NOTE

FLORIDA PARAPLEGIC, ASSOCIATION v. MICCOSUKEE TRIBE OF INDIANS OF FLORIDA: BALANCING COMPETING INTERESTS

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> *The Congress finds 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.*[1]
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> *The Congress finds that . . . a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government.*[2]

I. INTRODUCTION

The goals recited above are certainly laudable, but when these goals clash, who is the proper party to decide which goal carries more weight with respect to our Nation's public policy? The first quote comes from the Americans with Disabilities Act (ADA)[3] and provides the rationale behind Congress's enactment of a broad sweeping statutory scheme meant to eradicate discrimination

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1. *Americans with Disabilities Act*, 42 U.S.C. § 12101(a)(8) (1994).
2. *Indian Gaming Regulatory Act*, 25 U.S.C. § 2701(4) (1994).
3. 42 U.S.C. §§ 12101–12213 (1994).

against the disabled[4] and ensure that disabled individuals have equal opportunities[5] and access to public accommodations.[6] The second quote is from the Indian Gaming Regulatory Act (IGRA).[7] Congress recognized that tribal gaming provides a much needed source of income to Native American tribes[8] and sought, through the IGRA, to enact a statutory scheme that would provide for economic self-sufficiency[9] and protect tribal gaming from corruption so that the tribes could reap the economic benefits of such gaming enterprises.[10]

The ADA and IGRA have similar goals. Over forty-three million Americans have some type of mental or physical disability.[11] These individuals are often excluded from the opportunities, services, and benefits that the rest of society enjoys.[12] Excluding disabled individuals in American society results in far greater consequences than simply isolation or dependence.[13] For example, when Congress enacted the ADA, disabled Americans suffered from high rates of

4. *Id*. § 12101(a)(2). "Congress finds that . . . historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." *Id.*

5. *Id*. § 12101(a)(7). "[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society." *Id.*

6. *Id*. § 12101(a)(5). "[I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, . . . failure[s] to make modifications to existing facilities[,] . . . or other opportunities." *Id.*

7. 25 U.S.C. §§ 2701–2721 (1994).

8. *Id*. § 2701(1). "[N]umerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue." *Id.*

9. *Id*. § 2702(1). "The purpose of this Act is . . . to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." *Id.*

10. *Id*. § 2702(2). The purpose is "to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and . . . to ensure that the Indian tribe is the primary beneficiary of the gaming operation." *Id.*

11. 42 U.S.C. § 12101(a)(1).

12. H.R. Comm. on Educ. & Lab., *Americans with Disabilities Act*, 101st Cong. 51 (July 26, 1990). The legislative history includes the testimony of a woman who because of confinement to a wheelchair, experienced repeated acts of discrimination throughout her life, including denial of access to education, employment, airline travel, and theaters. *Id.*

13. *Id.* The committee report details horrifying accounts of discrimination against disabled persons. For example, a New Jersey zookeeper refused to admit persons with Downs Syndrome for fear that they would upset the animals. The report also noted the exclusion of an academically competitive student with cerebral palsy from his school, because the teacher stated that he had "a nauseating effect" upon his schoolmates. *Id.*

poverty and unemployment.[14] Polls revealed that disabled Americans were not only poorer than other Americans, but they were also less educated, less socially active, and had lower self-satisfaction.[15] Most tellingly, testimony before Congress revealed that most Americans still viewed the disabled as "less than fully human and therefore . . . not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right."[16] Based on these realities, Congress found it necessary to enact the ADA.[17]

Likewise, Native American tribes also suffer from high rates of poverty, unemployment, and a lack of access to benefits and opportunities that other Americans take for granted.[18] Unemployment rates among tribal members during some periods have been ten times the national average.[19] Congress addressed these factors through the unlikely remedy of legalized gambling.[20] Having a great interest in promoting economic self-sufficiency in tribes that would otherwise depend on federal funds,[21] Congress, through the IGRA, attempts to ensure the tribe's freedom to operate gaming facilities with little interference and mandates state cooperation.[22] The effect of allowing such gaming has meant that tribes are able to provide members and reservation residents with better governmental infrastructure and programs that would otherwise not be economically possible.[23]

It is ironic that in enacting these two pieces of legislation, Congress sought to remedy similar problems among two different

14. *Id.* at 53. A poll revealed that two-thirds of disabled Americans were unemployed, though an overwhelming majority of them expressed a desire to work. In hard numbers, the findings of the poll revealed that, at the time, 8.2 million Americans with disabilities wanted to work, but could not find employment. *Id.*

15. *Id.* at 52.

16. *Id.*

17. *Id*. at 49. "The Committee, after extensive review and analysis over a number of Congressional Sessions, concludes that there exists a compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the area[] of . . . public accommodations." *Id.*

18. Nicholas S. Goldin, Student Author, *Casting a New Light on Tribal Casino Gaming: Why Congress Should Curtail the Scope of High Stakes Indian Gaming,* 84 Cornell L. Rev. 798, 809–810 (1999).

19. *Id*.

20. *Id.* at 810.

21. *Id.* at 812.

22. 25 U.S.C. § 2710(d)(3)(A) (requiring that a state shall negotiate with a tribe in good faith regarding a Tribal-State gaming compact).

23. Sen. Rpt. 100-446, at 32 (Aug. 3, 1988).

classes of persons. However, the question remains unanswered and Congress seems to have failed to consider it; what should be the result when the competing interests of equal access for the disabled and economic self-sufficiency for Native American tribes directly conflict? The Eleventh Circuit recently decided just that issue, but interestingly, its holding did not further the goals of Congress with respect to either class of persons.[24]

In *Florida Paraplegic, Association v. Miccosukee Tribe of Indians of Florida*,[25] the Eleventh Circuit, faced with a case of first impression,[26] considered whether Congress intended to abrogate tribal sovereign immunity with respect to the ADA.[27] The controversy arose when the Florida Paraplegic Association, along with other plaintiffs representing the rights of the disabled (collectively the Association), sought an injunction to force a Miccosukee gaming facility and restaurant to comply with the ADA.[28] The Association alleged that the facilities denied access to the disabled because of steep ramps, inadequate handicapped parking, and improperly equipped restroom facilities.[29] The Eleventh Circuit held that despite congressional intent that the ADA have a broad sweep, the Association could not bring suit against the Indian tribe for violating the ADA in the gaming facility, because the doctrine of tribal sovereign immunity precludes such a suit.[30]

This Note takes issue with the Eleventh Circuit's decision, because the ruling disregards the congressional intent to eradicate discrimination against the disabled and inhibits tribal economic development by allowing tribes to shield themselves from suit even when acting in a purely commercial capacity. Part II discusses the historical background of the doctrine of tribal sovereign immunity, provides an overview of the relevant case law that attempts to define the common-law doctrine, and emphasizes the pervasive nature of tribal sovereign immunity in every aspect of the law. Part III delves into the economic justification for retaining the doctrine and the economic importance of tribal gaming. Part IV offers alternative views of tribal sovereignty and proposes that treating

24. *Infra* pt. III (discussing the impact of the court's ruling and why it does not further the goal of tribal self-sufficiency).

25. 166 F.3d 1126 (11th Cir. 1999).

26. *Id.* at 1127. In fact, no federal judicial circuit had considered a similar issue.

27. *Id.* at 1132.

28. *Id*. at 1127.

29. *Id.*

30. *Id*. at 1135.

tribal commercial entities as legally distinct from the tribes themselves would avoid uncertainty and inconsistency in the doctrine's application.

II. A HISTORICAL OVERVIEW OF THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY AND ITS EFFECTS

A. The Origin of Tribal Sovereign Immunity

The law has long recognized the concept of tribal sovereignty.[31] However, there is much debate about where tribal sovereignty originated.[32] Sovereignty is "the absolute power of a nation to determine its own course of action with respect to other nations."[33] To understand why the Eleventh Circuit would fail to carry out congressional intent of equal access for the disabled in places of public accommodation, the complicated rationale behind the doctrine of tribal sovereign immunity must be understood. While tribes may not possess "absolute power," the framers specifically referred to them in the United States Constitution, thereby recognizing that tribes had special status as sovereigns.[34] The mention of tribes in the Constitution also indicates that such sovereignty was subject to limitations imposed by the federal government.[35] The federal government reinforced the sovereign status of tribes by negotiating treaties with them, much in the same way it would with foreign sovereigns.[36]

It is their status as sovereigns that gives tribes the immunity from suit that they enjoy. There are two generally accepted theories

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31. *Johnson v. M'Intosh*, 21 U.S. 543 (1823). The United States Supreme Court recognized, to a limited extent, that tribes were at one time sovereign, though colonization may have diminished that sovereignty. *Id*. "[Native Americans] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it . . . but their rights to complete sovereignty, as independent nations, were necessarily diminished." *Id.* at 574.

