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Resolving Native American Land Claims and the Eleventh Amendment: Changing the Balance of Power

Katharine F. Nelson

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RESOLVING NATIVE AMERICAN LAND CLAIMS AND THE ELEVENTH AMENDMENT: CHANGING THE BALANCE OF POWER

KATHARINE F. NELSON*

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* Associate Professor, Widener University School of Law; B.A., University of Rochester; M.A., Columbia University Teachers College; J.D., Syracuse University College of Law. Copyright 1994. I would like to thank Elizabeth Paige Spencer and John Doncevic, my student research assistants, for their help in researching and editing this article.
I. Introduction

It can be argued that the Indian right to aboriginal land is fundamental because land is the basis of all things Indian. The relationship of a tribe to its land defines the tribe: its identity, its culture, its way of life, and its methods of adaptation. Since tribal existence is central to personal Indian selfhood, the very existence of an Indian people is largely dependent on the recognition and protection of Indian property rights.¹

You are not hostages in our house. We don’t hold you here. But we do recognize the fact that you are in our house. We have people who are working on settling the dispute as to how you should live in our house.²

² Irving Powless, Jr., The Sovereignty and Land Rights of the Houdenosaunee, in
As the United States looks forward to the twenty-first century, many localities still face Native American land claims. Some of these claims are over 200 years old. The United States Supreme Court's 1991 holding in *Blatchford v. Native Village of Noatak*—that the states enjoy Eleventh Amendment immunity from suits by Indian tribes—may further hinder settlement of these disputes because it alters the balance of power between the states and Native claimants.

Federal common law, statutes and treaties recognize and protect Native American rights to occupy and use tribal lands. These are among the most important interests that Native Americans hold and still form the basis for much of today's Indian policy. Unfortunately, the sorry history of Indian relations in this country has too often been, and continues to be, marred by government and private exploitation of Native American property rights.

Native Americans have a unique status in the United States that is unlike other ethnic and racial minorities. They are neither assimilated nor independent sovereigns. Instead, Indian tribes are considered "dependent domestic nations." As such, their ability to

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4. Id. at 782-88.
6. Modern day examples include usurping reservation water rights, depositing hazardous wastes on tribal lands and taking tribal land by eminent domain for public works projects.
7. Chief Justice John Marshall described Indian tribes as follows:

Though the Indians are acknowledged to have an unquestionable, and heretofore unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted, whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases. Meanwhile,
protect their rights has often been limited.\textsuperscript{8} Until relatively recently, tribal access to the federal judicial system was restricted or nonexistent. Indian tribes were often forced to rely on the federal government to assert their rights under the Indian/government trust doctrine or resort to self-help.

In 1966, Congress enacted the Indian jurisdiction statute.\textsuperscript{9} This statute gave the federal district courts original jurisdiction over civil claims by recognized Indian tribes arising under the Constitution, laws or treaties of the United States, without regard to the amount in controversy.\textsuperscript{10} In the 1970s, tribes began filing actions in federal court asserting possessory rights to millions of acres of ancestral land long since acquired by the states and currently occupied by private citizens, businesses, municipalities, counties and the states.\textsuperscript{11} In a series of decisions culminating with \textit{County of Oneida v. Oneida Indian Nation (Oneida II)},\textsuperscript{12} the United States Supreme Court eliminated most of the procedural hurdles that had plagued Indian land claims. It soon became apparent that many of these suits asserted valid claims and that the tribal plaintiffs had a good chance of prevailing on the merits. State and local defendants began settlement negotiations. As a result, a number of significant land claims have settled.

Although their terms vary, negotiated settlements have generally allocated public money and/or land to the Native claimants in

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\textsuperscript{8} For a discussion of the restrictions placed on Indian tribes, see \textit{infra} notes 37-125 and accompanying text.

\textsuperscript{9} \textit{Id.}

\textsuperscript{10} \textit{Id.}


\textsuperscript{12} 470 U.S. 226 (1985).
exchange for extinguishing the claimants' possessory interests in the disputed area not included in the allocation. Many of these agreements have involved millions of dollars in cash, property rights and other benefits. Although attention has focused primarily on the federal government's role in the settlement process, the state's participation and resources have also been crucial to successful negotiations. By law, the federal government must ratify any agreement involving alienation of tribal property rights but will not do so without the state's consent to the settlement terms. Moreover, the federal government will generally not contribute to a settlement until the state and local parties have agreed to provide their "fair share." 

One of the questions that the Supreme Court left open in Oneida II was whether the individual states have sovereign immunity from suits by Indian tribes. In 1991, the Supreme Court held that the Eleventh Amendment bars Indian tribes from suing states in federal court without the states' consent. As a result, tribes must now sue local municipalities, counties and private landowners to recover land and damages. However, these defendants generally lack adequate resources to either satisfy court judgments or offer reasonable settlements. Although the states still have an interest in resolving tribal land claims within their borders, countervailing political and financial pressures may hinder effective state involvement.

This Article examines the possible effects of the states' Eleventh Amendment immunity on resolving Indian land claims. Parts II and III summarize the origins of modern Native land claims and the history of tribal access to the federal courts. Part IV focuses on Indian land claim settlements. It discusses the benefits of negotiating settlements to these claims and examines three examples: the Narragansett, Puyallup and Seneca-Salamanca agreements. Part IV concludes by examining the important role that the states play in

14. For a discussion of the federal government's treatment of Native land claims as a local matter and the state's important role in settlement negotiations, see infra notes 404-11 and accompanying text.
15. Oneida II, 470 U.S. at 252 (leaving undecided whether Congress abrogated states' Eleventh Amendment immunity from tribal suits by enacting Nonintercourse Act).
the settlement process. Part V summarizes current Eleventh Amendment law including the states' sovereign immunity from suit by Indian tribes and Congress' power to abrogate that immunity if it so chooses. Finally, Part VI evaluates how the states' Eleventh Amendment immunity may affect settlement negotiations in tribal land claims. The Article concludes that negotiations are likely to be more difficult and protracted in the future and agreements harder to reach.

II. INDIAN TITLE AND THE NONINTERCOURSE ACT

Understanding the basis for modern Indian land claims requires an understanding of how Native American tribes hold property in this country. Indian tribes generally do not own fee simple title to tribal lands. Instead, they have a possessory interest in their land that is known as Indian title.

Indian title is based on a legal fiction called the Doctrine of Discovery. The United States Supreme Court recognized this doctrine in the early 1800s to describe the rights of the discovering European nations to land in the New World in relation to other "discovering" nations and the native inhabitants. Under the Doc-

17. The states' Eleventh Amendment immunity also impacts many other areas of Indian litigation. This Article focuses on land claims because the consequences of barring suits against the states are potentially more severe. In some other areas, such as enforcement of hunting and fishing rights, Native Americans may still be able to secure prospective injunctive relief against state officials under Ex parte Young, 209 U.S. 125 (1908). See Blatchford, 501 U.S. at 788 (leaving open question of whether Indian tribes can obtain injunctive relief).


19. Oneida I, 414 U.S. 661, 667 (1974) (discussing Native American right to occupancy); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 580 (1832) ("[Indians'] right of occupancy has never been questioned, but the fee in the soil has been considered in the government.").

Of course, individual Native Americans can own fee simple title to private lands. Tribes may also acquire fee title to non-treaty land where the government has extinguished Indian title or where tribes purchase private land in fee. See generally Mashantucket Pequot Indian Settlement Act of 1983, 25 U.S.C. § 1754(b)(8) (1988) (stating that lands purchased outside of settlement lands will be held in fee and subject to alienation); Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960) (holding that land purchased and owned in fee simple by Tuscarora Indian Nation could be taken to construct reservoir).

Federal restraints on alienating tribal land still apply to land that the tribe has purchased unless the government provides otherwise. COHEN HANDBOOK, supra note 18, at 484 (discussing federal protection of tribal land acquired by purchase).

20. See, e.g., Worcester, 31 U.S. (6 Pet.) at 543-44 (explaining origin and pur-
trine of Discovery, the discovering or conquering nation had legal title to the land that it discovered. This title was good against all other nations and gave the discovering nation the sole right to acquire possession of the land from the native inhabitants. Native Americans had the right to inhabit and use the land subject only to the sovereign or discovering nation's right to extinguish the Native Americans' right of occupancy. The sovereign could extinguish Indian title by either purchase or "just conquest." Accordingly, when Great Britain "discovered" North America, it became the sovereign with the sole right to extinguish Indian title. The power of sovereignty then passed to the original thirteen states when they declared—or won—their independence from Great Britain. Under the Constitution, sovereignty passed to the federal government. The Doctrine of Discovery is, in effect, codified in the United

pose of the Doctrine of Discovery); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 572-74 (1823) (explaining Doctrine of Discovery and diminishment of native inhabitants' rights in land discovered by European nations); see also Robert A. Williams, Jr., The American Indian in Western Legal Thought: The Discourses of Conquest 312-17 (discussing Chief Justice Marshall's acceptance of Doctrine of Discovery as means for rationalizing process of Native land acquisition in America based on Euro-centric, feudally-derived doctrines of conquest).

21. Oneida II, 470 U.S. 231, 234 & n.3 (1985) (explaining Doctrine of Discovery); Johnson, 21 U.S. (8 Wheat.) at 572-74 (stating that discovery gave exclusive title to discovering nation with "sole right of acquiring soil from the natives, and establishing settlements upon it").

22. Oneida II, 470 U.S. at 234 & n.3; Johnson, 21 U.S. (8 Wheat.) at 572-74; see also Newton, supra note 1, at 207-09 (explaining Doctrine of Discovery and Indian title).

23. Johnson, 21 U.S. (8 Wheat.) at 587-91; see also Treaty of Fort Stanwix, Oct. 22, 1784, U.S.-Six Nations, 7 Stat. 15, 15-16 (taking cessions of land from the hostile Iroquois Nations following War for Independence with Great Britain). What constitutes "just" as opposed to "unjust" conquest is unclear. History suggests that "just" conquest is whatever the sovereign determines it to be. See United States ex rel. Hualpai Indians v. Santa Fe Pac. R.R., 314 U.S. 339, 347 (1941) (quoting Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 586 (1823)) ("The exclusive right of the United States to extinguish Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry . . . .")

24. Johnson, 21 U.S. (8 Wheat.) at 573-74, 576-80. Of course, the same right of sovereignty also passed to the other "discovering" nations of what is now the United States, including Spain, France and Russia.

25. Oneida I, 414 U.S. 661, 667 (1974) (discussing historical development of authority over Native American lands). During the confederal period, the right to extinguish Indian title to land outside of the original states' boundaries, but within the national domain, vested in the central government. Id.; Johnson, 21 U.S. (8 Wheat.) at 584-88.

26. Oneida I, 414 U.S. at 667 ("Once the United States was organized and the Constitution adopted . . . tribal rights to Indian lands became the exclusive province of federal law."). Similarly, when the United States acquired territory from
States Constitution27 and the Indian Trade and Intercourse Act (the “Nonintercourse Act”).28 The Indian Commerce Clause of the Constitution reserves to the federal government the right to regulate commerce with Indian tribes.29 The grant of power is plenary. The Nonintercourse Act, first promulgated in 1790 under the Indian Commerce Clause,30 prohibits alienating Indian land without the federal government’s consent.31 The government’s consent other nations, such as the Alaskan territory from Russia, it also acquired the right to extinguish native title as an incident of sovereignty.

27. U.S. Const. art. I, § 8, cl. 3.

28. 25 U.S.C. § 177 (1988); Oneida I, 414 U.S. at 678 (“[T]he Nonintercourse Acts . . . put into statutory form what was . . . the accepted rule—that the extinguishment of Indian title required the consent of the United States.”).

29. The Indian Commerce Clause provides: “The Congress shall have Power . . . [t]o regulate Commerce with . . . the Indian Tribes.” U.S. Const. art. I, § 8, cl. 3.

30. Nonintercourse Act, ch. 33, 1 Stat. 137 (codified as amended at 25 U.S.C. § 177 (1988)). The Nonintercourse Act was designed to preserve peace on the frontier, reinforce the Indian Commerce Clause against the states and discourage Indian reprisals against White settlements by assuring the Indians that their possession of tribal lands was secure. These goals would facilitate the orderly advancement of the frontier. See Jack Campisi, From Stanwix to Canandaigua: National Policy, States’ Rights and Indian Land, in IROQUOIS LAND CLAIMS 49, 61 (Christopher Vecsey & William A. Starna eds., 1988) (explaining that Congress enacted Nonintercourse Act out of fear that state and private cessions of Indian land would cause a general Indian war); Clinton & Hotopp, supra note 18, at 36-37; Daniel M. Crane, Congressional Intent or Good Intentions: The Inference of Private Rights of Action under the Indian Trade and Intercourse Act, 63 B.U. L. Rev. 853, 896-904 (1983) (discussing policy behind Nonintercourse Act).

31. The current version of the Nonintercourse Act provides:
No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.


Since 1871, when the United States stopped making treaties with Indian Tribes, Congress generally has authorized transfers of tribal property interests by statute. See generally Rhode Island Indian Claims Settlement Act, 25 U.S.C. § 1705 (1988) (ratifying all prior transfers of Narragansett Tribe’s land and extinguishing Tribe’s aboriginal title). However, Congress may also expressly delegate its authority to the Executive branch. See COHEN HANDBOOK, supra note 18, at 515-17 (discussing restraints on alienation of tribal lands).
must be "plain and unambiguous." Conveyances of Native American land made in violation of the Nonintercourse Act are void.

Native American possessory rights to tribal lands may be based on aboriginal title or recognized title. As discussed, aboriginal title arises out of the Doctrine of Discovery and the Nonintercourse Act. However, the federal government has often formally recognized various tribes' rights to specific tracts of land through treaties, statutes and executive orders. In addition to the federal government, the states, political subdivisions of the states and private parties have also acquired millions of acres of Native American land over the years. Any conveyance of Indian land, made subsequent to the Nonintercourse Act, that the federal government has not ratified, was made illegally and is potentially the basis for a tribal land claim.

III. THE HISTORY OF TRIBAL ACCESS TO THE FEDERAL COURTS

A. Before Oneida I and II

One of the primary purposes of the federal courts is to provide

32. Oneida II, 470 U.S. 226, 247-48 (1985) (quoting United States ex rel. v. Santa Fe Pac. R.R., 314 U.S. 339, 346 (1941)). Instruments of conveyance, such as treaties and purchase contracts, between Indians and other entities are interpreted in the light most favorable to the Indians. Id. at 247.

33. Id. at 245-46.

34. "Aboriginal title" is also called "ancestral title," and "recognized title" is also referred to as "formal title."

35. The federal government has acquired most of the Native Americans' land. See Hagen v. Utah, 114 S. Ct. 958, 972 n.5 (1994) (Blackmun, J., dissenting) ("The 138 million acres held exclusively by Indians in 1887 when the General Allotment Act was passed had been reduced to 52 million acres by 1934. . . . [In 1934] John Collier testified before Congress that nearly half of the lands remaining in Indian hands were desert or semi-desert, and that 100,000 Indians were 'totally landless as a result of allotment.' ") (citations omitted); William T. Hagan, "To Correct Certain Evils:" The Indian Land Claims, in IROQUOIS LAND CLAIMS 17 (Christopher Vecsey & William A. Starna eds., 1988) (estimating that United States has acquired 90% of Native Americans' land by treaty or agreement).

36. See Clinton & Hotopp, supra note 18, at 42-44 (discussing early state cessions of Indian land). Authorities estimate that New York State alone has entered into almost 200 treaties alienating Indian land in violation of the Nonintercourse Act. Id. at 43.

37. See generally COHEN HANDBOOK, supra note 18, at 562-74 (discussing tribal access to Court of Claims and Indian Claims Commission); Clinton & Hotopp, supra note 18, at 45-51 (discussing tribal access to federal courts during 18th, 19th and 20th centuries); Hagan, supra note 35, at 17-30 (discussing tribal access to federal judicial system); Newton, supra note 1, at 199-236 (providing historical overview of Congress' authority to regulate Indian affairs and judicial deference to that authority); Glen A. Wilkinson, Indian Tribal Claims Before the Court of Claims, 55 GEO. L.J. 511, 511-28 (1966) (examining history of tribal litigation against federal government in Court of Claims); John Edward Barry, Comment, Oneida Indian Nation v. County of Oneida: Tribal Rights of Action and the Indian Trade and
a federal forum for vindicating federal rights. 38 Yet before 1968, 39 Native Americans’ access to the federal court system to assert federally protected tribal rights was often barred or restricted. In large part, this was due to the Indians’ special status as wards of the federal government, prejudice and national policy to open the frontier for White settlement through the orderly acquisition of Native land. 40

During the confederacy, 41 the United States had no national courts because the Articles of Confederation failed to provide for a national judicial system. 42 The state courts heard both state and national claims. However, Indian tribes were expected to petition the President to redress an infringement of their formal treaty rights. 43

Even after the national courts were created under the Constitu-


39. See Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 368-69 (1968) (holding that government/Indian trust relationship does not preclude tribes from suing on their own behalf to protect their property interests).

40. See generally Nancy Carol Carter, Race and Power Politics as Aspects of Federal Guardianship over American Indians: Land-Related Cases, 1887-1924, 4 AM. INDIAN L. REV. 197, 226-29 (1976) (discussing federal guardianship power over Native Americans and influence of racial and cultural prejudice); Newton, supra note 1, at 214-22, 236 (discussing historical basis and exercise of federal plenary power over Native Americans).

41. The colonies declared their independence from Great Britain in 1776. The Articles of Confederation were submitted to the United States in Congress Assembled in 1777, but were not ratified until 1781. See WILLIAMS, supra note 20, at 289-96 (discussing dispute between “landed” and “landless” states delaying ratification of Articles of Confederation). The United States Constitution became effective in June, 1788, after ratification by 9 states. RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 1.1, at 33-34 (2d ed. 1992).

42. The Articles of Confederation did make the United States in Congress Assembled the “last resort on appeal” in disputes between states “concerning boundary, jurisdiction, or any other cause whatever” and specified a procedure for selecting a seven-judge panel. ARTICLES OF CONFEDERATION art. IX. The Articles also gave the Confederate Congress power to create certain admiralty courts. Id. In 1780, Congress created “The Court of Appeals in Cases of Capture” as the first national court. The court existed until May 16, 1787. Hart & Wechsler, supra note 38, at 4-5 n.17-18.

43. See Treaty at Canandaigua, Nov. 11, 1794, U.S.-Six Nations, art. VII, 7 Stat. 44, 46 (stating that nations of Iroquois Confederacy could complain to United States President or his appointed superintendent to redress wrongs against them until legislature enacted other means for asserting their rights).
tion and the First Judiciary Act, Native Americans did not have access to them. Congress did not delegate federal question jurisdiction over civil cases to the lower federal courts in the First Judiciary Act. Accordingly, Indians could not assert any claims arising under the United States Constitution, laws or treaties in the federal courts. They could not invoke the courts' diversity jurisdiction because Congress did not confer citizenship on Indians until 1924. Furthermore, the United States Supreme Court held in *Cherokee Nation v. Georgia* that Indian tribes were not independent sovereign nations but rather "domestic dependent nations." As such, they were not foreign states that could invoke the Supreme Court's original jurisdiction or the lower courts' foreign diversity jurisdiction.

Congress finally granted the lower federal courts federal question jurisdiction in 1875. However, the courts were still uncertain as to whether Indians could sue to protect tribal rights without a specific statute authorizing them to sue. Native Americans were

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44. Article III of the Constitution provides for the Supreme Court and defines the Court's original and appellate jurisdiction. It also empowers Congress to establish lower federal courts and to confer judicial power on them within the scope of Article III. U.S. Const. art. III.

45. Judiciary Act of 1789, ch. 20, 1 Stat. 73; Hart & Wechsler, *supra* note 38, at 30-34 (summarizing provisions of First Judiciary Act). However, Congress did give the lower federal courts jurisdiction over federal criminal law prosecutions. Judiciary Act § 9, at 76-77. The Supreme Court was given appellate jurisdiction over some federal questions from the states' highest courts. *Id.* § 25, at 85-87; see Hart & Wechsler, *supra* note 38, at 30-34 (summarizing provisions of First Judiciary Act).

46. See Crane, *supra* note 30, at 901-02 (discussing Executive's primary enforcement role under Nonintercourse Act). A tribe could invoke the Supreme Court's appellate jurisdiction to review a state court judgment on a federal claim. *Oneida II*, 470 U.S. 226, 255 n.1 (1985) (Stevens, J., dissenting in part); Clinton & Hotopp, *supra* note 18, at 46-47 n.141. However, state courts were not generally open to Indians, especially to claims against the state. *See The Supreme Court, 1984 Term—Leading Cases*, 99 Harv. L. Rev. 120, 261 (1985) (discussing state court hostility toward tribal plaintiffs). For further discussion of the difficulties Native Americans faced in state courts, see *infra* notes 60-63 and accompanying text.


49. *Id.* at 17 (discussing relationship between Indian nations and federal government).

50. *Id.* at 19-20; see also *Oneida II*, 470 U.S. 226, 255 n.1 (1985) (Stevens, J., dissenting in part) (noting that before 1875, Indian tribes could not invoke federal courts' original jurisdiction to assert federal land claims; they could only obtain Supreme Court appellate review from state court judgments).


52. See, e.g., Heckman v. United States, 224 U.S. 413, 444-46 (stating that where Executive had right to sue for Indians, Indians had no say in litigation and
considered "wards" of the United States government. Under the trust doctrine, the government had the duty to protect tribal interests. Accordingly, the federal courts generally concluded that Indian tribes did not have the capacity to sue on their own behalf; they still had to rely on the federal government to assert their rights.

Too often, however, the government was not inclined to assert Indian rights for any number of reasons. When the federal government did choose to protect Native rights, the courts were often hostile. Even enforcing favorable court decrees could be problematic in the Nation's early years because of governmental hostility implying that they had no right to sue on their own behalf), rev'd sub nom. Mullen v. United States, 224 U.S. 448 (1912); Jaeger v. United States, 27 Ct. Cl. 278, 288 (1892) (finding that Indians did not have "common-law rights of suitors" and, therefore, were "not defendants . . . distinct from the United States" who were entitled to notice); id. at 285 (stating also that, "[w]henever . . . [Indian nations, tribes or Indians] have asserted a legal capacity in the maintenance of their rights, it has been in pursuance of some statute of the United States specially conferring upon them the civil rights of suitors."); see Newton, supra note 1, at 205, 228-29 (discussing historical development of Indians' standing); see also United States v. Forness, 125 F.2d 928 (2d Cir. 1942) (United States suing for Seneca Nation to determine if Senecas could cancel defaulted leases), cert. denied, 316 U.S. 694 (1942). But see Poafpybitty v. Skelly Oil Co. 390 U.S. 365, 370-71 (1968) (construing Heckman as implying Indian standing to sue). In Poafpybitty v. Skelly Oil Co., the Supreme Court finally rejected the argument that the government's trusteeship restricted Native Americans' right to sue on their own behalf to protect property rights. Poafpybitty, 390 U.S. at 370-71. Six years later the Supreme Court recognized that the federal courts have federal question jurisdiction over tribal land claims. Oneida I, 414 U.S. 661 (1974). For further discussion of Oneida I, see infra notes 89-101 and accompanying text.

53. Indian policy in the United States has shifted dramatically a number of times. For example, rapid settlement of the West in the late 1800s required acquisition of large areas of Indian land. Between 1871 and 1928, Congress adopted a policy of forced allotment of Indian lands and assimilation. The government divided tribal land and gave parcels to individual Indians. Surplus land was sold to whites. COHEN HANDBOOK, supra note 18, at 127-43; Newton, supra note 1, at 219-22. Between 1943 and 1961, the government adopted a policy of terminating federal responsibility over Indian tribes and affairs. COHEN HANDBOOK, supra note 18, at 152-80.

54. Professor Prucha described the early territorial courts as follows: The courts reflected the milieu in which they existed. The courts and juries were frontier-minded, opposed both to the Indians and to the federal army officers who were on hand to protect the red men. The Indians were a physical hindrance to the advance of white settlement, whose mere presence on the land was bad enough, but whose savage ways (breaking out again and again into atrocities under the repeated sting of injustice and hatred from the whites) seemed to justify extermination. The army with its authoritarian ways was said to be inimical to American democracy, which flourished in a somewhat undomesticated variety on the frontier.

to Native property and sovereignty interests. Moreover, the tribes could not sue the federal government for failure to protect their rights because the government had sovereign immunity. Even if a tribe could find a federal forum, state sovereign immunity barred any action against the state, local governmental entities or public officials. When Congress finally conferred citizenship on Native Americans in 1924, individual Indians could assert private claims under diversity jurisdiction. However, they generally lacked standing to assert tribal rights in federal court.

Theoretically, Native Americans could enforce their rights in the state courts. In reality, they were usually barred from the state courts as well. Considered "illiterate savages," they lacked the capacity to sue. When they could invoke the state's jurisdiction, judicial impediments such as incapacity to serve as witnesses or jurors made litigation virtually impossible. Other social and cultural barriers also hindered effective access to the state courts, including racism, ignorance of the "whiteman's" system of justice and illiter-

55. Clinton & Hotopp, supra note 18, at 47 & n.143 (discussing Jackson administration's hostility toward Supreme Court decisions protecting Indian land rights).

56. COHEN HANDBOOK, supra note 18, at 563 (noting that doctrine of sovereign immunity barred most tribal suits against federal government prior to enactment of Indian Claims Commission Act in 1946).

57. Clinton & Hotopp, supra note 18, at 46-47. In 1977, the Supreme Court held that political subdivisions of the state were not considered part of the state for Eleventh Amendment purposes. Mount Healthy Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977). The Supreme Court also recognized a narrow exception to Eleventh Amendment immunity by allowing suits for injunctive relief against state officials to vindicate federal rights. Ex parte Young, 209 U.S. 123 (1908). For a discussion of suits against state officials under Ex parte Young, see infra notes 441-55 and accompanying text.


59. See, e.g., Golden Hill Paugussett Tribe of Indians v. Weicker, 1994 WL 590827, at *9 n.1 (2d Cir. 1994) ("Individual Indians do not fall within the zone of interests to be protected by the Nonintercourse Act."); United States v. Dann, 873 F.2d 1189, 1195 (9th Cir.) (stating that individual Indians lacked standing to contest transfers of tribal land in violation of Nonintercourse Act), cert. denied, 493 U.S. 890 (1989); James v. Watt, 716 F.2d 71, 72 (1st Cir. 1983) (explaining that only Indian tribes, as opposed to individuals, possessed standing to sue), cert. denied, 467 U.S. 129 (1984); Epps v. Andrus, 611 F.2d 915, 918 (1st Cir. 1979) (stating that "claims on the part of individual Indians . . . are not cognizable"); Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 579 (1st Cir.) (stating that plaintiff must have been tribe when it commenced suit to have standing), cert. denied, 444 U.S. 866 (1979).

60. See Johnson v. Long Island R.R., 56 N.E. 992, 993 (N.Y. 1900) (holding that allowing Indians to sue would be contrary to public policy).

61. See The Supreme Court, 1984 Term—Leading Cases, supra note 46, at 261 (discussing problems Indians faced in state courts).
acy. Moreover, state sovereign immunity barred Native Americans from asserting any claims against the state without the state's consent. In 1855, Congress passed the first Court of Claims Act. The Act created a limited waiver of federal sovereign immunity. It allowed suits against the federal government for money damages. However, in 1863, Congress specifically amended the Court of Claims Act to exclude claims based on treaties with Indian tribes. As a result, tribes had to petition Congress for special legislation granting the Court of Claims jurisdiction to hear individual claims. Because each act was a limited waiver of sovereign immunity, the Court of Claims tended to interpret the jurisdictional grants narrowly to include only the parties and claims specified. Moreover, the Court of Claims often refused to address the merits, finding that the suit presented a nonjusticiable political issue. Congress passed approximately 200 special acts between 1863 and 1946. Only twenty-nine resulted in awards for the Indian claimants. The others were mostly dismissed on technical grounds, forcing claimants to petition Congress for revised jurisdictional grants. As a result, the system was both cumbersome and ineffective.

