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.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CITIZENS EQUAL RIGHTS FOUNDATION AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

The Amicus Curiae, Citizens Equal Rights Foundation (CERF) is a foundation established by Citizen's Equal Rights Alliance (CERA), a South Dakota non-profit corporation with members in 34 states, including the State of New York. CERF was established to protect and support the constitutional rights of all people, both Indian and non-Indian, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact the constitutional rights of citizens. CERF questions whether there is any constitutional authority to remove lands from state jurisdiction unless the land is directly acquired by the United States or a foreign state for government purposes. CERF has a critical interest in this case because CERA has members who own various assets and pay property taxes on fee lands within the original boundaries of various Indian reservations in the United States. The residential property of one of CERA's members is within the original Oneida reservation in close proximity to land reacquired by the Oneida Indians.

All parties have consented in writing to the filing of this Amicus Brief. [1]

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[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than amicus curiae, its members or its parent CERA's members, or its counsel have made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This brief focuses on whether the Federal District Court and Second Circuit Court of Appeals properly designated lands purchased by the Oneida Indian Nation as Indian country to negate property taxes assessed by the City of Sherrill. The district court and Second Circuit Court of Appeals concluded that the "reservation" acknowledged in the Treaty of Canandaigua and protected by the Nonintercourse Act, 25 U.S.C. § 177 was sufficient to allow these lands to be designated as "Indian country" because the Oneida Indian Tribe purchased the parcels. The City of Sherrill properly raises *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998) to refute designating these lands Indian country. The Second Circuit applied precedents from federal reservations of public domain land to denominate these parcels Indian country to remove them from state jurisdiction.

The history of federal Indian common law includes federal war powers. The incorporation of the war powers into federal Indian common law explains the loss of constitutional rights when an area is designated Indian country.

The Oneida Indian Nation and its individual members raise 42 U.S.C. § 1983 and federal common law to remove these lands from state jurisdiction. This Court should restrict itself and the lower federal courts from abusing federal Indian common law by applying the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 817 (1938) as was just done in *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004), to this Indian federal common law case. The federal courts improperly accepted removal from the state court tax enforcement proceedings. The

lower federal court decisions should be vacated and the case dismissed.

ARGUMENT

The land parcels purchased by the Oneida Indian tribe are not Indian country and are subject to taxation by the City of Sherrill. This brief explains how the three distinct constitutional clauses, which are the basis of federal Indian law were confused by the lower federal courts in this case to incorrectly designate these parcels of land Indian country. The Indian Commerce Clause, Art. I, Sec. 8, Cl. 3, is the only clause properly applied in New York today. The Treaty Clause, Art. II, Sec. 2, Cl. 2, applies only to this case in interpreting the effects of the 1794 Treaty of Canandaigua (7 Stat. 44) and 1838 Treaty of Buffalo Creek (7 Stat. 550). The Property Clause, Art. IV, Sec. 3, Cl. 2, which concerns federal territorial lands owned by the United States has never applied in New York, one of the original thirteen colonies. The Oneida Indian Nation argued for removal of this state property tax case to federal court by claiming that their original reservation of state land should be treated as being a federal Indian reservation subject to the federal land laws pursuant to the Property Clause.

The argument begins with the application of the *Village of Venetie* analysis and its definition of Indian Country to the facts of this case. This brief will then place the tribal and federal positions into historical context to address the problems of federal common law eviscerating private property rights, civil rights and state due process. It will conclude by examining the standing of the Oneida Tribe and its individual members to invoke through assertions of 42 U.S.C. §

1983 and federal common law the discretion of the federal courts to hear this claim to remove these parcels of land from the State of New York as Indian country.

I. THE LOWER FEDERAL COURTS ERRED IN FINDING THESE DISPUTED PARCELS OF LAND ARE INDIAN COUNTRY

A. Under the reasoning of *Alaska v. Native Village of Venetie* these disputed parcels of land are not Indian country.

The term Indian country is defined in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). The unanimous opinion merged the old federal common law definitions with the statutory version of Indian country defined by Congress in 1948 as 18 U.S.C. § 1151. According to the opinion, the federal courts are empowered to designate three types of land to be Indian country (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments. For an area to be Indian country there must be (1) a federal set aside of land for tribal use, and (2) federal superintendence. *Id.* at 526-7.

Defining the land as Indian country operates to remove primary state jurisdiction previously granted when the federal public land was opened for sale or settlement. *South Dakota v. Yankton Sioux Tribe*, 522

U.S. 329, 343 (1998). It is uncontested that the land parcels in dispute are not Indian allotments. The facts of this case do not fit into either remaining category of Indian country because the modern definitions are federal public land terms. As discussed in Felix Cohen's Handbook of Federal Indian Law, the term Indian country was developing and was not defined until the Indian Trade and Intercourse Act of 1834. F. Cohen, Handbook of Federal Indian Law, 29-34, (1982 ed.). The Second Circuit designated the disputed parcels of land as Indian country without ever applying the facts to this Court's definition of Indian country.