32. Scott D. Danahy, *License to Discriminate: The Application of Sovereign Immunity to Employment Discrimination Claims by Non-native American Employees of Tribally Owned Businesses*, 25 Fla. St. U. L. Rev. 679, 683 (1998).

33. Vine Deloria, Jr., *Self Determination and the Concept of Sovereignty*, in *Native American Sovereignty* 118, 118 (John R. Wunder ed., Garland Publg., Inc. 1996).

34. U.S. Const. art. I, § 8.

35. *See e.g. Worcester v. Ga.*, 31 U.S. 515, 555 (1832) (discussing the limitations on tribal sovereignty, i.e., quasi-sovereignty); *Cherokee Nation v. Ga.*, 30 U.S. 1, 17 (1831) (discussing the limitations on tribal sovereignty); *Johnson*, 21 U.S. at 574 (discussing the limitations on tribal sovereignty).

36. Deloria, *supra* n. 33, at 119.

about the origin of tribal sovereignty.[37] The first view asserts that Native American tribes are inherently sovereign, because they were self-governing entities long before the first Europeans set foot on American soil.[38] Under this view of sovereign immunity, the federal government would have little or no power to place any limitations upon tribes or to abrogate their immunity in any way.[39]

The second view asserts that tribal sovereign immunity is not an inherent right, but a doctrine the federal government adopted after the European conquest of North America.[40] This view sees tribes as no longer inherently sovereign, and therefore, subject to laws and limitations placed on them by the federal government.[41] The United States Supreme Court endorsed this latter view in *Johnson v. M'Intosh*.[42] This idea of sovereign immunity for tribes persists even though such sovereign immunity is not expressly granted by an act of Congress and is subject to such limitations as Congress may impose. The doctrine of tribal sovereign immunity remains intact, because limitations proposed by the legislature, whether at the state or federal level, generally do not survive strict judicial scrutiny.[43]

Struggling to characterize Native American tribes as sovereigns, the Supreme Court has referred to tribes as "foreign states" and "domestic dependent nations."[44] These characterizations do little to more fully describe the scope of tribal sovereignty, and therefore the scope of immunity that accompanies that sovereignty. The question remains — Is tribal sovereignty an absolute, subject

37. Danahy, *supra* n. 32, at 683–684.

38. *Id*. at 683.

39. *Id.*

40. *Id*.

41. *Id.* at 684.

42. 21 U.S. 543, 574 (1823) (stating that "[Native American tribes'] rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it").

43. Deloria, *supra* n. 33, at 121. When determining whether Congress intended to abrogate tribal sovereign immunity, it is as if courts feel compelled in all instances to find that no abrogation exists. They are hesitant to consider any circumstances other than the clear and unambiguous language of a particular statute. *See e.g. Fla. Paraplegic*, 166 F.3d at 1130–1131 (stating that "federal encroachment upon Indian tribes' natural rights is a serious undertaking, and we should not assume lightly that Congress intended to restrict Indian sovereignty. . . [a] tribe is not subject to suit unless the tribe waives its immunity or Congress expressly abrogates it. . . . With this firm rule in mind, we address the question of whether the Associations are permitted to sue").

44. *Infra* pt. II.

only to express limitations imposed by Congress, or is it an implicit right that sustains and protects tribal culture and self-governance?

Some commentators view sovereignty as more of a cultural benefit than a political power. Allowing sovereign status fosters not only a strong sense of community among tribe members, but also the tribe's motivation to develop its own social institutions, impervious to the drastic changes that take place around them. The theory is that if as sovereign nations the tribes 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, the success of social and political programs in tribal communities will increase. Sovereignty, therefore, is thought to foster a more motivated and efficient community with a clear tribal identity.[45]

If the purpose of sovereign status is to achieve social and political independence for tribes, economic self-sufficiency is a necessary condition precedent.[46] It is ironic that economic self-sufficiency is typically a prerequisite to sovereign status, but in the case of Native American tribes, fostering economic stability characteristic of a sovereign is the primary justification for retaining tribal sovereign immunity.

B. Court Imposed Limitations on Tribal Sovereign Immunity

The courts and the federal government consistently decline to limit tribal sovereign immunity. However, several recent decisions indicate a change in this trend.[47] One such instance in which courts are willing to pierce what once appeared to be impenetrable sovereignty is with respect to "general" statutes.[48] A "general" statute is broad in purpose and meant to apply to all individuals.[49] The Supreme Court in *Federal Power Commission v. Tuscarora*,[50] held that a general statute, the Federal Power Act, meant by Congress to be broad in scope, applied to Native American tribes

45. Deloria, *supra* n. 33, at 123. Deloria contends that allowing tribes to control such things as education and welfare according to tribal traditions would foster a natural community growth, whereas imposing federal programs relating to these matters could foster an artificial, government imposed growth. *Id*.

46. Linda Medcalf, *The Quest for Sovereignty*, in *Native American Sovereignty* 267, 280 (John R. Wunder ed., Garland Publg., Inc. 1996).

47. Danahy, *supra* n. 32, at 684.

48. *Fed. Power Commn. v. Tuscarora Indian Tribe*, 362 U.S. 99, 116 (1960).

49. *Id*. at 99.

50. 362 U.S. 99 (1960).

and to their property interests.[51] This authorized power companies to condemn fee lands owned by the Tuscarora tribe.[52]

The Ninth Circuit placed another limit on tribal sovereign immunity through its ruling in *Donovan v. Coeur d'Alene Tribal Farm*.[53] The *Coeur d'Alene* court developed a test that provided three situations in which the doctrine of tribal sovereign immunity precluded a lawsuit against a tribe.[54] The Coeur d'Alene Tribal Farm engaged in commercial activities on tribal land and employed non-Native American personnel.[55] Aside from its tribal ownership, the farm operated like other farms in the area.[56] Upon an inspection of the farm, the Occupational Safety and Health Administration (Administration) found 21 safety and health violations and imposed a $185 fine.[57] The farm did not challenge the Administration's authority to conduct the inspection, but asserted that Congress did not specifically abrogate tribal sovereign immunity in the express language of the Occupational Safety and Health Act (OSHA),[58] and therefore OSHA's mandates could not apply to the farm.[59] The OSHA Review Commission ultimately vacated the citation and the fine, finding the statute inapplicable to Native American tribes.[60] The Secretary of Labor appealed to the Ninth Circuit.[61]

The Ninth Circuit held that because OSHA is a general statute with a broad purpose, it did apply to tribes.[62] The purpose behind OSHA "is to 'assure so far as possible every working man and woman in the Nation safe and healthful working conditions.'"[63] Also, tribal immunity, not an absolute impenetrable right, could be limited by acts of Congress.[64] The court found that tribal sovereign

51. *Id*. at 116.
52. *Id.*
53. 751 F.2d 1113 (9th Cir. 1985).
54. *Id.* at 1116.
55. *Id*. at 1114.
56. *Id*.
57. *Id*.
58. 29 U.S.C. §§ 651–678 (1994).
59. *Coeur d'Alene*, 751 F.2d at 1114–1115.
60. *Id*.
61. *Id*. at 1115.
62. *Id.* at 1114–1115.
63. *Id.* at 1115 (quoting 29 U.S.C. § 651(b) (1982)).
64. *Id*. at 1115. The court went on to explicitly state: "[W]e have not adopted the proposition that Indian tribes are subject only to those laws of the United States expressly made applicable to them." *Id.* at 1116; *cf. Fla. Paraplegic*, 166 F.3d at 1131 ("We conclude . . . that Congress abrogates tribal immunity only where the definitive language of the statute itself states an intent either to abolish Indian tribes' common law immunity or to subject tribes to

immunity applied in the following three situations: (1) if the law in question affects tribal self-governance or purely intra-tribal matters; (2) if the law affects a tribal right previously guaranteed by treaty; or (3) if the legislative history or express language of the law indicates that Congress did not intend for the law to apply to tribes.[65] The court concluded that the operation of this commercial venture did not fall into any of these categories and, therefore, reinstated the citation and the fine.[66]

