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Assumptions Regarding Indians and Judicial Humility:

Thoughts from a Property-Law Lens

Ezra Rosser

Two Indians refuse to move until their complaints are heard. Stoically they stand. Waiting. Eventually a staffer promises them a meeting. This image of stoic and mostly silent Indians formed a mini-drama on the TV-show *The West Wing*. The treatment of Indian issues on HBO's *The Sopranos* was similarly curt: sitting out on the curb, mobsters complain that Indians are getting stuff – from gambling – without having to work for it like Italian-Americans have had to. This anger culminates in an attack on Indians protesting Columbus Day. Largely missing from both stories are Indian voices; instead, Indians are understood only as they relate to non-Indians. The same holds true for how the U.S. Supreme Court understands Indians, or doesn't understand them.

Awareness and understanding – real or assumed – of Indian legal issues varies considerably by location. Non-Indians in Arizona or New Mexico living near an Indian reservation have a distinct set of experiences from, say, Connecticut residents reading about the rise of Foxwoods Casino. And judges or justices living in large metropolises such as Washington, D.C. may have to go far out of their way to learn a little bit about the continent's original inhabitants.¹ Unfortunately, an *assumption* that Indians harm non-Indians can be found throughout the relatively recent Indian-law jurisprudence of the U.S. Supreme Court.

The recent decision in *City of Sherrill v. Oneida Indian Nation of New York*² attests to the power of this assumption of harm. Briefly, *Sherrill* involved a tribe that, after buying up land within its original reservation boundary, claimed the right not to pay taxes on this property because through such purchases the tribe had unified fee and aboriginal title. The Supreme Court disagreed and under an (un-briefed) *laches* theory ruled that too much time had passed since the land had passed out of Oneida hands for the tribe to assert such sovereignty. A secondary basis for the decision was the idea that were the Oneida to be successful in reasserting sovereignty it would be *disruptive* and harm the expectations of non-Indians in the area.

Indian-law academics have focused their ire on *Oliphant v. Suquamish Indian Tribe*,³ which rejected tribal criminal jurisdiction over non-Indians. The *Oliphant* assumption that non-Indians would not be treated justly by tribal courts, to say

nothing of the case's denial of Indian sovereign territorial rights, has been rightly criticized by scholars. Just as the *Oliphant* assumption that non-Indians would be harmed by Indian courts is problematic, so too are assumptions regarding how Indian land holdings impact neighboring non-Indians and off-reservation communities.

JUDICIAL ASSUMPTIONS

It comes as quite a shock for my first-year law students to learn that they have to read an Indian-law case for their first day of property law. Yet *Johnson v. M'Intosh*⁴ is the first case in the two leading property-law textbooks – Krier et al. and Singer.⁵ The second case, the first case for those for whom law-school memories are more removed, is the tale of a dispute between two fox hunters: *Pierson v. Post*.⁶ There are some professors who skip *Johnson v. M'Intosh*, either because it is too complicated or they do not want to bother with the Doctrine of Discovery or the fact of conquest. But in general only the most conservative members of the faculty do not teach both cases; since my primary field is Indian law, I follow the textbook order and the cases work well together.

My first year teaching, I walked up to the podium and within 20 seconds asked one student, "What are the facts in *Johnson v. M'Intosh*?" His startled reaction before getting to the case: "Wow, that was fast." This was the first type of push-back I got from students reading about Indian rights to land, but by no means the last. During a break the second time I taught *Johnson v. M'Intosh*, a student came down to the podium quite perturbed and declared that I "shouldn't use the word Indian." I assured her that it was alright. Students at my school are either too comfortable with the case – they *enjoy* finding the racist language in the opinion and denounce students who approach the case in a detached way – or they feel that they have little they can contribute and seem to long for the impersonal esoteric rules of civil procedure from their first semester.

