

BIG SPENDERS IN STATE ELECTIONS—HAS FINANCIAL PARTICIPATION BY INDIAN TRIBES DEFINED THE LIMITS OF TRIBAL SOVEREIGN IMMUNITY FROM SUIT?

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I. INTRODUCTION

The Agua Caliente Band of Cahuilla Indians (the “Tribe” or the “Band”) owns much of the land under Palm Springs, Cathedral City and Rancho Mirage, California.¹ It operates resorts, casinos,

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1. Agua Caliente History & Culture, <http://www.aguacaliente.org/default.aspx?tabid=57#overview> (last visited Dec. 27, 2007).

and housing complexes.² It also participates financially in a significant way in California's electoral process.³

That participation led to a confrontation over transactions dating back to 1998 between the Tribe and the California Fair Political Practices Commission (FPPC)⁴, the agency charged with enforcing California's Political Reform Act (PRA), which regulates financial activities related to California's elections and lobbying.⁵

On June 20, 2007, after nearly five years of litigation, in which the Tribe was unable to successfully assert its claimed right of sovereign immunity from suit, the parties entered into a stipulation in which the Agua Caliente Band "expressly waive[d] its sovereign immunity with respect to any enforcement of the Political Reform Act . . . by the Fair Political Practices Commission for any future violation of the Political Reform Act"⁶

The trend of tribal financial involvement in state politics is also well illustrated in Minnesota. In 2006, when all state legislative and constitutional offices⁷ were on the ballot, political committees registered by Minnesota Indian Tribes with the Minnesota Campaign Finance and Public Disclosure Board⁸ spent more than \$1.2 million to influence the election of candidates for state offices.⁹ More than \$900,000 of that total was spent by the political committees of just two tribes with more than \$700,000 of that going

2. *Id.*

3. *See generally* Agua Caliente FPPC Compliance Information, <http://www.aguacaliente.org/GovernmentAffairsPress/FPPCComplianceInformation/tabid/104/Default.aspx> (last visited Dec. 27, 2007).

4. FPPC v. Agua Caliente Band of Cahuilla Indians, No. 02AS04545, 2003 WL 733094 (Sacramento County Super. Ct. of Cal., Feb. 27, 2003). The Second Amended Complaint alleges unreported contributions and other violations beginning in 1998. Second Amended Complaint, *available at* <http://www.fppc.ca.gov/pdf/acl/AguaCalSAC2.pdf>

5. Political Reform Act of 1974, 1999 Cal. Legis. Serv. Ch. 365, sec. 4 (West) (codified as amended in scattered sections of CAL. GOV'T CODE § 81000 (2005)).

6. Stipulation for J., FPPC v. Agua Caliente Band of Cahuilla Indians, No. 02AS04545 (Sacramento County Super. Ct. of Cal. 2002).

7. Minnesota's legislative offices consist of sixty-seven state senators and 134 state representatives. MINN. STAT. § 2.031 subdiv. 1 (2006). Constitutional officers include the Governor, Lieutenant Governor, Secretary of State, State Auditor and State Attorney General. MINN. CONST. art. V, § 1.

8. The Minnesota Campaign Finance and Public Disclosure Board is the state agency charged with regulating and obtaining disclosure of financial matters related to state elections and lobbying. MINN. STAT. § 10A.02 subdiv. 8 (2006).

9. Summary of 2006 Reports of Receipts and Expenditures (on file with the Minnesota Campaign Finance Board) [hereinafter Reports], *available at* <http://www.cfbreport.state.mn.us/rptViewer/viewRptsOther.php>.

to the several organizational units of the Minnesota Democratic Farmer Labor Party.¹⁰

Minnesota tribal political spending in 2002, the previous year in which all state offices were on the ballot, totaled less than half the 2006 amount, at just over \$598,000.¹¹

While all Minnesota Tribes as a group spent \$1.2 million for political purposes in 2006, the Agua Caliente Band by itself made more than \$2 million in expenditures and contributions to influence California's elections.¹² Although significant compared to Minnesota tribal spending, that sum was much lower than the Agua Caliente Band's spending in 2004, its highest year.¹³ That year Proposition 70, an initiative measure related to Indian gaming operations that would amend both the California Code and the California Constitution, was on the general election ballot.¹⁴ The Agua Caliente Band spent more than \$16 million to influence state elections in 2004, including more than \$13 million specifically related to Proposition 70.¹⁵

There seems to be little question that Indian tribes are becoming a powerful force in the states' political processes, and that many tribes have the funds to support their efforts. In Minnesota, most of those funds come from tribal gaming or related operations.¹⁶

10. Reports, *supra* note 9. While candidate committees have limits on the contributions they may accept, political party units do not. *Id.* The Minnesota Democratic Farmer Labor Party is the state party affiliate of the Democratic Party. *Id.*

11. *Id.*

12. Major Donors and Independent Expenditure Committee Campaign Statement for the Agua Caliente Band of Cahuilla Indians [hereinafter Agua Caliente], available at http://www.aguacaliente.org/GovernmentAffairsPress/FP_PCComplianceInformation/tabid/104/Default.aspx (follow "Report for dates 07-01-06-12-31-06" hyperlink).

13. Agua Caliente, *supra* note 12, at Report for dates 01-01-04-12-31-04.

14. Official California Voter Information Guide, <http://vote2004.sos.ca.gov/voterguide/propositions/prop70-arguments.htm>.

15. Agua Caliente, *supra* note 12, at Report for dates 07-01-04-12-31-04.

16. Tribal political committees file disclosure statements with the Minnesota Campaign Finance and Public Disclosure Board under Minnesota Statutes section 10A.27 subdivision 13, which requires an entity not registered with the Board (the Tribe) to disclose the source of funds transferred to a registered entity (the Tribal political committee). Only two—the Leech Lake Band of Ojibwe and the White Earth Reservation—specifically list gaming revenue on their 2006 §10A.27 Disclosure Statements. The Leech Lake Band disclosed \$4000 in funds from the Leech Lake Gaming Division. Report of Receipts and Expenditures, available at <http://www.cfbreport.state.mn.us/pdfStorage/2006/CampFin/YE/40889.pdf>. The White Earth Reservation disclosed a contribution of \$500 from its general

Tribal gaming got its start in 1987 after the U.S. Supreme Court held in *California v. Cabazon Band of Mission Indians*¹⁷ that states' regulatory laws concerning gambling could not be applied to tribal gaming operations on reservation land.¹⁸ That decision was followed closely by adoption of the federal Indian Gaming Regulatory Act¹⁹ (IGRA) in 1988. The IGRA was intended "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments"²⁰ Following enactment of the IGRA, high stakes, casino-style Indian gaming began to emerge as the major source of income for many tribes.²¹

In every election cycle, Indian tribes vigorously attempt to influence such critical matters of state governance as to who will be the state's governor,²² who will be elected to the state's legislative

fund revenue. Report of Receipts and Expenditures, *available at* <http://www.cfbreport.state.mn.us/pdfStorage/2006/CampFin/YE/40916.pdf>.

Other tribes list income from affiliated businesses. For example, the Shakopee Mdewakanton Sioux community lists income from its recreational vehicle park, disclosing \$675,000 in transfers from "non-gaming revenues from the Shakopee Dakota Meadows RV Park. Report of Receipts and Expenditures, *available at* <http://www.cfbreport.state.mn.us/pdfStorage/2006/CampFin/YE/40550.pdf>. The park is an integral part of the Tribe's casino and golf course complex. *See* Welcome to Dakotah Meadows!, <http://www.ccsmdc.org/DakMead/> (last visited Dec. 27, 2007).

The 750 member Prairie Island Indian Community transferred \$175,000 in "Tribal Tax Revenues" to its political committee in 2006. Report of Receipts and Expenditures, *available at* <http://www.cfbreport.state.mn.us/pdfStorage/2006/CampFin/YE/30555.pdf>. The Prairie Island Community operates Treasure Island Resort & Casino which includes a casino, luxury hotel, four restaurants, and other attractions. *See* Prairie Island Indian Community, <http://www.prairieisland.org/> (last visited Dec. 27, 2007); *see also* <http://www.treasureislandcasino.com> (last visited Dec. 27, 2007).

17. 480 U.S. 202 (1987).

18. *See id.* at 221–22 (holding that where states regulated rather than prohibited gaming activities, the state regulations could not be applied on reservations).

19. 25 U.S.C. §§ 2701–03, 2706–14, 2716–17(a), 2719–21 (2006).

20. Indian Gaming Regulatory Act, 25 U.S.C. § 2702(1) (2006).

21. *See* ALAN MEISTER, CASINO CITY'S INDIAN GAMING INDUSTRY REPORT, 2007–2008 (6th ed. 2007). The report estimates that revenue (amounts wagered less prizes and payouts) at Indian gaming establishments rose from approximately \$121 million in 1988 to more than \$25 billion in 2006.

22. In Minnesota in 2006, five tribes donated a total of \$8500 to the Democratic candidate for governor (the maximum donation allowed was \$2,000 per donor). *See* Reports, *supra*, note 9. (Reports of Receipts and Expenditures for the year ending December 31, 2006.) (Select first letter of donor name then click on link to the specific donor.) The following tribal political committees contributed to Mike Hatch, the Democratic candidate for governor, in 2006: Bois

bodies,²³ and what will be the provisions of the state's constitution.²⁴ These incursions into the realm of state governance have renewed questions about the sovereignty of Indian tribes in relation to the states' sovereignty.

In order to understand those conflicting rights, this article will review the historical roots of legal doctrine regarding the position of Indian tribes with respect to the United States government and each state's government.²⁵ It will then trace significant doctrinal changes that arose as the result of changing political and cultural attitudes toward Indians.²⁶ Finally, it will address new theories raised in *Agua Caliente v. California FPPC*²⁷ and will comment on the California Supreme Court's resolution of the constitutional issues and the parties' eventual Stipulation for Judgment in that matter.²⁸

II. JOHN MARSHALL AND THE SUPREME COURT ESTABLISH THE ROOTS OF THE DOCTRINE OF INDIAN TRIBAL SOVEREIGNTY

The first United States Supreme Court case to address the status of Indian tribes was *Johnson v. M'Intosh*.²⁹ When *M'Intosh* was before the Court, John Marshall was in his twenty-second year as Chief Justice of the Court.³⁰ He had successfully laid several important foundations for a strong federal government³¹ and had

Forts Political Education Fund (\$1000), Fond du Lac Committee of Political Education (\$2000), Leech Lake PAC (\$500), Mah Mah Wi No Min Fund I—the political fund of the Mille Lacs Band of Ojibwe Indians, (\$2000), Prairie Island Indian Community PAC (\$2000), Shakopee Mdewakanton Sioux (\$2000).