These cases illustrate the fact that tribal sovereign immunity is not impenetrable, yet more often than not, the doctrine will be applied and upheld, often reaching inequitable results.[67] This inequity is apparent in the Eleventh Circuit opinion in *Florida Paraplegic*.[68] This inequity not only reaches the disabled citizen seeking equitable relief, but also the business person and the tort victim.[69]

C. The Pervasive Nature of Tribal Sovereign Immunity and the Resulting Inequity

The Eleventh Circuit reasoned that despite the "general" nature of the ADA and its broad applicability, the doctrine of tribal sovereign immunity precludes granting relief to the Association even though it only sought injunctive relief.[70] The Eleventh Circuit based its decision on long standing precedent that many courts feel compelled to follow.[71] The analysis of the following three cases reveals that tribal sovereign immunity is invoked by the courts in all types of legal actions against tribes.[72]

suit under the act").

65. *Coeur d'Alene*, 751 F.2d at 1116.

66. *Id.* at 1117–1118.

67. *Infra* pt. II(C).

68. *See infra* nn. 73–98 and accompanying text (discussing the Eleventh Circuit's reasoning in detail).

69. *Infra* pt. II(C).

70. *Fla. Paraplegic*, 116 F.3d at 1135.

71. *Infra* nn. 73–98 and accompanying text.

72. *Infra* nn. 73–133 and accompanying text.

1. Florida Paraplegic, Association v. Miccosukee Tribe of Indians of Florida: The Dichotomy between Applicability and Enforceability

The Florida Paraplegic Association and the Association for Disabled Americans, Inc. sued the Miccosukee Tribe of Florida for violating Title III of the ADA at one of the Tribe's gaming facilities. Alleging that the facility did not comply with the ADA's mandate for equal accessibility in public accommodations, the Association claimed that the casino and restaurant had inadequate handicapped parking and restrooms, inaccessible ramps, and a front door too difficult to open. The remedy sought was simply an injunction compelling the Tribe to bring the facility into ADA compliance.[73]

The district court, citing *Tuscarora*, found that Congress intended the ADA to have general applicability and that the ADA applied to Native American tribes.[74] The court noted the three exceptions that the Ninth Circuit outlined in *Coeur d'Alene*, and because accessibility of a tribal casino for handicapped persons did not fall within the recognized interests protected by tribal sovereign immunity, it found that the Miccosukee Tribe could be sued under Title III of the ADA.[75] The Miccosukee Tribe appealed to the Eleventh Circuit.[76]

The Eleventh Circuit agreed with the district court that the language of the ADA evidenced Congress's intent that the statute have broad applicability.[77] However, the court disagreed with the district court's conclusion regarding application of the statute.[78] Citing *Coeur d'Alene*, the Eleventh Circuit admitted that a tribal-run commercial enterprise, such as the Miccosukee casino and restaurant, did not fall within any of the categories recognized to have immunity.[79] Instead, the facility fell within the broad scope of entities covered by the ADA, and Congress intended it to be equally accessible to the disabled.[80] However, the conclusion that the mandates of Title III of the ADA applied to the Miccosukee facility

73. *Fla. Paraplegic*, 116 F.3d at 1127.
74. *Id*. at 1127–1128.
75. *Id*. at 1128.
76. *Id.*
77. *Id.* at 1127–1128.
78. *Id*. at 1130.
79. *Id.* at 1129–1130.
80. *Id.* at 1129.

did not result in an automatic victory for the Association, because application of the statute and enforcement of alleged violations of the statute presented two separate issues.[81] Citing the Supreme Court decision in *Kiowa Tribe v. Manufacturing Technologies, Inc.*,[82] Senior Circuit Judge Phyllis Kravitch, writing for the appellate court, noted that "'[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them.'"[83] Judge Kravitch emphasized that the court could "not assume lightly that Congress intended to restrict Indian sovereignty through a piece of legislation."[84] Finding no express abrogation of tribal sovereign immunity in Title III's language, the Eleventh Circuit dismissed the suit.[85]

Whether a statute is criminal or civil, a court should first consider the statute's express language with respect to its applicability to Indian tribes.[86] Giving deference to the Supreme Court decision in *Kiowa*, the court reasoned that a tribe cannot be sued unless it expressly waives its tribal sovereign immunity or Congress explicitly abrogates tribal sovereign immunity in the statute's language.[87] Finding no such waiver by the Miccosukee tribe, the court turned to an analysis of the ADA's language.[88] Despite congressional intent to make the ADA widely applicable, the actual language of Title III is devoid of any reference to Native American tribes.[89] This lack of express reference led the court to find that Congress must not have intended that Title III apply to tribes.[90] Other statutes in which Congress specifically identifies Native American tribes in the definitions of the parties that the statute applies to bolster this argument.[91] Nonetheless, the court failed to

81. *Id.* at 1130.

82. 523 U.S. 751 (1998); *infra* nn. 99–121 and accompanying text (discussing the facts and rationale of *Kiowa*).

83. *Fla. Paraplegic*, 166 F.3d at 1130 (quoting *Kiowa*, 523 U.S. at 755).

84. *Id*.

85. *Id.* at 1135.

86. *Id*. at 1131.

87. *Id*.

88. *Id*.

89. *Id*.

90. *Id.* at 1133–1134.

91. *Id.* at 1132. The opinion discusses the *Hazardous Materials Transportation Uniform Safety Act of 1990* (HMTUSA), 49 U.S.C. App. § 1801 (1990) (repealed 1994), and the *Resource Conservation and Recovery Act of 1976* (RCRA), 42 U.S.C. § 6972(a)(1)(A) (1994). Both HMTUSA and RCRA specifically provided for a cause of action against Native American tribes in the express language of the statute. *Fla. Paraplegic*, 166 F.3d at 1132. While HMTUSA and RCRA are discussed at some length, the court declined to discuss in detail the

note that portions of Title I of the ADA dealing with discrimination in employment, specifically exclude Native American tribes.[92] Title III contains no such exclusion with respect to Native American tribes, and therefore it may be inferred that Congress had no intent to exclude Native American commercial enterprises from complying with ADA requirements regarding accessibility of public accommodations.[93]

The opinion notes that the result reached may be inconsistent with the intent behind the enactment of Title III.[94] The court conceded that its dismissal of the Association's complaint may be "patently unfair,"[95] but emphasized that the Association was not completely without a remedy.[96] Because tribes are not immune to suit by the United States,[97] the United States attorney general could institute a suit to force compliance with Title III.[98] Nevertheless, individual rights and individual suits are lost by the holding in the case.

2. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.: The Eleventh Circuit's Reliance on the Wrong Case

The Eleventh Circuit relied heavily on the Supreme Court's opinion in *Kiowa*,[99] providing yet another example of the "patently unfair" results that tribal sovereign immunity may cause.[100] However, the court's reliance is misplaced if one takes a closer look at the specific facts of *Kiowa*.

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express reference to "Indian tribes" in Title I of the ADA, and the lack of express reference in Title III. *Infra* n. 109 and accompanying text.

92. *Fla. Paraplegic*, 166 F.3d at 1133. The court reduced this issue to a footnote in which it reasoned that the presence of reference to Tribes in Title I of the ADA "shed[] no light upon the critical question of whether tribes also may be sued by private citizens for violating the law." *Id.* at 1133 n. 17.

93. 42 U.S.C. § 12181. The definitions Section of Title III of the ADA does not expressly refer to Native American tribes. *Id.*

94. *Fla. Paraplegic*, 116 F.3d at 1135.

95. *Id*.

96. *Id.* at 1134.

97. *Id.* at 1135 (citing *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459–1460 (9th Cir. 1994) (stating that "tribal sovereignty does not extend to prevent the federal government from exercising its superior sovereign powers").

98. *Id.* at 1134.

99. *Id*. at 1130–1131.

