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A Tale of Conflicting Sovereignties: The Case Against Tribal Sovereign Immunity and Federal Preemption Doctrines Preventing States' Enforcement of Campaign Contribution Regulations on Indian Tribes

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A TALE OF CONFLICTING SOVEREIGNTIES: THE CASE AGAINST TRIBAL SOVEREIGN IMMUNITY AND FEDERAL PREEMPTION DOCTRINES PREVENTING STATES' ENFORCEMENT OF CAMPAIGN CONTRIBUTION REGULATIONS ON INDIAN TRIBES

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This Note will discuss whether Indian tribes can assert tribal sovereign immunity to avoid compliance with state campaign finance regulation and whether such regulations should be preempted by federal law. Tribal sovereign immunity is not an enshrined constitutional imperative; it exists only under federal common law, and can be limited by the courts from blocking state suits to enforce campaign finance regulations against tribes. This Note will also argue that state campaign finance regulations should not be preempted by federal law because states have a compelling interest in protecting their political processes from corruption that outweighs tribal interests in flouting the laws. States also enjoy rights arising from the text of the U.S. Constitution under the Tenth Amendment and the Guaranty Clause, which courts should recognize to permit states to regulate tribes in the context of state campaign finance laws.

INTRODUCTION

Two powerful constitutional tools enable Indian tribes to undermine the fairness of state election campaigns. First, tribes enjoy broad immunity from suit under the doctrine of tribal sovereign immunity, which prohibits state governments and private actors from bringing cases against tribes and their members without a waiver by the tribe or the consent of Congress.[1] Second, federal preemption bars states from enforcing regulations governing affairs on Indian tribal lands.[2] Tribal sovereign immunity and federal preemption can be mere inconveniences for states wishing to levy taxes on tribal enterprises[3] or hold tribes liable in contract and tort

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1. Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1998); *see also* Long v. Chemehuevi Indian Reservation, 171 Cal. Rptr. 733, 734 (Ct. App. 1981) (noting that tribes cannot be sued without the consent of Congress).

2. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980).

3. *E.g.*, Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 505 (1991) (holding that tribal sovereign immunity prohibits states from collecting taxes on tobacco sales to tribal members); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334,

suits.[4] These doctrines, however, are more problematic for states trying to run fair elections.

State legislatures may pass statutes that mandate public disclosure of private contributions to state candidates for political office to promote fairness and transparency in state election campaigns.[5] The efficacy of such regulations is diminished if state governments cannot enforce the regulations against tribal contributors who are shielded by sovereign immunity and federal preemption. States' inability to enforce campaign disclosure laws undermines the fairness of election campaigns, particularly when tribes can make substantial contributions to state candidates and influence, *inter alia*, state budget allocations.[6]

This Note argues that tribal sovereign immunity and federal preemption should not justify tribes' failure to comply with state campaign disclosure statues. Part I describes the legal history of tribal sovereign immunity regarding campaign finance laws. Part II argues that tribal sovereign immunity is not a constitutional imperative, but merely a creature of common law that has outlived its purpose and has dubious origins.[7] Part II ultimately recommends that tribal sovereign immunity should be strictly limited when it does not bear a sufficient nexus to a tribe's sovereign functions. Part III discusses why federal preemption should not prevent state enforcement of campaign contribution laws against tribes. Finally, Part IV argues that states enjoy rights under the Guaranty Clause and the Tenth Amendment of the U.S. Constitution that should allow them to enforce contribution disclosure statutes against tribes, especially because the text of the Constitution does not guarantee tribes any rights whatsoever.

343-44 (1983) (holding that federal preemption prevents enforcement of state hunting quotas against non-Indians hunting game on tribal lands).

4. *See, e.g.*, *Long*, 171 Cal. Rptr. at 735-36 (holding that tribal sovereign immunity barred wrongful death action against a tribally-owned marina).

5. *E.g.*, The California Political Reform Act of 1974, CAL. GOV'T CODE § 82013 (West 2006).

6. *See infra* Part I.B.

7. Oliver Wendell Holmes wrote that common law is subject to change by courts to reflect the experience of society: "It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience." OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1981).

I. HISTORY OF TRIBAL SOVEREIGNTY AND STATE SOVEREIGNTY IN THE CONTEXT OF STATE CAMPAIGN FINANCE REGULATIONS

A. *The Origins of the Doctrine of Tribal Sovereignty and the Supreme Court's Renewed Interest in State Sovereignty*

The judicial doctrine of tribal sovereign immunity was first promulgated by Chief Justice John Marshall of the Supreme Court in the *Cherokee Cases*.[8] In *Cherokee Nation v. Georgia*, the Cherokee Nation filed suit in the Supreme Court to prevent the State of Georgia from breaking up Cherokee lands and merging them into Georgian counties.[9] The tribe's case depended on the Court regarding the tribe as a "foreign state," as required under the Constitution for the Supreme Court to have jurisdiction over the case.[10]

Justice Marshall ruled that although Indian tribes could be considered "states," the tribes were something less than *foreign* nations.[11] This holding denied the tribe sovereign statehood and hence direct access to the Supreme Court, but it laid the foundation for the Court to rule in favor of the tribe just a few years later.

In *Worcester v. Georgia*, two missionaries appealed their criminal convictions under Georgia law for residing on Cherokee lands without obtaining a license from the state governor.[12] After reviewing the historical course of dealing and the relevant treaties, Justice Marshall concluded that, "[t]he Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, *in which the laws of Georgia can have no force*. . . ."[13]

8. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 538 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

9. *Cherokee Nation*, 30 U.S. (5 Pet.) at 15.

10. *Id.* at 16; *see* U.S. CONST. art. III, § 2, cl. 2 (reserving original jurisdiction in the Supreme Court for cases in which "States" are a party). Thus, if the Supreme Court had determined that the Cherokee Nation were a State, then the Supreme Court would have had jurisdiction to hear the case.

11. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17 ("They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right to possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.").

12. *Worcester*, 31 U.S. (6 Pet.) at 537.

13. *Id.* at 561 (emphasis added).

These cases were significant because they assured that states could not assert jurisdiction on tribal lands.[14] This premise still holds, but the Supreme Court now recognizes limitations on this doctrine.[15]

Since the *Cherokee Cases*, congressional policy towards Indians has vacillated between tribal termination and fostering tribal self-determination.[16] In the latter half of the twentieth century, congressional policy began to acknowledge tribal autonomy. For example, President Richard Nixon acknowledged to the Congress in 1970 that prior Indian policies had failed.[17] He encouraged a trust relationship between the federal government and the tribes[18] and urged Congress to pass legislation to allow tribes to manage their own affairs with a maximum degree of autonomy.[19] Other commentators also began to argue that state regulation in Indian country could thwart the economic progress of Indian tribes before that progress started to gain momentum.[20] Consequently, today federal policy favors providing for tribal self-sufficiency,[21] and tribes are indeed making great strides in economic development.[22]

While the federal government has limited state activities that might encroach on tribal self-sufficiency—such as state efforts to assert taxes or regulations in Indian country[23]—the Supreme Court has expanded the power of states.[24] Although the Constitution

14. *See* Fair Political Practices Comm'n v. Agua Caliente Band of Cahuilla Indians, No. 02AS04545, 2003 WL 733094, at *2-3 (Cal. Super. Ct. Feb. 27, 2003).

