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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

FAIR POLITICAL PRACTICES COMMISSION, Plaintiff and Appellant, v. SANTA ROSA INDIAN COMMUNITY OF THE SANTA ROSA RANCHERIA, Defendant and Respondent.	C044555 (Super. Ct. No. 02AS04544)

APPEAL from a judgment of the Superior Court of Sacramento County, Joe S. Gray, J. Reversed.

Riegels Campos & Kenyon and Charity Kenyon; Fair Political Practices Commission, Steven Benito Russo, Luisa Menchaca, William L. Williams, Jr. and C. Scott Tocher for Plaintiff and Appellant.

Monteau & Peebles, Christina V. Kazhe and Michael Robinson; Decker & Desjarlis and Daniel F. Decker for Defendant and Respondent.

Bill Lockyer, Attorney General, Andrea Lynn Hoch, Louis R. Mauro, Assistant Attorneys General, Kenneth R. Williams, Robert C. Nash, Deputy Attorneys General, Amicus Curiae on behalf of Plaintiff and Appellant.

The question in this case is whether the Fair Political Practices Commission (FPPC) can sue an Indian tribe for failure to comply with reporting requirements for campaign contributions contained in the Political Reform Act (PRA), Government Code section 81000 et seq.[1]

Plaintiff FPPC filed suit against Santa Rosa Indian Community of the Santa Rosa Rancheria (the Tribe),[2] alleging the Tribe failed to file semi-annual campaign contribution statements and filed late contribution reports from 1998 through 2001, as required by the PRA. The trial court granted the Tribe's motion to quash, which asserted the Tribe, as a federally-recognized Indian tribe, is immune from suit under the doctrine of tribal immunity. FPPC appeals. (Code Civ. Proc., § 904.1, subd. (a)(3) [appeal may be taken from an order granting a motion to quash].)

We shall conclude, on the one hand, that the doctrine of tribal immunity, as announced by the United States Supreme Court, has no foundation in the federal Constitution or in any federal statute but is rather a doctrine created by the common

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[1] Undesignated statutory references are to the Government Code.

[2] The Tribe at times calls itself "Santa Rosa Indian Community of the Santa Rosa Rancheria," and at times calls itself "Santa Rosa Rancheria Tachi Yokut Tribe." The Tribe's motion to quash asserted (with no apparent evidentiary support) that the Santa Rosa Rancheria Tachi Yokut Tribe is a federally recognized Indian tribe, and the Tachi Tribe is organized under the Articles of Community Organization of the Santa Rosa Indian Community, Santa Rosa Rancheria, Kings County, California. The Tribe further asserted the Palace Indian Gaming Center is a commercial entity owned and operated by the Tachi Tribe.

law power of the Supreme Court. On the other hand, the State has a constitutional right, under article IV, section 4 and the Tenth Amendment to the United States Constitution, to maintain a republican form of government. That form of government entails government by representatives elected by the People. The right to sue to enforce the PRA is necessary to preserve a republican form of government free of corruption and therefore has constitutional stature. The constitutional right of the State to sue to preserve its republican form of government trumps the common law doctrine of tribal immunity. The FPPC can therefore sue the Tribe. Accordingly, we shall reverse the order granting the motion to quash.[3]

FACTUAL AND PROCEDURAL BACKGROUND

FPPC filed a complaint against the Tribe, seeking civil penalties for the Tribe's alleged violations of the PRA. The complaint alleged (1) failure to file semi-annual campaign statements, and (2) failure to disclose late contributions, as follows:

The Tribe is a federally recognized Indian Tribe, doing business as Palace Bingo and/or Palace Indian Gaming Center. In the first half of 1998, the Tribe injected itself into state political affairs by contributing at least $125,000 to

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[3] We grant the Tribe's motion (filed January 15, 2004) for judicial notice of the trial court's written ruling on the motion to quash in this case, though the court's written formal order makes the written ruling superfluous.

We allowed the filing of an amicus curiae brief by the Attorney General, in support of FPPC.

California political candidates and committees. In the second half of 1998, the Tribe contributed at least $117,250. In the second half of 2000, the Tribe contributed at least $35,000 to California political candidates and committees. The amounts of these contributions made the Tribe a major donor committee under section 82013, subdivision (c).

The Tribe failed to file timely semi-annual campaign statements disclosing contributions, as required by section 84200. Instead, in August and September 2002, the Tribe filed untimely statements reporting 1998 and 2000 activity under different names.

