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# Protecting Non-Indians from Harm? The Property Consequences of Indians

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EZRA ROSSER\*

## Protecting Non-Indians from Harm? The Property Consequences of Indians<sup>1</sup>

For the term following the confirmation of Justice Alito and Chief Justice Roberts, the Supreme Court did not grant certiorari on any Indian law case for perhaps the first time since 1960.<sup>2</sup> With the Native American Rights Fund and other pan-Indian organizations actively pursuing an avoid-the-Court strategy, necessitated by the Court's hostility toward Indian

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\* Assistant Professor, American University Washington College of Law. Thanks to Kristen Carpenter, Frank Pommersheim, Alex Skibine, and Gerald Torres for their comments on earlier drafts of this Article; thanks also to participants at the 2007 Emerging Indian Law Scholars Roundtable at Lewis and Clark Law School, the 2008 property law works-in-progress conference hosted by Widener School of Law, and the 2008 DU-CU Indian Law Works in Progress Symposium. Thanks especially to Annelise Riles for her invitation to speak at Cornell regarding the New York Indian land claims. That invitation inspired this Article. The Author is Anglo.

<sup>1</sup> This is the first of two connected articles exploring the relationship between Indian property ownership and area non-Indian property owners. The second article is: Ezra Rosser, Barry Guertin & Alan Rukin, *Empirical Analysis of the Effect of Tribal Ownership of Land on Non-Indians* (work-in-progress, on file with the author). The approach in this Article is primarily qualitative and the subsequent article's approach is primarily quantitative using tax records and Geographic Information System ("GIS") information.

<sup>2</sup> Posting of Matthew L.M. Fletcher, *The S. Ct.'s New Indian Law Agenda?*, For the Seventh Generation Blog, <http://tribal-law.blogspot.com/2007/04/s-cts-new-indian-law-agenda.html> (Apr. 4, 2007) (This Article's author is a contributor to For the Seventh Generation Blog.); see also Native American Rights Fund & National Congress of American Indians, *Tribal Supreme Court Project Memorandum 1* (July 30, 2007), available at <http://www.narf.org/sct/caseupdates.pdf> (noting that "[d]uring the 2006 Term, the Court did not accept any Indian law cases for review").

claims since at least 1988,<sup>3</sup> there was cause for some rejoicing in the Court's lack of interest.<sup>4</sup> This happiness was short-lived: the Court has recently granted certiorari for two cases and has already used the first of those to undercut tribal judicial authority.<sup>5</sup> In the 2005 case *City of Sherrill v. Oneida Indian Nation of New York*,<sup>6</sup> general disfavor of Indian claims was highlighted when the Court ostensibly protected non-Indian property interests and non-Indian governments against the dangers of tribal land claims. But in order to do so, the Court abandoned prior precedent and instead relied upon a problematic laches theory in ruling against the tribe.

The commentary on the case has thus far rightly targeted and critiqued the Court's novel and unexpected (it was not even briefed by the parties) reliance upon the flawed laches argument, which somehow produced an 8–1 majority. In *Sherrill*, the Court was quite candid in its preferential option for non-Indians over Indians,<sup>7</sup> despite the Oneida Indian Nation of New York's ability to point to treaty-based rights that would mandate a different holding.

Similarly, the Court asserted without hesitation or analysis that non-Indian interests in “justifiable expectations” need to be protected from harm resulting from the Court permitting tribally

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<sup>3</sup> Alex Tallchief Skibine, *Teaching Indian Law in an Anti-Tribal Era*, 82 N.D. L. REV. 777, 777–78 (2006) (noting that “the general wisdom now is to advise Indian tribes to avoid the Supreme Court at all costs,” and identifying “1988 as the turning point in the Court's attitude toward tribal rights”).

<sup>4</sup> Matthew L.M. Fletcher, *The Supreme Court's Shrinking Indian Law Caseload*, INDIAN COUNTRY TODAY, Feb. 9, 2007, [http://works.bepress.com/cgi/viewcontent.cgi?article=1011&context=matthew\\_fletcher](http://works.bepress.com/cgi/viewcontent.cgi?article=1011&context=matthew_fletcher).

<sup>5</sup> *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709 (2008) (limiting tribal court authority over a nonmember bank doing business in Indian country); see also NATIVE AMERICAN RIGHTS FUND & NATIONAL CONGRESS OF AMERICAN INDIANS, *Tribal Supreme Court Project Memorandum* (Feb. 11, 2008), available at <http://www.narf.org/sct/updatememos/2008/10-07-08.pdf>.

<sup>6</sup> *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005).

<sup>7</sup> The language reference is to Liberation Theology of the Catholic Church whose guiding principle was “a preferential option for the poor.” Peter M. Cicchino, *Building on Foundational Myths: Feminism and the Recovery of “Human Nature”*: A Response to Martha Fineman, 8 AM. U. J. GENDER SOC. POL'Y & L. 73, 84 (2000). Literally applying such an option to the *Sherrill* litigants is tricky because the purchases of the Oneida Indian Nation were financed in part by a highly successful gaming operation that greatly enriched the tribe.

created checkerboard land ownership patterns.<sup>8</sup> This supposed harm has been underexplored to date, likely a consequence of the academy's instinctive need to respond to the glaring problems with the Court's core laches argument. Additionally, intellectual acceptance of the parallel critique of checkerboard jurisdiction by Indian advocates and the Indian law community has arguably led to internalizing and uncritically over-extending the complaints against border towns and checkerboard areas. That diminished sovereignty over checkerboard areas harms Indian tribes does *not* necessarily mean that the "justifiable expectations" of non-Indians are being harmed by tribally created checkerboard areas.

This Article—unlike many Indian law articles—accepts for the purpose of the analysis the Court's vantage point.<sup>9</sup> In *Sherrill*, the Court and the City of Sherrill leaders argued that permitting the Oneida Indian Nation to unilaterally convert land purchased on the market into tribal land would harm non-Indians.<sup>10</sup> In light of this argument, this Article explores what assumptions are revealed by the Court's facile acceptance of this argument, and whether non-Indians are harmed by tribal-state checkerboard land ownership. Part I introduces the *Sherrill* dispute, the Court's holding, and responses to the decision. Part I also provides the necessary backdrop for understanding the Court's assumptions with regard to the harms of Indian land ownership.<sup>11</sup> Part II investigates the assumptions that the Court and academics make about checkerboard areas and towns bordering Indian reservations. Part III presents non-Indian reactions to the Oneida Nation's land claims, using these reactions to better understand what non-Indians dislike about

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<sup>8</sup> *Sherrill*, 544 U.S. at 199.

<sup>9</sup> As Professor Kristen Carpenter and Ray Halbritter, who is head of the Oneida Indian Nation, note, "The question of who can appropriately analyze the experiences of American Indian tribes is a complicated one." Kristen A. Carpenter & Ray Halbritter, *Beyond the Ethnic Umbrella and the Buffalo: Some Thoughts on American Indian Tribes and Gaming*, 5 GAMING L. REV. 311, 327 n.142 (2001) (presenting the suggestion that "members of a minority community may be best situated to tell the stories of their people").

<sup>10</sup> *Sherrill*, 544 U.S. at 200.

<sup>11</sup> I have resisted suggestions that this section be shortened because I want to make sure those unfamiliar with this area of law can better understand the Article's later points, but Indian law scholars and others already familiar with *Sherrill* may want to skim this section.

Indian land ownership. Part IV explores the assumption that Indian land ownership harms non-Indians. Basic property law often does not protect property owners from harm caused by businesses or regulations; similarly, possible harm to non-Indian property owners attributable to tribal land ownership does not necessarily justify Supreme Court protection.<sup>12</sup> Basic property law and empirical evidence from Madison County, New York, suggests that the Court's assumption that non-Indians are harmed by proximity to Indian land is not justified. This Article in no way seeks to displace laches as the most important and most troubling thing done by the Court in *Sherrill*. It instead seeks to add to our understanding of the abused—and abusive—logic of the Court's understanding of Indian property rights.

## I

### INTRODUCTION TO *CITY OF SHERRILL, NEW YORK V. ONEIDA INDIAN NATION OF NEW YORK*

The April 11, 2005, City of Sherrill City Commission meeting began on a good note:

Mayor Shay opened the meeting by reading a statement announcing the United States Supreme Court's decision with the city's lawsuit against the Oneida Indian Nation of New York. The Supreme Court ruled 8–1 in the favor of the city of Sherrill ruling that land purchased by them does not become Indian reservation land. Mayor Shay said it is a great victory for Sherrill and the entire area. Mayor Shay thanked the City's attorney, Ira Sacks, and all his support staff, David Barker and Michael Holmes, as well as Dwight Evans and all the previous and present city commission that have kept the “fight” going. Stu Hill, West Hamilton Ave., was present and told the commission he echoed Mayor Shay's comments. He wanted to commend the city commissioners past and present and the administration and Ira<sup>13</sup> Sacks for his pro bono legal work. *Congratulations to all.*

The revelry continued May 5, 2005, when the City held an Ira Sacks appreciation dinner, celebrating the accomplishment of

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<sup>12</sup> When referring to non-Indians with the corresponding form of property interest, this Article uses the labels “property owner” or “landowner” even though at some points the Oneida tribe did not consider those labels appropriate. See Arlinda Locklear, *Morality and Justice 200 Years After the Fact*, 37 NEW ENG. L. REV. 593, 597 (2003) (attorney for the Oneida tribe noting, “We do not refer to the defendants as landowners. They assert that they own the land, but we deny that.”).

<sup>13</sup> City of Sherrill City Commission, Minutes, Apr. 11, 2005 (emphasis added).

the attorney who, on a pro-bono basis, failed to convince only a single Justice.<sup>14</sup> And in his farewell letter to the community, retiring City Manager David O. Barker confidently opined, “[t]he City of Sherrill should be proud of the position it took and held firm with regards to the Oneida Indians. . . . I am proud we stood our ground.”<sup>15</sup>

The Indian and Indian law communities were less elated about the Court’s ruling. *Indian Country Today*, the leading pan-Indian newspaper which happens to be owned by the Oneida Indian Nation,<sup>16</sup> accused the Supreme Court of “making political decisions” and going “out of its way” in denying “an Indian nation’s right to even buy back its historical and illegally taken (stolen) reservation lands.”<sup>17</sup> For many Indian law academics, while accustomed to judicial setbacks, *Sherrill* was particularly painful. Professor Joseph Singer noted that he reacted to the Court’s reasoning “with a fair amount of astonishment and anger.”<sup>18</sup> Furthermore, Professor Sarah Krakoff wrote that “the opinion is one of the most cringe-inducing of late . . . .”<sup>19</sup> One knows there is frustration when a professor entitles a section of a case examination law review article simply “Aarrghhh!” and that is exactly what Professor Krakoff felt compelled to do when writing about *Sherrill*.<sup>20</sup>

For those who follow Indian law scholarship, such frustration is not entirely surprising. Prior to *Sherrill*, Professor Philip Frickey observed, “[s]cholars rail—perhaps a better word for it is flail—against the trend in the cases.”<sup>21</sup> “[F]or some years now,”

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<sup>14</sup> City of Sherrill Newsl., Community Happenings, Spring 2005.

<sup>15</sup> City of Sherrill Newsl., David O. Barker, An Open Farewell Letter from Our Retiring City Manager, Fall 2005.

<sup>16</sup> Editorial, *A Plea to the Pope: Rescind the Papal Bulls*, INDIAN COUNTRY TODAY, May 26, 2006 (acknowledging Oneida ownership of the newspaper).

<sup>17</sup> Editorial, *Fundamental Justice Shaken in Iroquois Land Cases*, INDIAN COUNTRY TODAY, July 7, 2005.

<sup>18</sup> Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605, 611 (2006).

<sup>19</sup> Sarah Krakoff, *City of Sherrill v. Oneida Indian Nation of New York: A Regretful Postscript to the Taxation Chapter in Cohen’s Handbook of Federal Indian Law*, 41 TULSA L. REV. 5, 6 (2005).

<sup>20</sup> *Id.* at 10 (title of Part III of her article).

<sup>21</sup> Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of Lone Wolf*, 38 TULSA L. REV. 5, 33 (2002).

Professor Alex Tallchief Skibine relatedly observed, “I have found that teaching Indian law can have a depressing effect . . . due to the Supreme Court decisions I teach in the class.”<sup>22</sup> And while Professor Krakoff describes her efforts to try “desperately to avoid lapsing into unseemly cynicism, bordering on whiny sarcasm, when it comes to teaching some of the recent United States Supreme Court decisions in the field,” her subsequent assertion that this “is not merely the pathetic whine of the sore loser,”<sup>23</sup> could be unconvincing when the Court so easily comes out 8-1 against tribal rights. In an earlier article, I painted with a broad brush what I considered the field’s “standard pattern” of scholarship: “a description of how cases used to be decided, followed by a description of the wrong way they are currently decided.”<sup>24</sup> I went on to distinguish such scholarship from “simplistic complaint narratives,”<sup>25</sup> but by doing so I implicitly criticized scholarly whining. Given the strong version of *Sherrill*’s message, that “the American Court system will no longer sympathize with tribes seeking retribution for past wrongs,” some complaint, even whining, from advocates for the losers seems appropriate.<sup>26</sup> The Court’s novel use of laches and unexplored assumptions regarding the effects of checkerboard areas on non-Indians reveal the decision to be, in the words of Professor Robert Porter, “purely political.”<sup>27</sup> Such treatment of treaty-based rights is worthy of consideration *and* complaint.<sup>28</sup>

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<sup>22</sup> Skibine, *supra* note 3, at 777.