The land area in dispute was originally set aside for the Oneida Indians as a reservation by the State of New York in 1788 in the Treaty of Fort Schuyler. The Treaty of Fort Schuyler contains a complete cession of the Oneida's aboriginal land area in the State of New York giving it fee title to all the ceded lands as an original colony. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974). The State of New York accepted the cession and set aside approximately 300,000 acres of its state land to make up the reservation acknowledged in the 1794 Treaty of Canandaigua. The land parcels currently assessed by the City of Sherrill are located within these original 300,000 acres of state land but not within the 32 acres still reserved by New York for the Oneidas. None of the original state reservation lands are or have ever been held in trust status under 25 U.S.C. § 465 or any other federal land designation. This state set aside land was not ever territory of the United States according to the federal district court or Second Circuit. See *United States v. Boylan*, 256 F. 468, 491 (N.D.N.Y. 1919), *aff'd*, 265 F. 165 (2nd Cir. 1920).

Article 2 of the Treaty of Canandaigua recognized the 300,000 acres reserved to the Oneida by the State of New York in 1788 "to be their property" and stipulates that the said reservation shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase. (7 Stat. 44). This language, as the *Boylan* courts and this Court has ruled, merely subjects the state reservation lands to the restraint against alienation under the Nonintercourse Act, 25 U.S.C. § 177. At most, the Oneida Indians have the possessory right of occupancy also known as Indian title. The United States has never claimed in the Nonintercourse cases or in its Amicus Brief filed in this case that the state lands, which were reserved for the Oneida Indians and have always been treated as state lands, were under federal jurisdiction by operation of the Treaty of Canandaigua or the Nonintercourse Acts.

According to the opinion of the Court in *Venetie*, the Indian country statute, 18 U.S.C. §1151(a), requires an Indian reservation to be under federal jurisdiction in order to be designated Indian country. An Indian reservation under federal jurisdiction is the modern legal term developed for reservations of federal public domain land for an Indian tribe preserved in federal territorial status under the Property Clause, Art. IV, Sec. 3, Cl. 2. Therefore, an historical Indian reservation is assumed to have never come under state jurisdiction unless expressly diminished or dissolved by Congress. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998).

The term "reservation" as used in the Treaty of Canandaigua has none of the meaning of the legal term "Indian reservation" discussed in *Yankton Sioux*. The term "reservation" was used as a general classification

through the Nineteenth and into the Twentieth Centuries, not as a specific legal term. As *Yankton Sioux* makes plain, it was understood that Congress at the turn of the Twentieth Century failed to be meticulous in its intent to modify reservation status. Congress still assumed reservations were temporary and did not precisely determine which lands were in or out of the reservation in legislation. It was not until the "reservations" were deemed to be perpetual in the Indian Reorganization Act of 1934, 25 U.S.C. § 461 et seq., that the federal lands term was required to become legally precise to decide jurisdictional disputes between sovereigns. *Yankton* at 343-4. See also F. Cohen, Handbook of Federal Indian Law, 34-38 (1982 ed.), explaining the term "reservation" for purposes of Indian country.

The Treaty of Canandaigua was entered into at the end of the Eighteenth Century before any formal Indian policy was developed by the United States. To assume that the use of the word "reservation" in the Treaty of Canandaigua engenders Congressional intent to create a federal reservation and encompassed the formal meaning and Congressional intent of the legal term of the 1940's is inappropriate. See *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004). Yet, this is exactly the basis of the Second Circuit calling the Oneida land parcels Indian country as fully acknowledged in Respondent's Brief In Opposition. Respondent's Brief In Opposition (Br. in Opp.) at p. 10 citing the Second Circuit Opinion A23-28.

The Second Circuit is completely and clearly erroneous to cite *United States v. John*, 437 U.S. 634, 638-47 (1978) for the proposition that "by its nature" the Oneida reservation in 1794 "was set aside by Congress for Indian use under federal supervision." Opinion at

A25. As explained in *United States v. John*, the only way that lands ceded to the state could have been made into a federal Indian reservation post 1934 was for the United States to actually purchase the land, placing it under trust status to remove it from the jurisdiction of the state as done for the Mississippi Choctaw. *Id.* at 645-6. The Treaty of Canandaigua does not include any provisions for the United States to purchase the property from the State of New York on behalf of the Oneida tribe. Nor has Congress ever passed any legislation to purchase lands for the Oneida Indians in the State of New York.

