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# The Reports of Our Death Are Greatly Exaggerated - Reflections on the Resilience of the Oneida Indian Nation of New York

Allison M. Dussias

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# The Reports of Our Death Are Greatly Exaggerated— Reflections on the Resilience of the Oneida Indian Nation of New York

Allison M. Dussias\*

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## I. INTRODUCTION

In her 2005 opinion for the Supreme Court in *City of Sherrill v. Oneida Indian Nation of New York*, Justice Ruth Bader Ginsburg wrote disparagingly of what she described as the efforts of the Oneida Nation to rekindle the “embers of sovereignty that long ago grew cold.”<sup>1</sup> The Court rejected the Nation’s claim of a tax exemption for reservation land without directly addressing a basic principle of federal Indian law: tribal land within the boundaries of a treaty-guaranteed reservation is not subject to state and local taxation.

Among the reasons that Justice Ginsburg gave for the Court’s decision was the disruption to the status quo that would arise from protecting the land from taxation, as well as from other assertions of sovereignty that she predicted the Nation eventually would make. Absent from her analysis was an admission that the status quo arose from illegal conduct by the State of New York. Starting in the eighteenth century, the State acquired Oneida land through exploitative and in some cases fraudulent transactions, in defiance of federal law. It is as if Justice Ginsburg looked at the non-Indian governmental apparatus that had been built on the foundations of the State’s unlawful actions and acted out of fear that Oneida assertions of sovereignty might burn it all down.

When Professor Steele invited me to speak in this symposium focusing on the resilience and endurance of tribes and tribal institutions, the struggle of the Oneida Indian Nation of New York for full recognition of its preconstitutional sovereignty immediately came to mind. The Nation continues to exist despite over two hundred years of efforts to erase its presence from the center of New York State. Retaining core aspects of tribal governance, the Nation has not only survived but also developed successful businesses that make an important contribution to the region’s economy. Tribal government buildings and commercial enterprises

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1. *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 214 (2005).

today are situated on reservation land that was expropriated by New York State and repurchased by the Nation in the past few decades.

Undeterred by the outcome of the *Sherrill* decision, the Nation successfully applied to have reservation land taken into trust by the federal government, thus putting the land's status as sovereign, tribal land beyond question.<sup>2</sup> The Nation reached an agreement with the State and with Madison and Oneida Counties on outstanding legal issues in 2013.<sup>3</sup> This agreement, as Oneida leaders have said, reflects the peace and friendship envisioned by the 1794 Treaty of Canandaigua between the Oneidas and other Six Nations tribes and the United States.<sup>4</sup>

What can the Oneida Nation's experiences teach us about tribal resilience? The answer, in short, is a great deal, as indicated by the following words of Professor John Tahsuda: "The history of the Oneida people is in many ways a microcosm of the history of indigenous peoples around the world. Originally a flourishing society, the Oneidas have traveled the road to near extinction and back. Ultimately, they evolved into a positive political and economic force."<sup>5</sup>

In short, the Oneidas have shown exemplary resilience in the face of formidable challenges, including threats to their very survival as a nation.

This Article examines the historical and contemporary experiences of the Oneida Indian Nation of New York in its dealings with New York State and its non-Indian citizens. Three themes, apparent at different times and taking shape in different ways, emerge from this examination. These themes resemble musical refrains—oft-repeated messages, conveyed by the State and its citizens to the Nation, like discordant sounds from a broken record:

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2. See *infra* notes 182–197 and accompanying text (discussing the land-into-trust process).

3. See *infra* notes 194–200 and accompanying text (discussing the settlement agreement).

4. Oneida Indian Nation, *2013 Settlement Agreement*, ONEIDA, <http://www.oneidaindiannation.com/2013settlementagreement> (last visited Jan. 28, 2019) (noting that the Settlement Agreement "honors the 1794 Treaty of Canandaigua's original declaration that 'peace and friendship shall be perpetual' between the Nation and its surrounding communities").

5. John Tahsuda, *The Oneida Land Claim: Yesterday and Today*, 46 BUFF. L. REV. 1001, 1001 (1998).

1. What's yours is ours.
2. Surrender your sovereignty – resistance is futile.
3. By surviving as a people, you are spoiling our plans.

Boiling down the Nation's legal and political encounters with New York State to this basic level serves to highlight the blatant self-interest, and the settler colonialism, that are at the heart of it all, regardless of how much the State – at times aided and abetted by the Supreme Court – tries to hide behind legal niceties.

The Oneida Nation has not stood by in silence, however, when repeatedly confronted with these refrains. Rather, the Oneidas have, through words and actions, responded with their own messages to the State and its citizens:

1. Much of what is rightfully ours *is* now yours, because you stole it, but we are acting to reclaim it. At the same time, we will share with you the economic opportunities that we have created on our land.
2. We have *not* surrendered, and will not surrender, our sovereignty.
3. Like it or not, we *are* here – and we never went away, either as individuals or as a nation.

These responses, made in the face of repeated attacks on Oneida land, sovereignty, and basic existence, embody the resilience of the Oneida Nation.

This Article begins in Part II with a brief discussion of the concept of resilience and situates the Oneida Indian Nation of New York within the historical and contemporary Six Nations Confederacy. Part III traces the history of the Nation's past and present encounters with the State and its citizens, highlighting how the themes identified above have emerged repeatedly. Only through this detailed review of the State's actions, and the Nation's responses to these actions, can the full extent of Oneida resilience be appreciated. The Article concludes in Part IV with final reflections on the Oneida Indian Nation of New York as an exemplar of tribal resilience.

## II. PRELIMINARY MATTERS: DEFINING RESILIENCE, FOCUSING ON THE NATION

### *A. Defining Resilience*

What is *resilience*? What does it mean to be *resilient*? The American Psychological Association defines *resilience* as “the process of adapting well in the face of adversity, trauma, tragedy, threats or significant sources of stress.”<sup>6</sup> Although this definition is focused on individuals’ personal resilience, it nonetheless corresponds well with the historical and contemporary experiences of the Oneida Indian Nation of New York. As the analysis in Part II reveals, the Nation has survived repeated trauma and tragedy and threats to its continued existence. In the face of adversity in the form of legal setbacks and otherwise, it has adapted, persevered, and, in more recent years, even thrived.

A more general definition of *resilience* identifies it as “the capacity of a system, enterprise, or person to maintain its core purpose and integrity in the face of dramatically changed circumstances.”<sup>7</sup> Again, this provides an apt description of a key characteristic of the Oneida Nation: its ability to maintain its core purpose and integrity as a nation in the face of dramatic changes in its circumstances over the centuries.

Finally, systems theory scholars who focus on social-ecological systems define *resilience* as the capacity “to absorb disturbance and re-organize while undergoing change so as to still retain essentially the same function, structure, [and] identity.”<sup>8</sup> Once again, the Nation is resilient as so defined. It has confronted challenges and adapted as necessary to survive, while retaining its core identity.

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6. *The Road to Resilience*, AM. PSYCHOL. ASS’N, <http://www.apa.org/helpcenter/road-resilience.aspx> (last visited Jan. 28, 2019).

7. KRISTA S. LANGELAND ET AL., RAND CORP., HOW CIVIL INSTITUTIONS BUILD RESILIENCE: ORGANIZATIONAL PRACTICES DERIVED FROM ACADEMIC LITERATURE AND CASE STUDIES 5 (2016), [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR1200/RR1246/RAND\\_RR1246.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR1200/RR1246/RAND_RR1246.pdf); [www.jstor.org/stable/10.7249/j.ctt1btc0m7](http://www.jstor.org/stable/10.7249/j.ctt1btc0m7) (quoting ANDREW ZOLLI & ANN MARIE HEALY, RESILIENCE: WHY THINGS BOUNCE BACK 7 (2012)).

8. *About Resilience*, RESILIENCE, <http://www.resilience.org/about-resilience> (last visited Jan. 28, 2019).

*B. Focusing on the Oneida Indian Nation of New York*

In order to fully appreciate the resilience of the New York Oneidas, it is important to understand their place within the group of tribes that, from time immemorial, have called the geographic area now known as New York State home. The federally recognized Oneida Indian Nation of New York is one of the descendant tribes of the historical Oneida Indian Nation, which was a member of the close-knit alliance of tribes referred to as the Five Nations—and later the Six Nations—Confederacy.<sup>9</sup> For countless generations, the Oneidas have lived in what is today Central New York State, under their own form of government. Their aboriginal lands, consisting of about six million acres, stretched from the Pennsylvania border northward to the St. Lawrence River and eastward from the shores of Lake Ontario to the western Adirondack Mountains.<sup>10</sup> These lands were the location of a portage known as the Oneida Carry or the Carrying Place. Stretching the short distance between the Mohawk River and Wood Creek, this strategic portage was the only interruption in the water route between the Atlantic Ocean and Lake Ontario.<sup>11</sup> The importance of the Oneida Carry was recognized early on by Europeans, who, with Oneida consent, built fortifications there as early as 1689.<sup>12</sup> The British (and subsequently American) Fort Stanwix, an important treaty-making venue, was located at this site.<sup>13</sup>

At the time of the American Revolution, the Six Nations (the Oneidas, Cayugas, Mohawks, Onondagas, Senecas, and Tuscaroras)

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9. The confederacy comprised five tribes (the “Five Nations”) until it was expanded to include the Tuscaroras, who came north to seek refuge from hostile treatment in North Carolina. See Robert B. Porter, *Legalizing, Decolonizing, and Modernizing New York State’s Indian Law*, 63 ALB. L. REV. 125, 128 n.14. (1999).

10. *County of Oneida v. Oneida Indian Nation of N.Y. (Oneida II)*, 470 U.S. 226, 230 (1985). For a map of the Oneidas’ aboriginal territory, see KARIM M. TIRO, *THE PEOPLE OF THE STANDING STONE: THE ONEIDA NATION FROM THE REVOLUTION THROUGH THE ERA OF REMOVAL*, at xxiv (2011) [hereinafter *PEOPLE OF THE STANDING STONE*].

11. *PEOPLE OF THE STANDING STONE*, *supra* note 10, at 5. The Mohawk River flows east to meet the Hudson River, which flows into the Atlantic Ocean. Wood Creek flows into Oneida Lake, which is connected to Lake Ontario. *Id.*

12. *Id.* at 23 (noting the construction of French fortifications in 1689).

13. *Id.* at 29 (noting that Fort Stanwix was located at the Carrying Place and was the site of a treaty negotiation in 1767). The town of Rome, New York, developed around the Carrying Place. *Id.* at 100.

were the most powerful tribes in the northeastern United States.<sup>14</sup> The tribes are also referred to as the Haudenosaunee, meaning “People of the Longhouse,” in recognition of their conception of the Nations’ collective territories as a longhouse, their traditional dwelling.<sup>15</sup> The term “Iroquois Confederacy” has also been used, particularly by non-Indians, to refer to these tribal nations.<sup>16</sup>

The easternmost tribe of the Confederacy was the nation of the Mohawks (or Kanienkahagen, meaning “The People of the Flint”). Because of their location, the Mohawks were called the “Keepers of the Eastern Door,”<sup>17</sup> as the lands of the Six Nations stretching across the state were envisioned as a metaphorical longhouse. The Senecas (or Onondowahgah, meaning “The People of the Great Hill”) inhabit the westernmost territory and hence are the “Keepers of the Western Door.”<sup>18</sup> The Cayugas (or Guyohkohnyoh, meaning “The People of the Great Swamp”) historically occupied territory to the east of the Senecas in the Finger Lakes area.<sup>19</sup> The Onondaga Nation (or Onundagaono, meaning “The People of the Hills”), whose territory traditionally has served as the capital of the Haudenosaunee,<sup>20</sup> were recognized as the “Keepers of the Central

14. *Oneida II*, 470 U.S. at 230; *New York Indians v. United States (New York Indians II)*, 170 U.S. 1, 5 n.1 (1898).

15. Porter, *supra* note 9, at 127. The Haudenosaunee people also refer to themselves as Ongwehonweh, meaning the “Original People” of their homeland. *Id.* at n.8; see also Robert W. Venables, *Introduction*, in *THE SIX NATIONS OF NEW YORK: THE 1892 UNITED STATES EXTRA CENSUS BULLETIN*, at viii (photo. reprint 1995) (1892) [hereinafter *Introduction to 1892 Census*] (describing the name “Haudenosaunee” as “a metaphor for the multinational confederacy that extended from east to west across what is now New York State”).

16. Tahsuda, *supra* note 5, at 1001.

17. Porter, *supra* note 9, at 127 n.9. For a map indicating the locations of the New York territories of the Six Nations, see *PEOPLE OF THE STANDING STONE*, *supra* note 10, at 32 (1771 map).

18. Porter, *supra* note 9, at 127 n.13. The Senecas currently live on territories in New York, Oklahoma, and Ontario. *Id.* The Seneca Nation of Indians, located in Western New York State, has over 8000 members. *Nya:weh sgeno (Welcome)*, SENECA NATION OF INDIANS, <https://sni.org> (last visited Jan. 28, 2019). The Nation, which is governed by a constitution dating to 1848, alternates leadership between its two territorial areas, the Allegany and Cattaraugus Territories. *Our Government*, SENECA NATION OF INDIANS, <https://sni.org/government> (last visited Jan. 28, 2019).

