Disability Rights on Tribal Reservations

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Abstract

The Americans with Disabilities Act (ADA) is a statute that is largely silent regarding its application on tribal reservations. According to the traditional rules of federal Indian law, Congress must explicitly abrogate tribal sovereignty in order for a statute to be applicable on reservations. However, the Eleventh Circuit has applied the Tuscarora doctrine of the presumption of general applicability, overruling the federal Indian common law rule of explicit abrogation, and found that Title III of the ADA is applicable on tribal reservations. This paper argues that the Tuscarora doctrine is only good law because of the discriminatory backdrop against which native status has been designed and perpetuated. This paper uses two case studies to argue that the forceful application of the ADA on reservations is not the appropriate tool to ensure that tribes protect their members with disabilities. Instead, tribes must be financially empowered to continue to provide culturally appropriate services to this population for the maintenance of tribal self-government.

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Introduction

The Americans with Disabilities Act (ADA) was created through the courageous and undying efforts of people who endured consistent discrimination based on their disabilities. Centuries of disability discrimination and oppression traced to medieval demonology of disabling conditions and amplified by the eugenics movement, which led to laws in the US prohibiting marriage and forced sterilization, required advocates to pursue justice for people with disabilities.[1] Passage of the ADA was the result of civil acts of disobedience and grassroots demonstrations including the sit-in at the San Francisco Department of Health, Education, and Welfare building that lasted 28 days—the longest civil demonstration in US history.[2] However, whether this Congressional statute is enforceable against tribes, who govern their own membership, remains a lingering question. Does the law that was designed to protect one vulnerable population of disabled individuals encroach on the rights of the vulnerable members of tribal populations?

The imposition of the ADA may be a direct infringement on the tribal sovereignty that has been protected in certain Supreme Court cases. Federally recognized native tribes on tribe-owned reservations are

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1. Hilary N. Weaver, Disability Through a Native American Lens: Examining Influences of Culture and Colonization, 14 J. OF SOCIAL WORK IN DISABILITY & REHAB. 148, 155–56 (2015).

2. The History of the Americans with Disabilities Act, DREDF, https://dredf.org/about-us/publications/the-history-of-the-ada (last visited December 13, 2020).

sovereign nations, with unique membership criteria, cultural customs and traditions, and histories of oppression. The racialized historic degradation of autonomous sovereign nationship has led to misconceptions about native communities and outright inconsistent judicial decisions.

The ADA is a general federal statute that is largely silent regarding its application on tribal reservations. According to the traditional rules of federal Indian law, if a general statute does not make mention of administration to tribes, then it is effectively inapplicable on reservations. Established in 1883, this requirement of explicit divestiture of tribal sovereignty by Congress would have been threatening enough to tribal autonomy. For example, courts upheld the constitutionality of congressional acts like the Indian Major Crimes Act, which explicitly divested the tribe of some of its criminal jurisdiction.[3] However, the 1960 SCOTUS decision in Tuscarora created a new standard of implicit divestiture: an assessment of whether an exception has been bestowed upon tribes. The Eleventh Circuit is the highest court to have applied the Tuscarora doctrine to the ADA, finding that Title III is applicable on tribal reservations.

This paper uses legal and cultural history to argue that the Tuscarora decision was based on the racist and discriminatory backdrop against which native status has been designed and perpetuated. Through the case studies of the Yurok tribe in California and the Athabascan tribe in Alaska, this paper argues that the ADA is not the appropriate tool to ensure tribes remain accountable to their disabled membership. The

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3. United States v. Kagama, 118 U.S. 375 (1886).

Yurok tribe implements their own culturally appropriate services to their membership. The Athabascan tribe in Alaska faces financial and environmental barriers to successfully implementing a tribal policy of supporting disabled membership. These two case studies show that tribes are not only best positioned to support their disabled population but have also developed their own legal apparatus to protect the rights of those individuals. Instead of enforcing the ADA on tribal lands, tribes, as well as tribe-centered federal entities like the Federal Bureau of Indian Affairs (BIA), should be given greater financial support to directly service their own people.

Part I of this article explores the interaction of tribal sovereign power and Congressional divestiture of generally applicable statutes and how courts have viewed this interaction. Part II will cast light on how implicit divestiture supports the application of the ADA on tribal reservations and, as such, directly conflicts with foundational principles of Indian law. Part III assesses the disproportionate rates of those experiencing disabilities in tribal communities and argues that national agencies like the Bureau of Indian Affairs (BIA) face financial limitations to remedy this. Part IV is a case study of the Yurok Tribe, the largest native community in northern California, who resists the application of the ADA on tribal lands and employs its own culturally appropriate approach, The Yurok Tribe ensures the same protections of the ADA through the design of a legal apparatus and tribal court system that provides constitutional protections to their disabled membership, the development of state-partnerships that reaffirm this protection, and programs that provide direct services. Finally, Part V will consider the looming financial and environmental barriers for

some tribes, like the Athabascan Tribe in rural Alaska, to effectively service its membership. Part V will also argue for potential responses to this problem.

I. PART I

A. The Inconsistencies of Federal Indian Law

Lower courts have directly interfered with inherent tribal sovereignty by finding that provisions of the ADA can be applied on tribal reservations. These decisions have been made possible by the courts' inconsistent affirmations of tribal self-governance and impositions of limitations on the extent of that tribal autonomy. The Supreme Court of the United States has found that tribes retain their inherent sovereignty, but this holding is subject to complete abrogation by Congress because tribes are naturally dependent on the United States. The Supreme Court has created what can only be termed as an ad hoc assembly of ideas attempting to harmonize early notions of tribal sovereignty and tribal dependency.

During the 19th century, the time of initial colonial conquest and plunder of tribal land, the Supreme Court created the Doctrine of Discovery, which essentially conferred power upon the federal government to extinguish Indian land title via conquest, leaving natives with nothing more than a possessory title to the land and requiring government approval to sell.[4] Indian sovereignty was further limited by Justice Marshall's coined term, "domestic dependent nations," which prevented tribes from being

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4. Johnson v. M'Intosh, 21 U.S. 543, 570 (1823).

viewed as foreign states for constitutional purposes.[5] These early notions of tribal dependency on the federal government later became justifications for federal plenary power over tribes.

The trust relationship between the federal government and tribal governments asserts that tribes are "dependent" on the United States, and thus the federal government has a duty and power to protect them. This paternalistic notion has led to justifications for Congress' plenary power to abrogate tribal sovereignty—as long as they did so explicitly.[6] This principle relies on racist view of Natives as an inferior people, dependent on the government for "their daily food . . . and their political rights."[7] How-

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5. Cherokee Nation v. Georgia , 30 U.S. 1, 2 (1831).

6. Ex Parte Crow Dog, 109 U.S. 556, 557 (1883); see also Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903) (relieving any confusion about whether Congress could abrogate tribal sovereignty that had been previously protected in written treaties by extending the Last in Time principle to Indian treaties. Although treaties and statutes merit equal weight, whatever was enacted Last in Time would be binding. Since Congress ended treaty-making with Indian tribes in 1871, any protections offered to tribes through previous treaties could essentially be abrogated by Congressional statutes).

