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FEDERAL QUESTION JURISDICTION AND INDIAN TRIBES: THE SECOND CIRCUIT CLOSES THE COURTHOUSE DOORS IN *NEW YORK V. SHINNECOCK INDIAN NATION*

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I. INTRODUCTION

Most construction projects require permits from the local municipality. Some require additional permits from the state. The Westwoods Casino Project in Southampton, New York, the subject of *New York v. Shinnecock Indian Nation*, required no such permits.[1] At least that was what the project's developer, the Shinnecock Indian Nation (the Shinnecock or the Tribe), thought. Rather than build single-family homes on two-acre lots as mandated by the Town of Southampton's (the Town) zoning code, the Shinnecock envisioned a 130,000 square foot casino with 3,500 gaming devices and 140 table games; a 3,000 seat theater; 75,000 square feet of retail; five hotels; a 25,000 square foot spa; a 50,000 square foot convention center; a 1,200 to 1,300 seat bingo hall; and a variety of restaurants.[2] With 7.2 million expected visitors per year and a $300 W/U/D (win per unit per day, i.e., how much a gaming device wins per day on average), the Shinnecock certainly believed this development proposal to be more financially suitable for its land.[3] The Town and State of New York (the State), thought otherwise.

Nestled along the Atlantic Ocean in the south fork of Long Island approximately eighty miles from New York City, the Town is a popular seasonal destination. In fact, tourism and the vacation home industry drive the economic development engine of the community.[4] But, whereas the Shinnecock foresaw millions of new visitors each year with its project, the Town preferred to keep that number in the thousands. It is, after all, part of "the Hamptons."

In July 2003, the casino's construction began in earnest with the Shinnecock's contractor bulldozing trees and clearing brush.[5] Unfortunately for the Shinnecock, that was about as far as construction

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* Associate Member, 2012–2013 *University of Cincinnati Law Review*. I give thanks to the Lord, for He is good and blesses me every day. I also give love to my family, especially my parents, wife, and son, for their unspoken, daily reminders about the important things in life.

1. New York v. Shinnecock Indian Nation, 701 F.3d 101 (2d Cir. 2012).

2. *See* New York v. Shinnecock Indian Nation, 523 F. Supp. 2d 185, 229–32 (E.D.N.Y. 2007).

3. *See id.*

4. *Demographics*, TOWN OF SOUTHAMPTON, N.Y., http://www.southamptontownny.gov/content/718/default.aspx (last visited Apr. 30, 2013).

5. *Shinnecock Indian Nation*, 523 F. Supp. 2d at 232.

got before the State's preliminary injunction halted the activities.[6] The State alleged that the planned casino violated New York's antigaming laws and that the Shinnecock failed to apply for, and receive, environmental permits.[7] The Town joined the legal battle later claiming that the Shinnecock failed to receive site plan approval for the casino.[8] The Shinnecock did not directly dispute any of the allegations. The Shinnecock knew they had not applied for any permits from the State or received any approval from the Town. Instead, the Shinnecock contended that none of this mattered because neither the State nor the Town had any power under the United States Constitution and federal common law to require them to obtain any license, permit, or approval to construct and operate a casino at Westwoods.[9]

After removal from state court and spending nearly five years in litigation, the United States District Court for the Eastern District of New York ruled against the Shinnecock.[10] The Shinnecock pressed on for another four years only to have the United States Court of Appeals for the Second Circuit hold that the case failed federal question jurisdiction.[11] Thus, after nine years of discovery, motions, and untold attorneys' fees, the Shinnecock and the State returned to the place where it all began, state court—forced to relitigate the same issues and present the same evidence.

This Casenote analyzes the Second Circuit's decision. Although its ruling to remand for lack of federal question jurisdiction seemed fairly straightforward and unremarkable outside the context of Indian law, its effect could potentially foreclose the ability of Indian tribes to defend suits in federal court, the venue traditionally thought best able to balance the competing interests' of states and Indian tribes. Particularly if other courts adopt the Second Circuit's reasoning, this ruling could adversely affect Indian tribes' interests across the United States.

Part II of this Casenote will discuss federal question jurisdiction generally and specifically, its application to Indian tribes. The federal courts' historical importance in deciding cases involving Indian tribes is also discussed. Finally, it discusses the opinion of the Second Circuit and the events leading up to the opinion. Part III analyzes the Second Circuit's decision in light of the discussion contained in Part II. It concludes that the Second Circuit betrayed Supreme Court precedent, failing to give weight to all of the elements of federal question

6. *See* New York v. Shinnecock Indian Nation, 280 F. Supp. 2d 1 (E.D.N.Y. 2003).

7. *Shinnecock Indian Nation*, 523 F. Supp. 2d at 190.

8. *Id.* at 191.

9. *Id.* at 191–92.

10. *See id.* at 188–90.

11. *See* New York v. Shinnecock Indian Nation, 686 F.3d 133, 142 (2d Cir. 2012).

jurisdiction and incorrectly treating the Shinnecock like any other defendant, which they were not due to the unique congressional and judicial treatment of Indian tribes throughout this nation's history. Part IV concludes the Casenote.

II. BACKGROUND ON FEDERAL QUESTION JURISDICTION AND INDIAN LAW

Federal question jurisdiction precludes suits in federal court which, absent diversity, raise no federal issues on the face of a plaintiff's well-pleaded complaint. The next Part briefly discusses the elements of federal question jurisdiction.

A. Federal Question Jurisdiction

Since 1875, 28 U.S.C. § 1331 has conferred jurisdiction to federal district courts over any action "arising under the Constitution, laws, or treaties of the United States."[12] While this language appears rather uncontroversial,[13] just what type of action "aris[es] under" federal law continues to be a source of litigation in federal courts. Determining whether an action meets federal question jurisdiction requires the court to look first to the face of the plaintiff's well-pleaded complaint.[14] If the federal question appears on the face of plaintiff's "statement of his own claim in the bill or declaration, unaided by anything alleged in the anticipation or avoidance of defenses which it is thought the defendant may interpose[,]" the federal question is said to be "well-pleaded."[15]

In most cases, resolving whether the plaintiff meets the well-pleaded complaint rule ends the inquiry because federal question jurisdiction is "by and large" invoked by a plaintiff pleading a cause of action created

12. Act of March 3, 1875, 18 Stat. 470 (codified at 28 U.S.C. § 1331).

13. In fact, it closely tracks Article III, Sec. 2, Cl. 1 of the Constitution ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . ."). U.S. CONST. amend III, § 2, cl. 1.

14. Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908) ("[A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution."); *See, e.g.*, Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987) ("It is long settled law that a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law."); Gully v. First Nat'l Bank, 299 U.S. 109, 112–13 (1936) ("To bring a case within [§ 1331], a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another[,] . . . and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal.").

15. Okla. Tax Comm'n v. Graham, 489 U.S. 838, 841 (1989).

by federal law.[16] Thus, if a federal statute, for example, 42 U.S.C. § 1983, expressly provides that a plaintiff can bring suit against another party in federal court for a violation of that statute, the suit "arises under the [federal] law that creates the cause of action."[17]

Another way for a suit to access the federal courthouse, which the Supreme Court characterizes as a "special and small category of cases,"[18] occurs when a "state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities."[19] When the *Grable* Court expressed this "substantial" federal question test, it attempted to condense years of decisions in order to tame an "unruly doctrine,"[20] which instructed "common-sense accommodation of judgment to kaleidoscopic situations" or "a selective process which picks the substantial causes out of the web and lays the other ones aside."[21] Commentators and the Court have remarked that the doctrine appeared to be painted on a canvas by Jackson Pollock.[22] Regardless of its past confusion, the Court recently reaffirmed the *Grable* test in *Gunn v. Minton*[23] and held that if all four elements are met, the federal court can properly take the case because "there is a serious federal interest in claiming the advantages thought to be inherent in a federal forum."[24]

B. The Murky World of Regulating Indian Tribes

The Court's statement in *Gunn* that a federal forum provides certain advantages over state courts for "serious federal interests" invokes the "parity" debate. According to some commentators, federal courts are far

16. Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfr., 545 U.S. 308, 312 (2005).

17. Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916).

18. Gunn v. Minton, 133 S. Ct. 1059, 1064 (2013) (quoting Empire HealthChoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 699 (2006)).

19. *Grable*, 545 U.S. at 314.

20. *Gunn*, 133 S. Ct. at 1065.

21. Gully v. First Nat'l Bank, 299 U.S. 109, 117–18 (1936).

22. *Gunn*, 133 S. Ct. at 1065; 13D CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3562 (3d ed. 2008) (reviewing the general confusion on the subject). Jackson Pollock was an influential American painter in the Abstract Expressionist movement. Robert Coates, a critic for the *New Yorker*, described Pollock's work as "mere unorganized explosions of random energy, and therefore meaningless." Steven McElroy, *If It's So Easy, Why Don't You Try It*, N.Y. TIMES, Dec. 3, 2010, at LI9. Whether or not that critique is fair to Mr. Pollock depends on a person's taste in art. But, it certainly is an apt description of the Court's previous conception of federal question jurisdiction.

23. *Gunn*, 133 S. Ct. at 1065 ("[F]ederal jurisdiction over a state-law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.").

24. *Id.* (quoting *Grable*, 545 U.S. at 313).

better equipped to reach the "correct" decision.[25] Whether federal courts are in fact more sympathetic and more knowledgeable than state courts on federal issues is arguable. However, in the context of Indian law, state regulation of Indian tribes, and hence state courts' jurisdiction to hear cases involving them, have traditionally been minimal.

Cases involving Indian tribes represent a unique and interesting field of jurisprudence in the United States. Many rights that Indian tribes possess predate the Constitution,[26] which often require courts to research documents and treaties that are hundreds of years old.[27] Although Indian law can be confusing, Felix S. Cohen, in his widely-cited treatise, noted some "fundamental principles" that underlie the field of federal Indian law.[28]

First, "an Indian nation possesses in the first instance all of the powers of a sovereign state."[29] The rights vested in a tribe are generally not delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty, which preexisted the formation of the United States and continue unless diminished by treaty or statute from the federal government or, in certain instances, by federal common law.[30] Second, Congress and the executive branch of the federal government have both primary and broad responsibility over Indian affairs.[31] Finally, due to this federal responsibility, the states have limited authority over Indian affairs.[32] This latter notion finds support in early-nineteenth century Supreme Court opinions.[33] Recent state and

25. *See, e.g.*, Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that federal judges are more sympathetic to federal claims because their positions are more prestigious and better paid, which tend to be filled by more competent lawyers, and they enjoy life tenure, which makes their decisions more insulated from outside pressures); *but see* Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1469 (2005) (although state courts exhibit no clear reluctance to uphold federal claims that a federal district court would uphold, the paper offered a "weak parity" thesis: while state courts afford litigants a constitutionally adequate hearing on federal claims, they are not interchangeable with federal courts and sometimes provide a "home court advantage" to in-state defendants).

26. *See* Johnson v. M'Intosh, 21 U.S. 543 (1823).

27. For example, in *Shinnecock*, the district court analyzed land patents from as far back as 1635 to determine whether the Shinnecock extinguished its aboriginal title to Westwoods. New York v. Shinnecock Indian Nation, 523 F. Supp. 2d 185, 196 (E.D.N.Y. 2007).

28. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK].

29. *Id.* at 20.

30. *Id.*

31. *Id.*

32. *Id.*

33. Worcester v. Georgia, 31 U.S. 515, 520 (1832) ("The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress."); *In re* The Kansas Indians, 72 U.S. 737 (1866).

federal district court decisions have reaffirmed this principle in certain circumstances.[34] Thus, unless Congress grants to a state the power to regulate persons or conduct inside Indian land, federal supremacy leaves little room for state involvement.[35] In addition to federal statutes, numerous Supreme Court decisions have framed the states' power to control the conduct of Indian tribes.

In *Rice v. Olson*, the Court stated that "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history."[36] The Court once described the states as the "deadliest enemies" of Indian tribes.[37] Despite this strong language, an Indian tribe's power to avoid state regulation of their activities by asserting tribal sovereign immunity has not remained "static."[38] As Indians left the reservations and assimilated with non-Indians, the Court "modified" its approach to give states more power over both individual Indians and Indian tribes "where essential tribal relations were not involved and where the rights of Indians would not be jeopardized."[39] Still, "if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress . . . remained exclusive" and "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[40] In other words, under this framework, for state action to determine the conduct of Indians either (1) Congress must expressly abrogate the immunity of certain tribal conduct, thereby permitting states to exercise jurisdiction, or (2) the state action must not affect the right of Indians to govern their own affairs. However, the Court gives less deference to tribal sovereign immunity outside the reservation context. For example, in *Oklahoma Tax Commission v. United States*, the Court distinguished between reservation Indians and Indians that held land "in fee, not in trust."[41] In that case, those Indians that held land "in fee" were not entitled to

34. *See, e.g.*, Keweenaw Bay Indian Cmty. v. Naftaly, 452 F.3d 514 (6th Cir. 2006) (state may not tax tribal real property owned in fee within exterior boundaries of reservation); Shivwits Band of Paiute Indians v. Utah, 428 F.3d 966 (10th Cir. 2005) (state may not enforce its billboard regulations on trust land within Indian country); Winer v. Penny Enters., Inc., 674 N.W.2d 9 (N.D. 2004) (state court lacks jurisdiction to hear tort claim by non-Indian against Indian for accident arising on state highway within reservation); South Dakota v. Cummings, 679 N.W.2d 484 (S.D. 2004) (state police officers may not pursue fleeing tribal members onto reservation).

35. COHEN'S HANDBOOK, *supra* note 28, at 20.

36. Rice v. Olson, 324 U.S. 786, 789 (1945).

37. United States v. Kagama, 118 U.S. 375, 384 (1886).

38. McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 171 (1973).

39. Williams v. Lee, 358 U.S. 217, 219 (1959).

40. *Id.* at 219–20.

41. Okla. Tax Comm'n v. United States, 319 U.S. 598, 603–04 (1943).

"effective tribal immunity."[42]

Despite the lessening effectiveness of tribal sovereign immunity, it is relevant "not because it provides a definitive resolution of the issues . . . but because it provides a backdrop against which [] applicable treaties and federal statutes must be read."[43] Thus, although Indians are United States citizens, eligible to vote and use state courts, they are still relatively independent. The Court further stated in *McClanahan v. State Tax Commission of Arizona*:

> The relation of the Indian tribes living within the borders of the United States . . . [is] an anomalous one and of a complex character. . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.[44]

While much has changed since early Supreme Court decisions where Indian tribes lived autonomously on their land, they are still regarded as "semi-independent." While the states and Indian tribes today may not be "deadliest enemies" of long-ago lore, "federal treaties and statutes [still] define the boundaries of federal and state jurisdiction."[45]

C. Federal Question Jurisdiction and Indian Tribes

Although federal law and treaties often regulate the activities of Indian tribes, federal jurisdiction is not inevitable. Given that federal courts are "courts of limited jurisdiction"[46] and "possess only that power authorized by Constitution and statute,"[47] any case involving an Indian tribe still must meet the requirements of 28 U.S.C. § 1331.

Since *Grable* was decided in 2005, the Supreme Court has yet to decide how that test applies to a dispute involving an Indian tribe.[48] Certain statutes expressly provide a cause of action when litigation involves Indian tribes,[49] but no statute or constitutional provision

42. *Id.*

43. *McClanahan*, 411 U.S. at 172.

44. United States v. Kagama, 118 U.S. 375, 381–82 (1886).

45. *McClanahan*, 411 U.S. at 172 n.8.

46. Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 552 (2005).

