No. 03-855

IN THE
Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,
Petitioner,

v.

ONEIDA INDIAN NATION OF NEW YORK, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Established in 1944, the National Congress of American Indians ("NCAI") is the oldest and largest American Indian organization, representing more than 250 Indian Tribes and Alaskan Native villages, including New York tribes. NCAI is dedicated to protecting the rights and improving the welfare of American Indians. This case calls for the straightforward application of longstanding principles regarding treaty interpretation and tribal tax immunity. However, the City of Sherrill argues against the application of those principles based on vastly exaggerated claims of the hardship allegedly resulting from an adverse decision. While the practical consequences of the Court's decision here would largely be confined to New York's political subdivisions and tribes, NCAI and its members have a strong interest in opposing the abandonment of time-honored principles of Indian law based on arguments properly addressed to Congress, not this Court.

INTRODUCTION

Beginning in 1795, New York purchased 300,000 acres of land reserved to the Oneida Nation ("the Oneida") in plain violation of federal law. The Oneida were thereby ousted from these lands, but never lost their treaty-protected aboriginal rights of possession. Only the United States could strip the Tribe of those rights. See *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 230-34 (1985) ("*Oneida II*"). Between that time and the present, the lands have passed from New York to third-party purchasers.

Many eastern states that engaged in comparable courses of conduct have fashioned comprehensive land-claims solutions

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[1] No one other than NCAI made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief *amicus curiae*, and the letters of consent have been filed with the Clerk.

seeking to balance the interests of tribes and landowners potentially affected by the States' illegal actions. Congress has approved those settlements. See 25 U.S.C. ch. 19. New York, however, has refused to provide Tribes within its borders with meaningful redress for its past wrongs. Given New York's intransigence, the Oneida decided to purchase parcels of lost lands in free market transactions at fair market prices, in order to reactivate the treaty and aboriginal rights inherent in tribal possession of the parcels, including an immunity from state and local taxation.

New York, the original lawbreaker in this case, cries foul on behalf of the third-party interests created by the passage of time (of course, the Oneida paid third parties fair market price to take possession). But, the actual goal of New York and its subdivisions is to retain the long-term benefits of their illegal conduct – the ability to tax not only non-Indian lands but also tribal lands in the Oneida reservation. At the end of the day, New York and its subdivisions should not be permitted to retain the fruits of their defiance of federal law, and the Oneida's reacquisition of wrongfully transferred lands in the reservation should restore those parcels' tax-immune status.

Absent express congressional authorization, state and local governments may not tax tribal lands in an Indian reservation. See *Okla. Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450 (1995); *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985); *N.Y. Indians*, 72 U.S. (5 Wall.) 761 (1866); *Kan. Indians*, 72 U.S. (5 Wall.) 737 (1866). The parcels at issue are owned by the Oneida; they constitute part of the land "reserved" to the Oneida "forever" in the 1788 Treaty of Fort Schuyler ("1788 Treaty"). Pet. App. A136-37. In the 1794 Treaty of Canandaigua ("1794 Treaty"), the United States "acknowledge[d]" these lands "to be [the Oneida's] property" and promised that the same "reservation[] shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." *Id.* at A141. The United States has never terminated the reservation.

"Despite Congress' clear policy" to the contrary, between 1795 and 1846, New York entered into a series of transactions through which it acquired most of the Oneida reservation, including the parcels at issue. See *Oneida II*, 470 U.S. at 232. With a single exception not relevant here, these transactions occurred without the consent of the United States. Pet. App. A8-9. To regain possession of these parcels, the Oneida paid fair market value to non-Indian landowners in free market transactions. These facts should end this matter. Illegal transactions cannot and did not terminate the Oneida's aboriginal rights in their reserved lands, as this Court has already made clear. *Oneida II*, 470 U.S. at 234. Thus, once the Tribe regained possession, its treaty and aboriginal rights were reinvigorated, including the parcels' immunity from state and local taxation.

Sherrill, however, claims that it may tax the parcels at issue for several reasons: (a) The lands were never part of a federal reservation and are not otherwise within Indian country as defined by federal law; (b) assuming the lands are part of a federal reservation and are now tribal lands, they are freely alienable and thus subject to state and local taxation; and (c) assuming the lands were part of a federal reservation, that reservation was diminished or disestablished by the 1838 Treaty of Buffalo Creek.[2]

NCAI agrees with respondents that Sherrill's first two arguments are answered in large part by *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 678 (1974) ("*Oneida I*") and *Oneida II*, where this Court found that after adoption of the Constitution and enactment of the Trade and Intercourse Act of 1790 (known as the "Nonintercourse Act"), sales of land in the precise area were unlawful absent federal consent. In this brief, however, NCAI independently shows that application of the fundamental principles of Indian

[2] NCAI does not address Sherrill's fourth argument concerning tribal continuity that is addressed in respondent's brief and the briefs *amicus curiae* of the United States and the United Southern and Eastern Tribes.

law that govern this case leads to the same conclusions – that the parcels are part of a federal reservation and thus in Indian country, and that tribal lands in the reservation are immune from state and local taxation because the United States has never authorized such taxation and has never diminished or disestablished the reservation.

SUMMARY OF ARGUMENT

When the European powers "discovered" North America and entered into their relationships with North American tribes, the "discovery doctrine" was the international law principle which reconciled European concepts of land ownership and sovereignty with aboriginal possession. See F. Cohen, *Handbook of Federal Indian Law* 50-54 (1982 ed.) ("*Cohen Handbook*"); F. Cohen, *Original Indian Title*, 32 Minn. L. Rev. 28, 45 (1947). Pursuant to this doctrine, discovering European nations possessed the right to exclude other European powers from discovered lands and the exclusive rights to purchase Indian lands and to extinguish aboriginal title. The tribes lost their sovereign right to conduct foreign relations with other European nations and the right independently to alienate their lands. See generally *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 573-74 (1823). Otherwise, the tribes retained sovereignty in their territory and an aboriginal right of occupation "as sacred and as securely safeguarded as is fee simple absolute title." *United States* v. *Shoshone Tribe of Indians*, 304 U.S. 111, 117 (1938).

The United States Constitution incorporated discovery doctrine principles by centralizing in the federal government the exclusive authority to conduct relations with tribes, including the right to extinguish Indian title and allow the alienation of tribal lands. The Constitution:

> confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. *These powers comprehend all that is required for the regulation of our intercourse with the Indians.* [*Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (emphasis supplied).]