23. See generally Reports, *supra* note 9 (Reports of Receipts and Expenditures filed by Minnesota tribal political committees for the year ending December 31, 2006, showing numerous contributions to Minnesota candidates).

24. See discussion of California's Proposition 70 *supra* note 12; *supra* note 9.

25. See *infra* Parts II–IV.

26. See *infra* Parts V–VI.

27. 148 P.3d 1126 (2007).

28. See *infra* Parts VII–VIII.

29. 21 U.S. (8 Wheat.) 543 (1823).

30. John Marshall was appointed to the Supreme Court by John Adams in 1801, and served until 1835. JEAN EDWARD SMITH, JOHN MARSHALL—DEFINER OF A NATION 282, 523 (1996).

31. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the Court established the doctrine of inherent powers granted in the Constitution to the federal government and the supremacy of federal institutions over state laws that might hinder their purpose. In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), Marshall laid out his expansive view of the Commerce Clause of the Constitution and Congress' power to regulate the broad range of activities that would thereafter be considered part of commerce between the states.

established the Judiciary as a powerful branch of that government.³² Given Marshall's federalist credentials,³³ it is not surprising that in this first of the Indian cases, the decision between rights of the Indians and rights of the United States government in certain land resulted in a doctrine that strengthened the federal government at the expense of the Indians.

M'Intosh involved an action for ejectment in which the defendant claimed the disputed land through a patent from the United States and the plaintiffs claimed the same land through conveyances from the Illinois and Piankeshaw Indians.³⁴ Judgment in the court below found that only the United States had the right to transfer title to the land.³⁵

The question, according to Marshall, was confined to "the power of the Indians to give, and of private individuals to receive, a title which can be sustained by the courts of this country,"³⁶ but to answer that question, Marshall would have to examine the relationship between the United States and the Indians. Marshall concluded that the Indians did not have the power to give title to the land they occupied.³⁷

To reach this conclusion, Marshall began with a fundamental premise that "cannot be drawn into question."³⁸ His premise was that it is the right of a society to prescribe rules by which title to lands may be acquired. Thus, those rules must depend entirely on the law of the nation in which the lands lie.³⁹

A key principle of the law of "civilized" nations was that "discovery gave title to the government by whose subjects, or by whose authority, it was made. . . ."⁴⁰ From this principle of the discoverer's right, two corollaries arose. First, the discoverer had the sole right of acquiring the soil from any Indians who may be in

32. In *Marbury v. Madison*, 5 U.S. 37 (1803), Marshall wrote the opinion establishing the doctrine of judicial review, giving the Court the authority to review the constitutionality of legislative acts. *Marbury* was followed by cases establishing the federal courts' authority to review civil cases, i.e., *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), and criminal cases, *Cohens v. Virginia*, 19 U.S. 264 (1821).

33. SMITH, *supra* note 30, at 8.

34. *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

35. *Id.*

36. *Id.* at 572.

37. *Id.* at 603–605.

38. *Id.*

39. *Id.*

40. *Id.* at 573.

possession; and second, relations between the discoverer and Indians were to be regulated by those parties.⁴¹

Marshall recognized that in establishing the relationship between Indians and the discoverer, the rights of the Indians “were necessarily, to a considerable extent, impaired.”⁴² The Indians were recognized as having a right of possession or occupancy of the soil, but “their power to dispose of the soil at their own will . . . was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.”⁴³ As a result, the Indians’ “rights to complete sovereignty, as independent nations, were necessarily diminished”⁴⁴

The Indians’ right to possession might be extinguished “by purchase or by conquest”⁴⁵ and “[c]onquest gives a title which the Courts of the conqueror cannot deny”⁴⁶ The claims of Britain had been established and maintained as far west as the Mississippi “by the sword” and it was not for the courts, Marshall said, to question the validity of this title.⁴⁷

Having decided that the absolute title to the land, resides in the conqueror and that absolute title to land cannot reside in two entities at the same time,⁴⁸ Marshall concluded that only the United States could transfer valid title to the subject land.⁴⁹ The Indian inhabitants, he said, “are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others.”⁵⁰

MIntosh established two principles that would shape United States Indian law. First, while Indians may have considered themselves to be sovereigns or nations, that sovereignty was diminished by discovery and conquest. Second, the Indians were merely occupants of the land with no actual ownership rights. Even their occupancy of the land was subject to the authority of the United States.

41. *Id.*

42. *Id.* at 574.

43. *Id.*

44. *Id.*

45. *Id.* at 587.

46. *Id.* at 588.

47. *Id.* at 588–89.

48. *Id.* at 588.

49. *Id.* at 587–88.

50. *Id.* at 591.

Marshall next addressed the status of Indian tribes in 1831. *Cherokee Nation v. Georgia*⁵¹ arose as the result of a motion by the Cherokee Nation of Indians for an injunction to restrain the State of Georgia from enforcing its laws on lands within the Cherokee territory. Georgia was essentially attempting to abolish the Cherokee Nation. It nullified Cherokee laws, extended Georgia law to the Cherokee territory, and provided for the survey of all Cherokee lands in Georgia and for their distribution by lottery to the people of Georgia.⁵²

Georgia was losing patience with the federal government, which had agreed as a condition of Georgia's cession of territorial land to the United States in 1802 to extinguish Indian claims to the land that remained as part of the State of Georgia.⁵³ The Indian Removal Act of 1830⁵⁴ had just passed giving President Andrew Jackson the authority to negotiate treaties wherein Indian tribes would exchange land east of the Mississippi for land in the west and would relocate to that land. The Cherokees were unwilling to trade their land and relocate.⁵⁵ Georgia decided to take matters into its own hands.

Marshall candidly stated what had happened to the Cherokee nation since discovery:

A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence.⁵⁶

51. 30 U.S. (5 Pet.) 1 (1831).

52. *See id.* at 7, 13.

53. *See id.* at 8. The Cherokee Indians ceded land in Georgia making their reservation smaller and smaller until it was so small that they "resolved to cede no more." *Id.* Georgia applied to the United States to remove the Indians by force in order to meet its obligations under the cession agreement of 1802. *Id.* Presidents Monroe and Adams agreed to remove the Indians, but only by peaceful means. *Id.* The state of Georgia then resorted to its own means to force the Cherokee Indians from lands within the state. *Id.*

54. 21st Cong., Sess. I, ch. 148, 411-12 (1830), available at <http://memory.loc.gov/cgibin/ampage?collId=lsl&fileName=004/lsl004.db&recNum=458>.

55. *Cherokee Nation*, 30 U.S. (5 Pet.) at 10.

56. *Id.* at 15.

After expressing sympathy for the claim, Marshall began a detailed examination of the Court's jurisdiction to hear the case. Article Three of the Constitution provides that the federal courts shall have jurisdiction over cases "between a state or the citizens thereof, and foreign states, citizens or subjects."⁵⁷ The question of jurisdiction hinged on whether the Cherokee nation was a "foreign state."⁵⁸

Justice Marshall recognized that the Cherokee tribe had many of the attributes of a state in the sense that it was "a distinct political society . . . capable of managing its own affairs . . ."⁵⁹ But, he also recognized the unique situation that this state-within-a-state relationship created.⁶⁰ Indian territory, for example, was part of the United States⁶¹ and in the areas of commerce and foreign relations, the tribes were considered as within the jurisdiction of the United States.⁶² It is in this context that Marshall questioned whether Indian tribes may accurately be described as foreign nations.⁶³ He reasoned that "[t]hey may, more correctly, perhaps, be denominated domestic dependent nations."⁶⁴

In his concurring opinion, Justice Johnson said the tribes "never have been recognized as holding sovereignty over the territory they occupy."⁶⁵ But he also recognized that "their right of personal self government has never been taken from them . . ."⁶⁶

Not surprisingly, Marshall concluded that Indian tribes are not foreign states within the meaning of the Constitution.⁶⁷ Therefore, the Supreme Court did not have jurisdiction to hear the matter.⁶⁸ *Cherokee Nation* is important not so much for the jurisdictional holding but for the analysis of the Indians' status and its conclusion that Indian tribes were not completely sovereign but were "domestic dependent nations."⁶⁹

57. *Id.*

58. *Id.* at 16.

59. *Id.*

60. *Id.* at 13–14.

61. *Id.* at 17.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 22.

66. *Id.* at 27.

67. *Id.* at 20.

68. *Id.*

69. *Id.* at 17.

Justice Marshall had another opportunity to examine the status of the Cherokee's relationship with the state of Georgia and with the United States the following year. In *Worcester v. Georgia*,⁷⁰ one of the same Georgia statutes that gave rise to *Cherokee Nation* was again the subject of review. This time jurisdiction in the Supreme Court was proper as the case was between a citizen of Vermont and the state of Georgia.⁷¹

Under Georgia's new laws, Worcester had been convicted of residing in Cherokee territory without permission from the state and without swearing an oath to support and defend the constitution and laws of Georgia.⁷² He was sentenced to four years of hard labor in the state penitentiary.⁷³ Worcester's contention was that Georgia's act was unconstitutional and void because it was repugnant to treaties between the United States and the Cherokee and because it interfered with intercourse between the Cherokee nation and the United States, an area of the law reserved to Congress.⁷⁴

Justice Marshall reviewed the relationship between the Cherokees and the United States government from discovery through the 1791 Treaty of Holston,⁷⁵ which he found had been frequently renewed and was still in full force.⁷⁶ This treaty, Marshall concluded, "explicitly recogniz[ed] the national character of the Cherokees, and their right of self government; thus guarantying their lands; assuming the duty of protection, and of course pledging the faith of the United States for that protection"⁷⁷

Marshall concluded that:

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which secluded them from intercourse with any other European

70. 31 U.S. (6 Pet.) 515 (1832).

71. *Id.* at 536.

72. *Id.* at 537.

73. *Id.* at 540.

74. *Id.*

75. *Id.* at 554–56.

76. *Id.* at 556.