15. For example, Public Law 280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. §§ 1161–62 (1994), 25 U.S.C. §§ 1321–22 (2004), 28 U.S.C. § 1360 (2003)), granted criminal and civil jurisdiction for disputes arising in Indian country to California, Nebraska, Minnesota, Oregon, and Wisconsin. This grant of jurisdiction permits states to hear cases arising in contract and tort on Indian lands, but is not a blank check giving states a general regulatory power over Indian country. Bryan v. Itasca County, 426 U.S. 373, 387-89 (1976).

16. *See, e.g.*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §§ 1.04, 5.04 & 22.03[1][a] n.168 (Nell J. Newton et al. eds., 2005).

17. 116 CONG. REC. 17, 23258 (1970).

18. "One of the basic principles in Indian law is that the federal government has a trust or special relationship with Indian tribes. Courts have invoked the language of guardian and ward, or more recently trustee and beneficiary." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 16, § 5.04.

19. *Id.*

20. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 341 (1983).

21. *See, e.g.*, 116 CONG. REC. 17, 23258 (1970).

22. For example, in 1987, the Chickasaw Nation had a budget of $11 million and 200 employees. By 2005, through gaming, banking and various other enterprises, the Chickasaw budget had increased to $300 million and over 7,000 employees. Email from Robyn Elliot, Administrator, Division of Communications, The Chickasaw Nation (Aug. 31, 2005) (on file with the University of Michigan Journal of Law Reform).

23. *See* discussion of preemption *infra* Part III.A.

24. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 617–18, 627 (2000) (holding Violence Against Women Act unconstitutional due to insufficient nexus with interstate

nominally permits Congress only to regulate commerce between the states,[25] since the New Deal era, the Supreme Court has defined "commerce" very broadly,[26] effectively allocating considerable power to the federal government under the Commerce Clause to impose regulation in the states.

However, a recent string of Supreme Court opinions has resurrected the sovereignty of the states by limiting Congress' power under the Commerce Clause of the Constitution.[27] In *United States v. Lopez*[28] and *United States v. Morrison*,[29] congressional power to pass regulations on the states was checked by the Supreme Court. These cases are evidence of the Court's recent retreat from the seemingly limitless power of the federal government under the Commerce Clause. The Court may be redefining the balance of federalism to provide more sovereignty to the states.[30] This trend in Supreme Court jurisprudence of limiting federal encroachment on state sovereignty leads to a tension with present congressional policy towards empowering tribes, as discussed in the next section.

B. The Clash of State Sovereignty and Tribal Sovereignty: Agua Caliente Band of Cahuilla Indians v. Superior Court

Tribal sovereign immunity and state sovereignty recently clashed in *Agua Caliente Band of Cahuilla Indians v. Superior Court*,[31] a case recently heard by the California Court of Appeals. The Fair Politi-

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commerce); United States v. Lopez, 514 U.S. 549, 551, 561 (1995) (striking down the national Gun Free School Zone Act as unconstitutional and holding that the Act exceeded the bounds of the Commerce Clause).

25. U.S. CONST. art. I, § 8, cl. 3.

26. For example, in United States v. Darby, 312 U.S. 100, 114, 125-26 (1941), the Court dramatically expanded the federal government's ability to regulate activities taking place entirely within state borders by taking an expansive view of what interstate commerce is, and allowing for establishment of a national minimum wage. The Court reasoned that, so long as the activity that Congress seeks to regulate bears a sufficient nexus to interstate commerce, it falls within Congress' Commerce Clause powers. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 124-29 (1942) (upholding a federal agricultural quota under the aggregate theory of the Commerce Clause).

27. *See, e.g.*, *Morrison*, 529 U.S. 598; *Lopez*, 514 U.S. 549; *see also* Ambre Howard, *Current Events:* United States v. Morrison *529 U.S. 598*, 9 AM. U. J. GENDER SOC. POL'Y & L. 461, 467 (2001); Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895, 895 (1996).

28. *Lopez*, 514 U.S. 549. In the Court's view, there simply was not a sufficient nexus between possession of a gun near a school and interstate commerce. *Id.* at 560.

29. *Morrison*, 529 U.S. 598.

30. *See* William H. Pryor, Jr., *Madison's Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV. 1167, 1167, 1173 (2002).

31. Agua Caliente Band of Cahuilla Indians v. Super. Ct., 10 Cal. Rptr. 3d 679 (Cal. Ct. App. 2004).

cal Practices Commission (FPPC), a California state agency created to enforce California's Political Reform Act of 1974 (PRA),[32] brought suit in the Superior Court of the State of California to compel the Agua Caliente Band of Cahuilla Indians' compliance with the PRA. California's PRA was established in the wake of the Watergate scandal and the Supreme Court's decision in *Buckley v. Valeo*,[33] which upheld the constitutionality of a federal campaign contribution disclosure law.[34]

The PRA codifies the policy promulgated in *Buckley*.[35] The California state legislature's findings state that:

> (a) State and local government should serve the needs and respond to the wishes of all citizens equally, without regard to their wealth;
>
> (b) Public officials, whether elected or appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them . . . ;
>
> (f) The wealthy individuals and organizations which make large campaign contributions frequently extend their influence by employing lobbyists and spending large amounts to influence legislative and administrative actions;
>
> (g) The influence of large campaign contributors in ballot measure elections is increased because the ballot pamphlet mailed to the voters by the state is difficult to read and almost impossible for a layman to understand. . . .[36]

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32. The California Political Reform Act of 1974, CAL. GOV'T CODE § 82013 (West 2006). *See* Fair Political Practices Comm'n v. Agua Caliente Band of Cahuilla Indians, No. 02AS04545, 2003 WL 733094, at *2-3 (Cal. Super. Ct. Feb. 27, 2003).

33. Buckley v. Valeo, 424 U.S. 1 (1976).

34. *Id.* at 60-84. The Court noted that such a law served important government interests in "the 'free functioning of our national institutions,'" *id.* at 66 (quoting Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 97 (1961)), and that the sources of a candidate's funding "alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." *Id.* at 67. The Court also noted that the disclosure requirements reduced both actual corruption and the appearance of corruption, and that reporting requirements "are an essential means of gathering the data necessary to detect violations of . . . contribution limitations." *Id.* at 68. *Buckley* was an important decision because it provided specific approval for states to pass their own campaign disclosure laws, like the PRA. *See Fair Political Practices Comm'n*, 2003 WL 733094, at *5-6.

35. *Fair Political Practices Comm'n*, 2003 WL 733094 at *5-6.

36. CAL. GOV'T CODE § 81001 (West 2006).

The PRA requires disclosure of lobbying activities to prevent lobbyists from exerting improper influence on public officials.[37] The statute mandates disclosures by specified elected officers, candidates, and "committees."[38] The definition of "committee" includes "any person or combination of persons who directly or indirectly . . .

