

## Chapter 1

# Understanding Immunity Beyond the Courts

In January of 1991, the Seminole Tribe wrote a letter to Florida Governor Lawton Chiles to open negotiations with the state to permit gambling on tribal lands. The federal Indian Gaming Regulatory Act of 1988 required that before any gaming could be put into operation both the state and the tribe needed to reach a “compact” for any casino games such as slot machines. The act also required the states to negotiate fairly and in good faith with the tribes. Following up on their letter, in March the tribe submitted a proposed compact providing for tribal operation of poker and a limited range of electronic games. On May 24, 1991, the Governor’s General Counsel responded for the Governor, rejecting all of the tribe’s proposed games with the exception of poker. After another round of letters and meetings, the state continued to refuse to consider a compact that would include any machine gaming. Relying on the act, the tribe filed suit in federal district court to force the state to negotiate (*Seminole Tribe of Florida v. Florida* 1996).

In 1987, Peter Roberts started a company called College Savings Bank based on an idea he had to help parents save enough money for their children’s college education. The company sold a product known as CollegeSure, a certificate of deposit that guaranteed investors a return sufficient to fund uncertain future college education costs by linking it to the cost of tuition inflation. In 1988, the United States Patent Office granted Roberts a patent for the algorithm he used to calculate the savings. A year later, the Florida Prepaid Postsecondary

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Education Expense Board began offering a substantially similar program to Florida residents. College Savings Bank's business grew, but not at the rate of Florida's. In 1994, College Savings Bank sued the Florida Prepaid Postsecondary Education Expense Board claiming patent and trademark violations and seeking damages (*College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* 1999; *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* 1999).

In July of 1995, Patricia Garrett returned to her job as Director of Nursing, Women's Services/Neonatology at the University of Alabama, Birmingham Hospital after a yearlong battle with breast cancer. Garrett had undergone a lumpectomy, radiation treatment, and chemotherapy. During the time that she was undergoing treatment, her supervisor, Sabrina Shannon, made continuing threats to demote her despite Garrett's satisfactory performance. A co-worker told Garrett that Shannon did not like "sick people" and had a history of getting rid of them. At the suggestion of her doctor, Garrett took a medical leave from her job from March to July of 1995. When she returned to work, her supervisor told her that the hospital did not want her back. The hospital personnel department interceded on Garrett's behalf and she was allowed to return to her job. However, after only two weeks, her supervisor allegedly told her there was no way she could be successful at her job and that Garrett had to quit, be demoted to the nursing pool, or be discharged. Garrett quit and filed suit against University of Alabama, Birmingham alleging a violation of the Americans with Disabilities Act and seeking damages (*Board of Trustees of the University of Alabama v. Garrett* 2001).

These three cases, involving very different areas of the law, share one feature. Instead of arguing that state laws did not permit electronic gambling or that there was no breach of patent law or that the Americans with Disabilities Act had not been violated, the states being sued argued that they were immune from suit as a result of their Eleventh Amendment immunity, which reads "The Judicial power of the United States shall not be construed 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." Regardless of whether the state had in fact broken the law, they claimed they could not be held accountable in court.

These cases are part of the Supreme Court's growing jurisprudence in the area of sovereign immunity. Since *Seminole Tribe of Florida v. Florida* in 1996, the Supreme Court's concern with the Eleventh Amendment and state sovereign immunity has moved the topic from

the pages of law review articles to the front page of the news.<sup>1</sup> The Court has applied the principle of sovereign immunity to a variety of significant and far-reaching federal legislation including the Fair Labor Standards Act (*Alden v. Maine* 1999), the Trademark Remedy Clarification Act (*College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* 1999), the Patent Remedy Act (*Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* 1999), the Age Discrimination in Employment Act (*Kimel v. Florida Board of Regents* 2000), and the Americans with Disabilities Act (*Board of Trustees of the University of Alabama v. Garrett* 2001). In each of these cases, the Court found in favor of the states and dismissed the suits in question as impermissible under the Eleventh Amendment.<sup>2</sup>

