ARTICLES

SOVEREIGN RULES OF THE GAME: REQUIRING CAMPAIGN FINANCE DISCLOSURE IN THE FACE OF TRIBAL SOVEREIGN IMMUNITY

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I. INTRODUCTION

Do states' sovereign interests in electoral integrity trump tribal sovereign interests in immunity from state lawsuits? The answer lies in the delicately balanced relationship between states, tribes, and the federal government. This relationship has been defined and redefined throughout the history of the United States. A new moment of redefinition may be upon us. Tribes have newly accumulated wealth and political power, which have made them a strong force in state and federal elections. This paper examines the history, constitutional law, and common law and statutory doctrines implicated when tribal sovereignty and sovereign immunity clash with state sovereign interests in electoral in-

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tegrity. The paper concludes that a federal legislative solution is the optimal path to set forth a clear policy for tribes and states to follow when a tribe seeks to participate in a state's political processes.

Writing about Indian tribes,[1] money, and politics is a risky endeavor. To date, the debate concerning tribal-state relations, tribal-federal relations, and Indian tribes' political participation has been divisive.[2] The historical mistreatment of American Indian tribes by European settlers and by the early founders of the United States is not easily forgotten, nor should it be. The history, coupled with a legacy of failed federal policies and attempts at cultural obliteration, has divided most commentators into a "for Indians or against them" dichotomy.[3] Anti-gambling groups, cities, and counties campaign against tribal gaming to prevent the adverse impacts of gambling on communities and individuals within them.[4] Tribes and their advocates tout the expansion of tribal gaming as an essential step to tribal economic development and self-sufficiency.[5]

This paper examines the history and current state of affairs concerning tribal political participation. Additionally, this paper suggests legislative action to create a sensible structure in which Indian tribes can responsibly participate in the political process at both a federal and state level. Given the complicated history and present realities of federal Indian policies, the tensions between tribes and state and local governments as tribes exercise their right to build gambling centers under the Indian Gaming Regulatory Act, and the still existing poverty and isolation experienced by many American Indian people, the

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[1] This paper uses the term "American Indian," rather than "Native American," when referring to present-day tribes and tribal members because it appears that this is the primary term Indians use to refer to themselves. ROBERT ODAWI PORTER, SOVEREIGNTY, COLONIALISM AND THE INDIGENOUS NATIONS xxi (2005). When discussing tribes at the time of European contact, this paper will sometimes refer to "indigenous peoples." In an attempt to be respectful to the power of language in the context of colonization, this paper will not use the term "Native American." *See id.*

[2] *See, e.g.*, John LaVelle, *Strengthening Tribal Sovereignty Through Indian Participation in American Politics*, 10 KAN. J.L. & PUB. POL'Y 533, 535 (2001) (describing an "us or them" attitude in the discussion of Indian affairs, even within communities of Indian law scholars and people with indigenous backgrounds); Robert Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 107 (1999); Melissa Tatum, *A Jurisdictional Quandry: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts*, 20 KY. L. J. 123, 158 n.2 (2001-2002).

[3] *See, e.g.*, LaVelle, *supra* note 2, at 535.

[4] STAND UP FOR CALIFORNIA, www.standupca.org (last visited July 23, 2010); CAL. STATE ASS'N OF CNTYS., SURVEY OF TRIBAL GAMING IMPACTS ON COUNTY GOVERNMENTS (2002), *available at* http://www.csac.counties.org/legislation/indian_gaming/fact_sheet2.pdf.

[5] Alan P. Meister et al., *Indian Gaming and Beyond: Tribal Economic Development and Diversification*, 54 S.D. L. REV. 375, 383 (2009).

need for tribal participation in the political process is great.[6] Balanced against this need, however, is the need for a uniform set of rules that governs all campaign donors, not just those that have been historically represented in national and local political processes. This paper explains the legal implications of the balance between federal, state, and tribal interests, and offers suggestions that would draw federal and local tribal campaign spending into the arena of other campaign finance reforms.

In recent years, the national spotlight has been on the influence of money in politics. The Federal Election Commission ("FEC"), the agency charged with enforcing federal campaign finance laws, has recently brought enforcement actions against a number of organizations and major political parties for skirting federal election laws.[7] Candidates have increasingly realized the power of attracting small donor contributions: candidates appear autonomous and not beholden to special interests, but are still financially viable, which attracts larger donors.[8] Public pressure and power, through the use of the initiative process, have led to the passage of "clean money" statutes in several states.[9]

Senators John McCain and Russell Feingold worked together to produce and pass the Bipartisan Campaign Reform Act of 2002 ("BCRA").[10] The BCRA reaches more dramatically into state and local political processes than any federal legislation before it. However, the Supreme Court has recently imposed limitations on the BCRA.[11] Simultaneous with the rise in awareness of the power of money in politics and the interrelatedness of federal, state, and local campaigning, some tribes have made enormous economic strides with the advent of wide-spread tribal gambling monopolies in states such as California,

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[6] Professor Robert Porter disputes the conclusion that political participation is needed in his article, *The Demise of the Ongwehoweh and the Rise of the Native Americans.* Porter, *supra* note 2. For more on the debate between Professor Porter and Professor LaVelle, see LaVelle's article, *Strengthening Tribal Sovereignty*, and Porter's article. LaVelle, *supra* note 2; Porter, *supra* note 2. Professor LaVelle's arguments tend to be more persuasive.

[7] FEC v. Toledano, 317 F.3d 939 (9th Cir. 2002); FEC v. Nat'l Rifle Ass'n of America, 254 F.3d 173 (D.C. Cir. 2001); FEC v. Pub. Citizen, 268 F.3d 1283 (11th Cir. 2001); FEC v. Club for Growth, 432 F. Supp. 2d 87 (D.D.C. 2006).

[8] Richard L. Hasen, *More Supply, More Demand: The Changing Nature of Campaign Financing for Presidential Primary Candidates* (Loyola-LA. Legal Studies Paper No. 2008-26, 2008), *available at* http://ssrn.com/abstract=1267312; *see also* Ellen Weintraub & Jason K. Levine, *Campaign Finance and the 2008 Elections: How Small Change(s) Can Really Add Up*, 24 ST. JOHN'S J. LEGAL COMMENT. 461 (2009).

[9] Citizens Clean Elections Act, ARIZ. REV. STAT. ANN. §§ 16-940-16-961 (2009); Maine Clean Election Act, ME. REV. STAT. ANN. tit. 21-A, §§ 1121-28 (2008).

[10] 2 U.S.C. §§ 431-45 (2006).

[11] Citizens United v. FEC, 130 S.Ct. 876 (2010) (invalidating corporate contribution prohibition); Davis v. FEC, 128 S.Ct. 2759, 2762 (2008) (invalidating the "Millionaires' Amendment," which allowed candidates facing self-financed candidates to accept larger contributions).

Connecticut, Mississippi, and Wisconsin.[12] Armed with resources and a much greater understanding of the political process than their impoverished forbearers, tribal leaders have engaged in the political process eagerly and with great success at both the state and federal level.[13] Huge sums of tribal contributions and expenditures have been reported in election cycles this decade.[14]

Most states and the federal government have assumed that American Indian tribes should be treated just like any other campaign donor, and in most jurisdictions, tribes are considered individual donors rather than corporations, even though their contributions come from treasuries filled with casino proceeds.[15] The issue of applying campaign finance laws to tribes arose in California, and is likely to arise in other states.[16] While treated as individuals for the purpose

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[12] *Indian Tribes Exempt From New Limits on Campaign Gifts*, N.Y. TIMES, Mar. 18, 2003, at A22.

[13] *Id.* This article describes the federal contributions in the 2001-2002 election cycle by the Mississippi Band of Choctaw Indians ($615,000), the Ho-Chunk Nation from Black River Falls, Wisconsin ($512,000), the Agua Caliente Band of Cahuilla Indians ($429,500), and the Mashantucket Pequot Tribal Nation from Foxwoods, Connecticut ($419,895). *Id.* Also, the article quotes the Mashantucket Pequot Chief Operating Officer, John Guevremont, as indicating that the tribe gives to both Democrats and Republicans and that they encourage all fundraising invitations "because that gives us an opportunity to participate and network." *Id.*

[14] The Sacramento Bee indicated that "[f]rom 2000-2008 [California] tribes gave a total of $47 million to state officials, $211 million to propositions, more than $6 million to party political action committees, and another $60.9 million on local races and statewide initiatives." Cheryl Schmidt, *The Oh Decade: Decade Reveals Unintended Results of Law Expanding Tribal Casino Games*, SACRAMENTO BEE, Dec. 24, 2009, at 11A . The Agua Caliente tribe reported total expenditures of $2,210,750 in 2006. *Cal-Access*, CA. SEC'Y STATE, http://www.cal-access.ss.ca.gov/Campaign/Committees (last visited June 16, 2007). This amount paled compared to the tribe's expenditures in 2003-2004, which totaled over $16 million. *Id.* (last visited Nov. 29, 2010). Also, note that Agua Caliente was one of the tribes identified in the Jack Abramoff lobbying scandal—the tribe reportedly paid Abramoff and associates $10 million for lobbying efforts that allegedly included the bribing of public officials and other federal crimes. Todd Milbourn, *Tribe, State Sign Big Deal*, SACRAMENTO BEE, Aug. 9, 2006, at A1.

[15] Most state campaign finance laws define "individual" or "person" as a group of people, as well. *See, e.g.*, ARK. CODE ANN. § 7-6-201(14) (West 2007) ("person" includes "any other organization or group of persons acting in concert"); 10 ILL. COMP. STAT. ANN. 5/9-1.6 (West 2005) ("person" includes "organization[s] or group[s] of persons"); OKLA. STAT. ANN. tit. 21, § 187 (West 2002) ("person" includes "organization[s], committee[s], or club[s], or a group of persons who are voluntarily acting in concert"). At least one state specifically prohibits contributions from tribes and defines a tribe as a public entity, rather than a person, for the purpose of campaign finance law. S.D. CODIFIED LAWS § 12-27-21 (2004) ("No candidate, political committee, or political party may accept any contribution from any state, state agency, political subdivision of the state, foreign government, Indian tribal entity as defined in the Federal Register Vol. 72, No. 55 as of March 22, 2007, federal agency, or the federal government.").