Johnson v. M'Intosh is a largely invented case. According to the opinion it is a dispute between one party who acquired title to land from an Indian tribe and another party whose title traced back to a non-Indian sovereign. Chief Justice John Marshall writes that because of the Doctrine of Discovery, a

Footnotes

1. Justices Breyer and O'Connor toured the Navajo Nation in 2001 and while there praised the restorative aspects of the Navajo judicial system. See Jim Maniaci, *Judges Laud Navajo System: Peacemaker Court Called Impressive*, GALLUP INDEPENDENT, July 20, 2001.
2. 544 U.S. 197 (2005).

3. 435 U.S. 191 (1978).
4. 21 U.S. (8 Wheat.) 543 (1823).
5. JAMES E. KRIER ET AL., PROPERTY (6th ed. 2006); JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES (4th ed. 2006).
6. 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

racist doctrine under which European nations were said to acquire sovereign authority over land they “discovered” without regard to the Indian tribes already living on the land, and the fact of conquest, the party with Indian title must lose out in such a dispute. But as Eric Kades proved, in fact there was no real dispute – the land claims of the two parties never in fact overlapped! The Court did not trouble itself with the minor problem of a looking at whether there in fact was a real dispute, instead the case was decided and helped pave the way for an efficient transfer of land from Indians to non-Indians.⁷

What students usually fail to pick up on is that Indian title survived the ethnocentrism of *Johnson v. M'Intosh*.⁸ The party who bought land directly from an Indian tribe rather than acquiring it from the U.S. Government does have recourse, albeit not recourse before a U.S. court, according to Chief Justice Marshall: “The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws.”⁹ The Court acknowledged Indians as “the rightful occupants of the soil” while at the same time arguing that Indian “rights to complete sovereignty, as independent nations, were necessarily diminished.”¹⁰

The second case involves a fox, two hunters, and hounds. Lodowick Post and his hounds are chasing a fox (“poor reynard” as the fox is called in the dissent) when “Jesse Pierson jumps out of nowhere and grabs the fox.”¹¹ The question before the court was whether through his pursuit alone Post acquired a right to the fox sufficient to “sustain an action against Pierson for killing and taking” the fox.¹² The majority opinion, written by Justice Tompkins, was that Post had no right to the fox. For support, Tompkins looked to the writings of, in his own language, various “ancient writers.”¹³ Post’s claim was doomed because he had not “deprived the fox of his natural liberty, and brought him within his certain control,”¹⁴ as Tompkins held was required by the sources he surveyed. Tompkins concludes with a policy argument: that the rule adopted will help preserve “peace and order in society” by limiting “quarrels and litigation.”¹⁵

But Justice Livingston’s dissent is a powerful one. He argues that rather than relying upon the majority’s ancient writers, the dispute “should have been submitted to the arbitration of sportsmen.”¹⁶ Livingston calls into question the utility of hunting codes written “many hundred years ago,” and argues for the right to “establish” a new rule given the time that has passed.¹⁷ From an ancient writer, Livingston finds a distinction

between “large dogs and hounds” and mere “beagles,” a distinction that beagle owners may object to and which obscures the more powerful parts of the argument. Reading the dissent provides its share of entertainment – the fox is referred to as “poor *reynard*” whose memory “has not been spared” – but Livingston’s main point is that a new rule might be more efficient and better encourage the hunting of foxes.

Most students come to property law without much interest in either the rights of Indians to land or fox hunting, and by such metrics perhaps material on gated communities would be a better place to start. But students soon begin to raise questions: Should the racism in *Johnson v. M'Intosh* be forgiven as a product of its time? Did Marshall really believe in the assumptions underlying the Doctrine of Discovery or was he sufficiently apologetic about using the Doctrine? Perhaps because the challenges of the decision are readily apparent to even those encountering the case for the first time, it makes for a great way to start Property law. But I have found that many students only truly start questioning *Johnson v. M'Intosh* after they have read *Pierson v. Post*. Livingston’s primary contribution to property-law courses is not that he distinguishes between hounds and beagles, it is that he forces students to question judicial assumptions. Chief Justice Marshall’s voice in *Johnson v. M'Intosh* is just too authoritative, but the back-and-forth of *Pierson v. Post* brings out the need to think critically about the often unstated assumptions and the descriptions of the world found in judicial opinions.