19. Porter, *supra* note 9, at 127 n.12. For information about the contemporary Cayuga Nation government, based in Seneca Falls, New York, see *Government*, CAYUGA NATION, <https://cayuganation-nsn.gov/government.html> (last visited Jan. 28, 2019).

20. Porter, *supra* note 9, at 127 n.11. The Onondaga Nation is located on about 7300 acres of land near Syracuse, New York. The Nation continues to serve as the meeting place of the Grand Council of Chiefs, the Haudenosaunee’s traditional ruling body. *About Us, Facts*,



Fire.”<sup>21</sup> The last tribe to join the Confederacy was the Tuscarora Nation (or Ska-Ruh-Reh, meaning “The Shirt Wearing People”), who came from North Carolina in 1722 seeking refuge in Haudenosaunee territory.<sup>22</sup>

Finally, the aboriginal territory of the Oneida Nation (or Onayotekaono, meaning “The People of the Standing Stone”) is located between the Mohawk and Onondaga territory.<sup>23</sup> In the nineteenth century, some Oneidas relocated to Wisconsin where the Oneida Nation of Wisconsin, also a federally recognized tribe, is located on land near the city of Green Bay.<sup>24</sup> Other Oneidas moved to Canada, where their descendants, members of the Oneida Nation of the Thames (also known as the Thames Band), reside on reserved land in southwestern Ontario.<sup>25</sup> These Oneida tribes have been involved with the Oneida Indian Nation of New York in litigation related to their common interests.<sup>26</sup> Although these Oneida tribes have also shown resilience through their continuing survival as tribal nations, the focus of the analysis that follows is on the experiences of the New York Oneidas.

### III. ONEIDA RESILIENCE IN THE FACE OF DISPOSSESSION OF LAND, DENIAL OF EXISTENCE, AND DENIGRATION OF SOVEREIGNTY

The Oneida Indian Nation’s historical and contemporary experiences at the hands of New York State and its non-Indian citizens can be summarized in the form of three messages, or themes, repeatedly conveyed to the Nation:

1. We want your land – and we are willing to break the law to get it. Or, to put this message as simply as possible, “What’s yours is ours.”

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ONONDAGA NATION, <http://www.onondaganation.org/aboutus/facts> (last visited Jan. 28, 2019) [hereinafter ONONDAGA NATION]. For information about the contemporary Onondaga Nation and its government, visit the Nation’s website. ONONDAGA NATION, <http://www.onondaganation.org> (last visited Jan. 28, 2019).

21. ONONDAGA NATION, *supra* note 20.

22. Porter, *supra* note 9, at 128 n.14.

23. *Id.* at 127 n. 10.

24. For information about the Oneida Nation of Wisconsin and its government, visit the Nation’s website. ONEIDA, <https://oneida-nsn.gov> (last visited Jan. 28, 2019).

25. ONEIDA NATION OF THE THAMES, <https://oneida.on.ca> (last visited Jan. 28, 2019).

26. *See, e.g.*, Oneida Indian Nation of N.Y. v. New York, 860 F.2d 1145 (2d Cir. 1988) (naming the Wisconsin and Thames Band Oneidas as plaintiffs along with the New York Oneidas).

2. We demand your submission. We do not respect your sovereignty and will overshadow it with our own. In brief, the message is "Surrender your sovereignty – resistance is futile."
3. We are inconvenienced by your unexpected and disruptive survival as a people. We expected you to be long gone by now, along with all the other "dying Indians." In other words, "By surviving as a people, you are spoiling our plans."

These implicit messages bring to mind concepts and principles that have long played a role in Indian law: dispossession and the denial of tribal property rights, the denigration of tribal sovereignty, the myth of the dying Indian, and the general subordination of tribal rights and needs to the demands of the dominant society. These messages, and the Oneida responses to them, are explored in turn below.

A. *"We Want Your Land – and We Are Willing to Break the Law to Get It. What's Yours Is Ours."*

Historically, New York State's efforts to expropriate Oneida land took the form of purported purchases, sometimes termed "treaties." State officials were undeterred by reminders from federal officials that these actions were illegal in the absence of federal approval.

In more recent years, expropriation efforts have continued through attempts to foreclose on Oneida property based on nonpayment of debts secured by mortgages and on nonpayment of taxes. Historical and contemporary efforts to dispossess the Oneidas of New York are examined below.

1. *The Oneida Nation: America's "first ally"*

To understand Oneida rights today, it is necessary to step back in time to the American Revolution and follow the path of Oneida dispossession from that point forward. The American colonists' revolt against British rule divided the Six Nations Confederacy,<sup>27</sup> which at first had hoped to remain neutral in the face of calls for

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27. PEOPLE OF THE STANDING STONE, *supra* note 10, at 39.

support from the British and the rebelling Americans.<sup>28</sup> The Confederacy's Grand Council symbolically covered the central Council Fire kept by the Onondaga Nation in recognition of the Nations' lack of consensus.<sup>29</sup> The Oneida Nation sided with the soon-to-be United States, having determined that this alliance was necessary to protect the Oneida homeland.<sup>30</sup> It is worth emphasizing that the Oneidas acted as the rebellious colonists' allies, not as hired soldiers.<sup>31</sup> Recognizing the value of this alliance, the Americans promised the Oneidas freedom and protection of their lands after the successful completion of the war. This promise was reflected in the following 1788 statement to the Oneidas: "'You will then partake of every Blessing we enjoy, and united with a free people, your Liberty and Property will be safe.'"<sup>32</sup>

The Oneida Nation, as the future United States' first ally,<sup>33</sup> played an important role in the colonists' success. As historian Karim Tiro has explained, "[t]hrough combat, spying, and scouting, the Oneidas were indispensable to the survival of Patriot communities on the New York and Pennsylvania frontiers."<sup>34</sup> By participating in the defense of Fort Stanwix when the British attacked it in 1777,<sup>35</sup> and by fighting alongside American soldiers in a number of battles,<sup>36</sup> the Oneidas gained the respect of the American military and its European allies. The Prussian General

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28. *Id.* at 40–42; *see also* ALAN TAYLOR, *THE DIVIDED GROUND: INDIANS, SETTLERS, AND THE NORTHERN BORDERLAND OF THE AMERICAN REVOLUTION* 83–86 (2006) (discussing the Six Nations' early neutrality and subsequent changes in policy toward the British and Americans).

29. *See Introduction to 1892 Census, supra* note 15, at xi.

30. PEOPLE OF THE STANDING STONE, *supra* note 10, at 39, 45–48 (discussing the role that the location of Oneida territory at the front line of Indian country, as defined in the 1768 Treaty of Fort Stanwix, played in shaping the Oneidas' decision); *see also* TAYLOR, *supra* note 28, at 84–85 (discussing the Oneida decision).

31. TAYLOR, *supra* note 28, at 96. The Tuscaroras also sided with the rebelling colonists. *Id.* at 84–85, 92, 96.

32. *Id.* at 97 (quoting Letter from Philip Schuyler, Cont'l Army Gen. & Indian Comm'r, to the Oneida Nation (May 11, 1778)).

33. Oneida Indian Nation, *History*, ONEIDA, <http://www.oneidaindiannation.com/history> (last visited Jan. 28, 2019).

34. PEOPLE OF THE STANDING STONE, *supra* note 10, at 40; *see also* TAYLOR, *supra* note 28, at 96 (noting that as "guides and warriors," the Oneidas and Tuscaroras became "indispensable to the defense of an embattled frontier").

35. PEOPLE OF THE STANDING STONE, *supra* note 10, at 48.

36. *See, e.g., id.*, at 49–51 (discussing battles in which the Oneida Nation participated, including Oriskany, Saratoga, and Barren Hill).

Friedrich von Steuben, for example, praised their ability to “keep the Enemy Compact, prevent Desertion in our Troops, [and] make us Masters of Intelligence.”<sup>37</sup> Oneidas used well-honed skills in scouting and intelligence-gathering to keep the American forces safe from surprise attacks, serving as the principal source of information on enemy movements.<sup>38</sup> Ten Oneidas received officers’ commissions at the ranks of captain and lieutenant in recognition of their military prowess.<sup>39</sup>

The Oneidas paid a steep price for this alliance. Lives were lost in battles;<sup>40</sup> villages and fields were burned.<sup>41</sup> The Oneida women, holding authority over the determination of village locations, decided that they should leave their villages, and the Oneidas fled to Fort Stanwix and to the Schenectady area.<sup>42</sup> Forced to become refugees, they experienced serious privation—lack of sufficient food, clothing, and housing—and exposure to smallpox.<sup>43</sup> After witnessing some Americans reconnoitering their lands in the hope of gaining possession after the war, the Oneidas complained to American officials of the subterfuges of “people who want to take away our Lands by Piece Meals.”<sup>44</sup> This activity proved to be a harbinger of what was to come.

## *2. After the war was over: National treaty guarantees, state expropriation*

Despite the losses that it suffered in the war, the Oneida Nation had picked the winning side. Unlike other members of the Six Nations Confederacy that had sided with the British, the Nation did not need to assume the posture of a defeated foe. Though faced

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37. *Id.* at 50 (quoting Von Steuben as quoted in Letter from Committee at Camp to Henry Laurens (Mar. 2, 1778), in 9 LETTERS OF DELEGATES TO CONGRESS 1774–1789, at 199–200 (Paul H. Smith et al. eds., 1977) (alteration in original)); *see also id.* at 58 (noting the Oneidas’ role in tracking and finding soldiers who had deserted from Fort Stanwix).

38. *Id.* at 58–59; *see also* TAYLOR, *supra* note 28, at 96–97.

39. PEOPLE OF THE STANDING STONE, *supra* note 10, at 51.

40. *See, e.g., id.* at 49, 51.

41. *Id.* at 41, 57; *see also* TAYLOR, *supra* note 28, at 101 (describing the destruction of the Oneida village of Kanonwalohale).

42. PEOPLE OF THE STANDING STONE, *supra* note 10, at 56–58.

43. *Id.* at 40, 56–57; *see also* TAYLOR, *supra* note 28, at 101.

44. PEOPLE OF THE STANDING STONE, *supra* note 10, at 61 (quoting Speech by Oneidas, Tuscaroras, and “French Mohawks” to United States Commissioners (Sept. 9, 1782) (HM 11621, Huntington Library)) (internal quotation marks omitted).

with the serious undertaking of rebuilding their destroyed villages, the Oneidas had reason to be optimistic about the Nation's position in the postwar future. The Oneidas would later share their thoughts about these times in a 1788 message to the New York legislature:

In your late War with the People on the other Side of the great Water, and at a Period when thick Darkness overspread this Country, your Brothers the Oneidas stepped forth, and uninvited took up the Hatchet in your defense; we fought by your Side, our Blood flowed together, and the Bones of our Warriors mingled with yours; you appeared grateful for our Attachment, and gave us repeated Assurances, that should the Great Spirit give you Success, we should be made to rejoice. The Event of the War was favorable; we returned to our Country where Ruin and Desolation had spread over our Fields and Villages; we rejoiced however that we could return in Peace, and pleased ourselves with the Hopes of the peaceable and quiet Enjoyment of our Country, for which we had fought and bled, in the common Cause together with you.<sup>45</sup>

Following the war's conclusion, the fledgling United States signed the Treaty of Fort Stanwix of 1784 with the Six Nations.<sup>46</sup> In the treaty, the United States gave "peace to the Senecas, Mohawks, Onondagas and Cayugas,"<sup>47</sup> but no such measure was needed for its Oneida ally. Instead, the treaty guaranteed that the "Oneida and Tuscarora nations [should] be secured in the possession of the lands on which they [were] settled."<sup>48</sup> As the treaty commissioners observed, "[i]t does not become the United States to forget those nations who preserved their faith to them, and adhered to their

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45. Anthony Wonderley, "Good Peter's Narrative of Several Transactions Respecting Indian Lands": An Oneida View of Dispossession, 1785-1788, 84 N.Y. HIST. 237, 243 (2003) (citing FRANKLIN B. HOUGH, PROCEEDINGS OF THE COMMISSIONERS OF INDIAN AFFAIRS, APPOINTED BY LAW FOR THE EXTINGUISHMENT OF INDIAN TITLES IN THE STATE OF NEW YORK 124 (1861)).

46. Treaty with the Six Nations, Oct. 22, 1784, 7 Stat. 15.

47. Treaty with the Six Nations, 1784, pmbL., in 2 INDIAN AFFAIRS: LAWS AND TREATIES 5 (Charles J. Kappler ed., 1904), [http://avalon.law.yale.edu/18th\\_century/six1784.asp](http://avalon.law.yale.edu/18th_century/six1784.asp) (last visited Jan. 28, 2019).

48. *Id.* art. II. The United States "again secured and confirmed" the Oneidas in the possession of their lands in a 1789 Treaty at Fort Harmar. Treaty with the Six Nations, Jan. 9, 1789, 7 Stat. 33; *see also* Treaty with the Six Nations, 1784, art. III, in 2 INDIAN AFFAIRS: LAWS AND TREATIES 6 (Charles J. Kappler ed., 1904), [http://avalon.law.yale.edu/18th\\_century/six1784.asp](http://avalon.law.yale.edu/18th_century/six1784.asp) (last visited Jan. 28, 2019) ("The Oneida and Tuscarora nations, are also again secured and confirmed in the possession of their respective lands.").

cause, those, therefore, must be secured in the full and free enjoyment of those possessions."<sup>49</sup>

These commitments by the national government did not, however, discourage officials of the State of New York—who had even tried to undermine the United States' 1784 treaty negotiations with the Six Nations<sup>50</sup>—from acting as quickly as possible to gain possession of Oneida lands. The State had already confiscated 1.5 million acres of Cayuga and Onondaga lands without a treaty for distribution as bounty lands to New York veterans, but it was the treaty-guaranteed lands of their wartime comrades that New York citizens most coveted.<sup>51</sup> The State took advantage of conflicting interpretations as to the roles of the national and state governments in Indian affairs under the Articles of Confederation,<sup>52</sup> and the national government's general weakness under the Articles,<sup>53</sup> to move forward with its plans.