The Tribe violated section 84203 by failing to file a late contribution report with the Secretary of State within 24 hours of making late contributions as defined by section 82036 (i.e., a contribution of $1,000 or more, that is received before an election, but after the closing date of the last pre-election statement). The complaint alleged the Tribe failed to report two late contributions--(1) a $110,000 late contribution to Cruz Bustamante in 1998, and (2) a $250,000 late contribution in 1998 to the committee promoting Indian gaming activities in Proposition 5.

The complaint sought civil penalties, as authorized by section 91004.

The Tribe, appearing specially, filed a motion to quash service of summons and complaint, on the ground the court lacked jurisdiction over the Tribe because of tribal immunity from suit. The Tribe also asserted it was not required to comply

with the PRA but had voluntarily filed the campaign statements it filed.

FPPC opposed the motion to quash, arguing the Tribe was not immune from regulation or from suit under the PRA, which implicated the State's interest in protecting the integrity of its electoral process under the Tenth Amendment's reservation of powers to the states and the constitutional guarantee to the states of a republican form of government.

On May 13, 2003, the trial court issued a written order granting the Tribe's motion to quash the summons and complaint. The court said the critical issue was whether a state suit against a tribe to enforce state electoral campaign regulations, even if validly imposed upon the tribe, would be barred by the federal common law doctrine of tribal immunity from suit. The trial court concluded suit was barred by the doctrine of tribal immunity.

The trial court said, "Congress does not impermissibly intrude upon the States' reserved powers under the Tenth Amendment and Guarant[ee] Clause when, by silence, it permits the doctrine of common law tribal immunity from suit to bar suits by the States to enforce against tribes state reporting requirements for electoral campaign contributions."

The trial court said the State had alternative ways to enforce the PRA against the Tribe, the most promising of which was negotiation of a government-to-government agreement (like gaming compacts), which the Tribe "has indicated its willingness to discuss . . . ." Another alternative, said the trial court,

was for the State to ask Congress to enact federal legislation allowing the State to sue the Tribe to enforce the PRA. The court also said the State is not without means to obtain information about the Tribe's political contributions, because the PRA requires recipients of contributions to disclose information. The trial court acknowledged searches of recipient reports to track particular donors may be more cumbersome, "and the lack of dual reporting by recipients and donors might lead some recipients to violate PRA requirements by omitting tribal contributions from their reports, but overall, the recipient reports can be expected to provide the information about tribal contributions that is needed to achieve the purposes of the PRA . . . ."

FPPC appeals.

DISCUSSION

In this proceeding, the Tribe contends that, even assuming it is subject to regulation by the State under the PRA, it is immune from a lawsuit to enforce the PRA under the doctrine of tribal immunity from suit.[4]

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[4] The Tribe does not concede that the PRA applies to tribes but views the matter as irrelevant. In the final pages of its respondent's brief on appeal, the Tribe responds to FPPC's challenge to the trial court's suggestion that a tribe is not a "person" subject to the PRA. The Tribe says this issue is not relevant. Indeed, the heading in the Tribe's brief states, "Whether the [PRA] Applies to the Tribe is Irrelevant to the Issue Presented Here." (Capitalization omitted.) The Tribe asserts the issue here is whether the lawsuit is barred by the doctrine of tribal immunity. Thus, the Tribe does not claim the trial court's decision could be affirmed on the alternative ground that the PRA does not apply to tribes. Although the

The Tribe argues it has immunity from any state lawsuit unless it waives immunity (which it has not done) or unless Congress expressly authorizes the suit (which Congress has not done).

Courts have recognized tribal immunity from suit in a variety of contexts. (E.g., *Kiowa Tribe v. Manufacturing Tech.* (1998) 523 U.S. 751 (*Kiowa Tribe*) [Indian tribes enjoy immunity from suit on contracts regardless of whether they were made on or off the reservation]; *Oklahoma Tax Com. v. Potawatomi Tribe* (1991) 498 U.S. 505 [state may impose tax on Indian cigarette sales to non-Indians, but may not sue tribe to collect tax]; *Puyallup Tribe v. Washington Game Dept.* (1977) 433 U.S. 165, 172-173 [state court had no jurisdiction to order tribe to limit number of fish that members may catch and report number]; *Redding Rancheria v. Superior Court* (2001) 88 Cal.App.4th 384 [Indian tribe was immune from tort suit arising outside of tribal lands, where woman alleged she was injured while working as a bartender at a Redding hotel, hosting a party for the Indian tribe's casino].)