<sup>23</sup> Krakoff, *supra* note 19, at 5.

<sup>24</sup> Ezra Rosser, *The Trade-off Between Self-Determination and the Trust Doctrine: Tribal Government and the Possibility of Failure*, 58 ARK. L. REV. 291, 294 (2005). Professor Frickey recently put this much more concretely and eloquently by noting that WWJ(M)D—What Would John (Marshall) Do—should not be the fundamental question of Indian law, while in the same paragraph also giving credit to the inclination underlying standard Indian law scholarship by noting that “[i]n his best moments, then, Chief Justice Marshall provided examples of what ‘doing Indian law’ should be about.” Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 488 (2005).

<sup>25</sup> Rosser, *supra* note 24, at 294.

<sup>26</sup> Amy Borgman, Note, *Stamping Out the Embers of Tribal Sovereignty: City of Sherrill v. Oneida Indian Nation and Its Aftermath*, 10 GREAT PLAINS NAT. RESOURCES J. 59, 60 (2006) (based upon *Sherrill* and *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005)).

<sup>27</sup> Robert Odawi Porter, *Sherrill: Feeding America’s Appetite for Land*, INDIAN COUNTRY TODAY, June 17, 2005.

<sup>28</sup> A good example of scholarship, written prior to *Sherrill*, that effectively combines critical consideration and complaint is law professor and poet Frank

The Treaty of Canandaigua recognizes the Oneida Indian Nation's right to 300,000 acres in upstate New York.<sup>29</sup> This 1794 treaty recognized the validity of an earlier land reservation between the state of New York and the Oneida Indian Nation in 1788.<sup>30</sup> Despite the Treaty of Canandaigua recognizing the Oneida tribe's right to land it had occupied prior to the formation of the country, and despite the Oneida "all[ying] with the colonists and [fighting] alongside them in a number of critical battles,"<sup>31</sup> the Oneida began losing its reserved land to non-Indians immediately after the Treaty of Canandaigua.<sup>32</sup> New York's acquisition of reserved land was remarkably successful, "ultimately, by 1920, only 32 acres continued to be held by the Oneidas."<sup>33</sup> The U.S. government acquiesced in the actions of New York, and multi-generational Oneida complaints about U.S. "mistreatment" of the Oneida did not protect the Oneida's territorial integrity provided for in the Treaty of Canandaigua.<sup>34</sup>

When the tribe's complaints did not succeed in restoring its land, the Oneida eventually reacted in two ways: they sued everyone connected with the tribe's loss of land, including local

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Pommersheim's *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 ARIZ. ST. L.J. 439 (1999). Professor Pommersheim's article is his analysis of "a series of historically superficial and intellectually deficient Supreme Court pronouncements." *Id.* at 442. Tellingly, he introduces his analysis with a more poetic and descriptive sentence that calls attention to the complaints in the article: "Reflections transformed into plaintive yowls from the edge of the northern plains' prairie." *Id.* at 441.

<sup>29</sup> *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 203–05 (2005).

<sup>30</sup> *Id.* The United States recognized the 1788 treaty with New York because the Nonintercourse Act, which disallowed tribal-state treaties without approval by the federal government, was not passed until 1790. *Id.* at 204. For more on the Treaty of Canandaigua, see Robert W. Venables, *The Treaty of Canandaigua (1794): Past and Present*, in ENDURING LEGACIES: NATIVE AMERICAN TREATIES AND CONTEMPORARY CONTROVERSIES 45–80 (Bruce E. Johansen ed., 2004); see also Michael Matthews, Comment, *City of Sherrill v. Oneida Indian Nation: Balancing the Correction of Historical Wrongs with the Convenience of Ignoring Them*, 32 OKLA. CITY U. L. REV. 169, 174–75 (2007) (noting that Congress prohibited these state-tribal treaties two years after the Oneida-New York treaty "in order to avoid these kinds of land transactions").

<sup>31</sup> John Tahsuda, *The Oneida Land Claim: Yesterday and Today*, 46 BUFF. L. REV. 1001, 1002 (1998).

<sup>32</sup> *City of Sherrill*, 544 U.S. at 205; *Land Claim Timeline*, UTICA OBSERVER DISPATCH, May 22, 2007.

<sup>33</sup> *City of Sherrill*, 544 U.S. at 207.

<sup>34</sup> See *id.* at 218 n.12.



and federal governments and even individual non-Indian property owners, and they began open market land purchases within the original reservation boundaries. As Ray Halbritter, the Nation Representative of the Oneida Indian Nation of New York,<sup>35</sup> noted in a post-*Sherrill* Congressional hearing, the tribe's land claim case is "the largest and oldest" such case and "has twice been upheld by the United States Supreme Court."<sup>36</sup> The cases Halbritter went on to cite<sup>37</sup>—*Oneida Indian Nation v. County of Oneida*<sup>38</sup> ("Oneida I") and *County of Oneida v. Oneida Indian Nation*<sup>39</sup> ("Oneida II")—supported the tribe and did not foreshadow the *Sherrill* defeat.<sup>40</sup>

Though victories, the Supreme Court cases did not return land to the Oneida, and so the tribe began unilaterally reacquiring its reservation.<sup>41</sup> In 1993, Turning Stone Resort and Casino opened and, together with a host of other tribal enterprises also under Ray Halbritter's leadership,<sup>42</sup> business success fueled an Oneida

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<sup>35</sup> Though the title may confuse those not familiar with the tribe, the "Representative" is the head of the Oneida Indian Nation of New York. Oneida Indian Nation, *Fact Sheet: The Oneida Indian Nation*, available at <http://www.oneidaindiannation.com/pressroom/factsheets/26864764.html> (last visited Oct. 28, 2008).

<sup>36</sup> Testimony of Ray Halbritter, Nation Representative of the Oneida Indian Nation of New York, before the Committee on Natural Resources, U.S. House of Representatives, July 14, 2005, available at <http://republicans.resourcescommittee.house.gov/archives/ii00/archives/109/testimony/2005/rayhalbritter.htm>.

<sup>37</sup> *Id.*

<sup>38</sup> 441 U.S. 667 (1974).

<sup>39</sup> 470 U.S. 226 (1985).

<sup>40</sup> For more on the Oneida land claim cases up until 1991, see GEORGE C. SHATTUCK, *THE ONEIDA LAND CLAIMS: A LEGAL HISTORY* (1991).

<sup>41</sup> See *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 210–12 (stating that the Oneida reacquired parts of its original land through open-market transactions).

<sup>42</sup> See Carpenter & Halbritter, *supra* note 9, at 321–23, for more on why the tribe made the choice to found a casino. See Jay Donald Jerde, *Learning to Sell Grandmother: Why City of Sherrill, New York v. Oneida Indian Nation of New York Should Be Upheld to Preserve Tax-Free Status of Tribal Real Estate Acquisitions*, 28 *HAMLIN L. REV.* 341, 343 (2005), for a detailing of the business interests of the Oneida Indian Nation; see also *Fact Sheet: The Oneida Indian Nation*, *supra* note 35. For more on the casino, see Oneida Indian Nation, *Fact Sheet: Turning Stone Resort and Casino*, <http://www.oneidaindiannation.com/pressroom/factsheets/27429169.html> (last visited Nov. 21, 2008). See Oneida Nation Enterprises, <http://www.onenterprises.com/index.php> (last visited Nov. 21, 2008), for the homepage of Oneida Nation Enterprises, with links to the subsidiary businesses.

land-buying spree.<sup>43</sup> In 1990, the Oneida owned only fifty-two acres of non-trust land, but by 2006 the tribe owned more than 17,000 acres, with seventy-seven percent of the land acquired since 1998.<sup>44</sup> While targeted land purchases at times can go undetected,<sup>45</sup> the Oneida tribe's purchases were both impressive and noticed. Non-Indians who did not like the actions of the Oneida and other New York tribes banded together to form Upstate Citizens for Equality ("UCE"), an organization which continues to take a lead role in opposing the Oneida Nation. According to UCE, "money lost at the tables in the Turning Stone Casino goes in two very destructive directions: new purchases of land that erode our tax base, and start-up money for new and diverse tax evading businesses."<sup>46</sup> Unfortunately for the Oneida, the Supreme Court in *Sherrill*—a court which has never had an Indian member—took their natural non-Indian perspective on Oneida land acquisitions, a perspective shared by Upstate Citizens for Equality.<sup>47</sup>

*Sherrill* arose when the Oneida Nation refused to pay property taxes on parcels of property it had purchased.<sup>48</sup> *Oneida II* acknowledged that the Oneida possess aboriginal title to the land originally reserved for them. The tribe then argued, and the United States (though ultimately not the Court) agreed, that "because the Tribe has now acquired the specific parcels involved in this suit in the open market, it has unified fee and

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<sup>43</sup> See Jerde, *supra* note 42, at 344.

<sup>44</sup> Letter from S. John Campanie, Madison County Attorney, to Franklin Keel, Bureau of Indian Affairs Regional Director (Feb. 28, 2006), *available at* <http://www.madisoncounty.org/motf/MadCoSJCoin.htm> (opposing the Oneida application to take the land into trust).

<sup>45</sup> Harvard University, for example, initially concealed its identity when it "spent \$88 million secretly acquiring 52.6 acres of land in the Allston section of Boston," and only announced the institutional nature of the purchases after they had been accomplished. Sara Rimer, *Some Seeing Crimson at Harvard 'Land Grab,'* N.Y. TIMES, June 17, 1997, at A16.

<sup>46</sup> UPSTATE CITIZENS FOR EQUALITY, FEDERAL INDIAN POLICY AND THE ONEIDA LAND CLAIM, at 14 (Dec. 9, 2001), *available at* <http://www.upstate-citizens.org/fip.pdf>.

<sup>47</sup> See Krakoff, *supra* note 19, at 11 (noting the lack of Indian members on the Court through history).

<sup>48</sup> City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197, 211 (2005) ("Because the parcels lie within the boundaries of the reservation originally occupied by the Oneidas, OIN maintained that the properties are exempt from taxation, and accordingly refused to pay the assessed property taxes.").

aboriginal title and may now assert sovereign dominion over the parcels.”<sup>49</sup> Thus, the tribe was asserting a derivative treaty-based right to revive “ancient sovereignty piecemeal over each parcel.”<sup>50</sup> For the Court, the most important part of the tribe’s assertion was captured by the modifier “ancient,” and that modifier trumped both the tribe’s treaty guarantees and the seemingly self-actualizing nature of the tribe’s land reacquisition strategy.

With the exception of Justice Stevens, the lone dissenter, the Court felt that the amount of time since the Oneida previously controlled their land evoked “the doctrines of laches, acquiescence, and impossibility, and render[ed] inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate.”<sup>51</sup> The Oneida thus could not unite aboriginal and fee title because they had lost control of their reservation lands 200 years before and had waited too long before seeking judicial redress.<sup>52</sup> In almost poetic language, the Court held that “standards of federal Indian law and federal equity practice preclude the Tribe from *rekindling embers of sovereignty that long ago grew cold*.”<sup>53</sup> The Court again relied upon the modifier “ancient” to reduce the significance of the Oneida’s reacquired land: “OIN’s claim concerns grave, but ancient, wrongs, and the relief available must be commensurate with that historical reality.”<sup>54</sup>

The Court’s reliance on laches—a judicially created (here imagined?) statute of limitations on claims—can be critiqued on a number of legal grounds. Professor Krakoff notes that, by relying on laches where prior precedent would not support the outcome, “the Court has undermined core legal principles without having the courage to say it is doing so. . . . [P]erverting the core doctrines of law that apply to federal-tribal relations.”<sup>55</sup>

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<sup>49</sup> *Id.* at 213.

<sup>50</sup> *Id.* at 202.

<sup>51</sup> *Id.* at 221.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 214 (emphasis added) (internal quotation marks omitted).

<sup>54</sup> *Id.* at 216 n.11.

<sup>55</sup> Krakoff, *supra* note 19, at 11. See *id.* at 12–17, for critical coverage of the Court’s laches argument and the history of the issues involved. Krakoff’s complaint is similar to an earlier one of Dean David Getches: “[The Court] has not directly overruled precedent, but it has virtually ignored the Marshall trilogy, which had

Similarly, a student note on *Sherrill* critiqued the Court for failing to live up to the requirements of the Indian Trust Doctrine.<sup>56</sup> These points echo that of Justice Stevens, who in dissent wrote that the majority was acting in a way “irreconcilable with the principle that only Congress may abrogate or extinguish tribal sovereignty.”<sup>57</sup> More provocatively (Justice Stevens after all did “respectfully dissent”<sup>58</sup>), Professor Singer, author of one of the two leading Property textbooks, accuses the Court of having “divorced title from ownership in a manner more radical than ever previously done in U.S. law and did so by blaming the victim.”<sup>59</sup> Professor Singer argued that the barriers the Oneida faced in bringing a lawsuit earlier to protect their rights make the Court’s laches-based holding inappropriate.<sup>60</sup>

If *Sherrill* is a laches decision, the holding is buttressed with the Court’s negative perception of checkerboard areas. During oral argument, Justice Scalia made explicit the connection between problems that come with alternating control of land and the appropriateness of a laches-based decision:

JUSTICE SCALIA: Mr. Smith, isn’t there any principle of laches that comes into effect here. I mean, what you’re asking the Court to do is to sanction a very odd checkerboard system of jurisdiction in the middle of New York State. Some parcels are the ones the Indians choose to buy and are able to buy and are called Indian territory and everything else is governed by New York state isn’t it? It’s just a terrible situation as far as governance is concerned and part of the blame for the

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been the touchstone of nearly all Indian law cases since the first Supreme Court.” David H. Getches, *Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 274 (2001).

