2000

Tribal Immunity and Access for the Disabled

Lisa R. Hasday

Follow this and additional works at: https://digitalcommons.law.yale.edu/ylj

Recommended Citation
Available at: https://digitalcommons.law.yale.edu/ylj/vol109/iss5/5
Case Note

Tribal Immunity and Access for the Disabled

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

Self-sufficiency is a value with particular significance for both disabled people and Indian tribes, two historically disadvantaged groups. In *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians*, each of these two groups battled to preserve this important value for itself. The case considered whether the Florida Paraplegic Association and the Association for Disabled Americans could sue the Miccosukee Tribe for failing to meet the accessibility standards of Title III of the Americans with Disabilities Act of 1990 (ADA). In this case of first impression, the Court of Appeals for the Eleventh Circuit reversed the ruling of the U.S. District Court for the Southern District of Florida, which had denied the Tribe's motion to dismiss. Senior Circuit Judge Kravitch ruled that the Tribe, while subject

---

1. 166 F.3d 1126 (11th Cir. 1999) [*Miccosukee II*].
2. 42 U.S.C. §§ 12181-12189 (1994). Title III of the ADA prohibits discrimination against any individual "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 who owns, leases (or leases to), or operates a place of public accommodation." *Id.* § 12182(a).
3. Prior to this case, no circuit court had addressed whether the ADA applies to Indian tribes. *See Miccosukee II*, 166 F.3d at 1128.
4. *See id.* at 1135. The district court held that Title III applies to Indian tribes and that no exception prevented its application to the Miccosukee Tribe. *See id.* at 1127-28. The Tribe did not dispute the rule that statutes of general applicability apply to Indian tribes and that the ADA is such a statute. *See id.* at 1128 n.2; *see also* Florida Paraplegic Ass'n v. Miccosukee Indian Tribe, No. 96-2425 (S.D. Fla. July 25, 1997) [*Miccosukee I*]. Instead, the Tribe argued that sovereign immunity protected it from the suit, and that this case fell under an exception to the applicability rule for "purely intramural matters" touching "exclusive rights of self-governance." *Id.* (citing Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985)). The district court held that this exception did not apply because the facility at issue had "a commercial and service character," and that the Tribe was therefore not immune from suit. *Id.*
to the ADA,\textsuperscript{5} retained common-law immunity from a private suit alleging violations of Title III.\textsuperscript{6} This decision shielded the Tribe from being required to comply with ADA standards with regard to the parking lot, front door, wheelchair ramps, and bathrooms at the Miccosukee Indian Bingo and Gaming Center, a restaurant and entertainment facility that the Tribe owned.\textsuperscript{7}

This Case Note argues that the Miccosukee plaintiffs might have circumvented the obstacle of tribal sovereign immunity if they had sued tribal members rather than the Miccosukee Tribe as a whole.\textsuperscript{8} Part I discusses the \textit{Ex parte Young} doctrine in the context of state sovereign immunity and argues that the doctrine would have applied in the Miccosukee case if the defendant had been a state. Part II explores how this doctrine applies in the tribal context, citing cases that have held that tribal immunity does not extend to individual members of tribes. Part III

5. See Miccosukee II, 166 F.3d at 1128-30. The court concluded that the "expansive" language of the ADA, \textit{id.} at 1128 n.3, and its legislative history, see \textit{id.} at 1128 & n.4, made clear that Congress intended the statute to have broad applicability. The court further agreed with the district court that the case did not fall under the "self-governance" exception to the applicability rule. The opinion explained that "[t]he Miccosukee Tribe's restaurant and gaming facility is a commercial enterprise open to non-Indians," which "does not relate to the governmental functions of the Tribe, nor does it operate exclusively within the domain of the Tribe and its members." \textit{id.} at 1129. Lastly, the court noted (in response to an argument of the plaintiffs) that the fact that Title I of the ADA specifically excludes Indian tribes, while Title III does not exclude them, provides further evidence that Congress intended Title III to apply to Indian tribes. See \textit{id.} at 1133 n.17.