CROSSING BOUNDARIES

Indian contact with non-Indians, or vice versa, invites assumptions from both sides. Indians may assume that non-Indians are after their land or resources (perhaps a fair assumption) and non-Indians may assume that all Indians are casino Indians or are alcoholic (frequent but unfair assumptions). The places where contact is most frequent and perhaps most troublesome are often border towns, cities located just off-reservation whose consumer base includes a sizable number of reservation Indians.

In 1974, the bodies of three “beaten, tortured, and burned” Navajo men were found in the canyon country near Farmington, New Mexico.¹⁸ Three Anglo teenagers were

Indian contact with non-Indians, or vice versa, invites assumptions from both sides.

7. Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065 (2000).

8. Professor Robert A. Williams, Jr. has been the leading scholar on the nature and historical development of the eurocentricism of federal Indian law. See, e.g., ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSE OF CONQUEST* (1990); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219.

9. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 593 (1823).

10. *Id.* at 574.

11. Bethany Berger, *It's Not About the Fox: The Untold History of Pierson v. Post*, 55 DUKE L.J. 1089, 1091 (2006).

12. *Pierson v. Post*, 3 CAL. R. 175, 177 (N.Y. Sup. Ct. 1805).

13. *Id.*

14. *Id.* at 178.

15. *Id.* at 179.

16. *Id.* at 180 (J. Livingston dissenting).

17. *Id.* at 181 (J. Livingston dissenting).

18. NEW MEXICO ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, *THE FARMINGTON REPORT: A CONFLICT OF CULTURES I* (July 1975), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/35/64/c0.pdf.

What should courts do when faced with a conflict involving Indian and non-Indian contact?

charged with the murders.¹⁹ Sparked by the murders, the New Mexico Advisory Committee to the U.S. Commission on Civil Rights held hearings in Farmington and ultimately released its report in July 1975. “It was

perhaps inevitable,” the Farmington Report notes, “that someday the presence of conflicting races, cultures, and value systems would lead to violence and confrontation.”²⁰

By the 30th anniversary of the first report, when the advisory committee returned to check on how things had changed in three decades, “it found significant progress in race relations between Navajos and whites in Farmington.”²¹ And yet a year after the second Farmington Report was released, three Anglo teenagers picked up a 47-year-old Navajo hitchhiker and on the outskirts of “the Selma, Ala., of the Southwest,” kicked, punched, and beat him with a stick while using “racial slurs as they pummeled him.”²² Things may have progressed since 1974, but there is still a ways to go in Farmington and in many other border towns, from Gallup, New Mexico, to the City of Sherrill, New York.

Recently, much has been asked of non-Indians living within the original reservation boundary of the Oneida Indian Nation. The success of Turning Stone Resort and Casino allowed the Oneida Indian Nation of New York to buy up land within their original reservation, and non-Indians were asked to respect the right of the tribe to claim treaty-protected territory. When the land claims of the Oneida threatened non-Indians, non-Indians balked. Without going into the details – the tribe faced a bomb threat and repeated use of racially charged language – it is safe to say that non-Indians suddenly realized and reacted against the idea that an Indian nation could have an impact on their lives or their property values.²³

What should courts do when faced with a conflict involving Indian and non-Indian contact? The last time that the U.S. Supreme Court squarely took this on was in *Brendale v. Confederated Tribes*,²⁴ a case involving the power of a tribe to exercise zoning authority over its original reservation. According to a plurality, the tribe could zone the “closed” portions of the reservation – areas with few non-Indians – but the “open areas” of the reservation were a different story. Because the tribe “no longer possesses the power to determine the basic character” of an area that had become predominantly non-Indian in both ownership and population, the tribe could not exercise its zoning regulatory power over the open area.²⁵ The decision only seems like a split decision until you realize that

by treaty the United States supposedly had guaranteed the tribe “exclusive use and benefit” of the reservation.²⁶ There is nothing new about the problem of line drawing, but one might have hoped that the Court would have been more protective of promises memorialized in treaties that purport to respect reservation boundaries.

