

# Who Pays the Price?: The Impact of State Sovereign Immunity

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Beginning in the mid-1990s, the Supreme Court handed down a series of controversial decisions in the area of state sovereign immunity.<sup>1</sup> In case after case, the Court dismissed suits by individuals against states to enforce a variety of federal laws. 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>2</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.<sup>3</sup> 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.<sup>4</sup> The Court’s cases blocked litigants from recovering damages

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<sup>1</sup> These cases are also referred to as Eleventh Amendment cases because the Eleventh Amendment provides the primary source of textual support for the doctrine of state sovereign immunity. The Eleventh Amendment 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.”

<sup>2</sup> For a historical review of the concept of split sovereignty in the United States, see McDonald, Forrest (2000) *States’ Rights and the Union: Imperium in Imperio, 1776-1876*. (Lawrence, KS: University Press of Kansas). This is not a universally accepted description of sovereignty in the early United States. In *Chisholm v. Georgia*, 2 Dall. 419 (1793), one of the earliest Supreme Court decisions touching on the question of sovereignty, framer and Supreme Court Justice James Wilson argued that sovereignty resides in the people, not in the states or national government. Regardless of the merits of this argument, it is not one adopted by the current majority on the Supreme Court.

<sup>3</sup> *Alden v. Maine* 527 U.S. 706 (1999), 714.

<sup>4</sup> Young, Ernest A. (1999) “State Sovereign Immunity and the Future of Federalism.” *Supreme Court Review* 1-79: 1.

against states in the areas of fair labor standards, patents, trademarks, age discrimination, and disabilities law.

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. In this paper, I step back from the rhetoric on either side and examine the impact of these decisions. Since these sovereign immunity cases serve to limit legal recourse for damages,<sup>5</sup> they present 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.<sup>6</sup> 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 paper, I focus on three major cases decided by the Supreme Court between 1996 and 2001.<sup>7</sup> These cases range from gambling negotiations to age discrimination law and provide a sense of the varying types of responses and

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<sup>5</sup> Injunctive suits are still permitted, but are particularly ill-suited to many of the issues being challenged.

<sup>6</sup> Young, 3.

<sup>7</sup> This paper is part of a larger book project that includes studies of six current cases as well as historical studies from three other time periods to assess the impact of sovereign immunity.

consequences. Each case is closely examined, from its inception to its fallout, and I review the implications for all parties involved. I find that plaintiffs who are able to secure support from a substantial political coalition at either the state or federal level are not significantly affected by the loss of legal remedies, while plaintiffs who are unable to mobilize a political coalition are left with few options. Success in mobilizing political support depends on the plaintiff's resources including interest group involvement, the contextual political and social factors at the time, and the continued strength of the original political coalition that enacted the law the state allegedly violated. At the same time, where interested plaintiffs are able to mobilize a dominant political coalition, states run the serious risk of repercussions for their actions and do not emerge with increased autonomy. In sum, claims of state sovereign immunity are only effective against those plaintiffs that are politically weakest and carry a significant risk of political backlash for the state when plaintiffs mobilize the necessary political support to achieve their goals. My findings are preliminary given that this area of the law is still developing rapidly and effects may take years to fully appreciate.<sup>8</sup> Nonetheless, a close examination of these cases provides further insight into the benefits, costs, and risks associated with sovereign immunity.

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<sup>8</sup> I have also ignored responses that occurred in states that were not engaged in litigation, such as legislation in Minnesota, Missouri, or Connecticut. For a discussion of the Minnesota legislation and its adoption, see Chapter 7 and Bosworth, Matthew H. (2003) "'An Innate Sense of Fairness:' Minnesota's Sovereign Immunity Waiver and the Politics of Rights." Presented at Midwestern Political Science Association annual meeting, Chicago, IL.

## ***Seminole Tribe of Florida v. Florida***

The Seminole Tribe is one of the pioneers of tribal-run gambling and they have pushed hard to expand upon their successes. The conflicts that emerged with the state government of Florida led to the first major sovereign immunity decision by the current Court in 1996. The story of the struggles between the Seminole Tribe and the state of Florida over gambling is a complex one filled with ironies regarding the role of sovereign immunity. Each side used the defense to protect their interests, but resources and political support determined the outcome for both parties.

### **Background**

In the 1850s, as the majority of Seminoles were forcibly removed from Florida to Oklahoma, a stalwart group retreated to the Everglades and engaged in several wars to maintain their land.<sup>9</sup> The Seminole Tribe of Florida officially formed a charter in 1957 under the Indian Reorganization Act of 1934 and was recognized by the federal government. Life for the Seminoles was difficult, though. Tribal members were mostly uneducated and poor, living in thatched roof chickee huts. The annual tribal budget was under \$2 million in 1979, or \$400 per member, most of which came from the federal government. In 1979, tribal chairman Howard Tommie decided to increase the tribe's income by opening up tax-free tobacco shops and high-stakes bingo. Bingo

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<sup>9</sup> The following account of the rise of gambling in the Seminole Tribe is drawn from several sources. See Catellino, Jessica R. (2003) "Sovereignty as Interdependency: Florida Seminole Casinos, Law, and the Politics of Market Integration." Presented at Law & Society Association annual meeting, Pittsburgh, PA; Goldstein, Brad and Jeff Testerman (1997) "In Seminole Gambling, A Few Are Big Winners." *St. Petersburg Times*, 19 December, 1A; Olson, Wyatt (2003) "Gamblin' Men." *New Times Broward-Palm Beach*, 30 January; and Staletovich, Jenny (1998) "Focus on Gambling Issues." *The Atlanta Journal and Constitution*, 7 September, 8A.

was legal in Florida at the time, but the maximum jackpot was limited to \$100.

Tommie felt that the tribe would be shielded from the state law because of its status as a sovereign nation.<sup>10</sup>

Before the tribe could even open the bingo hall, Broward County Sheriff Robert Butterworth announced that he would arrest anyone gambling in violation of the state law.<sup>11</sup> The tribe sued Butterworth in federal court, claiming that the state of Florida did not have jurisdiction to enforce its law on the reservation. In what was a significant legal victory not only for the Seminole Tribe, but for all tribes interested in pursuing gambling, both the district court and the appellate court found for the tribe and enjoined Butterworth. The appellate court ruled that bingo was merely regulated rather than prohibited, so the state could not apply its criminal laws to the tribe.<sup>12</sup>

Following this legal victory, many tribes began aggressively expanding investments in the gaming industry. The rapid growth of casinos on tribal land and the subsequent outcry and attempted regulation from a number of states eventually forced Congress to address the issue. The final catalyst was the 1987 Supreme Court decision in *California v. Cabazon Band of Mission Indians* that restricted the ability of states to regulate gaming.<sup>13</sup> In 1988, Congress attempted to mediate the brewing conflicts by passing the Indian Gaming Regulatory Act (IGRA), which established

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<sup>10</sup> Tribal sovereignty is a long-standing and complex area of the law. See, for example, *Worcester v. Georgia*, 31 U.S. 515 (1832) (Indian nations are "distinct political communities, having territorial boundaries, within which their authority is exclusive..."). For a more recent discussion of the issue of tribal sovereignty, see Wildenthal, Bryan H. (2003) *Native American Sovereignty On Trial: A Handbook with Cases, Laws, and Documents*. (Santa Barbara, CA: ABC-CLIO).

<sup>11</sup> *Seminole Tribe of Florida v. Butterworth*, 491 F. Supp. 1015 (1980).

<sup>12</sup> *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (1981).

