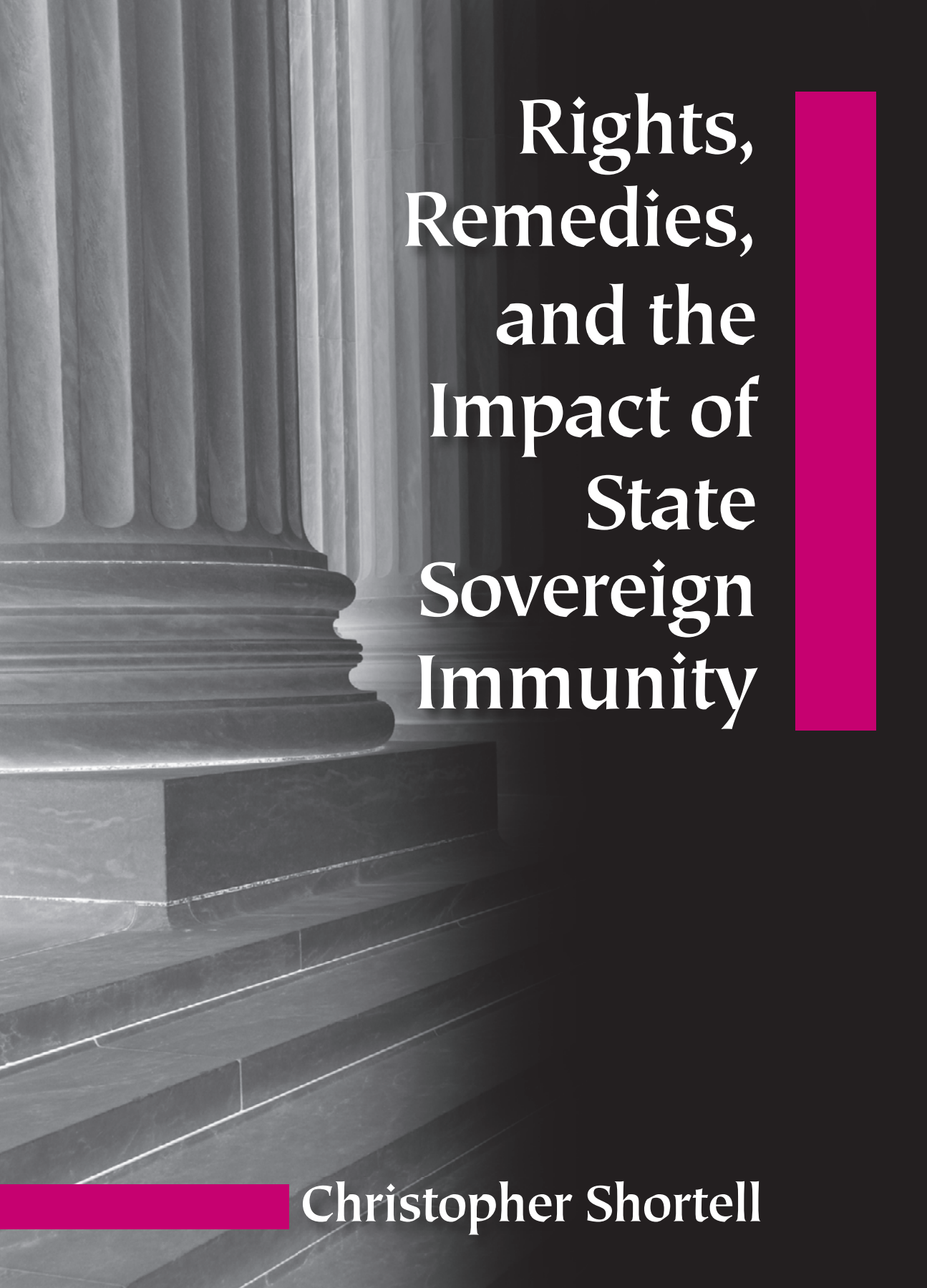

Rights, Remedies, and the Impact of State Sovereign Immunity

Christopher Shortell

Rights, Remedies, and the Impact of State Sovereign Immunity

SUNY series in American Constitutionalism
Robert J. Spitzer, Editor

Rights, Remedies, and the Impact of State Sovereign Immunity

Christopher Shortell

STATE UNIVERSITY OF NEW YORK PRESS

Cover photo: iStockphoto / Geoff Hardy

Published by
State University of New York Press, Albany

For information, contact State University of New York Press, Albany, NY
www.sunypress.edu

Production by Diane Ganeles
Marketing by Fran Keneston

Library of Congress Cataloging-in-Publication Data

Shortell, Christopher, 1975–
Rights, remedies, and the impact of state sovereign immunity / [Christopher Shortell].
p. cm. — (Suny series in American constitutionalism)
Includes bibliographical references and index.
ISBN 978–0–7914–7507–2 (hardcover : alk. paper)
1. State rights—United States. 2. Government liability—United States—States. I. Title.

KF4600.S56 2008
342.73′042—dc22

2007037529

10 9 8 7 6 5 4 3 2 1

For my father, Robert Shortell

This page intentionally left blank.

Contents

This page intentionally left blank.

Tables

This page intentionally left blank.

Preface

The topic of state sovereign immunity is one that seems to arise cyclically throughout American history. At times, the doctrine is prominent and generates substantial attention before it recedes once again into the background. In the 1790s, passions about the protection of states from lawsuits were sufficient to pass a constitutional amendment while in the mid-twentieth century few paid state sovereign immunity much attention. In the mid-1990s, the Rehnquist Court raised the profile of state sovereign immunity once again in a series of controversial decisions only to leave the direction of the doctrine under the Roberts Court uncertain.

All too often, however, the reemergence of state sovereign immunity as an influential doctrine is examined in isolation from the broader social impact of the legal decisions. Scholars readily debate the doctrinal significance of the decisions and the original intent of the Eleventh Amendment. Lost in that analysis is a picture of just what state sovereign immunity does and how it operates. This book seeks to fill that gap. Both proponents and opponents of state sovereign immunity make bold claims about the influence of the doctrine in either securing stronger state authority or violating principles of justice, but the claims are rarely backed up by any systematic evidence. By examining the periods of extensive usage of state sovereign immunity, I hope to provide a foundation upon which conclusions can be drawn about the value or risks inherent in the doctrine.

The findings suggest that the impact of state sovereign immunity is highly dependent on the social and political circumstances in which the doctrine is exercised. At times, the doctrine protects states from burdensome financial obligations. At other times, the doctrine serves as merely a speed bump in the push by a plaintiff for financial recovery from the state. Defining those circumstances and understanding why there are different outcomes in different cases is a major point of inter-

est in the book. Given the historical record, state sovereign immunity is a doctrine that will continue to be influential in American politics and making sense of its impact is critical not only to explaining its longevity but also in evaluating its use by both courts and states.

As with any large project, there are a number of people who need to be gratefully thanked for their assistance. Evan Gerstmann deserves credit for directing me toward the odd doctrine of sovereign immunity and suggesting that there was probably something worth studying in there. Apparently, he was correct. Harry Hirsch, Amy Bridges, Alan Houston, Michael Parrish, and Harry Scheiber were all of critical assistance throughout and their feedback has proven invaluable. Richard Sylla and John Wallis graciously provided me with citations and background on the economics of the 1840s. Jessica Cattelino kindly offered her insight into the history of the Seminole Tribe and their current gaming endeavors. I also received invaluable advice and feedback on various chapters from Matt Bosworth, John Dinan, Ronald Kahn, Mark Miller, and Richard Winters. Needless to say, any errors that follow are entirely my own.

Jessica Trounstine and Tony Smith deserve special thanks for taking on the harrowing task of reading each and every chapter as I wrote it and providing me with insightful comments, often with a very short turnaround time. Beyond their intellectual assistance, I owe them an enormous debt of gratitude for always being willing to chat about anything and everything. In addition, my colleagues at California State University, Northridge have provided me with a fantastically supportive environment in which to thrive as both a teacher and a scholar. I am fortunate to be surrounded by such a talented and dedicated group of individuals.

Without question, I owe my greatest debt to my wife, Dorota. Words fail when trying to describe everything she has done for me during this process, both in terms of emotional support and her own sacrifices, so I will simply say that without her, none of this would have been possible.

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

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.[1] 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.[2]

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.[3] 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

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.[4] 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,[5] 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.[6] 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.[7] 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.[8] 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.[9] 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.[10] 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.[11] 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.[12] 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

Resources	*Political Support Plaintiffs*	*Political Support Issue*	*Plaintiff's Likelihood of success after dismissal*	*Risk to states*
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.[13] 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.[14] 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.

Part 1

Setting the Stage: Development of a Doctrine

This page intentionally left blank.

Chapter 2

The Doctrine of State Sovereign Immunity

Although my primary concern is not with doctrinal issues, a solid understanding of the legal doctrine at various points in time is extremely helpful in making sense of when and how it is applied. This chapter provides a relatively brief overview of sovereign immunity as interpreted by courts through the country's history. I trace the doctrine from its origins all the way through to its most current manifestations.

ORIGINS OF SOVEREIGN IMMUNITY

Sovereign immunity as a legal concept extends at least as far back as the feudal system. Its emergence was closely tied with the doctrine of *rex gratia dei*, king by the grace of God (Hurwitz 1981, 10). Because of the divine right of kings, one could not act against the king without in essence revolting against God. By the thirteenth century, this doctrine had taken on a more specific form in England. During the reign of Henry III, Bracton noted that it was settled doctrine that the king could not be sued in his own courts by name (Jaffe 1963, 2). However, the king was bound to follow God's law and was the fountain of justice. He was, therefore, bound by law and conscience to redress the harms done to his subjects (Jacobs 1972, 5). In fact, the oft-quoted line that "the king can do no wrong" originally meant that the king "must not, was not allowed, not entitled, to do wrong" (Jaffe 1963, 4). Suits against the king were permitted through a process known as a petition

of right. Procedurally, these petitions required the king to consent to the suit. In practice, however, they were approved based on whether or not a law was violated rather than the sovereign's whim. The aggrieved party would present their claim before the Chancellor, who would make factual inquiries to determine whether there was a right at issue. If the claim made out a *prima facie* case for redress, the petition was approved and the suit was heard at trial (Jaffe 1963, 5; Jacobs 1972, 6). By the time of the American Revolution, subjects had the petition of right available to them and the Court of Exchequer had considered suits for restitution of property wrongly claimed by the king (Jacobs 1972, 5–6). Louis Jaffe concludes "the so-called doctrine of sovereign immunity was largely an abstract idea without determinative impact on the subject's right to relief against government illegality" (1972, 18).

With independence in the former colonies, though, there was no longer a king to petition for redress. The responsibility to redress grievances now fell on the state legislatures and parties had to petition them when there was a violation of rights. However, there was a critically important shift. No longer did the states approve petitions of right automatically upon showing of a *prima facie* case. Due in large part to serious concerns about debts, the state legislatures were hesitant to approve many suits, leaving dissatisfied parties with no legal remedy. This was particularly important under the Articles of Confederation, when a number of states and the Confederation government either defaulted on their debts or put new paper money into circulation (Jacobs 1972, 8).

The Constitution offered at least a partial fix for this problem. Article III, Section 2 reads:

> The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—*to Controversies between two or more States;-between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.* [Italics added]

This section appears to grant jurisdiction to federal courts to hear cases involving the states without first having to get the state's permission.

During the ratification debates, this section attracted attention from some of the state legislatures. The response from the framers varied, with James Madison, John Marshall, and Alexander Hamilton reassuring the states that jurisdiction only applies when the states bring suit themselves. Madison, for instance, stated during the Virginia ratifying convention that "[i]t is not in the power of individuals to call any state into court" and that the proper interpretation of the phrase in Article III, Section 2 "in which a State shall be a Party" applies only to when states are bringing suit against citizens (quoted in *Alden* 1999, 775). Edmund Randolph and James Wilson, on the other hand, argued that the passage did in fact subject the states to suits. James Wilson felt that it was very important that citizens be able to sue states in federal court because federal courts provide a "tribunal where both parties may stand on a just and equal footing" (quoted in *Alden* 1999, 777). At the least, there was disagreement among the framers themselves as to the proper meaning of the provision. It was left to the Supreme Court to decide the issue.

CHISHOLM V. GEORGIA AND THE ELEVENTH AMENDMENT

Chisholm v. Georgia (1793), the first well-known case that the Supreme Court decided, emerged out of a dispute over a Revolutionary War debt.[1] At the time, a number of states were facing legal challenges over debts they had failed to pay.[2] The state of Georgia, desperate for supplies for the American troops quartered near Savannah, purchased a sizable amount of goods from a merchant named Robert Farquhar in South Carolina in 1777.[3] Farquhar delivered the goods, but was refused payment on the several occasions that he requested it because the state gave the money to two agents who stole it. Farquhar died in an accident in 1784 with the debt still outstanding. His estate went to his ten-year-old daughter, Elizabeth. The executor of Farquhar's will was Alexander Chisholm, a fellow merchant, and Chisholm continued to attempt to recover the money. When the legislature of Georgia refused his request for payment in 1789, Chisholm brought suit on behalf of Elizabeth Farquhar against the state in the Federal Circuit Court for the District of Georgia. After losing in circuit court, Chisholm appealed to the Supreme Court.

In that decision, four of the five justices found that Georgia was liable for the debt and ordered the state to pay.[4] Most importantly, they concluded that the Supreme Court did have jurisdiction and that the state could be brought to trial. The analysis turned largely on the

interpretation of Article III, Section 2 of the Constitution. The debate on the Court coalesced around the question of whether this section allowed the states to be defendants or only plaintiffs. This was tied, in turn, to questions of sovereignty and federalism. Chief Justice John Jay and Justice James Wilson both explicitly held that in the United States, the people were sovereign, not the states. In light of that, states could not claim immunity on the basis of sovereignty. To further bolster his argument, Jay compared the municipality of Philadelphia, with forty thousand residents, to the state of Delaware with fifty thousand residents and could see no discernable reason why Philadelphia could be sued while Delaware could not (*Chisholm* 1793, 472). In addition, since states could sue a citizen of another state in federal court (as Georgia was in the process of doing), turnabout was fair play (*Chisholm* 1793, 473).[5] After all, states could be defendants in the Supreme Court when sued by other states, so there was no loss of dignity to appear before the Supreme Court as a defendant. Justice James Iredell was the sole dissenter in the case. He held that Congress had not granted explicit jurisdiction to the Court for suits against states and that the Court therefore ought to dismiss the case.

The decision in *Chisholm* elicited howls of outrage from a number of states. Georgia, New York, Virginia, and Massachusetts were the most vocal critics. The lower house of the Georgia legislature even went so far as to pass a bill making an attempt to enforce a monetary judgment against the state punishable by death (Jacobs 1972, 56–57). Not surprisingly, each of these states faced their own suits before the Supreme Court. It is worth noting that while widespread, the negative reaction to Chisholm even among state legislatures was hardly universal. A committee of the state senate of Delaware, for instance, commented that justice, probity, and good faith made it improper to exempt states from suit. The legislatures of Maryland and South Carolina never actually passed resolutions that were introduced condemning the decision and the Pennsylvania legislature rejected its committee report urging a constitutional amendment (Jacobs 1972, 65).

The bill that would eventually become the Eleventh Amendment was introduced to the United States Senate on January 2, 1794, and passed by a vote of 23 to 2 on January 14. The proposed amendment read as follows:

> 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.

The amendment passed the House on March 14 without any changes by a vote of 81 to 9 and was sent to the states for ratification. At the time of the passage of the Eleventh Amendment through Congress, there were fifteen states in the Union (the original thirteen plus Vermont and Kentucky). Since the Constitution required ratification by three-fourths of the states, twelve states needed to ratify before the Eleventh Amendment became law. The first state, New York, ratified the amendment within one month of its passage. New York was rapidly followed by Rhode Island. Connecticut, New Hampshire, Massachusetts, Vermont, Virginia, Georgia, Kentucky, Maryland, Delaware, and North Carolina then ratified the amendment within one year.[6] South Carolina eventually ratified the amendment on December 4, 1797, although that was not necessary for passage.[7] The legislatures of New Jersey, Pennsylvania, and Tennessee refused to ratify the amendment.[8]

Despite having attained ratification from the required number of states by February of 1795, the Eleventh Amendment was not actually certified until 1798. By January of 1796, almost a year after the twelve states had ratified, President George Washington had transmitted to Congress notices of ratification by only eight states. The next year, Congress passed a resolution requesting President John Adams to ascertain whether ratification had occurred in any other states, including Tennessee. On January 8, 1798, Adams reported back that twelve states had in fact ratified the amendment and that the amendment was now effective. Following the adoption of the Eleventh Amendment, the Supreme Court dismissed the pending cases and the doctrine of state sovereign immunity had at least a foothold in the Constitution.

HANS V. LOUISIANA AND THE REINTERPRETATION OF THE ELEVENTH AMENDMENT

The doctrine of state sovereign immunity in the United States continued with little change until the 1870s.[9] At that time, following the second large-scale repudiations of debts by American states in only three decades, the courts began to slowly increase the protective scope of the Eleventh Amendment.[10] This culminated in the case of *Hans v. Louisiana* (1890). Hans, a citizen of Louisiana, held bonds issued by the state that were originally backed by a continuing annual tax levy. The state, facing a financial crunch, revoked the levy and in effect repudiated the bonds.[11] Hans brought suit in an attempt to force the state to pay its debt. Since Hans was a citizen of Louisiana, the literal language of the

Eleventh Amendment did not apply to him. The amendment only barred suits by citizens of other states and foreign subjects. When the Supreme Court heard this case in its 1890 term, it acknowledged that a literal reading of the amendment would permit such a suit. However, facing significant political pressure to permit the repudiations and having little hope of enforcing a judgment against the state, the Court proceeded to interpret state sovereign immunity as a concept that extended well beyond merely the text of the Eleventh Amendment.

In order to accomplish this, the Court had to revisit the opinions in *Chisholm* and the adoption of the Eleventh Amendment. Justice Bradley, who wrote the majority opinion in *Hans*, argued that the adoption of the Amendment refuted the understanding of the Constitution held by the majority in *Chisholm* and emphasized the importance of Justice Iredell's dissent (1890, 12). Justice Bradley described the *Chisholm* decision as sending a "shock of surprise throughout the country" and held that the Eleventh Amendment merely reflected the general understanding at the time (1890, 11). In other words, the Amendment clarified the original intent of the Constitution rather than fundamentally changing it. As a result, there was no need to put into the Amendment any language about the broader theory of state sovereign immunity because it was already widely understood to exist. The Court ruled that Louisiana could not be sued even by its own citizens because that would run contrary to the tradition of sovereign immunity. This decision has received substantial criticism for its characterization of *Chisholm* and assumptions about sovereign immunity, but it nonetheless carried the day doctrinally.[12] Following *Hans*, states were immune from suit by virtually anyone.

SOVEREIGN IMMUNITY IN THE TWENTIETH CENTURY

This state of affairs did not last for long. By the early 1900s, widening exceptions to sovereign immunity were developing through suits against state officers. As state regulation of business increased, the number of lawsuits filed by corporations and railroads to enjoin state officials from carrying out those regulations also increased. The pivotal case on this issue was *Ex Parte Young* (1908). The state of Minnesota passed a railroad rate statute that the railroads thought constituted an unconstitutional taking of property. The Northern Pacific Railway Company brought suit against a number of officials of the state of Minnesota, including Attorney General Edward T. Young, to prevent the statute from taking effect.[13] The railway was successful in the fed-

eral circuit court, but Young initiated a lawsuit against the railroad anyway for violating the rate schedule. The circuit court then ordered Young imprisoned for contempt of court and Young made a habeas petition that reached the Supreme Court. Young claimed that as an officer of the state, he was immune from suit. A lawsuit against the attorney general was the same as a lawsuit directly against the state.

The Supreme Court, in an 8–1 decision, held that Young could be sued. Justice Peckham, who wrote the majority opinion, held that the rate statute in question was unconstitutional and upheld the circuit court's ruling. As a result, the Court concluded that when a state officer seeks to enforce an unconstitutional statute, "he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct" (*Ex Parte Young* 1908, 160). This was, fundamentally, a return to the doctrine of the "king can do no wrong." The state could do no wrong, so the officer carrying out the action must be responsible for the harm. The doctrine is something of a legal fiction, but it provided a way to hold the state accountable without running afoul of sovereign immunity.

Following *Ex Parte Young*, sovereign immunity declined in importance and effect. Officer suits provided an alternative means of redress, although by no means an all encompassing one. The Court also developed the concept of implied consent and the waiver of sovereign immunity. States could waive their immunity and agree to be sued in federal court at their discretion. As this doctrine developed, the Court held that the consent did not need to be express. By engaging in certain activities, states created an implied or constructed waiver of their immunity. *Parden v. Terminal Railway* in 1964 was the key case on this issue. Alabama was sued by employees of a state-owned railroad to enforce the Federal Employers' Liability Act. The Court held that Alabama had waived its immunity by choosing to operate a railroad engaged in interstate commerce. Congress "conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit" (Parden 1964, 192). Implied consent understood this way severely curtailed the reach of sovereign immunity.

Parden was, in many ways, the nadir of sovereign immunity as a doctrine.[14] Neither suits against officers nor waivers of immunity have stood up well against the test of time, however. Beginning in the 1970s, the Court began to slowly tighten the loopholes and strengthen the defense of sovereign immunity. One of the most critical turning points was *Edelman v. Jordan* (1974), an attempt to sue state administrators

of a federal-state welfare program for denying payments to certain claimants. The Court concluded that waivers could only exist "where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction" (*Edelman* 1974, 673).[15] Additionally, while the Court did order the state officers to obey the federal law in the future, it refused to order payments to make up for past violations. In essence, states did not have to pay for losses that resulted from violations of federal laws.

In other cases, the Court applied sovereign immunity to federal cases with pendent or supplemental jurisdiction over state laws (*Pennhurst State School & Hospital v. Halderman* 1984),[16] required a "clear legislative statement" from Congress to abrogate immunity (*Blatchford v. Native Village of Noatak*, 1991), expanded officer immunity so that suits for money damages against them could not proceed (*Tenney v. Brandhove* 1951; *Pierson v. Ray* 1967; *Scheuer v. Rhodes* 1974; and *Imbler v. Pachtman* 1976), and also prevented some suits against states that did not seek any monetary judgment (*Cory v. White* 1982; *Hess v. Port Authority Trans-Hudson Corporation* 1994). Not all the cases expanded the scope of sovereign immunity. *Fitzpatrick v. Bitzer*, decided in 1976, held that Congress has the authority to waive state immunity when it is acting to enforce Section 5 of the Fourteenth Amendment.[17] A class action lawsuit against Connecticut was filed by present and retired male employees alleging gender discrimination in the state's retirement plan. The plaintiffs were successful at proving their claim, but were denied monetary relief under the Eleventh Amendment. The Court ruled that the Fourteenth Amendment modified the Eleventh Amendment and permitted suits against states to enforce it. In cases of discrimination, Congress could act and hold states accountable.

In 1989, the Court also ruled that Congress could rely on its commerce clause power to permit suits against states. In that case, *Pennsylvania v. Union Gas Company*, a company attempted to sue Pennsylvania to force cleanup of seeping coal tar into a local creek. The Court held that Congress had expressly waived the immunity of states in the Superfund Amendments and Reauthorization Act of 1986 and that this was within their constitutional authority under the commerce clause. Justice Brennan wrote the plurality opinion in the case and was joined by Justice White who agreed that Congress had the commerce clause authority, but disagreed with the Court's reasoning.

By the mid-1990s, state sovereign immunity doctrine was a confusing patchwork of exceptions and limitations. An individual could sue a

state or state official for injunctive relief, but not for monetary damages unless the federal law violated was passed pursuant to Congress' Section 5 power or Article 1 commerce clause power.[18] Cities and counties could be sued, but not "arms of the state" such as public universities and regulatory commissions. Waivers of state immunity by Congress needed to be clear and explicit rather than constructed from state participation in regulated activities. As Judge John T. Noonan wrote about the doctrine, "it only hurts when you think about it" (Noonan 2002, 48).[19]

SEMINOLE TRIBE AND THE REBIRTH OF SOVEREIGN IMMUNITY

In 1996, the Rehnquist Court revisited the question of state sovereign immunity and began to place its stamp on the field.[20] These decisions did not come out of the blue. Sovereign immunity as a defense has been gaining steam since the 1970s. However, *Seminole Tribe of Florida v. Florida* and subsequent decisions do represent a distinct shift both in scope and effect. While the earlier cases were cautious steps, these cases have been more dramatic leaps. The current Court has significantly reshaped sovereign immunity and made it a powerful legal defense for states. A brief review of the major holdings should suffice to demonstrate the changes that have taken place.

Seminole Tribe was the first shot fired in the latest battle over sovereign immunity. In it, the Court explicitly overruled *Union Gas* and in overturning the Indian Gaming Regulatory Act held that Congress could not abrogate immunity by relying on the Commerce Clause. The decision also cast doubt on the *Ex Parte Young* doctrine although it did not directly address the issue (1996, 73–76). This case came as a shock to many and signaled more changes to come. The following term, the Court again took aim at the *Ex Parte Young* doctrine in *Idaho v. Coeur D'Alene Tribe of Idaho* (1997). The tribe sued the state and several state officers by name in a dispute of land rights. The Court dismissed their suit, holding that *Ex Parte Young* did not apply where the state courts were available for remedy. The majority opinion also urged a balancing and accommodation of state interests before applying *Ex Parte Young* in any circumstances.[21]

1999 was, by any measure, a banner year for sovereign immunity. During that term, the Court decided three major sovereign immunity cases and solidified the changes begun with *Seminole Tribe*. Two of the cases were related, *Florida Prepaid* and *College Savings Bank*. The

Court used the opportunity to strike down both patent and trademark laws that were applied to states. In similar reasoning to *Seminole Tribe*, the Court held that Congress acted beyond the scope of its authority when it waived state immunity in the Patent Remedy Act and the Lanham Act. The third case, *Alden v. Maine*, was even more contentious and signaled a clear breaking point with the text of the Eleventh Amendment. A group of parole officers in Maine sued the state for overtime pay under the Fair Labor Standards Act. After *Seminole Tribe* was decided, their case was dismissed from federal court and they initiated another suit in state court. In *Alden*, the Supreme Court ruled that sovereign immunity applied as a bar to suit in state courts as well as federal courts. Even though the Eleventh Amendment only addresses federal jurisdictional limits, Justice Kennedy's opinion relies on the deeper principle of sovereign immunity to find in the state's favor.

The pace of cases has remained high. In 2000, the Court prevented suits based on the Age Discrimination in Employment Act and *qui tam* suits under the False Claims Act (*Kimel*; *Vermont Agency of Natural Resources v. United States ex. rel. Stevens*).[22] In 2001, the Court invalidated the provision of the Americans with Disabilities Act that permitted enforcement suits against states for employment discrimination, reasoning that legislation protecting people with disabilities did not sufficiently fall under the scope of Section 5 of the Fourteenth Amendment (*Garrett*). In 2002, sovereign immunity was accepted as a jurisdictional bar in administrative hearings conducted by administrative law judges (*Federal Maritime Commission v. South Carolina State Ports Authority*). Not all cases have gone in favor of the states. In 2002, the Court prevented Georgia from removing a valid case alleging sexual harassment from state court to federal court and then claiming sovereign immunity as a defense to have the suit dismissed (*Lapides v. University System of Georgia*).

In the most recent cases on sovereign immunity, the Court has ruled in favor of the plaintiff. In *Nevada Department of Human Resources v. Hibbs* (2003), the Court ruled that the Family Medical Leave Act properly abrogated state sovereign immunity as an appropriate exercise of Congress's Section 5 powers. The following year the Court again sided with the plaintiffs in *Tennessee v. Lane* and upheld the application of physical accommodation requirements in Title II of the Americans with Disabilities Act to the states as valid Section 5 legislation, at least as it related to physical access to courts. In 2006, the Court again sided with the plaintiffs in three sovereign immunity challenges. The Court applied the reasoning from *Lane* to Title II claims in

prisons as long as the initial allegations are also presented as Section 1983 civil rights violations (*United States v. Georgia*).[23] The Court also refused to permit sovereign immunity defenses in bankruptcy cases, relying on the Bankruptcy Clause of the Constitution (*Central Virginia Community College v. Katz*).[24] Finally, the Court confirmed once again that counties are not arms of the state and therefore do not enjoy sovereign immunity protection (*Northern Insurance Company v. Chatham County*).

CONCLUSION

At present, the doctrine of sovereign immunity is still very much in flux. It has been expanded substantially in recent years, although not universally. The commerce clause is no longer a valid source of authority for Congress to waive state immunity. The interpretation of what constitutes a valid Section 5 abrogation has been narrowed to only those groups qualifying for suspect or semi-suspect class status. *Ex Parte Young* is still in effect, but its reach has been narrowed. Sovereign immunity from federal laws now applies equally in state courts and administrative hearings, but does not reach bankruptcy hearings. Even more uncertainty surrounds the doctrine with the death of Chief Justice Rehnquist, who was one of the primary advocates on the Court of the expanded application of sovereign immunity. *U.S. v. Georgia*, *Central Virginia Community College v. Katz*, and *Northern Insurance Company v. Chatham County* may signal a new direction for the Roberts Court, but it is far too soon to tell. That is the current state of the doctrine. What remains to be explored are the implications and consequences of this understanding of federal-state relations and legal jurisdiction.

This page intentionally left blank.

Part 2

Understanding the Impact: A Look Back

This page intentionally left blank.

Chapter 3

The Dawn of State Sovereign Immunity

Chapter 2 provides a background for the legal doctrine in the United States, but my interest rests in the impact of that doctrine. What is the reality of sovereign immunity in practice? What happens when states present a successful sovereign immunity defense?

As a starting point to answering these questions, the period of the 1790s provides a useful series of contentious and highly visible cases that involve state sovereign immunity. The early Supreme Court, before the appointment of John Marshall as Chief Justice, has received much less scholarly attention than succeeding periods, in large part because the Court did not address many high-profile issues. However, the debate over sovereign immunity was one area in which the Court generated substantial attention, much of it negative. A closer look at the seven Supreme Court cases involving states as defendants in this time period provides valuable insight into the impact of sovereign immunity as a doctrine. The stark differences in outcomes between suits resolved before the adoption of the Eleventh Amendment and those that were not reveal a pattern that previews much of what happened throughout the history of sovereign immunity in the United States.

This chapter begins with a brief background on the economic and political situation immediately surrounding the adoption of the Constitution, which is relevant in understanding the pressures and motivations of states with regard to the exercise of sovereign immunity. I then delve into the facts of each of the seven Supreme Court cases, tracing out how the cases arose and how they were ultimately resolved.

The focus here is not on the substance of the Court's decisions or actions. Instead I am interested in exploring the resolution of the cases once the Court acted or failed to act. I find that the nature of the litigants and the timing of the litigation affected the outcomes, with *resources* and *political support* playing key roles.

BACKGROUND—DEBT IN THE REVOLUTIONARY ERA

A number of scholars have argued that concern about debts was the driving force behind the states' insistence on the protection of sovereign immunity (see Orth 1987, 12–29; Gibbons 1983). Indeed, in each of the cases below, the state was attempting to protect its treasury from monetary judgments by courts. To understand why this was the case, it is necessary to examine the role of debt in the period of the Founding.

With the push for independence from Great Britain, the newly emancipated states found themselves in difficult financial straits. Their previously protected economic relationships were no longer operative and they faced the costs of paying for an ongoing war. The states felt financial pressures from every side—the national government, state governments, and citizens. In 1775, the national government issued paper money that was backed by payments from the states to handle the costs of the war effort. The costs were apportioned among the states based on population, with Virginia owing the most at $496,278 and Delaware owing the least at $37,219.60 (Nevins 1969, 470). By 1780, though, the economic situation had worsened because states had little incentive to contribute their share of payments and the Articles of Confederation lacked any tax enforcement mechanism for the national government.[1] Congress had to implement partial debt repudiation, paying forty cents on the dollar, in order to keep the government solvent (Nevins 1969, 471).

To make matters worse, states proceeded to rack up substantial debts on their own during this time period. The states issued paper money that quickly became worthless, particularly in the later years of the war. Thomas Jefferson estimated that by 1786, the states had issued $36 million in currency and contracted $25 million in debt.[2] Maryland, for example, owed £400,000 sterling to British creditors by 1786 while requiring £116,000 in specie—actual coins rather than just paper money—just to keep the government functioning (Nevins 1969, 531). The South had the most difficulty with their debts and the least success with collecting taxes, due in part to the impact of the war on the export of tobacco and the heavy fighting that took place there at the end of the

war (Nevins 1969, 485–486). After the war, the situation eased slightly. States were able to borrow money abroad, sell land, and apply duties to goods in an attempt to raise revenue to pay off their debts. The adoption of the Constitution further eased the fiscal problems of the new nation. By 1789, though, the states were still reeling under the burden of their debts. Alexander Hamilton's Report on the Public Credit summarized the debts from six states that reported their figures to the Treasury Department (Table 3.1).[3]

TABLE 3.1
DEBT HELD BY STATES IN 1789

State	*Debt*
Connecticut	$1,951,173
Massachusetts	$5,226,801
New Jersey	$ 788,680
New York	$1,167,575
Virginia	$3,680,743
South Carolina	$5,386,232

Source: Hamilton (1832, 28-29).

In addition to the reports from states, Hamilton estimated that Pennsylvania owed $2.2 million, Maryland owed $800,000, and New Hampshire owed $300,000 (Hamilton 1832, 28–29). A legislative subcommittee in North Carolina placed the debt at $3.5 million, the debt of Rhode Island was roughly $510,000 and Georgia was just under $1 million (Nevins 1969, 542). In response, Hamilton advocated a national assumption of all state debt associated with the Revolutionary War. This was a controversial position; it tended to heavily favor wealthy merchants who had bought up the state securities at cut-rate prices at the expense of those who had initially purchased the securities from the states and sold them when they appeared worthless. Nonetheless, after a contentious debate and a political bargain on the location of the nation's capital, Hamilton's proposal was adopted in July of 1790.

While the federal assumption of state debts did serve to reduce the pressure on the states, many still had substantial outstanding debts that were not related to the Revolutionary War. Table 3.2 presents the remaining debt burden of the states in 1790.

Some states, such as Delaware and New Hampshire, were relatively debt free since they had not contracted many debts outside of those

qualified for federal assumption. Others, most notably South Carolina and Massachusetts, were made only marginally better off.

TABLE 3.2
STATE DEBTS AFTER ASSUMPTION

State	*Debt*
Connecticut	$ 314,000
Delaware	$ 0
Georgia	$ 454,000
Maryland	$ 212,000
Massachusetts	$2,334,000
New Hampshire	$ 60,000
New Jersey	$ 112,000
New York	$ 40,000
North Carolina	$ 576,000
Pennsylvania	$ 397,000
Rhode Island	$ 494,000
South Carolina	$2,600,000

Source: Trescott (1955, 229).

In addition to the debts held by the state governments, individual citizens had also contracted heavy debt loads during the decades leading up to the adoption of the Constitution. The case of planter debt in Virginia has been studied extensively, with scholars in the early twentieth century suggesting that Virginians encouraged the Revolution in order to shirk their debts to British creditors (see Beard 1915; Harrell 1926). While that case was overstated, debt was the heaviest shadow hanging over Virginia life by the 1760s and 1770s (Elkins and McKitrick 1993, 90).[4] Virginians owed more than 2 million pounds to British creditors, almost as much as all the rest of the colonies combined (Evans 1962, 511). Throughout the 1760s and 1770s, the state legislature enacted bills to restrict or minimize debt payments to British creditors. For example, the Sequestration Act of 1777 allowed people to pay off British debts by payment to the state loan office instead of the British creditors (Evans 1962, 516). The economic difficulties of the 1780s led many Virginians to have poor records of paying back credit, and they rarely passed up the opportunity to lay the blame on the British merchants. Landon Carter is quoted as claiming that the merchants' very profession "kicks Conscience out the door like a fawning Puppy" and that a broker is a "villain in the very engagements he

enters into" (quoted in Elkins and McKitrick 1993, 91). Regardless of its impact on the Revolution, debts were an unavoidable reality that colored citizens' thoughts about the British and credit in general.

Debt was one of the major sticking points in the resolution of the Revolutionary War. The Treaty of Paris of 1783 that ended hostilities stipulated that "creditors on either side shall meet with no lawful impediment" to the recovery of prewar debts (82). The Continental Congress urged the states to heed the terms of the treaty, but most states refused to return confiscated property and imposed further impediments to the recovery of debts owed to the British. The British, in response, refused to evacuate seven forts on the American side of the Canadian border until the states complied (Orth 1987, 16–17). The British Foreign Secretary, Lord Carmarthen, detailed offending laws in each state in a letter to John Adams, stating clearly that "when America shall manifest a real determination to fulfil her part of the treaty, Great Britain will not hesitate to prove her sincerity to co-operate in whatever points depend on her" ("Abstract of Lord Carmarthen's Answer to Mr. Adams" 1787, 403). This eventually prompted the appointment of John Jay as an envoy to England to negotiate a new treaty. That treaty, when ratified in the mid-1790s, submitted the question of debts to a joint commission to resolve the conflict.[5]

Debts, then, were a prominent public topic and an issue of substantial concern at the federal, state, and individual level. Concern about protecting state treasuries was heightened by the fiscal challenges of the time and bolstered by strong public hostility over the debts. With this background in mind, a closer look at each of the cases is in order.

THE STATES IN COURT

The very first case docketed at the Supreme Court involved a lawsuit against a state. Over the following eight years, six other cases were brought before the Court. The cases ranged from a Loyalist trying to recover his property from Massachusetts to the Prince of Luxembourg seeking payment for a ship loaned to South Carolina. Despite the variety in conflicts, each came down to individuals seeking payment from state treasuries from some debt owed. The resolutions, though, did differ substantively and these are the focus of the following section. I will review the background and resolution of each case, concluding with a discussion of the ways in which resources and popular support for the plaintiffs determined the efficacy of sovereign immunity as a defense.

Cases Resolved Before the Eleventh Amendment

Van Staphorst v. Maryland. When Robert Morris was appointed Superintendent of Finance by Congress in 1781, one of his primary initiatives was to push the states to pay a share of the costs for the Revolutionary War. Morris dispatched Matthew Ridley, a prominent Baltimore merchant, to the Maryland Assembly to encourage them to seek a loan for military supplies. Maryland faced the additional threat of Cornwallis's campaign in Virginia that seemed likely to advance to Maryland (Van Winter 1977, 93–94). Pressured by Morris and concerned about looming battles, the state sent Matthew Ridley to Europe to obtain a loan and purchase war supplies (Marcus 1994, 7).[6] Ridley was instructed that the state would honor any commitment he made up to 1 million pounds of tobacco and four thousand barrels of flour.[7]

When Ridley was unsuccessful in securing a loan in France, he moved on to Holland and met with two brothers, Jacob and Nicholaas Van Staphorst.[8] During the Revolutionary War, Dutch bankers were one of the key sources of funding for both the states and the national government.[9] The Van Staphorsts were leaders in the movement to fund and support the newly emerged American government. The brothers were Patriots, members of a loosely formed Dutch political faction aiming to attach Dutch interests to France and thus the United States. Patriots saw the United States government as a model for reworking the Dutch government and the financiers were willing to take a risk to help the fledgling country (Riley 1978, 658, 673). On July 31, 1782, Ridley successfully secured a loan from the Van Staphorsts in exchange for future payments in tobacco. The payments in tobacco were key both to securing the loan and to the future conflict between the Van Staphorsts and Maryland. The Van Staphorsts saw the loan as an opportunity to capture some of the tobacco trade for Amsterdam, particularly to the detriment of Rotterdam, England, and France (Van Winter 1977, 156).

While Ridley was negotiating in Europe, though, the Revolutionary War was settling down at home. Cornwallis surrendered at Yorktown and peace negotiations began. When Maryland received the news from Ridley about the contract, they were less than pleased. The legislature felt that Ridley failed to take changing circumstances into account and locked them in at a lower price for the tobacco than they were likely to get on the open market now that hostilities were coming to an end. In response, the House of Delegates ratified the loan, but not the tobacco agreement (Van Winter 1977, 158). Nonetheless, since the terms of the loan included the tobacco agreement and the state received the money, the Van Staphorsts demanded the full amount of the tobacco that they

were owed. The state was unwilling to pay any of the interest because many in the legislature objected that under the terms of the contract, in addition to repayment of the principal and interest on the loan, the Van Staphorsts could purchase up to a thousand hogsheads of tobacco at a price far below its market value.[10] The state's hesitancy to pay was also driven by a worsening debt situation in 1783 (Crowl 1943, 86).

In response, the Van Staphorsts hired the firm of John Sterett and Company to represent their interests in Maryland. Sterrett filed a memorial with the House of Delegates asking for full payment on the terms negotiated in the contract, and both sides decided to submit the matter to an arbitrator. Not happy with the arbitration progress, Maryland decided to appoint three commissioners to negotiate with the Van Staphorsts directly, but they also failed to reach any resolution. Maryland, in an attempt to show its good faith on the loan, began to pay its regular interest payments, but in cash rather than the more valuable tobacco that the contract stipulated. Maryland likely remained reticent to pay in tobacco because it desperately needed the revenue from its tobacco production. By 1786, the state was struggling just to collect its taxes, with fifteen of the state's tax collectors asking for a delay in submitting taxes to the state (Crowl 1943, 95). No one in the legislature was happy about the prospect of giving up some of the profit from its tobacco industry. Nonetheless, they also faced the difficult reality that the payment by tobacco was specifically called for in the terms of the contract.

With the passage of the Judiciary Act of 1789, the federal court system was fully established and the Supreme Court held its first session in 1790. Frustrated by Maryland's refusal to pay in tobacco, the Van Staphorsts filed suit against the state at the first possible opportunity, relying on the Court's original jurisdiction (*Van Staphorst v. Maryland* 1791).[11] In November of 1790, the Court issued a summons to the governor and council of Maryland, which the Maryland legislature agreed should be acknowledged and followed.[12] There appears to have been little debate at the time that the summons was issued about whether the Court's actions fell within its authority. The state dispatched its Attorney General Luther Martin to Philadelphia to argue the case. He hired John Caldwell and Samuel Chase to assist him when he arrived there and was later joined by Jared Ingersoll. On the other side, U.S. Attorney General Edmund Randolph, in his private capacity, represented the Van Staphorst brothers.[13] When the Court first opened for business in February of 1791, the *Van Staphorst* case was the only one that the Court addressed. The Court ordered the state to plead in the case within two months time or face a default judgment.[14] The state

complied, submitting a plea in the following months. At this time, some questions began to arise about the Court's jurisdiction and authority. A letter from an anonymous correspondent to the *Independent Chronicle* bemoaned the loss of sovereignty by the states and a pamphlet by Massachusetts Attorney General James Sullivan worried that Maryland's lack of resistance would prove a bad precedent in the future.[15] Nonetheless, when the Court reconvened in August of 1791, the Justices appointed seven commissioners to take depositions in Amsterdam on the dispute. Four commissioners were suggested by Maryland and three were suggested by Randolph on behalf of the Van Staphorsts.[16]

While the commissioners began taking depositions, doubts about the case were voiced in the Maryland legislature. A committee of the House of Delegates suggested that allowing the Court to decide the case would potentially undermine the state's own sovereignty and its place "as an independent member of the union" (quoted in Marcus 1994, 19). The committee concluded that settlement would be more desirable than the negative precedent that would otherwise be set. It should be noted that the state's case was also rather weak, which may have made the option of settling more appealing. The state sent five delegates to reach a settlement with the Van Staphorsts, independent of the Court's proceedings. They were eventually able to agree to payment by Maryland in United States securities that it held in the state treasury. These were more valuable than the cash previously offered, but less costly to the state than the tobacco sales. With the settlement agreed upon by both parties, the case was discontinued in August of 1792 before the Court took any further action.

The *Van Staphorst* case provides an intriguing view into how cases against states were resolved when it was assumed that federal courts had jurisdiction. The threat of uncertainty prompted the parties to agree to a more secure settlement that they could negotiate between themselves directly. Both parties, while perhaps not happy, were satisfied with the eventual outcome. The case mirrors countless other lawsuits across an enormous range of controversies in its resolution. While the Van Staphorsts were resolving their case, other disputes with states were also simmering. The next case further demonstrates the important role that the Court played in resolving suits against states prior to the adoption of the Eleventh Amendment.