7. Id. at 567; see also Gregory Ablavsky, "With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings, 70 STAN. L. REV. 1025 (2018) (revealing that the practice of labeling these peoples as either "nation" or "tribe" has been a classic practice of the judicial court system and has had lasting effects not only on Federal Indian Law

ever, while relying on notions of tribal dependency to justify American usurpation of tribal authority, a handful of Supreme Court decisions have nonetheless affirmed tribes as "distinct, independent political communities," with the inherent right of sovereignty.[8] Recent lower courts have

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decisions but also modes by which Indian Law critics attempt to push against tribal sovereignty and self-governance. He suggests that this distinction of native status and civilization interpreted from these two terms also translates to the conception of political belonging, with "nation" suggesting "equality of Native polities" and tribe suggesting a "quasi-anthropological context" and supposed lack of civilization." It continues to bolster formal challenges by Indian Law critics of federal protections of tribal sovereignty and jurisprudence and informs lower court decisions who must interpret the extent to which inherent sovereignty is protected by these staggering opinions of the Supreme Court. And finally, it informally creates concerns from the general public about the extent to which tribes should be supported in advancing modes of self-government and protections to their tribal communities).

8. Worcester v. Georgia, 31 U.S. 515, 519 (1832) (creating one of the early canons of construction of Federal Indian Law requiring the interpretation of treaties be done in favor of Natives considering how they would have originally understood the treaty); see also Talton v. Mayes, 163 U.S. 376, 381–82 (1896) (reaffirming that tribes have not, in fact, been incorporated into the federal government and remain separate sovereigns); see also United States v. Wheeler, 435 U.S. 313, 322 (1978) (finding that tribal power to punish tribal criminal offenders is

perpetuated this inconsistent ideology, resulting in a question of whether general federal statutes silent on tribal applicability, like the ADA, abrogate tribal sovereignty.

II. Part II

A. Explicit Divestiture in Statutes of General Applicability

According to the traditional rules of federal Indian law, a statute must explicitly abrogate tribal sovereignty to be applicable on tribal reservations. Established in 1883, this requirement of explicit divestiture of tribal sovereignty by Congress was originally developed to protect tribal autonomy. In Ex parte Crow Dog, the court reasoned that absent explicit congressional divestiture, crimes committed by one Native against another fellow tribal member remained within tribal jurisdiction.[9] However, this requirement has also been used to threaten tribal sovereignty. In response to the decision in Crow Dog, Congress enacted the Indian Major Crimes Act, which explicitly abrogates tribal jurisdiction by placing certain crimes under federal jurisdiction if they are committed by a

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derived from its inherent sovereignty, not from the federal government, and therefore protections under the laws of separate sovereigns do not subject a defendant to double jeopardy); see also F. Cohen, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01 (2019) (asserting that Wheeler decision rested on the premise that the tribes have never voluntarily relinquished their power to punish tribal offenders, and while Congress has the power to regulate tribal self-government, its laws did not create tribe's power to govern itself).

9. Ex parte Kan-gi-shun-ca (Crow Dog), 109 U.S. 556, 556 (1883).

Native on a reservation.[10] In 1886, the Supreme Court in United States v. Kagama upheld the Act's constitutionality through explicit divestiture, finding that "[t]he power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell."[11] Almost a century later, the Supreme Court in Santa Clara Pueblo v. Martinez upheld the explicit divestiture requirement again, finding that the Indian Civil Rights Act (ICRA), however, did not explicitly waive tribal sovereign immunity, and therefore a Native woman was unable to bring an equal protection claim against her tribe.[12]

The Supreme Court has taken the threat to tribal sovereignty solidified in Kagama a step further by finding that a general statute applying to all persons includes Natives and is applicable on reservations. Arguably the most significant Supreme Court case to determine whether a

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10. United States v. Kagama, 118 U.S. 375 (1886); see also Talton v. Mayes, 163 U.S. 376, 383–84 (1896) (finding that, absent affirmative congressional action to the contrary, tribes were not subject to the Bill of Rights. Congress passed the Civil Rights Act of 1968, which applied most of the Bill of Rights onto tribal court adjudications).

11. Samuel E. Ennis, Implicit Divestiture and the Supreme Court's (Re) construction of the Indian Canons, 35 VERMONT L. REV. 623, 629 (2012) (citing Kagama as an early Court case that "affirmed the primacy of the federal government as the determinative arbiter of when tribal criminal jurisdiction must be curtailed for the safety of non-Indians").

12. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58–59 (1978).

federal statute of general applicability that was silent on its implementation on tribal land should be administered was decided in 1960. In Federal Power Commission v. Tuscarora Indian Nation, a tribal nation opposed the application of the Federal Power Act on Indians or Indian lands because it was only a general Act of Congress that did not expressly permit Indian lands owned in fee simple (or no longer held in trust for a tribal member by the US government) to be taken for public use as a storage reservoir of a hydraulic power project by the New York Power Authority.[13] The Court found for the Federal Power Commission, noting that "a general statute in terms applying to all persons includes Indians and their property interests."[14] The Ninth Circuit took this "well-established" doctrine from the Tuscarora decision and formulated a three-prong test.[15] The Donovan test found

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13. Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 115 (1960).

14. Id. at 107, 116. Although the Federal Power Act was not completely silent regarding its application on reservations, it did set out particular limitations in Section s 4(e), which established that the Commission could not lawfully take lands "for reservoir purposes in the absence of a finding by the Commission 'that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." Id. As a result, many find Tuscarora's commentary on statutes of general applicability to be considered dicta.

15. Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 , 1116 (finding that protecting tribal commercial enterprises from federal regulation would

> A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches "exclusive rights of self-government in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is some proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on the reservation . . . " In any of these situations, Congress must expressly apply a statute to Indians before we will hold that it reaches them.[16]

The Tuscarora decision, and the Donovan test thereafter, altered the presumption in Ex Parte Crow Dog that Congressional Acts must abrogate tribal sovereignty explicitly. It also instilled a presumption that Indian tribes are "treated as any other person [under statutes of general application], unless Congress expressly excepts them therefrom."[17]

B. Applicability of the ADA to Tribes

The Americans with Disabilities Act (ADA) has largely been understood to exclude application to Native tribes. Although Title I expressly prohibits its application on reservations and Title II arguably excludes

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effectively swallow the rule, and restricted the meaning "self-government" to purely intramural matters "such as conditions of tribal membership, inheritance rules, and domestic relations").

16. Id. at 1116 (quoting United States v. Farris, 624 F.2d 890, 893–94 (1980)).

17. Id.

application to tribal governments, Title III is completely silent on its application to tribes. Title I of the ADA finds that:

> No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[18]

Title I defines those who are excluded from the term "employer" as "the United States, a corporation wholly owned by the government of the United States, or an Indian tribe."[19] This definition has led legal analysts to conclude that employment discrimination suits cannot be brought against a tribe or its official under Title I for lack of subject matter jurisdiction.[20]

Although Title I expressly prohibits its application on reservations, Title II of the ADA is not as explicit in its exclusions:

> No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[21]

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18. 42 U.S.C. § 12112 (a).

19. 42 U.S.C. § 12111 (5)(B)(i).

20. Federal Disability Rights Laws as Applied to Native American Tribes, LEGAL E-BULLETIN (Southwest ADA Center, Houston, T.X.), June 2003.

21. 42 U.S.C. § 12132.

Public entity is restricted to mean "any department, agency, special purpose district, or other instrumentality of a State or States or local government."[22] This restriction has been interpreted to exclude tribal governments, who classify as neither state nor local governments and suits most likely cannot be brought against a tribe or its official under Title II for lack of subject matter jurisdiction.[23]

However, Title III is different. Although silent on its application to tribal reservations, it does not restrict its application to certain parties as done by Title II. Title III of the ADA requires

No individual shall be discriminated against 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.[24]

Title III of the ADA is completely silent on its application to tribal enterprises. Although SCOTUS developed the presumption of applicability of general statutes doctrine in 1960, the Court has not answered the specific question as to whether the ADA, in whole or in part, is applicable on tribal reservations.

