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Turf Struggle: Land, Sovereignty, and Sovereign Immunity

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As the discussion today illustrates, land is central to tribal sovereignty. For a tribe that lost possession of some or all of its lands in prior years, land claims can form a key part of the strategy to reassert that sovereignty. For many of those tribes, claims against state governmental entities play a central role in obtaining effective redress. My remarks will focus on the ways in which the Supreme Court's recently developed doctrines of state sovereign immunity will shape a tribe's ability to assert land claims against a state government.[1] Those sovereign immunity doctrines often will operate to bar at least some of the claims a tribe might assert against a state in land claims litigation—if the tribe asserts those claims as sole plaintiff. However, if the United States sues the state on the tribe's behalf, state sovereign immunity will pose no bar, and, under *Arizona v. California*,[2] the tribe can intervene in that litigation to assert its claims on its own behalf.[3]

A land claim suit against state government entities[4] might seek several

* Assistant Professor, University of Pennsylvania Law School. I am indebted to Frank Goodman and Steven Paul McSloy for very helpful comments on the issues discussed in this essay, and to participants in the New England Law Review's Symposium for instructive discussions of related questions. I previously worked as an associate at Cravath, Swaine & Moore, where I was part of the team that represented the Oneida Indian Nation of New York in land claims litigation (*see* Oneida Indian Nation v. County of Oneida, Nos. 70-CV-35 and 74-CV-187 (N.D.N.Y.)). Obviously, my views do not necessarily reflect the position of the Oneida Indian Nation of New York or of Cravath, Swaine & Moore or any of its other clients.

1. The title of this paper echoes that of an essay by Steven Paul McSloy. *See* Steven Paul McSloy, *Border Wars: Haudenosaunee Lands and Federalism*, 46 BUFF. L. REV. 1041 (1998).

2. 460 U.S. 605 (1983).

3. *See id.* at 614.

4. Obviously, many land claims cases will include claims against other defendants as well. The sovereign immunity protections that the present Court has derived from the Constitution do not protect local government defendants unless those entities are deemed arms of the state. *See* Alden v. Maine, 527 U.S. 706, 756 (1999) (noting that state sovereign im-

types of relief. Concerning tribal land currently held by the state, the tribe might seek damages arising from the state's previous unlawful possession of the land, as well as prospective relief enforcing the tribe's right to possess the land in the future. As an alternative to that prospective relief, the tribe might seek damages representing the present value of the state's future possession of the land. Often, however, the tribe will wish to recover the land itself. Moreover, in connection with the tribe's future possession of the land, the tribe might also seek declaratory and/or injunctive relief affirming the tribe's regulatory authority, and a corresponding absence of state regulatory authority, with respect to the land in question. Relatedly, the tribe may seek to reacquire tribal land currently held by non-state entities; and the tribe might seek prospective relief against the state concerning regulatory authority over that land as well. Moreover, in cases where tribal land was initially acquired from the tribe by the state and then was transferred by the state to third parties, the tribe may also seek to hold the state liable for damages for the tribe's loss of possession of the land on the theory that the state is jointly liable for the trespasses of the subsequent landholders.

Current sovereign immunity doctrine poses problems for each of these types of relief. Under *Blatchford v. Native Village of Noatak*,[5] state sovereign immunity bars tribal claims to the same extent that it bars claims by private litigants;[6] and, in the view of a majority of the current Supreme Court, that is a very large extent indeed. State sovereign immunity bars claims for damages against states, unless the state consents to suit[7] or Con-

munity "does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State"). Likewise, sovereign immunity obviously provides no defense for nongovernmental defendants. To simplify the analysis, I focus here on claims against state government entities.

5. 501 U.S. 775 (1991).

6. *See id.* at 782.