100. *Kiowa*, 523 U.S. at 760 (stating that "[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities . . . . Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case").

The Kiowa Tribe (Tribe), through a tribal entity known as the Kiowa Industrial Development Commission, entered into a contract with Manufacturing Technologies, Inc. to buy a significant amount of stock.[101] The chairman of the Tribe's business committee executed a promissory note for the contract price on tribal land in Carnegie, Oklahoma, and subsequently delivered the note to Manufacturing Technologies in Oklahoma City.[102] The Tribe then defaulted on the note and Manufacturing Technologies sued.[103] At trial, the Tribe moved to dismiss for lack of jurisdiction, asserting tribal sovereign immunity.[104] The trial court denied the motion and the appellate court agreed;[105] Manufacturing Technologies could sue the Tribe for off-reservation, commercial activity.[106]

The United States Supreme Court granted certiorari and reversed the lower court, thereby dismissing the case.[107] The Court cited several reasons for the reversal. It noted that the law had not, as Manufacturing Technologies urged, distinguished between matters of tribal governance and tribal commercial activity.[108] The Court distinguished between the applicability of state law to off-reservation business dealings and the abrogation of immunity to suit, holding that the former could exist without implicating the latter.[109] Citing the earlier Supreme Court opinion of *Turner v. United States*,[110] the Court stated, "'The fundamental obstacle to recovery is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages.'"[111]

Although the Court dismissed Manufacturing Technologies's suit, the majority opinion suggests that in the near future we may witness a re-evaluation of tribal sovereign immunity as Native American tribes become more active in the marketplace[112] and a distinction between commercial and noncommercial activities is

101. *Id*. at 753.
102. *Id*. at 753–754.
103. *Id*. at 754.
104. *Id*.
105. *Id*.
106. *Id*.
107. *Id*. at 760.
108. *Id.* at 754–755.
109. *Id*. at 755.
110. 248 U.S. 354 (1919).
111. *Kiowa*, 523 U.S. at 756–757 (quoting *Turner*, 248 U.S. at 358).
112. *Id.* at 757–758 (noting that the doctrine of tribal immunity is rational, as a means of promoting economic development and tribal self-sufficiency, and "can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities").

drawn.[113] However, the legislative branch, not the judiciary, should draw such a distinction.[114]

Justice John Paul Stevens's dissent notes that immunity is actually made up of two components, (1) the sovereign's immunity from suit in its own courts, which the sovereign itself defines through legislation and (2) the sovereign's immunity from suit in the courts of another sovereign, which is subject to limitations imposed by that other sovereign.[115] A unique situation was before the Court in Kiowa, because the suit involved balancing the rights of three sovereigns, the Tribe, the State, and the federal government.[116] Applying the laws of each sovereign with respect to one another, as well as the laws' jurisdictional limitations, proved confusing for the Court.[117] However, it established that the federal government had no jurisdiction or power to challenge laws affecting tribal self-governance or intra-tribal matters.[118]

The *Kiowa* dissent pointed out that the Court had never before considered a case involving tribal sovereign immunity that did not center around tribal land or some aspect of tribal governance.[119] The rule handed down by the majority gave Native American tribes greater immunity from suit than states, foreign nations, or even the federal government. Finding the majority's decision patently unfair, the dissent noted that the holding does not purport to be limited to voluntary contractual relationships,[120] leaving tort victims, or as in *Florida Paraplegic*, victims of discrimination on tribal lands, without remedy.[121]

113. *Id.* at 754–755. "Nor have we *yet* drawn a distinction between governmental and commercial activities of a tribe." *Id.* (emphasis added).

114. *Id.* at 758.

115. *Id*. at 760 (Stevens, Thomas & Ginsburg, JJ., dissenting).

116. *Id.* at 761.

117. *Id.* at 762 (citing *Puyallup Tribe, Inc. v. Dept. of Game of Wash.*, 433 U.S. 165, 175–176 (1977)).

118. *Id*.

119. *Id.* at 764.

120. *Id*. at 766.

121. *Supra* nn. 73–98 and accompanying text. Justice John Paul Stevens was justified in his fears that the *Kiowa* holding would leave many classes of potential plaintiffs without remedy. *Id.*

3. Trudgeon v. Fantasy Springs Casino:[122] *Tribal Corporations as Governmental Units*

The reach of *Kiowa* not only found itself mistakenly tangled in the Eleventh Circuit's rationale in *Florida Paraplegic*, but also more recently in a California district court decision where a plaintiff sought to recover damages for injuries suffered at a tribal gaming facility.[123] The plaintiff, who broke his hip and shattered his elbow as the result of a fight that broke out in the casino parking lot,[124] alleged that the defendant casino knew of prior criminal acts on the casino premises yet failed to provide adequate security.[125] The Cabazon Tribe moved for summary judgment, and the trial court granted the motion based on tribal sovereign immunity.[126]

The district court, relying heavily on *Kiowa*, concluded that states have no power to abrogate tribal sovereign immunity and that such immunity is only diminished to the extent that the federal government has expressly authorized.[127] The court proved unreceptive to the plaintiff's argument that the defendant was a proprietary, for-profit corporation that did not exercise the tribal governmental powers typically protected by tribal sovereign immunity.[128] Whether tribal sovereign immunity applied depended upon the extent and closeness of the relationship between the proprietary entity and the tribe.[129] Finding that the Cabazon Tribe specifically created the corporation to improve the general welfare of the tribe,

122. 84 Cal. Rptr. 2d 65, 66 (App. 4th Dist. 1999).

123. *Id*. at 66.

124. *Id*. at 66–67.

125. It is notable that the plaintiff did not sue the Cabazon Tribe itself, but a tribal corporate entity that operated Fantasy Springs. *Id.*

126. *Id.*

127. *Id.*

128. *Id*. at 67. The plaintiff argued that the lower court impermissibly extended immunity to the tribe's officers and agents. *Id*.

129. *Id.* at 68. The court cited three determinative factors as laid out by the Minnesota Supreme Court in *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 294 (Minn. 1996). Those factors are

> 1) whether the business entity is organized for a purpose that is governmental in nature, rather than commercial;
>
> 2) whether the tribe and the business entity are closely linked in governing structure and other characteristics; and
>
> 3) whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity.

Id. at 69.

the court concluded that the casino's purpose was governmental.[130] In addition, the corporation's structure indicated the casino was not simply a corporation, but a unit of the tribal government.[131] Finally, the court noted that federal policies that promote tribal gaming as a means of promoting tribal economic self-sufficiency dictate that the doctrine of tribal sovereign immunity extend to the casino.[132] As in *Florida Paraplegic*, the California court emphasized that a reservation court had civil jurisdiction over disputes on reservation land, meaning that the plaintiff did have a forum in which to seek redress for his injuries.[133]

III. THE ECONOMIC IMPACT OF TRIBAL SOVEREIGN IMMUNITY AND THE IMPORTANCE OF TRIBAL GAMING

Florida Paraplegic, Kiowa, and *Trudgeon* all demonstrate the inequity that sovereign tribal immunity can cause. They also show courts' willingness to extend the doctrine to all types of claims, to alleged violations of state law or federal law, from discrimination to contract or tort claims. The courts place major emphasis on the sovereign status of tribes and the notion that the tribes are entitled to immunity.[134] However, *Trudgeon*, the most recently decided of these cases, came closest to divulging the real motive behind the courts' protection of the doctrine — economics.

Florida Paraplegic's holding reinforces the disparate results that occur because of the competing interests on which tribal immunity rests. Often the justification for leaving sovereignty intact

130. *Id*.

131. *Id*.

132. *Id.* at 71. While the factors described by the Minnesota Supreme Court in *Gavle* appear to be a reasonable test for the extension of tribal sovereign immunity to tribal corporate entities, in practice, the test would protect any tribal gaming facility from liability because of the federal policies clearly stated in the language of the IGRA. *Supra* nn. 8–10 and accompanying text.

133. *Id*. at 73. The court stated, "We presume, in view of the Tribe's obvious incentive to maintain good relations with its business clientele, that the tribal court can and will fairly adjudicate the matter." *Id.; cf. infra* nn. 135–137 and accompanying text (arguing that the law should step in to ensure that tribes are more attractive to their "business clientele" by allowing suit against tribal corporate entities despite the barrier of tribal sovereign immunity).