77. *Id.*

potentate than the first discoverer of the coast of the particular region claimed⁷⁸

Further evidence of the Indians' status was found in the fact that the United States generally applied the term "nation" to Indian tribes and regularly entered into treaties with the tribes.⁷⁹ The Constitution, declaring such treaties to be the supreme law of the land, acknowledged the status of Indian tribes as "among those powers who are capable of making treaties."⁸⁰

The fact that the Cherokees, by treaty, placed themselves in the protection of the United States did not limit their right to self-government. Rather, the very fact of the repeated signing of treaties with the Cherokees recognized that right. According to Justice Marshall, it was the settled law of nations that a weaker nation accepting the protection of a stronger one does not, therein, surrender its right to self-government.⁸¹

The Court's conclusion became inescapable: the whole intercourse between the United States and the Cherokee nation, being vested by the Constitution and laws in the government of the United States, mandates that the laws of Georgia can have no effect within the boundaries of the Cherokee territory.⁸²

Thus, by 1835, it was clear that Indian tribes were considerably less than sovereign nations. They had no absolute title to their land and were under the "protection" of the United States. But they still had the right to deal with the United States by way of treaties and their sovereignty against the authority of the individual states appeared to be established.

III. THE PROMISES OF INDIAN TREATIES ARE WEAKENED AS A BASIS FOR TRIBAL SOVEREIGNTY.

The limits of tribal sovereignty were tested soon and regularly. One of the first areas to be limited was Indian treaty rights. In 1845, in *United States v. Rogers*,⁸³ the defendant, a white man, was accused of murdering another white man in Cherokee territory.⁸⁴ The defendant claimed that the Cherokee had adopted both him

78. *Id.* at 559.

79. *Id.* at 559–60.

80. *Id.*

81. *Id.* at 561.

82. *Id.*

83. 45 U.S. (4 How.) 567 (1846).

84. *Id.* 567–68.

and the deceased into their tribe.⁸⁵ The U.S. law in question extended federal criminal jurisdiction over all lands within the sole and exclusive jurisdiction of the United States, except for jurisdiction over crimes by one Indian against another.⁸⁶ A treaty with the Cherokee Indians gave them the right to govern their territory so long as their laws were not inconsistent with those of the United States.⁸⁷

The Court began by holding that Cherokee territory was land within the sole and exclusive jurisdiction of the United States and that the Cherokee Indians occupied it only with the consent of the United States.⁸⁸ That Rogers was a member of the Cherokee tribe was no objection to the jurisdiction of the district court.⁸⁹ As support for this position, the Court said:

[W]e think it too firmly and clearly established to admit of dispute that the Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of one of the States, Congress may by law punish any offense committed there, no matter whether the offender be a white man or an Indian.⁹⁰

But the federal statute excluded crimes by one Indian against another. After making the statement quoted above, that the nationality of the offender would not matter, the Court nevertheless held that the adoption of the defendant into the tribe did not make him an Indian within the meaning of the federal statute.⁹¹ Holding that the defendant was not an Indian appears to render the statement quoted above as dicta. That same statement would be cited and quoted as holding twenty-five years later in *The Cherokee Tobacco*.⁹²

By 1870, federal statutes were coming into direct conflict with Indian treaties in ways that could not be reconciled. In *The Cherokee Tobacco*, the Court considered the conflict between a federal statute imposing a tax on tobacco in all territories within the boundaries of

85. *Id.* at 568

86. *Id.* at 570–71.

87. *Id.* at 573.

88. *See id.* at 572.

89. *See id.*

90. *Id.*

91. *See id.* at 573. The *Rogers* Court also considered whether the treaty with the Cherokee tribe precluded application of the federal statute and found the statute and the treaty not to be in conflict. *Id.*

92. 78 U.S. (11 Wall.) 616, 619 (1870).

the United States and an Indian treaty provision that allowed Indians to grow and sell tobacco, paying tax only on that portion sold outside Indian territory.⁹³ The defendant owners of the subject tobacco, the impoundment of which was sought by the United States, were Cherokee Indians who had grown the tobacco within the boundaries of the Cherokee nation.

The Court cited *Cherokee Nation* for the proposition that Indian Territory is part of the United States.⁹⁴ It then repeated the entire quote from *Rogers* for the proposition that Indians residing in the territorial United States are under the jurisdiction of the United States, saying that both principles were “so well settled in our jurisprudence that it would be a waste of time to discuss them or to refer to further authorities in their support.”⁹⁵

Relying on cases involving treaties with foreign nations,⁹⁶ *The Cherokee Tobacco* Court held that an act of Congress could supersede a prior treaty.⁹⁷ When the two cannot be reconciled, legislative action is to be given effect in the courts and any resolution of the conflict must be addressed in the legislative branch.⁹⁸ Thus, by 1870, the power of Congress to abrogate the provisions of Indian treaties was established.

The next year the power of Indians to enter into new treaties with the United States was abolished by statute. The act of March 3, 1871, provided that:

No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.⁹⁹

Fifteen years later, in *United States v. Kagama*,¹⁰⁰ Justice Miller lamented that, “after an experience of a hundred years of the treaty-making system of government, Congress has determined

93. *Id.* at 617.

94. *See id.* at 619.

95. *Id.*

96. *See id.* at 621. The court cited *Taylor v. Morton*, 23 Fed. Cas. 784 (2 Curtis 454) (C.C.D. Mass. 1855) (No. 13799); *The Clinton Bridge*, 77 U.S. (10 Wall.) 454 (1870).

97. *Cherokee Tobacco*, 78 U.S. (11 Wall.) at 617.

98. *Id.* at 621.

99. 16 Stat. 566; Rev. Stat. §2079 (current version at 25 U.S.C. §71 (2006)).

100. 118 U.S. 375 (1886).

upon a new departure, -to govern [the Indians] by acts of Congress.”¹⁰¹

Kagama examined a congressional act that extended U.S. criminal law to crimes by one Indian against another, regardless of whether the crime was committed on Indian land.¹⁰² On the question of the act’s constitutionality, the Court found little in the language of the Constitution to help. It determined that the power of Congress to regulate commerce with the Indian tribes did not provide a basis for the legislation.¹⁰³ Relying on *Cherokee Nation* for the premise that Indian tribes are not states or nations, the Court upheld the act, holding that there are only two sovereignties in the United States; that of the federal government and that of the states.¹⁰⁴

In what now may seem a sad commentary, Justice Miller raised the government “protection” relationship with the Indians as part of the basis for stripping them of another aspect of their sovereignty. He said:

The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.¹⁰⁵

After *Kagama*, it was clearly established that Indian tribes had no treaties and no inherent sovereignty that would protect them against congressional action. They were now truly dependent on the will of Congress to protect the remaining remnants of their existence as governments. The authority of the states over Indian tribes, however, was a different matter. The holding of *Worcester* remained strong, although states were beginning to succeed in asserting their jurisdiction over Indians and Indian lands.

101. *Id.* at 382.

102. *See id.* at 376–77.

103. *See id.* at 378–79.

104. *See id.* at 379.

105. *Id.* at 384–85.

IV. STATES' EFFORTS TO EXERT THEIR JURISDICTION OVER TRIBAL LANDS AND MEMBERS

The first successful state encroachments on tribal sovereignty involved assertion of state court jurisdiction over non-Indians in events that occurred on Indian reservations.

In 1881, the Court considered *United States v. McBratney*,¹⁰⁶ a case in which a white man, McBratney, was convicted in federal circuit court of the murder of another white man. The murder occurred on the Ute Indian Reservation in Colorado.¹⁰⁷

Federal jurisdiction was supported by a statute giving the courts of the United States jurisdiction over the crime of murder occurring in parts of the country under the "exclusive jurisdiction of the United States," including Indian country.¹⁰⁸ Additional support for federal jurisdiction was found in the treaty of March 2, 1868, between the United States and the Ute Indians, which provided for trial and punishment under U.S. law of wrongs by whites against Indians or others on the Ute Indians' territory.¹⁰⁹

Subsequent to enactment of the federal criminal statute and signing of the treaty, the act of Congress of March 3, 1875, chapter 139, provided for the admission of Colorado to the Union. The act authorized the inhabitants of the territory to form a state government; it did not contain any exception for the Ute reservation, or jurisdiction over it, from the new state.¹¹⁰

McBratney challenged the jurisdiction of the U.S. court over the matter, claiming that jurisdiction lay in the state courts of Colorado.¹¹¹ Justice Gray delivered the opinion of the Court.¹¹²

Relying on *Cherokee Tobacco*, the Court held that the act forming the state of Colorado necessarily repealed any prior federal statute or treaty provision that was inconsistent with the act.¹¹³ Further, the Court held that the act, which established Colorado "upon an equal footing with the original States in all respects whatever,"¹¹⁴ gave the state criminal jurisdiction over all of

106. 104 U.S. 621 (1881).

107. *Id.* at 621-22.

108. *Id.*

109. *See id.* at 622.

110. *See id.* at 623.

111. *Id.* at 621-22.

112. *Id.* at 621.

113. *Id.*

114. *Id.* at 624.

its own citizens throughout its territorial limits, including the Ute Reservation.¹¹⁵ The earlier federal statute and treaty provisions giving exclusive jurisdiction over certain crimes to the United States government were repealed by implication because they were inconsistent with the statehood act.¹¹⁶

McBratney established the principle that state jurisdiction is not always limited by the reservation boundary.¹¹⁷ It was no longer an absolute rule that the United States or the Indian tribes had sole and exclusive jurisdiction over activities on reservations.¹¹⁸

The *McBratney* finding—that the new state of Colorado had jurisdiction over non-Indian crimes against other non-Indians—was extended to the original states in *New York ex rel. Ray v. Martin*.¹¹⁹ The *Ray* Court said that *McBratney* and cases that followed it “all held that in the absence of a limiting treaty obligation or congressional enactment, each state had a right to exercise jurisdiction over Indian reservations within its boundaries.”¹²⁰

The reach of state criminal jurisdiction on reservations was clarified in *Donnelly v. United States*,¹²¹ wherein the defendant, a white man who had murdered an Indian, challenged federal jurisdiction.¹²² There, it was held that the *McBratney* doctrine was limited to crimes of non-Indians against non-Indians and federal jurisdiction could be maintained where one of the parties involved in the incident was an Indian.¹²³

The limit of state court jurisdiction was further clarified in *Williams v. Lee*¹²⁴ in which Williams, a non-Indian, operated a store on the Navajo reservation. He sued in Arizona state court to collect money owed to him by two Navajo Indians for credit extended at his store.¹²⁵

The Court held that suit in state court to collect a debt incurred by Indians on their reservation was prohibited because imposition of state jurisdiction in such a situation would infringe

115. *Id.*

116. *Id.*

117. *See id.* at 621–24.

118. *Id.* at 624.

119. 326 U.S. 496 (1946).

120. *Id.* at 499.

121. 228 U.S. 243 (1913).

122. *Id.* at 252.

123. *See id.* at 271–72.

124. 358 U.S. 217 (1959).