> (b) Makes independent expenditures totaling one thousand dollars ($1,000) or more in a calendar year; or
>
> (c) Makes contributions totaling ten thousand dollars ($10,000) or more in a calendar year to or at the behest of candidates or committees."[39]

The FPPC alleged that the Agua Caliente tribe donated millions of dollars to fund over 140 political candidates and to fund state ballot initiatives since 1998.[40] It further alleged that the tribe failed to disclose large contributions to ballot initiatives directed towards building a rail line that would stop at the tribe's Coachella Valley Casino.[41] Had the rail project passed, it would have cost California taxpayers over a billion dollars.[42] Additionally, the FPPC alleged that the tribe failed to disclose multi–million dollar donations to a number of other ballot measures.[43]

The FPPC filed suit against the Agua Caliente tribe in 2002 to enforce its disclosure requirements under the PRA in Sacramento County Superior Court.[44] The tribe moved to quash service of summons and to dismiss the action under the doctrine of tribal sovereign immunity from suit.[45] The court denied the motion, stating that Supreme Court precedents only permit tribal immunity in "suits arising from the governmental as well as economic activities of a tribe within and outside of tribal territory,"[46] and that no

37. *Id.* §§ 81002, 86116.

38. *Id.* § 86116; *see also id.* § 82047 (defining the term "person" under the act to include "committees"); *id.* § 82013(c) (defining a "committee" to be a group of persons acting in concert and making contributions totaling more than ten thousand dollars in a given year).

39. *Id.* § 82013.

40. Real Party in Interest's Opposition Brief on the Merits at 5–6, Agua Caliente Band of Cahuilla Indians v. Super. Ct., 92 P.3d 310 (Cal. 2005) (No. S123832), 2005 WL 760047.

41. *Id.*

42. *Id.*

43. *Id.*

44. Fair Political Practices Comm'n v. Agua Caliente Band of Cahuilla Indians, No. 02AS04545, 2003 WL 733094, at *1 (Cal. Super. Ct. Feb. 27, 2003).

45. *Id.*

46. *Id.* at *5.

decision had ever suggested immunity could be asserted when a tribe attempts to participate in a state's political system.[47] The court also held that even if immunity were extended to suits from the PRA, such immunity would impermissibly interfere with California's rights under the Tenth Amendment and the Guaranty Clause of the U.S. Constitution, which guarantees California a republican form of government and reserves for California the right to govern its own elections.[48]

The tribe appealed to the California Court of Appeals,[49] arguing that the doctrine of tribal immunity from suit was a constitutional imperative. The appeals court noted that the tribe could point to no authority for that proposition.[50] The appeals court additionally opined that "[s]tates may regulate within Indian country only when state control is not preempted by federal law or when state control does not infringe on tribal sovereignty."[51]

The appeals court concluded that the doctrine of tribal sovereign immunity was not a constitutional imperative as the tribe claimed.[52] Noting that the Constitution mentions Indians only in the Indian Commerce Clause and the power of the executive to make treaties, the court concluded that tribal sovereign immunity is merely a creature of common law.[53] Like the trial court, the appellate court upheld the Tenth Amendment and the Guaranty Clause as a limitation on tribal immunity in any case where the tribe sought to flout FPPC requirements.[54]

The tribe appealed the case to the California Supreme Court.[55] Because this case is one of first impression,[56] and because there are far–reaching constitutional ramifications regarding a conflict between states' rights and tribal sovereignty, this case is likely to reach the Supreme Court of the United States. Part II of this Note explains why courts should hold that tribal sovereign immunity is not a constitutional imperative and recommends against application of the doctrine where tribes seek to avoid compliance with state campaign finance regulations.

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47. *Id.*

48. *Id.* at *6.

49. Agua Caliente Band of Cahuilla Indians v. Super. Ct., 10 Cal. Rptr. 3d 679 (Cal. Ct. App. 2004).

50. *Id.* at 684–85.

51. *Id.* at 686.

52. *Id.*

53. *Id.*

54. *Id.* at 687–88.

55. Agua Caliente Band of Cahuilla Indians v. Super. Ct., 92 P.3d 310 (Cal. 2004).

56. Fair Political Practices Comm'n v. Agua Caliente Band of Cahuilla Indians, No. 02AS04545, 2003 WL 733094, at *1 (Cal. Super. Ct. Feb. 27, 2003).

II. TRIBAL IMMUNITY FROM SUIT IS NOT A CONSTITUTIONAL IMPERATIVE

A. Tribal Sovereign Immunity Originated from Federal Common Law

If the doctrine of tribal sovereign immunity were found in the U.S. Constitution or in any act of Congress, it would have powerful binding effect on the states. However, tribal sovereign immunity cannot be found in the text of the Constitution or in any congressional act.[57] Tribal sovereign immunity is entirely created by federal common law.[58]

This Part argues that federal common law is not a constitutional imperative because it is court-created law that merely fills gaps left by the Constitution or by federal statutes. Tribal sovereign immunity is merely federal common law because it is created by neither Congress nor the Constitution. Courts should strictly limit the doctrine of tribal sovereign immunity in the case of statutes like the PRA because tribal sovereign immunity has outlived its purpose. Also, statutes like the PRA place minimal burdens on tribes and do not interfere with tribes' sovereign functions.

The Court of Appeals for the Ninth Circuit provided the best definition of "federal common law" in *United States v. Enas*.[59] In *Enas*, the court lamented that the term "federal common law" has "eluded precise definition," and sought guidance from secondary sources.[60] One source defined federal common law as "the development of legally binding federal law by the federal courts in the *absence of directly controlling constitutional or statutory provisions.*"[61] Another source defined federal common law as "any rule of federal law created by a court . . . when the substance of that rule is *not clearly suggested by federal enactments–constitutional or congressional.*"[62]

Tribal sovereign immunity is merely a federal "*common-law* immunity from suit."[63] Recently, Justice Clarence Thomas suggested that "the time has come to reexamine the premises and logic of

57. *Agua Caliente Band of Cahuilla Indians*, 10 Cal. Rptr. 3d at 684–85.
58. *Id.* at 687.
59. United States v. Enas, 255 F.3d 662, 674–75 (9th Cir. 2001).
60. *Id.*
61. *Id.* (quoting ERWIN CHEMERINSKY, FEDERAL JURISDICTION 349 (3d ed. 1999)) (emphasis added).
62. *Id.* (quoting Martha Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890 (1986)).
63. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (emphasis added).

our tribal sovereignty cases."[64] Justice John Paul Stevens, joined by Justices Ruth Bader Ginsburg and Thomas, opined that while it is "too late to repudiate the doctrine [of tribal sovereign immunity] entirely," it should not be extended "beyond its present contours."[65]

Those "contours" of tribal sovereign immunity were last set by the Court in *Kiowa Tribe v. Manufacturing Technologies, Inc.*,[66] a case that serves as a roadmap to the origins of tribal sovereign immunity. Justice Anthony Kennedy, writing for the majority, noted that the doctrine of tribal sovereign immunity is supported by "but a slender reed."[67] Justice Kennedy began his opinion by recounting the development of the doctrine. He noted that tribal sovereign immunity came about "almost by accident,"[68] and that the Court's decisions recognize that the doctrine was "founded upon an anachronistic fiction,"[69] because the very root of the doctrine was derived from the Court's decision in *Turner v. United States*[70]—a case that did not even turn on tribal sovereignty.[71]

Justice Kennedy went on to recount how the doctrine of tribal sovereign immunity was solidified in the Court's decision in *United States v. United States Fidelity & Guaranty* (*USF&G*).[72] *USF&G*—citing

64. United States v. Lara, 541 U.S. 193, 214 (2004) (Thomas, J., concurring).

65. Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 764 (1998) (Stevens, J., dissenting).