[16] *See* Agua Caliente Band of Cahuilla Indians v. Superior Court, 148 P.3d 1126 (Cal.

of giving and spending, tribes are not the same as individuals for the purpose of enforcement and lawsuits.[17] The question of how a tribal entity fits into the system of state and federal campaign finance laws requires an understanding of a tribe's legal status, its sovereign powers, and its subjugation to federal law. Tribes are now major political participants; and, therefore, states must understand whether they have the power to enforce electoral processes and campaign finance laws against tribes. If states cannot preserve the integrity of their electoral processes by enforcing campaign finance laws against all participants, a federal solution to the problem may be necessary.

As legislators and administrative bodies draft and contemplate campaign finance laws and regulations, they must understand the history of tribal sovereignty in the United States, the principles of state sovereignty at play, and the practical implications of this history and these principles on their ability to enforce laws against Indian tribes. Developments in campaign finance jurisprudence in the last thirty-five years bear on the relationship between federal, state, and tribal governments. States must carefully navigate through these triple sovereign interests when crafting solutions to harmonize the need for campaign finance disclosure laws and the unique position of American Indian tribes in our system of government.

II. SOVEREIGNTY

Tribal and state sovereignty are concepts that seem to have similar historical beginnings, but are quite distinct and in many instances incompatible. Tribal sovereignty, including immunity to suit, is rooted in a tribe's historical existence preceding the formation of the United States.[18] The state's power to govern its electoral process and impose campaign finance regulations similarly has its roots in the colonial era, and is recognized in the United States Constitution.[19] The application of both forms of sovereignty to the question of whether a state may sue a tribe cloaked with sovereign immunity to enforce the state's sovereign interests creates a conundrum. This is the precise issue that twelve judges in California examined in the *Agua Caliente Band of Cahuilla Indians v. Superior Court* and *Fair Political Practices Commission v. Santa Rosa Indian Community of the Santa Rosa Rancheria* cases.[20] Of the twelve, seven decided one way, five another—not an overwhelmingly clear answer from the judiciary

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2006). A companion case, Fair Political Practices Commission v. Santa Rosa Indian Community of the Santa Rosa Rancheria, 20 Cal. Rptr. 3d 292 (2004), was merged with the *Agua Caliente* case for review by the California Supreme Court. The cases rose through two separate Superior Court proceedings.

[17] Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 759 (1998).

[18] GETCHES ET AL., FEDERAL INDIAN LAW 46-52 (5th ed. 2005).

[19] U.S. Const. art I, sec. 4, cl. 1.

[20] *Agua Caliente*, 138 P.3d at 1126.

in California.[21] Since no other state or federal court has addressed this issue, the time is right for creative solutions from both state and federal legislatures. Any solution, though, must start with an examination of the problem's historical origins. Without understanding the roots of both forms of sovereignty and the purposes of immunity from suit, lawmakers cannot make responsible interpretations or modifications. Lawmakers must understand the history and purposes of tribal sovereignty and sovereign immunity before legislating limitations or expansions of these doctrines.

A. *Tribal Sovereignty and Tribal Sovereign Immunity*

1. History of Tribal Sovereignty

As early as the 1400s, Spanish explorers developed notions of tribal sovereignty and rights to land.[22] At the time, religious thinkers like Franciscus de Victoria advocated an emerging Humanist legal philosophy.[23] Victoria was one of the first to write about the Law of Nations and the natural rights of all rational people.[24] His definition of sovereignty for American Indian people was qualified, however, by a pro-European set of presumptions.[25] Victoria believed that the Law of Nations required a set of rights and duties.[26] He thought that if Indian people breached their duties, other nations could disregard Indian rights.[27] Hence, under Victoria's philosophy, the right of American Indians to peaceful and loving co-existence with Spaniards would be forfeited if American Indians attempted to preclude Spaniards from travel, discovery, and profit on the American continent.[28] Victoria advocated for a civilized nation guardianship over American Indians because he believed that American Indians might not understand the duties they owed under the Law of Nations.[29] This protector role continues to influence modern-day federal law.

Next, English colonists influenced the development of tribal sovereignty law.[30] English settlers were mainly concerned with property rights, and believed that they had a right to the newly discovered land. They justified this

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[21] The Superior Court judge in *Agua Caliente* decided in favor of the State. 148 P.3d at 1126. The Superior Court judge in *Santa Rosa Rancheria* decided for the Tribe. 20 Cal. Rptr. 3d at 292. The Appellate Court split 2 to 1 in favor of the State and the California Supreme Court divided 4 to 3 in favor of the State. *Id.*

[22] GETCHES ET AL., *supra* note 18.

[23] *Id.* at 48.

[24] *Id.* at 49-50.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* at 50-51.

[29] *Id.* at 51.

[30] *Id.* at 52

belief with religious ideas and civil rules such as *vacuum domicilium*.[31] Nonetheless, in the 1600s, English and Dutch settlers entered into both purchase agreements and treaties with many tribes in the area that is now New England.[32]

The British government was the dominant European power in the 1600s and much of the 1700s, and set policy concerning American Indian affairs throughout those centuries. However, it delegated the implementation and management of tribal relations within each jurisdiction to the individual colonies.[33] The Proclamation of 1763 asserted British control over all Indian land.[34] The Proclamation was the result of increasingly inconsistent relations between the British colonies and various American Indian tribes, particularly as the tribes created alliances with France.[35] The British issued the Proclamation at a time when the French and Indian Wars threatened the Crown's control over the colonies.[36] The history told on the website of the Saint Regis Mohawk Tribe is illustrative of the ever-changing alliances and tribal groupings that were taking place during this period.[37] The history also illuminates the transitory alliances between different American Indian peoples and ever-changing definitions of what constituted a tribe. Even before tribal groupings were torn apart during the period of removal in the 1830s, allegiances to various European settler groups and inter-tribe conflicts caused movement of people between and

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[31] *Id.* at 57. *Vacuum domicilium* means literally "empty domicile," and, in the context of the British settlers, refers to the belief that if the land is not domesticated, it is vacant and available for settling. Lauren Benton and Benjamin Straumann, *Aquiring Empire by Law: From Roman Doctrine to Early European Practice*, 28 LAW & HIST. REV. 1, 2 (FEB. 2010).

[32] GETCHES ET AL., *supra* note 18, at 57.

[33] JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW 38 (2002); ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 21-22 (2003).

[34] ROYSTER & BLUMM, *supra* note 33, at 38.

[35] *Id.*

[36] *Id.*; ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 28 (2d ed. 2010).

[37] *Tribal History*, SAINT REGIS MOHAWK TRIBE, http://srmt-nsn.gov/his.htm (last visited July 17, 2010). In part, the history explains that a group of Mohawks who now live on a reservation in upstate New York originally settled there in 1754. This was the result of two white brothers who had been captured in Massachusetts, married daughters of upstate New York Kanhnawake chiefs, but who had been living with French missionaries in Canada until they quarreled with other tribal members and decided to return to what is now the Saint Regis. Other refugees of the French and Indian War soon joined them and a group of Mohawk and Iroquois people soon emerged as a cultural entity. Since other New York Iroquois tribes fought on the side of the English in the French and Indian War, the tribe that the Saint Regis group emerged from, the Kahnawake Indians, was denounced and excluded by the Six Nations Confederacy of Iroquois tribes whose homelands were in central New York State. Instead, Kahnawake Indians were allied with a group called the Seven Indian Nations of Canada.

among different tribal groupings.[38]

Having viewed first-hand the potential impact of tribal alliances on warring nations, the soon-to-be American revolutionaries sought to secure the neutrality of American Indian tribes leading up to and during the Revolutionary War.[39] Moreover, American revolutionaries adopted the symbol of American Indians in their political propaganda leading up to the Revolution—the American Indian "came to symbolize a rebellious and uniquely American spirit."[40] Nonetheless, American colonists primarily viewed indigenous people as conquered people, rather than independent sovereigns with equal or superior entitlement to the land.[41]

The aftermath of the Revolutionary War and the beginning of the formation of the United States as a separate nation created an opportunity to shift policy on the acquisition of American Indian lands and the relationship between indigenous peoples and American revolutionaries.[42] The original Articles of Confederation contemplated roles for both federal and state governments in American Indian affairs.[43] However, by the time the Constitution was drafted, the Framers had decided to place the power "[t]o regulate Commerce . . . with the Indian tribes" in the hands of the federal government alone.[44] The first Congress then passed legislation relating to the boundaries of Indian country, regulation of Indian traders, and the requirement of federal approval of any transactions concerning American Indian land.[45]

Until the War of 1812, the U.S. government had entered into treaty negotiations with tribes using a model of international self-determination.[46] In other words, tribes and the U.S. government used arms-length negotiations between governments. These negotiations sometimes involved diplomacy or threats of alliances with others. Their negotiation techniques were similar to those used between other foreign sovereign nations at the time.[47] However, by the conclusion of the War of 1812, the United States increasingly viewed American Indian affairs as a domestic issue.[48] The U.S. government began using federal leg-

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[38] *Id.*

[39] CLINTON ET AL., *supra* note 33, at 22.

[40] ANDERSON ET AL., *supra* note 36 (noting that in 1773 colonists dressed as Mohawks during the Boston Tea Party).

[41] *Id.*

[42] *Id.* at 30.

[43] *Id.* at 30-31.

[44] U.S. CONST. art. I, § 8, cl. 3.

[45] The original statute was passed in 1790, 1 Stat. 137 (1790). The Nonintercourse Acts, as they became known, were re-enacted in 1834. 25 U.S.C. § 177. They are still part of the U.S. Code today. *Id.*

[46] ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM CASES AND MATERIALS 25 (LexisNexis 4th ed. 2003).

[47] CLINTON ET AL., *supra* note 33, at 25.

[48] *Id.*

islation as a means to regulate this perceived domestic, rather than international, concern.[49] In 1817, Congress passed the first federal criminal statute that provided for the exercise of federal jurisdiction over tribal members who committed serious crimes against non-Indians in Indian country.[50] Other legislation followed and, with it, the ushering in of a new phase of federal-tribal relations.