47. *Id.*

48. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2206 (2012). Although this case involved an Indian tribe and the Court cited *Grable*, it was not cited for jurisdictional purposes.

49. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 50 (1996).

outlines any general scheme for Indian tribes' disputes.[50] In addition, lower federal courts have ruled that Indian tribes are not citizens of any state for diversity jurisdiction under 28 U.S.C. § 1332.[51] Thus, federal jurisdiction is not automatic simply because the suit implicates an Indian tribe, it involves tribal-owned property, or it arises in Indian country.[52]

However, the Court has found that an Indian tribe's present-day possessory interest in its aboriginal lands presents a federal question. In *Oneida Indian Nation of New York v. County of Oneida, New York*, the Supreme Court held that a claim between an Indian tribe and various counties regarding the right of possession of real property met federal question jurisdiction even though it was essentially a state-law cause of action.[53]

In *Oneida*, the Indian tribe brought suit to recover damages from the unlawful possession of land it previously owned and occupied "from time immemorial[.]"[54] In the 1780s and 1790s, the Indian tribe entered into various treaties with the United States confirming the Indian tribe's right to possession of some six million acres of land in New York until, and if, the United States decided to purchase it.[55] The complaint alleged that the federal Nonintercourse Act,[56] which was passed in 1790, forbade the conveyance of any land without the permission of the United States.[57] In 1788, the Indian tribe ceded five million acres to the State of New York, with 300,000 acres withheld for a reservation.[58] In 1795, the Indian tribe further conveyed a portion of these reserved lands

50. COHEN'S HANDBOOK, *supra* note 28, § 7.04.

51. *Id.*; *see, e.g.*, Am. Vantage Cos., Inc. v. Table Mountain Rancheria, 292 F.3d 1091, 1098 (9th Cir. 2002); Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 27 (1st Cir. 2000); Romanella v. Hayward, 114 F.3d 15, 16 (2d Cir. 1997); Gaines v. Ski Apache, 8 F.3d 726, 729 (10th Cir. 1993).

52. COHEN'S HANDBOOK, *supra* note 28, § 7.04; *see, e.g.*, T.P. Johnson Holdings, LLC v. Poarch Band Of Creek Indians, No. 3:09-CV-305-WKW [WO], 2009 WL 2983201 (M.D. Ala. Sept. 17, 2009) (rejecting the contention that simply because an Indian tribe was a defendant, then federal subject matter jurisdiction was satisfied); *compare* Cal. *ex rel.* Brown v. Native Wholesale Supply Co., 632 F. Supp. 2d 988 (E.D. Cal. 2008) (In a suit alleging that a tribal cigarette importer sold cigarettes to tribal smoke shops, which then unlawfully sold those cigarettes to non-Indians in violation of state law, the court rejected the tribe's contention that tribal sovereign immunity necessarily supports federal subject matter jurisdiction.), *with* Penobscot Nation v. Georgia-Pacific Corp., 254 F.3d 317, 322 (1st Cir. 2001) (noting that "[e]specially in Indian cases, the Supreme Court has sometimes found federal rights present—or at least arguably present—out of a tradition of federal regulation in the area").

53. Oneida Indian Nation of N.Y. v. Cnty. of Oneida, N.Y., 414 U.S. 661 (1974).

54. *Id.* at 664.

55. *Id.*

56. 1 Stat. 137, 138 (codified at 25 U.S.C. § 177) (1790) ("[N]o sale of lands made by any Indians . . . within the United States, shall be valid to any person . . . to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.").

57. *Oneida*, 414 U.S. at 664.

58. *Id.*

to the state, allegedly without the consent of the United States.[59] The Indian tribe argued that this 1795 cessation was ineffective due to the federal treaties and Nonintercourse Act.[60]

The district court ruled that the suit failed federal question jurisdiction because the cause of action was created under state law as involving only allegations of the Indian tribe's possessory interest in the land and the counties' interference with it.[61] Further, the necessity of interpreting federal treaties and the Nonintercourse Act was simply a potential defense.[62] The Second Circuit affirmed, ruling that "the jurisdictional claim shatters on the rock of the well-pleaded complaint rule[.]"[63] The Second Circuit reiterated that although any decision necessarily required deciding whether the 1795 cessation complied with the federal Nonintercourse Act, "this alone did not establish 'arising under' jurisdiction[.]"[64] Instead, the Second Circuit read the complaint simply as a state-law action based on the current right to possession of real property.[65]

The Supreme Court assumed that the case was "essentially a possessory action," but reversed the lower courts' decisions because the complaint asserted "a current right to possession conferred by federal law, wholly independent of state law."[66] The Court found it not "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as to involve a federal controversy within the jurisdiction of the District Court[.]"[67] The Court stressed that "[g]iven the nature and source of the possessory rights of Indian tribes to their aboriginal lands . . . it is plain that the complaint asserted a controversy arising under the Constitution, laws, or treaties of the United States[.]"[68]

The Court noted that its precedent had held that only the United States could interfere with or determine an Indian tribe's right of occupancy.[69] Federal law protected tribal rights, and, regarding Indian

59. *Id.*

60. *Id.* at 664–65.

61. *Id.* at 665.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 666.

67. *Id.*

68. *Id.* at 667.

69. *Id.* at 667–68; *see, e.g.*, Johnson v. M'Intosh, 21 U.S. 543, 586 (1823) ("The exclusive right of the United States to extinguish [an Indian tribe's] title, and to grant the soil, has never, we believe, been doubted."); Worcester v. Georgia, 31 U.S. 515, 540 (1832); Holden v. Joy, 84 U.S. 211, 244 (1872); Butz v. N. Pac. R.R., 119 U.S. 55, 66 (1886); Cramer v. United States, 261 U.S. 219, 227 (1923); United States v. Shoshone Tribe of Indians of Wind River Reservation in Wyo., 304 U.S. 111,

title based on aboriginal possession, the "power of Congress . . . [was] supreme."[70] Thus, the Court declared, "Indian title is a matter of federal law."[71]

Finally, the Court recognized the tension between state law and federal law by noting that states often have denied "the notion that federal law and federal courts must be deemed the controlling considerations in dealing with Indians."[72] Despite this tension and "the obvious fact" that New York had dealt legitimately with Indian tribes antedating the Constitution and "continued to play a substantial role" today, the Court nonetheless stated that "this only underlines the legal reality that the controversy alleged . . . may well depend on what the reach and impact of the federal law will prove to be in this case."[73]

Justice Rehnquist's concurring opinion noted that federal courts traditionally were "inhospitable forums" for plaintiffs asserting possessory land claims.[74] However, due to the federal government's "continuing solicitude for the rights of the Indians in their land," this was not a "garden-variety ejectment claim."[75]

Finally, while the Supreme Court has yet to directly discuss *Grable*'s applicability to an Indian tribe, other federal courts have.[76] In a case with similar facts to *Shinnecock Indian Nation*, the Sixth Circuit found federal question jurisdiction in a suit that turned on whether a casino was located on Indian land.[77] The court stated:

> Specifically, each claim on its face presents a question of federal law (whether the Vanderbilt casino is located on Indian lands) that is disputed by the parties. That question could have a substantial impact on both the present litigation and on federal Indian-gaming law more generally. And there is no reason to think Congress would prefer this question to be resolved by state courts. To the contrary, Indian law is primarily the

115–16 (1938); United States v. Santa Fe Pac. R. Co., 314 U.S. 339, 345–46 (1941).

70. *Oneida*, 414 U.S. at 669 (quoting *Santa Fe Pac. R. Co.*, 314 U.S. at 347).

71. *Id.* at 670.

72. *Id.* at 678.

73. *Id.* at 678–79.

74. *Id.* at 683 (Rehnquist, J., concurring).

75. *Id.* at 684 (Rehnquist, J., concurring).