The State's first move was in 1785 at Fort Herkimer, to which the State summoned the Oneidas and Tuscaroras with the hope that their desperate postwar circumstances would mean that the

49. 2 THE OLDEN TIME 426 (Neville B. Craig ed., 1848) (internal quotation marks omitted) (quoting treaty commissioners).

50. PEOPLE OF THE STANDING STONE, *supra* note 10, at 63. The State's efforts included arranging to provide substantial quantities of liquor to Six Nations' leaders at the treaty negotiations. *Id.*

51. TAYLOR, *supra* note 28, at 144; *see also* Wonderley, *supra* note 45, at 243 (explaining that New York's plan to recover from the war and fill up its empty treasury was "based partly on income from the sale of Iroquois lands, both directly—from actual sale—and indirectly—from reduction of debt when veterans accepted land in lieu of pay").

52. TAYLOR, *supra* note 28, at 155–56. The Articles provided that Congress had "the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the states, provided, that the legislative right of any state within its own limits be not infringed or violated . . ." ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4. In the 1970s, the Oneida Indian Nation of New York, along with the Wisconsin and Ontario Oneidas, sued in federal court to challenge the State's 1785 and 1788 purchases of its lands, discussed below, on the grounds that they violated the Articles of Confederation and the 1784 Treaty of Fort Stanwix. The Court of Appeals for the Second Circuit concluded in 1988 that, according to its interpretations, neither the Articles of Confederation nor the 1784 Treaty prohibited, or required congressional consent for, New York's 1785 and 1788 purchases of Oneida land. Consequently, the court dismissed the action. Oneida Indian Nation of N.Y. v. New York, 860 F.2d 1145, 1167 (2d Cir. 1988).

53. TAYLOR, *supra* note 28, at 161 ("Hamstrung by the weak Articles of Confederation, Congress lacked the funds and the leadership to fulfill its treaty obligations to the Oneidas."). Congress could not even levy its own taxes under the Articles. *Id.*

meeting was “well timed for the Advantage of the State.”<sup>54</sup> Oneida leaders were pressured into signing the 1785 “treaty,”<sup>55</sup> which purported to cede an area of about 300,000 acres in the southern portion of their treaty-guaranteed territory for \$11,500 (in cash and goods).<sup>56</sup> Although all of the Six Nations were induced to cede lands after the war by “treaty” – which in each case “meant little more than forced land cession”<sup>57</sup> – it is especially tragic that the Oneidas, despite having “suffered most severely for their steadfast loyalty to the Americans during the war[,] . . . would be the first to fall before the land greed of their former allies.”<sup>58</sup> Within the next two years, the State made a huge profit on this land, selling it for more than ten times the price it had paid the Oneidas.<sup>59</sup>

In 1788, New York’s governor, George Clinton, summoned Oneida representatives to Fort Schuyler (also known as Fort Stanwix) after misleadingly telling them that they should not suppose “that it was our Intention to kindle a Council Fire at this Time in Order to Purchase Land from You for our People.”<sup>60</sup> Once discussions began, however, Clinton told the Oneidas, who were suffering from extreme poverty, that the State would not intervene to control land-hungry state citizens who were threatening to seize

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54. PEOPLE OF THE STANDING STONE, *supra* note 10, at 67 (quoting HOUGH, *supra* note 45, at 78). The state commissioners received a report that the Oneidas at Kanonwalohale were starving. TAYLOR, *supra* note 28, at 163.

55. For a discussion of the circumstances under which the document was signed, and the pressures to which the Oneidas were subject, see PEOPLE OF THE STANDING STONE, *supra* note 10, at 67–71; *see also*, TAYLOR, *supra* note 28, at 162–65. A vivid eyewitness account was provided by the Oneida leader Agwerondongwas, nicknamed “Good Peter,” in a 1792 interview with the federal commissioner, Timothy Pickering. Wonderley, *supra* note 45, at 246–50.

56. PEOPLE OF THE STANDING STONE, *supra* note 10, at 71, 97 (relaying the terms of the purported cession and a map indicating the 1785 cession). The city of Binghamton, New York, was later established on part of this land. *State of New York Treaties and Land Transactions with the Oneida, Onondaga, and Cayuga*, NAT’L PARK SERV.: FORT STANWIX <https://www.nps.gov/fost/learn/historyculture/nys-treaties-landtransactions-oneida-onondaga-cayuga.htm> (last updated Feb. 26, 2015).

57. Wonderley, *supra* note 45, at 243.

58. Barbara Graymont, *New York State Indian Policy After the Revolution*, 57 N.Y. HIST. 438, 455 (1976).

59. TAYLOR, *supra* note 28, at 165.

60. PEOPLE OF THE STANDING STONE, *supra* note 10, at 79 (quoting Governor George Clinton, in HOUGH, *supra* note 45, at 224) (internal quotation marks omitted).

Oneida land.<sup>61</sup> Clinton ignored the Nation's reminder that the United States had guaranteed their land's security.<sup>62</sup> The "treaty" resulting from this meeting reserved a tract of about 300,000 acres for the Oneidas and conveyed rights to the remaining Oneida Nation territory of over five million acres to the State.<sup>63</sup> Unbeknownst to the Oneidas, one of their chief negotiators at the meeting, Colonel Louis Cook, a Mohawk who had fought with them during the war, was in the pay of the State.<sup>64</sup> Although the Oneidas left the meeting with the understanding that they had leased land to the State, the text provides for the cession of the Oneidas' land (aside from the reserved area) for \$5000 and a \$600 annuity.<sup>65</sup> The Oneidas only learned that the State was acting contrary to the Oneidas' intent when the first annuity payment was delivered in 1789; the Oneidas' visit to the governor to try to correct the error was in vain.<sup>66</sup> By this time, the State had already carved a portion of the Oneida land into twenty townships (available for sale to settlers or land speculators) at a substantial profit, with further profits to be gained in future years from sale of the remainder of the ceded land.<sup>67</sup> The State's profits from the sale of the Oneida Nation's and other tribes' lands were so extensive that during the

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61. Wonderley, *supra* note 45, at 250, 261. The State was well aware of the Oneidas' dire straits and timed the meeting to maximize the impact of their hunger and desperation. *Id.* at 251.

62. *Id.* at 251-52.

63. *Id.* at 265, 272 (noting that an area of close to 300,000 acres in present-day Madison and Oneida Counties was reserved and describing the cession terms); *see also* County of Oneida v. Oneida Indian Nation of N.Y. (*Oneida II*), 470 U.S. 226, 231 (1985).

64. Wonderley, *supra* note 45, at 258, 262, 264 (describing Cook, who was referred to as Colonel Louis, and noting the selection of Cook to represent the Oneidas and how Cook was "now in the pay of New York").

65. PEOPLE OF THE STANDING STONE, *supra* note 10, at 79; *see also* TAYLOR, *supra* note 28, at 184 (noting that the annuity appealed to the Oneida Nation because it resembled a rental income and that with "apparent calculation, the state commissioners further fudged the issue by sometimes referring to the annuity as a 'rent' and to the cession as a 'lease'"). For a map indicating the Oneida Reservation as set out in the 1788 "treaty," *see* PEOPLE OF THE STANDING STONE, *supra* note 10, at 97.

66. TAYLOR, *supra* note 28, at 186-87.

67. *Id.* at 185 (noting that the State would reap at least \$172,800 from the sale of these townships, which was nearly twelve times what the State would pay to the Oneidas during the first fifteen years). The land carved into the twenty townships amounted to less than a quarter of the entire cession. *Id.*



period 1790–1795, nearly half of the State’s annual revenue came from the sale of recently expropriated Indian land.<sup>68</sup>

For the Oneidas, these “treaties” meant the loss of more than ninety percent of the land that they owned at the end of the war that had won New York its freedom<sup>69</sup> – hardly a fair way of treating a faithful ally. As the Indian Claims Commission noted in 1976, the Oneida Nation did not voluntarily part with its land in 1785 or 1788, and sold land in 1788 “only in the face of unwarranted accusations and threats by Governor Clinton” that gave the Nation “no choice but to sell the land which New York desired.”<sup>70</sup> As to the 1788 treaty, the Commission found that “it is clear from the evidence that the Oneidas did not even realize they were selling anything.”<sup>71</sup> Furthermore, these “treaties” “were the type of transaction against which the United States had promised to protect the Oneidas,” yet “the United States took no action to protect the Oneidas with regard to either of the treaties.”<sup>72</sup> As the Court of Claims found in 1978, “the nature of the chicanery practiced upon the Oneidas suggests that feasible levels of assistance . . . – short of forcing New York to desist or act fairly – might well have averted the harm.”<sup>73</sup> In short,

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68. *Id.* at 201–02. During this period, for every \$1.00 that the State spent on surveys, purchases, and annuities, it took in \$13.94 in land sale revenue. *Id.* at 201.

69. Karim M. Tiro, *Claims Arising: The Oneida Nation of Wisconsin and the Indian Claims Commission, 1951–1982*, 32 AM. INDIAN L. REV. 509, 519 (2007) [hereinafter *Claims Arising*].

70. *Id.* at 520; see *Oneida Nation of N.Y. v. United States*, 37 Indian Cl. Comm’n 522, 526 (1976). The Oneidas filed claims with the Indian Claims Commission with regard to lands ceded to New York State in twenty-seven transactions between 1785 and 1846. The Commission found in favor of the Oneidas with regard to the 1785 and 1788 transactions, a decision that was upheld by the Court of Claims. *United States v. Oneida Nation of N.Y.*, 576 F.2d 870, 882 (Ct. Cl. 1978). The Commission also found in favor of the Oneidas as to the other twenty-five transactions. *Oneida Nation of N.Y. v. United States*, 26 Indian Cl. Comm’n 138 (1971). The Court of Claims upheld the Commission’s decision as to transactions dated June 1, 1798, and June 4, 1802, but remanded the case as to the remaining twenty-three transactions for a determination of whether the United States knew of these transactions and therefore breached its fiduciary duty by failing to protect Oneida interests. *United States v. Oneida Nation of N.Y.*, 477 F.2d 939, 944–45 (Ct. Cl. 1973). The Oneidas ultimately withdrew their complaint before the Indian Claims Commission, with prejudice, after having litigated it for more than thirty years, so as to pursue a land claim rather than settle for the monetary damages that would result from success before the Commission. Tahsuda, *supra* note 5, at 1006 n.22 (1998).

71. *Claims Arising*, *supra* note 69, at 520 (quoting *Oneida Nation*, 37 Indian Cl. Comm’n at 529).

72. *Id.* (quoting *Oneida Nation*, 37 Indian Cl. Comm’n at 530).

73. *Oneida Nation of N.Y.*, 576 F.2d at 879. The Court of Claims upheld the Indian Claims Commission’s decision that the United States was liable under the “fair and

it was not just the State, but also the United States, that failed to treat its ally properly.

3. *The new constitution: Stronger national power vs. the New York state of mind*

In 1789, the Constitution, which unambiguously placed relations with Indian nations exclusively under federal authority, came into effect.<sup>74</sup> Supreme Court Justice Joseph Story praised the wisdom of this approach to Indian affairs, observing that the “Indians, not distracted by the discordant regulations of different states, are taught to trust one great body, whose justice they respect, and whose power they fear.”<sup>75</sup> In 1790, Congress passed the first Indian Trade and Intercourse Act (the Nonintercourse Act), which provided that no purchase of Indian nations’ land would be valid without federal consent.<sup>76</sup> Explaining the provision to a group of Senecas, President George Washington stated that the law provided security for remaining Indian lands: “No state, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government

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honorable dealings” clause of the Indian Claims Commission Act for the amounts that the Oneidas should have received from New York in the 1785 and 1788 transactions. *Id.* at 870. The Indian Claims Commission Act provided that the Commission had jurisdiction to hear “claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.” 25 U.S.C. § 70a(5) (1976).

74. *County of Oneida v. Oneida Indian Nation of N.Y. (Oneida II)*, 470 U.S. 226, 234 (1985). Article I, section 8, clause 3 of the Constitution, containing the Indian Commerce Clause, established Congress’s power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3.

75. JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1092–96 (1833), [http://press-pubs.uchicago.edu/founders/documents/a1\\_8\\_3\\_indians11.html](http://press-pubs.uchicago.edu/founders/documents/a1_8_3_indians11.html) (last visited Jan. 28, 2019).