In response to state demands for territory and control over their borders, the federal government embarked on a policy of removing tribes from their ancestral homelands in the mid-1800s.[51] The Cherokee cases emerged out of President Andrew Jackson's tribal policies, the Indian Removal Act of 1830, and—most directly—Georgia's assertion of jurisdiction over Cherokee lands in 1828.[52] In these cases, Chief Justice John Marshall first articulated that tribal governments were not constitutionally considered foreign sovereigns, but nonetheless were entitled to retain some of the powers of independently governed nations.[53] While the Cherokee nation won legal victories in these cases, these victories were short-lived. The Indian Removal Act of 1830, the political philosophy of the Jackson administration, and the federal and state governments' initial refusal to enforce the U.S. Supreme Court decision in *Worcester v. Georgia*, led to the infamous removal of the Cherokee tribe in the dead of winter along the Trail of Tears to Oklahoma.[54] By 1850, most tribes were forced west by fraudulent agreements, political pressure, and sometimes physical coercion.[55] Although in practicality the removal policy of Andrew Jackson's administration forced American Indian tribes to relocate, the federal government entered into "voluntary" agreements with relocating tribes that provided for self-governance on the new lands and tribal sovereignty.[56] These agreements were sometimes fraudulently induced, but the federal government sought to make its policy appear law-abiding and fair.

Westward expansion by Americans of European descent and the Pacific Ocean eventually prohibited the federal government from "voluntarily" removing American Indians to territories beyond the existing United States. Therefore, the policy of removal morphed into a policy of reserving land within

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[49] *Id.* at 25-26.

[50] 18 U.S.C. § 1152 (2006).

[51] CLINTON ET AL., *supra* note 46, at 26.

[52] ANDERSON ET AL., *supra* note 36, at 51-54.

[53] Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832). In Indian law cases, the flexibility of federal common law and the creation of new doctrines by certain prominent jurists has made outcomes difficult to predict along political or ideological lines.

[54] ANDERSON ET AL., *supra* note 36, at 75-77.

[55] *Id.* at 77.

[56] CLINTON ET AL., *supra* note 33, at 26-27.

states in order to give American Indians a permanent home.[57] Throughout the reservation period, the federal government continued to make treaties that assured tribes' self-determination and self-governance, albeit on specified Indian lands.[58] During this period, American Indians were only minimally involved with their respective political communities. The original California Constitution, enacted in 1849, restricted suffrage to white male citizens of the United States and Mexico, but provided that the Legislature could permit Indian suffrage by a two-thirds vote, if it deemed such an extension was "just and proper."[59] California did not extend suffrage to American Indians until the federal Citizenship Act was passed in 1924.[60] However, given the reservation policy, large tribal groups seldom had much contact with the political communities of nearby European-dominated cities and towns.[61]

In the late nineteenth and early twentieth centuries, political relations between the U.S. government and American Indians turned away from a model of independent sovereigns negotiating co-existence, albeit on unequal terms, and into a model of federal colonization and control over Indian affairs.[62] During this period, Congress passed the General Allotment Act of 1887, which aimed to provide individual title over land to Indians and encourage settlement on these lands by both Indians and non-Indians.[63] During this time, Congress also passed legislation aimed at the assimilation of Indians.[64]

In the early part of the twentieth century, Congress recognized that the allotment and assimilation approach was not working.[65] As a result, Congress passed the Indian Reorganization Act of 1934, which focused on rehabilitating Indian reservations' economies and halting the transfer of land that had previously been held for American Indian use.[66] The reorganization period was short-lived, and was immediately followed by a policy of termination, in which the federal government terminated relationships with tribes, relocated individu-

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[57] *Id.* at 28-29; ANDERSON ET AL., *supra* note 36, at 79-80 (including a brief timeline of federal Indian policies).

[58] CLINTON ET AL., *supra* note 46, at 29.

[59] KIMBERLY JOHNSTON-DODDS, EARLY CALIFORNIA LAWS AND POLICIES RELATING TO CALIFORNIA INDIANS 3 (California Research Bureau 2002) (citing CAL. CONST. OF 1850 art. II, § 1).

[60] Id. (citing 43 U.S.C. § 253) (repealed 1976). The Citizenship Act granted U.S. citizenship to all American Indian people. *Id.*

[61] CLINTON ET AL., *supra* note 46, at 28-29.

[62] CLINTON ET AL., *supra* note 46, at 30.

[63] 25 U.S.C. §§ 331-33 (originally enacted as Act of Feb. 8, 1887, ch. 119, 24 Stat. 388), *repealed by* Pub. L. No. 106-462, § 106(a)(1), 114 Stat. 1991, 2007 (2000).

[64] *See* Winnebego Indian Reservation, Neb., ch. 431, 43 Stat. 1114 (1924); Eastern Band of Cherokee Indians, N.C., ch. 253, 43 Stat. 376 (1924); Lac du Flambeau Band of Chippewas, Wis., ch. 158, 43 Stat. 132 (1924); Kan. Indians, Okla., ch. 297, 42 Stat. 1561 (1923).

[65] ANDERSON ET AL., *supra* note 36, at 132-33.

[66] *Id.*

al American Indians to cities, and provided state governments authority over reservation lands.[67]

The 1960s and 1970s saw increased federal legislation concerning American Indians, but most of this legislation was now focused on Indian self-determination.[68] Congress extended federal court jurisdiction to controversies involving tribes.[69] Additionally, Congress passed the Indian Civil Rights Act,[70] the Indian Self-Determination and Education Assistance Act,[71] and the Indian Child Welfare Act[72] during this period. Congress's goal when passing this legislation was to increase the power of tribal jurisdiction over tribal matters and expand the exercise of tribal self-governance.[73] Again, these laws did not define or work toward cooperation between tribal and non-tribal political communities, but instead focused on empowering tribes to take on more independent sovereignty over tribal affairs and on tribal land.[74]

According to most scholars and observers, the last few decades have seen a reemergence of government-to-government relations between tribes and the federal government.[75] Congress's legislation since 1980 has focused on providing advantages to tribes in an effort to stimulate economic development on tribal lands.[76] The Indian Gaming Regulatory Act[77] is the most prominent example of legislation that has led to a massive increase in tribal revenues.[78] Other legislation, including laws to provide federal tax exemptions, mineral rights, and land consolidation, has also fostered economic prosperity.[79]

2. Jurisprudence Concerning Tribal Sovereign Immunity

One hundred and seventy-six years ago, Chief Justice John Marshall wrote

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[67] *See* 18 U.S.C. §§ 1162 & 1360 (1953) (giving California, Minnesota, Nebraska, Oregon and Washington jurisdiction over offenses committed by or against Indians).

[68] ANDERSON ET AL., *supra* note 36, at 152-58.

[69] *Id.*

[70] 25 U.S.C. §§ 1301-03, 1311-12 (1968).

[71] 25 U.S.C. § 450(a) (1975).

[72] 25 U.S.C. §§ 1901-03, 1911-23, 1931-34, 1951-52, 1961-63 (1978).

[73] CLINTON ET AL., *supra* note 33, at 41-44.

[74] *Id.* at 45.

[75] *See* ANDERSON ET AL., *supra* note 36, at 80 (noting that the Self-Determination period started in the 1960s, but that during this period Congress recognized Indian sovereignty and self-determination, while the judiciary often undermined tribal sovereignty through decisions which limited tribal power).

[76] *See* Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (2006).

[77] *Id.*

[78] CLINTON ET AL., *supra* note 33, at 47.

[79] *See* Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-08 (2006); Indian Land Consolidation Act of 1983, 25 U.S.C. §§ 2201-11 (2006); Indian Tribal Government Tax Status Act of 1982, 26 U.S.C. § 7871 (2006); CLINTON ET AL., *supra* note 33, at 46.

that tribes were domestic dependent nations.[80] He suggested that the relationship between Indian tribes and the federal government was analogous to the ward-guardian relationship.[81] However, he did not define the relationship between tribes and states, although he was writing at a time when states were increasingly attempting to assert jurisdiction over tribal lands.[82] Based on Chief Justice Marshall's characterization of tribes as having inherent sovereignty, while at the same time being subject to the dominion of the United States, jurisprudence and legislation through the last 170 years has swung back and forth between focusing on the sovereignty of tribes—over their members and to some extent their land—and the dependence of tribes on the federal government for all benefits and allowances.[83]

The doctrine of tribal sovereign immunity is not like the doctrine of state sovereign immunity.[84] The doctrine of tribal sovereign immunity cannot be waived by implication, and qualified immunity does not attach to tribal officers.[85] Tribal members may be sued in state court, but the tribe may not be sued.[86] In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, the Supreme Court, in a majority opinion by Justice Kennedy, recounted how the doctrine accidentally came about and has been restated in case law for so long that it has become entrenched.[87] Three dissenting justices in *Kiowa* concluded that tribal immunity should not be extended to suits arising from a tribe's off-reservation activities.[88] Justice Stevens, joined by Justice Thomas and Justice Ginsburg,[89] observed that no prior Supreme Court case had "set forth any reasoned explanation for a distinction between the states' power to regulate the off-reservation conduct of Indian tribes and the states' power to adjudicate disputes arising out of such off-reservation conduct."[90] The majority opinion, while recognizing that the doctrine of tribal immunity might be in need of limitation or reform in the commercial enterprise context, opted to wait for Congress to change the rules.[91] Justice Kennedy explained that the federal immunity doctrine had been retained "on the theory that Congress had failed to

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[80] Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

[81] *Id.*; Worcester v. Georgia, 31 U.S. 515, 555 (1832), *abrogated by* Nevada v. Hicks, 533 U.S. 353 (2001).

[82] *See Worcester*, 31 U.S. at 515.

[83] *See* CLINTON ET AL., *supra* note 33, at 26-49.

[84] *See* Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 756 (1998).

[85] Puyallup Tribe, Inc. v. Dep't of Game of Wash., 433 U.S. 165, 171 (1977).

[86] *See Kiowa Tribe*, 523 U.S. at 751.

[87] *Id.* at 756-57.

[88] *Id.* at 760 (Stevens, J., dissenting).

[89] Again demonstrating that in the area of Indian law, political and ideological leanings are frequently not predictive of judicial interpretation of the doctrines.

[90] Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 764 (1998) (Stevens, J., dissenting).