125. *Id.* at 217–18.

on the tribe's sovereignty.¹²⁶ Justice Black, delivering the opinion of the Court, said that although the Court had modified the principles of *Worcester* over the years "in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized,"¹²⁷ its basic policy was still law. The Court went on to say that "[e]ssentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."¹²⁸ Justice Black's announcement of what appeared to be an infringement test for determining the scope of state jurisdiction over Indian tribes was a significant departure from the absolute doctrine expressed in *Worcester* and from prior decisions.¹²⁹

Applying the newly announced test to the facts before it in *Williams*, the Court held that there could be no doubt that "to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."¹³⁰ If the power of self-government was to be taken away from the Indians, the Court said, it was for Congress to take that action.¹³¹

The result reached in *Williams* is far less important than the principle the Court established: that state jurisdiction over tribes may be allowed if it does not infringe on the tribe's right to self-government.¹³² After *Williams*, the strength of tribal sovereignty principles to protect tribes from incursions of state law was weakened, but still appeared strong, at least where the state action would unduly infringe on the tribe's right of self-government.¹³³ But the clarity of the doctrine expressed in *Worcester* in 1835 was an idea of the past.¹³⁴

126. *Id.* at 223.

127. *Id.* at 219.

128. *Id.* at 220.

129. *Id.* at 223; *see also* *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

130. *Williams*, 358 U.S. at 223.

131. The Court also noted that although Congress granted to the states the right to assume civil and criminal jurisdiction over Reservations and their resident Indians, Arizona had not taken the steps to assume such jurisdiction. *Id.* at 224 n.10. Title IV of the Civil Rights Act of 1968 substituted provisions giving the consent of the United States to states' assumption of jurisdiction over tribal civil and criminal matters, but required approval of the tribe by vote of a majority of its members. 25 U.S.C. § 1322 (a) (1968).

132. *See Williams*, 358 U.S. at 217.

133. *See id.*

134. *See id.*

Another important case to address tribal sovereignty was *McClanahan v. State Tax Commission of Arizona*,¹³⁵ in which the State of Arizona attempted to impose its personal income tax on a Navajo Indian who lived on the reservation and derived all of her income from reservation sources.¹³⁶ The Arizona state courts that considered the matter held that the application was permissible.¹³⁷ On review by the United States Supreme Court, Justice Thurgood Marshall wrote on behalf of the Court.¹³⁸ Justice Marshall recognized that the Indian sovereignty doctrine had not remained static in the 141 years since the decision in *Worcester*.¹³⁹ Rather, it had undergone “considerable evolution in response to changed circumstances.”¹⁴⁰ In *McClanahan*, Marshall observed that “the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption.”¹⁴¹ According to Marshall, “[t]he modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.”¹⁴²

The Indian sovereignty doctrine no longer provided the basis for “definitive resolution” of state jurisdiction matters, but provided a “backdrop” against which treaties and federal statutes should be read.¹⁴³ Against that backdrop, the Court found that treaties with the Navajo Indians and federal statutes prohibited Arizona’s attempt to impose its income tax on Indians living and working on the reservation.¹⁴⁴

McClanahan is significant in part for its general acceptance, with clarification, of the *Williams* infringement test. *Williams* provided that “absent any governing Acts of Congress” the test to be applied is whether a state action infringes on the right of Indian self-government.¹⁴⁵

135. 411 U.S. 164 (1973).

136. *Id.* at 165.

137. *Id.*

138. *Id.*

139. *Id.* at 171.

140. *Id.* at 171.

141. *Id.* at 172.

142. *Id.* (footnote omitted).

143. *Id.*

144. *Id.* at 181.

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

The *McClanahan* Court considered the relevance of the *Williams* test to the case *sub judice* and noted that the “cases applying the *Williams* test dealt principally with situations involving non-Indians.”¹⁴⁶ In such cases, “both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* infringement test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.”¹⁴⁷ In *McClanahan*, the income that Arizona wanted to tax was earned by an Indian solely through reservation sources.¹⁴⁸ Thus, the matter was entirely within the scope of jurisdiction retained by the tribe by treaty and federal statute.¹⁴⁹ In such a case, the treaties and federal statutes preempt state law and the *Williams* infringement test is not applicable.¹⁵⁰

V. THE REGULATORY CASES PROVIDE OPPORTUNITIES FOR STATES TO INCREASE THEIR POWER OVER INDIAN TRIBES

Based on *Williams* as clarified by *McClanahan*, the law as of 1973 seemed to be that if federal statutes and treaties governed a matter, then state jurisdiction on reservation land would not apply.¹⁵¹ If the matter was not preempted by federal law and treaties, then whether the state could assert jurisdiction depended on whether the state’s action infringed to an unacceptable degree on the tribal right of self-government. So, because of the state interest in governing its own territory, state jurisdiction over activities that occurred off of reservations would be easier to establish.

In *Organized Village of Kake v. Egan*,¹⁵² the Indian tribe did not have a reservation or a treaty with the United States. The dispute was whether state law that prohibited salmon traps could be enforced against the tribe on state land.¹⁵³ The tribe had been granted permits for the traps by the United States government.¹⁵⁴ The Court held that state law was applicable to prohibit use of the

146. *McClanahan*, 411 U.S. at 179.

147. *Id.*

148. *Id.* at 165.

149. *Id.* at 179–80.

150. *See Williams*, 358 U.S. at 217.

151. *See id.*; *see also McClanahan*, 411 U.S. at 164.

152. 369 U.S. 60 (1962).

153. *Id.* at 62.

154. *Id.* at 61.

traps.¹⁵⁵ citing *Williams* and *New York ex rel. Ray v. Martin* the Court said that:

These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law State authority over Indians is yet more extensive over activities, such as in this case, not on any reservation.¹⁵⁶

Although *Organized Village of Kake* predated *McClanahan*, it continued to be cited for the proposition that state authority over off-reservation activities was more easily established than it would be for conduct within Indian territory.¹⁵⁷

Thus, in *Mescalero Apache Tribe v. Jones*,¹⁵⁸ the Court held that the state could impose its gross receipts tax on a ski resort operated by a tribe on land outside the reservation.¹⁵⁹ The Court recognized the line of cases prohibiting state taxation of on-reservation activities, but relied on *Organized Village of Kake* for its ruling, saying that “Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the state.”¹⁶⁰

In *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*,¹⁶¹ the Court considered the state of Montana’s attempt to apply its cigarette tax to all sales of cigarettes by Indian smokeshops operated on reservation lands.¹⁶² Relying on *McClanahan*, the Court prohibited the application of the cigarette tax to on-reservation sales to Indians.¹⁶³ But the Court was unwilling to extend *McClanahan* to prohibit imposition of state tax

155. *Id.* at 68.

156. *Id.* at 75.

157. *See* *Texas v. U.S.*, 497 F.3d 491, 510 (5th Cir. 2007); *People of South Naknek v. Bristol Bay Borough*, 466 F. Supp. 870, 876–77 (D. Alaska 1979); *John v. Baker*, 982 P.2d 738, 773 (Alaska 1999); *State ex rel. Peterson v. Dist. Court of Ninth Judicial Dist.*, 617 P.2d 1056, 1063 (Wyo. 1980).

158. 411 U.S. 145 (1973).

159. *Id.* at 157–58.

160. *Id.* at 148–49 (citing *Puyallup Tribe v. Dep’t of Game of Wash.*, 391 U.S. 392 (1968) (upholding the state’s right to regulate the time and manner of Indian’s off-reservation fishing rights); *Ward v. Race Horse*, 163 U.S. 504 (1896) (upholding state jurisdiction over off-reservation hunting; and other cases)).

161. 425 U.S. 463 (1976).

162. *Id.* at 467–68.

163. *Id.* at 480–81.

on cigarette sales to non-Indians.¹⁶⁴ The tax in question was a direct tax imposed by statute on the purchaser and collected by the seller merely as a convenience.¹⁶⁵ As such, it was not a tax on the tribe, which would have been prohibited by *McClanahan*.¹⁶⁶

The tribes argued that making them an involuntary tax collector was a gross interference with their right to be free of state regulation.¹⁶⁷ The Court disagreed, holding that “[t]he State’s requirement that the Indian tribal seller collect a tax validly imposed on non-Indians [was] a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax.”¹⁶⁸ While the activities that would be required in the tax collection system were not described, the Court held that because the collection burden was not a tax on the Indians, the cases prohibiting taxation of tribes themselves were inapplicable.¹⁶⁹ The Court saw “nothing in this burden which frustrates tribal self-government or runs afoul of any congressional enactment dealing with the affairs of reservation Indians.”¹⁷⁰ Because the state tax was not preempted by federal law and the burden on the tribes was acceptable, application of the *Williams* infringement test did not require striking down the state statutes.¹⁷¹

The state of Washington took the matter of state tax collection further. In *Washington v. Confederated Tribes of Colville Indian Reservation*,¹⁷² the state imposed both a cigarette tax and a state sales tax which applied to cigarettes and other items sold by Indian businesses on the reservation to non-Indian purchasers.¹⁷³ The Court recognized that the large majority of cigarette sales from these shops were to non-Indians traveling to the reservation to take advantage of the tribes’ claimed exemption from the state tax.¹⁷⁴ The Indians’ businesses were therefore largely dependent on their

164. *Id.*

165. *Id.* at 482.

166. *Id.* at 480–81.

167. *Id.* at 482.

168. *Id.* at 483.

169. *Id.*

170. *Id.*; see also *United States v. McGowan*, 302 U.S. 535, 539 (1938).

171. *Moe*, 425 U.S. at 483.

172. 447 U.S. 134 (1980).

173. *Id.* 141–42.

174. *Id.* at 145.

tax-exempt status which, if lost, would cause sales of cigarettes to fall sharply.¹⁷⁵

Based on *Moe*, the Court held that the state could impose its nondiscriminatory tax on non-Indian customers of the Indian retailers.¹⁷⁶ This was true even if imposition of the tax drastically reduced the Indian seller's business with non-Indians by eliminating the price advantage that arose from the claimed tax exemption.¹⁷⁷ The Court also relied on *Moe* for authority to impose at least "minimal" burdens on Indian retailers to collect the state tax.¹⁷⁸ The Court said that the cigarette tax collection burden under review was indistinguishable from that approved in *Moe*.¹⁷⁹

The burdens of Washington's sales tax scheme, however, were more extensive than those approved in *Moe*. The sales tax statutes required Indian retailers to keep detailed records of both exempt and nonexempt sales in addition to precollecting the sales tax.¹⁸⁰ For taxable sales to non-tribal members, the seller was required to record the number and dollar volume.¹⁸¹ For exempt sales to tribe members, the seller was required to record and retain for state inspection the names of all tribal purchasers, their tribal affiliations, the reservation on which the sale was made, and the amount and date of the sale.¹⁸² For members not known to the seller, presentation of a tribal identification card by the purchaser was required.¹⁸³

The Court found the recordkeeping requirements completely valid.¹⁸⁴ In a new twist on the *Williams* infringement test, the Court said the tribes had the burden of showing that the recordkeeping requirements were invalid.¹⁸⁵ Since there was no evidence presented in the district court about whether the requirements were reasonably necessary, the tribes failed to meet their burden of proving that the state's recordkeeping requirements were not "reasonably necessary" to prevent fraudulent transactions.¹⁸⁶

175. *Id.*

176. *Id.* at 159.