6. See \textit{id.} at 1130-34. The doctrine of tribal sovereign immunity provides that "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." Kiowa Tribe v. Manufacturing Techs., 523 U.S. 751, 754 (1998) (holding that a tribe was entitled to sovereign immunity from a suit on a promissory note that it had signed). See generally Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (holding that sovereign immunity bars suits against a tribe under the Indian Civil Rights Act); United States v. United States Fidelity & Guar. Co., 309 U.S. 506 (1940) (holding that an Indian tribe's immunity provides that the tribe could not be compelled to defend itself away from its own territory merely because its debtor was available only outside the tribe's jurisdiction); FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 324-28 (Rennard Strickland et al. eds., 1982) (surveying the case law and the statutes defining the extent of tribal sovereign immunity).

The Miccosukee court upheld the Tribe's sovereign immunity after concluding that the Tribe had not waived its immunity with respect to Title III "in general or this lawsuit in particular," Miccosukee II, 166 F.3d at 1131, and that Congress had not expressly abrogated tribal sovereign immunity under the ADA, "either by direct statement in Title III itself or by reference to other statutes having that effect," \textit{id.} at 1132. The court found that the ADA's legislative history contained no additional information on whether Indian tribes are subject to private lawsuits for violating Title III. See \textit{id.} at 1133-34 & n.18. The court pointed out, however, that Congress created an alternative method by which Title III may be enforced with respect to Indian tribes: Title III authorizes the U.S. Attorney General to bring a civil action to compel tribes' compliance with the statute. See \textit{id.} at 1134-35 & n.20 (citing 42 U.S.C. § 12188(b)(1)(B)).

7. See Miccosukee II, 166 F.3d at 1127.

8. This argument does not conflict with the court's holding that Congress has not abrogated the Tribe's sovereign immunity from a private action for an ADA violation. As the court pointed out, Congress explicitly abrogated sovereign immunity with respect to the ADA when the defendants are states, but did not do so for tribes. See \textit{id.} at 1133 (citing 42 U.S.C. § 12202).
elaborates on the policy considerations that support such an approach and suggests that courts should limit tribal sovereign immunity.

I

In the context of state rather than tribal sovereignty, the strategy of suing individuals (instead of the larger entities of which they are part) is well established. *Ex parte Young* held that the Eleventh Amendment does not preclude suits against state officers in their official capacity when the plaintiff seeks prospective injunctive relief to end a continuing violation of federal law. *Seminole Tribe v. Florida,* a recent Supreme Court case upholding state sovereign immunity in federal court, reframed the *Ex parte Young* doctrine as a narrow exception to the Eleventh Amendment. The majority held that the *Ex parte Young* doctrine could not be used to bring suit under the Indian Gaming Regulatory Act of 1988 (IGRA) against a state official. The Court declared that the doctrine applies only where a "limited" statutory remedial scheme exists, not where there is a "detailed" one.

Although *Seminole Tribe* clearly restricted the scope of *Ex parte Young,* scholars have concluded that the *Ex parte Young* doctrine is still good law. David Currie, for instance, declared that *Ex parte Young* is "alive and well