The tribes were otherwise recognized as sovereign over their internal affairs and lands. *Id.* at 551-53. In 1790, Congress exercised its exclusive authority by enacting the Nonintercourse Act, forbidding trade with Indians (absent federal authorization) and requiring that all sales of Indian lands be the product of a federal treaty or convention. See Act of July 22, 1790, ch. 33, 1 Stat. 137 (codified as amended in part at 25 U.S.C. § 177).

These principles of federal exclusivity and retained tribal sovereignty left state and local governments without jurisdiction over tribal Indians and lands within "Indian country," including jurisdiction to tax tribal lands, absent express federal authorization.

"Indian country" includes, *inter alia*, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent." 18 U.S.C. § 1151(a). An express congressional authorization is an absolute prerequisite to state or local taxation of *tribal* land in Indian country. See *supra* at 2. The parcels at issue were "reserved" to the Oneida "forever" by the 1788 Treaty, and that reservation was "acknowledged" and affirmed by the United States in, *inter alia*, the 1794 Treaty. As this Court recognized in *Oneida II*, an illegal transaction does not alter aboriginal rights of possession; the Oneida's possessory rights persisted in the "reserved" lands unlawfully alienated without federal approval. 470 U.S. at 230-34. In such circumstances, once the tribe pays non-Indian third parties fair value, the tribe's repossession of

reserved aboriginal lands reactivates the lands' immunity from state and local taxation.

Sherrill's responses are without merit. *First*, Sherrill claims that the 1788 Treaty terminated the Oneida's aboriginal rights of possession (rather than "reserving" those rights "forever") before the Constitution was adopted (though after the requisite total of nine states, including New York, signed it), and therefore that the nascent federal government lacked authority over Oneida lands and the Nonintercourse Act never applied. Under this view, neither the 1794 Treaty nor any of the United States' other agreements with the Oneida could have established a federal Oneida reservation that is "'Indian country'" under 18 U.S.C. § 1151 and *Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998).

This is plainly wrong. Even assuming that during the period from independence to the effective date of the Constitution, New York shared with the United States the *right* to extinguish aboriginal rights, the tribes retained those rights unless they actually were extinguished. Although New York purchased vast Oneida lands before the Constitution was adopted, the 1788 Treaty plainly did not terminate the Oneida's rights of possession in the discrete tract of land carved from the general cession, but instead explicitly "reserved" those rights "forever." This is the clear meaning of the treaty language. See *Winans* v. *United States*, 198 U.S. 371, 381 (1905) ("the treaty was not a grant of rights to the Indians, but a grant of right from them, – a reservation of those not granted"). If any doubt existed, the trust obligation that the colonies inherited from the Crown as discovering sovereign required that the 1788 Treaty be interpreted as the Tribe understood it. See *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999); *Worcester*, 31 U.S. at 552. The Oneida would not have understood the 1788 Treaty to terminate aboriginal rights; the Treaty "reserved" rights and the Tribe *retained* possession.

Even if the 1788 Treaty had created a bizarre, new state-law property interest unrecognizable in its historical and legal context – simultaneously terminating and reserving the Oneida's rights of possession – the Constitution and the Nonintercourse Act nonetheless provided the United States with *exclusive* authority to extinguish the Oneida's retained rights. The Act forbids unauthorized sales of tribal lands, including "to any state, whether having the right of pre-emption to such lands or not." Ch. 33, § 4, 1 Stat. at 138. See *Oneida I*, 414 U.S. at 678 (Nonintercourse Act codifies the principle "that the extinguishment of Indian title require[s] the consent of the United States").

Sherrill's alternative formulation – that a reservation is not within "Indian country" unless it is both set aside *and* actively superintended by the federal government – relies on *Venetie*. *Venetie* is inapposite here because it addresses a different type of "Indian country" – "dependent Indian communities," 18 U.S.C. § 1151(b) – in circumstances where Congress explicitly *terminated* the federal reservation. See 522 U.S. at 527.

Second, Sherrill contends that, even if the parcels at issue are in a federal reservation, they are subject to state and local government taxation until the federal government sets them aside again. According to Sherrill, the lands must be taxable because they have become freely alienable; Sherrill's apparent belief is that the lands are owned by the Tribe acting just like any private participant in the commercial marketplace. The premise and conclusion of this argument are wrong. Unlawfully-transferred reservation lands restored to tribal possession by purchase from non-Indian owners are *not* alienable without federal authorization under the plain language of the Nonintercourse Act. Moreover, the decisions Sherrill cites – *County of Yakima* v. *Confed. Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), and *Cass County* v. *Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998) – rested on the Court's view that Congress

expressly authorized both the alienation and taxation of those lands by statute and that tribal reacquisition cannot repeal the taxing authorization in a federal statute. Here, in sharp contrast, no congressional authorization of either sale or taxation exists; to the contrary, tribal reacquisition remedies an illegal transaction, restores a tax immunity unlawfully divested, and reactivates the Nonintercourse Act's restrictions on alienability.

Third, Sherrill contends even if the lands at issue were part of a federal reservation, the reservation was disestablished by the 1838 Treaty of Buffalo Creek. This Court, however, has refused to find that a treaty disestablishes a reservation unless the parties' agreement to do so is "'clear and plain.'" *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). The text of the Treaty of Buffalo Creek by itself defeats Sherrill's claim that the Treaty mandated the removal of the Oneida from their New York reservation to the Kansas Territory. Moreover, in terms that could not be clearer, the government agent who negotiated the treaty assured the Oneida that they would not be compelled to remove and could "choose to . . . remain where they are forever." JA 146; Pet. App. A35 n.18. Sherrill's argument (and that of its *amici*) amounts to an unsupported contention that the Court should ignore this dispositive evidence regarding the Treaty's meaning. But see *Mille Lacs*, 526 U.S. at 196. The altered regional demographics on which Sherrill relies are the result of unlawful transactions, not the Treaty of Buffalo Creek, and cannot by themselves work a *de facto* disestablishment of a federal reservation.