<sup>56</sup> Borgman, *supra* note 26, at 59.

<sup>57</sup> *City of Sherrill*, 544 U.S. at 226 (Stevens, J., dissenting).

<sup>58</sup> *Id.* at 227.

<sup>59</sup> Singer, *supra* note 18, at 611. Singer descriptively expanded upon his accusation when he labeled the Court’s blaming actions “Kafkaesque.” *Id.* at 612.

<sup>60</sup> *Id.* at 615–27; Matthew L.M. Fletcher, “Now What the Hell You Gonna Do in Those Days?” *A Research Note on Practical Barriers to Indian Land Claims* (Mich. St. U. Coll. of L., Working Paper No. 06-07, 2008), available at <http://ssrn.com/abstract=1128153>; accord Matthews, *supra* note 30, at 180–82; see also Locklear, *supra* note 12, at 601 (the delay in filing lawsuits “is not a function of the fact that the Indian people slept on their rights, it is a function of the State’s own duplicity in, first of all, taking the land illegally, and secondly, doing everything in its power over the last 150 years to refuse to address and set right those wrongs”).

situation we're in is that the Oneidas did not complain about this for 170 years.<sup>61</sup>

Justice Scalia's words were to resurface in the opinion. By using laches to underpin the Court's rejection of the tribe's unification of title theory, the Court turned to a rationale "which [was] never presented or briefed by the parties," and did so in a way that betrayed the Court's "pragmatic concerns" regarding possible Indian jurisdiction over the land.<sup>62</sup> Scholarship so far has narrowed in on the problems with the Court's use of laches, but the Court itself incorporated into its laches argument a focus on checkerboard areas to support its full holding:

Today, we decline to project redress for the Tribe into the present and future, thereby disrupting the governance of central New York's counties and towns. Generations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation. And at least since the middle years of the 19th century, most of the Oneidas have resided elsewhere. Given the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneidas' long delay in seeking judicial relief against parties other than the United States, we hold that the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders.<sup>63</sup>

There is always a danger when commenting on a bad decision, and *Sherrill*—even with eight votes—certainly is a bad decision. The problem lies in drawing too heavily on the Court for the shape of subsequent analysis. Such reliance risks reinforcing so-called "legal arguments" that may be better described as excuses rather than consequences of prior precedent or legal principles—

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<sup>61</sup> Transcript of Oral Argument at 32, *City of Sherrill*, 544 U.S. 197 (No. 03-855) (Scalia, J., questioning Michael R. Smith on Behalf of Respondents).

<sup>62</sup> Borgman, *supra* note 26, at 60. The Court was aware that laches was not one of the original issues in the case and felt the need to explain in a footnote why the case was resolved "on considerations not discretely identified in the parties' briefs." *City of Sherrill*, 544 U.S. at 214 n.8. Justice Breyer revealed some of the pragmatic concerns he had during oral argument when he speculated that the land at stake might be "worth a trillion dollars." Transcript of Oral Argument, *supra* note 61, at 29. A similar pragmatic monetary concern arguably helps explain the Court's treatment of Indian breach of trust cases. See Rosser, *supra* note 24, at 300–01.

<sup>63</sup> *City of Sherrill*, 544 U.S. at 202–03.

despite using fancy words understood only by lawyers (“laches”). In considering *Sherrill*, for example, there is a good article waiting to be written focusing on a close analysis of the Oneida’s pre- and post-Nonintercourse Act treaties, an analysis that the Court chose not to pursue.<sup>64</sup> Yet, just as the Court’s flawed imposition of a laches limitation forced a scholarly response, the Court’s revealed assumptions regarding checkerboard areas and their harm to non-Indians also merit response.

## II

### CHECKERBOARD AREAS

Indian law scholars and the Supreme Court seemingly agree on at least one thing: checkerboard areas are bad. *Really* bad. According to the Court, “A checkerboard of alternating state and tribal jurisdiction in New York State—created unilaterally at OIN’s behest—would seriously burden the administration of state and local governments and would adversely affect landowners neighboring the tribal patches.”<sup>65</sup> Likewise, according to Professor Frickey, checkerboard areas are a “dysfunctional . . . pattern of land ownership,”<sup>66</sup> and checkerboarding “makes the delivery of government services a nightmare.”<sup>67</sup> Similarly, Professor Rebecca Tsosie asserts that checkerboard jurisdiction “is inherently unworkable.”<sup>68</sup>

Behind the apparent agreement on checkerboard areas lurks a critical difference between the Court and Indian law academics: perspective. Indian law scholars tend to look at things from a tribal perspective; thus, checkerboard areas are primarily problematic because of judicial rules that limit tribal sovereignty

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<sup>64</sup> See *id.* at 215 n.9 (noting that the Court was not basing its decision on the interpretation of treaty language); see also Locklear, *supra* note 12, at 596 (describing New York’s land acquisition treaties as examples of “coercion in virtually every circumstance”).

<sup>65</sup> *City of Sherrill*, 544 U.S. at 219–20 (internal quotation marks and brackets omitted).

<sup>66</sup> Frickey, *supra* note 21, at 7.

<sup>67</sup> *Id.* at 33.

<sup>68</sup> Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 IND. L. REV. 1291, 1297 (2001); see also Getches, *supra* note 55, at 277 (citing the “practical concerns” of having zoning sovereignty be dependent upon property ownership).

over those areas.<sup>69</sup> The Court assumes the opposite perspective: it disfavors tribal-state checkerboard areas because of perceived harm to non-Indians, and this disfavor arguably explains *Sherrill*.<sup>70</sup> Published prior to *Sherrill*, Professor Frickey's summary of prior Indian case law arguably foretells the majority's position:

It seems apparent that the Court has been motivated primarily by two practical factors: a desire to protect nonmembers from tribal regulation (by excluding regions with lots of nonmembers from the reservation), and a desire to allow states and their subdivisions to administer public services efficiently, especially where nonmembers are the beneficiaries of these services.<sup>71</sup>

The Court's singular focus on non-Indian concerns betrays its own corresponding indifference to Indian ideas regarding resolution of disputes between tribes and non-Indian entities.<sup>72</sup> What remains unexplored is what exactly the Court is protecting non-Indians from and whether there is a need for such protection.

Perspective helps explain the Court's treatment of the Oneida claims. Professor Singer noted, "it takes *chutzpah* for the Supreme Court to complain about the untenability of checkerboard jurisdiction when it was the Supreme Court that created checkerboard jurisdiction."<sup>73</sup> But in *Sherrill*, the Court never questioned the idea that non-Indians suffer from checkerboarding. Many problems with the *Sherrill* decision have

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<sup>69</sup> As Professor Royster noted prior to *City of Sherrill*, "the Court has focused on non-Indian fee ownership within Indian country . . . as a justification for divesting tribes of territorial sovereignty." Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 29 (1995).

<sup>70</sup> Court prioritization of non-Indian perceptions of harm reflects the Court's general tendency to "disfavor interests of minorities when they conflict with interests of the majority in society." Getches, *supra* note 55, at 323. Dean Getches identified this as part of the Court's strong inclination "to follow what the Justices believe to be the mainstream values of American society." *Id.* at 321.

<sup>71</sup> Frickey, *supra* note 21, at 30.

<sup>72</sup> See Krakoff, *supra* note 19, at 6 (concluding that "the only unifying theme running through recent Indian law cases is that the Court either does not care about, or is hostile to, the interests of American Indians").

<sup>73</sup> Singer, *supra* note 18, at 609; accord Tsosie, *supra* note 68, at 1296 ("Rather than trying to facilitate the efficient administration of reservation lands by Indian tribes, the Court's opinions have increasingly determined that Indian nations retain very limited jurisdictional authority over non-Indians on fee lands.").

been identified: Justices not sticking with their preference for “original intent” reasoning in this context, poor reading of the Nonintercourse Act’s statutory language, the Court’s ironic checkerboard jurisdiction critique, the irony of the Court’s judicial activism in defining the tribal-state relationship, and the argument that non-Indians had justifiable expectations when New York never acquired valid title.<sup>74</sup> But perhaps the list should also include the Court’s unfounded ease in repetitively assuming injury to non-Indians if the Oneida reasserted sovereignty over purchased land.

*Sherrill* begs the question whether the outcome would have been different had the demographic facts been more favorable, and consequently, the Court not as focused on protecting non-Indians from checkerboard areas.<sup>75</sup> In *Sherrill*, the Court noted that the case involved an area in which “over 99% of the population in the area is non-Indian,” and that even with the tribe’s land acquisition, Oneida land represented “less than 1.5% of the counties’ total area.”<sup>76</sup> Although writing about *Oliphant*, Professor Royster’s words apply in part to the *Sherrill* Court’s use of demographic characteristics in a laches opinion, “[w]hile these facts were technically irrelevant to the holding, their influence on the Court’s decision is suspect.”<sup>77</sup> In fact, the *Sherrill* Court made clear that the demographic facts did play a

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<sup>74</sup> Singer, *supra* note 18, at 608–10.

<sup>75</sup> This question was suggested by a parallel question regarding the quintessential “bad” facts case, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), raised by Professor Royster:

The unanswerable but intriguing question is whether the Court would have held differently had it been presented with “good” facts: a similar crime occurring on a reservation that was virtually all trust land and with an overwhelmingly Indian population. Given the racist basis of the decision in *Oliphant*, it is likely the Court would have ruled against tribal jurisdiction in any case, but it would have had a harder time justifying its decision without the effects of allotment on the Suquamish Reservation.

Royster, *supra* note 69, at 45 n.240. Professor Frickey notes that the *Oliphant* Court did not limit its opinion to the bad facts and “[i]nstead of denying this tribe jurisdiction because of the dreadful circumstances, the Court announced a general rule: tribes lack criminal jurisdiction over non-Indians.” Frickey, *supra* note 21, at 22.

<sup>76</sup> *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 211 (2005).

<sup>77</sup> Royster, *supra* note 69, at 45.



role by stating that such demographics “may create ‘justifiable expectations’” in the minds of non-Indians.<sup>78</sup>

### A. *Framework for Understanding Sherrill*

The Court’s assumptions regarding the land claimed by the Oneida can be explored by borrowing from a framework developed to explain diminishment cases. Because the Oneida were attempting to reacquire land rather than trying to defend tribal control over existing reservation land, *Sherrill* is not explicitly a diminishment of tribal sovereignty case. Yet the *Sherrill* opinion fits the characteristics Professor Gloria Valencia-Weber highlights as governing the Court’s consideration of such cases:

- a. the land characteristics, size, configuration and history—real and attributed—of the tribal trust lands and the lands included within the Indian country statute, individual allotments, fee lands, and dependent Indian communities;
- b. the method of governance and specific activities on the disputed land; that is, what tribal governments and entities do, as well as the behavior of individuals; and
- c. the people on the land; specifically, what legal distinctions can be made among the persons who inhabit and use the land.<sup>79</sup>

Professor Valencia-Weber’s categories provide a good framework for considering how the possibility of checkerboard areas impacted the Court.

#### 1. *Land Characteristics and History*

Though the history of non-Indian land possession is the land characteristic the Court focused upon, it also noted that the land’s characteristics have changed through “development of every type imaginable [that] has been ongoing for more than two centuries.”<sup>80</sup> The Court used the “dramatic changes in the character of the properties” as a factor in disallowing the tribe to unify title.<sup>81</sup> Drawing on language of an earlier era, the Court explained: “[T]he properties here involved have greatly

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<sup>78</sup> *City of Sherrill*, 544 U.S. at 215–16 (citation omitted).

<sup>79</sup> Gloria Valencia-Weber, *Shrinking Indian Country: A State Offensive to Divest Tribal Sovereignty*, 27 CONN. L. REV. 1281, 1282 (1995).

<sup>80</sup> *City of Sherrill*, 544 U.S. at 219 (citation omitted).

<sup>81</sup> *Id.* at 216–17.

increased in value since the Oneidas sold them 200 years ago. Notably, it was not until lately that the Oneidas sought to regain ancient sovereignty over land converted from wilderness to become part of cities like Sherrill.”<sup>82</sup> Yet, the Court is careful not to explain why such changes are relevant. In a less politically correct environment, the Court was free to say what was just beneath the surface of the Court’s concern for 200 years of development: “To leave [Indians] in possession of their country, was to leave the country a wilderness. . . .”<sup>83</sup>

## *2. Tribal and Local Governance*

The *Sherrill* Court gave less attention to tribal governance of the land since tribal tax liability was the only governance issue raised. The majority felt there would be “problems associated with upsetting New York’s long-exercised sovereignty over the area.”<sup>84</sup> The Court acknowledged that its motivation for allowing local taxation of Oneida land was partly because of its concern that the tribe would not protect area landowners through the same “local zoning or other regulatory controls” that had been in place.<sup>85</sup> In contrast, the lower court dismissed the anti-tribal argument that unifying title might upset settled expectations. Such an argument, the lower court reasoned, “only begs the question whether the city is authorized to tax the properties.”<sup>86</sup> The Court’s concern is somewhat remarkable because during oral argument the tribe had conceded regulatory and taxing authority over non-Indians to the nontribal governments.<sup>87</sup> Of course, tribal governance over its own land might still “frustrate[] the efforts of both sovereigns to segregate

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<sup>82</sup> *Id.* at 215.

<sup>83</sup> *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 590 (1823).

<sup>84</sup> *City of Sherrill*, 544 U.S. at 216 n.11; *see also supra* note 71 and accompanying text.

<sup>85</sup> *City of Sherrill*, 544 U.S. at 219–20 (citations omitted).