76. Indian Trade and Intercourse Act, ch. 33, 1 Stat. 137 (1790). Section 4 of the Act provided that:

[N]o sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

*Id.* at 138.

will never consent to your being defrauded, but it will protect you in all your just rights.”<sup>77</sup>

Concerned about maintaining good relations with the Oneida Nation and the other Six Nations at a time when the United States was engaged in military conflicts with tribes farther west,<sup>78</sup> the United States signed a treaty with the Six Nations in 1794. In the Treaty of Canandaigua, the United States acknowledged the 300,000-acre reservation retained by the Oneida Nation in the 1788 transaction with New York, pledged that it would “never claim the same nor disturb them . . . in the free use and enjoyment thereof,”<sup>79</sup> and required federal oversight for any future land cessions.<sup>80</sup> The treaty also clarified the western boundary between the Six Nations and the United States in Seneca Nation territory and included a commitment to provide clothing and other goods to the Six Nations annually.<sup>81</sup> To this day, the United States annually sends bolts of “treaty cloth” to each of the Six Nations.<sup>82</sup>

In another treaty in the same year, the United States undertook (belatedly) to compensate their “faithful friends” the Oneidas for

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77. *Oneida Indian Nation of N.Y. v. County of Oneida*, 464 F.2d 916, 918–19 (2d Cir. 1972) (quoting George Washington), *rev'd*, *Oneida Indian Nation of N.Y. v. County of Oneida (Oneida I)*, 414 U.S. 661 (1974).

78. TAYLOR, *supra* note 28, at 241, 287–88 (noting the need “to cultivate the Six Nations,” the U.S. government’s work to preserve the Six Nations’ neutrality, and describing the 1794 offensive by General Anthony Wayne against tribes in the Ohio Valley).

79. Treaty with the Six Nations, Nov. 11, 1794, 7 Stat. 44 [hereinafter Treaty with the Six Nations (1794)]. Article 2 of the Treaty with the Six Nations (1794) provides:

The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New-York, and called their reservations, to be their property; and the United States will never claim the same nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them in the free use and enjoyment thereof . . . .

*Id.* at 45. The treaty is available in 2 INDIAN AFFAIRS: LAWS AND TREATIES 35–36 (Charles J. Kappler ed., 1904), [http://avalon.law.yale.edu/18th\\_century/six1794.asp](http://avalon.law.yale.edu/18th_century/six1794.asp) (last visited Jan. 28, 2019).

80. TAYLOR, *supra* note 28, at 291. This requirement was set out in treaty language guaranteeing that their reservation lands would remain theirs “until they choose to sell the same to the people of the United States, who have the right to purchase.” Treaty with the Six Nations (1794), *supra* note 79, at 45.

81. Treaty with the Six Nations (1794), *supra* note 79, arts. 3, 6.

82. PEOPLE OF THE STANDING STONE, *supra* note 10, at 94; *see also* Oneida Indian Nation, *Treaty of Canandaigua Anniversary Nov. 11, ONEIDA*, <http://www.oneidaindiannation.com/treaty-of-canandaigua-anniversary-nov-11> (last visited Jan. 28, 2019).

the losses that they suffered during the war.<sup>83</sup> The United States promised to provide \$5000 in cash, to be distributed among members of the Oneida and Tuscarora Nations “as a compensation for their individual losses and services.”<sup>84</sup> The United States would also provide \$1000 “to be applied in building a convenient church at Oneida, in the place of the one which was there burnt by the enemy, in the late war.”<sup>85</sup> The 1794 treaties did not, however, undo the damage done by the prior “treaties” with New York State, which had dispossessed them of substantial portions of the land that had been guaranteed to them by the 1784 Treaty of Fort Stanwix. Rather, the Oneidas and the other Six Nations were left to drown in a sea of white settlement.

Neither the Constitution, the 1790 Nonintercourse Act, nor the 1794 treaties deterred New York State. The State repeatedly entered into transactions in which it purported to purchase treaty-protected Indian land. The Oneidas’ remaining land, consisting of “the heartland of their territory,” straddled a key transportation corridor, rendering it particularly vulnerable to expropriation.<sup>86</sup> The State ignored federal warnings that its actions with regard to Indian land were illegal.<sup>87</sup> In a 1795 transaction, for instance, the State

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83. Treaty with the Oneida, Tuscarora, and Stockbridge Indians, Dec. 2, 1794, 7 Stat. 47, pmbl. The treaty stated as follows:

WHEREAS, in the late war between Great-Britain and the United States of America, a body of the Oneida and Tuscarora and the Stockbridge Indians, adhered faithfully to the United States, and assisted them with their warriors; and in consequence of this adherence and assistance, the Oneidas and Tuscaroras, at an unfortunate period of the war, were driven from their homes, and their houses were burnt and their property destroyed: And as the United States in the time of their distress, acknowledged their obligations to these faithful friends, and promised to reward them: and the United States being now in a condition to fulfil the promises then made: the following articles are stipulated by the respective parties for that purpose . . . .

*Id.* For examples of individual Oneidas’ wartime losses, see *The Oneida Nation in the American Revolution*, NAT’L PARK SERV.: FORT STANWIX, <https://www.nps.gov/fost/learn/history/culture/the-oneida-nation-in-the-american-revolution.htm> (last visited Jan. 28, 2019).

84. Treaty with the Oneida, Tuscarora, and Stockbridge Indians, *supra* note 83, art. 1.

85. *Id.* art. 4.

86. PEOPLE OF THE STANDING STONE, *supra* note 10, at 95.

87. An opinion of the U.S. Attorney General, for example, stated that title to the Six Nations’ land could be extinguished only by a treaty entered into under the United States’ authority. *Seneca Nation of Indians v. New York*, 206 F. Supp. 2d 448, 494 (W.D.N.Y. 2002). Colonel Timothy Pickering, who served as Secretary of War following the Treaty of Canandaigua, forwarded the Attorney General’s opinion to New York’s Governor Clinton

purported to purchase from the Oneida Nation more than half of the Oneida Reservation in exchange for cash and annual payments at a price far below the land's fair market value.<sup>88</sup> State officials had proceeded with the negotiations for the 1795 "treaty" after it was made clear to them that even if the Oneida Nation acquiesced in such an agreement, it would still be void.<sup>89</sup> Between the 1794 Treaty of Canandaigua and the end of the War of 1812, eight "treaties" were signed, leading to a landlocked reservation that was surrounded by nearly 75,000 whites.<sup>90</sup> All in all, during the late eighteenth and early nineteenth centuries, more than thirty purchase "treaties" were entered into with various segments of the Oneida Nation.<sup>91</sup> Oneida lands were surveyed, laid out in townships, subdivided, and sold to private parties.<sup>92</sup> Purchases made without

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and also ordered the Superintendent of the Affairs of the Six Nations not to help New York with any purchases of Indian land. *Id.* The amended version of the Nonintercourse Act in effect at this time provided that "[n]o purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the Constitution." Act of March 1, 1793, 1 Stat. 329 (1793) (codified at 25 U.S.C. § 177).

88. TAYLOR, *supra* note 28, at 304–06 (discussing the discrepancy between price and fair market value and cession terms); *see also* PEOPLE OF THE STANDING STONE, *supra* note 10, at 96–101 (discussing the context of the 1795 "treaty," the negotiations, and the terms). For a map of the Oneida Reservation, circa 1795, that shows the lands taken by the State in 1795 and an important transportation route, the Genesee Road, passing through the Reservation, *see* TAYLOR, *supra* note 28, at 296. For an extensive examination of the 1795 "treaty" and its relation to the Nonintercourse Act, *see* Jack Campisi, *New York-Oneida Treaty of 1795: A Finding of Fact*, 4 AM. INDIAN L. REV. 71 (1976) [hereinafter *New York-Oneida Treaty of 1795*].

89. *New York-Oneida Treaty of 1795*, *supra* note 88, at 76. Secretary of War Pickering represented the United States in the negotiations with the Six Nations that led to the 1794 Treaty of Canandaigua. *Id.* at 72.

90. PEOPLE OF THE STANDING STONE, *supra* note 10, at 96–98. For a map indicating cessions of Oneida land during this period, *see id.* at 97.

91. *Oneida Indian Nation of N.Y. v. City of Sherrill*, 337 F.3d 139, 148 (2d Cir. 2003) (citing Jack Campisi, *Oneida*, in 15 HANDBOOK OF NORTH AMERICAN INDIANS 481, 484 (Bruce G. Trigger ed., 1978) [hereinafter *Oneida*]). Findings of fact by the Indian Claims Commission in 1971 list the transactions entered into between the State and the Oneida Nation, or segments of the Nation, between 1795 and 1846. *Oneida Indian Nation of N.Y. v. United States*, 26 Indian Cl. Comm'n 138, 150–62 (Findings of Fact) (1971).

92. *Oneida Indian Nation*, 337 F.3d at 148. Individual Oneidas also purported to sell land to private parties. The so-called Sherrill Properties considered in the *Sherrill* litigation fall into this group of conveyances. *Id.*

federal consent clearly violated the Nonintercourse Act,<sup>93</sup> as well as being contrary to the 1794 Treaty of Canandaigua.<sup>94</sup>

#### 4. *Attempted removal, Oneida refusal*

After the War of 1812, State officials and economic interests became increasingly enthusiastic about the idea of removing the Six Nations from the State entirely. The remaining Oneida land, situated along the prime route for canal-building projects, was particularly desirable.<sup>95</sup> Under pressure from the State to leave, the Six Nations purchased land in Wisconsin from the Menominee and Winnebago tribes,<sup>96</sup> to which several hundred Oneidas moved in the 1820s.<sup>97</sup> Oneidas remaining in New York “held a single and undivided tract reserved out of the original Oneida reservation.”<sup>98</sup>

The 1830 Removal Act provided a mechanism for the removal of (supposedly) willing tribes to trans-Mississippi lands for which they could exchange their eastern lands.<sup>99</sup> In the 1838 Treaty of Buffalo Creek, members of the Six Nations agreed to remove to an area in Kansas, which had been set aside as Indian territory.<sup>100</sup> By

93. *Id.* at 147 (“The Supreme Court has consistently applied the principle, embodied in the Nonintercourse Act, that federal consent is required for purchases of Indian land or for the termination of aboriginal title. The absence of federal consent is the Oneidas’ central argument in this litigation.” (citations omitted)).

94. *See supra* notes 79–80 and accompanying text.

95. PEOPLE OF THE STANDING STONE, *supra* note 10, at 128 (noting that Oneida land “was situated along the most direct level route between the Mohawk River and Lake Erie”). For a detailed study of the role of transportation interests in the dispossession of the Oneida Nation and the other Six Nations, see LAURENCE M. HAUPTMAN, CONSPIRACY OF INTERESTS: IROQUOIS DISPOSSESSION AND THE RISE OF NEW YORK STATE (1999). The Oneida Nation was the tribe that was most affected by the State’s “transportation revolution” because its lands “were situated at a vital transportation crossroads that was essential for New York’s economic growth after the Revolution.” *Id.* at 27.

96. *New York Indians v. United States*, 170 U.S. 1, 11–14 (1898).

97. *United States v. Boylan*, 265 F. 165, 167 (2d Cir. 1920).

98. *Boylan*, 265 F. at 167.

99. *See* Act of May 28, 1830, 4 Stat. 411. The Act provided:

That it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States, west of the river Mississippi, not included in any state or organized territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts, for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there . . .

*Id.* at 411–12.

100. Treaty with the New York Indians, Jan. 15, 1838, 7 Stat. 550. The treaty provided for removal from New York and Wisconsin lands on which Six Nations members then resided.

this time, only approximately 5000 acres of the Oneidas' reservation land remained in their hands and (according to a schedule to the treaty) around 620 Oneidas still resided in New York State.<sup>101</sup> The Oneidas did not make any commitment to leave the State.<sup>102</sup> Rather, the treaty premised Oneida removal on their being able to "make satisfactory arrangements" with New York "for the purchase of their lands at Oneida."<sup>103</sup> No such arrangements were ever made, and the New York Oneidas did not relocate to Kansas,<sup>104</sup> although some did move to Wisconsin and to Ontario, Canada.<sup>105</sup> By the middle of the nineteenth century, approximately 200 Oneidas resided in the State.<sup>106</sup> They survived in the midst of a non-Indian population that had grown exponentially since the State began acquiring Oneida land illegally. The population of Oneida County, for example, which was under 2,000 in 1790, grew to almost 21,000 in 1800 and to about 107,750 in 1855.<sup>107</sup>

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101. *Oneida Indian Nation of N.Y. v. City of Sherrill*, 337 F.3d 139, 149–50 (2d Cir. 2003) (citing Buffalo Creek Treaty, 7 Stat. 550 (1838), sch. A, add. 29).

102. Some of the other Six Nations did make removal commitments, including the Senecas and the Tuscaroras. As it turned out, most of the Six Nations Indians did not remove to Kansas. The federal government disposed of the Wisconsin lands conveyed to it and placed the unoccupied Kansas land in the public domain for sale to settlers. *New York Indians v. United States (New York Indians II)*, 170 U.S. 1, 4, 24 (1898). In 1898, the Supreme Court held that the Buffalo Creek Treaty "effected a present grant of the Kansas lands to the Indians and that forfeiture of these lands could occur only through legislative action." *Oneida Indian Nation*, 337 F.3d at 151. The Court concluded that the Oneidas and the other New York Indians were entitled to money damages. *New York Indians II*, 170 U.S. at 25–36.

103. Treaty with the New York Indians, *supra* note 100, at 554. Article 13 of the treaty provided as follow:

The United States will pay the sum of four thousand dollars, to be paid to Baptista Powlis, and the chiefs of the first Christian party residing at Oneida, and the sum of two thousand dollars shall be paid to William Day, and the chiefs in securing the Green Bay country, and the settlement of a portion thereof; and they hereby agree to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Government of the State of New York for the purchase of their lands at Oneida.