The United States argues that the set aside made by the State of New York when federally acknowledged in the Treaty of Canandaigua vested an ownership interest in the Oneida tribe implying the land is a federal Indian reservation for purposes of defining Indian country. The United States relies on the court of appeals federal common law designation "that the properties are within the historic reservation land set aside for the tribe in the Treaty of Canandaigua." Cynically, the United States says that Congress has never changed the reservation status of the land. See Amicus Brief of the United States at p. 18.

These parcels of land purchased by the Oneida Indians within the original 300,000 acres set aside by the State of New York are not an Indian reservation under federal jurisdiction qualified to become Indian Country under federal common law or 18 U.S.C. § 1151. These parcels have never been federally set aside and are not and never have been under any direct federal superintendence. In fact, the district court opinion in *Boylan* cites to the federally approved appointment of a state superintendent to prevent the sale of the remaining Oneida lands under section 3, chapter 185 of

the Laws of New York approved April 18, 1843. *United States v. Boylan*, 256 F. 468, 476-7 (N.D.N.Y. 1919). As the *Boylan* courts made clear, the federal restriction on alienation did nothing to change the fee title of the lands held by the State of New York. *United States v. Boylan*, 265 F. 165, 173 (2nd Cir. 1920). The 300,000 acres of land set aside by the State of New York has always been under primary state jurisdiction.

Both the Oneida and the United States only claim to federal superintendence over these disputed parcels of land is that they have been restricted from alienation under the Nonintercourse Act. Lands being restricted from alienation was one factor for this Court to find the lands of the Santa Clara Pueblo to be Indian country in *United States v. Sandoval*, 231 U.S. 28 (1913). However, the opinion in *Sandoval* makes quite clear that federal superintendence over the private fee lands of the Pueblo only attaches because additional contiguous federal public lands have been reserved to the Pueblo as their reservation to give the United States superintendence over all of their property. *Id.* at 39.

The Court in *Sandoval* intermixed the federal land definitions of "reservation" and "dependent Indian community" to designate the Pueblos "Indian country." *Id.* at 39. Unlike the Pueblo Indians, the Oneida Indians were fully integrated into the citizenry of New York from the signing of the 1788 Treaty of Fort Schuyler. *Boylan*, 256 F. at 477-8. They were not uncivilized Indians living separate and apart from general society on territorial lands. *Sandoval* at 39.

Because these 300,000 acres of land have never been a federal Indian reservation under the federal public land laws of the United States they have never been subject to extinguishment, diminishment or

disposal by Congress under the Property Clause. Public land law decisions concerning lands that have been extinguished or diminished from a federal reservation may provide an example in this case. For example, the holding in *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998), that lands purchased by tribal members within the former exterior boundaries of the reservation were deemed taxable unless properly placed into actual trust status under 25 U.S.C. § 465, should apply with even more force on the Oneida parcels that cannot have any "reserved" federal territorial rights. See generally *United States v. Winans*, 198 U.S. 371 (1905), *Winters v. United States*, 207 U.S. 564 (1908).

The City of Sherrill has been forced to defend its authority to tax property that has never been federal land in federal court against modern federal Indian common law cases. New York is not a public lands state and obviously has not understood how to address the very aggressive claims of the Oneida Indians and United States to reestablish Indian territory ceded to New York before the adoption of the Constitution. The federal Indian common law doctrine of "reserved" federal territorial rights that has plagued the Western United States has no application to these lands in New York. Federal public land law decisions asserting federal territorial rights are not applicable to this case. The reservation for the Oneida set aside by the State of New York in 1788 is not a reservation under federal superintendence and is not and never was Indian country.

B. The Oneida Indian Nation's federal Indian common law rights are based solely on the Indian Commerce Clause.

This case would not exist but for the previous ruling in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974)(*Oneida I*) that reversed the lower court rulings that the federal courts did not have subject matter jurisdiction to hear the federal common law claims presented by the Oneidas. In thát case, this Court concluded that the complaint raised a controversy arising under the Constitution, laws or treaties by asserting a current federal common law right to possession under the Nonintercourse Act of 1790 sufficient to invoke the jurisdiction of the district courts under 28 U.S.C. § 1331 and § 1362. The Oneida complaint to remove the state tax enforcement proceedings to federal court cites the related continuing action of *Oneida Indian Nation v. County of Oneida*, No. 74-CV-187 as the basis in this case "to enjoin illegal tax foreclosure." Opinion A-25

In *Oneida Indian Nation v. County of Oneida*, this Court said "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." There is no citation that follows this sentence. Instead, the Court continues. "It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the preemptive right to purchase from the Indian was in the State, *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). Footnote 6. But this reality did not alter the doctrine that federal law, treaties and statutes

protected Indian occupancy and that its termination was exclusively the province of federal law." *Oneida I* at 670.