<sup>86</sup> *Oneida Indian Nation of N.Y. v. City of Sherrill*, 337 F.3d 139, 157 (2d Cir. 2003), *rev’d*, 544 U.S. 197 (2005).

<sup>87</sup> Transcript of Oral Argument, *supra* note 61, at 30–31. In his dissent, Justice Stevens called attention to the limited scope of the Oneida claim: “This case involves an Indian tribe’s claim to tax immunity on its own property located within its reservation. It does not implicate the tribe’s immunity from other forms of state jurisdiction, nor does it concern the tribe’s regulatory authority over property owned by non-Indians within the reservation.” *City of Sherrill*, 544 U.S. at 222 (Stevens, J., dissenting).

land uses which are incompatible,”<sup>88</sup> but the Court’s fears regarding tribal governance seem to go beyond the fear that tribal control will hamper rational land use planning. The City of Sherrill’s attorney played on such fears during oral argument: “It’s more than just the interference, the issue of taxation, the issue of sovereignty is whether a gas station is going to blow up or burn down.”<sup>89</sup> It seems hard to imagine that the Court would permit such speculation about exploding gas stations if this were, for instance, a simple regulatory authority dispute between Minneapolis and St. Paul.

### 3. *Legal Distinctions Among People*

The Court’s *explicit* consideration of the types of people living on land affected by the Oneida claim is limited to the Court’s introductory observation that ninety-nine percent of the people are non-Indian. The Court’s limited demographic discussion fits generally with its “rather blithe dismissal of tribal authority over significant non-Indian populations.”<sup>90</sup>

#### B. *Disfavor of Checkerboard Areas*

Having considered the categories guiding the Court when it diminishes tribal authority, it is now time to turn to possible explanations for the Court’s disfavor of checkerboard areas. There is no way to know what role the Justices’ subconscious thoughts played in forming their assumptions regarding Indians and Indian governance capacity.<sup>91</sup> Given the “legacy of allotment,” presented most fully in Judith Royster’s so-entitled article,<sup>92</sup> checkerboard areas are prevalent in Indian country.<sup>93</sup>

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<sup>88</sup> Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court’s Changing Vision*, 55 U. PITT. L. REV. 1, 74 (1993).

<sup>89</sup> Transcript of Oral Argument, *supra* note 61, at 9–10.

<sup>90</sup> Pommersheim, *supra* note 28, at 443.

<sup>91</sup> While this sort of background knowledge is most famously explored in terms of racism, in the case of Indian authority over non-Indians, racism can be coupled with non-race-based matters of common knowledge regarding checkerboard areas and interactions between whites and Indians. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

<sup>92</sup> Royster, *supra* note 69.

<sup>93</sup> See, e.g., Federico Cheever, *Confronting Our Shared Legacy of Incongruous Land Ownership: Notes for a Research Agenda*, 83 DENV. U. L. REV. 1039, 1040

Non-Indian interactions with Indians in checkerboard areas and in associated reservation border towns are largely responsible for forming society's knowledge, or at least a set of shared assumptions, regarding Indians. For the Court, perhaps, such interactions illustrate the dangers of allowing tribal land acquisition to create checkerboard areas.

For example, Marc Gaede's book of photographs, *Bordertowns*, captures the darker side of towns that bridge reservation and off-reservation life.<sup>94</sup> The title page photo, "Passed out in Winslow," makes way for scenes of derelict bars, drunks in police holding tanks, and alcohol-related injuries and deaths.<sup>95</sup> The problem with Gaede's photographic presentation is its one-dimensional nature, focusing only on the seedy and shocking.

When one talks with non-Indians who have never been to a reservation, the two things they "know" about Indians are that they are alcoholics and have casinos. *Bordertowns* arguably reinforces such "knowledge." Another book, *Ceremony*, describes Gallup, New Mexico, through the eyes of a drunk forced to sleep under bridges.<sup>96</sup> If you are Anglo and park your car in any of the Navajo Nation shopping centers, you often will be approached by *ada'adla\*ni\*gi\*i*, the Navajo word for those who drink alcohol.<sup>97</sup> They approach out of a mix of boredom

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(2006) ("Most western states contain Indian reservations whittled down or hollowed out by the allotment acts of the late nineteenth century."); Christopher A. Karns, Note, County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation: *State Taxation As a Means of Diminishing the Tribal Land Base*, 42 AM. U. L. REV. 1213, 1224 (1993) (noting that "many reservations today are composed of both fee-patented and trust lands, resulting in what is often referred to as a 'checkerboard pattern'" (quoting *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 430 (1989))); Jessica A. Shoemaker, Comment, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 WIS. L. REV. 729, 755 (2003) ("In the current state of Indian Country, the tribal land base is so eroded that the courts now consider it a 'checkerboard' with just a small percentage of the land still held by Indians or the tribe.").

<sup>94</sup> BORDERTOWNS: PHOTOGRAPHS BY MARC GAEDE (Marnie Walker Gaede ed., 1988).

<sup>95</sup> *Id.*

<sup>96</sup> LESLIE MARMON SILKO, *CEREMONY* (Penguin Books, 1986).

<sup>97</sup> The Diné language includes sounds and letters not found in English. Here, "" represents a glottal stop and "\*" a high tone. The Diné language is primarily an oral language, but does have its own alphabet. Spelling courtesy of Zelma King, my stepmother who has taught Diné at Navajo Community College. E-mail from

and desperation, fueled by alcoholism, in hopes of some sort of help to feed their addiction or cope with its consequences. A recent newspaper clipping is representative of the dangers of limited and specific non-Indian/Indian interactions. When a *New York Times* travel writer stopped in Pine Ridge, South Dakota, J. T. Kills Crow “approached [him] almost as soon as [he] stepped out of [his] car.”<sup>98</sup> After touring nearby Wounded Knee, J. T. and the reporter drank “beer from plastic cups (Pine Ridge is officially dry, so you can’t be seen with a can)” before the reporter bought two cases of Hurricane malt liquor, which J. T. was still drinking when the reporter went to sleep.<sup>99</sup> The next day, the reporter “drove away with [his] windows wide-open to air out the smell of spilled beer,” while J. T. slept.<sup>100</sup>

The oft-repeated social narrative of Indian alcoholism draws its power and authority from the very limited contacts between non-Indians and Indians. The first and sometimes only Indian that non-Indians meet too often is the passed out Indian, or the helpful approaching *adla\*anii*.<sup>101</sup> Just as non-Indians falsely extrapolate general casino wealth from their experiences with the small subset of tribes with massive gaming operations, border towns and checkerboard areas are similarly creating unfounded societal “knowledge” of Indians. This process of making undue conclusions from limited data taints societal knowledge and creates a distorted understanding of Indians. Similarly, during oral argument, the attorney for the City of Sherrill attempted to use a single difficult experience involving Indian land regulation to call into question the zoning choices and regulatory trustworthiness of an entirely separate tribe.<sup>102</sup>

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James Rosser to Ezra Rosser, Assistant Professor, American University Washington College of Law (Aug. 5, 2008) (on file with author).

<sup>98</sup> Matt Gross, *Scraping by with a South Dakota Tribe*, N.Y. TIMES, June 27, 2007, available at <http://travel.nytimes.com/2007/06/27/travel/27frugal.html>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> It should be noted that this problem is not necessarily about Indians. Rather, it may reflect the general phenomenon that any town selling alcohol next to a dry area will have a disproportionate number of drunks because the customer base is being drawn from a larger area.

<sup>102</sup> Transcript of Oral Argument, *supra* note 61, at 25–26 (Caitlin J. Halligan on Behalf of the Petitioner) (“For example, another tribe relying on the decision here purchased land within its original land claim area that’s just 300 yards from a local high school and have begun operation of a gaming hall there.”). For more on the dangers of applying rules applicable to all tribes, see Ezra Rosser, *Ambiguity and*

Given the Court's antagonism to Indian governance and Indian regulation of non-Indians in checkerboard areas, societal "knowledge" of Indians formed by too few observations seems to be subtly impacting the Court, leading it to exaggerate the harm to non-Indians associated with checkerboard areas.

### C. Advantages of Checkerboard Areas

Paradoxically, the *Sherrill* Court is aware of the principal reasons why non-Indians arguably would *not* have been harmed had the Court allowed Oneida tax immunity; the Court simply failed to fully develop the logical economic consequences of an Oneida victory in the case. During oral argument, Justice Scalia noted two very interesting points. First, because land purchased by the Oneida would not be subject to tax if the tribe's arguments had been accepted, it would have been "a lot easier for [the Oneida Nation] to buy it because it's much less expensive for them to hold that land."<sup>103</sup> Second, that "current owners can sell [their land] to somebody else."<sup>104</sup> By the time of the opinion however, Justice Scalia and seven other justices had seemingly forgotten that "[n]o non-Indians would be ousted from their lands" and that "[n]o enormous bill would have to be paid by Sherrill."<sup>105</sup> Instead, the majority simply noted that "the impracticability of returning to Indian control land that generations earlier passed into numerous private hands."<sup>106</sup> Disingenuously, the majority clouds what is currently at stake

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*the Academic: The Dangerous Attraction of Pan-Indian Legal Analysis*, 119 HARV. L. REV. F. 141 (2006), available at [www.harvardlawreview.org/forum/issues/119/dec05/rosser.pdf](http://www.harvardlawreview.org/forum/issues/119/dec05/rosser.pdf).

<sup>103</sup> Transcript of Oral Argument, *supra* note 61, at 14 (J. Kennedy questioning Ira S. Sacks on Behalf of the Petitioner).

<sup>104</sup> *Id.* at 7 (J. Scalia questioning Michael R. Smith on Behalf of Respondents).

<sup>105</sup> Krakoff, *supra* note 19, at 16. Professor Krakoff explains further in a footnote:

Even with regard to this fairness issue, the Court overlooks facts on the ground. The Oneida Indian Nation maintains a grant program to compensate local governments for lost revenues. The program is not a perfect substitute for reliable income flows from taxation, but in the subjective mix of factors that can be considered when determining whether equitable relief is warranted, the Court should have at least acknowledged it.

*Id.* at 16 n.105 (internal citations omitted).

<sup>106</sup> *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 219 (2005).

while highlighting the fact that the Oneida unsuccessfully “attempted to join as defendants, *inter alia*, approximately 20,000 private landowners, and to obtain declaratory relief that would allow the Oneidas to eject these landowners.”<sup>107</sup> It is left to Justice Stevens to remind the Court in his dissent that current non-Indian property owners are facing neither ejectment nor damage claims.<sup>108</sup>

The juxtaposition of Justice Scalia’s observations during oral argument and the Court’s disregard for the consequences of his observations shows the *Sherrill* opinion to be strikingly short-sighted. Had the tribe won the case, non-Indian property owners would still be able to possess their property and could still have sold their property to whoever offered the most money. Justice Scalia is correct that tax immunity would lower the tribe’s property ownership costs, and therefore make buying land easier for the tribe. This is true provided that the tribe is not subject to a liquidity constraint, which is unlikely here where the tribe is bankrolling its purchases with casino profits. How might a current non-Indian property owner “experience” the tribe’s ease of purchasing property? Through a higher sales price for their property. Ironically, the Court’s ruling *harms* non-Indian property owners by making non-Indian land less marketable to the tribe, which had been the deep-pocketed purchaser.

Even accepting that societal understandings, accurate or not, of ineffective Indian land use and regulation impact property values,<sup>109</sup> non-Indian property owners located in checkerboard areas may still be better off after a tribe acquires land than they were before such (re)acquisition. At one extreme are properties surrounded by tribal land. Despite the Court’s actual holding in *Atkinson Trading Co. v. Shirley*,<sup>110</sup> the owner of “a very small island of fee land” clearly benefited greatly from being

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<sup>107</sup> *Id.* at 210.

<sup>108</sup> *Id.* at 224 (Stevens, J., dissenting).

<sup>109</sup> Professor Angela Riley argues in a recent article that “the vast majority of evidence—often ignored by critics—indicates that many Indian nations are already engaged in good governance.” Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1062 (2007).

<sup>110</sup> *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001).

surrounded by and “located on the Navajo Nation.”<sup>111</sup> Similarly, even close to reservation borders, developers can use fee status within Indian country as a selling point, increasing prices because of the area’s shortage of fee land. A billboard for Karigan Estates in Window Rock, Arizona, reflects the unusual value fee land can have if located within a reservation: the billboard reads, “Karigan Estates: Where you OWN your land.”<sup>112</sup> As the billboard suggests, even individual Indians living in checkerboard areas often prefer buying fee land—for their individual ownership and not for conversion to trust status—because of real or perceived advantages in securing the various approvals needed to use land.<sup>113</sup> Rather than being harmed, which is what the Court assumes to always be the result of (tribally created) checkerboarding, current non-Indian property owners can benefit in the most direct way—financially—from owning fee land located in Indian country.

More work needs to be done to quantify the effect tribal land acquisition programs have on non-Indian small property owners. But given the Court’s self-assured, and uncritical, assertion of harm in *Sherrill*, it is enough for the moment to disprove the inherent necessity of harm to non-Indian property owners.<sup>114</sup> By focusing on a group convinced that Indian property acquisition harms non-Indians, the assumptions that surround Indian ownership and control can be better understood.

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<sup>111</sup> Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1175–76 (2004).

<sup>112</sup> Photo taken March 2007 and on file with the author. For landowners not in Indian country, fee simple status is not a typical selling point used to advertise a property.

<sup>113</sup> This real or perceived advantage is facilitated by the Court’s prioritization of the interests of fee land over “tribal interests in uniform regulation of land.” Tsosie, *supra* note 68, at 1296; *see also* Ezra Rosser, *This Land Is My Land, This Land Is Your Land: Markets and Institutions for Economic Development on Native American Land*, 47 ARIZ. L. REV. 245, 288–90 (2005) (describing institutional constraints that can limit and delay land development on Indian reservations).

