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 FOR RESPONDENTS

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STATEMENT

The City of Sherrill sought to tax tribal land in which the Oneidas have at all times held a tribal possessory right protected by federal laws and treaties, and to enforce the tax by evicting the Oneidas from the land.

New York had caused the transfer of the land out of Oneida possession in 1805 without the approval required by federal law. In *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) ("*Oneida II*"), the Court held that a similar illegal conveyance did not extinguish the tribal possessory right or federal protection of the land. After the *Oneida II* decision, the Oneidas regained possession of some of their land through voluntary transactions with willing sellers, including the land at issue here.

Giving effect to the Oneidas' unextinguished possessory right, and the principle that the right cannot be burdened by state and local taxation, the District Court enjoined the City of Sherrill's efforts to evict the Oneidas. Pet. App. 1-60. The Court of Appeals affirmed. Pet. App. 61-133.

A. Federal Protection of Oneida Lands

During the Revolution, the Oneidas allied with the new nation and shared in its victory. *See Oneida II*, 470 U.S. at 230-32; Treaty with the Oneida, 7 Stat. 47 (Dec. 2, 1794) (describing Oneida war sacrifices).

At the war's end, the Continental Congress confirmed the Oneidas' possession of their aboriginal lands, including the land at issue here. 25 J. Cont'l Cong. 681, 687 (Oct. 15, 1783). A year later, the United States made the Treaty of Ft. Stanwix. Article II provided: "The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled." Treaty with the Six Nations, 7 Stat. 15 (Oct. 22, 1784).

On September 22, 1788, New York purported to purchase millions of acres of aboriginal Oneida land through the Treaty of Ft. Schuyler. The first article provided that "[t]he Oneidas do cede and grant all their lands to the people of the State of New York forever." The second article, however, qualified the cession: "Of the said ceded lands," the second article "reserved" aboriginal land for the Oneidas to "hold to themselves and their posterity forever for their own use and cultivation." Pet. App. 136-37. "The Oneidas retained a reservation of about 300,000 acres," *Oneida II*, 470 U.S. at 231, which included the land at issue here.

Thereafter, the United States made the Treaty of Ft. Harmar. Treaty with the Six Nations, 7 Stat. 33 (Jan. 9, 1789). Article 3 stated: "The Oneida * * * are also again secured and confirmed in the possession of their respective lands." Next, in 1794, the United States and the Six Nations entered into the Treaty of Canandaigua. 7 Stat. 44 (Nov. 11, 1794). Articles 2 and 4 protected the Oneida reservation:

> 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: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.
>
> * * *
>
> The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: Now, the Six Nations, and each of them, hereby engage that they

> will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof.

Pet. App. 141, 142-43. Article 6 provided for the payment of annuities and the appointment of a federal superintendent, and Article 7 provided for resolution of future disputes by federal officials. *Id*. 143-44.

B. Federal Protection of Tribal Lands Generally

"With the adoption of the Constitution, Indian relations became the exclusive province of federal law." *Oneida II*, 470 U.S. at 234; *see also United States v. Lara*, 124 S. Ct. 1628, 1633 (2004). In 1790, Congress enacted the first Nonintercourse Act, prohibiting "the conveyance of Indian land except where such conveyances were entered pursuant to the treaty power of the United States." *Oneida II*, 470 U.S. at 231-32. Congress enacted a "stronger, more detailed version of the Act" in 1793. *Id*. at 232. The Act was reenacted in substantially identical form in 1796, 1799, 1802, and 1834. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 668 n.4 (1974) ("*Oneida I*"); *see* 25 U.S.C. § 177 (current version). The version applicable at the time of the 1805 conveyance at issue here provided: "no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation, or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the constitution." Act of March 30, 1802, 2 Stat. 139, 143.

C. Illegal Conveyance of Oneida Lands

In 1795, New York purchased about one-third of the Oneida reservation without federal approval. It did so despite the warning of the United States Secretary of War. *Oneida II*, 470 U.S. at 232-33.

For a brief time thereafter, New York sought to comply with federal law, requesting the appointment of federal commissioners for several treaties with tribes in New York, including for 1798 and 1802 land purchases from the Oneidas. *See Oneida II*, 470 U.S. at 246-47 & nn.19-20; F.P. Prucha, American Indian Treaties: The History of a Political Anomaly 115 (1994). After 1802, New York no longer sought the required federal approvals when dealing with the Oneidas. *Oneida Indian Nation v. County of Oneida*, 434 F. Supp. 527, 535 (N.D.N.Y. 1977).

In 1805, New York arranged an indenture that conveyed a tract of 100 acres (including the land at issue here) to an Oneida member. In 1807, New York authorized conveyance of the 100 acres to a non-Indian. N.Y. Assembly, Report of the Special Committee Appointed by the Assembly of 1888 to Investigate the "Indian Problem" of the State of New York, No. 51, at 259-63 (Feb. 1, 1889) ("Whipple"); CAJA 359-61, 374, 412-13 & 414. Through these and other illegal transfers from within the 300,000-acre reservation acknowledged in the Treaty of Canandaigua, the amount of land in Oneida possession shrank to about 5,000 acres by 1838. Letter from R.H. Gillet to C.A. Harris (Dec. 27, 1837), *in* S. Exec. Doc. No. Confidential 10E, 25th Cong., 2d Sess., at 35 (1838).

D. The Treaty of Buffalo Creek

In 1838, the United States negotiated the Treaty of Buffalo Creek with "the New York Indians." 7 Stat. 550 (Jan. 15, 1838). The New York Indians had rights in Wisconsin land by virtue of an earlier federally-approved purchase. Treaty with the Menominee, 7 Stat. 342 (Feb. 8, 1831); 7 Stat. 346 (Feb. 17, 1831); 7 Stat. 405 (Oct. 27, 1832). Article 1 of the Treaty of Buffalo Creek contained a cession by the New York Indians of all Wisconsin lands other than 50,000 acres, which were reserved. Pet. App. 148-49. Article 2 provided, "[i]n consideration of the above cession and relinquishment," that the United States would set apart land in Kansas for the

tribes. *Id*. 149-50. The only land in New York ceded by the treaty was not Oneida land, but Seneca and Tuscarora land, addressed in articles 10 and 14. *Id.* 153-54, 155-56.

Article 13 provided for payment to certain Oneidas "for expenses incurred and services rendered in securing the Green Bay country, and the settlement of a portion thereof" and that "they hereby agree to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida," thus leaving removal to the future satisfaction of the Oneidas. *Id*. 155.

Article 3 confirmed that removal was left optional; it provided for forfeiture of Kansas land of tribes that did not remove. *Id*. 150. The same article left the President with discretion to decide when, if ever, removal would occur. Article 15 authorized payments "from time to time under the direction of the President * * * in such proportions" as needed, depending on the number of Indians who chose to move to Kansas. *Id*. 157.

The Senate amended the treaty on June 11, 1838, providing that it "shall have no force or effect whatever" until "submitted and fully and fairly explained by a commissioner of the United States to each of said tribes or bands, separately assembled in council, and they have given their free and voluntary assent thereto." S. Exec. J. 130 (June 11, 1838).

The federal commissioner who had negotiated the treaty, Ransom H. Gillet, returned to New York, where, on August 9, 1838, he gave a document to the Oneidas promising that they "will not be compelled to sell or remove." Gillet also promised "that the treaty was not, & is not intended to compel the Oneidas to remove." Resp. App. 10-11.

On October 25, 1838, Gillet reported to the Commissioner of Indian Affairs that he had explained the treaty to the Oneidas as "necessary to enable them fully to understand

every thing." He noted that "[s]ome of the tribe expressed their fears that they might be compelled to remove, even without selling their land to the State, and desired some evidence from me that such would not be the construction of the papers." On receipt of Gillet's "assurance," "a large number signed the written assent." Resp. App. 6-7.

E. Federal Decision to Keep Tribes in New York and to Sell the Kansas Land

Removal to Kansas did not occur. The federal government decided not to promote or pay for removal. The President eliminated the removal option by restoring the Kansas lands to the public domain and selling them.

As summarized in an 1883 report by the Commissioner of Indian Affairs (H.R. Rep. No. 2001, 47th Cong., 2d Sess. (1883)): "There appeared to be no desire on the part of any considerable number of the Indians to remove, and the idea of the removal of small parties was discouraged by the department." JA 167, 163-71; *see* N.Y. Sen. Rep. No. 70, at 4 (Mar. 24, 1847) (federal commissioner told New York Indians in 1846 that "if it was their preference to remain at their present settlements, they were at full liberty to do so, and would here be protected in all their rights").

There was one effort to remove a few New York Indians, which the United States tried to stop, and it was a disaster. *See* JA 168-69 (many "died, and most of the survivors ultimately returned to New York"); Annual Report of the Commissioner of Indians Affairs 231-235 (1846) (same); S. Exec. Doc. C, 38th Cong., 1st Sess., at 1-2 (1863) (some had "to flee to save their lives, others having been murdered upon their premises"). "No further effort at removal appears to have been made * * *." JA 168; *see also id*. 184 (Court of Claims finding XV).

The United States abandoned even voluntary removal when the President proclaimed the sale of the Kansas lands.

New York Indians v. United States, 170 U.S. 1, 35 (1898) ("*New York Indians II*") (regarding Proclamation No. 667 (Aug. 21, 1860)); *see also New York Indians v. United States,* 30 Ct. Cl. 413, 448-51 (1895) (detailing federal decision not to remove).

In response to the New York Indians' 1883 petition, which was signed by four Oneida chiefs, JA 147-51, Congress authorized the Court of Claims to find facts regarding the Kansas lands. S. Rep. No. 910, 52d Cong., 1st Sess. (1892); JA 172-89. This Court thereafter held the New York Indians entitled to damages for the value of the Kansas lands promised in exchange for the cession of Wisconsin lands, which could not be restored. *New York Indians II*, *supra*.

F. The Oneidas After the Treaty of Buffalo Creek

The Oneida land remaining in tribal possession decreased as New York purchased it. Whipple, at 329-59. In 1843, New York purported to convey tribal land to individual members in severalty. Act of April 10, 1843, ch. 87, 1843 N.Y. Laws 62. Nevertheless, some of the lands remained in tribal possession. Maps prepared for the Commissioner of Indian Affairs from 1883 to 1917 consistently depict an Oneida reservation in New York.

The trust relationship between the United States and the Oneidas continued. The Oneidas received annuities in the form of cloth pursuant to the 1794 Treaty of Canandaigua. Annual Reports of the Commissioner of Indian Affairs, 1864, 1865, 1866, 1868, 1880, 1892-1901; *Oneida Indian Nation*, 434 F. Supp. at 538. Throughout the time that Sherrill treats as critical, the Annual Reports of the Commissioner of Indian Affairs consistently counted Oneidas living on the Oneida "reservation" or "reserve" among the tribes under the jurisdiction of the Bureau of Indian Affairs' New York agency. Annual Reports of the Commissioner of Indian Affairs, 1870-1920.

