SELF-DETERMINATION FOR WHOM? NATIVE AMERICAN SOVEREIGN IMMUNITY & DISABILITY RIGHTS

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I. A HISTORY OF DISCRIMINATION & ASPIRATIONS FOR SELF-DETERMINATION

Both Native American tribes and individuals with disabilities are historically oppressed minorities that have experienced a variety of profound social, cultural, and economic barriers. From the very beginnings of the United States, dominant societal attitudes have perceived Native Americans as being inferior and uncivilized, and commonly referred to them as so-called "savages."[1] Because of this ascribed inferiority, Native Americans were regarded as akin to wayward children and wards of the nation, dependent upon the federal government for their survival, necessitating instruction on how to become "civilized."[2] This attitude led to conscious policies on the part of the federal government to suppress Native American cultures, languages, and religious traditions; while attempting to forcibly assimilate them into the dominant "White" culture, language, and Christianity through the reservation and boarding school system. Like Native Americans, individuals with disabilities have also been historically viewed as inferior as they do not conform to what has been defined as normative, either physically or intellectually.[3] This perception of people with disabilities led to their segregation from society into institutions where they would

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[1] *See* THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776) ("He has excited domestic insurrections amongst us, and has endeavoured [sic] to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes[,] and conditions."). https://www.archives.gov/founding-docs/declaration-transcript.

[2] U.S. v. Kagama, 118 U.S. 375, 383–84 (1886); Cherokee Nation v. Ga., 30 U.S. 1, 5–6, 5 Pet. 1, 3–4, 10 (1831).

[3] 42 U.S.C. § 12101(a)(1)–(5) (2012).

be supposedly protected, trained, and potentially fixed before they could be reintegrated back into society.[4]

Native Americans and people with disabilities have struggled to shift the perception that they are inferior because of their differences from the dominant culture. Each group has struggled, employing a variety of tactics against almost insurmountable odds to achieve self-determination in their lives and communities. While federal legislation and policies have traditionally served to place burdens and barriers upon both groups, they are often now integral in providing the frame-work through which self-determination can be realized. Rather than being perpetual wards, Congress has recognized through the Indian Gaming Regulatory Act ("IGRA") that the "principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government."[5] Similarly, under the Americans with Disabilities Act ("ADA"), Congress has embraced the notion that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."[6] While these laws have assisted each group to gain greater self-determination, both populations continue to experience significant hardship when compared to other groups in the United States.

Despite the perception that tribal casinos have made Native Americans wealthy, Indian children continue to live in poverty at an average rate almost double that of other children in the United States.[7] Likewise, while the ADA protects against disability discrimination, individuals with disabilities are still found to be in poverty at an average rate double that of the general population.[8] One might think that the similar and ongoing struggles experienced by both Native Americans, and individuals with disabilities, would make them ready made allies.

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4 *See* 42 U.S.C. § 12101(a)(1)–(5).

5 25 U.S.C. § 2701(4) (2012).

6 42 U.S.C. § 12101(a)(7).

7 Sari Horwitz, *The Hard Lives – and High Suicide Rate – of Native American Children on Reservations*, WASH. POST (Mar. 9, 2014), http://www.washingtonpost.com/world/national-security/the-hard-lives--and-high-suicide-rate--of-native-american-children/2014/03/09/6e0ad9b2-9f03-11e3-b8d8-94577ff66b28_story.html.

8 MATTHEW W. BRAULT, U.S. CENSUS BUREAU, AMERICANS WITH DISABILITIES: 2010 HOUSEHOLD ECONOMIC STUDIES, at 5, 12, 22 tbl. A-3 (2012), http://www.census.gov/newsroom/cspan/disability/20120726_cspan_disability_slides.pdf.

However, federal laws advancing the self-determination of individuals with disabilities such as ADA and Section 504 of the Rehabilitation Act ("Rehab Act"), oftentimes conflict with tribal sovereign immunity, which serves as the bedrock upon which Native American self-determination has been built. The Supreme Court has not ruled on how these laws apply to tribes and "sometimes conflicting opinions are being developed in lower courts [as a result] the services and resources that should be available to people with disabilities are not always accessible in tribal communities."[9]

II. ORIGINS AND APPLICATION OF TRIBAL SOVEREIGN IMMUNITY

The doctrine of sovereign immunity protects Indian tribes from suit in court unless "Congress has authorized the suit or the tribe has waived its immunity."[10] Sovereign immunity not only protects against suits by individuals, but also bars a State from seeking to enforce its own laws against an Indian tribe through a lawsuit.[11] While the Supreme Court has expressed its discomfort with sovereign immunity when it has been utilized by a Tribe to evade liability for its off-reservation commercial activities, it has refused to repudiate the doctrine holding that "it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity. The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress."[12]

Sovereign immunity recognizes the inherent power of the sovereign to carry out its governmental duties while protecting its treasury from losses which could impair its ability to function.[13] For tribes this protection can be crucial as unlike

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[9] NATIONAL COUNCIL ON DISABILITY, PEOPLE WITH DISABILITIES ON TRIBAL LANDS: EDUCATION, HEALTH CARE, VOCATIONAL REHABILITATION, AND INDEPENDENT LIVING 7 (2003), http://www.ncd.gov/rawmedia_repository/329c5323_6bb3_403c_a146_495780db5d39.pdf.

[10] Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1998) (citing Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C., 476 U.S. 877, 890–91 (1986)); Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165, 171–173 (1977).

[11] Mich. v. Bay Mills Indian Cmty., 134 S.Ct. 2024, 2032 (2014) (holding that Michigan cannot sue the Indian Tribe for violating a compact with the State pursuant to the Indian Gaming Regulatory Act for its off-reservation casino).

[12] *Id.* at 2037.

