# LITIGATING FEDERALISM

## The States Before the U.S. Supreme Court

Eric N. Waltenburg, Bill Swinford

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Eric N. Waltenburg
and Bill Swinford

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For My Parents
—E.N.W.

For Regina and the Kids
—B.S.

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# Contents

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# Illustrations

**TABLES**

**FIGURES**

# Acknowledgments

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# 1

# Introduction

The Seminole Tribe of Florida petitioned the state of Florida for permission to open a casino on its tribal land; Florida balked. Gambling on Native American reservations is a multibillion dollar a year industry, one that is regulated by the federal *Indian Gaming Regulatory Act* (IGRA). Congress enacted the IGRA in 1988 to promote tribal economic development and self-sufficiency, and to provide a federal regulatory mechanism to protect Native American gaming from organized crime. The Act also obliges the states to negotiate in "good faith" with Native American tribes toward the formation of a compact concerning gaming activities, and it authorizes a tribe to sue a state in federal court to compel performance of that duty.

When the state of Florida refused to allow the gambling operation, the Seminole Tribe brought suit against the state of Florida in September of 1991. Under the auspices of the IGRA, the Tribe alleged that the state had failed to enter into good faith negotiations. Florida, for its part, moved to dismiss the suit, arguing that the IGRA violated the states' Eleventh Amendment sovereign immunity. A federal district court dismissed Florida's motion. The Eleventh Circuit Court of Appeals reversed, and the Seminole Tribe petitioned the U.S. Supreme Court for *certiorari.*

Ours is a federal system — a union of separate and quasi-sovereign states with respect to jurisdiction and administration over their purely local concerns on the one hand, and a national government, sovereign in both internal and external affairs on the other. A system of two sovereign spheres operating over the same citizens is complex. It regularly occasions disputes over the proper location of sovereignty and the powers and autonomy reserved to each sovereign sphere. It inevitably has fallen to the Supreme Court to resolve these disputes — disputes such as the one presented in the petition for *certiorari* filed by the Seminole Tribe. The Court agreed to docket the case and on October 11, 1995, the High Court heard oral arguments in *Seminole Tribe of Florida v. Florida* (116 S.Ct. 1114 [1996]).

Concerning questions of congressional power and the sovereign immunity of the states, *Seminole Tribe* would lay bare the position of the Court and the individual justices on the subject of "our federalism."[1] The case also epitomizes the two key aspects of the recent relationship between state governments and the U.S. Supreme Court as the states seek to protect their policy interests: increasingly active participation before the Court on the part of the states and a Court that is seemingly predisposed to their arguments.

## STATE PARTICIPATION

Thirty-one states participated as merits *amici* in support of Florida's position.[2] This is indicative of what has become an increasingly common occurrence over the last thirty years: state government participation before the Court in the capacity of party and/or *amici*. A primary reason for the substantial presence of state governments in this and other cases before the Supreme Court over the last quarter century or so is that the states are more successful there. A variety of studies have shown that state litigants are winning more often (see, for example, Epstein and O'Connor 1988; Kearney and Sheehan 1992). They are therefore rational litigators. That is, they adjust their litigious activity based upon their experiences — increasing it as they win, decreasing it in response to losses (see Cohen and Axelrod 1984).

What makes this increased activity and success all the more interesting is that until its most recent vintage, the Supreme Court of the post-1937 era has been very antagonistic to the policy interests of the states (see chapter 2). The Court had been part and parcel of an activist national government consistently pursuing a policy that eroded the states' position in the federal relationship. From its expansive reading of Congress's commerce power to sweeping judicial mandates requiring the states to reapportion their legislatures and bus their children, the Court repeatedly showed itself to be no great friend of the states.

Nevertheless, the states are more active and successful before the federal judiciary today than at any other point in American history. In part, state governments have recognized the practical reality that they must be active in national decision-making arenas to promote and protect their interests in an increasingly complex and nationally oriented policy environment. The Supreme Court is one of those arenas to be regularly engaged, much like Congress and the executive bureaucracy.

