

5-1-2004

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Recommended Citation

Cameron A. Reese, *Tribal Immunity from California's Campaign Contribution Disclosure Requirements*, 2004 BYU L. Rev. 793 (2004).
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Tribal Immunity from California's Campaign Contribution Disclosure Requirements

I. INTRODUCTION

Elections, on both a federal and state level, play a seminal role in America's representative system of government. Elected officials are charged by their constituents with the responsibilities of identifying and correcting perceived and apparent social, economic, and political problems. Because of the powers vested in these representatives, millions of dollars from candidates' personal fortunes and from the wallets of campaign supporters are invested each election.¹

Native American tribes and their tribal gaming interests are playing an increasing role in America's political process. On both a federal and state level, tribes and their affiliate gaming interests have made large contributions to political candidates to influence the debate on issues ranging from gambling licenses to tribal lands.² As with other campaign contributors, as the size of tribal contributions increases, so too does the concern over the influence tribes may be exerting on the electoral process.

This concern has reached a crescendo in California, which is home to more Indians³ than any other state and more Indian tribes

1. For example, in the 2000 Presidential election, George W. Bush raised over \$193,000,000 and Al Gore raised over \$132,000,000. *See* 2000 Presidential Race: Total Raised and Spent, *at* <http://www.opensecrets.org/2000elect/index/AllCands.htm> (last visited Mar. 29, 2004).

2. *See* Dwight Morris, *The State of Campaign Finance: It Could Be Worse*, WASH. POST, Jan. 23, 1998, <http://www.washingtonpost.com/wpsrv/politics/campaigns/money/archive/money012398.htm> (last visited Mar. 9, 2004). For a specific example of tribal involvement in federal elections, Indian tribes contributed over \$1.5 million to Democratic candidates and party committees during the 1996 election cycle. *Id.* Additionally, the Federal Election Commission, which maintains records of all donations to federal candidates of \$200 or more, reported that three tribes ranked in the top 500 soft money contributors in the 2000 election cycle. Brian Stockes, *Tribes Chart New Course in Campaign Finance*, INDIAN COUNTRY TODAY, Sept. 6, 2000, <http://www.indiancountry.com/?672&style=printable> (last visited Mar. 9, 2004).

3. United States Census 2000, *The American Indian and Alaska Native Population: 2000*, <http://www.census.gov/prod/2002pubs/c2kbr01-15.pdf> (last visited Mar. 9, 2004). According to the census report, the United States is home to 4,119,301 individuals who are either entirely or partially American Indian. *Id.* at 5. Of those, 627,562 live in California. *Id.*

than any state other than Alaska.⁴ Over the last few years, tribal contributions to candidates for California office have seen a dramatic increase.⁵ Most recently, California tribes provided significant contributions to two candidates in the recall election of California's governor.⁶ It is clear that California tribes will continue to make large campaign contributions to candidates they support and thereby have an impact on California's electoral process.

It is unclear, however, whether tribes must make public disclosure of those contributions. California, like many states, has enacted campaign disclosure requirements to protect the integrity of the state's electoral process.⁷ In 1974, California adopted the Political Reform Act of 1974 (the "PRA") to ensure that "receipts and expenditures in election campaigns [are] fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited."⁸ California's legislation, passed in the wake of Watergate when campaign finance reform became a major issue, is typical of disclosure requirements and reflects the political climate favoring disclosure. However, application of California's disclosure requirements to donations from federally recognized Indian tribes was recently tested in two superior court cases brought by the California Fair Political Practices Commission (FPPC) against two Indian tribes for violation of the State's

4. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, Notice, 67 Fed. Reg. 134 (July 12, 2002).

5. Max Vanzi, *Tribes' Political, Charitable Causes Get Casino Funds*, L.A. TIMES, May 6, 1996, at A3. For example, tribal contributions to California Democratic candidates increased from \$33,000 in 1992-93 to more than \$2.4 million in 1994-95. *Id.* While California tribes have historically donated most of their money to Democratic candidates, the tribes have made donations to Republican candidates as well. *See id.* As further evidence of their involvement in California elections, tribes donated more than \$741,000 in 1994 to a single candidate running for Attorney General. *Id.*

6. Indian tribes across the State donated more than \$3 million in support of Democratic candidate Cruz Bustamante. An additional \$100,000 of tribal money was donated in support of Republican candidate Tom McClintock. The tribes also contributed \$2 million to an independent expenditure committee. *See* Don Thompson, *Tribes Spreading Money Beyond Bustamante to GOP Opponent*, MERCURY NEWS, Sept. 18, 2003, <http://www.kansas.com/mld/mercurynews/news/local/6796522.htm> (last visited Mar. 9, 2004).

7. *See* CAL. GOV'T CODE § 81000-91015 (2003); *see also* CONN. GEN. STAT. § 150-9-333j (2003); MINN. STAT. § 10A.20 (2003); WIS. STAT. § 11.12 (2003).

8. CAL. GOV'T CODE § 81002(a). The legislation requiring campaign disclosure is known as the Political Reform Act of 1974.

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campaign disclosure requirements.⁹ In each case, the tribes filed motions to quash service of summons and dismiss the suits on the ground that the doctrine of tribal sovereign immunity from suit relieves the tribes from compliance with the campaign disclosure requirements.¹⁰

The superior court decisions delivered contradictory holdings on the question of “whether a state court has the power to exercise jurisdiction over a sovereign, federally recognized Indian tribe in an action brought by a state agency seeking to enforce state law concerning election campaign disclosures.”¹¹ In *Fair Political Practices Commission v. Agua Caliente Band of Cahuilla Indians*, the court concluded “that the tribe is not immune from . . . the PRA reporting requirements for its political contributions and legislative lobbying activities” because case law does not support the position “that a tribe is immune from suit for activities that . . . are intended to influence a sovereign State’s electoral and legislative processes.”¹² Two months later, a different superior court in *Fair Political Practices Commission v. Santa Rosa Indian Community of the Santa Rosa Rancheria* granted the tribe’s motion to quash, finding that case law supports a general tribal immunity “whenever Congress has not expressly abrogated the immunity or the tribe has not expressly waived its immunity from suit with respect to those activities.”¹³ The California Supreme Court has ordered an appeals court to consider whether Indian tribes must abide by the state campaign disclosure requirements.¹⁴ But while this question is being addressed in

9. *Fair Political Practices Comm’n v. Agua Caliente Band of Cahuilla Indians*, No. 02AS04545, 2003 WL 733094 (Cal. Super. Ct. Feb. 27, 2003), *aff’d*, *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 10 Cal. Rptr. 3d 679 (Ct. App. 2004), *available at* 2004 WL 389462; *Fair Political Practices Comm’n v. Santa Rosa Indian Cmty. of the Santa Rosa Rancheria*, No. 02AS04544, slip op. (Cal. Super. Ct. Mar. 6, 2003), <http://www.fppc.ca.gov/pdf/Santa%20Rosa%20Quash%20Ruling.pdf> (last visited Mar. 11, 2004).

10. These doctrines will be developed in full *infra* Part II. Briefly, the doctrine of tribal sovereignty suggests that registered tribes have governmental independence and are free from state intrusion on this sovereignty. Tribal immunity from suit suggests that tribes are not subject to suit in state courts unless the tribe or the federal government has waived this immunity.

11. *Agua Caliente*, 2003 WL 733094, at *1.

12. *Id.* at *5.

13. *Santa Rosa Cmty.*, No. 02AS04544, slip op. at 9.

14. *Agua Caliente Band of Cahuilla Indians v. Fair Political Practices Comm’n*, 2003 Cal. LEXIS 5367, at *1 (Cal. July 23, 2003). During the publication process of this

California state court, the impact of the court's ultimate decision is not isolated to California's campaign disclosure requirements. Representatives from the election enforcement committees of several states joined the FPPC in its argument, recognizing that the impact of this question in California will likely impact similar questions in their own states.¹⁵

This Comment argues that proper application of the United States Supreme Court's tribal immunity doctrine indicates that registered tribes are immune from suit by state election officials seeking to enforce campaign disclosure requirements unless or until the federal government expressly removes the immunity or the tribes expressly waive it. While states may have a substantial interest in ensuring that their elections are free from the influence of anonymous donors,¹⁶ that interest does not overcome the federally recognized doctrine of tribal immunity that was recognized as inherent in the tribes in early Supreme Court jurisprudence.¹⁷

Part II of this Comment introduces the doctrines of tribal sovereignty and tribal immunity from suit, providing an explanation of their origins and their current status. Part II also provides an introduction to the PRA and its subsequent disclosure requirements.¹⁸ Part III discusses the cases recently reviewed in California superior court and their holdings. Part IV addresses the

Comment, the appellate court denied the Tribe's petition by a 2-1 vote. The court ultimately concluded that the doctrine of tribal immunity has no basis in the Constitution and is therefore trumped by the rights of states to protect their republican form of government. *Agua Caliente*, 10 Cal. Rptr. 3d at 682. The dissent, however, concluded that the doctrine of tribal immunity "is anchored in the United States Constitution." *Id.* at 693. Consequently, the dissent argued that the two competing constitutional provisions should be "harmonized so as to give effect to both to the extent possible." *Id.* at 694 (citing *City and County of San Francisco v. County of Mateo*, 896 P.2d 181, 186 (Cal. Ct. App. 1995)). Under this rationale, the dissent suggested that a proper solution would recognize tribal immunity from the FPPC's action because protecting the doctrine in this situation would not destroy the State's right to regulate its electoral processes in light of "viable alternatives" available to the State. *Id.* The Tribe has yet to decide whether to appeal this decision to the California Supreme Court. Steve Wiegand, *Court: No Tribal Immunity to FPPC*, SACRAMENTO BEE, Mar. 4, 2004, at A3.