*Id.* The Oneida Nation's participation in the Buffalo Creek negotiations was limited, as only representatives of one tribal faction were present. *PEOPLE OF THE STANDING STONE*, *supra* note 10, at 162.

104. *New York Indians II*, 170 U.S. at 9–10.

105. *Oneida Indian Nation*, 337 F.3d at 150.

106. *Id.* (citing *Oneida*, *supra* note 91, at 485).

107. *HAUPTMAN*, *supra* note 95, at 6 (stating that the population was 1,891 in 1790, 85,310 in 1840, and 107,749 in 1855).

The dispossession of the Oneida Nation continued as additional purported purchases led to further shrinking of the land remaining in Oneida possession.<sup>108</sup> According to Annual Reports of the Commissioner of Indian Affairs, Oneida holdings in New York State shrank to approximately 350 acres in 1890 and 100 acres in 1893.<sup>109</sup> By the time the United States brought suit in 1920 to protect a group of Oneidas from ejection from Oneida Reservation land, the land holdings had shrunk to 32 acres.<sup>110</sup>

It is important to emphasize that the 1794 Treaty of Canandaigua was never abrogated and the Oneida Reservation that it recognized was never disestablished. These are actions that Congress alone can take. Nonetheless, New York State's exploitative and illegal actions over the years showed considerable success in achieving the State's goal of taking the Nation's land and undermining its status as a tribe. The survival of the Oneida Nation is a testament to the Nation's resilience in the face of repeated attacks on its homeland and its survival.

##### *5. New York State, the Oneidas' deadliest enemy*

New York State's conduct toward the Oneida Nation over the centuries paints a painful, and indeed shameful, picture. During the war for independence, the United States, and New York State in particular, benefited from the Oneida alliance, and expressed gratitude for the Oneidas' military and intelligence-gathering services. Once independence was achieved, however, and the Oneidas went home to destroyed villages, New York moved quickly to take Oneida land. As the discussion above has shown, by use of threats and trickery, and by deliberately taking advantage of Oneida poverty and marginalization, New York was able to acquire most of the Oneida Nation's land and resell it at a profit,

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108. *Oneida Indian Nation*, 337 F.3d at 150 (noting that "[t]he record does not reflect any large block sales of reservation land to New York State by the Oneidas after 1842, when 1100 acres were conveyed. But as the exodus of members continued over the next half-century, reservation acreage inhabited by Oneidas shrank significantly, by some accounts to less than 100 acres." (citations omitted)).

109. *Id.* (citing COMM'R OF INDIAN AFFAIRS, ANNUAL REPORT (1890), (1893)) ("stating that the Oneida Reservation contained only approximately 350 acres in 1890, and approximately 100 acres in 1893 when the tribe's New York branch itself numbered less than 200").

110. *United States v. Boylan*, 265 F. 165 (2d Cir. 1920).



thus building up the treasury of the Empire State. State leaders knowingly violated federal law in furtherance of their objectives. The State's actions were consistent with the Supreme Court's pronouncement in *United States v. Kagama* that, for tribes, "the people of the States where they are found are often their deadliest enemies."<sup>111</sup>

New York State did not, however, completely accomplish the goal of solving what nineteenth century State legislators termed the "Indian problem"<sup>112</sup> — the continued presence of the Oneidas and the other Six Nations. Despite expectations that the Oneida Nation would be completely erased from the landscape, the Oneidas remained, reduced in numbers and dispossessed of most of their land, but still a sovereign people. In the years ahead, the Oneidas of New York were to demonstrate their determination to retain their remaining land and to take action to recover wrongfully taken land. They would also show their willingness, despite the mistreatment that they experienced, to share the economic benefits and opportunities that they created on their land with other citizens of the State.

B. *"Surrender Your Sovereignty – Resistance Is Futile."*

*We are the Borg. Lower your shields and surrender your ships. We will add your biological and technological distinctiveness to our own. Your culture will adapt to service us. Resistance is futile.*<sup>113</sup>

By actions and words, New York State has repeatedly conveyed a message with respect to Oneida tribal sovereignty that can be summarized as follows: "We demand your submission. We do not respect your sovereignty and will overshadow it with our own." In brief, the message is "Surrender your sovereignty – resistance is futile." The State and its citizens have found, however, that like

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111. *United States v. Kagama*, 118 U.S. 375, 384 (1886) ("They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.").

112. HAUPTMAN, *supra* note 95, at 155 (showing that the New York State Assembly appointed a committee, referred to as the Whipple Committee, to investigate the "Indian problem" in 1888).

113. STAR TREK: FIRST CONTACT (Paramount Pictures 1996).

Oneida property rights, Oneida sovereignty is impossible to extinguish.

Even after New York managed, through a long string of illegal transactions, to dispossess the Oneida Indian Nation of New York of most of its homeland, a small amount of land remained in Oneida hands. In addition, the United States Congress never abrogated the 1794 Treaty of Fort Canandaigua or dissolved the Oneida Reservation that the treaty recognized. The government-to-government relationship between the Nation and the United States was never extinguished. Nevertheless, as discussed below, state and local officials preferred to act as if the Nation were long gone, along with its rights to land and to self-determination as a people. The Oneidas as individuals, and as a nation, proved to be more resourceful and resilient than state officials had expected. By governing land in New York State today, the Oneida Nation continues to demonstrate its refusal to surrender its sovereignty and the State's failure to achieve its Borg-like goal.

*1. Fighting for what remains: The Boylan case and state jurisdiction claims*

Early in the twentieth century, state and local officials were reminded of the survival of the Oneida Nation as a tribe, with treaty and property rights and a continuing relationship with the national government. A dispute arose when a group of non-Indians claimed title to land within the Oneidas' remaining 32-acre tract on the Oneida Reservation.<sup>114</sup> The land at issue was purchased at a mortgage foreclosure sale and was ultimately conveyed to Julia Boylan, who commenced a state court action for the partition of the property.<sup>115</sup> After the partition process was completed, the state court held that the Oneidas' interest in the property was extinguished. At the time that these proceedings took place, Oneida tribal members were in possession of the land and occupied it until they were forcefully ejected and removed under protest, pursuant to a court order.<sup>116</sup> Thus, New York State was not itself taking land

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114. *Boylan*, 265 F. at 166.

115. *Id.*

116. *Id.* at 167.

from the Oneida Nation, but, like the courts that enforced racially restrictive covenants prior to *Shelley v. Kraemer*,<sup>117</sup> the State's judicial system provided a mechanism for undermining the property rights of people of color.

Oneida chiefs sent a memorial to New York State officials, claiming the 32-acre parcel on behalf of the Nation, enjoyed as "a common and equal right,"<sup>118</sup> but to no avail. The United States then asserted its right to litigate on behalf of the Oneidas. In *United States v. Boylan*, the United States brought suit to eject the non-Indians who claimed title.<sup>119</sup> In its 1920 opinion in the case, the Court of Appeals for the Second Circuit held that "the attempted conveyance of these lands and the judgment of sale and partition is null and void" and approved "the decree restoring the ejected Indians to possession."<sup>120</sup> In reaching this conclusion, the court reviewed and applied key Indian law principles with regard to tribal sovereignty and nationhood, the primacy of the federal government in matters related to tribes, the relationship between tribes and the United States, and tribal property rights.

First, the court found that the Oneida Indians were "a distinct people, tribe, or band" who had not been "completely incorporated with us"<sup>121</sup> and whose "right of self-government has never been taken from them."<sup>122</sup> Second, because the Oneidas were "a separate nation, the exclusive jurisdiction over the Indians [was] in the federal government"<sup>123</sup> and the United States government had the sole power to act as their guardian.<sup>124</sup> Third, the United States maintained a treaty relationship with the Oneidas and accordingly

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117. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

118. U.S. Dep't of the Interior, Amendment to the May 20, 2008 Record of Decision for Oneida Indian Nation of New York Fee-to-Trust Request 23 (Dec. 23, 2013) [hereinafter Oneida Trust ROD Amendment], <https://turtletalk.files.wordpress.com/2014/03/344-in-terior-rod-amendment.pdf>.

119. *Boylan*, 265 F. at 165.

120. *Id.* at 174 (affirming the district court's decision).

121. *Id.* at 171.

122. *Id.* at 173.

123. *Id.* at 171; *see also id.* at 173 (noting that there "are many acts indicating the exercise and enforcement of the jurisdiction of the federal government over the Indians in the state of New York").

124. *Id.* at 173; *see also id.* at 174 (stating that "the United States and the remaining Indians of the tribe of the Oneidas still maintain and occupy toward each other the relation of guardian and ward").

continued to provide funds for their support.<sup>125</sup> And finally, the court found that the Oneida Nation's unquestioned right to occupy its lands could not be extinguished by the State and, given the collective nature of tribal rights in reservation lands, the lands could not be held in severalty, mortgaged, or encumbered.<sup>126</sup>

In short, the Second Circuit concluded that despite over 100 years of efforts by the State to absorb, or remove, the Oneidas, they had survived as a separate Nation, with a continuing treaty and trust relationship with the United States and collective rights in remaining tribal land on the Nation's reservation. The recognition of the survival of the Oneida Indian Nation of New York as a separate nation, which had never been deprived of the right of self-government, was in effect an acknowledgment of the resilience of the Nation.

## *2. Maintaining self-governance and rejecting submission*

In addition to participating in the illegal dispossession of most of the Nation's reservation land, the State had long tried to absorb the Oneidas politically and eradicate tribal sovereignty. Starting in 1855 and continuing into the twentieth century, regular reports were prepared at the request of the State legislature to investigate the "Indian problem" and to determine how best to speed up assimilation and detribalization.<sup>127</sup>

Although most of state policy was focused explicitly on seizing Six Nations land, this policy inevitably impacted tribal sovereignty as well, because reducing the tribal land base undermines tribal sovereignty. As sovereigns, tribes have power over their territory, so shrinking the territory impacts the extent of tribal governmental power. Some state actions in the nineteenth century infringed more directly on tribal authority. These actions included the adoption of laws aimed at controlling lumber cutting and leasing on tribal lands.<sup>128</sup> An effort to tax tribal land, however, was slapped down

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125. *Id.* at 171 (noting Treaties with the Six Nations in 1784, 1789, 1794, 1838, and 1842).

126. *Id.* at 173-74.

127. LAURENCE M. HAUPTMAN, FORMULATING AMERICAN INDIAN POLICY IN NEW YORK STATE, 1970-1986, at 10-14 (1988) [hereinafter HAUPTMAN, FORMULATING INDIAN POLICY] (describing reports starting in 1855 and continuing through 1922).

128. *Id.* at 9.

by the U.S. Supreme Court in the 1866 case, *In re New York Indians*.<sup>129</sup> Rejecting the State's argument that Seneca lands were subject to taxation, the Court stated:

Until the Indians have sold their lands, and removed from them . . . they are to be regarded as still in their ancient possessions, and are in under their original rights, and entitled to the undisturbed enjoyment of them. . . .

. . . We must say, regarding these reservations as wholly exempt from State taxation, . . . the exercise of this authority over them is an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations.<sup>130</sup>

The Court recognized that tribal relations, including the cohesiveness of a tribe as a political entity, would be undermined by the imposition of state taxing authority on tribal lands.

Undeterred by this setback, or by the subsequent decision in the *Boylan* case discussed above,<sup>131</sup> the State continued to seek greater control over the New York tribes.<sup>132</sup> From the 1920s on, the State sought the criminal and civil jurisdiction over tribes and reservation lands that it lacked under basic Indian law principles.<sup>133</sup> The State's efforts bore fruit during the Termination Era. In 1948, Congress granted the State "jurisdiction over offenses committed by or against Indians on Indian reservations[.]"<sup>134</sup> This was followed in 1950 by a statute granting the State's courts jurisdiction over civil actions and proceedings in which Indians were parties.<sup>135</sup>

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129. *Id.*

130. *In re New York Indians*, 72 U.S. (1 Wall.) 761, 770–71 (1866).

131. See *supra* notes 119–126 and accompanying text.

132. HAUPTMAN, FORMULATING INDIAN POLICY, *supra* note 127, at 13. In 1915, for example, the State Constitutional Convention drafted an amendment (which voters later rejected) that would have abolished Indian courts and transferred jurisdiction to state courts. *Id.* at 12.

133. From the 1920s until 1950, the State focused on obtaining criminal and civil jurisdiction over Indians. *Id.* at 14. Under foundational Indian law principles, dating to the 1830s, states generally lack jurisdiction over matters involving Indians on reservation lands. *Worcester v. Georgia*, 31 U.S. 515, 561 (1832) ("The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force").

134. Act of July 2, 1948, ch. 809, 62 Stat. 1224.

135. Act of Sept. 13, 1950, ch. 1947, 64 Stat. 845 (providing that New York courts "shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons").

However, the text of the civil jurisdiction statute provided that Indian reservations were not subject “to taxation for State or local purposes” or to execution on any state court judgment.<sup>136</sup> Significantly, these statutes did not purport to eliminate, or even limit, the sovereignty and tribal authority of the Oneidas and other tribes in the State.

The New York Oneidas, meanwhile, had continued to hold tribal meetings as needed and were represented in the Six Nations Council. Within the Oneida Nation, chiefs were elected and were accountable to the tribal membership.<sup>137</sup> The Nation interacted with and was included in reports and census records of the federal government.<sup>138</sup> These federal government interactions included participation in the distribution of the treaty cloth provided annually in fulfillment of an obligation under the Treaty of Canandaigua.<sup>139</sup> The Nation’s ability to maintain its sovereignty and treaty relationship with the federal government—especially in the face of the State’s efforts to use federal legislation to expand its authority over New York Indians and their reservations—demonstrates the Nation’s remarkable persistence and resilience.