Consequently, the states have taken steps to improve the frequency and effectiveness of their interactions with it. The states have done so primarily through the enhancement of their offices of attorneys general and the formation of cooperative associations, such as the National Association of Attorneys General Supreme Court Project (see chapter 4).

## THE SUPREME COURT OF THE POST-1960s ERA

As important, the Court of the 1990s has become an especially "state friendly" arena. Conventional wisdom and quantitative analyses alike (e.g., Kearney and Sheehan 1992) suggest that the states' increasing rate of litigation success is a

consequence of the appointees to the Court of presidents Nixon, Reagan, and Bush.[3] Republican presidents in the 1970s and 1980s made a series of appointments to the Court that operationally redounded to the advantage of the states. The appointees were generally marked by: (1) an ideological conservatism that read the Constitution narrowly and therefore viewed the expansion of federal authority with considerable skepticism, and (2) an identifiable affinity for the autonomy of the states that was distinct from their general ideological disposition (see chapter 3). Thus there can be little surprise in the appreciable improvement in the rate of the states' litigation success coincident to the mounting GOP presence on the Court (see Kearney and Sheehan 1992). The states, more professional litigators, perceived this development and increased their rate of activity accordingly.

Thus, something of an "action-reaction" process appears to be at work. In short, presidential appointments, state litigation proficiency, Court decisions, and state litigation actions form an interrelated causal structure wherein a force producing a change in one element will reverberate through the whole system. Because of the temporal ordering that exists, the key exogenous shock is the effect of presidential appointments. It produces a change in the Court's decisional behavior, and this in turn affects the states' decisions to engage the Court in the pursuit of their policy interests.

### *SEMINOLE TRIBE OF FLORIDA V. FLORIDA*

When Florida's attorneys walked into the Supreme Court on October 11, they entered an environment in which a number of the justices were predisposed to their cause. The legislation at issue — the IGRA — was enacted under an element of Congress's commerce power. This had been the principal constitutional mechanism through which Congress (oftentimes abetted by the Court) had expanded the scope of its authority and simultaneously enervated the states' sovereignty and jurisdictional autonomy. But the Congress's power under the Commerce Clause[4] was increasingly the victim of the post-1968 enhancement of the Court's conservative and federalist wing. When he rose to address the Court, Jonathan A. Glaugow, attorney for the state of Florida, explicitly attacked that basis of congressional power, declaring "Congress does not have the authority under the Indian Commerce Clause to subject a state to suit in federal court."[5]

From Florida's perspective, *Seminole Tribe* dealt less with the regulation of gambling than with the powers, place, and legitimate activities of the states within our federal system. Responding to a question from Justice Ruth Bader Ginsburg concerning Florida's power to control gambling on Native American reservations, Glaugow asserted "The reason we are here is because this case speaks more to the question of federalism and the relationship between the states and the federal government rather than whether or not we are going to have gambling in Florida."

Such a declaration found substantial traction on the Court. During the oral arguments, several justices staked out territory clearly on the side of Florida. For instance, as Mr. Glaugow attempted to explain to Justice Ginsburg what Florida would gain by winning, Justice Antonin Scalia offered the following: "I had

thought from your brief that your answer to Justice Ginsburg's question would simply be 'because Floridians are *proud.* We'd rather have the federal government write the law than to have us pretend to write it as a flunky of the federal government subject ultimately to overruling by the federal government anyway.'" Similarly, when Glaugow discussed the nature of the IGRA's harm to Florida, Justice Anthony Kennedy focused Glaugow's states' rights argument, offering: "Your position is that being required to negotiate is itself a harm to the state . . . Not the least of these harms being that if a gambling establishment is instituted it ought to be very clear that it was done by the federal government without the participation of the states. That the states object." Alternatively, when Bruce Rogow, the Seminole Tribe's attorney, argued that Congress's authority over Native American commerce was plenary, Justice Anthony Kennedy noted that the sweep of that authority does not necessarily encompass the power to enlist the states *as states* in pursuit of a national goal: "Well, but there is a difference between assigning power and functions between the two branches of government — in this case all to the national government — and going the further step of saying this allows the national government to order the states to invoke their political processes on behalf of the national government."