What is state sovereign immunity and what does it have to do with the Eleventh Amendment? In *Alden v. Maine*, a case that extended sovereign immunity protection to state courts as well as federal courts, Justice Kennedy described the Court's reasoning:

...the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments. (*Alden v. Maine* 1999, 713)

The holdings in these cases are predicated on the belief that the novel experiment of a federal system in the United States recognized the sovereignty of both the states and the national government rather than granting either superiority over the other.<sup>3</sup> It follows from this premise that state sovereign immunity protects states from the obligation of responding to lawsuits brought by individuals or foreign states because of "the dignity and essential attributes" inherent in their status as sovereigns (*Alden* 1999, 714). Ernest Young has characterized this approach to federalism as "immunity federalism," an attempt to strengthen states by protecting them from legal obligations imposed by the federal government (Young 1999, 1). Not surprisingly, these decisions are highly controversial and have been sustained by slim 5–4

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majorities. Civil rights, patents, trademarks, and tribal issues are all affected by the Court's decisions.

There is widespread debate among scholars about whether the current interpretation of the doctrine by the Court is correct, involving both factual and doctrinal disagreements.<sup>4</sup> To supporters of these decisions, state sovereign immunity represents a bold stance against overly encroaching federal interference with the states. To opponents, the decisions are a travesty of justice, denying legal remedy to those harmed by the states. I am interested in a different aspect of these cases. Rather than debate the legal and historical conceptions of sovereign immunity, I am most concerned with the consequences of the doctrine. Since sovereign immunity serves to remove legal recourse for monetary damages,<sup>5</sup> it presents an intriguing bundle of questions: What happens when courts no longer provide an avenue for relief against the government? What happens to individuals who are wronged by the state? Must they simply accept their losses or do they resort to alternative means of redress? What happens to the states that rely on sovereign immunity? Are there any repercussions? Young suggests that immunity federalism does little to protect the ability of states to act authoritatively in their own right and may be counterproductive for the goal of strengthening states (Young 1999, 3). Is this the case? The answers to these questions have broad implications for limited government, governmental accountability, and the role of the courts as a mechanism for governance.

In this book, I use both historical case studies and contemporary examples to explore these questions and highlight the issues raised by the Court's current actions. The case studies focus on periods of extensive use of sovereign immunity by the states and cluster into three different time periods—the 1790s, 1840s, and 1870s.<sup>6</sup> Despite notable differences between nineteenth and twentieth century politics, these case studies demonstrate the commonalities in the ways that the consequences of sovereign immunity develop. The eighteenth and nineteenth century cases deal predominately with states as debtors who made direct contracts while the current cases are more focused on the implementation of federal laws. Nonetheless, the dynamics surrounding the cases are the same. Across each of the case studies, an individual or group is trying to use the courts to force the state to do something that they would not otherwise do. States in all of the case studies are interested in protecting their treasuries, if not from the immediate claim then from concern over a potential flood of future claims. Additionally, in each instance political actors respond rationally to relevant pressures although the specific pressures change with time. The differences in

conditions between the time periods will be noted, but they should not distract from the underlying similarities.<sup>7</sup> Indeed, the advantage that these historical case studies provide is the demonstration that the outcome remains relatively constant across a variety of scenarios under which sovereign immunity is exercised.

Arguments about federalism typically boil down to how to properly divide authority between the national and local governments.<sup>8</sup> The current majority on the Supreme Court has a vision of appropriate federal-state relations that relies in significant part on the operation of sovereign immunity.<sup>9</sup> A careful review and understanding of the effectiveness of sovereign immunity as a means of protecting state authority is critical in evaluating the Court's approach. This study offers an opportunity to respond to rhetorical arguments about the dignity of states with facts and analysis based on what has actually transpired.<sup>10</sup> To accomplish this, the book is, at least in part, an analysis of the impact that a legal doctrine can have on the broader political sphere. Much has been written about the need for action by other political branches in order to implement court decisions.<sup>11</sup> I address the question of how "judicial losers" can use political means to achieve their goals even in the face of failure in court.