<sup>13</sup> 480 U.S. 202 (1987)

procedures and limits for gambling on tribal lands.<sup>14</sup> The law, passed under the guidance of western Democrats with large Native American populations, separated gaming into three different classes of activities. Class I gaming “means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.”<sup>15</sup> Class II gaming consists of bingo, games similar to bingo, nonbanking card games, and card games already legal and operating in the state prior to the passage of the IGRA.<sup>16</sup> Class III gaming is defined as all other forms of gaming not classified by Class I or Class II.<sup>17</sup> Class III gaming includes gambling such as slot machines, electronic games of chance, dog racing, lotteries, and banking card games. Tribes can engage in Class I or II gaming with relatively limited oversight or obstacles.<sup>18</sup> Class III gaming, on the other hand, requires a Tribal-State compact agreeing to the particular gaming activities. The law requires that the state enter into “good faith” negotiations with the tribes over Class III gaming and provides for a legal remedy if 180 days pass without a response from the state.<sup>19</sup> If the court finds the state has not been negotiating in good faith, the state is given sixty more days to comply or the

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<sup>14</sup> 25 U.S.C. §2701. For more on the adoption of the IGRA, see Boehmke, Frederick J. and Richard Witmer (2004) “Disentangling Diffusion: The Effects of Social Learning and Economic Competition on State Policy Innovation and Expansion.” *Political Research Quarterly* 57: 41; Bacon, Shannon (1997) “The Indian Gaming Regulatory Act: What Congress Giveth, The Court Taketh Away- Seminole Tribe of Florida v. Florida.” *Creighton Law Review* 30: 583-584; and Cohen, Neil Scott (2000) “In What Often Appears To Be a Crapshoot Legislative Process, Congress Throws Snake Eyes When It Enacts The Indian Gaming Regulatory Act.” *Hofstra Law Review* 29: 278.

<sup>15</sup> §2703 (6)

<sup>16</sup> §2703 (7)

<sup>17</sup> §2703 (8)

<sup>18</sup> The act allows class II gaming where the State "permits such gaming for any purpose by any person, organization or entity," and the "governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman" of the National Indian Gaming Commission. 25 U.S.C. §2710 (b)(1).

<sup>19</sup> §2710 (d)(7)(B)(i)

dispute goes to mediation. If the state continues to reject any compromise, the Secretary of the Interior is empowered to establish the procedures under which Class III gaming may be carried out.

### **The Case**

Gambling has been a boon for the Seminole Tribe, which now operates five casinos and has an annual budget of \$300 million a year. In January of 1991, the tribe sent a letter to Florida Governor Lawton Chiles requesting negotiations for a compact permitting the operation of Class III gaming in compliance with the IGRA.<sup>20</sup> In March, the tribe followed up on its initial letter with a proposed compact providing for tribal operation of poker and a number of video and electronic games. The tribe made what it considered to be a relatively modest request in order to expedite the compacting process. In May, the Governor's General Counsel responded by approving the poker but denying all other types of Class III gaming. After complaints from the tribe, the general counsel reiterated the state's position that no machine gaming or any other form of casino gaming would be negotiated. After a meeting with state officials in September of 1991, the tribe decided to bring suit against the state and the governor in federal district court, under the IGRA, to force the state to negotiate in good faith.

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<sup>20</sup> The facts of the case are drawn from the petitioner's brief in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

The state immediately filed a motion with the district court to dismiss the suit because of Eleventh Amendment immunity.<sup>21</sup> The district court rejected the motion and the state filed an interlocutory appeal with the Eleventh Circuit Court of Appeals.<sup>22</sup> In the meantime, the district court granted summary judgment on the facts to the state and dismissed the lawsuit, claiming that the state did negotiate in good faith. The tribe appealed that decision to the circuit court as well, although its resolution was put on hold pending the outcome of the Eleventh Amendment issue. The Eleventh Circuit combined the Seminole's case with one involving the Poarch Band of Creek Indians in Alabama that raised the same issue. In deciding the case, the court ruled that Congress did not have the authority under the Commerce Clause to abrogate the state's immunity.<sup>23</sup> Since the IGRA was enacted under Congress' commerce clause power, the law could not require the states to face lawsuits to enforce it. The court did conclude that the tribe could appeal to the Secretary of the Interior for resolution of the dispute.<sup>24</sup>

Both the tribe and the state appealed the decision. The tribe wanted to overturn the sovereign immunity holding while the state rejected the contention that the Secretary of the Interior could develop gambling regulations for their state. The

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<sup>21</sup> *Seminole Tribe of Florida v. Florida*, 801 F. Supp. 655 (S.D. Fla. 1992). The state's motion argued that sovereign immunity applied to the governor as well since negotiating the compact was a discretionary matter and thus not liable under the *Ex Parte Young* doctrine. Both the appellate court and the Supreme Court adopted this argument.

<sup>22</sup> An interlocutory appeal is an appeal on a question of law while the trial is still in progress. Most appeals are raised after the trial is over, but for certain important questions of law, parties can ask the appellate court to review the question before the trial proceeds any further.

<sup>23</sup> *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (11th Cir. 1994).

<sup>24</sup> *Id.* at 1029

Supreme Court accepted the tribe's writ of certiorari and agreed to hear the case during its 1995-1996 term.<sup>25</sup>

In its decision, the Court upheld the appeals court and concluded that the IGRA could not validly abrogate a state's sovereign immunity. Relying heavily on *Hans v. Louisiana*,<sup>26</sup> the Court explicitly overturned the earlier case of *Pennsylvania v. Union Gas Company* in which a plurality held that Congress had sufficient authority under the commerce clause to abrogate sovereign immunity since it is only a doctrine of common law rather than a constitutional principle.<sup>27</sup> The Court concluded that sovereign immunity is a constitutional guarantee for the states that can only be removed through authority granted to Congress by section 5 of the Fourteenth Amendment. As a consequence, the Court dismissed the Seminole's lawsuit and denied the courts any role in attaining state compliance with the federal law.

### **The Consequences**

The decision was a shock to many legal observers and seemed to confirm the Court's developing interest in restructuring the federal-state relationship.<sup>28</sup> The reemergence of sovereign immunity as a method of protecting state authority was seen as a boon for the states and, in conjunction with the earlier *United States v. Lopez*<sup>29</sup>

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<sup>25</sup> *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). The state's appeal over the question of the Secretary of the Interior's authority was denied certiorari. Petition No. 94-219.

<sup>26</sup> 134 U.S. 1 (1890)

<sup>27</sup> 491 U.S. 1 (1989)

<sup>28</sup> See Nagel, Robert F. (2001) *The Implosion of American Federalism*. (New York, NY: Oxford University Press) for a skeptical account of the Court's ability to achieve any substantive change.

<sup>29</sup> 514 U.S. 549 (1995). This case limited Congress' Commerce Clause power for the first time since the New Deal. The Court overturned the Gun-Free School Zones Act of 1990 that made it a federal

decision, a move towards a greater role for states in our federal system.<sup>30</sup> Certainly, Florida had scored a victory on the issue at hand. The federal courts could not force the state to negotiate with the Seminole Tribe over gambling. However, to look at the issue so narrowly is to miss the broader impact of the decision on both the tribe and the state. The Seminole Tribe, which had bucked state authority for more than fifteen years, was not about to drop the issue and give up. In this section, I trace the Seminole Tribe's complex actions in response to the decision and evaluate the outcomes as they relied on other political channels to achieve Class III gaming. By looking beyond the decisions themselves, it is possible to develop a fuller picture of the consequences of sovereign immunity.

Despite the tribe's failure in the courts, they were not left without options. Immediately following the decision, the tribe, along with a number of other tribes around the country, followed the advice of the Eleventh Circuit and appealed to Secretary of the Interior Bruce Babbitt to issue a ruling establishing how Class III gaming could be conducted.<sup>31</sup> The tribes had reason to be hopeful that Secretary Babbitt would view their situation favorably. Babbitt was a former governor of Arizona and precisely the type of western Democrat that had pushed for passage of the

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crime to possess a gun within 1000 feet of a school because the law was insufficiently related to the regulation of commerce.