As a practical matter, Florida's argument rested upon her Eleventh Amendment sovereign immunity. In recent years the High Court has questioned just how explicit the congressional legislation must be to abrogate that immunity. The evolving jurisprudence has generally held that the states' immunity from suit is not abrogated unless the federal statute reflects an unmistakably clear intent to do so (see McCulloch 1994). As a consequence, the states had enjoyed a string of limited victories in federal courts.[6] But one Supreme Court decision in particular probably gave the state of Florida confidence in its prospects for success before the Supreme Court in *Seminole Tribe.*

In 1991 the Court handed down *Blatchford, Commissioner v. Native Village of Poatak* (501 U.S. 775). Here, the Court ruled 6–3 that the Eleventh Amendment bars suits by Native American tribes without the states' consent unless the federal statute reflects an unmistakably clear intent to abrogate immunity. Most importantly for Florida, the *Blatchford* majority (Chief Justice William Rehnquist and Justices Byron White, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and David Souter) was still largely intact (only Justice White had left the bench). Thus, to a large degree the pro-state decisional environment of 1991 was unchanged in 1996.

Ultimately, the Court ruled in Florida's favor on a vote of 5–4. The majority found that the federal government's commerce authority was not sufficient to abrogate the states' Eleventh Amendment immunity.

## THE DATA AND THE SCOPE OF THE BOOK

This book is directed toward developing a systematic and detailed understanding of state decisions to litigate in pursuit of their policy goals since 1954. The study rests upon a theoretical perspective that places those decisions within a

context that is characterized by a network of relationships. Obviously, state decisions to engage the Court are substantially influenced by its decisional environment — the nature of its recent decisions and its composition — as well as their own abilities with and experiences before the High Court. The data we use to explore these relationships are drawn primarily from three sources.

**Survey and Interview Data**

A mail survey was conducted of the offices of state attorneys general (see Appendix A). Each office was contacted by phone to solicit the name of a specific person to whom the survey should be directed. An initial wave was sent in June 1997, with two follow-up waves sent in July and September to those offices that had not previously responded. Our final response rate was 42 percent, and every region of the nation is represented.

To supplement the survey data, we also conducted confidential interviews in December 1997 with high-ranking officials in the offices of attorneys general of five states, and in October 1997 we interviewed Dan Schweitzer, the Supreme Court Counsel for the Supreme Court Project of the National Association of Attorneys General, the principal interstate association in the area of litigation.

**Archival Data**

We also have collected data on state *amicus* activity on the merits. In the analysis that follows, we argue that *amicus curiae* activity is a mechanism through which the states, in effect, "lobby" the Supreme Court. That is, states file *pre-certiorari* briefs *amicus curiae* in an effort to gain access to the Court's extremely limited discretionary agenda by giving additional notice to the Court of a petition about which the states are concerned.[7] If access is achieved, states can then use merits *amicus* briefs to lobby the Court on a particular set of beliefs.

We used the *Records and Briefs of the United States Supreme Court* to collect information on the incidence of the states' merits *amicus* activity from 1954 to 1989. To focus our data collection, we first used the Law Office Information System's CD-Rom of the *U.S. Reports* to identify those cases with state merits *amicus* activity. Data were collected on the identity of the filing state and the direction of the brief — that is, whether the brief urged affirmance or reversal.

**Secondary Data**

Finally, we utilize data on state *pre-certiorari amicus curiae* activity originally collected as part of the National Science Foundation "Project on Organized Interests and the United States Supreme Court."[8] These data also identify the filing state and the direction of the brief. For the purposes of gathering information on state fortunes as direct parties, we employ the *United States Supreme Court Judicial Data Base*.[9]

**The Study's Plan**

Together, these data constitute a rich vein from which to analyze state interactions with the U.S. Supreme Court since 1954. Of course disputes over the federal relationship are as old as the Union, and, therefore, we begin with a broader