62. See Clinton & Hotopp, supra note 18, at 46.
63. Id. at 45, 47-48 n.141.
66. See, e.g., Northwestern Bands of Shoshone Indians v. United States, 95 Ct. Cl. 642, 681-93 (1942) (stating that proof of aboriginal title was insufficient where jurisdiction was limited to claims arising from treaty), aff'd, 324 U.S. 335 (1945); Klamath & Moadoc Tribes v. United States, 81 Ct. Cl. 79 (dismissing case because original jurisdictional grant did not authorize Court of Claims to examine evidence), aff'd, 296 U.S. 244 (1935); see Cohen Handbook, supra note 18, at 563, 565 (noting limitations placed on jurisdictional grants); Wilkinson, supra note 37, at 513-17 (discussing narrow interpretation of jurisdictional grants).
67. Final Report, supra note 64, at 3. Congress approved the first jurisdictional petition in 1881. Only 39 cases were granted jurisdiction before 1924. After Indians gained citizenship in 1924, Congress authorized claims more readily. Id. at 2-3; Hagan, supra note 35, at 19-20.
68. Final Report, supra note 64, at 3. Moreover, most of the special jurisdictional acts also allowed awards for the tribe to be offset by the government's expenditures on the tribe's behalf. Wilkinson, supra note 37, at 517-18.
69. Final Report, supra note 64, at 3.
70. These cases took a great deal of time to litigate. First, the Indians had to get Congress to pass a special jurisdictional act. Then they had to litigate their claim before the Court of Claims. Assuming they won, damage judgments by the Court of Claims were not self-executing. Cohen Handbook, supra note 18, at 572-73. Congress still had to appropriate the necessary funds and determine the method of distribution or use. Id. Native Americans had trouble hiring and pay-
Congress formally granted Native Americans the right to sue in 1946. It enacted the Indian Claims Commission Act which established the Indian Claims Commission.\textsuperscript{71} The Commission could hear all claims that would be within the Court of Claims' jurisdiction if brought by a non-Indian; cases in law and equity arising under the Constitution, laws and treaties of the United States or executive orders; and certain other equitable claims, including those based on principles of fair dealing.\textsuperscript{72} Indians could file claims accruing before August 13, 1946,\textsuperscript{73} and statute of limitations and laches defenses were not applicable.\textsuperscript{74}

The Indian Claims Commission Act allowed tribes to sue the federal government for breach of its trust duty to protect and manage tribal lands.\textsuperscript{75} However, the tribes could only recover money damages. The Act did little to help the tribes assert their possessory rights to lost land. They could not sue the states or current, nonfederal landowners, and they could not sue for possession of the land.\textsuperscript{76} In 1978, Congress terminated the Indian Claims Commission and transferred the cases still pending before the Commission and lawyers who were willing to accept litigation that could take years. Moreover, the General Accounting Office and Department of Justice could not keep up with the work load, and data requests caused a backlog of cases. See \textit{id.}; Hagan, \textit{supra} note 35, at 19-20; Wilkinson, \textit{supra} note 37, at 513-18 (discussing difficulties that tribal plaintiffs faced, including set-offs against awards).

For an egregious example of the problems with the special jurisdiction grants, see Hagan, \textit{supra} note 35, at 20 (discussing the Klamath Tribe's attempts to litigate before the Court of Claims). In 1920, Congress passed a jurisdictional act allowing the Klamath Tribe of Oregon to sue. The Court of Claims dismissed the case fifteen years later. Congress then had to amend the jurisdictional act to allow the court to examine the evidence. In 1937, seventeen years after the original jurisdictional grant, the Court of Claims awarded judgment to the Indians. The government paid $108,750 for land worth $3 million. \textit{Id}; see also Wilkinson, \textit{supra} note 37, at 512-13 (discussing Turtle Mountain Band's attempts to have Congress pass jurisdictional act authorizing Band to sue over 10 million acre land cession treaty).


73. Ch. 959, § 2, 60 Stat. 1049, 1050.

74. COHEN HANDBOOK, \textit{supra} note 18, at 564.

75. \textit{Id.} at 565-68; \textit{see, e.g.}, United States v. Oneida Indian Nation, 576 F.2d 870 (Cl. Cl. 1978) (involving Oneida Nation's suit against government for breach of fiduciary duty).

sion to the United States Court of Claims.\textsuperscript{77}

Congress gave the Court of Claims original jurisdiction over Indian claims against the federal government accruing after August 13, 1946.\textsuperscript{78} The Court of Claims, which is now called the United States Court of Federal Claims, hears claims arising under the Constitution, laws or treaties of the United States; claims arising under executive orders; and claims that could otherwise be brought by non-Indians in the United States Court of Federal Claims.\textsuperscript{79} Although tribes can sue the federal government for breach of its trust responsibility to protect their land, they still cannot recover their property interests. Moreover, they cannot recover for claims based on unrecognized aboriginal title, which the Indian Claims Commission Act had allowed.\textsuperscript{80}

By the 1960s, the federal courts were interpreting the district courts' general grant of federal question jurisdiction more liberally. However, many courts still refused to hear tribal land claims on procedural grounds. They frequently found that these claims were nonjusticiable or untimely or that the claimants lacked standing.\textsuperscript{81} Satisfying the amount in controversy requirement of 28 U.S.C. § 1331 was also a problem prior to 1980.\textsuperscript{82}


\textsuperscript{78} Ch. 959, § 24, 60 Stat. 1049, 1055 (repealed 1949) (codified as reenacted at 28 U.S.C. § 1505 (1988)).

\textsuperscript{79} 28 U.S.C. § 1505 (1988). Section 1505 currently provides:
The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

\textit{Id}; see also Cohen Handbook, supra note 18, at 566-68 (discussing Court of Claims jurisdiction over claims arising after 1946).

\textsuperscript{80} See Cohen Handbook, supra note 18, at 566-67 (noting Court of Claims lack of jurisdiction over claims involving “unrecognized original Indian title”).

\textsuperscript{81} See The Supreme Court, 1984 Term—Leading Cases, supra note 46, at 260-61 (discussing Indians’ lack of access to federal courts).

\textsuperscript{82} See Yoder v. Assiniboine & Sioux Tribes of Fort Peck Indian Reservation, 399 F.2d 360 (9th Cir. 1964) (holding that suit by Indian tribes did not satisfy amount in controversy requirement and therefore court lacked subject matter jurisdiction). 28 U.S.C. § 1331 no longer contains an amount in controversy requirement.
Finally, in 1966, Congress gave the federal district courts original jurisdiction over civil actions arising under the Constitution, laws or treaties of the United States that are brought by recognized Indian tribes.\(^83\) Unlike the general federal question jurisdiction statute in effect before 1980,\(^84\) 28 U.S.C. § 1362 has no amount in controversy requirement and is limited to tribal claims.\(^85\)

By enacting 28 U.S.C. § 1362, Congress finally recognized the right of Indian tribes to protect their federal rights in the federal courts. In 1968, the Supreme Court also clarified that the federal government’s trust relationship does not impair a tribe’s ability to sue on its own behalf to protect tribal property interests.\(^86\) Beginning in 1970, various tribes filed actions asserting possessory claims to their ancestral lands.\(^87\) Defendants in these actions were quick to raise nonjusticiability, lack of standing, statute of limitations, laches, Eleventh Amendment immunity and other defenses.\(^88\)


85. Section 1362 provides: “The district courts shall have original jurisdiction of all civil actions, brought by any Indian Tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1362. Because § 1351 no longer has an amount in controversy requirement, §§ 1331 and 1362 arguably confer essentially the same jurisdiction over tribal litigation. See Oneida I, 414 U.S. 661, 667 (1974) (finding jurisdiction under both 28 U.S.C. §§ 1362 and 1331). However, § 1331 does not limit jurisdiction to claims of tribes with “a governing body duly recognized by the Secretary of the Interior.” Therefore, unrecognized tribes may invoke § 1331 jurisdiction. See Narragansett Tribe v. Southern R.I. Land Dev. Corp., 418 F. Supp. 798, 805 n.3 (D.R.I. 1976) (noting that unrecognized tribe could assert jurisdiction under § 1331); Clinton & Hotopp, supra note 18, at 50 (same).


88. See, e.g., Oneida II, 719 F.2d 525 (2d Cir. 1983) (listing among other defenses statute of limitations, nonjusticiability and good-faith occupancy), aff’d in part and rev’d in part, 470 U.S. 226 (1985); Oneida Indian Nation of N.Y. v. New
B. Oneida I

In 1970, the Oneida Indian Nation of Wisconsin, the Oneida Indian Nation of New York and the Oneida of the Thames Band Council filed a test action against Madison and Oneida Counties, New York. The Oneidas sought the fair rental value, over a two-year period, for certain land that the defendant counties owned and used. The land in question was part of approximately 100,000 acres that the original Oneida Nation conveyed to New York State in 1795. The Oneidas claimed that the 1795 treaty was void under the Nonintercourse Act because the federal government had never ratified the conveyance. The defendant counties filed a third-party complaint for indemnification against New York State.

The United States District Court for the Northern District of New York originally dismissed the action. The district court found that the Oneidas' complaint asserted a possessory claim under state law. It therefore failed to raise a federal question sufficient to invoke the court's jurisdiction under 28 U.S.C. § 1331 or § 1362. The United States Court of Appeals for the Second Cir...
cuit affirmed.\textsuperscript{96}

The Supreme Court reversed. It held that the Oneidas' complaint asserted a current right of possession conferred by federal law, which was independent of state law.\textsuperscript{97} The Oneidas alleged that they had owned and occupied approximately six million acres in New York State, including the 100,000 acres in dispute, from "time immemorial . . . to the American Revolution;" the United States had recognized their right of possession in the 1784 Treaty of Stanwix and two subsequent treaties; and the Nonintercourse Act protected their possessory rights to their ancestral lands.\textsuperscript{98} Accordingly, their claim was based on aboriginal title governed by federal law, federal treaties and a federal statute.\textsuperscript{99} After examining the nature of Indian title, the Supreme Court concluded that the Oneidas' federal claim was neither insubstantial nor meritless, but involved a controversy concerning the validity, construction or effect of federal law.\textsuperscript{100} Therefore, the complaint stated a claim arising under the laws of the United States sufficient to invoke federal jurisdiction.\textsuperscript{101}

C. Oneida II\textsuperscript{102}

On remand to the district court, Judge Port held a trifurcated trial on the merits. He concluded that the federal government never ratified the 1795 treaty. Accordingly, the conveyance was void because it violated the Nonintercourse Act.\textsuperscript{103} On appeal, the Second Circuit affirmed the district court's findings on liability but were invalid under federal law. \textit{Oneida I}, 464 F.2d 916, 918-22 (2d Cir. 1972), \textit{rev'd}, 414 U.S. 661 (1974).

\textsuperscript{96} \textit{Oneida I}, 464 F.2d at 918 (holding that Oneidas' claim "shatters on the rock of the 'well-pleaded complaint' rule for determining federal question jurisdiction"). The Second Circuit also rejected the Oneidas' assertion of diversity and civil rights jurisdiction. \textit{Id.} at 922-23.

\textsuperscript{97} \textit{Oneida I}, 414 U.S. 661, 677 (1974).

\textsuperscript{98} \textit{Id.} at 663-65, 677-78; \textit{Oneida I}, 464 F.2d at 918-19.

\textsuperscript{99} \textit{Oneida I}, 414 U.S. at 677-78.

\textsuperscript{100} \textit{Id.}

\textsuperscript{101} \textit{Id.} at 667.

\textsuperscript{102} 470 U.S. 226 (1985). \textit{Oneida II} was a five-to-four decision for the Oneidas. \textit{Id.} at 228. The dissent would have dismissed the Oneidas' claim for laches. \textit{Id.} at 255-73 (Stevens, J., dissenting).

\textsuperscript{103} \textit{Id.} at 230. The district court awarded the Oneidas $16,694 plus interest. Judge Port also held that New York State had to indemnify the defendant counties. \textit{Id.} The district court's opinion that found the counties liable is reported at \textit{Oneida II}, 434 F. Supp. 527 (N.D.N.Y. 1977), \textit{aff'd in part and rev'd in part}, 719 F.2d 525 (2d Cir. 1983), \textit{aff'd in part and rev'd in part}, 470 U.S. 226 (1985). Judge Port's October 5, 1981 decision, awarding damages to the Oneidas, and his May 5, 1982, decision against New York State are unreported.
remanded for recalculation of the damages.\textsuperscript{104}

The Supreme Court granted certiorari to determine “whether an Indian tribe may have a live cause of action for a violation of its possessory rights that occurred 175 years ago.”\textsuperscript{105} The Court first examined whether the Oneidas' had a cause of action. The Supreme Court did not reach the question of whether Indian tribes have an implied right of action under the Nonintercourse Act. Instead, it held that the Oneidas had a right of action under federal common law.\textsuperscript{106} The Court based its conclusion on Native Americans’ aboriginal title, first recognized under the Doctrine of Discovery, and the federal government’s exclusive province in Indian relations under the Constitution. Writing for the majority, Justice Powell noted that the Supreme Court had recognized the Indians’ right to possess tribal land and implicit right to sue to enforce their possessory rights in a line of cases dating from the early 1800s to the present.\textsuperscript{107}

The Supreme Court rejected the counties’ argument that the Nonintercourse Act preempted federal common law in the area of Indian land claims.\textsuperscript{108} It found that the Nonintercourse Act did not create a comprehensive plan for dealing with violations of the Indians’ possessory rights. In particular, the Act provided no means for restoring land to the Indians. The Court concluded that until Congress provides a statutory remedy, Indian tribes may look to federal common law to provide a remedy for violations of their property rights.\textsuperscript{109}

In \textit{Oneida II}, the Supreme Court also considered whether the Oneidas’ claim was time-barred.\textsuperscript{110} The Court noted that no federal statute of limitations governs federal common law actions to enforce Indian property rights. Generally, courts would apply the most analogous state statute of limitations.\textsuperscript{111} However, after exam-

\begin{itemize}
\item \textsuperscript{104} \textit{Oneida II}, 719 F.2d 525, 544 (2d Cir. 1983), \textit{aff’d in part and rev’d in part}, 470 U.S. 226 (1985).
\item \textsuperscript{105} \textit{Oneida II}, 470 U.S. at 230.
\item \textsuperscript{106} \textit{Id.} at 233.
\item \textsuperscript{107} \textit{Id.} at 233-36.
\item \textsuperscript{108} \textit{Id.} at 236.
\item \textsuperscript{109} \textit{Id.} at 236-40. The Supreme Court also found that subsequent re-enactments of the Nonintercourse Act did not abate any cause of action for violation of the 1793 Nonintercourse Act. They merely continued the restraint on alienation of Indian land first recognized by common law and codified in the 1793 Act. \textit{Id.} at 245-46.
\item \textsuperscript{110} \textit{Id.} at 240-44.
\item \textsuperscript{111} \textit{See} Wilson v. Garcia, 471 U.S. 261, 266-67 (1985) (“When Congress has not established a time limitation for a federal rule of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with
\end{itemize}
In congressional legislation that enforces Indian rights, the Supreme Court concluded that Congress did not intend any statute of limitations to apply to Native land claims. Borrowing a statute of limitations would thus violate federal policy.112

The Supreme Court did not decide whether laches could be a defense to Native land claims. However, Justice Powell indicated in dicta that laches probably would not bar such claims for the same reasons that statutes of limitations do not apply.113

The Supreme Court also found that the Oneidas’ claim was justiciable.114 Relying on several earlier decisions, Justice Powell stated that granting Congress exclusive authority over Indian affairs in the Constitution was not a “‘textually demonstrable constitutional commitment of the issue to a coordinate political department’”115 sufficient to create a nonjusticiable political question.116 Similarly, the fact that Congress had delegated its remedial authority to the Executive in the 1794 Treaty of Canandaigua did not place the case within the political question doctrine.117

Finally, the Supreme Court affirmed the Oneidas’ claims on the merits.118 The majority rejected the counties’ argument that the federal government had ratified the 1795 conveyance to New York State in subsequent treaties.119 Justice Powell emphasized that treaties should be construed in favor of the Indians and congressional intent to extinguish Indian title must be “plain and unambiguous.”120 The Court found no clear congressional intent to extinguish the Oneidas’ possessory interests in the land.121 Finding no legal basis barring the Oneidas’ claims, a five-to-four majority upheld the counties’ liability under federal common law.122

While Oneida II was a victory for the Indian plaintiffs, it was not

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112. Oneida II, 470 U.S. at 240-44.
113. Id. at 244-45.
114. Id. at 248-50.
115. Id. at 249 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).
116. Id.
117. Id. The Supreme Court also rejected the counties’ argument that there was an unusual need to adhere to the Commissioner of Indian Affairs’ 1968 decision not to bring a land claim action for the Oneidas. Id. at 249-50.
118. Id. at 253.
119. Id. at 246-48.
120. Id. at 247-48.
121. Id. at 248.
122. Id. at 253.

a victory for the counties. The Supreme Court rejected their indemnification claim against the state.\textsuperscript{123} It held that the Eleventh Amendment barred the counties’ indemnification claim because New York had not waived its sovereign immunity from suit in federal court.\textsuperscript{124} The Supreme Court did not address whether the tribes could have sued the state.

\textit{Oneida I} and \textit{II} were significant victories for Native Americans. They established that the federal courts have federal question jurisdiction over tribal land claims and gave tribes, seeking to protect their property rights, a federal common law right of ejectment. \textit{Oneida II} also eliminated many of the procedural defenses, including statute of limitations, that had so effectively barred land claim actions in the past. The Oneidas’ small test case proved to be a major vehicle for opening the federal courts to Native American land claims.\textsuperscript{125}

IV. NEGOTIATED SETTLEMENTS

A. Land Claims

Following the enactment of 28 U.S.C. § 1362 and the Supreme Court’s decision in \textit{Oneida I}, Indian tribes filed numerous claims for tribal lands in the Eastern United States and elsewhere. Some of

\textsuperscript{123} Id. at 250-53.
\textsuperscript{124} The counties argued that Congress abrogated the states’ Eleventh Amendment immunity when it enacted the 1793 Nonintercourse Act and that New York waived its immunity from suit in federal court when it violated the Act. Id. at 252. The Supreme Court did not decide whether Congress could or did abrogate the states’ immunity by enacting the Nonintercourse Act. Id. Instead, the Court found that the counties’ indemnification claim arose under state law, not the Nonintercourse Act, and New York had not waived its immunity from suit in federal court. The counties’ indemnification claim was thus barred under Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984). \textit{Oneida II}, 470 U.S. at 252-53.

\textsuperscript{125} \textit{Oneida II} was remanded for recalculation of the damages. Id. at 254. Although the Oneidas have won their suit, at the time of this writing, the district court has not awarded any relief. For a discussion of the relief in \textit{Oneida II}, see infra notes 180-89 and accompanying text.

these claims have been dismissed,\textsuperscript{126} some have settled\textsuperscript{127} and others are still pending.\textsuperscript{128} New claims are also being filed.\textsuperscript{129}  


\textsuperscript{127} Oneida Indian Nation v. New York is one of the more interesting major land claims that has been dismissed. Unlike the Oneidas' test case and other previous claims, the Oneidas' six million acre claim in New York State arose under the Articles of Confederation. In 1978 and 1979, the Oneida Indian Nation of New York, the Oneida Indian Nation of Wisconsin, the Oneida of the Thames Band (a Canadian tribe), and the Six Nation Iroquois Confederacy intervenors sued New York State, various New York counties, and a defendant class of private landowners. The defendant class consisted of all landowners within the claim area except those with up to two acres of land containing a principal residence. Oneida Indian Nation, 649 F. Supp. at 422. Claiming to be the "matrilineal descendants of the aboriginal Oneida Indian Nation," the Oneidas and Iroquois Confederacy claimed title to approximately six million acres of land in central New York. The claim area covered a 50 mile swatch from Canada to Pennsylvania and included the City of Binghamton, numerous towns, large businesses and prime farm country. Id. at 421-22. New York State originally purchased the land from the Oneidas when the Articles of Confederation were in effect. Id. at 422. The Oneidas alleged that the two treaties in question were void because the confederal government had guaranteed their land in the Proclamation of September 22, 1783, and the Treaty at Fort Stanwix in 1784; the government never ratified the state treaties; and the Indian Trade and War Clauses of the Articles of Confederation precluded the state from preempting Indian land without the confederal government's consent. Id. at 423. The United States District Court for the Northern District of New York dismissed the Oneidas' claims. Id. at 444. Judge McCurn concluded that the Articles of Confederation did not preclude the states from preempting Indian land within their borders. Id. at 441. He also held that the confederal government had neither the power nor the intent in either the 1783 Proclamation or the Fort Stanwix Treaty to prohibit New York from purchasing the Oneidas' land. Id. at 444. The Second Circuit affirmed in 1988, and the Supreme Court denied the Tribes' petition for certiorari. Oneida Indian Nation v. New York, 860 F.2d 1145 (2d Cir. 1988), cert. denied, 493 U.S. 871 (1989). 


\textsuperscript{129} For example, several land claim actions are still pending in the Northern District of New York including the Cayuga Nation's 64,000 acre claim, the Canadian St. Regis Band of Mohawk Indians' 12,000 acre claim, and Oneida II on remand from the Supreme Court for recalculation of damages. 

\textsuperscript{129} On August 25, 1993, the Seneca Nation filed suit to reclaim Grand Island, which is located in the Niagara River in New York State. See James Fink, Seneca Suit May Stall Land Deals, Bus. FIRST-BUFFALO, Sept. 6, 1993, at 1-1. In November 1992, and the spring of 1993, the Golden Hill Paugussetts filed suit in state and federal court to recover approximately 84 square miles of land in Bridgeport, Trumbull, Orange, Seymour, Shelton, Stratford and Monroe, Connecticut.
Most people, raised on old movie and television westerns, consider Indian land claims ancient history. News that Native Americans have filed suit to recover land currently occupied by non-Indians is usually met at first with disbelief and even treated as a joke. As discussed in Part III, however, modern ejectment actions are a relatively recent phenomenon with serious consequences.


As of this writing, the Paugussetts’ federal action has been stayed pending the Bureau of Indian Affairs’ (BIA) determination of the claimants’ tribal status. Golden Hill Paugussett Tribe, 1994 WL 590827 at *9. In 1993, the United States District Court for the District of Connecticut dismissed the Paugussett’s federal suit, holding that the Indian claimants lacked standing because they had failed to exhaust the administrative process for gaining federal recognition as a tribe. Golden Hill Paugussett Tribe of Indians v. Weicker, 839 F. Supp. 130 (D. Conn. 1993) (holding Tribe lacked standing to sue under Nonintercourse Act and court lacked subject matter jurisdiction over claim based on Proclamation of 1763), remanded by 1994 WL 590827 (2d Cir. 1994). On appeal, the United States Court of Appeals for the Second Circuit rejected the district court’s standing and exhaustion analysis. Golden Hill Paugussett Tribe, 1994 WL 590827 at *5-*6. Instead, the Second Circuit concluded that the doctrine of “primary jurisdiction” applied. Id. at *6-*8. It concluded that the federal court should defer to the BIA’s expertise and experience in determining tribal status and ordered the district court to stay the Paugussetts’ action pending the federal agency’s determination of their application for federal recognition as a tribe. Id. at *7-*9. The parties may petition the district court to vacate the stay and adjudicate the merits of the Paugussetts’ claims if the BIA has not issued a decision within 18 months. Id. at *9.

The Second Circuit’s decision raises a number of important questions that are beyond the scope of this Article. These include whether abstention is appropriate in Native land claims and whether the BIA, which decides whether a tribe should receive formal recognition for specific federal benefit programs, should decide tribal status for Nonintercourse Act protection.

130. The New York Times reported that when the Golden Hill Paugussetts filed suit against Bridgeport, Connecticut, some of the local residents suggested that Bridgeport should be given to the Indians because of its financial and social problems. See Judson, supra note 129. However, local amusement soon stopped when the Paugussetts also threatened to sue the affluent towns of Fairfield, Westport and Weston. Id.; see Paul Brodeur, Restitution: The Land Claims of the Mashpee, Passamaquoddy, and Penobscot Indians of New England 71, 94, 96 (1985) (describing initial reaction to Passamaquoddy and Penobscot claims in Maine); Chris Lavin, Responses to the Cayuga Land Claim, in IROQUOIS LAND CLAIMS 87, 91 (Christopher Vecsey & William A. Starna eds., 1988) (describing initial reaction to Cayuga land claim).

131. Describing the potential effect of Joint Tribal Council of the Passamaquoddy Tribe v. Morton, filed on June 2, 1972, Paul Brodeur stated, “What was at stake was simply mind-boggling, of course, for if the case should be decided in favor of the Passamaquoddies the central issue in suits involving billions of dollars and a staggering amount of real estate would be resolved.” BRODEUR, supra note 130, at 94; see also Van Gestel, supra note 125, at 123-39 (discussing Indian land claims from private landowners’ perspective).
Most of the claim areas are currently inhabited by non-Natives. They include private homeowners, businesses and farms, as well as the local and state governments. Filing a land claim action places a cloud on title to the land within the claim area. Title insurance companies are reluctant to write title insurance in claim areas, making land transfers virtually impossible. Potential buyers have difficulty getting mortgages, and landowners cannot sell their land. Stagnation in the real estate market, in turn, harms other segments of the economy within the claim area and, sometimes, throughout the state. Outside businesses are reluctant to start new ventures in the region while existing business are reluc-

132. For example, the Golden Hill Paugussetts' suit against the City of Bridgeport, Connecticut, encompasses much of the central city, including the city hall. Constance L. Hays, With a Big Claim, a Tiny Tribe Seeks Aid, N.Y. Times, Nov. 28, 1992, at 21. They have also sued a number of other communities, affecting some 200,000 people, and have threatened an ejectment action against Fairfield, Westport and Weston, Connecticut, three of the most affluent and prestigious communities in the state. See Pazniokas, supra note 129. The Tribe filed their claims in both federal and state court. As of this writing, their federal action is stayed pending the BIA's determination of the Paugussetts' tribal status. Golden Hill Paugussett Tribe, 1994 WL 590827 at *9 (ordering district court to stay proceedings pending BIA's determination of plaintiffs' tribal status or plaintiffs' application to vacate stay if BIA fails to decide within 18 months). For further discussion of the status of the Paugussetts' federal action, see supra note 129.

The Cayuga land claims assert the right to possess 64,015 acres in central New York State including Ithaca, New York and Cornell University; the ejectment of approximately 7000 property owners; and $350 million in trespass damages. See Cayuga Indian Nation v. Cuomo, 565 F. Supp. 1297, 1301 (N.D.N.Y. 1983); Lavin, supra note 130, at 95. The Passamaquoddy and Penobscot claims in Maine, which were settled, covered approximately 12.5 million acres. The area was inhabited by an estimated 350,000 non-Indians, including timber and paper companies that were major economic forces in the state. See BRODEUR, supra note 130, at 74, 98; see also Oneida Indian Nation v. New York, 649 F. Supp. 420, 421-22 (N.D.N.Y. 1986) (dismissing Oneidas' claim for approximately six million acres of land in central New York State, stretching from Canadian to Pennsylvania borders, against a defendant class of "approximately 60,000 individuals, businesses, and governmental entities"), aff'd, 860 F.2d 1145 (2d Cir. 1988), cert. denied, 493 U.S. 871 (1989).

133. See, e.g., H.R. REP. NO. 57, 101st Cong., 1st Sess. 9 (1989) (estimating that Puyluups' claims "cloud title to hundreds of acres of land and that the value of these lands, including downtown office buildings, industrial port facilities, and expensive homes, is more than $750,000,000"); Hagan, supra note 35, at 25-27 (describing effects of Passamaquoddy, Penobscot, Narragansett, Pequot and Mashpee land claims on land titles within disputed areas).