<sup>30</sup> There are a number of articles and books suggesting that these decisions favor the states. See, for example, Noonan, John T. (2002) *Narrowing the Nation's Power: The Supreme Court Sides with the States*. (Berkeley, CA: University of California Press): 6 ("It is on their [the states] behalf that the court has labored"); Chemerinsky, Erwin (1999) "The Rehnquist Court & Justice: An Oxymoron?" 1 *Washington University Journal of Law & Policy* 37-52: 39 ("the Supreme Court has used federalism to protect states and limit federal power"); and Swinford, Bill and Eric N. Waltenburg (1998) "The Consistency of the U.S. Supreme Court's "Pro-State" Bloc." *Publius* (Spring) 25-41: 25 ("decisions emanating from the Court were notable for the degree to which they protected and expanded the policy interests of the states.").

<sup>31</sup> Thomas, Jennifer S. (1996) "Senate Considers Indian Gaming Rules." *St. Petersburg Times*, 10 May, 5B.

IGRA in the first place. The states recognized that the appeal to the Department of the Interior could be even more problematic for them than the IGRA was. The decision in *Seminole Tribe*, by undermining the IGRA compacting process, actually yielded the authority to the federal government. Instead of being a key player in the process, the states would have no say in the gaming conducted within their borders. The states suggested that the Secretary did not have the authority to make the regulations and Babbitt was hesitant to take any action.<sup>32</sup> At the same time, the state of Florida pushed the U.S. Department of Justice to enforce federal gaming laws that prohibited casinos from operating without proper licenses. The state's request resulted in a U.S. Attorney asking a judge to order the removal of illegal slot machines from Seminole casinos in Tampa and Immokalee.<sup>33</sup> The state filed its own suit in federal district court against the tribe to stop what it considered to be illegal gambling.<sup>34</sup>

The tribe responded by suing Secretary of the Interior Babbitt in June of 1997 to force him to issue a ruling.<sup>35</sup> The tribe was confident that the Secretary would issue a ruling in their favor that would make the legal action against them moot. Seminole Tribe Chairman James Billie said at the time "[I]t's too bad we have to sue the Secretary to force him to do his job, but continued threats of litigation from both the State of Florida and the Justice Department leave us little choice."<sup>36</sup> The filing of the lawsuit against Babbitt got the Interior Department to take action and in January of

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<sup>32</sup> United States Department of the Interior, "Class III Gaming Procedures." 63 *Federal Register* 3291.

<sup>33</sup> Gruss, Jean (1997) "Tribe Sues to Expand Gambling Operations." *Tampa Tribune*, 14 June, Business & Finance pg. 1.

<sup>34</sup> *State of Florida v. Seminole Tribe of Florida*, No. 96-2063-Civ-UUB. (1997)

<sup>35</sup> Gruss, 1.

<sup>36</sup> *Id.*

1998, the Secretary published draft regulations for comment.<sup>37</sup> In the regulations, the Secretary established that when a state used sovereign immunity to prevent enforcement of the IGRA, it would be his responsibility to determine if a state had been negotiating in good faith. Once that determination was made, the Secretary was authorized to send the negotiations to a mediator and ultimately to force the tribe and state to accept the mediator's conclusion.<sup>38</sup>

Alarmed by this potential outcome, the states appealed to the U.S. Congress for assistance. Senator Richard Bryan of Nevada introduced a bill that prohibited the Secretary of the Interior from promulgating final regulations for Indian gaming.<sup>39</sup> Senator Ben Nighthorse Campbell also introduced a bill that would have amended the IGRA and prohibited the Secretary from making regulations without the consent of both the state and tribe.<sup>40</sup> Both of the bills were referred to the Senate Indian Affairs Committee and hearings were held for Campbell's bill, but neither moved beyond that stage.

In the meantime, the Seminoles reached out to allies in their quest for expanded gambling. In June of 1998, Donald Trump announced that he was providing legal and lobbying support to the tribe, including the services of Mallory Horne, a

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<sup>37</sup> "Class III Gaming Procedures," 3289.

<sup>38</sup> *Id.*, 3291-3292.

<sup>39</sup> S. 1572 in the 105<sup>th</sup> Congress. The text of the bill was relatively short. It simply said that: "Notwithstanding section 11(d)(7)(B)(vii) of the Indian Gaming Regulatory Act (25 U.S.C. 2710(d)(7)(B)(vii)), the Secretary of the Interior may not promulgate—  
(1) as final regulations, the proposed regulations published on January 22, 1998, at 63 Fed. Reg. 3289; or  
(2) any similar regulations to provide for procedures for gaming activities under the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) in any case in which a State asserts a defense of sovereign immunity to a lawsuit brought by an Indian tribe in a Federal court under section 11(d)(7) of that Act (25 U.S.C. 2710(d)(7)) to compel the State to participate in compact negotiations for class III gaming (as that term is defined in section 4(8) of that Act (25 U.S.C. 2703(8)))."

<sup>40</sup> S. 1870 in the 105<sup>th</sup> Congress.

former speaker of the Florida House and Senate president.<sup>41</sup> Horne met with the tribe and the state to try to reach a compromise. Trump additionally provided financial support through donations to both political parties in Florida, including \$50,000 to the Republican Party, in an attempt to encourage a relaxation of the gambling laws.<sup>42</sup> These negotiations were unsuccessful, however, and did not result in any compromises. In November of 1998, Jeb Bush was elected governor of Florida and continued Lawton Chiles' approach to Indian gaming.

1999 was a critical year in the process, with three substantive victories for the Seminole Tribe. In April, Interior Secretary Bruce Babbitt released the final version of the rules by which tribes may initiate Class III gaming after a state has exercised its sovereign immunity.<sup>43</sup> The final rules were substantively the same as the proposed regulations from 1998 and granted final authority to the Secretary to accept or reject a compact emerging from mediation. This meant that the tribe could effectively bypass a recalcitrant state and force mediation on the subject. The tribe submitted a request to Babbitt for consideration of Class III gaming at their facilities. In response, Florida's Attorney General Robert Butterworth sued Babbitt, claiming that the Secretary did not have the authority to issue a ruling because of state's rights and a conflict of interest in his role as the trustee for all Indian lands.<sup>44</sup> Despite the state's lawsuit, as tribal attorney Bruce Rogow points out, "[t]his decision takes the state out of the litigation

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<sup>41</sup> Goldstein, Brad and Jeff Testerman (1998) "Trump Supports Indian Casinos." *St. Petersburg Times*, 18 June, 1A.

<sup>42</sup> Staletovich, Jenny (1998) "Focus on Gambling Issues: Seminoles Fight for Chance to Operate Casinos." *Atlanta Journal and Constitution*, 7 September, 8A.

<sup>43</sup> Department of the Interior, "Class III Gaming Procedures." 64 Federal Register 17535.

<sup>44</sup> Testerman, Jeff (2000) "Seminole Tribe Ups Ante on Slots." *St. Petersburg Times*, 11 September, 5B. Note that this is the same Robert Butterworth who threatened to arrest the Seminoles for illegal gambling in 1979 as sheriff of Broward County.

arena" concerning tribal gambling, "so, the state's left with the interior secretary's arena."<sup>45</sup>

At the same time, the tribe began aggressively constructing Class III-gaming facilities, including a \$2.6 million casino on the Brighton Reservation, a \$160 million resort hotel and casino in Hollywood, and a \$30 million gambling hall in Coconut Creek.<sup>46</sup> The tribe aggressively sought and got corporate backers including Hard Rock Cafe to jointly sponsor the casinos.