Sherrill and its *amici*'s remaining arguments seek to portray the consequences of this case as so extreme that the Court cannot apply the federal Indian law principles that govern. Specifically, they say that state and local governments will suffer a crippling blow to their tax revenues and overall fiscal health. Putting aside the extra-legal nature of these assertions – which should be directed to Congress, not this

Court – the argument suffers from several fatal flaws. Because other States facing New York's situation have settled their tribes' land claims, the practical consequences of the Court's decision are limited to New York, which could likewise enter into such an agreement. Further, this case addresses only the tax-immune status of reservations lands *possessed by the Tribe*. The Oneida do not assert a tax immunity for most of the reservation which is owned by non-Indians; and this Court has severely limited tribal jurisdiction and authorized state taxation of non-Indian reservation lands and activities. See *Montana* v. *United States*, 450 U.S. 544 (1981). In addition, as the brief *amicus curiae* of the Puyallup and Southern Ute Tribes, and Pueblo of Acoma demonstrates, numerous tribes and state and local governments (including the Oneida) have reached agreements concerning tribal payment for government services. Sherrill should not be permitted to translate its refusal to accept such proposals into an argument that the law should be ignored. Neither law nor facts support Sherrill's alarmist rhetoric.

ARGUMENT

I. THE RULE THAT TRIBAL RESERVATION LANDS ARE EXEMPT FROM STATE AND LOCAL TAXATION CLEARLY APPLIES HERE.

The foundational rules of Indian law include federal exclusivity in dealing with Indian tribes, tribal sovereignty within Indian lands, a unique federal-tribal trust relationship, and the absence of inherent state jurisdiction with regard to tribal Indians and lands. The immunity of Indian lands from state and local property taxes flows naturally from the general immunity of tribal lands from state laws. See *Yakima*, 502 U.S. at 258; *N.Y. Indians*, 72 U.S. at 768-70; *Kan. Indians*, 72 U.S. at 740. And, this Court has defined that immunity in categorical terms. See *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987) ("In the special area of state taxation of Indian tribes and tribal

members, we have adopted a *per se* rule. . . . [A]bsent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands . . . ."). The parcels at issue are immune from Sherrill's taxation because they are tribal lands in a federal reservation, and because Congress has never authorized their taxation. NCAI addresses three of Sherrill's attacks on this unexceptional application of established law.

A. The Lands At Issue Are In "Indian Country."

Sherrill incorrectly argues that the general rule of tax immunity does not apply because the parcels at issue are not "Indian country." See 18 U.S.C. § 1151. First, the parcels are part of a federal reservation and, second, that reservation is, by definition, "Indian country."

1. Following the Revolutionary War, "the National Government promised that the Oneidas would be secure 'in the possession of the lands on which they are settled,'" *Oneida II*, 470 U.S. at 231, a promise that was acknowledged and reaffirmed in the 1794 Treaty of Canandaigua, Pet App. A141, as well as in a congressional resolution and two other treaties.[3] Article 2 of the 1794 Treaty "acknowledges" the 300,000 acres "reserved to the Oneida" in the 1788 Treaty "to be their property" and agrees that "the said reservation shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase."[4] *Id.*

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[3] *See* 25 J. Cont. Cong. 687 (Oct. 15, 1783); Treaty with the Six Nations [Ft. Stanwix], art. II, 7 Stat. 15, 15 (1784); Treaty with the Six Nations [Ft. Hamar], art. 3, 7 Stat. 33, 34 (1789). *See Oneida II*, 470 U.S. at 231.

[4] Making a wholly new argument, Sherrill characterizes this language as a federal pre-approval of the Oneida's free alienation of tribal lands, an astonishing interpretation that is completely inconsistent with any contemporaneous understanding of the Treaty. The language granting the "people of the United States" a right to *purchase* Oneida lands casts no doubt on the federal government's *exclusive power to authorize such a purchase*. Sherrill's reading would also mean that the Treaty preapproved private purchases from the Seneca without express federal approval

Article 3 of the 1794 Treaty explicitly establishes a reservation for the Seneca. See Pet. App. A141; *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 122-23 n.18 (1960). It also guarantees the Seneca's right to certain lands in virtually the same language used to indicate that the Oneida reservation had been federally acknowledged and guaranteed in Article 2. See Pet. App. A142. Article 4 of the 1794 Treaty states that "[t]he United States have thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senecas," and agrees that the United States will "never . . . claim the same" and will "not disturb them . . . in the free use and enjoyment thereof." *Id.*

The 1794 Treaty thus confirmed that the Oneida's reservation lands were under federal protection and supervision. This Court has already characterized New York's attempt to tax Seneca lands protected in Article 3 as unlawful "interference with Indian possessory rights guaranteed by the Federal Government." *Oneida I*, 414 U.S. at 672. The same conclusion necessarily follows as to the Oneida lands similarly referenced in Article 2.

2. Despite this history, Sherrill makes two arguments that the lands at issue ceased to be Indian country in 1788. "Indian country" is defined by 18 U.S.C. § 1151 as:

> (a) *all land within the limits of any Indian reservation under the jurisdiction of the United States Government* . . . , (b) all dependent Indian communities within the borders of the United States . . . , and (c) all Indian allotments, . . . including rights of way running through the same. [(Emphasis supplied).][5]

(contrary to the subsequent history of federal approval of such purchases). Finally, Sherrill fails to make the required showing that the Oneida would have understood the 1794 Treaty to abrogate the Nonintercourse Act.

[5] As this Court has explained, § 1151 "statutorily define[s] Indian country to include lands held in fee by non-Indians within reservation boundaries." *Solem* v. *Bartlett*, 465 U.S. 463, 468 (1984). Section § 1151 is a criminal statute, but its definition is now utilized in most other

(a) Sherrill first argues that the Oneida reservation is not and never was an "Indian reservation under the jurisdiction of the United States" because the 1788 Treaty terminated the Oneida's aboriginal rights in those lands. Sherrill claims that in the 1788 Treaty, the Oneida sold the aboriginal rights of possession in *all* their lands to New York, which then ceded 300,000 acres back to the Oneida in some heretofore unknown state-law right of possession. From this, Sherrill concludes, the Oneida's aboriginal rights of possession were extinguished in 1788; the 1794 Treaty could not have created a federal reservation; and the lands reserved to the Oneida were never "Indian country" and thus never subject to the Nonintercourse Act. This argument reflects Sherrill's utter failure to understand the discovery doctrine, the principles governing treaty interpretation, and the Nonintercourse Act.

During the colonial period, tribes were recognized as sovereigns, governing their territories and in charge of their foreign relations with European powers. *Worcester*, 31 U.S. at 547. Under European law, however, a European power's "discovery" of aboriginal land limited tribal sovereignty in two respects: First the "discovering" state could lawfully prohibit a tribe within its realm from entering into treaties with rival powers. Second, and of vital importance here, the discovering power obtained the exclusive right to buy land from that tribe and thereby extinguish aboriginal title. *Id.* at 543-44.