Oswald v. New York. The dispute between Eleazer Oswald and the state of New York has the distinction of being the only case decided by the Supreme Court that was brought by a citizen of another state where

the state paid damages and trial costs after a jury trial. The origins of this dispute reach back even further than those of the *Van Staphorst* case. John Holt, Oswald's father-in-law, was a firebrand editor in New York, whose printing press and materials at the *New York Gazette or Weekly Post-Boy* were seized by the British for violating the Stamp Act. Following the seizure, Holt received backing from prominent New Yorkers George Clinton and Philip Shuyler to switch to the *New-York Journal*, where he proceeded to rail against the British and urged independence (Schlesinger 1935, 69, 82). In 1777, Holt was hired by the state of New York to print laws and resolutions of the legislature and other public papers as required (Goebel 1971, 724). The Committee of Safety that hired Holt, chaired by future Chief Justice John Jay, wrote a resolution to pay Holt £200 for one year. Holt continued to serve as the state's printer until his death in 1784. He was never paid a salary, but he did receive some state funds at various times for projects that he worked on (Marcus 1994, 57).[17] In 1783, Holt complained to the state Senate that he had to discontinue the publication of a newspaper because he had not been paid his annual salary or a number of other costs due him.

Following Holt's death, his widow Elizabeth Holt, filed a claim with the state for £5,293 that she claimed was owed to her husband's estate for his work as state printer. The amount included both costs he incurred and the salary that he was never paid. The state auditor authorized payment of £2000 for the costs, but refused to pay the salary. He determined that the money provided to John Holt for specific services was in lieu of a salary. Holt carried her case to the state legislature, which agreed to pay her the £200 pounds initially authorized by the Committee of Safety but no additional money for the subsequent years of work in accordance with the auditor's findings. After her full claim was denied, Holt sold the paper and moved to Philadelphia to live with her daughter and son-in-law, Eleazer Oswald. Elizabeth Holt died in 1788 and Oswald then renewed her claim for the money with the New York legislature. He submitted a petition to the New York Assembly, but the assembly was unable to reach any agreement about how to handle it. The initial three-man committee in the assembly determined that it was not competent to decide the issue and the assembly bill on government salaries provided no relief for Oswald. Faced with few other options, Oswald filed suit in the Supreme Court against the state of New York in February of 1791 (*Oswald v. New York* 1792).[18]

The suit filed by Oswald asked for a total of $31,458.35 from the state to cover both the salary and damages for the delay in payment.[19] Summons were sent to Governor George Clinton and Attorney General

Aaron Burr, but both were notorious Anti-Federalists and unlikely to look kindly on the newly formed Court. The governor transmitted the summons to the legislature, but the legislature gave no response. By February of the following year, the state had not answered the summons and did not send any representatives to the Court. The Court, perhaps hesitant to initiate an open conflict with New York, issued a second summons on February 14, 1792, clearly identifying Oswald as a resident of Pennsylvania to justify the Court's jurisdiction.[20] Again, though, the state did not respond and by February of 1793 Oswald's counsel moved for a default judgment against the state if no one appeared by the August term. The Court agreed and notified the governor and attorney general of their decision. That same month, New York suffered another blow when the Court decided *Chisholm v. Georgia*, concluding that the Court did have jurisdiction over suits against the states.[21] On August 6, 1793, Jared Ingersoll finally appeared as counsel for the state of New York, submitting a plea protesting the Court's claim to jurisdiction.[22] Before the Court could consider the motion, Oswald's attorney moved to postpone the case until the next term, likely because Oswald himself was in Europe for an extended period.

That delay was fortuitous for Oswald; the Federalists swept into power in the New York legislature in the 1793 election. At the beginning of the 1794 term, the legislature was set on ending the grip of the Anti-Federalist Governor Clinton on the state. Clinton had dominated the politics of the state for over a decade, but over the course of the constitutional ratification debates, a lively and organized opposition developed. Clinton narrowly defeated John Jay in the 1792 gubernatorial election amid claims of election fraud (Ellis et al. 1967, 124–129). By 1794, the Federalist-controlled legislature was eager to challenge Clinton. The Assembly rebuked the governor on the issue of the *Oswald* suit by refusing to pass a resolution condemning the *Chisholm* decision as Clinton desired, instead ordering the attorney general to defend the state before the Supreme Court. The state Senate passed its own resolution directing the attorney general to appear in court to defend the state.[23] These internal political struggles combined with the Court's decision in *Chisholm* prevented the state from making a jurisdictional challenge in the case.[24]

In light of these developments, the Court postponed the case in February 1794 to permit the gathering of depositions and affidavits.[25] Jared Ingersoll, representing the state before the Court, reviewed the documents in the case and concluded that the state was almost certain to lose. He encouraged the state to seek a settlement, but the attorney

general interpreted the resolutions of the assembly and senate as requiring the state to pursue the case all the way through trial. On February 5, 1795, the Court convened a jury and began the trial.[26] No full account of the proceedings has survived, but existing records show that depositions were submitted into evidence and at least two witnesses testified on behalf of the plaintiff. The next day, February 6, the jury returned a verdict in favor of Oswald, awarding him $5,315 in salary and damages and $.06 in costs.

Within days after the verdict, Oswald wrote Governor Clinton demanding payment and his request was forwarded on to the legislature with a reminder that it was the legislature that had directed the Attorney General to appear in the suit. In April, the legislature approved an act authorizing the payment of £2,144.13.11 in return for Oswald signing a release from the jury's verdict. On December 31, 1795, the state treasurer disbursed the payment to "the Representative of John Holt" (Marcus 1994, 66, fn 73). Four years after filing the suit, Oswald had successfully received the payment owed to John Holt's estate. In like manner to *Van Staphorst*, the availability of legal recourse provided a remedy that the political branches of the state were not willing to grant. Changes in the political coalition in power at the time made Oswald's task easier and made settlement before trial unlikely, but by far the more important factor was the uncertainty surrounding the scope of the Court's jurisdiction in these types of cases. The legislature initially was only willing to award £200 to Holt's estate, but ended up paying out more than £2000. Only one more case against a state was decided prior to the adoption of the Eleventh Amendment—*Chisholm v. Georgia*.

Chisholm v. Georgia. The first major case decided by the Supreme Court and the most well-known in the period before John Marshall became Chief Justice, *Chisholm* was the case that prompted the adoption of the Eleventh Amendment. As with the previous cases, the events in dispute arose out of the Revolutionary War.[27] In 1777, the state of Georgia, desperate for supplies for the American troops quartered near Savannah, purchased a sizable amount of goods through two agents, Thomas Stone and Edward Davies, from a merchant in South Carolina named Robert Farquhar.[28] Farquhar delivered the goods, but never received any payment. Stone and Davies received money from the Georgia treasury specifically to pay Farquhar, but never delivered it, likely absconding with it themselves. Farquhar tried to get payment from the state, but was unsuccessful despite multiple requests. He died in an accidental drowning in 1784 with the debt still outstanding. His

estate went to his ten-year-old daughter, Elizabeth, and Alexander Chisholm was named executor of Farquhar's will on her behalf. In 1789, the Georgia legislature denied a petition from Chisholm, claiming that the state had already paid the money to its agents Stone and Davies, removing the state's liability. The legislature urged Chisholm to seek Stone and Davies for compensation (Mathis 1967, 21–22). Chisholm was unable to recover the money directly from Stone and Davies, however, because they were both broke by then and Davies died shortly thereafter. Having exhausted his options with the state legislature, Chisholm decided to turn to the courts.

He initially brought suit on behalf of Elizabeth Farquhar against the state in the United States Circuit Court for the District of Georgia.[29] Chisholm sought $169,613 for the goods and $500,000 in damages against the state (Goebel 1971, 726). A summons was issued to Georgia Governor Edward Telfair on March 21, 1791. When the Circuit Court took up the case in October of 1791, Telfair filed a plea arguing that neither the federal circuit court nor any court of law or equity had jurisdiction over a suit against Georgia without the state's explicit consent. Telfair, on behalf of Georgia, moved to have the case dismissed. Telfair's hostility to the federal courts was in part driven by a widespread hostility toward the federal government in Georgia at the time. The Treaty of New York that President Washington negotiated with the Creek Nation ceded extensive lands to the west and south of the state. This significantly limited the state's ability to expand westward (Lamplugh 1986, 64–65).

Supreme Court Justice James Iredell, who was riding circuit in Georgia, and Judge Nathaniel Pendleton heard arguments in the case on October 20.[30] On October 21, they handed down their verdict, dismissing the case. Justice Iredell, whose opinion is the only one that has survived, concluded that the circuit court could not have jurisdiction over cases where states are the defendants because the Supreme Court was granted original jurisdiction where states are a party. Chisholm, undaunted, decided to follow Iredell's reasoning and filed a new suit against Georgia in the Supreme Court in the February 1792 term (*Chisholm v. Georgia* 1793).

A summons was again issued to the governor and attorney general of Georgia to appear during the August 1792 term. On August 11, when the Court heard the case, Georgia did not send anyone to represent the state. Upon motion from Chisholm's counsel, Edmund Randolph, the Court gave Georgia until February to appear before the Court or a default judgment would be entered against the state. In December, the Georgia House of Representatives reflected the hostility toward the federal government and passed a resolution declaring that

the Supreme Court did not have jurisdiction in the case and that any judgment would be treated as unconstitutional (Marcus 1994, 132). When the Court reconvened in February, Georgia still did not send a representative, although Georgia's resolution was read aloud to the Court.[31] The Court did hear from Chisholm's attorney on February 5 and took the case under consideration until February 18. On that day, the Court delivered its 4–1 decision in favor of the Court's jurisdiction to hear suits against states. The following day, the Court ordered the plaintiff to file his declaration with the Court that would then be submitted to the governor and attorney general of Georgia. If they made no response by the beginning of the August term, judgment would be entered against Georgia and a jury would determine the amount of damages owed to Chisholm.

The reaction among the various state legislatures and Congress was strong and relatively swift. The Eleventh Amendment was proposed, passed through Congress, and ratified, all within two years.[32] While the Amendment was progressing, though, Georgia faced the dilemma of how to handle the *Chisholm* suit. In August 1793, they authorized Alexander Dallas and Jared Ingersoll to request a delay, to which the plaintiff's counsel agreed. After several more delays, the Court issued a writ of enquiry authorizing a jury to be summoned at the February 1795 term. The writ was never acted upon, though, because Georgia opted to settle the case.[33] On December 9, 1794, Georgia paid out eight audited state certificates to Peter Trezevant, Elizabeth Farquhar's husband, worth just over £7,586. This was noticeably less than the amount sought in the lawsuit, but it is probable that Trezevant thought it was the best he could get.[34] In return Trezevant, and by extension Chisholm, agreed to drop all claims against the state. Oddly, the case continued on the Court's docket until all such suits were dismissed in 1798.[35]

Much like the *Van Staphorst* case, the state was pressured to settle the dispute as a result of the availability of legal action against it. While Farquhar and Chisholm previously were unsuccessful in their appeals to the state legislature, once the Supreme Court affirmed its jurisdiction, the state was much more willing to negotiate. The remaining four cases, however, paint a different picture. None of the other cases were resolved before the adoption of the Eleventh Amendment and the differences are both striking and instructive.

Cases Resolved After the Eleventh Amendment

Hollingsworth v. Virginia. Of all the suits against states heard by the Supreme Court in the 1790s, *Hollingsworth* had the earliest origins. In 1763, during Pontiac's War, Indian tribes in the Ohio Valley stole

goods and property from a group of New Jersey and Pennsylvania merchants and frontier traders (Marcus 1994, 274).[36] The victims estimated their loss at £85,916. Following the attacks, the merchants and traders formed a company called the Indiana Company to seek compensation from the tribes. There seems to be little question that there was an actual grievance at the heart of the Indiana Company's claims. The company was, however, also arguably a tool for land speculation by Pennsylvania and New Jersey merchants seeking a get-rich-quick scheme.[37] In 1768, the company reached a settlement with the chiefs of the Six Nations in the Treaty of Fort Stanwix, receiving a deed to 1.8 million acres of land comprising approximately one-quarter of present day West Virginia. The state of Virginia immediately protested the settlement, claiming that the land was properly Virginia's under its sea-to-sea charter of 1609 and subsequent Indian treaties.[38] In order to head off Virginia's objections and assure their ownership of the land granted in the treaty, the Indiana Company sent representatives Samuel Wharton and William Trent to England to get the British government's confirmation of their deed. While there, Wharton and Trent joined with another group of land speculators, the Grand Ohio Company, with hopes that a unified front would guarantee their success.[39] Despite repeated attempts in England, the worsening relations between the colonies and the mother country prevented any agreement.[40]

By 1775, the Indiana Company opted to go ahead on its own and prepared to sell parcels of the disputed land beginning January 1, 1777. After hearing of the company's plans, the Virginia Convention—the provisional legislature then in session—passed two hard-line resolutions. Settlers on the western lands did not have to pay anyone claiming title under an Indian deed until the legislature verified that deed, and in the future no purchases of Indian land should be made without legislative consent. The Indiana Company submitted petitions to verify their Indian deed to the Virginia legislature in 1776, 1777, and 1778 before their claim was finally heard in 1779. In June of 1779 after hearing from William Trent and Edmund Randolph on behalf of the Indiana Company and George Mason on behalf of the state, the Virginia House of Delegates denied the Indiana Company's deed. The legislature passed a statute invalidating all land titles based on unauthorized purchases or grants from Indians and announced that the state would be opening a land office of their own to dispose of the disputed territory.

In order to understand Virginia's strong stance on the issue, it is necessary to review some concurrent events. In their charters from the king, some colonies, such as Pennsylvania, New Jersey, and Maryland, had established western boundaries beyond which they could not

extend (see Jensen 1936). Virginia and several other states, on the other hand, had western claims all the way to the Pacific Ocean. The "landless" states were very concerned about being dwarfed in power by states that would reach enormous sizes. Additionally, land speculators in those landless states, often composed of leading merchants, planters, and politicians, had a much more difficult time getting land grants. The hope of states such as Maryland was that the western lands would all be ceded to the national government for administration, both limiting the reach of Virginia and opening up opportunities for local investors (Jensen 1936, 33). To that end, Maryland refused to ratify the Articles of Confederation unless Congress had control of the western lands, with the important exception of any lands previously granted by Indians such as that held by the Indiana Company (Selby 1988, 142; Jensen 1939, 323).

Virginia faced challenges to its land claims from numerous directions. The British government had hinted at boundary changes that would result in the loss of land in its Proclamation of 1763. Separatists in Transylvania (later Kentucky) and southwest Virginia sought to break away from the state and form their own states. Daniel Boone had already led more than a thousand settlers through the Cumberland Gap to settle in modern-day Kentucky (Selby 1988, 141). Private land companies comprised of both in-state and out-of-state speculators including the Ohio, Loyal, Illinois, and Wabash companies laid claim to various portions of the western lands (Onuf 1977, 354–355). Even the state of Pennsylvania was engaged in a land struggle with Virginia over the precise placement of its borders (Selby 1988, 143). In light of these developments, it is not particularly surprising that the Virginia legislature was unwilling to accept any claims from nonresidents, even those that appeared to have substance beyond pure land speculation.

Profit was not absent from Virginia's calculations either. George Mason, who led the battle against the Indiana Company's claims in the Virginia Legislature, was himself a principal in the Ohio Company and sought to protect that company's land grants (Selby 1988, 154). The state itself was also in desperate need of money and both Mason and Thomas Jefferson considered the sale of the western lands to be the quickest source of revenue. At the same time, in the view of the political leaders in the legislature, the sales should be done in such a way that kept a Virginia monopoly on western lands. Mason hammered home this argument in 1779 when considering the Indiana Company's appeal by emphasizing that recognition of a Philadelphia-based company's claims would boost the claims of other states and Congress to the western lands (Selby 1988, 154).[41] The hostility in Virginia toward

out-of-state speculators foreclosed any action from the state benefiting the Indiana Company.

Faced with Virginia's reticence, George Morgan, the main figure representing the Indiana Company at the time, submitted a petition to the Continental Congress in September of 1779 in hopes of getting the national government involved. Morgan had great hope for success in Congress because of his status as a well-connected member of a leading Pennsylvania family.[42] Congress forwarded the petition to a committee to consider. The committee reported back favorably on the company's claim and suggested a resolution asking Virginia to stop all land sales until after the conclusion of the war. The resolution quickly passed Congress, but enraged the Virginia legislature. The legislature dismissed Congress's jurisdiction in the matter and continued to operate its land office. Congress was in a difficult position because until Maryland ratified the Articles of Confederation, Virginia could claim that it was an independent nation and not subject to Congress (Selby 1988, 243). Despite sympathy at the national level, Morgan's claims were unsuccessful when Congress was unwilling to pursue the matter further during wartime.

As the war progressed, pressure built on the state to cede its western lands to Congress.[43] Virginia was, in principle, willing to do this, but did not want to have the earlier claims recognized. In 1781, Virginia offered to cede its territory north and west of the Ohio River in exchange for securing its title to the area south and east of the river, including the area claimed by the Indiana Company. Congress rejected the terms initially, but eventually accepted Virginia's offer in 1784 after watering down the conditions to more vague, general language. With this, the Indiana Company was left with no hope but a change in the powers of Congress and the national government in order to force a settlement. The realities of war superseded the interests of the Pennsylvania merchants and Virginia won the battle.

With the adoption of the Constitution, though, the company's hopes were revived. Virginia continued to operate its land office and sell the land in question to settlers. This left little choice to the company but to ask for compensation rather than ownership of the land itself. In 1789, 1790, and 1791, George Morgan, the company's leading member, submitted a petition to the Virginia legislature in hopes of a reversal in Virginia's previous stance. In October of 1791, the House of Delegates agreed to hear the claim but rejected it outright and signaled its continued support for the earlier resolution dismissing the company's claim. Although time had passed, Virginia looked no more favorably on out-of-state land speculators than before. It did not help

that Morgan himself had fallen considerably from grace. In 1788, he participated in a scheme with the Spanish government to settle lands west of the Mississippi with American settlers under Spanish rule. When the project fell through, Morgan returned to Pennsylvania but faced some hostility for his actions. In considering the company's petition in 1791, George Mason stated: "Mr. Morgan is entitled to as much justice as any other man, but surely no man who has endeavored to depopulate the United States by reducing their citizens to quit their own country and settle in the Spanish territory has little pretensions to favor from us" (quoted in Friedenberg 1992, 247).[44]

At that point, the company opted to file suit against the state in the Supreme Court during the August 1792 term (*Hollingsworth* et al. *v. Virginia* 1798).[45] The suit asked for $233,124.66 plus interest in compensation for 29 years of delay and $18,333.33 in expenses (Marcus 1994, 282; Lewis 1941, 317). The Court promptly issued a subpoena to Governor Henry Lee and Attorney General James Innes to appear before the Court on February 4, 1793. Governor Lee attended the Court as an observer, but Virginia sent no official representative. Since *Chisholm* was about to be decided by the Court, the case was delayed. Once *Chisholm* was decided, the attorneys for the Indiana Company asked that the Court issue another subpoena for Virginia to appear during the August term. Virginia did not appear again and the case, for reasons that are not entirely clear, was continued each term until 1796.

In August of 1796, the Court clarified its procedures for issuing subpoenas to states, requiring the plaintiffs to issue a third subpoena. Along with the subpoena, George Morgan included a letter suggesting the possibility of an out-of-court settlement to resolve the case. Morgan clearly hoped that the company could achieve settlements as the Van Staphorsts and Chisholm had before. Virginia was unresponsive, though, because they did not face the same pressure. By 1796, the Eleventh Amendment had passed through Congress and been ratified by a number of states although it was not yet confirmed by the president. The legislature passed a resolution ordering its delegates to Congress to work for ratification of the amendment as soon as possible. When the state did not make an appearance in February 1797, the Court authorized commissioners to be appointed to take testimony from witnesses. It is unclear whether the commissioners ever did collect testimony because the case was dismissed in February of 1798 following the formal adoption of the Eleventh Amendment.

It was not until 1803 that the company made another attempt to get compensation. Given Morgan's loss of status, an appeal to Congress would be unlikely to succeed. Morgan lacked political support for the

company's claim and general hostility to out-of-state land speculators at the time further hampered any efforts. Instead, the company decided to sue some of the landholders in the disputed territory, this time in federal circuit court presided over by native Virginian Chief Justice John Marshall. Since they were suing individual citizens rather than the state, there was no question of jurisdiction. In December 1804, though, the defendants introduced a motion that required the Indiana Company to post security for all costs within sixty days or the suit would be dismissed. Given the capital-heavy burden involved in such an action, the Indiana Company was unable to comply. No further action was taken and the case was finally dismissed in 1812.

Despite a potentially colorable legal claim, shareholders in the Indiana Company never received any compensation for their initial losses. Virginia's concerns about opportunism and encroachment on its territory were certainly valid, but the claims at the heart of the Indiana Company's dispute were never contested and never received a hearing. Despite the participation of politically powerful and influential individuals in the early part of the dispute, political pressures blocked any action at the state or federal level outside of the courts. In Virginia, hostility toward out-of-state land speculators made success unlikely in the state. At the federal level, the disgrace of George Morgan and the exigencies of the Revolutionary War undermined any hope of assistance from Congress. There was no support for either the Indiana Company's specific claims or the underlying issue of protecting land claims for out-of-state investors. In the absence of courts, there was no body left that would hear the company's claims.

Vassall v. Massachusetts. Land speculators, while distrusted and largely disliked by the public, were hardly the most unpopular group in post-revolutionary America. Tory loyalists, on the other hand, could make a good claim to that title.[46] Thomas Paine recommended seizure of Tory property in his pamphlet *Common Sense* and the Continental Congress seconded that recommendation in 1777 (Nevins 1969, 507). Many of those labeled as Loyalists, particularly in Massachusetts, were beneficiaries of British policies, either through official positions or through cash subsidies for certain products (Brown 1969, 50). William Vassall, a member of the Boston wealthy elite, counted among their number.[47] Vassall's main source of income was a Jamaican sugar plantation that he owned, although he had lived in Boston since early childhood.[48] In 1775, after the battles at Lexington and Concord, Vassall fled with his family to the island of Nantucket. At the end of the summer, Vassall and his family sailed to England and settled in a London suburb for

"the Sake of retiring from Noise, Tumult & War" (Marcus 1994, 352). Vassall also claimed that he left despite his affection for the state because he needed to maintain communication with his sugar plantation in Jamaica, something made difficult by the interruptions of war.

Despite Vassall's protestations of neutrality, the residents and leaders of Boston did not take kindly to his departure. Apparently, Vassall's loyalty to the king was unwavering and he had violated the nonimportation agreement among Boston merchants. In addition, he had been offered a seat on the hated Mandamus Council, though he refused the appointment.[49] As a consequence of these actions, the state labeled Vassall a Loyalist and in 1778, the General Court of Massachusetts included his name on a list of Loyalists prohibited from ever returning to the state. To make matters worse for Vassall, the following year the state legislature passed a law permitting the confiscation of property of anyone who left Massachusetts when the Revolution broke out as long as the state made the case before a jury. Vassall, who had left behind his large hilltop house filled with possessions, found this statute particularly concerning.[50] He immediately sent off a petition to the legislature asking to be exempted from the legislation.

Vassall's petition was ignored, but his property was not seized under the law. Unfortunately for Vassall, the state decided to take other means to acquire his property. In 1780, the General Court permitted the state to borrow money by mortgaging Loyalist properties. Vassall's property was used as a security to obtain a £50,000 loan. At the same time, Oliver Wendell, a probate judge in Suffolk County, auctioned off the furniture and household possessions by order of the General Court, holding the proceeds of roughly £600 from the sale for the state. When the war concluded in 1783, Vassall fully expected to have his property returned, since it had never been officially confiscated and the treaty forbade any further confiscations.[51] Wendell refused to release the proceeds, though, and in November of 1784 the state passed a statute declaring that all properties that had been mortgaged were to be considered officially confiscated along with all personal possessions inside. At the same time, Vassall had little luck seeking restitution through the British government because he had taken a neutral stance during the war rather than actively supporting the British cause.[52] The only bright point for Vassall was that Massachusetts permitted confiscated property to be retrieved if the mortgage was paid in full using the owner's own money. Vassall paid off the mortgage for the state in 1786 and reclaimed title. However, because of his advanced age he realized that he would never be able to return to Boston, so he sold the property in 1789.

Vassall did not give up on his claims against the state. He petitioned the General Court both for the proceeds from the sale of his possessions and the amount of the mortgage that he paid off. After receiving no response, his counsel recommended that he wait until the political climate changed, since he was unlikely to be successful otherwise. Despite the resolution of the war, there remained a fair amount of hostility and distrust toward Loyalists during this period (Brown 1969, 147–190). As early as 1787, Vassall began considering legal action that he could take against either the state or Wendell himself. Vassall maintained that his property had never been properly confiscated prior to the Treaty of Paris that put a halt to confiscation of Loyalist property. With the adoption of the Constitution in 1789, Vassall saw his opportunity. The incipient Supreme Court seemed like the perfect venue for him to bring his claim and he wrote that "in the new federal Court of Judicature . . . a sacred Regard for Justice will prevail in all their Proceedings" (quoted in Marcus 1994, 359). By December of 1791, Vassall was prepared to file a suit against the state in the Supreme Court.[53] At the urging of his American counselors, who were skeptical about the federal government's authority against the state, he made one more attempt at settlement. Vassall submitted another petition to the Massachusetts House of Representatives asking them to order Wendell to release the proceeds of the sale to him. A committee was appointed to consider the claim and reportedly was leaning in Vassall's favor. When Massachusetts Attorney General James Sullivan issued a report recommending the petition be denied, though, the House followed his advice and turned Vassall down.

With all other channels closed to him, Vassall proceeded to file the case against the state in February of 1793, just seven days before the decision in *Chisholm* (*Vassall v. Massachusetts* 1793). Like the Van Staphorsts and Chisholm, Vassall hired Attorney General Edmund Randolph as his attorney for the case. A subpoena was issued to the state in June, ordering it to appear during the August term. No representative from the state appeared in August and the Court continued the case to February 1794. The state was not ignoring the subpoena completely, though. The legislature proceeded to support and ratify the Eleventh Amendment in hopes that it would protect state sovereignty and resolve the case. The Court, possibly because of the advancement of the Eleventh Amendment, never heard Vassall's case. Because few Court records exist for the case, it is impossible to determine the reasons, but the Court continued the case each term until it was finally dismissed in February 1797 without explanation. Vassall made no other

attempts to recover what he estimated as a loss of £5000 before his death in 1800 at the age of 84.

Vassall was, by all accounts, a wealthy man who achieved many successes in his life. He was uniformly unsuccessful, however, in recovering anything from Massachusetts. Vassall had plenty of resources to pursue his cause, but they were all for naught. The repeated warnings of his American advisors point to the very real challenges faced by an unpopular minority in seeking redress from a state outside of the courts. The hostility toward Loyalists, most especially those who fled the country, was a palpable obstacle that Vassall was not able to overcome. Once the Supreme Court was closed off, Vassall was left with no other option but to accept the loss. In this case, relying on sovereign immunity served the state well, at the expense of Vassall. As the next case shows, though, a favorable result for the state is not always the outcome, even with the effective exercise of sovereign immunity.

Cutting v. South Carolina. Debts remaining from the Revolutionary War played a role in yet another case before the Supreme Court. In 1778, South Carolina appointed Alexander Gillon as commodore for the South Carolina Navy and sent him to Europe to acquire three frigates for the state.[54] Although South Carolina saw minimal military action at the time, privateers captured valuable British prizes and brought them into Charleston harbor (Wright 1976, 135). It is likely that these seizures encouraged the state to develop its navy in hopes of capturing prizes—ships or property captured at sea during wartime—themselves. After arriving in France in January 1779, Gillon had little success finding a willing party to finance and sell three frigates despite the $500,000 he was authorized to spend.[55] Disheartened, Gillon moved on to Amsterdam in hopes of having more luck. While there, he spotted a frigate owned by France that was available.[56] Gillon negotiated with the Chevalier Ann Paul Emanuel Sigismond de Montmorency Luxembourg, later the prince of Luxembourg, for the use of the ship. In March of 1780, the chevalier managed to obtain from the king of France permission for the use of the ship for three years. The ship, renamed the *South Carolina*, was given to Gillon to command to fight common enemies of France and the United States under the condition that a quarter of the value of any prizes taken by the ship would be paid to the chevalier. Gillon paid 100,000 livres up front and agreed to pay 300,000 livres if the ship were lost or captured. In May of 1780, the transaction was finalized and Gillon took possession of the *South Carolina* under the condition that the ship leave Amsterdam within three months.

The ship did not leave Amsterdam, though, until August of 1781. The reasons for the delay are contested, but Gillon's financial troubles likely played a large part. Gillon ran out of money while in Amsterdam and was forced to sell some of the state's supplies and borrow money.[57] After waiting for the ship to depart, in December the chevalier ordered some of his troops that had been committed to serving as the crew for the *South Carolina* off to other military actions. Gillon eventually sailed from Amsterdam leaving behind a number of debts and a growing hostility between himself and the chevalier, whom he blamed for the delay in departure. On the return journey to South Carolina, the frigate did capture several important prizes that were worth at least $110,000. Gillon made the money payable directly to South Carolina, though, instead of sending the chevalier's money to France as agreed. When the chevalier learned of this, he sent the French minister in Philadelphia, where the ship was docked, to request the money from Gillon. Gillon replied that he was awaiting instructions from the state, but the minister was suspicious and eventually sent a letter threatening legal action.[58] Gillon responded with a counterclaim, alleging that the chevalier was responsible for the delay in leaving Holland. In Gillon's estimation, the money from the prizes balanced out what the chevalier owed to the state. He then proceeded to prepare the ship for a three-month cruise.

The minister received a letter from South Carolina ordering Gillon to deliver the money to the chevalier's agent, but Gillon refused to comply because of the counterclaim he had made. The minister, Luzerne, filed a civil suit against Gillon in November of 1782 and the judge found in favor of the chevalier. Gillon was arrested and imprisoned, but managed to escape from the sheriff and board the *South Carolina*. He transferred the command of the ship to one of his officers and the ship sailed from Philadelphia without him. While Gillon traveled to Charleston by land, the British captured the *South Carolina* on December 20, 1782.[59] Once in Charleston, Gillon took up his case with the state legislature, who had recently received a petition from the chevalier for the money and the return of the ship by June of 1783. Gillon was able to convince the legislative committee considering the issue that, in fact, the chevalier, not the state, owed money.[60] When the news reached Luzerne, the French minister, his outrage prompted the state to back down from its decision and suggest that it was simply a preliminary finding.

The issue was transferred to a commission comprised of former South Carolina Congressional representatives for arbitration. The committee found that the former chevalier, now Prince of Luxembourg,

was owed 300,000 livres for the loss of the ship, one quarter of the prize collected and damages for the initial delay in departure from Holland. However, the commission also found that the prince owed the state money for the delay in Holland once his troops were removed from the ship. Calculating that amount based on the expense of maintaining the ship's crew essentially eliminated the prince's portion of the prize money. Declaring this unacceptable, the prince's representative fired off an angry letter and left Charleston. After the panel's decision, the King of France stepped into the dispute and demanded direct payment to him for whatever money remained owing under the contract because of his ownership of the ship. In 1785, the state offered to settle the claim by paying the money to a representative jointly approved by the prince and the king. No such representative was ever identified, however, and the prince continued to press his claim for the money.

In 1787, John Brown Cutting was appointed by the prince as his legal representative and ordered to pursue the claim in South Carolina. Cutting successfully got the legislature to levy a tax in 1789 specifically for payment to foreign creditors.[61] The advent of the French Revolution, however, prevented the prince from taking advantage of the act.[62] He and his family fled to Switzerland, his property was seized, and he died a year later in June of 1790. His claim against South Carolina was apparently his only remaining asset. At the behest of the late prince's estate, Cutting returned to South Carolina in 1794 to renew the claim. The state legislature decided to give Cutting £1000 of the total debt to allow for legal action to begin between Cutting and the French consul representing the king.

Still not satisfied with the state's response, Cutting filed suit against the state in the Supreme Court in 1795 seeking the full amount of the outstanding debt (*Cutting v. South Carolina* 1796).[63] A summons was issued to the state in March of 1796 and when the state did not appear or respond by August of 1797, the Court entered a default judgment for Cutting. A jury was empaneled to determine damages and on August 9, awarded him $55,002.84 on behalf of the prince's estate. Before the verdict and award could be carried out, though, the attorney general for South Carolina finally intervened. He filed a bill of interpleader, an action that allows the Court to bring all parties asserting claims to the money before the court without putting the state in the position of defendant. Since the case of *Cutting v. South Carolina* was concluded, the Court used the bill of interpleader to initiate a new suit and entered an injunction staying all further proceedings on the judgment in *Cutting*. Before proceeding with the state's bill of interpleader, the Court ordered the state to deposit the disputed money with the

Court, but the legislature refused. The case was continued, but no further action was taken on the case following the adoption of the Eleventh Amendment in 1798.

Unlike *Vassall*, the closure of the courts on the issue did not end the dispute. The Duke of Luxembourg, the late prince's brother, complained to United States Secretary of State Thomas Pickering about Cutting's administration of the estate and Cutting was eventually removed in favor of William Crafts. Crafts worked with the U.S. Attorney in Charleston to secure payment of the debt, but concern over France renewing its claim to the money prevented the state from taking any action. In 1804, the French government under Emperor Napoleon did raise the claim and in 1807 the state paid out 224,000 livres to France. An authorization to pay Crafts the remaining part of the debt was held up by concerns over Crafts's administration of the money and no further action was taken. In 1814, Crafts's replacement William Wightman finally got the South Carolina legislature to pass an appropriation act for $28,894.50 in state stock that was eventually turned over to the prince's nephew and heir. Despite the passage of the Eleventh Amendment, both the prince's estate and the government of France were able to recover their debt from the state. In contrast to the plaintiffs in *Vassall* and *Hollingsworth*, the prince's estate and the government of France both had financial resources and sufficient political support to overcome the lack of legal recourse by successfully appealing to the political branches.

Moultrie v. Georgia. The final case filed against a state prior to the adoption of the Eleventh Amendment involved yet another land speculation scheme, this time involving the infamous Yazoo lands. The Yazoo lands were an area in present day Alabama and Mississippi that were occupied by hostile Indian tribes and claimed at various times by Georgia, South Carolina, Spain, and the United States.[64] The area was potentially quite lucrative because of its proximity to the Mississippi River. In 1789, a group of prominent South Carolina businessmen and politicians formed the South Carolina Yazoo Company to petition Georgia to sell them a portion of the Yazoo territory. Alexander Moultrie, one of the founders, was the attorney general of South Carolina and brother to the former and future governor. To help with their petition, the company acquired a grant to 2 to 3 million acres worth of land from the Choctaw tribe that lived there.

On November 20, 1789, three companies presented petitions to the Georgia legislature for the opportunity to purchase parts of the area. The South Carolina Yazoo Company, the Virginia Yazoo Company,

and the Tennessee Company were independent but cooperative, each seeking different sections of the territory. After lobbying the Georgia Senate, a bill was passed granting each of the company's their petitions including selling over 10 million acres to the South Carolina Yazoo Company for $66,964. The companies would have the right of preemption for two years and an outright grant to the land if they paid the full amount by the end of that period. While the Georgia House considered the petition, another group called the Georgia Company made what appeared to be a better offer. They offered a higher price in more valuable currency or goods that would be less likely to depreciate.[65] The House narrowly rejected the offer and the original bill was passed and signed into law by the governor on December 21, 1789.

The sale of the lands prompted an immediate outcry from critics. Some denounced the sale as a giveaway resulting from corruption. Their case was bolstered by the rejection of the better paying Georgia Company offer.[66] Others argued that the land should not have been sold until Georgia's claim to the land was clear, citing competing claims from the federal government, Spain, and the Indians still living there.[67] Concerned about the international disputes that could potentially arise from the bill, the federal government stepped into this sensitive dispute when President Washington referred the matter to his Secretary of State Thomas Jefferson. Jefferson, in an attempt to defuse the situation, concluded that Georgia did not have the authority to remove the Indian's right to the land, but they could offer the right of preemption in attempts to purchase the land from the Indians. The South Carolina Yazoo Company, however, proceeded as before, either ignoring or unaware of Jefferson's decision.

The company gathered investors and produced pamphlets to attract settlers to its Walnut Hill settlement. Dr. James O'Fallon was hired as the company's western agent and he sought three to four hundred settlers from Kentucky. O'Fallon was a poor choice for the company, though, and he quickly fell in league with the Spanish governor Esteban Rodriguez Miro and U.S. general/Spanish spy James Wilkinson.[68] According to O'Fallon, the territory was to separate from the union and become a Spanish colony.[69] Miro feigned interest in O'Fallon's overtures, but privately worked against the settlement by encouraging Indian attacks on the settlers. When O'Fallon raised a battalion of troops to protect the settlers, the federal government became anxious about the possibility of armed conflict with Spain. A presidential proclamation was issued by President Washington accusing O'Fallon of levying an armed force in Kentucky and violating federal laws and treaties by settling on lands reserved for the Indians. The company quickly disavowed

O'Fallon and claimed that the territory was intended to be a state once it reached a population of 60,000. By October of 1791, Moultrie was forced to back down from any plans at settlement of the area after repeated refusals by the federal government to permit such a move.

At the same time, the South Carolina Yazoo Company was facing an even more serious dilemma. Payment to Georgia for the land was coming due. With no return on their investment yet, the company was in difficult financial straits. Moultrie himself had tried to pay off the amount to Georgia using embezzled money in February of 1790, but the money never arrived.[70] In the meantime, the Georgia legislature was facing the consequences of its actions. The Yazoo Bill caused great anger in many of the lowland counties of the state and their representatives pushed for action (Lamplugh 1986, 69). In addition, President Washington signed the Treaty of New York with the Creek Nation partly in response to the provocations of the South Carolina Yazoo Company (Friedenberg 1992, 264).[71] Given the general hostility this generated in Georgia toward the federal government, it is not surprising that some of that hostility was also directed at the speculators. In response, the legislature passed a bill requiring that payment on debts to the state had to be made in gold, silver, or Georgia currency issued after August of 1786. Since the members of the company had intended to pay the debt in "claims" against the state, they were left with few options. After trying and failing to raise the funds in specie, the company paid £3000 in specie and acceptable paper currency on December 19, 1791. The remainder of the amount due was submitted in the form of Georgia currency known as Wereat's certificates that were rejected by the state treasurer. With that rejection, the South Carolina Yazoo Company went silent and remained dormant for several years.

To make matters worse, Moultrie was impeached as attorney general of South Carolina in 1792 and convicted of embezzlement of state funds in 1793, likely related to the attempted payment to Georgia.[72] He further angered the South Carolina government by serving as an attorney to a suspected traitor who sued the legislature for $60,000 for violating the privacy of his records in a search (Stevens 1989, 86). By 1794, Alexander Moultrie was not a popular man in his state. Moultrie was not the only member of the company to experience a loss of fortunes. Founding member Thomas Washington was hung in South Carolina in 1791 for counterfeiting South Carolina debt certificates (Friedenberg 1992, 262).

That did not signal the end of controversy surrounding the Yazoo lands, however. In late 1794, Georgia began to receive offers of interest from new land speculating companies. In January of 1795, the leg-

islature and governor approved the sale of the land to four different companies at approximately a penny and a half per acre, including the area previously granted to the South Carolina Yazoo Company.[73] All but one of the legislators voting in favor of the act had been bribed and the charges of corruption were immediate and loud. Alexander Moultrie and the other investors were equally incensed and in August of 1796 filed a suit against the state in the Supreme Court (*Moultrie v. Georgia* 1797).

The suit alleged that Georgia violated its agreement with the company by selling the land again and that the act changing the type of currency accepted for state debts violated the original understanding of the agreement. According to the plaintiffs, a committee of the Georgia House of Representatives authorized the purchase with the condition that a certain type of Georgia currency known as Rattle Snake money was not used. The company took this to mean that any other type of currency would be accepted. As with *Chisholm*, the state refused to acknowledge the summons and did not put in an appearance before the Court. Hostility to the federal government over the Treaty of New York was still strong. In keeping with the Court's rules, when the state did not show in February of 1797, Moultrie was permitted to move ahead with the case. Depositions were collected and Moultrie was optimistic about the outcome. Although the 1789 act did not include language about Rattle Snake money, Moultrie's lawyers were hopeful that they would be able to introduce oral evidence about the agreement because of a legal doctrine that permitted such evidence when the terms of the contract were vague or ambiguous. For example, the minority report released in 1789 by those legislators opposed to the sale complained that the purchase price could be paid in audited state certificates (Lamplugh 1986, 71). In January of 1798, however, President Adams announced the ratification of the Eleventh Amendment and by February, the case had been dismissed.

Moultrie quickly filed a lawsuit against the four 1795 land companies and those who had purchased Yazoo lands from them in federal circuit court to seek redress. The suit sought a halt to land sales and an order to either turn over the land or pay compensation. However, for reasons that are not entirely clear, the suit was not pressed and never advanced. One likely reason for the failure of the suit to move forward was the growing controversy surrounding the 1795 land sale. The four companies had turned around and quickly sold the land to thousands of settlers and investors without disclosing the controversy surrounding the purchase. In 1796, the Georgia legislature repealed the 1795 sale because of the large-scale corruption that went into it. The secondary

purchasers lost their lands and many were financially ruined. Moultrie saw that it was in the company's best interest to present a unified front of Yazoo claimants against the state.

Unfortunately for Moultrie and the South Carolina Yazoo Company, the federal government stepped in and Georgia ceded it the entire territory in 1802. Congress set up a commission to hear claims for compensation from the sales of the land and set aside 5 million acres to settle the claims. Moultrie presented a petition in December of 1802, pointing out the financial hardships of the investors and the sacrifices of capital and time. The three commissioners were not swayed by their argument, though, and turned down the request on the grounds that the 1789 act did not specify that paper currency had to be allowed for payment. Moultrie was able to prevent the House as a whole from foreclosing the company's claim by leaving vague language in the legislation enacting the commission's report, but later that year, Congress granted the commission unreviewable authority to decide all claims emerging from the Yazoo lands. With that decision, the company was left with no further options. When Moultrie died in 1807, the claims of the company apparently died with him.

CONCLUSION

Each of the cases provides some insight into the impact of the state sovereign immunity doctrine, although the limited number of cases cautions against drawing firm conclusions. The three cases decided before the adoption of the Eleventh Amendment, *Van Staphorst*, *Oswald*, and *Chisholm*, all concluded with some form of restitution being made to the plaintiffs. Their cases were heard and, in the case of the *Oswald* suit, decided by a jury. This is the picture of a federal judiciary without the restraints of sovereign immunity doctrine. It is worth noting that *Chisholm's* outcome does stand a bit apart from the other two cases. Trezevant settled for significantly less than the original amount owed to the estate. Trezevant likely felt that was as much as he could get. The rapid response to the *Chisholm* decision by Congress suggested that, at the least, Trezevant would not have much support from the federal government in enforcing any ruling against the state.

The four cases that were dismissed by the Court as a result of the Eleventh Amendment paint a different picture. What is of particular interest in these cases is what the plaintiffs accomplished after the courts were closed to them. In *Hollingsworth*, *Vassall*, and *Moultrie*, the plaintiffs never received a legal hearing or any compensation.[74]

Reasoned arguments could be made that none of the plaintiffs would have been successful if their case had been heard, but there are equally strong arguments on the other side. We will never know if they would have prevailed. Outside of the courts, though, there is no question that they did not prevail.

Cutting, on the other hand, had a very different resolution and offers a useful counterpoint to the three other cases. In *Cutting*, despite a lengthy delay, the aggrieved party did receive full compensation without any court judgment. Why? A closer look at the nature of the plaintiffs brings out some key differences. The dispute in *Cutting* involved not only the Prince of Luxembourg, but also the French government. Substantial pressure was brought to bear by one of the United States' most valuable allies to resolve the claim, backed by considerable resources of time and money. In addition to France, the duke of Luxembourg brought Portugal into the dispute by retaining the Portuguese consul as his representative. That level of political power and interest practically guarantees success, with or without courts being involved. It is difficult to imagine any state resisting a justified claim by a key ally during a time of such uncertainty with regard to the nation's security. In fact, there were ample opportunities for the issue to be settled before the case ever came to court.