C. Applicability of Title III of the ADA on Tribal Reservations

Applying the Ninth Circuit's Donovan test, the Eleventh Circuit is the highest court to have answered the question of whether or not Title III of

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22. 42 U.S.C. § 12131 (1)(B).

23. Southwest ADA Center, supra 20.

24. 42 U.S.C. § 12182.

the ADA is applicable on tribal reservations. The Eleventh Circuit was asked to determine whether "congressional silence [in Title III of the ADA] should be taken as an expression of intent to exclude tribal enterprises from the scope of an Act to which they would otherwise be subject."[25] In Florida Paraplegic, the Eleventh Circuit applied Tuscarora's presumption of applicability of general statutes to the ADA.[26] The Eleventh Circuit supported this presumption for the following reasons: no existing treaty protecting tribal abrogated rights, the presumption did not interfere with tribal intramural matters, and Congress intended' all along that Title III of the ADA apply to "precisely [this] sort of facility."[27]

In Florida, associations representing the interests of the disabled brought action against the Miccosukee Tribe under Title III of the ADA, claiming that a tribal-owned restaurant and entertainment facility failed to meet the ADA's requirements.[28] The Court applied the Donovan test. Exception 1 (the statute would abrogate rights guaranteed under an Indian treaty) did not apply because both parties agreed that no existing treaty protected any associated tribal rights abrogated through Title III of the ADA.[29] Exception 2 (the statute would interfere with purely intramural matters touching exclusive rights of self-government) was not satisfied

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25. Donovan, 751 F.2d at 1115.

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

27. Id. at 1129.

28. Id. at 1126.

29. Id. at 1130.

because "tribe-run business enterprises acting in interstate commerce do not fall under the 'self-governance' exception to the rule that general statutes apply to Indian tribes."[30] When looking at whether or not Exception 3 'applied (whether the statute contradicts Congress' intent), the Court explored the Congressional intention of Title III of the ADA.

The Court referenced the purpose of the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[31] It also referenced the Senate and House reports accompanying the legislation of the ADA. These reports emphasized that the twelve categories of "public accommodations" in Title III be "construed liberally consistent with the intent of the legislation that people with disabilities should have equal access to the array of establishments that are available to others who do not currently have disabilities."[32] Finally, the Court makes a definitive statement that the Miccosukee Tribe's restaurant and gaming facility is:

> Precisely the sort of facility within "the array of establishments . . . available to others who do not currently have disabilities" that Congress intended to make "equally access[ible]" to disabled individuals through enactment of Title III of the ADA.[33]

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30. Id.

31. See id. at 1128(quoting 42 U.S.C. § 12101(b)(1)).

32. See id. at 1129(quoting S.Rep. No. 101–116, at 59 (1989)).

33. Id. at 1130.

D. Distinction between Right and Remedy

Has Title III of the ADA waived tribal immunity to suit? The Eleventh Circuit in FLA Paraplegic says no. Referencing vast amounts of federal Indian case law established by the Supreme Court, including but not limited to Worcester v. Georgia, Cherokee Nation v. Georgia, Santa Clara Pueblo v. Martinez, and Montana v. Blackfeet Tribe of Indians, the Court discusses the perplexities surrounding Indian tribes as "domestic dependent nations" but ultimately warns that "we should not assume lightly that Congress intended to restrict Indian sovereignty through a piece of legislation."[34]

Congress did not explicitly abrogate tribal immunity in Title III of the ADA through direct statement or through reference to other statutes having that effect. Congress has explicitly abrogated tribal immunity in other statutes such as the Resource Conservation and Recovery Act (RCRA), and Section 12202 of the ADA explicitly "removes immunity of states granted by the Eleventh Amendment of the Constitution." For these reasons, the Court inferred that Congress did not intend to abrogate tribal immunity here.[35] However, Congress specifically autho-

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34. Id. at 1131.

35. Id. at 1133–1134 (quoting H.R.Rep. No. 101–485, pt III, at 72 (1990)). The lack of remedy associated with federally mandated protections for those under tribal jurisdiction is not unprecedented, as decided by Santa Clara regarding the Indian Civil Rights Act (ICRA). Yet, the language in this Opinion acknowledges the lingering sentiment that this lack of remedy"may be troubling" and "may seem . . . even patently unfair."

rizes the US Attorney General to bring a civil action to compel a tribe's' compliance with Title III "engaged in a pattern or practice of discrimination."[36] Thus, tribes might be immune to suit by an individual, but the Attorney General may pursue an action against a tribe failing to comply with Title III.[37]

Referring to ICRA as completely "toothless," the Eleventh Circuit notes that Title III of the ADA authorizes the Attorney General to bring a civil suit against tribes who have not complied with the statute because tribal immunity does not bar suits against the federal government. The Court also offers a perspective that the "competing interests of allowing Indian tribes, sovereign yet subordinate dependent nations, to maintain their independence, but, at the same time, requiring tribes to comply with the same rules that bind all other political subdivision of the US" becomes increasingly difficult as "Indian tribes and their members become more integrated into the mainstream cultural . . . activities of American society." Id.

36. Id. at 1134.

37. The issue of tribal immunity has arisen under other disability law statutes like the Rehabilitation Act of 1973. The need for an "unequivocally expressed" waiver of tribal immunity against alleged violations of the Rehabilitation Act of 1973 has failed to be upheld in some lower courts. See Cruz v. Ysleta Del Sur Tribal Council, 842 F. Supp. 934 (W.D. Tex. 1993) (finding tribal sovereignty was explicitly abrogated by the Rehabilitation Act only by reasoning that "Indian tribe" was included in the definition of local agency, and that this definition was enough to serve

E. Implications of FLA Paraplegic

FLA Paraplegic implies that tribal governments should not handle the implementation of protections for their disabled members on their own terms. This implication is concerning. As argued in Part IV of this paper, tribes, such as the Yurok, are the most equipped and appropriate to

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as a waiver of tribal immunity); see also Sanderlin v. Seminole Tribe of Fla., 243 F.3d 1282, 1290 (11th Cir. 2001) (citing Frost v. Seminole Tribe of Florida, No. 94–7001-CIV-Roettger (S.D.Fla. July 3, 1995) (unpub. op) (finding that "having expressly mentioned Indian tribes by including agencies of Indian tribes within the definition of local agencies, Congress has expressed a clear intent to invade tribal independence in the Rehabilitation Act of 1973 [and] . . . accordingly, Congress has waived tribal immunity"). However, the Eleventh District has corrected lower court decisions by finding that the Rehabilitation Act is restrictively applicable to tribes who implement in State approved vocational rehabilitation projects and that Congress has not effectively waived tribal immunity, even when tribes accept federal funding for such projects. See Sanderlin v. Seminole Tribe of Fla., 243 F.3d 1282, 1285–86 (11th Cir. 2001) (clarifying that the full definition of "local agency" under the Rehabilitation Act restricted the implementation of the Act to those Indian tribes who had an agreement with the State to create a vocational rehabilitation project. The Court also reasserted that the "bare proposition that broad general statutes have application to Native American tribes does not squarely resolve whether there was an abrogation of tribal immunity in this particular instance).

serve not only their overall populations, but particularly those sectors who are most vulnerable, such as people with disabilities.

As previously mentioned, it was decided as early as 1883 that Congress had the federal plenary power to abrogate tribal sovereignty through a federal statute as long as it did so explicitly.[38] The Cohen's Handbook of Federal Indian Law, an encyclopedic handbook written by experts in the field and often cited by SCOTUS, embraces this notion that "Indian tribes have not given up their full sovereignty" and that "until Congress acts, the tribes retain their existing sovereign powers."[39] This potential requirement that Congress abrogate with intention and clarity supports the conclusion that the ADA is not applicable on tribal reservations.