Tribe, while disclaiming relevance of the PRA's applicability to tribes, incidentally argues the PRA does *not* apply to tribes, the Tribe does not adequately develop any analysis of the point. Thus, the Tribe does not even quote the PRA's statutory definition of "person." (§ 82047.) Nor does the Tribe respond to FPPC's cited authority, *Fair Political Practices Commission v. Suitt* (1979) 90 Cal.App.3d 125 at pages 132 through 133, in which we held the PRA's definition of "person" was broad enough to include the Legislature. We therefore consider it unnecessary to address the trial court's uncertainty as to whether the PRA applies to tribes.

The Tribe suggests tribal immunity from suit has a constitutional basis because the Constitution gives Congress plenary power over Indian affairs. However, the Tribe cites no authority specifically stating that tribal immunity from suit is a constitutional imperative.

In fact, the doctrine of tribal immunity from suit is not found in the federal Constitution or in any federal statute, but is a matter of federal common law. "The term 'federal common law,' although it has eluded precise definition, . . . is court-made law that is neither constitutional nor statutory. See Erwin Chermerinsky, *Federal Jurisdiction* 349 (3d ed. 1999) (defining federal common law as 'the development of legally binding federal law by the federal courts in the absence of directly controlling constitutional or statutory provisions'); Martha Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L.Rev. 881, 890 (1986) (defining federal common law as 'any rule of federal law created by a court . . . when the substance of that rule is not clearly suggested by federal enactments--constitutional or congressional')." (*United States v. Enas* (9th Circ. 2001) 255 F.3d 662, 674-675.)

Thus, the Supreme Court has said, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. [Citations.]" (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58 [tribe was immune from suit in federal court brought by female tribe member alleging violation of the Indian Civil Rights Act (ICRA, 25 U.S.C. § 1301 et seq.) which required Indian tribes to afford

equal protection to its members]; see also, *Kiowa Tribe, supra,* 523 U.S. 751, 756 [doctrine of tribal immunity developed "almost by accident"]; *Long v. Chemehuevi Indian Reservation* (1981) 115 Cal.App.3d 853, 856-857 ["Tribal immunity is based on policy considerations rather than specific constitutional provisions and is generally considered to be coextensive with the sovereign immunity of the federal government"].) "The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance. [Citation.] Of course, because of the peculiar 'quasi-sovereign' status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy. [Citations.]" (*Three Affiliated Tribes v. Wold Engineering* (1986) 476 U.S. 877, 890-891 [state statute, insofar as it disclaimed pre-existing jurisdiction over suits by tribal plaintiffs against non-Indians for which there was no other forum, was preempted by federal legislation].)

The Tribe cites *Worcester v. The State of Georgia* (1832) 31 U.S. 515 at page 558, which said the Constitution "confers on Congress the powers of war and peace: of making treaties, and of regulating commerce with foreign nations, and among the several States, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians." *Worcester*, which rejected the State of Georgia's attempt to apply its criminal laws within tribal lands, also said, "[t]he whole intercourse between the United States and this [Indian] nation, is, by our constitution

and laws, vested in the government of the United States." (*Id.* at p. 561.)

We recognize that state courts have said, "[f]ederal authority over Native American Indian matters derives primarily from the power to regulate commerce with Native American Indian tribes (U.S. Const., art. I, § 8, cl. 3) and secondarily from the power to make treaties (U.S. Const., art. II, § 2, cl. 2). [Citations.] The United States Constitution is silent regarding state action in these areas. A review of the evolving decisional law makes clear the federal government's predominance over Native American Indian affairs in general and over Indian land in particular. [Citation.]" (*Middletown Rancheria v. Workers' Comp. Appeals Bd.* (1998) 60 Cal.App.4th 1340, 1346 [Workers' Compensation Appeals Board lacked jurisdiction over Indian tribe for purposes of enforcing California workers' compensation laws].) The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this nation's history and has "'two independent but interrelated bases: federal preemption and the internal sovereign rights of Indian tribes.' [Citations.] States may regulate within Indian country only when state control is not preempted by federal law or when state control does not infringe on tribal sovereignty. [Citations.]" (*Id.* at pp. 1347-1348, italics omitted [enforcement of California's workers' compensation laws by administrative board would unlawfully infringe on tribe's right to govern its own employment affairs].)