134. *Kiowa*, 523 U.S. at 751; *Fla. Paraplegic*, 166 F.3d at 1126; *Trudgeon*, 84 Cal. Rptr. at 65.

is the economic plight of Native American communities.[135] This reasoning is flawed, however, because immunity to suit may be more of a hindrance than a benefit in the marketplace.[136] While the underlying purpose of the immunity is to preserve limited tribal resources, in reality, such immunity makes tribes unattractive business partners in the community at large.[137] The shield of immunity denies legal protection to parties contracting with tribes, making business ventures extraordinarily risky.[138] Courts decline to enforce even seemingly valid "sue-and-be-sued" clauses in tribal corporate charters based on the doctrine of tribal sovereign immunity.[139]

Congress attempted to create a distinction between the identity of the tribal government and any corporate identity that the tribe may establish by enacting the Indian Reorganization Act (IRA).[140] At least one commentator suggests that encouraging tribal independence and attractiveness as a business partner justifies such a distinction.[141] The court in *Kiowa* opted to defer to Congress to draw a distinction between tribal commercial activities and intra-tribal noncommercial activities.[142] Yet, based on the language of the IRA, Congress deferred to the tribes, allowing the tribes to establish the distinction.[143] Tribes, striving to develop economically and become more self-sufficient, should cast off sovereign immunity when involved in purely commercial situations. Relying less on the shield of tribal immunity and more on their own viability as active and successful marketplace participants would allow tribes to maximize the benefits of commercial activity and more quickly obtain economic self-sufficiency.

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135. *Kiowa*, 523 U.S. at 1130. The opinion recognized that tribal sovereign immunity may be inapplicable in a for-profit tribal commercial venture and that some of the economic arguments underlying the history of the doctrine may no longer be applicable.

136. Julie A. Clement, Student Author, *Strengthening Autonomy by Waiving Sovereign Immunity: Why Indian Tribes Should Be "Foreign" under the Foreign Sovereign Immunities Act*, 14 Thomas M. Cooley L. Rev. 653, 654 (1997).

137. *Id.*

138. *Id.*

139. *Id.* at 667.

140. 25 U.S.C. §§ 476–477 (1994). The IRA makes separate provisions for tribal "organization" and tribal "incorporation." A tribal "organization" is so organized for governmental purposes, while a tribal "incorporation" conducts business operations. The provisions do not, however, speak to the issue of abrogation of immunity. *Id.*

141. Clement, *supra* n. 136, at 662.

142. *Supra* n. 114 and accompanying text.

143. 25 U.S.C. § 477.

A. The Importance of Tribal Gaming in the Economic Mix

Because tribal gaming is an enormous revenue generator, opposition to limited immunity is intense. In *California v. Cabazon Band of Mission Indians*,[144] the Supreme Court found that California's attempts to prohibit tribal gaming controverted important tribal and federal interests.[145] The decision left states wondering if they could exert any control at all over tribal gaming facilities within state jurisdictions.[146] In response to the states' concerns, Congress enacted the IGRA.[147] Under the IGRA, tribal gaming is divided into three classes,[148] each of which receives different levels of federal, state, and tribal control.[149] By providing that gaming is only permitted to the extent that it is authorized by state law,[150] the IGRA grants states a measure of control through the use of legislative enactments.

Tribal gaming, since the IGRA's enactment, has exploded into a multi-billion dollar industry.[151] Pursuant to the IGRA, 225 tribes are operating legal gambling facilities in 27 states.[152] This increase in tribal gaming has furthered Congress's stated goal of promoting tribal economic self-sufficiency, because the revenues generated are used to provide better services and infrastructure to tribal

144. 480 U.S. 202 (1987).

145. *Cabazon,* 480 U.S. at 203. The holding is particularly significant because the Court drew a distinction between state enforcement of "prohibitory" laws and state enforcement of "regulatory" laws. *Id*. at 210–211. With respect to tribal gaming, the Court held that states could enforce the former, but not the latter. *Id*. at 211. The Court found that because California did not completely prohibit gambling, its laws regarding the scope of legal gambling were regulatory, rather than prohibitory and as such, could not be applied to tribal gaming. *Id*. This resulted in a proliferation of tribal gaming facilities in jurisdictions that otherwise permitted only limited or charitable gaming. Goldin, *supra* n. 18, at 812.

146. Sen. Rpt. 100-446, at 2.

147. 25 U.S.C. §§ 2701–2721.

148. *Id*. § 2703(6)–(8). Class I gaming consists of "social games solely for prizes of minimal value;" Class II gaming includes "pull-tabs, lotto, . . . and other games similar to bingo;" Class III gaming is defined as "all forms of gaming that are not class I gaming or class II gaming." *Id.*

149. *Id*. § 2710. Clearly, tribal gaming is subject to federal regulation under the IGRA. The IGRA provides specifically that tribes retain control of Class I gaming, while Classes II and III are subject to certain state laws. *Id.*

150. *Id*. § 2710(a)(1)(A).

151. Goldin, *supra* n. 18, at 819.

152. *Id*. Mr. Goldin indicates that 1996 estimates have proceeds from tribal gaming totaling approximately $5.4 billion. This is in contrast to the period prior to the enactment of the IGRA when tribal gaming generated revenues of only $110 million. *Id*.

members.[153] These reasons, along with the federal government's interest in tribal gaming's economic success,[154] are perhaps the unstated rationale behind the courts' reluctance to abrogate tribal sovereign immunity. The long-standing history of tribal sovereign immunity provides a shield under which the courts, in furtherance of federal policy, may protect the revenues generated by tribal gaming.[155] However, such protection is not without controversy.[156] The fact that tribal litigation primarily involves operation of gaming facilities illustrates this controversy.[157]

B. The California Supreme Court Delivers a Blow to the Protections Afforded to Tribal Gaming

Some commentators question the validity of economic justifications for tribal sovereign immunity and the protections given to tribal gaming enterprises.[158] In August 1999 the California Supreme Court dealt a blow to tribal gaming when it determined that

153. *Id.* at 820–821. Certain tribes have had enormous success with gaming facilities, generating revenues in the hundreds of millions of dollars. *Id*. at 819. For example, the Mashantucket Pequot Tribe's Foxwoods Casino in Connecticut is not only the largest casino in the world, but is estimated to gross over one billion dollars annually. *Id*. at 819–820. A Coeur d'Alene gaming facility in Washington state has provided employment for each and every tribal member. And, in a twist of irony, the Mille Lacs Band of Ojibwe in Minnesota has had such success with gaming, that among other capital ventures, it has purchased a bank that previously declined the Tribe's application for a loan. *Id*. This success in turn allows tribes to provide employment, education, medical services, and other community programs to reservation residents. *Id.* at 820–821.

154. *Id.* at 812. "To a large extent, tribal bingo spread so rapidly across reservations because the federal government shared with the tribes an interest in tribal gaming. By rehabilitating reservation economies, gaming held the potential to reduce the tribes' involuntary but longstanding reliance on federal funding." *Id.*

155. *E.g. Trudgeon*, 84 Cal. Rptr. 2d at 71 (discussing the public policies underlying the IGRA as a rationale for keeping tribal sovereign immunity intact).

156. Goldin, *supra* n. 18, at 834–838 (discussing the social impacts of tribal gambling that are borne by the community as a whole, including crime, problem gambling, and erosion of quality of life); *infra* pt. II(B).

157. *Supra* nn. 73–98 (discussing litigation involving the Miccosukee gaming facility); *infra* nn. 158–171 (discussing litigation based upon tribal gaming in California); *infra* nn. 219–237 (discussing litigation that resulted from the IGRA).

158. Goldin, *supra* n. 18, at 850–852. Tribal gaming supports only one percent of the Nation's Native American population. *Id.* at 851. The reality is that only a minority of the tribes engaged in gaming are successful, but their gaming operations bring into the greater community a host of additional social problems that are very costly. *Id.* at 850.