In the early twentieth century, the Oneidas' rights were confirmed when a state court mortgage foreclosure threatened thirty-two acres of the land remaining in tribal possession. The Attorney General of New York notified the court that the Oneidas "constitute, in fact, a band, with chiefs or head men, who speak for them, and claim tribal rights" and that the land in question was non-taxable tribal land. Resp. App. 12-24. After the court ordered eviction, without addressing the Attorney General's notice (*Boylan v. George*, 117 N.Y.S. 573 (N.Y. App. Div. 1909)), the United States filed a federal suit as trustee for the Oneidas. The District Court held that the Oneidas continued their tribal existence and that the Oneida lands were reservation lands, restoring them to Oneida possession. *United States v. Boylan*, 256 F. 468 (N.D.N.Y. 1919). The Second Circuit affirmed, holding 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" and that New York could not "extinguish the right of occupancy which belongs to the Indians." *United States v. Boylan*, 265 F. 165, 174 (2d Cir. 1920), *dism'd for want of jurisdiction*, 257 U.S. 614 (1921).

In 1936, the United States invited the Oneidas to vote on reorganization under the Indian Reorganization Act, which the Oneidas did, voting to keep a traditional form of tribal government and to reject a written constitution. 1936 Annual Report of the Commissioner of Indian Affairs, at 163.

In 1979, the Secretary of the Interior published the first list of federally recognized tribes, which included the Oneida Indian Nation of New York. 44 Fed. Reg. 7325, 7326 (Jan. 31, 1979); *see also* 68 Fed. Reg. 68180, 68182 (Dec. 5, 2003) (current list). The Department of the Interior also recognizes the Oneida Indian Nation of New York as holding rights to Oneida land under the Treaty of Canandaigua. JA 207-08.

SUMMARY OF ARGUMENT

I. The legal principles that govern this case have long been settled. Immunity from state and local taxation attaches to land in which an Indian tribe has a right of possession that is federally protected, whether because the aboriginal right of possession has never been extinguished or because a federal treaty protects the possessory right to the land as a "reservation" (or both). *E.g.*, *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764-65 (1985); *Oneida I*, 414 U.S. at 672; *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 172, 174-75 (1973); *New York Indians*, 72 U.S. 761, 771 (1866) ("*New York Indians I"*). The possessory right and consequent tax immunity, moreover, cannot be extinguished without clear *federal government* action—in the absence of which they persist despite illegal state-sponsored dispossession of an Indian tribe even for long periods of time, as *Oneida II* ruled with respect to the Oneidas' possessory right. *See also Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

These venerable principles, which are essential to the federal government's fulfillment of its responsibility to protect Indian tribes, were not disturbed by this Court's decisions in *Cass County v. Leech Lake Band*, 524 U.S. 103 (1998), and *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998). Both decisions involved land as to which Congress had clearly removed federal protection of tribal possessory status; new congressional authorization was required—but absent—to recreate such status; an Indian Tribe could not create it on its own by purchasing the land. Those decisions do not require new congressional action to protect land that has never lost its federal protection in the first place. Nor did Congress' creation in 1934 of a mechanism for creating new federally protected tribal lands, 25 U.S.C. § 465, effect an implied repeal of preexisting, otherwise-persisting federal legal protections for tribal land.

The only question, accordingly, is whether the lands at issue here—which undisputedly are within the Oneida Nation's aboriginal lands and the subject of federal treaties—validly lost their protected status. Sherrill urges that such loss occurred at three times—in 1788, through the New York Treaty of Ft. Schuyler; in 1838, through the federal Treaty of Buffalo Creek; and at some indistinct time near 1890, through some lapse in tribal government activity. These three arguments are legally insupportable.

II. The 1788 Ft. Schuyler Treaty did not abrogate the Oneida Nation's right of possession in the land at issue: before and after the treaty the Nation had its right of possession and consequent tax immunity. The treaty specifically "reserved" this land from the "cession" the Oneidas made to New York—language that must be read as protecting, not eliminating, the Nation's possessory right, which, indeed, the State respected in its conduct immediately following the treaty (recognizing tax immunity, for example). In any event, the national government was fully empowered to do what it unmistakably did in the 1794 Treaty of Canandaigua: acknowledge formal federal treaty protection to this land as a federal reservation. That protection, as well as the Nonintercourse Act, rendered illegal the post-1794 dispossession of much of the Nation's land by New York (without valid federal approval), regardless of any disputes about characterizations of the 1788 state treaty.

III. The Nation did not lose its possessory rights through the 1838 Treaty of Buffalo Creek. That treaty by its terms did not require the Nation to leave its land in New York, let alone cede or terminate any preexisting rights, or ratify earlier illegal transactions, in such land. It left removal from New York (for the promised Kansas lands) to the future voluntary decision of the Nation's members, who did not make that choice, and to the discretion of the executive branch, which changed its mind about even voluntary removal, chose not to

pay for it, told the Indians not to go, and sold the Kansas lands, ending the removal option. The formal negotiating history also establishes that mandatory removal was not within the parties' understanding of what they were doing in this bilateral agreement (whose interpretation is not simply a matter of congressional intent) because the federal commissioner specifically told the Nation that removal was not mandatory. He did so because the Oneidas would not agree to the treaty otherwise.

Post-1838 facts prove that the Nation did not give up its possessory rights through the Treaty of Buffalo Creek. In particular, when members of the Nation recovered money in *New York Indians II* for the federal government's sale of the Kansas lands, they did not thereby confirm that the Kansas lands was a swap for relinquishing rights in New York land. The New York tribes, rather, had land in Wisconsin that they gave up in the Treaty, and this Court confirmed in *New York Indians II* that the New York tribes got damages because they could no longer get back the Wisconsin lands; the damages, and the consideration for the Kansas lands, had nothing to do with New York lands.

IV. Finally, the Nation did not lose its federally protected possessory rights through some "lapse" in tribal status (Pet. Br. 41) near the end of the nineteenth century. This asserted basis for loss of rights does not even purport to invoke the formal federal government action (whether through bilateral agreement or unilateral imposition) that is required to extinguish tribal possessory rights. Here, the political branches of the federal government officially recognize the Nation's status and its entitlement to those rights, and the trust relationship between the United States and the tribe has never been abandoned or terminated. Those facts make any judicial inquiry into *de facto* "lapse" legally immaterial. *See*, *e.g.*, *United States v. John*, 437 U.S. 634, 652-53 (1978); *Winton v. Amos*, 255 U.S. 373, 378-79 (1921).

In any event, such an inquiry would present no triable issue in this case. On tribal continuity, Sherrill's evidence consists of isolated snippets of unelaborated assertions. Against those snippets is a massive array of contrary evidence, including contemporaneous, consistent governmental acknowledgments of the continued status of the Nation, and the tribal-status-affirming result of a full trial conducted at a time when witnesses who directly knew the facts could and did testify. *United States v. Boylan*. On this wholly lopsided evidence, the District Court that granted summary judgment, were it instead to act as trier of fact, could not make a reasonable contrary finding of any legally significant tribal discontinuity.

ARGUMENT

I. ONEIDA LAND SUBJECT TO UNEXTINGUISHED TRIBAL POSSESSORY RIGHTS CANNOT BE REMOVED FROM ONEIDA POSSESSION THROUGH A STATE LAW PROPERTY TAX FORECLOSURE.

Tax immunity accompanies a federally protected tribal possessory right never extinguished by the federal government. *Oneida II* specifically established that the Oneidas' tribal possessory right persists despite illegal transfer of tribal lands two centuries ago and despite the continued dispossession of the Oneidas. The Oneidas are therefore entitled to the tax immunity accompanying that right because, as shown in Points II-IV, *infra*, that right has never been extinguished.

A. States May Not Tax Land in Which a Tribe Holds an Unextinguished Possessory Right Deriving from Indian Title or Federal Treaty Protection.

In its aboriginal lands, a tribe has a possessory right—a right to occupy and use the lands—referred to variously as Indian title, aboriginal title and original title. *Oneida II*, 470 U.S. at 230; *Oneida I,* 414 U.S. at 667; *New York Indians I*,

72 U.S. at 771. That Indian title persisted through European discovery, after which the separate fee title was held, first, by the discovering European sovereign and, thereafter, by individual states or the United States. *Oneida II*, 470 U.S. at 234-35; *Oneida I*, 414 U.S. at 667. In New York and the other original states, the fee title passed from the British Crown to the state, *Oneida I*, 414 U.S. at 670, but the fee title was always burdened by Indian title, the tribal possessory right, *Oneida II*, 470 U.S. at 234; *Oneida I*, 414 U.S. at 667; *see United States v. Thomas*, 151 U.S. 577, 584 (1894) (holder of "naked" fee title cannot disturb Indian possession). The tribal possessory right is "as sacred as the fee simple of the whites." *Oneida I*, 414 U.S. at 668-69 (citations omitted).

Federal treaties, such as the Treaty of Canandaigua, add an additional, independent foundation for tribal possessory rights. *See Oneida II*, 470 U.S. at 231 (describing Oneida treaties that "secure" the Oneidas' possession of land and guarantee "free use and enjoyment"); *see also Oneida I,* 414 U.S. at 667, 670 (federal treaties recognized tribal occupancy rights in specific land). That right, like the aboriginal title, makes land a reservation and hence Indian country. 25 U.S.C. § 1151.[1]

State and local governments may not tax tribe-possessed lands in which the tribal possessory right, whether aboriginal

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[1] Federal treaties establish the Oneida reservation as a "reservation under the jurisdiction of the United States," as required for Indian country status under 25 U.S.C. § 1151. "[I]t cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the [Indians] and the exclusion of non-[Indians] from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the [Indians] under general federal supervision." *McClanahan v. State Tax Comm'n,* 411 U.S. 164, 174-75 (1973); *see Alaska v. Native Village of Venetie*, 522 U.S. 520, 528 n.3 (1998) ("We had also held, not surprisingly, that Indian reservations were Indian Country."); *Donnelly v. United States*, 228 U.S. 243, 269 (1913) (reservations are Indian country); *United States v. Pelican*, 232 U.S. 442, 445, 449 (1914) (same).

or treaty-based or both, is unextinguished. State taxation is "inconsistent with the original title of the Indians." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764-65 (1985) (citation omitted). It also is inconsistent with federal treaties that "define the boundaries of federal and state jurisdiction" by identifying lands "for the use and occupation of" a tribe. *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 172 n.8, 174-75 (1973); *see also Oneida I*, 414 U.S at 672 (state taxation "interfere[s] with Indian possessory rights guaranteed by the Federal Government"). "State and local governments may not tax Indian reservation land." *Cass County v. Leech Lake Band*, 524 U.S. 103, 110 (1998); *see Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *Kansas Indians*, 72 U.S. 737, 756 (1866); *New York Indians I*, 72 U.S at 771 (treating Senecas' Treaty of Canandaigua reservations as "wholly exempt from State taxation").