177. *Id.* at 157.

178. *Id.* at 159.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 160.

185. *Id.*

186. *Id.*

Colville established the level of state need for regulation as one of reasonable necessity to meet the state purpose and further established a presumption in favor of state jurisdiction to regulate, which must be disproved by the tribe.¹⁸⁷

In addressing the preemption part of the *Williams* infringement test, the *Colville* Court said that “[t]he federal statutes cited to us, even when given the broadest reading to which they are fairly susceptible, cannot be said to pre-empt Washington’s sales and cigarette taxes.”¹⁸⁸ The Court also found no support for preemption of the state tax laws in the tribe’s treaties.¹⁸⁹ Having addressed the preemption question, the Court held that the state did not infringe on tribal rights to self-government merely because its laws deprived the tribe from its cigarette sales income by removing the tax exemption.¹⁹⁰ The Court also held that “the State’s interest in taxing these purchasers outweighs any tribal interest that may exist in preventing the State from imposing its taxes.”¹⁹¹ Finding no federal preemption and an acceptable level of burden on the tribe, the Court held that the state statutes were valid.¹⁹²

The Court reviewed the principles of *Williams*, *McClanahan*, and *Colville* again in 1994 in *Department of Taxation & Finance of New York v. Milhelm Attea & Bros., Inc.*,¹⁹³ in which New York attempted to enforce its cigarette tax laws on non-Indian purchasers at tribal shops by means of restrictions, recordkeeping requirements, and precollection of the taxes imposed on wholesalers who provided the cigarettes to the tribes.¹⁹⁴

The cigarette tax system in New York required licensed Indian-trader wholesalers to purchase tax stamps and affix them to cigarette packages before retail sale.¹⁹⁵ The tax became a part of the retail price of the cigarettes and was considered a tax on the ultimate purchaser, not the wholesaler or the retailer.¹⁹⁶ The state believed that far more untaxed cigarettes were being sold on

187. *Id.*

188. *Id.* at 155.

189. *Id.* at 156.

190. *Id.*

191. *Id.* at 161.

192. *Id.*

193. 512 U.S. 61 (1994).

194. *Id.* at 64–67 (outlining New York’s cigarette taxation regulations).

195. *Id.* at 64.

196. *Id.*

reservations than would be the case if only tribe members were purchasing them; so, it instituted a system of quotas based on calculated demand for cigarettes by Indians purchasing on the reservation.¹⁹⁷ The system also imposed recordkeeping requirements related to sales of untaxed cigarettes.¹⁹⁸

The *Milhelm Attea* Court first confronted the question of “whether the New York scheme is inconsistent with the Indian Trader Statutes.”¹⁹⁹ The question was whether the extensive collection of federal laws regulating wholesalers trading with Indians preempted application of the state’s regulatory scheme.²⁰⁰ The Court reviewed the system of federal laws and rules governing Indian traders and noted its “sweeping” and “comprehensive” scope.²⁰¹ Nevertheless, the Court found that because the cigarette tax in question was not imposed directly on the traders, it was not governed by the federal system.²⁰² The Court held “Indian traders are not wholly immune from state regulation that is reasonably necessary to the assessment or collection of lawful state taxes.”²⁰³

Having found no federal preemption, the Court still had to address other principles that might preclude the state from exercising its jurisdiction.²⁰⁴ The next hurdle, the Court said, was to decide whether the lower court was correct in striking the state law because it “imposes *excessive* burdens on Indian traders.”²⁰⁵ It is interesting that in this case, the balancing test between the state interest and the burden is applied to the burden on Indian traders, not the burden on the tribes themselves. Nevertheless, the Court said it would apply the reasoning of its Indian cases and cited *Colville* in saying that the system was “a ‘reasonably necessary’ method of ‘preventing fraudulent transactions.’”²⁰⁶

After *Milhelm*, it is possible to draw some conclusions about the status of the states’ right to regulate Indians and Indian tribes. First, it is still true that states have very little authority to regulate

197. *Id.* at 65.

198. *Id.* at 67.

199. *Id.* at 70.

200. *Id.* at 64.

201. *Id.* at 70 (citing *Warren Trading Post v. Ariz. State Tax Comm’n*, 380 U.S. 685, 687-89 (1965)).

202. *Id.* at 74-75.

203. *Id.* at 75.

204. *See id.*

205. *Id.* (emphasis in original).

206. *Id.* (citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 160, 162 (1980)).

strictly on-reservation transactions involving tribe members. State authority to regulate off-reservation activities or on-reservation conduct with non-tribe members is much broader. Apparently, a federal preemption test will be applied, and if federal law preempts the state regulation, the latter will fail.²⁰⁷ But, the federal preemption may have to be quite specific to the conduct the state is attempting to regulate. The mere establishment of a reservation or recognition of a tribe by the federal government will not likely be a sufficient basis for a finding of federal preemption.

Once it is determined that federal preemption is not applicable, a balancing test will be applied.²⁰⁸ The test has evolved to a point where it appears to tilt in favor of the state. If the state is attempting to apply a law of general application, the state must show that the regulation is reasonably necessary to advance a legitimate state interest.²⁰⁹ The regulation may burden the subject Indian tribe so long as it does not interfere with the actual functions of tribal government. If it does interfere with tribal self-government, the tribe would be required to show that the regulation is excessively burdensome or not reasonably necessary before the state would be precluded from applying it.

States' ability to apply their laws in Indian territory and against Indians has changed greatly since *Worcester v. Georgia*. Although the states' jurisdiction to regulate Indian tribes has greatly expanded, the states still face limits on their ability to enforce their regulations by legal suit against tribes.

VI. TRIBAL SOVEREIGN IMMUNITY FROM SUIT: FROM A WEAK START TO A SKEPTICAL AFFIRMATION

By 1998, the doctrine of sovereign immunity of Indian tribes had undergone more than 150 years of change and modification, mostly to the detriment of the Indian tribes. Tribes could no longer enter into treaties and their sovereignty was completely subject to the plenary power of Congress. The states' authority to regulate on-reservation conduct and to require tribes to take part in tax collection, recordkeeping, and disclosure was firmly established. State regulatory jurisdiction over off-reservation activities was even greater.

207. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

208. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 176 (1963).

209. *Id.* at 177.

But one powerful aspect of sovereignty—sovereign immunity from suit—was introduced into the law “almost by accident,”²¹⁰ and became a canon of federal common law.

The doctrine of sovereign immunity from suit for Indian tribes has a sketchy beginning. Possibly, its first mention was in 1919, in *Turner v. United States*.²¹¹ The action was one for damages against the Creek Nation for its members tearing down Turner’s fence, which was on the Creek Nation’s land.²¹² Turner tried unsuccessfully to obtain compensation through the tribal court system until the tribe was dissolved in 1906.²¹³ In 1908, Congress passed a law allowing Turner’s suit to be heard in the U.S. Court of Claims.²¹⁴ The court of claims heard Turner’s petition and dismissed it.²¹⁵

The Supreme Court, in reviewing the decision of the court of claims, found that there was no right at law to recover damages and that no such right had been established by Congress’s authorization of jurisdiction over the matter in the court of claims.²¹⁶ The Court said that “[l]ike other governments, municipal as well as state, the Creek Nation was free from liability for injuries to persons or property due to mob violence or failure to keep the peace.”²¹⁷ In what might be considered unfortunate dicta, the Court summarized by saying that “[t]he fundamental obstacle to recover is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace.”²¹⁸

210. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998).

211. 248 U.S. 354 (1919).

212. *Id.* at 356–57.

213. *Id.* at 356.

214. *Id.* at 365–57.

215. *Id.* at 357.

216. *Id.*

217. *Id.* at 357–58.

218. *Id.* at 358. A review of the court of claims decision in *Turner v. United States*, 51 Ct. Cl. 125 (1916) suggests that the court did not even consider immunity from suit. The court questioned whether personal jurisdiction over the tribe had been obtained, but without answering that question, went to the merits of the case. *See id.* at 141. The court said that the plaintiff styled his case as one in contract, but that the petition claimed that a mob of Indians destroyed his fence. *Id.* at 146, 152. If that was the case, the court said, “the Creek Nation is not to be held responsible for the mob’s action.” *Id.* at 152. As an alternative theory, the court said that the action might be one against individuals who were excessive in their efforts to remove a public nuisance. *Id.* at 153–54. In that case also, the Creek Nation would not be liable. *Id.* at 154. In the end, the court of claims found that the plaintiff’s action would lie in tort, not in contract. *Id.* The special

The dicta in *Turner* became the holding in *United States v. United States Fidelity & Guarantee Co.*²¹⁹ The United States, acting on behalf of certain Indian tribes, sued U.S. F&G on a bond issued for the Tribes' benefit.²²⁰ U.S. F&G and the principal on the bond raised a Missouri state court judgment as a defense to the tribes' claims.²²¹ The state court action arose on the same facts and resulted in judgment against the tribes on a cross-claim by the bond principal in an amount that exceeded the tribes' claims on the bond.²²² In the federal action, the United States, on behalf of the tribes, argued that the Missouri judgment was void because the tribes had sovereign immunity from suit in the state courts.²²³

The Supreme Court noted the "public policy" that exempted the tribes from suit and, citing *Turner* as authority, held that "[t]hese Indian Nations are exempt from suit without Congressional authorization."²²⁴

The doctrine of tribal sovereign immunity from suit carried forward in the cases with little analysis. In *Oklahoma Tax Commissioner v. Citizen Band of Potawatomi Tribe of Oklahoma*,²²⁵ the Potawatomi Tribe sued to enjoin the Oklahoma Tax Commissioner from collecting taxes on all sales of cigarettes at the tribe-operated store.²²⁶ The Commissioner counterclaimed for the state's \$2.7 million tax claim and to enjoin the tribe from selling untaxed cigarettes in the future.²²⁷

As in its previous decisions, the Court upheld the state's regulations imposing cigarette taxes on sales by the tribe to non-members and requiring tribal collection and reporting of the taxes.²²⁸

statute allowing the action did not expand the court of claims' regular jurisdiction, which was over contract only. *Id.* at 154–55. For that reason, the court said it had no jurisdiction over the matter. *Id.* at 155. Even having found no jurisdiction over the type of claim, the court ended its opinion by saying, "We conclude that the Creek Nation is not liable to the plaintiff, and his petition must, therefore, be dismissed." *Id.* Nothing in the court of claims opinion suggested that the issue of tribal sovereign immunity from suit was ever considered.