7. A state could consent to suit in a number of ways. Sovereign immunity is a waivable defense, so that if the state fails to raise the defense at all, it will pose no bar to the tribe's claims; but that, of course, is highly unlikely. It appears that, pursuant to the Spending Power, Congress can elicit state consent to suit in connection with the state's acceptance of federal funds. It seems unlikely, however, that any such state consent would have been elicited with respect to Native American land claims. Finally, if the state removes a case from state to federal court, it thereby waives its immunity from suit. *See* Lapides v. Board of Regents, 535 U.S. 613, 623–24 (2002) (unanimous decision). Although the *Lapides* Court purported to limit its holding "to the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings," *id.* at 617, its reasoning appears to extend to all instances in which a state defendant removes a case from state to federal court. *See id.* at 619 (stating that "[i]t would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the 'Judicial power of the United States' extends to the case at hand, and (2) to claim Eleventh Amendment immu-

gress abrogates that immunity by means of a valid exercise of its authority to enforce the provisions of the Reconstruction Amendments.[8] The typical Native American land claim will not satisfy the requirements for a finding of such abrogation.[9] Admittedly, the Fifth Amendment's Just Compensa-

nity, thereby denying that the 'Judicial power of the United States' extends to the case at hand"). *Lapides* seems unlikely to provide much assistance to tribal land claims plaintiffs for two reasons. First, land claims plaintiffs suing states are likely to prefer a federal forum to a state forum, and thus will be unlikely to sue in state court as an initial matter, unless the state has waived sovereign immunity from suit in state court but not in federal court. Second, even if the plaintiff does sue in state court, a state defendant sued in state court is unlikely, in light of the *Lapides* holding, to join in a notice of removal to federal court.

8. Article I does not authorize Congress to abrogate state sovereign immunity. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 72–73 (1996). Congress may abrogate state sovereign immunity in the exercise of its enforcement authority under Section Five of the Fourteenth Amendment. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). Moreover, it appears that Congress also may abrogate state sovereign immunity pursuant to its power to enforce the provisions of the Thirteenth and Fifteenth Amendments. *See* City of Rome v. United States, 446 U.S. 156, 179–80 (1980) (upholding Voting Rights Act as a proper exercise of Fifteenth Amendment power and explaining that "*Fitzpatrick* stands for the proposition that principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation'"); Lawson v. Shelby County, 211 F.3d 331, 335 (6th Cir. 2000) (reading *City of Rome* as "suggest[ing] that Congress may also abrogate state sovereign immunity under the Fifteenth Amendment"); Mixon v. Ohio, 193 F.3d 389, 399 (6th Cir. 1999) (holding that the Voting Rights Act validly abrogated state sovereign immunity pursuant to Congress' power to enforce the Fifteenth Amendment); U.S. v. Nelson, 277 F.3d 164, 181 n.17 (2d Cir. 2002) (reasoning that "Congress's enforcement powers under Section Two of the Thirteenth Amendment would seem not to be limited by *Seminole Tribe* and its progeny"). However, Congress must clearly express its intent to abrogate. *See* Raygor v. Regents of the Univ. of Minnesota, 534 U.S. 533, 541–42 (2002); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985). Also, the abrogation must be a valid exercise of Congress' authority to enforce the relevant Amendment. *See, e.g.*, Bd. of Trustees v. Garrett, 531 U.S. 356, 374 (2001) ("[I]n order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation."). *See generally* Frank Goodman, *Preface* to *The Supreme Court's Federalism: Real or Imagined?*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 9, 18 (2001) (critiquing the Court's use of the congruence and proportionality test).

9. Take for example a claim under the Nonintercourse Act. That Act was first enacted in 1790, and was reenacted in 1793, 1796, 1799, 1802, 1834 and 1874. *See* Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137, 138; Act of March 1, 1793, ch. 19, § 8, 1 Stat. 329, 330–31; Act of May 19, 1796, ch. 30, § 12, 1 Stat. 469, 472; Act of March 3, 1799, ch. 46, § 12, 1 Stat. 743, 746; Act of March 30, 1802, ch. 13, § 12, 2 Stat. 139, 143; Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729, 730–31; Rev. Stat. § 2116. The first six versions of the Act clearly were not exercises of Congress' power to enforce the Fourteenth Amendment, since that Amendment was not adopted until 1868. In 1874, Congress revised and reenacted the federal statutes that were in force as of December 1, 1873, and included the Nonintercourse Act

tion Clause also appears to furnish an exception to the prohibition on damages relief.[10] That Clause has been incorporated against the states via the Due Process Clause of the Fourteenth Amendment,[11] and the Supreme Court implied in *First English Evangelical Lutheran Church v. Los Angeles*[12] that the Constitution requires the state to provide the remedy of just compensation for a governmental taking of property.[13] For several reasons, however, tribal litigants may prefer not to attempt to shoehorn their claims into the takings framework,[14] and thus this exception—to the extent that it is available—often will not provide an appealing route for the assertion of tribal damages claims against states.