<sup>114</sup> A much stronger argument could be made that incomers and future generations of non-Indians *would* be harmed had the Court allowed unilateral land reacquisition. However, by its own terms the Court based its holding on harm to non-Indians already in the area affected by the Oneida land purchases, and, as Part III suggests, “harm” must be placed in context of both the rights guaranteed to Indians and the limited assurances any individual has in a fixed set of property relations. Additionally, following any Court allowance for unilateral tribal land acquisition, incomers would be on notice of the relevant rules, reducing their ability to claim they suffered a recognizable harm.



## III

## NON-INDIAN RESISTANCE TO INDIAN LAND CLAIMS

Indian purchases and assertions of sovereignty over acquired land can make non-Indians fearful that this change in land ownership and control will harm “ordinary” non-tribal owners. The Oneida Indian Nation’s push to reacquire land within the tribe’s original reservation boundaries faced organized resistance from non-Indian property owners who felt threatened. One group, UCE, became the voice of non-Indian opposition to Oneida land acquisition, providing an institutional foundation for enduring resistance and for the emergence of opposition leaders. After the Oneida joined 20,000 private landowners to their land claim suit, tensions rose quickly, leading to everything from protests to racism to death threats directed against the Oneida. Non-Indian landowners’ fears of land loss or decreases in value helped fuel this tension, but non-Indians also were protesting perceived unfairness of Indian businesses and of the sudden increase in wealth of their formerly poor Indian neighbors. Though *Sherrill* was explicitly about a land claim, non-Indian opposition surrounding the case was not limited to Oneida land acquisition. Opponents also questioned the continued appropriateness of Indian sovereignty, and did so while simultaneously asserting a complete separation from the past wrongs committed against Indians.<sup>115</sup>

*A. Upstate Citizens for Equality*

After more than a decade of failed settlement negotiations, the Oneida Nation, with the support of the U.S. government, attempted to add private landowners to its land claim suit.<sup>116</sup>

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<sup>115</sup> As the discussion of the racism and death threats makes clear, the wrongs committed against Indians are not merely historical, they are ongoing. Nevertheless, here the focus is on the innocence or responsibility of non-Indians for the wrongs of prior generations.

<sup>116</sup> Beverly Gage, *Indian Country, NY: Oneida Indian Nation Seeks to Reclaim Land in Upstate New York*, NATION, Nov. 27, 2000, at 11. Who was at fault for the failure to reach a negotiated settlement remains a matter of dispute in the area. See Rocco DiVeronica, Letter to the Editor, POST-STANDARD (Syracuse, N.Y.), June 9, 2005, at 26 (“The New York Oneidas have refused to participate in good faith negotiations despite the likelihood that they will lose their casino.”).

The decision galvanized support for the nascent UCE.<sup>117</sup> Although the goal was to “pressure the state into a settlement,”<sup>118</sup> joining the private landowners to the suit suddenly made the Oneida land claim much “more personal, and a lot more controversial” in that part of New York.<sup>119</sup> As the *Christian Science Monitor* reported, the atmosphere could at best be characterized as “unneighborly.”<sup>120</sup> Those sued reacted to being sued and flocked to UCE: “Scott Peterman, president of Upstate Citizens for Equality, likes to joke that the Oneidas’ suit against local landowners was the best thing that ever happened to his organization.”<sup>121</sup>

Oneida opposition and UCE support manifested itself in ways both public and private. Right after private landowners were joined to the suit, “UCE and other landowners’ groups staged a massive motorcade encircling the Turning Stone, with as many as 5,000 local residents protesting the Oneidas’ legal maneuvers.”<sup>122</sup> According to Oneida-owned *Indian Country Today*, UCE managed to “threaten[] and cajol[e] their way into the public limelight as a dominant voice,” bringing rallies, newsletters, and lawsuits to the controversy,<sup>123</sup> and obtaining a

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<sup>117</sup> UCE was formed in 1997. Upstate Citizens for Equality Homepage, <http://www.upstate-citizens.org/> (last visited Nov. 2, 2008). One of the founders was Judge David K. Reed, who ultimately was investigated by the state Commission on Judicial Conduct and forced to resign from his Town Justice position because of his involvement with UCE and possible bias against the Oneida. *Justice, Focus of Probe, Resigns His Post in Verona*, POST-STANDARD (Syracuse, N.Y.), Apr. 13, 1999, at B1; see also Paul Lipkowitz, *Oneidas Ask State to Investigate Judge: Their Complaint Involves a Verona Town Justice’s Leadership of Upstate Citizens for Equality*, POST-STANDARD (Syracuse, N.Y.), Feb. 24, 1998, at B1. This section focuses on non-Indian reactions to the Oneida land claims, but it should be noted that many other tribal land claims have inspired non-Indian resistance. See, e.g., *400 Rally Against Reservation Expansion*, N.Y. TIMES, Apr. 7, 1993, at B7 (describing a protest to Mashantucket Pequot land claims).

<sup>118</sup> David W. Chen, *Begrudging the Neighbors Their Good Luck: Suit by Newly Rich Oneidas Stirs Up Other Resentments*, N.Y. TIMES, Jan. 22, 1999, at B1.

<sup>119</sup> Diana Louise Carter, *Suddenly Rich, and Resented*, ROCHESTER DEMOCRAT AND CHRON., May 30, 1999, at A1.

<sup>120</sup> Stacy A. Teicher, *Hostility Builds over Indian Land Claim in N.Y.*, CHRISTIAN SCI. MONITOR, Sept. 7, 1999, at 3.

<sup>121</sup> Gage, *supra* note 116.

<sup>122</sup> *Id.* This tactic was used later the same year to protest proposed Cayuga settlements. Lina Katz, *Who Owns the Land?*, ITHACA J., Aug. 13, 1999, at A1.

<sup>123</sup> Editorial, *Hidden Agendas and Seeking Justice*, INDIAN COUNTRY TODAY (Oneida, N.Y.), Oct. 26, 2005.

status “far beyond their numbers.”<sup>124</sup> Both the Oneida and UCE agree on one thing: despite how hard it is to know what influences judges, the Indian land claims lawsuits were likely influenced by UCE.<sup>125</sup> The level of support UCE generated among non-Indians is perhaps most evident from the grassroots-type fund-raising that supported the organization. UCE’s first fund-raiser was a garage sale<sup>126</sup> that became an annual tradition; UCE also raised money with an ongoing can and bottle drive.<sup>127</sup> When you add in a bake sale, UCE seems to be supported both in their public demonstrations and private fund-raising by a broad base of ordinary non-Indians.<sup>128</sup>

Controversy surrounds UCE in part because its in-your-face attention-grabbing tactics at times were infused with racism or threats of violence against Indian tribes and tribal leaders in upstate New York. At a crowded UCE meeting after private landowners were joined to the suit, a state assemblyman claimed that he kept his hair cut short for fear of being “scalped.”<sup>129</sup> Though the assemblyman’s comments were labeled “deplorable

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<sup>124</sup> *Fundamental Justice*, *supra* note 17.

<sup>125</sup> See Staff interview of Richard Tallcot, secretary of the Cayuga-Seneca chapter of UCE, *UCE Official: “It’s Not Over,”* POST-STANDARD (Syracuse, N.Y.), July 11, 2005, at B5 (Question: “Has the UCE had influence on land-claim court rulings?” Answer: “You never know how much influence you really have, because you’ll never be told directly. Definitely, we’ve had influence politically. And I know that judges read newspapers.”) [hereinafter Tallcot interview]; *Fundamental Justice*, *supra* note 17 (“These organized groups talk and influence media regularly . . . . Thus, their issues are the ones that get discussed as primary in media and by policymakers. Thus, their points of view are most likely to resonate with high judges and their clerks as well.”); see also Matthews, *supra* note 30, at 186 (“[T]he Supreme Court appears to have succumbed to political pressures to refrain from inconveniencing ‘innocent’ landowners.”).

<sup>126</sup> Dave Tobin, *Items Sold, Ideas Swapped: Garage Sale Helps Group Fund Fight Against Land Claim*, POST-STANDARD (Syracuse, N.Y.), Oct. 3, 1999, at B1.

<sup>127</sup> Tallcot interview, *supra* note 125; see also Scott Rapp, *Paint Sprayed on UCE Signs: Upstate Citizens for Equality Puts Up Reward for Help in Solving Vandalism*, POST-STANDARD (Syracuse, N.Y.), Dec. 13, 2003, at B1 (reporting that in December 2003 someone stole some of the UCE’s returnable cans and bottles).

<sup>128</sup> See Upstate Citizens for Equality Web site, UCE Bottle Drive and Bake Sale, <http://www.upstate-citizens.org/BottleCanDrive.htm> (last visited Nov. 2, 2008). Another fund-raising possibility ironically raised by Richard, secretary of the Cayuga-Seneca chapter of UCE: “We might see if we can try some bingo.” Tobin, *supra* note 126.

<sup>129</sup> Editorial, *Childish Slur: A Utica Assemblyman Betrays an Ugly Sense of Humor*, POST-STANDARD (Syracuse, N.Y.), Jan. 6, 1999. UCE President Scott Peterman in the same editorial is quoted dismissing critiques of the scalping comment by saying that no one took the “joke” seriously. *Id.*

words” by the editorial board of a local non-Indian paper,<sup>130</sup> the assemblyman was nonplussed: “Tell them to grow up . . . I’m sick and tired of having the Oneida nation, every time anyone says anything, saying it’s racist.”<sup>131</sup> An Oneida spokesperson later argued that the fact the assemblyman “felt comfortable uttering [the comment] at a meeting of the Upstate Citizens for Equality is further proof that this organization is a hate group.”<sup>132</sup> Later in the same year, UCE President Scott Peterman defended the group by saying “[w]e are not a bunch of crazy subversives.”<sup>133</sup> In rejecting the hate-group label, he called UCE “a coffee group.”<sup>134</sup> Yet as *The Nation* reported in 2000, “posts on the UCE electronic discussion board regularly contain choice racial remarks, such as ‘Kiss my lily white UCE ass!!!’”<sup>135</sup>

Using violence-laced words or images makes it difficult to distinguish UCE rhetoric and anti-Indian opposition from threats worthy of a police response.<sup>136</sup> Billboards and signs blur the line between opposition and threats— “[o]ne, depicting a man pointing a shotgun, challenges the tribe’s leader [Ray Halbritter] to ‘come get your rent.’”<sup>137</sup> In the same vein, cardboard mock “Patriot” missiles bearing the warning “Heads up, Ray” appeared.<sup>138</sup> Anti-Oneida feeling reached a dangerous point when local media received an anonymous letter, said to be from

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<sup>130</sup> *Id.*

<sup>131</sup> Michelle Breidenbach, *Tribe Says Remark Racist: Oneidas Say Assemblyman David Townsend Owes His Constituents an Apology*, POST-STANDARD (Syracuse, N.Y.), Dec. 23, 1998, at B1; see also Hart Seely & Michelle Breidenbach, *Uncivil Civil Claim: Hate Mail, Name-Calling, Threats Fly As Indians Sue*, POST-STANDARD (Syracuse, N.Y.), Sept. 26, 1999, at A1 (“Scott Peterman, president of Upstate Citizens for Equality has received hate mail. He’s seen his group called ‘Ugly Citizens for Each Other’ and ‘racist pigs.’”).

<sup>132</sup> *Childish Slur*, *supra* note 129.

<sup>133</sup> Seely & Breidenbach, *supra* note 131.

<sup>134</sup> Lipkowitz, *supra* note 117.

<sup>135</sup> Gage, *supra* note 116.

<sup>136</sup> Two founders of UCE resigned from the organization in 2000 when UCE leaders “failed to condemn” a newspaper column that said that violence can be both necessary and honorable. *Upstate Citizens Founders Leave Group over Column*, POST-STANDARD (Syracuse, N.Y.), Apr. 7, 2000, at B1.

<sup>137</sup> Teicher, *supra* note 120.

<sup>138</sup> Seely & Breidenbach, *supra* note 131. The mock missiles “pointed in the direction of Turning Stone Casino Resort.” Michelle Breidenbach, *Forum Looks at Climate of Hate: Oneidas Sponsor Talk Pegged to Hate Crimes Act, Which Takes Effect Next Week*, POST-STANDARD (Syracuse, N.Y.), Oct. 6, 2000, at B1.

thirty-four people who formed a group they labeled United States National Freedom Fighters (“USNFF”), in which the group threatened to begin “blood shedding.”<sup>139</sup> The group promised to:

[E]xecute one Indian approximately every three days, starting on Thanksgiving day. We will also execute one U.S. citizen (from the upstate NY area) who is noticed by one of the USNFF members as a person who contributes to the Indian nation by supporting the Casino and SavOn Gas Stations. Women will not be spared. Those who contribute to the Indians are traitors, not worthy of sympathy.<sup>140</sup>

The letter ended ominously: “[F]our VERY courageous people in the USNFF have offered to give their lives for this cause—they will do so by driving two to four trucks carrying explosives into the Oneida Indian Nation’s Casino.”<sup>141</sup> UCE distanced itself from USNFF and “denounced the threats.”<sup>142</sup> Yet, as the editors of a local non-Indian newspaper pointed out following the threats, UCE bore some responsibility for the USNFF letter by creating an environment filled with hate.<sup>143</sup> UCE’s “vitriolic rhetoric favored by some UCE members may be seen by some as giving them license to commit mayhem. . . . It’s not that long a leap, in the minds of stupid people filled with hate” to go from the standard language employed by UCE to a threat of violence.<sup>144</sup>

A separate more recent incident highlights the thin line between mere words and violence. David Vickers, UCE President in 2006, while discussing legal challenges to the Oneida casino, said, “We live in a modern society. These people can’t be shot, so we have to try to do what we can legally.”<sup>145</sup> When

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<sup>139</sup> Daan Braveman, *Tribal Sovereignty: Them and Us*, 82 OR. L. REV. 75, 111 (2003).

