

SOUTER, J., concurring

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 SOUTER, concurring.

I join the opinion of the Court with one qualification that goes to the appropriateness of considering the long dormancy of any claim to tribal authority over the parcels in question, as a basis to hold that the Oneida Indian Nation is not now immune from the taxing authority of local government. The Tribe’s claim, whether affirmative or defensive, see *ante*, at 14, n. 7, is one of territorial sovereign status entitled to recognition by the territorial state sovereign and its subdivisions. The claim of present sovereign status turns not only on background law and the provisions of treaties, but also on the Tribe’s behavior over a long period of time: the absence of the Tribe and tribal members from the particular lots of land, and the Tribe’s failure to assert sovereignty over them. The Tribe’s inaction cannot, therefore, be ignored here as affecting only a remedy to be considered later; it is, rather, central to the very claims of right made by the contending parties. Since the subject of inaction was not expressly raised as a separate question presented for review, see *ante*, at 14, n. 8, there is some question whether we should order reargument before dealing with it. I think that is unnecessary; the issue was addressed by each side in the argument prior to submission of the case, notwithstanding the terms of the questions on which review was granted.