Additionally, "courts have come to favor federal preemption over inherent sovereignty as the primary justification for the preclusion of state authority over Indian affairs. [Citation.] The basis for this assertion of exclusive federal authority over Indian affairs is rooted in three provisions of the United States Constitution: the Indian commerce clause (art. I, § 8, cl. 3), which gives Congress the exclusive power to control Indian commerce; the treaty clause (art. II, § 2, cl. 2)[5] [president has power to make treaties with advice and consent of the Senate]; and the supremacy clause (art. VI, cl. 2), which, together with extensive congressional legislation on Indian affairs, has broadly preempted state law. [Citation.]" (*Boisclair v. Superior Court* (1990) 51 Cal.3d 1140, 1147-1148 [construing federal legislation for state court jurisdiction over individual Indians].)

Authority for applying the doctrine of tribal immunity in this case cannot be found in the Indian commerce clause. The United States Constitution, article I, section 8, which describes the powers granted to Congress, states in clause 3 that Congress has the power "[t]o regulate commerce with foreign Nations, and among the several states, and with the Indian Tribes." This clause cannot support tribal immunity in this case because (1) it grants a power to Congress, and Congress has not granted the tribe immunity from this suit, and (2) it

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[5] The Tribe also cites article I, section 10, of the United States Constitution, which states, "No state shall enter into any treaty . . . ."

concerns the regulation of commerce, and this case concerns not commerce but rather the political process.

Nor can such authority be found in the treaty clause (art. II, § 2, cl. 2), because the Tribe has cited no ratified treaty that exists between it and the federal government.[6]

Nor does the supremacy clause[7] suggest that the doctrine of tribal immunity is other than a common law rule. The supremacy clause tells us that federal law trumps state law, but it does not provide textual support for adoption of the law in the first place.

We therefore conclude that the doctrine of tribal immunity, as it is sought to be applied in this case, is neither a constitutional nor a statutory doctrine. Rather, it is a creature of the common law power of the United States Supreme Court.

On the other hand, the Tenth Amendment to the United States Constitution states, "The powers not delegated to the United

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[6] At oral argument, the Tribe asserted that a treaty existed between it and the federal government. However, the Tribe admitted that the treaty had never been ratified and that it did not grant the Tribe immunity from suit in state courts.

[7] Article VI, clause 2 of the United States Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

But what are these powers that are reserved to the states? Surely one such power is the power and duty to maintain a republican form of government, since maintenance of that form of government is mandated by article IV, section 4 of the United States Constitution, which provides in relevant part, "[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . . ."

The right and duty of the state to maintain a republican form of government necessarily includes the right to elect representatives and to protect against corruption of the political process. Thus, "[b]y the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration." (*Duncan v. McCall* (1891) 139 U.S. 449, 461.) "'[E]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.' [Citations.] Such power inheres in the State by virtue of its obligation . . . 'to preserve the basic conception of a political community.'" (*Gregory v. Ashcroft* (1991) 501 U.S. 452, 462 [Age Discrimination in Employment Act did not apply to appointed state judges, and mandatory retirement of state judges did not violate equal protection clause].)

In a series of cases in which *individuals* sought to rely upon the constitutional guarantee of a republican form of

government, the United States Supreme Court held the question to be a nonjusticiable "political question." The situation was described most recently by the high court in *New York v. United States* (1992) 505 U.S. 144 at pages 184 through 185 (*New York*), as follows:

"In most of the cases in which the Court has been asked to apply the [Guarantee] Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine. [Citations.]

"The view that the Guarantee Clause implicates only nonjusticiable political questions has its origin in Luther v Borden, 7 How 1, 12 L Ed 581 (1849), in which the Court was asked to decide, in the wake of Dorr's Rebellion, which of two rival governments was the legitimate government of Rhode Island. The Court held that 'it rests with Congress,' not the judiciary, 'to decide what government is the established one in a State.' Id., at 42, 12 L Ed. 581. Over the following century, this limited holding metamorphosed into the sweeping assertion that '[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts.' [Citation.]

"This view has not always been accepted. In a group of cases decided before the holding of Luther was elevated into a general rule of nonjusticiability, the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable. [Citations.]

"More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions. [Citation.] Contemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances. [Citations.]

"We need not resolve this difficult question today." (*New York, supra,* 505 U.S. 144, 184-185.)