Prior to 1997, it appeared that a tribe's prospects for obtaining injunctive and declaratory relief were brighter than the prospects for securing damages relief. The *Ex parte Young* doctrine provides that state officials can be sued for injunctive relief to require their future compliance with federal

as Section 2116 of those Revised Statutes. *See* Act of June 20, 1874, ch. 333, § 2, 18 Stat. 113 (providing for publication of "the revised statutes of the United States enacted at this present session of Congress"); Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1012–15 (1938) (discussing the enactment of the Revised Statutes). Even if Congress could be viewed as acting pursuant to its Fourteenth Amendment enforcement power when it reenacted the Nonintercourse Act as part of this general revision—which seems unlikely—the reenacted statute fails to meet the clear statement requirement that the Court now requires for abrogation of state sovereign immunity. *See* Katharine F. Nelson, *Resolving Native American Land Claims and the Eleventh Amendment: Changing the Balance of Power*, 39 VILL. L. REV. 525, 614 (1994) ("[N]either 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.").

10. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

11. *See* Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 236 (1897).

12. 482 U.S. 304 (1987).

13. *See id.* at 316 ("[I]n the event of a taking, the compensation remedy is required by the Constitution."). *But see* Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067, 1074–75 (2001) (arguing that the Court in *First English* held merely that there is a cause of action for compensation for a taking, and that the Court did not address the further question whether sovereign immunity would bar a plaintiff from recovering that remedy against a state).

14. Among other reasons, a takings claim will be strategically unappealing because the tribal plaintiff frequently will be obliged to seek compensation through state procedures before suing in federal court. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194–95 (1985) (holding a takings claim in federal court was not ripe because "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation").

law.[15] Under the theory of *Young*, when a state official violates federal law, that violation strips the official of her character as a state officer, and thus of her ability to assert the state's sovereign immunity.[16] In past years, the Court has set an important (though criticized) limitation on *Young* relief: the relief must be prospective, rather than retrospective.[17] Accordingly, damages for past violations of federal law are not available under *Young*, but injunctive and declaratory relief with respect to future conduct are permissible.[18] One of the primary justifications for the doctrine is that, because state sovereign immunity impairs individual litigants' ability to seek damages relief against states, *Young* relief is necessary in order to enforce the supremacy of federal law.[19]

In 1997, in *Idaho v. Coeur d'Alene Tribe of Idaho*,[20] seven members of the current Court reaffirmed their general commitment to the *Young* doctrine.[21] Three of those seven, however, joined with the two remaining Jus-

15. *See Ex parte* Young, 209 U.S. 123, 159–60 (1908).

16. As the Court explained in *Young*:

> If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Id. (citing *In re* Ayers, 123 U.S. 443, 507 (1887)).

17. *See generally* Carlos Manuel Vázquez, *Night and Day:* Coeur d'Alene, Breard, *and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1 (1998).

18. Another recently imposed limit on *Ex parte Young* relief is that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." Seminole Tribe v. Florida, 517 U.S. 44, 74 (1996). This limit is unlikely to apply to tribal land claims; the primary statutory source for such claims is the Nonintercourse Act, and that statute does not specify the sort of "detailed remedial scheme" referred to in *Seminole Tribe*.

19. *See, e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984) ("Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights.").

20. 521 U.S. 261 (1997).

21. *See id.* at 288 (O'Connor, J., joined by Scalia & Thomas, JJ., concurring in part and in the judgment) (stating that "[w]here a plaintiff seeks prospective relief to end a state officer's ongoing violation of federal law, such a claim can ordinarily proceed in federal court."); *id.* at 296 ("I do not subscribe to the principal opinion's reformulation of the appropriate jurisdictional inquiry for all cases in which a plaintiff invokes the *Young* doctrine."); *id.* at 297 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting) ("The Tribe's suit falls squarely within the *Young* doctrine, and the District Court had an obliga-