[13] *See* Vicki Limas, *Application of Federal Labor and Employment Statutes to*

other sovereign entities its treasury is held in common for the benefit of the tribe and its members.[14] Additionally, "the entire community stands to suffer irreparable harm if their leaders, foreseeing possible liabilities at every action, are unable to fulfill the responsibility of their offices."[15] Sovereign immunity not only protects the tribal executive and legislative decisions, but also the economic decisions made by for-profit tribal businesses, which are an inseparable part of the tribal government.[16] These tribal business entities often provide the "economic means of attaining self-determination and self-sufficiency . . . which may be a tribe's only source of income apart from federal subsidies."[17] Consequently, tribal businesses form an essential part of tribal sovereignty as they allow for tribes to develop their own economy, freeing them from their dependence on the federal government.[18] After centuries of oppression, subjugation, and neglect, tribes have begun to experience a resurgence sustained by the fruits of profitable tribal economies, "which has the potential for reestablishing a Native American independence based on economic sovereignty."[19] Nevertheless, this reemergence of tribal independence is precarious as their sovereign immunity is not absolute, and it is enjoyed and exercised at the discretion of the federal government.

Prior to the arrival of Europeans, Native American tribes

Native American Tribes: Respecting Sovereignty and Achieving Consistency, 26 ARIZ. ST. L.J. 681, 687–88 (1994); William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U.L. REV. 1587, 1610–11 (2013) (arguing that sovereign immunity's origins lie in the monarchial immunity doctrine barring suit against the King in his own courts and foreign sovereign immunity which extends this protection against suit to other nations).

14 Limas, *supra* note 13, at 688.

15 *Id.* (citing Moses v. Joseph, 2 Tribal C. Rep A-51, A-54 (Sauk-Suiattle Tribal Ct. 1980)). *Contra* Andrea M. Kurak, Florida Paraplegic, Association v. Miccosukee Tribe of Indians of Florida*: Balancing Competing Interests*, 30 STETSON L. REV. 361, 367 (("[S]overeignty [is] more of a cultural benefit than a political power . . . [T]ribes are permitted to control their own political and social systems and follow their own cultural precepts, rather than rules and regulations predetermined by a modern American society. . . .") (citing Vine Deloria, Jr., *Self-Determination and the Concept of Sovereignty*, *in* NATIVE AMERICAN SOVEREIGNTY 118, 123 (John R. Wunder ed., 1996))).

16 Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 760 (1998) ("Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.").

17 Limas, *supra* note 13, at 690.

18 *Id.*

19 *Id.* at 691.

"were self-governing sovereign political communities."[20] When Europeans arrived on the continent, they initially entered into a variety of treaties with Native American tribes, thus acknowledging the Native peoples' own inherent power as sovereigns.[21] However, as the European powers gained a stronger foothold in the Americas and took military advantage over the Native Peoples, they began to perceive their sovereignty as greater; and the sovereignty enjoyed by tribes was now at the largesse of the colonizers.[22] This framework of superiority and diminishment of Native sovereignty is embodied within the United States Constitution, which gives Congress the power to regulate commerce with Indian Tribes without their consent.[23] The Supreme Court initially embraced the notion that tribal sovereignty was discretionary, and that while they once had complete sovereignty as independent nations, these rights had been diminished and impaired by the "discovery" of the so-called New World by European powers.[24]

Nonetheless, while it was clear that Native sovereignty had been diminished, it remained unclear how much independence tribes retained, and their status was unclear in relation to the states and federal government. In *Cherokee Nation v. Georgia*, the tribe sought an injunction from the Supreme Court, asserting that they were a foreign nation and thus the state of Georgia could not enforce legislation in their tribal territory, which was aimed at stripping them of their right to occupy their ancestral lands.[25] Chief Justice Marshall determined that the tribe lacked standing to sue as a foreign nation, as they had been rendered "domestic dependent nations . . . in a state of pupilage . . . [whose] relation to the United States resembles that of a ward to his guardian."[26] Although this decision reaffirmed the understanding that Native sovereignty had been reduced in relation to the federal government, it failed to delineate what rights tribes retained within their own communities *vis a vis* the States. The Court soon revisited this issue after a white missionary was arrested and convicted of violating a Georgia law making it a

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[20] U.S. v. Wheeler, 435 U.S. 313, 322–23 (1978).

[21] William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587, 1623 (2013).

[22] *Id.* at 1624.

[23] U.S. CONST. art. I, § 8, cl. 3.

[24] Johnson v. M'Intosh, 21 U.S. 543, 574 (1823).

[25] Cherokee Nation v. Georgia, 30 U.S. 1, 15 (1831).

[26] *Id.* at 17.

crime to be on tribal land without a license.[27] The Court overturned the missionary's conviction, finding that States lacked their own innate powers to regulate the affairs of Indian tribes as they were "distinct, independent political communities, retaining their original natural rights. . . ."[28]

Regardless of the Supreme Court's language in *Worcester v. Georgia*, considerable ambiguity remains as to the extent of Native sovereignty and Congress has specifically acted to abrogate tribal immunity. This uncertainty is derived from the paradox that tribes are "sovereign", but only to the extent afforded them by the federal government.[29] The Supreme Court has recognized that Congress has the authority to exercise "plenary and exclusive power over Indian affairs. . . ."[30] These powers have been recognized "as a shorthand for general federal authority to legislate on health, safety, and morals within Indian country."[31] This doctrine gives Congress almost unrestricted power to determine tribal sovereignty, even granting them the authority to terminate a Native peoples' status as a tribe.[32] However, Congressional intent to abrogate tribal sovereign immunity "cannot be implied but must be unequivocally expressed."[33]

The Supreme Court has found that tribal immunity can be abrogated even when legislation fails to mention Native Americans if Congress enacts a general statute that applies to all people.[34] In *Federal Power Comm'n v. Tuscarora Indian Nation,* 362 U.S. 99 (1960), the Court found that the Federal Power Act ("FPA") gave the Federal Power Commission the authority to grant a license to the Power Authority of New York to use eminent domain to condemn the Tuscarora nation's lands held in fee-simple so that a reservoir could be constructed.[35] The

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27 Worcester v. Georgia, 31 U.S. 515, 537 (1832).