My findings challenge some of the assumptions of both supporters and detractors of the doctrine. Contrary to the hopes of the doctrine's proponents, I find that the use of sovereign immunity by states is rarely successful in increasing state authority and almost always carries a significant risk of diminished state power. This is true in cases ranging from the debt repudiations of the 1840s to the refusal to negotiate with the Seminole Tribe. Those denied legal remedies against the state seek political or economic sanctions to achieve their goals. Since these approaches are by nature less precise than most legal remedies, they often have a broader impact than simply submitting to the original lawsuit. The hammering that state bonds and credit took as a result of repudiations in both the 1840s and 1870s demonstrates the risk inherent in shutting powerful actors out of the courts.<sup>12</sup> In the modern context, resource-rich groups such as the Seminole Tribe have successfully defied state power, relying instead on the federal government. Despite the concerns of those opposed to the application of sovereign immunity, the doctrine does not give states *carte blanche* to do whatever they wish.

It should not surprise anyone that plaintiffs shut out of the courts by sovereign immunity defenses do not stop pressing their claim, but the application of this understanding to extra-judicial responses by plaintiffs or defendants is all too rare. An unsuccessful attempt at a

lawsuit is not always the end of the story. Applied to sovereign immunity, these findings challenge the theories of scholars such as Todd Pettys and Robert Nagel who argue that sovereign immunity affords states with increased autonomy to compete with the federal government for the “people’s affection” (Pettys 2003, 368–374; Nagel 2001a, 58). The empirical record undermines this claim and suggests that the consequences can be the exact opposite of those proposed— states emerge from these conflicts with diminished autonomy and increased hostility. There are also implications of this for understanding the reach and scope of judicial power. The courts do not have the final say in most policy disputes and should be recognized as one political institution among many others.

That is not to say that the use of sovereign immunity is always harmful to the states. Indeed, this is perhaps the most important aspect of sovereign immunity that needs to be understood. Sometimes sovereign immunity does successfully protect the state from any monetary claim. Loyalists in the 1790s and older state employees such as Dan Kimel today fit into this category. What explains the difference in these outcomes? In evaluating the cases that follow, three critical characteristics of each case emerge to explain the variation. The first factor is *resources*. By resources, I primarily mean financial resources of the plaintiffs, although it also includes time, contacts, and influence on nongovernmental institutions such as credit markets. Not surprisingly, plaintiffs with resources are better equipped to respond to a loss of access to courts than those without resources, although with the assistance of interest groups it is possible to overcome this hurdle.

The control of resources is only part of the consideration when it comes to gaining remedies from states, though. The second factor is *political support for the plaintiff*. By this I mean whether a political coalition in a position to take action at either the state or federal level would have independent reasons to sympathetically act on the plaintiff’s claim. This evaluation is necessarily case-specific, but includes factors such as interest group activity, electoral pressures, and political party agendas. Since any remedy must come from the state, the involvement of elected officials or their delegates is critical. The third factor is *political support for addressing the underlying issue* in dispute. For example, while there may have been minimal support for College Savings Bank as a plaintiff, there is significant political support for revising patent and trademark law to eliminate the sovereign immunity defense. On the other hand, land speculators in the 1790s found little political support either for their own causes or for expanding out-of-state land speculation. This factor can also include “fairness” concerns

such as those found by Bosworth to be significant in securing passage of immunity waivers at the state level (Bosworth 2006).

These three factors are certainly related, but they are conceptually distinct. Resources can help to develop potential political support for either the plaintiff or issue, but they do not guarantee it. To take an extreme example, a drug kingpin may control substantial resources, but that is unlikely to translate into political support in either the legislature or the administration. Likewise, those without resources to get their message out to a relevant political coalition are unable to tap any potential political support. It is also possible to have situations where political remedies either compensate the plaintiffs without preventing others from finding themselves in the same situation in the future or ignore the plaintiffs and focus on preventing future cases from arising.