Ex Ante it is hard to list all the possible disputes between Indian and non-Indian neighbors or community members that may end up before a court. Disputes have erupted over whether non-Indian corporations should develop natural areas that have religious or spiritual significance to area Indian tribes. Similarly, whether stores on Indian land should be able to sell gasoline or cigarettes without charging customers the same taxes found off-reservation has been a hotly contested issue. But the disputes can be more mundane: What powers should state police officers have in checkerboard areas – areas with alternating reservation and fee lands – within reservation boundaries? What limits are there on the rights of a non-Indian bank to discriminate against Indian borrowers and what courts get to hear such cases?

To illustrate the challenges even in a garden-variety dispute involving two neighbors, one Indian, one non-Indian, I am going to use a nuisance hypothetical. Suppose that the Non-Indian, Bob Johnson, is your fairly typical white suburbanite. He drives an oversized SUV, has a house surrounded by a six-foot-tall privacy fence, and owns a full-bred yellow lab. The city he lives in prohibits junk cars from being kept on the lawns of residents and also has a noise ordinance for residential areas. Fortunately, Bob’s yellow lab cannot jump the privacy fence and therefore does not need to be kept chained up, which keeps him happy and ensures he does not bark very much. Moreover, Bob’s house has a three-car garage that houses his SUV, an old junker, and his motorcycle, so he has never been in violation of the city’s prohibition on visible junk cars. Just beyond Bob Johnson’s fence is a section of tribal trust land, on which Margarita Yellowhair has a single-wide trailer, three dogs, a horse, and seven chickens. Margarita also owns three dilapidated Ford F-150s. At any one time she can only seem to keep one truck running and she tends to use the others – parked or on blocks in her front yard – as a source of needed parts. Initially she let her dogs roam free, but after a neighbor’s dog got pregnant from one of her dogs, she decided to keep them on chains. Having once been free, her dogs bark constantly in protest of the new arrangement.

Readers familiar with reservation life may rightly question the above depiction of Bob and Margarita. The wealthy non-Indian, Bob, and less wealthy Indian, Margarita, are problematically stereotypical. Of course, if the hypothetical was based

19. *Id.* at 2.

20. *Id.* at 15.

21. NEW MEXICO ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, THE FARMINGTON REPORT: CIVIL RIGHTS FOR NATIVE AMERICANS 30 YEARS LATER 52 (Nov 2005), available at http://www.usccr.gov/pubs/122705_FarmingtonReport.pdf.

22. Evelyn Nieves, “In Navajo Country, Racism Rides Again,” SALON.COM, Sep. 2, 2006, <http://www.salon.com/news/feature/2006/09/02/navajo/>.

23. For a more complete account of non-Indian reactions, see Ezra Rosser, *Protecting Non-Indians from Harm? The Property Consequences of Indians*, 87 ORE. L. REV. 175, 198-209 (2008).

24. 492 U.S. 408 (1989).

25. *Id.* at 446.

26. Treaty of the United States and the Yakima Nation of Indians, Mar. 8, 1959, 12 Stat. 951 (1859).

on a casino tribe with high per capita payments in a poor community, the identities could be flipped. But it remains the case that overall Indians on reservations are of a notably lower socioeconomic class compared to the United States average. Therefore, given the truth behind the stereotypes, perhaps most apparent in border towns, I hope I will be forgiven for relying upon stereotypes in the hypothetical.