28 *Id.* at 559.

29 United States v. Wheeler, 435 U.S. 313, 323 (1978) ("The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance . . . In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statue, or by implication as a necessary result of their dependent status.").

30 Wash. v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 470 (1979).

31 1–5 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.02 (2015).

32 Menominee Tribe of Indians v. United States, 391 U.S. 404, 416 (1968).

33 Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

34 Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960).

35 *Id.* at 115.

Tuscaroras, citing past precedent, asserted that the FPA did not affect them since "General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."[36] The Court was not persuaded by this argument, finding it to be incongruent with prior decisions which had held that the Internal Revenue Act of 1918, required *everyone* (including Native Americans) to pay federal income tax despite the fact that they were not specifically mentioned.[37] Consequently, the Court established that "general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary."[38]

Although some scholars have argued that the Tuscarora rule is merely dicta,[39] lower appellate courts have embraced it, interpreting limitations in favor of tribes. The Ninth Circuit Court of Appeals, in *United States v. Farris*, determined that there existed three limitations on when a generally applicable statute could not be applied to an Indian Tribe unless Congress explicitly implicated Native Americans.[40] First, if the law affected the tribe's rights to purely intra-mural matters such as self-governance.[41] Second, Congress cannot abrogate tribal treaty rights, such as hunting or fishing rights, when it enacts general legislation.[42] Finally, if an Indian tribe can demonstrate, by pointing to the legislative history or other statements that a generally applicable statute was not intended to apply to them on their reservation, courts should embrace this intention.[43] While a number of Circuits outside of the Ninth have embraced this interpretation of *Tuscarora*, there is a lack of clarity as to what is purely an intra-mural matter, particularly when at issue are tribally operated businesses.[44] Moreover, courts have had trouble

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[36] *Id.* at 115–16 (quoting Elk v. Wilkins, 112 U.S. 94, 100 (1884)).

[37] *Id.* at 116–17 (citing Choteau v. Burnet, 283 U.S. 691, 693–94 (1931)).

[38] *Id.* at 120.

[39] Limas, *supra* note 13, at 697–98 ("Irrespective of the Court's reliance on rules developed in tax cases involving individuals rather than tribes, however, the key to the outcome of *Tuscarora* was simply the fact that the land involved was held in fee simple . . . the 'Tuscarora rule' is merely dictum.").

[40] *See* United States v. Farris, 624 F.2d 890, 893–95 (1980).

[41] *Id.* at 894.

[42] *Id.*

[43] *Id.* at 894–95.

[44] Limas, *supra* note 13, at 701–02 (Some courts read intramural "narrowly to include only matters involving membership, inheritance, and domestic relations."). Consequently, in *Donovan v. Coeur d'Alene Tribal Farm*, it was found that sovereign immunity did not protect a tribal business from a claim under the Occupation Safety and Health Act (OSHA), as it employed non-

interpreting congressional intention regarding a generally applicable law's ability to "modify or abrogate tribal rights in the face of congressional silence – i.e., when the statute or legislative history nowhere indicates that Congress ever considered the statute's effect on tribal rights."[45]

Tribal sovereign immunity can be further pierced under the Ex Parte Young doctrine.[46] This doctrine allows a plaintiff to circumvent a State's sovereign immunity under the Eleventh Amendment of the Constitution for violating a federal law by seeking an injunction and naming a State official acting in their official capacity as a defendant.[47] The reasoning behind the Ex Parte Young doctrine is that the State should not be allowed to violate federal law and then utilize sovereign immunity as a shield preventing the enforcement of federal legislation.[48] The Ex Parte Young doctrine has been found to extend to Indian tribes. In fact, the Supreme Court has declared that even if a tribe is not amenable to suit, the "doctrine of sovereign immunity . . . does not immunize the individual members of the Tribe."[49] However, the Supreme Court has narrowed the Ex Parte Young doctrine, finding it inapplicable to laws such as IGRA "where Congress has prescribed a detailed remedial scheme for the enforcement [of a federal law]."[50] Nonetheless, this limitation on the doctrine does not prohibit its application, but rather "turns on the analysis of the terms, history, purpose, and context of the remedial provisions of the particular [federal] statute sought to be

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Natives and the operation of such a commercial enterprise not a purely intramural matter. Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985).

45 Limas, *supra* note 13, at 707 (citing Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law,* 78 CALIF. L. REV. 1137, 1211 (1990)). "[A] primary . . . problem is that intentionalism requires asking a counter-factual and difficult question in many cases. It is unlikely that Congress ever anticipated, much less had some expectation about, the precise issue being litigated." Phillip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law,* 78 CALIF. L. REV. 1137, 1211 (1990).

46 *See* Ex parte Young, 209 U.S. 123, 167 (1908) ("The State cannot . . . impart to the official immunity from responsibility to the supreme authority of the United States.").

47 Andrea M. Kurak, *Fla. Paraplegic, Ass'n v. Miccosukee Tribe of Indians of Fla.: Balancing Competing Interests*, 30 STETSON L. REV. 361, 386 (2000).

48 *Id.*

49 Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165, 171–72 (1977) (citing U.S. v. U.S. Fid. & Guar. Co., 309 U.S. 506, 513 (1940)). *Accord* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978).