Hollingsworth, Vassall, and Moultrie all lacked that level of political might. In fact, each belonged to a class of individuals who were generally distrusted and disliked at the time. It may seem counterintuitive to apply that label to the plaintiffs in Hollingsworth and Moultrie, given the prominent nature of many of their members. The Indiana Company drew the support of Benjamin Franklin and his son, the governor of New Jersey. Alexander Moultrie served as attorney general of South Carolina and his brother was governor of the state. Nonetheless, by the time these cases were dismissed from the Court, the plaintiffs had fallen greatly in esteem. George Morgan and the other shareholders in the Indiana Company were powerful in the 1760s, but by the 1790s were no longer major players in politics or trade.[75] Moultrie's impeachment and conviction for embezzlement diminished his credibility and the company took another blow when founding member Thomas Washington was hung for counterfeiting. More broadly, the exploding Yazoo land scandal did little to endear out-of-state land speculators to the public at either the state or federal level. Vassall, as an exiled Loyalist, ranked among the politically untouchable. While attempts were made to come to terms with Loyalists who remained in the states, those who fled were treated much more harshly. Vassall was, not surprisingly, unable to get any

response from the political branches of government despite repeated attempts. It was as unlikely that a state would go out of its way to help an exiled Loyalist as it was that France would be denied a claim. The unpopularity and lack of political support for the three groups of plaintiffs in these cases was very likely decisive in their failure to attain any compensation.

This initial study, though comprising relatively few cases, is consistent with the cases to come. The pattern that emerges fits with the theory laid out in chapter 1. For those with financial resources and activated political support, the doctrine of sovereign immunity has a limited impact. The courts are merely one way of seeking redress and other methods can be equally as successful. For those lacking in resources or any kind of political support, though, the courts offer quite possibly the only hope and when they are barred, legitimate claims are denied. The strength and nature of this pattern will be expanded and developed in each of the following chapters.

Chapter 4

Debt Repudiation and Backlash in the 1840s

While the study of the 1790s demonstrates the difficulties for plaintiffs lacking resources or political support, the period of the 1840s offers complementary, but different, lessons on the impact of sovereign immunity. The 1840s were a critical time for sovereign immunity, with nine states running into serious financial troubles and defaulting on or repudiating their debts. These states relied on sovereign immunity to prevent federal enforcement of their obligations, especially to foreign bondholders. Many of these bondholders wielded extensive power and influence in worldwide financial markets, making such a move particularly risky. As a result of their actions, the states faced both economic and political sanctions. This chapter explores the causes and consequences of sovereign immunity in the 1840s with an eye to understanding the impact on the states.

Although no Supreme Court decisions arose out of this period, the doctrine nonetheless played a key role. It is, however, a neglected period in the research on sovereign immunity. The absence of federal cases helps explain the relatively limited attention paid by both legal scholars and historians.[1] For legal scholars, there are no federal cases to cite, resulting in a gap in the literature that skips from *Governor of Georgia v. Madrazo* in 1828 to *Davis v. Gray* in 1873.[2] For historians, the existence of sovereign immunity is assumed, but not examined in any detail.[3] In this chapter, I hope to fill in that gap and provide a broader treatment of the impact of sovereign immunity as a doctrine.

This is a complex story, but one that enriches our understanding of the dynamic between law and politics.

The chapter begins with a review of the circumstances leading up to the debt crisis in the 1840s, followed by a discussion of the state of the doctrine of sovereign immunity at that time. I then proceed to explore the impact these actions had on the states, paying particular attention to the economic and political consequences. I find that the collateral costs for states that relied on sovereign immunity to keep the dispute out of the courts far exceeded the cost of merely submitting to the suits and paying the debts.

A LOOMING CRISIS: STATE BORROWING IN THE 1830s

Beginning in the 1820s and accelerating dramatically in the 1830s, states embarked on an ambitious program of internal improvements, focusing primarily on transportation and banking. The northern states, inspired by the success of the Erie Canal in New York and facing growing pressure from the western states for access to the eastern markets, initiated extensive systems of canals, roads, and railroads.[4] Lack of transportation was seen as one of the crucial limiting factors in the expansion of the west (Scheiber 1969, 7; McGrane 1935, 3–6). The fact that the debts for the Erie Canal were paid off within ten years by the revenue from the canal was seen as a green light to borrow extensively to finance new transportation infrastructure (Trotter 1839, 79–80).[5] In the South, by contrast, borrowing was primarily for creating banking institutions. The southern states saw their banking institutions as weak, especially after the failure to recharter the United States Bank, and they sought a way to generate more banking capital. Land banks were the preferred method for these states, and by 1839, there was more than $52 million in state stocks issued for banking purposes (McGrane 1935, 6).

These events were all occurring within the context of the emergence of the second party system, consisting of the Democrats and the nascent Whig party.[6] While Democratic President Andrew Jackson was largely opposed to both banks and internal improvements, these stances were less true of many of his supporters at the state level. As I will discuss, most of the initial decisions to spend were bipartisan and broadly popular.

Not surprisingly, all of this led to a significant expansion of state expenditures and state debts. At all other times during the nineteenth century, aggregate state expenditures were roughly one-third the

amount of the total expenditures of the federal government. In the 1830s, those state expenditures shot up to two-thirds (Holt 1977, 6). To fund these increased expenditures, between 1820 and 1839, state debts rose by a factor of 13 (English 1996, 261). The Panic of 1837 provided a temporary jolt to borrowing by the states, but they quickly resumed financing increasingly unrealistic internal improvements.[7] It was not until 1839 that the system collapsed. When the Bank of England tightened credit, the resulting outflow of gold from the United States was enough to topple the fragile economy (English 1996, 262).[8] Without the availability of further credit, many state projects had to be abandoned with no hope of recouping the costs.

Nine states were hit particularly hard by these events, forcing them to default on their loans. These states can be grouped into three categories. Pennsylvania, Maryland, Illinois, and Indiana defaulted temporarily, but eventually settled with their creditors. Michigan, Louisiana, and Arkansas all partially repudiated their debts, usually agreeing to pay bonds directly issued by the states, but rejecting bank bonds issued in their name. Mississippi and Florida comprise the third group, those states that completely repudiated their debts, refusing to make any further payments on them (see English 1996, 265). A closer consideration of how these states responded to the economic crisis is critical for identifying the subsequent reactions.

TEMPORARY DEFAULTERS: PENNSYLVANIA, MARYLAND, ILLINOIS, AND INDIANA

All four of these states borrowed and spent heavily on canals and railways in hopes of substantial returns on their investments. Pennsylvania began construction on the "Main Line" Canal in 1826, an ambitious project that eventually extended 395 miles from Philadelphia to Pittsburgh (see Larson 2001, 80–87). In addition to the main canal, the state legislators also committed to construct numerous branch lines to keep various constituencies, especially the anthracite coal producing regions, happy. Maryland quickly followed suit with the Chesapeake & Ohio Canal and the Baltimore & Ohio Railroad both breaking ground in 1828 (Larson 2001, 90–91). Illinois and Indiana were slower to start but quickly caught up with the scope of their projects. In 1835, the Illinois legislature authorized construction on the Illinois & Michigan Canal, with the issuance of $500,000 in bonds. This modest start was followed in 1837 by the authorization of a massive system of general improvement including the construction

of seven railroads, improvement of the navigation of five rivers, and $200,000 for distribution to counties that did not get improvements. All of these improvements began at the same time and built in both directions from existing navigable streams. The state authorized $8 million worth of 6 percent bonds to fund the construction, with the faith of the state pledged for their interest and principal (McGrane 1935, 104). Indiana followed a similar course, beginning modestly with the Wabash & Erie Canal in 1832, but expanding dramatically in 1836 with the Mammoth Internal Improvement Bill, as it became known. That act continued and extended the Wabash & Erie, cleared the lower Wabash, began construction on the Whitewater Canal and Central Canal, began building the Madison Railroad as well as several roads, and provided for surveying for other projects. To carry this out, the legislature authorized up to $10 million in bonds (Wallis 2003, 231).

Each of the measures in these states was undertaken with bipartisan support. In Pennsylvania, the Democrats controlled the legislature and statehouse throughout the 1830s. In fact, Democrats in the state voted for internal improvement projects more frequently than Whig legislators, possibly because the Whigs viewed the projects as simple patronage for Democratic supporters (Ershkowitz and Shade 1971, 605).[9] The only strong opponents to the projects were the so-called "hards," Democrats who opposed any type of bank and preferred hard currency of gold or silver (Snyder 1958, 154, 157). In Maryland, the Whig party was ascendant in large part because of popular opposition to Andrew Jackson's stance on limiting government funding of internal improvements, which eased passage of the railroad and canal (Smith 1974, 272). Like Pennsylvania, Illinois's legislature was strongly Democratic, although the governor was in practice favorable to the Whigs. Nonetheless, the need for roads, canals, and railroads was stronger than commitment to Jackson's platform, and after extensive logrolling, the internal improvement programs passed (Jensen 1978, 44). Indiana was the most evenly split between the parties, but the Mammoth Internal Improvement Bill passed with broad bipartisan support (Madison 1986, 137). One study found that in every state in the 1830s there were virtually no significant differences in voting patterns between Democrats and Whigs when it came to internal improvements (Ershkowitz and Shade 1971, 604).

Bipartisan cooperation notwithstanding, these states quickly became indebted beyond their capacity to repay. In Pennsylvania, the hoped-for revenues from the Main Line Canal did not materialize, with the interest on state loans soaring to nearly nine times the income produced.[10] By 1840, Pennsylvania was more than $34 million in debt.

The public debt in Maryland at the time was $15 million, with nearly $600,000 in annual interest costs (McGrane 1935, 66, 91). Illinois and Indiana were in substantially worse positions to begin with and extensive borrowing did not help their financial situations. For example, in 1842, Illinois had annual revenues of just $98,000, but faced a public debt of $10.6 million and annual interest of $800,000 (Larson 2001, 219). Likewise, Indiana was $12 million in debt by 1841 and had managed to complete none of the many public works projects that had been initiated (Wallis 2003, 225).

Not surprisingly, in 1841 and 1842 each of these states defaulted on their interest payments. Pennsylvania defaulted for the shortest time, stopping payments in 1842 and resuming in 1845 after the legislature responded to the pleas of creditors and enacted a tax devoted solely to paying off the debt. While support for future internal improvement projects declined precipitously, the Democrats who initiated the spending remained in power and were committed to solving the problem.[11] Maryland and Illinois both defaulted in January 1842 with Maryland resuming in 1848 and Illinois resuming in 1846. As with Pennsylvania, the Illinois Democrats retained control of the legislature throughout the period, providing them with a strong incentive to address the problems for the state's credit. After deliberation in several legislative sessions, the state opted to levy a property tax and deed the canal to the creditors, measures that succeeded in addressing the debt.

In the late 1830s, the Democrats gained a narrow majority in the Maryland House as well as the governorship, but lost when a narrow segment of Democrats advocated repudiation of the debt in 1842. Baltimore-area Democrats in particular denounced such talk, but the damage was done and the Whigs took control of the legislature again in 1844 under the banner of the party that protects the state's integrity.[12] With that electoral mandate, the Whigs levied a tax, trimmed state offices, and issued new bonds paid out of the first receipts in the treasury, which permitted resumption of payment in 1848.

Indiana was the first to default from this group, failing to pay from 1841 until 1847. While the Whigs gained a substantial majority in 1840 thanks in large part to native son William Henry Harrison's presidential campaign, their control was short-lived. Beginning in 1841, power shifted heavily in favor of the Democrats. Blame fell directly on the Whigs for the fiscal predicament of the state and the Democrats were more than happy to accuse the Whigs of mismanagement and corruption despite the earlier bipartisan adoption of the spending programs (DeBoer 2004, 516). Democrats toyed with the idea of repudiation, but the party's complicity in the spending combined with

the advocacy of Charles Butler, an agent of the foreign bondholders, steered the legislature toward resumption of payment (McGrane 1935, 136–142). In a complex resolution, Indiana paid off the debt that had been issued directly in the state's name and deeded the canal and canal lands to their creditors for payment of bonds that had been issued by the canal company with the state's seal (see English 1996, 265).

Partial Repudiators: Michigan, Louisiana, and Arkansas

The next group of states was less diligent about repaying their debts and repudiated at least part of them. Michigan, motivated by the extensive internal improvements going on in neighboring states, borrowed heavily to build railroads and canals. Arkansas and Louisiana, on the other hand, issued state bonds to create capital for land, or property, banks in their states. Banks at this time were chartered by the state legislatures, which established the bank as a corporation and limited the liability of the shareholders. The shareholders paid in their capital, preferably specie (gold or silver), which was used to offer loans to others. In practice, though, many of these banks simply received IOUs from the shareholders in return for stocks and the value of the capital was typically vastly overestimated. For many banks, the state itself became a shareholder, offering up state bonds as capital. Land banks such as those in Louisiana and Arkansas issued loans for real estate purchases in exchange for mortgages (see Watson 1990, 35–36). In each of these cases, the states quickly overreached and were caught by the financial troubles in the late 1830s and early 1840s.

Michigan was a relative latecomer to the internal improvements movement. In March of 1837, the Democratically controlled state legislature authorized the borrowing of up to $5 million to carry out a general system of public works. The measure, which was adopted with support from both parties, was to include 596 miles of railroad, 233 miles of canals, and improvements to navigation on five rivers (McGrane 1935, 154; Formisano 1971, 36). In Louisiana, the primary concern was that a dearth of capital was preventing the sugar industry from growing. Planters urged the state to establish banks that could provide much-needed capital to purchase land and slaves. By 1833, the state had authorized $23.5 million in state bonds for the Bank of Louisiana, Consolidated Association of the Planters of Louisiana, Union Bank, and Citizens Bank (McGrane 1935, 168–173). The National Republicans, who became the Whig party, held a narrow majority in the legislature, but enjoyed substantial popular support for state sponsorship of development including banks (Sacher 1999,

225–226). Arkansas followed a similar approach to getting capital for its agricultural sector, although on a smaller scale. To address the lack of ready capital for investment in the state, the legislature in 1836 founded the Real Estate Bank and the State Bank of Arkansas. Collectively, they had $3 million in capital, guaranteed by state bonds and backed by the faith and credit of the state. The Democrats controlled the legislature and statehouse, but acted with the support of the Whigs. The two principal founders of the Real Estate Bank were Whigs themselves (Worley 1950, 404).

All three states ran into problems in the late 1830s that led to crises in credit. Michigan relied on the Morris Canal and Banking Company to sell its bonds, a number of which were later transferred to the United States Bank of Pennsylvania in advance of payment. The United States Bank sold many of the bonds in Europe, but had to suspend specie payments before it could pay the state.[13] That same year, in 1839, the state faced a deficit of $16,000 and decided to severely curtail their public works projects (McGrane 1935, 151–152). The state was left with a $5.6 million debt to pay when it had received less than half that amount in payments because of the failure of both the United States Bank and Morris Canal (English 1996, 262).

Louisiana's banks represented a common story among the land banks of the time. While initially cautious, they became increasingly bold, engaging in questionable real estate and cotton speculation. Hurt by the Panic of 1837 and the financial crisis in 1839, the banks were in disarray and the state was facing more than $19.2 million in debt (English 1996, 262). Arkansas, like Michigan, had relied on a questionable third party to sell its bonds, the North American Trust and Banking Company, because they were not selling immediately on the open market. One critical transaction that would come back to haunt the state was a $500,000 transfer in bonds to an English investor, James Holford, as collateral on a $325,000 loan to North American Trust and Banking Company. By the time the North American Trust and Banking Company became insolvent in 1840, the banks in Arkansas were near collapse and the state had a debt that worked out to $63 per capita for every white resident of the state (McGrane 1935, 248). Tensions ran so high that the Speaker of the House in Arkansas charged down from his podium and stabbed a rival legislator to death on the floor of the house because of a perceived slight over his participation in the bank.[14]

Michigan defaulted on their interest payments in January of 1842. The Whigs briefly controlled the state in 1840 after criticizing the Democrats for the state's financial situation and passed measures

limiting the scope of the state projects. It was too little, too late and the Democrats quickly returned to power in 1841 (Formisano 1971, 37). Facing little choice but to default, the Democrats suspended payment and continued on the same path as the Whigs, cutting back on the internal improvements. There was some pressure to repudiate the debt, but the Whigs and a portion of the Democrats known as "softs" for their support of banks and state investment in infrastructure combined to ensure that the state would maintain its credit (Dunbar and May 1995, 235). The effort was only partially successful. The state resumed payment in January 1846, but only on fully paid bonds for which the state had received payment. The so-called partial-paid bonds that the United States Bank sold were not addressed until 1849 and then they were only redeemed at approximately 30 cents on the dollar (English 1996, 265).

Louisiana went into default in February of 1843, with the failure of the Citizens Bank and Consolidated Association. The Whigs passed a bank reform bill in 1842 with great prodding from Democrats in hopes of fixing the failing banks, but the effort was unsuccessful. By 1843, the Democrats had swept the Whigs from power on the basis of the state's financial difficulties and considered repudiating the state's entire debt (Schweikart 1987, 30–31). While Democrats largely drove the repudiation talk, neither party advocated state assumption of the full debt. The following year, the legislature split the debt into two categories; 1) debt accumulated for administrative purposes, public works, and the purchase of stock in certain bonds totaling approximately $4 million on one hand; and 2) debt accumulated by the land banks on the state's behalf totaling $17.5 million on the other. The legislature voted to fund what it considered the state debt proper in March of 1844 but refused to consider the debt incurred by the land banks (McGrane 1935, 188–190). Through the 1840s and 1850s, the state worked to reduce its outstanding debt, but by the Civil War, the state still had not paid $5.4 million in bonds issued to the banks (McGrane 1935, 192).

Arkansas faced the smallest debt, but was the most recalcitrant in its payment. It was also the site of some of the most contentious partisan battles on the issue of state debt. In July of 1841, both the Real Estate Bank and the State Bank defaulted on their payments. By November of that year, it was clear that the state could not cover the $3.2 million in debt, since it only had $4,000 in the treasury (McGrane 1935, 257). Although initially chartered with a bipartisan vote, the minority Whigs were quick to use the banks' troubles to attack the Democrats in power. In response, the Democrats tried to lay the blame on the Whig officers of the banks and accused the Whigs of advocating

repudiation. Neither party wanted a full investigation, however, because of complicity by both sides. Taxation was considered as a possible remedy, but was rejected because it would have fallen most heavily on the planter class who dominated the legislature (Worley 1950, 423; see also Schweikart 1987, 28–29). Democrats retained control of the state government, but took no substantive action on funding the debt until after the Civil War in July of 1869. In addition, the state explicitly repudiated the Holford bonds in 1884 (English 1996, 265).

Complete Repudiators: Mississippi and Florida

The final two states responded most dramatically to their fiscal crises, completely and explicitly repudiating their debts. Both Mississippi and Florida used property banks extensively, supporting their capital with state-issued bonds. In 1830, Mississippi chartered the Planters' Bank to promote agriculture with a capital of $3 million, two-thirds of which was generated by state bonds. This action was taken by a Democratic legislature in response to broad popular demand and the Planters' Bank later became one of Jackson's "pet banks" that received federal funds. The Whigs briefly controlled the legislature in the middle part of the 1830s and used the time to advance their support for state-supported banks. In 1837, the state chartered the Union Bank and quickly increased the bank's capital by $5 million the following year, secured only by state bonds (Gonzalez 1973, 285–292; McGrane 193–195).

Florida's story is perhaps the most complex. At the time that Florida chartered its banks it was still a territory.[15] It was the territorial Legislative Council, dominated by those who would become Whigs, which approved the charter for the Bank of Florida in 1828, followed by the Bank of Pensacola, the Union Bank of Florida, the Southern Life Insurance and Trust Company, and fourteen others (Tebeau 1971, 144). Although Democrats were in the minority, they were also heavily involved in supporting the banks. By 1839, the state had authorized $4 million worth of territorial bonds to support the banks (Schweikart 1987, 40; McGrane 1935, 224–225).

Following the general financial problems of the time, these banks overextended their credit, suspended specie payments, and speculated in crops like cotton. By 1841, Mississippi owed a debt of $7 million, with the Union and Planters' Banks largely insolvent (English 1996, 262).[16] The Florida banks also engaged in poor loan practices, loaning large amounts of money to shareholders without requiring adequate security. By 1841, with a debt of $4 million, the people of Florida owed more than $74 per capita (English 1996, 262, 264).

In March of 1841, the Planters' Bank in Mississippi was unable to make its interest payments and defaulted on the bonds. In May of the same year, the Union Bank followed suit and defaulted. The state refused to provide the money and Governor McNutt advocated the repudiation of the Union Bank bonds. Beginning in 1839, the state Democrats had shifted toward a stricter "hard-currency" view and defeated the Whigs handily running on an anti-bank platform (Gonzalez 1973, 294). McNutt was able to argue that the sale of the bonds was illegal and fraudulent, although he himself had authorized the transaction.[17] Responding to the governor's description of the situation as a "bankers' war" in which the "honor, justice, and dignity of the people" was not involved and his openly anti-Semitic attacks on Baron Rothschild, the state legislature on February 26, 1842, formally repudiated the Union Bank bonds (McGrane 1935, 201). Although the planters in the state enjoyed the majority of benefits from the banks, they were more than willing to change their stance given that the majority of bondholders were northerners and foreigners (Schweikart 1987, 26). The bill passed easily over the objection of the Whigs after the defeat of their gubernatorial candidate in 1841. The Democratic coalition in place at the time was unconcerned about the consequences of repudiation both because the effects were felt by nonresidents and because there was general hostility toward state borrowing altogether.

As for the Planters' bonds, the legislature largely ignored them despite pleas from bondholders. In 1848, the legislature did apply $94,000 from a sinking fund to pay for some of the Planters' Bank bonds and $54,000 worth of bonds were received by the state in payment for public lands, but the total outstanding amount from those bonds was $2 million.[18] In the early 1850s, as the general objection to state-sponsored projects eased, there was a movement in the state to pay the Planters' bonds so as to restore the state's credit and allow it to build railroads. However, the issue was put to the voters in a referendum in 1852 and the Planters' bonds were formally repudiated as well. No further payment on these bonds was ever made.[19]

In 1838 and 1839, Florida drafted its constitution and applied to become a state. Congress granted statehood to Florida in 1845. In the midst of this transition, Florida needed to address its banking crisis and debt problems. In the drafting of the state constitution, banking was a key issue that disrupted the proceedings (Moussalli 1996). The Loco Focos, as the bank opponents were known, had already advocated repudiating the territory's "faith bonds," arguing that the territorial legislature could not bind the people. In the constitution adopted in 1838, impairing the obligation of contracts was forbidden in three sep-

arate articles, in an attempt to nullify the arguments of the Loco Focos (Moussalli 1996, 430–432). With the financial crisis of 1839, however, the tide turned heavily in favor of both the Democrats and repudiation. In February of 1840, the federal House Judiciary Committee, controlled by Jacksonian Democrats generally opposed to banks, issued an opinion that the Legislative Council exceeded its authority by approving faith bonds.[20] This conclusion was contested in the more sedate Democratic Senate, which condemned the House report (McGrane 1935, 236–237).[21] Despite the debate, the fate of the banks was sorely hurt by the report and the cause of the Loco Focos branch of the state Democratic party advanced.[22] When the Bank of Pensacola could not make their payments in January of 1841, the Democratic government of Florida refused to pay until all legal remedies against the shareholders had been exhausted. In February of 1842, the Legislative Council adopted a resolution repudiating all of the territorial faith bonds, requiring the Governor to "draw lines across the face" of any bonds that are turned in and to cut "off the seals therefrom" (quoted in Martin 1974, 163). While some payments were later made on the bonds by the banks for which they had been issued, the amount was small and the state never paid any amount.

THE ROLE OF STATE SOVEREIGN IMMUNITY

In this context of default and repudiation, state sovereign immunity played a critical role. Outraged by the actions of the states, jilted bondholders, especially from England and the Netherlands, sought routes for recouping their losses and recovering the worth of their bonds. When a contract is broken, one of the most common responses is to turn to the courts for enforcement of the contract. Indeed, a contract itself is commonly defined as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty" (*Restatement of the Law Second, Contracts* 1981, 1).[23] In this time period, however, not one federal case was filed against any of the defaulting or repudiating states.[24] This is a puzzle that begs for explanation. Was the Eleventh Amendment the bar that kept creditors out of federal courts? Were the creditors focused on other strategies such as legislation and changing public opinion? One possible explanation for this, and the one that I adopt, is that sovereign immunity as a doctrine acted as a deterrent before any creditor even bothered bringing suit. This can be a difficult argument to prove, since it depends as much on the absence of action as its presence.

However, there is some substantial evidence that bolsters my argument about the role of sovereign immunity. In order to determine what effect sovereign immunity had at the time, we need to look to the controlling case law, the published opinions of prominent lawyers, bankers, and politicians, and legal actions that did take place in the states. Each of these areas will be considered in turn.

Eleventh Amendment Cases

A useful starting point for tracing the effects of sovereign immunity is to review where the doctrine of sovereign immunity stood in the Supreme Court. Following the adoption of the Eleventh Amendment and the dismissal of the pending cases against states, the question of defining the boundaries of sovereign immunity arose rarely. There are, however, four Supreme Court cases in the early 1800s that are relevant. In 1809, the Marshall Court heard its first post–Eleventh Amendment case on the issue of sovereign immunity in *United States v. Peters*. The case dealt with the question of whether a state could use its Eleventh Amendment immunity on behalf of an individual when it claims an interest in the dispute. The case itself arose out of a Revolutionary War-era seizure of a British ship controlled by American mutineers. The state of Pennsylvania had only paid the sailors one-fourth of the sale price and had kept the rest in the account of the state treasurer, David Rittenhouse.[25] Rittenhouse never passed the funds to his successor and after his death, the state of Pennsylvania sought to recover the money from his heirs. However, the heirs were also sued by one of the sailors, Gideon Olmstead, and a federal judge entered a judgment on his behalf. The state sought to protect the heirs from suit by Olmstead because it directly implicated a significant state interest, that of recovering the money for themselves. In *Peters*, the Court held that the state could not use its immunity to protect others when it was not itself being sued.

The question of sovereign immunity lay largely dormant again until 1821, when the Court decided *Cohens v. Virginia*. In that case, the defendants were convicted of violating a state statute prohibiting lotteries not approved by the state. In their appeal to the Supreme Court, the defendants argued that the state court had ruled on an exemption provided by federal law to sell the lottery tickets. The Virginia legislature responded by passing a resolution stating that "a State cannot be made a party defendant to any suit before a federal tribunal, commenced with the view to obtain a judgment against such State, or to reverse one obtained by it in a State court" (quoted in Jacobs 1972, 82). Marshall

held that the Supreme Court could review state criminal convictions that implicated a federal question and that an appeal for a writ of error was not blocked by the Eleventh Amendment. He also rejected Virginia's claim because it was neither commenced nor prosecuted by citizens of another state, as required by the Amendment. Not only did Marshall rely on a fairly literal interpretation of the text of the Amendment, he also concluded that the Amendment only prevented federal courts from having jurisdiction where the sole source of jurisdiction was the fact that the parties lived in different states, known as diversity jurisdiction. Where there is a federal question that is being considered, either constitutional or statutory, Marshall suggested that the federal courts would still have jurisdiction.[26]

Marshall continued to narrow the scope of the amendment further in *Osborn v. The Bank of the United States* (1824). A state official of Ohio had collected an illegal tax from the Bank of the United States and then claimed that he shared the state's immunity for his actions. The Marshall Court rejected this argument, concluding that the state was not named as the party in the record, so was not itself being sued. As a result, federal courts do have jurisdiction where state officers are sued for unconstitutional actions.

This holding in *Osborn* was not as broad as it might at first seem. In 1828 in the case of *Governor of Georgia v. Madrazo*, Marshall took the opportunity to clarify his earlier position in *Osborn*. Madrazo, a Spanish citizen, was seeking to reclaim the value of slaves that had been seized by customs officers in Georgia. In his suit seeking restitution, he named the governor of Georgia as one of the defendants. Marshall rejected Madrazo's suit, arguing that the "claim upon the Governor, is as a governor; he is sued, not by his name, but by his title. The demand made upon him is not made personally, but officially" (*Madrazo* 1828, 123–124). The money asked for by Madrazo was in the general treasury of the state. The governor of Georgia was not acting under the aegis of an unconstitutional act, nor was he acting on his own contrary to federal law. For Marshall, this distinction, official accountability versus personal accountability, was sufficient to bring the Eleventh Amendment to bear.

The doctrine that emerged from these cases was that if a state officer is personally accountable, they may be sued, although any damages awarded cannot come from the state treasury. If the state officer is acting in an official capacity pursuant to a legitimate purpose, and the plaintiff is a citizen of another state or foreign country, the Eleventh Amendment bars federal jurisdiction. In the case of the bondholders in the 1840s, they clearly fell under the scope of the Eleventh Amendment.

Very few were citizens of the state in question and those that were usually received some protection or compensation from the legislature for their loss.[27] The actions of the state were at the behest of a majority of the legislature and could not be pinned on any particular state official. The bondholders were surely aware of this, but even if they were not, there were plenty of writings at the time to remind them.

Contemporary Writings

A review of the cases provides a picture of the controlling precedent, but it is necessary to look beyond judicial opinions to capture the contemporary understanding of state sovereign immunity. It is possible to develop a reasonably clear picture of the predominant popular impression of sovereign immunity from other public writings of the time. Most of the relevant pieces appeared when it became increasingly likely that some of the states would at the least be defaulting on their loans. While they are all critical of the actions of the states, they offer somewhat differing opinions about the reach of sovereign immunity.

The first published discussion about the ability to sue the states in this context came from Daniel Webster in response to a question from Baring, Brothers & Company, one of the leading British financial houses.[28] Going beyond the question of whether states could legally contract debts, Webster addressed the idea that states could not be sued. He acknowledged that, like the United States government, the states could not be sued in this instance. He felt that if the states were not willing to make provisions to pay their debts, they would be equally unlikely to satisfy any judgment made against them by a court. Webster's view was widely reported and although there was disagreement about his answer regarding the power of states to contract debts, his opinion regarding the legal obligations of states was not challenged (see Colton 1840). Webster's view received further exposure through the widely read publication of Alexander Trotter, an Englishman writing about the financial status of the states in 1839, who approvingly included Webster's response in the postscript of his book (Trotter 1839, 364–368).

As more states began to default and consider repudiation, opinions about the amenability of states to suit increased in number. In March of 1842, the *Law Reporter* ran an anonymous article considering the legal issues surrounding Mississippi's default and potential repudiation. According to the author, "the states of this Union have generally withdrawn themselves from the jurisdiction of any court, whether federal or of their own creation. No remedy lies against them in favor of injured

creditors" ("Repudiation" 1842, 430). The article instead suggested that "the voice of condemnation will swell in louder and more unequivocal tones against a state, which, resting upon its sovereign immunity, declares itself above compulsion and deaf to the voice of justice" ("Repudiation" 1842, 429). Alexander Everett, writing in *The United States Magazine and Democratic Review* in 1844 drew a similar conclusion about the amenability of states to suit. For Everett, "the debts of governments, which are exempt as such from liability to legal coercion, are all debts of honor" (1844, 7). Carroll Spence lambasted the states for "sneaking behind the shield of legal responsibility," but did not question that sovereign immunity prevented the creditors from bringing suit against the states (1843, 124). The Dutch financiers Hope & Company, in communication with Governor Call of Florida, acknowledged the barrier of sovereign immunity. They believed that "the immunity enjoyed by a sovereign state" would only make it "more scrupulous in fulfilling its engagements" (quoted in McGrane 1935, 240).

Not everyone was in agreement about the protected status of the states, however. The *New York American*, denouncing Michigan's actions, reminded foreign bondholders that the United States was a country of laws and that there was always an appeal to the courts (quoted in McGrane 1935, 156–157). It is unclear what specific legal remedies the editors had in mind. Justice Joseph Story, in his highly influential *Commentaries on the Constitution of the United States*, noted that the states "are not suable on any contracts made by themselves: but no one doubts that these are still obligatory on the United States" (1833, 232). The states may be protected, but the contracts themselves are enforceable against the United States. Nicholas Biddle, former president of the Bank of the United States, had even more specific ideas. He wrote an open letter to Pennsylvania arguing that the Supreme Court of the United States was set up for precisely this sort of situation (1843, 381–382). Instead of going to war over the debts, there were three options available to creditors. The United States government could sue the states, since the Secretary of War owned Pennsylvania stocks. Another state could take possession of some of the bonds and sue the defaulting states. Or, and Biddle saw this as the most likely route, a foreign state could take possession of its citizens' bonds and sue on their behalf. Once the issue made it into the courts, Biddle had little doubt that the states would lose. Judgment would then be enforced by the federal marshal and state property would be seized to pay off the debt. In drawing these conclusions, Biddle relied on the text of Article III of the Constitution as well as the text of the Eleventh Amendment.

The following year, Benjamin Curtis, future Justice of the Supreme Court, made a similar argument in the *North American Review*.[29] After an extensive review of the facts surrounding the debts of the states and a rejection of the states' contention that the debts are not binding, Curtis considered the remedies that were available. He was doubtful about the success of suits in the state courts that waived sovereign immunity, particularly Mississippi (Curtis 1844, 153).[30] Instead, Curtis urged the foreign states to take possession of the bonds and sue the states in the United States Supreme Court. The "claim for redress must be made upon the United States; for we cannot entertain the least doubt that the national government is as much responsible for injustice done to foreigners by the States, as by individuals and corporations" (Curtis 1844, 154). The way that the national government would provide redress was by hearing the case in the Supreme Court. Like Biddle, he relied on the text of Article III and the Eleventh Amendment to point out the loophole.

From this brief review, we can conclude several things. There was fairly universal agreement at the time that the foreign and domestic bondholders themselves could not sue the states. Agreement broke apart there, though. Some, such as the anonymous author for the *Law Reviewer*, Alexander Everett in the *Democratic Review*, and Carroll Spence in the *Boston Cultivator*, held that the only recourse for creditors was an appeal to the honor of the states. Curtis and Biddle both felt that foreign states could take possession of the bonds and sue the states directly in the Supreme Court. As we will see, the creditors did not follow the advice of Curtis and Biddle, relying instead on legislative maneuvering.[31] One reason for this was the perception that successful enforcement by a sovereign would prevent any arrangement for settlement of the remainder of the bonds, because those bondholders would still be barred from court. For example, the Queen of Spain held a substantial number of Mississippi bonds, but was dissuaded from suing out of fairness to other bondholders (McGrane 1935, 216). It is also worth noting that the government of England on multiple occasions refused to assume responsibility for British bondholders, despite repeated requests (McGrane 1935, 53, 202).

State Court Cases

A review of sovereign immunity in the 1830s and 1840s would be incomplete without considering the role of state courts. If creditors could obtain judgment against the states in state courts, that would maintain legal accountability and undermine the impact of the Eleventh

Amendment doctrine. At the time of this financial crisis, however, only three of the states defaulting or repudiating permitted suits to be filed against them in their own courts. Interestingly, the three states were three of the worst offenders in these circumstances—Arkansas, Louisiana, and Mississippi. One significant piece of evidence in favor of the argument that sovereign immunity played a key role in protecting the states is that all three of these states were sued in their own courts. Where the legal option was available, it was taken. The results of these state cases are indicative of the importance and relevance of sovereign immunity in federal courts.

State of Mississippi v. Johnson. Mississippi was one of the few states at the time to permit a suit to be brought against the state in their own courts.[32] Acting under their constitutional authority, the legislature required that these suits be brought in the Court of Chancery, the state's equitable court. While the bondholders did not take immediate legal action, after pursuing a strategy focused on public opinion and the legislature without success, they became frustrated. In 1852, they saw an opportunity to force the state to pay their bonds. The state, still dominated by Democrats but no longer subscribing to the Jacksonian hostility to internal improvements, was interested in joining Alabama, Tennessee, and Kentucky in building the Mobile and Ohio Railroad. The state, with no credit, was unable to borrow any money or use its public lands for this purpose and a number of citizens were eager to recover the state's reputation (McGrane 1935, 210). In light of this opportunity, the foreign bondholders formed committees in London and New York to coordinate the effort, financially backed by the investment houses Baring Brothers, Huth and Company, Hope and Company, and the Rothschilds (Hidy 1949, 336).

Passing on an opportunity to put the issue on the ballot in 1851, the committee authorized Hezron Johnson, a bondholder of Union Bank bonds, to bring suit against the state in the Chancery Court. They were confident that the odds were in their favor, since the Chancellor of the court was Charles Scott, a former attorney for the Union Bank who had gone on the record previously saying that the bonds were legal obligations for the state (McGrane 1935, 213). The state responded with the claim that the act authorizing the issuance of the bonds was unconstitutional and therefore the bonds did not represent any obligation on the state. Additionally, the state argued that the bonds were sold below their value in violation of the controlling statute. As expected, the Chancellor decided in favor of the bondholders and the state appealed to the Mississippi Supreme Court (*State of*

Mississippi v. Johnson 1853). The justices of this court were also known to be friendly to the cause of the bondholders, having published arguments in favor of payment in the past (McGrane 1935, 214). In April of 1853, the court handed down its ruling. After a lengthy analysis of the challenged act, the court concluded that "the supplemental act was not void" (*Johnson* 1853, 762). Additionally, the court rejected the claim that the bonds were sold for less than par (*Johnson* 1853, 769). Accordingly, the state was liable for their payment.

This was a clear legal victory for the bondholders, but the euphoria from the decision was short lived. The press and Democratic politicians in Mississippi immediately denounced the ruling and attacked the judges. The bondholders, hampered by lack of organization and concern about the high costs of a publicity campaign, were slow to react to the decision. Baring Brothers and Huth and Company eventually allocated £1000 for the campaign, but by then it was too late (McGrane 1935, 217). In the election that year, one of the Supreme Court justices was defeated for election and J.J. McRae, an ardent opponent of payment, was elected governor. To make matters worse, two key members of the committees died, J.G. King in New York, and Charles Stokes in London, deflating the momentum of the bondholders. Without the external push, the decision was unenforceable. The matter of the bonds was completely dropped until 1859 and Mississippi failed to garner funds for its railroad.

Beers v. Arkansas. William Platenius and Joseph Beers, administrators for the estate of James Holford in the United States, knew that the people of Arkansas were not eager to pay for the so-called Holford bonds.[33] After legislative efforts through much of the 1840s, they decided to bring suit against the state in 1854.[34] They filed separate suits in the Pulaski County Circuit Court, asking for $1 million in damages for violations of the contract. While this suit was pending, the Arkansas state legislature passed a law that required the filing of the original bonds with the office of the clerk in all cases seeking to enforce collection of any bond issued by the state. If this were not done, the court should dismiss the case (McGrane 1935, 263). It was impractical for Platenius and Beers to submit the bonds in time and they were also not willing to part with the physical evidence of indebtedness. The circuit court summarily dismissed their suits and the two administrators appealed to the Arkansas Supreme Court.[35] They claimed that the act of the legislature in 1854 was unconstitutional because it impaired the obligation of contracts. In *Platenius v. State* (1856), the Arkansas Supreme Court upheld the act of the legislature, pointing out that "it was within the competent powers of the

Legislature so to obstruct and impair" the right of litigants to sue the state (527–528). The court regarded the lawsuit as "but a mode of application to the Legislature for the satisfaction of the claim," since the court could not enforce any judgment against the state (527).

Platenius and Beers were not about to give up. They appealed the state court's decision to the U.S. Supreme Court, relying on the federal constitution's prohibition on impairing the obligation of contracts to provide jurisdiction.[36] In *Beers v. Arkansas* (1857), Chief Justice Taney considered the narrow question of whether the legislature's act of 1854 was unconstitutional. In his opinion, he cited and acknowledged the principle of sovereign immunity. He concluded that a state could modify its waiver of sovereign immunity without violating the Constitution. He wrote:

> It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it. (529)

Platenius and Beers were out of luck unless they deposited the contested bonds with the state court. Despite subsequent attempts to induce payment, the Holford bonds were eventually completely repudiated by manner of constitutional amendment.

Consolidated Bank v. State of Louisiana. After the Louisiana legislature refused to fund the land bank debt, they passed a law requiring the stockholders of one of the land banks, Consolidated Association, to pay all the debts owed by the bank. In 1848, Consolidated Association, in order to pay their debt, required a payment from their stockholders of $6 for each share owned. The board of directors asked for $12,000 from the state for the 2,000 shares the state owned (McGrane 1935, 191). The legislature did not think the state should be liable since the shares were given as a bonus for state sponsorship of the bonds. In order to determine the answer to this controversy, the legislature passed an act authorizing Consolidated Association to sue the state, which the board of directors promptly did. This case, *Consolidated Bank v. State*

of Louisiana (1850), addressed solely the question of whether the state was a shareholder, not whether the state was liable as a result of their guarantee of the bonds. The lower court held that the state was liable for the $12,000 and the state appealed to the Louisiana Supreme Court. The court reversed the lower court's judgment, relying on a statutory construction of the enabling legislation for the bank to find that the state was not liable. Interestingly, while there is a brief acknowledgment that the bonds had the faith of the state behind them, resulting in their successful sale, the court avoided touching on any implications that might arise from that for the bondholders (Consolidated Bank 1850, 60).

Implications

These three cases provide further evidence for the conclusion that the doctrine of sovereign immunity played a decisive role in the inability of bondholders to recoup their losses. Between the controlling precedents, which limited suits to cases where the state officer was personally liable, to the opinions of prominent authors, the bondholders would have clearly gotten the message that suits directly against the states would not be permitted in federal court. Where suits were available, bondholders used them in an attempt to secure payment from the states. However, even where they were successful, as with Mississippi, the state courts were unable to enforce their judgments. Federal courts would have offered a different route whereby the federal government could have been responsible for enforcement, perhaps with a different result. In the Arkansas case, the doctrine of sovereign immunity was used to prevent any hearing on the heart of the issue. And in Louisiana, the road to the courts was closed for bondholders and the court displayed an unwillingness to consider the issue. The combination of these factors strongly suggests that sovereign immunity was on the minds of the creditors and that it did serve as a bar to recovering their funds. Sovereign immunity played a fundamental role in enabling the states to avoid their obligations and was a point of contention that drove the creditors to respond using other means. Having traced the influence of sovereign immunity on the actions of the bondholders and the states, I now turn to the consequences for the states.

REPUDIATION AND DEFAULT: THE CONSEQUENCES

When considering the consequences of default and repudiation, there are two broad categories into which the responses can be grouped.

First, there were economic effects that not only differentiated the recalcitrant states from the others, but also far-reaching ones that affected the whole country. Secondly, there were political effects that subtly changed the relationships among federal, state, and local governments when it came to investing. The two categories are certainly interrelated, but I will first consider the more expressly economic dimension, followed by the more political one.

Economics: Borrowing, Bond Prices, and Screening

There is a substantial literature on both the theory and empirics of sovereign debt (see Eichengreen and Lindert 1989; Bulow and Rogoff 1989; Eichengreen 1991; Sylla and Wallis 1998). Most of the current work suggests that sovereigns pay their debts because of reputational concerns and screening by international capital markets for prospective bad debtors (see Tomz 2001; Cole, Dow, and English 1995; English 1996). As English explains, sovereign debtors repay because if they did not, they would get a reputation for defaulting and thereby lose access to international capital markets (1996, 259). Tomz expands and tempers this analysis by suggesting that credit history matters for governments, but only under certain circumstances. Specifically, he argues that mitigating circumstances and a willingness to resume some form of payment on the debt make a difference and reopen the credit market (2001, 3). I am suggesting that in this instance, states relying on sovereign immunity to close legal routes for creditors are signaling their status as "lemons"—bad bets for future loans.[37] Afterward, states must make some costly signal in order to change their status. A careful review of the financial status of the nine defaulting and repudiating states provides evidence for this argument.

Following the defaults and repudiations, particularly of Pennsylvania and Mississippi, stock prices for the nine states in question plummeted on the international market and their yields skyrocketed. In 1842, yields on Indiana's bonds, which were initially issued at 5 percent, rose to 32 percent (English 1996, 270). The bonds of the other nine states followed a similar pattern, which effectively prevented borrowing. Table 4.1 below shows the difference in stock prices in New York in 1847 for a sampling of states. While the other states were selling their bonds for close to the price of U.S. treasury bonds, the prices for the states that had defaulted were substantially lower, even domestically.[38]

The eleven states that did not default did not escape without repercussions. There was a substantial amount of caution about American state bonds in the investing community. Ohio was paying 10 percent interest on its bonds in 1842, up from 6 percent in the late 1830s.

(Sylla and Wallis 1998, 284).[39] Alabama, despite consistent payment on its loans, had stock trading only slightly above that of Mississippi (McGrane 1935, 268; "Financial and Commercial Review" 1849a). When Georgia floated a loan for railroads in 1851, the state was required to be directly liable for the bonds and to allow the bondholders a lien on the railroad and its receipts in case of default (McGrane 1935, 271). As the *London Bankers Magazine* reported, the specter of repudiation dampened the ardor for American securities for many years (McGrane 1935, 280).