The opinion then goes to the case of *Worcester v. Georgia*, 31 U.S. 515 (1832) to make the point under the Indian Commerce Clause that "the whole power of regulating the intercourse with them, was vested in the United States. *Id.* at 560." *Oneida I* at 670-1. It continues with some history and then reaches its point. "Enough has been said, we think, to indicate that the complaint in this case asserts a present right to possession under federal law." *Oneida I* at 675. The Nonintercourse Act, therefore, was interpreted in *Oneida I* as prohibiting tribes under the Indian Commerce Clause to sell or convey its rights to land without the permission of the United States within the 13 original colonies. The Oneida's right of possession has never been deemed more than a federal restriction on alienation of state land under the Indian Commerce Clause. See F. Cohen, Handbook of Federal Indian law (1982 ed.) p. 513-5.

According to this analysis, the Oneida Indians could maintain a suit that Indian occupancy was not properly terminated with federal permission pursuant to the Nonintercourse Act. In upholding the preemptive right of the original 13 colonies over their state lands in *Fletcher v. Peck*, this Court established that the federal courts cannot recharacterize these state reservation lands as federal territorial lands subject to the Property Clause. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 142-3 (1810). This distinction must be understood to be applied. The lower federal court opinions are confused as to the Oneida's federal right of possession.

As the Respondent's Brief in Opposition makes undeniable clear in their opening statement, the Oneidas are demanding that the federal courts treat the reservation of state land set aside by New York the same as federal territorial public domain lands set aside and reserved to the Mescalero Apache Tribe of New Mexico. "Despite the rule forbidding state and local taxation of Indian reservation land, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), Sherrill levied property taxes on the Oneidas." Br. in Opp. 1. Their whole argument is that the New York reservation was never diminished or disestablished under federal law. As stated in the previous section, unless the United States purchased these lands from the state of New York as done in *United States v. John*, the United States has never had any Property Clause authority over these lands to disestablish, diminish or to convey except to remove the restriction on alienation.

The facts of this case plainly show that following the 1832 decision in *Worcester v. Georgia*, the United States agreed to remove all of the New York Indians from the state of New York as evidenced by the Treaty of Buffalo Creek. As decided in 1898, in a case requiring this Court to interpret the 1838 Treaty of Buffalo Creek, "**These proceedings, by which these tribes divested themselves of their title to lands in New York,** indicate an intention on the part of both of the government and the Indians that they should take immediate possession of the tracts set apart for them in Kansas." *New York Indians v. United States*, 170 U.S. 1, 21 (1898). (emphasis added). The 1838 Treaty Buffalo Creek, executed by the Treaty of May 1842, was the federal permission for the Oneida to convey all of their lands restricted under the Nonintercourse Act to New York.

As confirmed by the Second Circuit opinion in *United States v. Boylan*, in 1842, 1,110 acres remained in the original reservation set aside by New York in 1788. The Treaty of 1842 which executed the broad provisions of the Treaty of Buffalo Creek, gave the permission of the United States required by the Nonintercourse Act as interpreted in *Worcester* to convey all of the Oneida lands. However, 32 acres in Schedule B, although released from the restriction on alienation, was continued as a state reservation for specific families. *United States v. Boylan*, 265 F. 165, 167-8 (2nd Cir. 1920). Only the 32 acres on Schedule B was retained in any federal restricted status.

The position of the United States in *Boylan* was that the families still living on the 32 acres required federal protection as wards to prevent New York from partitioning the remaining reservation land. *Boylan* 256 F. at 477-8. Even the 32 acres was contested as being subject to any federal restriction because the Oneida had ceased to exist as a tribe. See dissent of Circuit Judge Ward, *Boylan* 265 F. at 174-6. The United States never claimed in *Boylan* that lands ceded by the Oneida to New York before the Treaty of Buffalo Creek were not alienated with the permission of the United States or that conveyances of land made before the *Worcester* ruling in 1832 required the permission of the United States to be legally alienated. As Judge Ray said: "In the instant case the restriction on alienation by these Oneida Indians of their lands was not imposed by act of Congress..." *Boylan* 256 F. at 482.

Once Indian lands are alienated with the permission of Congress, even if the Indian tribe reaquires them, the protections of the Nonintercourse Act no longer apply. *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 505-06 (1986).

Therefore, under the Indian Commerce Clause, the Oneida Indian Nation, which claims in this case that it has no relation to the Oneidas still living on the reserved 32 acres, does not have a federal claim that these lands in New York are Indian country. Opinion of A3. See footnote 1.