California's stated public policy against gambling outweighed the economic plight of Native American tribes.[159]

Since adopting its first state constitution, California had a history of public policy prohibiting gaming and other types of gambling.[160] In 1984, in an attempt to prevent the proliferation of casinos that had occurred in Nevada and New Jersey, the citizens of California amended their constitution to prohibit casino-style gaming.[161] This prohibition appeared compromised when the residents of California voted for Proposition 5.[162]

Various plaintiffs in *Hotel Employees & Restaurant Employees International Union v. Davis*[163] sought a writ staying the enactment of Proposition 5,[164] which authorized Class III gaming at tribal casinos.[165] The plaintiffs contended that the type of tribal gaming that Proposition 5 authorized expressly violated the California constitution.[166] The state supreme court agreed.[167] While recognizing the economic plight of Native American tribes[168] and the federal policies promoted by the IGRA,[169] the court still declared Proposition 5 void, as it directly conflicted with California law and policy.[170]

The California Supreme Court's ruling is significant to a discussion of tribal sovereign immunity for several reasons. The first, and most applicable to *Florida Paraplegic*, is the court's

159. *Hotel Employees & Restaurant Employees Intl. Union v. Davis*, 981 P.2d 990, 1019 (Cal. 1999). The court quoted the Government Code, particularly the impetus for Proposition 5. "'[H]istorically, Indian tribes within the state [of California] have long suffered from high rates of unemployment and inadequate educational, housing, elderly care, and health care opportunities, while typically being located on lands that are not conducive to economic development in order to meet those needs.'" *Id.* at 1000.

160. *Id*. at 995–998. It was not until 1976 that the California constitution authorized bingo, and even then it did so only for charitable purposes. *Id.* at 998.

161. *Id.*

162. *Id.* at 994.

163. 981 P.2d 990 (Cal. 1999).

164. *Id*. at 1000–1001. Proposition 5 purported to resolve conflicts regarding tribal-state gaming compacts by authorizing Class III gaming without the delay and expense that the conflicts had created. *Id*. at 1000. The California voters overwhelmingly approved Proposition 5 in the general elections of November 1998. *Id.* at 994.

165. *Supra* n. 148 (describing "Class III" gaming); *Davis*, 981 P.2d at 994.

166. *Davis*, 981 P.2d at 994.

167. *Id*.

168. *Supra* n. 137 and accompanying text (quoting the California legislature's findings that prompted Proposition 5, expanding tribal gaming).

169. *Davis*, 981 P.2d at 1000. The language of Proposition 5 attempted to resolve the conflict with California law by stating that federal law provided a statutory basis within which tribes could gain economic self-sufficiency and that federal statutes authorized Class III gaming. *Id.*

170. *Id*. at 1009.

recognition that tribal economic interests will not always outweigh state law or long-standing state policy. This begs the question, if state law can place limitations on tribal gaming, why should federal law not be permitted to do the same? In addition, the legislative history of the ADA indicates that Congress intended the legislation to promote an across the board policy of equality for the disabled.[171] If state policy can outweigh tribal economic interests, then surely federal law promoting a policy of anti-discrimination, applicable nationwide, should be weighed even more heavily.

IV. ALTERNATIVES: RECONCILING CONFLICTS OF LAW, ECONOMICS, AND PUBLIC POLICY

Tribal sovereign immunity results in inequities that courts recognize,[172] but feel powerless to remedy.[173] These inequities could be overcome by changes in the way the law perceives tribal commercial entities.[174] If the law viewed tribes as sovereigns in the same manner that it does states or foreign governments,[175] the injured individual could find redress. The best solution to the inconsistency with which tribal sovereign immunity is applied, of course, lies with Congress.[176] Only specific legislation authorizing separation of the tribe from the tribal commercial enterprise will end the statute by statute analysis that courts presently undertake in an attempt to define the scope of tribal sovereign immunity.

A. Tribes as Foreign Nations

American courts have struggled to characterize Native American tribes and their status as sovereigns.[177] If tribes are truly sovereign, one alternative is to treat them the same way that the

171. *Supra* nn. 13–17 and accompanying text (relating the factors Congress considered in committee hearings before enactment of the ADA).

172. *Supra* pt. II(C) (discussing three different types of cases involving sovereignty with all three opinions conceding unfair results).

173. *Id.*

174. *Infra* pts. IV(A)–(C) (suggesting that inequity could be avoided by treating tribes as foreign nations, as states, or by enacting specific legislation).

175. *Infra* pts. IV(A)–(B).

176. *Infra* pt. IV(C).

177. *See e.g. Worcester*, 31 U.S. at 515 (discussing the status of Native American Tribes); *Cherokee Nation*, 30 U.S. at 1 (discussing the status of Native American Tribes); *Johnson,* 21 U.S. at 543 (discussing the status of Native American Tribes); *supra* pt. II (discussing the historical context from which tribal sovereignty emerged and its lasting effects).

law treats foreign sovereigns acting in the American marketplace.[178] In *Cherokee Nation v. Georgia*,[179] the Court dealt with the question of whether the Supreme Court had original jurisdiction over a suit brought by the Cherokee Indians.[180] Chief Justice John Marshall pointed out that in many respects Native American tribes are analogous to foreign states; they enter into treaties with the federal government, are capable of war, and are recognized as distinct from domestic states.[181] However, Chief Justice Marshall also pointed out that Native American tribes may be wholly separate from either domestic states or foreign states.[182] The Commerce Clause specifically differentiates between "Foreign Nations," "the Several States," and "Indian Tribes," indicating that tribes are distinct from states and foreign entities.[183] The *Cherokee Nation* Court ultimately rejected the notion that tribes are foreign nations under the Constitution[184] and adopted Chief Justice Marshall's characterization of tribes as "domestic dependent nations. . . . [t]heir relation to the United States resembl[ing] that of a ward to his guardian."[185] The Court reasoned that because foreign nations recognize Native American tribes as subject to the sovereignty of the United States government, such tribes were not meant to be included in the constitutional provision permitting access to the courts for controversies between states, citizens thereof, and foreign states.[186] While Chief Justice Marshall's opinion established the Cherokees as sovereigns in their own right, it precluded them from obtaining the relief they sought in courts of the United States.[187]

178. *Infra* pt. IV(A) (noting the distinction that the FSIA draws between a foreign sovereign acting in its sovereign capacity and a foreign sovereign acting in a purely commercial capacity).

179. 30 U.S. 1 (1831).

180. *Id.* at 15. The Cherokee Nation sought an injunction against the State of Georgia to prevent the State from imposing state laws upon tribal lands. *Id*. It is notable that Chief Justice Marshall stated, "[C]ertain laws of [Georgia], . . . go directly to annihilate the Cherokees as a political society." *Id.* This emphasizes that federal policy regarding Indian tribes, from its origin, stressed protection of tribal governance and culture.

181. *Id.* at 15–18.

182. *Id.* at 19.

183. U.S. Const. art. I, § 8; *Cherokee Nation*, 30 U.S. at 18.

184. 30 U.S. at 20. The majority found that the tribe was not a foreign nation within the context of the Constitution and, therefore, could not maintain a cause of action in a United States court. *Id.* Obviously, this notion changed and whether characterized as "states" or "foreign states," tribes are now permitted to litigate in United States courts.

185. *Id.* at 17.

186. *Id.* at 17–18.

187. *Id.* at 20. "If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted." *Id*.

Chief Justice Marshall had a second opportunity to attempt to define the status of Indian tribes the following year in *Worcester v. Georgia*.[188] The defendant, a missionary on Cherokee land, appealed to the Court after being arrested pursuant to a Georgia law that the defendant claimed had no applicability on tribal land.[189] Chief Justice Marshall, again revisiting the sovereign nature of the Cherokee tribe, noted that while tribes depend on the government for protection, tribes cannot be subject to laws of the government that intrude upon their national character.[190] The *Worcester* Court, straying from its characterization in *Cherokee Nation,* described the tribes as independent "nations," capable of entering into treaties.[191] As such, the *Worcester* Court held that not only were the laws of Georgia inapplicable on tribal lands, but they were also void, because they conflicted with treaties that the United States entered into with the Cherokee tribe.[192]

The Supreme Court opinions in *Cherokee Nation* and *Worcester* provided little guidance for subsequent courts to characterize Indian tribes.[193] These cases demonstrate uncertainty as to whether tribes are foreign nations under the Constitution with which the federal government could enter into treaties,[194] or dependent wards of the federal government as Chief Justice Marshall characterized them.[195] Perhaps if the tribes had been definitively characterized as foreign nations from the outset, much of the difficulty that courts and Congress have faced in defining the limitations of tribal sovereign immunity could have been avoided.[196]

The idea of sovereign immunity stems from notions of equality among sovereigns. Foreign nations recognize that their counterparts, in legal terms, all possess equal power, and in recognition of

188. 31 U.S. 515 (1832).