TABLE 4.1
STOCK PRICES OF AMERICAN STOCKS IN JANUARY 1847

Nondefaulting states	*Price*
Ohio	91–92
New York	$95\frac{1}{4}$
Tennessee	98
Kentucky	$98–98\frac{1}{2}$
United States*	100
Defaulting states	*Price*
Arkansas	$29\frac{1}{2}–30$
Illinois	32–33
Indiana	$33\frac{1}{2}–34$
Pennsylvania	$66\frac{1}{2}–66\frac{3}{4}$

* The price for United States Treasury bonds is included as a reference point, since they typically traded at a higher value than any of the state stocks.
Source: "Financial and Commercial Review" (1847).

The effects extended beyond just state loans. In 1842, for instance, the United States was unable to float a loan at all, despite a long record of paying its debts. United States Minister to England Edward Everett cited a desire to coerce the federal government to force payment of the state debts as the reason for the failed loan (McGrane 1935, 267). In 1844, Everett still spoke of hostility toward the United States and likened the effect of the defaults and repudiations at the state level to bankruptcy by the federal government. Capital was abundant, but the United States could not get a loan at any rate of interest. Foreign investors also sold off stock in private ventures affiliated with the states, such as the Reading Railroad and the Lehigh Navigation Company. In 1859, American railroad securities were still comparatively low because of lingering fear over American securities (McGrane 1935, 267–268, 280–281).

By the end of the decade, though, the defaulting states were beginning to regain access to capital markets. In 1849, Pennsylvania's stock price in London was up to 83, narrowing the price gap between it and other states from about 35 to approximately 20 ("Financial and Commercial Review" 1849b). The other defaulting states also improved their positions several years after resumption. By 1852, Indiana's yield was down from 32 percent to within 2 percentage points of Treasury yields. By 1855, Illinois was trading at under 6 percent. Michigan and Louisiana, partial repudiators, were slower to recover, but both were able to issue new loans in the mid-1850s (English 1996, 269–270). This is consistent with the theories of Tomz and English, since all of these states had resumed payment on their loans in some capacity. Those that resumed payment the soonest, such as Pennsylvania and Illinois, also improved their reputations sooner. These states immediately engaged in negotiations with creditors, reducing the need for costly legal action, and agreed to eventual full payment. For them, sovereign immunity was not economically expensive because they did not rely on it to block out creditors.

Michigan and Louisiana, while partially repudiating their debts, resumed payment on portions of their debt, and thereby regained access to credit, albeit later than other states. Michigan's mitigating circumstances, having not received full payment on the $5 million loan, were taken into consideration, allowing them to borrow again only five years after resumption of payment. Louisiana, which did not have mitigating circumstances that were as compelling as Michigan's, was locked out of the borrowing market for ten years after resuming payment. In addition, resumption of payment on Louisiana's state debt proper was not sufficient. The land banks that had defaulted eased tension by beginning to repay a substantial amount of the money owed. Sovereign immunity was invoked by both of these states and they consequently had a slower reentry to the market.

States that completely repudiated their debts, however, were unable to reenter the capital market until the Civil War. Mississippi and Florida were unable to attract any interest in loans for railroads in the 1850s or for assistance during the Civil War (McGrane 1935, 268; Schweikart 1987, 27). Arkansas, indistinguishable from Mississippi and Florida at the time because they had not resumed payment, likewise was unable to borrow. As the price for defaulting states' bonds began to rise, those of the repudiating states remained at half that value or less. In 1849, when Pennsylvania was trading at 83 in London, Mississippi was trading at 50 ("Financial and Commercial Review" 1849b). The *London Times* reported a steady demand for American

state stocks, but pointed out that the stocks of repudiating or doubtful states remained impossible to sell (McGrane 1935, 271). In fact, creditors raised the issue of Mississippi's repudiation as recently as 1986 when the state legislature authorized borrowing on the international market ("Pre-Civil War Debts Haunt Mississippi." 1986).[40]

These repudiating states used sovereign immunity to its full extent. Mississippi and Arkansas avoided both state and federal legal action, either by changing the rules for jurisdiction or by ignoring state court judgments. Facing recalcitrance on the part of these states, creditors were unwilling to risk any additional funds and kept existing bonds at very low prices. They remained lemons on the market. As Tomz finds from a review of two centuries of sovereign debt defaults, "governments that fell into default . . . could not raise additional capital on international markets until they offered an acceptable settlement to creditors" (2001, 32). An unwillingness to negotiate was made all the worse by reliance on sovereign immunity to prevent payment. Creditors were left with few options and responded with the methods that were available—primarily denial of future credit despite a strong demand for American securities.

Politics: Constitutional Amendments and Investment

Reliance on sovereign immunity had an impact beyond the economic sanctions of creditors. While the creditors lacked political support for their particular grievances, there was substantial political support for preventing states from defaulting or repudiating debts in the future. The repudiation of debts by the states added to a growing sense of distrust toward state governments among citizens, shaped in part by the national partisan conflicts between the Whigs and the Democrats.[41] Many citizens, from both parties, were outraged that borrowing had gotten out of control. This outrage was closely tied to recognition of how close their states had come to repudiation. As one delegate to the Indiana constitutional convention in 1850 put it, "a burnt child dreads the fire, and this State has been most dreadfully burned in this regard . . . She has walked to the brink of repudiation and lasting disgrace" (quoted in Goodrich 1950, 154).

Lack of trust came to a head when Democrats succeeded in getting states to amend and revise their constitutions in the 1840s. Between 1842 and the beginning of the Civil War, no fewer than 23 states adopted constitutional amendments prohibiting banks, borrowing, or using the credit of the state.[42] Rhode Island, revising its constitution in 1842, was the first state to take constitutional action, prohibiting bor-

rowing that exceeded $50,000 and preventing the state from pledging its faith for any debts.[43] Illinois, Michigan, and Oregon adopted the same debt limit in their constitutions.[44] Other limits typically varied from $100,000 to $1 million.[45] In addition to debt ceilings, supermajorities, submission to popular vote, and sinking fund requirements (money or revenue dedicated to paying off the debt) were common constitutional protections against overextending a state's credit.[46] Some state constitutions outright banned involvement in internal improvements or chartering banks.[47] In addition to the debt limitations, five states adopted provisions granting authority to state courts rather than legislatures to consider claims against the state.[48] One scholar of state constitutions has described the flood of constitutional amending in the following way: "State legislatures had proved unworthy of trust, and it was therefore deemed necessary to restrict their powers" (Tarr 1998, 112).

The broad distrust of state government resulted in future difficulties for the states. With the boom of railroad expansion just over the horizon, the states found themselves with their hands tied. Instead of leading the way as they had with canals, the states largely deferred to private corporations and municipal authorities when it came to funding. Larson argues that "railroad enthusiasts encouraged the people's disillusionment with public works and statewide systems, begging instead for special legislation allowing local governments to aid private railroads that promised advantages to their immediate locale" (2001, 236). He finds that the failure of government to provide for internal improvements was key to the rise of the laissez-faire economic approach adopted towards corporations in the late nineteenth century (2001, 5). In Florida, for example, the state's hostility toward chartering banks did not eliminate banks. Instead, there was a substantial increase in lending in the state by nonchartered banks and out-of-state institutions, over which the state had no control (Schweikart 1987, 42). Another study suggests that county-level funding was critical in Mississippi for railroad construction. At the same time, neither Arkansas nor Louisiana invested substantially in railroads, with Arkansas having only one (incomplete) railroad before 1861 (Heath 1950, 42).

Other scholars have pointed out how constitutional debt limitations result in "devolution" of debt to municipalities and special districts or appeals to the federal government to assume responsibility.[49] Where states are unable to respond to citizen demands, citizens may turn to another government, either local or national (Nice 1991, 71). Supporting this contention, Kiewiet and Szakaly find that states that

prohibit guaranteed state debt have by far the largest amount of local debt (1996, 86). This is not to suggest that states were completely removed from financing major projects. There were ways around even the strictest limits against state borrowing. For instance, Minnesota prohibited using the state's credit in the constitution of 1857. In 1858, in response to a land grant from Congress for the express purpose of railroad construction, the state amended the constitution to permit credit to be used in the construction of railroads in support of the land grant.[50] Even this action, though, was done in response to the federal government rather than initiated by the state. State involvement was significantly reduced from the previous period and states took on a diminished role in this area.

When sovereign immunity was used to repudiate state debts, it helped spur popular restrictions on state legislatures. Even Whigs, who were generally supportive of state investments, were taken aback by the repudiations of the states. After all, the repudiations had a substantial negative impact on precisely the economic interests the Whigs were most interested in. These restrictions in turn limited the capacity of state governments to engage in development. Into this void, federal, local, and private entities were more than willing to enter, diminishing the previous authority of the states. Where the states had been viewed as the primary source and authority for works of internal improvements in the 1830s, in the decades following repudiations the states took on a more peripheral role as a sponsor but not as a leader.

CONCLUSION

Despite the lack of federal cases on sovereign immunity in this time, the doctrine had a widespread effect. The repudiating states relied on it to protect them from bondholders, permitting them to ignore their debts. While resulting from short-term political pressures, that course of action proved unwise in the long run. Both economically and politically, the states suffered as a result. The British investment houses effectively kept the repudiating states from borrowing funds for decades, preventing access to any substantial amount of capital. In this case, although the bondholders lacked political support for their particular cause, their resources were sufficient to extract a high cost from the offending states. Perhaps more importantly, even though the bondholders themselves were politically unpopular, the issue of guaranteeing state payment of debts triggered a significant reaction. Actions that anger the electorate can also result in a diminished delegation of

authority, as evidenced by the flood of constitutional amendments. By the 1850s, many states had a diminished role in infrastructure development and significantly weakened credit. The strict restrictions on borrowing and spending were most likely not the solution the bondholders were looking for to guarantee state payment of debts, but the response by voters had wide-ranging and largely negative consequences for state autonomy. This historical study provides empirical evidence suggesting that sovereign immunity, far from increasing the power of the states, can actually undermine their authority.

This page intentionally left blank.

Chapter 5

Post–Civil War Debts and the Exercise of Immunity

The wave of repudiation of state debts that occurred in the post–Civil War period is, in many ways, similar to the events covered in the previous chapter. Unlike the 1840s, though, bondholders and their agents were much more aggressive in the courts, forcing the doctrine of sovereign immunity to the forefront. The prominent role of sovereign immunity as a defense and the response of courts at both the state and federal levels provide an explicit study of the impact of the doctrine on all parties involved in the disputes.

Following the close of the Civil War, many southern states engaged in extensive issues of state bonds to support railroads, levees, and other infrastructure improvements. The states overextended their credit and when the financial markets struggled, nine states scaled or repudiated their debts.[1] Again, the states relied on sovereign immunity to prevent bondholders from recovering any of their money, but at no small cost to the authority of the states in question. The bondholders, primarily investors from the northern states and foreigners, used their extralegal resources to sanction the violating states through both economic and political means. As a method of protecting or enhancing state authority, the use of sovereign immunity in this context was not successful. Consistent with the findings in chapters 3 and 4, I argue that aggrieved parties with substantial resources at their disposal who are shut out of the courts will not hesitate to use their power to either resolve the case politically or punish those states that continue to resist.

This chapter is organized in a similar fashion to the study of the 1840s. It begins with a review of the causes of indebtedness for each of the impacted states and how the states dealt with their debt. I then consider the role that sovereign immunity played in the struggle between states and their creditors. A thorough analysis of the federal and state cases decided gives a good picture of the role of courts in the disputes. Finally, I examine the repercussions of the states' actions, focusing on both economic and political responses. I find that the consequences weakened the states financially and helped overthrow political regimes.

REBUILDING THE INFRASTRUCTURE: BORROWING IN THE 1860s AND 1870s

By the close of the Civil War, most of the southern states were in economic ruins. The war took a heavy toll on the region's infrastructure and hampered further economic development. After Appomattox, the states sought to regroup and rebuild. This was not an easy task, however. The emancipation of the slaves virtually eliminated the existing tax structure in the states. In the antebellum period, most states relied on slave rather than land taxes. The states increased land taxes to compensate, but property values were plummeting at the same time (Thornton 1982, 351). In light of these fiscal woes, and under the guidance of local Republican parties, the states turned to bonds to finance projects such as building railroads, repairing levees, and redistributing land.

Debt in these states increased quickly. In the 1850s, Louisiana was only paying around $130,000 annually for interest on its debt. By 1871, that amount was up to $1.3 million and the following year it comprised 30 percent of the state's entire costs. By 1876, South Carolina was spending nearly 22 percent of its total disbursements on interest payments and Florida topped that at 32 percent (Thornton 1982, 383–384). In return for these investments, between 1868 and 1872 the southern railroads were rebuilt and almost 3,000 miles of track were added (Foner 1990, 168). Unfortunately, most of the progress was made only in Georgia, Arkansas, Alabama, and Texas. Despite the money raised through the sale of bonds, the states were still unable to deal with many of their problems and rising taxes on small farmers alienated voters. The Panic of 1873 ruined many railroads and by 1876 more than half the railroads in the country had defaulted on their bonds and were in receivership (Foner 1990, 217). In the South, where states became liable for the debts of defaulting railroads, many

of the states turned to reducing their debts either through scaling or outright repudiation.[2]

The call for repudiation was made easier by claims, some justified and some not, of widespread corruption in the legislatures. Many of the accusations of corruption were tinged with racism directed toward African-American politicians and popularized in academic circles for decades by the work of William Dunning and his protégés (Dunning 1907). Later scholars have pointed out that corruption was rampant throughout the country at the time in both the north and south, driven by a get-rich-quick mentality. The Republican administrations of Reconstruction were no better or worse than their counterparts elsewhere (see Foner 1990, 165; Goodrich 1956; Thornton 1982, 383–385). However, the convenience of racial hostility made blaming those administrations a handy scapegoat when states did repudiate their debts.[3]

The actions of the states can be divided into three categories. Tennessee and Virginia simply scaled their debt down, but did not repudiate any of their bonds. North Carolina, South Carolina, Alabama, and Louisiana all used a combination of scaling and repudiation to reduce their debts. Georgia, Florida, and Arkansas used repudiation of their debts with no offer to scale. I will review the circumstances of each group below before considering the role of sovereign immunity.

Scaling Down the Debt: Tennessee and Virginia

Tennessee and Virginia stand apart from the other states not only in terms of how they resolved their debts, but also in how those debts were contracted. Unlike the other southern states, neither of these states was subject to Congressional Reconstruction and military occupation. Republican rule in the states was short lived and the majority of the debts were contracted either before the war or under Democratic administrations. Tennessee, for example, had a debt of more than $25 million by 1866 as a result of antebellum loans for property banks and railroad development. The state was unable to pay interest on the bonds during the Civil War, so the overdue interest built up. In 1865, the legislature tried to address the problem of the outstanding bonds by issuing new bonds sufficient to pay off the overdue interest. Almost $5 million in new bonds were issued, followed by another $2.2 million in 1868 (McGrane 1935, 357). While the state worked to deal with its antebellum debt, though, it also faced 1,300 miles of railroad track badly in need of repair (Goodrich 1956, 420). William Scott estimated

that at least half of the $27 million in state aid to railroads was issued after the Civil War (1893, 133). Between 1868 and 1870, the state added $21.6 million of new debt including $14.4 million of endorsed railroad bonds and $113,000 for turnpike companies (McGrane 1935, 357–358). To support the railroads, the state most commonly would endorse companies' bonds. This meant that while the railroad was responsible for paying the interest and the principal on the bonds, if they defaulted, the state guaranteed its credit to pay. This made investing in the railroad bonds safer for investors because they were backed by the credit of a state even if the railroad went bankrupt. This type of bond created what was called a contingent debt for the states—it would only become a state debt if the railroads failed.

Virginia's debt problems derived almost exclusively from the antebellum era. By 1861, the state debt was already $34 million, mostly from internal improvements. As early as 1816, the state authorized bonds for turnpikes, canals, and property banks, many of which were designed to help communication between the eastern and western parts of the state (McGrane 1935, 364). By the end of the Civil War, the state debt, contracted mostly by Democratic administrations, was up to $38 million due to nonpayment of interest and West Virginia had become a separate state. The state provided no direct aid to railroads or other internal improvement projects in the Reconstruction era, but it was this earlier debt that plagued the state for the next forty years (Goodrich 1956, 416). In 1866, the legislature, comprised primarily of former Whigs who later formed the Conservative party, provided funding for the overdue interest of what it considered to be its portion of the state debt, but by 1867 with no agreement forthcoming from West Virginia over an equitable split in the debt, the state was no longer able to make its interest payments.

By 1870, both Tennessee and Virginia were in serious fiscal trouble. Unable to make their interest payments, both states were in default and had angry creditors demanding some resolution. In 1873, Tennessee sold its interest in the delinquent railroads reducing its debt from $43 million to $30.6 million (McGrane 1935, 359).[4] The legislature also attempted to fund the bonds again through the issue of new forty-year bonds, but then failed to provide sufficient taxation to pay for the bond issue. The situation was made worse by the Panic of 1873 and a series of bad crop years so that by 1877 the state decided to scale down its debt. One of the reasons given for scaling down the debt was that emancipation had changed the state's finances and holders of prewar bonds ought to share in the costs of that change (Jones 1977, 79). Reaching an agreement with bondholders proved difficult, how-

ever. The legislature rejected offers of 60 cents on the dollar and 50 cents on the dollar at 6 percent interest and the voters rejected a compromise of 50 cents on the dollar at 4 percent interest (McGrane 1935, 360–362).[5] Disputes over how to handle the bonds split the Democrats between the state credit crowd and the "low taxers" who advocated repudiation, which allowed the Republicans to come into office in the election of 1880. The Republicans favored the bondholders and offered a solution that would fund the entire debt at 3 percent interest payable in 99 years. The Tennessee Supreme Court struck the compromise down, claiming that the legislature could not bind the state for such a long period of time (*Lynn v. Polk* 1881).

The Republican legislature passed another compromise bill in 1882 offering 60 cents on the dollar and bearing 3 percent interest for the first two years, 4 percent for the next two, 5 percent for the next two, and 6 percent thereafter (McGrane 1935, 363). This compromise failed when the state treasurer refused to exchange the bonds once the Democrats won the election in the fall of 1882. Though he claimed it was because of the election results, in fact he had embezzled $400,000 from the state treasury, leaving the state without many funds.[6] Once back in power, the Democrats learned the lesson from their earlier defeat and proposed yet another settlement and this one was final. The state exchanged most bonds at the rate of 50 cents on the dollar with 3 percent interest, thereby reducing the state debt by approximately $13 million (Ratchford 1966, 192; McGrane 1935, 364).

In Virginia, a business-friendly majority of conservative Republicans and Conservative Party members took power in 1870 (Rubin 1977, 142–144). The legislature attempted to resume payment on its debt by passing a fateful piece of legislation known as the Funding Act of 1871. The act provided new thirty-four year bonds paying 6 percent interest for the two-thirds of the state debt for which Virginia considered itself to be responsible.[7] Most importantly, the act permitted the coupons from the new bonds, called consolidation bonds or "consols" for short, to be used to pay taxes or license fees owed to the state.[8] This was valuable because it guaranteed that there would always be a market for these bonds. Even if the state defaulted on paying the interest, the coupon could still be applied toward state taxes. The state issued more than $21 million in new bonds, retiring over $32 million of the old debt.[9] The Funding Act, however, was very unpopular in Virginia and the following year a new legislature passed an act ending the issue of any additional bonds and prohibiting tax collectors from accepting the bonds. The passage of this act initiated a long-standing controversy over the state's ability to refuse the bonds as payment for taxes, a battle that was

largely played out in the courts. The portion of the legislature's 1872 act prohibiting tax collectors from accepting the bonds was declared an unconstitutional impairment of the obligation of contract by the state supreme court (*Antoni v. Wright* 1872).

The Virginia legislature was just getting started, though. In 1873, the legislature passed a tax on the coupons of 50 cents for each $100 in value that would be deducted from the value of the coupon when it was submitted for taxes. This too was struck down as an impairment of the obligation of contract, this time by the United States Supreme Court (*Hartman v. Greenhow* 1880). Between 1873 and 1878, the state received an average of $1 million in coupons each year in lieu of taxes (Orth 1987, 92). By 1879, though, the bondholders knew that they had to negotiate with the state in order to avoid a repudiation of the bonds. The state offered a compromise measure to scale the debt down. The act passed by the legislature offered new bonds, still payable as taxes, which funded the full amount of the principal, but reduced the interest to 3 percent for ten years, 4 percent for twenty years, and 5 percent for five years (McGrane 1935, 371). Popular outrage at this act prompted the rise to power of the "readjusters," a group that strongly encouraged a partial repudiation of the debt. In 1882, when they controlled both the legislature and the governor, the readjusters passed the Riddleburger Act that scaled the debt down by 53 to 69 percent and offered no more than 3 percent interest on the new bonds. Critically, these bonds were not accepted as taxes.

To force bondholders to accept the new bonds, the state waged an aggressive campaign against the consols. Even with the return to power in 1883 of the business-friendly Conservative party, now-renamed the Democratic party, the state government showed no sign of wishing to compromise any further with the bondholders. The legislature passed a series of acts known as the "Coupon Killers" that used a variety of jurisdictional and procedural impediments to make the coupons irredeemable. For instance, coupons needed to be submitted to a court to be judged valid before they could be accepted. The legislature then removed the ability of the state courts to force the state treasurer to accept its judgments. As time passed and the state's actions were unsuccessful in suppressing the coupons, their measures became more extreme. State attorneys were required to appeal all lawsuits by taxpayers to the highest possible court. Anyone selling the consol bonds in Virginia needed to pay $1,000 for a license and pay a 20 per cent tax on the face value of all bonds sold. Coupons accepted for taxes were made to reduce the principal still owed on the bonds. Expert testimony about the validity of bonds could not be admitted to court and attor-

neys who solicited or induced a suit against the state were disbarred for life.[10] These actions were successful in reducing the number of coupons accepted as taxes to between $40,450 and $258,938 for the entire period between 1883 and 1890 (McGrane 1935, 377). However, each of these impediments was struck down by the United States Supreme Court in a series of cases throughout the 1880s.[11] In 1892, the state and bondholders finally reached an acceptable compromise where $19 million in new bonds were exchanged for $28 million in outstanding obligations. The new bonds offered 2 percent interest for 10 years and 3 percent for the following ninety years (McGrane 1935, 378). With that, the controversy finally came to an end.

Scaling and Repudiating: North Carolina, South Carolina, Alabama, and Louisiana

The Republican Reconstruction governments in the states of North Carolina, South Carolina, Alabama, and Louisiana all borrowed heavily in the post war period and all four states ultimately responded by repudiating part of their debt and scaling the rest of it down. North Carolina was already over $13 million in debt by 1868 as a result of aid for internal improvements in the 1850s (McGrane 1935, 334). The state drastically increased its indebtedness over the next two years, however. By the end of 1869, the state had authorized the issue of $27.9 million in state bonds as aid to various railroad companies in exchange for company stocks. Of the total authorized, $17.6 million was actually issued, including $16.2 million to six different railroad companies (Scott 1893, 69). Because the state constitution required that each bond issue have a special tax levied for the purpose of paying it off if the state's securities were selling for less than their face value, these bonds became known as "special tax bonds" (McGrane 1935, 335–336).

South Carolina's specific debt and its origins are clouded in uncertainty. Inaccurate records, fraud, and widespread corruption prevent any conclusive narrative of what happened to South Carolina's finances during Reconstruction. It is possible, however, to capture a general sense of the state's obligations and the way that it responded to them. South Carolina emerged from the Civil War owing $5.4 million on debts contracted by Democratic administrations before the beginning of the war, including interest that was not paid. Over the next several years, the state debt rose dramatically. The Republican legislature authorized the governor to borrow money using state bonds in order to pay off the past due interest on the existing debt and to provide operating funds for the

state (McGrane 1935, 344–347). A land commission was created and authorized to issue $700,000 in bonds for the purpose of purchasing land in the state that would then be resold at low cost to settlers, primarily freed slaves.[12] $1.5 million in state bonds were authorized for a state bank and the state endorsed numerous railroad bonds, including $4 million for the Blue Ridge Railroad (Ratchford 1966, 172; Scott 1893, 80). By 1871, according to one estimate, the state had authorized more than $10 million in state bonds (McGrane 1935, 349). The state's actual indebtedness, though, was much higher. The New York firm handling the sale of South Carolina's stocks convinced the governor and treasurer to issue twice as many bonds as the General Assembly had authorized (Edgar 1998, 395). The large number of bonds issued meant that they were selling well below face value. This resulted in the state selling even more in order to raise the amount of money that it sought. By 1871, a more accurate assessment put the state debt at $23.2 million (Ratchford 1966, 182).

Alabama issued its first post war bonds as early as 1865 in an attempt to keep the state government operating.[13] In 1867, the Republican dominated legislature authorized its first railroad bonds, offering to endorse railroad company bonds at the rate of $12,000 per mile of track completed.[14] In 1868, the rate of endorsement was increased to $16,000 per mile of track. By 1873, the state had endorsed more than $16 million in bonds for railroads, resulting in a cumulative state debt of roughly $28.6 million (Hollman and Murrey 1985, 311).

Louisiana, like virtually all of the southern states, faced a crumbling infrastructure. The state already had a debt of $11.2 million from failed property banks and other antebellum investments (Ratchford 1966, 183).[15] Beginning immediately after the end of the war, the Republican administration of the state began issuing bonds for the purpose of rebuilding levees, building railroads, and constructing a canal to the Gulf of Mexico. Between 1868 and 1872, twelve measures were adopted offering aid to railroads, usually at the rate of $12,500 per mile of track laid (Goodrich 1956, 433). $4 million in state bonds were issued to the Louisiana Levee Company in 1870 and 1871 with an additional $4.6 million for assorted state projects.[16] By 1874, the state debt stood at $36 million (Ratchford 1966, 183).

The states finally realized that their financial obligations were expanding at a pace that state revenues could not possibly keep up with. The states were also disappointed with the returns on their investments. In North Carolina, only $2 million of the $4 million received by the railroad companies was actually applied to improving the railroads in the state and only one railroad did well enough to pay the state any

dividends, but the state was responsible for bonds with a face value approaching $18 million (McGrane 1935, 334; Ratchford 1966, 176; Scott 1893, 69). In the fall of 1869, North Carolina put an end to its spending, repealing all appropriations to the railroads and ordering the railroads to return any bonds that had not yet been issued. At the same time, the legislature ordered the treasurer to stop all payment on special tax bonds and to transfer the revenues raised by the special taxes to the state's general fund (McGrane 1935, 337). When the conservative Democrats returned to power in 1870, they continued the policies adopted by the Republican legislature the previous year. Despite repeated attempts by bondholders of the special tax bonds, they were unsuccessful in getting the state to resume payment of interest. In 1879, the legislature passed a constitutional amendment formally repudiating the special tax bonds, worth almost $12.7 million plus outstanding interest, and the voters approved it later that year (McGrane 1935, 341; Ratchford 1966, 192).[17] That same year, after adverse judgments in federal courts, the state settled its antebellum debt by scaling it down for between 25 and 80 cents on the dollar and refusing to pay any outstanding interest. The overall settlement in 1879 resulted in the state reducing its debt by over 87 percent, down to just $3.6 million (McGrane 1935, 340; Orth 1987, 70).

In South Carolina, the state moved to address its fiscal problems after defaulting on its payments in 1872. After a legislative committee placed the state debt at $29.2 million, the legislature passed the consolidation act.[18] In that act, the state legislature, still controlled by Republicans, repudiated almost $6 million in bonds outright and scaled the remainder of the debt down by 50 cents on the dollar with 6 percent interest. In addition, the state refused to recognize an estimated $6.8 million of contingent debt that the state was liable for if the companies that issued it defaulted. The act authorized the state to issue consolidation bonds in exchange for the old bonds, which would no longer be funded (McGrane 1935, 351–352; Ratchford 1966, 186). By this act, the state had reduced its total liability by more than two-thirds, eliminating $16.5 million worth of debt (Ratchford 1966, 192).[19]

Alabama was hit hard by the Panic of 1873 and the collapse of its railroads. When the first railroad company defaulted in 1871, the state seized the railroad and began paying the interest due on the railroad's bonds (McGrane 1935, 289). When the rest of the railroads defaulted in 1873, the state tried to do the same. By January of 1874, however, the state defaulted on its interest payments and pressure was mounting to repudiate the debt (Hollman and Murrey 1985, 314). That same year, conservative whites returned to power in the state and many

regarded the earlier debts as illegitimate. In 1876, a commission presented its proposal on how to handle the debt to the legislature. $4.7 million worth of bonds were repudiated outright on the basis of irregularities or alleged fraud. The remaining debt was divided into five different debt categories, with state certificates and educational debts fully funded. The three other categories were scaled down at varying levels. Class C bonds were scaled down to less than 19 cents on the dollar, Class B bonds were exchanged at 50 cents on the dollar, and Class A bonds received their full value. In each of these three classes, the interest rate was reduced and the past due interest was ignored. Through this act, the state reduced its total debt from $25.5 million to $12.6 million (McGrane 1935, 290–291).[20] In 1879, the state reduced its debts even further by reducing the interest it paid on the bonds. By 1880, the total debt was down to just $9 million (Hollman and Murrey 1985, 319–320).

Louisiana put a stop to additional spending in the state in 1870, but it still had to resolve its outstanding obligations. In 1874, the Republican-controlled state defaulted on its interest payments and the legislature started to look into options on how to handle the debt. The legislature passed an act scaling the direct state debt down to 60 cents on the dollar with 7 percent interest (McGrane 1935, 319). At the same time, it canceled all outstanding pledges that had not yet been issued, eliminating more than $18 million in contingent debt owed as a result of the failure of companies that issued state endorsed bonds. No provision was made for the remaining $11.3 million in contingent debt, effectively repudiating it (Ratchford 1966, 188). In 1875, the state ordered the investigation of another $14 million in state bonds that resulted in the repudiation of an additional $3.2 million. These actions reduced the state debt by almost $24 million (Ratchford 1966, 192).[21] By 1879, Reconstruction had ended, the Democrats returned to power, and the state sought to reduce its burden further. The legislature proposed reducing the interest on the scaled debt from 7 percent to 2 percent for five years, 3 percent for fifteen years, and 4 percent thereafter. When none of the bondholders were willing to exchange their old bonds, the state eventually settled in 1882 on bonds worth 2 percent for five years and 4 percent thereafter (McGrane 1935, 321-322).[22]

Repudiation: Georgia, Florida, and Arkansas

Three states repudiated substantial numbers of their bonds rather than scaling the debt down. Georgia, Florida, and Arkansas followed a similar path as the other southern states in accumulating their debts, but

took a different course in resolving their financial troubles. Georgia had a small debt of only $2.8 million in 1865, immediately after the end of the Civil War. By 1872, it had grown to an estimated $18.2 million (Ratchford 1966, 183). Beginning in 1868, the Republican state legislature authorized aid to thirty-seven railroads, totalling almost $30 million (McGrane 1935, 306). The aid to the railroads ranged from a value of $3,000 to $15,000 per mile of track laid and were issued for the benefit of building and equipping 600 miles of track in the state (Goodrich 1956, 411; Porter 1880, 578). Some bonds were issued without the state treasurer's signature or without proper registration, making the total number of bonds actually issued difficult to calculate. A legislative committee in 1872 found $14 million in bonds held in New York and abroad, which totaled $18.2 million in debt when interest due was included (McGrane 1935, 306; Ratchford 1966, 183).

At the close of the Civil War, the railroads in Florida were bankrupt and the equipment was worn out. The state took possession of the railroads and sold them to private investors for cut-rate prices. The railroads needed serious work, however, and the state wanted to help the new companies. In order to successfully issue state bonds, the state needed to resolve its former repudiation in some fashion.[23] The Republican government opened settlement talks with foreign holders of the repudiated territorial bonds as a sign of good faith. This gesture reopened the capital markets to Florida, although British investors remained too wary to purchase many state stocks.[24] Beginning in 1869, the state issued endorsed bonds for eight different railroad companies, with the Florida Central Railroad and Jacksonville, Pensacola, and Mobile Railroad receiving the bulk of the aid. The aid ranged from $10,000 to $16,000 per mile of track laid. $3 million in state bonds were given to the Jacksonville, Pensacola, and Mobile Railroad, while the Florida Central got $1 million in state aid (McGrane 1935, 301).

Like Florida, Arkansas also suffered from bad credit at the time, having refused to pay its debts from the 1840s.[25] Immediately after the war, the state had to borrow money in order to keep the state functioning. Since it could not get many bonds, it relied primarily on state scrip issued to citizens that was receivable for paying taxes. This did not solve the problem, though, because it meant that the state had little or no revenue from taxes (Scott 1893, 120). In 1868, the Republican legislature passed a railroad aid bill that offered between $10,000 and $15,000 in state bonds per mile of track laid, which was ratified by a majority of voters in the state the same year. The state levied a tax on the railroads sufficient to make the interest payments, although no provision was made for seizing the railroads in the case of default

(McGrane 1935, 294; Thompson 1976, 201). In order to improve the value of the state bonds for the railroads, which were not selling well on the domestic or foreign markets, the state passed an act in 1869 funding the entire past due debt, including the controversial Holford bonds.[26] With that completed, the state proceeded to initiate a program to build and repair levees in the state. In 1871, $3 million in bonds were approved for contractors. Despite the abuse and fraud in many southern states at the time, Arkansas did manage to get a fair return on its investment. Eighty-five companies applied for state aid, but the legislature kept the number of companies receiving aid to only five. In exchange for $5.4 million in railroad bonds, the state increased its track by 662 miles (Goodrich 1956, 426).[27]

In the early 1870s, the railroads in these states began to default on their interest payments and the states were expected to make good on their pledges of support. By 1872, the Democrats had returned to power in Georgia and they sought to undo the work of Reconstruction under the Republicans. A Bond Committee reviewed the state debt and recommended the repudiation of $8.3 million in bonds it claimed were fraudulently issued by the state, including a number of railroad and currency bonds. The legislature adopted the committee's recommendations in August of 1872, repudiating all but a few of the railroad bonds (McGrane 1935, 307–310). In 1875, the state repudiated another $600,000 in bonds for the Macon and Brunswick Railroad previously declared valid, followed in 1876 by the repudiation of $375,000 in antebellum debt for the Central Bank.[28] The state's other antebellum debt remained untouched and was not scaled down. In 1877, the repudiations were made final when the legislature adopted a constitutional amendment confirming the repudiation (McGrane 1935, 311). The state repudiated $9.4 million in bonds between 1872 and 1876.

Early in the 1870s, Florida's railroads began to default on their interest payments and the state took possession of them. Florida was already running a deficit when the railroads defaulted and the state refused to pay any of the interest that was due (Ratchford 1966, 186; Scott 1893, 52). In 1873, the Republican legislature repealed all acts giving aid to the railroads, disappointed that only 29 miles of rail were brought into operation between 1868 and 1873 (Goodrich 1956, 427, 436; Tebeau 1971, 269).[29] That same year, the state also adopted a readjustment statute that swapped outstanding bonds for new ones at a lower rate, but payable in gold. The act effectively repudiated the railroad bonds, since they could not be exchanged and all funding for interest on the old bonds was repealed (Thornton 1982, 384). In 1876, the Florida Supreme Court made the repudia-

tion formal by declaring the bonds unconstitutional and denying the state's obligation to pay them, an action that the court repeated on two other occasions while the federal courts largely stayed out of the dispute (*Holland v. Florida* 1876).[30]

All five of the railroads receiving aid from Arkansas defaulted on their interest payments in 1873, leaving the state liable for $5.4 million in bonds. The railroads were put into receivership for the state and the government considered selling the assets to recover some of the costs (Scott 1893, 121). However, in 1874 with the return to power of the Democrats, the governor responded to the situation by repealing the law that had given aid to the railroads in the first place, claiming that the 1868 law was not properly submitted to the electorate. The repeal resulted in the railroads returning to the owners without the state benefiting from any sales (McGrane 1935, 295). The new government also arranged a test case to be brought in state court. The state supreme court heard the case of *Arkansas v. Little Rock, Mississippi River & Texas Railway* in 1877.[31] The court concluded that the bonds were not binding on the state because they were not validly issued, thus repudiating all bonds issued under the 1868 law.[32] A similar challenge was filed against the levee bonds and also succeeded (*Smithee v. Garth* 1878).[33] The two decisions repudiated a little over $7 million worth of bonds as well as any unpaid interest. The actions of the court were validated when a constitutional amendment was passed in 1884 repudiating not only the railroad and levee bonds, but also the disputed Holford bonds. By 1884, the state had repudiated a total of $8.4 million (Ratchford 1966, 189–190).[34]

SOVEREIGN IMMUNITY AND REPUDIATION

Unlike the 1840s, the courts played a very prominent role in the resolution of the post–Civil War repudiations. Numerous cases were filed during this period, especially at the state level. There are several reasons for the different responses. One of the foremost is the fact that many of the bondholders in this era were Americans, unlike the preponderance of foreign bondholders in the earlier cases. The American financial markets grew and matured substantially in the intervening years and played a much larger role in financing state projects. The American bondholders were familiar with the court system and its operation, giving them an advantage. The role of courts was also altered by the arrival of industrialization. The period considered here, between the 1870s and 1890s was one of an emerging focus in caseload on issues

surrounding business regulations, especially the sanctity of contracts.[35] The important function of endorsed bonds in this period of state investment also made bondholder lawsuits easier to execute. Instead of suing the states, in several instances bondholders were able to sue the railroad or levee companies directly.

The larger number of cases decided, however, did not mean that bondholders fared any better in the post war period than in the 1840s. The majority of federal lawsuits filed against states and their representatives during this time were dismissed due to sovereign immunity. At the state level, most of the courts were hardly sympathetic to the bondholder claims and often stretched legal arguments to justify the actions of the state. Even where these courts did rule against the state, their decisions were largely undermined or ignored by the state legislatures. In this section, I will examine how the legal system impacted the conflicts between state debtors and their creditors, with an emphasis on explaining the role of sovereign immunity. I begin with a review of the decisions at the federal level, followed by prominent state court decisions at the time. I will conclude with an analysis of the differing outcomes in cases and thoughts on the reasons and implications.

Sovereign Immunity at the Federal Level

Despite the cumulative repudiation and scaling down of approximately $116 million dollars by states, bondholders found little comfort in the legal system. Decisions that relied on sovereign immunity to dismiss claims against the states blocked the vast majority of claims. Succeeding in these forums was critical, because if an avenue of redeeming the bonds could be found, no matter how convoluted, it would mean that some market would exist for the bonds and their value would increase. Creditors initially had some reason for hope. The possibility of filing a suit against state officers received a boost in 1873 when the Supreme Court decided *Davis v. Gray* (1873). In that decision, the Court ruled that a suit against the governor of Texas by a railroad company could proceed despite the state's claim of sovereign immunity. Relying on the doctrine established by Chief Justice Marshall in *Osborn v. The Bank of the United States* (1824), the majority accepted jurisdiction where a state officer rather than the state itself was being sued. Hopes of the bondholders were furthered boosted by the success of some creditors in forcing North Carolina to apply dividends from its one successful railroad to payment on some antebellum bonds.

In *Swasey v. North Carolina Railroad* (1874), the federal circuit court, with Chief Justice Morrison Waite riding circuit, concluded that

the suit was not against the state directly and could therefore proceed.[36] The state's share of the railroad was ordered sold unless the state could reach a compromise with its creditors, which the state promptly did by fully refunding the bonds with new 6 percent bonds.[37] The following year, the Court again set aside claims of Eleventh Amendment protection and permitted a suit to move forward against the Board of Liquidation in Louisiana (*Board of Liquidation v. McComb* 1875). Henry S. McComb, a bondholder who had accepted the state's scaled-down consolidated bonds sued to prevent the board from exchanging the outstanding bonds of the politically powerful Louisiana Levee Company at par rather than at the discounted rate everyone else received. The Supreme Court upheld the injunction unanimously and concluded that the Eleventh Amendment does not insulate a public officer from judicial compulsion in the performance of his non-discretionary duty. However, *Board of Liquidation v. McComb* was to be the last such successful case for many years.

Following the formal collapse of Reconstruction and diminishment of federal influence in the southern states, the federal courts pursued a much stricter line on the question of sovereign immunity.[38] Between 1882 and 1890, the Supreme Court upheld sovereign immunity defenses in no less than eight separate cases. The first emerged, as many did, from the repudiation in Louisiana. After the Constitution of 1879 scaled the debt down even further, a group of bondholders filed suits in both state and federal court seeking to stop its implementation. The state case was moved to federal court and the cases were heard together. The plaintiffs sought an injunction against the state treasurer to keep him from carrying out the ordinance as well as a writ of mandamus forcing the treasurer to disburse the funds for the bonds. The Supreme Court decided in *Louisiana ex rel. Elliott v. Jumel* (1882) that both actions were blocked by sovereign immunity.[39]

The following year, the bondholders implemented a strategy suggested in the 1840s by Benjamin Curtis. Several bondholders convinced the states of New Hampshire and New York to pass laws allowing those with bonds to assign them to the state. The state would then sue the defaulting state and pass the proceeds on to the bondholders. New Hampshire and New York got six shares each of consolidated bonds of Louisiana and filed suit against Louisiana in the Supreme Court under its original jurisdiction (*New Hampshire v. Louisiana* 1883). The Court ruled that the case could not be brought because a state does not have standing where it is only seeking to recover money for its citizens. If the state does not have a substantial interest in the outcome itself, it cannot bring suit. This defeat for bondholders was immediately followed by

another potentially more serious one. In *Cunningham v. Macon & Brunswick Railroad* (1883), the Supreme Court essentially overturned its earlier decision in *Davis v. Gray* (1873). Bondholders sued the railroad and state officers after the state had taken possession as a result of default. The bondholders sought to set aside the sale of the railroad to the state, which made their railroad bonds worthless, and establish their lien on the railroad as well before it could be sold again. The Court concluded that the state was actually a party to the case and so sovereign immunity blocked jurisdiction.

The frustration for bondholders continued with the decision of *Hagood v. Southern* (1886). The plaintiff in the case sued the comptroller-general of South Carolina to force him to accept state scrip, issued on behalf of the Blue Ridge Railroad, for payment of taxes. The Court again relied on sovereign immunity to deny jurisdiction in the case, claiming that since the comptroller-general had no personal stakes in the case it was a case against the state directly. Suits directly against state officials were further limited when the Court heard *In re Ayers* in 1887. Rufus A. Ayers, Virginia's attorney general, was imprisoned for contempt when he refused to honor an injunction preventing him from bringing suit against taxpayers who paid the state with coupons from their bonds. The Court ruled that he should be released because federal courts did not have jurisdiction to issue a preliminary injunction against a state official forbidding all acts that would violate a contract. The state official must have done something specific before a suit could be brought.

The fate of most bondholder suits were sealed in 1890 when the Court decided three sweeping cases that greatly expanded the reach and role of state sovereign immunity. The first was *Christian v. Atlantic & North Carolina Railroad* (1890) and it effectively reversed the earlier decision in *Swasey*. Christian, a citizen of Virginia, filed suit against the railroad in an attempt to force any dividends on the railroad's stock to be paid to the bondholders first rather than the state. This was very similar to the remedy sought by the bondholders in the earlier case. This time, though, the Court concluded that the state was an indispensable party to the suit and dismissed it on the grounds of sovereign immunity.[40] This closed off one avenue that was previously available to bondholders—bringing suit against the railroad and levee companies directly to establish their legal interest in any money garnered from sale or operation. The other two cases decided just a little over a month later both addressed the same issue. In an attempt to get around the language of the Eleventh Amendment, the bondholders encouraged residents of the repudiating state to file suit. The Eleventh Amendment

only expressly denied jurisdiction in cases between states and citizens of other states, not their own. In Louisiana, Hans sought payment from the state directly for the outstanding interest on his bonds. In North Carolina, Alfred H. Temple sought to force the state auditor to implement a tax for payment of the special tax bonds. In *Hans v. Louisiana* (1890) and *North Carolina v. Temple* (1890), the suits were dismissed. The Court's primary opinion was in *Hans* and it rejected a narrow interpretation of the Eleventh Amendment, preferring to move beyond the text of the Amendment and focus on the perceived intentions of the founders on the issue. The combination of these decisions served to effectively eliminate any remaining remedies that bondholders could have used.