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38. Ex parte Crow Dog, 109 U.S. 556, 557 (1883).

39. F. Cohen, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01§ (2019) (quoting United States v. Wheeler, 435 U.S. 313, 323 (1978)); see also Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58–59 (1978) (upholding tribal sovereign immunity against an attempt by a Native woman to bring an equal protection claim against her tribe because the Supreme Court found that nothing on the face of the Indian Civil Rights Act (ICRA) waived tribal sovereign immunity); see also Mich. v. Bay Mills Indian Cmty., 572 U.S. 782, 782 (2014) (finding that the Congressional abrogation of Indian sovereignty within the Indian Gaming Regulatory Act (IGRA) should be limited to tribal gaming activity on tribal land, and could not be extended to apply to gaming operated outside Indian land).

However, the Supreme Court has also suggested that implicit divestiture of tribal sovereignty is possible at those times when it is "inconsistent with [tribal] status as domestic dependent nations," most commonly involving non-members.[40] Thus, tribes could lose their inherent sovereignty through implicit divestiture based upon their relegated status as "domestic dependent nations."

Permitting Congress to explicitly abrogate tribal sovereignty based on a historic misunderstanding of tribes as "domestic dependent nations" would have been threatening enough to tribal autonomy, but the decision in Tuscarora and the subsequent creation of the Donovan test have increased this threat. These decisions have changed the call for explicit abrogation of inherent tribal rights to an assessment of whether there was an explicit exception bestowed upon tribes. Requiring that inherent protections of tribal self-government (like the power to exclude) be secured in a treaty in order to be protected against enforcement of

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40. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 198–99 (1978) (finding that tribes did not have criminal jurisdiction over nonmembers, which has led many commentators to suspect that the judiciary has given upon itself the power to decide the scope of tribal powers); see also Johnson v. M'Intosh, 21 U.S. 543, 570 (1823) (finding that natives were not entitled to fee alienation of land to non-Indians); see also Worcester v. Georgia, 31 U.S. 515, 592 (1832) (finding that the tribes could not engage in commercial or diplomatic relations with foreign nations, in part, because the federal government, not the individual states, regulates intercourse with tribes and with foreign nations).

general federal statutes is mistaken against the idea posed in Talton and Wheeler. These cases contend that tribal sovereignty does not spring from the Constitution or federal government, and therefore must be clearly abrogated by Congress to be diminished.

Although the decision in Tuscarora appears to be an explicit divestiture case because the court is evaluating a general statute, it is actually an implicit divestiture case because the Court calls upon future courts to interpret congressional silence, as opposed to congressional intent. According to traditional rules of federal Indian law, if a general statute does not make mention of administration to tribes, then it is effectively inapplicable on reservations. But if one concedes to an implicit divestiture analysis—tribal dependent status has relegated their inherent sovereignty to a status of "every other person"—a general statute without mention of tribes can be applied on Indian land. Because implicit divestiture conflicts with foundational principles of Indian law, Tuscarora only remains good law in the face of Santa Clara and Crow Dog because of the discriminatory backdrop against which native status has been designed and perpetuated.

To reiterate, problematizing the imposition of federal statutes on tribal communities could not suggest that tribes are uninterested in establishing protections for disabled members. It instead encourages questioning the broader implications of these decisions for the maintenance of tribal self-government and exploring the reality that tribes are best equipped to respond and service their membership if given the autonomy to do so.

III. Part III

A. Higher Rates of Disabilities in Native American Populations

According to the National Congress of American Indians (NCAI), a nonprofit social welfare organization made up of American Indians and Alaska Natives (AIAN) tribal governments and their citizens, 24 percent of AIANs have a disability, compared to 19 percent of the general population.[41] The numbers become more startling when evaluating age groups: among AIANs age 55 and older, 34 percent had a disability, compared with 23 percent for the overall population in that age range.[42]

Many theorists have found that explanations for the higher rates of disabilities within Native American populations range from poverty, lower education, and substandard housing, to testing bias and cultural bias in referral processes.[43] Historians have noted that Native Americans were targeted by the eugenics movement in the 1920s and 1930s, and the effects of colonialization, including the removal of children from their

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41. Disabilities for Native Americans, NCAI, http://www.ncai.org/policy-issues/education-health-human-services/disabilities (last visited December 13, 2020).

42. American Indians and Alaska Natives in the U.S. labor force, US BUREAU OF LABOR STATISTICS, https://www.bls.gov/opub/mlr/2019/article/american-indians-and-alaska-natives-in-the-u-s-labor-force.htm (last visited November 9, 2020).

43. Hilary N. Weaver, Disability Through a Native American Lens: Examining Influences of Culture and Colonization, 14 J. OF SOCIAL WORK IN DISABILITY & REHAB. 148, 155–56 (2015).

homes into boarding schools and spread of debilitating disease on the reservations, have led to the development of lasting mental and physical disabilities.[44] This history and current reality has resulted in a desperate call for tribes to aid their most vulnerable members, though many barriers, such as inadequate funding and lack of state cooperation, make this difficult to achieve.

B. Limitations of Relevant Federal Entities and Mobilization of Local Tribal Organizations

Although the imposition of the ADA encroaches on tribal autonomy, some federal entities empower tribal self-determination to serve their own disabled membership. The Bureau of Indian Affairs (BIA) is currently positioned to provide financial and programmatic support to tribes seeking self-government.[45] The director of the BIA is Darryl LaCounte, both a member of the Turtle Mountain Band of Chippewa Indians in North Dakota and Assistant Secretary of Indian Affairs within the Interior

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44. Id. at 156–58.

45. Bureau of Indian Affairs Mission Statement, U.S. DEP'T OF THE INTERIOR: INDIAN AFFS., https://www.bia.gov/bia (last visited April 12, 2021). With roots reaching back to the Continental Congress, the BIA has adapted its mission statement to the current federal policy toward AIANs. The role of the BIA once modeled federal policy notions of subjugating and assimilating AIANs. It has now strongly restored its position as a "partner with tribes to help them achieve their goals for self-determination while also maintaining its responsibilities under the Federal-Tribal trust and government-to-government relationships."

Department. Thus, Native people are not only sitting in these top leadership positions, but also becoming increasingly present in employment roles throughout the BIA and the Indian Health Service (IHS). In stark contrast to the ADA's abrogation of tribal self-determination, the BIA and the IHS are tribe-centered federal entities that seek to empower tribal governments to service and protect the tribal constitutional safeguards of its disabled memberships.

Although these entities have improved their coordination and presence in the national conversation on disabilities, the BIA and the IHS face financial limitations on their abilities to scale the implementation of services for Natives with disabilities. In 1999 the NCAI recognized that the BIA and the IHS had failed to coordinate efforts to address the national disability policy in Indian country.[46] It called upon these institutions to collaborate to provide technical support for tribes serving members with disabilities."[47] It also requested the creation of the American Indian Disability Liaison Office within the National Council on Disability (NCD).[48]

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46. NAT'L COUNCIL ON DISABILITY, UNDERSTANDING DISABILITIES IN AMERICAN INDIAN AND ALASKA NATIVE COMMUNITIES: TOOLKIT GUIDE 149 (2003).