50 Seminole Tribe v. Florida, 517 U.S. 44, 74 (1996).

enforced."[51]

The doctrine of tribal sovereign immunity, while being increasingly diminished throughout our history, remains still very much alive. This is despite the fact that even the Supreme Court has proclaimed wariness about the perpetuation of this doctrine, arguing that it "developed almost by accident."[52] Moreover, the Court argued for further restrictions on its applications and the majority found that "tribal immunity extends beyond what is needed to safeguard tribal self-governance."[53] Notwithstanding these apprehensions, the Court has found that sovereign immunity protected a tribe from suit for its off reservation business activities.[54] While sovereign immunity continues to serve an important benefit for tribal businesses, providing greater autonomy and self-determination, it is troubling when tribes assert their immunity against federal legislation designed to promote the self-determination of people with disabilities. Accordingly, under these circumstances, the assertion of tribal immunity could be perceived as a license to discriminate and thus it might be prudent for tribes to waive their immunity in these limited instances.

III. THE ADA AND TRIBAL SOVEREIGN IMMUNITY

The ADA was enacted in 1990, with the intention of remediating societal attitudes and polices which in effect discriminated against individuals with disabilities, excluding them from participating in society.[55] Congress envisioned that the ADA would "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[56] The ADA prohibits discrimination against a qualified individual with a disability[57] which is defined as "a

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[51] Lisa R. Hasday, Case Note, *Tribal Immunity and Access for the Disabled: Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians, 166 F.3d 1126 (11th Cir. 1999)*, 109 YALE L. J. 1199, 1202 (2000) (citing David P. Currie, *Ex Parte Young After Seminole Tribe*, 72 N.Y.U. L. REV. 547, 551 (1997)).

[52] Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 752 (1998).

[53] *Id.* at 758.

[54] *Id.* at 760. *See also* Mich. v. Bay Mills Indian Cmty., 134 S.Ct. 2024, 2035 (2014).

[55] 42 U.S.C. § 12101(a)(5) (1990).

[56] 42 U.S.C. § 12101(b)(1) (1990).

[57] *See* 42 U.S.C. § 12112(a) (1990). Unless a covered entity can demonstrate that a reasonable accommodation for an individual with a disability would pose as an undue hardship "requiring significant difficulty or expense." 42 U.S.C. §

physical or mental impairment that substantially limits one or more major life activities . . . ; a record of such an impairment; or being regarded as having such an impairment."[58] Modeled after the Civil Rights Act of 1964, the ADA prohibits discrimination in a variety of areas including employment ("Title I"), public services ("Title II"), and public accommodations ("Title III"), mandating that covered entities provide reasonable accommodations for people with disabilities.[59] Unquestionably, Congress intended the ADA to be a general statute, yet Congress gave little consideration as to how the ADA might impact Indian tribes and how tribal sovereign immunity might impact individuals with disabilities.

Title I of the ADA makes it illegal for a covered entity to "discriminate against a qualified individual . . . [with a] disability 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."[60] However, with little analysis, Title I of the ADA is the only section that even mentions Native Americans, stipulating that tribes are not defined as a covered employer.[61] The legislative history of the ADA does not indicate why tribes were provided with this exemption, other than "merely stat[ing] that Congress incorporated by reference [the Civil Rights Act's] definition of 'employer' into the ADA. . . ."[62] The legislative history of the Civil Rights Act shows that this exemption was proposed by Senator Mundt of South Dakota, who argued that Native tribes should be excluded since "tribes control and operate their own affairs [and t]his amendment would provide to American Indian tribes in their capacity as a political entity [sic], the same privileges accorded to the U.S. Government."[63] Moreover, Congress excluded Indian tribes from the Civil Rights Act's employment provisions because they were concerned that tribes could be sued

12111(10)(A) (1990).

58 42 U.S.C. § 12102(1)(a–c) (1990).

59 U.S. Dep't of Justice Civil Rights Div., *Introduction to the ADA*, http://www.ada.gov/ada_intro.htm (last visited Nov. 27, 2016).

60 42 U.S.C. § 12112(a) (1990).

61 42 U.S.C. § 12111(5)(B)(i) (1990).

62 Limas, *supra* note 13, at 718–19 (citing H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2 at 54 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 306.).

63 Limas, *supra* note 13, at 715–16 (citing 110 Cong. Rec 13, 702 (1964)). However, while the Act initially *was* unenforceable against the Government it was amended in 1972 to cover employment by state, local, and federal government. *See id.* at 717.

under the Act for discrimination by preferentially hiring tribal members.[64] While this purpose is rationally tied to a legitimate tribal interest of promoting employment for its members, it is hard to discern what the purpose is for the exemption under the ADA. It is significant to note that this exemption negatively impacts tribal members with disabilities, as businesses operated by their own tribe would be allowed to openly discriminate against them by refusing to provide them with a reasonable accommodation.[65]

Nonetheless, this express language exempting tribes as covered employers under Title I of ADA demonstrates that Congress did not intend to abrogate tribal sovereign immunity despite the fact that the ADA is a statute of general applicability. Consequently, courts have had little difficulty finding that suits by qualified disabled plaintiffs under Title I of the ADA were barred by tribal sovereign immunity.[66] While plaintiffs have attempted to sidestep the issue of tribal sovereign immunity under Title I of the ADA, by making a variety of different arguments as to why a tribal business or entity should be covered, the courts have not been persuaded.[67]

In *Giedosh v. Little Wound Sch. Bd. Inc.*, the plaintiffs argued that their former employer, a school for Native children, could not assert sovereign immunity when it terminated their employment in violation of the Civil Rights Act and Title I of the ADA because the school board had severed its connection to the Oglala Sioux Tribe by incorporating under South Dakota law.[68] The Court found that the school board's choice of incorporation under State law did not affect its status as a tribal entity since the school was tribally charted for the purpose of educating Native children

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64 42 U.S.C. § 2000 (e–2)(i) (1964).