Beyond the overall bleak picture for bondholders, there were some rays of hope however. And the results in cases where suits were permitted offer a powerful counterpoint to the stifling effect of sovereign immunity. That is, where bondholders could successfully get their cases heard at the federal level, they were generally successful in negotiating much better terms with the states. For instance, in *Railroad Companies v. Schutte* (1880), the Supreme Court did not consider whether Florida's repudiation was constitutional, but it did grant bondholders liens on the railroads so that when they were sold, the bondholders would be compensated.[41] This was something the state supreme court was unwilling to do and signified a substantial victory for the creditors. Suits against railroad companies were not universally successful, though, especially when the state's interests were factored in. In 1885, the Court decided a series of cases known as the *Tennessee Bond Cases* (1885), which upheld Tennessee's lien on the railroads to the exclusion of the bondholders. The state could sell the railroad and collect the proceeds without applying the money towards paying the bonds.

Bondholders had their greatest success in Virginia. The Supreme Court decided almost a dozen cases, all but one favorable for bondholders, on the question of whether the state could be compelled to accept the coupons it issued as payment for state taxes.[42] Beginning in 1880, the Court confirmed that the Funding Act of 1871, by which many bondholders exchanged their old bonds for the new bonds whose coupons were accepted for taxes, was a binding contract on the state. In *Hartman v. Greenhow* (1880), the Court struck down a tax on the coupons as an unconstitutional impairment of the state's obligation of contract and ordered the defendant to accept the coupons for taxes. The case was brought against the city treasurer of Richmond directly and thereby avoided a sovereign immunity challenge from the state. The bondholders did face a setback in *Antoni v. Greenhow* (1883)

when the Court upheld the initial "coupon killer" legislation that was passed. The majority concluded that the acts left an "adequate and efficacious remedy." While the decision was not in the bondholders' favor, they were able to have their substantive arguments heard and ruled upon, unlike the cases above.

The Court assured that the bondholders did have an adequate remedy during a series of eight cases known collectively as the *Virginia Coupon Cases* (1885).[43] Bondholders brought the cases seeking an order discharging their tax liability after submitting coupons in payment. The Court held that they were not suits against the state, but rather suits against the officer who proceeded illegally against the defendants. The Court agreed with the bondholders and found no delinquency on their part, discharging any tax liability that the state might try to collect.[44] The decision by the Justices was met with a flurry of legislation from the state seeking to undermine the ability of bondholders to use their coupons.[45]

The conflict came to a head in 1890 when the Court decided *McGahey v. Virginia*. This case addressed Virginia's continued attempts to bring legal actions against taxpayers relying on the coupons. The Court declared that taxpayers using the coupons had a right to be free from molestation and any legal action taken against them should be denied. The Court also struck down some of the limitations the state had put in place, such as eliminating expert testimony. Federal courts had jurisdiction to hear the case because it was originally brought by the state in state circuit court seeking to declare McGahey delinquent on his taxes.[46] When the state initiates a suit, the other party can appeal without violating sovereign immunity, which is what McGahey and others did. Once the case was decided, the state quickly proceeded to negotiate with the bondholders. In 1892, the state and bondholders reached a settlement where $19 million in new bonds were exchanged for $28 million in outstanding obligations, with the new bonds bearing 2 percent for 10 years, and 3 for 90 years. The coupons and other interest obligations were not receivable for taxes. This settlement was agreeable to the bondholders and ended the dispute.

The contrast with how other bondholders were treated is instructive. Where sovereign immunity did not act as a roadblock, the creditors were able to successfully challenge the state and achieve a much better settlement than that offered initially by the state. Bondholders for whom relief was denied by the courts were left with little choice but to accept the states' actions, although not without consequences for the states.

Creditor Relief in State Courts

As discussed in chapter 4, if state courts are open and provide sufficient remedies to bondholders, then the importance and impact of sovereign immunity as derived from the Eleventh Amendment declines dramatically. In this period, the state courts were repeatedly tested by creditors, but largely came up short. The first cases filed on the question of repudiation during this time period came in North Carolina. In 1869, the state supreme court decided a trio of cases, all upholding the legislature's decision to no longer fund the special tax bonds. In *Galloway v. Jenkins* (1869), the court upheld an order preventing the state from issuing any more special tax bonds.[47] This was immediately followed by *University Railroad Company v. Holden* (1869), where the court refused to force the governor to issue previously authorized bonds, and *L.P. Bayne & Company v. Jenkins* (1869), where the court denied its ability to issue a writ of mandamus against the treasurer to compel payment of interest on the bonds. The North Carolina Supreme Court was kept busy throughout this period. Between 1873 and 1875, the court decided four more cases on the question of state bonds, all of which ruled against the bondholders' interests. The court turned down attempts to exchange now-worthless special tax bonds for railroad bonds, refused to force the treasurer to return money raised by the special taxes to the bond fund, denied the court's authority to order the state to begin collecting the special taxes for interest on the bonds again, and affirmed the legislature's ability to repeal the act providing for payment on the bonds (*Raleigh & Augusta Air-Line Railroad Co. v. Jenkins* 1873; *Self v. Jenkins* 1874; *August Belmont & Co. v. Reilly* 1874; and *Wilson v. Jenkins* 1875).

At the same time, the court avoided hearing cases that dealt directly with the validity of the bonds. In *Blake v. Askew* (1877), for instance, the court dismissed an attempt to establish that the bonds were valid debt on purely procedural grounds.[48] In 1889, the state supreme court dealt the final blow to creditors by ruling that it no longer had any jurisdiction to hear cases related to the bonds because a constitutional amendment removed the legislature's ability to levy funds to pay the bonds. Since the court could offer no remedy, it could not hear the cases (*Baltzer v. North Carolina* 1889).[49]

Louisiana is another state that heard a number of cases brought by bondholders, but this was by the legislature's design. The legislature directed the courts to determine the validity of $14 million worth of bonds that it suspected was illegally issued and anyone whose request

was denied by the Board of Liquidation could appeal to state court. The courts heard several cases and upheld some bonds while denying others (see *State ex rel. Forstall v. Board of Liquidation* 1875; *State ex rel. Attorney General v. Clinton* 1876; and *State ex rel. Citizens' Bank of Louisiana v. Funding Board* (1876). Creditors of the state did try to use the state courts to compel payment in other ways, though. In 1871, the estate of the state printer sought to force the legislature to issue the warrants, a type of noninterest bearing bond, it had guaranteed him in an earlier act. The Louisiana Supreme Court rejected the appeal, relying on the fact that the appropriations in the act exceeded the constitutional debt limit of $25 million. The act was declared unconstitutional and with it, any other debt contracted after that time (*State ex rel. Salomon & Simpson v. Graham* 1871).[50] In 1877, another creditor sought a writ of mandamus forcing the Board of Liquidation to provide funds sufficient to pay interest on contested bonds. The court refused to issue the writ, concluding that the court did not have that authority (*State ex rel. Forstall v. Board of Liquidators* 1877).

The other states heard a much smaller number of cases, but they are instructive nonetheless. The supreme courts of Florida, Arkansas, and Georgia all heard cases dealing with the state debt and in each case ruled against the bondholders. The Florida Supreme Court, in a series of three cases, invalidated and repudiated millions in state bonds, concluding that the bonds were not binding because the constitution did not permit exchanging state bonds for railroad bonds, only the issue of bonds for works that would fully be the state's property (*Holland v. State of Florida* 1876; *State of Florida v. Florida Central Railroad* 1876; and *Trustees of the Internal Improvement Fund v. Jacksonville, Pensacola, and Mobile Railroad Company* 1878). Arkansas' supreme court also played a key role in the state's repudiation, rejecting both railroad and levee bonds in two prominent cases. In the first, the court invalidated the enabling legislation of the railroad bonds because of problems with the timing of the voter approval (*State of Arkansas v. Little Rock, Mississippi River, and Texas Railway* 1877). In the second case, the court nullified the levee bonds because the specific votes of the legislators were not recorded in the legislative journal (*Smithee v. Garth* 1878). In *Gurnee, Jr. & Company v. Speer* (1882), the Georgia Supreme Court denied that it had jurisdiction to issue a writ of mandamus to force the treasurer to pay outstanding bonds because the legislature did not appropriate money for that purpose. In the same opinion, it also upheld the act that prohibited payment of bonds issued to the Macon & Brunswick Railroad. The court reasoned that the legislature was not repudiating debts, but simply trying to avoid paying fraudulent bonds.

In Alabama and South Carolina, bondholders did actually win victories in the state courts, but the consequences were limited. In Alabama, the governor refused to exchange old bonds that he considered to be "overissues" for the new scaled down, but funded, bonds. He argued that the legislature had only approved 4,720 bonds while 5,229 were actually issued. The court ordered the governor to exchange all of the bonds because they were sold as valid bonds to creditors and there was no way to accurately determine which bonds were issued beyond the approved amount (*State ex rel Plock & Co. v. Cobb* 1879). The governor complied and the bonds were exchanged. The opinion did, however, uphold the state's right to adjust the debt as it saw fit, essentially approving the state's earlier repudiation and scaling.

South Carolina's supreme court issued one of the most favorable decisions for bondholders. In *Morton, Bliss & Co. v. Comptroller General* (1873), the court found the bonds at issue to be legitimate debts of the state and ordered the comptroller general to levy taxes sufficient to pay the interest on the bonds. Unfortunately for Morton, Bliss & Company, the legislature responded by removing the comptroller general's authority to raise taxes, effectively nullifying the court's order. The state court apparently received the message, because no further challenges were heard to the state's failure to pay. The court did play a later role in determining which bonds were valid debts that could be exchanged for the scaled-down consolidated bonds, but it never addressed the formal repudiation in 1873.[51]

Tennessee and Virginia each stand apart from the other states, although for different reasons. In Tennessee, the state courts stayed out of the dispute and did not issue any significant rulings in cases relating to attempts by the bondholders to get payment. Most of the legal action regarding Tennessee's bonds took place at the federal level, as discussed above. The only notable exception was the lawsuit brought by taxpayers that undermined the compromise established by the Republicans in 1881. The court ruled that the legislature could not issue 99-year bonds because that bound the state for too long (*Lynn v. Polk* 1881). The Virginia Supreme Court, on the other hand, issued one of the few effective opinions during this period, although it required federal intervention to be eventually carried out. When the legislature repealed the 1871 Funding Act and prohibited tax collectors from accepting the coupons for payment, a taxpayer sued the sheriff to force him to accept the coupons. The court agreed that the Funding Act created a valid contract between the state and bondholders and that new act substantially impaired the state's obligation of contract (*Antoni v. Wright* 1872). It issued a writ to the sheriff forcing him to accept the

coupons. The court also rendered a similar decision in 1885 when it permitted a suit to proceed against the state treasurer for a taxpayer to recover money seized by the state after payment by coupons was rejected (*Brown, Davis, & Co. v. Greenhow* 1885). Neither of these decisions would have mattered, though, if it had not been for concurrent cases filed and decided at the federal level, as discussed above. The bondholders were not uniformly successful in Virginia, though. The court pleaded a lack of jurisdiction due to sovereign immunity when a group of bondholders sought to force the state to apply money received from selling one of the railroads towards paying off the outstanding bonds (*Board of Public Works v. Gannt* 1882).

What this study of state court cases suggests is that state level remedies were either nonexistent or ineffective. In the rare occasions that bondholders achieved any success in these courts, the decisions were either undermined by the other branches or made effective only by more extensive federal intervention. The precarious position of the courts with respect to the legislature and governor in the state made unpopular actions unlikely and as a result, state courts did not provide an arena for legal remedy.[52] The mere availability of state courts for creditors was not sufficient in light of the lack of authority that many of the courts faced.

Implications of the Decisions

At the federal level, sovereign immunity was an explicit bar to the bondholders seeking relief. Despite numerous creative efforts on the part of the creditors, they were largely unsuccessful wherever suits were perceived to be against the state directly. In those cases, creditors were left at the mercy of the states and suffered substantial economic losses as a result. Further evidence that the sovereign immunity doctrine negatively impacted the bondholders can be found by contrasting the sovereign immunity decisions with those that the federal courts were able to hear. Where federal courts did hear cases, the results, such as those in Virginia and Florida, were beneficial to the creditors and offered a remedy even where states were unwilling to pay their debts.

At the state level, though, access to the courts was not an adequate protection in large part because of the political limitations of the state judicial systems. With judges holding elective office, making unpopular rulings that would result in raised taxes was not conducive to remaining in office. Combined with the racial and partisan dynamics of the end of Reconstruction, state courts had little authority or opportunity to hold states responsible for their debts. When the South Carolina

Supreme Court tried, the legislature issued a sharp rebuke that sent a clear message to the court. It is true that the federal judiciary faces similar limitations in terms of ability to enforce its decisions. However, distance and insulation from the local state politics, lifetime appointments, and the acknowledged authority of the federal government to enforce laws all combined to make federal courts a more likely source of remedy. The Virginia cases demonstrate that even in the face of an intransigent state legislature, the federal courts could successfully offer remedies to bondholders in a way that state courts simply could not. When sovereign immunity was used to close the federal courts, the creditors were left with little choice but to turn to the same responses they used in the 1840s.

THE CONSEQUENCES OF REPUDIATION

As with the previous round of repudiations, the states involved did not escape unharmed. The southern states that repudiated their debts suffered substantial negative economic effects, similar to those faced in the 1840s. Bond prices plummeted and credit markets were closed to them. On the political side, the effects that can be traced to sovereign immunity are subtler than in the earlier period of repudiation but nonetheless present. I will discuss the economic impact and then proceed to the political costs.

Economic Responses

The analysis of economic repercussions in the 1870s relies on the same underlying theory of sovereign debt as in chapter 4. Sovereigns with bad reputations are unable to borrow on international credit markets unless they display some mitigating circumstances and a willingness to resume payment.[53] This theory is once again supported by the available evidence on state securities prices.

The reaction of the bond markets to the decisions of the states was swift. Alabama, which was trading as high as 94_ in 1870, plunged to 25 by 1874 (Ratchford 1966, 179). Tennessee's bonds went from a value of 79 in 1873 to 33 in 1879 and South Carolina's bond prices dropped as low as 11. The average price for state securities in the South during the period of 1872–1879 was just 51 cents on the dollar while the other regions of the country enjoyed averages of 104 cents on the dollar (Porter 1880, 590–591).[54] Table 5.1 shows the values of state securities over the period of 1872–1879. The prices of bonds from repudiating states are substantially lower than the other states.

TABLE 5.1

AVERAGE PRICES OF STATE SECURITIES FROM 1872-1879

Non-Repudiating States	*1872*	*1873*	*1874*	*1875*	*1876*	*1877*	*1878*	*1879*	*Avg.*
California	110	110	110	105	105	105	105	105	*107*
Illinois	99	95	95	99	101	100	102	103	99
Massachusetts	103	103	103	103	103	103	103	103	*103*
New York	104	105	106	109	110	113	115	114	*110*
Ohio	100	101	100	102	107	106	104	106	*103*
Repudiating States									
Alabama	90	57	25	43	26	26	29	60	*45*
Arkansas	50	30	19	12	15	11	8	7	*19*
Georgia	73	87	68	81	98	101	104	107	*90*
Louisiana	68	50	19	25	35	39	61	67	*46*
North Carolina	21	29	21	30	19	24	24	33	*25*
South Carolina	34	27	15	28	31	32	31	11	*26*
Tennessee	65	79	69	38	44	42	35	33	*53*
Virginia	50	42	35	35	44	39	36	36	*38*

Source: Porter (1880, 591).

The exception in this case is Georgia, whose bond prices actually increased to a high of 107 during the time period. This development appears to run counter to expectations. Georgia repudiated a large portion of its debt in 1872, followed by additional repudiations in 1875. There are two possible explanations for this finding. The first is that the price shown is for antebellum bonds sold by Georgia. Since Georgia went out of its way to guarantee the security of the antebellum bonds even while repudiating the postwar bonds, investors could have decided that those earlier bonds were a good investment given Georgia's ample natural and economic resources. The other explanation is that investors rewarded the fact that Georgia was cautious about which bonds it repudiated. The 1872 debt commission specified clear reasons for repudiating the debts it recommended, unlike other states such as Arkansas or South Carolina. This explanation is supported by the fact that Georgia was able to issue bonds in 1873, 1877, 1884, and 1887, albeit at high rates of interest early on (Johnson 1970, 637). This explanation also fits with Tomz's theory discussed above and in chapter 4. The problems identified by the debt commission served as mitigating factors that, combined with the state's willingness to honor its antebellum debts, were sufficient to reopen the credit markets despite the repudiation. This explanation does not change my conclusions regarding the impact of sovereign immunity, though. Georgia did not escape without any consequences—the price of its securities was still lower than every other state outside the South for most of the period and its first issue of bonds after repudiation was offered at the high yield of 8 percent. The consequences were minimized because the state offered assurances to the rest of its creditors and showed clear fraud on the part of the railroads in the issue of the bonds that it did repudiate. As with Michigan in the 1840s, these mitigating factors opened up the credit market much sooner than with other states.

Georgia was the exception rather than the rule. Arkansas tried to borrow money two months after its supreme court repudiated its bonds and found no interested parties (Thompson 1976, 237). Not only the states, but also businesses suffered from the acts. In Tennessee, the failure to agree to terms with its creditors during the 1870s hurt the credit of corporations and individuals living in the state (Scott 1893, 141). A contemporary observer noted that "every American railway company, or canal company, or land improvement company that offers its papers in foreign markets must pay forfeit for the damaged standing of the defaulting states" (Hume 1884, 568). For most of the states, it was a long climb back to recover standing in the financial markets. Alabama recovered relatively quickly since it, like Georgia, was cautious in

determining which bonds to repudiate and which to fully fund. By 1890, the state's credit was largely repaired, since it was able to issue $954,000 in bonds that sold for over 101 (Hollman and Murrey 1985, 320). Arkansas, on the other hand, was perceived as one of the worst repudiators. Hundreds of miles of track were built, for which the state ended up paying very little. Creditors did not take the widespread repudiation of the state debts lightly. One state historian found that even as late as 1917, New York banks were unwilling to handle any Arkansas state securities (Thompson 1976, 239). Most of the other states recovered at a pace between those two extremes. Ratchford found that by 1916, Virginia could sell bonds at a yield as low as 3 percent. Alabama, North Carolina, and Tennessee could manage 4 percent bonds. The other states issued bonds ranging up to 8 percent, depending on the quality of their credit (1966, 258). Louisiana, for instance, the state that used sovereign immunity so vigorously as a defense, was issuing bonds at the highest yield. That same year, the South Atlantic states finally managed to reduce their per capita debt to near the national average (Ratchford 1966, 257).

The repudiations continued to haunt the southern states for decades to come. Throughout the 1920s and 1930s, British creditors asked their government to press the United States to settle those debts. While ultimately unsuccessful in forcing the states to pay, any new issues of bonds by the repudiating states were met with difficult questions by foreign markets.[55] More importantly, G. Alan Tarr argues that the repudiations "ensured that investment capital would not be available in the future to underwrite industrial expansion, thus by default reorienting state economic development in an agrarian direction" (1998, 132). The creditors during this period may have lacked political support to recover their money, but they did have sufficient resources to punish the states in economic markets.

Political Responses

The failed spending on the railroads and other internal improvements led once again to increased hostility toward government support of any project.[56] In the post–Civil War period there was a flurry of constitutional amendments and conventions, particularly in the South, restricting state legislatures. Nine southern states adopted entirely new constitutions between 1875 and 1902, most with strong limits on both spending and taxation that resulted in far-reaching effects on state authority (Tarr 1998, 131). Unlike in the antebellum period, though, the constitutional changes that took place are not so easily traceable to

sovereign immunity. In the South, the anger of the citizens was directed at the initial spending by the Reconstruction governments, but not at the repudiations that resulted. The repudiations were popular actions among the conservative Democrats and seen as necessary responses to illegitimate governments that were previously in power. Even if sovereign immunity did not exist as a doctrine, the amendments would have likely been adopted.

The outrage and concern among citizens and elites of other states toward the threat of repudiation that contributed to the widespread antebellum amendments was muted in the post–Civil War period. This is attributable to several different causes. The actions of the southern states were seen as unique responses to the realities of Reconstruction, separate from anything that would happen in the north or west. The immediate threat of repudiation was not present in those states as it was in the earlier period. Another factor is that the consequences of the earlier political changes were still in place in most of the other states. Spending limits and restrictions on borrowing still served to check those state legislatures. By 1893, only five states in the country permitted state borrowing without limits.[57] Citizens in the north and west felt more secure from rampant spending and the dangers of repudiation.

That is not to say, though, that there were no political consequences for the southern states. Since many of the bondholders of this period were northerners rather than foreigners, they were much more willing to use their influence in the local political contests. Once the largely Republican governments started to scale down the debts and threaten repudiation in the early 1870s, angry creditors sent emissaries south to spread the word that as long as Republicans ruled, local projects could expect no support. Money was given to Democratic campaigns by northern investors—the Alabama party had one of the largest campaign funds in state history in the election of 1874 (Summers 1984, 292). Republicans were swept out of office throughout the early to mid-1870s culminating in the end of Reconstruction in 1876–1877. In states that were already controlled by Democrats such as Tennessee and Virginia, there was intense interest in supporting the wing of the party willing to pay off the debts.[58] This approach was ultimately unsuccessful as the Democratic governments that came to power proceeded to repudiate the bonds anyway. Outside of Tennessee and Virginia, the Democratic Party hegemony that followed was impossible for the creditors to break.

The negative political consequences were limited by the lack of political support for creditors in the states and unified opposition to what were viewed as the flawed policies of Reconstruction. None of the

repudiations directly impacted significant numbers of in-state residents since almost all of the bonds were held in the north or abroad. The state legislators faced no significant internal pressure to pay the debts, with the exception of some in the business community who wanted further access to credit. Nonetheless, the experience does demonstrate that when the interests of those shut out of courts fits with the political strategy of a significant bloc of voters or politicians, the ruling party can suffer adverse effects.

The bondholders of this period also had little luck at the federal level politically. Both Congress and the president were far more engaged in the issues surrounding Reconstruction and recovery from the Civil War. Where scaling and repudiation were initiated by Republican administrations at the state level, it was unlikely that the national Republican majority would be interested in drawing a great deal of attention to either the repudiations or the corruption that led to the debts in the first place. The contentious election of 1876 allowed Republicans to retain control of the federal government, but at the cost of ending Reconstruction. From that point on, neither Congress nor the president showed much interest in interfering with the southern states to any great extent. All of these factors made appeal to the federal government for further action unlikely to succeed.

CONCLUSION

Once again, states faced with difficult financial situations chose to rely on sovereign immunity to avoid payment and responsibility. The creditors responded by driving down the price of those state securities, severely limiting future economic investments in the region, and seeking to overturn the ruling parties in the states. Sovereign immunity protected states from court judgments, but could not completely seal the states off from the broader sanctions brought by investors. In terms of the key factors discussed in previous chapters, the resources of the aggrieved bondholders were sufficient to punish the states but not enough to recover their losses in the absence of political support. As both this case study and the previous one demonstrate, states must be very cautious in whom they shut out of the courts, as the consequences may be quite far-reaching and counterproductive. With these findings in mind, I turn now to the most recent series of cases addressing sovereign immunity.

Part 3

Ghosts of Cases Past: State Sovereign Immunity Today

This page intentionally left blank.

Chapter 6

Sovereign Immunity in the Rehnquist and Roberts Eras

It should be clear at this point that in the past sovereign immunity has been at best a mixed bag for states that rely on it. Often, it has resulted in unintended consequences that were more harmful to the states than simply submitting to the lawsuits brought against them. What does history tell us about the current crop of cases? Are the lessons of the 1790s, 1840s, and 1870s relevant to the federalism debates of today? Admittedly, there are some significant differences between those earlier case studies and the contemporary series of cases. Whereas in the past it was the states' actions that led to an upsurge in the number of sovereign immunity suits, today the revival is much more court-driven. States are not necessarily behaving any differently than they were twenty years ago, but their assertion of sovereign immunity is succeeding at a greater pace, thanks to recent judicial decisions. The eighteenth- and nineteenth-century cases centered primarily around issues of unpaid debts, with the federal government a minor player at best. Today, the cases address the question of federal power over the states, particularly in the area of discrimination legislation.

In order for the earlier case studies to provide relevant comparative information, there must be substantial similarities in the underlying political story. The study of the impact of these actions across time relies, therefore, on the assumption that political actors during each of the periods acted in rational ways to pursue their interests. While it is necessary to be explicit about this assumption, it is hardly a contentious

point.[1] The ability to mobilize a dominant political coalition depends on whether a plaintiff's appeal is central to the needs and interests of that political coalition. What does change over time is the nature of the interests of the political actors as well as the character of the issues in dispute. Foreign governments such as France were significant interests at the state level in the 1790s but much less so in the 1840s. Disputes over the legitimacy of Reconstruction governments were prominent in the 1870s, while today many sovereign immunity disputes develop over concerns of an overly intrusive federal government. These differences are notable and must be taken into account, but these are specific examples of conditions that are actually quite similar at a slightly higher level of abstraction. The core lessons gleaned from the interactions are the same. Careful and thorough case studies can provide confidence that the similarities are real and sustained.

This chapter addresses the contemporary cases, tracing their impact on both the states and on the plaintiffs. I focus on six major cases decided by the Supreme Court between 1996 and 2001. These cases range from gambling negotiations to disabilities law and provide a sense of the varying types of responses and consequences. Each case is closely examined, from its inception to its fallout, and I review the implications for all parties involved. Consistent with the past, I find that well-organized and funded individuals and groups are more successful at working around the loss of legal remedies, while resource-poor and politically weak groups are left with few options. At the same time, where interested plaintiffs control both resources and political support, states face repercussions for their actions and do not necessarily come out ahead. My findings are preliminary given that this area of the law is still developing rapidly and effects may take years to fully appreciate.[2] Nonetheless, a close examination of these cases provides further insight into the costs and risks associated with sovereign immunity.

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 Rehnquist 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 inter-

ests, 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.[3] 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 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.[4]

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 (*Seminole Tribe of Florida v. Butterworth* 1980). 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 (*Seminole Tribe of Florida v. Butterworth* 1981).

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. In 1988, Congress attempted to mediate the brewing conflicts by passing the Indian Gaming Regulatory Act, or IGRA, which established procedures and limits for gambling on tribal lands.[5] 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" (Indian Gaming Regulatory Act 1988, §2703 6). 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. Class III gaming is defined as all other forms of gaming not classified by Class I or Class II. 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.[6] 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. If the court finds the state has not been negotiating in good faith, the state is given sixty more days to comply or the 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.[7] 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.

The state immediately filed a motion with the district court to dismiss the suit because of Eleventh Amendment immunity (*Seminole Tribe of Florida v. Florida* 1992).[8] The district court rejected the motion and the state filed an interlocutory appeal with the Eleventh

Circuit Court of Appeals.[9] 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. Since the IGRA was enacted under Congress's 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 (*Seminole Tribe of Florida v. Florida* 1994).

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 Supreme Court accepted the tribe's writ of certiorari and agreed to hear the case during its 1995–1996 term (*Seminole Tribe of Florida v. Florida* 1996).[10]

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* (1890), the Court explicitly overturned the earlier case of *Pennsylvania v. Union Gas Company* (1989) 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. 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.[11] 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* (1995)[12] decision, a move toward a greater role for states in our federal system.[13] 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 and legal 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 (Thomas 1996). 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 IGRA in the first place. The tribe was relying on support from the Interior Department not only for their own predicament, but for the underlying issue affecting all tribes interested in setting up gaming. 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 more explicitly 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. Additionally, without a compact, the state would not have an opportunity to share any of the revenue generated by the gaming operations.

The states suggested that the Secretary did not have the authority to make the regulations and Babbitt was hesitant to take any action in hopes of avoiding an open conflict (United States Department of the Interior 1998, 3291). 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 (Gruss 1997). The state filed its own suit in federal district court against the tribe to stop what it considered to be illegal gambling (*State of Florida v. Seminole Tribe of Florida* 1997).

The tribe responded by suing Secretary of the Interior Babbitt in June of 1997 to force him to issue a ruling. 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" (Gruss 1997). The filing of the lawsuit against Babbitt got the Interior Department to take action and in January of 1998, the Secretary published draft regulations for comment (United States Department of the Interior 1998). 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.

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.[14] 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.[15] 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 former speaker of the Florida House and Senate president (Goldstein and Testerman 1998). 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 (Staletovich 1998). 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's 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 (United States Department of the Interior 1999). 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 (Testerman 2000).[16] Despite the state's lawsuit, as tribal attorney Bruce Rogow points out, "[t]his decision takes the state out of the litigation arena" concerning tribal gambling, "so, the state's left with the interior secretary's arena" (Testerman 1999).

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 (Testerman 1999). 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 that same year. In response to the suit filed by the state 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 (*State of Florida v. Seminole Tribe of Florida* 1999). The state responded through Assistant Florida Attorney General John Glogau, who said "[i]t's a bad outcome. It means they can continue to violate the law with impunity" (Testerman 1999).[17]

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 parimutuel betting, and certain electronic gambling machines. Although it was not everything that the tribe wanted, it was more 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 (Testerman 2001). Secretary Norton took no further action on the issue. 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 (Testerman 2004). The tribe agreed, but did not comply. The political support the tribe relied on prior to 2001 was no longer present in the federal government.

In November of 2004, the Seminole Tribe experienced another turnaround. The political winds in Florida shifted regarding gaming. fifty-one percent of the voters approved Amendment 4, which permits slot machines at race tracks and jai alai parlors (Kleindienst and Talalay 2004). 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, he agreed to begin negotiations with the tribe for Class III gaming (Klas 2005). By April of 2006, however, the negotiations broke down as a result of Governor Bush's continued opposition to expanding gaming in the state and the tribe's opening of an additional casino on what the state considers environmentally sensitive land (Burstein 2006; Driscoll 2007).

In response, the tribe once again returned to the federal level, pressing new Secretary of the Interior Dirk Kempthorne to issue regulations allowing tribal gaming in the state. The new Secretary agreed to initiate the process of drafting regulations and released a proposed version in October of 2006 that would allow Class III gaming 24 hours a day (Driscoll 2007). The state was warned that the regulations would be formally issued within 60 days if a compact was not reached. The 2006 gubernatorial election, however, delayed action. Governor Bush was term-limited out of office and Governor Charlie Crist was elected. Governor Crist appealed to the Interior Department to delay the release of the regulations in order to allow for further compact negotiations (Burstein 2007). To ensure that the state initiates the negotiations soon, the tribe has revived its 1999 lawsuit against the Secretary of the Interior to force the regulations to be released. If the tribe is successful in the lawsuit, the state would be cut out of millions of dollars in revenue annually. As a result, Governor Crist and the tribe are entering negotiations with the intent of reaching a quick settlement (Stockfisch 2007).

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 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 sovereign immunity claims. 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 enjoyed political support not only based on its own issues, but also stemming from support for permitting tribal gaming more generally. 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.[18] 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*" (Staletovich 1999, 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 threatened 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. When negotiations at the state level broke down, the tribe

returned to a new and more sympathetic Secretary of the Interior at the federal level for assistance. The pressure from the federal level combined with the threat of a lawsuit to force the federal government to act, the state has returned to negotiate. With both resources and political support for their cause, 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 final 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.

COLLEGE SAVINGS BANK AND *FLORIDA PREPAID*

In 1999, the Court decided a pair of cases arising from the same controversy. College Savings Bank alleged that Florida violated both patent and trademark law in promoting its own prepaid college savings plan. Intellectual property groups around the country paid careful attention to the progress of the suit. When the Supreme Court handed down its decisions in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* (1999)[19] and *Florida Prepaid Postsecondary Education Expense Board v. College Savings* (1999),[20] those groups quickly stepped up to condemn the rulings. The story of College Savings Bank provides a glimpse of the reactions of interested groups beyond the plaintiff that can provide political support to apply political, economic, and social pressure on the states even when there is little interest in helping the affected plaintiff specifically.

Background

In the 1980s, Peter Roberts noticed the rising costs of college education and had an idea for how parents could realistically meet those expenses. In 1984, he filed an application for a patent with the United States Patent and Trademark Office for a computer program that he

designed.[21] The program, using an algorithm to estimate the cost of college in the future, calculated the investment necessary today to ensure adequate savings. In 1988, when the Patent Office issued the patent, Roberts transferred ownership to his new business, College Savings Bank, based in New Jersey. The purpose of College Savings Bank was to sell to parents a financial product, a certificate of deposit known as CollegeSure that would help them meet the costs of their children's college education. College Savings Bank calculates interest rates based on a tuition index for the nation's 500 largest private colleges. The bank then invests in adjustable-rate mortgage-backed securities with returns expected to track tuition inflation. Roberts's idea was a success and the bank, based in New Jersey, began to draw customers. By 1992, College Savings Bank's deposits amounted to almost $68 million.[22] By the end of 1994, the deposits climbed to $80 million.[23]

College Savings Bank was not alone in the field, however. In 1986, while Roberts's patent application was still being reviewed, the University of Michigan began offering a prepaid tuition plan where parents could pay now what the university estimated its tuition would be when their children were in college.[24] In September of 1988, the Florida legislature authorized the creation of the Florida Prepaid Postsecondary Education Expense Board.[25] The board was charged with offering a prepaid college plan to all Florida residents. The actual plan would be administered by banks and insurance companies that the board approved.[26] The plan was marketed as three programs—one to cover tuition, one to cover health and student activity fees, and one to cover dormitory costs. The plan was not limited to use at Florida's state universities, however. The plan could be used for any qualified private university in or out of state. The marketing was designed to attract users of the state system and patrons of private colleges. Like College Savings Bank, the Florida plan promised returns to parents that would be sufficient to cover the future costs of college tuition. By 1995, the board had sold about 270,000 plans and had assets of over $1 billion (Sangchompuphen 1995).[27] A total of nine states were offering similar plans by 1995.[28]

The Case

By the end of 1994, College Savings Bank was starting to feel the bite from its public sector competitors. Earnings and dividends on state plans were tax-exempt, unlike the plan offered by College Savings Bank (Sangchompuphen 1995). Roberts decided it was time to put the patent to use and begin to warn off his larger competitors. On November 7,

1994, in the United States District Court of New Jersey, College Savings Bank filed a patent infringement suit against Florida Prepaid Postsecondary Education Expense Board, the largest of the state programs. The suit alleged that Florida was infringing on the patent through the data processing methods used for the program. College Savings Bank based its claims on the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act), a bipartisan bill passed easily by Congress in 1992.[29] In that legislation, Congress explicitly waived the immunity of states pursuant to its power under Section 5 of the Fourteenth Amendment. The law was adopted in response to the 1985 decision in *Atascadero State Hospital v. Scanton*, which held that Congress must make abrogation of state immunity explicit when it exercises its Section 5 power. Congress made its abrogation explicit in the area of copyright in 1991, followed by patents and trademarks in 1992.

Florida did not instantly invoke its sovereign immunity. Initially, the board asked that the case either be dismissed or moved to the District Court for the Northern District of Florida. The district court judge denied both motions (*College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* 1995). He concluded that if College Savings Bank's claims were true, it would be entitled to relief. He also rejected the idea that it would be more convenient for all parties to have the trial in Florida. Since the Florida plan was also sold in New Jersey, his court had sufficient jurisdiction. While the case was still pending, College Savings Bank filed a separate suit in 1995 against the board alleging a violation of the Lanham Act, which permits a private right of action against anyone who uses false descriptions or makes false representations in commerce. Specifically, the bank alleged that the board had engaged in "false and misleading claims" in its promotional materials by promising all contract beneficiaries the full amount necessary to fund a college education, a deferred tax liability, and backing by the full faith and credit of the United States. The bank also complained that the board had not disclosed the patent infringement suit in its 1995 annual report. The Lanham Act claim against the state was made possible by the 1992 Trademark Remedy Clarification Act, which was enacted at the same time as the Patent Remedy Act. It also specifically waived the sovereign immunity of states.

Florida Prepaid responded by filing a counterclaim, alleging libel against the board by Peter Roberts. The court quickly dismissed that claim, but did not rule on either the patent or trademark issues (*College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* 1996a). It was not until after the Supreme Court decided

Seminole Tribe that Florida Prepaid submitted a motion to dismiss both claims because of sovereign immunity. In December of 1996, the district court dismissed the Lanham Act claim, but denied the motion to dismiss the patent infringement claim (*College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* 1996b).

The decision hinged on the fact that patents are considered property under the law, while unfair competition does not implicate a property interest. The Fourteenth Amendment permits Congressional action to protect property, so the patent case could continue. Both parties immediately appealed. The Lanham Act case went to the Third Circuit Court of Appeals, while the patent case went to the Court of Appeals for the Federal Circuit.[30] The Third Circuit affirmed the district court's ruling on the Lanham Act, concluding that the erosion of the competitor's business through the false advertising did not rise to the level of a Fourteenth Amendment violation that would justify waiving the state's immunity (*College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* 1997). The Federal Circuit also upheld the district court, ruling that the Patent Remedy Act was constitutional and waived the state's sovereign immunity because it was protecting a due process right to property (*College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* 1998).

In January of 1999, the Supreme Court granted certiorari for both cases and issued a ruling in June. The Court upheld the Third Circuit's decision to dismiss the Lanham Act case and reversed the Federal Circuit's holding permitting the patent infringement suit. The Court concluded that the remedies provided by both the Patent Remedy Act and the Trademark Remedy Clarification Act exceeded Congress' Section 5 authority because they were not proportionate to the problem.[31] In its findings, Congress had not shown that states violate patent or trademark laws enough to justify waiving their immunity. As a result of the decision, College Savings Bank's suits were dismissed and it was legally powerless to enforce its patent.

The Consequences

After the Supreme Court's decision, the case was remanded and dismissed by the lower courts. College Savings Bank had no further grounds for suits against any of the state plans and opted to drop that approach. Peter Roberts still held the patent for the method, but it is only useful as a threat to other private competitors. College Savings Bank never recovered any damages or even had their case heard in court.[32] The company, acquired by Pacific Life in 2002, has continued

to grow, with deposits reaching almost $250 million in 2006.[33] Adopting an "if you can't beat them, join them" strategy, College Savings Bank entered agreements with states such as Arizona and Montana to manage prepaid plans for those states.[34] College Savings Bank's moderate success, however, is dwarfed by the business of the Florida plan. By 2006, Florida Prepaid College Board, which was renamed in 1999, had more than $6.8 billion in assets with more than 1.1 million plans sold (Florida State Board of Administration 2006, 1).

College Savings Bank's decision to drop the issue is not surprising. There was little incentive for them to pursue alternate political or economic means. It is extraordinarily difficult for one relatively small company to achieve substantial changes in the structure of federal intellectual property law. College Savings Bank's interest was further reduced by the fact that the patent expired in 2004. Given the pace of legal and social change, it was unlikely from the bank's perspective that any changes could be made in time to be effective to enforce the patent. The bank lacked both time and political support for their particular case. As Peter Menell has pointed out, these decisions significantly decrease the likelihood of those with small stakes from pursuing remedies in patent and trademark cases (Menell 2000, 1447).

College Savings Bank was hardly alone in its concern about state abuse of intellectual property, however. Among the amicus curiae briefs submitted in the cases, several came from trade and intellectual property groups. These groups included the American Society of Composers, Authors, and Publishers, the Business Software Alliance, the Motion Picture Association of America, the Recording Industry Association of America, the International Trademark Association, and the American Intellectual Property Law Association. Unlike College Savings Bank, these groups have a distinct and continuing interest in state accountability for intellectual property violations. In addition, they collectively have financial and political resources. They provide support for the underlying issue raised by the College Savings Bank case, which is the reform of intellectual property law to include state actors. While College Savings Bank itself was unable to generate support for its claim against Florida, the states faced a far greater risk from the groups mobilized by the decision.

Following the decision in June, these groups began agitating for other intellectual property remedies against states and saw Congress as the best forum for change. Like the Seminole Tribe before them, these groups pushed for greater federal involvement rather than ceding authority to the states. The concern of these groups has generated a response although no action was formally taken. In October of 1999,

Senator Patrick Leahy of Vermont introduced a bill entitled the Intellectual Property Protection Restoration Act of 1999.[35] The act proposed that unless states voluntarily waived their sovereign immunity, they would not receive any protections under the federal intellectual property system. At the same time, the United States Patent and Trademark Office began to contact intellectual property experts to develop a response to the court decision. This effort culminated in a one-day conference in March of 2000. The panelists were well-known intellectual property experts such as Daniel Meltzer from Harvard, Erwin Chemerinsky from University of Southern California, Peter Menell from Berkeley, and Ernest Young from University of Texas, as well as the solicitors-general from New York and Kansas and a representative from the National Association of Attorneys-General. Attendees at the conference read like a list of the Fortune 500, including Dow Chemical, Glaxo Wellcome, McGraw Hill, Merck, Reed Elseveier, and TimeWarner.[36]

Several proposals emerged from the conference, published in a variety of law review articles (see Berman, Reese, and Young 2001; Meltzer 2000; Menell 2000; Volokh 2000). For instance, Berman, Reese, and Young suggest that Congress could abrogate the state's immunity on a case-by-case basis when the plaintiff proves an actual constitutional violation (2001, 1042, 1083, 1115). Christina Bohannan argues that state waivers of immunity can be interpreted constructively through failure to raise sovereign immunity as an initial defense, by agreement in a private contract, or by conditioning federal funds (2002, 277).[37]

While Leahy's original bill did not make it out of committee, hearings were held before the Senate Judiciary Committee in June of 2000. Following the hearings, the chair of the Judiciary Committee, Senator Orrin Hatch, requested the General Accounting Office develop a report on state infringement of intellectual property in light of the College Savings Bank cases. That report, submitted to the committee in September of 2001, concluded that "few proven alternatives or remedies appear to be available to a property owner when a state does commit infringement . . . and any compensation for damages may fall short of what the property owner might have achieved previously" (U.S. General Accounting Office 2001, 31). The report also found 58 reported cases of intellectual property infringements by states between 1985 and 2001 (U.S. General Accounting Office 2001, 7). The report characterized this as relatively few, comprising less than .05 percent of all federal intellectual property actions.[38]

Leahy did not let the issue drop. In November of 2001, he submitted a second bill, followed by a third in March of 2002, and a fourth

bill in June of 2003.[39] These bills had companion bills in the House sponsored by Republican legislators such as Howard Coble and Lamar Smith.[40] The House called a hearing on June 13, 2003, for its version of the bill. Each bill refined the remedy slightly to avoid conflict with the Supreme Court's decisions. In the 2003 version, if states wish to receive monetary damages in suits to enforce their own patents, they must waive their immunity.[41] There were also provisions for case-by-case abrogation of immunity where states refuse to waive their immunity and codification of the *Ex Parte Young* doctrine permitting suits against state officers.

Despite the lack of success in passing the bill, there is good reason for continued concern about this issue at the federal level. For example, in the case of *Syrrx, Inc. v. Oculus Pharmaceuticals* (2002), the plaintiffs claim that Oculus asked the University of Alabama Birmingham to use Syrrx's method for array microcrystallizations in sponsored research without licensing the technology. The university followed Oculus's suggestion, relying on its sovereign immunity to successfully protect itself.[42] In testimony before the House Judiciary Subcommittee, Marybeth Peters, Register of Copyrights, referred to examples of states refusing to pay damages for infringement of copyrights as a result of their sovereign immunity protection (U.S. Congress 2003). These examples suggest that if the violations continue or expand, the call for reform will gain significant momentum.

The Implications

College Savings Bank was hurt by the use of sovereign immunity because their claim was never heard. They were not devastated, but they continue to operate at a disadvantage in a field increasingly filled with state actors. On the other side, Florida's use of sovereign immunity to block the lawsuit has not cost the state in its sales of the prepaid plan.

However, the successful use of sovereign immunity in these cases does have the very real potential ultimately to undermine the states in the area of intellectual property. The emphasis on a federal solution suggests that if and when Congress does act, the states will face the choice of giving up their intellectual property protection or their sovereign immunity. Intellectual property is also an international legal system that extends beyond the borders of the United States. Peter Menell suggests that state sovereign immunity could undermine the effective implementation of intellectual property treaties and protective regimes (2000, 1448–1460). States interested in profiting from patents

developed by their research universities could substantially impede that goal by encouraging international violation of intellectual property precepts through similar immunity schemes.[43] The states are currently protected by the relative infrequency of infringements by states, which is consistent with the culture of most state employees.[44] However, as Peters, the Register of Copyrights, points out, "recent experiences in the internet environment suggest where some individuals are given the ability to copy and enjoy creative works without paying for them, they will do so without regard to the harm it causes" (U.S. Congress 2003). If this happens, and occurs in a widespread way that appears to threaten the interests of many businesses, it is almost certain that the federal government will act. The interested parties in that case control both sufficient financial resources and widespread political support to succeed.