tices to set what appears to be a unique limitation on *Young*: in *Coeur d'Alene Tribe*, those five Justices held that the *Young* theory was unavailable to support the Tribe's request for declaratory and injunctive relief with respect to submerged lands held by the state and claimed by the Tribe.[22] Although Justice Kennedy wrote the principal opinion in *Coeur d'Alene Tribe*, only certain portions of that opinion gained a majority of votes; accordingly, my discussion will focus on the parts to which the majority subscribed.[23] In those parts, the Court justified its rejection of *Young* relief for the Tribe by dwelling on three aspects of the relief sought. First, the Court stressed that the relief would be equivalent to a quiet title action, and would thus have the effect of depriving the state of all ownership rights to the relevant territory.[24] Second, the Court emphasized that the relief sought would erase the state's regulatory authority over that territory.[25] Third, the Court indicated that the first two concerns were magnified in the *Coeur d'Alene* case because the lands in question were submerged beneath Lake Coeur d'Alene, and states have especially strong sovereign interests in navigable waters.[26]

As many have noted, the Court's holding in *Coeur d'Alene Tribe* is hard to justify. To the extent that the Court relied on the fact that the Tribe was seeking prospective relief to effectuate its right to possess the land, the holding contravenes prior case law that held government officials subject to suits seeking ejectment.[27] On the other hand, to the extent that the Court relied in *Coeur d'Alene Tribe* on the fact that the Tribe was challenging state regulatory authority over the land, that reliance seems contrary to the

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tion to hear it.").

22. *See id.* at 287 (Kennedy, J., joined by Rehnquist, C.J., and O'Connor, Scalia & Thomas, JJ.).

23. In the parts of his opinion that were joined only by Chief Justice Rehnquist, Justice Kennedy advocated a much more dramatic narrowing of the *Young* doctrine. *See id.* at 270–80.

24. *See id.* at 282.

25. *See id.*

26. *See Coeur d'Alene Tribe of Idaho*, 521 U.S. at 283–84.

27. *See* Tindal v. Wesley, 167 U.S. 204, 212, 223 (1897) (holding that state's Eleventh Amendment immunity did not bar judgment awarding possession of land to a private plaintiff in a suit against state officials who claimed to hold the land for public purposes in their capacity as state agents); United States v. Lee, 106 U.S. 196, 215–17, 223 (1882) (holding that the federal government's sovereign immunity did not preclude a private plaintiff's suit to recover possession of land held by federal officials for public purposes); *The Supreme Court, 1996 Term: Leading Cases*, 111 HARV. L. REV. 269, 277–78 (1997) [hereinafter *Leading Cases*] ("Ultimately, the Coeur d'Alene Tribe's claim can be factually distinguished from those brought in *Lee* and *Tindal* only because the disputed property involved submerged lands and the tribe's suit threatened the general regulatory authority of the state. This distinction, however, lacks a principled basis.").

very notion of *Young*.[28] Although the *Young* doctrine evolved in the second half of the twentieth century into a vehicle for civil rights suits against states, *Young* itself involved a challenge to state regulation,[29] and businesses continue to this day to use the *Young* doctrine to assert challenges to state regulatory schemes. Admittedly, the plaintiff in *Coeur d'Alene Tribe* was seeking to end *all* state regulation with respect to the disputed lands, rather than seeking simply to enjoin enforcement of a particular regulation with respect to a particular entity. Viewed from a different angle, however, this provided all the more reason for permitting the claim to proceed: to the extent that the state's assertion of regulatory authority over that land violated federal law, the extensiveness of that violation *strengthened* the case for permitting *Young* relief. Finally, one need not dispute the Court's view that navigable waters are important to the sovereign in whose territory they lie in order to question the relevance of that view to the issue of sovereign immunity. To conclude that the importance of navigable waters strengthens the state's claim to immunity is to assume the state's entitlement to the disputed territory; viewed from the Tribe's perspective, the importance of navigable waters merely underscores the gravity of the state's ongoing violation of federal law.[30]

However, though one may criticize the result in *Coeur d'Alene Tribe*, land claim litigants nonetheless must deal with its implications.[31] Where a

28. *Cf. Leading Cases*, *supra* note 27, at 278 ("It is difficult to understand how submerged lands implicate state sovereign power any more than the economic regulatory authority that was at issue in *Young* ....").

29. *See Young*, 209 U.S. at 127–29 (statement by Justice Peckham).