76. Md. Comm'r of Fin. Regulation v. W. Sky Fin., LLC, No. WDQ-11-0735, 2011 WL 4894075, at *5 (D. Md. Oct. 12, 2011) (In alleged violations of consumer loan laws, the court found that it lacked federal question jurisdiction even though the Indian tribe raised the defense of sovereign immunity because the defense was not an "essential element" of the claim.); Muhammad v. Comanche Nation Casino, 742 F. Supp. 2d 1268, 1277 (W.D. Okla. 2010) (In a slip-and-fall state law tort claim against an Indian-owned casino, the court found that it had federal question jurisdiction "'given the absence of threatening structural consequences' and the importance for availability for a federal forum, 'there is no good reason to shirk from federal jurisdiction over the dispositive and contested federal issue at the heart of this state-law . . . claim.'") (quoting Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfr., 545 U.S. 308, 319–20 (2005)).

77. Michigan v. Bay Mills Indian Cmty., 695 F.3d 406, 413 (6th Cir. 2012).

province of the federal courts. So federal jurisdiction does exist for these claims[.][78]

To summarize the discussion thus far, as a threshold matter, suits involving Indian tribes must satisfy the "arising under" language of 28 U.S.C. § 1331. This includes the "well-pleaded" complaint rule and presumably, the *Grable* framework. However, Supreme Court decisions clearly indicate that Indian tribes are somewhat different than the typical plaintiff or defendant. Due to Indian tribes' "semi-independent" character, limited sovereignty, and the federal government's broad power over their rights and activities, federal courts traditionally entertain cases involving them. Although state courts are frequently more involved in resolving disputes concerning Indian tribes than they had been in the past, under *Oneida*, at least, an Indian tribe's current possessory interest in its aboriginal land invokes federal question jurisdiction.

D. The State and the Tribe Go to Court

After the Shinnecock planned to commence tree clearing on the Westwoods site, the State brought suit in state court.[79] The Tribe filed a motion pursuant 28 U.S.C. § 1441[80] seeking to remove the action to federal court.[81] The district court granted the motion and held that the complaint "explicitly plead[ed] a federal question" because (1) it "raise[d] questions relating to the possessory rights of Indian tribes in tribal lands that [we]re federal in nature and subject to complete federal preemption," and (2) "[a]ll the causes of action necessarily require[d] the resolutions of questions of federal law."[82]

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78. *Id.* (finding its jurisdiction under the Indian tribe's assertion of tribal sovereign immunity).

79. New York v. Shinnecock Indian Nation, 280 F. Supp. 2d 1, 2 (E.D.N.Y 2003).

80. 28 U.S.C. § 1441(a) (2012) ("Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.").

81. New York v. Shinnecock Indian Nation, 274 F. Supp. 2d 268, 270 (E.D.N.Y. 2003). Shortly before the district court's decision regarding the Tribe's § 1441 motion, the Town filed its separate suit. The Tribe also made a motion to remove this action to federal court. The district court then consolidated the actions after making its decision on the Tribe's motion to remove. New York v. Shinnecock Indian Nation, 523 F. Supp. 2d 185, 192 (E.D.N.Y. 2007).

82. *Shinnecock Indian Nation*, 274 F. Supp. 2d at 269–71. On its face, the Complaint alleges five causes of action. In the first cause of action, the plaintiffs allege, in conclusion:

> 77. Therefore, defendants [sic] planned actions to build a casino and conduct gaming cannot be authorized by IGRA [the Indian Gaming Regulatory Act, 25 U.S.C. § 2701–2721] and, therefore, are in violation the federal statute [sic].

In their Declaratory Judgment portion of the Complaint, the plaintiffs allege in part:

> . . .
>
> i. the defendants are not a federally-recognized Tribe;

At trial, the Shinnecock raised a number of defenses. They first argued they held unextinguished aboriginal title to the Westwoods parcel.[83] They further argued that as a "sovereign tribe of Indians" they "[could not] be sued absent consent or waiver, which it did not give" in the present action.[84] Either one of these defenses, if proved, would have precluded the State from enforcing its antigaming laws and other permit requirements on the Shinnecock. However, the court, after conducting a thirty-day bench trial, which included over twenty witnesses, over 600 exhibits, and over 4,000 pages of transcripts, rejected each argument.[85]

The court also considered the applicability of the Indian Gaming Regulatory Act[86] (IGRA) on the Shinnecock's activities at Westwoods. Following the Supreme Court decision in *California v. Cabazon Band of Mission Indians*, which limited the power of states to apply their gaming laws on Indian lands,[87] Congress enacted IGRA in 1988. IGRA sought to provide a "comprehensive regulatory framework for gaming activities on Indian lands . . . [in order] to balance the interests of tribal governments, the states, and the federal government."[88] Two important provisions of IGRA are relevant in *Shinnecock Indian Nation*.

First, IGRA provides that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State

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j. the defendants' property which is the subject of this action, the gaming site, does not constitute "Indian lands" as that term is used in 18 U.S.C. § 1151 and in, 25 U.S.C. 2701 et seq. (IGRA);

k. the defendants lack sovereign immunity with respect to the operation of the state gambling laws at the gambling site; . . .

n. the defendants lack sovereign immunity to the operation of state and federal environmental laws at the gambling site;

o. the defendants cannot build a casino or any other structure for the purpose of gaming at the gambling site unless they first comply with Town, state, and federal and environmental laws;

p. the defendants may not begin building any kind of structure on the gaming site without first giving the plaintiffs 120 days notice prior to the beginning of such construction unless and until they fully comply with all Town, state and federal laws and regulations governing the building of structures on the gaming site;

q. the defendants may not operate a bingo hall or other gambling establishment without first giving the plaintiffs 120 days notice prior to the opening of the establishment unless and until they fully comply with the provisions of the Bingo Licensing Law, the Bingo Control Law, the Games of Chance Licensing Law or the provisions of the federal Indian Gaming Regulatory Act.

83. *Shinnecock Indian Nation*, 523 F. Supp. 2d at 249.

84. *Id.* at 297.

85. *Id.* at 302.

86. Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721 (2012).

87. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 214 (1987).

88. Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1548 (10th Cir. 1997); *see* Am. Greyhound Racing Inc. v. Hull, 305 F.3d 1015, 1018 (9th Cir. 2002) ("Congress declared [in 25. U.S.C. § 2702(1)] that IGRA's primary purpose was to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.").

which does not, as a matter of criminal law and public policy, prohibit such gaming activity."[89] Although this provision seems overly deferential to Indian tribes, the statute itself sets limits and depending on the proposed casino activities, both the federal Indian Gaming Commission and the state must approve the casino plan.[90] But, if the Indian tribe and its gaming activity follow IGRA's requirements, this federal law necessarily preempts state law.[91]

Second, before IGRA can apply to an Indian tribe's gaming proposal, the Indian tribe must meet two substantive requirements. First, the Indian tribe must be, in fact, an "Indian tribe" as defined under IGRA, which generally includes only tribes recognized by the Bureau of Indian Affairs.[92] Second, gaming under IGRA can only occur on lands the federal government defines as "Indian lands," which include both reservation lands and land held in trust by the United States.[93] Thus, if an Indian tribe fails one of these elements, state law determines the procedures and requirements needed to permit, construct, and operate a casino.[94]

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89. 25 U.S.C. § 2701(5) (2012).

90. 25 U.S.C. § 2710 (2012). For example, for "Class III gaming activities," which generally includes the most intrusive gaming activities and is the subject of the litigation between the Shinnecock Indian Nation and the State of New York, the particular state and Indian tribe must enter into a "Tribal–State compact" before the Indian Gaming Commission will permit the gaming activity. See 25 U.S.C. § 2710(d) regarding the particulars of the "Tribal–State compact," and 25 U.S.C. § 2703(8) for the definition of "Class III gaming."