189. *Id.* at 537–538.

190. *Id.* at 555.

191. *Id.* at 554.

192. *Id.* at 561–563. These "treaties," as supreme law of the land, would necessarily preempt state law. *Id*. at 561.

193. *Supra* pt. II (highlighting several cases where courts struggled with the sovereign or quasi-sovereign nature of tribes).

194. *Worcester*, 31 U.S. at 558.

195. *Cherokee Nation*, 30 U.S. at 17.

196. *Id*. at 50–57 (Thompson, J., dissenting). The dissent convincingly argues that Indian tribes are "foreign" in many respects and should be considered so under the Constitution. Justice Smith Thompson pointed out that as the original occupants of North America, tribes were "foreign nations, to all the world," and questions, "[I]f the Cherokees were then a foreign nation; when or how have they lost that character, and ceased to be a distinct people?" *Id.* at 54.

that equality expect and receive immunity from suit.[197] As commerce between foreign sovereigns has increased, the federal government has recognized that such immunity cannot be absolute.[198]

In 1976 Congress enacted the Foreign Sovereign Immunities Act (FSIA).[199] The FSIA grants foreign nations immunity from suit in United States courts except when the foreign sovereign expressly waives its right to immunity[200] and when the disputed action results from commercial activity carried on by the sovereign in the United States.[201] Further, not all commercial activity falls within the scope of the FSIA. "'[C]ommercial activity'" must be "either a regular course of commercial conduct or a particular commercial transaction or act"[202] and must have a direct effect on the United States.[203]

The Court in *Argentina v. Weltover*[204] noted that a foreign state engaging in commercial activities is not exercising its sovereign power, but instead, power peculiar to a private individual, i.e., the power to engage in business.[205] The Court concluded that a foreign government acting as a "private player" in the United States engages the marketplace in commercial activity and, therefore, is not entitled to immunity under the FSIA.[206]

The question for the courts in litigation arising from the FSIA concerning commercial ventures is often not related to whether immunity is in fact abrogated,[207] but whether the sovereign is engaged in commercial activity directly affecting the United

197. Clement, *supra* n. 136, at 664.

198. 28 U.S.C. § 1602 (1994). "Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the [s]tates in conformity with the principles set forth in this chapter." *Id.*

199. 28 U.S.C. §§ 1602–1611 (1994).

200. *Id*. § 1605(a)(1).

201. *Id*. § 1605(a)(2).

202. *Id*. § 1603(d). The statute goes on to state, "The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.*

203. *Argentina v. Weltover,* 504 U.S. 607, 608 (1992).

204. 504 U.S. 607 (1992).

205. *Id*. at 614 (discussing *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 704 (1976)).

206. *Id.*

207. *Cf. supra* pt. II(C)(1) (analyzing the Eleventh Circuit's reasoning in *Florida Paraplegic* as to whether Congress intended to abrogate tribal sovereign immunity with respect to the ADA). Often the *only* question before the courts is whether tribal sovereign immunity has been abrogated by Congress or waived by the tribe. *Id.*

States.[208] Treating tribes as foreign nations would allow courts more leeway to draw a distinction between tribal governance and tribes as marketplace participants. Rather than defer to Congress, as the Court chose to do in *Kiowa*,[209] courts could utilize preexisting legislation that distinguishes between governance and commercial activity.[210] If immunity exceptions applicable to foreign sovereigns were applied to tribal sovereignty, the immunity would remain intact with respect to intra-tribal and governmental affairs and only abrogated when tribes choose to enter the marketplace.

If the Miccosukee tribe were treated as a foreign sovereign, its operation of a restaurant and casino in the United States, catering to United States citizens, would assuredly lead the courts to find a commercial activity having a direct effect on the United States. There are numerous "consequences" associated with operating a restaurant and casino that would have a direct effect. For example, money would undoubtedly flow in and out of banking and financial institutions that the courts have already determined directly affect the United States.[211] If this was the case, the Eleventh Circuit, pursuant to the FSIA, would have had statutory authority to force compliance with the ADA at the gaming facility.

Legislative and decisional law seem to afford greater protection to tribal immunity than foreign or state sovereign immunity.[212] Just as courts decline to enforce "sue-and-be-sued" clauses in tribal commercial contracts, they also decline to enforce arbitration clauses in tribal contracts.[213] Alternatively, courts routinely uphold agreements by foreign nations to arbitrate disputes.[214] Applying these limitations to tribal sovereign immunity would aid not only those entering into business with tribes, but also the tribes.[215]

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208. *Argentina*, 504 U.S. at 618. There is a direct effect "if it follows 'as an immediate consequence of the defendant's . . . activity.'" *Id.* (quoting *Weltover*, 941 F.2d at 152). The direct effect need not be substantial or foreseeable. The court held that because money was supposed to have been deposited in a New York bank but was not, the United States was directly affected. *Id*. at 631–632.

209. *Kiowa*, 523 U.S. at 760. The majority opinion discusses the FSIA and notes that it results in "more predictable and precise rules" than the case by case, common law approach used in litigation regarding tribal commercial entities. *Id*. at 759.

210. 28 U.S.C. §§ 1602–1611.

211. *Hanil Bank v. PT. Bank Negara Indonesia*, 148 F.3d 127, 132 (2d Cir. 1998).

212. *Supra* pt. II(C)(2) (discussing the *Kiowa* dissent, the expansive purview of tribal sovereignty, and the court's powerlessness to address the issue absent direct action by Congress).

213. Clement, *supra* n. 136, at 667–668.

214. *Id.* at 668.

215. *Id.* at 653–654.

B. Treating Tribes as States

An analogous argument for treating tribes as domestic states, rather than going so far as to consider them foreign nations, can also be made.[216] Although states possess immunity from suit under the Eleventh Amendment,[217] the immunity may be lost either by express consent, congressional abrogation, or under the doctrine announced in *Ex Parte Young*.[218] Further, states can impliedly waive immunity by participating in areas regulated by federal constitutional power, such as commerce.[219]

Perhaps applying the doctrine of *Ex Parte Young* to Native American tribes would alleviate some of the confusion surrounding tribal immunity. The Court held in *Ex Parte Young*, that while a state could not be directly sued, state officials acting in their official capacity could be sued for violating federal laws.[220] The rationale behind the Court's holding was that individuals should not be permitted to violate the Constitution or any law of the United States and then assert immunity as a shield.[221]

If the same reasoning is applied to Native American tribes, they would be protected from suit involving governance or intratribal affairs, but members, or perhaps corporate entities, could be held liable for their individual actions. If this option had been available to the Eleventh Circuit in *Florida Paraplegic*, the court would have had little difficulty with the discussion of tribal immunity, because it would have been inapplicable. Rather than suing the tribe as a nation, the Association could have sued the restaurant and the casino as a totally separate corporate entity.

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216. *Cherokee Nation*, 30 U.S. at 16. "[Tribes] have been uniformly treated as a state from the settlement of our country." *Id.*

217. U.S. Const. amend. XI.

218. 209 U.S. 123 (1908). States normally enjoy immunity to suit under the Eleventh Amendment and that immunity extends to state officials. However, under the doctrine of *Ex Parte Young*, an official may be sued in his or her individual capacity if his or her actions violate some federal law. Wambdi Awanwicake Wastewin, Student Author, *Federal Courts — Indians: The Eleventh Amendment and the Seminole Tribe: Reinvigorating the Doctrine of State Sovereign Immunity*, 73 N.D. L. Rev. 517, 528 (1996).

219. Wastewin, *supra* n. 218, at 529.

220. *Ex Parte Young*, 209 U.S. at 123.