As this Court has already decided, the federal rights of the Oneida Indians to lands within the original reservation set aside by New York are confined solely to the Indian Commerce Clause. Unlike the situation in *Worcester v. Georgia*, the Treaty of Canandaigua does not have language granting the Oneida any federal rights beyond mere occupancy of the state reservation. *United States v. Boylan*, 265 F. 165, 173 (2nd Cir. 1920). This Court should reverse the lower federal courts in this case and hold that there is no federal basis to remove these tax enforcement proceedings from state court.

Under the analysis of *Oneida I*, conveyances of land from the Oneida Indians to the state of New York made prior to the *Worcester* opinion in 1832 were valid unless the principle of *ex post facto* can be suspended or later decisions of this Court applied retroactively to somehow remake these privately purchased parcels into federal territory not subject to state and municipal taxation. As discussed below, federal common law has a history of being applied retroactively, which needs to be reexamined by this Court.

II. FEDERAL INDIAN COMMON LAW IS NOT IN THE NATIONAL INTEREST

A. A short history of federal Indian common law.

As the Oneida Nonintercourse Act cases and this case clearly demonstrate, applying old concepts of federal common law using post 1934 legal precedents creates a morass of litigation. In *Ware v. Hylton*, 3 Dall. 199 (1796), this Court for the first time defined the basic sovereign relationships of the new Constitution. The case explains how Indian tribes were treated as semi-foreign states because during our Revolutionary War they had been actively encouraged by Great Britain to wage war against the colonists. According to the *Ware* Court, with the adoption of the Constitution, a single federal Indian policy was developed and applied to all Indian tribes because as long as they existed as tribes they were capable of making war. These preliminary decisions on the balance of the various sovereignties have not changed. See *Sosa v. Alvarez-Machain*, 124 S.Ct 2739 (2004) citing *Ware v. Hylton.*

Prior to 1938, this Court assumed that the federal courts would "discover" federal common law that would create a more just governance. *See generally Swift v. Tyson*, 16 Pet. 1 (1842). This general federal common law included such terms as "tribal sovereignty," "trust," "reservation," and "Indian country" that were interpreted broadly by this Court in the cases regarding statutes and treaties entered by the political branches. In *Worcester v. Georgia*, this Court interpreted an Indian tribe to be a separate sovereign entitled to be treated as wards of the United States owed a duty of protection like a "trust" as a matter of federal common law.

The War Powers under the Constitution of the United States of Solicitor William Whiting, written to justify the war power policies of the Civil War and continue them into the future, explains that from the 1830's forward Indians were regarded as hostiles directly under war power authority. See W. Whiting, War Powers Under the Constitution of the United States, (War Powers), citing speech of John Quincy Adams p. 76-78, (43d ed. 1871). As stated by Mr. Adams: "The war power is limited only by the laws and usages of nations. This power is tremendous; it is strictly constitutional, but it breaks down every barrier so anxiously erected for the protection of liberty, of property and of life." War Powers at 77. Federal common law expanded the right to seize and hold conquered territories placing military government over ordinary civil administration in public lands decisions in New Mexico and California. War Powers at 62-63.

During and after the Civil War, the "discovery" of federal common law was replaced with virtual total deference to the Executive and Congress. For the first time, conquered territories became subject to the absolute discretion of the Executive to permit the resumption of self-government and be again clothed with their former political rights. War Powers 309-10. The footnote to this section cites the Northwest Ordinance as being the model of our territorial governments in time of peace. This meant that the temporary territorial status stated in the Property Clause and under the Northwest Ordinance discussed in *Johnson v. M'Intosh*, 8 Wheat. 543 (1823) could be made a permanent status under the war powers. Since the whole conquered South and all federal lands were already subject to the war powers, Solicitor Whiting wrote a memorandum explaining how all lands acquired

by the United States or subjected to federal rights could by various means be deemed federal territory. War Powers at 470-8.

In the case of *Holladay v. Kennard*, 79 U.S. 390 (1871), an actual Indian skirmish during the Civil War is described. The Court casually explains that because there were hostile Indians that were public enemies at war with the United States, that the stagecoach company was required to have an agent of greater faculties than would have been normally required to avoid negligence liability. This case demonstrates how completely the war powers had become integrated into the domestic law. When Congress in the Revised Statute 2079 of March 3, 1871, completely placed federal Indian common law into the main body of statutes that expressly included the war powers from the Civil War, this Court acquiesced. See *United States v. Kagama*, 118 U.S. 375 (1886).