ALDEN V. MAINE

The third case I consider here was decided on the same day as the two College Savings Bank cases. *Alden v. Maine* (1999) involved the question of whether Eleventh Amendment immunity applied in state courts as well as federal courts. 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 toward addressing the applicability of federal anti-discrimination statutes to state employees. Instead of external parties such as Seminole Tribe and College Savings Bank, it was now the state's own employees who 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. Amendments, particularly ones in 1966 and 1974, expanded the scope of the FLSA to include public agencies and state employees. 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 (*National League of Cities v. Usery* 1976).

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. 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" (Fair Labor Standards Act 1938). 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" (*Mills v. Maine* 1993). 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 from the overtime pay requirement (Curran 1994). 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.[45] 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 (*Mills v. Maine* 1993). However, the judge 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 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.[46] 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 (*Mills v. Maine* 1994). The court then appointed a special master to determine the number of overtime hours and the pay owed to the probation officers.[47] 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 (*Mills v. Maine* 1996). 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 precedents that all this time and effort has been wasted" (*Mills v. Maine* 1996). The First Circuit upheld the dismissal in 1997 and the plaintiffs dropped the federal litigation (*Mills v. Maine* 1997).

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 (*Alden v. State* 1997). 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 (*Alden v. State* 1998). 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 (*Alden v. Maine* 1999).[48]

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" (Pochna 1999). 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 by the fact that the president of the Maine State Employees Association (MSEA), the union representing state employees, was himself a probation officer (Pochna 1999). 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" (Carrier 1999a).

The union's campaign quickly delivered results in the state legislature.[49] 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 (Carrier 1999b).[50] The bills were introduced at the beginning of the 2000 session by Saxl and referred to the joint standing judiciary committee.[51] 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."[52] In the second section, it permitted the bill to be applied retroactively only in the case of the probation officers. They could file suit in state court within ninety 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. 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 underlying issue of consenting to suits did

not enjoy the same level of support. By submitting two separate bills, the committee and the legislature were able to address each issue separately rather than together.[53] 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.[54] 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 with" (Kesich 2000). 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" (Carrier 2000). On May 11, the House failed to override the veto, voting 81–62 for the bill, which was less than the two-thirds required. 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 (Meara 2000).[55]

With the election in 2002 of Democrat John Baldacci to governor, the union began negotiations again with the state. Political support for the issue of waiving the state's immunity grew with the new administration in place. In February of 2003, the new House Majority Leader John Richardson reintroduced Saxl's bill to waive the state's immunity.[56] At the same time, the union entered into negotiations with Baldacci's administration in an attempt to reach an agreeable compromise.[57] 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.[58] The new bill extended state wage and overtime protections to state employees, equalizing the treatment between private 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 a remedy to aggrieved parties—as long as

those parties are capable of mobilizing substantial political support for themselves. 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 officers' 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 negotiating with both the state legislature and the governor than the federal government. And finally, Republican control of the federal government beginning in 2001 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. Indeed, Alden himself only received $26.86 from the settlement (Bosworth 2006, 405). 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 not only waive its future immunity, but to also 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.[59] The government's willingness to negotiate with the union and the state employees helped to dampen any external constraints that may have otherwise been applied. It is significant that, unlike the previous two cases, this one involved insiders rather than outsiders. Unlike the Seminole Tribe or College Savings Bank, 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.

KIMEL V. FLORIDA BOARD OF REGENTS

In the term following the *College Savings Bank* and *Alden* decisions, the Court addressed sovereign immunity once again. In *Kimel v. Florida Board of Regents* (2000), the Court upheld the dismissal of a lawsuit alleging violations of the Age Discrimination in Employment Act. 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 (U.S. Congress 2001a). 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 percent of the national average. The agreement also guaranteed the standard 1.5 percent annual salary increase.[60] 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 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 (*Chiles v. United Faculty of Florida* 1993). 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 cor-

rectly. 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 (*Kimel v. Florida Board of Regents* 1996). Subsequently, faculty and librarians from Florida International University joined the suit, bringing the total number of plaintiffs to thirty-six.

The Case

The suit filed by the professors alleged a violation of the federal Age Discrimination in Employment Act (ADEA). 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" (Age Discrimination in Employment Act 1967). 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. 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.[61] The state claim was less appealing, however, because of state damage caps of $200,000, which would work out to only about $5,500 per plaintiff (Florida Civil Rights Act 1992).

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.[62] In April of 1998, the appellate court ruled in a 2–1 decision to dismiss the cases on the basis

of sovereign immunity (*Kimel v. Florida Board of Regents* 1998). 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's 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 (*Kimel v. Florida Board of Regents*). The same five-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's Section 5 powers. The lawsuit was remanded and dismissed on both the ADEA and Florida Civil Rights Act grounds.[63] 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 (Kiehl 2000). 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.[64] 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 administrations. At the state level, Kimel and the other professors found little support for appropriating them the promised money.

Their situation did not go unnoticed, however. The American Association of Retired Persons (AARP) took note of the decision and, concerned about the potentially widespread effects of the decision, pressed Congress to react to prevent future cases (2001). In September of 2000, three prominent Senators on the Health, Education, Labor, and Pensions committee introduced the Older Workers' Rights Restoration Act.[65] 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's spending power found in the Supreme Court's decision in *South Dakota v. Dole* (1987), the Senators were confident that the bill was a constitutional way to get states to waive their immunity. 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 (see U.S. Congress 2001b). Following the hearing, Jeffords, Feingold, and Kennedy reintroduced the Older Workers' Rights Restoration Act.[66] 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 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 108th Congress, but appeared again in the 109th Congress with the Civil Rights Restoration Act of 2006.[67] The bill proposed to waive sovereign immunity for those states that accept federal funds. The bill did not make it out of committee, but with Democratic control of Congress future versions of the bill may have more success. The AARP, for example, has not let the issue drop and still lists legislation addressing the *Kimel* case as one of its legislative priorities (American Association of Retired Persons 2006). Nonetheless, no further action has yet been taken by Kimel or on his behalf.

Implications

Kimel and the other professors never received the Market Equity Adjustments promised in 1991. Even if a bill is passed by Congress permitting federal suits against states to enforce the ADEA, their statute of limitations has passed. The professors clearly lacked political support for action on their claim. At the state level, where any fiscal remedy would have to come from, the state politicians felt little pressure to address the situation. The weakened faculty union was not in a position to advocate on behalf of Kimel and the others strongly because it faced threats to its entire membership that were a higher priority in dividing up scarce resources. The Florida executive branch was clearly unreceptive given its refusal to require the disbursement of the money

initially and its use of sovereign immunity to block the lawsuit. The Florida legislature, controlled by the Republican Party at the time, was unlikely to be sympathetic to the claim independently given the historical tension between the party and labor unions.

That does not mean that there was no interest in addressing the potential problems raised by the decision for other older state employees, however. This battle primarily played out on the federal level. AARP immediately pushed for reform, convincing Senators Jeffords, Feingold, and Kennedy to take action in September of 2000. Despite the submission of the bill, these three senators were not in a position at the time to pass the legislation. While Senator Jeffords remained a Republican at the time, the other two senators were members of the minority party. The federalism revival in the courts was strongly advocated by many of the Republican Party elite, suggesting that absent a popular uproar, legislatively overturning the decisions was unlikely to be a priority for the majority party. Accordingly it is not a great surprise that the bill was unsuccessful in 2000. The political situation shifted in 2001, however. With an evenly divided Senate, Senator Jeffords's defection from the Republican Party gave the Democrats a bare majority. Those sympathetic to AARP's plea were now in a position to do something about it. The bill passed out of committee but nonetheless, it did not receive a vote on the floor. In all likelihood, with such a tightly divided Senate, the Democratic leadership decided the bill was simply not a high-enough priority given the other work that needed to get done. With the return to Republican control of the Senate in 2002, the bill once again faced an uphill battle.

The lack of response by the federal government thus far does not necessarily mean that the state should feel safe. As with *College Savings Bank*, the state risks serious repercussions if age discrimination is perceived 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" (U.S. Congress 2002, 10). The fact that the Senate bill made it out of committee suggests that there is support for federal intervention through the threat of spending restrictions. A mobilized constituency

that sensed an injustice could easily make that a reality, undermining state authority and strengthening the federal government's position.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA V. GARRETT

The most recent major case to protect states from federal intervention through sovereign immunity is *Board of Trustees of the University of Alabama v. Garrett* (2001).[68] The case dealt with the thorny issue of sovereign immunity from money damages under the Americans with Disabilities Act (ADA). While the interest in the case was high at the time it was decided, the response in the aftermath offers some insight into the impact of sovereign immunity. Although subsequent developments have largely eliminated the pressure for action, the limited initial response suggests the risks when groups that historically lack political voice are denied access to the courts.

Background

Patricia Garrett, a nurse at the University of Alabama, Birmingham hospital since 1977, was promoted to Director of Nursing, Women's Services/Neonatology in 1992. In August of 1994, however, she was diagnosed with breast cancer. Her doctors initiated an aggressive treatment plan including a lumpectomy, radiation treatment, and chemotherapy. While she was undergoing treatment, her supervisor Sabrina Shannon, Associate Executive Director of the hospital, allegedly pressured her to take a leave of absence or transfer to a lesser job, despite Garrett's satisfactory performance of her duties. A coworker told Garrett that Shannon did not like "sick people" and had a history of getting rid of them. When she recounted this pressure to her doctor, he suggested that for her health she should take a leave. From March to July of 1995, Garrett took an approved leave of absence from her work.

In July of 1995, Garrett had recovered sufficiently to return to work. When she got in touch with Shannon, however, she was told that the hospital did not want her back. The hospital's personnel department interceded on Garrett's behalf and she was allowed to return to her job. Garrett had some minor difficulties performing physical tasks with the same precision as before her sickness and treatment, but did not ask for any accommodation. After 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.[69] Garrett found a position as a nurse manager at a convalescence home operated by UAB and voluntarily transferred there, taking a $13,000 pay cut. In January of 1997, Garrett filed a lawsuit against the hospital alleging a violation of the Americans with Disabilities Act, the Rehabilitation Act, and the Family Medical Leave Act.

The Case

The Americans with Disabilities Act was passed in 1991 after years of effort by disabled activists. The act covers a large variety of access and discrimination issues, involving both public and private actors. Title I of the act addresses employment, specifically prohibiting "discriminating against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment" (Americans with Disabilities Act 1991). The act requires "reasonable accommodation" for the person with the disability and prohibits employers from "utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability" (Americans with Disabilities Act 1991).[70] The act specifically included states in its scope and rejected state disability laws as sufficient protection, citing serious deficiencies in both scope and remedies.[71] Alabama, in fact, lacked any private right of action to enforce its disabilities laws and denied any compensatory damages even in cases of intentional discrimination. In her suit, Garrett specifically claimed that the hospital intentionally and maliciously discriminated against her because of her disability, failed to accommodate her by not proffering another position of comparable salary and status, and retaliated against her for requesting such accommodation. Garrett also alleged violations of the Rehabilitation Act of 1973 and the Family Medical Leave Act (1993), although the Supreme Court did not consider those issues.

In response to Garrett's suit, the university asked for summary judgment on the ADA, Rehabilitation Act, and Family and Medical Leave Act claims on the basis of its sovereign immunity.[72] Garrett responded by pointing out that Congress explicitly relied on the Equal Protection Clause and its Section 5 powers to enact the three laws, permitting it to legitimately waive the state's immunity. *Kimel* had not yet been decided, so it was unclear how much leeway the Supreme Court was willing to grant Congress in the realm of the Fourteenth Amendment. In 1998, the district court rejected this argument and dis-

missed the case (*Garrett v. University of Alabama Board of Trustees* 1998). Garrett appealed to the Eleventh Circuit and her case was combined with that of Milton Ash, an employee of the Alabama Department of Youth Services who was also making an ADA claim. In October of 1999, the Eleventh Circuit overturned the district court and ruled that Congress did have the authority under Section 5 of the Fourteenth Amendment to waive state immunity in the ADA and the Rehabilitation Act (*Garrett v. University of Alabama Board of Trustees*).[73] The state appealed to the Supreme Court and in 2000 the case was granted certiorari on the question of the ADA.[74] The following year, in another 5–4 decision, the Court held that Title I of the ADA exceeded Congress' authority as it applied to the states (*Board of Trustees of the University of Alabama v. Garrett* 2001). The Court overturned the Eleventh Circuit and remanded the case for dismissal.

Consequences

The Garrett case drew more than twenty amicus curiae briefs representing more than 160 interest groups, most in support of Garrett. The case received national attention around the time of oral arguments and when the decision was handed down. However, unlike the quieter cases such as *Alden* or *Seminole Tribe*, the political response in the aftermath has been very limited. There are several reasons for that, which will be discussed below.

For Patricia Garrett, the case has taken an unusual turn. Garrett found little political support after the decision to address her specific claim in the state or federal government. However, the courts opened up another avenue for resolution. The Eleventh Circuit initially dismissed the case after remand from the Supreme Court, but then granted Garrett's request for a rehearing. At the rehearing, Garrett raised the possibility that Congress's mention of the Spending Clause in the Rehabilitation Act could be sufficient to waive the state's immunity.[75] Cases such as *Seminole Tribe* explicitly addressed Congress's authority under the Commerce Clause in Article I of the Constitution, but the jurisprudence on the Spending Clause in Article I is more muddled.[76] The University of Alabama surprisingly agreed with Garrett that it was an unanswered question and suggested that the case be remanded for further consideration.

The Eleventh Circuit obliged and remanded the case to the district court to "analyze the issue and, if it deems appropriate, to develop an evidentiary record" (*Garrett v. University of Alabama Board of Trustees* 2001). In September of 2002, after hearing arguments from

both sides, the district court ruled in favor of the university and rejected the spending clause justification (*Garrett v. University of Alabama Board of Trustees* 2002). The judge concluded that the alleged waiver of immunity did not meet the community standards of fairness because there was not a clear agreement to waive immunity in return for accepting federal funds. The following year, in September 2003, the Eleventh Circuit reversed the district court's ruling, concluding that the state did in fact waive its immunity by continuing to receive federal funds. It remanded the case back to the district court for resolution (*Garrett v. University of Alabama Board of Trustees* 2003).[77]

The District Court, in January of 2005, granted summary judgment for UAB on the Rehabilitation Act claim after reviewing the facts of the case (*Garrett v. University of Alabama Board of Trustees*). Judge William Acker found no discrimination on the part of UAB, pointing out that Garrett's transfer to the nursing home was voluntary. Evincing no small amount of frustration, Judge Acker pointed out that the entire case could have been resolved years earlier if the Spending Clause grant of jurisdiction through the Rehabilitation Act was addressed in the initial briefs. The case is on appeal once again to the Eleventh Circuit, although this time for substantive rather than jurisdictional questions. In the meantime, Garrett has retired from nursing (Associated Press 2002). Nonetheless, Garrett received something that none of the other plaintiffs in these cases did—a hearing of her grievance. That the result was unfavorable for her is, in a sense, irrelevant. Not all litigants deserve victory in court. What is significant is that her claims were presented and given consideration. The decision to dismiss her case was based on the substance of her claim rather than a jurisdictional argument by the state.

Of perhaps more interest is the overall lack of response to the expansion of sovereign immunity to cover the Americans with Disabilities Act. The state initially faced a threatened response to the decision, but the challenge failed to materialize. The Supreme Court decided the case in February of 2001, and in March State Senator Wendell Mitchell introduced the Alabamians with Disabilities Act.[78] The act, crafted by Mitchell, the Governor's Office on Disabilities, and the Alabama Disabilities Advocacy Program, largely mirrored the Americans with Disabilities Act. It provided similar protections and explicitly included state employees in its scope.[79] The enforcement provisions and damages awards were a substantial improvement over existing state law, permitting individual suits with actual and punitive damages. Mitchell's bill was solidly supported by disabled groups in Alabama such as the Alabama Disabilities Action Coalition. Mitchell,

chair of the Business and Labor committee, also signed up twenty co-sponsors in hopes of smoothing the bill's passage. The state Business Council opposed the bill initially in the Senate, and received several concessions ("Alabama Struggles to Pass a State ADA" 2001). Most noticeably, amendments struck the clause permitting damages and replaced it with attorney's fees and back pay where actual damages could be shown. On May 3, the Senate passed the amended bill unanimously and sent it to the House.

The passage of the bill by the Senate appears to have stirred up stronger opposition among the business community. The Alabama Civil Justice Reform Committee, a tort reform group supported by businesses and trade groups in the state, released a report on the act that called it "well-intentioned, but in reality would open the floodgates for abuse by the trial lawyers." They were disappointed that "pro-business Senators did not realize that the controversial bill was up for consideration," hinted that it was done while the Senate "was handling non-controversial legislation," and promised a number of amendments in the House (Alabama Forestry Association 2001). Other groups also proclaimed their opposition. The Industrial Relations Board, a state agency, was concerned about the costs of arbitration. Human Resource Managers, an industry group, complained that the bill was merely a duplication of the ADA ("Alabama Struggles to Pass a State ADA" 2001). The bill was referred to the House Commerce Committee, but no hearing or vote was ever scheduled on the act. It died at the end of the session and was not subsequently reintroduced. The Alabama Disabilities Advocacy Program, which helped craft the legislation, no longer lists passage of the act as one of their priorities and it appears to be effectively dead.[80] The Alabamians with Disabilities Act was the only state bill introduced on the issue and no federal bills have addressed the question of state compliance with Title I of the ADA. For the state, negative consequences of the *Garrett* decision have been virtually nonexistent.

The Implications

While Garrett's case presents some interpretative challenges because of her later success in getting the Rehabilitation Act claim heard, there are still significant lessons to be drawn from what happened. Between the time of the Supreme Court's decision and the Eleventh Circuit's surprising holding in 2003, there was a period where Garrett was similarly situated to the other sovereign immunity plaintiffs. She alleged a grievance and was denied a hearing by the state's use of sovereign

immunity. Unlike in *Seminole Tribe* or *Alden*, though, there was little action taken to address the situation. Why there was so little response in this case at that time? There are several potential reasons that emerge. The first is the challenge of forming coalitions between disabled state employees and other more prominent and powerful groups. As with *Kimel*, it was difficult for disabled state employees to make the case that this ruling affects all state employees. Most state employees are not disabled and are unlikely to see their rights as threatened by the ruling in the way that the employees in the *Alden* decision did. Garrett's other source of potential group support, the Alabama State Nurses Association, is limited in the same way. With a mix of both public and private nurses, it is even more difficult for disabled nurses who are state employees to achieve unity with the other employees.

Another potential reason relates to the political challenges faced by the disabled community in recent years. While *Garrett* is uniformly criticized, its relatively limited scope further isolates those affected by it. Since the Court explicitly refused to address whether sovereign immunity protected states from Title II challenges, which deals with the administration of public services and effects virtually all disabled persons, only state employees are implicated by the decision. The threat of a successful sovereign immunity defense to Title II claims was an issue of serious concern among the disabled community, although the Court's 2004 decision in *Tennessee v. Lane* permitting suits to go forward relieved many.[81] Scarce resources were further thinned by the Court's decisions in *Alexander v. Sandoval* (2001) and *Barnes v. Gorman* (2002). *Sandoval* prevented individual suits under the ADA that make disparate impact claims while *Barnes* rejected punitive damages in ADA Title II cases alleging discrimination by public entities. Both of these decisions implicated wider groups of disabled activists and drew further resources away from battling the consequences of the *Garrett* decision. Finally, the fact that Garrett's Rehabilitation Act claim was still pending may also have kept the disabled community from pressing the issue any further. It appears, then, that Garrett and other disabled state employees lack both the resources and political support to successfully engage in electoral or legislative politics to remedy discrimination when courts are not available.

CONCLUSION

What does the review of recent sovereign immunity cases tell us about their impact? Two primary patterns emerge with regard to the plain-

tiffs. Groups or individuals that are shut out of the courts are able to respond 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 for both the tribe and tribal gaming 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 not only for the probation officers, but for other state employees as well. 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.

College Savings Bank itself did not experience the same level of success as the Seminole Tribe or the probation officers. Nonetheless, there was a reaction to the ruling in the case. The cause of reforming intellectual property law was adopted by other companies and trade groups and they have pressured Congress to take action. It should be noted, though, that these other methods often result in suboptimal outcomes for plaintiffs. The Maine probation officers received some compensation, but only a part of what the special master had determined was due to them. Passage of a Congressional patent and trademark bill would make state waivers of immunity voluntary and none of the bills would help College Savings Bank itself. None are perfect results, but they are at least progress toward accountability.

The two later cases point to a different trend. Both *Kimel* and *Garrett* represent plaintiffs that have more limited resources and are less successful at building coalitions. Kimel found little interest in aiding him and his fellow litigants. There was some support for protecting older workers more generally, although the support was not strong enough to generate any final action by either the state or federal government. Garrett could not even generate the political support for protecting disabled state employees, much less addressing her particular circumstances. These plaintiffs are relatively weak politically precisely because they can be divided from their larger classes. Older state

employees are distinct both from younger state employees and older private employees. Disabled state employees face the same calculation. While each case generated cries of outrage in the press from broader interest groups, after the initial decision the causes have not received the same level of intensity or focus as other issues. This is consistent with findings by Strolovich (2006) that advocacy groups often fail to adequately represent their most disadvantaged members. Ironically, these are the 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. It is difficult to imagine that widespread violation of patent and other intellectual property law by states would not result in a severe response from interested companies. Microsoft is not likely to sit idly by while states install pirated copies of Windows on their computers. 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 in the same way that states were prohibited from contracting debts following the defaults and repudiations of the 1840s. The use of sovereign immunity could, in fact, undermine the very policy effect that states are trying to achieve.[82] At best, states can utilize sovereign immunity effectively only against those groups that are weak 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. While the states do not gain an appreciable amount of authority or discretion, they ignore the rights of the most disadvantaged.

Hibbs and Lane

Noticeably absent from the discussion above are the two most recent major decisions on sovereign immunity by the Supreme Court, *Nevada Department of Human Resources v. Hibbs* (2003) and *Tennessee v. Lane* (2004). In *Hibbs*, a 6–3 decision upheld the portion of the Family Medical Leave Act that waived sovereign immunity for the states. In *Lane*, a 5–4 ruling upheld the applicability of Title II of the Americans with Disabilities Act's accessibility requirements to states. Since sovereign immunity was not a successful defense for the states in these cases, they do not follow the pattern of the other recent cases.

Nonetheless, it is worth considering how these two cases fit into the preceding analysis.

First, they offer a test of what happens to states and litigants when sovereign immunity is no longer an issue. In *Hibbs*, for example, the plaintiff, William Hibbs, was able to present his case in district court in the fall of 2004. After reviewing the initial filings, the district court judge granted summary judgment for the state and dismissed the suit (Whaley 2004).[83] While Hibbs was unsuccessful, the dismissal was based on the presentation of evidence rather than the status of the state. An independent body was able to determine whether the state violated its commitment on family medical leave or not. George Lane and the other plaintiffs in the ADA suit enjoyed much greater success. They settled with Tennessee in March 2005 for $967,000 in attorney's fees and damages as well as a commitment by the state to make all courthouses accessible to the disabled (Associated Press 2005).

Consistent with the discussion above, it is also interesting to consider what might have happened with these issues had the Supreme Court decided differently. Unlike the ADA or ADEA, the FMLA affects virtually all state employees. It is more analogous to *Alden* than to *Garrett* or *Kimel*. Given the scope of employees affected, it is likely that there would have been sufficient resources and political support to remedy the problem even if sovereign immunity successfully kept such cases out of the courts. Likewise with Title II of the ADA, the group of impacted people would be much larger than in Garrett's Title I case. Since Title II involves accommodation requirements for all disabled citizens, the impetus for legislative change would have been much stronger. It is likely that the disabled community could have rallied enough resources and political support to achieve at least some gains outside the courts.

Perhaps Justice O'Connor, the swing vote in both cases, recognized the Court's limitations and decided to let sleeping dogs lie in these instances. Regardless of the reasons why the two cases were resolved the way that they were, the decisions likely ultimately had little impact on the overall policy outcomes in the areas of disabled access and worker leave time. With sufficient resources and political support, sovereign immunity as a doctrine is only a speed bump rather than a barrier. In chapter 7, I will discuss the implications of these cumulative findings and offer suggestions for possible responses.

This page intentionally left blank.

Chapter 7

Conclusion

I began the book with a series 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? What impact do these decisions have on the expansion or contraction of state authority? The preceding study provides the tools to begin to answer these questions. The questions get at the impact of sovereign immunity on two different dimensions. How did the decisions affect the individual or groups suing the state? And how did the doctrine influence the state and its scope of authority?

Each chapter considered both of these questions and the results illuminate our understanding of how and why sovereign immunity affects the interaction between citizen and state. It is worth considering these results cumulatively. I will review the lessons learned on both of these dimensions along with the implications for understanding the impact of sovereign immunity. I will conclude with suggestions for how to address these implications.

SOVEREIGN IMMUNITY AND THE PLAINTIFFS

The first dimension to consider is the impact of the doctrine on those individuals or groups making a claim against the state. To reiterate, the

core questions are what happens to individuals who are wronged by the state? And must they simply accept their losses or do they resort to alternative means of redress? In answering these questions, three variables play a key role. Plaintiffs can be arranged across a spectrum of resources, political support for the plaintiff, and political support for the general issue. Some plaintiffs controlled extensive financial resources while others had only their salaries. Some plaintiffs were major players in state or federal politics while others were not in a position to garner interest from political coalitions. Keeping these three factors in mind helps to explain the variation in outcomes that we see across the many different cases. Why did the Prince of Luxembourg's estate succeed while Dan Kimel did not? Table 7.1 presents the plaintiffs across these three variables, with the acknowledgment that breaking this down into yes/no categories obviously oversimplifies the spectrum of resources and political support available. However, the simplification is useful in that it serves to highlight the disparities between those with and those without. For comparison purposes, Table 7.2 presents the information from Table 1.1 again.

How well do the predictions from chapter 1 for plaintiff success match up with the realities of the cases examined? As expected, the results of the case studies fit the expectations quite well. For example, the probation officers in *Alden* combined with the state employee union to exert substantial and successful political pressure on the state. The likelihood of success for the plaintiff was high and the probation officers did indeed receive compensation. Cases with plaintiffs in this position are relatively rare since disputes are unlikely to ever reach the level of litigation. Most of these conflicts play out in the other political branches. Where such cases do come to court, sovereign immunity has only a limited effect. It protects the state in the short term from an immediate response and may shift the status quo slightly in the state's favor. However, these plaintiffs are always likely to succeed in the long run.

On the opposite end of the spectrum, Patricia Garrett had minimal resources and little support for her as a plaintiff. In those circumstances, it is not surprising that she was unsuccessful in arenas outside of the courts.[1] Prior to the current rise of discrimination laws, these types of cases were also relatively rare. Individuals who lack resources and political support are unlikely to be able to afford a lawsuit in the first place. Historically, it is not surprising that these sorts of plaintiffs had little voice. The rise of contingent fees by lawyers and the expansion of standing by both federal and state governments have opened the courts to these plaintiffs. Sovereign immunity, however, serves to close the door and these individuals are left with no options.

TABLE 7.1

PLAINTIFF'S RESOURCES AND POLITICAL SUPPORT

	Resources	*Political Support Plaintiff*	*Political Support Issue*	*Plaintiff Success?*	*Harm to state?*
Hollingsworth v. Virginia	Yes	No	No	No	No
Vassall v. Massachussetts	Yes	No	No	No	No
Cutting v. South Carolina	Yes	Yes	Yes	Yes	No
Moultrie v. Georgia	Yes	No	No	No	No
Creditors in 1840s	Yes	No	Yes	No	Yes
Creditors in 1870s	Yes	No	No	No	Yes
Seminole Tribe v. Florida (pre–2001, post–2004)	Yes	Yes	Yes	Yes	Yes
Seminole Tribe v. Florida (2001–2004)	Yes	No	No	No	No
College Savings Bank	Yes	No	Yes	No	No
Alden v. Maine	No	Yes	Yes	Yes	Yes
Kimel v. Board of Regents	No	No	Yes	No	No
Garrett v. Board of Trustees	No	No	No	No	No

TABLE 7.2
EFFECTS OF RESOURCES, POLITICAL SUPPORT FOR PLAINTIFFS, AND POLITICAL SUPPORT FOR ISSUE

Resources	*Political Support Plaintiffs*	*Political Support Issue*	*Plaintiff's Likelihood of success after dismissal*	*Risk to states*
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

Those with resources but lacking political support for their particular claim are in a similar position. These are individuals or groups who are wealthy and connected, but for various reasons are politically unpopular. Land speculators, Loyalists, and creditors in the 1870s all fit this description. The plaintiffs in these cases possess sufficient resources to use the courts, but are unable to turn those resources to their advantage in the political arena. These plaintiffs, like those lacking resources, are unable to recover anything from the states. Even in cases where plaintiffs had resources and there was political support for broad reform, they were unsuccessful if there was no direct political support for the plaintiff. Creditors in the 1840s fit this description and went without any political remedy. College Savings Bank was in a similar position and faced the same result. The only plaintiffs who succeeded enjoyed some political support for their particular situation. This appears to be a necessary condition for plaintiff success.

Seminole Tribe offers an intriguing case study because of the substantial changes that occurred in their situation over time. In the chart, the Seminole Tribe occupies two lines—one pre-2001/post–2004 and one for 2001–2004. The reason is that during the course of the Seminole Tribe's struggle to expand its gaming, its political support at the federal level dropped. The election of George W. Bush as president dealt a setback to the tribe and removed the influential support it previously received from the Secretary of the Interior. Not only did the tribe specifically lose political standing, but the issue of Indian gaming in general dropped in influence. The tribe's options for recourse prior to January 2001 were different than those after Bush's inauguration. The reverse that occurred in Florida in 2004 regarding gaming restored the

tribe to its previous position and made success very likely. The lesson from this is that circumstances change and groups that appear powerful initially may prove to be less so over time. This is true to a lesser extent for the land-speculating plaintiffs in the 1790s. Although the Indiana Company and the South Carolina Yazoo Company did not find substantial popular support among voters for out-of-state land speculation, they did possess political support for their own causes through contacts and intrigue. As the fortune of these land speculators faded, however, so too did their direct political support as well as their resources. The categories above are not necessarily fixed. A group can move from one category to the other over time and that will have serious implications for their ability to adjust to a sovereign immunity defense.

SOVEREIGN IMMUNITY AND STATE AUTHORITY

The second dimension involves the impact of sovereign immunity on the states themselves. What happens to the states that rely on sovereign immunity? Are there any repercussions? What impact do these decisions have on the expansion or contraction of state authority? The factors that are of greatest significance for the states are plaintiff resources and political support for the underlying issue. Where states use sovereign immunity to deflect lawsuits brought by plaintiffs who lack resources or any sort of political support, the negative consequences are negligible. The state can successfully rely on sovereign immunity to deny access to federal courts in these instances. At these times, the state does increase its autonomy, although only slightly and only at the expense of the weak and less powerful.

Where plaintiffs do have resources and political support exists both for the plaintiff and broader reform, however, a state relying on sovereign immunity is taking serious risks. *Alden* and *Seminole Tribe* are excellent examples of what states face in these circumstances. In the wake of *Alden*, the state agreed to waive its immunity in state court for state employees including maritime employees. In *Seminole Tribe*, the Secretary of the Interior's increased role came at the expense of the states. Both cases resulted in diminished autonomy. Bosworth's study of sovereign immunity waivers by the states supports this conclusion, indicating that political mobilization of interest groups in the state is a necessary condition for waivers to pass.[2]

Only one case, *Cutting v. South Carolina*, directly contradicts expectations. The predicted risk of reduced autonomy for the state was high, but South Carolina escaped with no harm in that regard. What

explains this difference? South Carolina, faced with pressure from France, Portugal, and the United States government, was unquestionably in a dangerous position. The state, however, immediately conceded its obligation to pay its debt and offered little to no resistance to the recovery of the money. By providing the plaintiff with the sought-after remedy, South Carolina was able to reduce the chances of France taking action against the state. To a lesser extent this dynamic was also present in *Alden* and *Seminole Tribe*. The ultimate harm to the state's autonomy in both cases was relatively mild. This leads to an important clarification to the initial predictions. While the risk may be high when the plaintiff controls resources and both types of political support, immediate acquiescence to the plaintiff's demands makes it possible for states to avoid more substantial negative outcomes.

In light of this, cases with only resources and support for the issue actually present the greatest threat to states. When the state does not acquiesce to at least some of the plaintiff's demands, the conflict is likely to continue. When plaintiffs lack any means of response, this is not serious. When those resources and opportunities are available, however, states are likely to face severe consequences. For example, by shutting out creditors in the 1840s, those states suffered significant repercussions that undercut their ability to compete for the "people's affection."[3] The plaintiff's resources were sufficient to deliver economic retribution while the widespread sense of hostility toward state legislatures driven largely by Jacksonians opened up the door to severe political restrictions. The loss of access to credit and the constitutional restraints that followed were a serious blow to the states' ability to lead the way in areas such as railroad development. In the wake of *College Savings Bank* and *Florida Prepaid*, states are playing with fire by shirking on patent and trademark laws. States have avoided a backlash thus far by keeping patent and trademark violations to a minimum. If the states are not very cautious, the numerous business groups opposed to the application of sovereign immunity in this area promises a swift and serious response. States have the right to exercise sovereign immunity in suits of this type on paper, but the actual use of it as a defense bears enormous risk. When plaintiffs with resources are able to resort to external sanctions, the states can end up paying a higher cost than if they simply submitted to the original suit. It appears that Ernest Young's concern about immunity federalism failing to protect state authority is supported by the empirical record (1999, 3).

Lacking resources and direct political support for the plaintiff does not mean that states are free from risk. In cases such as *Kimel*, where political support certainly exists to protect against age discrimination,

abuse by the states will likely bring severe consequences. The states do not face as much risk, however, as in the previous cases because the plaintiff has a harder time mobilizing that broader political support. If states are cautious and cognizant of the dangers, they can avoid paying a political cost, but again the actual use of sovereign immunity in these circumstances bears a risk that outweighs its benefits.

Finally, among the most common sovereign immunity cases historically are those where plaintiffs have resources but lack any type of political support. Where the plaintiffs control a resource that states need, such as the creditors from the 1870s, states are going to face extra-legal sanctions. If those resources are not necessary for the state, however, money and time alone are unlikely to be successful. Plaintiffs ranging from land speculators in the 1790s to the Seminole Tribe between 2001 and 2004 were largely powerless to do much of anything to damage state autonomy in the absence of political support.

IMPLICATIONS

What does all this tell us about the current debates over sovereign immunity? First, proponents of sovereign immunity who argue that it is a powerful tool to increase state authority are mistaken. In limited circumstances, states may be successful in protecting their autonomy, but such action comes with a risk. Offending the wrong plaintiff can be a costly mistake. States that regularly use sovereign immunity are taking risks without understanding the potential costs. Those who are genuinely concerned about reinforcing state authority would be well advised to take a different approach. Measures such as tort reform could serve to limit the state's liability without triggering the same hostile reaction. Of course, any such measure sweeping too widely would simply activate the same political dynamics present in the sovereign immunity cases. Denying the public its perceived right to governmental accountability is always problematic.

The preceding study also shows that those who disproportionately bear the burden of sovereign immunity are the weakest and most vulnerable in our society—precisely those groups to who courts can uniquely offer an opportunity for accountability. My conclusions are close to those of Rubin and Feeley (1994). In their survey of federalism, they find that it "achieves none of the beneficial goals that the Court claims for it" (Rubin and Feeley 1994, 907). Likewise, I find that sovereign immunity achieves none of the beneficial goals that the Court claims for it.

SUGGESTIONS FOR THE FUTURE

Given these implications, what can be done to protect both state autonomy and a plaintiff's right to a remedy? A repeal of the Eleventh Amendment, although appealing to those concerned about sovereign immunity, is simply not practical. The same states that rely on it to avoid lawsuits would need to ratify an amendment removing that protection. It is possible that a substantial political shift in enough states could result in the ratification of an amendment, but such circumstances are extremely unlikely to occur barring very high-profile sovereign immunity cases that directly impact nearly all of the population. Another possibility is to follow the example of Minnesota, Illinois, and North Carolina to write immunity waivers into state law. The legislatures in each of these states limited the reach of the Supreme Court's precedent by passing laws waiving the state's immunity in federal courts under each of the laws addressed by the Court's opinions (Bosworth 2006, 395–403). While potentially effective, it is no more likely to succeed generally than a repeal of the Eleventh Amendment, for the same reasons. Despite the general ineffectiveness of sovereign immunity, a significant number of states are unlikely to be supportive of relinquishing any tools that might potentially protect them from future assaults on the treasury. Indeed, Bosworth finds that similar measures failed in five other states.

There are two options that are more realistic. The first is that state agencies could retain the power of sovereign immunity but choose not to exercise it. Given that most applications of sovereign immunity carry a substantial risk for the state, it is actually in the state's best interest long-term to avoid it as a defense. The fact that more state attorneys general signed onto an amicus brief in favor of Patricia Garrett's right to sue than supported the right to use sovereign immunity lends support to this as a potentially realistic solution. States could rely on either existing or more stringent frivolous lawsuit rules to limit the number of meritless cases they face. The challenge with this approach, of course, is that short-term goals can sometimes carry greater weight politically. Not all states are willing to respond to suits that could result in large damages even if over time that would be a better strategy for the state.

Alternatively, courts could establish a narrower construction of sovereign immunity. One potential loophole long promoted by legal scholars is the distinction between diversity jurisdiction and federal question jurisdiction. Authors such as William Fletcher (1983) argue that the Eleventh Amendment intended to limit diversity jurisdiction,

where courts can hear disputes because the parties are from different states, not federal question jurisdiction. Federal question jurisdiction is the authority of the federal courts to hear any case pertaining to federal laws. State sovereign immunity protection, then, should not extend to cases where states violate federal laws. The "diversity theory" as it has come to be known has been supported by a number of subsequent scholars (see Jackson 1988; Amar 1987; Pfander 1998; Orth 2000). Indeed, Vicki Jackson concluded that the body of scholarly work on the subject is "remarkably consistent in its evaluation of the historical evidence and text of the amendment as not supporting a broad rule of constitutional immunity for states" (1988, 44). The diversity theory was also adopted as one of the rationales that the dissenters used in the recent sovereign immunity cases (see *Seminole Tribe of Florida v. Florida* 1996, 101–116). Regardless of the legal theory adopted, however, it is well within the Court's ability to limit the application of sovereign immunity, just as it was responsible for its expansion.

What would the consequences of the loss of sovereign immunity be for the states? While we cannot know for certain, we can look to cities and counties for examples of governmental bodies that do not enjoy sovereign immunity. Beginning in the 1860s, the Court repeatedly denied the protection of sovereign immunity to cities and counties (see *Cowles v. Mercer County* 1869; *Riggs v. Johnson County* 1868; *Lincoln County v. Luning* 1890). How did these entities fare in the absence of sovereign immunity? Despite similar levels of debt for railroad aid as that contracted by states, by 1889 municipal bonds were ranked second only to federal securities on Wall Street as quality investments (Orth 1987, 118). More recently, neither New York City nor Orange County was protected by sovereign immunity during their bankruptcies, yet they managed to recover (Fuchs 1992; Baldassare 1998). Cities and counties are accountable if they violate federal antidiscrimination laws, but have not collapsed under the crushing weight of frivolous lawsuits.[4] These examples strongly suggest that states would likewise not be fundamentally weakened in the absence of sovereign immunity.

Perhaps most importantly, limiting the reach of sovereign immunity is consistent with the idea of a government that is responsive to its citizens. The ability to hold government accountable should not be restricted exclusively to those with resources and political support. In a limited government that prides itself on democratic accountability, the courts have an important role to play. There is an old legal maxim that there is no right without a remedy. By removing any legal remedy,

sovereign immunity serves to deny the rights of those seeking redress. That is not something that should be done lightly and the costs of such actions must be weighed carefully. In the case of sovereign immunity, the costs are high while the benefits are marginal. That alone should be sufficient to give the current majority on the Court and their supporters pause.

Notes

CHAPTER 1

1. It is worth noting that the Court's decisions have been moving in the opposite direction of other federal unions, especially the European Union. See Pfander (2003) for a comparison of the two approaches.

2. The Court's most recent decisions on sovereign immunity are notable exceptions, suggesting a possible softening of the doctrine. In *Nevada Department of Human Resources v. Hibbs* (2003), the Court upheld the provision of the Family Medical Leave Act that permitted individuals to sue states. In *Tennessee v. Lane* (2004), the Court upheld the application of Title II of the Americans with Disabilities Act to the states with regard to access to courts. In *U.S. v. Georgia* (2006), the Court again upheld the application of Title II of the ADA to the states as long as the Title II claims are also specific claims of Fourteenth Amendment violations. And in *Central Virginia Community College v. Katz* (2006), the Court rejected Virginia's sovereign immunity claim with regard to bankruptcy court. I will discuss these cases and how they fit into the overall analysis of state sovereign immunity in greater detail in chapter 6. It is also worth noting that these recent cases are not the only instances of finding against the states. See, for example, *Lapides v. University System of Georgia* (2002) (state could not remove an otherwise valid case from state court to federal court and then claim a sovereign immunity defense); *Wisconsin Department of Corrections v. Schacht* (1998) (federal court could hear remaining claims that were not protected by the Eleventh Amendment); *California v. Deep Sea Research* (1998) (Eleventh Amendment did not bar federal jurisdiction over an admiralty suit where the state did not possess the property in question); *Hess v. Port Authority Trans-Hudson Corporation* (1994) (bi-state railway created by interstate compact was not entitled to Eleventh Amendment immunity).

3. For a historical review of the concept of split sovereignty in the United States, see McDonald (2000). This is not a universally accepted description of sovereignty in the early United States. In *Chisholm v. Georgia* (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.

4. Most of the scholarly literature is critical of the Court's decisions and has questioned the wisdom of the entire doctrine of sovereign immunity since the late 1970s. Legal scholars Martha Field, William Fletcher, and John J. Gibbons were pioneers in undermining the historical arguments in favor of sovereign immunity, arguing instead that the intent of the Eleventh Amendment was to restrict only diversity jurisdiction. See, for example, Field (1978a), Field (1978b), Fletcher (1983), and Gibbons (1983). For more current analyses of the doctrine, see Okin (2001), Chemerinsky (2001), and Noonan (2002).

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

6. I do not include any period from the early twentieth-century in my analysis. As explained in chapter 2, from 1908 through the early 1970s, sovereign immunity as a doctrine was weakened substantially with a number of exceptions and limitations. The current series of cases are more akin to the nineteenth-century cases in terms of the prominent role of sovereign immunity.

7. This relationship between the case studies will be developed more thoroughly in chapter 6.

8. See, for example, Shapiro (1995), Elazar (1987), Peterson (1995), and Frey and Eichenberger (1999). This project also speaks to skeptics of federalism, such as Rubin and Feeley (1994). They contend that federalism does not achieve any of the beneficial goals the Court claims for it. I test a subset of this claim with regard to sovereign immunity.

9. For a discussion of the Court's approach to federalism, see Brown and Enrich (2000), which explores the Court's return to nineteenth-century notions of federalism, and Farber (2000), which suggests that the Court's recent federalism cases reflect a sense of personal allegiance to certain aspects of federalism.

10. It is important to attempt to define what the Court means by dignity. Even if the resulting actions are harmful to the states, there can still be some dignity inherent in the ability to choose freely. Evan Caminker, however, has persuasively argued that the Court's professed concern with maintaining state dignity does not match its actions very well. He concludes that the Court is more concerned with particular federalism values that enhance state authority and views the use of dignity language as an instrumental approach to achieve that end (Caminker 2001). Given this instrumental concern, dignity in this context can be understood practically as a proxy for state authority, and I will adopt that definition throughout. Even where dignity is not purely instrumental, it is difficult to conceive of its enhancement by shirking debts and denying rights. Resnik and Suk address this in a recent article. They defend the application of dignity as a distinct concept to states, but argue that such dignity is not comparable to the dignity held by individuals. As such, the role-dignity of states

should not trump the accountability of states for their behavior toward individuals (Resnik and Suk 2003).

11. Two of the most notable recent works in this vein are Rosenberg (1991) and McCann (1994).

12. In fact, using the courts to channel international hostility was one of the prime reasons that the federal court system was designed. For more on this argument see Smith (N.d.).

13. Such cases could emerge where there is a conflict between political support at the federal level and political hostility at the state level. In these instances, federal preemption is likely to result in a significant loss of state autonomy.