47. Id.

48. Id. at 149. Although the federal report highlighted the need to coordinate efforts with tribal governments to develop culturally specific strategies, it ultimately interprets the ADA as having abrogated tribal sovereignty to apply the ADA protections in Indian Country. Id. at 160 (stating that "[a] tribe's immunity from suit in federal court should not

Although this Liaison Office never was created, the NCAI proposals did heighten consideration of culturally relevant services provided by nonprofit organizations and created an enhanced understanding of disability issues within federal agencies. The BIA and the IHS have become members of the Interagency Committee on Disability Research, and now serve an advisory function for the Committee. Additionally, the BIA began a general assistance program that provides a monthly financial assistance payment to tribal members who cannot work due to a physical or mental disability.[49] Recently, the Bureau of Indian Education (BIE) released a policy memorandum providing guidance on how BIE-operated schools should implement Section 504 of the Rehabilitation Act regulations, which were determined to be applicable to educational programs and activities conducted by the U.S. Department of Interior. These programs include BIE-operated elementary and secondary schools.[50] And

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result in a tribe's conclusion that ADA is inapplicable" and that "Congress makes it clear that the Act is a "national mandate" to end discrimination.") The report concludes that "the Federal Government, in fulfilling its trust obligations, can and should provide funding to meet these [ADA] requirements."

49. Social Services, Central California, U.S. DEP'T OF THE INTERIOR: INDIAN AFFS., https://www.bia.gov/regional-offices/pacific/central-california-agency/social-services (last visited December 13, 2020).

50. Bureau of Indian Education, National Policy Memoranda: Section 504 of the Rehabilitation Act of 1973, (2020) (providing tribes with interim guidance on implementing Section 504, found applicable to BIE-operated

the BIA Office of Equal Employment Opportunity and Civil Rights Programs administers the EEO complaint process and provides guidance and services to BIA and BIE employees that believe they have been discriminated against in the workplace for physical or mental disability.[51] However, BIA and IHS funding is limited and faces difficulties in providing culturally relevant services to each tribe given that each has its own unique cultural practices. Similarly, the BIE legal guidance and support only applies to BIE-affiliated entities.

Therefore, nationwide programs have also been formed to develop culturally appropriate services to natives with disabilities, including the American Indian Rehabilitation Research and Training Center, which is meant to" . . . "involve more Native Americans in the design and delivery of rehabilitation services."[52] The American Indian Disability Technical Assistance Center is another national program which provides technical assistance to tribes to help build services and infrastructure for tribal members with disabilities. But because each tribe has a unique history and culture, local and tribal programs have also been organized to provide services to their own membership with disabilities.[53]

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schools under 29 U.S.C. § 794 and 20 U.S. Code § 7801).

51. Office of Equal Opportunity and Civil Rights Programs (OEOCRP), U.S. DEP'T OF THE INTERIOR: INDIAN AFFS., https://www.bia.gov/bia/eeo (last visited December 13, 2020).

52. Weaver, supra note 43, at 154.

53. Id. (referencing ASSIST! To Independence, which provides services to Navajo, Hopi, and Southern Paiute reservations to improve functional

IV. Part IV

A. The Yurok Tribe's Response

The Yurok Tribe sets an example through its tribe-initiated programs that provide services directly to its membership. The Yurok Tribe has created a legal apparatus to ensure tribal constitutional protections for its disabled population, coordinated efforts with local state actors to safeguard these protections, and established culturally informed services to rehabilitate its membership. As such, the Yurok Tribe serves as a notable case study of why the ADA should not apply on tribal reservations.

As California's largest federally recognized tribe, with more than 5,000 enrolled occupying members living on Yurok Territory, Yurok extends one mile on each side of the Klamath River and continues upriver for 44 miles, stretching over parts of Del Norte and Humboldt counties.[54] Most tribal members today live throughout these neighboring counties.[55] Their way of life was disrupted by colonial invasion during

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skills and enhance the quality of life for Native Americans with disabilities, and Native American Advocacy Project, which provides services to reservation members of the nine tribal nations in South Dakota with a variety of disabilities).

54. Our History, THE YUROK TRIBE, https://www.yuroktribe.org/our-history (last visited April 12, 2021).

55. Telephone Interview with Dawn Baum, Acting General Counsel, Yurok Tribe Office of the Tribal Attorney (May 30, 2019). Id. Historically, the Yurok maintained social and trade relations throughout villages along the Pacific Coast, using dentalium shells, known as Terk-n-term,

the 17th century. The 1850s Gold Rush brought deadly massacres and diseases that decimated tribal membership and land, and fully ignored their rights to tribal sovereignty.[56] In the late 1800s, Yurok children were removed from the Reservation and sent to boarding schools such as Chemawa in Oregon and Sherman Institute in Riverside, California. These boarding schools sought to eliminate their connections to cultural and religious teachings.[57]

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as currency. Our History, THE YUROK TRIBE, https://www.yuroktribe.org/our-history (last visited April 12, 2021). Some of the traditional ceremonies that accompanied their religion and sovereignty include the Deerskin Dance, Jump Dance, Brush Dance, and Flower Dance, some of which they have since revived and continue to conduct to this day. Religion, THE YUROK TRIBE, https://www.yuroktribe.org/religion (last visited April 12, 2021).

56. Gold Rush in Yurok Country, THE YUROK TRIBE, https://www.yuroktribe.org/gold-rush-in-yurok-country (last visited April 12, 2021). Id.

57. Western Education, THE YUROK TRIBE, https://www.yuroktribe.org/western-education (last visited April 12, 2021). "Today, many elders look back on this period in time as a horrifying experience because they lost their connection to their families, and their culture. Many were not able to learn the Yurok language and did not participate in ceremonies for fear of violence being brought against them by non-Indians. Some elders went to great lengths to escape from the schools, traveling hundreds of miles to return home to their families. They lived with the constant fear of being caught and returned to the school." The Yurok signed the "Treaty

A tribal council made of nine tribal members, seven which represent the seven tribal districts and one tribal chairperson and vice chairperson, is elected by vote by registered tribal members.[58] Regular and special tribal council meetings are held and open to members of the Yurok Tribe.[59] According to Dawn Baum, Deputy General Counsel of the Yurok Tribe, the tribal council, rather than the tribal court, is one of the first steps toward responding to general needs of the tribal members with disabilities.[60] The tribal council itself has attempted to become more accessible to those with disabilities, who often cannot make the jour-

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of Peace and Friendship" in 1851, but the US Senate failed to ratify the treaty and an Executive Order was enacted to confine Yurok people to the Klamath River Reserve. Recognizing that a formal structure with a written form of government was necessary to resist American imposition of their own laws and policies on their people, the Yurok established their own Constitution in 1993. The Constitution outlines the jurisdictional authority and tribal sovereignty of its Tribal Government, and has declared its Territory to include all that was held in aboriginal title, with the intent to regain possession to all that was once theirs. Telephone Interview with Dawn Baum, Acting General Counsel, Yurok Tribe Office of the Tribal Attorney (May 30, 2019).

58. YUROK CONST. art. III, § 1, https://yurok.tribal.codes/Constitution.

Id.

59. Id.

60. Telephone Interview with Dawn Baum, Acting General Counsel, Yurok Tribe Office of the Tribal Attorney (May 30, 2019).

ney through difficult terrain to attend one of the meetings, by webcasting its meetings.[61] Public interest groups are encouraged to request ahead of time that the tribal council place them on the tribal council meeting agenda to ensure that their grievances will be addressed.[62] During her time working for the tribe, Baum has never been privy to any claim by a tribal member that was not immediately addressed and accommodated by the tribal government.[63] Yet, it is her understanding that the looming barriers to addressing certain problems for members with disabilities is the lack of financial resources.[64] Since the tribe is 90 percent grant funded, if there is a certain line item for a project not funded by grant money, the tribe "may struggle to find resources to address it."[65] Baum has been particularly concerned with the devastation the tribe has suffered as a result of the Opioid crisis. However, she remains hopeful because the Yurok Tribal Government remains responsive to this group's needs.[66]

B. The Opioid Crisis in Yurok Country

The Opioid crisis that has ravaged the country has disproportionately affected American Indians and, in particular, the Yurok Tribe. Humboldt and Del Norte Counties, home to a majority of Yurok tribal members, are

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61. Id.