---

10. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.
11. The doctrine actually far predates the 1908 *Ex parte Young* decision. For a sampling of American and English cases allowing suits against officers, see Vicki C. Jackson, Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex Parte Young, 72 N.Y.U. L. REV. 495, 511 n.61 (1997).
13. As in *Miccosukee,* a Florida Indian tribe was a litigant in *Seminole Tribe.* Whereas the Miccosukee Tribe was the defendant, however, the Seminole Tribe was the plaintiff. The Seminole Tribe filed suit against Florida for prospective injunctive relief to compel negotiations under the Indian Gaming Regulatory Act of 1988. See id. at 51-52. Viewed together, *Miccosukee* and *Seminole Tribe* illustrate that the doctrine of sovereign immunity is a mixed blessing for Indian tribes, depending on how they are situated in the particular case.
15. See *Seminole Tribe,* 517 U.S. at 76.
16. See *id.* at 74, 75 n.17. Arguably, the remedial scheme of Title III of the ADA meets Justice Rehnquist's test in that it is detailed enough to preclude the possibility of suing state officers under *Ex parte Young.* Title III authorizes private individuals to sue for injunctive relief and the Attorney General to bring an action against "any person or group of persons" for injunctive relief or monetary damages. See 42 U.S.C. § 12188 (1994). Indian tribes are not exempt from the category of "any person or group of persons," so the Attorney General may bring an action against tribes to comply with the ADA. See *Miccosukee II,* 166 F.3d at 1134-35. In addition to authorizing the remedy of civil suits, the ADA "encourages" the use of alternative dispute resolution. See 42 U.S.C. § 12212.
and living in the Supreme Court." He noted that the Court’s decision does not preclude the application of Ex parte Young to statutes other than IGRA and that "the impact of Seminole Tribe upon Ex parte Young remedies turns on analysis of the terms, history, purpose, and context of the remedial provisions of the particular statute sought to be enforced." The courts may also be motivated to continue their use of the Ex parte Young doctrine after Seminole Tribe because the latter decision contains several analytical flaws.

Cases decided after Seminole Tribe in the specific context of ADA violations demonstrate that the Ex parte Young doctrine is still in force. In Nelson v. Miller, the Sixth Circuit held that the Ex parte Young exception applied to a case in which blind voters brought an action against the Michigan Secretary of State. The voters alleged that the official had violated the ADA and the Rehabilitation Act of 1973 (RA) in failing to provide them with a means of marking their ballots without third-party assistance. Because the plaintiffs sought only future compliance rather than retroactive money damages, the court determined that their claims were not against the state and were sufficient to compel the state officer to comply with federal law. In Armstrong v. Wilson, disabled state-prison inmates and parolees sought wide-ranging, wholesale institutional reforms of a state’s prison system based on alleged violations of the ADA and the RA. The Ninth Circuit rejected the defendants’ argument that such broad reform was outside the bounds of Ex parte Young. These cases upheld the Ex parte Young doctrine on the ground that it is “sufficient” to invoke the doctrine where prospective injunctive relief is sought. Even the Seminole Court noted that it has “often . . . found federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to ‘end a continuing violation of federal law.’”

18. See id. at 548.
19. Id. at 551 (emphasis added).
20. See generally Jackson, supra note 11 (pointing out several unsupported assumptions in the majority opinion).
21. The Supreme Court will soon decide whether states are bound by the ADA. See Linda Greenhouse, Supreme Court Will Revisit States’ Rights in Bias Case, N.Y. TIMES, Jan. 22, 2000, at A12 (reporting that the Court will review Florida Department of Corrections v. Dickson, 157 F.3d 908 (11th Cir. 1998), cert. granted, 68 U.S.L.W. 3473 (U.S. Jan. 21, 2000) (No. 98-829)).
22. 170 F.3d 641 (6th Cir. 1999).
24. See Nelson, 170 F.3d at 646-47.
25. 124 F.3d 1019 (9th Cir. 1997).
26. See id. at 1025-26.
27. See Nelson, 170 F.3d at 646; Armstrong, 124 F.3d at 1026.
As in Nelson and Armstrong, the plaintiffs in Miccosukee sought only a prospective injunction. These precedents demonstrate that the Miccosukee plaintiffs would have been able to bring their ADA suit if the restaurant and entertainment facility had been owned by the state and if they had named individual state officials as defendants in a suit for prospective injunctive relief. The next Part argues that the results should be the same if the defendants were members of an Indian tribe.

II

Ex parte Young and Seminole Tribe address Eleventh Amendment issues that unquestionably apply to states, not to tribes. The same strategy of targeting individual defendants, however, applies in the tribal context as well. As the Fifth Circuit stated in TTEA v. Ysleta del Sur Pueblo, "There is no reason that the federal common law doctrine of tribal sovereign immunity, a distinct but similar concept [to state sovereign immunity], should extend further than the now-constitutionalized doctrine of state sovereign immunity" to provide immunity to tribal members. The disability associations could thus bring suit against individual Miccosukee Tribe members to compel them to conform their facility to the ADA's requirements.