65 *Supra* note 9, at 5, 87 (stating it is estimated that 22 percent of Native Americans have at least one disability).

66 *See* Barnes v. Mashantucket Pequot Tribal Nation, No. 3:06-CV-693 (RNC), 2007 U.S. Dist. LEXIS 15591, 1–3, 5 (D. Conn. Mar. 3, 2007) (discussing Plaintiff's suit against the Mashantucket Pequot Tribe's Foxwoods Casino where he had been employed as a dealer was barred). *Accord* Pena v. Miccosukee Serv. Plaza, No. 00-6663-CIV-Middlebrooks, 2000 U.S. Dist. LEXIS 17199, 4, 6 (S.D. Fla. Oct. 4, 2000) (discussing how the Court barred suit by a Plaintiff who alleged that he was not allowed to return to work on account of his disability).

67 *See* Reuer v. Grand Casino Hinckley, No. 09-1798 (MJD/RLE), 2009 U.S. Dist. LEXIS 75691, 4, 25, 27–28, 30–31 (D. Minn. Aug. 25, 2009). *See also* Barnes v. Mashantucket Pequot Tribal Nation, No. 3:06-CV-693 (RNC), 2007 U.S. Dist. LEXIS, at 1–3, 5; Pena v. Miccosukee Serv. Plaza, No. 00-6663-CIV-Middlebrooks, 2000 U.S. Dist. LEXIS 17199, 4, 6.

68 Giedosh v. Little Wound Sch. Bd., Inc., 995 F. Supp. 1052, 1053–55 (1997).

living on the reservation.[69] Next, in *Ruer v. Grand Casino Hinckley*, two former Blackjack dealers employed at a casino affiliated with the Mille Lacs Band of Ojibwe brought suit under Title I of the ADA claiming that sovereign immunity could not be invoked since the casino was not solely owned by the tribe and was located adjacent to the reservation.[70] Moreover, the plaintiffs asserted that the tribe had waived its sovereign immunity by complying with OSHA regulations and posting notices regarding employment rights under the ADA.[71] The Court dismissed these arguments, citing the fact that there was no evidence that the casino was not wholly owned by the tribe as it had been chartered for their benefit, and that posting a notice about the ADA could not waive sovereign immunity since a waiver must be unequivocally expressed and cannot be implied.[72] Finally, in *Setchell v. Little Six*, the plaintiff was told that she would not be hired as an employee of a casino owned by the Mdewakanton Sioux Tribe because on her application she noted she had a back injury, after which she brought suit in State court under the ADA and the Minnesota Human Rights Act.[73] The appellant stressed that while the tribe was entitled to sovereign immunity, she was not suing the tribe but their casino, which was a foreign corporation.[74] The appellant further argued that Title I of ADA did not cover corporations owned by tribes and that if Congress had intended it to do so it would have specified that they should be included.[75] The Court was unpersuaded, noting that under the canons of construction "statutes passed for the benefit of dependent Indian tribes are to be liberally construed, with doubtful expressions being resolved in favor of the Indians."[76]

The only instance where Title I of the ADA has been found to be applicable to a business owned by Native Americans was in *Pearson v. Chugach Gov't Servs.*, where the defendant was an Alaska Native Corporation ("ANC").[77] ANCs have been

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69 *Id.* at 1057–58.

70 Reuer v. Grand Casino Hinckley, No. 09-1798 (MJD/RLE), 2009 U.S. Dist. LEXIS 75691, 4, 25, 27–28, 30–31.

71 *Id.* at 30.

72 *Id.* at 26–30.

73 Setchell v. Little Six, No. C4-95-2208, 1996 Minn. App. LEXIS 410, 1–2 (Minn. Ct. App. Apr. 9, 1996).

74 *Id.* at 2.

75 *Id.* at 4.

76 *Id.* at 5–6 (citing Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g P.C. 467 U.S. 138, 149 (1984)).

77 Pearson v. Chugach Gov't Servs., 669 F. Supp. 2d 467, 468 (2009).

distinguished from tribes as they were developed after Congress extinguished aboriginal land claims to Alaska and in exchange, formed Native owned corporations which received forty-four million acres of land and $962.5 million in monetary compensation.[78] While the defendant claimed that as an ANC they were equivalent to a tribal entity for the purposes of sovereign immunity, the Court noted that ANCs are not federally recognized as a tribe when they are not playing a role in tribal governance.[79] However, since ANCs are excluded under the Civil Rights Act's definition of a covered employer, the Court had to address whether this exemption was "broad enough to preclude related employment discrimination claims raised under the ADA. . . ."[80] The Court noted that Title I of the ADA was developed with reference to the Civil Rights Act and as such both acts should be interpreted consistently and therefore the "congruence between these anti-discrimination statutes suggests that [they] reflect the same federal policy, and are subject to the same limits."[81] Nevertheless, the Court rejected the ANC's argument that they had no liability under the ADA because of their exclusion from the Civil Rights Act's definition of an employer which Congress drew upon when they crafted Title I of the ADA.[82] Finding that if Congress had intended to exempt ANCs from Title I of ADA, they would have included them in its language, and the mere fact that overlap exists between the ADA and the Civil Rights Act was inconclusive as to this intent.[83] The Court was apprehensive about ANCs, as they have become increasingly involved in interstate for-profit commerce, which had little to do with promoting Native employment or self-governance, and invoking immunity under these circumstance merely allowed them to avoid normal anti-discrimination prohibitions.[84] This case highlights the difficulty that courts can have with interpreting whether to extend sovereign immunity to tribes when Congress has failed to consider the effect that a general statute might have on a tribe.