Finally the tribe was handed an ironic legal victory. In response to the suit filed by the state back in 1996 alleging illegal gambling, the tribe claimed sovereign immunity as its defense. The tribe argued in its filings that as a sovereign nation, it could not be sued. In July of 1999, in a decision that, according to the court, "demonstrates the continuing vitality of the venerable maxim that turnabout is fair play," the tribe's sovereign immunity defense was upheld and the suit was dismissed by the Eleventh Circuit.<sup>47</sup> The state responded through Assistant Florida Attorney General John Glogau, who said apparently without irony "[i]t's a bad outcome. It means they can continue to violate the law with impunity."<sup>48</sup>

On January 19, 2000, the last day of Clinton's presidency, the tribe thought they finally reached a settlement. Bruce Babbitt issued a decision on the Florida case and permitted high-stakes poker, off-track pari-mutuel betting and certain electronic gambling machines. Although it was not everything that the tribe wanted, it was more

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<sup>45</sup> Quoted in Testerman, Jeff (1999) "Tribe Pushing Casino Projects." *St. Petersburg Times*, 24 July, 1B.

<sup>46</sup> *Id.*

<sup>47</sup> *State of Florida v. Seminole Tribe of Florida*, 181 F.3d 1237 (1999)

<sup>48</sup> Quoted in Testerman (1999), 1B.

than the state had been willing to permit. The election of George W. Bush in 2000 signaled a change for the tribe, though. The fact that the president's brother was the governor of Florida did not bode well. The new Secretary of the Interior, Gayle Norton, rescinded Babbitt's ruling and asked for more feedback from the states and tribes before proceeding.<sup>49</sup> The Secretary has taken no action since then. The National Indian Gaming Commission also clamped down on the tribe, threatening to close the tribe's casinos unless it removes gaming machines that are not compliant with federal law.<sup>50</sup> The tribe agreed, but has not yet complied.

In November of 2004, the political winds in Florida shifted regarding gaming. 51% of the voters approved Amendment 4, which permits slot machines at race tracks and jai alai parlors.<sup>51</sup> The tribe, while it opposed the amendment because it benefited competitors, immediately approached Governor Bush asking for the state to reopen compact negotiations in light of the change in support for gaming. In June of 2005, Governor Bush agreed and negotiations are underway once again between the governor and the Seminole Tribe.<sup>52</sup>

## **Implications**

The *Seminole Tribe* case offers a clear picture of the importance of both financial resources and political power in facing off with a state government. The

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<sup>49</sup> Testerman, Jeff (2001) "U.S. Interior to Review Tribal Gambling Rules." *St. Petersburg Times*, 26 July, 1A.

<sup>50</sup> Testerman, Jeff (2004) "Government Tells Tribe to Toe Line on Casinos." *St. Petersburg Times*, 25 February, 1B.

<sup>51</sup> Kleindienst, Linda and Sarah Talalay (2004) "Way is Clear for South Florida Slot Machines As Constitutional Amendment Passes." *South Florida Sun-Sentinel*, 5 November.

<sup>52</sup> Klas, Mary Ellen (2005) "Florida Governor May Let Indian Tribes Expand Gambling Operations." *Miami Herald*, 15 June.

tribe and the state have returned to where they began after a long period of stalemate. The actions following the decision of the Court can be divided into three distinct periods, which helps illuminate the ability of litigants to respond to a sovereign immunity defense. From the time of the decision until 2000, the tribe met with a number of successes in achieving its goals despite the hostility of the state. It battled off lawsuits, avoided federal enforcement of gaming restrictions, and moved the locus of authority on the question of tribal gaming from the state to the Secretary of the Interior. The tribe's \$300 million annual income financed lobbyists and lawyers at both the state and federal levels to pursue its aims. The tribe found sympathetic ears at the federal level as a result of its political influence and got a rule issued by the Interior Department that increased the scope of acceptable gaming. This is consistent with research documenting the increased political influence of Native American tribes.<sup>53</sup> At the same time, the state government was increasingly frustrated with the tribe's willingness to ignore the rules. According to Assistant Attorney General John Glogau, "[t]he enforcement of this law has been nonexistent. Neither the U.S. attorney nor the [Bureau of Indian Affairs], nobody has made any serious effort to make the tribes toe the line. *Since the Seminole decision messed things up so the tribe couldn't sue the state, they just weren't going to toe the line. They say, if the tribes don't have a remedy, we'll just let them break the law.*"<sup>54</sup>

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<sup>53</sup> See, for example, Corntassel, Jeff J. and Richard C. Witmer, II (1997) "American Indian Tribal Government Support of Office-Seekers: Findings from the 1994 Election." *Social Science Journal* 34: 511-525.

<sup>54</sup> Quoted in Staletovich, Jenny (1999) "Tribe, State At Standoff Over Casinos." *Palm Beach Post*, 7 September, 1A. Italics added.

A change took place in 2000, however. With the election of the Florida governor's brother to the White House, the tribe's sympathetic federal support disappeared. The decisions by Secretary Norton and the National Indian Gaming Commission threaten to put a stop to the tribe's success in offering additional gaming. The tribe still had adequate resources to protect its status quo, but without political support at either the state or federal level, it was unable to succeed at skirting the consequences of the Court's decision to remove legal recourse. In November of 2004, the circumstances changed once again. Political support for the tribe at the state level came in the form of the approved Amendment 4. Voters in the state signaled that their long-standing opposition to the expansion of gaming in the state had waned. In this new political environment, Governor Bush relented and opened up talks with the tribe to permit slot machine gaming. Political support at the federal level became unnecessary with the change in support at the state level. With both financial resources and political support, the tribe is likely to succeed regardless of the Court's ruling on the case.

Nonetheless, it is difficult to say that the state is in a better position now than it was before the case. Even with a sympathetic federal administration, the fact remains that the Interior Secretary, not the state government, now retains the authority to determine the extent of tribal gaming. It is worth reflecting on the fact that the state was successful in the federal district court on the merits of the case before it was dismissed because of the sovereign immunity defense. In other words, had the state not used sovereign immunity to end the suit, it would have likely won its case and

thereby retained control over any gaming compacts in the state. The decision to use sovereign immunity is a risky one and it often results in unintended consequences that put the state in a worse position than if it simply consented to the suit.

### ***Alden v. Maine***

The second case I consider here, *Alden v. Maine*, involved the question of whether Eleventh Amendment immunity applied in state courts as well as federal courts.<sup>55</sup> Following *Seminole Tribe*'s rejection of federal jurisdiction, the application of sovereign immunity in state courts would leave no legal remedy for individuals seeking damages for violations of federal laws. This case signaled a shift in the Court's decisions towards addressing the applicability of federal anti-discrimination statutes to state employees. Instead of external parties such as Seminole Tribe, it was now the state's own employees that were feeling the effects. The reactions of the plaintiffs after the decision demonstrate the influence that powerful lobbies can have at the state level when they direct their resources to the problem.