The Nation also took action as a sovereign seeking redress for the unlawful dispossession of its land via the Indian Claims Commission. The New York and Wisconsin Oneidas initiated proceedings before the Commission in 1951 with regard to lands ceded to New York State in twenty-seven transactions between 1785 and 1846.<sup>140</sup> The Oneidas received favorable decisions from the Commission and the Court of Claims on their claim that the federal government had a fiduciary duty to ensure that they had received “conscionable consideration” for the taken lands.<sup>141</sup> The Claims Commission victories, however, had a significant limitation: the

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136. *Id.* The statutory text also made it clear that it did not confer jurisdiction or make State law applicable “in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to [September 13, 1952].” *Id.* at 845–46.

137. Oneida Trust ROD Amendment, *supra* note 118, at 25.

138. *Id.* at 26–27.

139. *Id.* at 27–28; *see also supra* notes 81–82 and accompanying text (discussing the treaty cloth).

140. Oneida Nation of N.Y. v. United States, 37 Indian Cl. Comm’n 522, 522 (1976) (transactions in 1785 and 1788); *id.* at 531 (twenty-five transactions after 1790).

141. Oneida Nation of N.Y. v. United States, 26 Indian Cl. Comm’n 138, 145 (1971).

Commission proceedings could only result in monetary damages, which would not adequately compensate the Oneidas for what had been taken from them.<sup>142</sup> Moreover, these proceedings were against the United States, rather than against New York State and its subdivisions, which had dispossessed the Nation and still held some of the taken land. In 1970, the Oneidas filed a land claim in federal district court against Oneida and Madison Counties, based on the 1795 cession that had violated the Nonintercourse Act.<sup>143</sup> Although the Oneidas achieved important victories before the Supreme Court,<sup>144</sup> the resulting negotiation and mediation process went on for years without reaching a settlement.<sup>145</sup>

Although these claims were focused on property rights, it is important to emphasize that they were predicated on sovereignty. As the case names indicate, the Nation, rather than individual tribal members, brought the claims in its capacity as a sovereign. The basis for the right to redress was the violation of a treaty entered into by the historical Oneida Nation as a sovereign and now being vindicated by its modern-day successor sovereign in New York State. Like the continuing vitality of tribal governmental

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142. The Commission found in favor of the Oneidas with regard to the 1785 and 1788 transactions, a decision that was upheld by the Court of Claims. *United States v. Oneida Nation of N.Y.*, 576 F.2d 870, 881–82 (Ct. Cl. 1978). The Commission also found in favor of the Oneidas as to the other twenty-five transactions. *Oneida Nation*, 26 Indian Cl. Comm'n at 139, 163. The Court of Claims upheld the Commission's decision as to the transactions dated June 1, 1798, and June 4, 1802, but remanded the case as to the remaining twenty-three transactions for a determination of whether the United States knew of these transactions and therefore breached its fiduciary duty by failing to protect Oneida interests. *United States v. Oneida Nation of N.Y.*, 477 F.2d 939, 944–45 (Ct. Cl. 1973). The Oneidas ultimately withdrew their complaint before the Indian Claims Commission, with prejudice, after having litigated it for more than thirty years, so as to pursue a land claim rather than settle for the monetary damages that would result from success before the Commission. Tahsuda, *supra* note 5, at 1006.

143. The Oneidas argued in the 1970 “test case” against Oneida and Madison counties that the cession of 100,000 acres to the State in 1795 violated the Nonintercourse Act and thus did not terminate their right to possession. They sought damages measured by the fair rental value, for two years, of land occupied by the two counties. *Oneida Indian Nation of N.Y. State v. County of Oneida (Oneida I)*, 414 U.S. 661, 663–65 (1974).

144. The Supreme Court held in 1974 that the Oneidas had stated a federal claim. *Oneida I*, 414 U.S. at 675. The Court subsequently held that they could maintain their claim to be compensated “for violation of their possessory rights based on federal common law.” *County of Oneida v. Oneida Indian Nation of N.Y. (Oneida II)*, 470 U.S. 226, 236 (1985).

145. U.S. Dep't of the Interior, Record of Decision: Oneida Indian Nation of New York Fee-to-Trust Request 11 (May 2008) [hereinafter Oneida Trust ROD]; *see also* *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 209–10 (2005) (discussing the litigation in the lower federal courts after *Oneida II*).

institutions, the claims showed the Nation's remarkable resilience in the face of longstanding efforts to divest the Nation of the treaty-guaranteed land base on which it was entitled to exercise its sovereignty. Rather than acceding to the State's demands for submission, the Nation repeatedly conveyed the message that it had not surrendered and would not surrender its sovereignty.

C. *"By Surviving as a People, You Are Spoiling Our Plans."*

The message conveyed by the State in response to the Oneidas' survival amounts to the following: "We are inconvenienced by your unexpected and disruptive survival as a people. We expected you to be long gone by now, along with all the other 'dying Indians.'" In other words, "You are spoiling our plans."

1. *Rebuilding the tribal land base*

Undeterred by the frustrations of the land claims proceedings discussed above, the Nation pursued other means to try to restore its land base. Beginning in 1987, the Nation began making purchases of land within the boundaries of the Oneida Reservation guaranteed by the Treaty of Canandaigua. Because the reacquired parcels are within the limits of an Indian reservation, under federal law, they are by definition "Indian country" — "the geographic area in which tribal and federal laws normally apply and state laws do not."<sup>146</sup> The Nation asserted jurisdiction over its reacquired lands, managing the lands under Nation law, and entered into agreements with interested municipalities on issues like law enforcement and public health and safety.<sup>147</sup>

In 1993, in a further exercise of sovereignty, the Nation entered into a gaming compact with the State, pursuant to the provisions of the Indian Gaming Regulatory Act.<sup>148</sup> The Nation has been

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146. Oneida Indian Nation of N.Y. v. City of Sherrill, 337 F.3d 139, 153 (2d Cir. 2003) (citing 18 U.S.C. § 1151).

147. Oneida Trust ROD, *supra* note 145, at 21, 57.

148. Nation-State Compact Between the Oneida Indian Nation of New York and the State of New York (1993) [hereinafter Nation-State Compact], [https://www.bia.gov/sites/bia\\_prod.opengov.ibmcloud.com/files/assets/as-ia/oig/oig/pdf/idc1-025715.pdf](https://www.bia.gov/sites/bia_prod.opengov.ibmcloud.com/files/assets/as-ia/oig/oig/pdf/idc1-025715.pdf). The Department of the Interior approved the compact in 1993. Bureau of Indian Affairs, Notice of Approved Nation-State Compact, 58 Fed. Reg. 33160 (June 15, 1993). At the time that the Department approved the Compact, the Nation was conducting gaming on its 32-acre tract



conducting Class III gaming at Turning Stone Resort Casino, located on reacquired tribal land, since that time.<sup>149</sup> The Nation did not pay taxes on reacquired lands on the basis of tribal tax immunity,<sup>150</sup> but did voluntarily make payments and other contributions in recognition of its use of services of state and local governments.<sup>151</sup>

In 1997 and 1998, the Nation reacquired several parcels of reservation land located in the City of Sherrill in Madison County (the Sherrill Properties). After the Nation, relying on tribal tax immunity, refused to pay property taxes that Sherrill assessed on the Sherrill Properties, Sherrill purchased some of the parcels at tax sales and instituted eviction proceedings in state court, actions that the Nation challenged in federal district court.<sup>152</sup> In 2001, the district court held that tribally owned land in Sherrill was not taxable, a decision that the Court of Appeals for the Second Circuit affirmed in 2003.<sup>153</sup> The Second Circuit concluded that the parcels at issue qualify as “Indian country,” that tribal sovereign immunity barred the eviction action, and that the record demonstrated the Nation’s continuous tribal existence.<sup>154</sup>

City officials’ conduct may look like the unremarkable reaction of a government to a feared loss of tax revenue through reduction of its tax base. The City of Sherrill’s action was, however, anything

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and had built a major new facility to house gaming operations. Letter from Thomas Thompson, Acting Assistant Sec’y of Indian Affairs, to Niels C. Holch (June 4, 1993), [https://www.bia.gov/sites/bia\\_prod.opengov.ibmcloud.com/files/assets/as-ia/oig/oig/pdf/idc1-025715.pdf](https://www.bia.gov/sites/bia_prod.opengov.ibmcloud.com/files/assets/as-ia/oig/oig/pdf/idc1-025715.pdf) (approving the Compact).

149. Oneida Trust ROD, *supra* note 145, at 8–9 (citing Nation-State Compact, *supra* note 148).

150. *Id.* at 22, 50 (noting that prior “to the Supreme Court’s decision in *City of Sherrill*, the Nation’s lands were considered not subject to taxation”). Regardless of the taxability of the Nation’s land, as a matter of federal law (i.e., the Indian Gaming Regulatory Act), taxes cannot be assessed on gaming and gaming-related improvements. *Id.* at 50–51.

151. *Id.* at 22, 47, 57–58.

152. Oneida Indian Nation of N.Y. v. City of Sherrill, 337 F.3d 139, 144 (2d Cir. 2003). The Nation sued the City in federal district court, arguing that the parcels were exempt from state and local taxation and seeking declaratory and injunctive relief as to the eviction and imposition of property taxes. *Id.* The Nation also sought a declaration that its lands in Madison County were not taxable. *Id.* at 145.

153. Oneida Indian Nation of N.Y. v. City of Sherrill, 145 F. Supp. 2d 226, 266 (N.D.N.Y. 2001), *aff’d*, 337 F.3d 139.

154. *Oneida Indian Nation*, 337 F.3d at 155–56, 146, 165. The court of appeals noted that there was no legal requirement that “a federally recognized tribe demonstrate its continuous existence in order to assert a claim to its reservation land[,]” but, in any case, the record showed the Nation’s continuous existence. *Id.* at 165–67.

but routine. The City sought to impose its authority over a federally recognized tribe, with regard to tribally owned land located within the tribe's treaty-guaranteed reservation. Moreover, the City's actions do not exist in the abstract but rather must be viewed against the backdrop of tribal-state relations over the past two centuries, as explored in the discussion above. The conduct of the State and its subdivisions suggests that they expected the Oneidas and Oneida legal rights to be of short-term duration. The continued existence of the Oneida Nation and its sovereignty-based claim to tax immunity for its reservation land were unexpected and inconvenient. They served as reminders to the subdivisions of the Empire State that the erasure of the Oneida Nation from the State was incomplete. These Indians had, in short, failed to die off.

## 2. *The myth of the "dying Indian"*

In the nineteenth century, many Americans bought into the myth of the "dying Indian." American Indians were perceived as a dying race, doomed to extinction because they could not survive in the face of a superior civilization. This expectation underlay official government policy and was embraced by popular culture. It was expressed in literary works, such as James Fenimore Cooper's *The Last of the Mohicans* (1826). Cooper grew up in Cooperstown, founded by his father, and reportedly met Oneidas as a young man.<sup>155</sup> William Cullen Bryant's mid-nineteenth-century poem "The Disinterred Warrior" reflects the views of the time:

A noble race! but they are gone,  
With their old forests wide and deep,  
And we have built our homes upon  
Fields where their generations sleep.  
Their fountains slake our thirst at noon,  
Upon their fields our harvest waves,

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155. According to his daughter Susan Fenimore Cooper, when Cooper was a young man, "occasionally some small party of the Oneidas, or other representatives of the Five Nations, had crossed his path in the valley of the Susquehanna, or on the shores of Lake Ontario, where he served when a midshipman in the navy." SUSAN FENIMORE COOPER, PAGES AND PICTURES FROM THE WRITINGS OF JAMES FENIMORE COOPER, WITH NOTES 129 (W.A. Townsend & Co. 1861).

Our lovers woo beneath their moon—  
Then let us spare, at least, their graves.<sup>156</sup>

Some believed that part of the race would survive, but that their only hope to do so was through assimilation, as individuals, into the dominant society. This was certainly the view of the missionaries who established themselves on Haudenosaunee lands. They sought to “kill the Indian, and save the man,” to quote Captain Richard Pratt, the founder and longtime superintendent of the Carlisle Indian Industrial School,<sup>157</sup> which a number of Oneida and other Six Nations children attended.<sup>158</sup>

For those who sought to “save” Indians via assimilation, by what we would today call cultural genocide, tribal sovereignty was anathema. Ending so-called tribalism and subjecting all Indians and their lands to white authority was a clear necessity. Reflecting this attitude, an 1889 report to the New York State Assembly, for example, expressed impatience with the progress of the absorption process, noting the need to educate members of the New York tribes “to be men, not Indians” and opining that “when the Indians of the State are absorbed into the great mass of the American people, then, and only then, and not before, will the ‘Indian problem’ be solved.”<sup>159</sup> It is against this backdrop that the actions of Sherrill officials and the decision of the Supreme Court in the *Sherrill* case must be viewed.

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156. Quoted in Kristina Bross, *Dying Saints, Vanishing Savages: ‘Dying Indian Speeches’ in Colonial New England Literature*, 36 EARLY AM. LITERATURE 325, 326 (2001). For a thorough exploration of the myth of Indians as a dying race and its impact on government policy, see BRIAN DIPPIC, *THE VANISHING AMERICAN: WHITE ATTITUDES AND U.S. INDIAN POLICY* (1991).