15. Representatives from the election boards in Minnesota, Connecticut, and Wisconsin filed declarations in the *Agua Caliente* case to oppose the Tribe's motion to quash service. *See* Opposition to Motion to Quash, at <http://www.fppc.ca.gov/index.html?id=385> (last visited Mar. 11, 2004).

16. *See* *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

17. A review of the Supreme Court's tribal immunity jurisprudence is included *infra* Part II.

18. CAL. GOV'T CODE §§ 81000-91015 (2003).

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question of whether a federally recognized Indian tribe is immune from suits brought by state agencies to enforce campaign disclosure requirements. Specifically, Part IV analyzes whether the lack of a specific federal law providing immunity from suit to tribes for their activities in state electoral processes forecloses the doctrine of tribal immunity, and whether the Tenth Amendment and Guarantee Clause serve as an explicit waiver by the federal government to tribal immunity from suit for participation in state elections. While concluding that tribal immunity precludes suit against tribes for their failure to comply with disclosure requirements, Part IV also identifies how the purposes of the disclosure requirements can still be met while recognizing tribal immunity. Part V provides a brief conclusion.

II. BACKGROUND

A. *The Doctrine of Tribal Sovereignty*

1. *The development of tribal sovereignty*

Traditional notions of tribal sovereignty in the United States date to early decisions of the Supreme Court concerning whether tribes possessed the ability to transfer title to property after the establishment of authority and laws in the United States.¹⁹ In *Johnson v. McIntosh*, Chief Justice Marshall noted that while the tribes retained some rights to sovereignty after discovery, the establishment of law and exercise of authority in the Americas led to a necessary impairment of the historic tribal rights in land.²⁰ Thus, while

19. See *Johnson v. McIntosh*, 21 U.S. 543 (1823). Some scholarship also suggests that the notion of tribal sovereignty predates even the Constitution. See, e.g., Robert Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 118–48 (2002).

20. 21 U.S. at 574. Early treatment in the Court of the native tribes was based largely on the European principle of discovery. This principle allowed the discoverer to “assert[] the ultimate dominion to be in themselves; and claim[] and exercise[], as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives.” *Id.* Chief Justice Marshall concluded that while the tribes were the “rightful occupants of the soil . . . their rights to complete sovereignty, as independent nations, were necessarily diminished” by discovery. *Id.* Thus, while Chief Justice Marshall recognized the tribes as sovereigns, they were not recognized as “complete” sovereigns, suggesting that the tribes were ultimately subject to the federal government. See also *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164, 173 (1973).

Marshall characterized the tribes as sovereigns in *Johnson v. McIntosh*, that characterization was left unclear by his suggestion that the tribes' sovereignty was incomplete.²¹

The Court added definition to its characterization of the tribes as sovereigns ten years later in *Cherokee Nation v. Georgia*,²² in which the Court examined the "condition of the Indians in relation to the United States."²³ In defining their relationship to the United States, the tribes characterized themselves as *foreign nations* owing no allegiance to the United States.²⁴ The Court, however, rejected this characterization for several reasons. First, because the tribes were "within the jurisdictional limits of the United States," the Court held it would not be proper to characterize them as foreign.²⁵ Second, the treaties between the tribes and the United States placed the tribes under the protection of the United States.²⁶ Finally, the tribes admitted that "the United States [has] the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper."²⁷ Thus, instead of characterizing the tribes as foreign nations, the Court instead characterized the tribes as "domestic dependent nations."²⁸ This characterization enforced the notion of tribes as "distinct political societ[ies], separated from others, capable of managing [their] own affairs and governing [themselves]," while still recognizing that the tribes were not nations independent from the United States and its laws.²⁹

In a further explanation of the relationship between the tribes and the United States, Chief Justice Marshall noted in *Worcester v.*

21. *See supra* note 20.

22. 30 U.S. (5 Pet.) 1 (1831).

23. *Id.* at 16. The Court characterized this relationship as "unlike that of any other two people in existence" and as "marked by peculiar and cardinal distinctions which exist no where else." *Id.*

24. *Id.*

25. *Id.* at 17.

26. *Id.*

27. *Id.*

28. *Id.* Marshall went on to explain that the characterization implied that the tribes "occupy a territory to which we assert a title independent of their will . . . [T]hey are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian." *Id.* Though not explicitly defining the term "dependent," Marshall gives the term meaning by recognizing that "[t]hey look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father." *Id.*

29. *Id.*

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*Georgia*³⁰ that the combined acts of the United States government “consider the several Indian nations as distinct political communities, having territorial boundaries, *within which their authority is exclusive*, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.”³¹ This explanation expanded the notion of tribes as domestic dependent nations by providing that tribes possess some level of exclusive authority within their tribal boundaries.³²

This recognition of exclusive authority included a separation between tribes and the states. Marshall noted that “[t]he treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the Union.”³³ This separation of tribes from the states was grounded largely in the language of Article I of the Constitution, which gives Congress authority to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”³⁴ The Court reasoned that this language

30. 31 U.S. (6 Pet.) 515 (1831).

31. *Id.* at 557 (emphasis added). Marshall reemphasized the Court’s recognition of tribal authority in noting that “[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil.” *Id.* at 559. That he should use the characterization “independent” so soon after his characterization of the tribes as “domestic *dependent* nations” in *Cherokee Nation* suggests a further recognition of tribal sovereignty and a weakening of the term “dependent.”

32. It is important to recognize that this exclusive authority was only extended by the Court to cover activities on territorial boundaries. The implicit corollary is that tribes do not possess exclusive authority over tribal conduct occurring off territorial boundaries. This distinction will be discussed *infra* note 59. It is also important to recognize that this exclusive authority can be diminished by Congress under Article I of the Constitution. *See infra* note 34.

33. *Worcester*, 31 U.S. at 557.

34. U.S. CONST. art. I, § 8, cl. 3. The Court compares the language in Article I with the language of the Articles of Confederation, which suggested that states possessed some authority to regulate tribal conduct. *Worcester*, 31 U.S. at 558. Under the Articles of Confederation, Congress was given the authority to “regulat[e] the trade and manag[e] all the affairs with the Indians, not members of any of the states.” *Id.* at 558–59. This authority, however, was subject to the limitation “that the legislative power of any state within its own limits be not infringed or violated.” *Id.* at 559. This caveat to Congress’s authority to regulate tribal conduct provided the suggestion that the Articles of Confederation granted to states some authority to regulate tribal conduct within state boundaries. The strength of this suggestion, however, is unclear. In Federalist Paper 42, Madison questions the notion that the Articles of Confederation granted to states the authority to regulate tribes. THE FEDERALIST NO. 42. Madison noted that “how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so

“comprehend[s] all that is required for the regulation”³⁵ of the tribes, and therefore “[t]he whole intercourse between the United States and [Indian tribes], is, by our constitution and laws, vested in the government of the United States.”³⁶ This separation of tribes from the states was used by the Court to shield tribes from attempts by state legislatures to regulate conduct within tribal boundaries.³⁷

2. The modern doctrine of tribal sovereignty as it relates to nonmembers on Indian land

Since *Worcester*, federal case law has chipped away at the notion that tribal sovereign immunity serves as a complete prohibition to the exercise of jurisdiction by states over tribes and conduct on tribal land.³⁸ In 1973, the Court recognized that “the doctrine [of tribal sovereignty] has undergone considerable evolution in response to changed circumstances.”³⁹ The Court explained this evolution by

far intruding on the internal rights of legislation, is absolutely incomprehensible.” *Id.* Madison continued by noting that this was “not the only case in which the articles of confederation . . . inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States.” *Id.*

35. *Worcester*, 31 U.S. at 559.