219. 309 U.S. 506 (1940).

220. *Id.* at 510.

221. *Id.* at 511.

222. *Id.* at 510.

223. *Id.* at 510–11.

224. *Id.* at 512.

225. 498 U.S. 505 (1991).

226. *Id.* at 507.

227. *Id.* at 507–08.

228. *Id.* at 512.

With respect to the counterclaim for unpaid taxes, Justice Rehnquist, writing for the Court, recognized the tribe's sovereign immunity from suit and, relying on *U.S. F&G*, held that the immunity also applied to Oklahoma's counterclaim for taxes owed.²²⁹ The Court rejected Oklahoma's arguments that tribal sovereign immunity from suit should be limited or abandoned in the immediate case because it "impermissibly burdens the administration of state tax laws" or "because tribal business activities such as cigarette sales are now so detached from traditional tribal interests that the tribal sovereignty doctrine no longer makes sense in this context."²³⁰

The state argued that by barring suit against the tribe to collect the taxes or compel regulatory compliance, the Court had provided a right without a remedy.²³¹ The Court recognized that sovereign immunity from suit might bar the state from the most efficient remedy, but that it did not preclude all remedies.²³² In considering other remedies that may be available, the Court pointed out that it has never held that individual agents or officers of a tribe would not be liable for damages in an action brought by the state.²³³ Thus, some sort of suit against a tribal officer was apparently permitted under the doctrine of tribal sovereign immunity from suit.

The most recent attempt to narrow or reverse the doctrine of tribal sovereign immunity from suit occurred in 1998 in *Kiowa Tribe v. Manufacturing Technologies*.²³⁴ There, defendant sued in state court to collect a contractual debt of \$285,000 owed by the Kiowa Tribe.²³⁵ Although the facts were not entirely clear, it appeared that the debt was incurred off the reservation and that payments were to be made off the reservation.²³⁶ The transaction was a commercial one not involving tribal government.²³⁷ The tribe opposed state court jurisdiction based on its immunity from suit in state courts.²³⁸

The Supreme Court, in a skeptical opinion, upheld the doctrine of tribal sovereign immunity from suit with five Justices

229. *Id.* at 509–10.

230. *Id.* at 510.

231. *Id.* at 514.

232. *Id.*

233. *Id.*

234. 523 U.S. 751 (1998).

235. *Id.* at 754.

236. *See id.* at 753–54.

237. *Id.* at 753.

238. *Id.* at 753–54.

joining Justice Kennedy in the majority.²³⁹ A strongly worded dissent by Justice Stevens, joined by two other Justices, would have limited the doctrine to actions involving tribal government and would not apply it to the commercial litigation under consideration.²⁴⁰ What makes the case especially interesting is that even the majority opinion, while maintaining the doctrine, expresses much doubt in its continuing application.

Justice Kennedy started the opinion with a statement that tribes are subject to suit only where authorized by Congress or when the tribe has waived its immunity.²⁴¹ He pointed out that in upholding immunity from suit, the Court has not made a distinction based on where the conduct occurred or on whether it involved governmental or commercial activities.²⁴² The state regulatory cases, he pointed out, are not contradictory to this doctrine, as “[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them.”²⁴³

Justice Kennedy then examined the origins of tribal immunity from suit, tracing the roots of the doctrine to its almost accidental recognition in *Turner* through the recent effort to have it narrowed in *Potawatomi*.²⁴⁴ He acknowledged that the doctrine “can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities”²⁴⁵ and that “[t]here are reasons to doubt the wisdom of perpetuating the doctrine.”²⁴⁶

Nevertheless, the majority declined to confine the doctrine to reservations or to noncommercial activities, “defer[ring] to the role Congress may wish to exercise in this important judgment”²⁴⁷ because “Congress is in a position to weigh and accommodate the competing policy concerns and reliance issues. The capacity of the

239. *Id.* at 753–60.

240. *Id.* at 760–66 (Stevens, J., dissenting).

241. *Id.* at 754. (citing *Three Affiliated Tribes of the Fort Bethold Reservation v. Wold Eng'g P.C.*, 476 U.S. 877, 890 (1986); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940)).

242. *Id.* at 755.

243. *Id.*

244. *Id.* at 756–57.

245. *Id.* at 757–58.

246. *Id.* at 758.

247. *Id.*

Legislative Branch to address the issue by comprehensive legislation counsels some caution by us in this area.”²⁴⁸

In the Court’s final paragraph, suggesting a possible limit of the holding to the facts of the case, Kennedy concludes, “Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.”²⁴⁹

One may assume that, in reaching its conclusion in *Kiowa*, the Court was simultaneously considering what was happening in Congress. *Kiowa* was argued in January 1998. In February 1998, Senator Slade Gordon introduced the “American Indian Equal Justice Act,” identified as “a bill to provide for Indian legal reform.”²⁵⁰ Passage of the bill would have resulted in sweeping changes in the law, giving federal and state courts jurisdiction over most claims against tribes and waiving sovereign immunity for those actions.²⁵¹ *Kiowa* was decided on May 26, 1998. Hearings on Senator Slade’s bill were held in March and May 1998, but the bill was never voted on by the Senate.²⁵²

Justice Stevens, leading the dissent and joined by Justices Thomas and Ginsburg, believed that rather than merely following precedent, the majority was extending tribal immunity from suit beyond its previous contours.²⁵³ No previous case had considered immunity from suit in a purely commercial activity that did not involve on-reservation conduct. The dissenters would not expand the doctrine and would have allowed the state court matter to proceed.²⁵⁴

The net result of *Kiowa* seems to be an invitation to Congress to act, coupled with a skeptical, although still absolute, holding that tribes are immune from suit, at least in contract. The limit of the principal holding to contract cases probably results from Justice Kennedy’s care not to extend the holding beyond the facts of the case.

248. *Id.* at 759.

249. *Id.* at 760.

250. American Indian Equal Justice Act, S. 1691, 105th Cong. § 2, *reprinted in* 144 CONG. REC. S1155–06 (1998) (proposed).

251. *Id.*

252. See Timothy Egan, *Backlash Growing as Indians Make a Stand for Sovereignty*, N.Y. TIMES, Mar. 9, 1998, *available at* <http://query.nytimes.com/gst/fullpage.html?res=940DEFDA1430F93AA35750C0A96E958260>.

253. *Kiowa*, 523 U.S. at 760.

254. See *id.* at 760 (Stevens, J., dissenting).

After *Kiowa*, there remained three points on which a challenge to tribal immunity from suit might be supported. The first is that *Kiowa* was limited to suits on contracts. Second, in *Kiowa*, the Court was urged to confine tribal immunity to suits arising on the reservation or related to noncommercial activity, but Justice Kennedy said that “[w]e decline to draw this distinction *in this case*,”²⁵⁵ possibly suggesting that there may be a case where the distinction would be drawn. Finally, the door remained open from the holding of *Potawatomi* that suit might be authorized against individual tribal officers.

In fact, three courts, the United States Court of Appeals for the Fifth Circuit, the Iowa Supreme Court, and the North Dakota Supreme Court have all narrowed *Kiowa* and allowed suits in equity against Indian tribes with neither congressional nor tribal consent.²⁵⁶

Although the cases straying from the *Kiowa* ruling are few, that they exist, and that in at least one case the petition for a writ of certiorari to the Supreme Court was denied, suggest that the doctrine of tribal immunity from suit is not yet settled. Congress has not accepted the *Kiowa* Court’s invitation to act in the nine years since its proffer. The three justices who joined in the *Kiowa* dissent are still members of the Court; two of the six in the majority no longer serve. The right case could result in a significant shift in the federal common law of tribal sovereign immunity. Some thought that case would be *Fair Political Practices Commission v. Agua*

255. *Id.* at 758 (majority opinion) (emphasis added).

256. *See generally* *Comstock Oil & Gas v. Ala. & Coshatta Indian Tribes of Tex.*, 261 F.3d 567 (5th Cir. 2001), *cert. denied*, 535 U.S. 971 (2002) (denying sovereign immunity from suit for injunctive relief for both tribal officers and the tribes themselves); *TTEA v. Yselta del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999) (holding that tribal officers had no sovereign immunity from suit in an action for an injunction, limiting *Kiowa* to suits on contract); *Wasker v. Bear*, No. 04-1917 (Iowa Ct. App. filed Oct. 25, 2006) (involving a tribal leadership dispute holding that the tribe was an indispensable party but denying defendants’ argument that once the tribe was joined, tribal sovereign immunity from suit would preclude state jurisdiction; holding that tribal sovereign immunity from suit is not available in an action for declaratory judgment which does not include a claim for damages); *Cass County Joint Water Res. Dist. v. 1.43 Acres of Land & Turtle Mountain Band of Chippewa Indians*, 643 N.W.2d 685 (N.D. 2002) (holding that tribal sovereign immunity from suit was not applicable in a state action to condemn land held by the tribe in fee, noting that the action was not one for damages and that the land was off the reservation).

Caliente Band of Cahuilla Indians,²⁵⁷ which began in California in 2002.

VII. AGUA CALIENTE: BIG MONEY AND CONSTITUTIONAL ISSUES

The development of Indian law in the United States over more than 160 years, summarized in the above sections, set the stage for the most recent and most direct state challenge to tribal sovereign immunity: The California Fair Political Practices Commission (the "FPPC") sued the Agua Caliente Band of Cahuilla Indians in California state court seeking injunctive relief and money damages.²⁵⁸ The FPPC alleged unreported contributions in excess of \$7,500,000.²⁵⁹

The Agua Caliente Band filed a motion in the trial court to dismiss for lack of jurisdiction based on the doctrine of tribal sovereign immunity from suit.²⁶⁰ The trial court denied the Band's motion²⁶¹ and the matter was appealed to the California Court of Appeal, which also denied the Band's requested relief.²⁶² The California Supreme Court granted the Band's petition for review in the matter of *Agua Caliente Band of Cahuilla Indians v. Fair Political Practices Commission*.²⁶³

On one side of the dispute was the Agua Caliente Band of Cahuilla Indians situated in southern California. Before the existence of the United States, the Agua Caliente Band inhabited about 2000 square miles of land around what is now the Palm Springs area of California.²⁶⁴ In the 1860s the United States government gave the odd-numbered sections of land in that area to the Southern Pacific Railroad.²⁶⁵ In 1876, the Agua Caliente Indian Reservation was established by executive order of President Grant.²⁶⁶ Because of the previous grants to the railroad, the

257. No. 02AS04545, 2003 WL 733094 (Cal. App. Dep't Super. Ct. Feb. 27, 2003).

258. *Fair Political Practices Comm'n v. Agua Caliente Band of Cahuilla Indians*, 148 P.3d 1126, 1128 (Cal. 2006).