66. *Id.* at 754. In that case, the Kiowa Tribe entered into a contract with Manufacturing Technologies to purchase shares in an aviation firm. *Id.* at 753. There was disagreement amongst the parties as to whether the contract was executed on tribal land. *Id.* at 753-54. The contract did not specify governing law, but contained a clause disclaiming any limitation on the "sovereign rights of the Kiowa Tribe of Oklahoma." *Id.* at 754. When the tribe defaulted on the payment, Manufacturing Technologies brought suit, and the tribe asserted immunity. *Id.* The lower courts ruled in favor of the tribe, and Manufacturing Technologies asked the Supreme Court to rule that tribes could be subject to suit for off-reservation commercial conduct. *Id.*

67. *Id.* at 757.

68. *Id.* at 756.

69. *Id.* at 758 (quoting Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505, 514–15 (Stevens, J., concurring).

70. Turner v. United States, 248 U.S. 354 (1919).

71. *Kiowa Tribe*, 523 U.S. at 757. The *Turner* case involved a non-Indian lessee of Indian lands, who used the lands for grazing. Turner built a fence around the land, which was subsequently torn down by an Indian mob. In upholding the dismissal of the suit, Justice Brandeis wrote, "The fundamental obstacle to recovery is *not the immunity of a sovereign to suit,* but the lack of a substantive right to recover damages resulting from the failure of a government or its officers to keep the peace." *Turner*, 248 U.S. at 358 (emphasis added). Justice Brandeis' mention of sovereign immunity was rhetorical, assuming its existence without any analysis or otherwise citing any authority. Yet, *Turner* is the case upon which the doctrine of tribal sovereign immunity is built. Hence, Justice Kennedy's opinion that *Turner* is a "slender reed."

72. United States v. U.S. Fid. & Guar., 309 U.S. 506 (1940) [hereinafter *USF&G*]. In this case, the United States leased certain coal lands on behalf of the Chickasaw and Choctaw nations with the USF&G Company acting as a guarantor for royalties owed to the tribes.

Turner—held that "Indian Nations are exempt from suit without Congressional authorization,"[73] and according to Justice Kennedy, the Court has upheld the *USF&G* doctrine in subsequent cases "with little analysis."[74]

Having traced the common law history of tribal sovereign immunity, and having concluded that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine,"[75] Justice Kennedy decided to defer to Congress, which to him meant extending the contours of tribal sovereign immunity to include cases arising from tribal commercial activities occurring on or off reservation lands.[76] He suggested that Congress, or impliedly the Court, may shape tribal sovereign immunity, subject to constitutional limitations.[77] In other words, neither the Court nor Congress is under any constitutional compulsion to perpetuate the doctrine. Rather, both are merely limited by the Constitution.

In *Agua Caliente Band of Cahuilla Indians v. Superior Court*, the Agua Caliente tribe argues that tribal immunity from suit is a constitutional imperative by virtue of Congress' plenary powers over Indian affairs, but the tribe has not cited any authority in support of that proposition.[78] In fact, once created, common law doctrines such as tribal immunity can be overturned by Congressional act,[79] so it is incorrect that any doctrine created by federal common law rises to the level of irreproachable constitutional order.[80] Congress

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Id. at 510. When the lessee filed for bankruptcy, the United States, still acting on behalf of the tribes, brought suit against the lessee in federal district court in Missouri. *Id.* The lessee made counterclaims against the tribes, which resulted in a net judgment to the lessee. *Id.* The United States then filed suit in federal district court in the Eastern District of Oklahoma seeking remuneration from USF&G. *Id.* The USF&G claimed that the Missouri judgment was a bar to recovery. *Id.* at 511. The district and appeals courts both found for USF&G, but the Supreme Court reversed, stating that the Missouri judgment was "void in so far as it [undertook] to fix a credit against the Indian Nations." *Id.* at 512.

73. *Kiowa Tribe*, 523 U.S. at 757 (quoting *USF&G*, 309 U.S. at 512 (citing *Turner*, 248 U.S. at 358)).

74. *Id.*

75. *Id.* at 758.

76. *Id.* at 760.

77. *Id.* at 759.

78. Agua Caliente Band of Cahuilla Indians v. Super. Ct., 10 Cal. Rptr. 3d 679, 684 (Cal. Ct. App. 2004). The Indian Commerce Clause cannot support their argument, because it grants a power to Congress only, and because campaign finance regulations are not about commerce, but politics. *Id.* at 686. Neither will the Treaty Clause work to support their case, because the Agua Caliente tribe has no treaty with the United States. *Id.*; *see* U.S. CONST. art. I, § 8, cl. 3 (giving Congress authority to regulate commerce with Indian tribes); U.S. CONST. art. II, § 2, cl. 2 (conferring on the President the power to enter into treaties with the advice and consent of the Senate).

79. United States v. Enas, 255 F.3d 662, 674–75 (9th Cir. 2001).

80. *See id.*

has the power to overturn federal common law doctrines relating to Indian tribes.[81]

Because tribal sovereign immunity is merely federal common law built upon a "slender reed,"[82] it is not subject to "the all–or–nothing analysis that tends to produce legal petrification instead of an evolving boundary between the domains of old principles."[83] Rather, federal common law "tends to pay respect . . . to detail, seeking to understand old principles afresh by new examples and new counterexamples."[84] Therefore, courts are at liberty to decide the contours of tribal sovereign immunity and whether the contours of tribal sovereign immunity should continue to protect tribal attempts to circumvent state election regulations.

B. Reasons to Limit the "Contours" of Tribal Sovereign Immunity

Courts should limit the contours of tribal sovereign immunity because allowing it to block enforcement of statutes like the PRA is contrary to the doctrine's purpose, which is to protect tribes from encroachment by states.[85] Also, using tribal sovereign immunity to block enforcement of statutes like the PRA is fundamentally unfair because it requires courts to allow an injustice on a sovereign state. Finally, tribal sovereign immunity does not apply when state encroachments are not burdensome, and requiring tribes to comply with state campaign finance laws is not too burdensome to justify application of tribal sovereign immunity to statutes like the PRA.