14. Permitting courts to address a problem can sometimes provide an attractive alternative to politicians seeking to distance themselves from difficult and politically unpopular decisions. For a theoretical discussion of this, see Holmes (2003, 25–28).

CHAPTER 2

1. These subjects will be covered in more detail in chapter 3.

2. See, specifically, *Vanstophorst v. Maryland* (1791); *Oswald v. New York* (1792); *Vassall v. Massachuse*tts (1793); *Cutting v. South Carolina* (1796); *Moultrie v. Georgia* (1797); and *Hollingsworth v. Virginia* (1798).

3. For details on the facts of the case, see chapter 3 and Mathis (1967).

4. At this point in the Supreme Court's history, the Justices still wrote their opinions *in seriatim*, meaning that there was no single opinion of the Court. Each Justice announced their reasoning and result and the result with the most Justices behind it was the victor. This did not change until John Marshall came on the Court.

5. Georgia was suing two citizens of South Carolina at the same time that *Chisholm* was being considered. See *Georgia v. Brailsford* (1792).

6. New York ratified the amendment on March 27, 1794. The remainder of the states that ratified and the dates of ratification are: Rhode Island, March 31, 1794; Connecticut, May 8, 1794; New Hampshire, June 16, 1794; Massachusetts, June 26, 1794; Vermont, between Oct. 9 and Nov. 9, 1794; Virginia, Nov. 18, 1794; Georgia, Nov. 29, 1794; Kentucky, Dec. 7, 1794; Maryland, Dec. 26, 1794; Delaware, January 23, 1795; North Carolina, Feb. 7, 1795; and South Carolina, Dec. 4, 1797 (Mathis 1967, 26).

7. It is unclear why South Carolina decided to delay consideration of ratification for several years (Jacobs 1972, 67).

8. Tennessee was admitted to the Union on June 1, 1796, which was prior to the official certification of the Amendment, but after twelve states had voted to ratify. South Carolina's ultimate ratification as the thirteenth state made moot the question of whether the addition of Tennessee changed the number of states required for ratification (Orth 1987, 20).

9. This time period will be covered in more detail in chapter 5.

10. See, for example, *Louisiana ex rel. Elliott v. Jumel* (1883); *New Hampshire v. Louisiana* (1883); *Christian v. Atlantic & North Carolina Railroad* (1890); and *North Carolina v. Temple* (1890).

11. For more details about the case, see Gibbons (1983, 1973–2002).

12. See Gibbons (1983), Orth (1987), Jackson (1988), Sherry (1990), and Amar (1987).

13. The states sought to shut off judicial review by making violations of the law prohibitively expensive. In Minnesota, for instance, the set fines could reach several hundred million dollars in just one month, while in North Carolina, the fines were $2.5 million a day. In *Ex Parte Young*, the shareholders of the Northern Pacific Railway sought a preliminary injunction before the law was in place so as to avoid the penalties. For more on this, see Orth (1987, 128–129).

14. Justice Scalia uses similar language to describe *Parden* in his opinion in *College Savings Bank* (1999, 617).

15. See also *Employees of Department of Public Health and Welfare of Missouri v. Department of Public Health and Welfare of Missouri* (1973); and *Welch v. Texas Dept. of Highways and Public Transportation* (1987).

16. Pendent jurisdiction (now known as supplemental 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*, the Court ruled that once the federal claim had been dismissed, federal courts had no pendent jurisdiction in suits against states.

17. Congress' authority derives from Section 5 of the Fourteenth Amendment, which allows Congress to pass whatever laws are necessary to enforce the rest of the amendment.

18. Injunctive relief is a prohibition or order from a court to either stop a particular action or to force a particular action be carried out. In the sovereign immunity context, an injunction could be served against a state ordering it to stop firing disabled people in the future, but no monetary damages could be awarded to those who were already fired.

19. For a further review of modern sovereign immunity doctrine in an irreverent and easily accessible manner, see Noonan, chapters 2 and 3.

20. The modern cases will be covered in more detail in chapter 6.

21. Justice O'Connor wrote a concurring opinion in which she rejected this new standard for applying the *Ex Parte Young* doctrine.

22. *Qui tam* suits are undertaken by a private individual on behalf of the United States, who is the real party of interest.

23. Section 1983 of the U.S. Code provides liability for state-sanctioned civil rights abuses. It reads as follows: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

24. The Bankruptcy Clause is found in Art. I, Sec. 8 of the Constitution.

CHAPTER 3

1. For a general discussion of the collective action problems faced by the fledgling country, see Dougherty (2001). See also Nevins (1969, 473–474).

2. Jefferson's numbers are not uncontested. Later estimates suggested that the states issued only $30 million in currency, but contracted $26 million in debt (Nevins 1969, 481).

3. The precise amounts of state debts remain somewhat uncertain primarily because of incomplete reporting at the state level. Hamilton's numbers are the most complete that are recorded.

4. See Evans (1962) for a challenge to the Beard-Harrell line of argument. Elkins and McKitrick acknowledge Evans's critique, but point out that debt remained an inescapable fact of life in pre-Revolutionary Virginia (1993, 90).

5. The joint committee eventually failed to come to any compromise and high-level negotiations took place once again. In 1802, the United States paid $2,664,000 to English claimants (Orth 1987, 17).

6. Many of the original records for the case are fragmentary and damaged. Except where otherwise noted, the following details on the case are drawn from Marcus (1994, 7–56). Marcus 1994 is a thorough compilation of primary sources surrounding the early cases before the Supreme Court, an

indispensable resource. Some additional details about each of these cases are available in Goebel (1971, 723–741, 756–759).

7. The Assembly also stipulated that the tobacco should be valued at no less than fourteen livres per hundred pounds and the flour no less than thirteen livres, with interest no more than 8 percent for tobacco and 9 percent for flour (Marcus 1994, 7).

8. For more details about Ridley's attempts at negotiating a loan, see Klingelhofer (1963). In addition to his negotiations on behalf of Maryland, Ridley was also involved in the 3 million franc loan issued by the Van Staphorsts to the United States government that was primarily negotiated by John Adams (Klingelhofer 1963, 98).

9. For more details on the role of Dutch finance, see Van Winter (1977).

10. This was largely a result of a poorly drawn contract that guaranteed payment of a thousand hogsheads of tobacco (a hogshead of tobacco was a large wooden barrel weighing approximately 1,000 pounds) to the Van Staphorsts for the loan. If the value of the tobacco was greater than the loan payment, the Van Staphorsts could purchase the remaining tobacco for fourteen livres per hundred pounds. As the price of tobacco went up, this became a significant discount (Marcus 1994, 11).

11. Article III, Section 2 of the Constitution granted the Supreme Court original jurisdiction in cases between states and citizens of foreign countries. This meant that the Supreme Court acted as the trial court without any lower courts getting involved. The case is occasionally mistakenly referred to as *Vanstophorst v. Maryland*. See, for example, Jacobs (1972, 43).

12. It is worth noting that Maryland's response stands in stark contrast to later reactions by state legislatures to future summons.

13. It was common at the time for the U.S. Attorney General to also have a private practice. Indeed, the salary of the attorney general made it necessary to supplement the income with additional work.

14. It is unclear why Martin did not file a plea at the time on behalf of Maryland (Marcus 1994, 18). It is also interesting to note that current standards of recusal did not apply at the time. Chief Justice John Jay was Matthew Ridley's brother-in-law and had advised Ridley on the loan while in Paris, but he heard the case nonetheless.

15. Both documents are included in Marcus (1994, 20–32).

16. All the commissioners were Dutch and closely tied to the Van Staphorsts.

17. Except where otherwise noted, the details of the case are drawn from Marcus (1994, 57–126).

18. Oswald was barred from any further appeals directly to the state because the state auditor had already denied Elizabeth Holt's claim and the

deadline for making any further Revolutionary War–era claims expired on January 1, 1791 (Marcus 1994, 58). There is some irony in the fact that Oswald turned to the federal courts since he had been, until recently, an outspoken Anti-Federalist.

19. The claim broke down as follows: $3,458.35 for the salary, $8,000 for work, labor, and materials, and $20,000 in damages. At the time in New York, £100 was equivalent to $250 (Marcus 1994, 60, fn 16).

20. Justice James Iredell, the lone dissenter in *Chisholm v. Georgia* (1793), at this time began to speak up about his concerns regarding the Court's jurisdiction in cases such as *Oswald*. One of his specific concerns was with the lack of identification of Oswald as a resident of Pennsylvania on the summons.

21. *Chisholm* is discussed in greater detail below.

22. One of the curious features of this case is that Jared Ingersoll served as Oswald's counsel on this case the previous year.

23. The willingness to participate in this case does not necessarily mean that the legislature was in favor of states being sued without their consent. Just two months later, the legislature ratified the Eleventh Amendment (Marcus 1994, 64, fn 50).

24. Nonetheless, even if the political conflicts had not existed, it is unlikely that New York would have been any more successful at exercising a claim of sovereign immunity than Georgia.

25. Among those deposed were Chief Justice John Jay and Governor George Clinton.

26. Since this case was brought directly under the Court's original jurisdiction, there were no lower court trial proceedings.

27. The following narrative borrows heavily from what is considered the most comprehensive account of the facts of *Chisholm v. Georgia*, Mathis (1967).

28. The original payment was supposed to be $169,613.33 for goods including cloth, thread, silk, handkerchiefs, blankets, coats, and jackets (Mathis 1967, 21).

29. The case has not been recorded, but appears in the minutes of the court as *Exr. of Farquhar v. the State of Georgia* (Goebel 1971, 726).

30. Until the twentieth-century, each of the Justices was required to "ride circuit" and hear trial level cases around the country. At the time, the Circuit Courts were the only lower courts in the federal system.

31. Alexander Dallas and Jared Ingersoll presented the resolution to the Court because they were representing Georgia in another case, but they refused to participate in oral arguments because the state had not instructed them to do so (Marcus 1994, 132).

32. Despite the rapid progress on the amendment, it was not until January of 1798 that President Adams officially announced the amendment's ratification. The reason for the delay is not entirely clear, although slow transportation and uncertainty over exactly how many states needed to ratify the amendment probably contributed.

33. Although the record of decision-making by the Georgia legislature is not clear, it is probable that the state opted to settle rather than face a near-certain loss at a jury trial. The Eleventh Amendment was not yet ratified and the trial would have taken place before ratification was possible.

34. See, for example, Mathis (1967, 27, fn 45) and Marcus (1994, 136–137). Trezevant expressed his doubt the Georgia would comply with a court judgment in an appeal he made to Congress.

35. While Trezevant recovered some of the debt by selling three of the certificates right away to cover costs, he held onto the other five certificates. After the passage of the Eleventh Amendment, which was ratified in 1798, the state passed a law requiring that all state certificates be renewed within two years or they would become worthless. Trezevant, who was out of the country when the law was passed and did not hear about it, was left with appealing to the state legislature to honor even the reduced amount he had received. It was not until 1847 that the claim was finally settled by the Georgia legislature (Mathis 1967, 28–29).

36. Unless otherwise noted, the following background is drawn from Marcus (1994, 274–351).

37. The most detailed account of the background behind the company's claims can be found in Lewis (1941, 35–72).

38. Dr. Thomas Walker signed the treaty as Virginia's representative, weakening the state's case, but he may have been motivated more by interest in his own land speculation than in protecting the territory of his state (Lewis 1941, 63–65).

39. Benjamin Franklin and his son William Franklin, Governor of New Jersey, were heavily involved in this land speculation, later known as the Vandalia Grant (Marcus 1994, 276).

40. For a detailed description of the many attempts by Samuel Wharton, the company's agent, to convince the British government to support the claim, see Marshall (1965).

41. Evidence of Virginia's partiality toward its own citizens can be seen in the payout the state made to speculator Richard Henderson for his claims to parts of modern-day Kentucky. Henderson was a Virginia citizen, while the members of the Indiana Company were not. William Trent, one of the founders of the company, explicitly told the Virginia legislature that he would settle for the same amount of money given to Henderson. The state ignored his offer (Selby 1988, 244).

42. For background on Morgan, see Friedenberg (1992, 242–243).

43. New York had ceded its western lands and the British control of the southern states made a unified confederation seemingly more important if victory was to be achieved. Since this was a major sticking point between the states, there was enormous pressure to resolve it and move towards unity (Jensen 1936, 42–45).

44. Morgan's foiled attempt to settle New Madrid is detailed in Friedenberg (1992, 242–247).

45. The case was originally filed as *Grayson* et al. *v. Virginia*, but William Grayson had died in 1790 and was a Virginia merchant. The Court would not have had any jurisdiction, so the bill was revised to name Levi Hollingsworth, a Philadelphia merchant, as the lead plaintiff (Goebel 1971, 725).

46. I primarily use the term Loyalist, although Tory was often interchangeable. For further discussion of the words, see Calhoon (1965, xi–xii).

47. Vassall was the ninth wealthiest property owner in Boston in 1771 (Maas 1989, 159).

48. Much of the following account is drawn from Marcus (1994, 352–449). As with the earlier cases, few Court documents remain and the case was not even reported by Dallas in the official Court reports. Marcus (1994) relies heavily on personal correspondence and official state actions to piece together the full facts of the case.

49. The Mandamus Council, advising the governor, was a replacement in response to the Boston Tea Party for the elected council that had previously been in place (Marcus 1994, 353).

50. Vassall also had property in Rhode Island that was seized. Vassall had no luck recovering that property because Rhode Island unequivocally seized the property through a court of law before the signing of the peace treaty ending the Revolutionary War (Marcus 1994, 363).

51. In fact, Vassall hoped to return to Boston and appealed for a license to return. His appeal, however, was turned down by Governor John Hancock (Maas 1989, 491).

52. The commission determining what claims to reward graded Loyalists according to their commitment (Brown 1969, 181).

53. At the time, the Supreme Court had original jurisdiction for cases involving citizens of other countries and states. Since Vassall had declared himself a British citizen since the Revolutionary War, he had standing to sue.

54. *Cutting*, like *Vassall*, was not recorded by Alexander Dallas and the records for the case are incomplete. Except where otherwise noted, the following facts are drawn from Marcus (1994, 450–495).

55. Gillon was also permitted to raise loans for additional money (Smith 1908, 192). Part of the challenge was Benjamin Franklin's strong resistance to Gillon's overtures to the French court. See Stone (1979, 161–164).

56. The ship, *L'Indien*, had originally been commissioned from Dutch boat builders by representatives of the United States government. The plan was to give the ship to John Paul Jones to command. Great Britain, however, got wind of the transaction and protested. The American commissioners transferred ownership of the frigate to the French to avoid hostility between England and Holland. According to Samuel Eliot Morison, the imposing design of the ship was the inspiration for Old Ironsides (Stone 1979, 159, 162).

57. Gillon's loan to equip the ship came from the Van Staphorst brothers about a year before their contentious loan to Maryland (Van Winter 1977, 37).

58. Gillon was kept in Philadelphia by Robert Morris, Superintendent of Finance for the Continental Congress, who hoped to acquire the ship for the U.S. In Gillon's hasty departure from Amsterdam, he had left behind three ships' worth of stores purchased by the continental government that he was supposed to have escorted back. Morris used that as an excuse to detain Gillon while they negotiated settlement (Stone 1979, 168).

59. The capture of one of the largest warships of its era by three British man o' wars without a single return shot fired does not reflect positively on the captain, John Joyner (Stone 1979, 168–170).

60. Gillon's direct role in the case ended at this point, although his participation in South Carolina politics became notorious. His failures in this matter did not hurt his prospects at home. Gillon became the head of the "Marine Anti-Brittanic Society," a group known for threatening violence against Loyalists in the state. His public stature resulted in his election to the South Carolina legislature, an offer of appointment to the post of lieutenant governor that he turned down, and election to Congress. In 1787, still facing debts from his time in Europe, Gillon achieved further prominence by proposing to end the foreign slave trade so that the value of his domestic slaves would increase, an action that would have permitted him to pay off his debts. For more on Gillon, see Phillips (1909, 533–534) and Brady (1972, 604–605).

61. Cutting was also representing the Van Staphorsts in a separate debt dispute with South Carolina (Marcus 1994, 456).

62. The King of France ran into the same problem and never filed a claim under the 1789 act either (Marcus 1994, 457).

63. On the same day that the summons was issued to the state, the late prince's brother—Ann Charles Sigismond de Montmorency Luxembourg, the duke of Luxembourg—decided to initiate his own claim to the debt as the heir to his brother's estate. Unhappy with what Cutting was doing, he appointed the Portuguese envoy to the United States as his representative. The French gov-

ernment wasn't certain whether it had enough evidence to proceed in bringing a case on behalf of the king, so did not take any action (Marcus 1994, 458).

64. Unless otherwise noted, the background information about this case is drawn from Marcus (1994, 496–596).

65. The concern was that the three companies would pay for the land using state certificates that had depreciated in value by as much as eight times (Marcus 1994, 497).

66. It should be noted, however, that the South Carolina Yazoo Company's initial offer of $200,000 for 15 million acres was $60,000 more than Congress had offered the state a year earlier for 60 million acres. Additionally, there were serious questions among the legislators about the Georgia Company's sincerity. The company was formed the day of the offer with the sole intent of blocking the sale of the land to the other companies (Lamplugh 1986, 66–67).

67. Georgia based its claim on its 1763 colonial boundaries that set the southern boundary at the 31st parallel. The British Board of Trade in 1764 amended Georgia's southern boundary to increase the size of Florida, which had been acquired from Spain, but Georgia never acknowledged the change. Key parts of the Yazoo territory were in this area. When Britain ceded Florida back to the Spanish without clarifying the question of borders, Spain claimed the land as its own. The federal government also had a claim to the land as a result of the Treaty of Paris in 1783, where Britain ceded land north of the 31st parallel to the United States. South Carolina's claim to the land was resolved with Georgia in 1787, so was not at issue (Marcus 1994, 499).

68. For more on O'Fallon's checkered life, see Parish (1930). O'Fallon's dealings with the South Carolina Yazoo Company are covered in Parish (1930, 238–256). O'Fallon was also connected with Alexander Gillon from the *Cutting* case. Both men were founders of the Marine Anti-Britannic Society in Charleston.

69. It is not entirely clear whether this was the intention of the owners of the South Carolina Yazoo Company or not. Moultrie gave O'Fallon secret instructions that have not survived. Moultrie did write Benjamin Farrar, a wealthy planter, about the usefulness of the proposed settlement to Spain, but did not explicitly mention secession from the union (Marcus 1994, 501, fn 32).

70. It is not clear what happened with the payment. Since the money was embezzled from South Carolina by Moultrie, it is possible that the messenger stole the money and Moultrie could not report it. This is pure speculation, though. There is no further mention of this attempt to pay in Moultrie's letters.

71. See the discussion about the Treaty of New York and its restrictions on Georgia's westward expansion in the treatment of *Chisholm v. Georgia* above.

72. For more on Moultrie's impeachment, see Marcus (1994, 502, fn 36).

73. This sale of the land prompted a much larger scandal than the earlier purchase, one that was eventually resolved by the Supreme Court in *Fletcher v. Peck* (1810).

74. Moultrie did receive a hearing by the Congressional committee that decided claims arising from the Yazoo lands. However, the committee was unwilling to consider oral evidence while there was a realistic possibility that the Court would have. There is a substantial difference between legal hearings in court and committee hearings in Congress, and this worked against Moultrie's claim.

75. Lewis points out that "several of the partners were having acute financial problems." Samuel Wharton, for example, declared bankruptcy (Lewis 1941, 272–274).

CHAPTER 4

1. The one exception, *Beers v. Arkansas* (1857), is discussed below. Briefly, the case addressed the scope of a legislature's ability to determine the rules and guidelines for bringing a suit against the state in state court, rather than a question of sovereign immunity.

2. In the legal literature, see for example, Jacobs (1972, chs 4–5), Gibbons (1983), and Fletcher (1983). These are the classic pieces on Eleventh Amendment history and are frequently cited and relied upon by subsequent authors. Orth (1987) does address this time period, but that is a relatively isolated case in the literature.

3. See, for example, McGrane (1935), Ratchford (1966), and Sylla and Wallis (1998). English (1996) is an exception to this, although his coverage of the issue is brief.

4. For an extensive case study on this movement, see Scheiber (1969).

5. Note that Trotter did sound a cautious note about the effect that such expansion could have on the ability of these projects to generate sufficient revenue.

6. For more on the division of party systems, see Chambers, Nesbit, and Burnham (1967).

7. See, for example, the discussion of Illinois's internal improvements below.

8. For an alternative explanation of the collapse, focusing on domestic causes, see Kim and Wallis (2005).

9. For a brief discussion of the Whigs desire to sell the Main Line Canal, see Holt (1999, 155).

10. In the years 1835 to 1840, the average annual revenue from the public works was slightly less than $140,000. The average annual interest was greater than $1.2 million (McGrane 1935, 67).

11. For more on Pennsylvania's reliance on state banks to try to make its interest payments and the ultimate failure of that strategy, see Kim and Wallis (2005).

12. More detail on the party dynamics can be found in Smith (1974, 271–292). McGrane (1935, 94) details the actions taken by Democrats and Whigs to denounce any repudiation efforts.

13. Banks at the time were required to make payments in gold or silver to show that they had sufficient funds to operate.

14. The Speaker was later acquitted by a very friendly jury (Worley 1950, 409–411).

15. This meant that the United States Congress had oversight authority for the territory and could reject any action by the Legislative Council, but did not act in this case.

16. Note that this was a lighter burden per capita ($18.62) than many of the other states that contracted debts. For example, Alabama had a state debt that worked out to $26.06 per capita, but never defaulted or repudiated (English 1996, 264).

17. For more details on McNutt's argument and the circumstances surrounding the sale, see McGrane (1935, 195–201).

18. The $94,000 amount was eventually reduced by the High Court of Errors and Appeals without explanation to $45,000 (McGrane 1935, 207, fn 54).

19. The issue did continue to arise, however, into the twentieth-century. In 1933, the Principality of Monaco sued the state of Mississippi to recover $100,000 in repudiated bonds that it had in its possession. The Supreme Court decided in favor of Mississippi, holding that sovereign immunity extended to suits by foreign states (*Principality of Monaco v. Mississippi* 1934).

20. It is worth noting that the opinions of Daniel Webster, Peter A. Jay, Horace Binney, and Chancellor Kent had been sought by the territory on this very question at the time the banks were being chartered. They were unanimous in their opinion that contracts entered into by the territory would be binding when it became a state (McGrane 1935, 226).

21. In November of 1840, the Democrats lost control of both houses of Congress as well as the presidency.

22. The Democratic Party had significant victories in the state from 1839 to 1845 (Schweikart 1987, 41).

23. For a more detailed discussion of the relationship between contracts and the law, see Benson (2001).

24. The state cases that were filed in Mississippi, Arkansas, and Louisiana will be covered later in this section.

25. It was common at that time for fiscal officers to hold state funds in their own accounts.

26. Marshall's theory has spawned a substantial body of research discussing what is known as the diversity theory. For some representative works on this approach, see Jackson (1988), Amar (1987), Marshall (1989), Fletcher (1989) and Orth (2000)

27. For example, in Louisiana, the legislature passed a law allowing stockholders in the defaulting banks to release their mortgaged property if they turned in any outstanding bonds. This action overwhelmingly helped in-state creditors (McGrane 1935, 183).

28. The question that the House of Baring asked Webster was "Has the legislature of one of the American states legal and constitutional power to contract loans at home and abroad?" See Wilste and Moser (1980, 401–402). Webster was actually paid $200 for his opinion by the Baring's agent in the United States, T.W. Ward. The Baring's were not comfortable with the payment, so Ward paid Webster out of his own pocket (McGrane 1935, 76).

29. It should be noted that Curtis was solicited to write this article at the behest of T.W. Ward, acting as agent for Baring, Brothers & Co. Most of the statistics in the article were provided by Ward himself. Curtis, however, refused any payment for his services (McGrane 1935, 75).

30. Rightfully so, as it turned out. See the discussion of *Mississippi v. Johnson* below.

31. The question of whether a foreign state could sue a state to recover money from bonds was not addressed until *Principality of Monaco v. Mississippi* (1934). In that case, discussed in more detail in Orth (1987, 140–141), the Supreme Court denied Monaco's claim.

32. The provision is found in the Mississippi State Constitution of 1832, Article 7, Section 10. "The legislature shall direct by law in what manner and in what courts, suits may be brought against the state." This provision appeared in the state's first constitution in 1817, Article VI, Section 11. This was removed with the adoption of the constitution of 1890.

33. See the discussion of these bonds above.

34. The Arkansas State Constitution of 1836 provided that "the General Assembly shall direct by law in what courts and in what manner suits may be commenced against the State." In 1839, the legislature established the method for bring suit against the state (cited in *Platenius v. State* 1856). By the Constitution of 1874, suits against the state were constitutionally prohibited. See Arkansas State Constitution, Article 5, Section 20.

35. There was some indication that the court would have found the state to be liable for the bonds on the merits. In *Ex Parte Conway* (1842), the court mentioned in dicta that Holford would be wronged if denied payment because

he was an innocent investor. The court also held that "the State is responsible for whatever amount is justly and equitably owing by her; and the holders of these bonds, as well as those of our other public securities, need be under no apprehension but that she will faithfully and honorably discharge to the utmost farthing all her engagements." (McGrane 1935, 363–364).

36. This provision is found in the United State Constitution, Article 1, Section 10.

37. See Tomz (2001, 3) for a further discussion of "lemons."

38. Note that these were not new issues. These were the prices for the bonds that had already been issued before default.

39. See Sylla and Wallis (1998, 285) for yield increases of New York, Kentucky, and Ohio 1831–1846.

40. For another example of the state repudiations remaining an issue for foreign bondholders, see Gittler (2003).

41. It should be noted that the acts of repudiation were popular in the states that enacted them, usually carried out through popular referendum. This is not surprising given the fact that payment required higher taxes and the state governments had made the case to their people that the debts were illegitimate. Nonetheless, as I argue, these actions did have consequences particularly as they relate to trust in state legislatures.

42. The states were Alabama (1861), Arkansas (1846), California (1849), Illinois (1848), Indiana (1851), Iowa (1857), Kansas (1859), Kentucky (1850), Louisiana (1845), Maine (1848), Maryland (1851), Michigan (1843, 1850), Minnesota (1857), Missouri (1854, 1859), New Jersey (1844), New York (1846), Ohio (1851), Oregon (1857), Pennsylvania (1857), Rhode Island (1842), Texas (1845), Virginia (1851), and Wisconsin (1848). Florida included a faith or credit provision in its Constitution of 1838 that was partly a response to the state's borrowing, but it came before the state repudiated. Massachusetts also included debt limitations in its proposed Constitution of 1853, but it was not ratified.

43. The specific provision is in the Constitution of 1842, Article 4, Section 13.

44. These can be found in the Illinois Constitution of 1848, Article 3, Section 37; Michigan Constitution of 1850, Article XIV, Section 3; and Oregon Constitution of 1857, Article XI, Section 7.

45. See, for instance, Texas Constitution of 1845, Article VII, Section 32 ($100,000 limit) and New York Constitution of 1846, Article VII, Section 10 ($1 million limit). Missouri's Constitution of 1859 was an outlier, permitting debt up to $30 million.

46. See, for example, Minnesota Constitution of 1857, Article IX, Section 5 (2/3rds of both houses required to contract debts); California Constitution of

1849, Article VIII (must be approved by a majority of the popular vote); and Virginia Constitution of 1851, Section 29 (requires a sinking fund be in place for any debt that is contracted).

47. Maryland Constitution of 1851, Article III, Section 22 (prohibiting state from being involved in internal improvements) and Oregon Constitution of 1857, Article XI, Section 1 (prohibiting the state charter of banks).

48. California Constitution of 1849, Article XI, Section 11; Illinois Constitution of 1848, Article III, Section 34; Indiana Constitution of 1851, Article IV, Section 24; Oregon Constitution of 1857, Article IV, Section 24; Wisconsin Constitution of 1848, Article IV, Section 27. Massachusetts also included a waiver provision in their proposed constitution of 1853. The Constitution narrowly failed ratification, although Proposition Four was one of the closest measures, losing by only 3,023 votes out of 130,633 votes cast (*Official Report of the Debates and Proceedings in the State Convention*, v.3 1853, 713, 768).

49. For a discussion of the debates at the federal level in the 1840s and '50s, see Larson (2001, 240–252).

50. This provision is found in the Minnesota Constitution of 1857, Article IX, Section 10 (amended 1858).

CHAPTER 5

1. When a state "scales" its debt, it reduces both the principal and the interest owed, but continues to recognize the obligation of the bond. For example, a state may exchange new bonds for old ones at a rate of 50 cents on the dollar. That reduces the principal owed by the state by half. In addition, states would often reduce the interest on the bonds from 6 or 7 percent to 3 or 4 percent in an attempt to lower their annual debt service. Bondholders are encouraged to do this because the alternative offered by the states is repudiation of the entire debt.

2. Not only states, but also municipalities in the south overreached financially at this time. A number of the cities defaulted on their loans, but a series of Supreme Court cases during the 1870s and 1880s established that they could not claim sovereign immunity as a defense. After coming to terms with creditors, the cities were quickly able to resume borrowing to address a number of needs. Given that the defaults were happening concurrently with their own fiscal troubles, the states had little opportunity to learn from the experience of the cities. It is impossible to tell what lessons were ultimately taken, since the law of sovereign immunity changed significantly at the beginning of the twentieth century and states became more liable. I discuss the lessons of the lack of sovereign immunity for cities further in chapter 7. See also Orth (1987, 110–120).

3. One further note on this subject is worth mentioning. The Dunning school's widespread influence on academic perceptions of Reconstruction col-

ored much of the literature published in the first half of the twentieth century. Even today, scholars must be cautious when exploring the causes of profligate spending during the post–Civil War era. While Reginald McGrane and Benjamin Ratchford remain the most comprehensive sources on the subject of state debt, I have sought to balance accounts in each of the states with multiple sources in an attempt to present a fair and accurate portrayal. There is little question that there was substantial corruption surrounding this spending, as will be seen. However, as it relates to the question of sovereign immunity and responsibility for state debt, such corruption does not remove the obligation of contract from a state. See, for example, *Fletcher v. Peck* (1810), where the Supreme Court upheld Georgia's land sales despite massive bribery.

4. Despite reducing its debt, the state still took a net loss of almost $8 million (Ratchford 1966, 181).

5. The bondholders were represented in the negotiations by the New York–based Committee of Tennessee Bondholders, a group that had been delegated responsibility by most of the interested bondholders (Jones 1977, 129).

6. The state treasurer was former president James K. Polk's nephew and the scandal was a great embarrassment to the family (Jones 1977, 140, 142).

7. The other one-third of the debt was assigned to West Virginia, although the new state did not agree. Virginia issued certificates to creditors for the amount owed by West Virginia. While not central to the dispute here, the conflict between the two states over responsibility for the antebellum debt continued until the Supreme Court finally mediated the dispute in 1915. West Virginia was ultimately responsible for 23.5 percent of the antebellum debt and paid it off in 1919 (McGrane 1935, 378–381; Orth 1987, 90–109).

8. Each bond came with coupons attached for the annual interest due on the bond. The bondholder would submit the coupon to the state to receive the interest payment. In the case of this act, the bondholder was permitted to submit the coupon to the tax collector and apply the interest owed to paying their taxes (Orth 1987, 92).

9. By exchanging old bonds for the new, the bondholders sacrificed the past due interest resulting in the reduction of the state debt (Ratchford 1966, 201).

10. For more on these actions and additional measures taken by the state, see McGrane (1935, 373–377).

11. These cases will be covered in much greater detail below.

12. The commission was actually very successful at making land available to freed slaves, but was extremely unpopular among the state's white population (Edgar 1998, 396).

13. The state issued $1.5 million in bonds to fund state operations since the state had virtually no tax base and a heavily damaged infrastructure (Hollman and Murrey 1985, 308).

14. The bonds were issued once 20-mile sections were completed with the provision that the state had first lien on the property in case of default (Hollman and Murrey 1985, 309).

15. For more on Louisiana's antebellum debts, see chapter 4.

16. The legislature authorized $1.5 million for the construction of a state house, $100,000 for the Mississippi Navigation Company, and $3 million in state bonds for covering the state's short-term debt (McGrane 1935, 315–316).

17. The special tax bonds did spawn a number of lawsuits by bondholders, which will be covered in the next section. The state also repudiated $44,000 in bonds for the state penitentiary (Porter 1880, 574).

18. The number of $29.2 million is incorrect since it includes $6 million in sterling bonds that were never actually issued (Ratchford 1966, 182).

19. In 1879, a state commissioner invalidated another $1.1 million in bonds, which he claimed had not been properly issued (McGrane 1935, 354).

20. Interest payments on the debt fell from $540,000 annually in 1873 to $236,000 annually in 1878 (Thornton 1982, 386).

21. In order to be considered valid, bondholders had to present these bonds to a court for determination.

22. These actions by the state spawned a host of lawsuits at both the state and federal level, including some of the most far-reaching cases dealing with sovereign immunity.

23. See chapter 4 for a full discussion of Florida's territorial bonds.

24. The talks ultimately failed to reach a compromise. The state offered a settlement that would have given investors only 5 pence per pound plus some waste land in the state. The creditors were unwilling to settle for so little. For more on this, see McGrane (1935, 298-299, 302).

25. See chapter 4 for more detail on Arkansas' antebellum debt.

26. These were bonds issued to a British investor as collateral for a loan to the state's agent. See chapter 4 for more details on these bonds. The 1869 act ended up not being as successful as hoped and foreign creditors continued to refuse Arkansas bonds. Most of the bonds were sold to American investors (McGrane 1935, 293).

27. Evidence suggests that the governor was serious about his responsibility to use the state aid properly because the money was spent only on main arteries for the most part (Thompson 1976, 232).

28. The decision to repudiate the Macon and Brunswick Railroad bonds was aided by the fact that the railroad defaulted on its interest payments in 1873 (Scott 1893, 103).

29. Of the $2.8 million raised by the state, only $300,000 was actually applied to the improvement of the railroads. The remainder went to pay off

debts to North Carolina owed by the railroad executives and as bribes to various supporters in the Florida state government (Tebeau 1971, 270).

30. The other two state court decisions were *State of Florida v. Florida Central Railroad* (1876), and *Trustees of the Internal Improvement Fund v. Jacksonville, Pensacola, and Mobile Railroad Company* (1878). The later role of the federal courts is addressed below.

31. Since the state initiated the suit, there were no sovereign immunity concerns.

32. The reasoning of the court's opinion was somewhat stretched. The Arkansas Constitution of 1868 provided that if no effective date was mentioned, an act became law ninety days after adjournment. The act was passed July 21, 1868, and the legislature adjourned July 23. The people voted on the act in November. The court held, though, that the act didn't become law until ninety days after the adjournment of the last session of the legislature, which was April 1869 and so the bonds were held to be completely void. See Ratchford (1966, 189) for more.

33. The levee bonds were invalidated because the yeas and nays of the final vote were not written down in the legislative journals.

34. The amendment was proposed in 1879, but narrowly did not receive the required majority of all votes cast in the election that year. When it was reintroduced in 1884, it was overwhelmingly ratified. See also McGrane (1935, 296–298).

35. See, for example, McCloskey (2000, ch. 5).

36. The ruling was implicitly upheld by the Supreme Court in *Railroad Company v. Swasey* (1874).

37 The bondholders sacrificed only three years of past due interest (Ratchford 1966, 185).

38. See Orth (1987, 47–109) for a detailed and largely persuasive argument about the impact of the end of Reconstruction on the Court's sovereign immunity doctrine. Essentially, he argues that the removal of federal troops and the influence of the compromise of 1876 stripped the federal courts of the capacity to enforce unpopular decisions in the south. As a consequence, they avoided the issue by using the Eleventh Amendment as an escape clause. For a different analysis, see Collins (1988).

39. Ex rel. is short for ex relatione, meaning "upon information." The term is used to describe a legal action instituted in the name of the state, but brought by a private person with an interest in the matter.

40. For the Court, the primary difference between the two cases was who had physical possession of the stock certificates in question. In *Swasey*, the certificates were still in possession of the railroad company even though they were pledged to the state. In *Christian*, the stock certificates had already been issued to the state and were in the state's possession.

41. A lien for $197,000 plus interest was placed on the Florida Central Railroad and one for $2.75 million was placed on the Jacksonville, Pensacola, and Mobile company.

42. For additional background on the Virginia cases, see Fairman (1987, 712–724).

43. The individual cases heard were *Pleasants v. Greenhow*, *Poindexter v. Greenhow*, *White v. Greenhow*, *Chaffin v. Taylor*, *Carter v. Greenhow*, *Moore v. Greenhow*, *Allen v. Baltimore & Ohio Railroad Co.*, and *Marye v. Parsons*. The primary opinion in the cases was in *Poindexter v. Greenhow* (1885).

44. For more on the change in votes by the Justices over the course of these eight cases, see Fairman (1987, 717–720).

45. This is covered in greater detail above in the discussion of Virginia's resolution of its debt.

46. Details about the case's progression up through the state courts can be found in the Virginia Supreme Court opinion, *McGahey v. Commonwealth* (1888).

47. Jenkins was the state treasurer at the time.

48. The court decided that there was no controversy because the two parties had worked together to arrange bringing the test case.

49. The North Carolina Supreme Court's ability to hear cases directly against the state was purely advisory in nature. The state constitution did not grant the court any authority to issue injunctions or writs of mandamus against the state. Since a ruling that the bonds were valid could not be backed up by an order to provide relief and the legislature was constitutionally barred from taking action, the court concluded that it had no jurisdiction. The court's decision was affirmed by the United States Supreme Court in *Baltzer v. North Carolina* (1896). The Court ruled that the state could remove the state court's jurisdiction without impairing the obligation of contract.

50. It is worth noting that it is not entirely clear that the state debt ever violated the constitutional limit (Porter 1880, 581).

51. See *Walker v. State* (1879) for the court's determination of which bonds were valid and which were not. The court was also involved in a dispute over the validity of state scrip that was issued to keep the state afloat during the immediate aftermath of the war. The court concluded that the scrip was a bill of credit specifically prohibited by the federal constitution and refused to force the comptroller general to raise taxes to pay for it (*State ex rel Shiver v. Comptroller General* 1873).

52. For example, during this time North Carolina switched to popularly elected state justices serving eight year terms.

53. See the discussion in chapter 4 and in Tomz (2001), Cole, Dow, and English (1995), and English (1996).

54. These values were determined by averaging the sales on every Friday during the year. The average of the southern states does not include Kentucky, which was included with the western states.

55. See McGrane (1935, 384–386) for examples.

56. For more on this, see Hyman (1989, 60).

57. The states were New Hampshire, Vermont, Massachusetts, Connecticut, and Delaware (Scott 1893, 241).

58. This was the Redeemers in Tennessee and the Funders in Virginia. For more on each group see respectively Hart (1975, 1-27) and Moore (1974, 27-44).

CHAPTER 6

1. A growing literature, based on this underlying assumption, applies an "electoral connection" logic to antebellum politics. See, for example, Bianco, Spence, and Wilkerson (1996), Carson, et al. (2001), and Carson and Engstrom (2005).

2. 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 (2006).

3. The following account of the rise of gambling in the Seminole Tribe is drawn from several sources. See Cattelino (N.d.), Goldstein and Testerman (1997), Olson (2003), and Staletovich (1998).

4. Tribal sovereignty is a long-standing and complex area of the law. See, for example, *Worcester v. Georgia* (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 (2003).

5. For more on the adoption of the IGRA, see Boehmke and Witmer (2004, 41), Bacon (1997, 583–584), and Cohen (2000, 278).

6. 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 (Indian Gaming Regulatory Act 1988, §2710 [b] [1]).

7. The facts of the case are drawn from the petitioner's brief in *Seminole Tribe of Florida v. Florida* (1996).

8. 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.

9. 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.

10. The state's appeal over the question of the Secretary of the Interior's authority was denied certiorari in Petition No. 94–219.

11. See Nagel (2001b) for a skeptical account of the Court's ability to achieve any substantive change.

12. This case limited Congress's 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 crime to possess a gun within 1,000 feet of a school because the law was insufficiently related to the regulation of commerce.

13. There are a number of articles and books suggesting that these decisions favor the states. See, for example, Noonan (2002, 6) ("It is on their [the states] behalf that the court has labored); Chemerinsky (1999, 39) ("the Supreme Court has used federalism to protect states and limit federal power"); and Swinford and Waltenburg (1998, 25) ("decisions emanating from the Court were notable for the degree to which they protected and expanded the policy interests of the states.").

14. The bill was S. 1572 in the 105th 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])."

15. The bill was S. 1870 in the 105th Congress.

16. Note that this is the same Robert Butterworth who threatened to arrest the Seminoles for illegal gambling in 1979 as sheriff of Broward County.

17. Why this critique applies only to the Seminole Tribe and not to the state of Florida as well is not clear.

18. See, for example, Corntassel and Witmer (1997).

19. Henceforth, I will refer to this case as *College Savings Bank*.

20. Henceforth, I will refer to this case as *Florida Prepaid*.

21. "Methods and Apparatus for Funding Future Liability of Uncertain Cost." U.S. Patent No. 4,642,768. Roberts submitted a second patent in 1987 that was substantially similar to the earlier one, with some minor variations. See "Methods and Apparatus for Funding Future Liability of Uncertain Cost." U.S. Patent No. 4,722,055. This was the patent that was at issue in the suit against Florida.

22. College Savings Bank December 31, 1992 FDIC filing, available at http://www3.fdic.gov/idasp/main.asp (accessed May 11, 2007). Note that all Internet resources are also on file with the author.

23. College Savings Bank December 31, 1994 FDIC filing, available at http://www3.fdic.gov/idasp/main.asp (accessed May 11, 2007).

24. The program is discussed in Noonan (2002, 87).

25. See Florida Statute Ch. 240.551 for the enabling laws.

26. These partners included First Union National Bank, Coopers & Lybrand, Ernst & Young, U.S. Trust Company, In Tuition Solutions, NationsBank, Watson Wyatt Investment Consulting, Shields/Alliance, and T. Rowe Price Associates (Brief for Respondent, *Florida Prepaid Postsecondary Education Expense Board v. College Savings* 1999, 1).

27. By comparison, College Savings Bank had sold only 10,000 plans.

28. The states were Alabama, Alaska, Kentucky, Massachusetts, Ohio, Pennsylvania, Texas, and Wyoming.

29. The bill was sponsored by Senator Dennis DeConcini (D-AZ) and co-sponsored by Senator Orrin Hatch (R-UT). It passed by voice vote in both the Senate and House.

30. Appeals dealing with patents are automatically appealed to the Federal Circuit court as a jurisdictional matter. Congress chose to centralize the handling of patent claims because of their extremely complex and technical nature.

31. This analysis was based on the Court's standard announced in *City of Boerne v. Flores* (1997). That case required Congress's actions under the Fourteenth Amendment to be congruent and proportional to the harm they are trying to remedy.

32. It is far from certain that the bank would have succeeded in its patent claim. However, the facts were never established because the case never went to trial.

33. College Savings Bank December 31, 2006, FDIC filing, available at http://www3.fdic.gov/idasp/main.asp (accessed May 11, 2007).

34. See http://arizona.collegesavings.com/ and http://montana.collegesavings.com/(both accessed May 11, 2007).

35. The bill was S. 1835 in the 106th Congress.

36. Attendees are cited in U.S. Congress (2000).

37. Bohannan is not alone in her focus on waivers. See also Bartell (2000).

38. It is worth noting that the Patent and Trademark Office disagreed with this characterization, saying a pattern of infringement existed (U.S. General Accounting Office 2001, 32).

39. See S. 1611 in the 107th Congress, S. 2031 in the 107th Congress, and S. 1191 in the 108th Congress. No bill was submitted in the 109th Congress and none has yet been submitted in the 110th Congress. It is not clear whether Democratic control of Congress will lead to any action.

40. Coble's bill was H.R. 3204 in the 107th Congress. Smith's bill was H.R. 2344 in the 108th Congress.

41. This is significant because states are increasingly relying on income from intellectual property developed at their research universities. Florida, for instance, has earned more than $51 million from Florida State University's patent for the cancer drug Taxol (Francis 1999).

42. Oculus Pharmaceuticals was still liable for violating the patent and settled with Syrrx in 2003 ("Syrrx Successfully Enforces Submicroliter Crystallization Patent" 2003).

43. Menell suggests that "China or other centrally planned economies could emulate state sovereignty and provide cumbersome and largely ineffective state remedies, all the while claiming they have the same substantive law as the United States" (2000, 1458). For another discussion of the international implications of state sovereign immunity, see ("Note: Too Sovereign But Not Sovereign Enough: Are U.S. States Beyond the Reach of the Law of Nations?" 2003).