The presence or lack of these factors should directly affect the ability of plaintiffs to successfully achieve their goals in the face of a sovereign immunity defense and determine the impact on states exercising a sovereign immunity defense.

**TABLE 1.1**  
**EFFECTS OF RESOURCES, POLITICAL SUPPORT FOR PLAINTIFFS,**  
**AND POLITICAL SUPPORT FOR ISSUE**

<i>Resources</i>	<i>Political Support Plaintiffs</i>	<i>Political Support Issue</i>	<i>Plaintiff's Likelihood of success after dismissal</i>	<i>Risk to states</i>
Yes	Yes	Yes	High	High
Yes	Yes	No	Medium	Medium
Yes	No	Yes	Low	Medium
Yes	No	No	Low	Medium
No	Yes	Yes	High	High
No	No	Yes	Low	Medium
No	Yes	No	Medium	Low
No	No	No	Low	Low

The combination of these three factors can lead to eight possible outcomes, detailed in Table 1.1. For each outcome, there is a probability of success for the plaintiff and a probability of harm for the state. Success for the plaintiff simply means receiving, through political rather than legal means, at least part of what the plaintiff sought in the original suit. By risk to the state, I mean the level of risk that using sovereign immunity as a defense will result in a reduction in autonomy and power for the state compared to its status before using sovereign immunity. This can include anything from federal preemption to a state law waiving its immunity in the future.

The values in the table above were reached using the following decision rules. In situations where the plaintiff has resources, the risk to the states is at least medium since the plaintiff could potentially use those resources to harm the state extra-legally. Likewise, where political support for the underlying issue exists, the risk to states is at least medium. Such circumstances suggest that a political coalition exists that could take action if provided with the proper circumstances. Where political support for the plaintiff is lacking, however, the likelihood of success for the plaintiff is low. To receive the sought-after remedy, plaintiffs must identify a political coalition interested in supporting their cause specifically and willing to mandate the payment of at least some funds as compensation.

What does this tell us about the outcomes of sovereign immunity disputes? Aggrieved parties with resources, political support for themselves, and political support for their issue are unlikely to be substantially impacted by the removal of courts. Indeed, these individuals wield sufficient power that disputes between these actors and the states are unlikely to ever reach the courts. In the limited cases where the conflicts do get to court and the state relies on a sovereign immunity defense, the state is not likely to be successful in the long term.<sup>13</sup> As long as resources and political support for both plaintiffs and the underlying issue are present, the state would face dramatic repercussions if it proceeded to ignore the interests of such actors. These interactions should be rare and the use of sovereign immunity in these instances carries immediate and substantial risks for states.

Plaintiffs with resources and political support for their issue, but lacking a sympathetic political coalition for themselves, are far more likely to take their conflicts with states to the courts in the first place. After dismissal from the courts in these cases, the lack of political support allows the state to ignore the wishes of the affected individual or group, at least in the short term. In fact, if the plaintiff not only lacks political support but faces active hostility, the state may be severely constrained in its ability to address the concerns outside of the courts.<sup>14</sup> The command of resources by the plaintiffs, however, can be a significant matter. Where the actors control extra-legal means of recourse, they can exact punishment from the offending state. Politically, it is also possible that the coalition supportive of the underlying issue could take action to protect that interest in the future, resulting in a restriction of state autonomy on the issue. In these cases, both sides end up significantly worse off. The plaintiffs are not granted any remedy, but the states also suffer losses financially and politically.



A third relevant category is plaintiffs who lack resources and any political support. It is these plaintiffs that states can treat with impunity, confident that any repercussions will be limited. Without access to resources necessary to impose extra-legal sanctions or a significant mobilized political coalition at either the state or federal level, these actors are left with few options. In these instances, sovereign immunity is a successful barrier for the state, resulting not only in the loss of any potential remedy, but the elimination of an opportunity to even consider whether a remedy is justified.