The first two cases in which this Court deferred to the political branches' definitions of Indian law following the Civil War were *In Re Kansas Indians*, 72 U.S. 737 (1866), and *New York Indians v. United States*, 72 U.S. 761 (1866). This Court wrongly interpreted the 1794 Treaty of Canandaigua as if the lands owned by the State of New York were federal territorial lands by applying the decision of the Kansas Indians directly to the New York situation. *Id.* at 769. This error led to the ruling in *New York Indians v. United States*, 170 U.S. 1, 21 (1898) which corrected the earlier misinterpretation by applying the subsequent Treaty of Buffalo Creek.

General federal common law made by the federal courts lay dormant until the 1890's when it resurfaced in an even stronger form than existed prior to the Civil War. This period of judicial activism applied the war

powers incorporated into federal land law while expanding the trust relationship between the Indian tribes and federal government to wholesale challenge state acquired rights to due process of law and to private property. *Talton v. Mayes*, 163 U.S. 376 (1896), *United States v. Winans*, 198 U.S. 371 (1905), *Winters v. United States*, 207 U.S. 564 (1908). Congress responded with the Naturalization Act of 1924 conferring citizenship on all Native Americans. Thus continuing its legislative policy to assimilate the Indian tribes.

With the adoption of the Indian Reorganization Act of 1934, Congress decided the reservations could be deemed permanent. Federal Indian policy had to be publicly perceived as being in the interests of the Indian tribes. For it to be for the benefit of the Indian tribes, the whole history of federal Indian policy was rewritten, camouflaging the war powers and expanding the trust relationship. Solicitor Felix S. Cohen was assigned the task of writing the new Handbook of Federal Indian Law. The Federal Indian Law handbook produced and published by the government is disturbingly similar to the War Powers book produced by Solicitor William Whiting to justify and argue for the continued use of the War Powers during and after the Civil War. Just like the War Powers book, it has gone through many revisions and reprintings. Both books were written by federal solicitors and published originally by the federal government.

Various editions do not necessarily agree with each other. For example, Footnote 5 of *Oneida I* cites not only cases but the U.S. Dept. of Interior, Federal Indian Law handbook of 1958 as setting "out some of the fundamentals of the law dealing with Indian possessory rights to real property stemming from aboriginal title, treaty and statute." *Oneida I* at 669-70.

The 1982 edition of the Handbook of Federal Indian Law says: "The 1958 edition did not reflect Felix Cohen's work....Cohen's balanced synthesis of complex issues evolved into a volume with a constant theme: the federal government's power over Indian affairs is limitless." F. Cohen, Handbook of Federal Indian Law, Preface p. ix (1982 ed.).

B. The Federal Indian Common Law Rulings in this case are based on War Powers.

The Oneidas assert on page 16 of their Brief in Opposition that their federal possessory right created by the 1794 Treaty of Canandaigua has always been protected from alienation by the Nonintercourse Act of 1790, 25 U.S.C. § 177. "Thus, in 1795, Secretary of War Timothy Pickering sent to the New York Governor the opinion of Attorney General William Bradford stating that lands held by the Oneidas after the 1788 state treaty were restricted by federal law and that New York could not cause their alienation except 'by a treaty holden under the authority of the United States, and in the same manner prescribed by the laws of Congress.'" Br. in Opp. at 16-7.

Nonintercourse acts are war powers acts. According to William Whiting, the Solicitor of the War Department during and after the Civil War, Congress acknowledged the existence of civil war when it passed the Nonintercourse Act of July 13, 1861 against the seceded Southern States. War Powers at 237-8. He asserts that under the case of the *Hiawatha* the Supreme Court found it was bound to take judicial cognizance of the congressional declaration of war. See *Prize Cases*, 67 U.S. 459 (1863). In *Hiawatha*, Solicitor Whiting asserts that this Court also determined "since

that time the United States have full belligerent rights against all persons residing in the districts declared by the President's Proclamation to be in rebellion." War Powers at 238-9. Full belligerent rights in the United States means that all constitutional rights are nonexistent because a state of war exists. Against the war powers there are no private property rights, civil rights or due process rights under state law. War Powers at 238-40.

It is no accident that when the federal courts assume subject matter jurisdiction to hear a federal Indian common law claim as done in these Oneida cases based on the Nonintercourse Act that all civil rights and state due process is completely subjugated to the federal common law right. No matter how politically incorrect it is to say so, there is an inherent conflict between constitutional civil rights and liberties and reasserting tribal sovereignty claims under federal common law that are federal domestic war powers.[2]

Instead of admitting that the war powers discriminate against Indians, the legal fiction has been perpetuated that the United States was and is protecting Indians as a "trust." This Court has continued to allow Congress to treat Indian tribes as separate from the citizens of the states completely depriving Indian people of any and all constitutional rights. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49

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[2] Organizations and individuals who promote "the equal protection of the law" including federal and state constitutional rights for all citizens, like CERA and CERF, often endure attacks and negative labeling such as "anti-Indian," "racist," "hate group" and "KKK" precisely because of their advocacy for equal protection. A recent example is a June 22, 2004 article in Indian Country Today entitled "CERA-- The Ku Klux Klan of Indian country" by Dave Lundgren.