134. In New York State, only two title insurance companies were offering insurance against Indian land claims in the 1980s. See Donna Snyder, Mortgages Offered on Allegany Reservation; Cattaraugus Bank Says Program Includes Residential, Commercial Loans, Buff. News, Feb. 24, 1993 (Local) (noting past difficulty of obtaining title insurance); see also Hagan, supra note 35, at 26 (noting effects of Narragansett Tribe's land claim on real estate market and construction industry in Charlestown, Rhode Island, because of buyers' inability to obtain title insurance).

135. See Letter from Booth Gardner, Governor of Washington State, to the Legislators, in Puyallup Tribal Settlement 3 (1989) (public relations pamphlet) (discussing Puyluups' claims and potential effects on state economy).
tant to expand. Tribal land claims can also affect the state and local governments' ability to raise revenue by impairing their bond ratings. 136 Finally, Native residents may be harmed when land disputes cause state and local agencies to withhold Indian services. 137

Tribal land suits also generate hostility and exacerbate existing antagonism among the Native Americans, local residents and the state. 138 Over the years, differing life styles, sovereignty disputes, conflicting land claims and prejudice have often generated distrust between Indians and local residents, as well as between Indians and the state. Generally, Native Americans have not inhabited the disputed land for years, even centuries. Whereas some of the non-Native inhabitants may have occupied the land for generations. Assuming that they or their ancestors had acquired fee title, the current inhabitants naturally believe that after so many years they have an inherent right to the land. Suddenly, these inhabitants find their homes, businesses and way of life threatened. 139

At the same time, Native Americans have watched their lands disappear over the years, often through fraud, misunderstanding, and state and federal cessions. 140 Although much of the land was

136. See Laurence M. Hauptman, Formulating American Indian Policy in New York State, 1970-1986 26 (1988). Paul Brodeur described the effect of the Passamaquoddy and Penobscot claims in Maine as follows:

By September, word that the Indian land suit included the claim that the tribes had civil jurisdiction over their ancestral territories [in Maine] reached Ropes & Gray - a Boston law firm that acts as legal adviser to issuers of New England municipal bonds - and toward the end of the month Ropes & Gray let it be known that it would no longer be able to give unqualified approval to municipal bonds issued within the disputed area. Within a few days, the sale of more than twenty-seven million dollars in bonds for cities, towns, hospitals, and school districts was either canceled or delayed, and reports began to circulate that people living there might soon find it impossible to transfer real estate or get mortgages.

Brodeur, supra note 130, at 97.

137. See Hauptman, supra note 136, at 26 (describing potential effect of Indian claims on education and other services).


139. See Van Gestel, supra note 125, at 130 (arguing that "[t]oday's landowner/defendants are nothing less than hostages in a power struggle between three governments - federal, state and Indian").

140. See, e.g., Oneida Nation v. United States, 37 Ind. Cl. Comm'n. 522, 524-30 (1976) (finding that New York State coerced Oneidas into selling most of their land to State against their will in 1785 Fort Herkimer and 1788 Fort Schuyler Treaties), aff'd, 576 F.2d 870 (Ct. Cl. 1978). Despite the Indian Claims Commission's
ceded in the 1700s and 1800s, substantial losses have occurred since World War II. Because of the potential consequences in both land and money, Indian land claims naturally spark intense emotions, making dispute resolution, both in and out of court, extremely difficult.

A tribe may base its claim to the disputed land on aboriginal title or title that the federal government has formally recognized in a treaty, statute or executive order. In the typical suit, the claimants assert that the state and/or private parties alienated the land in question without the federal government's formal consent. As a result, the conveyances are void because they violated the Nonintercourse Act and any other document guaranteeing the tribe's possessory interests. The tribe claims that their title to the land is superior because the current occupants' title is based on the illegal transactions. The relief sought varies; however, tribal findings, the Second Circuit subsequently refused to consider the nature of these transactions in Oneida Indian Nation v. New York, apparently applying a political question or perhaps doctrine of state rationale. 860 F.2d 1145, 1162 (2d Cir. 1988); cert. denied, 493 U.S. 871 (1989); see also Hagan, supra note 35, at 17-19 (describing United States' tactics to gain Indian land and resulting problems).


142. See generally COHEN HANDBOOK, supra note 18, at 164-75 (discussing Indian policy during termination era and loss of Native land); LAURENCE M. HAUPTEMANN, THE IROQUOIS STRUGGLE FOR SURVIVAL WORLD WAR II TO RED POWER 85-178 (1986) (discussing loss of Iroquois land for Kinzua Dam Project, Allegheny flood-control project, Saint Lawrence Seaway and Niagara Power project).

143. See generally COHEN HANDBOOK, supra note 18, at 472-510 (describing historical ways by which Indian tribes have acquired property interests). Many reservations were created by executive order in the latter half of the nineteenth and first part of the twentieth centuries. Id. at 493. A tribe has formal title if Congress has ratified the executive order establishing the reservation. Even without ratification, a reservation created by executive order is generally treated as formally recognized land. See Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251, 1261 n.10 (9th Cir. 1983) (holding that an "[e]xecutive [o]rder may convey title to land to an Indian tribe as effectively as any other conveyance from the United States"), cert. denied, 465 U.S. 1049 (1984); COHEN HANDBOOK, supra note 18, at 496-97 (suggesting that "the distinctions between 'recognized' and 'unrecognized' title may be of chiefly historical significance with respect to executive order reservations").

144. See, e.g., Oneida II, 470 U.S. 226, 229 (1985) (alleging 1795 treaty conveying Oneida land to New York violated federal treaties and Nonintercourse Act); Puyallup Indian Tribe, 717 F.2d at 1254 (9th Cir. 1983) (claiming Port's possession of exposed river bed violated 1857 executive order); Canadian St. Regis Band of
claimants frequently seek possession of the land, trespass damages, and hunting and fishing rights. 145

B. Defenses in Land Claim Actions

Once a tribe has filed a formal lawsuit, the non-Native defendants may be able to raise a number of defenses. However, most of the typical common law defenses no longer apply to Indian ejectment actions after Oneida II. 146 The reason that common law defenses are not available is based in part on the Supremacy Clause and in part on the federal government’s trust relationship with Native Americans. Indian title is protected by federal law through the Nonintercourse Act, federal treaties and other federal statutes. Applying common law defenses that arise under state law to defeat Indian land claims would effectively transfer title in violation of the Nonintercourse Act and, therefore, violate the Supremacy Clause. 147 Moreover, state law defenses do not apply against the federal government when it sues on the Indians’ behalf. 148 Under the trust doctrine, Indian tribes that sue on their own behalf are


145. See, e.g., Oneida Indian Nation v. New York, 649 F. Supp. 420, 423 (N.D.N.Y. 1986) (seeking declaration of ownership, possession of disputed land, and trespass damages), aff’d, 860 F.2d 1145 (2d Cir. 1988), cert. denied, 493 U.S. 871 (1989); Canadian St. Regis Band of Mohawk Indians, 573 F. Supp. at 1592 (seeking declaration of ownership and right to possess land plus trespass damages); Cayuga Indian Nation, 565 F. Supp. at 1306 (seeking declaration of current ownership, possession of disputed land, trespass damages, restitution for natural resources removed from land, and other relief); see also Lavin, supra note 130, at 95 (discussing Cayugas’ claim).

146. For a discussion of the Supreme Court’s treatment of common law defenses in Oneida II, see supra notes 110-13 and accompanying text.

147. See COHEN HANDBOOK, supra note 18, at 512-13 & n.20 (stating that Supremacy Clause bars state law defenses); Clinton & Hotopp, supra note 18, at 85 (suggesting that state common law defenses are preempted by federal statutory restraints against alienation of tribal lands); see also Oneida II, 470 U.S. at 240 n.15 (“Under the Supremacy Clause, state-law time bars, e.g. adverse possession and laches, do not apply of their own force to Indian land title claims.”).

Just as the Supreme Court recognized a federal common law right of ejectment for tribal land claims, the Court could also recognize federal common law defenses to such claims. So far, the Court has not done so presumably because traditional defenses would be inconsistent with federal policy in this area. See id. at 240-45.

148. See Board of County Comm’rs v. United States, 308 U.S. 343, 350-51 (1939) (stating that federal sovereign immunity bars state law defenses against federal government when it sues on Indian’s behalf or otherwise).
acting in the same capacity as the federal government, at least to some extent, and are generally entitled to the same benefits.149 Accordingly, the courts have rejected defenses based on adverse possession, statute of limitations, laches, estoppel by sale, state mortgage and tax foreclosure sales and state eminent domain proceedings.150 The courts have also rejected certain federal jurisdictional defenses including nonjusticiability, political question and the indispensability of the United States as a party.151

Several defenses remain, however. For instance, the claimants may no longer be a tribe, or they may have abandoned their tribal status during a crucial period.152 Even though tribes must be formally recognized by the federal government in order to assert an action under 28 U.S.C. § 1362,153 tribes that have not been formally recognized may still assert federal question claims under 28 U.S.C. § 1331.154 Moreover, they do not need formal recognition to fall

149. See Oneida II, 719 F.2d 525, 538 (2d Cir. 1983), aff'd in part and rev'd in part on other grounds, 470 U.S. 226 (1985). But see Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) (rejecting similar argument concerning states' Eleventh Amendment immunity). After Blatchford, the Supreme Court may be less inclined to reject common law defenses based on a trusteeship argument. However, Blatchford involved an Eleventh Amendment defense that is a constitutionally-based jurisdictional bar as opposed to a state common law defense. Id.


151. See, e.g., Oneida II, 470 U.S. at 248-50 (rejecting nonjusticiability defenses); Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251, 1254 (9th Cir. 1983), cert. denied, 465 U.S. 1049 (1984) (stating that United States was not indispensable party); Narragansett Tribe, 418 F. Supp. at 809-13 (dismissing motion to join United States as indispensable party); see also Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968) (holding that Indian lessors have standing to bring own action).


154. Unlike § 1362, § 1331 does not limit who may invoke general federal question jurisdiction. 28 U.S.C. § 1331 (1988) ("The district court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties
within the protection of the Nonintercourse Act. However, tribes claiming land based on aboriginal or formal title must have been a tribe from the date of the illegal transaction to the filing of the claim. Tribal status under the Nonintercourse Act requires “a body of Indians of the same or . . . similar race, united in a community under one leadership or government, and inhabiting a particular, though sometimes ill-defined, territory.” For example, non-Native defendants successfully asserted lack of tribal status as a defense in the Mashpees’ suit to recover 11,000 acres on Cape Cod, Massachusetts. After a 40-day trial, a jury found that the Mashpees had voluntarily abandoned their tribal status between 1842 and 1869 because they lacked a defined political structure.

The defendants in the Paugussetts’ suit in Connecticut have as-


To prove a violation of the Nonintercourse Act, the plaintiff must demonstrate that:

(1) it is or represents an Indian “tribe” within the meaning of the Act;
(2) the . . . land at issue [is] covered by the Act as tribal land;
(3) the United States has never consented to the alienation of the tribal land; [and]
(4) the trust relationship between the United States and the tribe, which is established by coverage of the Act, has never been terminated or abandoned.


asserted a similar defense.  

Defendants may also assert that the tribe has voluntarily abandoned the land. This defense is only available if the tribe's claim is based on aboriginal title. To have aboriginal title, a tribe must have been in exclusive, continuous possession of the land. If the tribe has voluntarily abandoned its aboriginal land at some point, it cannot claim protection under the Nonintercourse Act. However, voluntary abandonment is not a defense to claims based on recognized title because only Congress can divest the tribe of formally recognized title.

Congress has plenary power to extinguish Indian title or to terminate a tribe's trust status. Therefore, defendants may also defeat a tribe's possessory claims by proving that Congress, or a previous sovereign, has extinguished or limited the claimants' possessory rights. For example, the Supreme Court recently held that Congress had abrogated the Cheyenne River Sioux Tribe's right to regulate non-Indian hunting and fishing on reservation land that the federal government had taken for the Oahe Dam and Reservoir. Similarly, in 1977, the Supreme Court determined that Congress had intended to open nonallotted portions of the Rosebud Sioux Reservation to non-Indians.

Finally, states may claim sovereign immunity from suit. The


161. See id.

162. Id.

163. See United States v. Santa Fe Pac. R.R., 314 U.S. 339, 357-58 (1941) (finding voluntary relinquishment of tribal claims to lands outside reservation); cf. Cayuga Indian Nation, 758 F. Supp. at 115 (finding no abandonment as a matter of law because Cayugas had recognized title that only Congress could extinguish).


Eleventh Amendment bars suits in the federal courts by Indian tribes against states without the states’ consent or congressional abrogation of the states’ Eleventh Amendment rights. States also enjoy common law sovereign immunity in their own courts.

C. Negotiated Settlements

Settlements are the norm in civil litigation. Ninety percent or more of all civil cases filed settle. Negotiated settlements are generally preferred to court imposed resolutions for a number of reasons. They avoid the time, expense and inflexibility of formal litigation. The negotiating process allows the parties to address each other’s real needs and to reach a mutually acceptable compromise. Each side gives up something to gain something. Thus, the parties can reach a “win-win” result instead of leaving one party the winner and the other the loser. Parties are also able to reach more creative solutions without the rigid rules that govern court litigation. Because both sides participate in working out the agreement and benefit from it, each side theoretically has a greater


168. See Will v. Michigan Dep’t of State Police, 491 U.S. 58, 67 (1989) (“It is an ‘established principle of jurisprudence, that the sovereign cannot be sued in its own courts without its consent.” (quoting Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1857))).

169. See Roger S. Haydock et al., Fundamentals of Pretrial Litigation 651 (3d ed. 1994) (stating that between 90% and 97% of civil cases settle).

170. But see Owen Fiss, Against Settlement, 93 Yale L.J. 1073 (1984) (arguing that negotiated settlement may not be preferable to adjudication); Carrie Menkel-Meadow, For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference, 33 UCLA L. Rev. 485, 505 (1985) (discussing negative aspects of settlement process including economic waste, coercive practices and absence of authoritative rulings in certain situations).


172. See Menkel-Meadow, supra note 170, at 504 (“Settlement can be particularized to the needs of the parties, it can avoid win/lose, binary results, provide richer remedies than the commodification or monetarization of all claims, and achieve legitimacy through consent.”); Carrie Menkel-Meadow, Toward Another View of Legal Negotiation: The Structure of Problem Solving, 31 UCLA L. Rev. 754, 795-801 (1984) (addressing parties’ needs through “problem-solving” model of negotiation).

173. See Menkel-Meadow, supra note 172, at 804-17 (contrasting “problem-solving” negotiations with adversarial dispute resolution and illustrating greater flexibility of “problem-solving” negotiations for fashioning resolutions that address principal needs of parties).
stake in their agreement than in a court-imposed remedy. Accordingly, the parties are more likely to abide by the agreement.\textsuperscript{174} Moreover, the negotiating process, combined with a mutually acceptable conclusion, tends to reduce hostilities, which is important for the parties’ future relations.\textsuperscript{175}

Negotiated settlements are particularly important in Indian land disputes. While the federal courts may be well-suited to determine the parties’ legal ownership rights, they are not well-suited to deal with the complex political and social issues that these disputes raise or to fashion appropriate relief in cases where the tribal claimants prevail.\textsuperscript{176} Tribal property rights generally depend on interpreting federal statutes, treaties and common law, together with determining the facts surrounding land transactions and tribal status. These are traditional court functions. However, Indian land claims frequently seek large tracts of land currently inhabited by private homeowners, businesses, local municipalities and the state. In most cases, none of these people were alive, let alone participated in, the transactions under scrutiny.\textsuperscript{177} This makes transferring the claimed lands back to the Indians virtually impossible as a practical and equitable matter, even when the current owners are parties to the suit. Forcing whole communities to abandon their homes and businesses would create economic and social chaos. Moreover, the courts have no real way to enforce their orders.\textsuperscript{178}

\begin{itemize}
\item \textsuperscript{174} See Frank E.A. Sander, \textit{Varieties of Dispute Processing}, 70 F.R.D. 111, 120 (1976) (stating that negotiated settlements are likely to be more “durable” than court-imposed resolutions).
\item \textsuperscript{175} See generally id. at 120-21 (examining how process of achieving voluntary settlement allows parties to probe underlying conflicts and restructure their relationship to avoid or minimize future conflicts).
\item \textsuperscript{176} See Van Gestel, \textit{supra} note 125, at 132 (arguing that “[a] fundamental and pervasive difficulty with the Indians’ claims is that they ask the court to decide issues not well suited to judicial resolution, and to grant relief not appropriate for an appointed tribunal and incapable of judicial administration.”). In his \textit{Afterword}, Thomas Tureen states:

If, as all law students are taught, hard cases make bad law, these [Maine and Mashpee land claims] were certainly candidates for some very bad decisions. Clearly, they would press the limits of the judicial process and tempt the judges and juries who would hear them, even in the liberal nineteen-seventies, to rule with emotions rather than reason.

Tureen, \textit{supra} note 141, at 145.
\item \textsuperscript{177} See Van Gestel, \textit{supra} note 125, at 130 (emphasizing that “[n]ot a single man or woman who has been sued [in the New York land claims] had any hand in the motives or methods of the land purchases by the state of New York occurring almost two centuries before their birth”).
\item \textsuperscript{178} In \textit{Oneida II}, the Supreme Court inserted a final footnote suggesting that equitable concerns might limit the available relief:

The question whether equitable considerations should limit the relief available to the present day Oneida Indians was not addressed by the
Even determining the fair market rental value of the claim area can be an overwhelming task. The value of the land is generally determined by its value minus improvements if the occupant occupied the land in good faith.\textsuperscript{179} However, what constitutes improvement to "white society," such as roads and buildings, does not necessarily constitute improvement to Native Americans. Moreover, it may be impossible to determine when such improvements were made.

The \textit{Oneida} test case illustrates how difficult fashioning a remedy can be.\textsuperscript{180} Because this suit was designed to be a test case, the Oneidas carefully limited the relief that they sought. They did not want to intimidate the federal courts and have the courts find Indian land claims nonjusticiable. Rather than suing all of the inhabitants in the 100,000 acre claim area, the Oneidas sued two counties.\textsuperscript{181} The counties occupied a relatively small portion of the land on which they operated several roads, a park, a gravel pit and a fire department radio tower.\textsuperscript{182} The Oneidas could have demanded possession of the land and the fair market rental value from 1795 to the present. Instead, the Oneidas sought the rental...
value for just two years, 1968 and 1969. Judge Port, of the Northern District of New York, originally awarded the Oneidas $16,694 plus interest. The Second Circuit affirmed liability but reversed the award and remanded for recalculation of the damages. As discussed, the Supreme Court affirmed in *Oneida II*, and the case was remanded to Judge McCurn in the Northern District of New York.

The district court's dilemma was how to determine the fair market rental value of the land in 1968 and 1969 when improvements had been made at unknown times and stages. Roads, in particular, presented a problem. The roads in the claim area had not been constructed or acquired by the defendant counties at one identifiable time. Instead, roads were constructed and improved in segments over several hundred years. Originally, the people who lived along the roads were responsible for their maintenance and improvement. Segments were later turned over to the local municipalities and eventually to the defendant counties at various times.

Judge McCurn told the parties in the *Oneida* test case to try to reach agreement on how the damages should be calculated. He ordered them to brief the issues and tentatively scheduled a hearing on damages for October, 1986. In September, the parties entered into settlement negotiations and asked the court to stay all proceedings. As of this writing, no hearing has been held on damages, and the parties have not yet reached a settlement.

The Oneidas deliberately limited the scope of their test case and the relief sought so that the court would not dismiss their claims as nonjusticiable. Most land claims seek much more exten-

183. *Id.* at 529.
184. *Id.* at 540. In calculating the fair rental value of the land, Judge Port valued the land as "unimproved" and then allowed the Counties a set-off for improvements. *Id.* at 541. He also discounted the fair market rental value of the land containing highways by 10%, treating the Oneidas' damages claim like a just compensation claim for a road easement. *Id.* at 542.
185. *Id.* at 541-42. The Second Circuit concluded that the district court should not have discounted the fair market value by 10% and that the district court needed to evaluate whether the Counties had occupied the land in good faith since the 1800s. *Id.*
186. 470 U.S. 226, 253-54 (1985). The Supreme Court reversed the Second Circuit on the Counties' claim for indemnification against New York State. *Id.*
187. *Id.* at 254. In the interim, Judge Port had become incapacitated and died. Judge Neal P. McCurn took over the *Oneida* test case on remand to the district court.
sive relief. As a result, determining the appropriate remedy in cases where the Native claimants prevail presents even greater problems.

In addition to the practical problems involved in awarding land and calculating damages, the federal courts lack the power to extinguish Indian title. Article I of the Constitution gives Congress sole authority to "regulate Commerce . . . with the Indian Tribes." The Nonintercourse Act provides that any alienation of Indian title must be made "by treaty or convention entered into pursuant to the Constitution." Accordingly, only Congress can extinguish Native title. However, the federal government is generally not a party in the typical land claim suit. Actions in ejectment are usually brought against the current public and private occupants. Although the federal government is at least partially at fault for failing to protect Indian land under various treaties, statutes or its trust relationship with the tribes, the government enjoys sovereign immunity and cannot be sued without its consent. The court has no power over the federal government when it is not a party to the litigation. Therefore, the court cannot order that

190. See, e.g., Cayuga Indian Nation v. Cuomo, 565 F. Supp. 1297, 1301 (N.D.N.Y. 1983) (seeking possession of approximately 64,000 acres, fair market rental value for over 200 years and other monetary and protective relief).

191. U.S. Const. art. I, § 8, cl. 3.

192. 25 U.S.C. § 177 (1988). For a discussion of the Nonintercourse Act, see supra notes 30-33 and accompanying text. The federal government stopped making treaties with Indian tribes in 1871. 25 U.S.C. § 71 (1988) ("No Indian nation or tribe . . . shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . .").

193. See U.S. Const. art. I, § 8, cl. 3; Oneida I, 414 U.S. 661, 670 (1974) ("Indian title is a matter of federal law and can be extinguished only with federal consent . . ."). Congress can expressly delegate its authority to extinguish Indian title to the Executive branch. Cohen Handbook, supra note 18, at 515-17. The Supreme Court has also not ruled out the possibility that the President might have been able to extinguish Indian title in the past. See Oneida II, 470 U.S. 226, 248 (1985) (finding "no indication that either the Senate or the President intended by these references [in subsequent federal treaties] to ratify the 1795 conveyance [of Oneida land to New York State]").

194. The federal government enjoys sovereign immunity from suit and may not be sued without its consent. Therefore, neither the nonfederal defendants nor the plaintiffs in a land claim action can join the federal government as a party. Tribal claimants may be able to assert a claim against the government in the Court of Federal Claims for breach of the government's trust relationship, but they can only recover monetary damages, not land. Of course, the government may consent to suit. It may also assert an action for repossession of tribal lands against the current inhabitants on behalf of the Indians. For example, the federal government recently intervened in the Cayugas' suit against New York State. It probably did so because the state had raised an Eleventh Amendment defense against the Cayugas that is not available against the federal government.

195. See Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251, 1254 (9th
the tribe's title be extinguished if the federal government is not a party.\footnote{196} For example, a federal court probably could not fashion a remedy ordering the local defendants to pay a prevailing tribe the fair market value of the disputed land in exchange for extinguishing the tribe's title to the claim area.\footnote{197}

This is not to say that the federal courts cannot fashion a viable remedy in land claim actions or that negotiated settlements are a panacea. The Supreme Court has held that Indian land claims are justiciable,\footnote{198} although the remedy may be limited by hardship concerns.\footnote{199} For example, in a suit where the claimants prevail, the court could declare the tribe's possessory interest. It could then order the non-Indian occupants to pay trespass damages\footnote{200} and future rent while allowing them to maintain possession.\footnote{201} Even though this remedy would satisfy the case or controversy requirement of Article III, it probably would not satisfy either side in the dispute. Although the Indians would gain monetary relief and have their title acknowledged, they would still lack possession of the land. The current inhabitants would not be evicted, but they would lose fee simple title. This, together with the monetary obligation, would generate economic hardship and intense hostility.\footnote{202}

\footnote{196. Even if the federal government is a party to the litigation, there may be a problem with the court's ordering Congress to extinguish Indian title where such action would not be in the tribe's best interest and would, thus, breach the government's trust obligations. \textit{See The Supreme Court, 1984 Term—Leading Cases, supra note 46, at 263-64} (criticizing Supreme Court for urging Congress, in \textit{Oneida II}, to breach its trust obligations).

\footnote{197. Of course, Congress could impose this remedy by incorporating it in a statute, but the court would have no power to order Congress to do so. If the plaintiffs' claims were based on aboriginal title, one might try to argue that a court order extinguishing title in exchange for other compensation would constitute voluntary abandonment of the tribe's aboriginal rights. Voluntary abandonment would derive from the tribe's initiating litigation and consenting to a court-ordered remedy. However, asserting occupancy rights through litigation, winning on the merits and then having the court order divestment of those rights seems to be the very antithesis of a voluntary abandonment.


\footnote{199. \textit{See id.} at 253 n.27 (questioning whether equitable concerns should limit available relief but expressing no final opinion).

\footnote{200. \textit{But see supra} notes 179-90 and accompanying text for a discussion of the difficulties in calculating trespass damages.

\footnote{201. This type of remedy would essentially create a lease arrangement similar to the Seneca-Salamanca leases. For a discussion of the Seneca-Salamanca leases, see \textit{infra} notes 324-80 and accompanying text.

\footnote{202. \textit{See Van Gestel, supra} note 125, at 125 (stating that "countless personal, business and municipal defaults" would result from such a judgment).}
Negotiated settlements can also be problematic. The "win-win" goal of a negotiated agreement can quickly become a "win-lose" result when one party is in a substantially better negotiating position than the other party. In land claim disputes, the state, counties and large commercial landowners generally have far greater resources and political influence at both the state and federal levels than the tribes. Because Congress must approve any settlement, which it will not do without the state's support, and because Congress has sole power to extinguish Indian title, there is a danger that an undesirable settlement may be forced on the claimants. Moreover, some faction on either side of the dispute will always be unhappy with whatever settlement is reached. Never-


204. See Menkel-Meadow, supra note 170, at 505 (listing factors such as economic superiority, misleading statements and collusion among several parties in order to isolate another party). But see Menkel-Meadow, supra note 172, at 833-34 (arguing that "problem-solving" negotiations may still be beneficial despite one party being significantly more powerful than other).

205. See generally Starna, supra note 189, at 163, 169-70 (stating that small percentage of Native Americans in New York State, compared to state's non-Native population—38,000 to 17.6 million in 1987—"furnishes persuasive evidence supporting the view historically and commonly held in government circles that Indians in the state do not constitute a political threat to those in power, and are not regarded as an important political constituency.").

206. See Indian Law Resource Ctr., supra note 203, at 94 (noting that Penobscots only had six days to examine and approve complex Maine land claims settlement). Over time tribal claimants have become more sophisticated at litigating and negotiating land claims. Court decisions favoring Native claimants have helped Native Americans "even the playing field," somewhat. Moreover, tribes may get outside assistance. For example, the Indian Law Resource Center provides free legal representation. See Judson, supra note 129, at B-1. In Connecticut, large, out-of-state gambling interests are apparently funding the Golden Hill Paugussets' claims. Id.