Under the discovery doctrine, the tribe retained control over "internal and social relations, and [was] not brought under the laws of the Union or the state within whose limits they resided." *United States* v. *Kagama*, 118 U.S. 375, 382 (1886). The tribe also maintained its existing rights of use and occupancy, known as Indian or aboriginal title, subject only to the sovereign's exclusive right to extinguish those rights by purchase. *Worcester*, 31 U.S. at 544; see also

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contexts. *See Okla. Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123 (1993).

Oneida II, 470 U.S. at 235-36. This rule kept peace among colonial powers and the tribes, prevented conflict about land title, and gave the sovereign monopoly power over the land market. See generally *Cohen Handbook* at 50-62.

In the original 13 colonies, the discovery doctrine gave the British Crown the exclusive right to acquire Indian lands and to extinguish aboriginal title. *Johnson*, 21 U.S. at 587 ("the power [of discovery and purchase] now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees").[6] When the United States declared independence, the rights to restrain alienation and to extinguish title passed to the colonies. *Oneida I*, 414 U.S. at 667. The Articles of Confederation, however, were unclear about whether, and the extent to which, the states or the United States had succeeded to the Crown's discovery rights. See R. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn. L. Rev. 1055, 1098-47 (1995) (legal history of federal-state conflict during this period); cf. *Oneida Indian Nation* v. *New York*, 860 F.2d 1145, 1152-61 (2d Cir. 1988) (New York had the power to purchase tribal land *prior* to the effective date of the Constitution). New York and other colonies took the position that they had inherited some of the powers of the British Crown with respect to tribes within their boundaries. It was as purported successor to the British Crown that New York entered into the 1788 Treaty, purchased most of the Oneida lands, and recognized the Oneida's "reservation" of 300,000 acres "forever." Pet. App. A136-37.

Experience under the Articles demonstrated to the Constitutional Convention of 1787 that exclusive federal control over Indian policy, including land policy, was necessary. Separate states' actions routinely created serious

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[6] *See also Worcester*, 31 U.S. at 548 (describing Royal Proclamation of Oct. 7, 1763 (forbidding white settlement west of the crest of the Appalachian Mountains and requiring imperial approval prior to the issuance of patents to Indian lands lying east of that line)).

conflicts and threats of wars with powerful tribes. See 33 J. Cont. Cong. 455-63 (Aug. 3, 1787). With relatively little debate, accordingly, the Constitution gave the federal government exclusive power over Indian affairs. See J. Madison, *Journal of the Federal Convention* 654-56 (E. Scott ed. 1898); *Worcester*, 31 U.S. at 559 ("[t]hese powers comprehend all that is required for the regulation of our intercourse with the Indians"); *Blackfeet*, 471 U.S. at 764 ("[t]he Constitution vests the Federal Government with exclusive authority over relations with Indian tribes").[7]

Promptly in 1790, the First Congress enacted the Nonintercourse Act, which codified the discovery doctrine's restraint on alienation absent sovereign consent by providing:

> That no 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. [Ch. 33, § 3, 1 Stat. at 138 (emphasis supplied).][8]

As George Washington explained to the New York Senecas, the Nonintercourse Act "is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States." See *American State Papers: Indian Affairs* No. 23, at 142 (1832).

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[7] *See also The Federalist No. 42*, at 268 (Madison) (C. Rossiter ed., 1961) ("[t]he regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the Articles of Confederation, which render the provision obscure and contradictory").

[8] The 1790 Act was reenacted with only minor modifications in 1793, 1796, 1799, and 1802. In 1834, the general restraint on individual Indian sales was removed, *see* Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729, 730-31 (codified as amended in part at 25 U.S.C. § 177).

The Nonintercourse Act gave the federal government exclusive authority with respect to *all* Indians lands, including those in the original 13 colonies:

> The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13. It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the pre-emptive right to purchase from the Indians was in the State. But this reality did not alter the doctrine that *federal law, treaties and statutes protected Indian occupancy and that its termination was exclusively the province of federal law.* [*Oneida I*, 414 U.S. at 670 (footnote and citation omitted) (emphasis supplied).][9]

In sum, the Constitution and the Nonintercourse Act "explicitly extinguished whatever claims the states might previously have had to exercise power over Indian land transactions and explicitly federalized the regulation of Indian land cessions." R. Clinton & M. Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 Me. L. Rev. 17, 88 (1979).[10]

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[9] *Amici* Counties incorrectly cite *New Jersey* v. *Wilson*, 11 U.S. (7 Cranch) 164 (1812), for the proposition that the Nonintercourse Act did not apply to Indian lands within states. Brief *Amicus Curiae* of Madison & Oneida Counties at 14. No Indian was a party in *Wilson*, and the decision did not involve or address the validity of a tribal conveyance, reservation status, or any tribal possessory rights. This Court simply upheld a Contract Clause claim against New Jersey brought by non-Indian purchasers of land as to which the State had promised tax immunity. 11 U.S. at 165-67.

[10] The exclusive federal power over tribal relations and the federal statutory restraints on alienation also created a trust or fiduciary responsibility in the United States with respect to the tribes and tribal land. *See Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *Seminole*

As noted, the 1788 Treaty was signed during the period governed by the Articles of Confederation (though after New York had signed the Constitution and the required nine states had established it). New York was acting as one of the successors to the discovering sovereign (the Crown) when it entered into that Treaty. In that capacity, New York acquired most of the Oneida lands, while the Oneida "reserved" 300,000 acres "forever." Thus, New York exercised its purported right to purchase most of the Oneida's land, while simultaneously recognizing the Oneida's aboriginal rights in the reserved tracts of land. The Treaty constituted a routine exercise of a "discovering" sovereign's right to purchase certain lands while "reserving" other lands to the Oneida in fulfillment of the sovereign's trust obligation with respect to the Tribe's aboriginal rights of possession. See also *Worcester*, 31 U.S. at 552.

