

STEVENS, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 03–855

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

[March 29, 2005]

JUSTICE STEVENS, dissenting.

This case involves an Indian tribe’s claim to tax immunity on its own property located within its reservation. It does not implicate the tribe’s immunity from other forms of state jurisdiction, nor does it concern the tribe’s regulatory authority over property owned by non-Indians within the reservation.

For the purposes of its decision the Court assumes that the District Court and the Court of Appeals correctly resolved the major issues of fact and law that the parties debated in those courts and that the City of Sherrill (City) presented to us in its petition for certiorari. Thus, we accept those courts’ conclusions that the Oneida Indian Nation of New York (Tribe) is a federally recognized Indian Tribe; that it is the successor-in-interest to the original Oneida Nation; that in 1788 the Treaty of Fort Schuyler created a 300,000 acre reservation for the Oneida; that in 1794 the Treaty of Canandaigua established that tract as a federally protected reservation; and that the reservation was not disestablished or diminished by the Treaty of Buffalo Creek in 1838. It is undisputed that the City seeks to collect property taxes on parcels of land that are owned by the Tribe and located within the historic boundaries of its reservation.

Since the outset of this litigation it has been common

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ground that if the Tribe's properties are "Indian Country," the City has no jurisdiction to tax them without express congressional consent.¹ For the reasons set forth at length in the opinions of the District Court and the Court of Appeals, it is abundantly clear that all of the land owned by the Tribe within the boundaries of its reservation qualifies as Indian country. Without questioning the accuracy of that conclusion, the Court today nevertheless decides that the fact that most of the reservation has been occupied and governed by non-Indians for a long period of time precludes the Tribe "from rekindling embers of sovereignty that long ago grew cold." *Ante*, at 14. This is a novel holding, and in my judgment even more unwise than the Court's holding in *County of Oneida v. Oneida Indian Nation of N. Y.*, 470 U. S. 226 (1985), that the Tribe may recover damages for the alleged illegal conveyance of its lands that occurred in 1795. In that case, I argued that the "remedy for the ancient wrong established at trial should be provided by Congress, not by judges seeking to rewrite history at this late date," *id.*, at 270 (opinion dissenting in part). In the present case, the Tribe is not attempting to collect damages or eject landowners as a remedy for a wrong that occurred centuries ago; rather, it is invoking an ancient immunity against a city's present-day attempts to tax its reservation lands.

Without the benefit of relevant briefing from the parties, the Court has ventured into legal territory that belongs to Congress. Its decision today is at war with at least two bedrock principles of Indian law. First, only Congress has the power to diminish or disestablish a tribe's reservation.² Second, as a core incident of tribal sovereignty, a

¹The District Court noted that "[n]o argument is made that should a finding be made that the properties in question are Indian Country, they are nonetheless taxable." 145 F. Supp. 2d 226, 241, n. 7 (NDNY 2001).

²See *South Dakota v. Yankton Sioux Tribe*, 522 U. S. 329, 343 (1998)

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tribe enjoys immunity from state and local taxation of its reservation lands, until that immunity is explicitly revoked by Congress.³ Far from revoking this immunity, Congress has specifically reconfirmed it with respect to the reservation lands of the New York Indians.⁴ Ignoring these principles, the Court has done what only Congress may do—it has effectively proclaimed a diminishment of

(“Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights. Accordingly, only Congress can alter the terms of an Indian treaty by diminishing a reservation, and its intent to do so must be ‘clear and plain’” (citations omitted)); *Solem v. Bartlett*, 465 U. S. 463, 470 (1984) (“Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise”).

³See *Montana v. Blackfeet Tribe*, 471 U. S. 759, 764–765 (1985) (noting that the Court has “never wavered” from the view that a State’s attempt to tax Indian reservation land is illegal and inconsistent with Indian title) (citing *The Kansas Indians*, 5 Wall. 737 (1867), and *The New York Indians*, 5 Wall. 761 (1867)); *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U. S. 103, 110 (1998) (“We have consistently declined to find that Congress has authorized such taxation unless it has “made its intention to do so unmistakably clear””).