### **Background**

The Fair Labor Standards Act (FLSA), originally passed by Congress in 1938, provides minimum standards for both wages and overtime entitlement.<sup>56</sup>

Amendments, particularly ones in 1966 and 1974, expanded the scope of the FLSA to

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<sup>55</sup> 527 U.S. 706 (1999)

<sup>56</sup> 29 U.S.C. §201

include public agencies and state employees.<sup>57</sup> The 1974 amendment, which is the critical one fully extending FLSA protections to state employees was passed in conjunction with an increase in the minimum wage during a period of serious economic recession. Labor groups lobbied heavily for its passage and Congress overrode President Nixon's veto to get it passed. In 1976, though, the Supreme Court struck down the 1974 amendment for violating the Tenth Amendment, which permitted the states to retain their exemption from FLSA standards.<sup>58</sup>

The Court reversed itself in 1985 in *Garcia v. San Antonio Metro Transit Authority*, holding that the wage and hour provisions do apply to state employers.<sup>59</sup> Most importantly for this case, the decision meant that the states were now liable for the FLSA requirement that workers must receive overtime pay of time-and-a-half for work beyond forty hours in a week. The act, however, only applies to nonexempt employees, those that are not employed in a "professional capacity."<sup>60</sup> The key tests are whether the work requires background "knowledge of an advanced type in a field of science or learning" and whether the job requires "consistent exercise of discretion and judgment."<sup>61</sup> The act permits employees to bring suits in either state or federal court to enforce the provisions.

In 1985, in response to the *Garcia* decision, the Maine Bureau of Human Resources classified the state's probation officers as professional employees, exempt

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<sup>57</sup> § 203 (d) and (x)

<sup>58</sup> *National League of Cities v. Usery*, 426 U.S. 833 (1976)

<sup>59</sup> 469 U.S. 528 (1985)

<sup>60</sup> § 213(a)(1)

<sup>61</sup> Cited in *Mills v. Maine*, 839 F. Supp. 3 (1993).

from the overtime pay requirement.<sup>62</sup> Subsequent communications from the United States Department of Labor and relevant court decisions brought that rule into question by 1988. The approximately one hundred probation officers in the state, who sometimes worked long hours and over weekends, were upset by the designation. They began the process of making an FLSA complaint in December of 1989. Rebuffed by the state in their attempts to reclassify their jobs as nonexempt, in December of 1992, Jon Mills and ninety-five other state probation officers filed suit against the state in U.S. district court to contest the designation and receive the overtime pay they were denied.

### **The Case**

The officers sued the state to recover their back overtime pay and to receive liquidated damages as set forth in the FLSA.<sup>63</sup> This required the officers to prove that the Board of Human Resources misclassified them as professional employees. In a pretrial motion, the district court judge ruled that the probation officers did not meet the criteria for professional employees and the state had, therefore, violated the FLSA.<sup>64</sup> However, he acknowledged that the probation officers did fall under the law enforcement provisions of the FLSA, which limited damages and increased the amount of work permitted from forty hours a week to forty-three. This initial victory

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<sup>62</sup> Curran, Jeanne (1994) "Probation Officers React to Findings on Job Status." *Bangor Daily News*, 15 January

<sup>63</sup> Once a violation of the FLSA is found, the state must prove that it acted reasonably and in good faith in order to avoid mandated liquid damages.

<sup>64</sup> *Mills v. Maine*, 839 F. Supp. 3 (1993)

for the probation officers resulted in the state reinstating their nonexempt status and agreeing to pay them overtime wages beginning in January of 1994.

The suit continued, though, over the issue of back pay for the overtime. What remained to be settled was the question of how many overtime hours the state was responsible for- should it be calculated based on a forty hour work week or a forty-three hour work week.<sup>65</sup> In June of 1994, the district court reinforced its ruling that the forty-three hour work week applied and denied the request for liquidated damages above and beyond the back pay.<sup>66</sup> The court then appointed a special master to determine the number of overtime hours and the pay owed to the probation officers.<sup>67</sup> On March 27, 1996, the Supreme Court handed down its decision in *Seminole Tribe*. On April 17, the special master filed his report with the court. The state of Maine asked for summary judgment and dismissal of the case based on its sovereign immunity, which the court granted.<sup>68</sup> The judge pointed out in his opinion that there was now nothing to show after years of litigation. He noted that “[i]t is unfortunately a tragic consequence of the Supreme Court’s inability to maintain the status of its own

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<sup>65</sup> The probation officers argued that since the state had not treated them as law enforcement personnel, they should not be subject to the forty-three hour work week.

<sup>66</sup> *Mills v. Maine*, 853 F. Supp. 551 (1994)

<sup>67</sup> There were some additional legal challenges related to the overtime issue, although they are not directly relevant to the question of sovereign immunity. For instance, in *Blackie v. Maine*, 888 F. Supp. 203 (1995) and *Blackie v. Maine*, 75 F.3d 716 (1996), some of the probation officers challenged the state’s refusal to continue paying a 16% payment premium that had existed before they were considered nonexempt employees. The officers claimed that this was a retaliatory action for the lawsuit. Both the district court and the court of appeals found for the state.

<sup>68</sup> *Mills v. Maine*, 1996 U.S. Dist. LEXIS 9985 (1996)

precedents that all this time and effort has been wasted.”<sup>69</sup> The First Circuit upheld the dismissal in 1997 and the plaintiffs dropped the federal litigation.<sup>70</sup>

The probation officers were not about to let the matter go, however. The FLSA explicitly permits suits in either federal or state court. Sixty-five of the original plaintiffs filed suit in state court on July 31, 1996.<sup>71</sup> The state once again raised a defense of sovereign immunity, arguing that if it was immune in federal court, it should be immune in state court as well. The state court accepted this defense and the state supreme court affirmed the decision.<sup>72</sup> In the last hope for their case, the probation officers appealed the Maine Supreme Judicial Court’s ruling to the United States Supreme Court. In June of 1999, their litigation was brought to an end when the Court ruled that sovereign immunity applied to state as well as federal courts despite the specific language of the Eleventh Amendment.<sup>73</sup>

### **The Consequences**

After the case was decided, the probation officers were disheartened. One employee said “[w]e don't get the same kind of protections that other employees get. We know the state violated federal law. They clearly are using this to hide from their responsibilities.”<sup>74</sup> Denied any legal recourse in either state or federal courts, the probation officers turned to the legislature for relief. They were aided in this endeavor

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<sup>69</sup> *Id.*

<sup>70</sup> *Mills v. Maine*, 118 F.3d 37 (1997)

<sup>71</sup> *Alden v. State*, 1997 Me. Super. LEXIS 209 (1997)

<sup>72</sup> *Alden v. State*, 1998 ME 200 (1998)

<sup>73</sup> *Alden v. Maine*, 527 U.S. 706 (1999). The Eleventh Amendment refers only to the judicial power of the United States.

<sup>74</sup> Pochna, Peter (1999) “Court Denies Overtime Back Pay for State Officers.” *Portland Press Herald*, 24 June, 1A.

by the fact that the president of the Maine State Employees Association (MSEA), the union representing state employees, was himself a probation officer.<sup>75</sup> The probation officers were quick to point out that the ruling affected all state employees and garnered support among their colleagues. In the press, the union and its parent union Service Employees International Union (SEIU) pushed for a broad reading of the impact of the case. A lawyer from SEIU was quoted as saying "[i]t could have an impact for state employees with regard to other federal rights."<sup>76</sup>

The union's campaign quickly delivered results in the state legislature. By early July, the Maine House Majority Leader Michael Saxl announced his intent to propose two pieces of legislation in the upcoming legislative session. The first would provide \$450,000 in back pay to the probation officers and the second would waive the state's sovereign immunity in state employment cases.<sup>77</sup> The bills were introduced at the beginning of the 2000 session by Saxl and referred to the joint standing judiciary committee.<sup>78</sup> The first bill introduced, LD 2530, actually covered both points in the same bill. It provided for state consent "to be sued in state or federal court by its employees, former employees and employment applicants seeking to enforce rights or obtain remedies afforded by federal law when the United States Congress has indicated its intent that such laws be applicable to the states in their capacity as employers."<sup>79</sup> In the second section, it permitted the bill to be applied retroactively

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<sup>75</sup> Id.