36. *Id.* at 561. This does not suggest that states possess no ability to regulate tribes. For example, states still possess the authority to regulate all intrastate commerce.

37. *Worcester* involved legislation passed in 1830 by the Georgia Legislature requiring all white individuals living within the Cherokee nation to obtain a permit from the governor and take an oath to support and defend the Georgia Constitution. *Id.* at 523. Mr. Worcester, a white missionary from Vermont, was sentenced to four years in the state penitentiary for violating this provision, and brought suit to challenge the validity of the state statute. *Id.* at 562. The Court ultimately concluded that the Georgia act was unconstitutional and that the State had no authority to regulate conduct within tribal boundaries. *Id.* at 561 (“The 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, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.”).

38. See *Okla. Tax Comm’n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505 (1991) (states are free to collect taxes on sales to nonmembers); *Rice v. Rehner*, 463 U.S. 713 (1983) (state can require traders who operate on reservations to obtain a state liquor license to sell liquor for off-premises consumption); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (states may impose cigarette and sales taxes on on-reservation purchases by nonmembers of the tribe); *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976) (states can require Indian retailer on reservations to add cigarette tax to non-Indian sales); *Draper v. United States*, 164 U.S. 240 (1896) (state law may be used to try to punish crimes committed on an Indian reservation by or against non-Indians); *United States v. McBratney*, 104 U.S. 621 (1882) (state law can be applied to crimes committed by non-Indians against non-Indians on Indian land).

39. *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164, 171 (1973).

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suggesting that “notions of Indian sovereignty have been adjusted to take account of the State’s legitimate [business] interests in regulating the affairs of non-Indians.”⁴⁰ This adjustment resulted in the Court granting states some rights over the nonmembers on Indian land so long as the state did not “infringe[] on the right of reservation Indians to make their own laws and be ruled by them.”⁴¹

Instead of treating tribal sovereignty as an absolute bar to state jurisdiction over any conduct occurring on the reservation and any conduct of Indians off the reservation, Justice Thurgood Marshall noted that the “trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption.”⁴² The trend towards preemption allowed the doctrine of tribal sovereignty to remain a “relevant” doctrine so long as it was used to “provide[] a backdrop against which the applicable treaties and federal statutes must be read.”⁴³ Preemption analysis, however, meant that the doctrine was not relevant to provide “definitive resolution” on questions of state jurisdiction.⁴⁴ The Court’s characterization of tribal sovereignty as merely a backdrop against which treaties are considered has “alter[ed] the presumption that the tribe has governmental power over all matters affecting the tribe on the reservation, and that the state does not.”⁴⁵

The doctrine of federal preemption, as currently recognized by the Court, indicates that “State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests

40. *Id.*; see also *Williams v. Lee*, 358 U.S. 217 (1959); *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946). By “non-Indians,” the Court was referring to changes in the doctrine of tribal sovereignty that allowed state courts to hear both suits by Indians against non-Indians as well as suits by non-Indians against non-Indians for crimes committed while on the reservation. See *Williams*, 358 U.S. at 220.

41. *McClanahan*, 411 U.S. at 172 (citing *Williams*, 358 U.S. at 219–20); see also *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

42. *McClanahan*, 411 U.S. at 172. Marshall evidenced this trend by noting that “modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.” *Id.*

43. *Id.*; see also *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980) (noting that determination does not depend “on mechanical or absolute conceptions of state or tribal sovereignty, but [calls] for a particularized inquiry into the nature of the state, federal, and tribal interests at stake”).

44. *McClanahan*, 411 U.S. at 172.

45. WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW* 75 (West 2d ed. 1988).

at stake are sufficient to justify the assertion of State authority.”⁴⁶ Thus, under a preemption analysis, state law may preempt tribal interest in self-government if the state can demonstrate that its interest outweighs the tribe’s interest in self-government.⁴⁷ Even with respect to nonmembers on Indian land, this is not an easy balancing test for states to win.⁴⁸ The preemption analysis, then, operates to provide states with jurisdiction over nonmembers on Indian land only when the state can demonstrate a substantial interest in regulating conduct on Indian land and only if that interest outweighs the tribe’s interest in self-government.⁴⁹

3. Determining when states are authorized to regulate tribes and tribal members

The federal preemption analysis, which the Supreme Court has used to determine those situations in which states are authorized to regulate non-Indians on Indian land, has not been used to determine when states are authorized to regulate tribes themselves and tribal

46. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983); *see also Bracker*, 448 U.S. at 145; *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962).

47. *See* CANBY, *supra* note 45, at 76. Importantly, the Court noted in a footnote to *Mescalero* that “[t]he exercise of state authority may also be barred by an independent barrier—inherent tribal sovereignty—if it ‘unlawfully infringe[s] on the right of reservation Indians to make their own laws and be ruled by them.’” *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 n.16 (1983) (quoting *Bracker*, 448 U.S. at 142) (citation omitted). But because tribal self-government is not generously defined “to include anything that affects Indian interests . . . most cases involving the application of state law in Indian country are decided on preemption grounds.” CANBY, *supra* note 45, at 76.

48. For an example of the difficulty states have in winning this balancing test, *see* *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). In *New Mexico v. Mescalero Apache Tribe*, the State attempted to enforce its hunting and fishing regulations against non-Indians who obtained permission to hunt and fish on the reservation. *Id.* at 329. The Supreme Court upheld a decision by the Tenth Circuit that did not allow the State to preempt tribal regulations governing hunting laws for non-Indians on the reservation. *Id.* at 330. The Court noted that the “[d]evelopment of the reservation’s fish and wildlife resources has involved a sustained, cooperative effort by the Tribe and the Federal Government.” *Id.* at 327–28. This relationship with the federal government and the subsequent development of wildlife resources, the Court reasoned, provided a significant benefit to the Tribe by providing the resources needed to “maintain the Tribal government and provide services to Tribe members.” *Id.* at 327. The Court ultimately concluded that granting jurisdiction to the State “would effectively nullify the Tribe’s unquestioned authority to regulate the use of its resources . . . , interfere with the comprehensive tribal regulatory scheme, and threaten Congress’ firm commitment to the encouragement of tribal self-sufficiency and economic development.” *Id.* at 344.

49. *See supra* notes 46–47 and accompanying text.

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members. Indeed, the Supreme Court has been reluctant to minimize tribal authority to regulate its own conduct and the conduct of its members, particularly when that conduct occurs on the tribe's land.⁵⁰

Unlike situations involving the state's ability to regulate non-Indians on Indian land, the Court has not adopted a balancing test to determine those situations in which states are empowered to regulate tribes and tribal members. Instead, the Court reviews state attempts to regulate tribal conduct under more traditional notions of tribal sovereignty.⁵¹ With these traditional notions serving as the measuring stick, those situations in which states have been granted authority to regulate tribes themselves are rare, especially when states are attempting to regulate tribes and their members on reservation land. Indeed, the Court has stated that only under "*exceptional circumstances* [may] a State . . . assert jurisdiction over the on-reservation activities of tribal members."⁵² And while noting that exceptional circumstances exist in which states may regulate conduct of tribes or tribal members on reservations, the Court has provided no suggestion of the circumstances which would allow states to satisfy this test.⁵³

Thus, under the doctrine of tribal sovereignty, tribes and tribal members enjoy a general immunity from state regulation for on-reservation conduct, unless a state can satisfy the "exceptional circumstances" test.⁵⁴ For example, with respect to state attempts to

50. The Court characterized the instances in which it granted to states the authority to regulate tribes in the absence of congressional authorization of such authority as "few." *Organized Village of Kake v. Egan*, 369 U.S. 60, 74 (1962).

51. *See id.* at 74-75.

52. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 (1987) (emphasis added) (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983)).

53. The Court in *New Mexico v. Mescalero Apache Tribe* cites to *Puyallup Tribe Inc. v. Dept. of Game of Washington*, 433 U.S. 165 (1977), as an example of an exceptional circumstance in which a state was allowed to regulate the on-reservation activities of tribal members. 462 U.S. at 331-32 & n.15. In *Puyallup Tribe*, the State of Washington was allowed to regulate on-reservation fishing by tribal members. 433 U.S. at 165. The facts of this case were deemed exceptional for two reasons. First, the land at issue, while located within the reservation boundaries, did not belong to the Tribe. *Id.* at 175. Second, the Court held that the State had an interest in conserving the wildlife, which had become a scarce resource. *Id.* at 175-77.