The doctrine of tribal sovereign immunity has exceeded its purpose.[86] In a previous era, when courts viewed tribes as quasi–sovereign states, tribal sovereign immunity might have been necessary to protect the tribes from "encroachment by the states."[87] Today, tribal sovereign immunity sometimes has a perverse use: thwarting the legitimate tort claims of non–Indians harmed by Indian products and services.[88] In the present day, Indian tribes provide valuable products and services to American consumers, including, *inter alia*, ski resorts, gambling enterprises, and tobacco sales.[89] Thus, "[i]n [the] economic context, immunity can harm

81. *See id.*
82. *Kiowa Tribe*, 523 U.S. at 757.
83. Washington v. Glucksberg, 521 U.S. 702, 770 (1997) (Souter, J., concurring).
84. *Id.*
85. *See Kiowa Tribe*, 523 U.S. at 758.
86. *See id.*
87. *Id.*
88. *Id.*
89. *Id.*

those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims."[90] Even though tribal sovereign immunity has exceeded its purpose, it does not necessarily mean that tribes are no longer in need of protection from encroachment by states; instead the point is that tribal immunity should be limited only to encroachment cases, and should not be a tool for tribes to assert to escape liability stemming from their own positively-initiated external commercial dealings or lobbying activities.[91]

Tribal sovereign immunity also exceeds its original purposes when it is applied to activities bearing no meaningful nexus to a tribe's land or sovereign functions. In *Kiowa*, Justice Kennedy, by purportedly deferring to Congress, effectively extended the doctrine of tribal sovereign immunity to off-reservation activity, an expansion which arguably exceeded the original scope of the doctrine.[92] Given that the issue in *Kiowa Tribe* was whether to extend tribal sovereign immunity to cover off-reservation conduct, the dissent was loath to do so:

> Despite the broad language used in prior cases, it is quite wrong for the Court to suggest that it is merely following precedent, for we have simply never considered whether a tribe is immune from a suit that has no meaningful nexus to the tribe's land or *its sovereign functions.*[93]

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90. *Id.*

91. The evolution of sovereign immunity for foreign nations has taken this pragmatic approach to grants of immunity that courts should also take with respect to tribal sovereign immunity. *See id.* at 759. Just as with tribal sovereign immunity, in its early decisions, the Supreme Court doctrine of foreign sovereign immunity was absolute. *Id.* However, due to the sorts of economic harms that Justice Kennedy envisioned in *Kiowa Tribe*, the State Department, and later Congress were forced to craft a policy limiting the absolute immunity as created by the Court. *Id.* This resulted in the Foreign Sovereign Immunities Act, which explicitly codified rules for a commercial exception to the general rule of foreign sovereign immunity. *See id.* (citing Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983)); Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116 (1812); *see also* 28 U.S.C. §§ 1604, 1605, 1607 (2005)).

92. *See Kiowa Tribe*, 523 U.S. at 761–62 (Stevens, J., dissenting). Justice Stevens believes the scope of tribal sovereign immunity should be much more limited. *Id.* at 760. He reasoned that *Turner* and *USF&G* dealt with three of the Indian nations comprising the Five Civilized Tribes, and *USF&G* was a case in which the federal government was litigating on behalf of the tribes. *Id.* at 761-62. A plausible reading of these cases is that they were meant to apply only to the Five Civilized Tribes, and that the *USF&G* case only stands for the proposition that tribal immunity may not be waived when the federal government is litigating on its behalf. *Id.* (citing United States v. U.S. Fid. & Guar. Co., 309 U.S. 506 (1940); Turner v. United States, 248 U.S. 354 (1919)).

93. *Kiowa Tribe*, 523 U.S. at 764 (Stevens, J., dissenting) (emphasis added).

Extending immunity to off-reservation conduct is not deferential to Congress because the extension essentially creates a rule that undermines state power.[94] If the Court in fact wished to create rules that limit state power, it could in theory do so if the rules could be justified by federal interests,[95] but in *Kiowa*, the majority failed to do so.[96]

Such extension of the doctrine is also unfair because it provides Indian tribes with broader immunity than that enjoyed by the states, the federal government, and foreign nations that have variously given up immunity from either tort liability, commercial liability, or both.[97] "Governments . . . should be held accountable for their unlawful, injurious conduct."[98]

Tribal sovereign immunity does not apply when compliance with state regulations is not burdensome for the tribe.[99] In applying tribal sovereign immunity, the Supreme Court takes into consideration the extent to which compliance with state regulation burdens the tribes.[100] In *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe*, the Court held that tribal sovereign immunity does not apply to state taxation of tobacco sales in Indian country to non-Indian customers.[101] The Court considered "that requiring the tribal seller to collect these taxes was a minimal burden justified by the State's interest in assuring the payment of these concededly lawful taxes."[102]

The doctrine of tribal sovereign immunity should not be extended to facts like those of the *Agua Caliente* case. In *Kiowa*, Justice Stevens, in dissent, stressed that courts should not permit tribes to use tribal sovereign immunity to avoid liabilities stemming from activities that bear no "meaningful nexus to the tribe's land or its sovereign functions."[103] The Agua Caliente tribe's ability to defy California's PRA, and to contribute funds to state candidates for public office, while ignoring its reporting obligations does not affect the tribe's ability to govern itself. Congress' failure to act should not serve as an excuse for courts to sanction an injustice.

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94. *Id.* at 765.

95. *Id.*

96. *Id.*

97. *Id.* at 765-66.

98. *Id.*

99. *See* Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505, 512 (1991) (citing Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 483 (1976)). *See also* Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980).

100. *See Citizen Band of Potawatomi Indian Tribe*, 498 U.S. at 505.

101. *Id.*

102. *Id.* at 512.

103. *Kiowa Tribe*, 523 U.S. at 764 (Stevens, J., dissenting).

Compliance with the PRA would not be burdensome for the Agua Caliente tribe. In *Citizen Band of Potawatomi Indian Tribe,* the Court found that compliance with state taxes on cigarettes was not burdensome in relation to the state's interest in collecting the taxes.[104] Reporting campaign contributions is even less burdensome than collecting taxes, because reporting contributions does not involve pooling funds and making payments the way that tax collection does. Furthermore, a state's interest in protecting its political system from corruption is sufficiently compelling to justify the minimal burden on the tribe.[105]

The alternatives to a state's enforcement of regulations like the PRA against tribes include negotiating agreements with tribes or seeking legislation from Congress.[106] But these alternatives are not realistic.[107] Absent the threat of a lawsuit, there is no incentive for a tribe to comply with campaign finance reporting requirements.[108] Tribal compliance is necessary because donees under statutes like the PRA must also report their donations.[109] Tribal disclosure would not merely be a duplication of effort.[110] Statutes like the PRA require disclosure by both the payor and the payee as a check to discourage omissions by one or the other.[111]

Tribal sovereign immunity should not bar states from enforcing statutes like the PRA against Indian tribes through suit. Tribal sovereign immunity is merely a common law doctrine, which stands in contrast with states' rights under the Constitution to a republican form of government free from corruption, discussed in the next section. As such, the right of states to sue to enforce statutes like the PRA is essential.[112]

III. FEDERAL PREEMPTION SHOULD NOT BAR ENFORCEMENT OF STATUTES LIKE THE PRA

If tribal sovereign immunity can be overcome, a regulating state faces an additional obstacle to enforcing its regulations in Indian

104. *Citizen Band of Potawatomi Indian Tribe,* 498 U.S. at 512.

105. *See infra* Part III.C.

106. *See* Agua Caliente Band of Cahuilla Indians v. Super. Ct., 10 Cal. Rptr. 3d 679, 689-90 (Cal. Ct. App. 2004); *id.* at 695 (Davis, J., dissenting).

107. *Id.* at 689-90.