<sup>140</sup> Letter from the United States National Freedom Fighters to the Utica Observer-Dispatch, reprinted in Michelle Breidenbach, *Group Threatens to Kill Indians, Others Angry over Land Claim, Group Also Says It Will Bomb Casino. Police, FBI Investigate*, POST-STANDARD (Syracuse, N.Y.), Nov. 5, 1999, at A1.

<sup>141</sup> *Id.*

<sup>142</sup> Breidenbach, *supra* note 140.

<sup>143</sup> See Editorial, *Threats Against Oneidas: Cowards in Climate of Hate*, POST-STANDARD (SYRACUSE, N.Y.), Nov. 10, 1999, at A18.

<sup>144</sup> *Id.*

<sup>145</sup> Peter Lyman, *Oneidas Accuse UCE Head of Racism: David Vickers Defends “These People Can’t Be Shot” Comment on Radio Show*, POST-STANDARD (Syracuse, N.Y.), Dec. 8, 2006, at A1.

the host interrupted to say, “Not that you would want them shot,” Vickers added a qualification, “No, of course not.”<sup>146</sup> Backed into a corner, Vickers tried to clarify that when he said “These people can’t be shot,” he was “referring to the government, not the Indians.”<sup>147</sup> But ultimately, in defending his statement, Vickers drew upon a racist distinction, unfortunately elevated into American law by the Supreme Court, between Indians and civilized people.<sup>148</sup> Vickers’s excuses highlighted that he saw himself as a “civilized human being taking [his] case to court,”<sup>149</sup> and that all he was doing was “making a comparison to how we do behave in a civilized society . . . . We seek to have laws enforced. That’s all.”<sup>150</sup> Much is revealed by Vickers’s statement and by his excuses—both the vehemence of the dispute and UCE’s expectation that Indians should have non-Indian norms and laws enforced against them.

### B. Fairness and Oneida Success

Bombs did not destroy Turning Stone Casino, people filling up at Oneida-owned gas stations were not targeted, and Indians were not shot. But these threats were atypically strong expressions of much wider popular resentment of the Oneida’s supposedly unfair business success and sudden wealth. As one letter to the editor noted, “The fairness notion has not been important when the white guys had things going in a favorable direction for them. Now, however, when the Native Americans come to the table with some power and some money, it creates a big whine from people who suddenly want to assure fairness.”<sup>151</sup> The *whine*, or less pejoratively the “complaints,” in the area

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<sup>146</sup> *Id.*

<sup>147</sup> Jennifer Fusco, *Vickers’ Comments Draw Rebuke from Oneidas*, OBSERVER-DISPATCH (Utica, N.Y.), Dec. 8, 2006, at A1.

<sup>148</sup> Professor Robert A. Williams, Jr., deserves a lot of credit for his groundbreaking works that explore the relationship between racist understandings of Indian people and the development of federal Indian law. See ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990); ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005).

<sup>149</sup> Fusco, *supra* note 147 (quoting Vickers).

<sup>150</sup> Lyman, *supra* note 145.

<sup>151</sup> Doug Nettle, Letter to the Editor, *UCE’s Call for Fairness Rings Hollow*, POST-STANDARD (Syracuse, N.Y.), July 9, 2000.

focused on the tribe's business success, especially the tribe's legal and tax advantages over non-Indian businesses. On a personal level, many non-Indians accustomed to the poverty of their Indian neighbors have not taken the newfound wealth of the Oneida in stride. Because the gains made by the Oneida are tied to rights connected with tribal sovereignty, and thus not available to non-Indian individuals or businesses, their success is seen as unfair.

The Oneida Indian Nation, under Ray Halbritter's leadership, has developed a sprawling business empire.<sup>152</sup> As the Oneida Nation's 1999 Annual Report notes, the tribe is not a casino operator that incidentally has a separate government; it is "a government that happens to operate a casino."<sup>153</sup> But the tribe also owns and operates restaurants, marinas, gas and convenience stores, a campground and RV-park, an air charter business, a newspaper, golf courses, a slot machine factory, T-shirt printing factory, luxury and budget hotels, a convention center, a Las Vegas-style theater, and smoke shops.<sup>154</sup> The positive impact of Oneida's business enterprises on the local economy has earned some non-Indian support. According to the Oneida Nation, the tribe has "created almost 5,000 jobs," ninety-five percent of which are held by area non-Indians.<sup>155</sup> "Those that work there are naturally in favor of what their employer wants," UCE President David Vickers was forced to acknowledge when tribal employees show up in T-shirts reading "My job, my vote" to support the tribe's land claims.<sup>156</sup> As one letter to the editor of a local newspaper critical of UCE noted,

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<sup>152</sup> For more on the challenges and controversies within the Oneida Tribe surrounding both economic development and Ray Halbritter, see Bruce E. Johansen, *The New York Oneidas: A Business Called a Nation*, in ENDURING LEGACIES: NATIVE AMERICAN TREATIES AND CONTEMPORARY CONTROVERSIES 95-133 (Bruce E. Johansen ed., 2004).

<sup>153</sup> Gage, *supra* note 116.

<sup>154</sup> This is a compiled list created from a number of sources. Braveman, *supra* note 139, at 110; Breidenbach, *supra* note 140; Carter, *supra* note 119; see Krista J. Karch, *Turning Stone Major Employer in Central New York*, OBSERVER-DISPATCH (Utica, N.Y.), Feb. 6, 2005.

<sup>155</sup> Fact Sheet, Oneida Indian Nation, Positive Economic Impact of the Oneida Indian Nation, available at <http://www.oneidaindiannation.com/pressroom/factsheets/26836179.html> (last visited Oct. 28, 2008).

<sup>156</sup> Alaina Potrikus, *Hearings Start Oneida Land Trust Application: Making Land Tax-Free Will Protect Jobs, Save the Local Economy, Employees Say*, POST-STANDARD (Syracuse, N.Y.), Jan. 15, 2006, at B1.

any other employer that created so many jobs “would get the red-carpet treatment. . . . [T]he Nation may be the only good economic thing our area has going for it.”<sup>157</sup> Ironically, even if they are not employees of the tribe, UCE members may benefit from Oneida business success: Oneida-driven economic development reduces the municipal cost of borrowing,<sup>158</sup> and allows the tribe to make discretionary transfers in a way mirroring PILOT (payment in lieu of taxes) programs for area governments.<sup>159</sup> On a national level, Oneida success may help ensure that the U.S. government targets resources to tribes with greater needs.<sup>160</sup>

The challenge created by tribal business success and pervasive employer-employee contacts is that non-Indians start to experience and perceive the Oneida Nation and, similarly, entrepreneurial tribes more as businesses than sovereign nations.<sup>161</sup> Or as stated by a UCE attorney, “In the 1980s, if someone said ‘Indian’ people would think of a picture of a guy with a tear running down his face, caring for the environment. If you say Indians now they think of casinos.”<sup>162</sup> As Nazareth College President Daan Braveman argues, such businesses make Indians seem less distinctly “other,” which can create the

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<sup>157</sup> Frank Spurduto, Letter to the Editor, *Oneida Indian Nation May Be Golden Goose*, POST-STANDARD (Syracuse, N.Y.), Apr. 26, 2005, at A9.

<sup>158</sup> See Chen, *supra* note 118 (“[T]he Oneidas’ economic muscle had, among other benefits, helped convince Wall Street to upgrade Oneida County’s municipal bond rating, saving taxpayers \$3.2 million in borrowing costs.”); Carter, *supra* note 119 (“Employment at the casino and other projects has boosted the economy so much that the county has won a Triple A bond rating, reducing the cost of municipal borrowing.”).

<sup>159</sup> Labeled “Silver Covenant Chain” payments, Oneida county officials have, despite the obvious similarities, highlighted the discretionary, “gift”-like attributes of the Oneida Indian Nation’s Silver Covenant Chain payments to reject the PILOT identification. See Press Release, Ralph J. Eannace, Jr., Office of the County Executive, Oneida County Will Continue to “Make Whole” Communities in Indian Land Claim Area (Mar. 14, 2003).

<sup>160</sup> Carter, *supra* note 119 (“Although entitled to federal assistance programs, the Oneidas have asked the U.S. Bureau of Indian Affairs to keep money designated for them and use it for Native Americans in greater need.”).

<sup>161</sup> See Gage, *supra* note 116 (“For better or worse, the Oneidas’ contemporary efforts to right historic wrongs through land claims are inseparable from the prospect of casino riches and business expansion. In that sense, the Oneidas have already fulfilled UCE’s fondest dream: They have become good Americans.”).

<sup>162</sup> Ellen Barry, *Tribal Gamble: The Lure and Peril of Indian Gaming*, BOSTON GLOBE, Dec. 12, 2000, at A19 (quoting Peter Gass, an Upstate Citizens for Equality attorney).



“temptation to conclude that tribes should lose their unique sovereignty when they behave like members of the dominant community.”<sup>163</sup> This “temptation” is evident in non-Indian accusations of the unfairness of business advantages the Oneida Nation has as a result of its sovereign status.

The “unfairness” most frequently complained about is that Oneida businesses are exempt from certain taxes, allowing them to compete on price in an “unfair” way.<sup>164</sup> Though Ray Halbritter “jokes that if word got out that a Native American casino was on the moon, people would go there and try to tax it,”<sup>165</sup> non-Indians take Oneida freedom from taxation very seriously. UCE argues that permitting land to become tribal trust land places all other businesses in New York “in immediate positions of unfair, second-class status.”<sup>166</sup> Oneida sales-tax exemption is seen as a tool for driving out smaller non-Indian business.<sup>167</sup>

The challenge when considering the effect of tribal tax advantages is separating out tax-driven business effects from narratives that use tribal advantages to scapegoat for losses that are not a consequence of Oneida business advantages. Attributing general tax increases to the Oneida Nation is one example.<sup>168</sup> Similarly, non-Indian assertions that declines in

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<sup>163</sup> Braveman, *supra* note 139, at 110.

<sup>164</sup> See, e.g., Jan Golab, *The Festering Problem of Indian “Sovereignty”*. *Congress Sleeps. Indians Rule.*, 15 AM. ENTERPRISE No. 6, at 26, Sept. 1, 2004 (“The true meaning of sovereignty, [Executive Director of United Property Owners, Barb] Lindsay says, is tax evasion.”); see also Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 161 (2006) (noting the Supreme Court’s disfavor of tribal exemptions from state taxation).

<sup>165</sup> Carter, *supra* note 119.

<sup>166</sup> David B. Vickers, Op-Ed., *Two Nations . . . Divisible: What’s to Become of Land Purchased by the Oneida Indian Nation? New York Can’t Give Up Control over These Acres*, POST-STANDARD (Syracuse, N.Y.), Feb. 19, 2006, at D1.

<sup>167</sup> Gage, *supra* note 116.

<sup>168</sup> For an example of an assertion that the Oneida Nation is responsible for general tax increases, see Krista J. Karch, *Sherrill Tense in Advance of Court Arguments*, OBSERVER-DISPATCH (Utica, N.Y.), Jan. 9, 2005, at 1A (quoting a resident’s assertion that “[m]y taxes have gone up a lot. It seems that (the Nation) doesn’t want to come to a settlement, and it’s costing me money.”). *But see* G. William Rice, *Teaching Decolonization: Reacquisition of Indian Lands Within and Without the Box—An Essay*, 82 N.D. L. REV. 811, 845–46 (2006). (“All tribes should have the authority to reacquire the lands within their territorial boundaries . . . . Since the state and local governments would no longer be responsible for provision of services on such lands, it would seem that any claim

business revenue are necessarily connected to tribal businesses strain credibility.<sup>169</sup> Oneida tax advantages can be used in a politically opportunistic way, a fact that was ironically highlighted by UCE's skeptical response to a recent publicity stunt targeting Ray Halbritter.<sup>170</sup> That being said, it must be acknowledged that while these advantages do not by themselves allow the Oneida "to crush direct competition,"<sup>171</sup> the tribe can operate its businesses in ways not available to non-Indian entrepreneurs. Such an acknowledgment, however, is the start, not the end, of the discussion given the tribe's governmental status. For example, one critic of the Oneida Nation estimated the tribe saved \$400 million between 1995 and 2007 because of its tax exempt status.<sup>172</sup> To which the tribal spokesman responded, "They should have used a historian instead of an economist, because it's not an issue of dollars and cents—it's an issue of principle."<sup>173</sup>

When wealth is involved, jealousy can harden into principle. One such principle expressed by some non-Indians is that no one should have special rights, even if such rights are tied to Indian status.<sup>174</sup> As one UCE member stated, "I just don't like the idea

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they continued to promote respecting taxation or jurisdiction over such lands would be without merit.").

<sup>169</sup> The accounting conveyed through anecdotal reporting can be surprisingly detailed. See, e.g., Teicher, *supra* note 120 (relating the story of one UCE member who claimed that the Oneida hotel "took away 14" reservations in one year).