But who is harming who? Property scholars developed the infamous “box of four” out of one of the most influential law-review articles of all time – Guido Calabresi and A. Douglas Melamed’s *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*²⁷ – in part to answer this question. Figure 1 is the box of four as it is often presented for nuisance cases (Calabresi and Melamed rely heavily upon nuisance examples):

FIGURE 1: CALABRESI & MELAMED BOX OF FOUR

		Protection Type	
		Property	Liability
Initial Entitlement	Resident	Rule 1	Rule 2
	Polluter	Rule 3	Rule 4

According to this framework, Rule 1 means that the Resident gets the initial entitlement (say to be free from pollution) and sets the price that he or she is willing to sell the entitlement to the Polluter. Rule 2 means the Resident gets the initial entitlement but the state, or a court, sets the price at which the Resident must sell the entitlement (often called a damage award). For Rule 3 and Rule 4, the Polluter gets the initial entitlement (say to pollute), and in Rule 3 the Polluter sets the price and in Rule 4 the state sets the price.

Many non-lawyers, or those new to the law (such as students), instinctively equate “Resident” with “Good Actor” and “Polluter” with “Bad Actor.” Some of the cases reinforce this mental shortcut: A sympathetic homeowner is subjected to smoke from a factory or to excessive noise from an apartment building’s industrial strength air-conditioning unit. From the perspective of the Resident, they are being harmed by the way that the Polluter is using his or her land; however, from the perspective of the Polluter, they are being harmed by the way Resident is using his or her land. The Resident cannot use his or her property as desired, say to peacefully look up upon the night sky because of the Polluter’s use *and similarly* the Polluter cannot freely pollute because of the competing desires of the Resident. One way property law deals with this simultaneous benefit and harm is by limiting Resident claims when the Polluter employs a large number of people in the community or when the Resident “comes to the nuisance.”

27. 85 HARV. L. REV. 1089 (1972).

28. See also Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605, 611 (2006)

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The first challenge when thinking about the conflicting land-use decisions of Bob and Margarita is to figure out who is the “Polluter.” Ultimately, it is a matter of perspective. Most Americans probably instinctively will view Margarita – with her junk cars and barking dogs – as the “Polluter.” When the city’s zoning rules are included it seems almost

self-evident that Margarita is the “Bad Actor.” Such a judgment arguably reflects middle-class values, and perhaps non-Indian ones as well, more than a meaningful distinction between Bob and Margarita’s actions. If Bob and Margarita live in an open area where most people do not wall off their homes, then Bob’s privacy fence could well be viewed as an eyesore breaking up the view Margarita can enjoy. And in poorer communities or in areas where most lots are spaced far apart, broken down cars may be viewed as normal rather than something that a neighbor could be upset about. Even expectations about the noise from barking dogs can reflect class-based biases. Bob and Margarita are, therefore, both the Resident and the Polluter.

One way to solve the question of who is being harmed would be to apply the “coming to the nuisance” idea. In a dispute involving Indian and non-Indian land-use decisions, non-Indians, including Bob, arguably “came to the nuisance,” in that Indians were the initial occupiers of the continent. This solution has the advantage that it is simple – Indians are always right – but it is not reflective of values all but the most strident Indian advocate would have. Even if the dispossession of Indians was accomplished through manifest destiny – arguably genocidal – policies, often with the imprimatur of legality, the “newcomers” surely have obtained rights with time.²⁸ So we must be careful not to take the “coming to the nuisance” argument too far.

One way to appropriately limit its power would be to take seriously reservation boundaries. The expectations of non-Indians who live inside original reservation boundaries – the boundaries that are memorialized through treaty or executive orders, not the boundaries post-allotment – should not be the same as they might be if they lived off-reservation. To put it back in terms of Bob and Margarita’s land-use conflicts: If Bob’s land is located within the boundaries of a reservation, then he should not expect Margarita to hide her cars and Margarita should have a greater right regarding her unobstructed view. The challenge is what to do when the boundary between Bob and Margarita is also the reservation boundary. I submit that in such a case both parties should have little recourse regarding their neighbor’s choices.

The law tolerates all sorts of boundaries, even arbitrary or inefficient ones. The town of Crater Lake, Iowa, is a great case

(noting that in *Sherrill* “the Supreme Court appears to have given whole-hearted support for what I have called the “reliance interest in property””).