54. Tribal immunity from regulation should not be confused with tribal immunity from suit. Tribal immunity from suit will be discussed *infra* Part II.B.

tax reservation land or Indian income generated from activities carried on within the reservation, the Court has held that “Indian tribes, like the Federal Government itself, are exempt from direct state taxation and that this exemption is ‘lifted only when Congress has made its intention to do so unmistakably clear.’”⁵⁵ As a result, tribes are immune from state attempts to regulate income from on-reservation property or income-generating activities.⁵⁶

While the Court has been unwilling to grant a general presumption that all “on-reservation activities involving a resident tribe are . . . beyond the reach of state law”⁵⁷ the Court has “consistently admonished that federal statutes and regulations must be ‘construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence.’”⁵⁸ The Court, however, has been more willing to grant to states the right to regulate the conduct of tribes or their members when that conduct occurs off the reservation.⁵⁹ For example, the Court in *Mescalero Apache Tribe v. Jones* held that the State of New Mexico was authorized to impose a tax on sales receipts the Tribe earned from its operation of a ski-resort on off-reservation land leased from the federal government.⁶⁰ In reaching its decision, the Court noted that “[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory

55. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 183 n.14 (1989) (citing *Montana v. Blackfoot Tribe*, 471 U.S. 759, 765 (1985)); *see also* *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164 (1962).

56. Compare with *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, where the Supreme Court held that the Tax Commission was not entitled to tax on-reservation sales of cigarettes to tribal members but was entitled to tax the on-reservation sales to nonmembers. 498 U.S. 505 (1991).

57. *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 845 (1982).

58. *Id.* at 846 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980)). The preemption analysis is essentially a fact-specific inquiry in which the Court weighs the competing state interest against the tribe’s interests in self-government. While no presumption exists in favor of the tribe’s interest in self-government, the Court’s language suggests that the scales might be tipped initially in favor of the tribes, thus requiring the states to demonstrate compelling reasons for tipping the scales in favor of state jurisdiction.

59. *See* *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (“State authority over Indians is yet more extensive over activities . . . not on any reservation.” (citing *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962))).

60. *Id.* at 155.

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state law otherwise applicable to all citizens of the State.”⁶¹ As a result, traditional notions of tribal sovereignty as a bar to immunity from state regulation have been weakened when the conduct at question takes place off-reservation.

Supreme Court jurisprudence, then, suggests that for the PRA to apply to California tribes, the court must determine whether the tribal conduct (campaign donations) occurred on or off the reservation. If the conduct occurred off-reservation, the state will likely be required to demonstrate that the requirements are applicable to all state citizens. If the conduct occurred on-reservation, the state will likely be required to satisfy the “exceptional circumstances” test.

B. Tribal Immunity from Suit

Even if a court were to determine under either a preemption analysis or under the “exceptional circumstances” test that states are authorized to regulate tribal conduct, states may still be helpless to enforce their applicable regulations. Under the doctrine of tribal immunity, tribes enjoy common law immunity from suit by states.⁶² This protection was recognized by the courts as a natural extension of the powers vested in a sovereign and “necessary to protect nascent tribal governments from encroachments by States.”⁶³

Unlike immunity from regulation, tribal immunity from suit extends to tribal activities taking place both on and off the reservation.⁶⁴ Additionally, the scope of conduct covered by the immunity has been extended to areas not relating directly to tribal

61. *Id.* at 148–49; *see also, e.g.*, *Puyallup Tribe v. Dept. of Game of Wash.*, 391 U.S. 392 (1968).

62. *See* *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998) (“[T]ribal immunity is a matter of federal law and is not subject to diminution by the States.”); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (“Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.”); *Puyallup Tribe*, 433 U.S. at 172 (“Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe.”); *United States v. United States Fid. & Guar.*, 309 U.S. 506, 512 (1940) (“Indian Nations are exempt from suit without congressional authorization.”); *Turner v. United States*, 248 U.S. 354, 358 (1919) (“Without authorization from Congress, the Nation could not then have been sued in any court; at least without its consent.”).

63. *Kiowa*, 523 U.S. at 758. While the doctrine is generally recognized as an outgrowth of traditional notions of sovereignty, the Supreme Court recently stated that the “doctrine developed almost by accident.” *Id.* at 756.

64. *Puyallup Tribe*, 433 U.S. at 168 (1977).

self-government, such as off-reservation commercial conduct or noncompliance with state and local laws.⁶⁵

In fact, the Court recently recognized tribal immunity from suit where state laws were validly imposed against tribes. In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, Manufacturing Technologies sought damages for the Tribe's default on a contract entered into off-reservation.⁶⁶ Because the contract was entered into outside the reservation, the Tribe was not immune from application of the state contract laws under the canon of cases that provides for the application of state substantive law to a tribe's commercial activities occurring off-reservation.⁶⁷ But while the Tribe was subject to the requirements of the state substantive law, the Court recognized that the Tribe was immune from enforcement actions under the doctrine of tribal immunity from suit.⁶⁸ The Court held that "[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case."⁶⁹ Thus, while the Court has refused to extend tribal immunity from *regulation* in many situations to tribal conduct occurring off-reservation,⁷⁰ tribal immunity from *suit* extends to cover conduct occurring both on- and off-reservation.

Under the doctrine of tribal immunity, "a tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."⁷¹ Thus, unless Congress has abrogated immunity, or the tribe has waived it, the doctrine of tribal immunity prevents state enforcement actions against tribes, even if the state is authorized to

65. See *Kiowa*, 523 U.S. at 755; *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991).

66. 523 U.S. at 752.

67. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962).

68. *Kiowa*, 523 U.S. at 755 ("To say substantive state laws apply to off-reservation conduct . . . is not to say that a tribe no longer enjoys immunity from suit. . . . There is a difference between the right to demand compliance with state laws and the means available to enforce them." (citing *Potawatomi*, 498 U.S. at 514)).

69. *Id.* at 760; see also *Potawatomi*, 498 U.S. at 514 (holding that while the state had authority to tax cigarette sales to nonmembers on the reservation, the tribe was immune from suit by the state to collect unpaid taxes).

70. See *supra* notes 64-67.

71. *Kiowa*, 523 U.S. at 751; see also *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986).

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regulate the tribe. Moreover, courts require that any tribal waiver be explicit, and will not imply any waiver from a tribe's conduct.⁷² For example, the Supreme Court recently determined that a tribe that filed a civil action had not waived its immunity from counterclaims arising out of the same scenario.⁷³

Similarly, congressional abrogation must also be explicit.⁷⁴ In *Santa Clara Pueblo v. Martinez*, a female member of the Santa Clara Pueblo Tribe brought an action claiming that an ordinance denying tribal membership to children of female members who do not marry within the Tribe, while at the same time extending tribal membership to children of male members who marry outside the Tribe, violated the Indian Civil Rights Act of 1986 (ICRA).⁷⁵ Martinez claimed that the ordinance violated a provision in the ICRA which made it unlawful for tribes to "deny to any person within its jurisdiction the equal protection of its laws."⁷⁶ The Tribe asserted immunity from suit. Though the Court recognized that Congress theoretically had the power to abrogate tribal immunity in cases arising under the ICRA, because the Court found no explicit language to that effect, it concluded that tribal immunity from suit still existed in these cases.⁷⁷

While a tribe's ability to both file suit and rely on the doctrine of immunity to protect itself against suits arising out of the same scenario may seem inequitable, Congress and the courts have been unwilling to provide many loopholes to the broad purview of tribal immunity from suit. Though the Court has recognized "reasons to doubt the wisdom of perpetuating the doctrine," and has hinted that it might "need to abrogate tribal immunity, at least as an overarching

72. *See* C & L Enters., Inc. v. Citizen Band of Potawatomi Indian Tribe of Okla., 532 U.S. 411, 418 (2001) ("[T]o relinquish its immunity, a tribe's waiver must be 'clear.'" (citations omitted)); *United States v. Testan*, 424 U.S. 392, 399 (1976) (holding that sovereign immunity "cannot be implied but must be unequivocally expressed").

73. *Potawatomi*, 498 U.S. at 509.

74. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("This aspect of tribal sovereignty [common-law immunity from suit] . . . is subject to the superior and plenary control of Congress.").

75. 25 U.S.C. §§ 1301–1303 (2000).

76. *Id.* § 1302(8).

77. *Martinez*, 436 U.S. at 59 ("In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit.").

rule,”⁷⁸ it has yet to provide any general exceptions to the traditional understanding of tribal immunity from suit and has continued with its general application of the doctrine.⁷⁹ The Court has been unwilling to base decisions on competing policy considerations, preferring instead to leave that debate to Congress.⁸⁰

Thus, even if tribal immunity from regulation does not shield tribes from compliance with the requirements of the PRA, California will be unable to enforce those requirements in state court unless either the tribe or Congress has expressly abrogated tribal immunity from suit in this situation.

C. The Political Reform Act of 1974

The Political Reform Act of 1974 was adopted to ensure that public officials serve in an “impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them.”⁸¹ Because the legislature determined that the then-existing disclosure requirements increased the influence of large campaign contributors, new disclosure requirements were adopted.⁸² The Act identifies the following as its purposes:

- (a) Receipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited.
- (b) The activities of lobbyists should be regulated and their finances disclosed in order that improper influences will not be directed at public officials.