<sup>170</sup> In 2007, assemblyman David Townsend sent an open letter, in flyer form, to Ray Halbritter comparing the general duty "everyone" has to pay taxes with Oneida non-payment of taxes. Glenn Coin, *Flier: Tell Oneidas to Pay Their Taxes; Assemblyman Urges Residents to Clip Out Letter, Mail It to Halbritter*, POST-STANDARD (Syracuse, N.Y.), May 25, 2007, at B1. In a newspaper interview, UCE President David Vickers asked, "Does he really think if people send letters to Halbritter that Halbritter will say, 'Gee, OK, I guess I'll pay now?'" *Id.* Vickers explained the flyer by adding, "What Townsend is trying to do is focus everybody's anger at Halbritter." *Id.*

<sup>171</sup> Karch, *supra* note 154.

<sup>172</sup> Glenn Coin, *Oneida Nation Profits \$115M: Report Commissioned by State Shows Nation's Businesses Worth \$2 Billion*, POST-STANDARD (Syracuse, N.Y.), Mar. 17, 2007, at A1 (reporting the results of a study by Professor Gregg Jarrell).

<sup>173</sup> *Id.*

<sup>174</sup> Katz, *supra* note 122 (reporting that "[r]esidents in the Cayuga land claim area say the Cayuga Indians should not have any more rights than other Americans" and including the notion, expressed by a non-Indian born in the United States, that non-Indians are as Native American as members of an Indian tribe).

of super-citizens in the United States.”<sup>175</sup> At a UCE meeting after landowners were joined as defendants a “few people even donned Colonial-era garb and displayed a sign that read, ‘What About Our Rights?’”<sup>176</sup> Yet, the fact of sudden wealth may be as important as the expressed equality principle. As the *New York Times* reported:

[T]he land-claim dispute has brought to the surface a latent sense of frustration and jealousy over the phenomenal success of the Oneida Indian Nation . . . . Just like that, it seems, the Oneidas have rocketed from poverty to affluence, from being the have-nots to the haves, while everyone else in a working-class area stocked with grind-it-out dairy farmers has seen income stagnate.<sup>177</sup>

This latent jealousy owes itself partly to the principles involved, but also to the contrast between the riches of the tribe today and their recent “ragtag” condition.<sup>178</sup> As one letter to the editor pointed out, being “bothered that the Oneidas have acquired some wealth, suggest[s] that we still want our Indians poor and invisible.”<sup>179</sup> The jealous backlash to sudden Indian wealth in New York echoes non-Indian reaction to the success of the Mashantucket Pequot Tribe in Connecticut: “[T]heir sudden rise out of poverty has been a bitter pill to swallow.”<sup>180</sup> In the memorable words of one non-Indian from Foxwoods Casino’s hometown of Ledyard, the Pequots “never had a pot to pee in, and all of a sudden they’re driving in \$40,000 cars.”<sup>181</sup> Dislike of

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<sup>175</sup> Krista J. Karch, *Emotions High over Land-Claim Settlement*, OBSERVER-DISPATCH (Utica, N.Y.), Dec. 9, 2004, at A1 (quoting Karl Esengard, owner of a Western-themed store who hoped to move to where there were no Indians); accord Carter, *supra* note 119 (quoting 1999 UCE President Scott Peterman saying of the Oneida, “They’re not treated equally, they’re treated as super citizens.”).

<sup>176</sup> Chen, *supra* note 118.

<sup>177</sup> *Id.*

<sup>178</sup> Carter, *supra* note 119 (“The marble floors, valet parking and curving architecture of Turning Stone Casino Resort make it hard to believe that the Oneida Indians who own it were so recently a ragtag lot, clinging to a 32-acre reservation as their only asset.”); see also Carpenter & Halbritter, *supra* note 9, at 312–13 (arguing that tribes are derided as backward if they are not economically successful and “criticized as departing from customary Indian activities” when they are economically successful).

<sup>179</sup> Bill Sullivan, Letter to the Editor, *Ignorance, Racial Rhetoric Offend White People Too*, POST-STANDARD (Syracuse, N.Y.), Jan. 4, 1999, at A11.

<sup>180</sup> Barry, *supra* note 162.

<sup>181</sup> *Id.*

tribal tax advantage is even more “galling” when it seems as if non-Indian “working stiffs . . . are subsidizing” wealthy members of casino tribes.<sup>182</sup>

#### IV

#### EFFECT ON ASSESSED LAND VALUES OF NON-INDIAN PROPERTY OWNERS

Strong feelings in upstate New York regarding Oneida success and land claims generate many popular assumptions that do not necessarily reflect the actual effects on non-Indian property values of Oneida land purchases. Without question, many area non-Indians *believe* their property value is being negatively impacted by Oneida land acquisition. Anecdotally, “[Area resident Deborah] Anderson-Gaiser said the lawsuits have pushed land value into the ground. ‘There’s a cloud over my property,’ she said.”<sup>183</sup> Similarly, another upstate New Yorker, Daniel Gates, blamed the Oneida lawsuit on his inability to sell his farm for two years despite dramatically lowering his price.<sup>184</sup> Yet the opinions of real estate professionals related to land claim effects on property values are mixed.<sup>185</sup> The problem with these

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<sup>182</sup> Chen, *supra* note 118 (quoting UCE President Scott Peterman). Because the Oneida Nation does not simply disperse its income in per capita payments to all members, not all tribal members are in fact wealthy. See Carter, *supra* note 119 (“[W]hile some Oneidas are flourishing, a trip to the reservation today, where dozens still live in trailers, makes it clear that sudden wealth has not reached everyone.”); Carpenter & Halbritter, *supra* note 9, at 323 (stating that the Oneida Nation “encourages its members to be self-reliant” by not making per capita payments); see also Coin, *supra* note 172 (reporting that “Nation businesses are worth more than \$2 billion—about \$6 million for each of the nation’s 343 households” according to a study by Professor Gregg Jarrell).

<sup>183</sup> Karch, *supra* note 175.

<sup>184</sup> *Farmer Finds No Buyers for Prime Property*, TIMES UNION (Albany, N.Y.), Oct. 24, 1999, at A8 (“He’s trying to sell almost all of it to pay off tens of thousands of dollars in debt, but claims the Oneidas’ lawsuit scares off potential buyers. ‘Would you buy anything that you could not get clear title to?’ he asked. Gates has been trying to sell the farmland and his home without success for about two years. Even after dropping the prices to well below market value, he said, there are no takers.”).

<sup>185</sup> *Compare id.* (“Real estate brokers agree with Gates. Because of the difficulty in insuring titles, selling in the land claim area is ‘a nightmare,’ said Michael Gaiser, an independent real estate broker, because it is difficult to insure titles.”), with Karch, *supra* note 154 (“Jackson said that in her 20 years in the Realty business, only two people have ever backed out of contracts because of land claim fears. ‘I don’t really feel that has affected us at all,’ she said. In the late 1990s, heightened tensions in the Nation’s decades-old land claim raised fears that property values

anecdotes, aside from the normal limits of anecdotes, is that they could be describing uncertainty regarding security of title, but not capturing the effect of Indian ownership on neighboring property values.

*A. Proximity to Indian Land on Non-Indian Assessed Property Values*

Empirical research on the effects of Indian land acquisition can shed *some* light on the assumption—made by the Court in *Sherrill*—of harm to non-Indian property owners. To better understand whether non-Indians have been harmed by Oneida land purchases, I examined, with the help of two other researchers, the relationship between tribal land ownership and property value of neighboring non-Indian property owners in Madison County, New York.<sup>186</sup> This research was motivated in part by Professor Frickey’s recent push for more grounded, empirical work by Indian law scholars.<sup>187</sup>

Though in its initial stages, our research so far does not support the U.S. Supreme Court’s assumption that Indian property ownership harms neighboring non-Indian property owners. We used ArcSoft to analyze information contained in a Shapefile database of all the parcels of land located in Madison County, New York.<sup>188</sup> Using Geospatial Information Systems software, we tagged each parcel within the county with the land’s assessed value according to county tax records. By pairing parcel data such as land type (rural, urban, etc.) and physical size/boundaries with parcel by parcel land assessments from 2002 to 2007, we were able to better understand the geospatial relationship between Oneida-owned land and surrounding non-

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would plummet as both buyers and sellers lived amid uncertainty about whether the Nation would eventually wind up with the land. But, Jackson said, property value has actually risen slightly in the region over the past decade.”).

<sup>186</sup> See Rosser, Guertin & Rukin, *supra* note 1.

<sup>187</sup> See Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649, 664 (2006) (advocating work that is “more empirical, less doctrinal, more experiential, more narrative, less stridently normative, potentially more interdisciplinary.”); see also Alexa Koenig, “*The Actual State of Things*”: *Empirical Scholarship in Indian Country* (work in progress July 2008) (on file with the author) (detailing existing empirical Indian law scholarship).

<sup>188</sup> Madison County Shapefile data is available from the county for a fee of \$350.

Indian land.<sup>189</sup> The idea underlying this research was that such an analysis of property values could shed light on whether there is a relationship between neighboring non-Indian property values and Indian land ownership and control.

Our first run through the data, looking at the entire county as a single data set, did seem to pick up on a difference in property value for land located within half a mile of Oneida-owned parcels and other non-Indian land. However, out of concern that our initial results were being driven by factors other than Indian ownership, we looked more closely at the effect of Oneida ownership, focusing on two county school districts with a sufficient number of Oneida-owned parcels to allow for analysis. Doing this allowed us to correct for the effect rural-urban difference can play, as well as the role school quality can play in driving property value differentials across school districts. Though Indian ownership did seem to have a correlation with higher property values in one of the two districts, our overall conclusion from the data is a modest one: that the Supreme Court was not justified, at least with regard to property values, in asserting non-Indians were harmed by “disruptive” Oneida Indian land ownership.

Perhaps of equal importance, our limited empirical examination of Madison County revealed the limits of isolated empiricism. Regardless of whether the property values of non-Indian-owned land near tribally owned land exceed or fall short of general county property value changes, the larger questions involving the appropriateness of Indian land reacquisition cannot be answered by empirical results alone.

Empirical work regarding tribes is challenging; the size of tribes and the differences between tribes diminish the usefulness of even the most robust findings. After the Oneida Nation went on its buying spree, its total land holdings in Madison County still only accounted for 1.5% of the county’s total land base. Real estate is popularly said to be primarily about “location, location, location.” The Supreme Court’s assumption that Indian ownership and control harms non-Indians invites a study such as ours that looks at this assumption through empirical analysis of property data. Yet because the Oneida and other

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<sup>189</sup> The categories are those captured by tax assessments and by the physical information contained in the Shapefile.

tribes have been so thoroughly dispossessed of their land, the effect of Indian land ownership cannot be separated from the many other attributes, such as area location or land use type, that characterize the Indian and neighboring non-Indian land holdings.

Even if you could definitively say that Indian land ownership and control did or did not adversely affect neighboring non-Indian property owners for one particular tribe, such a result would at best have limited relevance or utility when looking at other tribes' situations. Elsewhere I have described the diversity of the more than 500 tribes and argued that legal generalizations that treat all tribes the same should be avoided.<sup>190</sup> In examining the consequences of tribal land ownership, locational uniqueness of property is coupled with tribal diversity to make property generalizations perhaps more problematic than legal generalizations.<sup>191</sup> Tribes hold land in many different forms, from fee simple to allotments to tribal trust land. But even if such land holding forms are collapsed into the generic "Indian land" category—which probably reflects how non-Indians see such land—each tribe has its own unique land base and relationship to neighboring non-Indian property owners.<sup>192</sup>

Empirical work provides a limited window upon the relationship between tribal land holdings and non-Indian property owners, but does not by itself either prove or disprove the assumption of harm to non-Indian property owners. Because such research is necessarily tribe and location specific, in some respects the results of any property study will be anecdotal in ways similar to the anecdotes of real estate agents or even the complaints of individual property owners. This observation is not meant to disparage empirical work. To

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<sup>190</sup> Rosser, *supra* note 102, at 142.

<sup>191</sup> For example, the reservation/off-reservation checkerboard form of land ownership that exists between Farmington, New Mexico, and the Navajo Nation is different from the checkerboard pattern caused by Oneida's land purchases in Madison County. On a more micro level, even involving a single reservation, the checkerboard complications are different near Gallup, New Mexico, than they are near Farmington.

<sup>192</sup> A good way of understanding the variety of Indian land holding forms is to compare land tenure across reservations. See IMRE SUTTON, INDIAN LAND TENURE: BIBLIOGRAPHICAL ESSAYS AND A GUIDE TO THE LITERATURE 85 (1975) (using land tenure maps to compare the Bad River, Southern Ute, and Pala Indian Reservations).

understand whether the Court is justified in its negative assumptions regarding Indian land ownership and control, an analysis of the correlation between Indian ownership and non-Indian property values using property data can help justify or, here, discount such assumptions. But saying whether non-Indians are affected by Indian ownership does not tell us whether the law should protect non-Indian property owners from tribal land reacquisition side effects.

### *B. Expectations and Innocence of Non-Indians*

Should property owners be protected from adverse consequences of Indian land ownership and control? To answer this question it is instructive to return to property law basics. Property law protects owners against many risks by defining the rights of owners and neighbors in a way that helps ensure a degree of land use predictability, but property ownership in many ways is defined by the risk born by owners.<sup>193</sup> When things go well—when the area experiences economic growth or when demand for the owner’s property goes up for other reasons—risk is experienced as increased equity.<sup>194</sup> However, when things go poorly, for example, when an industry declines or when crime goes up, the owner must suffer the consequences. Typically, property owners have little recourse when their property loses value.<sup>195</sup> With only a few narrow exceptions under the common law, property owners who were not having their beneficial use rights infringed upon could not prevent a neighbor from using their land in a way that caused area land prices to fall.<sup>196</sup>

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<sup>193</sup> In a recent article, Professor Lee Anne Fennell puts forward the advantages of separating ownership risk from ownership control. See Lee Anne Fennell, *Homeownership 2.0*, 102 NW. U. L. REV. 1047 (2008). The need for such scholarship fits within the proverbial expression, the exception that proves the rule.