259. *Id.* at 1128-29 (alleging unreported contributions in excess of \$7,500,000 in count one). The penalty for unreported contributions is one times the amount that was not reported. CAL. GOV'T CODE § 91004.

260. *Aqua Caliente*, 148 P.3d at 1129.

261. *Id.*

262. *Id.*

263. *Id.* at 1126.

264. *Aqua Caliente History & Culture*, *supra* note 1.

265. *Id.*

266. *Id.*

reservation consisted of a checkerboard pattern of sections of land totaling 31,500 acres.²⁶⁷

The Agua Caliente Reservation was subject to the allotment laws of the United States, ending in 1959, at which time Congress authorized the Tribe and its members to lease their land for periods up to ninety-nine years.²⁶⁸ Today, much of the original reservation has been developed under such leases and underlies much of Palm Springs, Cathedral City, and portions of Rancho Mirage.²⁶⁹ The Tribe itself operates two major casinos, a golf resort, and other commercial operations on its land.²⁷⁰ It has another hotel under construction and is involved in condominium and single family home developments.²⁷¹

On the other side of the dispute was the FPPC, which is charged with administration and enforcement of California's Political Reform Act (PRA), adopted by initiative in 1974.²⁷² As a citizen initiative, the PRA included findings adopted by the voters. Among these were findings that large campaign contributions by lobbyists and organizations allow them to "gain disproportionate influence over governmental decisions"²⁷³ and that previous campaign finance laws "suffered from inadequate enforcement by state and local authorities."²⁷⁴

The PRA, like many post-Watergate campaign finance regulation schemes (including Minnesota's 1974 Ethics in Government Act),²⁷⁵ provided for a comprehensive system of regulation and disclosure of financial activities that could influence elections or elected officials.²⁷⁶ *Buckley v. Valeo*,²⁷⁷ and other cases²⁷⁸

267. *Id.*

268. *Id.*

269. *Id.*

270. Agua Caliente Tribal Enterprises, <http://www.aguacaliente.org/TribalEnterprises/tabid/60/Default.aspx> (last visited Dec. 27, 2007).

271. *Id.*

272. *See generally* CAL. GOV'T CODE §§ 81000–91014 (2005). *See also* § 81000 (noting the PRA's approval and effective dates).

273. CAL. GOV'T CODE § 81001(c).

274. *Id.* at subdiv. (h).

275. 1974 Minn. Laws ch. 470 (codified as amended at MINN. STAT. ch. 10A (2006)).

276. *See generally* Roger Jon Diamond et al., *Political Reform Act: Greater Access to the Initiative Process*, 7 SW. U. L. REV. 453 (1975) (providing a comprehensive examination of the PRA). *See also* Daniel A. Weitzman, *Expenditure Limitations in Campaigns for Statewide Office in California*, 6 PAC. L.J. 631, 658 (1975) ("Unlike many states plagued by ineffective legislation in the form of vague, unenforceable, and loophole ridden campaign financing laws, the Political Reform Act of 1974

have clarified the constitutionality of such statutory schemes, and in *Agua Caliente* the tribe did not challenge the PRA itself.²⁷⁹

Also, in *Agua Caliente*, the Tribe “recognized that the state has the power to regulate political campaigns or create campaign contribution disclosure rules within its borders.”²⁸⁰ Given the history of the regulatory cases, it would be hard to conceive of a situation more appropriate for state regulation. A key state interest was at issue, no federal preemption existed, and, because the Tribe’s reservation was created by executive order rather than treaty, no sovereignty issue could be based on treaty language.²⁸¹

Having conceded the state’s authority to regulate, the Tribe was left with the sole defense of its sovereign immunity from suit, and it was on this issue that the matter reached the state supreme court (the trial court and intermediate appellate court had both ruled against the Tribe).²⁸²

The FPPC acknowledged that the Tribe had not waived its claim of sovereign immunity from suit and that Congress had not authorized the suit.²⁸³ The question, then, was whether the state’s right to regulate in the area of campaign finance and lobbying and to enforce those regulations by legal action was sufficient to overcome the Tribe’s immunity from suit.

The Tribe argued that its immunity from suit arose from the U.S. Constitution, but it was unable to provide support for that

provides California with the necessary machinery for controlling and enforcing the new campaign expenditure limitations.”).

277. 424 U.S. 1 (1976) (holding that provisions of the Federal Election Campaign Act limiting individual contributions to campaigns and requiring disclosure of expenditures are constitutional, despite First Amendment free speech objections).

278. See, e.g., *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (holding that Federal Election Campaign Act provision prohibiting direct expenditure of corporate funds in connection with election to public office, as applied to anti-abortion group’s distribution of letters and pamphlets, violates the First Amendment right to free speech); *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197 (1982) (holding that the First Amendment right to association must yield to the interests that Congress sought to protect by enacting the Federal Election Campaign Act).

279. See *Fair Political Practices Comm’n v. Agua Caliente Band of Cahuilla Indians*, 148 P.3d 1126, 1129–30 (Cal. 2006).

280. *Id.* at 1130.

281. *Id.* at 1130, 1132.

282. See *id.* at 1129–30 (discussing the lower courts’ opinions).

283. *Real Party in Interest’s Opp’n Br. on the Merits at 9, Agua Caliente Band of Cahuilla Indians v. Superior Court*, 148 P.3d 1126 (Cal. 2006) (No. S123832), 2005 WL 760047.

position.²⁸⁴ In fact, the historical review in the previous sections of this Article suggests that there is no such support to be found. Any sovereign right to immunity from suit would have to arise from a tribe's inherent sovereignty or from treaties, giving it exclusive jurisdiction over its land. Having no treaty, the Agua Caliente Tribe's sovereign immunity from suit could be based only on federal common law. Case law supporting that immunity had a weak beginning and culminated with the less-than-enthusiastic endorsement of the *Kiowa* Court.

Considering the Supreme Court's misgivings about the doctrine of immunity from suit expressed directly in the *Kiowa* dissent, and also acknowledged by that Court's majority, it is easy to speculate that had *Agua Caliente* reached the California Supreme Court solely on the arguments raised in previous cases, the California justices may have found *Agua Caliente* to be the case where the distinction from other cases was sufficient to allow them to explicitly draw the contours of the doctrine.

The FPPC, however, in its unique role as protector of the sovereign state's elections process, was able to raise constitutional issues that had not been available to previous states seeking to sue Indian tribes. To surmount the remaining "slender reed" of support for immunity from suit left after *Kiowa*, the FPPC claimed it had an affirmative right to sue the Tribe under the United States Constitution. To support its claim, the FPPC relied on the Guarantee Clause²⁸⁵ and the states' reserved rights expressed in the Tenth Amendment to argue that the state had a constitutional right to enforce its campaign finance laws by suit and that this constitutional right superseded any common law or inherent right the Tribe had immunizing it from suit by the state.²⁸⁶

Article IV, Section 4, provides: "The United States shall guarantee to every State in this Union a Republican Form of Government" ²⁸⁷ The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor

284. See *Agua Caliente*, 148 P.3d at 1131 ("The Tribe asserts that sovereign immunity from suit has a constitutional basis because the [F]ederal Constitution provides Congress with plenary power over Indian affairs. The Tribe, however, fails to cite any authority that specifically states that tribal immunity from suit is a constitutional imperative.").

285. U.S. CONST. art. IV, § 4.

286. See *Agua Caliente*, 148 P.3d at 1135–36 (setting forth the FPPC's contentions with respect to the Guarantee Clause and the Tenth Amendment).

287. U.S. CONST. art. IV, § 4.

prohibited by it to the States, are reserved to the States respectively, or to the people.”²⁸⁸

The FPPC cited *Gregory v. Ashcroft*²⁸⁹ in support of its position that constitutional provisions guarantee it the right to regulate election finance and to sue to enforce its regulations.²⁹⁰ *Gregory* dealt with a Missouri constitutional provision setting qualifications for state judges.²⁹¹ The provision was alleged to be in conflict with a federal statute, and the question was whether the federal statute must be given application.²⁹² The state constitutional provision, the Court said, went “beyond an area traditionally regulated by the States” to a decision “of the most fundamental sort for a sovereign entity” since, “[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.”²⁹³

In addition to upholding Missouri’s right to regulate the qualifications of elected officials by its conclusion that Congress did not intend the federal statute’s application to extend into this area of traditional state sovereignty, the Court discussed, in dicta, its recent line of cases addressing “the unique nature of state decisions that ‘go to the heart of representative government.’”²⁹⁴ Quoting

288. U.S. CONST. amend. X.

289. 501 U.S. 452 (1991).

290. See Real Party in Interest’s Opp’n Br. on the Merits, *supra* note 283, at 12.

291. *Gregory*, 501 U.S. at 455.

292. *Gregory* was a case in which the state mandatory age limit for judges conflicted with a federal statute prohibiting age discrimination. *Id.* The Court held that the federal statute did not apply to state court judges because Congress, in order to “upset the usual constitutional balance” between federal power and the state’s rights retained under the Tenth Amendment to regulate its own elections, would have had to “make its intention to do so unmistakably clear in the language of the statute.” *Id.* at 460 (internal quotation marks omitted). Having disposed of the matter through limiting statutory construction, the Court did not reach the Guarantee Clause issue, rendering its statements in that regard dicta. See *id.* at 458, 463.

293. *Id.* at 460.

294. *Id.* at 461 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)).

Sugarman was the first in a series of cases to consider the restrictions imposed by the Equal Protection Clause of the Fourteenth Amendment on the ability of state and local governments to prohibit aliens from public employment. In that case, the Court struck down under the Equal Protection Clause a New York City law that provided a flat ban against the employment of aliens in a wide variety of city jobs.

Id.