As early as 1977, the Supreme Court allowed suits for injunctive relief against tribal members rather than tribes. Puyallup Tribe, Inc. v. Department of Game affirmed that "whether or not the Tribe itself may be sued in a state court without its consent or that of Congress, a suit to enjoin violations of state law by individual tribal members is permissible." Admittedly, the facts of Puyallup differed somewhat from those of Miccosukee. While both cases sought injunctive or declaratory relief, the former case was brought by a state agency for an alleged violation of state law, whereas the latter was brought by private associations for an alleged violation of federal law. One year later, the Court held in Santa Clara Pueblo v. Martinez that a tribal officer was not protected by the tribe's

29. See Miccosukee II, 166 F.3d at 1127.
30. 181 F.3d 676 (5th Cir. 1999).
31. Id. at 680. The Miccosukee court's own analysis supports this approach, given its comparative analysis of state sovereign immunity and tribal sovereign immunity in resolving the question of whether Congress expressly abrogated the latter in enacting Title III. The court saw "no reason to adopt a different standard for evaluating [c]ongressional intent with respect to the waiver of tribal sovereign immunity" than for evaluating congressional intent with respect to the waiver of state sovereign immunity. Miccosukee II, 166 F.3d at 1131. The court was thus inclined to support the argument that tribal sovereign immunity does not extend to tribe members, just as state sovereign immunity does not extend to state officers.
33. Id. at 171.
34. 436 U.S. 49 (1978).
immunity from a lawsuit for declaratory and injunctive relief against enforcement of a particular tribal ordinance. In 1985, this ability to sue tribal officials allowed energy companies to obtain an adjudication of the validity of tribal taxes in *Kerr-McGee Corp. v. Navajo Tribe of Indians*.

More recent cases, albeit ones decided prior to *Seminole Tribe*, have also upheld the notion that tribal immunity does not extend to individual members of the tribe. These cases differed from *Miccosukee* in terms of the remedy sought (damages rather than injunctive relief) and the type of plaintiff involved (non-disabled plaintiffs). *Miccosukee* remains, however, a prime candidate for application of the basic concept they articulate: suing individual tribal members.

III

As Indian tribes increasingly engage in enterprises such as ski resorts, gambling casinos, and sales of cigarettes to non-Indians, the courts will continue to be called upon to decide whether Indian tribes may be sued for violating federal laws such as the ADA. In *Miccosukee*, the court decided that the Miccosukee Tribe could not be sued. The court cited various Supreme Court cases to establish that there is a “unique trust relationship between the United States and the Indians” so that “ambiguities in federal laws must be resolved to the Indians’ advantage.” In addition, the court declared that “Indian sovereignty has deep historical roots... and the presumption that tribes should not be subjected to lawsuits in state or federal court remains as strong today as ever.” The *Miccosukee* court undercut its own argument about the strength of tribal sovereign immunity, however, with its extensive discussion of cases in which courts found evidence of congressional intent to abrogate tribal sovereign immunity, specifically, the court pointed to three circuit court decisions holding that

35. See id. at 59. However, the availability of actions against tribal officials in federal court is restricted by the lack of any general federal cause of action applicable to such cases. See id. at 71.
37. See, e.g., Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 514 (1991) (noting that the Court has “never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State”); Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 458, 462 (8th Cir. 1993) (holding that members of the Tribal Council had acted beyond the scope of their authority and thus had placed themselves outside the tribe’s sovereign immunity); United States v. James, 980 F.2d 1314, 1319 (9th Cir. 1992) (“Tribal immunity does not extend to the individual members of the tribe.”). But see Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479 (9th Cir. 1985) (extending immunity to tribal officials against a suit seeking declaratory and injunctive relief and damages and holding that the officials had acted within the scope of their authority).
38. *Miccosukee II*, 166 F.3d at 1131 (emphasis added) (quoting Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985)); see also id. at 1131 n.13 (citing other cases that note the importance of resolving ambiguities in the law in favor of Indians).
39. Id. at 1135.