Tribal immunity from state taxation is so fundamental that the Constitution refers to "Indians not taxed." U.S. Const. Art. I, § 2; Amend. XIV, § 2; s*ee Elk v. Wilkins,* 112 U.S. 94, 99 (1884); F. Cohen, Handbook of Federal Indian Law 389 (1982 ed.). This immunity is not balanced against other interests. "In the special area of state taxation of Indian tribes and tribal members, we have adopted a *per se* rule" against state taxation of tribes and their reservations. *California v. Cabazon Band*, 480 U.S. 202, 215 n.17 (1987); *see also Bryan v. Itasca County*, 426 U.S. 373, 388-89 (1976) (permitting state regulation and taxation of tribes could "result in the undermining of * * * tribal governments").

B. The Tribal Possessory Right Persists Unless Extinguished in Compliance with Federal Law, Even if Possession Is Interrupted for a Long Time as a Result of Land Transfers that Violated Federal Law.

Although New York and the other original states holding fee title have the sole, "pre-emptive right to purchase from

the Indians," *Oneida I*, 414 U.S. at 670, the states cannot purchase Indian title and extinguish the tribal possessory right without federal consent. "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." *Id*. The holder of the preemption right can act only "with the consent of the government." *New York Indians I*, 72 U.S. at 771. "With the adoption of the Constitution, Indian relations became the exclusive province of federal law," *Oneida II,* 470 U.S. at 234*,* and, since 1790, the Nonintercourse Act has prohibited conveyances of Indian title "except where such conveyances were entered pursuant to the treaty power of the United States." *Id*. at 231-32. The federal role also exists because federal treaties "protect[] Indian occupancy," *Oneida I*, 414 U.S. at 670, and reservations can be modified only by Congress, *e.g.*, *Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

In *Oneida II*, the Court gave these principles specific effect with respect to Oneida land conveyed to New York in 1795 without the required federal approval. The Oneidas asserted a continuing trespass on their continuing possessory right and sought rental damages for 1968 and 1969 against the two counties that had acquired some of the land. *Oneida II,* 470 U.S. at 229. The District Court found the counties liable to the Oneidas "for wrongful possession of their lands" and ultimately entered judgment awarding damages equal to the "rental value" of the land in 1968 and 1969. *Id.* at 230. The Court of Appeals affirmed in part, remanding only for a recalculation of the rental damages for the those two years. *Id*. This Court "affirmed with respect to the finding of liability under federal common law." *Id*. at 253.

The affirmance of the judgment imposing liability for damages for trespass in 1968 and 1969 necessarily confirmed, on the record in that case, the enduring Oneida possessory right and federal protection against alienation of it. The Court affirmed the Oneidas' cause of action "for violation of their

possessory rights." *Id*. at 236. The Court reiterated the rule, codified in the Nonintercourse Act, that the sovereign's consent "was required to extinguish aboriginal title and thus that a conveyance without the sovereign's consent was void *ab initio*." *Id*. at 245. The Court held that a tribal possessory right persists despite illegal conveyance, ruling that post-1795 treaties involving other Oneida land did not reflect "congressional intent to extinguish Indian title" to the Oneida land transferred in 1795. *Id*. at 247-48; *see also Oneida I*, 414 U.S. at 667, 670, 674.

The Court recognized the impact of its decision, noting that it granted review because of the importance of the case for the Oneidas and "potentially for many eastern Indian land claims." *Oneida II,* 470 U.S. at 230. In the conclusion of its decision, the Court referred to the amicus brief of the United States and remarked that "[t]he Government recognized, as we do, the potential consequence of affirmance." *Id*. at 253. It is up to Congress to address any problems that cannot be resolved in the usual cooperative manner. *See id*.; *see also* note 4, *infra.*

C. A Clear Federal Treaty or Statute Is Required to Extinguish the Tribal Possessory Right and Accompanying Tax Immunity.

A federally protected tribal possessory right can be extinguished only by a clear federal statute or treaty, *Oneida II*, 470 U.S. at 248, and the same is true of the accompanying tax immunity, *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985). As to the Oneidas, Congress has not extinguished either. *Cf*. 25 U.S.C. § 233 (New York may not tax reservations lands). Thus, the federally protected possessory right that barred New York from transferring Oneida land even in voluntary transactions also bars New York and its political subdivisions from taking Oneida land from the Oneidas today through tax foreclosures and evictions.

The 1998 decisions in *Cass County v. Leech Lake Band*, 524 U.S. 103 (1998), and *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998), did not alter the bedrock requirement of affirmative federal extinguishment of federal protection. Those decisions merely forbid tribal efforts to create, on their own, federal protection of land that Congress has declared unprotected. They do not demand new federal government action to protect a possessory right that has never lost federal protection in the first place.

In *Venetie*, a federal statute revoked an Indian reservation in Alaska. Congress transferred the land to Native corporations, and they transferred the land in fee simple to an Indian tribe. The Court held that the tribe's acquisition of title to, and its presence on, the land did not convert a terminated reservation into a "dependent Indian community" subject to tribal power to tax non-Indian contractors working there. In effect, the Court held that the tribe could not itself undo what Congress had done, by restoring the federal protection Congress had eliminated.[2]

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[2] *Venetie* did not superimpose an "active control" requirement on reservation land, so that some reservations no longer qualify as Indian country. See note 1, *supra.* Nor did *Venetie* change the rule that "when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *Mattz v. Arnett*, 412 U.S. 481, 504-05 (1973) (quoting *United States v. Celestine*, 215 U.S. 278, 285 (1909)). And *Venetie* did not change the rule that tribal possessory rights persist until the United States acts unambiguously to alter them. *Oneida II*, 470 U.S. at 248; *see also Bates v. Clark*, 95 U.S 204, 209 (1877) (land is Indian country "so long as the Indians retain their original title to the soil").

In any event, there is ample evidence of federal involvement with respect to the Oneidas and their lands. The national government guaranteed possession in 1784, 1789 and 1794 treaties, the last providing for a federal superintendent and for federal dispute resolution. Today, the Bureau of Indian Affairs approves requests to encumber Nation land restricted against alienation. *E.g.,* JA 229-36. Sherrill itself has sought the Secretary of the Interior's approval in connection with an easement on Oneida

In *Cass County*, an Indian tribe purchased land from non-Indians within the boundaries of the tribe's reservation in Minnesota. The land was covered by a federal statute that had specifically removed federal protection, *i.e.*, restrictions against alienation, of the land. The Court held that Congress had removed the tribe's tax immunity in the land when it removed restrictions on alienability. Tribal action could not reverse that decision.

The point of *Venetie* and *Cass County* is that Indian tribes themselves cannot generate new federally-protected rights simply by acquiring possession of lands in which Congress has terminated their old rights. Neither decision suggests that original and continuing federal protection of tribal possessory rights will not be enforced because of earlier illegal transfers.

Like *Venetie* and *Cass County*, the statute authorizing new federal protection for land when the federal government takes it into trust for a tribe, 25 U.S.C. § 465, supplies no basis for abrogating preexisting, well-established federal protections. Congress, in creating this authority in 1934, did not effect an implied repeal of the preexisting federal rights of tribes in their land or change the legal consequence of those rights, including tax immunity. That process, of course, is required for land that, as in *Venetie* and *Cass County*, does not otherwise have federal protection, but it is not required for land that is already subject to federal protection that has not been removed.[3]

Refusing tax immunity to land that the Oneidas have brought back into their possession, and in which the tribal possessory right has never been extinguished, would amount

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lands. JA 212-15; *see also* 64 Fed. Reg. 67293 (Dec. 1, 1999) (Oneida ordinance); 59 Fed. Reg. 2629 (Jan. 18, 1994) (Oneida ordinance); 58 Fed. Reg. 33160 (June 5, 1993) (Oneida compact).

[3] The Oneidas have not sold any reacquired lands, which remain subject to pre-existing restraints on alienation.

to extinguishment that Congress has not authorized. In *Oneida II*, the Court left open whether "equitable considerations" might limit ejectment as a remedy with respect to land that is not in the Oneidas' possession. 470 U.S. at 253 n.27. The issue here is not remedy for dispossession, but protection of actual possession accompanied by an unextinguished federally protected possessory right. *Cf. Cayuga Indian Nation v. Cuomo*, 1999 WL 509442, *23-24 (N.D.N.Y. July 1, 1999) ("By using monetary damages to purchase property from willing sellers, the Cayugas should have no difficulty accomplishing the same goals which they hope to accomplish through ejectment.").[4]

Thus, the only relevant question in this case is whether the Oneida possessory right was ever lawfully extinguished, and, as we now show, it was not.

II. THE ONEIDAS' POSSESSORY RIGHT WAS PROTECTED AT THE TIME OF THE 1805 DISPOSSESSION.

The land at issue is part of the Nation's aboriginal lands. The Nation did not lose its aboriginal possessory rights (or

[4] Giving meaning to the possessory right when the Oneidas have possession does not affect lands not in Oneida possession. Decisions like *Montana v. United States*, 450 U.S. 544 (1981), and *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001), curtail tribal jurisdiction with respect to land not in tribal possession—and the Oneidas do not claim it. Further, 25 U.S.C. §§ 232 and 233 give New York civil and criminal adjudicatory jurisdiction with respect to most claims and offenses arising on Indian reservations in New York. Sustaining the Nation's tax immunity will not have dire effects. *See* Br. of National Congress of American Indians. As to land that is in Oneida possession, the District Court found that Sherrill exaggerates its claims of injury arising from inability to tax those lands. Pet. App. 106-08. The Oneidas make large payments to and enter into service agreements with local governments. JA 265. Sherrill refuses both. That refusal is not typical of local governments. S*ee* Br. of Puyallup Tribe *et al*. (explaining how tribes and local governments resolve financial issues through service agreements and other means).

tax immunity) in the 1788 state Treaty of Ft. Schuyler. The Nation had possession and immunity before and after. The Nation's rights were protected by the 1790 federal Non-intercourse Act and, in any event, established by the 1794 federal Treaty of Canandaigua, and by earlier federal treaties. In fact, the 1794 treaty by itself proves federal protection before the 1805 dispossession of the land at issue, for the Oneidas' rights under that treaty are no less than the possessory rights and tax immunity of the Senecas specifically affirmed in *New York Indians I*. *See* 72 U.S. at 768 (in the Treaty of Canandaigua, "the United States have acknowledged the reservations to be the property of the Seneca nation—that they will never claim them nor disturb this nation in their free use and enjoyment"); Pet. App. 141-43. The 1788 state Treaty of Ft. Schuyler certainly did not preclude federal protection of the land by federal treaty and federal statute.[5]

A. The 1788 State Treaty Did Not Extinguish Oneida Rights in the Reserved Lands.

Article 1 of the treaty provides that the Oneidas "cede and grant all their lands to the people of the State of New York forever," (Pet. App. 136), but article 2 immediately qualifies that cession: "[o]f the said ceded lands" a tract described by metes and bounds is "reserved" to the Oneidas to "hold to themselves and their posterity forever for their own use and cultivation." Pet. App. 137. That is the language of reservation, not retrocession. The two articles together delineated the boundary between the lands ceded to the state and the lands reserved by the tribe. In the latter, the Oneidas retained the right of perpetual possession.