44. See Menell (2000, 1428–1436) for a discussion of the social and bureaucratic constraints on state employees and the environment that those constraints produce.

45. 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.

46. 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.

47. 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* (1995) and *Blackie v. Maine* (1996), some of the probation officers challenged the state's refusal to continue paying a

16 percent 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.

48. The Eleventh Amendment refers only to the judicial power of the United States.

49. More details on the lobbying efforts in the wake of *Alden* can be found in Bosworth (2006, 404–408).

50. $450,000 was the amount the special master found to be due to the probation officers before the federal case was dismissed.

51. In the Maine legislature, all of the standing committees are joint between the House and Senate.

52. The bill was LD 2530 in the Second Regular Session of the 119th Maine Legislature.

53. For a discussion of the dissension on the committee, see Kesich (2000).

54. The bill was LD 2682 in the Second Regular Session of the 119th Maine Legislature.

55. It is worth noting that between 2000 and 2003 there were no reported federal cases filed against Maine officials using this rationale.

56. The bill was LD 415 in the First Regular Session of the 121st Maine Legislature.

57. The negotiated agreement was mentioned on the Maine State Employees Association Web site, http://www.mseaseiu.org/. Accessed on July 16, 2003.

58. The bill was LD 1619 in the First Regular Session of the 121st Maine Legislature.

59. 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" (Curran 1994).

60. State employees receive a 3 percent annual cost of living increase. However, university faculty see less than 2 percent because of deductions for faculty promotions and equity adjustments.

61. 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* (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.

62. The two other cases were *MacPherson v. University of Montevallo* (1996) and *Dickson v. Florida Dept. of Corrections* (1996). Dickson also raised an Americans with Disabilities Act challenge.

63. See the discussion of supplemental jurisdiction and *Pennhurst* in endnote 61 above for an explanation of why both claims were dismissed.

64. See the President's message "Death of a Contract" at http://www.unitedfacultyofflorida.org/updates/deathcontract.htm. Accessed July 22, 2003.

65. The bill was S. 3008 in the 106th Congress.

66. The bill was S. 928 in the 107th Congress.

67. The bill was S. 3823 in the 109th Congress.

68. Since the decisions in *Nevada Department of Human Resources v. Hibbs* (2003) and *Tennessee v. Lane* (2004) denied the state's sovereign immunity claim, they do not fit well into the analysis in this chapter. Garrett remains the last major decision by the Supreme Court upholding sovereign immunity. There were other significant decisions in the interim, however. *Federal Maritime Commission v. South Carolina State Ports Authority* (2002) is probably the most notable, which permitted sovereign immunity to be raised as a defense before Administrative Law Judges.

69. The District Court, in its later opinion granting summary judgment, referred to this episode as "shar[ing] with Garrett the idea of transferring her to a less stressful and less demanding position, but without any reduction in pay" (*Garrett v. University of Alabama Board of Trustees* 2005).

70. Garrett also alleged a violation of Title II of the act, which deals with the administration of public services. The question of sovereign immunity from Title II was not addressed by the Supreme Court in this case.

71. For a thorough state-by-state review of discrimination laws at the time of the adoption of the ADA, see Brief for the National Association of Protection and Advocacy Systems and United Cerebral Palsy Associations, Inc. as Amici Curiae in Support of Respondents, *Board of Trustees of the University of Alabama v. Garrett* (2001), especially pages 12–23.

72. The court first dismissed with prejudice Garrett's claim for punitive damages under the Rehabilitation Act.

73. Ironically, two of the three judges upheld the district court's dismissal of the Family Medical Leave Act claim. Subsequently, the Supreme Court came to the exact opposite conclusion. The ADA was unconstitutional, while the Family Medical Leave Act was acceptable.

74. Since the Eleventh Circuit's decision on the Rehabilitation Act rested on the same logic as the decision on the ADA, the Supreme Court's decision

also applied to whether the Rehabilitation Act abrogated sovereign immunity through Section 5 powers.

75. The Rehabilitation Act claims authority in both the Fourteenth Amendment and the Spending Clause. "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 . . . or the provisions of any other federal statute prohibiting discrimination *by recipients of Federal financial assistance*." [emphasis added].

76. The leading case on the reach of Congress's Spending Clause powers is *South Dakota v. Dole* (1987).

77. The Ninth Circuit reached a similar conclusion in *Vinson v. Thomas* (2002). Both of those decisions are in conflict with a Second Circuit decision concluding that the Rehabilitation Act does not waive immunity (*Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn* 2001). It is possible that the Supreme Court may consider this issue at some point, although it has chosen not to thus far.

78. The bill was SB 435 in the 2001 Regular Session of the Alabama Legislature.

79. §2 (5) "EMPLOYER. Any person or public or private entity that employs 15 or more persons, including the state, cities, districts, authorities, public corporations, and entities and their instrumentalities."

80. See the Alabama Disabilities Advocacy Program's website http://www.adap.net/. Accessed August 4, 2003.

81. *United States v. Georgia* (2006) was another Title II victory for the disabled community.

82. The devolution that occurred during the 1990s certainly appears to have slowed dramatically since 2001. The most likely reason for the slow down is the unified Republican control of the federal government from 2001–2007. The Republican party primarily championed the cause of increased state autonomy during the 1990s, but once in unified power did not take any steps to resume devolution. The events of September 11 also played a substantial role in the retreat from devolution.

83. The judge ruled that because Hibbs was fired after his family leave time had run out, it did not constitute a violation of the FMLA. The Ninth Circuit upheld the District Court's ruling in November 2005 (Riley 2005).

CHAPTER 7

1. This comes with the obvious caveat that Garrett's later case reviewing her Rehabilitation Act claim constitutes a success for getting her complaint heard. That took place, however, in a legal context. Outside the courts, little else occurred.

2. Mobilization of interest group support is necessary, but not always sufficient, as Bosworth finds. He concludes that immunity waivers targeting a broad array of issues are more likely to pass than a waiver targeting only one specific law or one specific group (Bosworth 2006, 413).

3. Pettys and Nagel suggest that the importance of state autonomy is that it permits states to compete with the federal government for popular support. See chapter 1 as well as Pettys (2003, 368–374) and Nagel (2001a, 58).

4. This is, of course, not to suggest that cities and counties do not face severe fiscal problems. These problems, however, do not stem from their lack of sovereign immunity. Protections against frivolous lawsuits are already in place and concerns about states being overwhelmed with such suits are highly unlikely.

Cases Cited

Central Virginia Community College v. Katz, 543 U.S. 356 (2006)

Chiles v. United Faculty of Florida, 615 So. 2d 671 (1993)

Chisholm v. Georgia, 2 Dall. 419 (1793)

Christian v. Atlantic & North Carolina Railroad, 133 U.S. 233 (1890)

City of Boerne v. Flores, 521 U.S. 507 (1997)

Cohens v. Virginia, 19 U.S. 264 (1821)

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, Civ. No. 94-5610 (1995)

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 919 F. Supp. 756 (1996a)

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 948 F. Supp. 400 (1996b)

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 131 F.3d 353 (1997)

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 148 F.3d 1343 (1998)

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999)

Consolidated Bank v. State of Louisiana, 5 La. Ann. 44 (1850)

Cory v. White, 457 U.S. 85 (1982)

Cowles v. Mercer County, 74 U.S. 118 (1869)

Cunningham v. Macon & Brunswick Railroad, 109 U.S. 446 (1883)

Cutting v. South Carolina (1796), not reported by Dallas, "Docket of the Supreme Court," Vol. A., 31

Davis v. Gray, 83 U.S. 203 (1873)

Dickson v. Florida Dept. of Corrections, No. 5:9cv207-RH (1996)

Edelman v. Jordan, 415 U.S. 651 (1974)

Employees of Department of Public Health and Welfare of Missouri v. Department of Public Health and Welfare of Missouri, 411 U.S. 279 (1973)

Ex Parte Conway, 4 Ark. 302 (1842)

Ex Parte Young, 209 U.S. 123 (1908)

Federal Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743 (2002)

Kimel v. Florida Board of Regents, 139 F.3d 1426 (1998)

Kimel v. Florida Board of Regents 528 U.S. 62 (2000)

L.P. Bayne & Company v. Jenkins, 66 N.C. 356 (1869)

Lapides v. University System of Georgia, 535 U.S. 613 (2002)

Lincoln County v. Luning, 133 U.S. 529 (1890)

Louisiana ex rel. Elliott v. Jumel, 107 U.S. 711 (1883)

Lynn v. Polk, 76 Tenn. 121 (1881)

MacPherson v. University of Montevallo, 938 F. Supp. 785 (1996)

McGahey v. Commonwealth, 85 Va. 519 (1888)

McGahey v. Virginia, 135 U.S. 662 (1890)

Mills v. Maine, 839 F. Supp. 3 (1993)

Mills v. Maine, 853 F. Supp. 551 (1994)

Mills v. Maine, 1996 U.S. Dist. LEXIS 9985 (1996)

Mills v. Maine, 118 F.3d 37 (1997)

Miranda B. v. Kitzhaber, 328 F.3d 1181 (2003)

Morton, Bliss & Co. v. Comptroller General, 4 S.C. 430 (1873)

Moultrie v. Georgia (1797), not reported by Dallas, "Docket of the Supreme Court," Vol. A., 32

National League of Cities v. Usery, 426 U.S. 833 (1976)

Nevada Department of Human Resources v. Hibbs, 123 S. Ct. 1972 (2003)

New Hampshire v. Louisiana, 108 U.S. 76 (1883)

North Carolina v. Temple, 134 U.S. 22 (1890)

Northern Insurance Company v. Chatham County, 547 U.S. 189 (2006)

Osborn v. The Bank of the United States, 22 U.S. 738 (1824)

Oswald v. New York, 2 Dall. 401 (1792)

Pace v. Bogalusa City School Board, 325 F.3d 609 (2003)

Parden v. Terminal Railway, 377 U.S. 184 (1964)

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984)

Pennsylvania v. Union Gas Company, 491 U.S. 1 (1989)

Pierson v. Ray, 386 U.S. 547 (1967)

Platenius v. State, 17 Ark. 518 (1856)

Poindexter v. Greenhow, 114 U.S. 270 (1885)

Principality of Monaco v. Mississippi, 292 U.S. 313 (1934)

Railroad Companies v. Schutte, 103 U.S. 118 (1880)

Railroad Company v. Swasey, 90 U.S. 405 (1874)

Raleigh & Augusta Air-Line Railroad Co. v. Jenkins, 68 N.C. 499 (1873)

Riggs v. Johnson County, 73 U.S. 166 (1868)

Scheuer v. Rhodes, 416 U.S. 232 (1974)

Self v. Jenkins, 71 N.C. 578 (1874)

Seminole Tribe of Florida v. Butterworth, 491 F. Supp. 1015 (1980)

Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (1981)

Seminole Tribe of Florida v. Florida, 801 F. Supp. 655 (S.D. Fla. 1992)

Seminole Tribe of Florida v. Florida, 11 F.3d 1016 (11th Cir. 1994)

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)

Smithee v. Garth, 33 Ark. 17 (1878)

South Dakota v. Dole, 483 U.S. 203 (1987)

State ex rel. Attorney General v. Clinton, 28 La. Ann. 219 (1876)

State ex rel. Citizens' Bank of Louisiana v. Funding Board, 28 La. Ann. 249 (1876)

State ex rel. Forstall v. Board of Liquidation, 27 La. Ann. 577 (1875)

State ex rel. Forstall v. Board of Liquidators, 29 La. Ann. 690 (1877)

State ex rel Plock & Co. v. Cobb, 64 Ala. 127 (1879)

State ex rel. Salomon & Simpson v. Graham, 23 La. Ann. 402 (1871)

State ex rel Shiver v. Comptroller General, 4 S.C. 185 (1873)

State of Florida v. Florida Central Railroad, 15 Fla. 690 (1876)

State of Florida v. Seminole Tribe of Florida, No. 96-2063-Civ-UUB (1997)

State of Florida v. Seminole Tribe of Florida, 181 F.3d 1237 (1999)

State of Mississippi v. Johnson, 25 Miss. 625 (1853)

Swasey v. North Carolina Railroad, 23 F. Cas. 518 (1874)

Syrrx, Inc. v. Oculus Pharmaceuticals, 2002 U.S. Dist. LEXIS 14893 (2002)

Tennessee Bond Cases, 114 U.S. 663 (1885)

Tennessee v. Lane, 541 U.S. 509 (2004)

Tenney v. Brandhove, 341 U.S. 367 (1951)

Trustees of the Internal Improvement Fund v. Jacksonville, Pensacola, and Mobile Railroad Company, 16 Fla. 708 (1878)

United States v. Georgia, 546 U.S. 151 (2006)

United States v. Lopez, 514 U.S. 549 (1995)

United States v. Peters, 9 U.S. 115 (1809)

University Railroad Company v. Holden, 63 N.C. 410 (1869)

Vanstophorst v. Maryland, 2 Dall. 401 (1791)

*Vassall v. Massachuse*tts (1793), not reported by Dallas, "Docket of the Supreme Court," Vol. A, 5

Vermont Agency of Natural Resources v. United States ex. rel. Stevens, 529 U.S. 765 (2000)

Vinson v. Thomas, 288 F.3d 1145 (9th Cir. 2002)

Virginia Coupon Cases, 114 U.S. 269 (1885)

Walker v. State, 12 S.C. 200 (1879)

Welch v. Texas Dept. of Highways and Public Transportation, 483 U.S. 468 (1987)

Wilson v. Jenkins, 72 N.C. 5 (1875)

Wisconsin Department of Corrections v. Schacht, 524 US 381 (1998)

Worcester v. Georgia, 31 U.S. 515 (1832)

References

"Abstract of Lord Carmarthen's Answer to Mr. Adams." 1787. *The American Museum*, May.

Alabama Forestry Association. 2001. "Alabamians with Disabilities Act." *Forestry Legislative Report*, 14 May.

"Alabama Struggles to Pass a State ADA." 2001. *Independent Living News*, June.

Amar, Akhil Reed. 1987. "Of Sovereignty and Federalism." *Yale Law Journal* 96: 1425–1520.

American Association of Retired Persons. 2001. *The Policy Book: AARP Public Policies 2001*. http://www.aarp.org/ppa/chapter4.pdf. Accessed July 22, 2003.

American Association of Retired Persons. 2006. *The Policy Book: AARP Public Policies 2005*. http://assets.aarp.org/www.aarp.org_/articles/legpolicy/4_employ05.pdf. Accessed January 26, 2006.

Associated Press. 2002. "Disability Discrimination Suit Against UAB Dismissed." *Associated Press State and Local Wire*, 7 September.

Associated Press. 2005. "State's Courts Must Be Accessible Under Settlement." *Associated Press State and Local Wire*, 24 March.

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: 569–604.

Baldassare, Mark. 1998. *When Government Fails: The Orange County Bankruptcy*. Berkeley: University of California Press.

Bartell, Laura A. 2000. "Getting to Waiver: A Legislative Solution to State Sovereign Immunity in Bankruptcy After Seminole Tribe." *Bankruptcy Development Journal* 17: 17–104.

Beard, Charles A. 1915. *Economic Origins of Jeffersonian Democracy*. New York: MacMillan.

Benson, Peter, ed. 2001. *The Theory of Contract Law*. New York: Cambridge University Press.

Berman, Mitchell N., Anthony Reese, and Ernest A. Young. 2001. "State Accountability for Violations of Intellectual Property Rights: How to "Fix" Florida Prepaid (And How Not To)." *Texas Law Review* 79: 1037–1197.

Bianco, William T., David B. Spence, and John D. Wilkerson. 1996. "The Electoral Connection in the Early Congress: The Case of the Compensation Act of 1816." *American Journal of Political Science* 40: 145–171.

Biddle, Nicholas. 1843. "The Debt of Pennsylvania." *Niles' National Register*, 12 August.

Black, Donald J. 1973. "The Mobilization of Law." *Journal of Legal Studies* 2: 125–149.

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: 39–51.

Bohannan, Christina. 2002. "Beyond Abrogation of Sovereign Immunity: State Waivers, Private Contracts, and Federal Incentives." *New York University Law Review* 77: 273–345.

Bosworth, Matthew H. 2006. "'An Innate Sense of Fairness': State Responses to the U.S. Supreme Court's Sovereign Immunity Decisions." *Publius* 36: 393–420.

Brady, Patrick S. 1972. "The Slave Trade and Sectionalism in South Carolina, 1787–1808." *Journal of Southern History* 38: 601–620.

Brown, Judith Olans and Peter D. Enrich. 2000. "Nostalgic Federalism." *Hastings Constitutional Law Quarterly* 28: 1–66.

Brown, Wallace. 1969. *The Good Americans: The Loyalists in the American Revolution*. New York: William Morrow and Co.

Bulow, Jeremy and Keneth Rogoff. 1989. "Sovereign Debt: Is to Forgive to Forget?" *American Economic Review* 79: 43–50.

Burstein, Jon. 2006. "Federal Deal Would Allow Seminole Tribe To Get Vegas-Style Slot Machines." *South Florida Sun-Sentinel*, 24 October.

Burstein, Jon. 2007. "Seminoles Take Slots to Federal Judge." *South Florida Sun-Sentinel*, 17 January.

Calhoon, Robert M. 1965. *The Loyalists in Revolutionary America, 1760–1781*. New York: Harcourt Brace Jovanovich.

Caminker, Evan H. 2001. "Judicial Solicitude for State Dignity." *The Annals of the American Academy of Political and Social Science* 574: 81–92.

Carrier, Paul. 1999a. "Decision May Put Workers At Risk." *Portland Press Herald*, 29 June.

Carrier, Paul. 1999b. "Two Bills to Repay Probation Officers." *Portland Press Herald*, 3 July.

Carrier, Paul. 2000. "Gov. King Says No to Minimum Wage Bills." *Portland Press Herald*, 9 May.

Carson, Jamie L. and Erik J. Engstrom. 2005. "Assessing the Electoral Connection: Evidence from the Early United States." *American Journal of Political Science* 49: 746–757.

Carson, Jamie L., Jeffery A. Jenkins, David W. Rohde, and Mark A. Souva. 2001. "The Impact of National Tides and District-Level Effects on Electoral Outcomes: The Congressional Elections of 1862–63." *American Journal of Political Science* 45: 887–898.

Cattelino, Jessica R. N.d. *High Stakes: Florida Seminole Gaming, Sovereignty, and the Social Meanings of Casino Wealth*. Durham, NC: Duke University Press. Forthcoming.

Chambers, William Nesbit and Walter Dean Burnham, eds. 1967. *The American Party Systems: Stages of Political Development*. New York: Oxford University Press.

Chemerinsky, Erwin. 1999. "The Rehnquist Court & Justice: An Oxymoron?" *Washington University Journal of Law & Policy* 1: 37–52.

Chemerinsky, Erwin. 2001. "Against Sovereign Immunity." *Stanford Law Review* 53: 1201–1224.

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: 277–308.

Cole, Harold L., James Dow, and William B. English. 1995. "Default, Settlement, and Signalling: Lending Resumption in a Reputational Model of Sovereign Debt." *International Economic Review* 36: 365–385.

Collins, Michael G. 1988. "The Conspiracy Theory of the Eleventh Amendment: The Judicial Power of the United States- The Eleventh Amendment in American History." *Columbia Law Review* 88: 212–246.

Colton, Calvin. 1840. *Reply to Webster: A Letter to Daniel Webster, of Massachusetts, a member of the Senate of the United States, in reply to his legal opinion to Baring, Brothers & Co. upon the illegality and unconstitutionality of state bonds, and loans of state credit*. New York: John Windt Publisher.

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.

Crowl, Philip A. 1943. *Maryland During and After the Revolution: A Political and Economic Study*. Baltimore: Johns Hopkins Press.
Curran, Jeanne. 1994. "Probation Officers React to Findings on Job Status." *Bangor Daily News*, 15 January.
Curtis, Benjamin R. 1844. "State Debts." *North American Review* 58: 109–157.
DeBoer, Michael John. 2004. "Equality as a Fundamental Value in the Indiana Constitution." *Valparaiso University Law Review* 38: 489–575.
Dougherty, Keith L. 2001. *Collective Action Under the Articles of Confederation*. New York: Cambridge University Press.
Driscoll, Amy. 2007. "Crist, Seminole Tribe Open Talks on Slots." *Miami Herald*, 7 March.
Dunbar, Willis F. and George S. May. 1995. *Michigan: A History of the Wolverine State*. 3rd ed. Grand Rapids, MI: William B. Eerdmans Publishing.
Dunning, William A. 1907. *Reconstruction, Political and Economic 1865–1877*. New York: Harper & Bros.
Edgar, Walter. 1998. *South Carolina: A History*. Columbia: University of South Carolina Press.
Eichengreen, Barry. 1991. "Historical Research on International Lending and Debt." *Journal of Economic Perspectives* 5: 149–169.
Eichengreen, Barry and Peter H. Lindert, eds. 1989. *The International Debt Crisis in Historical Perspective*. Cambridge, MA: MIT Press.
Elazar, Daniel J. 1987. *Exploring Federalism*. Tuscaloosa: University of Alabama Press.
Elkins, Stanley and Eric McKitrick. 1993. *The Age of Federalism*. New York: Oxford University Press.
Ellis, David M., James A. Frost, Harold C. Syrett, and Harry J. Carman. 1967. *A History of New York State*. Ithaca, NY: Cornell University Press.
English, William B. 1996. "Understanding the Costs of Sovereign Default: American State Debts in the 1840's." *American Economic Review* 86: 259–275.
Ershkowitz, Herbert and William G. Shade. 1971. "Consensus or Conflict? Political Behavior in the State Legislatures During the Jacksonian Era." *Journal of American History* 58: 691–621.
Evans, Emory G. 1962. "Planter Indebtedness and the Coming of the Revolution in Virginia." *William and Mary Quarterly* 19: 511–533.

Everett, Alexander. 1844. "The State Debts." *The United States Magazine and Democratic Review* 14: 3–16.

Farber, Daniel A. 2000. "Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism." *Notre Dame Law Review* 75: 1133–1145.

Field, Martha A. 1978a. "The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One." *University of Pennsylvania Law Review* 126: 515–549.

Field, Martha A. 1978b. "The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States." *University of Pennsylvania Law Review* 126: 1203–1280.

"Financial and Commercial Review." 1847. *United States Democratic Review* 20: 187.

"Financial and Commercial Review." 1849a. *United States Democratic Review* 24: 280–281.

"Financial and Commercial Review" 1849b. *United States Democratic Review* 25: 183.

Fletcher, William A. 1983. "A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction." *Stanford Law Review* 35: 1033–1131.

Fletcher, William A. 1989. "The Diversity Explanation of the Eleventh Amendment: A Reply to Critics." *University of Chicago Law Review* 56: 1261–1299.

Florida State Board of Administration. 2006. 2005/2006 Annual Report. http://www.florida529plans.com/pdf/2006_AnnRpt.pdf. Accessed May 11, 2007.

Foner, Eric. 1990. *A Short History of Reconstruction*. New York: Harper & Row.

Formisano, Ronald P. 1971. *The Birth of Mass Political Parties: Michigan, 1827–1861*. Princeton: Princeton University Press.

Francis, Mike. 1999. "How the High Court is Penalizing Corporate America." *Business Week*, 2 August.

Frey, Bruno S. and Reiner Eichenberger. 1999. *The New Democratic Federalism for Europe*. Northampton, MA: Edward Elgar Publishing.

Friedenberg, Daniel. 1992. *Life, Liberty, and the Pursuit of Land: The Plunder of Early America*. Buffalo: Prometheus Books.

Fuchs, Ester R. 1992. *Mayors and Money: Fiscal Policy in New York and Chicago*. Chicago: University of Chicago Press.

Gibbons, John J. 1983. "The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation." *Columbia Law Review* 83: 1889–2005.

Giles, Michael W. and Thomas D. Lancaster. 1989. "Political Transition, Social Development, and Legal Mobilization in Spain." *American Political Science Review* 83: 817–833.

Gittler, Marshall. 2003. "US should look closer to home for failure to repay bondholders." *Financial Times*, 1 February.

Goebel, Julius, Jr. 1971. *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*. New York: MacMillan.

Goldstein, Brad and Jeff Testerman. 1997. "In Seminole Gambling, A Few Are Big Winners." *St. Petersburg Times*, 19 December.

Goldstein, Brad and Jeff Testerman. 1998. "Trump Supports Indian Casinos." *St. Petersburg Times*, 18 June.

Gonzalez, John Edmond. 1973. "Flush Times, Depression, War, and Compromise." in *A History of Mississippi*, ed. Richard Aubrey McLemore. Jackson: University and College Press of Mississippi.

Goodrich, Carter. 1950. "The Revulsion Against Internal Improvements." *Journal of Economic History* 10: 145–169.

Goodrich, Carter. 1956. "Public Aid to Railroads in the Reconstruction South." *Political Science Quarterly* 71: 407–442.

Gruss, Jean. 1997. "Tribe Sues to Expand Gambling Operations." *Tampa Tribune*, 14 June.

Hamilton, Alexander. 1832. "Report on the Public Credit." in *American State Papers*. v. 1 (finance). Washington, DC: Gales and Seaton.

Harrell, Isaac S. 1926. *Loyalism in Virginia: Chapters in the Economic History of the Revolution*. Durham, NC: Duke University Press.

Hart, Roger L. 1975. *Redeemers, Bourbons, & Populists*. Baton Rouge: Louisiana State University Press.

Heath, Milton S. 1950. "North American Railroads: Public Railroad Construction and the Development of Private Enterprise in the South before 1861." *Journal of Economic History* 10: 40–53.

Hidy, Ralph W. 1949. *The House of Baring in American Trade and Finance*. Cambridge, MA: Harvard University Press.

Hollman, Kenneth W. and Joe H. Murrey, Jr. 1985. "Alabama's State Debt History, 1865–1921." *Southern Studies* 24: 306–325.

Holmes, Stephen. 2003. "Lineages of the Rule of Law." In *Democracy and the Rule of Law*, eds. Jose Maria Maravall and Adam Przeworski. New York: Cambridge University Press.

Holt, Charles Frank. 1977. *The Role of State Government in the Nineteenth Century American Economy, 1820–1902*. New York: Arno Press.

Holt, Michael F. 1999. "The Primacy of Party Reasserted." *Journal of American History* 86: 151–157.
Hume, John F. 1884. "Responsibility for State Roguery." *The North American Review*, December: 563–580.
Hurwitz, Leon. 1981. *The State As Defendant*. Westport, CT: Greenwood Press.
Hyman, Michael R. 1989. "Taxation, Public Policy, and Political Dissent: Yeoman Disaffection in the Post-Reconstruction Lower South." *Journal of Southern History* 55: 49–76.
Jackson, Vicki C. 1988. "The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity." *Yale Law Journal* 98: 1–126.
Jacobs, Clyde E. 1972. *The Eleventh Amendment and Sovereign Immunity*. Westport, CT: Greenwood Press.
Jaffe, Louis. 1963. "Suits Against Governments and Officers: Sovereign Immunity." *Harvard Law Review* 77: 1–39.
Jensen, Merrill. 1936. "The Cession of the Old Northwest." *Mississippi Valley Historical Review* 23: 27–48.
Jensen, Merrill. 1939. "The Creation of the National Domain, 1781–1784." *Mississippi Valley Historical Review* 26: 323–342.
Jensen, Richard J. 1978. *Illinois: A Bicentennial History*. New York: W.W. Norton.
Johnson, Amanda. 1970. *Georgia as Colony and State*. Atlanta, GA: Cherokee Publishing.
Jones, Robert B. 1977. *Tennessee at the Crossroads*. Knoxville: University of Tennessee Press.
Kesich, Gregory. 2000. "State Workers Seek Right to Sue Employer." *Portland Press Herald*, 14 March.
Kesich, Gregory. 2000. "Employees Lose Round in Fight for Right to Sue." *Portland Press Herald*, 25 March.
Kiehl, Stephen. 2000. "Legislators Vote to Replace University Regents with Local Boards." *Palm Beach Post*, 6 May.
Kiewiet, D. Roderick and Kristin Szakaly. 1996. "Constitutional Limitations on Borrowing: An Analysis of State Bonded Indebtedness." *Journal of Law, Economics, and Organization* 12: 62–97.
Kim, Namsuk and John Joseph Wallis. 2005. "The Market for American State Government Bonds in Britain and the United States, 1830–1843." *Economic History Review* 58: 736–764.
Klas, Mary Ellen. 2005. "Florida Governor May Let Indian Tribes Expand Gambling Operations." *Miami Herald*, 15 June.
Kleindienst, Linda and Sarah Talalay. 2004. "Way is Clear for South Florida Slot Machines As Constitutional Amendment Passes." *South Florida Sun-Sentinel*, 5 November.

Klingelhofer, Herbert E. 1963. "Matthew Ridley's Diary During the Peace Negotiations of 1782." *William & Mary Quarterly* 20: 95–133.

Lamplugh, George R. 1986. *Politics on the Periphery: Factions and Parties in Georgia, 1783–1806*. Newark: University of Delaware Press.

Larson, John Lauritz. 2001. *Internal Improvement: National Public Works and The Promise of Popular Government in the Early United States*. Chapel Hill: The University of North Carolina Press.

Lawrence, Susan E. 1991. "Participation Through Mobilization of the Law: Institutions Providing Indigents with Access to the Civil Courts." *Polity* 23: 423–442.

Lewis, George E. 1941. *The Indiana Company, 1763–1798*. Glendale, CA: Arthur H. Clark Company.

Maas, David Edward. 1989. *The Return of the Massachusetts Loyalists*. New York: Garland Publishing.

Madison, James H. 1986. *The Indiana Way: A State History*. Bloomington: Indiana University Press.

Marcus, Maeva. 1994. *The Documentary History of the Supreme Court of the United States, 1789–1800*. v.5. New York: Columbia University Press.

Marshall, Peter. 1965. "Lord Hillsborough, Samuel Wharton and the Ohio Grant, 1769–1775." *English Historical Review* 80: 717–739.

Marshall, William P. 1989. "The Diversity Theory of the Eleventh Amendment: A Critical Evaluation." *Harvard Law Review* 102: 1372–1396.

Martin, Sidney Walter. 1974. *Florida During the Territorial Days*. Philadelphia: Porcupine Press.

Mathis, Doyle. 1967. "*Chisholm v. Georgia*: Background and Settlement," *Journal of American History* 54: 19–29.

McCann, Michael. 1994. *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*. Chicago: University of Chicago Press.

McCloskey, Robert G. 2000. *The American Supreme Court*. 3rd ed. Chicago: University of Chicago Press.

McDonald, Forrest. 2000. *States' Rights and the Union: Imperium in Imperio, 1776–1876*. Lawrence: University Press of Kansas.

McGrane, Reginald C. 1935. *Foreign Bondholders and American State Debts*. New York: The MacMillan.

Meara, Emmet. 2000. "Veto of Bill on State Worker Suits Raises Ire." *Bangor Daily News*, 11 May.

Meara, Emmet. 2000. "Four King Vetoes Survive Override Efforts." *Bangor Daily News*, 12 May.

Meltzer, Daniel J. 2000. "State Sovereign Immunity: Five Authors in Search of a Theory." *Notre Dame Law Review* 75: 1011–1067.

Menell, Peter S. 2000. "Economic Implications of State Sovereign Immunity from Infringement of Federal Intellectual Property Rights." *Loyola of Los Angeles Law Review* 33: 1399–1466.

Moore, James Tice. 1974. *Two Paths to the New South*. Lexington: The University Press of Kentucky.

Moussalli, Stephanie D. 1996. "Florida's Frontier Constitution: The Statehood, Banking & Slavery Controversies." *Florida Historical Quarterly* 74: 423–439.

Nagel, Robert F. 2001a. "Judicial Power and the Restoration of Federalism" *The Annals of the American Academy of Political and Social Science* 574: 52–65.

Nagel, Robert F. 2001b. *The Implosion of American Federalism*. New York: Oxford University Press.

Nevins, Allan. 1969. *The American States During and After the Revolution: 1775–1789*. New York: Augustus M. Kelley.

Nice, David C. 1991. "The Impact of State Debt Policies to Limit Debt Financing." *Publius* 21: 69–82.

Noonan, John T. 2002. *Narrowing the Nation's Power: The Supreme Court Sides with the States*. Berkeley: University of California Press.

"Note: Too Sovereign But Not Sovereign Enough: Are U.S. States Beyond the Reach of the Law of Nations?" 2003. *Harvard Law Review* 116: 2654–2677.

Official Report of the Debates and Proceedings in the State Convention, Assembled May 4th, 1853 to Revise and Amend the Constitution of the Commonwealth of Massachusetts. 1853. Boston, MA: White & Potter.

Okin, Jaclyn A. 2001. "Has the Supreme Court Gone Too Far?: An Analysis of *University of Alabama v. Garrett* and Its Impact on People With Disabilities." *American University Journal of Gender, Social Policy & the Law* 9: 663–694.

Olson, Wyatt. 2003. "Gamblin' Men." *New Times Broward-Palm Beach*, 30 January.

Onuf, Peter. 1977. "Toward Federalism: Virginia, Congress, and the Western Lands." *William and Mary Quarterly* 34: 354–355.

Orth, John V. 1987. *The Judicial Power of the United States*. New York: Oxford University Press.
Orth, John V. 2000. "History and the Eleventh Amendment." *Notre Dame Law Review* 75: 1147–1159.
Parish, John Carl. 1930. "The Intrigues of Doctor James O'Fallon." *Mississippi Valley Historical Review* 17: 230–263.
Peterson, Paul E. 1995. *The Price of Federalism*. Washington, DC: The Brookings Institution.
Pettys, Todd E. 2003. "Competing for the People's Affection: Federalism's Forgotten Marketplace." *Vanderbilt Law Review* 565: 329–391.
Pfander, James E. 2003. "Member State Liability and Constitutional Change in the United States and Europe." *American Journal of Comparative Law* 51: 237–274.
Phillips, Ulrich B. 1909. "The South Carolina Federalists, I" *American Historical Review* 14: 529–543.
Pochna, Peter. 1999. "Court Denies Overtime Back Pay for State Officers." *Portland Press Herald*, 24 June.
Porter, Robert P. 1880. "State Debts and Repudiation." *International Review*, November: 556–592.
"Pre-Civil War Debts Haunt Mississippi." 1986. *Journal of Commerce*, 3 October.
Ratchford, Benjamin U. 1966. *American State Debts*. New York: AMS Press.
"Repudiation." 1842. *The Law Reporter* 4: 409–436.
Resnik, Judith and Julie Chi-hye Suk. 2003. "Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty." *Stanford Law Review* 55: 1921–1962.
Restatement of the Law Second, Contracts. 1981. Philadelphia: American Law Institute.
Riley, Brendan. 2005. "Ex-Government Worker Loses Leave Case Against Nevada." *Associated Press State and Local Wire*, 4 November.
Riley, James C. 1978. "Foreign Credit and Fiscal Stability: Dutch Investment in the United States, 1781–1794." *Journal of American History* 65: 654–678.
Rosenberg, Gerald. 1991. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago Press.
Rubin, Edward L. and Malcolm Feeley. 1994. "Federalism: Some Notes on a National Neurosis." *UCLA Law Review* 41: 903–952.
Rubin, Louis D. 1977. *Virginia: A Bicentennial History*. New York: W.W. Norton.

Sacher, John M. 1999. "The Sudden Collapse of the Louisiana Whig Party." *Journal of Southern History* 65: 221–248.

Sangchompuphen, Tommy. 1995. "College Prepayment Plan is Focus of Patent Suit Against Florida." *Wall Street Journal*, 10 July.

Scheiber, Harry N. 1969. *Ohio Canal Era: A Case Study of Government and the Economy 1820–1861*. Athens: Ohio University Press.

Schlesinger, Arthur M. 1935. "The Colonial Newspapers and the Stamp Act." *New England Quarterly* 8: 63–83.

Schweikart, Larry. 1987. *Banking in the American South: From the Age of Jackson to Reconstruction*. Baton Rouge: Louisiana University Press.

Scott, William A. 1893. *The Repudiation of State Debts*. New York: Thomas Y. Crowell and Co.

Selby, John E. 1988. *The Revolution in Virginia, 1775–1783*. Williamsburg, VA: The Colonial Williamsburg Foundation.

Shapiro, David L. 1995. *Federalism: A Dialogue*. Evanston, IL: Northwestern University Press.

Sherry, Suzanna. 1990. "The Eleventh Amendment and Stare Decisis: Overruling *Hans v. Louisiana*." *University of Chicago Law Review* 57: 1260–1272.

Smith, Charles A. N.d. "Credible Commitments, Trade, and the Avoidance of War: The Role of the Early American Judiciary." *Law & Society Review*. Forthcoming.

Smith, D.E. Huger. 1908. "Commodore Alexander Gillon and the Frigate *South Carolina*." *South Carolina Historical and Genealogical Magazine* 9: 192.

Smith, W. Wayne. 1974. "Politics and Democracy in Maryland, 1800–1854." In *Maryland: A History, 1632–1974*, eds. Richard Walsh and William Lloyd Fox. Baltimore: Maryland Historical Society.

Snyder, Charles McCool. 1958. *The Jacksonian heritage; Pennsylvania politics, 1833–1848*. Harrisburg: Pennsylvania Historical and Museum Commission.

Spence, Carroll. 1843. "Repudiation of State Debts." *Boston Cultivator*, 22 April.

Staletovich, Jenny. 1998. "Focus on Gambling Issues." *The Atlanta Journal and Constitution*, 7 September.

Staletovich, Jenny. 1999. "Tribe, State At Standoff Over Casinos." *Palm Beach Post*, 7 September.

Stevens, Michael E. 1989. "Legislative Privilege in Post-Revolutionary South Carolina." *William & Mary Quarterly* 46: 71–92.

Stockfisch, Jerome. 2007. "Crist Deals Fresh Hand to Casinos." *Tampa Tribune*, March 31.

Stone, Richard G. Jr. 1979. "'The *South Carolina* We've Lost': The Bizarre Saga of Alexander Gillon and His Frigate." *American Neptune* 39: 161–164.

Story, Joseph. 1833. *Commentaries on the Constitution of the United States*. v. 2. Boston: Hillard, Gray, and Co.

Strolovich, Dara Z. 2006. "Do Interest Groups Represent the Disadvantaged? Advocacy at the Intersections of Race, Class, and Gender." *Journal of Politics* 68: 893–908.

Summers, Mark W. 1984. *Railroads, Reconstruction, and the Gospel of Prosperity*. Princeton: Princeton University Press.

Swinford, Bill and Eric N. Waltenburg. 1998. "The Consistency of the U.S. Supreme Court's "Pro-State" Bloc." *Publius* 28: 25–41.

Sylla, Richard and John Joseph Wallis. 1998. "The Anatomy of Sovereign Debt Crises: Lessons from the American State Defaults of the 1840's." *Japan and the World Economy* 10: 267–293.

"Syrrx Successfully Enforces Submicroliter Crystallization Patent." 2003. *Business Wire*, 5 March.

Tarr, G. Alan. 1998. *Understanding State Constitutions*. Princeton, NJ: Princeton University Press.

Tebeau, Charles W. 1971. *A History of Florida*. Coral Gables, FL: University of Miami Press.

Testerman, Jeff. 1999. "Tribe Pushing Casino Projects." *St. Petersburg Times*, 24 July.

Testerman, Jeff. 2000. "Seminole Tribe Ups Ante on Slots." *St. Petersburg Times*, 11 September.

Testerman, Jeff. 2001. "U.S. Interior to Review Tribal Gambling Rules." *St. Petersburg Times*, 26 July.

Thomas, Jennifer S. 1996. "Senate Considers Indian Gaming Rules." *St. Petersburg Times*, 10 May.

Thompson, George H. 1976. *Arkansas and Reconstruction*. Port Washington, NY: Kennikat Press.

Thornton, J. Mills, III. 1982. "Fiscal Policy and the Failure of Radical Reconstruction in the Lower South." In *Region, Race, and Reconstruction*, eds. J. Morgan Kousser and James M. McPherson. New York: Oxford University Press.

Tomz, Michael. 2001. "How do Reputations Form? New and Seasoned Borrowers in International Capital Markets." presented at the annual meeting of the American Political Science Association, San Francisco.

Treaty of Paris, Sept. 3, 1783, United States-Great Britain, art. IV, 8 Stat. 80, T.S. No. 104.

Trescott, Paul B. 1955. "Federal-State Financial Relations, 1790–1860." *The Journal of Economic History* 15: 227–245.

Trotter, Alexander. 1839. *Observations on the Financial Position and Credit of Such of the States of the North American Union as have Contracted Public Debts*. London: Longman, Orme, Brown, Green & Longmans.

U.S. Congress. House. Committee on the Judiciary. 2003. *Statement of Marybeth Peters, Register of Copyrights*. 108th Cong., 1st sess., 17 June.

U.S. Congress. Senate. Committee on Health, Education, Labor, and Pensions. 2001a. *Prepared Testimony of Dan Kimel, Professor of Physics*. 107th Cong., 1st sess., 4 April.

U.S. Congress. Senate. Committee on Health, Education, Labor, and Pensions. 2001b. *Prepared Testimony of Marci A. Hamilton*. 107th Cong., 1st sess., 4 April.

U.S. Congress. Senate. Committee on Health, Education, Labor, and Pensions. 2002. *Older Workers' Rights Restoration Act of 2001: Report Together With Minority Views*. 107th Cong., 2nd sess.

U.S. Congress. Senate. Subcommittee on Courts and Intellectual Property. 2000. *Statement of Q. Todd Dickinson, Undersecretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office*. 106th Cong., 2nd sess., 27 July. http://www.uspto.gov/web/offices/ac/ahrpa/opa/bulletin/statesovimmunity.pdf. Accessed July 11, 2003.

U.S. Department of the Interior. 1998. "Class III Gaming Procedures." *Federal Register* 63: 3291.

U.S. Department of the Interior. 1999. "Class III Gaming Procedures." *Federal Register* 64: 17535.

U.S. General Accounting Office. 2001. *Intellectual Property: State Immunity in Infringement Actions*. http://www.gao.gov/new.items/d01811.pdf. Accessed July 11, 2003.

Van Winter, Pieter J. 1977. *American Finance and Dutch Investment, 1780–1805*. New York: Arno Press.

Volokh, Eugene. 2000. "Sovereign Immunity and Intellectual Property." *Southern California Law Review* 73: 1161–1170.

Wallis, John. 2003. "The Property Tax as a Coordinating Device: Financing Indiana's Mammoth Internal Improvement System, 1835 to 1842." *Explorations in Economic History* 40: 223–250.

Watson, Harry L. 1990. *Liberty and Power: The Politics of Jacksonian America*. New York: Hill and Wang.

Whaley, Sean. 2004. "Ex-Government Worker Loses Leave Case Against State." *Las Vegas Review-Journal*, 14 October.

Wildenthal, Bryan H. 2003. *Native American Sovereignty On Trial: A Handbook with Cases, Laws, and Documents*. Santa Barbara, CA: ABC–CLIO.

Wiltse, Charles M. and Harold D. Moser, eds. 1980. *The Papers of Daniel Webster: Correspondence, Vol. 4: 1835–1839*. Hanover, NH: University Press of New England.

Worley, Ted R. 1950. "The Control of the Real Estate Bank of the State of Arkansas, 1836–1855." *Mississippi Valley Historical Review* 37: 403–426.

Wright, Louis B. 1976. *South Carolina: A Bicentennial History*. New York: W.W. Norton.

Young, Ernest A. 1999. "State Sovereign Immunity and the Future of Federalism." *Supreme Court Review* 1999: 1–79.

Zemans, Frances Kahn. 1983. "Legal Mobilization: The Neglected Role of the Law in the Political System." *American Political Science Review* 77: 690–703.

Index

POLITICAL SCIENCE

Rights, Remedies, and the Impact of State Sovereign Immunity

Christopher Shortell

"The author's treatment of the history of the state use of sovereign immunity is quite thorough. He does an excellent job of discussing the periods right after the adoption of the Constitution, Reconstruction, and post-1996. Through the historical discussion, he advances his empirical argument; his thesis is persuasive and well supported."

— Matthew H. Bosworth, author of *Courts as Catalysts: State Supreme Courts and Public School Finance Equity*

"This is a meticulously researched book that makes use of an impressive range of primary sources in the course of assessing the impact of judicial rulings over a span of two centuries."

— John J. Dinan, author of *The American State Constitutional Tradition*

A volume in the SUNY series in American Constitutionalism
Robert J. Spitzer, editor

State University of New York Press
www.sunypress.edu

ISBN: 978-0-7914-7507-2