207. Each of the Native land claim settlements has had its critics. For example, a dissenting faction of the Gay Head Indians filed numerous lawsuits challenging the authority of the Wampanoag Tribal Council of Gay Head to represent Native interests in settling claims to the Gay Head Peninsula on Martha's Vineyard Island in Massachusetts. See James v. United States Dep't of Health & Human Servs., 824 F.2d 1132, 1133-35 (D.C. Cir. 1987); James v. Hodel, 696 F. Supp. 699, 700 n.1 (D.D.C. 1988), aff'd sub nom. James v. Lujan, 893 F.2d 1404 (D.C. Cir. 1990). A newspaper article discussing the Puyallup settlement quoted one dissenter as saying, "I think these non-Indian people got away very, very cheap and we are the ones who are going to pay for it." George Hardeen, Tribe to Sign Land Settlement Pact; Indian Claims: Puyallup Members Will Share $162 Million for Relinquishing Interest in Acreage in Tacoma Area, L.A. TIMES, Mar. 24, 1990, at A2; see also Associated Press, Washington Indian Tribe Settles Land Claim for $162M, BOSTON GLOBE,
theless, the potentially astronomical awards, the difficulty in fashioning a judicial remedy and the possibility of establishing a better relationship among the parties generally make negotiated settlements preferable to court ordered remedies.\textsuperscript{208}

D. \textit{Examples of Negotiated Land Claim Settlements}

Land claim settlements come in all shapes and sizes. They vary depending on the participants, the political climate, the political power of the interested parties, the historical background and the philosophy of Indian relations at the time. In general, however, modern negotiated settlements usually include a grant of land and/or money to the claimants in exchange for the claimants' dropping their claims, extinguishing Indian title to other claimed lands and relinquishing certain sovereignty rights.

1. \textit{Rhode Island Indian Land Claims Settlement}

a. Background

In the early 1970s, a number of the eastern tribes filed suit in federal district court to recover their lands.\textsuperscript{209} The Narragansett


208. \textit{See} \textit{Hauptman}, \textit{supra} note 136, at 31. Discussing the Moss Lake settlement in upstate New York, Mario Cuomo, who was then Secretary of State for New York, stated:

The Mohawk settlement has moved us toward a realization that the way to resolve these things [Native land disputes] is not by letting them go to court because if the Indian goes to court and wins then the court will say that the land belongs to the Indians. If the land belongs to the Indian, the court will not actually deliver the land to the Indians because the legislative process will then intervene to say that's an absurd result - for example, to give the whole City of Saratoga to the Indians. We must find a different process - conflict resolution without legislation, a process of negotiation.


There is a recognition that any final resolution of pending disputes through a process of litigation would take many years and entail great expense to all parties; continue economically and socially damaging controversies; prolong uncertainty as to the access, ownership, and jurisdictional status of issues in question; and seriously impair long-term economic planning and development for all parties.

\textit{Id.}

Tribe was the first to negotiate a settlement. Congress subsequently ratified the parties' agreement in the Rhode Island Indian Claims Settlement Act.

The Narragansett Tribe's ancestral lands were located in Rhode Island. In 1880, the Tribe lost their land to the State when Rhode Island passed legislation disbanding the Tribe. In 1975, the Tribe filed two actions in federal district court to regain possession of approximately 3,200 acres in Charlestown, Rhode Island. The suits were brought against the Director of the Rhode Island Department of Environmental Management and thirty-two private land owners. The Narragansetts claimed that the loss of their land in 1880 violated the Nonintercourse Act because the federal government had never approved the transfer.

Charlestown, Rhode Island, is a small seacoast town with a substantial summer tourist trade. When the Narragansetts filed suit, the area was on the verge of a real estate boom due to the influx of new residents and tourists from Boston, Providence and New


216. See Hagan, supra note 35, at 26 (stating that in 1975, Charlestown's normal population of less than 4,000 persons grew to approximately 20,000 during the tourist season).
York. The Narragansetts' claim clouded property titles in the area, including land not subject to the suits. As a result, development essentially stopped.

The United States District Court for the District of Rhode Island consolidated the Narragansetts' two actions. In 1976, the court issued an opinion finding subject matter jurisdiction and striking the defendants' other defenses. Following this decision, the Tribe, State and other parties to the lawsuits began settlement negotiations. They finally reached an agreement in February 1978. Congress subsequently ratified the settlement agreement with minor changes in the Rhode Island Indian Claims Settlement Act, which became effective on September 30, 1978.

b. Settlement Terms

Under the settlement, the Tribe acquired approximately 1,800 acres of land in exchange for relinquishing its land claims and ab-
original title in Rhode Island.\textsuperscript{224} The settlement provided for creation of a state-chartered corporation (State Corporation) to hold the land conveyed under the settlement in trust for the Tribe.\textsuperscript{225} The Narragansett Tribe, incorporated as a Rhode Island nonbusiness corporation (Indian Corporation), would select the majority of the directors and thereby control the State Corporation.\textsuperscript{226} Rhode Island agreed to convey approximately 900 acres of public land to the State Corporation for the Tribe.\textsuperscript{227} The State Corporation also received 900 acres of private land.\textsuperscript{228} The federal government established a $3.5 million fund to purchase the private settlement land.\textsuperscript{229} Under the agreement, no private landowner would be forced to sell his or her land; private land would be purchased at fair market value through purchase option agreements.\textsuperscript{230}

The settlement agreement further provided that all of the public land and seventy-five percent of the private land would be used for conservation purposes.\textsuperscript{231} This left approximately 225 acres for development. The Tribe was given authority to regulate hunting and fishing on settlement land as long as the Tribe maintained minimum standards for protecting wildlife, fish stock and safety.\textsuperscript{232}

The Rhode Island Indian Claims Settlement Act also exempted the settlement land from federal, state and local taxes.\textsuperscript{233} However, income-producing activities on the land were taxable.\textsuperscript{234} The Act


\textsuperscript{227}. 25 U.S.C. § 1706(b); R.I. Agreement, \textit{supra} note 210, at 25, para. 2.

\textsuperscript{228}. R.I. Agreement, \textit{supra} note 210, at 25-26, para. 3.

\textsuperscript{229}. 25 U.S.C. §§ 1703, 1707(a), 1710 (1988); \textit{see also} R.I. Agreement, \textit{supra} note 210, at 25-26, para. 5.

\textsuperscript{230}. R.I. Agreement, \textit{supra} note 210, at 25-26, para. 3. The agreement provided that private land would be purchased at fair market value through purchase option agreements and no one would be forced to sell his or her land. \textit{Id.}; \textit{see also} 25 U.S.C. § 1704 (1988).

\textsuperscript{231}. R.I. Agreement, \textit{supra} note 210, at 26-27, paras. 12, 14.


\textsuperscript{234}. \textit{Id.} § 1715(b). The Tribe also agreed to reimburse Charlestown for future services provided to the settlement lands. \textit{Id.} § 1715(c); R.I. Agreement, \textit{supra} note 210, at 27, para. 16.
extinguished the Narragansetts’ aboriginal title in Rhode Island and validated all prior land transfers.\textsuperscript{235} It also gave the State civil and criminal jurisdiction over the settlement land.\textsuperscript{236} The State Corporation could grant public and private easements over the land pursuant to Rhode Island law.\textsuperscript{237} However, this provision apparently also subjected the State Corporation to involuntary eminent domain proceedings to secure public easements.\textsuperscript{238} Finally, the Act absolved the federal government of any further responsibility for the settlement land, the Narragansetts, the State Corporation or the Indian Corporation after the government conveyed the private settlement land to the State Corporation and extinguished Indian title.\textsuperscript{239} Nevertheless, the Act provided that if the Secretary of the Interior formally recognized the Narragansett Tribe, the settlement land would gain federal trust status and could not be alienated without the Secretary’s approval.\textsuperscript{240}

\textsuperscript{235} 25 U.S.C. § 1705 (1988); see also R.I. Agreement, \textit{supra} note 210, at 26, para. 6. The Act also extinguished any other tribe’s title and claims in Rhode Island unless the tribe or other claimant commenced an action within 180 days of the Act’s enactment. 25 U.S.C. §§ 1705, 1712 (1988). Claims to land in Charlestown brought by Indian claimants other than the Narragansetts had to be brought against the State Corporation. 25 U.S.C. § 1705(b).


\textsuperscript{237} 25 U.S.C. § 1707(c) (1988); see also R.I. Agreement, \textit{supra} note 210, at 26, para. 7.

\textsuperscript{238} 25 U.S.C. § 1707(c). The Act provides:

That nothing in this [Act] shall affect or otherwise impair the ability of the State Corporation to grant or otherwise convey (including any involuntary conveyance by means of eminent domain or condemnation proceedings) any easement for public or private purposes pursuant to the laws of the State of Rhode Island.

\textit{Id.; see also} R.I. Agreement, \textit{supra} note 210, at 26, para. 7 (indicating that settlement lands would have federal restraint on alienation, “provided that nothing in the federal restriction or in any other aspect of this memorandum shall affect the ability of the State Corporation to grant or otherwise convey (whether voluntary or involuntary, including any eminent domain or condemnation proceedings) easements for public or private purposes.”).

\textsuperscript{239} 25 U.S.C. § 1707(c).

\textsuperscript{240} \textit{Id.} Presumably, without the Secretary’s recognition, the land was otherwise alienable. See S. Rep. No. 972, \textit{supra} note 210, at 7 (“[S]ettlement lands will be subject to a special federal restraint on alienation only if the Secretary [of the Interior] subsequently acknowledges the Tribe’s existence under the Department of the Interior’s regulations governing recognition of Indian tribes.”).
c. Evaluation

Viewed in hindsight from the Tribe’s perspective, the Rhode Island Indian land claims settlement has its flaws. 241 The Narragansetts gave up substantial sovereignty rights in addition to claims for many acres of land. More recent settlements tend to be more lucrative, depending on the size of the claim, with less loss of tribal sovereignty rights. 242 Some have included large monetary funds for social and economic development, in addition to land grants or funds to purchase land. 243

Nevertheless, the Narragansetts’ settlement was the first and should be considered in light of the times in which it was negotiated. 244 In 1978, no court had yet decided on the merits a similar possessory action in favor of the Native claimants. The Narragansetts’ claims had accrued nearly 100 years before the Tribe filed suit and were based on aboriginal title. 245 It would be another seven years before the Supreme Court would decide Oneida II. 246 Under the circumstances, the parties could have reasonably anticipated that the First Circuit or the Supreme Court would simply dismiss the Narragansetts’ claims as untimely, nonjusticiable or otherwise barred. The Narragansetts gained a substantial land base through the settlement. 247 In the face of rapid real estate development, they were also able to preserve a large tract of land and gain the right to regulate hunting and fishing on their land without state interference. 248 Today, the Tribe might have been able to negotiate a better deal, but without the legal precedents and experience of negotiating subsequent settlements, the Tribe and their attorneys fared reasonably well. They also established an important precedent for future settlements.

244. See, e.g., Hagan, supra note 35, at 26; see also supra notes 210-11 and accompanying text.
247. For a discussion of the terms of the Narragansett settlement, see supra notes 224-40 and accompanying text.
248. For a discussion of the settlement lands and the terms governing them, see supra notes 224-32 and accompanying text.
In 1983, the federal government formally recognized the Narragansetts as a tribe.\(^{249}\) Formal recognition gave the Tribe’s land federal trust status\(^{250}\) and made the Tribe eligible for federal grants in education, housing and health care.\(^{251}\) As of this writing, the Narragansetts are planning to build a casino.\(^{252}\) In March, 1994, the United States Court of Appeals for the First Circuit rejected Rhode Island’s argument that state law prohibiting casino gambling applied to the Tribe pursuant to the Settlement Act.\(^{253}\) The First Circuit ruled, instead, that the federal Indian Gaming Regulatory Act\(^{254}\) governed and thus required the State to negotiate with the Narragansett Tribe over establishing casino gambling on tribal land.\(^{255}\)

In reaching its conclusion, the First Circuit somewhat clarified the extent of the State’s jurisdiction over the Tribe’s land under the Settlement Act. The court rejected the State’s argument that the Act granted Rhode Island exclusive jurisdiction over the settlement land.\(^{256}\) Instead, the First Circuit held that the Tribe still “retained that portion of jurisdiction they possess by virtue of their sovereign existence as a people”\(^{257}\) and concluded that Rhode Island and the Narragansett Tribe have concurrent jurisdiction over the settlement land.\(^{258}\)


\(^{251}\) See generally 25 C.F.R. § 83.12 (1994) (noting that recognized tribe is eligible for federal services and benefits). The State Corporation subsequently transferred title to the settlement lands to the Tribe. In 1988, the Tribe deeded the lands to the Federal Bureau of Indian Affairs to be held in trust. Rhode Island v. Narragansett Tribe, 19 F.3d 685, 689 (1st Cir.), cert. denied, 115 S. Ct. 298 (1994). The validity of these transfers is doubtful because Congress has not formally ratified them. See id. at 689 n.2 (noting issue but declining to consider it because issue was unnecessary to questions before court and because parties had not raised it).

\(^{252}\) Narragansett Tribe, 19 F.3d at 690; see also Associated Press, Indians, Governors Disagree on Tribe Casinos, PHILA. INQUIRER, Apr. 4, 1993, at A3; Gerald M. Carbone & Tatiana Pina, Casino Expected to Draw 15,000 Daily, Tribe Says, PROVIDENCE JOURNAL-BULLETIN, July 17, 1992, at A1.

\(^{253}\) Narragansett Tribe, 19 F.3d 685.


\(^{255}\) Narragansett Tribe, 19 F.3d at 706.

\(^{256}\) Id. at 702.

\(^{257}\) Id.

\(^{258}\) Id. at 701. The First Circuit declined to specify the scope of the State’s concurrent jurisdiction, except as limited by IGRA and the facts of the case. Id.
2. **Puyallup Land Claims Settlement**

The Puyallup settlement is the largest and most comprehensive of the voluntarily negotiated settlements to date. It resolved claims to approximately 20,000 acres of land around Tacoma, Washington, including vital portions of the Port of Tacoma and the Tacoma industrial area.259

a. **Background**

The Puyallup Tribe's ancestral lands were located on the eastern side of Puget Sound.260 At the Treaty of Medicine Creek in 1854, the Puyallups and other area tribes ceded approximately 2.24 million acres of land to the federal government.261 In return, they received $32,000, guaranteed fishing rights, and the promise of smaller parcels of land for reservations.262 Presidential executive orders in 1857 and 1873 established the Tribe’s reservation lands.263 These grants included land along the mouth of the Puyallup River at Commencement Bay and sections of what are now the cities of Tacoma, Fife and Puyallup. The Tribe subsequently lost most of its land under the allotment acts.264 In addition, the State of Washington acquired the land under all of the navigable water-

261. Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132; H.R. Rep. No. 57, *supra* note 260 (providing historical background for Puyallup settlement); Roberta Ulrich, *Puyallup Deal Sparks Hopes, Fears*, OREGONIAN, June 25, 1989, at B1 (discussing Treaty of Medicine Creek). Isaac I. Stevens, the Governor and Superintendent for Indian Affairs in the Washington Territory, negotiated the Treaty. Ulrich, *supra*, at B1. He was also the surveyor of a transcontinental railroad route. *Id.* The purpose of the treaty was to obtain the land for white settlement and to induce the Indians to move onto reservations voluntarily and without violence. United States v. Washington, 520 F.2d 676, 682-83 (9th Cir. 1975).
263. *See* e.g., *Puyallup Indian Tribe*, 717 F.2d at 1253-54, 1260 (discussing Executive Order of January 20, 1857); H.R. Rep. No. 57, *supra* note 260, at 6-7. Contrary to what they had been promised, the Puyallups were settled on land with poor access to Commencement Bay and without access to the Puyallup River and its fisheries on which the Tribe depended. The Tribe’s protests erupted into hostilities with the United States and non-Indian settlers which lasted until August 1856. The Executive Orders of January 20, 1857, and September 6, 1873, expanded the Tribe's reservation lands to include the mouth of the Puyallup River and important tidelands. *Puyallup Indian Tribe*, 717 F.2d at 1253-54, 1259-60; H.R. Rep. No. 57, *supra* note 260, at 6-7.
ways within the State’s borders when it gained statehood in 1889. The Port of Tacoma and other private parties later acquired ownership of the tidelands in Commencement Bay and certain riverbed property within the Tribe’s original reservation.

The Puyallups began asserting their land claims and other treaty rights as early as the late 1800s. In the 1960s and 1970s, disputes over tribal fishing rights became a serious problem. Litigation began in 1963 and culminated with a series of Supreme Court decisions that examined the State’s right to control Native fishing. This litigation, together with the militant protests in the 1960s and 1970s, known as the “fishing wars,” bred mistrust and hostility between Natives and non-Natives.

Against this background, the Puyallups claimed title to some 20,000 acres of land throughout the Tacoma area that had been part of their original reservation. In 1974, the United States Court of Appeals for the Ninth Circuit recognized the validity of the Tribe’s original reservation boundaries. In 1983, the Ninth Circuit upheld the Puyallups’ title to twelve acres of former riverbed along the Puyallup River. The following year, the Tribe filed suit against the Union Pacific Railroad and the Port of Tacoma to regain 120 acres of tideland along Commencement Bay and ad-


266. H.R. Rep. No. 57, supra note 260, at 7-8; see also Puyallup Indian Tribe, 717 F.2d at 1254 (discussing Port of Tacoma’s acquisition of exposed riverbed and other land abutting Puyallup River).


269. Ulrich, supra note 261, at B1. In one incident, militant tribe members occupied a former Indian hospital in a week-long standoff against the police and United States marshals. Id.

270. Associated Press, supra note 207, at 8 (National/Foreign).


272. Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251, 1253-54, 1263-67 (9th Cir. 1983), cert. denied, 465 U.S. 1049 (1984). Between 1948 and 1950, the Army Corps of Engineers rechanneled portions of the Puyallup River, leaving the riverbed exposed. The Puyallups' suit involved 12 acres of former riverbed that were located within the Tribe's reservation land after the Executive Order of 1857. Id. at 1254.
ditional riverbed along the Puyallup River. These claims clouded title to much of the Tacoma area, including prime industrial and Port of Tacoma land. Several important state highways also crossed the claim area. The House Report accompanying the Puyallup Tribe of Indians Settlement Act estimated that the value of the land, including office buildings, homes, and port facilities, was more than $750 million.

Settlement negotiations began shortly after the Ninth Circuit’s 1983 decision for the Tribe in Puyallup Indian Tribe v. Port of Tacoma. On August 27, 1988, the Puyallup Tribe, the State of Washington, the federal government, the local governments of Pierce County and various private property owners reached an agreement. The federal government ratified the agreement in the Puyallup Tribe of Indians Settlement Act of 1989.

b. Settlement Terms

The settlement package was worth approximately $162 million in land, money, economic and social development, fisheries enhancement and construction of the Blair Navigation Project. The state, local governments and private parties provided fifty-two percent of the settlement assets. The federal government contrib-

277. 717 F.2d 1251 (9th Cir. 1983) (declaring Puyallup Tribe’s title to 12 acres of former riverbed).
278. Agreement between the Puyallup Tribe of Indians, Local Governments in Pierce County, the United States of America, and Certain Private Property Owners, Aug. 27, 1988 [hereinafter Puyallup Agreement], reprinted in H.R. Rep. No. 57, supra note 260, at 23-165. The parties had actually reached an agreement earlier; however, the Tribe’s members voted to reject it in February 1986. Negotiations resumed in 1987 and were completed in August 1988. See Ulrich, supra note 261. The signatories to the settlement agreement were the United States Government; the State of Washington; the Port of Tacoma; Pierce County; the Cities of Tacoma, Fife, and Puyallup; the Union Pacific Railroad Co.; Burlington Northern, Inc.; the Riverbed Owners Committee; the Commencement Bay Tideland Owners Committee; and the Puyallup Indian Tribe. Puyallup Agreement at 1, reprinted in H.R. Rep. No. 57, supra note 260, at 27.
uted the remaining forty-eight percent.281

The Puyallup Tribe received 900 acres of land.282 The land included property for a marine terminal, industrial development, fisheries enhancement and recreation.283 The United States currently holds title to the land in trust for the Tribe, and most of the land has "on-reservation" status.284 The agreement also provided for environmental audits and decontaminating land in the port area.285

In addition, the settlement established several multi-million dollar funds to benefit the Tribe and its members. The federal government created a $22 million permanent trust fund.286 The principal may not be invaded, but the Tribe may use the trust income to provide social, health and welfare services for its members.287 The permanent trust fund should generate approximately $88 million for the Tribe over the next fifty years.288 The Washington State Department of Social and Health Services agreed to provide the Tribe with additional funds for an elder care facility; a youth substance abuse facility; a child day care center; computers for the tribal mental health center; and training in alcoholism counselling, day

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281. The State estimated the parties' contributions as follows:


283. The market value of the land was approximately $37.5 million. Puyallup Agreement § I(A), supra note 278, at 2, reprinted in H.R. Rep. No. 57, supra note 260, at 28.


287. The purpose of the trust fund is "to provide the Tribe with a permanent resource that enhances the ability of the Tribe to provide services to its members." Puyallup Agreement, supra note 278, at 1. The income may be used only for "housing, elderly needs, burial and cemetery maintenance, education and cultural preservation, supplemental health care, day care and other social services." Id.; 25 U.S.C. § 1773d(b)(3)(A); Puyallup Agreement, supra note 278, at 1.

288. PUYALLUP TRIBAL SETTLEMENT, supra note 281, at 6.
care, child welfare and mental health. The settlement also established a $9.5 million economic development and land acquisition fund. The Tribe received an additional two million dollars for developing and expanding small business enterprises owned by Tribe members. Finally, each member of the Tribe, as of the ratification date, received a one-time, $20,000 payment from a $24 million annuity fund.

The settlement did not affect the Tribe’s fishing rights. However, it did establish a $10 million fund for fisheries enhancement. Under the agreement, the Tribe, State and local governments will work together to increase fish production, protect fish habitat, control pollution and prevent flood damage. The settlement also included a navigation agreement to reduce conflicts between tribal fishing and commercial shipping.

Another important part of the settlement provided for construction of the Blair Navigation Project. The project was designed to promote domestic and foreign trade by improving shipping access and “unlocking” valuable waterfront land for development, including Puyallup property. The settlement allocated $51 million for widening and deepening the Blair Waterway Channel and for building a connecting bridge over the channel or a by-

pass road around the waterway.\footnote{299. Id., at doc. 6, at 2-3, reprinted in H.R. Rep. No. 57, supra note 260, at 154-55; see also 25 U.S.C. § 1773f(c) (appropriating $25,500,000 for costs associated with Blair Project).}{299} The federal government gave the Tribe permission to engage in foreign trade so the Puyallups could further benefit from the Project.\footnote{300. 25 U.S.C. § 1773f(b).}{300} Under the agreement, the Tribe also receives an annual incentive payment for participating in the Project. These payments will total $2.5 million over a twenty-year period.\footnote{301. Puyallup Agreement § VII, supra note 278, at 17 & doc. 4, reprinted in H.R. Rep. No. 57, supra note 260, at 43, 156.}{301} In return, the Puyallups relinquished claims to approximately 20,000 acres of land and certain sovereignty rights. The Settlement Act extinguished the Tribe’s title to all land in Washington State that was not exempted under the settlement.\footnote{302. 25 U.S.C. § 1773a; Puyallup Agreement § IX, supra note 278, at 28-30, reprinted in H.R. Rep. No. 57, supra note 260, at 54-56.}{302} In addition, the Tribe agreed not to contest several local projects that would be constructed with minimal impact on the fisheries.\footnote{303. Puyallup Agreement § IV, supra note 278, at 9-11, reprinted in H.R. Rep. No. 57, supra note 260, at 35-37.}{303} The Tribe was given jurisdiction over its trust land, including land conveyed under the agreement.\footnote{304. 25 U.S.C. § 1773g; Puyallup Agreement § IV, supra note 278, at 18-19, reprinted in H.R. Rep. No. 57, supra note 260, at 44-45.}{304} However, the Tribe agreed not to assert jurisdiction over non-trust land and non-Indians within the reservation, except as authorized under the Indian Child Welfare Act.\footnote{305. 25 U.S.C. § 1773g; Puyallup Agreement §§ VIII(A)(1)(b),(e), supra note 278, at 19, reprinted in H.R. Rep. No. 57, supra note 260, at 45.}{305} The agreement gave each government the exclusive right to enforce its environmental laws on its own land.\footnote{306. 25 U.S.C. § 1773g; Puyallup Agreement § VIII(A)(3), supra note 278, at 20, reprinted in H.R. Rep. No. 57, supra note 260, at 46.}{306} Finally, the parties consented to suit in the United States District Court for the Western District of Washington to enforce the settlement.\footnote{307. Puyallup Agreement § XI(B), supra note 278, at 33, reprinted in H.R. Rep. No. 57, supra note 260, at 59.}{307}

c. An Example of Mutually Beneficial Negotiations

Although the negotiations were protracted and difficult,\footnote{308. See H.R. Rep. No. 57, supra note 260, at 9 (citing four years of difficult and extensive negotiations eventually resulting in current settlement).}{308} the Puyallup settlement illustrates how the flexibility of negotiating an agreement can allow the parties to address what is important to each party, lead to a "win-win" result and create better relations for
future interaction. Had the State and local parties litigated the Puyallups’ claims, development in one of the State’s most important deep-water ports and industrial areas would have essentially stopped because of the cloud on property titles in the area.\textsuperscript{309} Economic growth throughout Washington State would have been hurt. The State estimated that prolonged litigation would have cost millions of dollars in state funds and the State’s economy could have lost billions of dollars.\textsuperscript{310} The Tribe, in turn, would have faced years of litigation, uncertainty and the hostility such litigation typically generates.

Through the negotiations process, the parties were able to address their major concerns. The agreement substantially increased the Tribe’s land, provided for increased fish production\textsuperscript{311} and established substantial financial resources for the Puyallups’ social and economic development and stability. For the State and the other public and private parties, the settlement quieted property titles and allowed for development and economic growth. Washington State was also very concerned that if the Puyallups prevailed, private landowners would sue the State for originally passing bad title.\textsuperscript{312} The settlement removed this threat, as well as the threat of any future land claims by the Tribe. Moreover, the agreement allowed the State and local governments to resolve jurisdictional issues which were particularly important to them.\textsuperscript{313}

Washington State, the Tribe and the other local parties reaped another important benefit. The agreement called for millions of federal dollars to be spent in the area, including millions for improving the port.\textsuperscript{314} The influx of capital and improvements will benefit all of the parties, not just the Tribe. The State and local

\textsuperscript{309} See \textit{Puyallup Tribal Settlement}, \textit{supra} note 281, at 4; Ulrich, \textit{supra} note 261, at B1.

\textsuperscript{310} Letter from Booth Gardner, Governor of Washington, to Washington State Legislators, \textit{supra} note 135, at 3; see also 25 U.S.C. § 1773(a)(5) (“[A]ny final resolution of pending disputes through a process of litigation would take many years and entail great expense to all parties; continue economically and socially damaging controversies; prolong uncertainty as to the access, ownership, and jurisdictional status of issues in question; and seriously impair long-term economic planning and development for all parties.”).

\textsuperscript{311} See Grover, Stetson, & Williams, P.C., \textit{supra} note 280, at 294 (noting that “key concern” of tribe was preserving and increasing fisheries).

\textsuperscript{312} \textit{Puyallup Tribal Settlement}, \textit{supra} note 281, at 3, 4, 9, 15. Generally, the states have sovereign immunity from suit, but they may waive their immunity.

\textsuperscript{313} See Grover, Stetson & Williams, P.C., \textit{supra} note 280, at 295-96 (emphasizing that agreement “resolved major issues regarding tribal-state jurisdiction and police powers” and describing allocation of jurisdiction under settlement).

\textsuperscript{314} The federal government’s contribution to the settlement was approximately $77.25 million. H.R. Rep. No. 57, \textit{supra} note 260, at 9.
parties contributed $84,394 million to the settlement. The agreement should generate many times that amount in economic growth and tax revenues.

Relations among the parties prior to the settlement were marked by distrust, animosity and occasional violence. During the course of the negotiations, the parties were able to identify certain areas of common interest and establish cooperative programs for their mutual benefit. For example, one shared goal was enhancing the fisheries. In particular, the parties wanted to increase the number of salmon and steelhead released into the Puyallup River and Commencement Bay Basin and to protect the fish environment. Accordingly, the agreement provides for a cooperative fisheries enhancement program, pollution control and decontaminating polluted areas. The agreement also requires consultation and a cooperative approach to resolving future conflicts. Both the negotiations process and the final agreement thus provided a means for easing tensions among the parties, solving specific problems and improving future relations.