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[5] The argument that New York extinguished Oneida possessory rights in 1788 was hardly obvious through three decades of litigation. In *Oneida I* and *Oneida II*, the State and the Counties defended against the assertion of a tribal possessory right but never thought to say it had been extinguished in 1788. Sherrill never made the point until it filed a Fed. R. App. P. 28(j) letter after argument in the Court of Appeals.

It is well-established that such language of cession and reservation does not affect the tribal right to possess the reserved lands. Indeed, in 1795, United States Attorney General Bradford concluded that the 1788 treaty gave only the "right of preemption" to New York as to the reserved lands, with the Oneidas retaining their possessory rights, which could only be extinguished "by a treaty holden under the authority of the United States, and in the manner prescribed by the law of Congress." Resp. App. 2-3 (adding that "they are still the lands of those [Indian] nations").

In 1833, United States Attorney General Taney construed language similar to the 1788 treaty ("From the cession aforesaid, the following tracts shall be reserved") as leaving Indian title to the reserved land undisturbed:

> I have the honor to state that, in my opinion, the original Indian title in these reservations was not extinguished on the ratification of the treaty. It ceded, by the first article, a certain tract of country to the United States, and, by the second article, reserved from the cession large quantities of land in favor of certain Indians named. These reservations are excepted out of the grant made by the treaty, and did not therefore pass by it: consequently, the title remains as it was before the treaty; that is to say, the lands reserved are still held by the original Indian title.

Title to the Pottawatomie Reservations, 2 Op. Att'y Gen. 587 (1833) (treaty at 7 Stat. 378 (1832)); *see also Kansas Indians*, 72 U.S. at 755 (holding Shawnee land immune from state taxes under 1854 treaty, 10 Stat. 1053, notwithstanding cession of all land to the United States in article 1 and explicit cession back to the Shawnee in article 2).

In *United States v. Winans*, 198 U.S. 371, 377 (1905), the Court held that a tribe reserved fishing rights in a treaty that, in article I, did "cede, relinquish, and convey to the United States all [tribal] right, title and interest in and to" certain lands but, in article III, "secured" to the tribe "the right of

taking fish at all usual and accustomed places" on the ceded lands. "[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." *Id*.; *see Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 678 (1979) ("securing" rights is synonymous with reserving rights).

In *United States v. Klamath & Moadoc Indians*, 304 U.S. 119 (1938), the Court similarly construed a treaty that stipulated that the "Indians aforesaid cede to the United States all their right, title, and claim to all the country claimed by them." Treaty with the Klamath, 16 Stat. 707 (Oct. 14, 1864). Article 1 added: "*Provided*, That the following-described tract, within the country ceded by this treaty be set apart as a residence for said Indians [and] held and regarded as an Indian reservation." *Id*. The Court read the language as ceding only "a part" of the tribal lands, with the tract subject to the proviso continuing as "part of the reservation retained by plaintiffs out of the country held by them in immemorial possession." *Klamath*, 304 U.S. at 122. That the land was retained by a proviso "clearly did not detract from the tribes' right of occupancy." *Id*. at 123.

Winans and *Klamath* exemplify the Court's frequent rejection of technical arguments that would diminish the value of a treaty right held by a tribe. *E.g.*, *Seufert Bros. v. United States*, 249 U.S. 194, 198 (1919); *Winters v. United States*, 207 U.S. 564, 576-77 (1908); *Minnesota v. Hitchcock*, 185 U.S. 373, 396-97 (1902). Indian treaties "are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them." *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *accord Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970).

The Court (per Marshall, C.J.) applied the same principle in *Worcester v. Georgia*, 31 U.S. 515, 552-53 (1832), holding

that a treaty detailing the "[t]he boundary allotted to the Cherokees for their hunting grounds, between the said Indians and the citizens of the United States" did not effect an implied surrender of tribal rights followed by a grant of lesser rights. "It could not * * * be supposed, that any intention existed of restricting the full use of the lands they reserved." *Id*. at 553.

> Is it 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." *The actual subject of contract was the dividing line between the two nations;* and their attention may very well be supposed to have been confined to that subject. When, in fact, they are ceding lands to the United States, and describing the extent of their cession, it may very well be supposed that they did not understand the term employed, as indicating that, instead of granting, they were receiving lands. If the term would admit of no other signification, which is not conceded, its being misunderstood is so apparent, results so necessarily from the whole transaction; that it must, we think, be taken in the sense in which it was most obviously used.

Id. at 552-53 (emphasis added); *see also id*. at 563, 582 (M'Lean, J., concurring).[6]

The negotiating history of the 1788 treaty confirms that the Oneidas gave up no possessory rights in the reserved lands. The Oneidas previously had leased all their lands to a private land company "excepting and reserving" the same lands later reserved under the 1788 treaty. 1 Franklin B. Hough, Pro-

[6] The same analysis applies to the 1788 state treaty. Under the Articles of Confederation, the state had power to extinguish Indian title, if at all, only by purchase with tribal consent. *See* p. 25 & n.9, *infra*. Thus, the tribe's understanding controls, as a matter of federal law, the meaning and extent of cession in a state treaty.

ceedings of the Commissioners of Indian Affairs Appointed by Law for the Extinguishment of Indian Title in the State of New York, at 123 (1861). After New York invalidated the lease, it sought to acquire the same lands, with the previously-reserved lands again to be reserved. There is no evidence that the State asked the Oneidas, or that the Oneidas intended, to give up rights in the reserved lands, which included the Oneidas' homes and prime fishing areas. *Id.* at 232-33.

The 1823 decision in *Goodell v. Jackson*, 1823 N.Y. LEXIS 36 (N.Y. Sup. Ct. 1823), is not to the contrary. The case did not even involve Oneida Nation lands or any controversy about the meaning of the Treaty of Fort Schuyler. Rather, it involved an individual Oneida's non-reservation land (granted by the State for military service) which the court held came within New York laws forbidding alienation to non-Indians without state approval. Along the way, the court, in one sentence, referred imprecisely to a cession and retrocession in the Ft. Schuyler treaty (never quoting or analyzing the treaty language). It made these references, however, not to deny the protected status of Nation lands, but, in the very next sentence, to confirm that, after the treaty, the Nation's lands remained protected against alienation (implying similar status for the individual Oneida's non-reservation land). The court specifically stated that the Nation's lands remained immune from taxation. 1823 N.Y. Lexis at *31-36.[7] A single passing reference to "retrocession" cannot alter the 1788 treaty's preservation of the Oneidas' possessory rights.

Not surprisingly, a New York legislative committee rejected any interpretation of the 1788 Oneida treaty as

[7] *Goodell's* offhand incorrect reference is the source of the other "authorities" Sherrill and its County amici rely on, including the cryptic dictum in *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831), which then became the basis for the decision in the American and British Claims arbitration. Pet. Br. 21-22.

"treating the title of the Indians to these lands as having been derived from an *appropriation by the State*, when in fact it was a *reservation by the Indians,* an original ownership." N.Y. Assembly Rep. No. 142, at 3 (May 24, 1878) (emphasis in original). An 1882 opinion by the New York Attorney General construed identical language in the 1788 treaty with the Onondagas to "recognize[] and confirm[]" the tribe's "immemorially recognized right of occupancy * * * in the most solemn manner in which this State could recognize and confirm the same." N.Y. Sen. Rep. No. 77, at 2 (Apr. 4, 1882). [8] The New York Court of Claims later described the Treaty of Canandaigua as "confirm[ing] the Onondagas' aboriginal right of possession." *Andrews v. State*, 79 N.Y.S. 2d 479, 482 (N.Y. Ct. Cl. 1948).

Finally, the limited nature of New York's authority at the time of the 1788 Ft. Schuyler treaty confirms that the treaty cannot be read to have extinguished the Nation's aboriginal right of possession in the reserved lands, thereby transferring to New York political power (including taxation) over the Oneidas and the land on which they resided. *First*, that reading would infringe the national government's power to "regulat[e] and manag[e] all affairs with the Indians," under the Articles of Confederation, Art. IX(4).[9]

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[8] The State made a treaty with the Onondagas in 1788 worded like the Treaty of Ft. Schuyler. The Onondagas retain possession of a large block of land south of Syracuse. It is not taxed, and has never been. *See* Brief of Amici Cayuga Indian Nation of New York, *et al*.

[9] A proviso in Article IX(4) left some power to the States, but that proviso did not allow the termination of basic possessory rights in land the tribe continued to occupy. *See* Letter from James Madison to James Monroe (Nov. 27, 1784), *in* 2 The Founders' Constitution 529 (1987) ("If this proviso be taken in its full latitude, it must destroy the authority of Congress altogether."). The Second Circuit read the proviso to allow a more limited exercise of state authority to purchase land with tribal consent in *Oneida Indian Nation v. New York*, 860 F.2d 1145 (2d Cir. 1988).

Second, the proposed reading would treat the Ft. Schuyler treaty as "preempting" exclusive federal authority over Indian commerce under the new Constitution. New York signed the Ft. Schuyler treaty on September 22, 1788, two months after it ratified the Constitution, three months after the requisite ratification by nine states, and nine days after Congress approved the resolution putting the Constitution into operation. *See* Resolution of Sept. 13, 1788, *in* 4 The Founders' Constitution 670 (declaring the Constitution to have "been ratified in the manner declared to be sufficient for the establishment of the same"). The Ft. Schuyler treaty should not be read to breach the Constitution's already-effective limits on the power of signatory states to take actions committed to the federal government. *See U.S. Term Limits v. Thornton*, 514 U.S. 779, 846 (1995) (Thomas, J., joined by Rehnquist, C.J., O'Connor and Scalia, JJ., dissenting).[10]

B. The Nonintercourse Act Protected the Oneidas' Possessory Right.

The Nonintercourse Act, first enacted in 1790, forbids conveyance of land, "or any title or claim thereto," from any Indian tribes without the requisite federal consent. In 1790, the Oneida Nation was in occupancy of the reserved land, and the land was not subject to taxation. No matter how the Oneidas' right in and occupancy of the reserved land are

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[10] In *Owings v. Speed*, 18 U.S. 420 (1820), this Court held that Virginia could break a contract after it ratified the Constitution but before the new government was installed. That action by Virginia, however, did not impair the powers of the new government or interfere with the interests of the other states that had mutually covenanted to be bound by the Constitution. For analysis of when aspects of the Constitution became effective, see Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?* 77 Notre Dame L. Rev. 1 (2001); and Vasan Kevasan, *Essay: When Did the Articles of Confederation Cease to Be La*w? 78 Notre Dame L. Rev. 35 (2002) (agreeing that states were bound by limitations in the Constitution upon its establishment).

characterized, Congress protected those rights and that occupancy.