30. *See* Lauren E. Rosenblatt, *Removing the Eleventh Amendment Barrier: Defending Indian Land Title Against State Encroachment After* Idaho v. Coeur d'Alene Tribe, 78 TEX. L. REV. 719, 737 (2000) ("[I]f the Court assumes without investigation that all sovereign interests are state interests, it has assumed without valid examination that the Indians have no sovereign rights."). The *Coeur d'Alene* Court acknowledged that "[a]s the Tribe views the case, the lands are just as necessary, perhaps even more so, to its own dignity and ancient right"—but the Court concluded that "[t]he question before us is not the merit of either party's claim ... but the relation between the sovereign lands at issue and the immunity the State asserts." *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 287.

31. By contrast, *Coeur d'Alene Tribe* should not pose a similar impediment in other kinds of cases. Admittedly, some lower federal courts have read *Coeur d'Alene Tribe* as creating an exception with potentially broader application. For example, the Tenth Circuit articulated a two-part test to determine whether *Coeur d'Alene Tribe* bars *Young* relief:

> In light of *Coeur d'Alene Tribe*, federal courts must examine whether the relief being sought against a state official "implicates special sovereignty interests." If so, we must then determine whether that requested relief is the "functional equivalent" to a form of legal relief against the state that would otherwise be barred by the Eleventh Amendment. In the end, we must not extend the *Ex parte Young* doctrine to allow a suit for prospective equitable relief when that relief would be just as intrusive, if not more so, into core aspects of a state's sovereignty.

tribe seeks possession of state-held lands submerged under navigable waters and seeks relief excluding the state from regulating those lands, *Coeur d'Alene Tribe* will bar the application of the *Young* doctrine. Even if the disputed territories are merely dry land—with no navigable waters—it seems possible that the same result would occur, so long as the relief sought would bar both state possession and state regulation of the land.[32] However, where the relief involves one of the latter aspects but not the other, the case will be distinguishable from *Coeur d'Alene Tribe*.[33] Thus,

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ANR Pipeline Co. v. Lafaver, 150 F.3d 1178, 1190 (10th Cir. 1998). Similarly, the Fourth Circuit reasoned that *Coeur d'Alene Tribe* "reflects a considered evaluation of the degree to which a State's sovereign interest would be adversely affected by a federal suit seeking injunctive relief against State officials." Bell Atlantic Md., Inc. v. MCI WorldCom, Inc., 240 F.3d 279, 295 (4th Cir. 2001), *vacated*, Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635 (2002). The Fourth Circuit viewed *Coeur d'Alene Tribe* as instituting a "case-by-case approach" under which the court "must evaluate the federal interests served by permitting a federal suit" for injunctive relief against state officials, and "must determine whether the federal suit would unduly sacrifice the important value of [the state's] sovereign immunity." *Id.* at 295.

The Supreme Court, however, vacated the Fourth Circuit's judgment in the *Bell Atlantic Maryland* case, and in doing so the Court rejected the Fourth Circuit's case-by-case balancing approach. *See* Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635 (2002). As the Court explained, "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Id.* at 645. (quoting *Coeur d'Alene Tribe*, 521 U.S. at 296 (O'Connor, J., joined by Scalia & Thomas, JJ., concurring in part and in the judgment)). Justice Kennedy wrote separately in *Verizon Maryland* to reiterate his view that "our *Ex parte Young* jurisprudence requires careful consideration of the sovereign interests of the State as well as the obligations of state officials to respect the supremacy of federal law." *Id.* at 649 (Kennedy, J., concurring). However, *Verizon Maryland*'s reaffirmation of the "straightforward inquiry" that should govern the availability of *Ex parte Young* relief strongly suggests that at least seven of the Justices view *Coeur d'Alene Tribe*'s exception as *sui generis*. (Although Justice O'Connor took no part in the consideration or decision of the *Verizon Maryland* case, the majority's language in *Verizon Maryland* concerning the "straightforward" application of *Ex parte Young* was taken from Justice O'Connor's partial concurrence in *Coeur d'Alene Tribe*.)

32. *But see* Vázquez, *supra* note 17, at 49 ("[T]he Court's disquisition on the special nature of submerged lands suggests that the exception extends only to disputes over sovereignty over such lands.").