(1978). In *United States v. Lara*, 124 S.Ct. 1628 (2004), Congress' authority under the Indian Commerce Clause to treat Indian people as separate from all other citizens was deferred to again allowing an Indian man to be convicted in a foreign tribal court and federal court for the same offense.

But as acknowledged in *Lara*, federal Indian policy has encompassed an aspect of military and foreign policy from our first century. The pages cited to in *Lara* of the decision in *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 315-322 (1936) are the rationale that stopped the Executive Branch from using domestic war powers within the United States. *Lara* at 1634. The *Lara* opinion continues by applying this fact to the "plenary" powers assumed to reside in Congress to legislate tribal sovereign authority and federal Indian policy to change "judicially made" federal Indian law. *Id.* at 1637. The *Lara* opinion implies that no previous federal common law decisions are constitutional decisions of this Court protected by Art. III separation of power concerns. Since there is no way to remove the war powers from federal Indian common law, it is no longer in the national interest for this Court to promote federal Indian common law.

III. THE ONEIDA INDIAN NATION AND THE INDIAN INDIVIDUALS DO NOT HAVE STANDING IN THE FEDERAL COURTS TO CHALLENGE STATE PROPERTY TAXES

A. The Erie Doctrine should be applied to end federal Indian common law.

In the beginning, if Indian persons ended their tribal affiliations they were treated as all other persons.

Indian tribes that still acted as separate tribes and could wage war were treated as potential enemies subject to exclusive federal control under the Indian Commerce Clause. This simple but realistic approach balanced state and federal interests on lands that had never been federal territory. See *Fletcher v. Peck*, 10 U.S.(6 Cranch) 87 (1810).

According to the United States, the Oneida Indians of the State of New York, who never waged war on the United States, are still separate and apart from the general citizenry of New York requiring this Court to defer to the special trust relationship and enforce their federal common law rights against the people and state of New York. U S. Amicus at 16-17. Their separate status is based on the Executive Branch's exclusive authority to recognize their separate status as an Indian tribe under its war power authority as explained in the prior section of this brief.

This is exactly the kind of discrimination cited in *Erie Railroad Co. v. Tompkins*, 304 U.S. 817 (1938) that required reversal of the general federal common law doctrine of *Swift v. Tyson*. As this Court said: "Diversity of citizenship jurisdiction was conferred to prevent apprehended discrimination in state courts against those not citizens of the state. *Swift v. Tyson* introduced grave discrimination by noncitizens against citizens... Thus, the doctrine rendered impossible equal protection of the law." *Erie* at 820-1.

The Oneida tribe in their Complaint in this case claim to invoke federal question jurisdiction under 28 U.S.C. § 1331 and the direct statute for Indian diversity jurisdiction, 28 U.S.C. § 1362, as was done in the Nonintercourse case as a matter of federal Indian common law. The Erie Doctrine should apply to Indian diversity jurisdiction under 28 U.S.C. § 1362 just as it

does to 28 U.S.C. § 1332 jurisdiction to stop the application of federal Indian common law by the federal courts. The discriminatory effect of applying Indian diversity jurisdiction with the United States siding with the Oneidas to attack state sovereignty far exceeds the discriminatory effect of a private party asserting federal common law. There are no private property rights, civil rights or state due process rights against these assertions of federal Indian common law.

The Erie Doctrine also applies to federal question jurisdiction under 28 U.S.C. § 1331. The federal common law right of being restored to possession and to territorial sovereignty is the asserted federal question in the Nonintercourse Act cases. In this case this right to possession under federal common law is the basis that the lands can also be made Indian country not subject to municipal property taxes assessed by the City of Sherrill. Under this federal common law analysis, all private property rights can be cancelled and the parcels at issue be deemed federal territory for as long as the Executive Branch designates as explained by Solicitor Whiting. War Powers at 470-8.

There is no limit to this asserted Executive war power as long as the federal courts have federal Indian common law. Congress has never possessed any constitutional authority to change the status of these lands owned by the State of New York except to extinguish any claim that the lands were restricted from alienation. As said in *Erie Railroad Co. v. Tompkins*, "The federal courts assumed, in the broad field of 'general law,' the power to declare rules of decision which Congress was confessedly without power to enact as statutes." *Erie Railroad Co. v. Tompkins*, 304 U.S. 817, 819 (1938).