C. The Federal Treaty of Canandaigua Protected the Oneidas' Reserved Lands From State Taxation.

The Treaty of Canandaigua formally confirmed federal protection and preempted state tax laws. It acknowledged the reservation as the Oneidas' "property" and promised the Oneidas "the free use and enjoyment thereof," confirming its status as a reservation (and hence, Indian country). Pet. App. 142-43. It is irrelevant that the federal treaty adopted by reference the boundaries of the Oneida reservation drawn in the 1788 state treaty. State protection does not preclude federal protection. *Oneida I*, 414 U.S. at 672 n.7, 673 n.8. There is no dispute that the Oneidas were in possession and had a perpetual right of occupancy. The federal government, in the exercise of its plenary and exclusive powers over relations with Indian tribes under the Constitution, could and did protect a perpetual right of possession already acknowledged in a state treaty.

The Treaty of Canandaigua extends the same promise of federal protection to the Oneidas as it does to the Senecas. Pet. App. 141-43. It uses the same "acknowledge[ment]" language. *Id.* The United States had no reason to offer less protection to the Oneidas, its allies in the war, than to the Senecas, its adversaries. This Court has already established the Senecas' protection against property taxes under the Treaty of Canandaigua. *New York Indians I*, *supra*.

Even if the lands were not aboriginal lands and had not already been immune from taxation, the federal government could protect tribal lands from alienation through tax foreclosures. The Court held in *Board of County Commissioners v. Seber*, 318 U.S. 705, 717-18 (1943), that the federal government could extend tax immunity to land purchased and

titled to an individual Indian. "The fact that the Acts withdraw lands from the tax rolls and may possibly embarrass the finances of a state or one of its subdivisions is for the consideration of Congress, not the courts." *Id*. at 718. In *United States v. John*, 437 U.S. 634, 652-53 (1978), the Court upheld the federal government's authority to protect tribal land as Indian country (thereby removing it from the tax rolls and state criminal jurisdiction), without regard to whether the land previously had been subject to state jurisdiction and taxation. *Cf. Menominee Tribe v. United States*, 391 U.S. 404, 411 n.12 (1968) (any state jurisdiction over land during a lapse in reservation status "would not have survived" later federal treaty and its recognition of tribal rights).

Amici Madison and Oneida Counties suggest that the 1794 treaty should be construed narrowly to avoid the constitutional question whether the United States can take property belonging to the States. MOC Br. 4 (citing *United States v. Minnesota*, 270 U.S. 181, 209 (1926)). But this argument (not made by Sherrill and not made by the Counties in this case below or in *Oneida I* and *II*) offers not a construction but an outright nullification of the entirety of Article 2.[11] It is incorrect also because giving the 1794 treaty its plain meaning takes no property right from New York, which, both before and after the 1794 treaty, held fee title burdened by a tribal possessory right. Political control over a tribe in possession of land is exclusively federal under the Constitution and is not the subject of *Minnesota* and its questions about federal constitutional power with regard to state property.[12]

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[11] The suggestion is inconsistent with Sherrill's contention that the Oneidas must apply to have land taken into trust, an illusory option if the Constitution forbids federal protection of the land. Pet. Br. 29-31.

[12] The Counties' separate claim that "[t]he Second Circuit's decision violates the Tenth Amendment" by diminishing sovereign powers of New York, MOC Br. 27-30, is outside any of the questions presented and is also without merit. The State neither claimed nor exercised political

III. THE 1838 TREATY OF BUFFALO CREEK DID NOT DISESTABLISH THE ONEIDA RESERVATION.

Sherrill contends that the Treaty of Buffalo Creek "required the Oneidas to permanently abandon their lands in New York," Pet. Br. *i*, and thereby terminated protection for the entire reservation, including land, like the land at issue here, that was not the subject of the treaty because it had been illegally alienated before 1838. This contention is wrong. The treaty did not mandate Oneida removal, and neither the United States or the Oneidas understood it to terminate the Oneida reservation.

A. The Relevant Question Is Whether the Oneidas, as Well as the United States, Intended to Disestablish the Oneida Reservation.

Sherrill incorrectly focuses on its view of congressional intent, as if it were addressing construction of a federal statute. Pet. Br. 36-37. The Treaty of Buffalo Creek was not unilateral federal legislation, but a bilateral agreement between two governments. Moreover, it was an Indian treaty,

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sovereignty over the Oneida reservation as a result of the 1788 treaty, and the Counties offer no evidence that the treaty was understood by the parties as extending state sovereignty over the reservation. *Goodell v. Jackson,* shows it was not so understood. Moreover, the later illegal land acquisitions by New York could not give it sovereign power that the Constitution assigns to the national government. *United States v. Lara*, 124 S. Ct. 1628, 1633 (2004) (referring to Congress' "broad general powers to legislate in respect to Indian tribes, powers we have consistently described as 'plenary and exclusive'"). When a federal treaty has established an Indian reservation, only Congress can disestablish that reservation. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Federal supremacy principles preclude a state from eliminating reservation status by its own actions. *See Oneida I*, 414 U.S. at 673-74, n.8 (quoting *People ex rel. Cusick v. Daly*, 212 N.Y. 183, 196-97 (1914)); *cf. United States v. Holliday*, 70 U.S. 407, 419 (1865) (states cannot "withdraw" Indians from federal protection).

subject to a well-developed body of law based on the unequal positions of the United States and Indian tribes and the trust relationship between them. It is well-established that an Indian treaty must be applied as understood by the tribe. *Minnesota v. Mille Lacs Band*, 526 U.S. 172, 195 & 196 (1999); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-76 (1979).

It is also "well established that treaties should be construed liberally in favor of the Indians." *Oneida II*, 470 U.S at 247. Even when a statute is at issue, "[a] congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz v. Arnett*, 412 U.S. 481, 505 (1973); *see DeCoteau v. Dist. County Court*, 420 U.S. 425, 444 (1975); *Solem*, 465 U.S. at 470. A treaty must be no less clear.

B. The Treaty Text Does Not Establish the Required Intention to Disestablish the Oneida Reservation.

1. *The Treaty Did Not Ratify the Illegal Pre-Treaty Transfers.*

The Treaty of Buffalo Creek did not extinguish Oneida title (and the concomitant tax immunity) in land transferred before 1838 by ratifying those earlier, illegal transfers. In *Oneida II*, the District Court rejected the argument that the Treaty of Buffalo Creek ratified earlier illegal land sales, 434 F. Supp. at 539, and the Counties reasserted the argument in this Court. Reply Brief of the County of Oneida and the County of Madison, at 18-19, *County of Oneida v. Oneida Indian Nation*, Nos. 83-1065 & 83-1240; *cf. Oneida II*, 470 U.S. at 269 n.24 (Stevens, J., dissenting) (referring to discussion of treaty in amicus brief of United States). The Court did not address the argument but did reject the stronger argument for ratification of a 1795 sale by subsequent 1798 and 1802

treaties. *Oneida II,* 470 U.S. at 246-48 & nn. 19-20. The 1798 and 1802 treaties drew boundaries based on "the last purchase from" the Oneidas and "other lands heretofore ceded by the said Oneida nation." *Id*. Even those references to the prior transaction were not sufficiently "explicit" or "plain and unambiguous" to extinguish Oneida possessory rights. *Id*.

The Treaty of Buffalo Creek, in contrast, made no reference to prior land sales at all, and there is no evidence of negotiations about such land. *See Mille Lacs*, 526 U.S. at 197-98 (rejecting an effect of treaty never mentioned to tribe during negotiations). Accordingly, there is no logic by which the Treaty of Buffalo Creek's references to land actually in Oneida possession can be said to comprehend "plain and ambiguous" or "explicit" extinguishment of Oneida title in land not mentioned in the treaty, not discussed during negotiations, and not in the contemplation of any party to the treaty. At most, argument about the treaty's effect on property not addressed in the treaty is about what the United States or the Oneidas might have done if the subject had come up; there can be no legally effective ratification or extinguishment in such circumstances.

2. *The Treaty Did Not Mandate Sale of Oneida Lands or Oneida Removal.*

The 1838 treaty nowhere ceded any Oneida lands or mandated sale or removal. Article 13 conditioned Oneida removal on future "satisfactory arrangements" regarding sale of land to the State of New York. Pet. App. 155. Contracts that condition something on the "satisfaction" of a party routinely are interpreted not to compel a party to be satisfied but to leave it up to the party to make that determination. 13 Williston on Contracts § 38:21 (4th ed. 2000). Moreover, the absence of a price term meant, as in any contract, that there was no enforceable agreement of sale. *See Williams v. Morris*, 95 U.S. 444, 455 (1877) ("Decided cases everywhere

require that the memorandum should mention the price."). In addition, not only the Oneidas but the United States had to be satisfied with any later terms of sale; the treaty did not repeal the Nonintercourse Act, which remained applicable and required federal involvement in purchase negotiations and in approval of the purchase and its terms. *See Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960) (Act's "obvious purpose is to prevent unfair, improvident or improper disposition * * * by Indians").[13]

Other provisions of the treaty made clear that some or all of the Oneidas and other New York Indians might not remove. Article 3 provided that "such of the * * * New York Indians as do not accept and agree to remove * * * shall forfeit all interest in the [Kansas] lands." Pet. App. 150. Article 3 vested the President with discretion about when, if ever, to permit removal. Article 15, added by the Senate, provided for appropriations to be made "from time to time under the direction of the President of the United States in such proportions" as needed. *Id*. 156-57. Proportionate appropriations were required because not all the money would be needed if not all the Indians removed. *See New York Indians v. United States*, 30 Ct. Cl. 413 (1895) ("article 15 * * * should be read with article 3"). Further, the Senate deleted a provision that seemed to obligate the United States to remove the Indians: "[t]he United States stipulate & agree to remove all the New York Indians * * * ." S. Exec. J. 127 (June 11, 1838). By deleting it, and by leaving removal to the discretion of the President under articles 3 and 15, the Senate clarified that even voluntary removal might not occur. *See id*. at 130 (resolution directing reduction in removal funds and

[13] Authorization of "uncertain future sales" with "uncertain future proceeds" does not terminate reservation status, *DeCoteau*, 420 U.S. at 448, because it lacks "an unconditional divestiture of Indian interest in lands," *Solem*, 465 U.S. at 469 n.10 (holding no termination of reservation by statute authorizing government "to sell and dispose of" tribal land).