The text of the 1788 Treaty leaves no doubt as to its proper construction. It dispositively states that the Oneida "reserved" lands "forever" – language that, in this setting, has an established meaning. The word reservation originally meant "land reserved from an Indian cession to the federal government regardless of the form of tenure." See *Cohen Handbook*, at 34. When the term is used as an aid to judicial construction, it denotes rights reserved from a cession made by the Indians to the government, rather than rights granted to the Indians by the government. See *Winans*, 198 U.S. at 381 ("[T]he treaty was not a grant of rights to the Indians, but a grant of right from them, – a reservation of those not granted. *And the form of the instrument and its language was adapted to that purpose*") (emphasis supplied). As Professor Cohen explains,

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Nation v. *United States*, 316 U.S. 286, 296-97 (1942). And, it is the trust responsibility which, in turn, gave rise to the canons of construction requiring that an agreement between a discovering sovereign (or its successor) and a tribe must be construed as the tribe would have understood it. *See Mille Lacs*, 526 U.S. at 196.

> "Indian reservations" acquired their name from the fact that when Indians ceded land, they commonly made "reservations" of land to be retained in Indian ownership. This practice goes back at least to 1640, when Uncas, the Mohican chief, deeded a large area to the Colony of Connecticut, out of which he carved a reservation for himself and his tribe." [*Original Indian Title*, *supra*, at 35 n.17 (citing 1 Trumbull, *History of Connecticut* 117 (1818)).][11]

Sherrill's reading of the 1788 Treaty would give the State greater rights than the United States would have had upon entering into the same Treaty. This extraordinary, counter-historical interpretation should be rejected.

Sherrill's reading of the Treaty is doomed not only because it contravenes the ordinary usage of "reservation," but also because it is utterly inconsistent with any understanding the Oneida would have had. *Worcester*, 31 U.S. at 552, is directly on point. There, the Court interpreted a treaty "allott[ing]" Cherokee territory. Georgia argued that "allotted" meant land given to the Cherokee by the United States while "marked out" meant land demarcated as between sovereigns. Rejecting this technical argument, the Court said it was not "reasonable to suppose that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish the word 'allotted' from the words 'marked out.'" *Id.* See *id.* at 582 (M'Lean, J., concurring) ("[h]ow the words of the

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[11] *See also United States* v. *Alcea Band of Tilanooks*, 329 U.S. 40, 52 (1946) (whether a tract of land "was properly called a reservation . . . or unceded Indian country . . . is a matter of little moment . . . the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent") (omissions in original); *Minnesota* v. *Hitchcock*, 185 U.S. 373, 390 (1902) ("[I]n order to create a reservation, it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes.").

treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction").

Even if the 1788 Treaty could be read to have created some new state-law right of possession, the Constitution and the Nonintercourse Act placed disposition of that right under exclusive federal control. Indeed, the Act flatly prohibited any "sale of lands" by Indians without federal authorization, including sales to states "having the right of pre-emption to such lands." Ch. 33, § 4, 1 Stat. at 138. "The federal restraints on alienation and exclusive control over the extinguishment of Indian title constitute federal regulatory action under the Indian Commerce Clause; *they do not result from either federal claims to an interest in land owned by tribes or the tenure by which the tribal land is held.*" *Cohen Handbook* at 514-15 (emphasis supplied). New York's continuing purchases of Oneida lands after adoption of the Constitution violated the Nonintercourse Act, and failed to extinguish the treaty-recognized aboriginal rights in the lands.

(b) Sherrill's second argument is that even assuming the Oneida parcels are in a federal reservation, they are not "Indian country." Sherrill maintains that *Venetie* crafted a new test to assess whether a reservation is Indian country, requiring that the federal government not only set aside, but also engage in active, continuous administrative superintendence of, reservation lands. This argument is plainly wrong.

"Indian country" has always included reservations set aside by federal treaties. See *Venetie*, 522 U.S. at 528 n.3 ("[w]e ha[ve] also held, not surprisingly, that Indian reservations [a]re Indian country"). *Venetie* does not remotely suggest that a court, when considering such reservation lands, must separately assess whether the government has subjected those same lands to continuous administrative supervision. Nor do this Court's earlier precedents. The leading case is *Donnelly* v. *United States*, 228 U.S. 243, 269 (1913), where this Court – without any reference to the need for a continuous

superintendence inquiry – firmly declared that "nothing can more appropriately be deemed 'Indian country' . . . than a tract of land that . . . is lawfully set apart as an Indian reservation," whether originally occupied by the tribe or set aside from the public domain. The federal government ultimately possesses the authority to enact laws governing Indian reservations; and this Court has, accordingly, deemed reservation lands to fall under federal superintendence by definition. See *Venetie*, 522 U.S. at 529 ("[in *United States* v. *McGowan*, 302 U.S. 535, 539 (1938)], [w]e reasoned that, *like Indian reservations generally*, the [non-reservation Indian] colony had been ""validly set apart for the use of the Indians . . . under the superintendence of the Government""") (omission in original) (emphasis supplied).

In contrast, *Venetie* considered lands governed by the Alaska Native Claims Settlement Act ("ANCSA"). As the Court detailed, ANCSA expressly *revoked all reservations* in Alaska (except one) and extinguished all aboriginal claims to land in the State, and conveyed land in fee simple to state-chartered Alaska Native corporations. Because ANCSA expressly terminated the Alaska lands' reservation status (§ 1151(a)) and because the lands had not been taken into federal trust (§ 1151(c)), the Court considered only whether the lands fell within the third distinct category of Indian country lands – whether the lands were "'dependent Indian communities.'" *Id.* at 527. In answering "no," the Court considered it critical that the lands were freely alienable and could be used for non-Indian purposes, and found that ANCSA expressly terminated federal superintendence of the land at issue. Finally, the Court concluded that an express goal of ANCSA was to avoid "'a lengthy wardship or trusteeship,'" severely "undercut[ting]" any finding of federal superintendence. *Id.* at 533-34. Nothing in *Venetie*, which addresses the "dependent Indian community" definition, suggests that a federal *reservation* is not "Indian country" under federal law.

The 1788 Treaty reserved Oneida lands; that reservation shortly thereafter became subject to federal authority. It is "Indian country" as matter of federal law.

B. The Reacquired Lands Are Not Alienable And, In Any Event, Congress Has Not Authorized State And Local Taxation.

Sherrill and its *amici* try desperately to force this case into the procrustean bed of *Yakima* and *Cass County,* which they read to say that alienable land in Indian country is taxable. They argue that even though the Oneida lands were unlawfully alienated, the Oneida's reacquisition does not bring the restrictions on alienability back into effect, and the Oneida must petition the United States for trust status under 25 U.S.C. § 465, to reinstate their lands' tax-immune status.