33. As Vicki Jackson has observed:

> [w]hether what was crucial was that the claims to real property were asserted by a tribe (with the ensuing loss of sovereign regulatory authority for the state resulting from the unique status of "Indian Tribes" under federal law), or that the real property in question was submerged land under a riverbed (with their unique associations with state sovereignty and interstate equality under the equal footing doctrine), or the conjunction of these factors, cannot clearly be discerned from the

where a tribe seeks only possession, without seeking relief concerning regulatory authority, *Coeur d'Alene Tribe* should not bar *Young* relief.[34] Conversely, if a tribe seeks declaratory and/or injunctive relief against state officials concerning the state's authority to regulate tribal land that the state does not currently possess, the relief sought is not as extensive as that sought in *Coeur d'Alene Tribe* and thus the latter's holding is distinguishable.[35] Moreover, with respect to land not currently held by the state, an alternative strategy might sometimes prove useful. Instead of a suit by a tribe against state officials to enjoin all state regulation of the tribal lands, persons who live or work on the land might sue those officials to enjoin the enforcement of state regulations with respect to them in particular. This sort of suit would more closely parallel the strategy approved in *Young*, and thus seems likely to avoid the bar set by *Coeur d'Alene Tribe*. *Coeur d'Alene Tribe*, then, should not preclude all litigation challenging a state's possession or regulation of tribal land. It will, however, impose some limitations on the scope of the relief sought in such litigation.

In sum, most land claim suits against states will face significant sovereign immunity issues if the tribe sues alone. By contrast, state sovereign immunity is no bar to suits by the United States,[36] and because the United States has a trust responsibility to protect tribal interests against state encroachment, the United States can sue to enforce tribal rights against

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> Court's opinion. One might fairly conclude from the *Coeur d'Alene* opinions, however, that some or all of these factors together constituted the circumstance that make the case so "particular and special."

Vicki C. Jackson, Coeur d'Alene, *Federal Courts and the Supremacy of Federal Law: The Competing Paradigms of Chief Justices Marshall and Rehnquist*, 15 CONST. COMM. 301, 313 (1998) (quoting *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 287).

34. *See* Vázquez, *supra* note 17, at 49 (arguing that the *Coeur d'Alene* exception to the *Young* doctrine "would thus appear to embrace only disputes over sovereignty between states and Indian tribes, and possibly also between states and foreign states"); Rosenblatt, *supra* note 30, at 758 (arguing that tribes might avoid "the obstacle posed by the new *Young* analysis" by "request[ing] relief that stops short of divesting the state of any sovereign power").

35. *See, e.g.*, Timpanogos Tribe v. Conway, 286 F.3d 1195, 1205 (10th Cir. 2002) (noting that where a tribe's claim sought "no more than an injunction barring ... state officials from prosecuting [tribe] members ... for hunting, fishing, and gathering with Tribe-issued licenses on Indian lands within the ... Reservation," the claim was "squarely within the exception set out by *Ex parte Young* and its progeny"); Agua Caliente Band of Cahuilla Indians v. Hardin, 223 F.3d 1041, 1043 (9th Cir. 2000) (holding that a tribal claim for a declaratory judgment that federal law bars California from taxing non-tribe members' on-reservation food and beverage purchases "fall[s] within the *Ex Parte Young* exception to the Eleventh Amendment bar").

36. *See, e.g.*, United States v. Texas, 143 U.S. 621, 646 (1892).

states.[37] Moreover, the *Arizona* case demonstrates that when the federal government asserts claims against a state on a tribe's behalf, the tribe can intervene in that suit to press its claims on its own behalf. The *Arizona* doctrine, of course, predates the recent rash of state sovereign immunity decisions. However, as I have argued elsewhere, *Arizona* intervention meets the concerns that underlie the Court's current expansive view of state sovereign immunity, because in relevant respects an *Arizona* suit resembles a suit by the United States (which is still permitted) rather than a suit by a private party or a tribe alone (which is now barred).[38] In particular, the fact

37. *See* Rosenblatt, *supra* note 30, at 741–49 (discussing United States' trust responsibility to sue on tribes' behalf); Vázquez, *supra* note 17, at 50 ("Disputes between states and Indian tribes concerning sovereignty over submerged lands can be resolved in the federal courts if the federal government brings suit.").