Kansas lands in proportion to number who choose not to remove).[14]

Articles 10 and 14 treated Seneca and Tuscarora land in New York differently from Oneida lands. Without condition, these articles ceded land and required the Senecas and Tuscaroras to go to Kansas and to "continue to reside there." Pet. App. 155. Even as to these tribes, the treaty did not of itself terminate federal protections. *See New York Indians I*, *supra*; *Fellows v. Blacksmith*, 60 U.S. 366 (1856); *New York Indians II*, 170 U.S. at 21.

Article 2 refers to the Removal Act, but that does not suggest compulsory removal. Pet. Br. 36-37. The Removal Act contemplated voluntary removal, restricted to "such tribes or nations of Indians as may choose to exchange the lands where they now reside." Act of May 28, 1830, 4 Stat. 411, § 1. The treaty's "exchange" of lands did not involve lands in New York. Article 2 provided, "[i]n consideration of the above [Wisconsin] cession and relinquishment," that the United States would set aside the Kansas lands. Pet. App.

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[14] The treaty was consistent with earlier treaties with the Menominee that permitted voluntary removal of the New York Indians to Wisconsin. *See* Treaty with the Menominee, 7 Stat. 342 (Feb. 8, 1831); Treaty with the Menominee, 7 Stat 346 (Feb. 17, 1831) (making "unlimited the time of removal and settlement upon these lands by the New York Indians"); Treaty with the Menominee, 7 Stat. 405 (Oct. 27, 1832). A policy of voluntary removal is also reflected in efforts from 1836 forward to negotiate the Treaty of Duck Creek. S. Exec. Doc. No. Confidential G, 24th Cong., 2nd Sess. (Jan. 25, 1837). Although never ratified because superseded by the Treaty of Buffalo Creek, the Treaty of Duck Creek was drafted by the United States to exchange Wisconsin lands for lands to the west and to permit voluntary emigration to them by the New York Indians in Wisconsin and New York. The treaty provided that the United States would bear the cost of removal whenever any "portion" of any tribe was "willing and prepared to remove" and that persons who did not remove forfeited lands. *Id.* at 2.

149-50. The reference to the Removal Act was in connection with the Wisconsin-Kansas exchange and simply specified that the Kansas lands would be held according to the type of patent authorized by the Act.

C. The Record of Treaty Negotiations Establishes that the United States and the Oneidas Understood the Treaty Not to Compel Land Sales or Removal.

The treaty was signed on January 15, 1838. Almost immediately, the federal treaty Commissioner, Ransom Gillet, explained that it did not mandate removal.

On January 18, 1838, Gillet wrote the Commissioner of Indian Affairs to explain that the two Oneidas from New York who signed the treaty acted for themselves and had not committed other Oneidas to remove. "None of them profess to have power conclusively to bind their nation." Gillet added: "The business with the Tuscaroras is intirely [sic] completed. That with the Oneidas at the Castle, as far as the powers of those present will permit it to be done." Letter from Ransom Gillet to C.A. Harris, Comm'r of Indian Affairs (Jan. 18, 1838) (available on Nat'l Archives Microfilm Publ'n M234, roll 583, frames 548-49).

On February 27, 1838, Gillet again wrote to the Commissioner of Indian Affairs, responding to a February 14, 1838, letter from the Oneidas informing the President that they did not intend to remove from New York. S. Exec. Doc. No. Confidential 10E, 25th Cong., 2d Sess., at 54-56 (April 23, 1838). In his response, Gillet acknowledged that the Oneidas did not want the treaty to "operate on their interests without their consent" but declared: "This is a misapprehension of its provisions." *Id*. at 27-28. Referring to the objection that the two Oneidas who signed the treaty acted only for themselves, Gillet also declared: "Nothing more than what is here conceded they had a right to do, was attempted by those who

attended the council." *Id.; see also* S. Exec. Doc. No. Confidential 16, 25th Cong., 2d Sess., at 1-2 (May 7, 1838) (letter from Oneidas to the Senate indicating no intent to remove).

The Senate amended the treaty on June 11, 1838, conditioned on subsequent tribal assent. S. Exec. J. 126-31 (June 11, 1838); *see* p. 5, *supra*. Gillet then met with the Oneidas in council at Oneida. He gave this written assurance, which resonates loudly in this case and of its own force refutes Sherrill's argument regarding mandatory sales and removal:

> I hereby most solemnly assure them that the treaty was not, & is not intended to compel the Oneidas to remove from their reservations in the state of New York to the west of the state of Missouri or elsewhere unless they shall hereafter voluntarily sell their land where they reside & agree to do so. They can, if they choose to do so remain where they are forever. The treaty gives them lands if they go to them and settle there, but they need not go unless they wish to. When they wish to remove, they can sell their lands to the Governor of the State of New York, & then emigrate. But they will not be compelled to sell or remove.

Resp. App. 10-11.[15] In a report reproduced for the Senate, S. Exec. Doc. No. Confidential B, 26th Cong., 1st Sess., at 29-40 (Jan. 14, 1840), Gillet stated:

> Some of the tribe expressed their fears that they might be compelled to remove, even without selling their land to the State, and desired some evidence from me that such would not be the construction of the papers. On consulting with Timothy Jenkins, Esquire, their local State agent, I drew up and gave them an assurance to that

[15] Gillet gave the same assurance to the St. Regis Mohawks on February 13, 1838, explaining in a supplemental treaty article that they "shall be at liberty to remove" but that the United States "shall not compel them to remove." S. Exec. Doc. No. Confidential 10E, 25th Cong., 2d Sess., at 23-24 (Apr. 23, 1838).

> effect, a copy of which I hand you, marked No. 1. On receiving this, a large number signed the written assent * * *."[16]

The treaty also notes that the Oneidas signed after Gillet "fully and fairly explained" it. Pet. App. 173-74. The meaning of the treaty described to the Oneidas by Gillet is controlling. *See New York Indians II*, 170 U.S. at 33 (relying on commissioner's statement about "rights of the Indians" under Treaty of Buffalo Creek).

In *Minnesota v. Mille Lacs Band*, 526 U.S. 172 (1999), the question was whether a treaty ceding "all right, title, and interest" in land extinguished tribal hunting and fishing rights secured in an earlier treaty. *Id*. at 195. The Court noted that it had found an extinguishment of hunting and fishing rights in "similar language" in a treaty made by a different tribe. *Id*. at 202. Nevertheless, the Court explained that "review of the history and the negotiations of the agreements is central to the interpretation of treaties" and that tribal understanding, as revealed by such review, is controlling. *Id*. at 196, 202. The federal negotiator never told the Indians that the treaty would affect hunting and fishing rights, and no party spoke about the hunting and fishing rights. *Id*. at 197-98. Accordingly, the Court held that the treaty did not extinguish hunting and fishing rights.

In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), the question was whether treaties permitting tribes a right of fishing at the "usual and accustomed" places "in common with all citizens" entitled the tribes to a reserved allocation of fish that could

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[16] Gillet's report was transmitted to the Senate and was printed, S. Exec. Doc. No. Confidential B, 26th Cong., 1st Sess., at 29-40 (Jan. 14, 1840), but it appears that Gillet's assurances to the Oneidas and the other attachments to the report were not printed. The Senate later returned those documents. Nat'l Archives microfilm publ'n M234, reel 583, frames 0966-89.

not be taken by non-Indians. *Id*. at 675. The Court recognized that the treaty's words might not secure that right. *Id*. at 677-78. The Court observed that the federal commissioner gave the Indians "his assurances" that the treaty permitted them to continue to fish, and the Court relied on those assurances in deciding the case. *Id*. at 667-68 & n.11, 677-78. The Court emphasized that the negotiator's promises "were crucial in obtaining the Indians' assent" and that the tribe had asserted the importance of fishing rights. *Id*. at 676. Noting that an Indian treaty must be interpreted as it was understood by the Indians, the Court held that a right to fish "in common" with all citizens would have been understood by the tribes as permitting them a reserved allocation—*i.e.*, greater fishing rights than non-Indians have. *Id*. at 675-76.

The Commissioner's assurances to the Oneidas in 1838 are even more powerful than statements of the treaty negotiators in *Washington* and in *Mille Lacs*. *Washington* involved vague statements by the federal negotiator concerning fishing rights. *Mille Lacs* involved the mere absence of a statement by the negotiator that the treaty was meant to eliminate hunting and fishing rights. In neither case did the negotiator affirmatively describe to the Indians a specific meaning of the treaty, as Gillet did.

It is impossible to square Sherrill's mandatory-sale-and-removal argument with Gillet's assurances. The assurances conclusively nailed down what the Oneidas understood in 1838, and, as well, what "the construction of the papers" would be in the future. There was no gap between how non-Indian treaty drafters and the Indians understood the treaty. Everyone—Indian and non-Indian—could understand the assurance of the United States Commissioner: "they will not be compelled to sell or remove." JA 146.

D. No Other Facts Reflect Disestablishment of the Oneida Reservation.

1. *Failure of the Kansas Reservation*

The Treaty of Buffalo Creek failed, so far as establishing a Kansas reservation was concerned. The discretion given to the President in the treaty regarding removal was exercised in favor of keeping the New York Indians in New York. The United States affirmatively told the Indians not to remove and tried to stop removal by the small party that actually went to Kansas in 1846. JA 168-69. Most of that party died or returned to New York, and the United States never appropriated funds for removal thereafter or otherwise attempted removal. *Id.* The United States instead spent funds to reestablish the Tonawanda Senecas and the Senecas in New York. 11 Stat. 735 (Nov. 5, 1857); 7 Stat. 586 (May 20, 1842). Perhaps most important, the United States restored the Kansas lands to the public domain and sold them, making removal impossible.