Humility is required when courts are asked to weigh in on disputes between Indians and non-Indians.

in point. As the *New York Times* reported, Crater Lake is a little “nub” of land that juts into Omaha, Nebraska.²⁹ The Missouri River made an oxbow curve around Crater Lake, making the land connect with Iowa; that is until 1877 when the river changed course, cutting off the oxbow and leaving Crater Lake, Iowa, stranded in Nebraska!³⁰ In a more familiar example, in 1922 the U.S. Supreme Court upheld the Village of Euclid, Ohio’s authority to limit industrial expansion using its zoning authority even though Euclid was fast becoming a suburb of Cleveland.³¹ Though the Court left open the future possibility that “general public interest” might at some point “far outweigh the interest of the municipality” in determining municipal development through zoning, the Court upheld Euclid’s “authority to govern itself as it sees fit.”³²

Indian nations should also have the ability to govern reservations as they see fit, but there will be challenges. The U.S. Supreme Court has limited tribal authority over non-Indians in several important respects: first by curtailing criminal jurisdiction and more recently by limiting tribal authority in the civil context. But it is important that assumptions regarding the nature of tribal governance or the nature of Indian land not form the basis for further limitations on tribal sovereignty. Non-Indians may believe any number of things about how Indian sovereignty or the reservation status of nearby land harms them, but it is important to distinguish between non-Indian assumptions and demonstrated harm.

In the tribal court context, many non-Indians assume that non-Indians cannot get a fair hearing before a tribal court. This assumption, shared by many non-Indian judges, can form the basis for denying tribes’ jurisdiction over non-Indians that tribes would have if jurisdiction was determined, as it is in the state context, by geographic boundaries. As with most assumptions, it has an intuitive basis: non-Indians might be nervous for example that an Indian jury might not be a jury of their peers or they might fear that Indians might have justifiable prejudice against non-Indians. Yet, as Professor Bethany Berger’s research shows, the treatment of non-Indians who appear before Navajo Nation courts is “remarkably balanced,” both in terms of their win-loss ratios and in qualitative terms.³³ While the assumption may seem reasonable at first blush, there is no proof that it is accurate.

Another assumption non-Indians may make is that it is “bad” to live next to an Indian reservation or have Indian

neighbors. The research I am currently working on explores one aspect of this assumption, using tax data from upstate New York to test if non-Indian property values are negatively affected by proximity to Indian land. The research was inspired by the U.S. Supreme Court’s unexplored assumption of harm to non-Indians in *City of Sherrill v. Oneida Indian Nation of New York*.³⁴ The challenges exploring this harm reveal the assumptive nature of the Court’s claimed harm to non-Indians. Lawyers are generally not comfortable with Geographical Information Systems programming or with statistical data analysis, so to do the exploration, I had to find co-authors with such expertise. Even having assembled people with the expertise needed, the answer to whether non-Indians are harmed has not jumped out of the analysis; therefore, our work continues. These challenges suggest two important things: (1) the assumption of harm may well not be accurate, at least as it relates to non-Indian property values, and (2) the Court did not adequately investigate its assumption of harm before the assumption was used as a reason to limit tribal sovereignty.

There is much that can be said in defense of the Court’s assumption of harm, but it is important to notice that it is in fact an assumption. The same can be said of Justice Tompkins’s majority opinion in *Pierson v. Post* – there may in fact be good reasons that pursuit alone should not give a hunter a right to the fox, but assumptions relied upon should be acknowledged. Doing so may inspire a little judicial humility.

HUMILITY AND COURTS

Humility is required when courts are asked to weigh in on disputes between Indians and non-Indians. Why humility? Because decisions should not be based upon stereotypes of Indians or assumptions, based on limited experiences or anecdotal evidence, regarding how Indians affect non-Indians. The good news is that state courts and lower federal courts could play a leading role in this. The U.S. Supreme Court has been fairly unconcerned with learning what life on a reservation is like, or even with mastering the precedent applicable to Indian-law cases. State court, and to some degree lower federal court, judges, especially judges in states with larger Indian populations, have the ability to help set a new course for Indian/non-Indian relations, one that rejects the American legacy of colonialism rather than embraces it.