62. Id.

63. Id.

64. Id.

65. Id.

66. Id.

experiencing dangerously high opioid usage rates. In January of 2018 alone, approximately 51,841 opioid pills were prescribed in reservation zip codes 95546 and 95548, inhabited by less than 5,000 people.[67] In 2018, 73 percent of all opioid health service visits were by tribal members labeled Opioid-Dependent, meaning they simply could not function without opioids.[68] In addition, suicide as a result of opioid addiction has

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67. State of California Controlled Substance Utilization Review & Evaluation System CURES.

68. Mudgett, M 2018 Opioid Surveillance Update, California Tribal Epidemiology Center. See also California Tribal Epidemiology Center, CRIHB (finding people in Humboldt County die from drug poisoning at more than double the national rate, and have been doing so for more than a century); California Dept. of Public Health CURES database (finding that in 2017, the death rate due to opioid overdose in Humboldt County was almost 75 per 100,0000 Native American residents, in comparison to the next highest which was 20 per 100,000 Latino residents; and within Del Norte County in the year 2017, the opioid overdose death rate numbered approximately 55 per 100,000 Native American residents, in comparison to the next highest being 15 per 100,000 White residents. Kidsdata.org Lucile Packard Foundation for Children's Health, 2015, revealing that from this problem of opioid addiction, Native American children in Humboldt County suffered an abuse and neglect rate in 2015 of 252.4 per 1,000 children, in comparison to the national average of 24.2 per 1,000 children); Dillehay, V. "In Search of Homes for Native Foster Kids." Del Norte Triplicate (Aug. 13, 2016) (finding that Yurok children

disproportionately affected Natives. Seven tribal members out of the 150 residents in the small reservation community of Weitchpec took their own lives in less than a two-year period. On December 28, 2016, the Yurok Tribe declared a state of emergency seeking resources to curb this emergency.

C. Yurok Wellness Court Protects Disabled Membership's Constitutional Rights

Title I of the ADA generally offers protections to addicts who are in recovery, but not active users.[69] Surely, there are Yurok members who are seeking recovery from their opioid addiction, but as previously discussed, Title I of the ADA is not applicable to tribes. However, the Yurok Tribe promotes protections and provides services, not limited to the employment sphere, to their tribal membership who face addiction by emphasizing a particular "cultural focus and village-style expectations of communal responsibility."[70] The Constitution of the Yurok Tribe has pledged five responsibilities in particular that speak to tribe's dedication towards empowering and protecting their members with disabilities.

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are three times more likely to be placed into foster care than non-native children and although only 1 percent of children in Del Norte County are Native American, they make up 36 percent of the children in foster care in that County).

69. 42 U.S.C. § 12114(a)–(b).

70. Lee Romney, Yurok Tribe's Wellness Court Heals With Tradition', L.A. TIMES (Mar. 5, 2014), https://www.latimes.com/local/lanow/la-xpm-2014-mar-05-la-me-ln-yurok-wellness-court-20140304-story.html.

> [I]n order to exercise the inherent sovereignty of the Yurok Tribe, we adopt this Constitution in order to: 1) Preserve forever the survival of our tribe and protect it from forces that may threaten its existence; 2) Uphold and protect our tribal sovereignty which has existed from time immemorial and which remains undiminished . . . 4) Preserve and promote our culture, language, and religious beliefs and practices, and pass them on to our children, our grandchildren, and to their children and grandchildren on, forever; 5) Provide for the health, education, economy and social wellbeing of our members and future members . . . 7) Insure peace, harmony and protection of individual human rights among our members and among others who may come within the jurisdiction of our tribal government.[71]

The Tribe remains committed to its constitutional dedications to tribal sovereignty, survival, promotion of health, and protection of well-being through the development of the Yurok Wellness Court. Formed in 2009, the Wellness Court was created to "provide a path to healing for non-violent Yurok offenders affected by drugs and/or alcohol through an intensive substance abuse treatment program to improve family, community, and cultural involvement, to promote healthy life choices, and to reduce criminal recidivism."[72] By addressing substance abuse among

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71. YUROK CONST. Preamble, https://yurok.tribal.codes/Constitution/Preamble (emphasis added).

72. Wellness Court, YUROK TRIBAL CT., https://yuroktribalcourt.org/

community members, the Wellness Court (also known as Healing to Wellness Courts) uses a non-adversarial model that fits neatly within indigenous concepts of consensus-driven justice and healing.[73] T he Yurok Wellness Court, like other wellness courts across the country, uses a restorative justice team to connect participants with drug and alcohol abuse treatment, support services, and court monitoring to promote recovery and community reintegration.[74] Access to the Yurok Wellness Program is not limited to entry through the criminal justice system; some members voluntarily participate and others are referred by community members.

Other tribes can receive support to adopt and implement their own wellness court through the Tribal Law and Policy Institute (TLPI). TLPI is a Native American operated non-profit that provides training and technical assistance for Tribal Healing to Wellness Courts, including, but not limited to, assisting in drafting policies and procedures, reviewing court's incentives and sanctions, and reviewing team roles and responsibilities.[75]

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programs/wellness-court (last visited December 13, 2020). National American Indian Court Judges Association, Building a Collaborative Court with Other Jurisdictions to Treat Nonviolent Tribal Adult Offenders, https://naicja.wildapricot.org/resources/Documents.

73. Romney, supra note 70; Telephone Interview with Lauren van Schilfgaarde, former Tribal Law Specialist, Tribal Law and Policy Institute (June, 2019).

74. Id.; Romney, supra note 70.

75. Tribal Law & Pol'y Inst., About Us, TRIBAL HEALING TO

TLPI highlights how the key task for Wellness Courts of identifying participants is challenging because of weak referral processes and and the lack of standardized screening processes.[76] According to Lauren van Schilfgaarde, former Tribal Law Specialist of TLPI, most participants in Wellness Courts are considered "multi-generational trauma victims."[77] The serious reality of an inter-generational trap of addiction for native peoples makes it more difficult for participants to remain accountable to their own progression through the program during the initial stages. For this reason, Van Shilfgaarde encourages that administration of Tribal Wellness Programs be conducted through "warm-handoffs." This term refers to a method of collaborative care wherein the administrator of one stage of care introduces the patient to the administrator of the next stage of care in real-time. Warm-handoffs ensure that officials are shouldering the responsibility of progression through the program, before reaching later stages wherein the participants will have built the skills to allow them to facilitate this progression on their own behalf.[78] TLPI Healing to Wellness Court Enhancement Trainings attempt to produce the institutional

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WELLNESS CTS., http://wellnesscourts.org/about-us (last visited December 27, 2019); Tribal Law & Pol'y Inst., Wellness Court Resources, TRIBAL HEALING TO WELLNESS CTS., http://wellnesscourts.org//wellness-court-resources (last visited December 27, 2019).

76. Telephone Interview with Lauren van Schilfgaarde, former Tribal Law Specialist, Tribal Law and Policy Institute (June, 2019). Id.