<sup>76</sup> Carrier, Paul (1999) "Decision May Put Workers At Risk." *Portland Press Herald*, 29 June, A1.

<sup>77</sup> Carrier, Paul (1999) "Two Bills to Repay Probation Officers." *Portland Press Herald*, 3 July, B1.

<sup>78</sup> \$450,000 was the amount the special master found to be due to the probation officers before the federal case was dismissed.

<sup>78</sup> In the Maine legislature, all of the standing committees are joint between the House and Senate.

<sup>79</sup> LD 2530 in the Second Regular Session of the 119<sup>th</sup> Maine Legislature

only in the case of the probation officers. They could file suit in state court within 90 days of the passage of the bill.

The bill was amended, however, in the judiciary committee to drop any mention of the immunity waiver. Instead, the bill provided direct payment to the probation officers from the state treasury of \$282,894, including court and legal fees. This was significantly lower than the \$450,000 amount advocated by the special master, but matched the state's estimate of its responsibility. As amended, the bill passed out of the committee unanimously and was passed by both houses of the legislature. As of August 11, 2000, the probation officers received some, although not all, of their back pay for overtime.

Following the amendment to the first bill, Representative Saxl introduced a second bill, LD 2682, which waived the state's immunity under specific federal legislation.<sup>80</sup> This included the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and federal law relating to injuries of seamen.<sup>81</sup> This bill faced a much more contentious challenge, with the Judiciary Committee sending it to the legislature with a split vote. Representing the hesitations of some legislators, Senator John Benoit said at the time "sovereign immunity is not something you just fudge

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<sup>80</sup> It is not clear, but seems likely that this was a compromise on the committee. There was substantial support for the payment of the officers, but the immunity issue was much more contentious. By submitting two separate bills, the committee and the legislature were able to address each issue separately rather than together. For a discussion of the dissension on the committee, see Kesich, Gregory (2000) "State Workers Seek Right to Sue Employer." *Portland Press Herald*, 14 March, B1.

<sup>81</sup> LD 2682 in the Second Regular Session of the 119<sup>th</sup> Maine Legislature

with.”<sup>82</sup> With strong lobbying from the state employees union, however, the bill did pass out of the legislature in May of 2000. Republican Governor Angus King, whose administration had testified against the bill, vetoed it on May 8, saying “the bill could carry a large price tag for which the state has not set aside money.”<sup>83</sup> On May 11, the House failed to override the veto, voting 81-62 for the bill, which was less than the two-thirds required.<sup>84</sup> Tim Belcher, the lead counsel for the employees union, expressed disappointment and pointed out that employees were left with little choice but to “reluctantly sue individual managers for violations of federal law” using the *Ex Parte Young* doctrine.<sup>85</sup>

With the election in 2002 of Democrat John Baldacci to governor, the union began negotiations again with the state. In February of 2003, the new House Majority Leader John Richardson re-introduced Saxl’s bill to waive the state’s immunity.<sup>86</sup> At the same time, the union entered into negotiations with Baldacci’s administration in an attempt to reach an agreeable compromise.<sup>87</sup> In May, an agreement was reached between the parties and Richardson’s original bill was pulled. Richardson then introduced LD 1619 at the behest of the governor.<sup>88</sup> The new bill extended state wage and overtime protections to state employees, equalizing the treatment between private

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<sup>82</sup> Kesich, Gregory (2000) “Employees Lose Round in Fight for Right to Sue.” *Portland Press Herald*, 25 March, B1.

<sup>83</sup> Carrier, Paul (2000) “Gov. King Says No to Minimum Wage Bills.” *Portland Press Herald*, 9 May, A1.

<sup>84</sup> Meara, Emmet (2000) “Four King Vetoes Survive Override Efforts.” *Bangor Daily News*, 12 May.

<sup>85</sup> Meara, Emmet (2000) “Veto of Bill on State Worker Suits Raises Ire.” *Bangor Daily News*, 11 May. It is worth noting that between 2000 and 2003 there were no reported federal cases filed against Maine officials using this rationale.

<sup>86</sup> LD 415 in the First Regular Session of the 121<sup>st</sup> Maine Legislature

<sup>87</sup> The negotiated agreement is mentioned on the Maine State Employees Association website <http://www.mseaseiu.org/> (Accessed on July 16, 2003)

<sup>88</sup> LD 1619 in the First Regular Session of the 121<sup>st</sup> Maine Legislature

and public sector employees. It permitted suits in state court to enforce the provisions, although it did not permit liquidated damages or attorney's fees. The bill passed quickly with strong bipartisan support and was signed into law by the governor on June 12. After over a decade of legal and political wrangling, the state employees of Maine finally succeeded in opening the courts to their claims.

### **The Implications**

The results of the *Alden* case suggest that being shut out of the courts does not necessarily deny any remedy to aggrieved parties-- as long as those parties are capable of mobilizing substantial political support. The probation officers quickly and effectively characterized the court decision as one that affected all state employees, in a variety of different contexts. The combination of an active union and a clear finding of fault on the part of the state also helped the probation officers receive compensation and protection from future employment discrimination by the state. Of course, it is worth noting that the probation officer's ultimate success hinged on the election of a governor who was more favorable to their union. From the beginning, the employees union targeted the state rather than federal action. There are a number of reasons for this. The first was the rapid success they had at the state level. Secondly, the union was more experienced with the negotiating with both the state legislature and the governor than the federal government. And finally, Republican control of the federal government from 2001 on made a successful appeal unlikely.

Even the benefits received are not the same as those promised under the federal law, though. The special master determined that approximately \$450,000 in overtime back pay was owed to the officers. The final appropriation was for roughly \$280,000, a noticeable drop. Likewise, the state employment laws do not permit the liquidated damages for state employees that the FLSA does if the state willfully discriminates. State employees received most, but not all, of the protections and benefits that they would have received without sovereign immunity.

In this case, the state suffered relatively little harm as a result of their sovereign immunity defense. It was not totally costless, though. The heightened profile of the issue forced the state to include maritime employees in their employment protections, which was not the case under the FLSA. The ill will engendered between probation officers and the administration during the process may also prove problematic in future contract negotiations.<sup>89</sup> The government's willingness to negotiate with the union and the state employees helped to dampen any major negative effects on state autonomy that may have otherwise resulted. It is significant that, unlike the previous case, this one involved insiders rather than outsiders. Unlike the Seminole Tribe, state employees are inherently a part of the state government system. This position offers political leverage that may not be available to external groups. When state employees band together, they can present a strong voice. As the next case demonstrates, however, in order for that strength to exist, the employees must be united.

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<sup>89</sup> This ill will can be seen in comments from the officers such as "There are some very angry people. Most probation officers want to do the job -- they just want to be paid fairly. We're very angry that we've had to take these steps." quoted in Curran, "Probation Officers React"

### ***Kimel v. Florida Board of Regents***

In the term following the *Alden* decision, the Court addressed sovereign immunity once again. In *Kimel v. Florida Board of Regents*, the Court upheld the dismissal of a lawsuit alleging violations of the Age Discrimination in Employment Act.<sup>90</sup> The outcome of this case suggests that not all state employee political responses are successful. As in *Alden*, the state employees must be unified and supported by a strong organization such as a union, something lacking in this case.

### **Background**

In the late 1980s and early 1990s, older faculty in the Florida university system saw their pay lagging behind both inflation and their younger colleagues. Some salaries were less, in real dollars, than they were as starting salaries in 1966.<sup>91</sup> At the behest of these employees, their union, the United Faculty of Florida, entered into negotiations with the Florida Board of Regents to raise their pay. In 1991, the Regents agreed to a collective bargaining agreement under which long-term faculty members would receive salary adjustments, known as Market Equity Adjustments, to bring them up to approximately 80% of the national average. The agreement also guaranteed the standard 1.5% annual salary increase.<sup>92</sup> The Florida legislature agreed with the board and made the funds available for the 1991-1992 fiscal year. However, the state was hit with a budget crisis as a result of the recession in 1991 and found

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<sup>90</sup> 528 U.S. 62 (2000)

<sup>91</sup> (2001) "Prepared Testimony of Dan Kimel, Professor of Physics." *Federal News Service* (April 4).