State courts have in the past recognized the right thing to do well before the U.S. Supreme Court. The California Supreme Court invalidated a state antimiscegenation law in 1948, nineteen years before the United States Supreme Court caught up in *Loving v. Virginia*.³⁵ And as noted in its recent unanimous

29. William Robbins, “Standing by a Capricious Neighbor,” *N.Y. TIMES*, Apr. 21, 1988, at 18.

30. *Id.*

31. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

32. *Id.* at 389-90. Fifty years later, the New Jersey Supreme Court famously overrode a municipality’s exclusionary zoning outside of Camden and Philadelphia in support of the general public interest in affordable housing. *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 67 N.J. 151 (1975).

33. Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 *ARIZ. ST. L.J.* 1047, 1047 (2006).

34. 544 U.S. 197 (2005).

35. *Perez v. Sharp*, 32 *CAL. 2D* 711 (1948); *Loving v. Commonwealth of Virginia*, 388 U.S. 1 (1967). For commentary on these cases and antimiscegenation laws, see RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 259-80 (2003).

decision on gay marriage, the Iowa Supreme Court struck blows against slavery and segregation “long before” the United States Supreme Court.³⁶ Beating the U.S. Supreme Court to recognize a right might seem anything but an example of humility, but in cases involving Indian tribes, the right thing to do is the recognition of existing rights rather than the creation of new rights. Any time that a non-Indian court considers an Indian/non-Indian dispute, the resulting opinion has the potential to limit the authority of sovereigns whose societies pre-date the War of Independence and the U.S. Constitution. The decisions of the Rehnquist Court, and now the Roberts Court, with few exceptions have *taken away* the sovereignty of tribes when such sovereignty impacts non-Indians. State courts need not dogmatically follow this trend. Humility – here I mean recognition that sovereign nations, even nations located entirely within the United States, should not have their powers stripped lightly – regarding the role the judiciary should play when courts hear disputes involving the powers of tribal nations, would seem to require affording greater respect to tribal sovereignty and greater deference to tribal decisions on how to govern reservations.

If you surveyed Indian-law professors about where the U.S. Supreme Court has made the biggest mistake or caused the most problems in the field, I suspect that the leading contender would be *Oliphant*, though more radical scholars might highlight *Johnson v. McIntosh*. But I am particularly troubled and disheartened by the mistaken assumptions and arrogance of *Atkinson Trading Co. v. Shirley*.³⁷ In a unanimous decision the Court invalidated the Navajo Nation’s 8% hotel-occupancy tax after the tax was challenged by Atkinson Trading Company, the owners of Cameron Trading Post. The Court held that the tax did not fit within either of the *Montana* exceptions. In *Montana v. United States*,³⁸ the Court limited civil authority of tribes over nonmembers as a general matter, but provided two exceptions. The first is that tribes can regulate “the activities of nonmembers who enter consensual relationships with the tribe or its members.”³⁹ The second exception is that tribes “may exercise civil authority over the conduct of non-Indians on fee lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.”⁴⁰ The *Atkinson* Court quickly rejected application of either exception, holding that Cameron Trading Post had not met the consent test – for if there was in this case “the exception would swallow the rule” – nor did it have a large enough direct effect.⁴¹