<sup>194</sup> Population growth, coupled with risk, helps explain why the savings of most Americans come in the form of homeownership.

<sup>195</sup> The subprime mortgage proposals being considered as options to alleviate the current housing crisis focus primarily on rewriting abusive or predatory loans, not on protecting owners against loss in the value of their homes. See generally Rayth T. Myers, Comment, *Foreclosing on the Subprime Loan Crisis: Why Current Regulations Are Flawed and What Is Needed to Stop Another Crisis from Occurring*, 87 OR. L. REV. 311 (2008) (describing several of the proposals being considered).

<sup>196</sup> The rise of private ordering in the form of common interest community regulation designed to curtail what neighbors can do on their property through contract law attests to the indifference of property law to the downside risk held by owners. For more on common interest communities, see, e.g., EVAN MCKENZIE,



Moreover, it is Property Law 101 that ownership risk extends to risk associated with government action or inaction.<sup>197</sup> So long as it does not amount to a taking, owners bear not only market risk but the risk that their property will decline in value through government action or inaction. For example, when a metro line is extended farther into the suburbs, land owners benefit.<sup>198</sup> Alternatively, when a city abandons a successful city beautification program or when the government cuts back on farm subsidies, private owners affected by such decisions cannot claim that they have a property-based right tied to their land value stemming from such programs. Whether by government action, the actions of neighbors, or changes in the surrounding economy, land ownership normally is associated with some degree of risk outside of owner control.

What makes risk associated with tribal land reacquisition different from “normal” neighborly, economic, or business risk? Put in the terms of the *Sherrill* Court, non-Indian property owners can be harmed by many external forces; why should the Court cry foul over risk linked to Indian nations when it permits the many other risks of ownership? The anger among non-Indians in upstate New York toward the Oneida suggests that a critical distinction between most neighbors and Indian neighbors is the tribal tax exemption. As *Sherrill* demonstrates, the Oneida Nation was not only buying land, it was attempting to unilaterally remove such land from the tax base. The problem with such a distinction is that it runs into analogous non-Indian parallels allowed by property law and the Court.

When universities buy property and use it as part of the institution’s academic program, cities lose that part of their tax

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PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT (1994).

<sup>197</sup> In a recent article, Professor Anup Malani argues that because property values internalize legal changes, laws can be judged based on their effect on housing prices. See Anup Malani, *Valuing Laws As Local Amenities*, 121 HARV. L. REV. 1274 (2008). This article rejects Professor Malani’s argument in as much as it insists that even if harm to non-Indian property owners could be proven, it is best that they should have to suffer such an effect of Indian land ownership.

<sup>198</sup> If the line extension is a foregone conclusion, then land prices will increase prior to the official announcement, but important government action still underlies the change in value. Insiders, with knowledge of future government action, have an incentive to purchase property in advance of general knowledge of the impending change so they can reap the reward associated with the government’s property value increasing policy.

base. When part of a city decides to become independent and separates from the original city, the larger city's tax base declines. And when property is taken through eminent domain, the locality's tax base diminishes. These examples do not show that tribal land acquisition has no effect on the surrounding area, but they do demonstrate that there is no firm rule against removing land from an area's tax base.

Returning to the basics of property law reveals that owner expectations are crucial for understanding the sense that non-Indians are harmed by Indian land acquisition. Ownership risk that is expected—whether tied to neighbors, the market, or familiar governments—is accepted, whereas unexpected ownership risk connected to tribes is not.<sup>199</sup> The irony is striking. The first case in the leading property law textbook is, not coincidentally, an Indian law case that can shed a lot of light on the expectations of non-Indian property owners.<sup>200</sup> In some respects this seminal case, *Johnson v. M'Intosh*,<sup>201</sup> is the opposite of *Sherrill*. In *Sherrill*, the Court considered the rights of an Indian tribe that had purchased land from non-Indians; in *Johnson*, the Court compared the rights of an investor who had bought land from an Indian tribe to the rights of a non-Indian who ostensibly purchased the same land from the U.S. government.<sup>202</sup> In an opinion written by Chief Justice John Marshall, relying upon racism-laced laws that diminished the rights of Indian tribes relative to European-Christian nations,

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<sup>199</sup> Homeowner activism plays an important role policing what is accepted and what is not accepted, and does so with a goal of protecting housing values. See WILLIAM A. FISCHER, *THE HOMEOWNER HYPOTHESIS* (2001) (emphasizing the role homeowners play in protecting their largest investment, their homes, against risk).

<sup>200</sup> The most commonly used textbook in the field is JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, & MICHAEL H. SCHILL, *PROPERTY LAW* (6th ed. 2006). Perhaps the second-leading property law textbook also starts with the same Indian law case, but it is less surprisingly so because the author also has a demonstrated scholarly commitment to Indian law. See JOSEPH WILLIAM SINGER, *PROPERTY LAW* (4th ed. 2006).

<sup>201</sup> 21 U.S. (8 Wheat.) 543 (1823).

<sup>202</sup> In a great article, Professor Eric Kades shows that there was not an actual case or controversy between the parties to the action. Instead, the land purchases upon which the case was based never in fact overlapped, a fact not recognized until Professor Kades published his work. See Eric Kades, *History and Interpretation of the Great Case of Johnson v. M'Intosh*, 19 *LAW & HIST. REV.* 67, 68 (2001) (showing a map demonstrating that the land claims of the parties were not overlapping).

the Court held that non-Indians who purchased land from the government had superior title to non-Indians who purchased land directly from tribes. In my Indian Law class, I focus the discussion of *Johnson* on its reliance on anti-Indian racism, introducing a theme that helps explain over the course of the seminar much of the Court's Indian law jurisprudence. In Property Law, the focus is different. While students do pick up on the racism in the opinion; *Johnson* emphasizes the state's role in saying what property is and what rights owners have. *Johnson* makes it clear that property comes from and requires state recognition of ownership, and that the state plays a central role establishing the expectations owners can have regarding "their" property.

The *Sherrill* opinion is depressing, aside from the reasons identified by others,<sup>203</sup> because it fails to recognize one of property law's central tenets: that owners' expectations are best understood in terms of situational requirements. Property law is replete with examples of seemingly straightforward ownership rights being diminished or negated because of applicable customs, or alternatively, of owner expectations being upset through the creation of new customs. Thus, the person who finds a whale that has washed up on a beach does not own that whale because of an area business custom.<sup>204</sup> The person who has been hunting a fox must bow to a judicially imposed definition of capture and cannot rely upon the custom of local hunters.<sup>205</sup> Similarly, the landowner cannot even exclude trespassing attorneys because of a judge's ideas regarding good public policy,<sup>206</sup> and so on. Yet, the Court in *Sherrill* does not acknowledge that the expectations of non-Indian property owners should be informed by the fact that their property is located within the Oneida Nation's original reservation.

Non-Indian property owners within the Oneida reservation assert a right to the same expectations regarding their property as off-reservation owners because current non-Indian property owners are said to be "indisputably innocent of any wrongdoing"

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<sup>203</sup> See *supra* notes 16–28 and accompanying text.

<sup>204</sup> *Ghen v. Rich*, 8 F. 159 (D. Mass. 1881).

<sup>205</sup> *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805).

<sup>206</sup> *State v. Shack*, 277 A.2d 369 (N.J. 1971).

toward Indians.<sup>207</sup> Even in his dissent, Justice Stevens describes non-Indians as “innocent landowners.”<sup>208</sup> Non-Indian property owners affected by Oneida land-claim efforts argue that they “didn’t swindle anybody.”<sup>209</sup> Feelings are so strong that even those who acquired land much closer to when the Oneida first lost their land fail to see the connection between the past and their present claim of innocence.<sup>210</sup> One non-Indian, Daniel W. Gates, can trace his farm back to 1798 when his “great-great-great-great-grandfather, Zepheniah” purchased the land, yet he blames the Oneida for unmet expectations regarding the sale of his farm.<sup>211</sup> Irony is lost on another non-Indian couple: Mary Leonard, “What the Indians are doing is wrong”; Robert

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<sup>207</sup> Gus P. Coldebella & Mark S. Puzella, *The Landowner Defendants in Indian Land Claims: Hostages to History*, 37 NEW ENG. L. REV. 585, 585 (2003) (written by attorneys with Goodwin Procter, a firm that represented non-Indian landowner defendants).

<sup>208</sup> *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 226 (2005) (Stevens, J., dissenting).

<sup>209</sup> Seely & Breidenbach, *supra* note 131; *see also* Nessle, *supra* note 151 (“Should Native Americans withhold their attempts at recouping their territory, or at least some of it, because the time lapse since they lost it leaves no one to accuse because they are all dead? This is the position of UCE, as one member is quoted, ‘We are not guilty, we did not do anything.’ I am sure that if UCE members were victims of such atrocities as those perpetrated against Native Americans, they would be fighting mad no matter who is left to fight against and, in the American tradition, carry it on until corrective action is taken.”); Locklear, *supra* note 12, at 599 (asserting that non-Indian property owners cannot claim innocence because Indian “claims have been known about for generations” and, despite living in a representative government, such non-Indians have done “[v]ery little” to “convince their government to settle these claims”).

<sup>210</sup> This is not to say that those who acquired land more recently did not have “constructive notice . . . that the parcels in question are in dispute.” Matthews, *supra* note 30, at 183.

<sup>211</sup> *Farmer Finds No Buyers*, *supra* note 184. Professor G. William Rice has described this attitude as “grandpa stole [Indian] land fair and square.” Rice, *supra* note 168, at 813. Tellingly, in an earlier response to non-Indian anger at the Oneida, one unsympathetic resident wrote:

The Oneida people have nothing to be ashamed of. They did not take your land; your ancestors took theirs. The Oneida people are now using legal tactics and money to buy back their own land. This in itself is ludicrous.

If you want to be angry and protest, take up your concerns with your own government and your own conscience.

Your ancestors and your government are responsible for your present predicament, not the Oneida people. The shoe is on the other foot and you can’t stand the pinch.

Leonard, “How would you feel if you were dispossessed of your land?”<sup>212</sup>

By asserting the innocence of non-Indian property owners, the Court in *Sherrill* ignored the fact that, as one upstate New York non-Indian put it, “We’re the intruders here.”<sup>213</sup> What this quote captures is the way non-Indians continue to benefit from the violation of reservation boundary integrity.<sup>214</sup> In a recent article, Professor Frickey argues against a “retrospective on national guilt,” and quoting Frank Pommersheim, another Indian Law professor, writes that “[t]he point is not to assign blame—an essentially fruitless exercise.”<sup>215</sup> I guess I am a greater believer in both guilt and blame. One letter to the editor of Syracuse, New York’s *Post-Standard* helps explain the role appreciation for fault can play. Chuck Davis, of Nedrow, New York, wrote, “[O]ur government cheated tribes out of millions of acres. To this very day treaties are being torn apart word for twisted word. So don’t whine because tribes are finally getting a fraction of their land back.”<sup>216</sup> Questioning the innocence of non-Indian landowners allows us to question their expectation that Indians do not have a right to reacquire land or to upset the standard off-reservation expectations of property owners.

#### CONCLUSION

Reframing the characterization of the potential harm to non-Indians from Indian land ownership and control, from principally about decreased property values to primarily about what the expectations of non-Indian property owners should be, permits us to move beyond the Court’s simplistic assumption of harm. *Sherrill* was primarily justified using a problematic laches argument; however, the Court’s assumptions regarding border towns and checkerboard areas also played a role. A

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Mary C. George, Letter to the Editor, *Homeowners’ Ancestors Stole Land from Oneidas*, POST-STANDARD (Syracuse, N.Y.), Feb. 8, 1999.

<sup>212</sup> Tobin, *supra* note 126.

<sup>213</sup> Karch, *supra* note 168 (quoting Sue Getz, of Clark Mills, New York).

<sup>214</sup> Locklear, *supra* note 12, at 598 (“[T]hey are not innocent in any sense of the word. They are trespassers. . . . [T]hey are sitting on, taking advantage of, and enjoying the benefit of land that belongs to the Iroquois people.”).

<sup>215</sup> Frickey, *supra* note 24, at 489.

<sup>216</sup> Chuck Davis, Letter to the Editor, *It’s About Time Tribes Regained Their Property*, POST-STANDARD (Syracuse, N.Y.), Sept. 29, 2003.

preoccupation with protecting the expectations of “innocent” non-Indian property owners led to the Court’s unexamined assumption that Indian ownership and control of land harms neighboring non-Indian property owners. As our study shows, this assumption may not in fact reflect how Indian land holding affects non-Indians, and cannot be justified by empirics alone. Even if non-Indian property value negatively correlates with Indian land proximity, a concept that remains mere assumption, land value is not an adequate rationale for negating Indian sovereignty over reacquired land. “Indian land claims raise fundamental questions of historical justice and responsibility” for which “Americans have never been forced to answer for.”<sup>217</sup> By not exploring its assumption that Indians harm non-Indian property owners, the Court fails to take into account the role of the law, and the Court, in forming the expectations behind ideas such as harm or benefit. Guilt is a messy, unpleasant topic for the guilty, but if non-Indian guilt is just swept under the rug, Indians will lose key aspects of their sovereignty as non-Indians narrow their understanding of how they expect to be affected by Indians.

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<sup>217</sup> Gage, *supra* note 116.