315. See id. (included state, local and private contributions). The State's public relations pamphlet on the settlement lists the state, local and private contributions as $84,594 million. PUYALLUP TRIBAL SETTLEMENT, supra note 281, at 4.

316. The State estimated that "over the next 10 years the agreement will create $320 million annually in economic expansion of the State's second largest urban concentration that will provide a return several times over to State coffers in the form of additional tax revenues." PUYALLUP TRIBAL SETTLEMENT, supra note 281, at 11; see also id. at 4 ("Estimates of the growth potential for the Port area alone could mean as much as $38 million in sales tax revenue. In addition, up to $9 million annually may be realized from other tax sources. Expansion of the Port will bring enhanced export opportunities for the agricultural industry in Eastern Washington, the timber industry and manufacturing in all parts of the state.").

317. See Grover, Stetson & Williams, P.C., supra note 280, at 293 (describing Puyallup settlement agreement as "major triumph of negotiation and perseverance" and "comprehensive resolution of long and bitter disputes between the various governments and communities").

318. Numerous state and local agencies were brought in to assess the Tribe's needs and develop effective programs. The mutual knowledge and working relationships that developed may prove to be one of the most important long-term benefits from negotiating the settlement.

319. Puyallup Agreement, supra note 278, at doc. 4, reprinted in H.R. Rep. No. 57, supra note 260, at 96 (noting "common goal to protect and enhance the fisheries resource... while allowing construction and development to occur").


323. Of course, it remains to be seen how well the settlement will work over time. As of May 1993, $2.2 million had been distributed for various programs. Associated Press, Puyallup Accord Three Years Later: The Good and Bad, SEATTLE TIMES, May 9, 1993, at B-2. A "showcase" marina had been built on the Hylebos Waterway which was expected to generate $650,000 per year. Id. The Tribe had
3. **Seneca-Salamanca Lease Settlement**

As of this writing, the most recently negotiated settlement act involves the lease controversy between the City of Salamanca, New York, and the Seneca Nation. Salamanca is located almost entirely within the Allegany Reservation in southwestern New York State, about 60 miles south of Rochester. The population is approximately 6,600, most of whom are non-Indians. Unlike the previously discussed settlements, the Seneca Nation Settlement Act of 1990 did not settle title to the land in question. Instead, it established new leasing terms between the residents of Salamanca and the Seneca Nation to land in Salamanca, New York, that belongs to the Seneca Nation.

a. **Background**

The Seneca Nation is a member of the Six Nation Iroquois Confederacy, also known as the Houdenosaunee. During the American Revolution, the Senecas sided with the British. At the Treaty of Fort Stanwix in 1784, which ended the war between the

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324. See Hauptman, supra note 136, at 25 (stating that Salamanca “is composed of thousands of non-Indians who live and work on land leased from the Senecas”); Treadwell, supra note 138, at A2.


326. Equitable title to the land, whether based on aboriginal or formal title, includes the rights to use and occupy the land. See Cohen Handbook, supra note 18, at 491 (discussing occupancy rights secured by aboriginal title and recognized title). Even where title is not contested, leasing tribal land without the federal government's consent violates the Nonintercourse Act. 25 U.S.C. § 177 (1988).


328. The Iroquois Confederacy consists of the Seneca, Cayuga, Oneida, Onondaga, Mohawk and Tuscarora Nations. Hauptman, supra note 142, at x. Today, they are located in New York, Oklahoma, Wisconsin and Canada. Id.

329. Only the Oneidas and Tuscaroras sided with the United States. The other Iroquois nations allied with Great Britain.

Iroquois Confederacy and the United States, the United States took large land cessions from the hostile tribes as war reparations.\(^{331}\) However, the Fort Stanwix Treaty also guaranteed to the tribes, including the hostile tribes, their lands within what is now New York State.\(^{332}\) The Senecas vehemently protested the loss of almost all of their land.\(^{333}\) As a result, in the 1794 Treaty at Canandaigua, the United States gave the Senecas some additional land and again guaranteed their possessory rights.\(^{334}\) Today, the Senecas live primarily on the Cattaraugus and Allegany Reservations in southwestern New York State.\(^{335}\)

In the mid-nineteenth century, New York opened the western part of the state to the railroads. Under apparent state authority, but without federal consent, the railroad companies leased rights-of-way and other land from the Seneca Nation and individual Tribe members.\(^{336}\) Non-Indian railroad workers and farmers followed the
railroads. They established settlements on land leased from the Indians including the City of Salamanca.\(^{337}\) The New York courts declared these leases void because the federal government had not approved them.\(^{338}\) The State subsequently pressured the federal government to give the Salamanca residents title to the land or ratify the leases.\(^{339}\) Over the Senecas' strong objections, the United States Congress approved the leases in 1875\(^{340}\) and again in 1890.\(^{341}\) The 1890 Act granted Salamanca residents and businesses ninety-nine-year leases at "favorable rates."\(^{342}\) Many rents were set so low that some lessees only paid a dollar a year.\(^{343}\) The average annual rent in 1990 was ten dollars.\(^{344}\) The Act contained no acceleration clause and no provision for renegotiating or increasing the annual

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337. 25 U.S.C. § 1774(a)(2)(B) (Supp. V 1993). Discovery of oil and abundant timber also lured many white settlers and profiteers to southwestern New York. By 1900, the Senecas were outnumbered five-to-one on the Allegany Reservation. Hauptman, supra note 142, at 17.


339. An 1871 resolution provided:

Resolved (if the Senate concur), that the Senators from this State in Congress be instructed and the Representatives be requested to presume the passage of some act as the formation of a treaty with the Seneca nation of Indians, whereby title may be obtained to the whole or a portion of the Allegany Reservation, or such relief secured for white settlers as the circumstances demand.

Joint Resolution of the New York State Assembly and Senate, Jan. 18, 1871, quoted in Hauptman, supra note 136, at 4; see also H.R. Rep. No. 832, supra note 336, at 4 (1990); S. Rep. No. 511, supra note 327, at 32 ("It is equally clear that the State of New York bears significant responsibility. It was the State that originally authorized the leasing within the Allegany Reservation and then sought Federal legislation to either extinguish Indian title to the land or confirm long term leases.").


343. The rental fees were substantially less than the actual lease value of the land. 25 U.S.C. § 1774(a)(3) (Supp. V 1993). See United States v. Forness, 125 F.2d 928, 941 (2d Cir.) ("The consideration - $4.00 a year - comes close to being unconscionably small."); cert. denied sub nom. City of Salamanca v. United States, 316 U.S. 694 (1942); Treadwell, supra note 138, at A1 (quoting Calvin John, Seneca Nation President: "In 1890, we didn't have any legal assistance and, as witnesses testified in a congressional investigation in 1920 or '30, the Indians were plied with liquor to coerce them into signing. The old agreement was unfair to both sides, really.").

rents during the lease term.\textsuperscript{345} Despite the low rates, the Tribe had difficulty collecting the annual rents. By 1939, over twenty-five percent of the non-Indian leaseholders were in default.\textsuperscript{346} On March 4, 1939, the Senecas finally issued a resolution canceling all delinquent leases.\textsuperscript{347} The United States brought a test case on the Tribe’s behalf to determine the Tribe’s right to cancel leases for nonpayment.\textsuperscript{348} In \textit{United States v. Forness}, the United States Court of Appeals for the Second Circuit held that the Seneca Nation could cancel delinquent leases and negotiate new leases for higher rents.\textsuperscript{349} The Second Circuit also indicated that federal law, not state law, governed.\textsuperscript{350} \textit{Forness} generated considerable anti-Indian backlash and renewed efforts by New York State, powerful politicians, business concerns and private parties to extinguish the Seneca’s title to the land.\textsuperscript{351} Although these powerful interests were not successful, their efforts left a legacy of distrust and antagonism.\textsuperscript{352}

The ninety-nine-year leases terminated on February 19, 1991.\textsuperscript{353} Approximately 3,300 leases were affected.\textsuperscript{354} Prior to termination, the Senecas announced that they would offer new leases but at higher rates and for a shorter term. The annual rents would be based on the fair market value of the land. Leases that were not renegotiated would be canceled, and the land, including improvements, would be confiscated. The Tribe’s announcement generated considerable alarm and hostility among Salamanca

\textsuperscript{345} Act of September 30, 1890, ch. 1132; see also H.R. Rep. No. 832, \textit{supra} note 336, at 4.

\textsuperscript{346} Hauptman, \textit{supra} note 142, at 21.

\textsuperscript{347} Forness, 125 F.2d at 931.

\textsuperscript{348} United States \textit{v. Forness}, 37 F. Supp. 337 (W.D.N.Y. 1941), rev’d, 125 F.2d 928 (2d Cir.), cert. denied \textit{sub nom}. City of Salamanca \textit{v. United States}, 316 U.S. 694 (1942). The United States sued Frank and Jesse Forness. The City of Salamanca and a number of large mortgage holders intervened as defendants. \textit{Id}. at 340. The Fornesses operated a garage in the center of the City. Under their lease, their annual rent for the land was four dollars. By March 1939, they owed eight-years’ rent plus interest. \textit{Forness}, 125 F.2d at 931. Over 800 other leaseholders were also in default. Hauptman, \textit{supra} note 142, at 15. For a discussion of \textit{Forness} and its aftermath see Hauptman, \textit{supra} note 142, at 15-43 and Hauptman, \textit{supra} note 327, at 108-19.

\textsuperscript{349} Forness, 125 F.2d at 940-41.

\textsuperscript{350} \textit{Id}. at 932.

\textsuperscript{351} See Hauptman, \textit{supra} note 142, at 31-43 (discussing ramifications of \textit{Forness}).

\textsuperscript{352} See Hauptman, \textit{supra} note 136, at 25-26 (discussing effect of bigotry and racial tensions on negotiations between Seneca Nation and Salamanca).


residents.\textsuperscript{355}

New York authorized the Salamanca Indian Lease Authority (SILA) to negotiate a new lease agreement with the Seneca Nation in 1969.\textsuperscript{356} In July 1990, after 20 years of difficult, often bitter negotiations,\textsuperscript{357} the City of Salamanca and the Seneca Nation finally reached an agreement.\textsuperscript{358} The federal government subsequently approved the agreement by enacting the Seneca Nation Settlement Act of 1990.\textsuperscript{359}

b. Settlement Terms

The Seneca-Salamanca settlement provided for new leases at higher rates and compensated the Tribe for its losses incurred under the prior leases.\textsuperscript{360} The Tribe agreed to offer new leases to the City, individual lessees and lessees in several neighboring towns for a forty-year term.\textsuperscript{361} Thereafter, the new leases are renewable for an additional forty years.\textsuperscript{362} For residential property, the annual

\textsuperscript{355} H.R. Rep. No. 832, \textit{supra} note 336, at 4-5; \textit{see also} Gruson, \textit{supra} note 138, at B-1. By the 1990s, the City of Salamanca and the other small towns affected by the leases were economically depressed. Several factors combined to make this area particularly hard hit, including the decline of the railroads, the major interstate bypassing the City, and the recession. H.R. Rep. No. 832, \textit{supra} note 336, at 5. Moreover, many of the City’s inhabitants were elderly and living on fixed incomes. \textit{Id}. People who were accustomed to paying only a nominal fee for their land were suddenly faced with substantial increases in their annual rent that many could not afford. \textit{Id}.


\textsuperscript{357} \textit{See Fluent}, 928 F.2d at 544 (discussing negotiation efforts and final agreement).


\textsuperscript{360} \textit{See Seneca Agreement § I(A), \textit{reprinted in} H.R. Rep. No. 832, \textit{supra} note 336, at 13.}


rent is eight percent of the fair market value of the land without improvements. The rent is ten percent of the fair market value. The City is responsible for collecting the annual rents and paying the aggregate amount to the Tribe. Salamanca also agreed to pay to the City an amount to the Tribe. SalaInanca also agreed to pay a miniInUIn of $800,000 per year until the aggregate annual rent exceeds $800,000. Thereaf­ ter, the annual aggregate rent will be the amount under the eight percent/ten percent formula. The agreement also provides for periodic reappraisals of the land and establishes a dispute resolution mechanism. As part of the settlement, the Seneca Nation relinquished any claims to rents before February 20, 1991.

In addition, the Seneca Nation received $60 million as compensation for its losses under the previous lease arrangements. The federal government contributed $35 million, and New York State contributed $25 million. Forty-six million dollars of these funds

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364. Id.
365. Id. § II(B)(6), reprinted in H.R. Rep. No. 832, supra note 336, at 15-16. As long as the City pays the aggregate annual rent due, the Seneca Nation may not seek redress against an individual leaseholder for failure to pay his or her rent to the City. The agreement gives the City the exclusive right to go after a delinquent lessee. Id. § IV(B), reprinted in H.R. Rep. No. 832, supra note 336, at 18.
366. Id. § II(B)(5), reprinted in H.R. Rep. No. 832, supra note 336, at 15. The agreement provides that the annual rent from the City will be reduced proportionately for any leases that are not renewed. Id. § II(B)(7), reprinted in H.R. Rep. No. 832, supra note 336, at 16.
367. The average annual rent for a household in 1993 was approximately $150. See Salamanca, Senecas Agree to Form Joint Depository, BUFFALO NEWS, June 24, 1993.
369. Document 3 of the Agreement establishes the Seneca Nation-City of Salamanca Joint Leasing Commission. Seneca Agreement § IV & doc. 3(A), reprinted in H.R. Rep. No. 832, supra note 336, at 17, 23. The Seneca Nation and the City each appoint two members of the Commission. These four select the fifth member. Id., doc. 3(B), reprinted in H.R. Rep. No. 832, supra note 336, at 23-24. The Joint Commission determines the annual rents and notifies the City. Id. § IV(A) & doc. 3(D), reprinted in H.R. Rep. No. 832, supra note 336, at 17, 24-25. The agreement provides initially for good faith negotiations to resolve disputes over lease terms and administration. The Joint Commission may mediate disputes if it provides for mediation in its procedural rules. If a dispute is not resolved, the agreement calls for binding arbitration, reviewable by the United States District Court for the Western District of New York. Id. § IV(B) & doc. 3(E), (F), reprinted in H.R. Rep. No. 832, supra note 336, at 17, 25-28. The agreement also gives the Council of the Seneca Nation power to investigate whether the City and the leas by the United States District Court for the Western District of New York. Id. § IV(B) & doc. 3(E), (F), reprinted in H.R. Rep. No. 832, supra note 336, at 17, 25-28. The agreement also gives the Council of the Seneca Nation power to investigate whether the City and the lessees are complying with the lease terms and leasing provisions of the agreement. Id. § III, reprinted in H.R. Rep. No. 832, supra note 336, at 16.
is unrestricted. The remaining $14 million must be used for economic and community development.

One of the more innovative settlement provisions establishes a ten-year, multi-million-dollar escrow account. The City receives two-thirds of the income annually for economic and community development within Salamanca. One-third of the annual income goes to the Joint Venture Commission on Economic Development which is made up of representatives from both the City and the Seneca Nation. After ten annual payments are made, the Tribe receives the principal. None of the settlement funds or income generated from them is subject to tax, levy or forfeiture.

The Settlement Act also provides that the Tribe may use settlement money to buy additional land. Land purchased within the Senecas' aboriginal territory or near a former reservation will have restricted status. Land purchased near existing reservations may be included in and expand the Tribe's reservations. At the time Congress passed the Settlement Act, the Tribe planned to invest most of the settlement funds and use the income for land acquisition, elder care, education and youth programs, economic development, job creation, environmental programs and substance abuse programs. The Tribe also anticipated giving each member a small cash payment not to exceed $2000.

The Seneca-Salamanca settlement left several important issues unresolved. Neither the agreement nor the federal act specifies

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374. 25 U.S.C. § 1774d(b)(2)(B)(ii); Seneca Agreement § V(D), reprinted in H.R. Rep. No. 832, supra note 336, at 19. The federal government contributed five million dollars for economic and community development. Three million dollars was placed in the escrow account. 25 U.S.C. § 1774d(b)(2)(B)(ii). The remaining two million dollars in restricted federal funds was paid into an interest bearing account for the Tribe. Both the income and principal can be used for the Tribe's economic and community development. Id. § 1774d(b)(2)(B)(i). New York State's share of the economic and development funds is nine million dollars. 25 U.S.C. § 1774d(c).
376. 25 U.S.C. § 1774f(a) (Supp. V 1993). The settlement also does not affect the Tribe's or its members' eligibility for federal programs. Id. § 1774f(b).
377. Id. § 1774f(c).
378. Id. The settlement agreement also includes provision for the City to supply certain tribal and tribal members' property with electric, water and sewer services. Seneca Agreement §§ V(A), (B), reprinted in H.R. Rep. No. 832, supra note 336, at 18.
380. Id. at 31.
who owns the improvements on leased land. Moreover, neither deals with what will happen after the second, forty-year lease term ends.

c. Aftermath

The settlement did not resolve the dispute between the Seneca Nation and the Salamanca residents. A vocal group of lessees refused to sign the new leases. They formed the Salamanca Coalition of United Taxpayers, Inc. (SCOUT)\(^{381}\) and filed suit in federal court challenging the constitutionality of the Seneca Nation Settlement Act of 1990. They also sought a declaration that the negotiated agreement was void and an order compelling the Seneca Nation to renew their leases for 99 years.\(^{382}\) The suit was dismissed. Affirming the district court's decision, the Second Circuit held that the Seneca Nation had sovereign immunity from suit and was an indispensable party to the claims against the non-Indian defendants.\(^{383}\) In the fall 1991 elections, the residents of Salamanca replaced the city council that had approved the agreement with opponents of the agreement.\(^{384}\) The new council petitioned Congress to reopen the settlement.\(^{385}\) In January 1992, they unsuccessfully tried to stop payment on the City's annual rent check.\(^{386}\) In April 1992, the council declared the Seneca-Salamanca Lease Agreement void. They then unanimously voted to override the mayor's veto of their action.\(^{387}\) At least one resident moved his house off the reservation, and a number of homeowners threatened

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\(^{381}\) See Heuck, supra note 207, at A1.


\(^{383}\) Id.


\(^{386}\) See Andrew Maykuth, A Lease’s Uncertain Legacy: A New York Town’s Residents Have Found That Their Homes May Belong to the Seneca Indians, PHILA. INQUIRER, Apr. 5, 1992, at A1. Judicial action forced the City to pay the annual rent for two years. The City paid an additional $119,000 in late fees and $31,000 in attorney’s fees defending the council’s actions. See Donna Snyder, Salamanca Agrees to Pay Seneca Lease; $746,217 Payment Is Due on Feb. 20, BUFFALO NEWS, Feb. 11, 1993 (Local Section) [hereinafter Payment Article]; Donna Snyder, Salamanca Republicans Share Vision; GOP Candidates Focus on Positive Future for City, BUFFALO NEWS, Sept. 10, 1993 (Local Section).

\(^{387}\) Treadwell, supra note 138, at A1.
to dynamite their houses.388

In response, the Tribe again threatened to evict those who refused to sign new leases and confiscate any buildings on the land.389 The Senecas also refused to discuss a joint depository for the escrow account so the City could not receive its share of the economic and community development funds.390 Banks refused to offer mortgages, and insurance companies refused to write title insurance.391 The state subsequently exacerbated the situation by trying to tax gasoline and cigarette sales on the reservation.392

The residents’ negative reaction to the settlement was no doubt fueled in large part by both SCOUT’s and the press’ scare tactics. Rumors spread that tribal members were riding around the City selecting homes to confiscate, and SCOUT leaders warned that local residents had no way to protect their property interests because the Senecas were immune from suit.393 Such tactics exacerbated existing mistrust, antagonism and racism on both sides.394 Although most inhabitants of Salamanca generally conceded that the old rents were unfair, the increased annual payments, on top of existing taxes, also caused some hardship to those living on fixed incomes, especially during hard economic times. The primary cause of the negative reaction, however, appears to be the parties’ failure to resolve two of the lessees’ major concerns in the settlement agreement: Who owns the improvements on the land395 and what will happen after the second, forty-year lease term expires.396

Nevertheless, as of this writing, tensions have died down, and the settlement finally appears to be working. Only about four per-

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390. Stumbling Block Seen on ’93 Lease Payment, BUFFALO NEWS, Jan. 14, 1993 (Local Section).
393. See Maykuth, supra note 386, at A1.
394. See id. (quoting U.S. Rep. Amory Houghton who stated: “There’s a tremendous undertow of racial animosity underlying all of this.”); see also Heuck, supra note 207, at A1.
395. See Zremski, supra note 384, at A1 (“In the end, the two sides compromised by leaving the home ownership issue unresolved—and didn’t stress that fact when explaining the deal to the city residents.”).
percent of those affected did not sign new leases.\textsuperscript{397} The real estate market is again functioning,\textsuperscript{398} an escrow account has been established, and the annual income is being distributed.\textsuperscript{399} The City is finally paying the annual aggregate rent to the Tribe.\textsuperscript{400} New City officials, who want to work with the Seneca Nation, have been elected. The State has also helped subsidize the City for revenue lost because of the increase in tax-exempt property.\textsuperscript{401} Moreover, the money that the settlement generates for both the Tribe and the City should provide much needed economic stimulus to the area.\textsuperscript{402}

Whether history will repeat itself when the current leases expire in eighty years remains to be seen. The settlement provides the Seneca Nation with a substantial and steady source of income, which should induce the Tribe to offer leases in the future. Rents are reasonably set to vary with the fair market value of the land, and the settlement agreement provides an impartial dispute resolution procedure. If the current lease agreement works over time, it may prevent similar hostilities in the future by providing a model for future lease agreements.\textsuperscript{403}


\textsuperscript{398} Donna Snyder, \textit{Mortgages Offered on Allegany Reservation; Cattaraugus Bank Says Program Includes Residential, Commercial Loans}, \textit{BUFFALO NEWS}, Feb. 24, 1993 (Local Section); Donna Snyder, \textit{Salamanca Gets $150,000 Grant from State; Money Will Ease Revenue Crunch Linked to Indian Tax Exemptions}, \textit{BUFFALO NEWS}, Sept. 22, 1993 (Local Section) [hereinafter \textit{State Grant Article}].

\textsuperscript{399} \textit{Salamanca, Senecas Agree to Form Joint Depository}, \textit{BUFFALO NEWS}, June 24, 1993 (Local Section).

\textsuperscript{400} \textit{Payment Article, supra} note 386.

\textsuperscript{401} \textit{State Grant Article, supra} note 398.

\textsuperscript{402} Donna Snyder, \textit{Senecas Get Checks to Make Up for Rent Inequity Infusion of $2,000 Tax Free Per Capita Gives Impetus to Salamanca’s Economy}, \textit{BUFFALO NEWS}, June 14, 1992, at C5. The Seneca Nation has used some of the settlement funds to build two health centers and a community center run by the Tribe’s Department of Aging. \textit{See} Donna Snyder, \textit{Senecas Ready New Health Centers Facility on Allegany Reservation; Should Open in About Two Weeks}, \textit{BUFFALO NEWS}, Oct. 1, 1993. The Tribe has also purchased additional land. \textit{See State Grant Article, supra} note 398.

\textsuperscript{403} The problem of who owns the improvements on the land remains, however. \textit{See} Zremski, \textit{supra} note 384, at A1. Even if the parties agree to leave this issue unanswered, they will still have to decide whether the rents should be based on the fair market value of the land with or without the improvements. \textit{Id.} In the current agreement the parties decided to base the rents on the value of the land without any buildings because the City could not afford the alternative. \textit{Id.} (quoting Sen. Daniel K. Inouye, Chair of the Senate Select Committee on Indian Affairs, who stated: “In effect, the Seneca Nation agreed to defer its claim to ownership of the improvements during the term of the [lease].”).
E. The State's Role in Settlement Negotiations

The state's participation is usually crucial in reaching a negotiated settlement in disputes over Native land claims. The federal government tends to view tribal land claims as local matters. Accordingly, Congress will not ratify a land claim settlement agreement without the state's approval. Moreover, the federal government will generally avoid direct involvement in the settlement negotiations until the parties have essentially reached an agreement.

Although the federal government will usually contribute a substantial share of the settlement funds, it will do so only if the state and local parties contribute their "fair share." In most cases that share is approximately fifty percent. Depending on the size and
location of the claim area, some recent settlements have involved millions of dollars in both land and money. Local communities and private residents do not normally have sufficient resources to fund such settlements. Therefore, the state's contribution in land and money is necessary to provide a viable offer. Unlike local communities, the state can spread the cost throughout the entire state. Moreover, where the state's illegal acts originally caused the tribe to lose its land, fairness dictates that the state should bear at least some of the costs rather than leaving the local communities and residents "holding the bag."

The state's active participation in the negotiations may be important in other ways. Large claims often include numerous towns, cities and counties, as well as individually named private parties. They also arouse local animosity and intransigence. Getting all the various interested parties to agree on a settlement is extremely difficult. The state's leadership and coercive powers can help induce the local parties to bargain in good faith and reach a compromise. Moreover, ignorance, insensitivity and lack of respect for the Native claimants and the seriousness of their claims can also thwart the negotiating process. The state can thus serve an important role in educating local communities about the Native communities and insuring that the appropriate rituals and respect are observed. Finally, the state has resources and expertise through its various agencies that local communities lack. As in the Puyallup negotiations, these resources and expertise can be tapped for assessing the Native and local communities' needs and fashioning effective settlement programs.

V. The Eleventh Amendment

Federal litigation has been a major impetus in pressuring the


409. See Starna, supra note 189, at 176 (discussing problems and solutions in negotiations process).

410. See id.

411. For an explanation of the state and local agencies' assistance in fashioning the Puyallup settlement, see supra notes 318-23 and accompanying text.
states, local interests and the federal government to negotiate tribal land claims. These suits have frequently named states and state officials as defendants. Before 1991, the lower federal courts split over whether the states were immune from tribal suits in federal court under the Eleventh Amendment to the Constitution.\textsuperscript{412} Some of the jurisdictions that found the states amenable to suit held that tribal suits against the states fell outside the scope of the Eleventh Amendment.\textsuperscript{413} Other courts reasoned that Indian tribes suing on their own behalf enjoyed the same authority to sue the states as the federal government would have, were it suing on the tribes' behalf.\textsuperscript{414} Still other jurisdictions concluded that Congress had abrogated the states' sovereign immunity when it enacted the Indian jurisdiction statute, 28 U.S.C. § 1362.\textsuperscript{415} In 1991, the Supreme Court ruled that the Eleventh Amendment bars suits by Indian tribes against unconsenting states in federal court.\textsuperscript{416} The states' Eleventh Amendment immunity from tribal suits will likely have a significant impact on both future Native land claim litigation and settlement negotiations.\textsuperscript{417}

A. Eleventh Amendment Protection

The Eleventh Amendment limits the federal courts' jurisdic-


\textsuperscript{413} Hoffman, 896 F.2d at 1162-65 (finding that states consented in "plan of the convention" to federal jurisdiction over Indian affairs, and Eleventh Amendment did not revoke consent).

\textsuperscript{414} See Oneida Indian Nation, 691 F.2d at 1080 (concluding that when Congress enacted 28 U.S.C. § 1362, it intended "to provide Indian tribes with a capacity to sue that is as broad in some respects as that of the United States").

\textsuperscript{415} Id. at 1079-80 (holding that 28 U.S.C. § 1362 abrogated the states' Eleventh Amendment immunity from tribal suits); Lac Courte Oreilles Band, 595 F. Supp. at 1080-81 (same); Charrier v. Bell, 547 F. Supp. 580, 585 (M.D. La. 1982) (same); Confederated Tribes of the Colville Indian Reservation, 446 F. Supp. 1339, 1350 (E.D. Wash. 1978) (same), rev'd in part on other grounds, 447 U.S. 134 (1980).