77. Id.

78. Id.

knowledge necessary to combat these barriers and to promote effective protocols and systems of review to ensure that tribal Wellness Courts throughout the country are effective.[79] TLPI also recognizes that what works for one tribe may not work for another tribe, as each has its distinct histories and cultural traditions, and is working to ensure the adaptation of these assistance resources to maintain high effectiveness in various contexts.[80]

Since Yurok, as well as many other tribal governments, are predominantly grant-funded, the issue of how these tribes can afford to implement these procedures and services members remains difficult. There are three major sources of federal funding for Tribal Healing to Wellness Courts: the Bureau of Justice Assistance, Office of Juvenile Justice and Delinquency Protection, and Substance Abuse and Mental Health Services Administration (SAMHSA). Furthermore, U.S. Department of Justice operates the Coordinated Tribal Assistance Solicitation (CTAS), which consolidates most tribal-specific grants into one solicitation used to "enhance law enforcement, bolster adult and juvenile justice systems and prevent and control juvenile delinquency."[81] As with the BIA and the IHS, these funding sources act as a method of empowerment to tribal independence, as opposed to a federal mechanism used to abrogate tribal

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79. Id.

80. Id.

81. Tribal Justice and Safety: Grants, U.S. DEP'T OF JUSTICE, HTTPS://WWW.JUSTICE.GOV/TRIBAL/GRANTS (last visited April 12, 2021).

sovereignty. TLPI regularly posts federal funding announcements on its website to ensure that Tribal Wellness Courts get access to the financial means to subsist and grow.

D. Yurok Collaborative Court with State Counties

As Chief Judge of the Yurok Tribal Court and former San Francisco Superior Court commissioner, Judge Abby Abinanti has been recognized for her contributions to the tribal justice system by tribal governments throughout the nation, by American publications like the Times, and other international publications. The first Native American woman admitted to the California bar, Judge Abinanti decidedly enhanced the capacity of the Healing to Wellness Court in 2012 by creating a collaborative court that administers the Wellness Program through intergovernmental cooperation with Del Norte and Humboldt Counties. These two Counties retain criminal jurisdiction over the Yurok reservation, thereby forcing tribal members to be hailed into state court, and the Counties are not required to notify the Yurok Tribe when a tribal member is arrested.

On behalf of the Yurok Tribe, Judge Abinanti approached the state court system in order to propose transferring nonviolent cases involving tribal members, frequently relating to alcohol or substance abuse, to Yurok tribal court.[82] Before any agreement was reached, the Tribe and the two counties had to build "trust and intergovernmental cooperation";

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82. Emerging Practices in Tribal Civil and Criminal Legal Assistance, NAT'L AM. INDIAN CT. JUDGES ASS'N (November 2016); Telephone Interview with Dawn Baum, Acting General Counsel, Yurok Tribe Office of the Tribal Attorney (May 30, 2019).

the Yurok Court participated in multiple trainings in order to establish its expertise and capacity to supervise and treat tribal adult offenders.[83] Judge 'Abinanti's reputation among judges in the county court system allowed for this trust to truly flourish and made intergovernmental cooperation fully possible.[84]

The establishment of these best practices led to a Memorandum of Understanding (MOU), which the Yurok tribal court entered into with each county, establishing the co-monitoring of adult offenders between both the county and the Tribe, the recognition of tribal court orders, and the cultural needs of the offenders.[85] The MOU with Humboldt County provides for joint supervision of members sentenced to ankle monitoring for curfew compliance and alcohol consumption, which allows the tribal court to administer services through a personalized case plan including dates of drug testing, type of treatment, and required participation in cultural activities.[86] The two MOUs with Del Norte County provide for concurrent jurisdiction and supervision of adult and juvenile cases. They

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83. Building a Collaborative Court With Other Jurisdictions to Treat Nonviolent Tribal Adult Offenders, NAT'L AM. INDIAN CT. JUDGES ASS'N (Mar 4, 2015), https://naicja.wildapricot.org/our-programs/webinar-4 (View "Access Materials" on upper-right of page; then click "View PowerPoint").

84. Id.

85. Id.

86. Emerging Practices in Tribal Civil and Criminal Legal Assistance, supra note 82.

also allow the tribal court to develop a case plan to administer culturally appropriate services, supervise the participant's development, and establish an agreement with the county Probation Department to screen for Native adult offenders and notify the tribal court if an offender is cited or picked up.[87]

Once the case has been transferred to Yurok tribal court, a case manager and probation officer meet with the participant and conduct a needs assessment, which includes determining if there are housing issues, child support obligations, and other factors that could affect a participant's likelihood of successful engagement with the program.[88] The Wellness Court develops a personalized case plan that takes into account the member's personal situation and determines what treatment is required. Possibilities for treatment include recovery and support groups, in-patient treatment, outpatient services, sober living, and Alcoholics Anonymous or Narcotics Anonymous meetings.[89] Treatment is centered on the member's cultural responsibilities to the Tribe, including participating in Yurok regalia making, canoe carving, and ordering fishing on the Klamath River, attending language classes and traditional dances, and visiting with the community elders.[90]

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87. Id. Telephone Interview with Dawn Baum, Acting General Counsel, Yurok Tribe Office of the Tribal Attorney (May 30, 2019). Id.

88. Id.

89. Id.

90. Id.

E. Yurok Services to Disabled Membership Through a Re-Entry House

Just this past year, the Wellness Court has helped establish a Yurok Re-Entry House, which was designed to assist tribal members who have completed a 30-day inpatient intensive treatment with a successful transition to their communities.[91] The Yurok Re-Entry House has looked to Friendship House, an 80-bed residential facility in San Francisco that houses clients "immersed in both American Indian cultural practices and Western approaches for substance abuse recovery and prevention."[92] The Re-Entry House educates residents about the environmental factors that contribute to addiction and methods to replace self-destructive behavior. Furthermore, participation in American Indian culture, such as sweat lodge ceremonies, aid in the reclamation of balance and peace and help clients begin to walk the "Red Road to Recovery."[93] Financially constrained, the Yurok Tribe has limited all access to its three-bedroom Re-Entry House to tribal men, but is hoping to open one soon for women and families.[94]

Centering healing on its culture as a source of strength has significant importance for the Yurok Tribe's retainment of cultural identity more

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91. Telephone Interview with Dawn Baum, Acting General Counsel, Yurok Tribe Office of the Tribal Attorney (May 30, 2019).

92. Substance Abuse for Adults, FRIENDSHIP HOUSE SF, https://www.friendshiphousesf.org/index-test (last visited May 5, 2019).

93. Id.

94. Telephone Interview with Dawn Baum, Acting General Counsel, Yurok Tribe Office of the Tribal Attorney (May 30, 2019).

broadly. After the boarding school era, intergenerational dissemination of cultural knowledge had been disrupted, and the strength once found through these traditional frameworks had been lost.[95] The revitalization and dissemination of these cultural practices and traditional thought is important not only for a tribal member's own process of healing, but also for the tribal community as a whole. By implementing these cultural practices of healing for their disabled members, the Yurok Tribe resists the historic erasure of an entire people by federal and state entities and restores tribal nationship.

V. PART V

A. Looming Barriers to Accessible Services Faced by Athabascan Tribes in Rural Alaska

Some tribes have not had the same success as the Yurok in servicing their membership with disabilities due to financial constraints and obstacles posed by rural environments. The NCD has noted several general barriers to accessing necessary and appropriate services for Natives with disabilities living in Indian Country. These barriers include "the digital divide and limited information technology infrastructure in rural areas,"[96] and are compounded by inadequate culturally appropriate outreach and lack of language appropriate communication materials. These limitations

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95. Id.