78. *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 758 (1998).

79. *Id.*

80. *Id.* at 759. The competing policy considerations the Court appears to be contemplating are those of maintaining tribal independence and of protecting those who deal with tribes. While Congress and the Court have granted tribes immunity from suit to protect tribal rights of independence, the Court suggests that in an “interdependent and mobile society . . . tribal immunity extends beyond what is needed to safeguard tribal self-governance.” *Id.* at 758.

81. CAL. GOV'T CODE § 81001(b) (2003).

82. *Id.* § 81001(d); *see also* Governor Gray Davis Comm. v. Am. Taxpayers Alliance, 125 Cal. Rptr. 2d 534, 543 (Cal. Ct. App. 2002) (“The manifest purpose of the financial disclosure provisions of the Act is to insure a better informed electorate and to prevent corruption of the political process.”).

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(c) Assets and income of public officials which may be materially affected by their official actions should be disclosed⁸³

The Act is essentially a reporting act, requiring both candidates and contributors to report contributions made and received. With respect to contributors, the Act requires that “committees” make disclosures of their campaign contributions.⁸⁴ Committees are defined by statute as “any person or combination of persons who directly . . . makes contributions totaling ten thousand dollars (\$10,000) or more in a calendar year to or at the behest of candidates or committees.”⁸⁵ Each committee is required semiannually to submit reports called campaign statements if they have made contributions or independent expenditures during the six-month period before the date on which the report must be filed.⁸⁶

On the campaign statement, committees are required to disclose every contribution or independent expenditure made during the period equaling one hundred dollars (\$100) or more.⁸⁷ This report must provide the name of the candidate, the candidate’s address, the amount of the contribution, the date on which the contribution was provided, the cumulative amount of contributions made to the

83. CAL. GOV’T CODE § 81002(a)–(c). This section explicitly identifies four additional purposes that are not relevant to the scope of this Comment.

84. *Id.* § 84211.

85. *Id.* § 82013(c). The Act defines the term “person” to include any “individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, limited liability company, association, committee, and any other organization or group of persons acting in concert.” *Id.* § 82047. The term does not specifically mention Indian tribes or any other distinct political entities. If an Indian tribe were to fit within this definition, it would likely do so as an organization or group acting in concert. The FPPC asserted in its complaint that tribes satisfy the Act’s definition of person. Plaintiff’s Second Amended Complaint ¶ 9, *Fair Political Practices Comm’n v. Agua Caliente Band of Cahuilla Indians*, 2003 WL 733094 (Cal. Super. Ct. Feb. 27, 2003) (No. 02AS04545), at <http://www.fppc.ca.gov/pdf/acl/AguaCalSAC2.pdf>. The issue of whether tribes fit within this definition, however, is beyond the scope of this Comment, which focuses on the first question that would arise in similar cases, i.e., whether the doctrine of tribal immunity prevents the state from enforcing such legislation in a lawsuit.

86. CAL. GOV’T CODE § 84200(a)–(b). The terms “contributions” and “independent expenditures” are defined terms within the Act. *See id.* §§ 82015, 82031. The question of whether the contributions made in these cases satisfy either of these definitions is a question of fact which is not essential to the thesis of this Comment.

87. *Id.* § 84211(k).

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candidate, and the office and district for which the candidate seeks nomination or election.⁸⁸

The Act also imposes reporting requirements for lobbying expenses. Any person who makes direct or indirect payments of \$5,000 or more in a calendar quarter “to influence legislative or administrative action” must file periodic reports.⁸⁹ This report must contain the name of the lobbyist employed by the filer, the total amount paid to each lobbying firm, the total amount of all payments to lobbyists employed by the filer, and a description of the specific lobbying interests of the filer.⁹⁰

Regulation of the Act falls to the FPPC, which has “primary responsibility for the impartial, effective administration and implementation of this title.”⁹¹ The FPPC’s broad mandate includes the power to investigate possible violations of the Act and to hold hearings to determine if violations have occurred.⁹² It is under this authority that the *Agua Caliente* and *Santa Rosa Community* cases arose.

III. CALIFORNIA CASES TESTING THE APPLICABILITY OF TRIBAL IMMUNITY FROM SUIT UNDER THE PRA

A. Fair Political Practices Commission v. Agua Caliente Band of Cahuilla Indians⁹³

1. *The facts*

In October of 2002, the FPPC brought suit against the Agua Caliente Band of Cahuilla Indians (hereinafter “Agua Caliente”)⁹⁴ for violation of the Political Reform Act’s campaign disclosure and

88. *Id.* § 84211(k)(1)–(5).

89. *Id.* § 86115(b).

90. *Id.* § 86116(a)–(d).

91. *Id.* § 83111.

92. *Id.* §§ 83115, 83116.

93. No. 02AS04545, 2003 WL 733094 (Cal. Super. Ct. Feb. 27, 2003), *aff’d*, Agua Caliente Band of Cahuilla Indians v. Superior Court, 10 Cal. Rptr. 3d 679 (Ct. App. 2004), *available at* 2004 WL 389462.

94. The Agua Caliente Tribe resides on approximately 30,000 acres in the Palm Springs area. The bylaws and constitution of the Tribe were adopted in 1952 and approved by the Department of Interior, Bureau of Indian Affairs, in the same year. *See* Political History, *at* <http://www.aguacaliente.org/political.htm> (last visited Mar. 11, 2004).

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lobbying disclosure requirements. The FPPC claimed that the Tribe made sizable contributions in 1998, 2001, and 2002 without disclosing the contributions.⁹⁵ The size of the contributions qualified the Tribe as a major donor committee required to file semiannual reports detailing all political contributions.⁹⁶ The Tribe, however, filed no reports with the FPPC and furthermore, according to the FPPC, did not report funds paid to a lobbying firm contracted to influence legislative actions.⁹⁷ Representatives from the election enforcement committees of several states joined with the FPPC in arguing that states possess the ability to both regulate and enforce campaign disclosure requirements on tribes living within the state's jurisdiction.⁹⁸

The Tribe responded by bringing a motion to quash service of summons on the grounds that the court lacked personal jurisdiction as a result of tribal immunity.⁹⁹ The ensuing lawsuit tested "whether a state court has the power to exercise jurisdiction over a sovereign, federally recognized Indian tribe in an action brought by a state agency seeking to enforce state law concerning election campaign disclosures."¹⁰⁰

95. Plaintiff's Second Amended Complaint ¶¶ 10–14, *Agua Caliente* (No. 02AS04545), at <http://www.fppc.ca.gov/pdf/acl/AguaCalSAC2.pdf> (last visited May 26, 2004). The FPPC alleged that the Tribe made contributions totaling at least \$7,510,177 in 1998, \$175,250 in 2001, and another \$426,000 in 2002. *Id.* ¶¶ 11–13. The FPPC asserts that these contributions went to support statewide ballot initiatives as well as more than 140 candidates for state offices, such as Governor, Lieutenant Governor, and Attorney General. *Id.* The suit was brought before the recall election in 2003; thus, any funds donated to candidates in that election were not part of this suit.

96. CAL. GOV'T CODE § 82013.

97. Plaintiff's Second Amended Complaint ¶¶ 14, 17–22, *Agua Caliente* (No. 02AS04545), at <http://www.fppc.ca.gov/pdf/acl/AguaCalSAC2.pdf>.

98. Representatives from Connecticut, Minnesota, and Wisconsin filed declarations opposing the Tribe's motion to quash. *See* Opposition to Motion to Quash, at <http://www.fppc.ca.gov/index.html?id=385> (last visited Mar. 11, 2004). The declarations filed by these representatives serve as an indication of the importance of these cases. A recognition by California courts that tribal contributions are not subject to regulation by the State or that tribes are immune from enforcement of such statutes has the potential to impact court decisions in nearly every state.

99. *Agua Caliente*, 2003 WL 733094, at *1.

100. *Id.*

2. *The case in support of removing tribal immunity from suit under the PRA*

The superior court ultimately concluded that the doctrine of tribal immunity does not shield tribes from suits for failure to disclose campaign contributions under the PRA.¹⁰¹ Accordingly, the court determined that it had the power to determine whether the Tribe was in violation of the Act.