Until the courts are willing to restrict tribal sovereign immunity, resorting to the *Ex parte Young* exception is useful. Allowing plaintiffs to circumvent the barrier of tribal sovereign immunity by suing individual tribe members in ADA cases promotes the adjudication of cases like *Miccosukee* that raise issues of fundamental importance. It ensures that the Miccosukee Tribe’s facility, and others like it, will truly be places of public accommodation—open to all individuals, whether disabled or not. If such lawsuits are barred, then potentially hundreds—if not thousands—of disabled people may be turned away from Indian-owned facilities. And as Indian tribes participate more and more in mainstream commercial life, this threat becomes all the more serious. Perhaps the more important issue, however, is whether the courts should concern themselves with the *Ex parte Young* exception or, instead, the underlying rule. Should tribal sovereign immunity be allowed at all, and, if so, should it be limited?

Writing for the dissent in *Alden v. Maine*, in which the majority held that Congress could not subject a state to a private suit in state court without its consent, Justice Souter likened the issue of sovereign immunity to the *Lochner*-era laissez-faire doctrine: The Supreme Court has given “immutable constitutional status” to both, yet both are “unrealistic,” “indefensible,” and “fleeting.” Souter and the three Justices who joined his dissent viewed state sovereign immunity as “true neither to history nor to the structure of the Constitution.” Yet the rule of state sovereign immunity is guaranteed under the Constitution. Thus, in the state context, it makes sense to have an *Ex parte Young* exception. Tribal sovereign immunity, however, has no explicit basis in the Constitution at all. This fact raises the question of whether tribal sovereign immunity should be limited.

---

40. See id. at 1132 (citing Public Serv. Co. v. Shoshone-Bannock Tribes, 30 F.3d 1203 (9th Cir. 1994); Northern States Power Co., 991 F.2d at 458).
41. See id. (citing Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094 (8th Cir. 1989)).
42. The few scholars who have addressed the topic of whether the *Ex parte Young* exception should apply to tribal sovereign immunity generally argue that applying this exception to Indian tribes is neither practical nor respectful of tribal sovereign immunity. One scholar, who readily admits that he believes that “the proper place for the tribes to stand is very near the top of the sovereignty ladder,” considers suing individual tribal agents “nearly useless as [a] practical solution[].” Bruce A. Wagman, *Advancing Tribal Sovereign Immunity as a Pathway to Power*, 27 U.S.F. L. Rev. 419, 425, 466 (1993). But when the plaintiffs seek injunctive relief rather than damages, Wagman’s concern about individuals with shallow pockets vanishes.
43. 119 S. Ct. 2240 (1999).
44. Id. at 2294-95 (Souter, J., dissenting).
45. Id.
even beyond the exception provided under *Ex parte Young*.

As the Supreme Court declared last year, "In our interdependent and mobile society, . . . tribal immunity extends beyond what is needed to safeguard tribal self-governance." 47

Tribal self-governance is an important value to be maintained, for it restores some measure of the sovereignty Indians enjoyed before colonization. 48 Just as Indians equate tribal sovereign immunity with self-determination, however, the disabled view the ADA as facilitating their own self-determination. Perhaps a better solution to this conflict would have been the Miccosukee Tribe’s waiving its immunity. Respecting the self-determination of other disadvantaged groups might in fact be the best way for the Indians to preserve, if only symbolically, their own self-determination. At the same time, providing access for the disabled seems to celebrate traditional Indian attitudes toward land. In the words of the American Indian Policy Review Commission, "Indians believed, and still believe, that because of the sacredness of the land it could not be owned, could not be partitioned, fenced and developed for one individual." 49 Just as fences ought not to be built to keep any one individual inside, neither should they be built to keep disabled Americans outside.

—Lisa R. Hasday

---


Judge John Minor Wisdom