Looking out from the chambers of the Supreme Court this might make sense – how important can a hotel or trading post really be after all? But from the Navajo Nation, and perhaps from anywhere in rural parts of the southwest, it is out of

touch with the reality of life in such areas. In Washington, D.C., there may be countless hotels and other forms of commercial activity, but on the Navajo Nation the scattered trading posts play a critical role in the economic and social life of tribal members. Moreover, as the Court acknowledges in the opinion, trading posts are connected to the tribe through a web of relationships and interdependencies; to allow the trading-post owners to pretend

that they should not have to contribute to area governance that they benefit from makes the two exceptions virtually meaningless.⁴² The *Atkinson* decision is based on the assumption that a hotel or trading post means the same in northern Arizona, on the Navajo Nation, as it does in wealthier, more densely populated, non-Indian parts of the country. The Court could have been more humble before it stripped the Navajo Nation of one of the central government powers, taxation; it could have required more of Atkinson Trading Company than simply showing that Cameron Trading Post was located on fee land. The U.S. executive branch attorneys, while not using the language of humility, joined the tribe in urging the Court to appreciate the unique role that traders play on reservations and leave in place the Navajo Nation’s power to impose this tax.⁴³ The Court balked.

Like all neighbors, Indians and non-Indians will not always get along; yet it is important that such disagreements not become cause for destroying tribal sovereignty. The parties involved mean that many cases will end up in the federal court system, but not all will reach the Supreme Court, and some will be heard by state court judges. At a recent and rare public appearance, Justice Thomas stated:

I’m very very reluctant to, to have a strong opinion on something without having briefs or opinions to read and think through. It slows you down because, you know this job is easy for people who’ve never done it. [laughter, clapping] And what I have found in this job is that they know more about it than I do, especially if they have the title “law professor.”⁴⁴

Justice Thomas’s stated reluctance to have a strong opinion about a controversy without having first read and thought about it is a step in the right direction. Hopefully, judges closer to reservation life will be able to add a local understanding and a skepticism regarding what is “known” about Indian tribes and

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36. *Varnum v. Brien*, 2009 Iowa Sup. LEXIS 31, at 24, available at <http://www.judicial.state.ia.us/wfData/files/Varnum/07-1499.pdf>.

37. 532 U.S. 645 (2001).

38. 450 U.S. 544 (1981).

39. *Id.* at 565.

40. *Id.* at 566.

41. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 655-57 (2001).

42. The reverse of the justices’ fears is true: the *rule* has swallowed the *exceptions*!

43. *Atkinson*, 532 U.S. at 656 (2001).

44. Justice Clarence Thomas, “Keynote Address,” Bill of Rights Institute’s *Being an American Awards Gala*, Mar. 31, 2009, transcript available at http://www.beinganamerican.org/files/essays/thomas_keynote.pdf.

reservations to this reluctant stance. Professor Jeffrey Rosen writes, “Humility, ultimately, is a character trait as well as a judicial disposition. It describes the spirit, as Judge Hand put it, ‘which is not too sure that it is right.’”⁴⁵ As a term “judicial humility” seems loaded, a rhetorical tool of (conservative) court commentators to decry activist judges. I do not mean to employ “judicial humility” in that way. Rather, judicial humility as it relates to disputes involving Indian tribes counsels for caution regarding what is “known” about Indian nations. Cursory treatment of Indian issues in shows like *The West Wing* and *The Sopranos* should not be mirrored by equally shallow judicial assumptions regarding how Indians affect neighboring non-Indians.



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45. Jeffrey Rosen, *The Supreme Court: Judicial Temperament and the Democratic Ideal*, 47 WASHBURN L. J. 1, 10 (2007) (quoting from LEARNED HAND, *THE SPIRIT OF LIBERTY* 190 (1953)). See also Paul L. Caron & Rafael Gely, “A Need for Judicial Humility,” NATIONAL

LAW JOURNAL, Nov. 24, 2003 (“Judicial humility is neither liberal nor conservative. It recognizes that judges and lawyers hold no monopoly on wisdom . . .”).



NOTICE FOR AMERICAN JUDGES ASSOCIATION MEMBERS

The newsletter of the American Judges Association, *Benchmark*, has been moved from print to electronic publication. If we have your email address on file, we will send *Benchmark* to you each time it is published. *Benchmark* is the official newsletter of the AJA, and it contains notice of AJA activities, elections, awards, and events. This move will help us make sure that you get timely notice of AJA information, and it will also help us in keeping AJA dues as low as possible.

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