108. *Id.* at 690.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 689-90.

country—federal preemption. Federal preemption is the doctrine that state governments have no general police power within Indian country.[113] There are important exceptions to this rule.[114] Federal preemption involves an analysis under two separate lines of cases. Section III.A addresses the first line of cases relating to states' ability to regulate non–Indians in Indian country. Section III.B addresses the second line of cases relating to the states' ability to regulate tribes or tribal members in Indian country. Finally, Section III.C argues that federal preemption should not apply to prevent states from enforcing statutes like the PRA.

A. Federal Preemption of State Attempts to Regulate Non–Indians on Indian Lands

States have a compelling interest in enforcing statutes like the PRA against non–Indians on tribal lands,[115] because tribes might depend on professional lobbyists who are non–Indians. For example, if a state candidate for political office visits a reservation, and a non–Indian lobbyist employed by the tribe hands the candidate a check, states would like to attach liability to that non–Indian lobbyist under statutes like the PRA. States should be able to enforce statutes like the PRA without the application of federal preemption.

When states seek to regulate non–Indians on tribal lands, the law requires a balancing of tribal interests versus state interests to determine jurisdiction.[116] *New Mexico v. Mescalero Apache Tribe* illustrates how courts address this prong of federal preemption.[117] The Court took three important factors into account in applying a "particularized inquiry": (1) Congress' goal of tribal self–sufficiency, (2) identification of a function or service the state provides in conjunction with its desire to regulate, and (3) the off–reservation effects of the tribal activities in the absence of the state's ability to regulate in Indian country.[118]

113. Williams v. Lee, 358 U.S. 217, 220 (1959).

114. *See, e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141-45 (1980).

115. *See* Buckley v. Valeo, 424 U.S. 1, 28-36 (1976).

116. In a pair of nineteenth century cases, *United States v. McBratney*, 104 U.S. 621 (1881), and *Draper v. United States*, 164 U.S. 240 (1896), the Supreme Court began creating exceptions to the rule that state laws can have no force in Indian country. *McBratney* and *Draper* gave the states jurisdiction over cases involving crimes taking place in Indian country by non-Indians against non-Indians, opening the door into the inquiry into the nature of the subject matter, and the identity of the parties involved in a case. *See Draper*, 164 U.S. at 247; *McBratney*, 104 U.S. at 624.

117. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983).

118. *Id.* at 333-34, 341-42.

In *Mescalero*, the State of New Mexico sought to enforce state hunting and fishing regulations against non–Indians on tribal lands.[119] The federal government had provided the Mescalero Apache tribe substantial funding over the course of several years to develop resort facilities to attract non–Indians with the intent of enabling tribal self–sufficiency.[120] Non–Indian hunters and fishermen were attracted to the reservation by tribal regulations that were more liberal than those of New Mexico.[121] A non–Indian hunter could, for example, kill both a buck and a doe on tribal land, but under New Mexico's regulations, the hunter could only kill a buck.[122] The state enforced its regulations against hunters as the hunters drove out of the tribal lands.[123]

In deciding whether the New Mexico regulations should be preempted, the Court noted that its "determination does not depend 'on mechanical or absolute conceptions of state or tribal sovereignty, but call[s] for a particularized inquiry into the nature of the state, federal and tribal interests at stake.'"[124]

The Court in *Mescalero* found that New Mexico's regulations would interfere with Congress' intent to provide for tribal self–sufficiency.[125] Not only had the federal government provided substantial funding for the development of resort facilities, it also had provided the tribe with elk, fish, and other wildlife to populate the tribal lands and stock its lakes for the sole purpose of attracting non–Indian hunters and fishers.[126] If the state fixed its own regulations on the same hunters and fishers, it would discourage visits to the tribal lands for recreation and diminish the tribe's ability to enjoy the collateral economic benefits.[127] The Court found this state regulation of an Indian tribe was against congressional intent.[128] The state also provided no special function or service to the tribe in conjunction with its desire to regulate activities on tribal lands. The Court held that "New Mexico does not contribute in any significant respect to the maintenance of these resources, and can point to no other 'governmental functions it provides' in

119. *Id.* at 327-28.
120. *Id.* at 328.
121. *Id.* at 329.
122. *Id.*
123. *See id.*
124. *Id.* at 333 (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980)).
125. *Id.* at 344.
126. *Id.* at 328.
127. *Id.* at 341.
128. *Id.* at 342.

connection with hunting and fishing on the reservation by non-members that would justify the assertion of its authority."[129] Finally, the Court held that New Mexico could not point to any off-reservation effects that warranted the state regulation: "Some species of game never leave the tribal lands, and the State points to no specific interest concerning those that occasionally do."[130] The Court recognized the state stood to lose revenue from the sales of its hunting and fishing licenses, but the Court felt this loss was *de minimus*, and was insufficient to justify the assertion of state regulations in Indian country.[131]

B. Federal Preemption of State Attempts to Regulate Indians on Indian Lands

The second facet of preemption analysis addresses the case of states seeking to regulate Indians on Indian lands. State regulation of Indians on Indian lands is a much more serious matter than regulation of non-Indians on Indian land, as it goes further to the issue of tribal sovereignty.[132] If states are trying to regulate Indians on Indian lands, the *Mescalero* balancing test does not apply.[133] The Court will generally preempt any such laws unless the state can show "exceptional circumstances" that make the regulation necessary.[134] There are a few cases in which the Court found such circumstances, and they were indeed exceptional.[135]

In *Puyallup Tribe, Inc. v. Washington Department of Game*, the Supreme Court found an exceptional circumstance when the State of Washington regulated the on-reservation fishing activities of tribal members.[136] In *Puyallup*, the land at issue did not belong to the Puyallup tribe, but lay within the reservation boundaries; thus, the key issue was externalities, or "off-reservation" effects, of its use.[137] Members of the Puyallup tribe were extending nets to catch salmon and other species of fish that swim their way from the open

129. *Id.* at 342 (citation omitted).

130. *Id.*

131. *Id.* at 342-43.

132. *See* Bryan v. Itasca County, 426 U.S. 373, 388 (1976) (pointing to the possible destruction of tribal governments to result "if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers, including taxation, of state and local governments.").

133. *Mescalero Apache Tribe*, 462 U.S. at 341-43.

134. *Id.* at 331-32.

135. *See* Org. Vill. of Kake v. Egan, 369 U.S. 60, 74 (1962) (recounting some of the cases in which the Court found exceptional circumstances).