Oregon v. Mitchell,²⁹⁵ the Court recognized that “the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections”²⁹⁶

The *Gregory* Court said that the states’ authority that lies “at the heart of representative government” is reserved to the states under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States “guarantee[s] to every State in this Union a Republican Form of Government.”²⁹⁷

The FPPC went on to argue that laws designed to prevent corruption of the political process, such as the PRA, are an exercise of the states’ constitutional power to regulate elections and the constitutional guarantee of a republican form of government.²⁹⁸ Those states’ constitutional rights, the FPPC argued, must be given effect over the Tribe’s immunity from suit, which is a creation of federal common law.²⁹⁹

By citing cases in which states challenged federal laws that infringed on the states’ sovereign governments³⁰⁰ and selecting quotes of general principle, many of which were dicta, the FPPC attempted to elevate the Guarantee Clause and the reservation of rights in the Tenth Amendment to create an affirmative power in the state to sue not the federal government, but other entities, to enforce the asserted constitutional right.

The Tribe argued that the Guarantee Clause is not a grant of authority or an affirmative right to the states; rather, it imposes an obligation on the federal government to guarantee to the states a republican form of government.³⁰¹ The Guarantee Clause may have been relevant for consideration in the cases cited by the FPPC because those cases arose on the basis of claims that Congress, by

295. 400 U.S. 112 (1970) (invalidating a federal statute that imposed, *inter alia*, a national voting age for state elections; this case was in turn abrogated by the ratification of the Twenty-Sixth Amendment in 1971).

296. *Gregory*, 501 U.S. at 461–62 (quoting *Mitchell*, 400 U.S. at 124–25).

297. *Id.* at 463 (citing U.S. CONST. art. IV, § 4; *Sugarman*, 413 U.S. at 648).

298. Real Party in Interest’s Opp’n Br. on the Merits, *supra* note 283, at 14–16.

299. *Id.*

300. *See id.* at 12–13. The FPPC relied on *Gregory*, which did not reach the Guarantee Clause question since the Court held the federal statute was not intended to apply. *Gregory*, 501 U.S. at 460. The FPPC also relied on *Mitchell*, which dealt with federal statutes that attempted to impose voting requirements on state elections. *See* 401 U.S. 112 (1970).

301. Agua Caliente Band of Cahuilla Indians’ Opening Br. on the Merits at 47–55, *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 148 P.3d 1126 (Cal. 2006) (No. S123832), 2004 WL 2823274.

passing laws that were inapposite to the state's right to a republican form of government, had breached the constitutional guarantee.³⁰²

The California Supreme Court said:

The Tribe correctly notes that the high court has not applied the Tenth Amendment or the guarantee clause to uphold a state's enforcement of a state election provision against a sovereign tribe. But neither has the court held that the federal common law doctrine of tribal sovereign immunity trumps state authority when a state acts in political matters resting firmly within its constitutional prerogatives.³⁰³

The California Supreme Court could have stopped at that point and concluded that the case was sufficiently different from any considered before and therefore the doctrine of tribal sovereign immunity from suit would not apply under the facts of the case. But the court did not take such an approach. Rather, it went on to discuss the importance of state elections and the state's ability to guard against corruption of the election process, finally holding that "the guarantee clause, together with the rights reserved under the Tenth Amendment, provide the FPPC authority under the Federal Constitution to bring suit against the Tribe in its enforcement of the PRA."³⁰⁴

Thus, the California court elevated the Article IV, Section 4 guarantee of a republican form of government, and the Tenth Amendment reservation of rights, to a full-blown affirmative constitutional right held by the State of California to sue Indian tribes in state court to preserve the integrity of the state's election finance regulatory system. The California court moderated its position only slightly in the conclusion section of its opinion, saying:

In light of evolving United States Supreme Court precedent and the constitutionally significant importance of the state's ability to provide a transparent election process with rules that apply equally to all parties who enter the electoral fray, we find the FPPC states the better case. Although concepts of tribal immunity have long-standing application under federal law, the state's exercise

302. *Id.*

303. *Fair Political Practices Comm'n v. Agua Caliente Band of Cahuilla Indians*, 148 P.3d 1126, 1138 (Cal. 2006) (internal quotation marks omitted) (citing *Gregory*, 501 U.S. at 462; *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973)).

304. *Id.* at 1138-39.

of state sovereignty in the form of regulating its electoral process is protected under the Tenth Amendment and the guarantee clause. We therefore find that the Tribe lacks immunity from suit for its alleged failure to follow the PRA's mandated reporting requirements.³⁰⁵

Justice Moreno, joined by two other justices, dissented and would have held that the state did not have authority to sue the Tribe.³⁰⁶ The dissenters would have rejected the constitutional arguments raised by the FPPC and instead relied on *Kiowa* and the long line of Supreme Court precedent holding that Indian tribes have sovereign immunity from suit.³⁰⁷

The opinion of the California Supreme Court was filed on December 21, 2006. A Petition for Rehearing was denied on February 28, 2007.³⁰⁸ On May 8, 2007, the Tribe requested an extension of sixty days within which to file a petition for writ of certiorari.³⁰⁹ That request was granted and the petition was due not later than July 28, 2007.³¹⁰

On July 12, 2007, the Tribe notified the California Supreme Court that it had entered into a Stipulation for Judgment and that judgment had been entered in the district court.³¹¹ The Tribe indicated that it would not be filing a Petition for Writ of Certiorari to the Supreme Court.³¹²

In its stipulation for judgment, the Tribe waived its sovereign immunity for any action by the FPPC to enforce California's

305. *Id.* at 1140.

306. *Id.* at 1140–1145 (Moreno, J., dissenting).

307. *See id.*

We have now begun to enter a new era in which tribal economic and political power is growing, and the ideal of tribal sovereignty is becoming more concretely realized. If the doctrine of tribal sovereign immunity needs to be modified to respond to these changes, federal law teaches that it is Congress, not the states, that is constitutionally delegated and historically assigned the task of making that modification, and it is in a unique position “to weigh and accommodate the competing policy concerns and reliance interests.”

Id. at 1145 (quoting *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 759 (1998)).

308. California Appellate Courts Case Information, http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=316566&doc_no=S123832 (last visited Dec. 27, 2007).

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

Political Reform Act.³¹³ It also agreed to pay a civil penalty of \$250,000.³¹⁴ Judgment was entered accordingly.

VIII. SUMMING IT ALL UP: STATE CAMPAIGN FINANCE LAWS DRAW THE FIRST FIRM LIMITS ON TRIBAL SOVEREIGNTY

The law of Indian tribal relationships with states has changed dramatically from its roots in *Worcester*, in which Justice Marshall held with great clarity that “[t]he Cherokee nation, then, is a distinct community . . . in which the laws of Georgia can have no force”³¹⁵ In *Kiowa*, however, the majority found only a “slender reed”³¹⁶ to support the original doctrine of tribal immunity from suit and recognized “reasons to doubt the wisdom of perpetuating the doctrine.”³¹⁷

Since *Kiowa* a few courts have distinguished the matters before them and held that there is no tribal sovereign immunity from a suit for equitable relief.³¹⁸ California, after *Agua Caliente*, became the fourth jurisdiction to define the contours of tribal sovereign immunity from suit and the first to deny such immunity in an action for monetary damages.³¹⁹ It is also the first to rely on a holding that the Guarantee Clause and the Tenth Amendment of the Constitution give rise to an affirmative right in the state to sue to defend its republican form of government.

The result reached by the California Supreme Court is not as surprising as its reasoning. With scant support in the cases, it found a previously unrecognized affirmative state constitutional right, which it then held was sufficient to override the federal common law holding that Indian tribes are generally immune from suit. While the result may be presumed to be correct, the court’s position would have been more easily reconciled with the federal common law developed from *M’Intosh*³²⁰ through *Kiowa*³²¹ if the court had recognized the state’s constitutional *interest* in protecting its election processes without elevating that interest to a

313. Stipulation for J., *FPPC v. Agua Caliente*, No. 02AS04545 (Sacramento County Super. Ct. of Cal. 2002).

314. *Id.*

315. 31 U.S. (6 Pet.) 515, 561 (1832).

316. 523 U.S. 751, 757 (1998).

317. *Id.* at 758.

318. *See supra* note 256.

319. *See id.*

320. 21 U.S. (8 Wheat.) 543 (1823).

321. 523 U.S. 751 (1998).

constitutional *right*. The court could have taken the position of the Fifth Circuit, and the other courts in cases cited above, and held that the matter before it was one in which the distinction not made in *Kiowa*³²² could, in fact, be made and would be controlling.

No case has been considered by the Supreme Court in which a state right so fundamental as regulating and protecting election processes was at odds with an Indian tribe's assertion of its right to act free from the responsibility to answer for its actions in court. Should such a case reach the high Court, it seems quite possible that the contours of tribal sovereign immunity from suit will finally be drawn and that the doctrine's application will be held to end where a state's interest in preserving its republican form of government begins. This can be accomplished, of course, without elevating the Guarantee Clause or the reservation of rights in the Tenth Amendment to create an affirmative right to sue an entity other than the federal government.

The fact that the Agua Caliente Band decided to settle its dispute with the FPPC with a waiver of sovereign immunity from suit for all matters arising under the California Political Reform Act suggests that its evaluation of the law may have resulted in a similar conclusion. Whether used to create a new right, or simply seen as a strong recognition of important state interests, the constitutional provisions argued by the FPPC could have easily tipped the delicate balance in the Supreme Court.

As the examination of cases in this Article suggests, even the most slender reed of authority or dicta can become the basis for sweeping changes in legal doctrine. For that reason, it would be dangerous for any Indian tribe to allow a case to reach the Supreme Court on the issue of tribal sovereign immunity from suit unless an outcome in favor of the tribe is reasonably certain. Given the current state of the doctrine, that case may never arise again.

Just as only a sovereign can enter into a treaty, only a sovereign can choose to waive its own immunity. By entering into a stipulation with the FPPC, the Agua Caliente Band of Cahuilla Indians may have actually strengthened its sovereignty. Without

322. *Id.* at 758 (stating that the Court declines "in this case" to make a distinction between the case before it and others challenging tribal immunity from suit).

question, the Tribe limited its financial exposure³²³ and preserved the *Kiowa* holding, at least for the immediate future.

323. Stipulation for J., *FPPC v. Agua Caliente*, No. 02AS04545 (Sacramento County Sup. Ct. of Cal. 2002). As noted previously in this Article, the Tribe's exposure was in excess of \$7,500,000. The stipulation provided for payment of \$200,000 to the state, not as civil penalty, but as consideration for the stipulation.