91. 18 U.S.C. § 1166(c) (2012) ("For the purpose of this section, the term "gambling" does not include—

(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or

(2) class III gaming conducted under a Tribal–State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect.");

see also, Carruthers v. Flaum, 365 F. Supp. 2d 448, 466 (S.D.N.Y. 2005) ("IGRA preempts state anti-gaming laws, but only to the extent of its application."); Cayuga Indian Nation of N.Y. v. Vill. of Union Springs, 317 F. Supp. 2d 128, 148 (N.D.N.Y. 2004) ("IGRA . . . preempts state and local attempts to regulate gaming on Indian lands.").

92. 25 U.S.C. § 2703(5) (2012). "The term 'Indian tribe' means any Indian tribe, band, nation, or other organized group or community of Indians which—

(A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and (B) is recognized as possessing powers of self-government."

Id.

93. 25 U.S.C. § 2703(4). "The term 'Indian lands' means—

(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power."

Id.

94. *See e.g.*, *Carruthers*, 365 F. Supp. 2d at 466; First Am. Casino Corp. v. E. Pequot Nation, 175 F. Supp. 2d 205, 209–10 (D. Conn. 2000) ("Because IGRA's text unambiguously limits its scope to gaming by tribes that have attained federal recognition, the statute does not apply to defendant's

In this case, the district court determined that the Shinnecock met neither prerequisite under IGRA. First, since the Bureau of Indian Affairs did not recognize the Shinnecock under federal law, the district court found that it could not meet the definition of "Indian tribe." Further, since the Shinnecock held the land "in fee," and was thus neither reservation land nor land held in trust by the United States, the Westwoods's parcel failed the "Indian lands" prong.

E. The Shinnecock Appeal to the Second Circuit

Following the district court's issuance of a permanent injunction against the Shinnecock's activities at Westwoods, the Shinnecock appealed to the Second Circuit challenging the district court's legal and factual conclusions and arguing that the federal government's recognition of the Tribe after the district court's decision mooted the permanent injunction.[95] However, the Second Circuit held that the district court lacked jurisdiction and declined to reach the merits of the appeal.[96] Thus, the Second Circuit vacated the judgment and remanded with instructions for the district court to remand the case back to state court.[97]

Judge John M. Walker, Jr., writing for the three-judge panel, first held that the State's complaint alleged violations of only state and local law and, therefore, did not state a federal cause of action.[98] Although the State referenced federal law in its complaint, those references "only anticipate[d] and refute[d] the Shinnecock's defenses."[99] Thus, according to the Second Circuit, the complaint was not "well-pleaded." Regarding the well-pleaded complaint rule's applicability to Indian tribes, the court quoted *Oklahoma Tax Commission* for support that "although tribal immunity may provide a federal defense to [the State's] claims, . . . it has long been settled that the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under

gaming-related activities . . . . Accordingly, plaintiff's state law claims are not completely preempted by IGRA.").

95. New York v. Shinnecock Indian Nation, 686 F.3d 133, 137 (2d Cir. 2012). Regarding the federal recognition of the Tribe, the Department of Interior issued a Final Determination "extend[ing] Federal Acknowledgment . . . to the Shinnecock Indian Nation," which entitled it to be placed on the list of federally recognized Indian tribes maintained by the Bureau of Indian Affairs and thus qualifying the Tribe as an "Indian tribe" under IGRA. Brief of Defendant–Appellant the Shinnecock Indian Nation and All Other Defendants–Appellants at 9, New York v. Shinnecock Indian Nation, 686 F.3d 133 (2d Cir. 2012) (No. 08-1194-cv), 2010 WL 8759130, at *9.

96. *Shinnecock Indian Nation*, 686 F.3d at 135.

97. *Id.* at 142.

98. *Id.* at 138–39.

99. *Id.* at 138.

federal law."[100]

The court next addressed whether *Grable* provided federal question jurisdiction because the "right to relief depend[ed] on the resolution of substantial questions of federal law."[101] In this case, resolution of the applicability of either IGRA or the doctrine of tribal sovereign immunity conferred by aboriginal title raised the alleged "substantial question of federal law." Although the Second Circuit acknowledged that this was "essentially the only issue in dispute at trial" and, in order to prevail on its claims, the State needed to prove that no federal Indian law precluded application of state and local law, it held that those federal issues were insufficient to establish federal question jurisdiction.[102]

The Second Circuit found that the claims asserted did not "necessarily raise"[103] a federal issue because whether the construction of the casino violated state and local law was a "distinct" issue from whether a federal defense such as tribal sovereign immunity precluded the State and Town from regulating the Shinnecock's activities at Westwoods.[104] To illustrate its point, the court noted that if the Shinnecock had in fact complied with state and local law, a "court could have resolved the case without reaching the federal issues."[105] In other words, unlike *Grable*,[106] where the plaintiff "had no content other than the federal law issue on which it was based," the claims here "could [have] be[en] decided without reference to federal law."[107] Although the federal issues in the case were necessary to the resolution of the State's claims, the Second Circuit stated that this was irrelevant to the jurisdictional question because "[c]omplete defenses, by definition, always must be decided before a claim can be resolved."[108]

Finally, the court rejected the Shinnecock's assertion that federal question jurisdiction could be premised under *Oneida*. It seized on language in Justice Rehnquist's concurring opinion that *Oneida* was not

100. *Id.* at 139 (quoting Okla. Tax Comm'n v. Graham, 489 U.S. 838, 841 (1989)).

101. *Id.*

102. *Id.*

103. *Id.* (quoting Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfr., 545 U.S. 308, 314 (2005)).

104. *Id.* at 140.

105. *Id.*

106. In *Grable*, the plaintiff brought a state-law claim asserting superior title to certain real property the IRS had seized and sold to the defendant in order to satisfy the plaintiff's federal tax liability. *Grable*, 545 U.S. at 310–11. The defendant removed the case to federal court on the basis that the plaintiff's state law quiet title claim depended on the interpretation of federal tax law's notice requirements. *Id.* The district court denied the plaintiff's motion to remand and ruled in favor of the defendant on the merits. *Id.* The court of appeals affirmed and the Supreme Court granted certiorari on the jurisdictional issue. *Id.*

107. *Shinnecock Indian Nation*, 686 F.3d at 141 n.5.

108. *Id.*

a case that "depend[ed] for its federal character solely on possible federal defenses[.]"[109] Whereas in *Oneida* "the right to possession itself [was] claimed to arise under federal law in the first instance,"[110] i.e., the Indian tribe brought the claim, in this case, according to the Second Circuit, the "federal issues related to Indian land arise defensively."[111]

Judge Peter W. Hall wrote a strong dissent,[112] which argued, in essence, that while the federal issues could be used as defenses by the Shinnecock, if the State wanted to regulate the Tribe's activities at all, resolution of those federal issues must be answered before determining whether the Tribe violated state and local law. The dissent agreed with the majority that determining whether tribal sovereign immunity barred the State's action was not the basis of federal question jurisdiction.[113] Instead, it existed because the State had to prove that Westwoods was not "Indian land" as defined in IGRA[114] and 18 U.S.C. § 1151,[115] which included aboriginal title as "Indian country."[116] Addressing the "well-pleaded complaint" rule, the dissent argued that the State affirmatively pleaded that the Shinnecock occupied and held Westwoods "in fee," and that it would "prove, in order to prevail on its claims, that Westwoods [was] not 'Indian Country.'"[117]

The dissent found the *Grable* test met because whether the

109. *Id.* at 141 (quoting Oneida Indian Nation v. Cnty. of Oneida, 414 U.S. 661, 682–83 (1974)).

110. *Id.* (quoting *Oneida*, 414 U.S. at 675).

111. *Id.*

112. "By focusing on the tribe's defenses instead of the complaint, the majority, inadvertently . . . ensures that every state or local enforcement action brought against an Indian tribe alleged to be occupying non-'Indian land,' whether commenced initially in federal court or commenced in state court and removed to federal court, will be dismissed for want of federal subject matter jurisdiction." *Id.* at 142 (Hall, J., dissenting). Thus, according to Judge Hall, tribes within the jurisdiction of the Second Circuit "will no longer have the option of a federal forum to resolve those disputes regarding aboriginal title[.]" *Id.* at 143 (Hall, J., dissenting). This result "flies in the face of over 200 years of federal Indian law jurisprudence, which has evolved in large part to address and accommodate the historically thorny nature of tribal-state relations and a fear of 'home-cooking' in state courts, particularly as to issues involving the assertion of state jurisdiction over Indian tribes." *Id.* (Hall, J., dissenting).