We agree with Professor Laurence Tribe, who has opined that, in light of *New York*, *supra,* 505 U.S. 144, the question of the justiciability of the guarantee clause *when asserted by a state* is not foreclosed. (See 1 Tribe, American Constitutional Law (3rd ed. 2000) § 5-12, pp. 910-911.) As Professor Tribe has said, "To be sure, the Supreme Court has never held that the Guarantee Clause . . . confers judicially cognizable rights upon *individuals* . . . [but] it need not follow from the unavailability of the Guarantee Clause as a textual source of protection for *individuals* that the clause confers no judicially enforceable rights upon *states as states*. It is, after all, 'to every State' that the promise of the Guarantee Clause is addressed." (Tribe, *supra,* § 5.12, pp. 910-911.)

The Tribe argues: "To the extent that the FPPC asserts claims alleging violations of the Tenth Amendment and the Guarant[ee] Clause, the FPPC is pursuing this action against an improper party." The Tribe argues the guarantee clause protects states only from acts of state and federal governments, and since the Tribe is not a state or federal government, the Tribe cannot violate this constitutional provision. This argument

misses the point, because FPPC does not allege the Tribe is violating the Tenth Amendment or the guarantee clause. Rather, FPPC is asserting a constitutional right based upon the Tenth Amendment and the guarantee clause, which trumps the Tribe's claim to sovereign immunity from suit.

We conclude it is entirely appropriate for the State to invoke the guarantee clause, together with its reserved right under the Tenth Amendment, to preserve its republican form of government--the very essence of its political process--from corruption. And we so hold.

There can be no doubt that the PRA accomplishes this aim.

The United States Supreme Court said recently, "'To the extent that large [political] contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.'" (*Nixon v. Shrink Missouri Gov't. PAC* (2000) 528 U.S. 377, 388.)

The purpose of California's PRA is to insure a better-informed electorate and to prevent corruption of the political process. (§§ 81001-81002; *Thirteen Committee v. Weinreb* (1985) 168 Cal.App.3d 528, 532.) "Costs of conducting election campaigns have increased greatly . . . , and candidates have been forced to finance their campaigns by seeking large contributions from lobbyists and organizations who thereby gain disproportionate influence over governmental decisions." (§ 81001, subd. (c).) "The people enact [the PRA] to accomplish the following purposes: [¶] (a) Receipts and expenditures in

election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited. [¶] (b) The activities of lobbyists should be regulated and their finances disclosed in order that improper influences will not be directed at public officials." (§ 81002.) Government has a substantial interest in (1) providing the electorate with information as to where political campaign money comes from; (2) deterring corruption and avoiding the appearance of corruption by exposing large contributions to the light of publicity; and (3) detecting violations of contribution limits. (*Buckley v. Valeo* (1976) 424 U.S. 1, 67-68 [upholding reporting requirements of federal election campaign statutes against a First Amendment challenge].) Statutes requiring campaign contribution disclosures serve to protect the integrity of the electoral process and a republican form of government.

But does this federal constitutional right of the state to maintain the integrity of its republican form of government entail the right to bring suit to enforce the right?

Our Supreme Court has recognized that rules or procedures necessary to secure a constitutional right may themselves be given constitutional stature. These rules and procedures add flesh to otherwise skeletal constitutional rights. Several examples should suffice.

In *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), the Supreme Court held that, in order to preserve a citizen's right not to incriminate himself under the Fifth Amendment, police

officers had to give citizens in custody certain advisements (*Miranda* rights) before interrogating them. In *Dickerson v. United States* (2000) 530 U.S. 428 (*Dickerson*), the court held that the *Miranda* warnings (and the consequences of not giving them) were required by the federal Constitution and could not be overruled by an act of Congress. (*Id.* 530 U.S. at p. 432.)[8]

Similarly, the Fourth Amendment to the federal Constitution protects against "unreasonable searches and seizures." In *Wilson v. Arkansas* (1995) 514 U.S. 927 at page 934, the high court held that police officers were required to knock and announce their presence before entering a residence as "an element of the reasonableness inquiry under the Fourth Amendment." (Fn. omitted.)