38. *See* Catherine T. Struve, *Raising* Arizona: *Reflections on Sovereignty and the Nature of the Plaintiff in Federal Suits Against States*, 61 MONT. L. REV. 105, 141 (2000). In that article, I noted that the Court's current approach to state sovereign immunity appeared to undermine the rationale for another mechanism for suits against states—the use of a *qui tam* suit by a private individual to assert claims against a state on behalf of the United States. *See id.* at 132–33 ("[*Q*]*ui tam* suits against states in which the United States chooses not to intervene fall close to the line sketched by the *Alden* Court around state sovereign immunity."). *But see* Evan H. Caminker, *State Immunity Waivers for Suits by the United States*, 98 MICH. L. REV. 92, 95 (1999) (arguing that although "[t]he Court hinted in *Alden* that" the states' waiver (in the constitutional plan) of immunity from suit by the United States "might exclude suits brought on behalf of the United States by private plaintiffs rather than by public officials," such a view "rests in tension with the Court's professed commitment, throughout its immunity jurisprudence generally and its waiver jurisprudence specifically, to an originalist methodology; one that focuses on the nature of the legal interest asserted rather than on the structural form of the litigation"). *Vermont Agency of Natural Resources v. United States ex rel Stevens*, 529 U.S. 765 (2000), presented the Court with a potential opportunity to address the question of state sovereign immunity with respect to *qui tam* suits under the False Claims Act, 31 U.S.C. §§ 3729–3733. *See Stevens*, 529 U.S. at 768. Ultimately, the Court decided *Stevens* as a matter of statutory interpretation, holding that states were not "persons" subject to suit by private individuals under the Act. *See id.* at 787–88. The Court thus "express[ed] no view on the question whether an action in federal court by a *qui tam* relator against a State would run afoul of the Eleventh Amendment"—but it "note[d] that there is 'a serious doubt' on that score." *Id.* at 787 (quoting excerpt from Justice Brandeis's statement in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), that "[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided," *Ashwander*, 297 U.S. at 348 (Brandeis, J., concurring) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932))). Even if state sovereign immunity bars *qui tam* suits against states, however, such a bar would not call into question the legitimacy of tribal intervention in United States suits against states under the *Arizona* doctrine. *See* Struve, *supra* note 38, at 141–64 (discussing reasons why state sovereign immunity would not bar *Arizona* intervention even if it did bar *qui tam* suits).

that the United States is a plaintiff satisfies the Court's requirements "that the National Government must itself deem the case of sufficient importance to take action against the State"[39] and that the federal government must be politically accountable for the maintenance of the suit.[40]

The Court's recent decision in *Idaho v. United States*[41]—the sequel to the *Coeur d'Alene Tribe* litigation—underscored the continuing validity of the *Arizona* doctrine. In a separate lawsuit, the United States sued the state, seeking relief with respect to roughly one-third of the land that the Tribe had sought in its suit.[42] The district court permitted the Tribe to intervene,[43] and, after a bench trial, found for the plaintiffs.[44] Accordingly, the district court quieted title in favor of the United States and the Tribe (as trustee and beneficiary, respectively), and it permanently enjoined the state from asserting any interest in the relevant land.[45] The Ninth Circuit affirmed, as did the Supreme Court.[46] In affirming, the Supreme Court expressly rejected the contention that sovereign immunity barred the claims against the state. As the Court explained, "[b]ecause this action was brought by the United States, it does not implicate the Eleventh Amendment bar raised when the Tribe pressed its own claim to the submerged lands in *Idaho v. Coeur d'Alene Tribe of Idaho*."[47] Although the *Idaho* Court's discussion of state sovereign immunity did not refer explicitly to the Tribe's intervention, the Court cited the portion of the *Arizona* opinion which had addressed that issue.[48]

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39. Alden v. Maine, 527 U.S. 706, 759–60 (1999).

40. *See id.* at 756 ("Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States.").

41. 533 U.S. 262 (2001).

42. *See* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 266 (1997) (noting that the United States' suit against Idaho concerned "approximately a third of the land covered by this suit").

43. *See* United States v. Idaho, 95 F. Supp. 2d 1094, 1095 (D. Idaho 1998).

44. *See id.* at 1117.

45. *See id.* The court also declared that the United States and the tribe were "entitled to the exclusive use, occupancy and right to the quiet enjoyment of" the relevant lands. *Id.*

46. *See* United States v. Idaho, 210 F.3d 1067, 1069 (9th Cir. 2000), *aff'd*, 533 U.S. 262, 281 (2001).