\textsuperscript{417} For a discussion of the future impact of the states' Eleventh Amendment immunity on tribal land claims, see infra notes 538-90 and accompanying text.
tion over the states.\textsuperscript{418} It provides:

The Judicial power of the United States shall not be con­
structured to extend to any suit in law or equity, commenced
or prosecuted against one of the United States by Citizens
of another State, or by Citizens or Subjects of any Foreign
State.\textsuperscript{419}

Despite its seemingly simple wording, the Eleventh Amendment has
been the source of continued debate.\textsuperscript{420} The discussion focuses on
the sources and extent of the states' immunity from suit and the
proper interpretation of the Amendment, its scope and its
application.\textsuperscript{421}

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(Eleventh Amendment affirms "that the fundamental principle of sovereign immu­
nity limits the grant of judicial authority in Art. III.").
\textsuperscript{419} U.S. CONST. amend. XI. The states' sovereign immunity is based on the
premise that the sovereign cannot be sued without its consent. Hans v. Louisiana,
134 U.S. 1, 16-17 (1890).
\textsuperscript{420} See, e.g., Welch v. Texas Dep't of Highways \& Pub. Transp., 483 U.S. 468,
496-521 (1987) (Brennan, J., dissenting) (arguing that Eleventh Amendment only
applies to diversity actions); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 252-
302 (1985) (Brennan, J., dissenting) (same); Martha Field, \textit{The Eleventh Amendment
and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the
States}, 126 U. PA. L. REV. 1203, 1261-78 (1978) (arguing that Eleventh Amendment rein­
stated common law immunity); William A. Fletcher, \textit{The Diversity Explanation of the
that Eleventh Amendment limits diversity jurisdiction against the states); Vicki C. Jack­
son, \textit{The Supreme Court, the Eleventh Amendment, and State Sovereign
Immunity}, 98 YALE L.J. 1, 75-84 (1988) (arguing that Eleventh Amendment reinstated common law
immunity); Lawrence C. Marshall, \textit{Fighting the Words of the Eleventh Amendment}, 102
HARV. L. REV. 1342 (1989) (suggesting that Eleventh Amendment means what it
says); William P. Marshall, \textit{The Diversity Theory of the Eleventh Amendment: A Critical
Amendment); see also Erwin Chemerinsky, \textit{Congress, the Supreme Court, and the Elev­
enth Amendment: A Comment on the Decisions During the 1988-89 Term}, 39 DEPAUL L.
REV. 321, 341-43 (1990) (arguing that Eleventh Amendment analysis should focus
on underlying values of Amendment instead of framers' intent); Larry G. Simon,
\textit{The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified},
73 CAL. L. REV. 1482 (1985) (arguing against an originalist interpretation of the
Constitution).

Justice Scalia has also described the Supreme Court's Eleventh Amendment
jurisprudence as "muddled." Pennsylvania v. Union Gas Co., 491 U.S. 1, 44-45
(1989) (Scalia, J., concurring in part and dissenting in part). Perhaps the only
sure thing that can be said about the Eleventh Amendment is that hasty amend­
ments to the Constitution make "bad law." Discussion of the controversy sur­
rounding the Eleventh Amendment is beyond the scope of this Article except as it
may relate to whether Indian tribes can sue the states and whether the federal
government has the power to abrogate the states' Eleventh Amendment immunity
in Indian land disputes.

\textsuperscript{421} A majority of the Supreme Court has viewed the Eleventh Amendment
as a constitutionally-based limitation on the federal courts' subject matter jurisdic­
tion. \textit{See} Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991); Pen-
The Eleventh Amendment was adopted in response to *Chisholm v. Georgia*, 422 decided in 1793. In *Chisholm*, the Supreme Court held that Article III of the Constitution authorized suits in federal court against a state, without its consent, by citizens of another state. 423 Fearing suits to collect unpaid war debts and to recover property seized during the Revolutionary War, the states quickly introduced and adopted the Eleventh Amendment. 424

The Supreme Court has subsequently expanded the scope of

_nhurst_, 465 U.S. at 98. Writing for the majority in _Blatchford_, Justice Scalia explained:

Despite the narrowness of its terms, since _Hans v. Louisiana_, 134 U.S. 1 (1890), we have understood the Eleventh Amendment to stand not so much for what it says but for the presupposition of our constitutional structure which it confirms; that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty . . . and that a state will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the “plan of the convention.” _Blatchford_, 501 U.S. at 779 (citations omitted).

Recent changes in the Supreme Court do not suggest that the Court will change its basic view of the Eleventh Amendment in the foreseeable future. In _Welch_, the justices were divided over whether to overrule _Hans v. Louisiana_ and adopt a narrower interpretation of the Eleventh Amendment. _Welch_, 483 U.S. at 468. Justice Scalia declined to decide the issue in _Welch_ because the parties had not sufficiently briefed the issue. _Id._ at 495-96 (Scalia, J., concurring in part and in judgment). The Court has subsequently refused to overrule _Hans_. In _Union Gas_, five justices—Rehnquist, White, O'Conner, Kennedy, and Scalia—reaffirmed the validity of _Hans_. _Union Gas_, 491 U.S. at 34-35 (Scalia, J., concurring in part and dissenting in part); _id._ at 57 n.8 (White, J., concurring in part and dissenting in part). Since then Justices Brennan, Marshall and Blackmun, three of the four justices who believed that the Eleventh Amendment only applies to diversity cases, have left the Court.

422. 2 U.S. (2 Dall.) 419 (1793). In *Chisholm*, a South Carolina citizen sued the State of Georgia to recover on a debt incurred during the Revolutionary War. Robert Farquhar had supplied materials to the State of Georgia, and Georgia subsequently refused to pay for them. Following Farquhar's death, Alexander Chisholm, the executor of Farquhar's estate and a citizen of South Carolina, sued Georgia to recover the money owed to the estate. He asserted jurisdiction under the Judiciary Act of 1789 which created original jurisdiction for suits against a state by citizens of other states. The issue before the Supreme Court was whether Article III of the Constitution authorized suits in federal court against an unconsenting state by a citizen of another state. Four of the five Supreme Court justices held that it did. Justice Iredell was the lone dissenter. Georgia's reaction to *Chisholm* was to pass a law declaring that anyone attempting to enforce the Supreme Court's decision would be guilty of a felony and hung without benefit of clergy. Clavin R. Massey, _State Sovereignty and the Tenth and Eleventh Amendments_, 56 U. CHI. L. REV. 61, 98-111 (1989) (discussing factual background and justices' opinions in *Chisholm*).

423. _Chisholm_, 2 U.S. (2 Dall.) at 419.

424. Both houses of Congress approved the Eleventh Amendment within three weeks of the *Chisholm* decision. ERWIN CHEMERINSKY, _FEDERAL JURISDICTION_ 374 (2d ed. 1994). The necessary number of states ratified it within a year. _Id._ However, the President did not formally declare the Eleventh Amendment officially ratified until 1798, three years later. _Id._
the Eleventh Amendment far beyond its literal language. A state may not be sued by a citizen of another state,\(^{425}\) a citizen or subject of a foreign country,\(^{426}\) the state’s own citizens,\(^{427}\) a foreign country,\(^{428}\) a corporation chartered by Congress\(^ {429}\) or an Indian tribe.\(^ {430}\) The bar applies to federal question,\(^ {431}\) diversity,\(^ {432}\) and admiralty actions.\(^ {433}\)

**B. Exceptions to Eleventh Amendment Immunity**

1. **Consent\(^ {434}\)**

The Eleventh Amendment does not preclude all suits against a state, however. The federal government may sue the states,\(^ {435}\) and

425. U.S. Const. amend. XI.
426. Id.
427. Hans v. Louisiana, 134 U.S. 1, 16 (1890).
432. U.S. Const. amend. XI.
433. Florida Dep’t of State v. Treasure Salvors, Inc., 458 U.S. 670, 700 (1982); Ex parte New York No. 2, 256 U.S. 503, 511 (1921). But see Welch, 483 U.S. at 497-504 (Brennan, J., dissenting) (arguing that Eleventh Amendment only applies to cases in law and equity, not admiralty).
434. In addition to the exceptions discussed in this section, the Supreme Court recognized constructive waiver in *Parden v. Terminal Railway of Ala.*, 377 U.S. 184 (1964), overruled in part by Welch v. Texas Dep’t of Highways & Pub. Transp., 483 U.S. 468 (1987). A majority of the Court held that Congress could condition the state’s operation of a railroad in interstate commerce on waiving its sovereign immunity from suit in federal court. Id. at 195-96. By later operating a railroad in interstate commerce, the Court found that Alabama had consented to suit under the Federal Employees Liability Act, 45 U.S.C. §§ 51-60 (Supp. IV 1992) (FELA). *Parden*, 377 U.S. at 190-92. The Supreme Court subsequently overruled *Parden* to the extent that *Parden* recognized constructive consent without an unmistakably clear expression of Congress’ intent to override the states’ sovereign immunity in the statute. Welch, 483 U.S. at 478. This requirement that the statutory language clearly state Congress’ intent to override the states’ Eleventh Amendment immunity as a condition of participating in a federal program essentially merges constructive consent with abrogation. In other words, the state chooses to have its sovereign immunity abrogated by engaging in the activity. Congress’ power to abrogate, coupled with the state’s activity under the statute, become the main focus, rather than the state’s choice. Accordingly, constructive consent is no longer a distinct exception to the Eleventh Amendment. See Chemerinsky, *supra* note 424, at 410 (characterizing constructive waiver as “virtually nonexistent”); John R. Pagan, *Eleventh Amendment Analysis*, 39 Ark. L. Rev. 447, 494-95 (1985-86) (describing implied-waiver doctrine as “legal fiction”); cf. Hilton v. South Carolina Pub. Ry. Comm’n, 112 S. Ct. 560, 564-66 (1991) (holding that FELA created cause of action against state-owned railroad enforceable in state court).
435. See, e.g., United States v. Texas, 143 U.S. 621 (1892) (suit involving boundary dispute between United States and Texas).
a state may sue another state in federal court. The Supreme Court has declared that authority for these suits is "inherent in the Constitutional plan" because they are necessary to preserve the permanence and peace of the Union. A state may also consent to be sued in federal court. However, the state's intention to waive its sovereign immunity must be unmistakably clear. Political subdivisions of the state such as counties, municipalities and local school districts are not considered "arms of the state" for Eleventh Amendment purposes, and each may be sued in federal court.

2. The Ex Parte Young Fiction and Prospective Injunctive Relief

The Supreme Court has also created a legal fiction that allows suits for prospective relief against state officials acting in violation of the Constitution or federal laws. In Ex parte Young, the Court reasoned that a state official who acts unconstitutionally is "stripped of his [or her] official or representative character." Although

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437. See Welch, 483 U.S. at 487 (citing Monaco v. Mississippi, 292 U.S. 313, 328-29 (1934)).
439. Id. at 305-06. The state's waiver of its sovereign immunity must be clearly stated "by the most express language or by such overwhelming implication from the text as [would] leave no room for any other reasonable construction." Id. (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 239-40 (1985)). Moreover, the state does not waive its immunity to suit in federal court by waiving its immunity to suit in its own courts. Id. at 306.
440. See Mount Healthy Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977) (stating that Eleventh Amendment bar does not extend to counties, municipal corporations or other political subdivisions of state). Paradoxically, these political subdivisions are considered sufficient state actors to evoke Fourteenth Amendment liability. Home Tel. & Tel. v. Los Angeles, 227 U.S. 278, 294 (1913); see also Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984) (characterizing this anomaly as "well-recognized irony"). In general, state agencies and departments fall within the state's Eleventh Amendment protection. See, e.g., Florida Dep't of Health and Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147 (1981) (finding no state waiver of Eleventh Amendment immunity in suit against state agency for retroactive Medicaid reimbursements).
441. 209 U.S. 123 (1908).
442. Id. at 159-60. In Ex parte Young, Minnesota passed a law restricting railroad rates. Id. at 127. The railroads and their shareholders challenged the rates as confiscatory in violation of the Fourteenth Amendment. Id. at 130. The federal district court issued a preliminary injunction enjoining Young, the state's attorney general, from enforcing the new rates. Id. at 132. When Young ignored the court's order and sought mandamus against the railroads in state court, the federal court held him in contempt. Id. at 134. Young subsequently petitioned the Supreme Court for a writ of habeas corpus. Id. at 126. He argued that the Eleventh Amendment barred the federal court from issuing an injunction against the state. Id. at 134. The Supreme Court held that the Eleventh Amendment does not
the official's action is enough to trigger Fourteenth Amendment liability, his or her actions fall outside Eleventh Amendment protection.\textsuperscript{443} Plaintiffs cannot recover retroactive monetary relief that would be taken from the state treasury or retrospective equitable relief.\textsuperscript{444} Where such relief is sought, the state is deemed the real party in interest even though an official is named because the relief would operate against the state.\textsuperscript{445} However, plaintiffs can obtain prospective injunctive relief.\textsuperscript{446} Accordingly, the federal court can order a state official to comply with federal law. Prospective relief also includes “ancillary expenses” that are necessary to effectuate


\textsuperscript{445} Pennhurst State Sch. & Hosp., 465 U.S. at 101-02 & n.11 (“The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.” (quoting Hawaii v. Gordon, 373 U.S. 57, 58 (1963))).

\textsuperscript{446} Id. at 102-03 (distinguishing between suits for prospective and retroactive relief); \textit{Ex parte Young}, 209 U.S. at 159-60 (allowing suits against state officers for injunctive relief).
injunctive relief\textsuperscript{447} or to “aid in the court’s jurisdiction.”\textsuperscript{448}

Although the \textit{Ex parte Young} doctrine has generated criticism,\textsuperscript{449} the Supreme Court has deemed it necessary to vindicate important federal rights.\textsuperscript{450} The right to sue state officials for their unconstitutional actions strikes an “uneasy balance” between the Eleventh Amendment goal of protecting the states from suit in federal court and the Fourteenth Amendment goal of subjecting state officials to liability for their unconstitutional acts and assuring the supremacy of federal law.\textsuperscript{451}

\begin{footnotesize}
\footnote{447. See Quern v. Jordan, 440 U.S. 332, 348-49 (1979) (allowing lower court to order that notice be sent to welfare recipients about procedures for seeking “back benefits”); Milliken v. Bradley, 433 U.S. 267, 288-90 (1977) (upholding order that state pay half of cost of remedial education programs, in-service training, and hiring additional counsellors in school desegregation case). Explaining the distinction between retroactive and prospective relief, the Supreme Court has stated: Relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant. . . . On the other hand, relief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury. \textit{Papasan}, 478 U.S. at 278.}


\footnote{449. See, e.g., Kenneth C. Davis, \textit{Suing the Government by Falsely Pretending to Sue an Officer}, 29 U. CHI. L. REV. 435, 437 (1961-62) (criticizing \textit{Ex parte Young}); Massey, \textit{supra} note 422, at 69-72 (stating that \textit{Ex parte Young} and Court’s subsequent limitations of doctrine force courts and litigants to waste “vast amounts of energy in determining whether the state is the real party in interest [and] whether the relief sought is permissible under \textit{Edelman}”). \textit{But see} John V. Orth, \textit{The Judicial Power of the United States: The Eleventh Amendment in American History} 133-34 (1987) (arguing that state official is proper defendant); Charles A. Wright, \textit{The Law of Federal Courts} 312 (5th ed. 1983) (“[T]he doctrine of \textit{Ex parte Young} seems indispensable to . . . establishment of constitutional government and . . . rule of law.”).}

\footnote{450. Green v. Mansour, 474 U.S. 64, 68 (1985). Writing for the majority in \textit{Green}, Justice Rehnquist stated: Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in \textit{Ex parte Young} gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law . . . . But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment. \textit{Id.}}

\footnote{451. See Lea Brilmayer, \textit{An Introduction to Jurisdiction in the American Federal System} 134 (1986) (emphasizing that \textit{Ex Parte Young} is a necessary “accommodation” of conflicting goals of Eleventh and Fourteenth Amendments, protecting states from suits in federal court while ensuring supremacy of federal law); \textit{see also} Chemerinsky, \textit{supra} note 420, at 342-43 (arguing that Eleventh Amendment
Ex parte Young does not extend to state officials who violate state law, however. In Pennhurst State School & Hospital v. Halderman, the Supreme Court reasoned that ordering state officials to comply with state law does not implicate the supremacy of federal law and unduly interferes with the states' sovereignty. As a result, federal courts cannot hear supplemental state claims against state officials.

3. Abrogation Under the Fourteenth Amendment

Congress can also override the states' immunity from suit in federal court under the Fourteenth Amendment to the Constitution. In Fitzpatrick v. Bitzer, the Supreme Court recognized that Congress can abrogate the states' Eleventh Amendment immunity pursuant to its enforcement powers under section 5 of the Fourteenth Amendment. The Court reasoned that the Fourteenth Amendment was specifically intended to limit the states' powers. By ratifying the Amendment, the states sacrificed some of their powers to give Congress plenary power to enforce the Fourteenth Amendment. The states thus relinquished their sovereign immunity protected by the Eleventh Amendment for the limited purpose of expanding Congress' power where necessary to effectuate the purposes of the Fourteenth Amendment. However, Congress' intent to abrogate the states' Eleventh Amendment immunity must be "unmistakably clear" in the text of the statute.

interpretation should focus on underlying policies of Amendment and not framers' intent).

453. Id. at 106.
457. Id. at 456. Section 5 provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.
459. Id.
460. Id. at 456.
4. Abrogation Under Article I

Whether Congress can similarly abrogate the states' sovereign immunity under its Article I powers remained unanswered for many years.\(^{462}\) The Supreme Court finally addressed abrogation under the Commerce Clause\(^ {463}\) in *Pennsylvania v. Union Gas Co.*\(^ {464}\) The Commerce Clause gives Congress the power to regulate commerce among the states, with Indian tribes and with foreign nations.\(^ {465}\) Although *Union Gas Co.* can be read expansively to allow abrogation of the states' Eleventh Amendment immunity under the entire Commerce Clause, some federal courts have limited the Supreme Court's decision to the Interstate Commerce Clause.\(^ {466}\) The lower courts are currently divided over whether Congress has similar ab-

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Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."). Justice Scalia joined the plurality's opinion with the understanding that the statutory text could clearly subject the states to suit without expressly referring to the Eleventh Amendment or the state's sovereign immunity. *Id.* at 233. Professors Eskridge and Frickey have accused the Court of adopting a "super strong" clear statement rule. William N. Eskridge Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules As Constitutional Lawmaking,* 45 VAND. L. REV. 593, 597-98 (1992) (criticizing Supreme Court's adoption of "super strong" clear statement rules); see also Chemerinsky, *supra* note 420, at 334-35 (arguing that neither constitutional limit on federal jurisdiction nor diversity theories of Eleventh Amendment supports clear statement rule); William P. Marshall, *The Eleventh Amendment, Process Federalism and the Clear Statement Rule,* 39 DEPAUL L. REV. 345, 355-55 (1989-90) (arguing that clear statement rule allows Court to frustrate congressional intent).

\(^{462}\) In *Parden,* the Supreme Court held that the state had consented to suit under FELA when it decided to operate a railroad in interstate commerce. *Parden v. Terminal Ry. of Alabama,* 377 U.S. 184 (1964), *overruled in part* by *Welsh v. Texas Dep't of Highways & Pub. Transp.,* 483 U.S. 468 (1987). The Court assumed that Congress had the authority under its commerce powers to condition the right to operate a railroad in interstate commerce upon the state's consent to suit in federal court. *Id.* at 192; *see also* *Welsh,* 483 U.S. at 475-76 & n.5 (assuming Congress had power to abrogate state's Eleventh Amendment immunity under Article I without deciding issue); *Oneida II,* 470 U.S. 226, 252 (1985) (assuming hypothetically that Congress might be able to abrogate states' immunity from suits by Indian tribes but not deciding issue).

\(^{463}\) U.S. CONST. art. I, § 8.

\(^{464}\) 491 U.S. 1 (1989) (holding that states can be held liable for damages in federal court under CERCLA as amended by SARA).

\(^{465}\) U.S. CONST. art. I, § 8, cl. 3 (providing that "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

\(^{466}\) *See* Seminole Tribe v. Florida, 11 F.3d 1016, 1026-28 (11th Cir. 1994) (holding that Congress had no power under Indian Commerce Clause to authorize suits against unconsenting states in IGRA); Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F. Supp. 1484, 1489-90 (W.D. Mich. 1992) (holding that Congress had no power under the Indian Commerce Clause to abrogate the states' Eleventh Amendment immunity in IGRA), *appeal dismissed,* 5 F.3d 147 (6th Cir. 1993).
rogation powers under the Indian Commerce Clause.467


In Union Gas Co., the Supreme Court was asked whether the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),468 as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA),469 made the states liable for monetary damages in federal court.470 The case presented two issues: (1) whether Congress had clearly expressed its intent to abrogate the states' immunity in the statutory text and (2) whether Congress had the authority to abrogate the states' Eleventh Amendment immunity.471 A majority of the Court concluded that CERCLA, as amended by SARA, clearly expressed Congress' intent to hold the states liable for damages in federal court.472 A different set of five justices also concluded that Congress had the power under the Commerce Clause to abrogate the states' Eleventh Amendment immunity from suit.473

Justice Brennan believed that the Eleventh Amendment only applied to diversity cases and was not implicated in federal question suits like Union Gas Co.474 However, he could not put together a majority for overruling Hans v. Louisiana.475 In an interesting illus-

467. For further discussion of Congress' abrogation powers under the Indian Commerce Clause, see infra notes 523-37 and accompanying text.
470. Pennsylvania v. Union Gas Co., 491 U.S. 1, 5 (1989). The United States sued Union Gas Company to recover the cost of cleaning up a coal tar deposit site. Id. at 6. Union Gas filed a third-party complaint against Pennsylvania. Id. It claimed that the state was responsible for part of the clean-up costs because the state had exposed the coal tar deposit while excavating a creek as part of a flood control project. Id. Pennsylvania asserted that the Eleventh Amendment barred the third-party action. Id.
471. Id. at 5.
472. Id. at 13. Justice Brennan was joined by Justices Marshall, Blackmun, Stevens and Scalia on the first issue. Id. at 7-13, 29-30 (Scalia, J., concurring in part and dissenting in part).
473. Id. at 23, 57. Justice Brennan wrote the plurality opinion, joined on the power issue by Justices Marshall, Blackmun and Stevens. Id. at 13-23; id. at 23-29 (Stevens, J., concurring). In a separate opinion, Justice White concurred with Justice Brennan's conclusion on the power issue. Id. at 57 (White, J., concurring in part and dissenting in part).
475. 134 U.S. 1 (1890). For further discussion of the Court's interpretation of the Eleventh Amendment under Hans and support for overruling this case, see supra note 421.
tration of consensus building—or perhaps more accurately, lack of consensus building—Justice Brennan essentially turned the traditional arguments against abrogation under Article I upside down to conclude that Congress did, in fact, have the authority under the Interstate Commerce Clause to abrogate Eleventh Amendment immunity. Opponents had argued that unlike the Fourteenth Amendment, Article I could not authorize Congress to override the states’ sovereign immunity because the Eleventh Amendment superseded Article I. In other words, the states could not give up power that they did not yet have. Moreover, the Fourteenth Amendment was specifically intended to limit the states’ power, and section 5 of the Amendment expressly gave Congress authority to effectuate the Fourteenth Amendment. In contrast, the Eleventh Amendment lacked an explicit enforcement clause.

Justice Brennan, however, reasoned that if the Eleventh Amendment embodied the principle of sovereign immunity that the states brought to the Constitutional Convention, that power predated Article I. When the states approved Article I, they gave up power to enlarge Congress’ power. Justice Brennan also read the Eleventh Amendment narrowly to conclude that it limited only federal judicial power, not congressional power. He reasoned that even if the Eleventh Amendment created new sovereign immunity, it could not limit the plenary power expressly granted to Congress under Article I without a much clearer expression of that intent than the language of the Eleventh Amendment provides. Finally, Justice Brennan concluded that the states consented to be held liable for monetary damages in federal court, where Congress deemed necessary, when they adopted Article I and gave Congress plenary power to regulate interstate commerce.

476. See Union Gas Co., 491 U.S. at 41-42 (Scalia, J., concurring in part and dissenting in part).
477. See id. at 42.
478. Id. at 17-18.
479. Id. at 19-20.
480. Id. at 18. In reaching this conclusion, Justice Brennan focused on the language of the Eleventh Amendment. He emphasized that the Eleventh Amendment refers to “judicial power” not being “constru[ed]” and does not mention “congressional power.” Id.
481. Id.
482. Id. at 22. Justice Brennan reasoned that Congress might have to subject the states to money damages in some instances to fully effectuate its Commerce Clause policies. Id. at 20.

Justice Stevens wrote a concurring opinion reiterating his belief that the Eleventh Amendment is a constitutional limit on the federal judiciary’s diversity jurisdiction that neither Congress nor the Court may abrogate. Id. at 25-24 (Stevens, J., concurring). However, he concluded that the sovereign immunity that the Court
In a singularly unrevealing concurring opinion, Justice White agreed with the plurality’s conclusion on the power issue. He disagreed, however, with “much of [Justice Brennan’s] reasoning.”\(^{483}\) Justice White gave no explanation for either his conclusion or disagreement.\(^{484}\)

has recognized in other types of actions is court-created based on concerns of comity and federalism. \(^{136}\) at 25-29. Congress may override this judicially-created immunity. \(^{136}\) at 28-29 & n.4.

\(^{483}\) \(^{136}\) at 57 (White, J., concurring in part and dissenting in part). In Part I of his opinion, Justice White disagreed that CERCLA or SARA expressed in “unmistakably clear language” Congress’ intent to abrogate the states’ immunity from suit. \(^{136}\) at 45-56. However, he acquiesced in the majority’s conclusion otherwise and agreed that Congress had the power to abrogate the states’ Eleventh Amendment immunity. \(^{136}\) at 56-57.

\(^{484}\) The following is Justice White’s sole discussion on the power issue in \(^{136}\) Gas Co.:

My view on the statutory issue has not prevailed, however; a majority of the Court has ruled that the statute, as amended, plainly intended to abrogate the immunity of the States from suit in the federal courts. I accept that judgment. This brings me to the question whether Congress has the constitutional power to abrogate the States’ immunity. In that respect, I agree with the conclusion reached by Justice Brennan in Part III of his opinion, that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of his reasoning.

\(^{136}\) at 56-57 (White, J., concurring in part and dissenting in part) (footnote omitted). Justice White’s conclusion on the power issue was not altogether unexpected. It is quite similar to his dissenting opinion in \(^{136}\)en, which also fails to explain his conclusion on the power issue:

I agree that it is within the power of Congress to condition a State’s permit to engage in the interstate transportation business on a waiver of the State’s sovereign immunity from suits arising out of such business. Congress might well determine that allowing regulable conduct such as the operation of a railroad to be undertaken by a body legally immune from liability directly resulting from these operations is so inimical to the purposes of its regulation that the State must be put to the option of either foregoing participation in the conduct or consenting to legal responsibility for injury caused thereby.