[91] *Id.* at 758.

abrogate it in order to promote economic development and tribal self-sufficiency."[92]

Supreme Court precedent has established that a tribe's clear statement[93] or an unequivocal expression of waiver by Congress[94] can waive tribal sovereign immunity. In *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, a tribe entered into a contract that contained an arbitration clause.[95] When the contract was in dispute and the other party attempted to commence an arbitration action, the tribe sought to invoke its sovereign immunity.[96] The Supreme Court, in an opinion by Justice Ginsburg, decided that since the tribe had drafted large portions of the agreement, stated that the choice of law for the contract was Oklahoma law, and agreed to have disputes resolved by the Construction Industry Arbitration Rules of the American Arbitration Association, the tribe had effectively waived its sovereign immunity to suit in the matter.[97]

In the absence of such an express waiver, however, the Supreme Court has generally permitted the exercise of tribal sovereign immunity, even in situations where a state has a right to regulate the activities of tribal businesses owners.[98] In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, the Supreme Court held that the State of Oklahoma could not maintain actions to collect cigarette taxes against a tribe that owned a convenience store and sold cigarettes to members and non-members of the tribe.[99] While the Court acknowledged the state's right to tax the sale of cigarettes to nontribal members and to enlist the assistance of the tribe in collecting these taxes, the Court pointed the state to Congress to provide an enforcement mechanism in the event that the tribe did not voluntary engage in this collection.[100] While the California Supreme Court in *Agua Caliente* distinguished its case from *Potawatomi* based on core political process concerns present in the campaign finance disclosure context,[101] the distinction is a thin one. Presumably, a state's right to tax is fundamental to its ability to exist and fund projects. Unfortunately, the Supreme Court did not have the opportunity to hear the *Agua Caliente* case, and the harmonization of these two rulings will have to await another case.

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[92] *Id.* at 757.

[93] C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 412 (2001).

[94] CLINTON ET AL., *supra* note 33, at 490.

[95] *C & L Enters.*, 532 U.S. at 415.

[96] *Id.* at 416.

[97] *Id.* at 420.

[98] Okla.Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 514 (1991).

[99] *Id.* at 510.

[100] *Id.* at 512.

[101] Agua Caliente Band of Cahuilla Indians v. Superior Court, 148 P.3d 1126, 1133 (Cal. 2006).

B. *State Sovereignty and Guaranteed Powers*

While judicial opinions and federal statutes largely define the parameters and limits on tribal sovereignty, the U.S. Constitution expressly outlines the parameters of state sovereignty.[102] The Tenth Amendment provides 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."[103] The Eleventh Amendment prohibits suits by citizens against states, unless a state has waived its right to immunity.[104]

The Federalist Papers indicate that the retention of certain powers by the states was critical to the balanced system that we now call federalism.[105] A strong national government was necessary to unite the interests of the various states and to speak as one voice in matters of foreign relations.[106] However, the unique interests of the citizens of each state were to be recognized through the retention of local control over criminal laws, police power, and the electoral process.[107]

As discussed above, the Drafters of the Constitution decided that the federal government should have the ability to negotiate in a uniform manner with American Indian tribes.[108] Individual states, which had been entering into treaties with tribal nations within their borders, were stripped of this power by express provisions of the Constitution.[109]

However, while the Constitution obliterated states' sovereign powers with respect to inter-governmental negotiations, the Constitution preserved states' ability to direct and control their own electoral process, albeit very limited exceptions.[110] Article I, section 4 states, "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."[111] While Congress may change the rules set by the states, courts have interpreted the Elections Clause and the Guarantee Clause[112] as providing states with control over their own election processes.[113]

Even after the Fifteenth Amendment to the U. S. Constitution was ratified, the preference for allowing states to run elections the way they saw fit was so entrenched in American jurisprudence that it took decades of contentious debate for the federal government to step-in and pass legislation to ensure that

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[102] U.S. CONST. amend. XI.

[103] *Id.*

[104] *Id.*

[105] THE FEDERALIST No. 9 (Alexander Hamilton).

[106] *Id.*

[107] *Id.*

[108] *See* U.S. CONST. art. I, § 8, cl. 3.

[109] U.S. CONST., art. I, § 8.

[110] U.S. CONST. art. I, § 4, cl. 1.

[111] *Id.*

[112] U.S. CONST. art. IV, § 4.

[113] Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986).

Southern states provided the franchise to African-American citizens.[114] Congress passed the Voting Rights Act in 1965 only after evidence of a history and pattern of denying African-Americans the right to vote for generations was established.[115] And to this day, in the election law context, the Supreme Court has sought to avoid any unnecessary interference with federalism in the course of allowing federal oversight of state election practices.[116]

III. DEVELOPMENTS IN CAMPAIGN FINANCE DISCLOSURE LAWS

Until recently, the sovereign interests of tribes and states have not converged in the arena of campaign finance laws.[117] There has been little question that states and the federal government have a strong interest in the preservation of the integrity of the electoral process.[118] One constitutionally acceptable way to avoid corruption or the appearance of corruption by campaign contributions has been through disclosure laws requiring that candidates publicly report major funders.[119] Both federal and state legislatures have passed new campaign finance laws—including disclosure requirements—and, in large measure, courts have upheld the laws for the purpose of eliminating corruption and the appearance of corruption of public officials.[120] The BCRA, which aimed to reduce the influence of "soft money" in federal campaigns by limiting political party contributions and spending and by redefining political speech and disclosure

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[114] Voting Rights Act of 1965, 42 U.S.C. §§ 1973-1973bb-1 (2006).

[115] H.R. REP. NO. 89-439(1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 1965 WL 4484; 42 U.S.C.A. § 1973(c) (West 2010).

[116] Growe v. Emison, 507 U.S. 25, 33 (1993) (recognizing that the Constitution leaves reapportionment decisions primarily to the states and establishing that federal courts should defer to redistricting plans crafted by state courts in order to avoid involving themselves with areas of state concern). One notable exception might be Bush v. Gore. 531 U.S. 98 (2000). However, most scholars and judges see that case as unique to the circumstances and not signaling an increased federal oversight of state elections mechanisms. *See, e.g.*, Richard L. Hasen, *Bush v. Gore and the Lawlessness Principle: A Comment on Professor Amar*, 61 FLA. L. REV. 979, 985-86 n. 42 (2009); Akhil Reed Amar, *Bush, Gore, Florida, and the Constitution*, 61 FLA. L. REV. 945, 966 (2009) (indicating that there was really no consensus on the equal protection argument advanced by the Bush campaign and discussed in the per curiam opinion).

[117] *See* Agua Caliente Band of Cahuilla Indians v. Superior Court, 148 P.3d 1126 (Cal. 2006).

[118] Buckley v. Valeo, 424 U.S. 1, 58 (1976).

[119] *Id.* at 60-68; McConnell v. FEC, 540 U.S. 93, 119-120, 196 (2003). In the wake of the Proposition 8 election in California in 2008, some have suggested that disclosure laws should be modified. *See* Scott M. Noveck, Campaign Finance Disclosure and the Legislative Process, 47 HARV. J. ON LEGIS. 75, 75 (2010).

[120] Most recently in *Citizens United v. F.E.C.*, 130 S.Ct. 876 (2010), the Court held that the disclosure and disclaimer requirements of the BCRA were valid exercises of federal power over elections.

requirements, largely withstood a multi-angled federal court challenge.[121] The BCRA also expanded the definition of federal election activity and swept in a fair amount of election spending that previously would have been regulated only by state law.[122] As will be discussed below, the federalization of election activity may signal an avenue for bringing tribes into the election rules, which are being followed by all other participants in the political process.

Starting with *Buckley v. Valeo* and extending to numerous state law decisions,[123] courts have repeatedly upheld disclosure laws for the purpose of ensuring transparency and voter information.[124] Disclosure laws require candidates and major political donors to report contributions and spending, so that the electorate can access information about the source of funding support for candidates.[125] Disclosure is seen as a deterrent to corruption or the appearance thereof by providing agencies and watchdog organizations the tools to track and connect contributions to votes by public officials once they take office.[126] Lower courts have struggled to address the nuances of campaign financing, such as whether campaign contribution limits are too low or whether expenditure limits are acceptable as long as public financing options provide an opportunity for limitless speech. However, historically, few judges have questioned the governmental interests in disclosure laws.[127] The last decade has seen some successful challenges to disclosure laws in lower courts on the basis that indi-

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[121] *See McConnell*, 540 U.S. at 93.

[122] Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1548-50 (2007); Miriam Galston, *Emerging Constitutional Paradigms and Justifications for Campaign Finance Regulation: The Case of 527 Groups*, 95 GEO. L.J. 1181, 1203-07 (2007); Richard L. Hall, *Equalizing Expenditures in Congressional Campaigns: A Proposal*, 6 ELECTION L.J. 145 (2007); Craig A. Defoe, Note, *Regulating Coordinated Communications: How the FEC Rules Restrict Business Communications and Benefit Incumbents*, 40 IND. L. REV. 119 (2007).

[123] *See* Socialist Workers 1974 Cal. Campaign Comm. v. Brown, 125 Cal. Rptr. 915, 920 (Cal. Ct. App. 1975).

[124] Buckley v. Valeo, 424 U.S. 1, 68-82 (1976); FEC v. Toledano, 317 F.3d 939 (9th Cir. 2002); Citizens for Responsible Gov't. v. Davidson, 236 F.3d 1174 (10th Cir. 2000); Colorado Right to Life Comm., Inc. v. Davidson, 395 F. Supp. 2d 1001, 1002 (D. Colo. 2005); Nat'l Fed'n of Republican Assemblies v. United States, 218 F. Supp. 2d 1300 (S.D. Ala. 2002); Herschaft v. N.Y.C. Campaign Fin. Bd., 139 F. Supp. 2d 282 (E.D.N.Y. 2001); Chamber of Commerce v. Moore, 191 F. Supp. 2d 747 (S.D. Miss. 2000); Frank v. City of Akron, 95 F. Supp. 2d 706 (N.D. Ohio 1999).

[125] *See Buckley*, 424 U.S. at 61.

[126] *Id.* at 66-68.