113. The dissent argued that the majority "misconstrue[d] the tribe's defense of sovereign immunity as the pertinent federal issue purporting to give rise to federal question jurisdiction." *Id.* at 143 (Hall, J., dissenting).

114. *Supra* note 93.

115. "Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country', as used in this chapter, means . . . (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

116. The majority addressed this argument in a footnote stating that it "failed to perceive a difference between the plaintiffs' right to bring an action enforcing state and local law at Westwoods, and the Tribe's sovereign immunity from suit and local regulation of activities at Westwoods" because "the question whether plaintiffs can bring this action is simply a restatement of the question whether the Tribe is immune from suit and from state and local regulation." *Shinnecock Indian Nation*, 686 F.3d at 141 n.4.

117. *Id.* at 143 (Hall, J., dissenting).

Shinnecock held aboriginal title to Westwoods was an "essential element" of the State's claim.[118] In other words, "only by pleading that the tribe does not hold aboriginal title to Westwoods[,] an issue of federal law that is actually in dispute by virtue of the tribe's presuit ownership and occupation of Westwoods as if the tribe does hold Indian title[,] can the state plead facially viable claims in the present case."[119] Thus, unless the State could prove its case under federal law, the State's authority to regulate the Shinnecock's casino activities was "a dead letter."[120]

Although the majority did not consider it "part of the jurisdictional calculus" of *Grable*,[121] the dissent found the "important and historic interest"[122] in providing Indian tribes with a federal forum to adjudicate their land disputes with states as one that "sensibly belongs in federal court."[123] It found little risk that recognizing federal jurisdiction over the case would "open the floodgates for cases" involving tribal and state casino permitting disputes.[124]

Finally, regarding *Oneida*, whereas the majority found it supporting the argument that issues of federal Indian law cannot "disturb the well-pleaded complaint rule,"[125] the dissent read it for the proposition that "possessory rights of Indian tribes to their aboriginal lands" necessarily "arise under" federal law.[126]

III. DISCUSSION OF THE SECOND CIRCUIT'S DISREGARD FOR THE RIGHTS OF INDIAN TRIBES

The importance of *Shinnecock Indian Nation* depends not on the merits of the Shinnecock's right to build a casino. Its importance relates to the apparent foreclosing of the federal forum for all Indian tribes to defend against state enforcement actions altering the rights of their allegedly aboriginal title. Given that Supreme Court precedent indicates

118. *Id.* at 145–46 (Hall, J., dissenting).

119. *Id.* at 146 (Hall, J., dissenting). To put it another way in *Grable* terms, the dissent states that "[b]ecause the tribe owns and occupies Westwoods, making it *prima facie* Indian land, the plaintiffs' right to relief—regulation of activities at Westwoods—necessarily depends on the resolution of a substantial question of federal law—is Westwoods 'Indian land' within the meaning of 25 U.S.C. § 2703(4) and 18 U.S.C. § 1151." *Id.* at 144 (Hall, J., dissenting).

120. *Id.* (Hall, J., dissenting).

121. *Id.* at 141 n.6.

122. *Id.* at 146–47 (Hall, J., dissenting).

123. *Id.* at 146 (Hall, J., dissenting) (quoting Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfr., 545 U.S. 308, 315 (2005)).

124. *Id.* at 147 (Hall, J., dissenting).

125. *Id.* at 141 (quoting Oneida Indian Nation v. Cnty. of Oneida, 414 U.S. 661, 676 (1974)).

126. *Id.* at 142 (Hall, J., dissenting) (quoting *Oneida*, 414 U.S. at 667).

that "Indian title is a matter of federal law,"[127] it seems curious that the Second Circuit found absolutely no basis for federal question jurisdiction. Despite its concern with federal "defenses" implicating the well-pleaded complaint rule, on balance, the Second Circuit erroneously applied *Grable* and failed to give proper deference to *Oneida*.

A. The Well-Pleaded Complaint Rule

The majority opinion held that the complaint alleged violations of state and local law, and any reference to federal law asserted only that it would not immunize the Shinnecock's conduct.[128]

Initially, to assess whether a complaint alleges a violation of federal law "on its face," a court must look to the complaint itself.[129] The majority cited only two out of the seventy-seven total allegations, in just the first cause of action alone, to hold that the references to federal law arose only as a possible defense to the State's allegations.[130] Although these two allegations could, perhaps, be read to "anticipate" a federal defense, the State also expressly alleged that the Shinnecock's conduct violated federal statutes.[131] In addition, the State further alleged that the Shinnecock were not a federally-recognized tribe, the Westwoods parcel was not "Indian lands" under federal law, the Shinnecock lacked sovereign immunity, and the Shinnecock could not begin construction of the casino without first complying with IGRA, a federal law.[132]

While these allegations were, of course, defenses to the State's enforcement action, the State must also *prove* them in order to prevail on its claims. The majority opinion sidestepped the fact that the State's

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127. *Oneida*, 414 U.S. at 670.

128. *Shinnecock Indian Nation*, 686 F.3d at 138.

129. *Supra* note 14.

130. *Shinnecock Indian Nation*, 686 F.3d at 138–39.

> 74. Because federal recognition of a tribe of Indians is a condition precedent under [the] IGRA for any tribe of Indians in New York State to conduct certain gaming activities which would otherwise be in violation of State law, and because the United States has not granted such recognition to the [Tribe], it and its officials are subject to and must comply with the State gaming laws in order to conduct such gaming . . . .
>
> 76. . . . [B]ecause the site of the planned casino is not "Indian Country" as defined in federal law and in [the] IGRA, the *Cabazon* decision[, which arguably supports the Shinnecock's right under federal law to construct the casino free from local regulation,] has no application at all.

Id.

131. New York v. Shinnecock Indian Nation, 274 F. Supp. 2d 268, 269 (E.D.N.Y. 2003).

> 77. Therefore, defendants [*sic*] planned actions to build a casino and conduct gaming cannot be authorized by IGRA [the Indian Gaming Regulatory Act, 25 U.S.C. § 2701–2721] and, therefore, are in violation the federal statute [*sic*].

Id.

132. *Id.* at 269–70; *supra* note 82.

authority to regulate the Shinnecock necessarily required resolution of whether the Shinnecock ever extinguished aboriginal title to the Westwoods parcel. In other words, these defenses were necessary elements to the State's allegation that the Shinnecock violated state and local law. A court cannot even reach the merits of those claims unless it first resolves the federal law issues.

In some cases, a federal court might remand or dismiss a case because the plaintiff alleged a frivolous federal claim in order to endow itself of the perceived benefits of a federal forum.[133] In this regard, the well-pleaded complaint rule acts as scissors (or a sledgehammer) to remove cases where federal issues may only be subordinate to, or possible defenses of, state law. In many other cases, federal courts ignore discussion of the well-pleaded complaint rule because the federal issue so pervades the case that deciding the merits requires first reaching the federal issues.[134] In *Shinnecock Indian Nation*, for example, the district court never considered the well-pleaded complaint rule in the removal proceedings, the preliminary injunction proceedings, or the trial proceedings. It was assumed that the State pleaded a federal question because of the inescapable issue of whether the Shinnecock could claim tribal sovereign immunity due to its alleged aboriginal title of Westwoods.