The decision in the *Village of Venetie* was an attempt to rebalance state and federal interests by confining the federal common law definition of Indian country to the statutory definition of Indian country. The lower federal courts utterly disregarded the decision as discussed in the first section of this brief in favor of a broad federal common law definition of their own fashioning. If the federal courts can hear these federal Indian common law claims there will always be the potential for a federal judge to apply the war powers to completely destroy state jurisdiction even over land that was never federal territory. Such a power could destroy the tax base not only of the City of Sherrill but also of the State of New York and other states.

The only solution to end the use of federal war powers in federal Indian common law is to apply the Erie Doctrine that "There is no federal general common law." *Erie* at 822. Such a declaration would not terminate all Indian tribal rights. The Indian tribes that reside on historic Indian reservations of federal public domain land will still retain most of the statutory rights they presently enjoy. What is terminated is the ability of the federal courts to restore or place additional lands under federal territorial status subject to the war powers. This does mean that the Indian Commerce Clause, Treaty Clause and Property Clause must be reinterpreted to remove federal Indian common law on a case by case basis. [3]

The 32 acres of land still reserved by the State of New York for tribal use will remain untaxed. Lands

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[3] This same argument would apply against placing lands into "trust status" a federal Indian common law term incorporated into 25 U.S.C. § 465.

purchased by the Oneida Indians within the original set aside by the State of New York would no longer be capable of being deemed Indian country by a federal court as a matter of federal Indian common law to evade municipal taxation.

B. The Fourteenth Amendment cannot be applied in Indian claims to remove lands from state taxation.

The Complaint in this case also cites 42 U.S.C. § 1983 as a basis for asserting the subject matter jurisdiction of the federal courts to remove these parcels of property from the jurisdiction of the City of Sherrill. Under *Inyo County v. Paiute-Shoshone Indians of the Bishop Community*, 538 U.S. 701 (2003) the Oneida Indian Tribe is not a "person" entitled to bring suit against the City of Sherrill. *Inyo County* at 704, 708-12. The Complaint was also filed by individual tribal members against the City of Sherrill. Whether individual tribal members can assert federal Indian common law claims based on the Nonintercourse Act, 28 U.S.C. § 177, as a civil rights action has not been answered by this Court.

Obviously, 42 U.S.C. § 1983 is a civil rights statute. The Oneida individuals are asserting that the City of Sherrill violates their civil rights by taxing these parcels of land, which they claim were not federally permitted to be conveyed to New York under the federal Nonintercourse Act. The individuals asserting the civil rights claim are citizens of the State of New York. These individuals are arguing that it violates their civil rights to treat the disputed parcels as being under state municipal jurisdiction because of federal Indian common law.

The civil rights statute, 42 U.S.C. § 1983, is based on the Fourteenth Amendment to the United States Constitution. Indians not taxed are not "persons" entitled to raise a civil rights claim. The Fourteenth Amendment in Section 2 excludes Indians not taxed. Therefore, the only way these individual Indians can assert a claim as persons is if the land they reside on is taxable. These individual Indians have no standing under 42 U.S.C. § 1983 to assert that any federal court has authority to declare that these parcels of land are not subject to taxation by the City of Sherrill. Only under federal Indian common law do these members of the Oneida Indian Nation have standing to bring this suit against the City of Sherrill that their right of self-government is harmed by the land being taxed.

As stated in *Erie Railroad Co. v. Tompkins*, it is a violation of the equal protection of the law, the main provision of the Fourteenth Amendment, to allow federal common law to cause discrimination. This Court has recently upheld the application of *Erie Railroad Co. v. Tompkins*, in *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004) to limit the discretion of the federal courts to create or formulate new federal common law principles to 18th Century statutes like the Alien Tort Statute of the Judiciary Act of 1789. This Court specifically held that "These reasons argue for great caution in adapting the law of nations to private rights."

This reasoning should apply equally to the Nonintercourse Act of 1790. In 1790, the Indian tribes were treated as foreign states only obligated by treaty and the law of nations. See *Ware v. Hylton*, 3 Dall. 199 (1796). The lower federal courts in this case wrongly expanded the federal Indian common law term of Indian country by applying modern federal Indian

common law precedents to alter the historical meaning of the Nonintercourse Act of 1790 under *Sosa v. Alvarez-Machain*. These parcels of land which were within the state lands reserved for the Oneida Indians in 1788 are not and never have been Indian country.

CONCLUSION

The lower federal court rulings should be reversed and this case dismissed.

Respectfully submitted,

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