[127] *See* Chamber of Commerce v. Moore, 288 F.3d 187, 191 (5th Cir. 2002); *In re* Lance, 106 N.Y.S. 211 (1907). There are a few noteworthy exceptions, but even where disclosure statutes were struck down, it was not because of a lack of state interest in disclosure. *See, e.g.*, Buettell v. Walker, 319 N.E.2d 502 (Ill. 1974) (finding that an Executive Order compelling disclosure was beyond executive power under Illinois Constitution); State *ex rel.* Pub. Disclosure Comm'n v. Rains, 555 P.2d 1368 (Wash. 1976) (finding a disclosure statute

viduals have a right to anonymity in political speech; but, generally, most courts still view disclosure rules as an important and narrowly drawn tool in the campaign finance regulation arena.[128]

In the limited circumstances where disclosure requirements have been unenforceable, the plaintiff challenging the law established a protected right to anonymous speech.[129] Two cases, *Buckley* and *McIntyre v. Ohio Elections Commission,* send mixed messages with respect to compelled disclosure of identity in political speech.[130] *Buckley* allows for compelled disclosure in the context of political speech;[131] *McIntyre* states that anonymous political speech is guaranteed by the First Amendment.[132] A third case, *Brown v. Socialist Workers 1974 Campaign Committee*, articulates a well-settled exception to disclosure rules for members of politically unpopular groups that might be targeted for harassment, if they cannot remain anonymous in their association.[133] Questions remain about the reach of the *Socialist Workers* exception to the general rule of public disclosure of political donors and participants. To date, the *McIntyre* rule of anonymous political speech has not been harmonized with the *Buckley* rule of disclosure.[134] Tribes have not argued that they fall within the *McIntyre* or *Socialist Workers* exceptions to disclosure laws; instead, they have relied on arguments of sovereign immunity. Nonetheless, the underlying rationale for campaign finance disclosure laws and the exceptions to the laws are relevant to balancing the interest of a state against a tribe's interest in avoiding disclosure enforcement.

Buckley set forth three governmental interests for requiring political participants to disclose their spending on political campaigns: (1) anti-corruption; (2) information; and, (3) enforcement.[135] First, required disclosure deters corruption in that it enables the public to track contributors and spenders and to link them to candidates or officials who might act in ways to benefit certain individuals or groups.[136] Second, required disclosure provides information that is helpful to voters in that it demonstrates which individuals or groups support

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unconstitutional due to vagueness); Elections Bd. v. Wis. Mfrs. & Commerce, 597 N.W.2d 721 (Wis. 1999) (finding a disclosure regulation unconstitutional for due process violations).

[128] Justice Kennedy, writing for the Court in *Citizens United*, only garnered a majority in Part IV of his opinion, which upheld the BCRA's disclosure and disclaimer provision. Citizens United v. FEC, 130 S.Ct. 876, 914-15 (2010).

[129] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

[130] Buckley v. Valeo, 424 U.S. 1, 60-68 (1976); *McIntyre*, 514 U.S. at 334.

[131] *Buckley*, 424 U.S. at 60-68.

[132] *McIntyre*, 514 U.S. at 343.

[133] Brown v. Socialist Workers 1974 Campaign Comm., 459 U.S. 87, 91-99 (1982).

[134] *McIntyre*, 514 U.S. at 334.

[135] DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, ELECTION LAW: CASES AND MATERIALS 989 (3d ed. 2004).

[136] *Id.*

candidates.[137] In other words, contributions and spending by particular groups can become shorthand for political philosophy or ideology. Third, required disclosure facilitates enforcement "of other campaign finance laws."[138] Without disclosure, determining which candidates have accepted contributions in excess of federal and state limits would be a difficult undertaking.

The analytical challenge for disclosure limits is not that they restrict campaign activities or directly limit speech by placing a cap on the amount of money that can be spent on a political message. Rather, the Supreme Court in *Buckley* explained that the concern with compelled disclosure of campaign related spending and communication relates to the First Amendment right to privacy of association and belief.[139] The Court explained:

> Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny. We also have insisted that there be a "relevant correlation" or "substantial relation" between the governmental interest and the information required to be disclosed. This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure.[140]

While identifying this form of strict scrutiny as the appropriate standard to employ, the *Buckley* Court acknowledged that under this articulation of the strict scrutiny test, some governmental interests of the kind that relate to the "free functioning of our national institutions" could outweigh even substantial burdens on the exercise of the First Amendment by individuals.[141] Applying this test to the disclosure requirements contained in the Federal Election Cam-

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[137] *Id.*

[138] *Id.*

[139] Buckley v. Valeo, 424 U.S. 1, 58 (1976).

[140] *Id.* at 64-65

[141] *Id.* at 66 (citing Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 97 (1961)). The *Buckley* decision covered a wide-range of rulings on campaign finance reform using this basic rubric, and ultimately established a formula where expenditure limitations are subject to the strictest form of constitutional scrutiny and contribution limits receive heightened, but not insurmountable scrutiny. In the Supreme Court's most recent review of *Buckley*, a plurality of Justices in *Randall v. Sorrell*, 548 U.S. 230 (2006), concluded that Vermont's campaign expenditure limits were unconstitutional and that its contribution limits, while not an outright violation of the rules announced in *Buckley*, were too low to permit effective election speech. Most notable about *Randall* was the fact that for different reasons, three Justices (Thomas, Stevens, and Scalia) dissented by stating that they would overrule *Buckley*. Two other Justices did not find the question of whether to overrule *Buckley* to be squarely presented, but presumably would overrule certain portions of the opinion if it were. Additionally, two other Justices appeared to read the prohibition on expenditure limitations as not absolute. While *Randall* does not address disclosure requirements, it does breathe insight into the confused area of campaign finance law.

paign Act ("FECA"), the *Buckley* Court concluded that the informational, anti-corruption, and enforcement interests were all substantial government interests, and that—in most applications—the requirement to disclose political contributions to candidates was the least restrictive means of "curbing the evils of campaign ignorance and corruption that Congress found to exist."[142]

The challengers of the FECA in *Buckley* argued that the disclosure requirements were overly broad as applied to minor parties and their candidates.[143] They asserted that supporters of minor parties would be afraid to donate if they were required to disclose their allegiance to a politically less popular movement.[144] They also argued and the Court acknowledged that there was a reduced likelihood that minor party candidates would be in a position to succumb to *quid pro quo* corruption. For these reasons, the challengers suggested that disclosure requirements should not be applied to minor parties and their candidates in the same manner as major parties.[145] The *Buckley* court acknowledged that there was a more limited chance of *quid pro quo* corruption in contributions to minor party candidates who were unlikely to win office.[146] Further, the court acknowledged that minor party candidates were unlikely to amass the same level of resources to trigger anti-corruption and enforcement concerns.[147] Nonetheless, the *Buckley* court concluded that the informational interest was sufficient to have uniform rules for everyone who participates in the campaign process.[148]

Decided almost twenty years later, *McIntyre* held that anonymous political speech was protected by the First Amendment.[149] Justice Stevens, writing for the majority, framed the *McIntyre* issue as "whether and to what extent the First Amendment's protection of anonymity encompasses documents intended to influence the electoral process."[150] In the case, a woman was fined under an Ohio statute for distributing anonymous leaflets opposing a school tax levy.[151] The *McIntyre* court found that the statute was a content-based restriction aimed at "core political speech."[152] Accordingly, the Court applied exacting scrutiny to the law.[153] In support of its case, Ohio articulated that its interests in preventing fraud and libel and in providing voters with relevant information

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[142] *Buckley*, 424 U.S. at 68.

[143] Buckley v. Valeo, 424 U.S. 1, 68 (1976).

[144] *Id.* at 71.

[145] *Id.*

[146] *Id.* at 70.

[147] *Id.* at 70.

[148] *Id.* at 71.

[149] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

[150] *Id.* at 344.

[151] *Id.* at 334.

[152] *Id.* at 380.

[153] *Id.*

were compelling interests and furthered by the law.[154]

In a seeming departure from *Buckley*, the *McIntyre* court held that "Ohio's informational interest is plainly insufficient to support the constitutionality of its disclosure requirement."[155] The court further found that although the interest in preventing fraud and libel was compelling, the statute was too broad to pass constitutional muster on that basis.[156] Responding to Ohio's attempt to rely on the holding relating to disclosure requirements in *Buckley*, the *McIntyre* court observed that the cases were distinguishable in that *Buckley* focused on mandatory disclosure of campaign-related expenses, while *McIntyre* addressed the prohibition of anonymous campaign literature.[157] Of course, this distinction rings hollow when taken together with *Buckley*'s pronouncement that campaign expenditures equate to political speech. Presumably, the requirement that campaign spending be disclosed is also a prohibition on anonymous campaign speech. Many cases following *Buckley* have interpreted the message of *Buckley* in this manner both with respect to campaign spending on candidates and campaign spending on ballot measures of the kind that the political speaker in *McIntyre* sought to offer her opinion about, although some have seen a distinction between speech in the form of spending and compelled personal disclosures.[158]

The *McIntyre* Court also observed that *Buckley* approved of the FECA disclosure requirements as a result of a federal interest in avoiding the appearance of corruption; an interest not articulated by the State of Ohio in *McIntyre*.[159] After *McIntyre*, the law concerning the validity of *Buckley*-approved enforcement and voter information interests was left in doubt. Cases made their way through the lower courts challenging disclosure requirements that were not supported by anti-corruption interests.[160]

McConnell v. FEC, a multi-angled challenge to the BCRA, did not shine much light on the tension between *Buckley* and *McIntyre*.[161] What *McConnell* did say about disclosure suggests that the Supreme Court continues to recognize both the strong informational interests of the voting public and the enforcement interests of the government in being able to track political contribu-

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[154] *Id.* at 335.

[155] *Id.* At 349.

[156] *Id.* at 350.

[157] *Id.* at 353.

[158] Am. Constitutional Law Found., Inc. v. Meyer, 120 F.3d 1092, 1102 (10th Cir. 1997), *aff'd sub nom.* Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182 (1999) (holding that name badges and compelled disclosures by petition circulators were unconstitutional under an analysis that invoked both *Buckley* and *McIntyre*).

[159] *McIntyre*, 514 U.S. at 354.

[160] Citizens for Responsible Gov't. v. Davidson, 236 F.3d 1174 (10th Cir. 2000); Perry v. Bartlett, 231 F.3d 155 (4th Cir. 2000); Vt. Right to Life Comm., Inc. v. Sorrell, 19 F. Supp. 2d 204 (D. Vt. 1998).