⁴In providing New York state courts with jurisdiction over civil actions between Indians, Congress emphasized that the statute was not to be “construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes.” 25 U. S. C. §233. See *Oneida Indian Nation of N. Y. v. County of Oneida*, 414 U. S. 661, 680–681, n. 15 (1974) (“The text and history of the new legislation are replete with indications that congressional consent is necessary to validate the exercise of state power over tribal Indians and, most significantly, that New York cannot unilaterally deprive Indians of their tribal lands or authorize such deprivations. The civil jurisdiction law, to make assurance doubly sure, contains a proviso that explicitly exempts reservations from state and local taxation Moreover, both federal and state officials agreed that the bills would retain ultimate federal power over the Indians and that federal guardianship, particularly with respect to property rights, would continue” (quoting Gunther, *Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem of Federal-State Relations*, 8 *Buffalo L. Rev.* 1, 16 (1958))).

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the Tribe's reservation and an abrogation of its elemental right to tax immunity. Under our precedents, whether it is wise policy to honor the Tribe's tax immunity is a question for Congress, not this Court, to decide.

As a justification for its lawmaking decision, the Court relies heavily on the fact that the Tribe is seeking *equitable* relief in the form of an injunction. The distinction between law and equity is unpersuasive because the outcome of the case turns on a narrow legal issue that could just as easily, if not most naturally, be raised by a tribe as a *defense* against a state collection proceeding. In fact, that scenario actually occurred in this case: The City brought an eviction proceeding against the Tribe based on its refusal to pay property taxes; that proceeding was removed to federal court and consolidated with the present action; the District Court granted summary judgment for the Tribe; and the Court of Appeals affirmed on the basis of tribal tax immunity.⁵ Either this defensive use of tax immunity should still be available to the Tribe on remand, but see *ante*, at 14, n. 7, or the Court's reliance on the distinctions between law and equity and between substantive rights and remedies, see *ante*, at 13, is indefensible.

In any event, as a matter of equity I believe that the "principle that the passage of time can preclude relief," *ante*, at 16, should be applied sensibly and with an even hand. It seems perverse to hold that the reliance interests of non-Indian New Yorkers that are predicated on almost

⁵See 337 F. 3d 139, 167 (CA2 2003). Additionally, to the extent that we are dealing with genuine equitable defenses, these defenses are subject to waiver. Here, the City sought to add the defense of laches to its answer; the District Court refused on the ground of futility, 145 F. Supp. 2d, at 259; the Court of Appeals upheld this determination, 337 F. 3d, at 168–169; and the City failed to preserve this point in its petition for certiorari or brief on the merits. The City similarly failed to preserve its impossibility defense in its submissions to this Court, and there is no indication that the City ever raised an acquiescence defense in the proceedings below.

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two centuries of inaction by the Tribe do not foreclose the Tribe's enforcement of judicially created damages remedies for ancient wrongs, but do somehow mandate a forfeiture of a tribal immunity that has been consistently and uniformly protected throughout our history. In this case, the Tribe reacquired reservation land in a peaceful and lawful manner that fully respected the interests of innocent landowners—it purchased the land on the open market. To now deny the Tribe its right to tax immunity—at once the most fundamental of tribal rights and the least disruptive to other sovereigns—is not only inequitable, but also irreconcilable with the principle that only Congress may abrogate or extinguish tribal sovereignty. I would not decide this case on the basis of speculation about what may happen in future litigation over other regulatory issues.⁶ For the answer to the question whether the City may require the Tribe to pay taxes on its own property within its own reservation is pellucidly clear. Under settled law, it may not.

Accordingly, I respectfully dissent.

⁶It is not necessary to engage in any speculation to recognize that the majority's fear of opening a Pandora's box of tribal powers is greatly exaggerated. Given the State's strong interest in zoning its land without exception for a small number of Indian-held properties arranged in checkerboard fashion, the balance of interests obviously supports the retention of state jurisdiction in this sphere. See *California v. Cabazon Band of Mission Indians*, 480 U. S. 202, 215 (1987) (“[I]n exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members”). Nor, as the Tribe acknowledges, Brief for Respondents 19, n. 4, could it credibly assert the right to tax or exercise other regulatory authority over reservation land owned by non-Indians. See *Atkinson Trading Co. v. Shirley*, 532 U. S. 645 (2001); *Strate v. A-1 Contractors*, 520 U. S. 438, 456 (1997) (denying tribal jurisdiction in part because the Tribe could not “assert a landowner's right to occupy and exclude” over the land in question); see also *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408, 444–445 (1989) (opinion of STEVENS, J.) (“Because the Tribe no longer has the power to exclude nonmembers from a large portion of this area, it also lacks the power to define the essential character of the territory [through zoning]”).