Unlike Title I, Title III of the ADA does not include a specific

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78 *Id.* at 471 (citing John v. Baker, 982 P.2d 738, 748 (Alaska, 1999)).
79 *Id.* at 469.
80 *Id.* at 470.
81 *Id.* at 474–75 (citing U.S. Airways, Inc. v. Barnett, 535 U.S. 391, (2002)).
82 *Id.* at 476.
83 *Pearson,* 669 F. Supp. 2d at 476.
84 *Id.*

exemption for Native Tribes. However, Title III of the ADA prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person. . . ."[85] The inclusion of the language "any person" indicates that Congress intended Title III of the ADA to be a generally applicable statute that covered Native American tribes. However, while Title III of the ADA has been found to apply to public accommodations in Indian country, there appears to be a split amongst the circuits as to whether a private plaintiff can enforce it against a tribe.

The 11th Circuit Court of Appeals initially addressed the question of first impression as to whether Title III of the ADA created a private right of action against an Indian tribe who failed to comply with its requirements.[86] In *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians*, the plaintiffs sued seeking injunctive relief that would compel the Miccosukee Indian Tribe's restaurant and casino to comply with requirements of Title III of the ADA.[87] The plaintiffs asserted that the tribe's facilities lacked adequate handicapped parking and barrier free entrances, and had bathrooms that were not equipped properly for individuals with disabilities.[88] The trial court found in favor of the plaintiffs, holding that Title III of the ADA was a statute of general applicability applying to all persons, including on reservation tribal businesses.[89] The Appellate Court reviewed their decision *de novo*.[90]

The Court of Appeals acknowledged that Title III of the ADA is a general statute, which was intended "to invoke the sweep of congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities."[91] Moreover, the legislative history of Title III specifically indicated that the intent was for "people with disabilities [to] have equal access to the array of establishments that are available to others who do not currently have disabilities."[92] The Court recognized

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85 42 U.S.C. § 12182(a) (2006).

86 Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians, 166 F.3d 1126, 1127 (11th Cir. 1999).

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.* at 1128.

91 *Id.* at 1128 (citing 42 U.S.C. § 12101(b)(1); (4) (1990)).

92 Fla. Paraplegic Ass'n, 166 F.3d at 1126 (citing S.Rep No. 101–116 at 59

that other Appellate Courts have interpreted comprehensive federal statutes that are silent as to impact on Indian tribes as being applicable regardless of sovereign immunity so long as they would not interfere with a purely intra-mural matter such as self-governance; abrogate a treaty right; or contradict Congressional intent.[93] The 11th Circuit found that a tribal casino and restaurant engaged in interstate commerce was not an issue of self-governance, nor did any other exception apply, as no treaty rights were involved, and these facilities were of the sort "that Congress intended to make 'equally accessible' to disabled individuals through enactment of Title III of the ADA."[94] Therefore, the Court concluded that Title III of the ADA applied to the tribe, however this was not determinative as to whether "the tribe may be sued for violating the statute . . . [since] 'there is a difference between the right to demand compliance . . . and the means available to enforce them.'"[95]

Despite the fact that the Court accepted that Title III of the ADA was applicable to the tribe, the 11th Circuit found that the tribe's immunity was not abolished as it had not been waived and Congress had not unequivocally expressed an intent to abrogate it.[96] Moreover, the Court felt that references to a general statute's legislative history were insufficient to abrogate tribal immunity as any ambiguities in federal laws should be resolved in favor of a tribe.[97] This appears to be a break from past precedent, reading extra provisions into the *Tuscarora* rule in the face of congressional silence. The Court distinguished Title III of the ADA from other general statutes such as the Hazardous Materials Transportation Safety Act of 1990 and the Resource Conservation and Recovery Act of 1976 which both clearly abrogated tribal sovereign immunity, finding that Congress' silence under Title III of the ADA was "a stark omission of any attempt by Congress to declare tribes subject to private suit for violating the ADA's public accommodation requirements.[98] The Court further distinguished Title III from other circuit's decisions

(1989)).

93 *Id.* at 1128–29.

94 *Id.* at 1129.

95 *Id.* at 1130 (citing Kiowa Tribe v. Manufacturing Technologies Inc., 523 U.S. 751, 755 (1998)).

96 *Fla. Paraplegic Ass'n*, 166 F3d 1131.

97 *Id.* (citing Atascadero State Hosp. v. Scanton, 473 U.S. 234, 242 (1985); Mont. v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985)).

98 *Fla. Paraplegic Ass'n*, 166 F.3d at 1132.

regarding the applicability of OSHA regulations to Indian tribes as that suit involved the federal government against the tribe and was not a private suit.[99] Additionally, the Court felt that Congress was aware of the need to abrogate sovereign immunity as provisions of the ADA removed the States' sovereign immunity under the Eleventh amendment, allowing for a private right of action and that this was a "telling indication that Congress did not intend to subject tribes to suit under the ADA."[100] Moreover, the Court noted that committee reports, floor debates and other legislative materials failed to address the effect that Title III would have on tribes and that this supported their conclusion that Congress did not intend there to be a private right of action.[101] Finally, the Court rejected the argument that Title III created a private right of action since Congress had expressly excluded Tribes under Title I, demonstrating their intent for the remaining sections to be applicable to Indian tribes.[102]

The 11th Circuit's rationale is hardly conclusive. Congressional silence on the impact that Title III would have on tribes most likely stems from the fact that Congress failed to consider it at all.[103] This conclusion is bolstered by the fact that the inclusion of language in Title I, relating to Indian tribes, was incorporated not because of lively discussion as to the effect that the ADA would have on tribal business and employment, but merely because Congress borrowed already existing language from the Civil Rights Act of 1964.[104] Consequently, the 11th Circuit's decision creates a right to accessible public accommodations operated by tribes without the ability to enforce this right.[105] Even the Court accepted that this conclusion might be troubling and unfair, but asserted that alternative remedies still existed for enforcement, as the Attorney General could initiate a civil suit compelling compliance with Title III if they had "engaged in a pattern or practice of discrimination."[106] However, to date there are no published records which indicate

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99 *Id.* at 1133 n. 15.