There is no evidence that, having eliminated the Kansas option, the United States intended to leave the New York Indians with no reservation (or that the Indians agreed to that). The United States continued to recognize the Oneidas' rights in reservation land in their possession in New York, eventually suing in *Boylan* to protect the Oneidas' rights. Maps prepared for the Commissioner of Indian Affairs consistently show an Oneida reservation.[17] New York tribes

[17] Sherrill relies on a few statements, in the nature of uninformed legal assertions, that there was no Oneida reservation. Most of the statements were made before the rights of the Oneidas were even partially clarified in the *Boylan* litigation. For many years, federal and state officials mistakenly believed that New York had jurisdiction over Indian tribes within the state. *Oneida I*, 414 U.S. at 678 & n. 13. In any event, Sherrill's statements are a few outliers dwarfed by the consistent indication in the Commissioner of Indian Affairs' annual reports concerning the continued existence of the Oneida reservation. *Cf. Hagen v. Utah*, 510 U.S. 399, 420 (1994) (where text and contemporaneous evidence

remain in New York to this day. 68 Fed. Reg. 68180 (Dec. 5, 2003) (recognizing "Onondaga Nation of New York," "Cayuga Nation of New York," "Tonawanda Band of Seneca Indians of New York," "Oneida Nation of New York," "St. Regis Band of Mohawk Indians of New York," and "Seneca Nation of New York").

For the first time, Sherrill argues relinquishment based upon *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339 (1941), a case not cited in Sherrill's petition for certiorari or in its briefs in the Second Circuit. The contention is not fairly included in the question Sherrill presented regarding disestablishment by the Treaty of Buffalo Creek, Pet. Br. *i*, and is, regardless, wrong. *Santa Fe* actually held that a tribe had not lost its original reservation when a substitute reservation failed, 314 U.S. at 355, as was true of the Kansas lands reserved for the New York Indians.

Santa Fe addressed two efforts to relocate a tribe that occupied aboriginal lands not protected by a federal treaty. *Id*. at 344-46. The Court concluded that the first, failed effort to remove the tribe to a new reservation did not end the tribe's rights in the original reservation, viewing the new reservation only as an "offer." The offer, akin to the offer of Kansas land to New York Indians, did not imply an intention "to extinguish all of the rights which the [tribe] had in their ancestral home." *Id*. at 353; *see also Mattz*, 412 U.S. at 487-88 (after new reservation created, most returned to existing reservation, and new reservation "was then discontinued").

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answer disestablishment question, "confusion in the subsequent legislative record" does not alter answer); *Solem*, 465 U.S. at 474-75, 478 (legislative history referred to "reduced reservation," "reservations as diminished," and "reservations thus diminished" were "isolated phrases" that did not clearly show an intent to diminish reservation); *Seymour v. Superintendent*, 368 U.S. 351, 356 n.12 (1962) (two later statutes referring to the "former" reservation show congressional confusion, not disestablishment).

The Court held that the tribe did relinquish its aboriginal land by a later executive order creating a new reservation at the request of "[a] majority of the tribe, 'in council assembled.'" *Santa Fe,* 314 U.S. at 356. The Court noted that some of the tribe's members moved to the new reservation and stayed there; although many tribal members did not use the new reservation, there was evidence "that the Indians were satisfied" with it; and it was never "abandoned." *Id*. at 357. The Court "deemed" the acceptance of the new reservation to relinquish tribal rights in aboriginal land outside the new reservation. *Id*. at 358.

The Oneidas did not relinquish their New York reservation under the standard articulated in *Santa Fe*. They did not request, go to or keep a Kansas reservation. Any effort of the New York Indians to remove to Kansas was nipped in the bud by the United States, which directed that removal not occur and would not appropriate funds to pay for it. The United States sold all the Kansas land. *Santa Fe* compels the conclusion that the Kansas reservation failed and that the Oneidas did not relinquish rights in New York. *See Mille Lacs*, 526 U.S. at 172 (after presidential order compelling removal and revoking usufruct rights, Secretary of Interior suspended removal efforts, which Court held preserved usufruct rights because their revocation was "integral" to removal effort, which failed).

2. *Subsequent History in New York*

Sherrill and some amici also emphasize the post-1838 jurisdictional and demographic history of the Oneidas' lands. *See South Dakota v. Yankton Sioux*, 522 U.S. 329, 356 (1998) (subsequent history is of limited value). In this case, the demographic changes cannot be attributed to the Treaty of Buffalo Creek at all, but rather to the illegal state transactions that alienated almost all of the reservation before the treaty. Even if the 1838 treaty had not been made, the lands at issue here, like the other land alienated before 1838, would have

been in non-Indian hands. In those circumstances, relying on demographic changes to support disestablishment of a reservation would be to give legal effect to illegal transactions. *See Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 669 n.14 (dominance of non-Indian fishing irrelevant to persistence of tribal fishing right where non-Indian dominance caused by illegal incursion on tribal rights and illegal exclusion of Indians).[18]

3. *New York Indians II Litigation*

Sherrill argues that the damages awarded in *New York Indians II* worked the same relinquishment that would have occurred if all the Oneidas had sold and moved to Kansas. Those damages, however, were paid to compensate the New York Indians for the Wisconsin land they irrevocably ceded in exchange for the Kansas land, not to compensate them for lands in New York. Otherwise, the federal government would have been unjustly enriched by receiving the Wisconsin lands and giving nothing in return. *See New York Indians II,* 170 U.S. at 24 (United States sold and received consideration for both the Wisconsin and Kansas lands). While the possibility of removal from New York may have been part of the "inducement" for the United States to make the treaty, *id*. at 15, it was no part of the bargain enforced by the Court's damage award. *New York Indians II* merely required "compensation to the Indians for the seizure and sale of the Wisconsin lands." *Id.* at 29.[19]

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[18] In *Yankton Sioux*, the Court quoted *Solem*'s reference to "*de facto*, if not *de jure*, diminishment" and observed that evidence of *de facto* treatment of land "is the least compelling for a simple reason: Every surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation." 522 U.S. at 356.

[19] Amicus New York refers to Senator Platt's statement, made in 1893 when discussing authorization for the Court of Claims to adjudicate the

The Court's award contained no set-off for any amount that any New York Indians, such as the Seneca and Tuscarora, had earlier received for lands in New York, although it did set off the amount of an earlier federal settlement with the Tonawanda Senecas. *Id*. at 36. Neither the Court, nor the United States, nor any of the tribal parties—who at the time of the litigation were on their New York reservations – considered that rights in New York lands were adjudicated or extinguished in the litigation.[20]

IV. THE ONEIDA INDIAN NATION OF NEW YORK ALWAYS HAS BEEN AN INDIAN TRIBE ENTITLED TO EXERCISE FEDERALLY PROTECTED RIGHTS IN ONEIDA LAND.

Sherrill's final argument addresses tribal status, not any disposition of the possessory right by the tribe or the federal government. It argues that there is a material factual dispute about whether "there was a lapse" in tribal status. Pet. Br. 41. This contention is wrong. *First*, the determination by the political branches that the Nation persisted is dispositive. *Second,* so long as the trust relationship between the United States and the tribe has not been terminated or abandoned, a lapse in tribal status is irrelevant to whether federal laws and

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New York Indians' claim, that the Treaty of Buffalo Creek exchanged New York lands for Kansas lands. NY Br. 11, 20. Senator Platt prefaced his remarks: "I had not thought that this measure was coming up at this time, and perhaps I may not be able to recall the facts." 24 Cong. Rec. 588 (Jan. 16, 1893).

[20] Prior to the litigation, the United States tried to settle the Kansas claim through a treaty and told the tribes that payment for the Kansas lands had no effect on their rights in New York. "[T]he commissioner informed them that making a treaty about the Kansas lands would not deprive them of any of their rights to the New York reservation, nor would it impair their title in any way." S. Exec. Doc. No. Confidential Y, 40th Cong., 3d Sess., at 475-76 (1869); *see also New York Indians II,* 170 U.S. at 33.

treaties continue to protect tribal land. *Third*, Sherrill's evidence does not create a genuine factual dispute about tribal continuity that would be legally material under any conceivable standard.[21]

A. The Persistence of the Nation Is Conclusively Recognized by the Federal Government.

Decisions to recognize Indian tribes are committed to the political branches. *See* Amicus Curiae Brief of the United South and Eastern Tribes, Inc. The Department of the Interior recognizes the Oneida Indian Nation of New York as a tribe with rights under federal laws and treaties, and has repeatedly done so both formally and informally without interruption. Sherrill does not claim that the federal government ever withdrew or terminated its recognition of the Oneida Nation as a tribe in New York.

Federal recognition "establishes tribal status for all federal purposes," H.R. Rep. No. 103-781, at 2-3 (1994), not just eligibility for benefits. If there is a tribal continuity requirement, federal recognition satisfies it, because the Department's "position is, and has always been, that the essential requirement for acknowledgment is continuity of tribal existence rather than previous acknowledgment." 59 Fed.

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[21] Sherrill denies only the continuity of the tribe. What is not in dispute is that the Oneida Indian Nation of New York is a tribe now, JA 36, 64 (admissions); *see also* 68 Fed. Reg. 68180, 68182 (Dec. 5, 2003) (most recent list of recognized tribes), and was recognized as a tribe by the federal government when it made treaties in 1784, 1789, 1794, and 1838 and also at the time the land in question was alienated. Pet. App. 43, n.23; *see also* 25 C.F.R. § 83.8(c)(1) (treaties are a form of federal recognition). Nor has Sherrill disputed that the Nation is the same tribe or a successor to the tribe that signed the Oneida treaties, which is established in the record. JA 207-08 (affidavit); Pet. App. 44 (Court of Appeals noting that Nation is a "direct descendant").

Reg. 9280 (Feb. 25, 1994).[22] In 1994, Congress expressly charged the Secretary of the Interior with responsibility for "keeping a list of all federally recognized tribes" and prohibited the termination of a recognized tribe except by an act of Congress. Pub. L. 103-454, § 103, 108 Stat. 4791, *codified at* 25 U.S.C. § 479a, note; *see* 43 U.S.C. § 1457; 25 U.S.C. § 9.

A determination that tribal status has not terminated is by its nature a political determination. *United States v. Holliday*, 70 U.S. 407, 419 (1865); *Seber*, 318 U.S. at 718; *United States v. Nice*, 241 U.S. 591, 598 (1916); *United States v. Rickert*, 188 U.S. 432, 445 (1903); *see also Baker v. Carr*, 369 U.S. 186, 215-16 (1962) (citing tribal recognition as an example of a political question). Tribal recognition is a "formal political act * * * [that] imposes on the government a fiduciary trust relationship to the tribe and its members," not solely a factual determination. H.R. Rep. No. 103-781, at 2-3; *see also* Handbook of Federal Indian Law, at 6 (federal government has combined and divided tribes and united scattered Indian communities into tribes). The political branches are better suited to make "an inherently policy-based decision," *United States v. Bean*, 537 U.S. 71, 77 (2002), as well as to sift through the ethnographic records typically presented in a dispute over tribal acknowledgment. *See* B. Coen, *Tribal Status Decision Making: A Federal Perspective on Acknowledgment*, 37 New Eng. L. Rev. 491, 495 (2003).