47. Idaho v. United States, 533 U.S. 262, 271 n.4 (2001).

48. *See id.* (citing Arizona v. California, 460 U.S. 605, 614 (1983)). In the cited passage, the Court had explained, concerning the *Arizona* litigation, that:

> [t]he Tribes do not seek to bring new claims or issues against the states, but only ask leave to participate in an adjudication of their vital water rights that was commenced by the United States. Therefore, our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised.

Thus, although some questions remain concerning the details of its application,[49] *Arizona* intervention remains viable under the current sovereign immunity precedents. The availability of *Arizona* intervention, however, is an imperfect solution to the problems posed by current sovereign immunity doctrine, for it makes the tribe's access to justice dependent on the federal government's willingness to sue on the tribe's behalf.[50] The recent devel-

Arizona v. California, 460 U.S. 605, 614 (1983).

49. The Supreme Court has not yet explicitly resolved the extent to which the tribal intervener can seek relief and make arguments that differ from the positions taken by the United States. In *Arizona* itself, the special master's grant of intervention rested in part on the recognition that the tribal interveners sought relief not requested by the United States. *See* Struve, *supra* note 38, at 137 ("The Special Master's Preliminary Report made clear that the Tribes sought greater relief than did the United States—indeed, that conclusion was among the primary reasons the Special Master permitted the Tribes to intervene."). Building on this notion, I have argued that tribal interveners should have considerable latitude to take positions that differ from those asserted by the United States. *See id.* at 157, 166–69, 172. In the Cayuga land claims litigation, the district court has held that a tribal plaintiff may raise "new claims or issues" not put forward by the United States plaintiff, "so long as those issues or claims encompass the same subject matter as the original claims or issues." Cayuga Indian Nation v. Cuomo, 1999 WL 509442, at *13 (N.D.N.Y. July 1, 1999); *see also* Canadian St. Regis Band of Mohawk Indians v. New York, 146 F.Supp.2d 170, 181 (N.D.N.Y. 2001) ("[T]he tribal plaintiffs' and the United States' claims here flow from the same subject matter and, thus at least for now, the court holds that the complaints are 'virtually identical' for Eleventh Amendment purposes.").

Some courts, however, have suggested that the tribal plaintiff should not assert claims or seek relief beyond that sought by the United States. Thus, in land claims litigation brought by the Seneca Nation of Indians, in which both another tribal plaintiff and the United States had intervened, the Second Circuit Court of Appeals affirmed the district court's rejection of the state's sovereign immunity defense, but stated in dictum that "the State of New York retains its Eleventh Amendment immunity to the extent that the [tribal plaintiffs] raise claims or issues that are not identical to those made by the United States." Seneca Nation of Indians v. New York, 178 F.3d 95, 97 (2d Cir. 1999) (per curiam). Likewise, in the Idaho litigation, the United States was unwilling to assert claims concerning all the lands that the Tribe wished to put at issue. *See* United States v. Idaho, 210 F.3d 1067, 1080 (9th Cir. 2000). The district court refused to permit the Tribe to assert claims as to the additional lands, see United States v. Idaho, 95 F.Supp.2d 1094, 1097 n.3 (D. Idaho 1998), and the Court of Appeals affirmed on the ground that both the United States and the state defendant had "disavowed" any wish to place the additional lands at issue in the suit. *See Idaho*, 120 F.3d at 1080.

Of course, with respect to claims against non-state defendants, the tribe clearly should be able to assert claims not pressed by the United States, because the constraints discussed here apply only when the United States' presence as a co-plaintiff is what permits the tribe to press its claim at all.

50. *Cf.* John P. LaVelle, *Sanctioning a Tyranny: The Diminishment of* Ex parte Young, *Expansion of* Hans *Immunity, and Denial of Indian Rights in* Coeur d'Alene Tribe, 31 ARIZ. ST. L.J. 787, 941–42 (1999) ("At a time in American history when federal Indian policy ostensibly is one of supporting tribal self-determination and autonomy, it is ironic, to

opments in sovereign immunity doctrine make it all the more essential that the federal government fulfill its trust obligations to Native American tribes—including its obligation to seek redress when states have violated tribal rights.

say the least, that the Supreme Court is forcing Tribes into a position of dependency on the United States for protecting the lifeblood of tribal homelands—the lakes, rivers and other bodies of water located on Indian reservations.").