<sup>92</sup> State employees receive a 3% annual cost of living increase. However, university faculty see less than 2% because of deductions for faculty promotions and equity adjustments.

itself with a \$700 million shortfall. Before the pay increase could take effect, the legislature rescinded the funding for any pay increases for employees.

Several unions sued the state, claiming a breach of contract. The Florida State Supreme Court agreed that the legislature could not renege on their agreement, but only for the 1991-1992 fiscal year.<sup>93</sup> For the 1992-1993 fiscal year, the salaries reverted to their previous levels. As the recession eased, the legislature allocated sufficient discretionary funds to cover the Market Equity Adjustments during the 1993-1994 fiscal year. However, the Regents refused to require the administrators at each of the universities to use the funds for salary adjustments for longer-serving faculty. Seven of the nine state universities did use the funds for faculty salaries, but Florida State University and Florida International University refused. The affected faculty at those universities appealed to the Regents, asking that the board take action to allocate the funds correctly. When the Regents refused, a physics professor named Dan Kimel joined with other professors and librarians from Florida State University to file suit against the state in federal court.<sup>94</sup> Subsequently, faculty and librarians from Florida International University joined the suit, bringing the total number of plaintiffs to thirty-six.

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<sup>93</sup> *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (1993)

<sup>94</sup> *Kimel v. Florida Board of Regents*, 1996 U.S. Dist. LEXIS 7995 (1996)

## The Case

The suit filed by the professors alleged a violation of the federal Age Discrimination in Employment Act (ADEA).<sup>95</sup> Congress passed the act with large majorities in 1967 in an attempt to fight widespread age discrimination. The central components of the ADEA make it against the law for employers "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age," or "to limit, segregate, or classify . . . employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of age."<sup>96</sup> The original act did not apply to states or any of their political subdivisions such as cities and counties. However, in 1974, in response to concerns about this gap in coverage from interest groups representing older workers, Congress amended the act to explicitly include state employees.<sup>97</sup> The act permits suits in federal court to enforce its provisions. The professors also alleged that the refusal to allocate the money created a disparate impact on long-serving faculty, thereby violating the Florida Civil Rights Act of 1992's prohibitions on age discrimination.<sup>98</sup> The state

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<sup>95</sup> 29 U.S.C. § 621-634

<sup>96</sup> § 623(a)(1) and § 623(a)(2).

<sup>97</sup> § 630(b).

<sup>98</sup> Both claims were brought up before the federal district court. Supplemental jurisdiction (formerly known as pendent jurisdiction) permits federal courts to hear cases that allege violations of both state and federal laws. Even if the federal claim is dismissed, courts can continue to hear the state law violations so that the litigants do not have to file two separate lawsuits based on the same facts. In *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), however, the Supreme Court ruled that once the federal claim had been dismissed on the basis of sovereign immunity, federal courts had no supplemental jurisdiction in suits against states.

claim was less appealing, however, because of state damage caps of \$200,000, which would work out to only about \$5500 per plaintiff.<sup>99</sup>

Initially, the case proceeded normally. The district court denied a motion for dismissal from the Board of Regents and the case appeared to be on track. When *Seminole Tribe* was decided in early 1996, however, the Regents immediately filed a motion to dismiss the case on the basis of sovereign immunity. In May, the district court denied that request, concluding that the Age Discrimination in Employment Act validly abrogated the state's immunity. The Regents filed an interlocutory appeal to the Eleventh Circuit to reconsider the issue and the case was put on hold. The Eleventh Circuit combined Kimel's lawsuit with two other ADEA suits pending against states.<sup>100</sup> In April of 1998, the appellate court ruled in a 2-1 decision to dismiss the cases on the basis of sovereign immunity.<sup>101</sup> The rationale for each judge in the case was different. For the two in the majority, one felt that Congress had not demonstrated clear intent to abrogate immunity in the ADEA and the other felt that the abrogation was not authorized under Congress' Section 5 power. They agreed, however, that the cases could advance no further.

Kimel and the other plaintiffs appealed to the Supreme Court and in January of 2000, the Court handed down its ruling. The same 5-member majority held that while there was a clear intent to abrogate state sovereign immunity, the ADEA could not validly do so because it exceeded Congress' Section 5 powers. The lawsuit was

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<sup>99</sup> Florida Statute 768.28.

<sup>100</sup> The two other cases were *MacPherson v. University of Montevallo*, 938 F. Supp. 785 (1996) and *Dickson v. Florida Dept. of Corrections*, No. 5:9cv207-RH (1996). Dickson also raised an Americans with Disabilities Act challenge.

<sup>101</sup> *Kimel v. Florida Board of Regents*, 139 F.3d 1426 (1998)

remanded and dismissed on both the ADEA and Florida Civil Rights Act grounds.<sup>102</sup> The plaintiffs did attempt subsequently to file a state court action under the state age discrimination law, but it was dismissed in February of 2001 because the statute of limitations had run out. At that point, all legal options were exhausted.

### **The Consequences**

For the Florida professors, the Supreme Court decision came at a particularly unfortunate time. In May of 2000, the Florida legislature passed a bill that substantially restructured the administration of the state universities, eliminating the Board of Regents by 2003 and establishing individual Boards of Trustees at each campus.<sup>103</sup> This change created a host of challenges for the United Faculty of Florida union, from contracting issues, to motions to eliminate tenure, to serious concerns about academic freedom.<sup>104</sup> Since the professors still had the state case pending, there was little reason for the union to devote resources to the issue. Unlike the probation officers in Maine, the Florida faculty did not have a broad base of support among all state employees upon which to draw and were further split by the move to individual campus administration.

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<sup>102</sup> See the discussion of supplemental jurisdiction and *Pennhurst* in footnote 126 above for an explanation of why both claims were dismissed.

<sup>103</sup> Kiehl, Stephen (2000) "Legislators Vote to Replace University Regents with Local Boards." *Palm Beach Post*, 6 May, A14.

<sup>104</sup> The union continues to struggle with the state over this issue. See the President's message "Death of a Contract" available at <http://www.unitedfacultyofflorida.org/updates/deathcontract.htm> (Accessed July 22, 2003)

Their situation did not go unnoticed, however. The American Association of Retired Persons (AARP) took note of the decision and pressed Congress to react.<sup>105</sup> In September of 2000, three prominent Senators on the Health, Education, Labor, and Pensions committee introduced the Older Workers' Rights Restoration Act.<sup>106</sup> Senators James Jeffords, Russell Feingold, and Edward Kennedy proposed the bill as a response to the Supreme Court's decision. The bill required states to waive their sovereign immunity with regard to the ADEA in order to receive federal funds. Based on the interpretation of Congress' spending power found in the Supreme Court's decision in *South Dakota v. Dole*, the Senators were confident that the bill was a constitutional way to get states to waive their immunity.<sup>107</sup> The bill was referred to committee in 2000, but went no further at that time.