It is important to note that these categories do not represent absolute classifications. Each factor is actually a continuum, with some groups controlling more resources and others fewer. Likewise with political support, which exists in varying degrees. In fact, a case's status with regard to resources and political support can change over time, resulting in different outcomes as it progresses. Nonetheless, these categories are helpful in clarifying the role of sovereign immunity. Plaintiffs can be grouped, at least roughly, into these categories for a better sense of how the elimination of legal recourse affects both parties in the original suit.

When states use sovereign immunity to keep groups lacking resources and active political support out of court, there is rarely any backlash. It is in these circumstances that the fears of opponents of sovereign immunity appear to be justified. This is true to a somewhat lesser extent of plaintiffs that lack both resources and political support for their specific case. The political support for the issue presents some threat to the state, but it is more difficult to mobilize action in these circumstances. States have more leeway in not responding to these groups because the likelihood of political, social, or economic pressure is lower.

Of course, there are significant problems with this. While minimizing the risks of harm, it would place the full burden of exercising sovereign immunity on those plaintiffs lacking resources and political support. It is precisely these plaintiffs that are most in need of access to the court system to remedy wrongs because of the difficulty in bringing about change through other political channels (see Black 1973; Giles and Lancaster 1989; Lawrence 1991; Zemans 1983). Indeed, in the case of federal laws establishing causes of action against states, the political coalition that established the law relied on the courts as the means of enforcement to avoid further political involvement. This suggests that at best, states can rely on sovereign immunity effectively only against those groups that are the weakest and least likely to cause harm. These victories for states are victories on the margins, and they come at the expense of those most vulnerable.

In sum, I find that ultimately the expansion of sovereign immunity does little to expand state authority and carries a serious risk of negative consequences. It is worth noting that this is not a legal critique of the judicially developed doctrine. Whether the Court interprets the ability of states to use sovereign immunity in more circumstances is, in a sense, irrelevant unless the states choose to make use of the doctrine. While there may well be valid criticism of the Court for leaving a loaded weapon lying around, ultimate responsibility must fall on the states that exercise such power.

### PLAN OF THE BOOK

The remainder of the book is organized into three sections. The first provides a review of how sovereign immunity as a doctrine came to be what it is today. Chapter 2 covers the highlights of sovereign immunity, providing a necessary background for the case studies to follow. Part 2 consists of in-depth case studies of three distinct time periods. Chapter 3 addresses the 1790s and the initial application of state sovereign immunity. I trace the relevant cases, the consequences of court decisions, and the actions of the states. In chapter 4, I turn to the 1840s, a period of substantial economic upheaval that resulted in nine states defaulting or repudiating their debts. Although there was little doctrinal development in the courts, sovereign immunity had a lasting impact on the outcomes. Chapter 5 addresses the post-Civil War period from the 1870s to the 1890s. As in chapter 4, the states relied on sovereign immunity to avoid their financial obligations. The cases leading up to the decision in *Hans v. Louisiana* (1890) increasingly protected the states from their fiscal liabilities, which was not without repercussions. I explore the circumstances surrounding the repudiation of debts and the reactions of the creditors.

Each of these historical case studies is used to highlight certain common trends and consequences, which are then applied in Part 3 to the current group of cases. The final case study in chapter 6 begins with *Seminole Tribe* and traces the impact on both the plaintiffs and the states successfully relying on the doctrine in major cases since *Seminole Tribe*. I conclude in chapter 7 with further considerations about the wisdom of expanding the reach of sovereign immunity. I note that at the heart of what is troubling about state sovereign immunity is the loss of legal accountability as a mechanism for keeping government in check for those whose grievances are not considered sufficiently central to the relevant political actors in other branches. I suggest some alternatives and warn of the risks inherent in continuing further down this path.