In reaching its conclusion, the court recognized that neither the Tribe nor Congress had expressly abrogated immunity in this situation.¹⁰² Indeed, the court reaffirmed the Supreme Court's explicit statement that "an effective waiver of tribal immunity from suit must be clearly and unequivocally expressed."¹⁰³ The court relied on this rule to conclude that the Tribe's voluntary participation in the state's political contests did not serve as an effective waiver of tribal immunity from suit.¹⁰⁴ The court also rejected the FPPC's contention that tribal immunity from suit has been absolved in any situation in which a state seeks to regulate its political processes.¹⁰⁵

But while the court recognized the Supreme Court's holdings allowing immunity to be abrogated only upon express waiver, and after finding that the Tribe provided no express waiver, the court nevertheless concluded that Agua Caliente was "not immune from the FPPC's action to enforce the PRA reporting requirements for its political contributions and legislative lobbying activities."¹⁰⁶ Relying on the implications in *Kiowa* that the doctrine should not exist as a general rule,¹⁰⁷ the court determined that the rule should not apply in this situation because "[n]o case has held that a tribe is immune from suit for activities that, instead of promoting tribal self-governance and development, are intended to influence a sovereign

101. *Id.* at *5.

102. *Id.*

103. *Id.* at *4 (citing *C & L Enters., Inc. v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 423 (2001)).

104. *Id.* ("Thus, the Tribe's contributions to political campaigns and employment of legislative lobbyists made outside the statutory framework of the PRA, though quite extensive, are insufficient by themselves to effectively waive the Tribe's immunity from the FPPC's enforcement action.")

105. *Id.*

106. *Id.* at *5.

107. *See supra* notes 78–80 and accompanying text.

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State's electoral and legislative processes."¹⁰⁸ The court noted further that "[no] case suggest[s] that the federal common law of tribal immunity was meant to apply to a suit by the State to enforce its laws regulating all persons who seek to influence the State's political processes."¹⁰⁹ Based on these perceived gaps in Supreme Court jurisprudence, the court chose to identify conduct affecting a sovereign state's electoral processes as a situation in which the doctrine of immunity from suit does not exist.

The court supported its conclusion on two grounds. First, the court cited the Supreme Court's holding in *Mescalero Apache Tribe v. Jones* that off-reservation Indians are, like other citizens, subject to all nondiscriminatory laws of the states.¹¹⁰ Under this doctrine the court reasoned that the Tribe would be subject to the nondiscriminatory PRA because the impact of the regulation reached beyond the reservation and did not relate specifically to tribal self-government.¹¹¹

Second, the court concluded that tribal immunity from suit in this situation would violate rights reserved to the State by the Constitution. Specifically, the court found that recognizing tribal immunity in this situation would "intrude upon the State's exercise of its reserved power under the Tenth Amendment to regulate its electoral and legislative processes and would interfere with the republican form of government guaranteed to the State."¹¹² The court contended that among the powers reserved to states under the Tenth Amendment and the Guarantee Clause was that of controlling the influence of wealthy interests in state elections.¹¹³ This reasoning was supported by reference to *Buckley v. Valeo*,¹¹⁴ in which the Supreme Court upheld federal campaign disclosure laws as an important tool in protecting the political process. The court applied

108. *Agua Caliente*, 2003 WL 733094, at *5. The court attempts to distinguish this case from other cases in which the Supreme Court refused to abrogate tribal immunity by noting that "[p]ertinent decisions recognizing the doctrine have concerned activities affecting tribal self-governance and economic development, not activities affecting the governance and development of another sovereign." *Id.*

109. *Id.*

110. *Id.* (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)).

111. *Id.* at *5-6.

112. *Id.* at *6.

113. *Id.*

114. 424 U.S. 1 (1976).

the same reasoning to the PRA and concluded that the Act “must apply equally to all with no exceptions.”¹¹⁵

Based on this reasoning, the court held that it was “empowered to exercise jurisdiction over the Tribe to decide the important issues raised in this case.”¹¹⁶ In July of 2003, however, the California Supreme Court ordered an appeals court to reconsider the issue of whether tribes are protected by common law immunity.¹¹⁷

B. Fair Political Process Comm’n v. Santa Rosa Community of the Santa Rosa Rancheria¹¹⁸

1. *The facts*

The FPPC also brought a claim in October 2002 against the Santa Rosa Community of the Santa Rosa Rancheria Tribe (hereinafter “Santa Rosa”)¹¹⁹ for violations of the PRA. The claim alleged that the Tribe contributed at least \$125,000 in 1998 and \$35,000 in 2000 to California political candidates and committees.¹²⁰ As in *Agua Caliente*, the FPPC argued that the size of the contribution qualified Santa Rosa as a committee under the PRA and subjected the Tribe to semiannual reporting requirements.¹²¹

Santa Rosa filed a motion to quash “on the ground that [the] court lacks jurisdiction over the Tribe pursuant to the federal common law of tribal immunity from suit.”¹²² The Tribe’s motion was heard by the superior court in early 2003.

115. *Agua Caliente*, 2003 WL 733094, at *7.

116. *Id.*

117. See *supra* note 14; see also Don Thompson, *California Rulings Cut Both Ways in Tribal Election Law Cases*, S.F. CHRON., July 23, 2003, <http://www.sfgate.com/cgi-bin/article.cgi?f=/news/archive/2003/07/23/state2055EDT0220.DTL>.

118. No. 02AS04544, slip op. (Cal. Super. Ct. Mar. 6, 2003), <http://www.fppc.ca.gov/pdf/Santa%20Rosa%20Quash%20Ruling.pdf> (last visited Mar. 11, 2004).

119. The Santa Rosa Tribe’s boundaries encompass approximately 170 acres in the San Joaquin Valley. The Tribe was established in 1934 and has over 200 members. See The Tachi Yokut Tribe: The Santa Rosa Rancheria, <http://www.tachi-yokut.com/rancheria.html> (last visited Mar. 11, 2004).

120. First Amended Complaint of the FPPC ¶¶ 9–10, *Santa Rosa Cmty.* (No. 02AS04544), at <http://www.fppc.ca.gov/pdf/SantaRosaFAC.pdf> (last visited May 26, 2004).

121. *Id.* ¶¶ 13–23.

122. *Santa Rosa Cmty.*, No. 02AS04544, slip op. at 2.

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2. *The case against removing tribal immunity under the PRA*

In March of 2003, a superior court judge ruled that, in contrast with the ruling in *Agua Caliente*, the Santa Rosa Tribe was immune from any suit brought under the Political Reform Act.¹²³ Instead of focusing on whether the State's interest in protecting its political processes outweighs the Tribe's interest in tribal immunity from suit, the court focused exclusively on the doctrine of waiver. Like the court in *Agua Caliente*, the court refused to recognize the Tribe's participation in the State's political processes as an express waiver of tribal immunity.¹²⁴

With respect to congressional waiver, the court reaffirmed the Supreme Court's position in *Kiowa* that any congressional waiver must be explicit.¹²⁵ As a corollary, the court reasoned,

[C]ongressional silence regarding the immunity of Indian tribes from suits to enforce state law requirements for electoral campaign contributions cannot be construed as congressional acknowledgment of the States' right to bring such suits against the tribes in the exercise of the States' powers under the Tenth Amendment and the Guaranty [sic] Clause of the United States Constitution.¹²⁶

The court concluded that tribal immunity from suit is available to tribes even in situations in which rights granted to a state might be minimized, unless Congress *expressly* abrogates the immunity.¹²⁷ According to the court, "Congress . . . may exercise its plenary power over Indian affairs to approve, either by express enactment or by silence, common law tribal immunity from suits by the States . . . even though the immunity may hamper the States' exercise of its reserved powers under the Tenth Amendment."¹²⁸

123. *Id.* at 12.

124. *Id.* at 11.

125. *Id.* at 9.

126. *Id.* at 9-10.

127. *Id.* at 10 ("Congress does not impermissibly intrude upon the States' reserved powers under the Tenth Amendment and Guaranty [sic] Clause when, by silence, it permits the doctrine of common law tribal immunity from suit to bar suits by the States to enforce against tribes state reporting requirements for electoral campaign contributions.")

128. *Id.* at 10-11 (footnote omitted). The court's conclusion is based primarily in the Constitution:

Congress has plenary power to control and define the sovereign activities and interests of Indian tribes under article 1, section 8, clause 3, of the United States

In reaching its conclusion, the court was “not unmindful” of the State’s interest in protecting its political processes.¹²⁹ Rather, the court recognized that California has a fundamental interest in protecting the State’s political processes and that the PRA serves as an effective means of protecting those interests.¹³⁰ In spite of these concessions, however, the court concluded that it must recognize the immunity from suit traditionally granted to tribes.