Assuming the majority opinion was correct to hold that the allegation of tribal sovereign immunity failed the well-pleaded complaint rule, the State also expressly alleged that the Shinnecock violated the federal IGRA statute.[135] Although determining whether the Shinnecock held aboriginal title resolves both the tribal sovereign immunity and IGRA issues, IGRA is a completely separate and distinct federal law unrelated to tribal sovereign immunity. Indian tribes routinely assert tribal sovereign immunity in a wide variety of contexts.[136] Sometimes those assertions are illegitimate, which was possibly the case here.[137] But, when a state expressly alleges that an Indian tribe's conduct violates a federal Indian gaming statute, which directly regulates said conduct and

133. *See, e.g.*, Bell v. Hood, 327 U.S. 678, 682–83 (1946); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998).

134. In *Grable*, for example, the Supreme Court never mentioned nor discussed the well-pleaded complaint rule.

135. *Supra* note 131.

136. *See, e.g.*, M.J. *ex rel.* Beebe v. United States, 721 F.3d 1079, 1083–85 (9th Cir. 2013) (holding that a tribal police officer was immune from tort liability under tribal sovereign immunity); Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1056 (9th Cir. 2004) (holding that Congress abrogated tribal sovereign immunity under the Bankruptcy Code).

137. The dissent, after finding federal question jurisdiction, argued that the Shinnecock had no basis for tribal sovereign immunity. New York v. Shinnecock Indian Nation, 686 F.3d 133, 147–56 (2d Cir. 2012).

is the subject matter of the suit, it can hardly be said that IGRA is "simply a restatement" of tribal sovereign immunity.[138]

B Federal Question Jurisdiction Under Grable

Having discussed the well-pleaded complaint rule, this Part examines whether, under *Grable*, the complaint alleged a "state-law claim [that] necessarily raise[d] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities."[139]

Of the four *Grable* elements, the majority found that the complaint met only one—the "disputed" federal issue of whether federal Indian law precluded the State from exercising its laws over the Shinnecock.[140] The majority either rejected or failed to discuss the other three elements.

The majority misinterpreted the "necessarily raised" element to mean that if, under some hypothetical situation, the case could be resolved without looking to federal law, then the state-law claim does not necessarily raise a federal issue.[141] In other words, in this case, if the Shinnecock hypothetically submitted for permits, received site plan approval, and properly completed a host of other things required to build a casino under state law, a court would not need to determine whether tribal sovereign immunity or IGRA precluded state regulation. To support its unique argument, the majority noted that *Grable* could not be decided without determining whether the IRS notice complied with federal law.[142] Since the plaintiff "premised" his superior title claim exclusively on federal law, there was no state content in the complaint that would support the plaintiff's claim.[143] If the majority's interpretation of *Grable* holds true, the only way that a federal court could entertain this action, or any action concerning an Indian tribe's right to use its land without state interference, would be for the State to "premise" its complaint only on federal law violations, which it would never do.

More critically, even if *Grable* requires a hypothetical test to determine whether state law could conceivably resolve the claims, *Shinnecock Indian Nation* met that test because a court would first need to conclude that the Shinnecock extinguished its aboriginal title, thereby

138. *Id.* at 141 n.4.

139. Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfr., 545 U.S. 308, 314 (2005).

140. *Shinnecock Indian Nation*, 686 F.3d at 139.

141. *Id.* at 140–41.

142. *Id.* at 140.

143. *Id.* at 139–40.

rendering both IGRA and tribal sovereign immunity inapplicable, before even reaching the alleged state-law violations. And, if a court found that the Shinnecock had, in fact, held aboriginal title, whatever state-law violations existed would necessarily be secondary to federal law under the IGRA framework and tribal sovereign immunity. For example, in *Gunn*, the Supreme Court stated that for the plaintiff to prevail on his state-law legal malpractice claim, it would "necessarily require application of patent law" because the plaintiff's lawyer allegedly failed to make an argument that led to invalidation of his patent.[144] To determine the legal malpractice claim, the court would need to do a "case within a case" analysis of whether, had the argument been made, the outcome of the earlier litigation would have been different.[145] In other words, a court must first conclude that the argument would have changed the outcome in the patent case, which would have turned on application of federal law, and if so, then determine the merits of the state-law claim. Similarly, in *Shinnecock Indian Nation*, in order for the State to prevail, it would "necessarily require application" of federal Indian law to determine extinguishment of aboriginal title prior to reaching the merits of the state-law claim.

Furthermore, as discussed in Part II.B, the Supreme Court often holds that controversies involving Indian tribes necessarily turn on federal law due to their limited sovereignty and, since the founding of the United States, the federal government's framing of their rights through various statutes and treaties. For example, in this case, if and how the State can regulate the Shinnecock's casino activities depends on the interpretation of IGRA and extinguishment of aboriginal title. While IGRA does not completely preempt the field of Indian gaming, it does provide a comprehensive framework that must be referenced whenever an Indian tribe proposes any sort of tribal gaming. Thus, states have only a limited ability to regulate tribal gaming and can only go as far as the federal government allows under IGRA.

Although the majority opinion relied exclusively on the "necessarily raised" element and considered the "substantiality" and "federal-state comity" elements not "part of the jurisdictional calculus,"[146] given that *Grable* incorporated both elements into its test, and *Gunn* reinforced them,[147] the majority clearly erred in its conclusion.

One could assume that because IGRA so pervades tribal gaming, this pervasiveness, alone, would satisfy the "substantiality" element of

144. Gunn v. Minton, 133 S. Ct. 1059, 1065 (2013).

145. *Id.*

146. *Shinnecock Indian Nation*, 686 F.3d at 138.

147. *Gunn*, 133 S. Ct. at 1065 ("Where all four of these requirements are met, we held, jurisdiction is proper. . . .").

Grable. However, despite saturation of federal law in a particular field, the Supreme Court still looks to the complaint to determine if it arises under federal law. For example, in *Gunn*, the Court found that resolution of the federal patent law issue was not so substantial "to the federal system as a whole."[148] In essence, the case boiled down to a state-law legal malpractice claim and while a court would have to answer a question of patent law, that answer would have no binding effect outside the individual case.[149] In other words, a state court's holding in *Gunn* would have only limited applicability to patent law generally.

On the other hand, a state court's ruling on aboriginal title and, thus, an Indian tribe's inability to claim tribal sovereign immunity or to be regulated under the federal tribal gaming framework, could upset the federal–state balance that Congress established through treaties and statutes as well as with IGRA. While patent law geographically extends much farther to encompass all fifty states, in New York, where tribal–state interactions occur quite frequently, an adverse ruling against the Shinnecock could potentially have wider impacts even outside the context of Indian gaming. By foreclosing a federal forum to the Shinnecock to argue the merits of aboriginal title, the majority in *Shinnecock Indian Nation* ensures that *all* disputes affecting real property of *all* Indian tribes in the Second Circuit will be heard by state courts in a "context of cases in which the states will understandably be at their most aggressive, seeking to exercise control over how real property within the boundaries of state borders may be used."[150] While outside the context of Indian tribes, a state's exercise of its land use laws is predominantly, if not exclusively, within its review, as discussed earlier, Indian tribes in "Indian country" or on "Indian land" implicate rights and activities that a state, in many cases, cannot regulate. Those rights and activities are framed by federal law and treaties that should properly be heard in a federal forum.

In *Bay Mills*, the Sixth Circuit held that whether a casino was located on Indian land "implicate[d] significant federal issues."[151] Although not an exact factual match to *Shinnecock Indian Nation*,[152] the case involved what the court characterized as "federal common law," i.e., tribal sovereign immunity and state-law claims.[153] The court noted that the

148. *Id.* at 1066.

149. *Id.* at 1068.

150. New York v. Shinnecock Indian Nation, 701 F.3d 101, 102 (2d Cir. 2012).

151. Michigan v. Bay Mills Indian Cmty., 695 F.3d 406, 413 (6th Cir. 2012).

152. *Bay Mills* involved violation of a tribal–state compact under IGRA and the reach of tribal sovereign immunity for off-reservation casinos.