[161] McConnell v. FEC, 540 U.S. 93 (2003).

tions and spending.[162] In *McConnell,* all of the Justices—except Justice Thomas—joined in an interpretation of *Buckley* that upheld a BCRA requirement, which mandated the disclosure of contributions and expenditures made in support of an entire range of electioneering communications, if those funds exceeded $10,000.[163] In doing so, the *McConnell* Court reasserted that the state's interests in "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions" were sufficient to support the limited burden on speech that after-the-fact disclosure to a governmental agency imposed.[164]

The most detailed mention of the *McIntyre* case in the *McConnell* decision appears in Justice Thomas's dissent concerning the validity of the BCRA's disclosure requirements.[165] Justice Thomas contended that the only fair reading of *McIntyre* is that *McIntyre* overturned *Buckley* "to the extent that *Buckley* upheld a disclosure requirement solely based on the governmental interest in providing information to the voters."[166] While none of the other Justices who decided the *McConnell* case in 2003 subscribe to this interpretation of the *McIntyre–Buckley* disclosure divide, there are four new Justices on the Supreme Court since *McConnell* was decided. However, even if some of them share Justice Thomas's conviction that no burden on anonymous political speech can be outweighed by a public interest in disclosure, it would be unlikely that all four would join Justice Thomas to establish majority support for this reading of *McIntyre-Buckley.*

Scholars have questioned whether *McConnell* may have *sub silentio* overruled *McIntyre* on the question of whether an informational interest is sufficient to justify compelled disclosure of spending on election-related activity.[167] They have noted that the decision left open several questions relating to the scope of disclosure requirements.[168] Lower courts have also wrestled with the implications of the *McConnell* decision for state disclosure laws.[169] Most, like the Seventh Circuit Court of Appeals in *Majors v. Abell,* have concluded that

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[162] *Id.* at 195.

[163] *Id.* at 104.

[164] *Id.* at 196.

[165] *Id.* at 275 (Thomas, J., dissenting in part).

[166] *Id.* at 276.

[167] LOWENSTEIN & HASEN, *supra* note 135, at 1022 n.2.

[168] Richard L. Hasen, *The Surprisingly Easy Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy,* 3 ELECTION L.J. 251, 251 (2004) (indicating that the constitutionality of disclosure rules remains unclear in three areas: first, whether government may require disclosure in face-to-face communications—*McIntyre* and *Buckley* would suggest no; second, whether government may compel disclosure of small expenditures; and, third, whether the government may compel disclosure of contributions and expenditures relating to ballot measure campaigns).

[169] Majors v. Abell, 361 F.3d 349 (7th Cir. 2004).

voter information and collection of data for enforcement are sufficiently important governmental interests to warrant the burden associated with compelled disclosure of campaign spending.[170]

California, like many other states, has enacted disclosure requirements that parallel those instituted by federal law both in the FECA and later in the BCRA.[171] In California, the Government Code sets forth its rationale for its disclosure laws as follows: "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."[172] Here, California specifically identifies at least two of the interests approved of by the Court in *McConnell*; namely, the informational interest and the enforcement interest.[173] These interests should apply equally to all participants in the political process. Nothing in the unique relationship between American Indian tribes and states suggests that information about tribal money supporting state candidates and the ability to enforce campaign finance laws against all who contribute to a state's political process should be regulated differently than other political donors.

IV. THE INTERSECTION OF TRIBAL, FEDERAL, AND STATE SOVEREIGNTY WITH CAMPAIGN FINANCE LAW

From the early history of the nation, the interactions of states and tribes have been filtered through federal policies. Shifting notions of tribes as sovereigns and dependents that date back to pre-colonial times have informed these federal policies. Today's tension between a state's control of electoral politics and a tribe's ability to assert sovereign immunity is deeply rooted in the historical realities of three sources of power attempting to simultaneously govern and interact with one another. Where the area which a state seeks to regulate relates to its core function, the independence of a tribal action is most difficult to accept. The integrity of a state's election process is one such core function.

A. *The California Example*

As discussed above, *Agua Caliente* featured a conflict between a large southern California tribe and the Fair Political Practices Commission of the State of

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[170] *Id.* at 354 (although the case does it with considerable back and forth debate and a dissent by Judge Easterbrook); Cal. Pro-Life Council, Inc., v. Getman, 328 F.3d 1088, 1107 (9th Cir. 2003); Voters Educ. Comm. v. Wash. State Pub. Disclosure Comm'n, 166 P.3d 1174 (Wash. 2007); *see also* Elizabeth Garrett & Daniel Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295, 301-02 (2005); *cf.* ACLU of Nev. v. Heller, 378 F.3d 979 (9th Cir. 2004) (holding that *McIntryre* required invalidation of a Nevada disclosure statute).

[171] CAL. ELEC. CODE § 81002(a) (West 2005).

[172] *Id.*

[173] McConnell v. FEC, 540 U.S. 93 (2003).

California.[174] Understanding this dilemma in California is important to understanding the tension between various levels of government and tribal interests. All tribes in California, including the Agua Caliente Band of Cahuilla Indians in Palm Springs, must negotiate with the Governor of California and gain approval of the California Legislature to operate gambling casinos with "Class III" gaming.[175] Under federal law, once a compact is reached with a state, the tribe is permitted to engage in Class III gaming. Class III games include highly profitable slot machines and other games of chance.[176]

The Agua Caliente Tribe reached an amended compact with Governor Arnold Schwarzenegger in August 2006, which would have brought at least $600 million to the tribe and about $80 million to California over a twenty-three year period.[177] The legislature, however, rejected this compact.[178] Without ratification, the tribe could not break ground on the expansion of its Palm Springs gambling empire.[179] As the State Assembly and Senate were contemplating the bill seeking approval of Agua Caliente's compact, the third branch of government was also pondering the implications of the tribe's vast financial resources and its sovereign powers.

In 2006, the California Supreme Court ruled on the *Agua Caliente* case.[180] The tribe is registered as a major donor and as an Independent Expenditure Committee with the California Secretary of State.[181] Yet, the Agua Caliente Tribe and others[182] maintained throughout litigation that Indian tribes are not subject to enforcement actions that would require them to disclose the recipients or amounts of their campaign contributions or expenditures.[183] They ar-

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[174] Agua Caliente Band of Cahuilla Indians v. Superior Court, 148 P.3d 1126, 1129 (Cal. 2006).

[175] *See* Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 715-16 (9th Cir. 2003). Class I, II, and III gambling devices are defined in the Indian Gaming Regulatory Act. *Id.* Class III gaming is allowed on Indian lands only if three conditions are met: (1) the tribe and the National Indian Gaming Commission approve; (2) gaming is allowed in the state; and, (3) a tribal-state compact exists. *Id.*

[176] *Id.*

[177] Milbourn, *supra* note 14, at A1.

[178] AB 2399 (Garcia) introduced August 15, 2006, Died in Conference Nov. 30, 2006, http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_23512400/ab_2399_bill_20061130_status.html (last visited Nov. 30, 2010).

[179] CAL. CONST. art. IV, § 19(f).

[180] Agua Caliente Band of Cahuilla Indians v. Superior Court, 148 P.3d 1126 (Cal. 2006). The Real Party in Interest on behalf of the State of California in that case was the Fair Political Practices Commission, a state agency that sued the Agua Caliente tribe to enforce campaign finance disclosure laws.

[181] CA. SEC'Y STATE, *supra* note 14.

[182] Brief for Blue Lake Rancheria & Mainstay Bus. Solutions as Amici Curiae Supporting Petitioner, Agua Caliente Band of Cahuilla Indians v. Superior Court, 148 P.3d 1126 (Cal. 2006) (No. S123832), 2005 WL 2236910 *2.

[183] Agua Caliente Opening Brief, 2004 WL 2823274 *2, *19-21 (Sept. 23, 2004).

gued that they may voluntarily report to the Secretary of State consistent with campaign finance laws, but that they may not be compelled to provide information, nor can they be penalized for failing to report accurately.[184]

The California Supreme Court decided that the Fair Political Practices Commission may enforce its disclosure regulations against the Agua Caliente Tribe through a lawsuit in state court.[185] The majority relied on the Tenth Amendment and the Guarantee Clause of the U.S. Constitution to reach this conclusion. As the three dissenting justices pointed out, these constitutional provisions have not previously been relied on to create an exception to the long-standing federal common law rule of tribal sovereign immunity from suit.[186] The four justice majority of the California Supreme Court, closely following the reasoning of two justices from the Third District Court of Appeal, consciously diverged from existing precedent and placed fundamental policy concerns above traditional legal analysis.[187] Black letter law in this area to date suggests that tribal sovereign immunity from suit is broadly construed in the absence of express consent by the tribe subject to suit.[188] The tribe filed a motion for reconsideration of the case with the California Supreme Court; however, the court denied the motion.[189]

In *Agua Caliente*, the judges were divided on the issue of whether tribal sovereign immunity should apply to enforcement actions for violations of state election laws. The case turned on the unique intersection of federal, state, and tribal sovereignty and supremacy. In recent years, the previously unremarkable balance of powers between these three units of government has been highlighted by the increased economic powers of gaming American Indian tribes.[190] Tribes have used this economic power to engage in the political process seemingly without constraint.[191] Simultaneously, federal legislation relating to elec-

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[184] *See id.*

[185] *Agua Caliente*, 148 P.3d at 1126.

[186] Agua Caliente Band of Cahuilla Indians v. Superior Court, 148 P.3d 1126, 1141 (Cal. 2006) (Moreno, J., dissenting) ("The United States Supreme Court has thus far rejected all attempts to limit Indian lawsuit immunity that have not originated with Congress.").

[187] *See* Agua Caliente Band of Cahuilla Indians v. Superior Court, 10 Cal. Rptr. 3d 679 (2004). This means that six jurists who reviewed the case adopted the approach favoring the state political process concerns and five thought that traditional doctrines of tribal sovereign immunity and limitations on a state's power over Indian tribes prevented the enforcement of disclosure laws. The close count demonstrates the uncertainty in this area of law.

[188] 42 C.J.S *Indians* § 19 (2007).

[189] Agua Caliente Band of Cahuilla Indians' Petition for Rehearing and Request for Stay of Remittitur, Agua Caliente Band of Cahuilla Indians v. Superior Court, 148 P.3d 1126 (2007) (No. S123832), 2007 WL 460018. The tribe initially sought an extension of time to file a petition for certiorari to the Supreme Court, but then elected not to file a petition. Therefore, the California Supreme Court decision is the last word on the subject, for now.

[190] Meister et al., *supra* note 5.