IV. A STATE’S INTEREST IN ITS ELECTORAL PROCESSES IS INSUFFICIENT TO ABROGATE TRIBAL IMMUNITY FROM SUIT

The court in *Santa Rosa* reached the correct result. Tribal immunity protects tribes from suit under the Political Reform Act. *Agua Caliente* incorrectly focused on a preemption analysis, which is appropriate only when deciding whether a state is authorized to regulate individual activity, and not when deciding whether a state has the right to enforce a regulation against a tribe or its members. Further, the Tenth Amendment and Guarantee Clause of the United States Constitution do not act as an explicit waiver of tribal immunity and, therefore, are not grounds for abrogating immunity. Finally, recognizing tribal immunity from suit does not lead to an undesirable result because recipients of campaign donations must also file disclosure statements that identify donors, including tribal donors.

A. The Court Reached the Wrong Conclusion in Agua Caliente by Incorrectly Relying on a Preemption Analysis to Abrogate Tribal Immunity from Suit

The court in *Agua Caliente* concluded that tribal immunity did not protect the Tribe from suit under the Political Reform Act because no case has applied the doctrine of tribal immunity to instances in which tribal conduct is designed to influence a state’s political processes rather than promoting self-government.¹³¹ This

Constitution. . . . As a result, the States have jurisdiction over tribal activities only as permitted by federal law even when the tribal activities affect state sovereign powers, rights, and interests.

Id. at 10 (citations omitted).

129. *Id.* at 12.

130. *Id.*

131. Fair Political Practices Comm’n v. Agua Caliente Band of Cahuilla Indians, No. 02AS04545, 2003 WL 733094, at *5 (Cal. Super. Ct. Feb. 27, 2003), *aff’d*, Agua Caliente

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reasoning suggests a balancing of interests by the court and a belief that states may properly regulate tribes when tribes are acting to influence a sovereign's political processes. While this assertion may be correct, it incorrectly focuses the question on *regulation* rather than *enforcement*.

The test for determining when states are authorized to regulate tribal conduct on Indian land¹³² is different from the test used to determine when tribal immunity from suit may be abrogated to allow states to enforce their regulations in state court.¹³³ In determining those situations in which states are authorized to regulate tribal conduct on Indian land, the Supreme Court has recognized that tribal sovereignty must "take account of the State's legitimate interests in regulating the affairs of non-Indians."¹³⁴ Courts, therefore, engage in balancing the competing interests of tribes in promoting self-government against state interests in regulating conduct within its borders to determine those situations in which states are entitled to *regulate* non-Indians on reservations. This balancing of interests, however, does not answer the question of whether tribes are immune from suit.

Rather than addressing the question of whether the state has authority to *enforce* tribal violations of the PRA, the court in *Agua Caliente* focused on the issue of whether the state has authority to *regulate* tribal campaign contributions.¹³⁵ Under the Supreme

Band of Cahuilla Indians v. Superior Court, 10 Cal. Rptr. 3d 679 (Ct. App. 2004), available at 2004 WL 389462.

132. See *supra* notes 50–61 and accompanying text.

133. See *supra* notes 62–80 and accompanying text.

134. McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 171 (1973); see also *supra* notes 46–49 and accompanying text.

135. The distinction between the authority to regulate and the ability to enforce regulations through a lawsuit is not merely a distinction without a difference. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, the Supreme Court concluded that Oklahoma was authorized to tax cigarette sales by the Tribe to nonmembers. 498 U.S. 505, 513 (1991). However, in addition to deciding that the State was authorized to regulate these cigarette sales, the Court also concluded that tribal immunity from suit prevented the state from bringing enforcement actions in court to collect the taxes. *Id.* at 509–11. In reaching this conclusion, the Court admits that "[t]here is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy." *Id.* at 514. The Court suggests, however, that the State is not without a remedy. The State could, for example, "collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores." *Id.* (citations omitted). For further examples of the distinction between regulation and enforcement, see *Washington v.*

Court's decision in *Buckley v. Valeo*, which concluded that states have a significant interest in protecting their political processes and ensuring that wealthy contributions do not influence political candidates, it is possible that California has authority to regulate tribal contributions from tribes intended to influence the state's political processes.¹³⁶

But no matter how large the state interest, the question of tribal immunity has traditionally been one of waiver.¹³⁷ While the court in *Agua Caliente* was correct that “[n]o case has held that a tribe is immune from suit for activities that, instead of promoting tribal self-governance and development, are intended to influence a sovereign State’s electoral and legislative processes,”¹³⁸ it is also correct that no court case (prior to *Agua Caliente*) has abrogated tribal immunity on the basis that a state has a significant interest in enforcing its regulations. Rather, as the court in *Santa Rosa* correctly noted, “the issue is resolved by federal case law recognizing tribal immunity from suits arising from particular tribal activities whenever Congress has not expressly abrogated the immunity or the tribe has not expressly waived its immunity from suit with respect to those activities.”¹³⁹

Tribal immunity cannot be abrogated by invoking a compelling governmental interest; it can only be abrogated by express

Confederated Tribes of Colville Reservation, 447 U.S. 134 (1980), and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976).

136. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). While *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), suggests that the question of whether tribes themselves may be regulated depends on whether the activity occurred within or without Indian country, the fact that tribal conduct may have an impact beyond the reservation does not necessarily mean that the state can regulate it if the conduct actually occurred on the reservation. Thus, the question of whether California has the authority to regulate a tribe depends largely on where the tribe’s conduct occurred, not on the place of its impact.

137. See *Fair Political Practices Comm’n v. Santa Rosa Cmty.*, No. 02AS04544, slip op. at 9 (Cal. Super. Ct. Mar. 6, 2003), <http://www.fppc.ca.gov/pdf/Santa%20Rosa%20Quash%20Ruling.pdf> (last visited Mar. 11, 2004). (“Were the preemption analysis to result in a determination authorizing state regulation of tribal contributions, the determination would not resolve the critical issue here: whether a state suit against a tribe to enforce a state electoral campaign regulations [sic], even if validly imposed upon the tribe, would be barred by the federal common law doctrine of tribal immunity.”).

138. *Fair Political Practices Comm’n v. Agua Caliente Band of Cahuilla Indians*, No. 02AS04545, 2003 WL 733094, at *5 (Cal. Super. Ct. Feb. 27, 2003), *aff’d*, *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 10 Cal. Rptr. 3d 679 (Ct. App. 2004), available at 2004 WL 389462.

139. *Santa Rosa Cmty.*, No. 02AS04544, slip op. at 9.

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congressional actions or waived by express tribal actions.¹⁴⁰ While requiring express waiver may serve as an “unjustifiable impediment[] to the State’s achievement of its sovereign interest in the integrity of its electoral processes . . . [,] [a]ny perceived inequity resulting from the application of tribal immunity to bar this action must be accepted.”¹⁴¹ The Supreme Court has been unwilling to provide exceptions to its waiver requirements, choosing instead to leave competing policy concerns in the hands of Congress.¹⁴² Until Congress chooses to abrogate this immunity or until tribes provide express waiver of their immunity, courts should not engage in a balancing of competing interests to determine when tribal immunity from suit may be abrogated.

*B. Neither the Tenth Amendment nor the Guarantee Clause
Constitute an Express Waiver*

The court in *Agua Caliente* also relied on the rights guaranteed to states by the Tenth Amendment and the Guarantee Clause of the Constitution in concluding that tribes are not immune from suit brought under the PRA.¹⁴³ While the Tenth Amendment reserves to a state the power to regulate its legislative processes,¹⁴⁴ and the Guarantee Clause grants to every state the right to a republican form of government,¹⁴⁵ neither, as the court correctly noted in *Santa Rosa*, serves as an explicit waiver of tribal immunity from suit.

The FPPC argued, and the *Agua Caliente* court agreed, that “[w]ere the Tribe immune under federal law from judicial relief for violations of the PRA requirements, the State’s exercise of its

140. *See supra* Part II.B.

141. *Santa Rosa Cmty.*, No. 02AS04544, slip op. at 12; *see also* *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng’g, Inc.*, 476 U.S. 877, 893 (1986) (“The perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interests . . . , much in the same way that the perceived inequity of permitting the United States or [a state] to sue in cases where they could not be sued as defendants because of their sovereign immunity also must be accepted.”).

142. *See* *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998).

143. *Fair Political Practices Comm’n v. Agua Caliente Band of Cahuilla Indians*, No. 02AS04545, 2003 WL 733094, at *6 (Cal. Super. Ct. Feb. 27, 2003), *aff’d*, *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 10 Cal. Rptr. 3d 679 (Ct. App. 2004), *available at* 2004 WL 389462.