153. *Bay Mills*, 695 F.3d at 413.

federal issues raised "could have a substantial impact on both the present litigation and on federal Indian-gaming law more generally" and that there was "no reason to think Congress would prefer this question to be resolved by state courts."[154] Interestingly, the Second Circuit decided *Shinnecock Indian Nation* about six weeks prior to *Bay Mills*. While there was no indication in either opinion that the courts were aware of each other's ongoing litigation, it is noteworthy that these two courts reached such different conclusions.

Despite finding federal question jurisdiction under tribal sovereign immunity, the court in *Bay Mills* did not find jurisdiction because of the alleged violation of IGRA. Its reasoning was couched in terms of issuing an "advisory opinion," which is a separate justiciability analysis. However, its tribal sovereign immunity finding could be attacked given the defense's diminished applicability and various courts' rejection of it in other contexts.[155] But, the analysis certainly changes if the issue involves tribal sovereign immunity in "Indian country" or on "Indian land," which is generally reservation lands, lands held in trust by the United States, or aboriginal land. When an Indian tribe raises the defense in those contexts, federal law and federal treaties determine whether the land is in fact "Indian country" or "Indian land."

While a state court can quite capably determine whether a particular property is a reservation or held in trust by the United States by simply calling the Bureau of Indian Affairs, a dispute involving aboriginal title often requires scouring and interpreting documents hundreds of years old—no easy task for either a state or federal court. Regardless of the difficulties in ascertaining the question of whether land is aboriginal, when the question is arguable, a state court might fall on the side of the plaintiff–state. That is not to say that state courts reach the wrong decision for illegitimate reasons. But, when faced, on the one hand, with a casino project of the size the Shinnecock proposed, and on the other, a state and local government attempting to exercise its police power to regulate land use and protect the interests of its residents, it is easy to see why a state court might rule against an Indian tribe asserting the nebulous defense of tribal sovereign immunity. Yet, a court cannot even reach this defense until it determines the status of the land, which is informed by federal statutes and treaties. This is the point of both *Bay Mills* and the dissent in *Shinnecock Indian Nation*—there is "no reason to think Congress would prefer [Indian] questions to be resolved by state courts" rather than a federal court charged with interpreting and applying Congress's statutes to specific cases.[156]

154. *Id.*

155. *See* discussion *infra* Part II.B.

156. *Bay Mills*, 695 F.3d at 413.

C. Oneida *and* Shinnecock

As an initial matter, if *Oneida* were argued today, it would satisfy the *Grable* framework. The Indian tribe necessarily raised a disputed federal issue—whether the Indian tribe's cessation of land implicated the Nonintercourse Act giving rise to a present possessory interest. The issue was substantial as the federal statute required the United States' consent for any cessation of Indian land. Finally, although the case was premised as a state-law ejectment action, an Indian tribe's right to occupancy in its land could "only be interfered with or determined by the United States," and, thus, resolution in federal court would not disturb the balance of federal and state judicial responsibilities.[157]

The majority in *Shinnecock Indian Nation* read *Oneida* as support for the well-pleaded complaint rule. The dissent read *Oneida* for the proposition that any land disputes involving Indian tribes properly belong in federal court simply because they occupy and own the land "in fee." While the dissent is probably closer to the correct interpretation of *Oneida*, it still reads the case too broadly. The reason *Shinnecock Indian Nation* implicates *Oneida* is not because it involved a land dispute between a state and an Indian tribe. Rather, it implicates *Oneida* because that land dispute implicated a federal statute—IGRA—and federal common law—tribal sovereign immunity—due to the property's alleged aboriginal title. Because it implicated federal law, it satisfied the concern of Justice Rehnquist's concurring opinion in *Oneida* as a bona fide issue of federal concern and not a "garden-variety" land dispute.[158] If the State's claim in *Shinnecock Indian Nation* fell outside IGRA and the issue of aboriginal title, and hence outside federal law, the claim would fail federal question jurisdiction. For example, if a person was injured on the Westwoods property, the case could be properly adjudicated in state court because it would not implicate any important federal issues. If the claim involved a permitting dispute after construction commenced, federal law would not apply. Thus, while *Oneida* is limited in scope, if the controversy itself involves resolution of a land dispute that must be informed by federal law, the case controls.

D. Federal Courts vs. State Courts

Although most state courts can competently adjudicate claims involving aboriginal title, controversies arising under IGRA, or cases generally affecting Indian land, this alone is not a reason to foreclose the federal courthouse to Indian tribes. As discussed earlier, the Supreme

157. Oneida Indian Nation v. Cnty. of Oneida, 414 U.S. 661, 668 (1974).

158. *Id.* at 684.

Court recognized in *Oneida* the constant tension between states and Indian tribes.[159] To combat this tension, and to recognize the federal government's own tension with Indian tribes, Congress has enacted various laws since the United States' founding to protect Indian tribes and to give states only limited power to regulate Indian tribes' activities on Indian land. Once an Indian tribe gives up that protection, whether through treaties or some other mechanism, or once the federal government relinquishes its power over the Indian tribe, a state can regulate as it would any of its other citizens. Until that time, federal statutes and federal common law severely circumscribe a state's power. Despite these restrictions, states will continue to find ways to regulate the conduct of Indian tribes if only to protect its own interests and the welfare of its non-Indian residents. In *Shinnecock Indian Nation*, for example, the district court analyzed expert witness testimony to conclude that the casino project would have had considerable, detrimental effects on the environment, traffic, and safety of the surrounding area. It went so far as to rule that *even if* the Shinnecock held aboriginal title to Westwoods, thus supporting the defense of tribal sovereign immunity, the casino project would still have been barred due to these negative consequences.[160] This ruling only underscores the fact that Indian tribes' activities often directly conflict with the objectives of the state and local government.

The difficulty for courts is balancing these competing objectives. In most cases, state courts have proven effective, but historically in Indian cases, and sometimes, in cases outside that context, state courts will provide a "home court advantage."[161] The reason to favor federal courts in Indian law is not because that forum provides some sort of technical expertise. Instead, the concern relates to the belief that state courts would naturally favor their constituents' interests because the Indian tribe's conduct appears "above the law." When an Indian tribe violates only state law, that claim likely fails federal question jurisdiction. An Indian tribe can certainly claim tribal sovereign immunity, but unless federal law regulates the conduct, most courts would find those claims unavailing. However, when a plaintiff alleges a state-law violation that necessarily raises a stated federal interest, such as an Indian tribe's claim of aboriginal title, Supreme Court precedent teaches that this federal interest is substantial enough in itself to warrant federal question jurisdiction without upsetting any congressionally approved balance of federal and state judicial responsibilities.

159. *Supra* note 72.

160. New York v. Shinnecock Indian Nation, 523 F.Supp.2d 185, 189 (E.D.N.Y. 2007).

161. *Supra* note 25.

IV. CONCLUSION

When the litigation between the State of New York and the Shinnecock Indian Nation started in 2003, neither party expected that after nine years of litigation the Second Circuit would remand the case to state court for failing federal question jurisdiction. When that appeal crossed the Second Circuit's bench, the two parties expected either an affirmance or reversal. Given the poor merits of the Shinnecock's tribal sovereign immunity argument and its blatant disregard of IGRA, it had no reason to push its case further to the Supreme Court. Although it would have been interesting for the Court to determine how *Grable* and *Gunn* fit with claims involving Indian tribes and whether the Court would broaden *Oneida*'s reach, this analysis will have to wait for another day.[162] Thus, like any other party, it seems for the time being that Indian tribes under the Second Circuit's jurisdiction will be forced to fight their claims in state court, regardless of whether resolution of the issue turns on federal Indian law.

162. Although it may not answer how *Grable/Gunn* informs federal question jurisdiction and Indian tribes, the United States Supreme Court granted certiorari to resolve *Bay Mills*. Michigan v. Bay Mills Indian Cmty., 695 F.3d 406 (6th Cir. 2012), *cert. granted*, 81 U.S.L.W. 3702 (U.S. June 24, 2013) (No. 12-515).