100 *Id.* at 1133.

101 *Fla. Paraplegic Ass'n*, 166 F.3d 1133.

102 *Id.* at 1133 n. 17 (finding that the Court found the argument persuasive as Title III's applicability to Indian tribes, "but sheds no light upon the critical question of whether tribes also may be sued by private citizens. . . . ").

103 *Id.* at 1133–34.

104 *See Fla. Paraplegic Ass'n*, 166 F.3d at 1133 n.17.

105 *Id.* at 1134.

106 *Id.* at 1134–35 (quoting 42 U.S.C. § 12188(b)(1)(B)).

that the Attorney General has ever utilized its enforcement powers against an Indian tribe for failing to comply with Title III of the ADA.

Nonetheless, the 11th Circuit's decision did not entirely foreclose the ability of private individuals to exercise the right to mandate tribal compliance with Title III of the ADA, so long as the plaintiffs sought an injunction, and sued a tribal official under the *Ex parte Young* doctrine.[107] The Supreme Court has affirmed this conclusion, finding that even when a State's sovereign immunity bars suit under Title I of the ADA "[t]hose standards can be enforced . . . by private individuals in actions for injunctive relief under *Ex parte Young*."[108] The *Ex parte Young* doctrine remains a useful tool to ensure that tribal places of public accommodation remain open to all people, safeguarding the rights of individuals with disabilities who would otherwise be excluded from Native owned businesses.[109]

Additionally, outside of the 11th Circuit, a federal District Court in California concluded that a private right of action exists under Title III of the ADA against a tribal owned off-reservation business.[110] The Court distinguished this case from *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians*, asserting that the 11th Circuit failed to address whether immunity for a tribe's "on-reservation activity would apply to a business entity located off reservation."[111] Moreover, the Court was persuaded by the fact that "the strong federal policy and public interest in enforcing the nation's disability-related civil rights laws outweighs any tribal interest in extending their sovereignty to commercial activities conducted off the reservation."[112] Congress should clarify the split between the 11th and 9th Circuits, as clarity is needed to determine whether or not a private right of action exists under Title III against an Indian tribe.

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107 *See* Hasday, *supra* note 52, at 1202–04.

108 Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 n.9 (2001).

109 Hasday, *supra* note 52, at 1205.

110 D'Lil v. Cher-AE Heights Indian Cmty. of the Trinidad Rancheria, NO. C 01-1638 TEH, 2002 U.S. Dist. LEXIS 28882, at *14, *29–31 (N.D. Cal. 2002) (determining that a wholly owned tribal inn that was not barrier free and accessible as mandated by Title III and sought injunctive relief as well as damages).

111 *Id.* at *28–29.

112 *Id.* at *30–31.

IV. SECTION 504 OF REHABILITATION ACT AND TRIBAL IMMUNITY

Section 504 of the Rehabilitation Act of 1973 ("Rehab Act") is regarded as the first comprehensive federal attempt to prevent discrimination against individuals with disabilities. Section 504 makes it unlawful for a qualified individual with a disability to "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . "[113] The language of any federally funded program or activity indicates that Congress had intended Section 504 to apply broadly to *any* federally funded program. In fact, the Supreme Court has interpreted it broadly, preventing not only intentional discrimination in federally funded programs but also discrimination that results from "benign neglect."[114] Moreover, the Court has also held that individuals have a private right to enforce violations of Section 504 so long as they are not seeking punitive damages.[115]

While Section 504 of the Rehab Act was specifically intended to advance the rights of individuals with disabilities, the intent of the Act as a whole was to revise the existing State vocational rehabilitation programs, extending services for people with severe handicaps.[116] The legislative history of Section 504 does not address Indian Tribes because there is no legislative history for this section, which was inconspicuously inserted by Senator Humphrey without discussion.[117] However, other sections of the Rehab Act, which pertain specifically to rehabilitation programs, indicate that a local agency is defined as "a unit of general local government or of an Indian tribe (or combination of such units or tribes) which has an agreement with the designated State agency to conduct a vocational rehabilitation program."[118] The insertion of this definitional language regarding Indian Tribes has created confusion for courts as to whether Section 504 only applies to tribes who operate a vocational rehabilitation program. This is

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113 29 U.S.C. § 794(a) (2012).

114 Alexander v. Choate, 469 U.S. 287, 292, 294–97, 299–301 (1985).

115 Barnes v. Gorman, 536 U.S. 181, 189 (2002).

116 H.R. Res. 8070, 93d Cong. §§ 2(1), 504 (1973).

117 *See* David Pfeiffer, *Signing the Section 504 Rules: More to the Story,* RAGGED EDGE ONLINE (2002), http://www.ragged-edge-mag.com/0102/0102ft6.html.

118 29 U.S.C. § 705(24) (2012).

despite the fact that Section 504 does not specifically relate to Rehabilitation programs, and has consistently been found to bar discrimination against individuals with disabilities by any program that receives federal funding.