Justice White’s failure to explain his conclusion on the power issue in \(^{136}\) has generated considerable frustration and criticism. See Seminole Tribe v. Florida, 11 F.3d 1016, 1026-27 (11th Cir. 1994) (“It is regrettable that Justice White failed to provide any reasoning of his own to support his conclusion that Congress had abrogation power as his vague concurrence renders the continuing validity of \(^{136}\) Gas in doubt.”); Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550, 558-59 (S.D. Ala. 1991) (declining to read \(^{136}\) Gas Co. expansively and stating that “Justice White’s mysterious, laconic concurrence on the abrogation issue makes the plurality opinion something of a ‘four-and-a half’ vote majority”), aff’d sub nom. Seminole Tribe v. Florida, 11 F.3d 1016 (11th Cir. 1994); HART & WECHS­LER, supra note 38, at 129 (Supp. 1992) (“Doesn’t a Justice who casts the deciding vote have some obligation to provide an explanation that is intelligible to the legal
Dissenting on the power issue, Justice Scalia, joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy, argued that Congress did not have authority under Article I to subject uncon­senting states to suits in federal court.\textsuperscript{485} For these Justices, the Eleventh Amendment limits both Congress' powers under Article I and the federal courts' powers under Article III.\textsuperscript{486} Rejecting the plurality's analysis,\textsuperscript{487} Justice Scalia emphasized that \textit{Hans} and its progeny had recognized that the Eleventh Amendment embodies a broad constitutional policy protecting the states' sovereign immunity.\textsuperscript{488} He concluded that the only way to uphold abrogation under the Commerce Clause was to overrule \textit{Hans}, which he, joined by the other dissenting Justices and Justice White, rejected.\textsuperscript{489} Finally, Justice Scalia warned that the Court's decision finding Article I power to abrogate Eleventh Amendment immunity rested on "shaky grounds" and would not endure for long.\textsuperscript{490}

The key to Justice Brennan's analysis on the power issue is his conclusion that the Eleventh Amendment limits the federal judiciary's jurisdiction and not Congress' power.\textsuperscript{491} If he is correct, the focus should turn to the type of constitutional grant that the states

\textsuperscript{485} \textit{Union Gas Co.}, 491 U.S. at 35-42. Chief Justice Rehnquist and Justices O'Connor and Kennedy also agreed with Justice White that CERCLA, as amended by SARA, did not clearly express Congress' intent to hold the states liable for money damages in federal court. \textit{Id.} at 45 (White, J., concurring in part and dissenting in part); \textit{id.} at 57 (O'Connor, J., dissenting).

\textsuperscript{486} \textit{Id.} at 39-40; \textit{see also} Chemerinsky, \textit{supra} note 420, at 340.

\textsuperscript{487} \textit{Union Gas Co.}, 491 U.S. at 35-42.

\textsuperscript{488} \textit{Id.} at 37-38 ("\textit{Hans} was not expressing some narrow objection to the particular federal power by which Louisiana had been haled into court, but was rather enunciating a fundamental principle of federalism, evidenced by the Eleventh Amendment, that the States retained their sovereign prerogative of immunity.").

\textsuperscript{489} \textit{Id.} at 30-35 (Scalia, J., concurring in part and dissenting in part); \textit{id.} at 57 n.8 (White, J., concurring in part and dissenting in part) ("I reiterate my view that . . . \textit{Hans} v. Louisiana, 134 U.S. 1 (1980), should not be overruled.").

\textsuperscript{490} Justice Scalia stated:

It is a particularly unhappy victory, since instead of cleaning up the allegedly muddled Eleventh Amendment jurisprudence produced by \textit{Hans}, the Court leaves that in place, and adds to the clutter the astounding principle that Article III limitations can be overcome by simply exercising Article I powers. It is an unstable victory as well, since that principle is too much at war with itself to endure. We shall either overrule \textit{Hans} in form as well as in fact, or return to its genuine meaning.

\textit{Id.} at 44-45.

\textsuperscript{491} \textit{Id.} at 18; \textit{see also} Lawrence H. Tribe, \textit{Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism}, 89 \textit{Harv. L. Rev.} 682, 693-95 (1975-76) (arguing that Eleventh Amendment limits federal courts and not congressional authority).
gave to Congress in the "plan of convention." The states' overall intent is what matters, not whether they actually considered and agreed to subject themselves to suit in the federal courts. By ratifying Article I, the states gave Congress plenary power to regulate commerce. They, thus, intended to give up all of their powers to Congress for use when Congress deemed necessary. Accordingly, the states retain no powers in this area. To reclaim some of that power would require a clear constitutional amendment. As Justice Brennan emphasized, the limited language of the Eleventh Amendment does not clearly express this intent with respect to Congress' plenary commerce powers.

The current Supreme Court almost certainly has the votes to overrule Union Gas Co. All of the Justices who decided Union Gas Co. apparently disagreed with the plurality's rationale on the power issue, and Justices Brennan, Marshall, White and Blackmun, four of the five votes for Article I abrogation authority, have left the Court. Nevertheless, the current Court may let Union Gas Co. stand, relying instead on the "clear statement rule" to insulate the states from suits in federal court. In fact, the Supreme Court has had ample opportunity to overturn Union Gas Co. or to limit its scope, but the Court has not yet done so.

Moreover, there is good reason to let Union Gas Co. stand if the Court is unwilling to overrule Hans or interpret the Eleventh Amendment as conveying "subconstitutional protections." Congress' right to abrogate the states' Eleventh Amendment immunity under Article I is limited by the "clear statement rule." The two

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492. Of course, if the Eleventh Amendment is in fact a broad limit on congressional authority as well as federal judicial authority, Congress cannot legislatively overrule that constitutional limitation.


495. See George D. Brown, Has the Supreme Court Confessed Error on the Eleventh Amendment? Revisionist Scholarship and State Immunity, 68 N.C. L. REV. 867, 891 (1989-90) (arguing that Supreme Court's abrogation theory constitutes compromise solution which protects state treasuries while permitting federal enforcement of federal substantive norms).
together provide a compromise between the harsh results from the Court's expansive interpretation of *Hans* and the needs of federalism. Federalism envisions the proper balance and respect between the federal and state governments. Writing for the majority in *Younger v. Harris*, Justice Black explained federalism as follows:

What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and to protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Nevertheless, he cautioned that federalism "does not mean blind deference to 'States Rights' any more than it means centralization of control over every important issue in our National Government and its courts." What Justice Black described is a "two-way street" where the states' sovereignty interests are balanced against state compliance with federal law and protection of federal rights.

Congress' power to abrogate the state's sovereign immunity under Article I and the Fourteenth Amendment recognizes that the states must adhere to federal law under the Supremacy Clause. The power to abrogate prevents the states from violating the Constitution and other federal law with impunity. Federalism is not served when the federal government abdicates its constitutional authority to the states.

The "clear statement rule," however, serves as a check on both Congress' and the federal judiciary's powers. The rule ensures that Congress actually thinks about whether it wants to subject the

496. *Id.; see also Blatchford*, 501 U.S. at 786 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989) ("To temper Congress' acknowledged powers of abrogation with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure, we have applied a simple but stringent test: 'Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.' "(citation omitted))). *But see Blatchford*, 501 U.S. at 790 (Blackmun, J., dissenting) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 254, 254 (1985) (Brennan, J., dissenting) ("[S]uch 'special rules of statutory drafting are not justified (nor are they justifiable) as efforts to determine the genuine intent of Congress... [T]he special rules are designed as hurdles to keep the disfavored suits out of the federal courts.' "(citation omitted))).

498. *Id.* at 44.
499. *Id.*
states to liability and requires that Congress express its intent clearly in the text of the statute. Therefore, only Congress, not the courts, makes the decision, after careful consideration, to curtail the states' sovereign immunity for the limited purpose of effectuating important constitutional or other federal policies where necessary.\footnote{501} As long as Congress does not abuse its power to abrogate under Article I, a majority of the Supreme Court may continue to recognize Congress' Article I abrogation authority as limited by the "clear statement rule."\footnote{502} Unfortunately, the federal judiciary can also upset the federalism balance if courts use the "clear statement rule" to subvert congressional intent rather than to enforce it.\footnote{503}

b. \textit{Blatchford v. Native Village of Noatak}

Two years after \textit{Union Gas Co.}, the Supreme Court decided \textit{Blatchford v. Native Village of Noatak}.\footnote{504} A six-to-three majority held that the Eleventh Amendment also bars suits by Indian tribes against the states.\footnote{505} Several Native villages sued Alaska, challenging the State's revenue sharing statute on equal protection

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\footnote{501. See Blatchford v. Native Village of Noatak, 501 U.S. 775, 790-91 (1991) (Blackmun, J., dissenting) ("Because federal intrusion into state authority is the unusual case, and because courts are to use caution in determining when their own jurisdiction has been expanded, this Court has erected the clear-statement rule in order to be certain that abrogation is Congress' plan." (citation omitted)); Eskridge & Frickey, supra note 461, at 597 (explaining that "super strong clear-statement rules . . . are a practical way for the court to focus legislative attention on [constitutional] values"); Tribe, supra note 491, at 695-96 ("[A]lthough it may seem novel to inject separation of powers considerations into the core of a problem involving federal-state division of power, recognition of the peculiar institutional competence of Congress in adjusting federal power relationships makes [the 'clear statement rule'] an appropriate and useful approach to reconciling national power with state litigational immunity.").


503. See Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96 (1989) (holding that § 106(c) of the Bankruptcy Code, 11 U.S.C. § 106(c) (1988), was not unmistakably clear abrogation of states' Eleventh Amendment immunity against suits in federal court for money damages); Dellmuth v. Muth, 491 U.S. 223 (1989) (holding that Education of the Handicapped Act was not unmistakably clear abrogation of states' Eleventh Amendment immunity); Chemerinsky, supra note 420, at 336 (stating that even when statute contains explicit language of congressional intent, "the Court often interprets it as inadequate to authorize suits against state governments"); Marshall, supra note 461, at 354-55 (arguing that clear statement rule allows Supreme Court to frustrate congressional intent).


505. \textit{Id.}
They sought damages equalling the amount of funds that they would have received under the previous revenue sharing plan. The Supreme Court was asked to decide whether the Eleventh Amendment was applicable to suits by Indian tribes. If so, the Court then had to decide whether the Indian jurisdictional statute, 28 U.S.C. § 1362, abrogated the states' Eleventh Amendment immunity or the federal government had delegated to the tribes its power to sue the states. The Supreme Court held that the Eleventh Amendment applies to tribal suits against the states and Congress did not abrogate the states' Eleventh Amendment immunity from

506. Id. at 777-78. In 1980, Alaska passed a revenue sharing statute which gave unincorporated Native village governments $25,000 per year. Id. The state attorney general concluded that the statute violated the equal protection clause of the State's constitution. Id. at 778. The Commissioner of Alaska's Department of Community and Regional Affairs subsequently expanded the revenue sharing program to include all unincorporated communities. Id. As a result, the Native villages received less money than they would have under the original program. Id. In September 1985, the Native Village of Noatak, the Native Village of Akiachak and the Circle Village sued the Commissioner of the Department of Community and Regional Affairs in the United States District Court for the District of Alaska. Id. They claimed that diluting the funds for the Native villages violated federal and state law. Native Village of Noatak v. Hoffman, 896 F.2d 1157, 1159 (9th Cir. 1990), rev'd sub nom. Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991). The Villages sought declaratory and injunctive relief and an order compelling the Commissioner to pay them the money that they would have received under the original program. Id.

The district court dismissed the complaint for lack of subject matter jurisdiction. Id. at 1159-60. The district court's order was filed on December 1, 1987, and is not published. On appeal, the United States Court of Appeals for the Ninth Circuit initially reversed, concluding that the Indian jurisdictional statute, 28 U.S.C. § 1362, abrogated the State's Eleventh Amendment immunity; the plaintiffs were federally recognized Indian tribes within the meaning of § 1362; and their claims arose under federal law. Native Village of Noatak v. Hoffman, 872 F.2d 1384, 1387-90 (9th Cir. 1989), withdrawn by 896 F.2d 1157 (9th Cir. 1990), rev'd sub nom. Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991). Following the Supreme Court's decision in Delmuth, the Ninth Circuit withdrew its decision. Hoffman, 896 F.2d at 1159. In its second opinion, the Ninth Circuit concluded that the states had consented to suit by Indian tribes in the "plan of convention" so the Eleventh Amendment was not applicable. Id. at 1161-65. The Ninth Circuit stated:

The answer is that Indian affairs are sui generis and that in this unique area concerning relations with non-foreign governmental units, the surrender of state sovereignty carried with it a surrender of immunity from suit.

To recapitulate, there is no need for an explicit overriding of state immunity if the state in consenting to the Constitution has consented to being sued. The states did give consent to federal jurisdiction of Indian affairs. The Eleventh Amendment has not revoked the consent of the states, because neither in terms nor purpose does the amendment apply to Indian tribes. No other general immunity protects the state from suit by tribes.

Id. at 1164-65. The Supreme Court subsequently reversed the Ninth Circuit. Blatchford, 501 U.S. 775.

tribal suits in § 1362. 508

Writing for the majority this time, Justice Scalia rejected the Native villages’ argument that the Eleventh Amendment was only applicable to suits by individuals. Relying on Monaco v. Mississippi, 509 the Court held that the Eleventh Amendment extends to both individuals and sovereigns. 510 Justice Scalia also found that the states had not waived their sovereign immunity from tribal suits in the “plan of convention” when they adopted the Constitution. 511 Conceding that Indian tribes are somewhat like the states because they both are domestic sovereigns, 512 Justice Scalia, nevertheless, concluded that no mutual surrender of immunity in the “plan of convention” had occurred. He reasoned that the tribes had not been parties to the Constitutional Convention and had retained their sovereign immunity from suit by the states. Accordingly, he refused to conclude that the states had surrendered their immunity to benefit the tribes. 513

Justice Scalia also rejected the Native Villages’ argument that the federal government had delegated to the tribes its authority to sue on their behalf when Congress enacted § 1362. 514 Expressing skepticism that the federal government could in fact delegate such power, 515 the Court found no indication of any intent to allow the tribes to sue the states in either the text of § 1362 or its purpose. 516

508. Id. at 779-88.
509. 292 U.S. 313 (1934) (holding that Eleventh Amendment bars suits by foreign sovereigns against non-consenting states).
511. Id. at 781-82.
512. Id. at 782.
513. Id.
514. Id. at 783-86.
515. Id. at 785.
516. Id. at 784-86. The Court also limited Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976). Blatchford, 501 U.S. at 784-85 (holding that Tax Injunction Act, 28 U.S.C. § 1341 (1988), did not bar tribes’ access to federal court to obtain injunctive relief from state taxation). In Moe, the Supreme Court stated that by enacting § 1362, Congress intended that “[a] tribe’s access to federal court to litigate a matter arising ‘under the Constitution, laws, or treaties’ would be at least in some respects as broad as that of the United States suing as the tribe’s trustee.” Moe, 425 U.S. at 473. In Blatchford, however, Justice Scalia concluded that Moe had decided only that § 1362 eliminated the application of the Tax Injunction Act, 28 U.S.C. § 1341, to tribal suits. Blatchford, 501 U.S. at 784-85. He distinguished reading § 1362 as withdrawing a congressionally-created jurisdictional limit based on principles of comity from reading § 1362 as eliminating a constitutionally-created bar to the federal courts’ jurisdiction. Id. at 785.

The legislative history of § 1362 reveals that the Indian jurisdictional statute was enacted in response to Yoder v. Assiniboine & Sioux Tribes, 339 F.2d 360 (9th Cir. 1964). See H.R. REP. No. 2940, 89th Cong., 2d Sess. 2-3 (1966), reprinted in 1966 U.S.C.C.A.N. 3145, 3146-47 (stating that purpose was to permit Indian tribes to
Finally, Justice Scalia found no abrogation of the State's Eleventh Amendment immunity because § 1362 did not satisfy the unmistakably clear language requirement for abrogation. He rejected the Villages' assertion that the Court should apply a minimal clarity standard because § 1362 was enacted when Parden v. Terminal Railway of Alabama was in effect. Because Parden was a conditional consent case rather than an abrogation case, it was not applicable. Justice Scalia ignored the statutory construction rule, raised by the dissent, that requires courts to construe ambiguous statutes that are intended to benefit Indian tribes in favor of the tribes. In concluding that the Eleventh Amendment barred the Native Villages' claims for damages, the Court also refused to address whether the Villages could have recovered injunctive relief against the state. Finally, the Court never considered whether

bring civil actions arising under Federal Constitution, laws or treaties without regard to jurisdictional amount in controversy requirement of § 1331); S. Rep. No. 1507, 89th Cong., 2d Sess. 2 (1966) (same). In Yoder, tribal claims were dismissed for lack of subject matter jurisdiction because the tribes failed to demonstrate the necessary amount in controversy that was then required under 28 U.S.C. § 1331 (1988). Yoder, 339 F.2d 560. Congress enacted § 1362 primarily to eliminate the amount in controversy requirement in federal question suits brought by Indian tribes. See H.R. Rep. No. 2040, supra; S. Rep. No. 1507, supra. There is no indication in the legislative history of § 1362 that Congress considered the states' Eleventh Amendment immunity. Id. Similarly, the states' Eleventh Amendment immunity was not raised in Moe or considered by the Supreme Court. See Moe, 425 U.S. at 463. Nevertheless, tension now exists between the Supreme Court's interpretation of § 1362 in Blatchford and its interpretation of § 1362 in Moe.

519. Blatchford, 501 U.S. at 787-88; see also supra note 434.
521. See id. at 795-96 (Blackmun, J., dissenting).
522. Id. at 788 (refusing to address possibility of injunctive relief because Ninth Circuit had not addressed that issue).

Justice Blackmun, joined by Justices Marshall and Stevens, dissented. Id. at 788-96 (Blackmun, J., dissenting). Justice Blackmun reiterated the dissent's belief that the Eleventh Amendment was not implicated in federal question suits. Id. at 789. He then attacked the majority's application of the clear statement rule to § 1362. Id. at 790-96. Justice Blackmun argued that the policies for the clear statement rule as a tool of statutory construction were not applicable to suits by Indian tribes. Id. at 792. He reasoned that the clear statement rule is designed to preserve the proper balance of power between the federal government and the state by allowing the federal government to intrude into the state's authority only when Congress declares such intent in the clearest language. Id. at 790-91. However, the balance of power is weighed against the states and heavily in favor of the federal government when Indian affairs are concerned because Congress has plenary power over Indian matters. Id. at 791-92. Justice Blackmun, thus, concluded that the clear statement rule was not applicable to tribal suits against the states. Id. at 792.

Justice Blackmun further observed that the Court should use traditional rules
Congress would actually have power to abrogate the states’ Eleventh Amendment immunity under the Indian Commerce Clause as opposed to the Interstate Commerce Clause, which was at issue in *Union Gas Co.*

c. Abrogation Under the Indian Commerce Clause 523

A number of lower federal courts have held that Congress does not have authority to abrogate the states’ Eleventh Amendment immunity under the Indian Commerce Clause of Article I. 524 Refusing to read *Union Gas Co.* expansively, in part because of Justice Brennan’s “weak plurality opinion” and subsequent changes in the Court, they have limited the application of *Union Gas Co.* to abrogation under the Interstate Commerce Clause. 525 Although the reasoning is not entirely clear, these courts distinguish between Congress’ powers under the Interstate Commerce Clause and the Indian Commerce Clause based on the different functions of the two clauses. 526 They also rely on the Supreme Court’s holding in of statutory interpretation, noting that Congress’ use of “all suits” in § 1362 was sufficient to include suits by Indian tribes against the state. *Id.* at 792-96. Justice Blackmun also noted that Congress enacted § 1362 to foster tribal self-determination because Congress recognized that, at times, it lacked the resources or will to properly vindicate the tribes’ rights under the government’s trust duty. *Id.* at 794. Citing *Moe*, Justice Blackmun stated that § 1362 was intended to give the tribes the same rights to sue for full vindication of their rights as the federal government would have, and this would necessarily include suits for money damages. *Id.* at 793-94. Finally, Justice Blackmun argued that the Court should interpret § 1362 in the Native Villages’ favor under traditional principles for interpreting ambiguous statutes that are intended to benefit Indian tribes. *Id.* at 795-96.

523. U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power... to regulate Commerce... with the Indian Tribes.”).


526. See, e.g., *Seminole Tribe*, 11 F.3d at 1027; *Ponca Tribe*, 834 F. Supp. at 1345;
Blatchford that there was no mutual surrender of sovereign immunity between the states and Indian tribes "in the plan of the convention."527

Distinguishing between the Interstate Commerce Clause and the Indian Commerce Clause, however, makes little sense. Both are plenary grants of power to Congress which are located in the same clause of Article I.528 More importantly, the Indian Commerce Clause presents a stronger case for abrogation than the Interstate Commerce Clause. The Articles of Confederation contained an Indian affairs clause similar to the Indian Commerce Clause in the Constitution, except that it contained two exceptions.529 The Articles of Confederation gave the confederal government exclusive power over Indians. However, it reserved to the states the right of preemption and limited Congress' authority to nonassimilated Indians.530 Despite this provision, the states continued to engage in In-

Spokane Tribe, 790 F. Supp. at 1060-61. In Seminole Tribe, the Eleventh Circuit states that Congress' plenary powers under the Interstate Commerce Clause allow Congress to "place limits on the states in order to 'maintain [ ] free trade among the States.' " Seminole Tribe, 11 F.3d at 1027 (quoting Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989)). The primary function of the Indian Commerce Clause, however, is "to provide Congress with plenary power to legislate in the field of Indian affairs." Id. The Eleventh Circuit then concludes that the two clauses should be treated differently because they have different underlying purposes. Id. The court, however, never explains why. Id. The Eleventh Circuit even concedes that Congress has power under the Indian Commerce Clause to limit the states but, nevertheless, finds no abrogation power in the Indian Commerce Clause. Id. Like Congress' powers under the Interstate Commerce Clause, however, Congress' authority over Indian affairs would be incomplete without the authority to subject the states to suit where necessary to effectuate its Indian commerce powers. See Union Gas Co. v. Pennsylvania, 491 U.S. 1, 19-20 (1989). In both clauses, the states surrendered their authority to allow Congress to regulate in the area. Just because the primary purposes of the two clauses are different does not mean that Congress' abrogation powers are different. See Cheyenne River Sioux Tribe, 3 F.3d at 280-81; Ponca Tribe of Oklahoma, 37 F.3d at 1431-32; Spokane Tribe of Indians, 28 F.3d at 996-97.

527. See Seminole Tribe of Florida, 11 F.3d at 1022 ("[T]he states cannot be said to have surrendered their sovereign immunity under the 'plan of the convention.' "); Sault Ste. Marie Tribe of Chippewa Indians, 800 F. Supp. at 1489 ("Blatchford holds that states did not waive immunity to suit by Indian tribes.").

528. See U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

529. The Indian Affairs Clause of the Articles of Confederation provided:

"The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated . . . ."

ARTICLES OF CONFED., art. IX, cl. 4.

dian affairs and to take Indian land. This resulted in hostilities, essentially plunging the fledgling nation into a widespread Indian war which it could little afford following the Revolutionary War with Great Britain. The confederal government’s inability to control the states’ interaction with the Indian tribes, particularly the states’ cessions of Indian lands, was a major reason for the need to “form a more perfect union.”

The Indian Commerce Clause was incorporated in the Constitution specifically to exclude the states from Indian affairs and to give Congress plenary power over the tribes.

The Supreme Court has consistently recognized that Congress has exclusive power over Indian affairs and that the states have no jurisdiction without an express grant from Congress. In contrast, the states may regulate, and even burden, interstate commerce as long as they do not “unduly burden” it. Accordingly, one cannot reasonably argue that the states gave Congress less authority when they adopted the Indian Commerce Clause than the Interstate Commerce Clause; the states relinquished all of their power “in the plan of the convention” to give Congress both plenary and exclusive power under the Indian Commerce Clause.

531. See Oneida Indian Nation v. New York, 649 F. Supp. 420, 437 (N.D.N.Y. 1986) (stating that this lack of control “was one of the ‘evils’ that the Constitution ‘entirely altered’ ”), aff’d, 860 F.2d 1145 (2d Cir. 1988), cert. denied, 493 U.S. 871 (1989); id. at 441 (“[T]he central government’s inability to deal effectively with Indian problems in the South lead to Congress’ plenary control over Indian affairs under the Constitution and the Nonintercourse Act.”); Newton, supra note 1, at 200.


534. See Kassel v. Consol. Freightways Corp., 450 U.S. 662, 669 (1981) (“[C]ommerce Clause does not . . . invalidate all state restrictions on commerce . . . . [I]n the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which . . . in some measure affect interstate commerce or even, to some extent, regulate it.” (quoting Southern Pacific Co. v. Arizona, 325 U.S. 761, 767 (1945))); Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (“The crucial inquiry . . . must be directed to determining whether [the challenged statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.”)

535. It is difficult to see how the Supreme Court can ultimately decide that Congress has no abrogation power under the Indian Commerce Clause without at
The Supreme Court had the opportunity to overrule *Union Gas Co.*, or to limit its holding to the Interstate Commerce Clause, in *Blatchford*. However, the Court never discussed whether Congress had authority to abrogate the states' Eleventh Amendment immunity under the Indian Commerce Clause. It only considered whether the Eleventh Amendment applied to suits against the states by Indian tribes and whether Congress had, in fact, abrogated the states' Eleventh Amendment immunity in 28 U.S.C. § 1362. The fact that the Supreme Court did not even raise the power issue suggests that *Union Gas Co.*, or at least its reasoning, was controlling.

VI. THE IMPACT OF THE STATES' ELEVENTH AMENDMENT IMMUNITY ON RESOLVING INDIAN LAND CLAIMS

A. Land Claim Actions Against the State

The immediate consequence of *Blatchford v. Native Village of Noatak* is that Indian tribes may not sue a state unless the state has consented or Congress has abrogated the states' Eleventh Amendment immunity. Consent will not be implied; it must be “unmistakably clear.” For obvious reasons, states will not likely consent to most suits by Native Americans, particularly suits involving tribal land claims. Congress may also abrogate the states' sovereign immunity under the Fourteenth Amendment or the Indian Commerce Clause, least rejecting Justice Brennan's rationale in *Union Gas Co.* that favors Congress' abrogation powers under the Interstate Commerce Clause.


537. *Id.*

538. *Id.*


540. However, the state may choose to intervene in a suit which has substantial impact on the state's interests. For example, the State of Washington intervened in the Puyallups' suit asserting title to land surrounding the State's most important deep water port. Order of Judge John C. Coughenour Granting the State of Washington Intervention, Mar. 24, 1990, Puyallup Tribe v. Union Pac. R.R., No. C84-359TC (W.D. Wash.). The federal government may also choose to intervene on behalf of the tribe to assert a claim against the state. See Order of Judge Neal P.McCurn Granting the United States Intervention, Nov. 30, 1992, Cayuga Indian Nation v. Cuomo, Nos. 80-CV-930, 80-CV-960 (N.D.N.Y.)

mence Clause in Article I.\textsuperscript{542} However, Congress' intent to abrogate the states' Eleventh Amendment immunity must be unmistakably clear on the face of the federal statute or treaty.\textsuperscript{543} Neither 28 U.S.C. § 1331 nor § 1362 constitutes an abrogation.\textsuperscript{544}

The tribes might try to argue that Congress intended to abrogate the states' Eleventh Amendment immunity from suit in the Nonintercourse Act. Both the language and history of the Act indicate that Congress meant the prohibition against alienating Indian land to apply to the states.\textsuperscript{545} However, it is not clear that the tribes even have a cause of action under the Act, let alone the right to sue the states. In \textit{Oneida II}, the Supreme Court refused to decide employment except permitting "preferential treatment . . . given to any individual because he is an Indian living on or near a reservation"). The Supreme Court has held that Title VII abrogates the states' Eleventh Amendment immunity from suit. \textit{Fitzpatrick}, 427 U.S. at 445, 447-48.

\textsuperscript{542} For a discussion of Congress' authority to abrogate the states' sovereign immunity under the Indian Commerce Clause, see supra notes 523-37 and accompanying text.


\textsuperscript{544} \textit{Id.; see also Atascadero State Hosp. v. Scanlon}, 473 U.S. 234, 246 (1985) ("A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.").