157. “Kill the Indian, and Save the Man”: Capt. Richard H. Pratt on the Education of Native Americans, CARLISLE INDIAN SCH. DIGITAL RESOURCE CTR., <http://carlisleindian.dickinson.edu/teach/kill-indian-and-save-man-capt-richard-h-pratt-education-native-americans> (last visited Jan. 29, 2019) (website contains two pdfs detailing Captain Pratt’s speech).

158. Digitized student records, available online, indicate that children from the Six Nations, including Oneida children, were enrolled at Carlisle. The students’ individual files can be found by using the search engine to search for records by their tribal affiliation. *Explore Student Files*, CARLISLE INDIAN SCH. DIGITAL RESOURCE CTR., [http://carlisleindian.dickinson.edu/student\\_files/explore](http://carlisleindian.dickinson.edu/student_files/explore) (last visited Jan. 28, 2019).

159. HAUPTMAN, *FORMULATING INDIAN POLICY*, *supra* note 127, at 3 (quoting N.Y. LEGISLATURE ASSEMBLY, REPORT OF THE SPECIAL COMMITTEE TO INVESTIGATE THE INDIAN PROBLEM OF THE STATE OF NEW YORK APPOINTED BY THE ASSEMBLY OF 1888 (1889)).

### 3. *The Supreme Court's response to the Nation's disruptive survival*

As a federally recognized tribe, with rights under a treaty that had never been abrogated and with a reservation and a government-to-government relationship that had never been extinguished, the Oneida Nation had reason to be confident that the Supreme Court would vindicate its rights. From the perspective of its opponents, however, the Oneida Nation's persistence simply showed that the State still had "an Indian problem."

In 2005, the Supreme Court rejected the Nation's claim of a tax exemption for the Sherrill Properties.<sup>160</sup> Justice Ginsburg's opinion for the Court in *Sherrill* hints at an unspoken sympathy for the local officials who were faced with a challenge to their power because of the unwanted survival of an Indian tribe within their midst. Appearing like zombies, or like the White Walkers of the HBO series *A Game of Thrones*,<sup>161</sup> these Oneidas refused to stay dead. They refused to be treated as if their sovereignty had been stamped out because they knew that it had not been.

Justice Ginsburg's description of the Oneida land at issue in *Sherrill* referred to the parcels of land as having been "once contained within the Oneidas' 300,000-acre reservation,"<sup>162</sup> as if the Reservation no longer existed. In fact, these parcels are *still* contained within the Reservation that the United States acknowledged and guaranteed in the 1794 Treaty of Canandaigua, unless and until Congress diminishes the Reservation.<sup>163</sup> She also referred to non-Indian ownership of "the area that *once composed* the Tribe's *historic reservation*"<sup>164</sup> – again, inaccurately characterizing the status of the Reservation as a thing of the past. The taking of the Oneidas' land was treated as if it had occurred in the far distant past, yet it had continued into the middle of the nineteenth century. Justice Ginsburg's reference to the Tribe's "ancient dispossession"<sup>165</sup> was simply inaccurate.

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160. *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 197 (2005).

161. *Game of Thrones: Winter Is Coming* (HBO television broadcast Apr. 17, 2011).

162. *Sherrill*, 544 U.S. at 204 (emphasis added).

163. *See supra* notes 147 & 152 and accompanying text (noting that the parcels at issue lie within the Reservation boundaries as guaranteed by the treaty).

164. *Sherrill*, 544 U.S. at 202 (emphasis added).

165. *Id.* at 221.

Justice Ginsburg's attitude toward Oneida rights as being outdated extended to her description of Oneida sovereignty. She characterized the Nation's assertion of tax immunity as an effort to "unilaterally revive its ancient sovereignty . . . over the parcels at issue."<sup>166</sup> The word "ancient" can be used in reference to tribal sovereignty in a respectful way to acknowledge tribal sovereignty as being long enduring, preconstitutional, and time-honored. Justice Ginsburg went on, however, to state that the "Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases . . ."<sup>167</sup> Justice Ginsburg's usage of "ancient" thus suggests that Oneida sovereignty was archaic and obsolete. The same message was conveyed by the statement that the Nation was precluded from "rekindling embers of sovereignty that long ago grew cold."<sup>168</sup>

The opinion assumes an almost indignant tone when describing the impact that the success of the Oneidas' claim could have on non-Indians. Justice Ginsburg stated that providing redress for the Nation would "disrupt[] the governance of Central New York's counties and towns."<sup>169</sup> In other words, non-Indians had made, and carried out, plans for the area that were premised on the Oneidas having been pushed out or subordinated. Non-Indians had owned and developed the area, converting the land "from wilderness to become part of cities like Sherrill."<sup>170</sup> The parcels at issue had undergone "dramatic changes" in character, precluding the Nation "from gaining the disruptive remedy it now seeks."<sup>171</sup> There was also a fear that the Nation's demands would not stop at asserting tax immunity for a few parcels of land. "[L]ittle would prevent the Tribe," Justice Ginsburg wrote, "from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area."<sup>172</sup> In short, these Indians—who were expected to have disappeared long ago, yet frustratingly still remained—could not be allowed to spoil the

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166. *Id.* at 203.

167. *Id.*

168. *Id.* at 214.

169. *Id.* at 202.

170. *Id.* at 215.

171. *Id.* at 216–17.

172. *Id.* at 220.

arrangements that others had made on stolen Oneida land. Assertions of tribal sovereignty had to be anticipated and resisted, because the expectations of non-Indians had to be protected.

The *Sherrill* Court's treatment of the Nation's claims brings to mind the Court's holding in *Johnson v. M'Intosh*.<sup>173</sup> Writing for the Court in *Johnson*, Chief Justice Marshall embraced the Discovery Doctrine to protect the status quo of non-Indian land ownership derived from government grants. The Doctrine had "been asserted in the first instance, and afterwards sustained"; the country had "been acquired and held under it"; and "the property of the great mass of the community originate[d] in it."<sup>174</sup> Consequently, the Doctrine could not be questioned or "be rejected by courts of justice."<sup>175</sup> Despite this holding, Marshall at least alluded to the Doctrine's conflict with "natural right"<sup>176</sup> and hinted at doubts about "the original justice of the claim" (though he declined to speculate on such issues).<sup>177</sup> The *Sherrill* Court, by contrast, entertained no notion of justice being on the side of the Oneidas.

A "blame the victim" mentality also seemed to permeate Justice Ginsburg's opinion. The Oneidas were accused of dragging their feet in pursuing their claims. Justice Ginsburg stated that it was not until the 1970s that they sought to regain possession of their lands and the Nation did not acquire the properties in question until the 1990s<sup>178</sup> — statements that ignored the substantial practical and legal difficulties that faced the Nation in taking these actions. Moreover, she referred to the Oneidas having "long ago *relinquished* the reins of government," as if the Nation had voluntarily given up governance to the State.<sup>179</sup> This ignores the truth of what really happened — Oneida governmental authority was undermined by the shrinking of the treaty-guaranteed land base, brought about by illegal land transactions.

Ultimately, Justice Ginsburg relied on what she claimed were "equitable" considerations to reject the Nation's tax immunity

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173. *Johnson v. M'Intosh*, 21 U.S. (1 Wheat.) 543 (1823).

174. *Id.* at 591.

175. *Id.* at 592.

176. *Id.* at 591.

177. *Id.* at 588.

178. *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 216 (2005).

179. *Id.* at 203 (emphasis added).

claim. She wrote that the Nation's allegedly long delay in seeking equitable relief and developments in the city of Sherrill "render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate."<sup>180</sup> In light of the illegal, abusive, and exploitative treatment of the Oneida Nation by New York State and its citizens over the years, there was a dark irony in the conclusion that *equity* demanded that the Nation's claim be rejected. In short, after years of suffering from grossly *inequitable* treatment, the Nation was told that such treatment would continue for the benefit (as usual) of non-Indian interests. The Nation's tax immunity claim, for its own land on its own reservation, was rejected. The *Sherrill* decision's negative repercussions were expanded in 2010, when the Second Circuit Court of Appeals held that the Oneida land claim based on acquisitions in violation of the Nonintercourse Act was barred by the so-called equitable defenses recognized in *Sherrill*.<sup>181</sup>

#### 4. Protecting Oneida land by the land-into-trust process

Undeterred by the *Sherrill* decision, the Oneida Nation once again showed its resilience in the face of a setback. Justice Ginsburg's opinion noted that Title 25 U.S.C. § 465 authorizes the Secretary of the Interior to acquire land in trust for Indians, and that such land is exempt from state and local taxation. This mechanism "takes account of the interests of others with stakes in the area's governance and well-being," she explained, and provides the "proper avenue" for the Nation "to reestablish [sic] sovereign authority over territory last held by the Oneidas 200 years ago."<sup>182</sup>

The Nation moved very quickly after the *Sherrill* decision, petitioning the United States to place tribal lands into trust. In April 2005, the Nation applied to have approximately 17,370 acres of its land within the Reservation's boundaries placed into trust, which would protect the land from state and local taxation and from regulation unless otherwise provided under federal law.<sup>183</sup> After a three-year process, which included an extensive comment period

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180. *Id.* at 221.

181. *Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d 114, 118 (2010), *cert. denied*, 565 U.S. 970 (2011).

182. *Sherrill*, 544 U.S. at 220, 221.

183. *Oneida Trust ROD*, *supra* note 145, at 8.

and public hearings for the land-into-trust request and the preparation of an environmental impact statement under NEPA,<sup>184</sup> the Department of the Interior decided to acquire title to 13,003.89 acres owned by the Nation in Madison and Oneida Counties and place it into trust for the Nation.<sup>185</sup> In December 2016, the Court of Appeals for the Second Circuit rejected a challenge to the federal government's trust land decision.<sup>186</sup> The Supreme Court's November 2017 rejection of the challengers' certiorari petition cemented the Nation's success in navigating the land-into-trust process.<sup>187</sup>

The trust acreage centers around Turning Stone Resort Casino in Oneida County and the Nation's 32-acre territory in Madison County.<sup>188</sup> Included in the trust land are sites for member residences, government buildings, Nation businesses, agriculture, and hunting and fishing.<sup>189</sup> The Interior Department's Record of Decision noted that the Nation was prepared to assume jurisdiction over these lands, which it already had a track record of managing, and that the trust acquisition would "settle jurisdictional disputes in favor of the Nation over areas where the Nation's development is focused and its presence is most pronounced."<sup>190</sup> New York State would continue, however, to enjoy unusually extensive criminal and civil jurisdiction over the Reservation, including the trust lands, pursuant to federal legislation.<sup>191</sup> The Record of Decision

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184. National Environmental Policy Act, 42 U.S.C. §§ 4321–4370h (2012). See Oneida Trust ROD, *supra* note 145, at 9–10, for a history of the process.

185. *Id.* at 73; *see also id.* at 19 (describing the taking into trust of this lesser amount of land as the preferred alternative). The trust land acquisition did not include the Sherrill lands, but the Nation had already entered into intergovernmental agreements with the City of Sherrill and the City of Oneida with regard to tax and regulatory matters. *Id.* at 58.

186. *Upstate Citizens for Equality, Inc. v. United States*, 841 F.3d 556 (2d Cir. 2016). A challenge brought by New York and Madison and Oneida Counties was settled in 2014. *New York v. Jewell*, No. 6:08-cv-644, 2014 WL 841674 (N.D.N.Y. Mar. 4, 2014) (approving the settlement); *see also infra* notes 192–198 (discussing the settlement agreement).

187. *Upstate Citizens for Equality, Inc. v. United States*, 2017 WL 5660979 (2d Cir. Nov. 27, 2017).

188. Oneida Trust ROD, *supra* note 145, at 19.

189. *Id.* at 19, 37–38.

190. *Id.* at 55.

191. *Id.* at 57. New York would continue to have jurisdiction over offenses committed by or against Indians on Indian reservations pursuant to Title 25 U.S.C. § 232, and State police officers would continue to be able to make arrests for federal, state, and local law violations. New York would continue to have adjudicatory jurisdiction in civil actions and proceedings between Indians or between Indians and non-Indians, pursuant to Title 25 U.S.C. § 233, while not having general power to tax and regulate Indians on the Reservation.



thus did not (and could not) remove the shadow of state jurisdiction hanging over the Reservation, but it did acknowledge the Nation's sovereignty as being more than just "cold embers," to paraphrase the *Sherrill* opinion.<sup>192</sup>

Highlighting the federal government's support for tribal self-determination, the Record of Decision rejected the argument of some commentators that the Department should require equivalency between state and local regulations and tribal regulations for the trust lands. Tribal self-governance would be undermined by such a requirement for trust lands.<sup>193</sup> Moreover, the trust acquisition would "support the Nation's efforts for ensuring that tribal, Federal, State, and local environmental, health, and safety concerns are met."<sup>194</sup> The survival of tribal sovereignty, acknowledged and supported by the Record of Decision, is also apparent in the survival of the traditional membership rule, under which "membership and clan affiliation are derived from one's mother."<sup>195</sup> As the Supreme Court has observed, tribal membership rules are "'no more or less than a mechanism of social . . . self-definition'" and are basic to each "tribe's survival as a cultural and economic entity."<sup>196</sup> The Nation provides services and support to more than just persons on the membership roll. Its services extend to enrolled members and their families, as well as to other Indians in Central New York.<sup>197</sup>

##### 5. *Sharing the benefits of tribal economic success*

The Record of Decision also highlighted the Nation's substantial economic contributions to the Central New York region. This area "generally has been in economic decline, with several major regional employers ceasing operations in the recent past[,]" the Record of Decision noted.<sup>198</sup> If the Nation's enterprises were to cease operating, "the region could not readily absorb the loss of 5,000 jobs and the over \$100 million payroll that those jobs

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192. *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 214 (2005).