The Senators did not drop the issue, however. In April of 2001, the committee held a hearing on the subject of "Federalism and States' Rights: When Are Employment Laws Constitutional?" The committee heard testimony from Kimel as well as several law professors concerned about the Court's recent sovereign immunity decisions and advocating the constitutionality of the ADEA proposal.<sup>108</sup> Following the hearing, Jeffords, Feingold, and Kennedy reintroduced the Older Workers' Rights Restoration Act.<sup>109</sup> In September of 2001, the Health, Education, Labor, and Pensions committee approved the bill by a vote of 12 to 9 and it was reported out of committee

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<sup>105</sup> See American Association of Retired Persons (2001) *The Policy Book: AARP Public Policies 2001*. Ch. 4, available at <http://www.aarp.org/ppa/chapter4.pdf> (Accessed July 22, 2003)

<sup>106</sup> S. 3008 in the 106<sup>th</sup> Congress.

<sup>107</sup> 483 U.S. 203 (1987)

<sup>108</sup> See, for example, (2001) "Prepared Testimony of Marci A. Hamilton." *Federal News Service* (April 4).

<sup>109</sup> S. 928 in the 107<sup>th</sup> Congress.

in April of 2002. The bill was placed on the Senate calendar, but did not receive a vote before the end of the session. The bill was not reintroduced in the 108<sup>th</sup> Congress, although the AARP still lists legislation addressing the *Kimel* case as one of its legislative priorities.<sup>110</sup> Given the recent battles over Social Security, Medicare, and the introduction of the Medicare prescription drug coverage, it is unlikely that the AARP has been able to dedicate many resources to this effort. No further action has been taken by Kimel or on his behalf.

### **Implications**

As of May 2004, Kimel and the other professors have not received their Market Equity Adjustments. Even if a bill is passed by Congress permitting federal suits against states to enforce the ADEA, their statute of limitations has passed. A change in leadership at Florida State University and Florida International University may result in payment to the professors, but that is unlikely in the midst of the most recent state budget crisis. The professors were unable to mobilize sufficient political support in their state to be successful in their political efforts. The cause for their inability to establish a broad coalition includes the relative importance of other issues, the weakening of the faculty union, the difficulty of achieving recognition of ageism as a concern for all employees, or a mixture of all or some of the above. Nonetheless, the outcome for the professors underscores the importance of being able to trigger

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<sup>110</sup> American Association of Retired Persons (2006) *The Policy Book: AARP Public Policies 2005.*, available at [http://assets.aarp.org/www.aarp.org/\\_articles/legpolicy/4\\_employ05.pdf](http://assets.aarp.org/www.aarp.org/_articles/legpolicy/4_employ05.pdf) (Accessed January 26, 2006) The organization also calls for the waiver of sovereign immunity by states.

continued political mobilization of legislators or administrators in overcoming a sovereign immunity defense.

The loss by the professors does not necessarily mean that the state has come out ahead. The state risks serious repercussions if age discrimination is seen as more widespread. AARP is a powerful lobby and Florida is especially sensitive to claims of age discrimination given the high percentage of elderly residents. State age discrimination laws do help to relieve this pressure somewhat. However, as the Senate committee found, these laws are not as comprehensive or protective as the federal law. The committee reported that “the law in one State does not cover public sector employees. Nine States do not allow State employees to bring private lawsuits. Five States do not permit jury trials. Eight States cut off protection for employees at age 70. And 30 States do not require that prevailing parties be reimbursed for their attorney fees.”<sup>111</sup> The fact that the Senate bill made it out of committee suggests that there is substantial support for federal intervention through the threat of spending restrictions. A mobilized constituency that sensed an injustice could make that a reality, undermining state authority and strengthening the federal government’s position.

## **Conclusion**

What does the review of recent sovereign immunity cases tell us about their impact? Two primary patterns emerge with regard to the plaintiffs. Plaintiffs that are

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<sup>111</sup> United States Senate (2002) “Committee on Health, Education, Labor, and Pensions Report on Older Workers’ Rights Restoration Act of 2001.” (Washington, D.C.: Government Printing Office): 10.

shut out of the courts by sovereign immunity are able to redress their grievances through other methods if they have sufficient political influence, such as the Seminole Tribe or the Maine probation officers. The Seminole Tribe was able to use its extensive financial resources and lobbyists to keep the possibility of Class III gaming open through pressure on the Secretary of the Interior. The combination of resources and political support was initially successful, but the change in administrations at the federal level reduced the political support available and put the tribe in a more difficult position. It was not until the political preferences of the voters of the state changed that the tribe was able to once again enter negotiations with the governor.

The Maine probation officers joined with other state employees to get the state legislature to approve funding for their claim and to apply fair labor laws to state employees. The employee union provided both financial and political backing that made success possible, convincing the Democratic and labor-sympathetic majority to take action. As with the Seminole Tribe's experience, though, it required a political change by voters to bring a Democrat into the governor's office in order to make those gains.

The most recent of the cases points to a different trend. *Kimel* involved a group that could not mobilize a successful political coalition to redress the professors' grievances.<sup>112</sup> The plaintiffs were unsuccessful because they were unable to garner sufficient support from interest groups. The interest groups that could have aided them, United Faculty of Florida and AARP, did not deem the issue of sufficient

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<sup>112</sup> This is also true of Patricia Garrett, the plaintiff in *Board of Trustees of the University of Alabama v. Garrett* 531 U.S. 356 (2001), although her case was later heard by the courts as a Rehabilitation Act claim, making the comparison more complex.

importance to invest the resources necessary to reverse the effect of the ruling. This failure can be traced to two key factors. First, the affected faculty make up just a small part of the relevant constituency of the interest groups. For United Faculty of Florida, the plaintiffs were older faculty from just two universities in the very large system. Likewise, for AARP, the ruling affected only older state employees, not the far more numerous older private employees. Despite their relatively small numbers, the interest groups still expressed interest in the case. However, the second key factor made it unlikely that the groups would have spare resources to dedicate to the problem. In Florida, the sweeping changes in the structure of the Florida higher education system meant that the union was struggling for its very survival. While outraged by the treatment of some of their members, the union clearly had higher priorities that needed to be addressed that affected a larger swath of their membership. For AARP, the interest group initially signaled a commitment to action by pressing for the passage of legislation in the Senate. As time passed, however, the resources of AARP became stretched thinner, dealing with a Medicare prescription drug plan and proposed changes to Social Security. Both of those issues affected all of the group's members and became higher priorities. Kimel's cause received sympathetic attention, but could not garner the same level of intensity or focus as other issues. This is consistent with findings by Dara Strolovich that advocacy groups often fail to adequately represent their most disadvantaged members.<sup>113</sup> Ironically, these are the

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<sup>113</sup> Strolovich, Dara (2003) "Closer to a Pluralist Heaven? Women's, Racial Minority, and Economic Justice Advocacy Groups and the Politics of Representation." Presented at Midwest Political Science Association annual meeting, Chicago, IL.

groups 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.

The outcomes in many of the cases do not necessarily leave the states in a stronger position than before either. In most instances, sovereign immunity places the states in a position little different from before the doctrine made a resurgence. The states are protected for now but only as long as they do not upset substantial constituencies. Perhaps most damaging to the states, the extensive use of sovereign immunity could discourage further devolution of responsibility from Congress to the states. The use of sovereign immunity could, in fact, undermine the very policy effect that states are trying to achieve.<sup>114</sup> At best, states can utilize sovereign immunity effectively only against those groups that are weak and least likely to cause the state harm. These victories for states are victories on the margins and they come at the expense of those most vulnerable. While the states do not gain an appreciable amount of authority or discretion, they ignore the rights of the most disadvantaged.

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<sup>114</sup> The devolution that occurred during the 1990s certainly appears to have slowed dramatically since 2001. The most likely reason for the current slow down is the unified Republican control of the federal government. The Republican party primarily championed the cause of increased state autonomy during the 1990s, but once in unified power has not taken any steps to resume devolution. The events of September 11<sup>th</sup> also played a substantial role in the retreat from devolution.