[191] *Id.*

tion law has increased. The BCRA arguably extended the reach of federal election law into the purview of what had previously been left to state regulation. With the balance of power in election law teetering between federal and state regulators, and the balance of power in Indian law uncertain in terms of state and tribal sovereignty concerns, the question of whether a state can enforce its campaign regulations against tribes is not easy to answer. As discussed more fully below, the federal system is generally and historically the jurisdiction for tribal regulation.

B. *Federal Regulation of Federal Tribes*

Congress can regulate tribes and tribal activities.[192] While federal campaign finance laws, such as the BCRA, apply to Indian tribes seeking to affect the outcome of federal elections, these laws do not apply to campaign giving specifically directed at state elections, including candidate elections and ballot measure committees. Congress could completely regulate tribal campaign giving under its plenary power contained in the Commerce Clause, but to date, it has chosen not to.

As a result of federal regulatory action and inaction by Congress, federal law currently treats tribes as "individuals" and requires disclosure of tribal spending in the same manner as any other individual player in the federal election arena.[193] Congress has never directed how Indians should be treated with respect to campaign finance laws. Instead, the FEC defines the rights and responsibilities of tribal governments to comply with federal election laws through regulations and advisory opinions.[194] The root of this congressional silence may well be that tribes from certain regions have spent enormous amounts of money in recent years.[195] Given how many states now have wealthy tribes eager to participate in the political process by spending generously in federal and state

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[192] U.S. CONST. art. I, § 8.

[193] 2 U.S.C.A. § 431(11) (West 2006); 11 C.F.R. § 100.10 (2006).

[194] 11 CFR § 100.10 (2006); FEC Advisory Opinions 1993-12, 1999-32, 2000-05, 2005-01.

[195] W. DALE MASON, INDIAN GAMING: TRIBAL SOVEREIGNTY AND AMERICAN POLITICS 232-36 (2000); David Wilkins, *An Inquiry Into Indigenous Political Participation: Implications for Tribal Sovereignty*, 9 KAN. J.L. & PUB. POL'Y 732, 732-33 (1999-2000); Bob Egelko, *State's Top Court to Rule on Disclosure of Tribal Donations*, S.F. CHRON., June 24, 2004, at B3; Phillip Matier & Andrew Ross, *State Indian Tribes Cover Their Political Bets with Cash*, S.F. CHRON., Jan. 8, 2003, at A17; Josh Richman, *Two Gaming Measures on Ballot, But One Is DOA*, ALAMEDA TIMES-STAR, Oct. 19, 2004, *available at* 2004 WLNR 20578606; Benjamin Spillman, *Battin Affirms Support of Easing Restrictions on Indian Gambling*, DESERT SUN, Mar. 25, 2004, at 4B; *Indian Gaming: Long-Term Contribution Trends*, CENTER FOR RESPONSIVE POL., http://opensecrets.org/industries/indus.asp?Ind=G6550 (last visited Aug. 22, 2010) (website tracks federal contributions and documents an increase in campaign contributions by Indian Casinos and individuals to federal candidates from over $2 million in 1996 to over $7.5 million in 2006).

campaigns, the incentive for Congress to define tribes as political organizations or regulate their giving in any express manner is not great.

An interesting comparison can be drawn between the regulation of tribes within the federal campaign finance laws and the regulation of foreign sovereigns. Federal law treats sovereign nations as outside the scope of political community.[196] In fact, federal law prohibits direct and indirect contributions and expenditures of foreign money to American political campaigns at the federal, state, and local level.[197] The prohibition applies to contributions, expenditures, and any other thing of value made by a foreign national or solicited from a foreign national to be used in connection with an election.[198] Under the statute, "foreign national" includes foreign governments, corporations, and individuals.[199] While the early history of tribal sovereignty suggests that tribes were viewed as foreign nations capable of entering treaties, abiding by international government-to-government rules of engagement, and having exclusive control over their own population, federal law recognizes only the last of these indicia of sovereignty today. The differential treatment of tribes and foreign nations with respect to federal election laws is one example of the distinction between these two types of sovereignty.

A narrow exception to the prohibition on foreign involvement in the United States Election process exists through a regulatory interpretation. The FEC has interpreted section 441e to prohibit foreign corporations from forming political action committees ("PACs"). However, that same regulation permits certain domestic subsidiaries of foreign corporations to form PACs and participate in the political process in the same manner as any other American corporation.[200] The fact that tribal casinos operate essentially in the same manner as a foreign corporation suggests that if tribal entities were truly sovereign, the same rules of political participation should apply to tribal casinos. Perhaps, tribes could form domestic subsidiaries to create a mechanism for participation on a similar playing field as other corporations.

The three dissenting Justices in the *Kiowa* case suggested that tribal enterprises should be treated as corporations in situations where they act as corporations.[201] In the majority opinion, Justice Kennedy expressed agreement with this position as a matter of policy, but concluded that congressional action should expressly mandate this treatment.[202] Congress has the power to require

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196 2 U.S.C. § 441e (2006).

197 *Id.*

198 *Id.*

199 *Id.*

200 Jeffrey K. Powell, *Prohibitions on Campaign Contributions from Foreign Sources: Questioning Their Justification in a Global Interdependent Economy*, 17 U. PA. J. INT'L ECON. L. 957, 965 (1996).

201 Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 756 (1998) (Stevens, J., dissenting).

202 *Id.* at 757-58.

tribal corporations to form PACs in the same manner as other corporations for the purpose of spending and reporting election related activity.[203]

C. *Tribal-State Relations and Regulation in the State System*

The Constitution says little concerning the relationship between tribes and the federal government, and is silent on the relationship between tribes and states. The Tenth and Eleventh Amendments help to define states' sovereignty and relationship with the federal government.[204] In fact, the argument that the Fair Political Practices Commission ("FPPC") advanced in its enforcement cases against the Agua Caliente and Santa Rosa Rancheria tribes was that the Tenth Amendment and the Guarantee Clause ensure that no federal common law principle can override the power of a state to control its political process.[205] The two trial court judges who heard the companion cases, which were ultimately consolidated and heard by the Third District Court of Appeal as *Agua Caliente*, came to opposite conclusions on the FPPC's argument against the application of sovereign immunity.

The Third District Court of Appeal then heard the *Agua Caliente* case and split 2-1. The majority concluded that a state's sovereign right to control its electoral process could not yield to tribal sovereign immunity from civil enforcement actions.[206] The dissenting justice reached the opposite conclusion.[207] The California Supreme Court followed the majority in the Court of Appeal's decision and affirmed the FPPC's ability to bring an action.[208] With such a split in the interpretations of the various judges who reviewed the case, the tribe understandably opted to forego a petition for certiorari to the U.S. Supreme Court.[209] The history of this case suggests that the status of the relationship of state sovereigns and tribal sovereigns residing in the same political community is anything but clear. Learned legal minds differ on the assessment of how

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[203] A recent case indicating that corporations have political speech rights which cannot be completely silenced may have implications for both tribal and non-tribal corporations. Citizens United v. FEC, 130 S.Ct. 876, 879 (2010). Although *Citizens United* did say that corporations cannot be banned from contributing, it did not remove the ability of Congress and of state legislatures to regulate the giving of corporate entities or impose disclosure and disclaimer requirements. *Id.* at 914-15.

[204] U.S. Const. amends. X-XI.

[205] Real Party in Interest's Opposition Brief on the Merits at 15, Agua Caliente Band of Cahuilla Indians v. Superior Court, 148 P.3d 1126 (Cal. 2006) (No. S123832), 2005 WL 760047.

[206] Agua Caliente Band of Cahuilla Indians v. Superior Court, 148 P.3d 1126, 1139 (Cal. 2006).

[207] *Id.* at 1140.

[208] *Id.* at 1139.

[209] *See id.* at 1140. Because of the difficulty of predicting judicial interpretations in this area, an appeal to the United States Supreme Court on such a close case might be considered risky to tribal interests.

tribal sovereignty should be treated when directly in conflict with the exercise of sovereign powers of a state.

Legal scholars Roger Clinton, Carole Goldberg, and Rebecca Tsosie ask with respect to the California Court of Appeal's decision in *Agua Caliente*:

> If the state is unable to bring suit in state court to enforce its campaign control laws against tribal participants in the state electoral process, is the integrity of that process seriously endangered, considering the potential for some gaming tribes to make substantial contributions to candidates and ballot measures? Can't the state insist that the recipients of campaign contributions make the disclosures?[210]

While there may be other ways to protect the state electoral process, those very case-specific questions skirt the larger concern about how the sovereign interests of tribes and the states play out in the important area of political participation in state processes.

The campaign finance arena is not the only place where the Constitution's failure to define the relationship between states and tribes has resulted in a relationship that is at times tense. In certain federal legislation, like Public Law 280, Congress has delegated aspects of its guardian relationship to the states.[211] Passed in the 1950s, Public Law 280 grants certain states, including California, criminal and civil adjudicatory jurisdiction over Indian land.[212] This was done in large part because federal oversight of Indian trust lands in small pockets scattered over a vast state like California was difficult and there was a perception of lawlessness on reservations with a resulting threat to nearby non-tribal communities.[213] As a result of the delegation, county sheriffs are responsible for providing police services to most reservations and rancherias in California.[214]

In other instances, the federal government has required states and tribes to negotiate as equal sovereigns. Enacted in 1988, the Indian Gaming Regulatory Act ("IGRA") permits Class III gaming—including Nevada-style games of chance—only when the tribe has entered into a compact with the state in which its land sits.[215] The IGRA contains provisions describing in general terms the

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[210] CAROLE GOLDBERG ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM CASES AND MATERIALS 454 (6th ed. 2010).

[211] Pub. L. No. 280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360 (2006)).

[212] *Id.*

[213] GOLDBERG ET AL., *supra* note 210, at 759.

[214] *Id.* Currently, the Tribal and Order Act is pending in Congress. If passed and signed, the federal government would assume concurrent criminal jurisdiction over Indian Country within Public Law 280 states where authorized by the Attorney General. H.R. 725, 111th Cong. (2010).