193. *Oneida Trust ROD*, *supra* note 145, at 66.

194. *Id.* at 68.

195. *Id.* at 35.

196. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 54 (1978) (quoting *Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5, 15 (D.N.M. 1975)) (alteration in original).

197. *Oneida Trust ROD*, *supra* note 145, at 35.

198. *Id.* at 24.

provide.”<sup>199</sup> Comparing the revenues provided by the Nation to the state and local governments to the cost of services attributed to the Nation in 2005, the Nation’s contributions exceeded the cost by about \$16.76 million.<sup>200</sup> Also, its direct and indirect contributions would more than offset tax revenue losses from otherwise taxable lands that were being placed in trust.<sup>201</sup>

More recent data bears out the Record of Decision’s conclusions as to the positive economic impact of the Nation’s enterprises. In 2016, for example, the Nation was the largest employer in Central New York, annually paying almost \$140 million to its employees, who paid over \$14 million in federal income taxes, over \$5 million in state income taxes, and almost \$7.9 million in Social Security taxes.<sup>202</sup> The Nation’s enterprises spent almost \$93 million in 2016 in payments to New York State vendors, mostly in Oneida, Madison, and Onondaga Counties.<sup>203</sup> The Nation’s 2016 Annual Report noted that it continued “to invest resources in [its] community, remaining a model of shared prosperity for the future of the region even as so many others endure hardships and face uncertain times.”<sup>204</sup> The Annual Report also expressed confidence that “the foundation [the Nation has] built and partnerships [it has] forged will continue to protect this region’s economy,” guaranteeing “a bright future . . . for generations to come.”<sup>205</sup>

The Record of Decision acknowledged, as borne out by this more recent data, that the Nation was sharing the benefits of its success with governments and with people who had often treated the Nation as an enemy. The Nation has in effect conveyed the message that “what’s ours IS yours,” but not in the sense of acquiescing to dispossession. Rather, the Nation has invited non-Indians to share in its success.

It is worth pausing to reflect on this point. Not only did the Oneidas prove resilient as a Nation, but they have also

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199. *Id.*; see also *id.* at 67 (noting the Nation’s acquisition and farming of agricultural lands, while farm land use was down in the area).

200. *Id.* at 23.

201. *Id.*

202. ONEIDA INDIAN NATION, 2016 ANNUAL REPORT 29–30 (2016).

203. *Id.* at 30.

204. *Id.* at 1.

205. *Id.*

demonstrated generosity. Of course, tribal generosity to non-Indians is not unprecedented. One of the great stories of American history is the story of the first Thanksgiving. Though it has assumed mythic proportions, one aspect of the story rings true—the generosity of the Wampanoags in sharing their knowledge and the bounty of their land with newcomers. The colonists' ultimate treatment of the Wampanoags and other New England tribes makes for a less happy story.<sup>206</sup>

Similarly, the Virginian Algonquians of Powhatan's confederacy provided corn to the hapless early Virginia colonists.<sup>207</sup> These Englishmen could not provide sustenance for themselves and had sited their initial settlement in an area that lacked good drinking water in the summer.<sup>208</sup> They did not grow sufficient food to feed themselves because of their obsession with getting rich from raising tobacco as a cash crop.<sup>209</sup> When the Powhatans were unable to both feed their own families and sell corn to the colonists, however, the colonists simply seized their corn.<sup>210</sup> Colonists boasted of using tribal "uprisings" as an excuse to seize the Tribes' cultivated fields for their own use.<sup>211</sup>

In the case of both the Wampanoags and the Virginia tribes, relations that started out as voluntary and reciprocal disintegrated over time. Rapacious colonists used their superior numbers and violent force to take what they wanted. Instead of being on terms set by the tribes or at least negotiated with them, the transfer of tribal property, real and personal, came to be dictated by non-Indians.

So, too, with Oneida land in New York State. The Oneidas were repeatedly told "what's yours is ours." Land was taken in defiance of federal law. New York State acquired Oneida land at prices that were a fraction of the price that the State received when the land

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206. Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2296–97 (1989) (discussing Wampanoag generosity, the first Thanksgiving, and the Plymouth colonists' violent actions).

207. The discussion in this paragraph is drawn from Allison M. Dussias, *Protecting Pocahontas's World: The Mattaponi Tribe's Struggle Against Virginia's King William Reservoir Project*, 36 AM. INDIAN L. REV. 1, 3, 20–27 (2012) (examining relations between the Virginia Algonquians and the English colonists).

208. *Id.* at 22.

209. *Id.* at 25.

210. *Id.* at 24.

211. *Id.* at 26.

was sold to private parties and sought to undermine tribal sovereignty along the way.

Today, despite the bad experiences of the distant and recent past, the Oneida Nation is willing to say “what is ours IS yours” – but no longer on the terms that the state and local governments dictate. The Nation has negotiated agreements with the State with respect to economic and commercial issues such as taxation, financial contributions to local communities, and sharing of profits from tribal enterprises, such as casinos. In May 2013, for example, the Nation, the State, and Madison and Oneida Counties signed a Settlement Agreement to resolve several outstanding legal disputes, in recognition of the parties’ shared commitments to protect and promote “the environment, health, safety and welfare of all of their people,” to protect and strengthen “the social fabric of Central New York,” and to develop “the entire regional economy.”<sup>212</sup> The State stipulated that “the Reservation was not disestablished and that the Reservation is reservation land for purposes of state and federal statutes.”<sup>213</sup> The State and Counties also agreed to drop legal objections that they had made (as yet unsuccessfully) to the trust land acquisition<sup>214</sup> and to support future trust land applications up to a specific acreage cap.<sup>215</sup> The Agreement addressed the property tax dispute at the center of the *Sherrill* dispute by providing that specified Oneida land (including trust land) “shall be non-taxable” and that the Nation would not be liable “for any past, present or future property tax payment with regard to” the specified land.<sup>216</sup> Additional sections of the Agreement dealt with disputes over other taxes, such as sales taxes, excise taxes on

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212. Settlement Agreement by the Oneida Nation, the State of New York, the County of Madison, and the County of Oneida 1 (May 16, 2013).

213. *Id.* at 12.

214. To resolve a challenge that the State and the two Counties had made to the trust land decision, the parties agreed to the dismissal of the trust litigation with prejudice, and the State and Counties agreed not to fund any challenge to the trust decision. *Id.* at 12–13.

215. *Id.* at 14.

216. *Id.* at 11. More specifically, the Agreement provided for a tax exemption for the so-called “Nation Land,” which was defined as land possessed by the Nation within the Reservation’s boundaries that is the 32-acre Boylan tract; another specific tract; land held in trust by the United States for the Nation; and the Nation’s “Reacquired Land” up to a cap of 25,370 acres. *Id.* at 3.

cigarettes and tobacco products, and fuel taxes.<sup>217</sup> Finally, the agreement provided for the Nation to have exclusive gaming rights in Central New York, with a portion of gaming revenues being shared with state and local governments.<sup>218</sup>

Admittedly, the Nation was not, and is not, totally free to set the terms of its agreements with state and local officials as to taxation and other issues. Legal setbacks, particularly at the hands of the Supreme Court in the *Sherrill* decision, have impacted the Nation's bargaining position. But this is what resilience is all about – suffering a setback, yet managing to adapt, persevere, and move forward.

#### IV. CONCLUSION

*Central New York is a sacred place – it is our eternal homeland, and our future is intertwined with Madison County's future. We are marching forward together – carrying forward the legacy of friendship and cross-cultural collaboration that was first made famous when two centuries ago our people stood in solidarity with General George Washington and those who were fighting for independence.*<sup>219</sup>

For over two hundred and fifty years, despite the sacrifices that it made as America's first ally, the Oneida Indian Nation has faced an uphill battle in its efforts to retain its land, preserve its sovereignty, and maintain its existence as a people. Actions often speak louder than words. The actions of New York government officials and the State's non-Indian citizens have repeatedly conveyed several messages, loud and clear:

1. What's yours is ours.
2. Surrender your sovereignty – resistance is futile.
3. By surviving as a people, you are spoiling our plans.

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217. *Id.* at 6-11.

218. *Id.* at 5-6. The gaming exclusivity provision applies to casino gaming and specified gaming devices, including slot machines, in a ten-county area. *Id.* at 2 (defining *Casino Gaming and Gaming Device*), 6 (setting out the geographic scope of exclusivity for *Casino Gaming and Gaming Devices*).

219. Ray Halbritter, Nation Representative, quoted in *Oneida Indian Nation Contributes to Madison County Time Capsule*, ONEIDA INDIAN NATION, <http://www.oneidaindian.nation.com/oneida-indian-nation-contributes-to-madison-county-time-capsule> (last visited Jan. 28, 2019).

As with the mythical Hydra, cutting off one head—countering one challenge to the Nation and its legal rights—does not stop the beast. Rather, the beast puts forth another challenge.

In *City of Sherrill v. Oneida Indian Nation of New York*, the Supreme Court in effect endorsed New York officials' oft-repeated hostile messages to the Oneida Nation. The Court was complicit in the denial of treaty-guaranteed property rights, the denigration of tribal sovereignty, and the subordination of Oneida rights to the demands of the dominant society.

As the discussion above has revealed, however, the Oneida Nation has shown remarkable resilience in the face of seemingly never-ending challenges, including the repercussions of the *Sherrill* decision. Conveying its own messages of determination to reclaim land, exercise sovereignty, and persevere as a people, the Nation has been able to survive and indeed flourish. Moreover, in recent years the Nation has shared the benefits of its entrepreneurship and economic success by partnering with former opponents in an effort to build a better future for all residents of Central New York State. Noting these efforts at partnership, Nation Representative Ray Halbritter has stated that “[w]hen the next generation looks back at their ancestors, they will be able to see a concrete example of two peoples that were driven apart by animosities, but that decided once and for all to embrace reconciliation and respect.”<sup>220</sup>

The Oneida Nation has also shared the benefits arising from its resilience, and the insights gained from its successes, with other tribes. The Nation has worked to protect “Indian Country’s unique and sacred heritage” not only through programs in Central New York State that promote Indian language and culture, but also by supporting the Smithsonian Institution’s National Museum of the American Indian.<sup>221</sup> The Nation has offered itself as a testament to the benefits of Indian gaming as a tribal economic development model, noting how it has used gaming revenues to pay for many services that allow it to operate as a nearly self-sufficient entity, while also creating “an engine of job growth that has benefited the entire region.”<sup>222</sup> The Oneidas have partnered with National

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220. *Id.*

221. *National Initiatives in Indian Country*, ONEIDA INDIAN NATION, <http://www.oneidaindiannation.com/about/national-initiatives-in-indian-country> (last visited Jan. 28, 2019).

222. *Id.*

Congress of American Indians in a national leadership initiative, the “Change the Mascot” campaign, which educates the public about the damage done to Indians by sports teams’ use of racial slurs and racist imagery. The campaign has prompted schools around the country to change their mascots.<sup>223</sup>

The Nation has also reached out to other tribes facing challenges to their own resilience. Nation Representative Halbritter traveled to the Standing Rock Sioux Reservation in 2016 to demonstrate Oneida solidarity with the Standing Rock Sioux Tribe in its opposition to the Dakota Access Pipeline. He noted that the struggle was “more than a critical fight over a pipeline,” as it was “also part of a courageous fight over many generations to protect the basic civil rights of all people—including those like Native Americans who have too often been bullied, ignored or treated as afterthoughts.”<sup>224</sup> Halbritter “urge[d] everyone to stand on the right side of history with the Standing Rock Sioux.”<sup>225</sup>

The following comment on another resilient tribal nation, the Osage Nation of Oklahoma, seems adaptable as a fitting description of the Oneida Indian Nation:

What has been possible to salvage has been saved and is dearer to our hearts because it survived. What is gone is treasured because it was what we once were. We gather our past and our present into the depths of our being and face tomorrow. We are still Osage.<sup>226</sup>

Like the Osages, the Oneidas have endeavored to protect what has survived to the present, while also taking action to regain treasures that have been lost in the past. In contrast with the Hydra-like challenges that it repeatedly has had to confront, the Oneida Nation has proved itself to be more like the mythical Phoenix, ever rising, renewed, from the ashes of the past, and ready to face the challenges of the present and of the future.

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223. *Id.*

224. *Oneida Nation Representative Joins Standing Rock Sioux Tribe in Demonstration of Solidarity*, ONEIDA INDIAN NATION (Oct. 28, 2016), <http://www.oneidaindianation.com/oneida-nation-representative-joins-standing-rock-sioux-tribe-in-demonstration-of-solidarity>. Halbritter delivered recording devices to the pipeline protestors, to enable them to document and share their treatment. *Id.*

225. *Id.*

226. DAVID GRANN, *KILLERS OF THE FLOWER MOON: THE OSAGE MURDERS AND THE BIRTH OF THE FBI* 245 (2017).