96. NATIONAL COUNCIL ON DISABILITY, PEOPLE WITH DISABILITIES ON TRIBAL LANDS: EDUCATION, HEALTH CARE, VOCATIONAL REHABILITATION, AND INDEPENDENT LIVING 37 (2003).

not only make it difficult to provide federally sponsored IHS aid to Natives living in rural areas, but also make it difficult for tribal governments and organizations to reach their own membership.[97]

For example, Alaska struggles to overcome severe financial and environmental barriers to directly servicing its disabled community and accessing services provided by IHS. With Native Americans comprising 18 percent of the general population, Alaska has the highest percentage of Native Americans of any state. Home to more than 200 federally recognized tribes, Alaska is two times the size of Texas and one third of the people live in a rural environment ranging in size from fewer than 100 people to about 500 people.[98] Additionally, Alaskan Natives (AN) are 1.5 times more likely to suffer from serious psychological distress, manifested in a high prevalence of depression, substance abuse, and suicide; 35 percent of all AN deaths between 2002 and 2011 resulted from suicide, with 63.2 percent associated with alcohol.[99] Most of these small rural villages lack a healthcare clinic, and even those larger villages that have a healthcare facility lack the funding and the staffing to justify building a much needed after-care services posttreatment or hospitalization center.

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97. Id. at 38.

98. Jessica C. Black, Nicole Wheeler, Molly Tovar & Dana Webster-Smith, Understanding the Challenges to Providing Disabilities Services and Rehabiliationin Rural Alaska: Where Do We Go From Here?14 J. OF SOCIAL WORK IN DISABILITY & REHAB. 222, 223–225 (2015).

99. Id. at 223.

With over 55 percent of the inhabitants of the northern rural areas being AN, most ANs with disabilities must travel through natural barriers like mountains and glaciers to larger, urban areas to access the basic healthcare services provided by the IHS. ANs have to consider the cost of travel to an IHS facility (and the unpredictability of air travel due to weather restrictions) and the emotional turmoil of leaving their close-knit homes and communitites. They must also overcome other barriers associated with living in rural areas, including poverty, lack of education, and language barriers.[100] These incredible roadblocks lead ANs with disabilities to avoid treatment altogether or to move off their reservations to live in larger metropolitan cities in Alaska.

Alaskan tribal governments fare no better in these conditions. The Athabascan Indians are the largest tribe in Alaska with approximately 12,000 members. The Council of Athabascan Tribal Governments (CATG) attempts to service its disabled membership by operating five clinics located throughout rural villages in northeastern Alaska.[101] CATG's goal is to staff each clinic with a Community Health Aide (CHA) or Medical Office Assistant, with periodic visits from a nurse-practitioner or physician's assistant.[102] However, funding restraints and low recruit-

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100. Id. (finding that the poverty rate in rural Alaska is 14.1 percent, with an unemployment rate of 8.5 percent in 2014).

101. CATG, CHA/P, COUNCIL OF ATHABASCAN TRIBAL GOV'T, https://www.catg.org/health-services/chap (last visited December 13, 2020).

102. Id.

ment rates make this goal difficult to achieve. CHAs can provide primary and emergency care to village residents, but only within the limits of their levels of training. CHAs also commit to providing home visits for disabled members but face similar roadblocks to those mentioned above (e.g., environmental barriers and technological data barriers).

Researchers have concluded that the intense barriers facing the disabled native community have created a need for "more research dedicated to understanding the magnitude of disability experienced in the rural villages."[103] With this data, culturally competent services can be formulated for those experiencing a disability and can provide the training necessary to create more culturally competent providers. Finally, researchers recommend increasing the funding allocated to IHS and community-based clinics like CATG.[104] The professional recommendation has not been to ensure implementation of the ADA throughout the state, but rather to financially empower tribes to continue to service their own membership in culturally appropriate ways. When a tribe provides constitutional protections to their disabled membership and a system of legal recourse to safeguard those rights, the issue is not one of competency but one of capacity. The solution resides along a continuum of increased funding and assistance to tribes seeking to administer their own culturally appropriate services, rather than complete abrogation of that sovereignty through statutes of general applicability.

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103. Black, supra note 98 at 229.

104. Id. at 230.

Conclusion

The work that Judge Abinanti has pursued on the Yurok reservation and the development of tribal court systems throughout the nation problematizes the need for statutes of general applicability to be forcibly administered on tribal reservations. A disabled tribal member experiencing constitutional violations or discriminatory ableist behavior has recourse provided by the tribal court system, which commonly includes one level of appellate review.[105] Larger tribes like the Cherokee or Navajo have their own appellate court systems and smaller tribes have their tribal councils serve as their appellate courts. Some tribes have joined regional courts of appeals in the Northwest and Southwest.[106]

[105.] Tonya Kowalski, Facts about Tribal Courts and Governments (August 24, 2011) (unpublished manuscript) (on file with Stetson University College of Law) ("[T]here are currently 565 federally recognized tribes listed in the Federal Registrar, and just over 340 of them are in the lower 48 states . . . . Well over half the tribes in the lower 48 states have their own tribal system.").

[106.] NICS, About Us, NW. INTERTRIBAL CT. SYS., (March, 2000) www.nics.ws/about.html (last visited December 20, 2020) (comprising 15 tribes with their own independent court and codes, and provides appellate review); AILC, SWITCA Home, SW. INTERTRIBAL CT. OF APPEALS, www.nics.ws/about.html, https://www.ailc-inc.org/our-work/switca (last visited December 20, 2020) (inviting federally recognized tribes in New Mexico, Arizona, southern Colorado and west Texas to join SWITCA to receive impartial appellate review of lower court decisions before a panel

Tribal court systems provide constitutional protections and judicial safeguards to their disabled membership. These protections not only sufficiently mirror those provided by general statutes but also protect the integrity of tribal customs.

In addition to the efficient tribal court systems, tribal governments have been implementing culturally appropriate services to assist their disabled membership, such as the Yurok's Re-Entry House.

Federal agencies like the BIA, BIE, and IHS are finding ways to collaborate and provide funding and other culturally informed support to tribes throughout the nation but fall short due to funding constraints and an inability to reach members in very rural areas. Local tribes, like the Athabascan Tribe in Alaska, face similar problems when trying to meet the needs of their tribal memberships. Yet, research and case studies like this paper's analysis of the Yurok Tribe, support the assertion that abrogation of tribal self-government is not the answer. Tribes continue to develop their own court systems and have been focused on providing culturally informed support to their vulnerable membership. However, they lack the funding to do so. The forceful administration of the ADA would only result in the ability of an individual to sue a tribe for failing to abide by the terms of the ADA—a failure that is likely caused by inadequate funding. The recourse provided by the ADA is a non sequitur to the financial constraints tribes commonly face when servicing their membership. Historically disempowered and constantly in a state of resistance to retain the autonomy that they inherently enjoy, IHS and BIA should

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of judges).

support tribes through financial resources to implement their own programs and policies to service their individual communities.

Although the ADA protects the individual rights of a person with disabilities, the services that are administered by tribes are in large part done through a communal lens. There is no sense of an individual beyond the tribe member's responsibilities to the larger tribal community. This perspective is central to the governing policies and healing processes of tribal members. The ADA is a tremendous account of what members of a community can achieve when they resist historic discrimination. Tribal governments hone a similar sentiment of resistance in order to protect their very existence. The ADA should not be implemented by default against tribes who seek the financial and legal support of servicing their own people. Tribal governments are the most appropriate source of power to respond to the most vulnerable members of their community, revitalizing the cultural and traditional norms that have been historically disrupted.