Yakima and *Cass County*, however, arose in the distinct historic context of the allotment era statutes – federal laws *authorizing* the transfer of Indian lands and expressly allowing the imposition of state and local taxes. Here, in marked contrast, the initial transfer of land from the Oneida violated federal law. And, Congress has never authorized state and local taxation of tribal lands within this reservation.

Under the Constitution, absent some exercise of federal authority, tribes retain sovereignty over their members and lands and aboriginal title. See *Cherokee Nation*, 30 U.S. at 16 (a tribe is a "distinct political society, separated from others, capable of managing its own affairs and governing itself"). Thus, once the Constitution was enacted, states ceased to have jurisdiction vis-à-vis tribes and tribal lands, which were immune from state laws unless otherwise provided by Congress. See *Cohen Handbook* at 388; *Worcester*, 31 U.S. at 556-57.[12] "The policy of leaving Indians free from state

[12] Indeed, in addressing apportionment of population among the States for purposes of representation in the House of Representatives and federal taxation, the Constitution expressly excludes "Indians not taxed," U.S. Const. art. I, § 2, ch. 3, "an accurate description of the status of [tribal]

jurisdiction is deeply rooted in the Nation's history." *Rice* v. *Olsen*, 324 U.S. 786, 789 (1945).

The general rule of federal preemption of state property taxes on tribal land operated without difficulty during the initial federal Indian eras of isolation and removal. In the late 19th century, however, Congress "retreated from the reservation concept and began to dismantle the territories that it had previously set aside as permanent and exclusive homes for Indian tribes." *Yankton Sioux*, 522 U.S. at 335. Through the General Allotment Act of 1887 ("GAA") and other allotment statutes, Congress allotted reservation lands to individual Indians and opened "surplus" land to non-Indian homesteading. *Id.* at 335-36 (ch. 119, 24 Stat. 388). Allotted land under the GAA could not be taxed until the restrictions on its sale were lifted; but a 1906 amendment to the GAA permitted the Secretary of the Interior to eliminate such restrictions and to issue a fee patent at which time "all restrictions as to . . . taxation of said land shall be removed." Ch. 2348, 34 Stat. 182, 183 (codified at 25 U.S.C. § 349). Similar provisions were enacted with respect to many other allotments. See *Cohen Handbook* at 410-11 nn.54, 55 (citing statutes). Massive quantities of allotted land were lost.

Relevant here, the GAA and other allotment acts were deemed *expressly* to authorize state and local taxation of allotted land after restrictions on its sale were lifted. See GAA § 6, 25 U.S.C. § 349 (state laws apply to allottees who receive a fee patent to land); *Goudy* v. *Meath*, 203 U.S. 146 (1906) (relying on § 6 to uphold state taxation of allotted Indian land in a reservation when federal restrictions expired).

Congress "formally repudiated" the allotment policy by passing the Indian Reorganization Act of 1934, see *Yankton Sioux*, 522 U.S. at 339, which provided that no further allotment of tribal land should take place and sought to

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Indians in 1789," a time "when Indians were not subject to any ordinary laws save those of their tribes," *Cohen Handbook* at 388, 389.

encourage tribal self-determination. Ch. 576, § 4, 48 Stat. 984, 985 (codified as amended at 25 U.S.C. § 464). That Act, however, simply stanched the tribes' hemorrhaging of lands. When Congress reversed course, tribes had already lost ownership of vast lands which were no longer tax exempt. *Yakima* and *Cass County* arose in this context.

In *Yakima*, the County sought to tax lands owned by individual tribal members pursuant to the GAA. The Court found in the GAA (as amended by the Burke Act) a clear congressional intent to allow taxation of allotted lands after they became fully alienable. Put differently, once the lands became freely alienable, the landowners, though tribal members, no longer held the land in federal trust, but rather as any non-Indian landholders would.

The circumstances presented here are not remotely analogous. In *Yakima*, the Court addressed the consequences of transactions authorized – indeed, required – by federal statute. Here, the Court addresses the consequences of transactions *forbidden* by federal law. Under *Yakima*, the Court found that Congress expressly made the allotted lands taxable and that the tribe's reacquisition of such land, even in Indian country, did not automatically repeal the statute and reconfer a tax exemption. Congress *never* authorized taxation of tribal lands in the Oneida reservation. Indian title to the parcels at issue was never quieted; they are tribal lands which are *not* freely alienable under the plain text of the Nonintercourse Act. See 25 U.S.C. § 177. See also 25 C.F.R. § 152.22(b) (trust lands, restricted lands, "and any other land owned by an Indian tribe may only be conveyed where specific statutory authority exists").

Cass County is likewise inapposite. There, this Court construed the Nelson Act of 1889, which implemented the allotment policy for the Chippewa Tribes of Minnesota. It required the Chipppewa to cede title to land in the state; the United States then either allotted lands to tribal members as under the GAA, sold the lands as pine lands to the highest

bidder, or sold the land as "surplus" to non-Indians under the Homestead Act. In the 1980s, half a century after congressional repudiation of allotment, the Leech Lake Band repurchased fee land within its reservation. Cass County assessed property taxes against the reacquired parcels.

The Court found that the County could tax the Tribe's reacquired lands. The Nelson Act reflected an "unmistakably clear" congressional intent to authorize taxation because it terminated the Indian right of possession and made the lands freely alienable. 524 U.S. at 113-14. Thus, like *Yakima*, *Cass County* fundamentally turned on a congressional authorization of the initial alienation and a clearly-expressed congressional intent to permit taxation of lands after they had become freely alienable. Neither circumstance obtains here. And, *Cass County* reaffirms the longstanding principle of tribal lands' tax immunity absent clear congressional action.

Sherrill misuses cases arising out of the federal allotment *statutes* to justify taxation of lands lost to the Tribe through *unlawful transactions*. Tribal reacquisition remedies *illegal* transactions, and reactivates the lands' tax exemption and the Nonintercourse Act's restrictions on alienability.

C. The Oneida Reservation Was Never Diminished Or Disestablished.

A necessary consequence of the exclusive federal authority over the alienation of tribal lands and the resultant federal trust obligation is that "only Congress" can disestablish or diminish a reservation. *Solem*, 465 U.S. at 470. Neither a state, cf. *Oneida II*, 470 U.S. at 234, nor private individuals, see *United States* v. *Celestine*, 215 U.S. 278, 286-87 (1909), can alter the status of reservation lands. "Once a block of land is set aside for an Indian reservation *and no matter what happens to the title of individual plots within the area*, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470 (emphasis supplied).