136. Puyallup Tribe, Inc. v. Wash. Dep't of Game, 433 U.S. 165, 176-77 (1977).

137. *Id.* at 174-75.

sea up the Puyallup River to spawn each year.[138] Despite the state's attempts at regulation, the tribe's fishing activities posed a real threat of extinction to the fish.[139]

Rice v. Rehner is a second example of a case in which the Supreme Court found an exceptional circumstance allowing a state to regulate Indians in Indian country.[140] *Rice* involved the State of California's efforts to impose liquor licensing requirements on a tribal alcohol merchant who sold principally to non–Indian customers.[141] The Court held that the law was not preempted in the narrow area of liquor licensing because historically there had been no correlation between Indian sovereignty and liquor merchandising.[142] The Court noted that historically (as far back as the colonial period), Indian tribes never had exclusive authority over the liquor trade in their territory.[143] Thus, the Court found an exceptional circumstance justifying state regulation in Indian territory, stating that "[t]here can be no doubt that Congress has divested the Indians of any inherent power to regulate in this area. In the area of liquor regulation, we find no 'congressional enactments demonstrating a firm federal policy of promoting tribal self–sufficiency and economic development.'"[144]

C. State Statutes like the Political Reform Act of 1972 Should Not Be Preempted by Federal Law

Federal preemption should not prevent states from enforcing statutes such as the PRA against tribes. At a minimum, injunctive relief should be made available such that tribes should have to disclose contributions. Congress has no power to regulate state elections, except by the Fourteenth and Fifteenth Amendments to the Constitution.[145] States have a compelling interest in preventing corruption in their own political spheres.[146] This state interest does not interfere with Indian sovereignty and rights to

138. *Id.* at 168.
139. *Id.* at 176.
140. Rice v. Rehner, 463 U.S. 713 (1983).
141. *Id.* at 715.
142. *Id.* at 722–25.
143. *Id.*
144. *Id.* at 724 (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980)).
145. *See, e.g.*, Guinn v. United States, 238 U.S. 347, 358-59 (1915) (striking down Oklahoma election laws that disenfranchised African-American voters).
146. *See* Buckley v. Valeo, 424 U.S. 1, 45 (1973).

self–determination. On the contrary, tribal attempts to corrupt state political systems create considerable externalities, which overcome the *Mescalero* balancing test.

The right to contribute to state political candidates was never an inherent part of tribal sovereignty,[147] so statutes like the PRA should not be preempted by federal law. The Supreme Court in *Rice* held that California could impose liquor licensing requirements on Indians selling liquor on Indian lands because of the off–reservation effects of liquor sales to primarily non–Indian customers and the historical non–inherence of liquor regulation by tribes.[148] Under the same line of reasoning, the statutes like the PRA should not be preempted, because the off–reservation effects of Indian non–compliance are substantial.[149] It would be entirely unfair to excuse Indian tribes from compliance with statutes like the PRA when all other wealthy donors, including corporations and individuals, must comply.[150]

Federal or tribal interests could not justifiably preempt a state's right to regulate tribal contributions to state candidates for political office, even where states attempt to regulate Indians' activities on Indian lands. To block state courts from enforcing state campaign finance regulations would be a dramatic infringement on state sovereignty.[151] It might be inappropriate for states to seek monetary damages from tribes that violate campaign finance regulations, but at least injunctive relief should be available to states so that they may compel tribes to disclose their campaign contributions. Federal preemption should not apply to states seeking injunctive relief because historically, tribes never depended on flouting state campaign finance laws for their sovereignty, and the off–reservation effects of tribal non–compliance with the PRA are substantial.

147. Real Party in Interest's Opposition Brief on the Merits, *supra* note 40, at 6.

148. *Rehner*, 463 U.S. at 733.

149. Real Party in Interest's Opposition Brief on the Merits, *supra* note 40, at 6-7.

150. Indeed, the Jack Abramoff scandal has shed national attention on the fundamental unfairness of tribes asserting sovereign immunity and related arguments to skirt campaign finance laws. *See* Jeffery H. Birnbaum, *A Tribal Loophole for Campaign Gifts*, WASH. POST, Feb. 2, 2006, at A19.

151. Real Party in Interest's Opposition Brief on the Merits, *supra* note 40, at 23 ("It would be to announce, in effect, that States, through the Commerce Clause, ceded to federally-recognized Indian tribes power to undermine our shared republican form of government–unless Congress undertakes affirmatively to guarantee powers *reserved by the Constitution to the States*. It would be to announce, in effect, that Congress, by inaction, may authorize these groups of citizens to deprive their fellow citizens of constitutionally guaranteed power to protect our shared elections from actual or threatened corruption.").

IV. CONSTITUTIONAL ARGUMENTS IN FAVOR OF ENFORCEMENT OF STATUTES SUCH AS THE POLITICAL REFORM ACT OF 1972

Tribal sovereign immunity and federal preemption should not be substantial obstacles to enforcement of statutes such as the PRA in which states seek to regulate the fairness of their own campaign finance systems. However, an examination of rights enumerated by the U.S. Constitution further illustrates that states should be free to enforce statutes like the PRA. Courts have a responsibility to uphold the constitutional rights of the states by allowing enforcement of their campaign finance laws against Indian tribes. While the Constitution does not confer any rights to Indian tribes, it does guarantee states the right to regulate their elections through the "Reserved Powers" clause of the Tenth Amendment.[152] The Guaranty Clause also confers the right to regulate elections by granting states the right to a republican form of government.[153]

A. The Constitution Does Not Confer Rights to Indian Tribes

The text of the Constitution does not explicitly guarantee rights to Indian tribes. The rights of Indian tribes are provided by the federal trust and plenary power doctrines.[154] These doctrines were created by the courts and legislatures and enforced by the executive, but they are not guaranteed under the Constitution. In *United States v. Lara*, Justice Thomas noted in his concurring opinion that "the States (unlike the tribes) are part of a constitutional framework that allocates sovereignty between the State and Federal Governments. . . . The tribes, by contrast, are not part of this constitutional order. . . ."[155]

Unlike tribes, states have rights under the Constitution. Two key constitutional provisions guarantee that states should be able to enforce statutes like the PRA against the tribe: the Tenth Amend-

152. U.S. CONST. amend. X.

153. U.S. CONST. art. IV, § 4.

154. *See* Stephanie Dean, *Getting a Piece of the Action: Should the Federal Government Be Able to Tax Native American Gambling Revenue?*, 32 COLUM. J.L. SOC. PROBS. 157, 163–64 (1999). An example of the lack of applicability of the Constitution to Indian tribes outside the scope of the Indian Commerce Clause is Congress' passing of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 (West 2006), to force tribes to extend constitutional rights to their members. *See also* Whitney Kerr, *Giving Up the "I": How the National Museum of the American Indian Appropriated Tribal Voices*, 29 AM. INDIAN L. REV. 421, 421 n.1 (2004).

155. United States v. Lara, 541 U.S. 193, 218-19 (2004) (Thomas, J., concurring).

ment and the Guaranty Clause. Parts IV.B and IV.C argue that although the Supreme Court has historically not given much credence to states' rights under the Tenth Amendment and the Guaranty Clause, recent cases bear out the proposition that this position is changing, particularly in relation to states' ability to govern their own elections.