The first federal court to determine the applicability of Section 504 to a tribe found that it was enforceable against the Tigua Tribe despite their sovereign immunity.[119] However, eight years after this decision the 11th Circuit Court of Appeals held otherwise in *Sanderlin v. Seminole Tribe*.[120] In this case the plaintiff was employed as a police officer by the Tribe, but suffered a seizure while working and was later terminated as a result of his disability.[121] The plaintiff argued that by voluntarily accepting federal funds, the tribe had waived its immunity from lawsuits under the Rehab Act.[122] The Court recognized that any waiver of sovereign immunity by the Seminole Tribe could not be implied, but must be unequivocally expressed.[123] The plaintiff asserted that such a waiver had occurred after the Seminole's Chief, Billie, entered into three voluntary contracts with the federal government which were contingent upon the tribe refraining from discrimination under Section 504.[124] It was demonstrated that Chief Billie assured the government that the tribe would "comply with Section 504 of the Rehabilitation Act [under these programs]."[125] In fact, one of these federal contracts involved the acceptance of $320,041 by the plaintiff's former employer, the Seminole Department of Law, which was conditional on their compliance with Section 504.[126]

Nevertheless, the Court was unpersuaded that the acceptance of voluntary federal funds and assurances by the Chief that the tribe would comply with Section 504 constituted a waiver of its sovereign immunity.[127] The Court pointed to tribal ordinances that required a waiver of immunity to be enacted by the tribal

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119 Cruz v. Ysleta Del Sur Tribal Council, 842 F. Supp. 934, 935 (W.D. Tex. 1993).

120 Sanderlin v. Seminole Tribe, 243 F.3d 1282, 1293 (11th Cir. 2001).

121 *Id.* at 1284 (discussing how the Tribe had initially accommodated the officer by assigning him to work that did not involve driving, but after suffering a second seizure over two years later he was terminated).

122 *Id.* at 1285–86.

123 *Id.* at 1286.

124 *Id.*

125 *Id.*

126 *Sanderlin*, 243 F.3d at 1286–87.

127 *Id.* at 1287.

council, and not an officer such as Chief Billie.[128] Moreover, the 11th Circuit asserted that even if Chief Billie had the authority to waive the tribes' immunity, these voluntary federal contracts "merely convey[ed] a promise not to discriminate. They in no way constitute[d] an express and unequivocal waiver of sovereign immunity and consent to be sued. . . ."[129] Finally, the Court rejected the argument that Section 504 of the Rehab Act was a statute of general applicability despite its language denoting *any* program, believing that the Section 504 abrogated a tribe's sovereign immunity only if it operated a vocational rehabilitation program.[130]

Following the decision in *Sanderlin*, the Department of Justice's Office for Legal Counsel ("OLC"), clarified that Section 504 is a statute of general applicability which applies to tribally operated schools regardless of whether or not the tribe operates a State sponsored vocational rehabilitation program.[131] The OLC found that the cannons of statutory construction, which resolve ambiguity in a generally applicable statute, were not overcome as an unambiguous statute "unless Indians are expressly excluded from its application."[132] Section 504 does not expressly exclude tribes nor do other sections of the Rehab Act, which in fact embrace inclusion of Indian tribes. Moreover, the OLC noted that it is difficult to comprehend how Section 504 "could be interpreted contrary to its plain meaning, pursuant to a canon intended to infer congressional intent in the face of silence. . . ."[133]

V. SELF-DETERMINATION FOR NATIVE AMERICANS AND INDIVIDUALS WITH DISABILITIES

Self-determination and equality under the law are rights cherished by both Native Americans and individuals with disabilities. Native American tribes equate sovereign immunity with self-determination, whereas individuals with disabilities

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128 *Id.*

129 *Id.* at 1289.

130 *Id.* at 1291. *See also* Vulgamore v. Tuba City Reg'l Healthcare Corp., No. CV—11—8087—PCT—DCD, 2011 WL 3555723, at 2 (D. Ariz. Aug. 11, 2011) (interpreting Section 504 as to not apply to a Tribe unless it operates a vocational rehabilitation program).

131 Applicability of Section 604 of the Rehabilitation Act to Tribally Controlled Schools, 28 Op. O.L.C. 276, 280–81 (2004).

132 *Id.* at 280.

133 *Id.* at 290.

view federal legislation such as the ADA and Section 504 as facilitating their self-determination.[134] While some courts have interpreted Title III of the ADA and Section 504 as being unenforceable in Indian country due to sovereign immunity, this is contrary to the intent of these laws, which was to provide a national mandate against discrimination.[135] Thus it is unfathomable that these general statues were intended to prohibit discrimination everywhere except in Indian country. Congressional silence on the application of sovereign immunity to these laws is most likely because Congress never considered tribes would use their immunity as a shield to freely discriminate against others.

Tribes should be cognizant that their immunity is enjoyed at the discretion of Congress, which has the plenary power to eliminate it.[136] While the Supreme Court in *Kiowa* upheld sovereign immunity, it stated that "[i]n our interdependent and mobile society . . . tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians."[137] In *Bay Mills*, the Court was again reluctant to perpetuate the doctrine, but deferred to Congress to limit tribal sovereign immunity.[138] Potentially the best way for tribes to continue to benefit from sovereign immunity and exercise their own self-determination, is by respecting the self-determination of other disadvantaged groups such as individuals with disabilities.[139] Tribes could do so by not only waiving sovereign immunity with regards to Title III or the Rehab Act, but also by enacting their own tribal ordinances similar to these federal regulations, taking into consideration their uniqueness as a distinct people. Additionally, Congress should clarify how the ADA and Section 504 impact a tribe in the face of confusion between federal courts. Finally, for individuals with disabilities and their advocates, the Ex parte Young doctrine remains a viable tool that should be utilized to ensure that interstate places

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134 Hasday, *supra* note 51, at 1206.

135 Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians, 166 F.3d 1126, 1135 (1999).

136 *See* Hasday, *supra* note 51, at 1205.

137 Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 758 (1998).

138 Michigan v. Bay Mills Indian Cmty., 134 S.Ct. 2024, 2039 (2014).

139 Hasday, *supra* note 51, at 1206.

of public accommodation and federal funding are not discriminating against people with disabilities.