[215] 25 U.S.C. § 2710(d)(1)(C) (2006).

subjects which tribes and states may negotiate[216] and limits the purposes for which gaming revenues may be used.[217] This piece of federal legislation contains a good faith negotiating requirement and treats states and tribes as independent sovereigns capable of negotiating binding agreements.[218]

In the absence of specific federal legislation defining the relationship between tribes and states with respect to campaign finance, the participants and the courts are left to fall back on other less specific provisions in the Constitution and federal common law. The Constitution is implicated because tribes are comprised of members with First Amendment rights to speech and association.[219] Therefore, it would seem that tribes must be allowed to participate in the political process. Participation in a state's political process would seem to bring with it the requirement to comply with that state's campaign finance disclosure rules. After all, if the Tenth Amendment means anything, it ought to mean that a state can control its election process.[220] However, the federal common law doctrine of tribal sovereign immunity suggests that the state cannot enforce its campaign finance laws through the enforcement mechanism those laws provide, i.e. civil suit.

In California, for purposes of campaign finance laws, a tribe is treated as a person.[221] Other governmental organizations are also treated as a "person" for the purpose of California campaign finance regulations.[222] In *Fair Political Practices Commission v. Suitt*, the California Court of Appeal determined that

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[216] 25 U.S.C. § 2710(d) (2006).

[217] 25 U.S.C. § 2710(b) (2006).

[218] 25 U.S.C.A. § 2710(d)(3)(A) (West 2006). The relationship between the tribe and the state in good faith negotiations may be taken up in a recent case entitled Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger, 602 F.2d 1019 (9th Cir. 2010). A petition for a *writ of certiorari* was filed in this case on September 23, 2010. The Ninth Circuit held that the State of California did not negotiate with the Rincon tribe in good faith when it sought to enter into a revenue-sharing agreement that would have supplied the state with General Fund revenue in exchange for a compact that greatly increased the size of the gambling operation on tribal land.

[219] United States v. Nice, 241 U.S. 591, 598-99 (1916). It has been long established that tribal members are citizens of both the United States and their Tribes, affording them all the rights of U.S. citizenship.

[220] Paul E. McGreal, *Unconstitutional Politics*, 76 NOTRE DAME L. REV. 519, 559 (2001); Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 21-22 (2003); Cameron A. Reese, *Tribal Immunity from California's Campaign Contribution Disclosure Requirements*, 2004 BYU L. REV. 793 (2004); Stephen L. Smith, *State Autonomy After Garcia: Will the Political Process Protect States' Interests?*, 71 IOWA L. REV. 1527, 1528 (1986); Paul Porter, Note, *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*, 40 U. MICH. J.L. REFORM 191, 213-215 (2006).

[221] CAL. GOV'T. CODE § 82047 (2005).

[222] *Id.*; CAL. GOV'T. CODE § 84210 (2005).

the California Legislature and the Assembly Democratic Caucus were "persons" for purposes of reporting campaign contributions and expenditures.[223] Federal law, as discussed above, mirrors this approach in defining both tribes and municipal governments as persons in 2 U.S.C. § 431(11); however, tribes are not subject to the same yearly aggregate limits as individuals under federal law.[224]

After the BCRA, any communication identifying a candidate for federal office is regulated as an electioneering communication and is subject to federal regulation.[225] Since tribes are now in the business of making communications about candidates for federal and state offices, they should understand their reporting obligations for communications relating to candidates they support and oppose. Equally important, states should understand their role, if any, in regulating tribe-funded campaign related speech with respect to state officeholders and candidates.

V. ALLOWING CAMPAIGN FINANCE ENFORCEMENT ACTIONS AND LEGISLATIVE SOLUTIONS

With the conclusion of the *Agua Caliente* case, California is the first state to enforce campaign finance disclosure laws against tribes, even in the face of the seemingly absolute barrier to suit created by tribal sovereign immunity. The majority of the justices on the California Supreme Court concluded that applying the doctrine of tribal immunity to suits involving campaign finance regulations was not justified, even if the Supreme Court justified applying the doctrine to tribes acting in their commercial capacity in *Kiowa*.[226] Other states will now likely grapple with the balance between tribes who engage in both on- and off-reservation commercial activities, as well as participation in state and federal political processes. A federal policy establishing that states have the legislative power to regulate tribes, and all others who participate in a state's political process, is one way to make the rules of the election game clear for all participants. Principles of federalism, including allowing states to maintain control over their electoral processes, and the federal interest in maintaining control over a uniform and consistent American Indian policy, favor legislation that sets some ground rules for tribal political participation.

Courts have found that campaign finance disclosure requirements serve at least three compelling state interests in the First Amendment context. First,

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[223] Fair Political Practices Comm'n v. Suitt, 153 Cal. Rptr. 311, 316 (Cal. Ct. App. 1979).

[224] FEC Advisory Opinion 2000-05; 2 U.S.C. § 441a(a)(3) (1976).

[225] 2 U.S.C. § 434(f)(3) (2006). This provision withstood a facial challenge in McConnell v. FEC, 540 U.S. 93 (2003), but was recently invalidated in some instances by an as applied challenge in FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007) (holding that corporate treasuries could be used to promote issue advocacy).

[226] Agua Caliente Band of Cahuilla Indians v. Superior Court, 148 P.3d 1126, 1140 (Cal. 2006)

they are instrumental in promoting an informed electorate. Second, they combat political corruption and the appearance of corruption. Third, they are a necessary measure in enforcing other campaign finance laws.[227] While these interests are generally discussed in the context of defending against First Amendment challenges to disclosure requirements, the interests are no less compelling when considered in determining whether disclosure laws should be enforced in the face of a common law claim of immunity. Congress can alter tribal sovereign immunity because it is a federal common law doctrine.[228] As *Kiowa* suggested, there is a need for federal legislation to change the reach of immunity in the context of tribal off-reservation commercial activities.[229] Regulation of tribal off-reservation political speech activity is no less, and perhaps is more, worthy of an exception to the federal common law immunity rule. In both instances, where the state may legislate, it should be allowed to enforce its legislation through litigation.

In the absence of federal legislation making clear that tribal sovereign immunity to suit does not apply to enforcement actions in the campaign finance context, other states litigating the question should rely on the Tenth Amendment and Guarantee Clause rationales that the California Supreme Court followed in *Agua Caliente*. States attempting to distinguish *Kiowa* in future litigation should also focus on the rationale that supported the majority opinion. *Kiowa* identifies the interests of economic development and tribal self-sufficiency as the purposes behind Congress's retention of tribal immunity.[230] These interests are not furthered by allowing tribes to invoke immunity for enforcement actions relating to campaign disclosures. In other words, unlike commercial lawsuits, a suit by the FPPC or another regulating agency requiring disclosure would not have severe economic impacts on the tribe.

As a practical matter, disclosure of tribal money in campaign financing is perhaps even more important than disclosure of some other sources of campaign money. Given that tribal money comes predominantly from gaming revenues, the state's interest in avoiding corruption or the appearance of corruption in its electoral process may be even more compelling.[231] Furthermore, the IGRA itself limits the uses for which a tribe may direct proceeds from casino gambling.[232] The federal government, therefore, has already articulated a federal interest in the sources of tribal money used in federal and state political processes.[233]

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[227] McConnell v. FEC, 540 U.S. 93, 95-96 (2003).

[228] Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 758-59 (1998).

[229] *See id.* at 760-61 (Stevens, J., dissenting).

[230] *Id.* at 758-59.

[231] Mike Dorning, *Casinos bet on D.C. Clout* CHI. TRIB., Feb. 20, 2006, *available at* 2000 WLNR 724436. The Coushatta Indians gave Jack Abramoff $30 million to protect their Louisiana Riverboat Casino. *Id.*

[232] 25 U.S.C. . § 2710(b)(2)(B) (2006).

[233] *Id.*

The appropriateness of using gaming revenue for campaign contributions under the IGRA is an open question. This federal act enumerates purposes for which tribes may use gaming revenue,[234] and political contributions are not an enumerated use.[235] While the catch-all provision might encompass political participation, one could also construe the IGRA to prohibit the use of casino money for political spending. As in other areas involving tribal affairs, this is an omission that is legally significant not just to the federal government, but also to state governments. Economic self-sufficiency is a laudable goal on which the federal government may rest its American Indian policy. However, a side effect of economic independence should not be corruption, or the appearance of corruption, in state and federal electoral systems, as tribes pump gaming dollars into candidate coffers and ballot measure committees.

If the disclosure requirements of the various states and the BCRA are aimed at anything, it is to ensure that the sources of funds in election campaigns are discernible to enforcement agencies and the general public. Congress should not knowingly provide tribes the tools to gain an economic advantage without ensuring that the primary use of the money acquired is to further the welfare of tribe members. Lining the pockets of federal and state legislator campaign committees and ballot measure committees may result in tribes having increased access to state and federal lawmakers. However, unless one supposes illegal bribery or improper *quid pro quo* arrangements are being made in return for the expenditure of casino profits, there is no direct benefit to tribal members when casino revenues are spent on state or federal elections. Based on the interests that the federal government has already articulated concerning the sources and uses of tribal casino money and the disclosure of campaign finance spending, Congress should enact legislation expressly abrogating tribal sovereign immunity for enforcement actions by states seeking to uphold their campaign finance laws against American Indian tribes.

VI. CONCLUSION

There are a number of solutions to the problem posed by the intersection of tribal interests in political participation and state interests in enforcement of campaign finance disclosure laws. Federal legislative action expressly waiving federal common law tribal sovereign immunity in the limited circumstance of off-reservation political activity is the preferred solution to the tension. Tribes and states will both benefit from having clear ground rules for tribal engagement in state political processes. A limited federal legislative solution is also consistent with the history of the relationship between tribes and states, as one that must involve a national arrangement between the U.S. government and tribal governments, which are domestic dependent sovereigns.

In the absence of such legislation, future courts should follow the *Agua Ca-*

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234 *Id.*

235 *Id.*

liente court's reliance on the Tenth Amendment as a basis for allowing the state to go forward in enforcing its campaign finance laws. Any solution, whether legislative or judicial, must be regarded with an understanding of the three sovereigns whose concerns are implicated, the critical importance of disclosure requirements in the maintenance of an informed electorate, and the Constitutional guarantees embodied in the First Amendment. With an eye to all of these factors, this paper concludes that tribes should fully participate and fully disclose their participation in state election activity. When they do not disclose pursuant to the rules of the jurisdiction, tribal immunity should not be an available shield, unless Congress articulates other reasons or rationales necessitating this protection.