B. States' Rights Under the Tenth Amendment

The Tenth Amendment of the U.S. Constitution states that, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[156] The power to regulate state electoral processes has not been "delegated to the United States by the Constitution, nor prohibited by"[157] the states. In fact, the Supreme Court has deferred to the judgment of the states themselves in this area.[158]

Concededly, the Court has historically rendered the Tenth Amendment virtually moot under its Commerce Clause jurisprudence,[159] as illustrated by the Court's decision in *United States v. Darby*.[160] In a unanimous opinion, the Court wrote:

> The power of Congress over interstate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." [It] can neither be enlarged nor diminished by the exercise or non–exercise of state power. . . . Our conclusion is unaffected by the Tenth Amendment.[161]

This vision of a strong Commerce Clause has changed over the course of the last century, however, and the importance of states' rights under the Tenth Amendment has gained importance in the eyes of the Court. For example, in *New York v. United States*, the Court held that Congress could not, under its Commerce Clause power, compel states to provide for radioactive waste disposal within their borders.[162] The Court stated that "Congress exercises its conferred powers subject to the limitations contained in the

156. U.S. CONST. amend. X.
157. *Id.*
158. *See* Gregory v. Ashcroft, 501 U.S. 452, 461-62 (1991).
159. U.S. CONST. art. I, § 8, cl. 3.
160. United States v. Darby, 312 U.S. 100, 114 (1941).
161. *Id.* at 114, 123 (citations omitted).
162. New York v. United States, 505 U.S. 144, 188 (1992).

Constitution.... [T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States."[163]

Furthermore, recent cases demonstrate that the Tenth Amendment's "reserved powers" doctrine applies specifically when states attempt to regulate their elections. In *Gregory v. Ashcroft*, the Court noted:

> We [previously] recognized explicitly the States' constitutional power to establish the qualifications for those who would govern: "Just as 'the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections,' '[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.' Such power inheres in the State by virtue of its obligation, already noted above, 'to preserve the basic conception of a political community.'"[164]

Courts should follow the reasoning of *Ashcroft*: the Framers intended the states to retain regulatory power over the manner in which their political officers are chosen. It is vital that federal courts consider the Framer's intent when presented with state conduct of state elections. Given that the Court has recognized that elections fall exclusively within the purview of states' rights under the Tenth Amendment, statutes like the PRA should be enforceable against Indian tribes.

C. States' Rights Under the Guaranty Clause

The other constitutional source of authority permitting states to apply statutes like the PRA to Indian tribes is Article IV, Section 4 of the U.S. Constitution, the so–called "Guaranty Clause." It states that, "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."[165] Statutes like the PRA help states maintain a republican form of government,[166] and

163. *Id.* at 156–57.

164. Gregory v. Ashcroft, 501 U.S. 452, 461-62 (1991) (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)) (internal citations omitted).

165. U.S. CONST. art. IV, § 4.

166. *See* CAL. GOV'T CODE § 81002 (West 2004) (articulating that the purpose of the PRA is to provide public disclosure to inhibit improper campaign practices and improper influences on elections).

therefore the Guaranty Clause compels their enforcement—even against Indian tribes.

Concededly, the Court has historically not given the Guaranty Clause much weight. Throughout the Court's history, from *Luther v. Borden*[167] through *Baker v. Carr*,[168] the Court has held that questions presented under the Guaranty Clause of Article IV, Section 4 are nonjusticiable, political questions, the resolution of which is properly left to Congress. However, the Court has recognized:

> [T]he authority of the people of the States to determine the qualifications of their most important government officials. It is an authority that lies at "'the heart of representative government.'" It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States "guarantee[s] to every State in this Union a Republican Form of Government."[169]

Though the Guaranty Clause is seldom considered, courts should utilize it in cases involving statutes like the PRA because the guarantee of a republican form of government must necessarily entail the ability to enforce laws enacted to preserve that republican form of government.[170] Without the means to enforce those laws, Article IV, Section 4 of the U.S. Constitution is "ephemeral."[171] This result cannot be the intent of the Framers. Just as the "power to regulate interstate commerce would be 'incomplete without the authority to render States liable in damages,'"[172] so too would the guaranteed right to a "Republican Form of Government"[173] be incomplete without the power to enforce state laws like the PRA. This right must have an accompanying remedy.

Additionally, the Court has recently suggested that not all Guaranty Clause claims are nonjusticable political questions.[174] Up to

167. Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849).

168. Baker v. Carr, 369 U.S. 186, 209–10 (1962).

169. *Gregory*, 501 U.S. at 463 (citations omitted).

170. *See, e.g.*, Fair Political Practices Comm'n v. Santa Rosa Indian Cmty., 20 Cal. Rptr. 3d 292, 301-302 (Ct. App. 2004) ("[W]ithout a right to bring suit, the state's constitutional right to preserve its republican form of government would be 'ephemeral.' . . . . We therefore conclude that resort to a judicial remedy is essential to secure the state's constitutional right to guarantee a republican form of government free of corruption. As such, the right to sue must be given constitutional stature.").

171. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961).

172. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996) (quoting Pennsylvania v. Union Gas Co., 491 U.S. 1, 19-20 (1989)).

173. U.S. CONST. art. IV, § 4.

174. New York v. United States, 505 U.S. 144, 184–85 (1992).

this point, only *individuals* have brought actions under the Guaranty Clause,[175] and the Supreme Court has not yet been presented with a *state* action under the Guaranty Clause. The court in *Agua Caliente* chose to adopt the view of Professor Laurence Tribe, who wrote that the question of whether a *state* may successfully raise claims under the Guaranty Clause is not foreclosed.[176]

The states enjoy rights under the U.S. Constitution in the form of the Tenth Amendment, which empowers them to regulate state elections, and the Guaranty Clause, which guarantees them a republican form of government. However, the Constitution does not confer similar rights on Indian tribes. Although the Supreme Court historically has not given the Tenth Amendment and the Guaranty Clause much weight, recent cases such as *Gregory* suggest that in the realm of state campaign finance laws, such constitutional provisions confer rights on states that trump the federal common law doctrines that allow Indian tribes to flout state laws.

CONCLUSION

The doctrine of tribal sovereign immunity is a common law doctrine created by the Supreme Court to protect the self–sufficiency of tribal government and economic activities. In California, the Agua Caliente tribe's ability to flout the PRA and make otherwise illegal campaign contributions infringes on California's sovereignty, substantially affects the fairness of elections for all, and does not protect tribal self–sufficiency. Courts should not extend the doctrine of tribal sovereign immunity to cover cases like these.

Similarly, federal preemption should not prevent states from enforcing statutes such as the PRA against tribes. State efforts to govern the conduct of their own elections present "exceptional" circumstances that should render preemption unnecessary. Because a tribe's ability to influence the outcome of state elections has never been a historical element of tribal sovereignty, and because the off–reservation effects of corruption and the appearance of corruption are considerable, federal preemption should not apply.

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175. Agua Caliente Band of Cahuilla Indians v. Super. Ct., 10 Cal. Rptr. 3d 679, 687-88 (Ct. App. 2004).

176. *Id.* at 688 (citing 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW at 910-11 (3d ed. 2000)) ("To be sure, the Supreme Court has never held that the Guarantee Clause . . . confers judicially cognizable rights upon *individuals* . . . [but] it need not follow from the unavailability of the Guarantee Clause as a textual source of protection for *individuals* that the clause confers no judicially enforceable rights upon *states as states*. It is, after all, 'to every State' that the promise of the Guarantee Clause is addressed.").

Courts should recognize the constitutional rights of states to govern their own elections and enjoy a republican form of government. Moreover, courts should recognize states' compelling interest in preventing corruption and the appearance of corruption in their political systems. Finally, courts should recognize that suits enforcing campaign finance disclosure laws are not barred by the doctrines of tribal sovereignty immunity or federal preemption, and that at a minimum, injunctive relief should be available.