This Court has never permitted *de facto* diminishment or disestablishment of a reservation. To the contrary, in light of the federal trust obligation, diminishment or disestablishment requires a "'clear and plain'" congressional act. *Yankton Sioux*, 522 U.S. at 343 (quoting *United States* v. *Dion*, 476 U.S. 734, 738-39 (1986)).[13] The standard is particularly high for a reservation guaranteed and allegedly abrogated by federal treaty, because Congress's intention to abrogate a treaty must be "clearly express[ed]," *Mille Lacs*, 526 U.S. at 202, and because a treaty must be interpreted not simply with respect to Congress's intent, but as "the Indians themselves would have understood [it]," *id.* at 196.[14]

In support of its argument that the Oneida reservation was disestablished, Sherrill cites only the 1838 Treaty of Buffalo Creek – not an act of Congress but a bilateral treaty – in which, *inter alia*, the Oneida exchanged lands in Wisconsin for lands in Kansas. This Treaty does not in any way, let alone clearly, reflect an agreement to disestablish the Oneida's New York reservation. The Oneida's assent was obtained only *after* a federal agent explicitly explained that the Treaty allowed them to "remain where they are forever." JA 146. And, the Oneida did not, in fact, leave the land.

To determine whether Congress has clearly diminished or disestablished a reservation through unilateral legislation, this Court considers three factors – the text of the statute, the

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[13] *See, e.g.*, *Yankton Sioux*, 522 U.S. at 357-58 (1894 surplus land act); *Hagen* v. *Utah*, 510 U.S. 399, 407 (1994) (1905 Proclamation effectuating 1902 Act); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 598 (1977) (1904 surplus land act); *DeCoteau* v. *Dist. County Court*, 420 U.S. 425, 445 (1975) (1891 surplus land act); *United States* v. *Santa Fe Pac. R.R.*, 314 U.S. 339, 357 (1941) (1883 act creating reservation at tribe's request diminished old reservation).

[14] Although no "particular form of words" is required, the statutory or treaty language must be clear, *Hagen*, 510 U.S. at 411 (citing *Solem*, 465 U.S. at 475); and ambiguities in the language are resolved in favor of continued reservation status. *See South Dakota* v. *Bourland*, 508 U.S. 679, 687 (1993).

surrounding circumstances or historical context, and the interpretive knowledge that can be gained from transactions following the federal act. See *Hagen*, 510 U.S. at 411; *Solem*, 465 U.S. at 470-71. Even when transported wholesale to the context of a bilateral treaty, none of these factors supports diminishment or disestablishment here.

Sherrill sees the Buffalo Creek Treaty as a mandatory removal treaty vis-à-vis the Oneida, but that interpretation finds no support in the text – the "most probative evidence of diminishment," *Hagen*, 510 U.S. at 411 – and is directly refuted by a federal agent's contemporaneous explanation of the Treaty's terms. The Treaty contains no language that can be construed as a cession of Oneida lands in New York, see Pet. App. A147-48. It ceded the *Wisconsin lands* of the New York Indians and provided for the removal of the New York Indians "[i]n consideration of [that] cession and relinquishment." *Id.* at A149. In Article 13 addressing the Oneida, the Treaty makes removal conditional, occurring only upon the "mak[ing] of satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." *Id.* at A155. Moreover, the Treaty expressly contemplated that the Oneida and some other New York tribes might *not* remove, providing that:

> such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years, or such other time as the President may . . . appoint, shall forfeit all interest in the lands so set apart, to the United States. [*Id.* at A150.]

This is a far cry from clear evidence of an agreement to disestablish the reservation.

Dispositively, moreover, before the Oneida assented to the Treaty, federal Commissioner Ransom Gillet explained its meaning, as reflected in a document provided and explained to the Oneida chiefs and then submitted to the Senate with the

Treaty: "the treaty does not and is not intended to compel the Oneidas to remove from their reservation in the State of New York . . . unless they shall hereafter voluntarily sell their lands where they reside & agree to do so. . . . [t]hey will not be compelled to sell or remove." JA 146. This is plainly the meaning of the text that would have been understood by the Oneida. See *Washington* v. *Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979) (treaties are construed "'not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians'" (quoting *Jones* v. *Meehan*, 175 U.S. 1, 11 (1899))).

The Court has found clarity and disestablishment in congressional *acts* explicitly forfeiting tribal authority over lands.[15] But when Congress merely expresses an intent to open a reservation to settlement in the future, that is insufficient to disestablish a reservation. For example, *Solem* distinguished a direction to "'sell and dispose' of" unallotted reservation land from the immediate "language of cession" that clearly diminishes a reservation. 465 U.S. at 473; see also *Mattz* v. *Arnett*, 412 U.S. 481, 495-96 (1973) (a declaration that lands are "'subject to settlement, entry, and purchase'" is insufficient to disestablish). In *Santa Fe*, 314 U.S. at 354-55, Congress created a new reservation for the Walapai to induce removal, but the Walapai "did not accept the offer which Congress had tendered." *Id.* at 354.

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[15] *See Rosebud Sioux*, 430 U.S. at 597 (the tribe does "'hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to'" the unallotted lands of their reservations) (quoting 33 Stat. 256); *DeCoteau*, 420 U.S. at 445 (the tribe would "'cede, sell, relinquish, and convey'" its unallotted lands to the United States) (quoting 26 Stat. 1036); *Or. Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753, 768 (1985) (recognizing similar cession language as being a "broad and unequivocal conveyance of the Tribe's title to the land"); *Hagen*, 510 U.S. at 407-08 (tribal lands will "be restored to the public domain . . . . [and] opened to entry, settlement, and disposition") (internal quotation marks omitted) (quoting 34 Stat. 3119-20).

Congress's intent that the Walapai remove did *not* disestablish the Tribe's reserved lands; tribal rights in those lands terminated only many years later after the Tribe unequivocally accepted the new reservation and agreed to remove. *Id.* at 358. Similarly, Congress's expressed desire that the Oneida remove in the future did not affirmatively disestablish their reservation, as the solemn assurances made by the government's negotiator amply confirm.[16]

The Treaty's historical context does not provide the "unequivocal evidence" missing from the text. See *Yankton Sioux*, 522 U.S. at 351. The Treaty effected the New York tribes' exchange of their lands in Wisconsin for lands in Indian Territory (now Kansas), but the United States had varying success in convincing the affected tribes to remove. The Seneca and Tuscarora nations agreed to remove within five years (agreements that were later reversed). The Cayuga and Onondaga were promised money if they removed, but did not agree to do so. Pet App. A153-54. The St. Regis Mohawks secured a supplement to the treaty providing that "the Government shall not compel them to remove." 7 Stat. 561, 561 (1838). As noted, the Oneida made only a conditional agreement and ultimately did not remove.