144. U.S. CONST. amend. X.

145. U.S. CONST. art. IV, § 4.

reserved power to regulate and preserve the integrity of its electoral . . . processes would be seriously compromised.”¹⁴⁶ Indeed, were immunity available to tribes for violating state campaign disclosure laws, states would lose the right to control completely their electoral processes. If such were the case, tribes would be allowed to make campaign contributions as they saw fit without having to report such contributions. Under the Supreme Court’s *Buckley* analysis, failure to make tribes comply with these disclosure requirements would potentially interfere with a state’s interest to inform its voters and ensure the integrity of its electoral processes.¹⁴⁷

But while an inability to compel compliance with state campaign disclosure requirements might interfere with a state’s compelling interest, that interference does not remove a tribe’s immunity under the Supreme Court’s requirement that removal of immunity must be explicit.¹⁴⁸ No court has identified the Tenth Amendment or the Guarantee Clause as an explicit waiver of tribal immunity. Tribal immunity from suit has its roots in the Constitution, which grants to Congress “plenary power to control and define the sovereign activities and interests of Indian tribes.”¹⁴⁹ Congress has exercised this plenary power to grant to tribes a general immunity from suits by states. Consequently, “[s]tates have jurisdiction over tribal activities *only as permitted* by federal law even when tribal activities affect state sovereign powers, rights, and interest.”¹⁵⁰ While this immunity may conflict with powers vested in states by the Tenth Amendment and the Guarantee Clause, “the Supremacy Clause of the United States Constitution permits Congress to legislate even in areas traditionally regulated by the States as long as it is acting within the powers granted it under the Constitution.”¹⁵¹ Consequently, some of the powers granted to the states by the Constitution may be

146. *Agua Caliente*, 2003 WL 733094, at *5, *7.

147. 424 U.S. 1 (1976).

148. For an example of explicit waiver of tribal immunity by Congress, see Indian Tribal Economic Development and Contracts Encouragement Act of 2000, Pub. L. No. 106-79 (2000), and Tribal Tort Claims and Risk Management Act of 2000, Pub. L. No. 105-277 (2000).

149. See *Fair Political Practices Comm’n v. Santa Rosa Cmty.*, No. 02AS04544, slip op. at 10 (Cal. Super. Ct. Mar. 6, 2003), <http://www.fppc.ca.gov/pdf/Santa%20Rosa%20Quash%20Ruling.pdf> (last visited Mar. 11, 2004) (citing U.S. CONST. art. I, § 8, cl. 3).

150. *Id.* (emphasis added) (citing *Three Affiliated Tribes v. Wold Eng’g*, 476 U.S. 877 (1986), and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)).

151. *Id.* at 11 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).

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diminished by congressional action. It is clear from the Court's recent recognition of tribal immunity that it does not see the Tenth Amendment as providing explicit waiver of tribal immunity in suits between tribes and states.¹⁵²

As a result, neither the Tenth Amendment nor the Guarantee Clause serves as an exception to the general requirements of tribal immunity from suit. Instead, an acknowledgement of tribal immunity in cases brought under the PRA does not "impermissibly intrude upon the States' reserved powers under the Tenth Amendment and Guaranty [sic] Clause."¹⁵³ While neither includes an explicit exception for tribal immunity from a state's reserved powers, this silence cannot serve as "congressional acknowledgment of the States' right to bring such suits against the tribes in the exercise of the States' powers under the Tenth Amendment and the Guaranty [sic] Clause of the United States Constitution."¹⁵⁴ Because of the time and resources which would be required for Congress to explicitly identify every situation in which tribal immunity is applicable, such a requirement for determining whether tribal immunity is available would be unreasonable. Because of these congressional limitations, the Supreme Court's requirement that immunity be abrogated only upon express waiver is a more appropriate standard for determining when states may bring suit against tribes.

C. Immunity Does Not Prevent the Disclosure of Tribal Contributions

While removal of tribal immunity is unfounded when the FPPC is trying to enforce disclosure requirements against Indian tribes, such removal does not destroy the purpose of the Act, which is to provide California voters with a clear picture of a candidate's financial supporters.¹⁵⁵

In addition to requiring that donor committees report contributions made to political candidates, the Act also requires that candidates or other recipients of tribal contributions report the contribution.¹⁵⁶ Under section 84211 of the Act, candidates and

152. *See generally* Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 759 (1998).

153. *Santa Rosa Cmty.*, No. 02AS04544, slip op. at 10.

154. *Id.*

155. CAL. GOV'T CODE § 81001(b) (2003).

156. *Id.* § 84211.

others who receive contributions must report “[t]he total amount of contributions received during the period covered by the campaign statement and the total cumulative amount of contributions received.”¹⁵⁷ In addition to disclosing the amounts of any contribution, the Act requires that the candidate disclose the donor’s name, address, and occupation.¹⁵⁸ The Act makes no explicit exception for donations by Indian tribes.¹⁵⁹

Thus, while the tribe is immune from prosecution to enforce the requirements of the Political Reform Act, disclosure of the extent of tribal influence on political candidates and processes is made available through mandatory disclosure requirements enforceable against candidates. The dual reporting requirements imposed upon both donor and donee achieve the same result, though in a different manner, as if the tribe were not immune from suit and were responsible for complying with the state’s reporting requirements.¹⁶⁰

If the purpose of the PRA is to ensure that voters are not misled in the election process by the hidden interests of a candidate or the invisible supporters of legislation, the source of the disclosure,

157. *Id.* § 84211(a).

158. *Id.* § 84211(f).

159. While the Act includes no specific requirement that tribes disclose the recipient(s) of their donations and while acts by the State to enforce the disclosure requirements would, as this Comment suggests, violate the notions of tribal immunity, the Agua Caliente Tribe has “extended [a] courtes[y] to the State of California and disclosed the recipients of campaign donations for the year 2002.” FPPC & Lobbyist Reports, *at* <http://www.aguacaliente.org/reports.htm> (last visited Mar. 11, 2004). These disclosures were made in compliance with the Act’s requirements and were made on the State’s reporting forms. These disclosures are available on the Tribe’s website. *See id.*

160. This result assumes, of course, that candidates will be truthful in their disclosures. The potential for candidate dishonesty in reporting campaign contributions increases when supporters are not required to report their contributions. One purpose of the dual reporting system is to remove enticements for candidate dishonesty. But as the potential for dishonesty increases, the likelihood of such dishonesty does not also necessarily increase. In deciding whether to be truthful in their reporting of campaign contributions, candidates must weigh any added benefits received from failing to disclose campaign contributors against the potential costs associated with a future revelation of their dishonesty. Because of the potentially high costs associated with a candidate who is thought to have deceived voters, it is likely that this cost-benefit analysis will result in candidates providing full disclosure of their campaign supporters.

Further, while a removal of the requirement that supporters report their campaign donations may increase the likelihood of collusion between candidates and supporters, it should be noted that the dual reporting system allows for collusion between parties as well. Candidates and supporters could decide to mutually ignore the reporting requirements under the dual reporting system as they can when only the candidate is required to report contributions.

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whether tribe or candidate, is irrelevant. That the tribes themselves are not required to provide disclosures does not destroy these purposes; the dual disclosure requirements provide that all financial contributors to a candidate's campaign are disclosed by the candidate.¹⁶¹

With respect to tribal contributions, the real effect of tribal immunity from enforcement of the Political Reform Act is that a snapshot of all tribal contributions will only be available if the tribe chooses to voluntarily comply with the state disclosure requirements. Without this snapshot, voters will be required to look at individual disclosure requirements to determine which candidates and which causes individual tribes support. But because the information is available, albeit in a less manageable form through candidate disclosures, the purposes of the Act are still satisfied.

V. CONCLUSION

Protecting a state's interests in its own political processes by requiring individuals and organizations who donate to political candidates or causes to disclose their donations (rightfully) has been held to be an important governmental interest. The right to regulate these processes is entrusted to the states through the Constitution. This authority to regulate may serve as a limit to traditional notions of tribal sovereignty that the Supreme Court has recognized as inhering in Indian tribes.

But while states may have compelling interests in protecting their political processes, and while those interests may preempt tribal sovereignty and allow states to regulate tribal contributions, those interests do not allow states to enforce the regulations in state court. The doctrine of tribal immunity provides Indian tribes with a general shield against prosecution in state or federal court. This immunity is removed only when it is expressly waived either by Congress or the tribes. As the court in *Santa Rosa* correctly held, neither a state's compelling interests in protecting its political processes nor the Tenth Amendment nor the Guarantee Clause serve as an express waiver of tribal immunity for cases brought under the PRA.¹⁶²

The policies of the Act, however, are not frustrated by recognizing tribal immunity. Because the state requires recipients of

161. CAL. GOV'T CODE § 84211(a)(2003).

162. *See supra* Part III.B.

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campaign contributions to disclose the names of donors and the amounts of any donations made, any influence that tribes may attempt to exert on California's political processes will be disclosed.¹⁶³ Thus a tribe's interests in avoiding suit and the state's interest in protecting its processes are both protected by recognizing tribal immunity under the Political Reform Act.

Cameron A. Reese

163. CAL. GOV'T CODE § 84211(a).