221. Wastewin, *supra* n. 218, at 532.

C. The Need for Express Legislation

As tribes become more involved in commercial activity, the lack of express legislation that could create a level playing field, gains significance. The Supreme Court's decision in *Seminole Tribe v. Florida*[222] precluded the tribe from getting the relief it sought because of Eleventh Amendment state sovereignty.[223] The tribe brought suit against the State of Florida for failure to negotiate in good faith a gaming compact under the IGRA.[224] The Supreme Court held that Florida had not expressly consented to suit under the Act, and nothing in the language of the statute expressly abrogated Eleventh Amendment state immunity.[225] Further, the doctrine of *Ex Parte Young* did not operate to hold the governor personally liable for the state's failure to negotiate.[226] The holding in this case appeared to raise the bar with respect to penetrating state immunity, but did nothing to change the previously recognized exceptions.[227] From the tribe's point of view, the decision may have bolstered its own immunity to suit, but the decision also demonstrates the disadvantages of entering into business with a sovereign that is not amenable to suit.[228]

Just as the IGRA purports to authorize suit against a state for failure to negotiate gaming compacts in good faith,[229] it also provides a provision through which states may bring suit against tribes for violations of gaming compacts.[230] This is undoubtedly the express language that courts search for when discerning congressional intent to abrogate tribal sovereign immunity. However, even this "express" language did not permit the State of Florida to sue the Seminole Tribe.[231]

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222. 517 U.S. 44 (1996).

223. *Id.* at 47.

224. 25 U.S.C. § 2710; *Seminole Tribe*, 517 U.S. at 52.

225. *Seminole Tribe*, 517 U.S. at 47.

226. *Id*. The ruling effectively wiped out the legislative provision that purported to authorize tribes to bring suit against states for violations of the statute.

227. Wastewin, *supra* n. 218, at 539.

228. *Id.* at 540–541.

229. *Supra* pt. III(A).

230. 25 U.S.C. § 2710(d)(3)(C)(1).

231. *Infra* nn. 232–239 and accompanying text (discussing *Seminole Tribe*). The Court held that despite the IGRA, the State of Florida could not sue the Seminole Tribe, because it was immune.

Three years after the Supreme Court decision in *Seminole Tribe*, the State of Florida (State) found the tables turned, leaving it no forum in which to enjoin the Seminole Tribe from engaging in gaming activities that allegedly violated both state and federal law.[232] The State alleged that tribal entities had engaged, and continued to do so, in Class III gaming activities without the required tribal-state gaming compact.[233] The district court determined that tribal sovereign immunity precluded the suit, despite the State's urging that the IGRA, by express statutory language, authorized the suit.[234]

The State contended that Congress abrogated tribal sovereign immunity with respect to alleged violations of IGRA, that the Seminole Tribe by engaging in Class III gaming under IGRA impliedly waived its immunity to suit and that tribal sovereign immunity does not necessarily extend to prospective equitable relief.[235] The court disposed of these arguments, concluding that Congress authorized suit against tribes only when tribes violate the provisions of a tribal-state compact;[236] tribal sovereign immunity could not be impliedly waived.[237] Finally, the notion that tribal sovereign immunity did not extend to prospective equitable relief stemmed from a concurrence to an earlier Supreme Court opinion, and therefore, was not the law.[238] These determinations led the

232. *Fla. v. Seminole Tribe*, 181 F.3d 1237, 1239 (11th Cir. 1999).

233. Because the Seminole Tribe had not entered into a compact with the State of Florida authorizing Class III gaming, the state alleged violations of IGRA and various state and federal criminal statutes. *Id.*

234. The IGRA expressly states, "The United States district courts shall have jurisdiction over . . . any cause of action initiated by a State or Indian tribe to enjoin a class III gaming . . . in violation of any Tribal-State compact." 25 U.S.C. § 2710(d)(7)(A)(ii).

235. *Seminole Tribe*, 181 F.3d at 1239. It is notable that the Association in *Florida Paraplegic* sought nothing more than prospective equitable relief. This novel theory regarding the application of tribal sovereign immunity to such an action apparently carried little weight with the court and probably would not have been useful. *Id.* at 1244–1245.

236. *Id.* at 1243. The state's first theory, that the statute's express language abrogated sovereign tribal immunity, failed because the statute only allowed such a suit when a violation of a gaming compact existed. The state's allegations centered around tribal gaming *absent* the required compact. The court concluded that because there was not a compact the IGRA did not provide a cause of action. *Id.*

237. The court concluded that an intent to abrogate tribal sovereign immunity must be "unequivocally expressed." *Id.* As such, tribes could not impliedly waive their immunity. Noting that this result may leave the state without a forum for its claims, the court cited *Florida Paraplegic* for the proposition that a lack of forum should not enter into a determination of the abrogation of tribal sovereign immunity. *Id*.

238. *Id*. at 1245.

court to affirm the district court's holding that tribal sovereign immunity barred the suit.[239]

Florida v. Seminole Tribe[240] highlights the need for specific and unambiguous legislation regarding the amenability of tribes to suit with respect to tribal commercial enterprise. Although the State believed that the tribe's immunity was expressly abrogated by statute, a condition that courts often find lacking, the statutory authority did not permit the remedy that it sought.[241] Legislation similar to FSIA, explicitly severing tribal commercial activities from tribal governmental functions, would avoid the statute by statute interpretation that the courts now undergo.[242] Regardless of the type of action, or the relevant statutes involved, such legislation would expressly authorize courts to permit suits to go forward, thereby avoiding "patently unfair" results.[243]

CONCLUSION

This Note first discussed the circumstances in which two classes of persons residing in the United States find themselves. Their disadvantages and economic struggles appear to run parallel, and in both cases Congress made it a broad national policy to attempt to remedy their plight. These two classes are of course disabled Americans and Native Americans. Admittedly, the legislature and judiciary do not face an easy task when asked to weigh one class of rights against another. However, continuing to uphold tribal sovereign immunity in a purely commercial context does not favor either class.

The immediate impact of the Eleventh Circuit's decision is twofold, the Miccosukee tribe is not required to bring its gaming

239. The court went on to note that the Seminole Tribe may be subject to federal action as a result of the alleged violations. *Id.* at 1249.

240. 181 F.3d 1237, 1245 (11th Cir. 1999).

241. *Supra* nn. 232–239 and accompanying text.

242. The importance of retaining tribal culture and tribal self-governance requires very specific legislation and a threshold test that would have to be met before the legislation would apply. For example, like the FSIA, the legislation could be applicable to a purely commercial tribal entity. However, it would then be necessary to find that the entity produced a "significant impact" on commerce (something analogous to the "direct effect" of the FSIA). This would afford protection to the small business owner who is barely subsisting, while allowing the highly successful tribal marketplace participants to not only be held accountable for their transgressions, but also to present themselves as attractive business associates to potential business partners and customers.

243. *Supra* pt. II(C) and accompanying text (discussing the unfair outcomes of several cases involving tribal sovereign immunity).

facility into compliance with the public accommodation requirements of the ADA and disabled patrons are denied equal access to the facility. On the surface, it appears as if the tribe may have won this case. However, policy considerations preclude the tribe from claiming victory. The tribe has taken several steps backward regarding its economic development. The court made the tribe's inability to compete in the marketplace clear when it reaffirmed that tribal sovereignty is not easily penetrated and that one should be weary of participating in the commercial ventures of a tribal entity. Through vigorous litigation intended to protect its sovereign immunity, the tribe has asserted a shield against all who may challenge its business practices. However, this shield may be the sword that causes the tribe's demise when potential customers refuse to patronize tribal facilities for fear of relinquishing many of their otherwise federally protected rights. The tragic social and economic problems that tribes face, referred to in the introduction to this Note, are not aided by the Eleventh Circuit's decision.

Likewise, the discrimination against disabled persons that Congress sought to eradicate by enacting the ADA is fostered by the Eleventh Circuit's decision. Title III of the ADA's broad remedial purpose is ignored. Equality of access in public accommodations, which Congress tried to mandate through federal legislation, is thwarted by the Eleventh Circuit's holding.

If part of the purpose underlying tribal sovereign immunity is to protect scarce tribal resources and promote tribal economic development, the Eleventh Circuit should have recognized that forcing compliance with the ADA at the restaurant and casino would have maximized tribal benefit, while at the same time adhering to congressional intent to eradicate discrimination against the disabled. As it stands, the Eleventh Circuit's ruling in *Florida Paraplegic, Association v. Miccosukee Tribe of Indians of Florida* accomplishes neither.