In reality, Sherrill and its *amici* rely heavily, indeed virtually exclusively, on the third, and "least compelling" factor (*Yankton Sioux*, 522 U.S. at 356) used to determine diminishment or disestablishment – land transactions after the Treaty. But they ignore that this evidence is only an aid to *interpretation of the federal treaty or statute* – and is "an unorthodox and potentially unreliable method of...

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[16] Sherrill incorrectly claims that "[t]his Court has recently recognized that an agreement to remove 'as soon as' an expected imminent event occurs is a present agreement to remove." Pet.'s Br. 35. A footnote in *Mille Lacs* listed removal treaties executed in 1837, including a treaty with the Saganaw Chippewa in which the tribe ceded over 100,000 acres to the United States. *See* 526 U.S. at 190 n.4. This cession, not the phrase "as soon as," made the Saganaw Chippewa treaty a "removal treaty."

interpretation" at that. *Solem*, 465 U.S. at 472 n.13. This Court has *never* found *de facto* disestablishment based solely upon demographic patterns. Here, where the Treaty and the negotiating history belie any claim of disestablishment, these patterns have no place in the analysis.[17]

Moreover, Sherrill is not relying on demographic changes resulting from the implementation of a Treaty. Instead, Sherrill relies on sales that *preceded* and *followed* the Treaty and *violated the Nonintercourse Act*. Sherrill's real argument is that the 1838 Treaty somehow ratified illegal sales that took place before its negotiation (including sales of the parcels here) and authorized future illegal sales. This Court has already rejected this kind of *post hoc* ratification argument absent express language of ratification. See *Oneida II*, 470 U.S. 246-48 & n.19. The Treaty text cannot bear this weight.

In any event, this Court has discussed demographics only in the context of allotment acts approving land sales. *Illegal* land sales before and after a treaty are neither relevant nor probative. Put differently, the argument that illegal sales of Oneida lands can diminish or disestablish a federal reservation turns federal supremacy into a charade.[18] The Treaty of Buffalo Creek does not reflect any "clear and plain" intent to diminish or disestablish the Oneida reservation.

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[17] *See, e.g., Yankton Sioux*, 522 U.S. at 356-57 (subsequent demographics "reinforce[d] our holding" that surplus land act diminished reservation); *Hagen*, 510 U.S. at 420 (subsequent demographics did "not controvert[]" finding that surplus land act diminished reservation).

[18] *Amici*'s arguments that the United States acquiesced in state and local jurisdiction over Oneida lands after they were illegally alienated and that the Oneida abandoned their lands are not relevant to the disestablishment question. Neither passive acquiescence nor abandonment after an illegal sale can stand in for a treaty clearly expressing the parties' agreement to disestablish. And, even if third-party possession of lost lands might limit a tribe's right to possession, *see United States* v. *Creek Nation*, 295 U.S. 103, 110-11 (1935), this Court has never suggested that such circumstances limit tribal sovereignty if the tribe in fact obtains possession by purchasing the lands from the non-Indian third party.

II. A FINDING THAT THE TRIBAL LANDS AT ISSUE ARE IN INDIAN COUNTRY WILL NOT HAVE THE APOCALYPTIC CONSEQUENCES SHERRILL AND ITS *AMICI* PREDICT.

Sherrill and its *amici* claim, in vastly overblown terms, that an adverse decision in this case will yield dire consequences. Their arguments are entirely misplaced.

First, Sherrill and its *amici* address their arguments to the wrong audience. This Court has repeatedly held that "Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice." *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 432 (1943); see also *N.W. Bands of Shoshone Indians* v. *United States*, 324 U.S. 335, 353 (1945). This rule is often invoked in situations where the equities would otherwise weigh in favor of revising a treaty to benefit a tribe. Fidelity to treaty terms is at least as important where those terms support the tribal position, as do the terms of the 1788, 1794, and 1838 Treaties. Indeed, this Court has already accepted "the potential consequences" of its decision in *Oneida II*. See 470 U.S. at 253.

As noted above, other States that violated the Nonintercourse Act fashioned congressionally-approved settlements with affected tribes. The policy issues arising from the taxation of land are appropriately addressed through such settlements. Sherrill's true complaint lies with New York for its failure to negotiate such an agreement.

Second, Sherrill and its *amici* seek to obscure that the questions presented concern whether Sherrill may circumvent the traditional *tax-immune status* of *tribally-owned* lands in a reservation. This case has no relevance to whether the Tribe may tax or otherwise regulate reservation lands *that it does not own*, *i.e.*, almost all of the Oneida reservation. This Court has sharply limited the ability of tribes to exercise such jurisdiction. See *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645 (2001); *Montana* v. *United States*, 450 U.S. 544 (1981).

Third, the impact that a reaffirmation of longstanding principles of tribal tax immunity would have on New York and its subdivisions is vastly exaggerated. Numerous states and counties have within their borders non-taxable tribal land holdings that dwarf the amount of land realistically at issue here. But while New York and its subdivisions have submitted numerous briefs *amicus curiae* to the Court, no other governmental entity has supported petitioner, suggesting they do not suffer fiscal chaos as a result of the presence of tribal land and, indeed, often thrive through contributions made by Indian tribes to their economies. See Brief *Amicus Curiae* of Puyallup and Southern Ute Tribes, and Pueblo of Acoma.

Sherrill's assertions on this subject ring particularly hollow. The Oneida Nation seeks to act fairly not only with respect to the third-party landowners from whom it purchased property, but also with regard to the counties and municipalities affected by those purchases. Accordingly, the Tribe operates a Silver Covenant Chain Grant program, providing direct grant monies to local governments and school districts based on the amount of tribal landholdings within their boundaries. See JA 216-19. In the case of county and municipal government units, those grant monies are equivalent to the taxes the Tribe would have paid on its landholdings absent its tax immunity. *Id.* at 216-17 In the case of the school districts, the Tribe pays twice to three times as much in grants as it would in taxes. *Id.* at 219. *Sherrill, however, has steadfastly refused to accept any grant monies from the Tribe.* See CA2 J.A. A-1587. Sherrill has elected to fight the Tribe rather than to cooperate with it, and should not be heard now to complain about the consequences of its own choice.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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