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[22] In reviewing petitions for acknowledgment by tribes never before recognized by the federal government, the Department of the Interior does not require proof of the "[e]xistence of community and political influence or authority * * * at every point in time." 25 C.F.R. § 83.6(e). "Fluctuations in tribal activity during various years" do not preclude federal recognition. *Id.* That interpretation, set forth in published regulations pursuant to congressional delegation, is entitled to deference. *Barnhart v. Thomas*, 124 S. Ct. 376, 380 (2003); *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 844 (1984).

The question whether a tribal government persists sufficiently so that treaty rights persist also is consigned to the political branches, just as it is with foreign governments. *Clark v. Allen*, 331 U.S. 503, 513 (1947) (rejecting contention that treaty lapsed because Germany "ceased to exist"); *see also Terlinden v. Ames*, 184 U.S. 270, 286-87 (1902).[23]

B. Federal Protection of Tribal Land Continues Unless the Trust Relationship Between the United States and the Tribe Is Terminated or Abandoned.

Sherrill does not claim that the federal government ever terminated its relationship with the tribe. Nor, although it quotes cases about abandonment of the trust relationship by a tribe, Pet. Br. 41-43, does Sherrill claim that the Oneidas ever abandoned tribal status. *See Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 587 (1st Cir. 1979) (abandonment means tribe "intend[ed] to give up their tribal organization and abandon their rights and status voluntarily"). Instead, Sherrill claims that any "lapse" in tribal status is fatal and that federal protection vanishes from "the moment in time when the lapse begins." Pet. Br. 43. This contention is unsupported. Sherrill does not explain what a "lapse" is, or why it would remove federal protection, except to insist that logic requires

[23] New government decisions to acknowledge tribes may now be reviewable because regulations "bring the tribal recognition process within the scope of the Administrative Procedure Act," *Miami Nation v. Dep't of Interior*, 255 F.3d 342, 348 (7th Cir. 2001), but Sherrill would lose an APA challenge. The standard is whether agency action is "arbitrary and capricious." 5 U.S.C. § 706. Acknowledgment of the Oneida Indian Nation is neither. "Unambiguous previous federal acknowledgment is acceptable evidence of the tribal character of a petitioner to the date of the last such previous acknowledgment." 25 C.F.R. § 83.8(a). Prior federal acknowledgment includes the federal government's invitation to the Oneida Indian Nation to reorganize under the Indian Reorganization Act in 1936, and the federal government's suit to recover land as trustee for the Oneida tribe in *United States v. Boylan*.

it. *Id*. 41. Sherrill's amici do not support that extreme position, focusing instead on whether the tribe claiming rights is a successor to the tribe that made a treaty, a question committed to the political branches and not disputed in this case. Br. of Cayuga & Seneca Counties, at 8-9 ("even a five- or ten-year lapse, might not break the connection between the historic tribe's treaty rights and the modern group claiming those rights").

Continuity, as Sherrill uses the term, does not determine whether federal protection persists because the federal government can act to protect tribal land in the absence of a tribal government. *See Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 664 (some signatory tribes "had little or no tribal organization"); *United States v. McGowan*, 302 U.S. 535, 539 (1938) (land set aside for homeless Indians scattered across Nevada is Indian country).

The decisions most pertinent to Sherrill's novel claim preclude it. In *United States v. John*, 437 U.S. 634, 652 (1978), the Court upheld federal authority to protect Mississippi Choctaw land as Indian country notwithstanding "the long lapse in the federal recognition of a tribal organization in Mississippi." *See also Winton v. Amos*, 255 U.S. 373, 378 (1921); Brief for the United States at 8-9*, United States v. John*, Nos. 77-836 & 77-575 (quoting *Winton*). This Court has also held that the statutory termination of a tribe, which means that its governmental status ceases to exist as a matter of law, did not abrogate a tribe's treaty rights. *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *see also South Carolina v. Catawba Tribe*, 476 U.S. 498 (1986).

C. There Is No Evidence Allowing a Reasonable Finding of Tribal Discontinuity.

The archival evidence presented by Sherrill, Pet. Br. 43-44, would not permit a reasonable factfinder to find tribal discontinuity. The evidence is far too lopsided. *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986) ("whether the evidence presents a sufficient disagreement to require submission to [factfinder] or whether it is so one-sided that one party must prevail as a matter of law;" no triable issue unless "reasonable" finding possible).[24]

The Nation's continuous existence as a tribe within the jurisdiction of the New York Agency is documented in the Annual Reports of the Commissioner of Indian Affairs from 1870 to 1920. The agent duly recorded the Oneida population on the Oneida reservation or "reserve" and on other reservations in New York. *See* Act of July 4, 1884, ch. 180, § 9, 23 Stat. 76 (requiring agent to conduct a census); New York Iroquois Censuses, 1886-1924 (Heritage Books, digital reprint CD-ROM) (reprinting manuscript census records from Nat'l Archives Microfilm Publ'n 595, rolls 290-300); F. Hugo, Manual for the Use of the Legislature of the State of New York, 270 (1918) (listing the Oneida reservation among the "Indian reservations in New York" and recording the population in 1855, 1865, 1875, 1892, 1905, 1910, and 1915). And, in 1915, the United States filed suit as trustee for the Oneidas. Record, at 2-5, *Boylan v. United States*, No. 458 (O.T. 1920). In 1920, the Court of Appeals affirmed the District Court's finding "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." *Boylan*, 265 F. at 174; *see also id*. at 171 (accepting finding that "the Oneida Indians were a distinct people, tribe or band"). Sherrill has advanced nothing that could outweigh the *Boylan* determination of the Oneidas' tribal status at the turn of the twentieth century, made with the benefit of testimony from witnesses living at the time of the supposed

[24] Sherrill has not sought review of any question concerning the denial of its motion pursuant to Fed. R. Civ. P. 56(f) to defer summary judgment pending additional discovery. S*ee* Pet. App. 6-47; 109-110. All relevant evidence is readily available in public archives.

lapse in tribal status.[25] *See also Waterman v. Mayor*, 280 N.Y.S.2d 927, 930 (N.Y. Sup. Ct. 1967) ("The proof submitted * * * indicates that the Oneida Indian Reservation does now exist and that there is an Oneida Indian tribe.").

The executive branch also recognized tribal persistence when it invited the Oneidas to reorganize their government under the Indian Reorganization Act in 1936; the Oneidas voted to keep a traditional government. 1936 Annual Report of the Commissioner of Indian Affairs, at 163; *see also* 25 U.S.C. § 476(a) (authorizing reorganization by "[a]ny Indian tribe").

In 1977, the District Court held a trial in the Oneida land claim test case and found that the Oneida Indian Nation of New York met the standard for tribal status in *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899 (D. Mass. 1977), on which Sherrill relies here. *Oneida Indian Nation v. County of Oneida*, 434 F. Supp. at 538. The court found that the Nation is a "direct descendant[] of the Oneida Indian Nation which inhabited Central New York prior to the Revolutionary War." *Id*. at 532-33. No party disputed that finding before this Court in *Oneida II*, which relied on it in affirming the judgment of liability in favor the Oneidas. 470 U.S. at 253. This Court referred to the Nation as a "direct descendant[] of members of the Oneida Indian Nation." *Id*. at 230.

Sherrill relies, in the end, on two insignificant items from 1891-1892. It points to the 1892 Extra Census Bulletin: Indians, The Six Nations of New York, Pet. Br. 44, but that

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[25] One of those witnesses was William Honyost Rockwell, who identified himself as one of the Oneida chiefs. Record at 30, *Boylan v. United States*, No. 458 (O.T. 1920). Chief Rockwell testified before Congress several times. *See Hearings before a Subcomm. of the House Comm. on Indian Affairs*, 71st Cong., 2d Sess. 5046-52 (1931); *Indians of New York, Hearings before the House Comm. on Indian Affairs*, 71st Cong., 2d Sess. 26-35 (1930).

very document describes the distribution of treaty cloth annuities to the Oneida Indian Nation in 1891 and refers to "Abram Hill, the honored Oneida chief." *Id*. at 78. The report includes a photograph of Hill, as well as another Oneida chief. *Id*. (unpaginated). The report also mentions "Alexander Burning, a chief, [who] lives at Oneida." *Id*. at 25. Hill and Burning are identified as the chiefs who gathered the tribal census for the federal Indian agent in 1892. New York Iroquois Censuses, 1892 (Heritage Books, digital reprint CD-ROM) (roll 291, frames 688, 696). And Sherrill points to the conclusory statement of the Interior Department's agent for New York that is reproduced as an attachment to the 1891 Annual Report of the Commissioner of Indian Affairs, Pet. Br. 43-44, a statement that the Oneidas "have no tribal relations, and are without chiefs or other officers." The statement is overwhelmed and disproved by a solid body of contrary evidence, including as to 1891.

Sherrill's other scattered excerpts are also off the point. They do not concern disputed facts, but rather the legal consequences of the conveyances of reservation land and Oneida assimilation and citizenship. Pet. Br. 44-45. Several excerpts concern whether the Oneidas still had a reservation, *see* note 17, *supra*, not whether the Oneidas remained a tribe in New York.[26] *United States v. Elm*, 25 F. Cas. 1006 (N.D.N.Y.

[26] The same is true of the statement in S. Rep. No. 1836, 81st Cong., 2d Sess., at 5 (1950). The report states clearly that the Oneidas remain a tribe in New York under federal supervision. *Id*. 3; *see also* Compilation of Material Relating to the Indians of the United States, H.R. Rep. No. 30, 81st Cong., 2d Sess., at 80 (1950) (listing Oneida reservation in New York). Sherrill also refers to a 1925 conclusory letter responding to an inquiry about federal payments to the Oneidas. That letter is inconsistent with the government's formal position in *Boylan*, and with the findings in that case. The 1942 edition of Felix Cohen's Handbook of Federal Indian Law, at 417, reprints a 1915 memorandum by an Interior lawyer as an "interesting account." The memorandum is not presented as Cohen's own assessment. *See John*, 437 U.S. at 651 n.20.

1877), was premised on the view, since repudiated by this Court, that a member of an Indian tribe cannot be a citizen. *See United States v. Nice*, 241 U.S. 591 (1916); *Seber*, 318 U.S. at 718; *Tiger v. Western Inv. Co.*, 221 U.S. 286, 311-16 (1911); *Brader v. James*, 246 U.S. 88, 96 (1918). Six years after *Elm*, four Oneida chiefs signed the petition to Congress regarding the Kansas land claim. JA 147-51. The excerpt from the 1906 Annual Report of the Commissioner of Indian Affairs also speaks only to an assimilation consistent with continued tribal status and tax immunity. *Kansas Indians*, 72 U.S. at 756.

In sum, even if there were a legally relevant, judicially determinable issue of tribal continuity for purposes of preserving federally protected possessory rights, there is no genuine issue of fact as to that question in this case. A trier of fact could not reasonably find discontinuity.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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