\textsuperscript{545} See \textit{Oneida II}, 470 U.S. 226, 253 (1985) (affirming lower court's finding that state treaty made in violation of Nonintertcourse Act was void); \textit{Oneida I}, 414 U.S. 661, 670 (1974) (discussing federal government's exclusive right to extinguish Indian title codified in Nonintercourse Act and stating that "[t]he 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"). The first version of the Nonintercourse Act expressly prohibited the states from alienating Indian land without the federal government's approval. Act of July 22, 1790, ch. 33, § 4, 1 Stat. 138. Section 4 of the 1790 Act provided:

[N]o sale of land made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

\textit{Id.} The current version of the Nonintercourse Act provides:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

whether the Nonintercourse Act creates an implied right of action for Indian tribes.\textsuperscript{546} Instead, the Court held that the Oneida's right to sue arose under a federal common law right of ejectment.\textsuperscript{547}

The Supreme Court's reluctance to address the issue is not surprising. When the Nonintercourse Act was first enacted, Congress probably never considered the Indians' right to sue. The tribes were expected to rely on the federal government to enforce their rights.\textsuperscript{548} In any event, neither the current version of the Nonintercourse Act nor any of its previous versions contains "unmistakably clear language" showing Congress' intent to abrogate the states' Eleventh Amendment immunity.\textsuperscript{549} Similarly, the courts are not likely to find clear language abrogating the states' sovereign immunity in the specific treaties that protect tribal lands.\textsuperscript{550} Although some statutes allow tribes to sue states to enforce certain specific rights,\textsuperscript{551} they do not generally apply to land claims.\textsuperscript{552}

\textsuperscript{546} Oneida II, 470 U.S. at 233 ("We need not reach the . . . question [of implied right of action] as we think the Indians' common-law right to sue is firmly established.").

\textsuperscript{547} Id.

\textsuperscript{548} See, e.g., Treaty at Canandaigua, Nov. 11, 1794, art. VII, 7 Stat. 44, 46 (stating that Six Nations should complain to President of the United States or his appointed superintendent to redress wrongs against them until legislature enacted other means for asserting their rights). For a discussion of the reasons why Indian tribes were expected to rely on the federal government to enforce their rights, see supra notes 43-52 and accompanying text.


\textsuperscript{550} Congress stopped making treaties with Indian tribes in 1871. 25 U.S.C. § 71 (1988) ("No Indian nation or tribe . . . shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . . "). Like the Nonintercourse Act, land treaties were written when Indian capacity to sue was at least uncertain and they were expected to petition the federal government to enforce their property rights. See supra note 43 and accompanying text.


B. Actions Against State Officials to Enforce Property Rights

Whether tribes can sue state officials under *Ex parte Young* to enforce property rights presents an interesting question. The Eleventh Amendment bars suits for retroactive relief against state officers acting in their official capacities.\(^553\) Accordingly, suits to recover the fair market value of lost tribal lands, trespass damages or other monetary damages are prohibited. This type of relief constitutes retroactive monetary relief that would come from the state's treasury, making the state the real party in interest.\(^554\) The Eleventh Amendment would also bar suits to recover lost land or substitute lands.\(^555\) The court would have to adjudicate the state's title to the land in dispute. Again, the state would be the real party in interest. Although awarding land to the claimants would not constitute payment from the state treasury, it would deplete the public domain and constitute both a declaration of, and restitution for, the state's past wrongs.\(^556\)

However, the Eleventh Amendment does not prohibit suits for prospective injunctive relief against state officials.\(^557\) As discussed

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\(^{554}\) See Edelman, 415 U.S. at 668 (“[A retroactive award of monetary relief] is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action.”).

\(^{555}\) See Papasan v. Allain, 478 U.S. 265, 279-81 (1986) (holding that Eleventh Amendment barred plaintiffs' breach of trust claim against state officials where plaintiffs sought declaration that sale of Chickasaw Cession school lands was void, and also sought establishment of perpetual trust or substitution lands); Florida Dep't of State v. Treasure Salvors, Inc., 689 F.2d 1254, 1255-56 (5th Cir.), on remand from 458 U.S. 670 (1982) (holding that state could not be forced to litigate title to property in federal court); see also Florida Dep't of State v. Treasure Salvors, 458 U.S. 670, 702 (1982) (White, J., concurring in judgment and dissenting in part) (stating that *Ex parte Young* was not applicable where state claimed ownership of sunken treasure and action was to determine state's title); cf. Treasure Salvors, 458 U.S. at 699-700 (plurality opinion) (indicating in dicta that state cannot be named as defendant in action to determine property title).

\(^{556}\) See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1983) (quoting Dugan v. Rank, 372 U.S. 609, 620 (1963) (“The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration' . . . .” (emphasis added)(citations omitted))).

\(^{557}\) Id. at 102-03. Although the Supreme Court refused to address whether the tribal plaintiffs in *Blatchford* could recover prospective injunctive relief against state officials, no reason exists to treat tribes differently from other plaintiffs. Ac-
in Part V, a federal court can order an official to comply with federal law in the future. The court can also award monetary relief that is ancillary to prospective injunctive relief, even though the funds will be paid from the state treasury. The question is whether Indian tribes can characterize their land claims to fit within this narrow exception. The Supreme Court has noted that distinguishing between suits for retroactive relief and suits for prospective relief is often difficult. To determine whether an action fits within the *Ex parte Young* fiction, the court will examine the substance, rather than the form, of the relief sought and the underlying policies of *Ex parte Young*.

Tribes might try to characterize their land claim actions as suits for prospective relief by seeking to enjoin state officials to enforce federal law prospectively. If a state’s cessions of Indian land were void *ab initio* under the Nonintercourse Act, the tribe would still hold valid title. Prospective injunctive relief would prohibit the official from interfering with the tribe’s future occupancy. Alternatively, the tribe might seek future rental payments as ancillary to the injunctive relief. In either case, however, the federal court would have to adjudicate the state’s title to the land based on the state’s past actions. Although careful wording of the complaint and the relief sought might characterize the relief as prospective, a court would likely find that the complaint is really against the state and, therefore, barred by the Eleventh Amendment. Native Americans may have a better chance enforcing future hunting and fishing rights on state lands. Such relief looks more like traditional prospective relief.

Accordingly, the *Ex parte Young* doctrine should be available to Indian tribes in the appropriate case. See, e.g., Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 552 (9th Cir. 1991) (holding that Eleventh Amendment did not bar injunctive and declaratory relief against Commissioner of Health and Social Services in suit to compel state recognition of native villages and tribal court adoption decrees under Indian Child Welfare Act).

558. For a discussion of the circumstances under which a federal court may order a state official to comply with federal law in the future, see supra notes 441-55 and accompanying text.


561. Id. at 279.

562. See *Oneida II*, 470 U.S. 226, 245-46 (1985) (stating that under Nonintercourse Act, “a conveyance without the sovereign’s consent was void *ab initio*”).

563. See *Papasan*, 478 U.S. at 279-81 (holding that Eleventh Amendment barred petitioners’ trust claims against state officials and rejecting distinction between characterization of claims as “continuing obligation of a trustee” and “on going liability” for past breaches of trust).
spective relief and less like punishment for past wrongs.\textsuperscript{564}

C. Land Claim Actions Against Non-State Landholders

\textit{Blatchford} does not signal the end of Native land claims, however. Tribes can still sue political subdivisions of the state, including local cities, towns and counties,\textsuperscript{565} as well as private landowners.\textsuperscript{566} The cost of defending land claim actions is normally extremely high. For example, by 1986, local defendants in \textit{Cayuga Indian Nation v. Cuomo} had already incurred approximately $1 million in legal expenses, and the case is still pending as of this writing.\textsuperscript{567} Most land claim litigation takes many years and involves numerous court proceedings.\textsuperscript{568} When the state is a named defend-

\textsuperscript{564} See generally Kimball v. Callahan, 493 F.2d 564, 569-70 (9th Cir.), cert. denied, 419 U.S. 1019 (1974) (holding that Native American plaintiffs retained hunting and fishing rights on former reservation lands free from state regulation).


\textsuperscript{566} Before \textit{Blatchford}, tribal plaintiffs commonly named as defendants local subdivisions of the state and certain large private landowners in addition to the state. See, e.g., Oneida Indian Nation of N.Y. v. New York, 649 F. Supp. 420, 422 (N.D.N.Y. 1986), aff’d, 860 F.2d 1145 (2d Cir. 1988), cert. denied, 493 U.S. 871 (1989) (suing New York State, various New York counties and defendant class of private landowners); Cayuga Indian Nation of New York v. Cuomo, 565 F. Supp. 1297, 1303 (N.D.N.Y. 1983) (suing “the Governor of New York, numerous administrative agencies, authorities and officials, the Counties of Cayuga and Seneca, various local governmental entities and officials, . . . various commercial and individual landowners,” and a proposed class of “all other persons who assert an interest in any portion of the Original Reservation lands,” estimated to exceed 7,000 individuals and entities); Narragansett Tribe v. Southern R.I. Land Dev. Corp., 418 F. Supp. 798, 806 (D.R.I. 1976) (suing Director of Rhode Island Department of Environmental Management, private individuals and businesses).


\textsuperscript{568} The protracted land claims litigation in New York State presents a particularly egregious illustration. At the time of this writing, the \textit{Oneida} test case has been pending for 24 years and has been twice before the Supreme Court. For a discussion of the background and procedural history of the \textit{Oneida} test case, see \textit{supra} notes 89-125, 180-89 and accompanying text. Similarly, the Cayuga land claim has been pending before the Northern District of New York since November 1980. The Cayugas initially filed suit after the House of Representatives rejected a negotiated settlement because of a local congressman’s opposition. See generally Lavin, \textit{supra} note 130, at 87-100. So far, the Northern District of New York has issued at least six major decisions in the \textit{Cayuga} action. See \textit{Cayuga Indian Nation of New York v. Cuomo}, 771 F. Supp. 19, 24 (N.D.N.Y. 1991) [hereinafter \textit{Cayuga VI}] (rejecting defendants’ laches defense and granting plaintiffs’ partial summary judgment, except against state, on defendants’ liability); Cayuga Indian Nation of New York v. Cuomo, 762 F. Supp. 30, 35-36 (N.D.N.Y. 1991) [hereinafter \textit{Cayuga IV}] (dismissing plaintiffs’ claim against Conrail); Cayuga Indian Nation of New York v. Cuomo, 758 F. Supp. 107, 118 (N.D.N.Y. 1991) [hereinafter \textit{Cayuga IV}] (rejecting defendants’ defense of abandonment); Cayuga Indian Nation of New
tant, local defendants can “ride on the state’s coattails” to a large extent if they choose. Without the state, they must absorb all of the defense costs.

More importantly, local municipalities, businesses and private landowners may be held liable for illegal actions that the state committed long before they had access to the land in question or before they even existed.\textsuperscript{569} Court awards to successful claimants in the form of damages, land or both may be prohibitively large. In the \textit{Oneida} test case, Judge Port initially awarded $16,694 in damages plus interest against the two defendant counties.\textsuperscript{570} The award only constituted the fair market rental value of approximately 872 acres of land over a two-year period.\textsuperscript{571} However, many land claims involve much larger tracts of land and potential damages that have been accruing for decades and even centuries.\textsuperscript{572} Unlike the states and federal government, which have greater resources and can spread costs throughout the state or nation, local governments and private landowners, especially small business and landowners, generally lack the necessary resources to adequately cope with such claims. Moreover, Eleventh Amendment and common law sovereign immunity preclude losing defendants from seeking indemnification from the state in either the federal or state courts.\textsuperscript{573} Unless


570. \textit{Oneida II}, 719 F.2d 525, 540 (2d Cir. 1983), \textit{aff’d in part and reversed in part}, 470 U.S. 226 (1985). The Second Circuit affirmed the counties’ liability but remanded for recalculation of the damages. \textit{Id.} at 544. As of this writing, \textit{Oneida II} is still pending in the district court; however, proceedings are stayed pending settlement negotiations. For a discussion of why proceedings have been stayed, see \textit{supra} notes 188-89 and accompanying text.

571. \textit{Oneida II}, 719 F.2d at 540.

572. \textit{See, e.g., Cayuga I}, 565 F. Supp. at 1301 (seeking possession of approximately 64,000 acres, award of fair market rental value for over 200 years and other monetary and protective relief); \textit{see also supra} notes 213, 270-76 and accompanying text (discussing Narragansett and Puyallup land claims).

the federal government decides to intervene against the state or the state chooses to intervene as a party-defendant, local governments and private landowners must now face land claim litigation on their own.

D. Impact On Land Claim Settlements

Less obvious but potentially more serious, the states’ Eleventh Amendment immunity from tribal suits may deter settlements in land claim disputes. As discussed in Part IV, voluntary settlements are preferable to court imposed remedies. Unlike formal adjudication, the negotiating process provides the parties with greater flexibility to fashion creative, constructive solutions for difficult problems. Working through each side’s needs and concerns can also establish a basis for better future relations. The Puyallup Agreement illustrates the type of comprehensive agreement that is possible and that benefits everyone. In addition, the federal courts do not have to confront the complex and controversial social and political issues that these claims inevitably raise if the parties can resolve their disputes through negotiations. Voluntary settlements also relieve judges of trying to fashion relief that is both equitable and enforceable for meritorious tribal claims.

Since the Supreme Court decided Oneida II, Native Americans have successfully used land claim litigation to induce otherwise recalcitrant states and local landowners to come to the bargaining table. Even though the voluntary settlements that have resulted may not fully, or even adequately, compensate the tribes for their lost lands or the wrongs they have suffered, the tribes have benefitted. They have gained additional land, and some tribes, like the Puyallups and Senecas, have also acquired substantial economic resources.

The danger of Blatchford is that it weakens the tribes’ negotiat-

574. For a discussion of why negotiated settlements are preferable to judicial remedies, see supra notes 176-208 and accompanying text.

575. For a discussion of the settlement terms and the benefits resulting from the Puyallup Agreement, see supra notes 280-323 and accompanying text.

576. For a discussion of the difficulties associated with trying to fashion relief that is both equitable and enforceable, see supra notes 176-202 and accompanying text.

577. See Hagan, supra note 35, at 28 (“The tactic of filing suit against landowners as well as states has proved highly successful in generating pressure for settlement”); Starna, supra note 189, at 165 (stating that Iroquois’ “primary strategy” was to achieve “out-of-court resolutions of claims brought”).

578. For a discussion of the economic resources acquired by the Puyallups and Senecas through a voluntary settlement, see supra notes 280-301, 360-80 and accompanying text.
ing position in relation to the states. Depending on the specific circumstances, the state may be more reluctant to join settlement negotiations and to contribute state resources knowing that it cannot be held liable to either the Native claimants or the non-Native occupants. Local landowners and communities may be left with insufficient resources to offer viable settlements and to trigger federal contributions.

Of course, states will still have an interest in resolving land claims within their borders. Without the threat of state liability, however, states may well find themselves in a “catch-22” position. Normally, the state and the affected communities strongly oppose any compromise immediately after the claimants file suit. However, as both the hardship in the claim area and the likelihood of losing increase, those affected will pressure the state to take an active role in resolving the dispute.\textsuperscript{579} The more economically and politically influential the claim area, the greater that pressure will be. The rest of the state, and usually a vocal minority from the claim area, will exert pressure against expending state resources to resolve the land claim. The pressure against committing significant state resources to the dispute will be substantial, especially in times of financial difficulties. Accordingly, Eleventh Amendment immunity will tend to tip the balance against the state’s willingness to contribute to the “settlement pot” and may well reduce the state’s incentive to take an active role in the negotiations process. Even where the state chooses to take an active role in facilitating an agreement, it will have less influence over local participants without the promise and coercive influence of a substantial state contribution.

The state’s immunity from suit will also force Native claimants to sue the most economically and politically important localities that can exert the greatest pressure on the state. This strategy was quite effective in the Puyallup land claim. Because the Puyallups’ claim impacted Washington State’s most important deep-water port, the state and a number of local governments sought intervention in \textit{Puyallup Tribe v. Union Pacific Railroad} and ultimately negoti-

\begin{footnotesize}
\textsuperscript{579} See Lavin, supra note 130, at 100. Lavin states that:
Recent history has shown that achieving unanimity among the residents of whatever area is chosen for a new reservation site is unlikely, but as litigation costs mount and the court case draws closer to a trial date, state, local, and federal leaders will face increasing pressures to risk offending some constituents if the title threat and the drain of the defense costs are to be lifted from the community at large.
\end{footnotesize}

\textit{Id.}
ated an agreement. More recently, Governor Lowell Weicker's refusal to negotiate with the Golden Hill Paugussett Tribe in Connecticut prompted the Tribe to threaten to extend its land claim actions against politically and economically influential Fairfield County.

In contrast to the states that have negotiated settlements, New York has had a dismal record for resolving land disputes with the Iroquois Nations. The reasons for this failure are complex and rooted in historical, social and political problems on both sides. Despite judicial findings of liability in both the Oneida test case and Cayuga Indian Nation v. Cuomo, as well as "on-again-off-again" settlement negotiations interrupted by periodic litigation, the Oneida, Cayuga and St. Regis land claims are still pending in federal court after many years. New York's reluctance to settle these cases may be partially due to the fact that these claims involve relatively rural, economically poor areas of the State with less influence in the State's capital than more affluent downstate areas.

If the parties cannot reach satisfactory settlements, the federal courts will be forced to adjudicate Native land claims and fashion relief where the tribes prevail. So far, the courts have avoided making major awards in land claim actions because the defendants have resorted to negotiations when they realized that the Native claimants could well prevail. If the federal courts are forced to fashion remedies in these disputes, they will also be forced to consider the Supreme Court's suggestion in Oneida II that "equitable considerations should limit the relief available" or impose substantial bur-

580. For a discussion of land claims asserted by the Puyallups and the consequences of those claims, see supra notes 270-76 and accompanying text.
581. See Pazniokas, supra note 129, at A1 (reporting state's refusal to negotiate settlement with Paugussets); see also Judson, supra note 129, at B1 (stating that state's attorney general "has vowed to fight 'tooth and nail' rather than negotiate").
582. See Judson, supra note 129, at B1.
583. See generally Hauptman, supra note 136 (discussing relations between New York State and Iroquois Confederacy between 1970 and 1986); Hauptman, supra note 142 (discussing history of Iroquois Confederacy from 1940 to 1974).
584. See Starna, supra note 189, at 168-74.
587. See Oneida II, 470 U.S. at 253 n.27. After rejecting the counties' defenses, affirming their liability, and lamenting Congress' failure to extinguish the Oneidas' title to the land claim area, the Supreme Court stated in a footnote:

The question whether equitable considerations should limit the re-
dens on local communities and private landowners. Judgments that overly tax local inhabitants or insufficiently compensate Native claimants will create greater dissatisfaction with the judicial process and bitterness among all concerned.

To the extent that Eleventh Amendment immunity deters state participation in resolving tribal land claims, Native Americans, long frustrated in trying to protect their sovereignty interests, will become further frustrated by protracted and unsuccessful settlement negotiations or inadequate judicial remedies. If accepted means of dispute resolution are perceived as inadequate, Native claimants will be more inclined to resort to self-help measures. Although one thinks of "Indian hostilities" as history, incidents of civil unrest by Native Americans protesting their treatment by society are common in modern times. Recent examples include the Mohawks' 1974 seizure of an abandoned Girl Scout camp at Moss Lake, New York;588 the Canadian Mohawks' 1990 blockade of the Mercier Bridge into Montreal, Canada, when local authorities threatened to convert their ancestral lands into a golf course;589 and the Senecas' 1992 road barricades when New York State attempted to tax reservation sales of cigarettes and gasoline.590

588. In May 1974, 60 Mohawk warriors took over an abandoned Girl Scout camp at Moss Lake in the New York Adirondacks. They occupied the 612-acre site for three years. In 1977, then New York Secretary of State Mario Cuomo and the Mohawk faction reached a settlement. New York gave the Indians occupancy rights, but not title, to two parcels of state land in Clinton County in exchange for relinquishing the camp. See Hauptman, supra note 136, at 29-30.

589. Associated Press, Mohawks, Canadian Army Demolish Barriers Together, PHIL. INQUIRER, Aug. 30, 1990, at A4. In the summer of 1990, Mohawk Indians near Montreal, Canada, fought a gun battle with provincial police in an attempt to stop the resort town of Oka from building a golf course on their ancestral land. Id. A police officer was killed. Id. The Mohawks also blocked a number of roads, shut down the Mercier Bridge into Montreal and threatened to blow up the bridge. P-I News Services, Angry Crowd Assails Indians Near Montreal, SEATTLE POST-INTELLIGENCER, July 17, 1990, at A2. The bridge blockade infuriated commuters and local residents, resulting in a number of racial incidents. Id. The Canadian government called out the army, and a standoff over the bridge ensued. Associated Press, supra, at A4. Leaders of the Mohawk community, the army and the Canadian government finally negotiated a settlement. Id. The barricades were dismantled without major bloodshed, and Oka agreed not to expand their golf course on the disputed land. Id.

590. Treadwell, supra note 138, at A1. New York State attempted to tax cigarettes and gasoline sales to non-Indians on reservations. Id. Following a state court ruling in 1992 upholding the State's authority to impose the tax, a number of
States and local communities were generally able to ignore Native land claims until Congress and the Supreme Court finally opened the federal courts to these claims. Through litigation, Native Americans have forced state, local and federal bureaucracies to take their land claims seriously. The states’ Eleventh Amendment immunity from suit, however, alters the balance of power by weakening both the Native claimants’ and the local landowners’ ability to pressure states into settling. Without the threat of defense costs or liability, states may be more susceptible to political and economic pressures against committing state resources to facilitating voluntary settlements. Unless the local defendants can exert sufficient pressure on the states, or the federal government decides to intervene against the states, local communities, businesses and other private land owners will have to face tribal land claims with little or no assistance. Negotiations are likely to become even more protracted and agreements harder to reach. If Native land claims are not resolved voluntarily, either the federal courts will have to resolve them or the federal government will feel compelled to impose a solution.

VII. Conclusion

Experience has shown that there are no simple solutions to the continuing problem of Native American land claims. Everyone “gets caught in the middle.”

Congress could, of course, extinguish the tribes’ title to the land. If title is based on ancestral title, the federal government does not even have to pay compensation. However, involuntary extinguishment merely perpetuates the inequitable treatment of Native Americans throughout this country’s history, exacerbates their bitterness toward “white society,” and does nothing to assuage the country’s collective guilt. Moreover, the Fifth Amendment

Senecas blocked roads and threw burning tires from a highway bridge in protest. Id. The incident exacerbated tensions following the Seneca-Salamanca lease settlement. Id. The incident exacerbated tensions following the Seneca-Salamanca lease settlement.

591. See Oneida II, 470 U.S. at 253 (“We agree that this litigation makes abundantly clear the necessity for congressional action.”); Van Gestel, supra note 125, at 137-38 (calling on Congress to “live up to its representative responsibility and enact legislation that will resolve these issues in a way that is fair to all parties and will clear away once and for all the clouds on title by these kinds of Indian land claims”). Numerous bills have been introduced in Congress to unilaterally extinguish Indian land claims over the years.


593. Discussing why Indian cases are typically omitted from the study of federal courts jurisprudence, Professor Judith Resnik explains:

The history of United States’ dealings with the peoples who inhabited the
requires the federal government to compensate the tribes for extinguishing formally recognized title.\textsuperscript{594} Given the current concern for the budget deficit, extensive extinguishment of formally recognized Indian title is not only undesirable but also unlikely.

Some proponents of Native rights have suggested that the tribes should forego litigation and concentrate on attaining economic growth and self-sufficiency.\textsuperscript{595} Litigation and economic development strategies are often linked, however. Litigation is seen as the catalyst for obtaining the resources necessary for economic and social development, at least if it leads to a settlement.\textsuperscript{596} Indeed, filing suit may be the only way to get the non-Native bureaucracies' attention in many instances.\textsuperscript{597} Pursuing economic growth will

continent before Western Europeans arrived is one of conquest, exploitation, and eradication. Phrases like "allotment," "discovery" and "relocation" capture events that are deeply embarrassing to those committed to a vision of a United States founded upon consent and dedicated to nondiscriminatory treatment. Unlike the disturbing history of slavery, no arguably comfortable mileposts are available.


\textsuperscript{594} United States \textit{v.} Sioux Nation, 448 U.S. 371, 424 (1980).

\textsuperscript{595} See Tureen, \textit{supra} note 141, at 147. Thomas Tureen, plaintiffs' counsel in a number of the Eastern land claims, stated in his afterword to Paul Brodeur's book on the Mashpee and Maine Indian land claims:

The future for Indian tribes, in this writer's view, does not lie in further land claims. . . . [S]ituations in which the Nonintercourse Act, or other federal laws or decisions involving Indians, offers meaningful opportunities for Indians to regain lost territory and rights are extremely limited. And while the United States judicial system has displayed remarkable restraint and tolerance during the Nonintercourse Act claims, the Supreme Court has made clear in the Oneida decision that Indians are dealing with the magnanimity of a rich and powerful nation, one that is not about to divest itself or its non-Indian citizens of large acreage in the name of its own laws. In short, . . . it ultimately makes the rules and arbitrates the game.

A far greater opportunity for Indian expansion and growth exists within normal commercial channels.

\textit{Id.}

\textsuperscript{596} See Hagan, \textit{supra} note 35, at 28 ("The tactic of filing suit against landowners as well as states has proved highly successful in generating pressure for settlement."); Starna, \textit{supra} note 189, at 165 ("Negotiated settlements, or more directly, out-of-court resolutions of claims brought, were, from the outset, the [Iroquois'] primary strategy . . . .")

\textsuperscript{597} For example, the success of the Pequot's casino in Ledyard, Connecticut, has made gambling a desirable way of raising substantial funds. Some tribes may be using land claims to pressure the states into negotiating agreements under IGRA to allow casino gambling on Native land. See Judson, \textit{supra} note 129, at B1 (discussing Paagussetts' claim in Connecticut); Denise Lavoie, \textit{Indians, Whites at War—In Court; Paagussetts Seek to Reclaim Hundreds of Acres of Land Within Bridgeport, Conn.}, \textit{Fresno Bee}, July 8, 1993, at 2 (South Valley) ("Bernard Wishnia, an attorney . . . who is representing the tribe, concedes that the lawsuits are an attention-grabbing [strategy] . . . aimed at pressuring officials to push for a settlement and gain-
probably not end land claims, at least not in the near future, and may actually increase the number of claims filed.

Forcing the federal courts to resolve tribal land claims also raises problems. As discussed, the federal courts are not well-suited to dealing with the complex social and political issues that Indian land claims raise or to fashioning appropriate relief where the claimants prevail. Moreover, court battles exacerbate tensions among the tribe, state and local residents, often leaving bitter resentments that impair future relations.

Negotiated settlements are still the most viable means for resolving these disputes. The negotiations process can provide the flexibility necessary for the parties to address each other’s major concerns. It can also establish a basis for better future relations. The state generally plays an important role in reaching a negotiated settlement. In most land claims, the federal government will contribute substantially to the settlement, but it will not approve an agreement without the state’s endorsement or a “fair-share” contribution from the local parties. Local communities normally lack the necessary resources to make viable settlement offers without the state’s resources. Moreover, leaving local communities to shoulder the burden of the settlement, especially in those cases where the state was primarily at fault, is inequitable.

The states’ Eleventh Amendment immunity from tribal suits may impair voluntary settlements by weakening the Native claimants’ bargaining power and by leaving local landowners and municipalities with insufficient resources and direction to negotiate viable settlements. Although Congress can abrogate the states’ immunity from tribal suit in federal court, it is not likely to do so. The members of Congress represent their states, and it is highly unlikely that the states will willingly subject themselves to suits over Native land claims. Moreover, abrogation is ultimately not the answer. While abrogation might restore the tribes’ bargaining power, the adversarial nature of these disputes would remain. Furthermore, states can always “stonewall,” thereby protracting settlement talks and forcing the federal courts to adjudicate Native land claims.

Ultimately, the states, federal government, local residents and tribes must work together in good faith to resolve these disputes.

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Although recently negotiated settlements are not flawless, they provide a basis for addressing pending and future land claims. The invitation of Irving Powless, Jr., a chief of the Iroquois, remains the best alternative:

The Creator has given us a mind. He has given us the ability to sit and think. And we hope that we are intelligent enough to sit down and negotiate a solution to the problem that faces us today. I think that, sitting under the Tree of Peace with the Houdenosaunee, we can come to a solution to the problem.\textsuperscript{598}

\textsuperscript{598} Powless, \textit{supra} note 2, at 161.