Again, in another Fourth Amendment case, *Mapp v. Ohio* (1961) 367 U.S. 643 (*Mapp*), the high court held that the rule requiring the exclusion at trial of unlawfully obtained evidence "is an essential part of both the Fourth and Fourteenth Amendments." (*Id.* at p. 657.) The court reasoned, "Were it

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[8] Recently, four justices of the United States Supreme Court indicated the *Miranda* rule was not constitutionally-based. (*Chavez v. Martinez* (2003) 538 U.S. 760 [*Miranda* violation did not give rise to civil rights claim under Fifth Amendment where no criminal charges were ever filed].) However, those justices, who did not acknowledge *Dickerson*, *supra*, 530 U.S. 428, did not constitute a majority and therefore *Chavez* did not overrule *Dickerson*. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (*Marks v. United States* (1977) 430 U.S. 188, 193.)

otherwise, . . . the freedom from state invasions of privacy would be . . . ephemeral . . . ." (*Id.* at p. 655.)[9]

In this case, the state's resort to the judicial process is a procedure essential to enforce its reserved right and duty to maintain a republican form of government. What else is it to do, call out its "well regulated militia"? We daresay no one would sanction such a remedy. We conclude that, without a right to bring suit, the state's constitutional right to preserve its republican form of government would be "ephemeral." (*Mapp, supra,* 367 U.S. 643, 655.)

FPPC cites declarations in the record supporting its argument that alternatives to judicial enforcement of the PRA are unavailable. For example, although the PRA requires recipients as well as donors to report campaign contributions, FPPC's Chief Investigator attested the ability to cross-check statements by donors and recipients is an important investigative tool for enforcing the PRA. This comports with common experience that the requirement for both payor and payee to file disclosure statements will act as a check to discourage omissions by one or the other. Thus, the fact that recipients are supposed to report contributions does not constitute an alternative method of enforcement.

In response to FPPC's argument that it has no adequate alternatives to judicial enforcement of the PRA, the Tribe

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[9] In *United States v. Leon* (1984) 468 U.S. 897 at page 906, the court abandoned *Mapp*'s, *supra,* 367 U.S. 643, characterization of the exclusionary rule as a constitutional right.

asserts in the introductory pages of its appellate brief that FPPC has "other avenues" available to enforce the PRA without filing suit against the Tribe. However, the Tribe offers no discussion on the subject.

We therefore conclude that resort to a judicial remedy is essential to secure the state's constitutional right to guarantee a republican form of government free of corruption. As such, the right to sue must be given constitutional stature. (See *Dickerson v. United States, supra,* 530 U.S. 428.)

In this case, the State, through FPPC, is asserting a right guaranteed by the Constitution of the United States. The Tribe asserts a common law immunity. The State's constitutional right trumps the Tribe's common law immunity, because no court--not even the United States Supreme Court--has the common law power to make up a rule that conflicts with the United States Constitution. Thus, the United States Supreme Court has said, "The Departments of the government are Legislative, Executive *and Judicial*. They are coordinate in degree to the extent of the powers delegated to each of them. Each, in the exercise of its powers, is independent of the other, but all, rightfully done by either, is binding upon the others. *The Constitution is supreme over all of them*, because the people who ratified it have made it so; consequently, anything which may be done unauthorized by it is unlawful." (*Dodge v. Woolsey* (1856) 59 U.S. 331, italics added.)

The Tribe cites various cases where the doctrine of tribal immunity has been applied. (See *ante*, pp. 7-11.) However, all

of these cases are distinguishable because in none of them did a state assert a federal constitutional right to bring suit that trumped the common law doctrine of tribal immunity. "'It is axiomatic that cases are not authority for propositions not considered.' [Citations.]" (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388.)

The Tribe cites *Morton v. Mancari* (1974) 417 U.S. 535 [41 L.Ed.2d 290] (*Morton*), which held federal legislation granting Indians an employment preference in the Bureau of Indian Affairs (BIA) did not constitute impermissible discrimination against non-Indians. *Morton* said, "The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl 3, provides Congress with the power to 'regulate Commerce . . . with the Indian Tribes,' and thus, *to this extent*, singles Indians out as a proper subject for separate legislation. Article II, § 2, cl 2, gives the President the power, by and with the advice and consent of the Senate, to make treaties. This has often been the source of the Government's power to deal with the Indian tribes. The Court has described the origin and nature of the special relationship:

"'In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them . . . dependent people, needing protection . . . . Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to

prepare the Indians to take their place as independent, qualified members of the modern body politic. . . . [Citations.] Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations." (*Morton, supra*, 417 U.S. 535, 551-552, italics added.) Thus, *Morton* does not stand for the proposition that the doctrine of tribal immunity has a constitutional basis or that the Tenth Amendment is immaterial to the question of tribal immunity, which is controlled exclusively by federal law.

We recognize the United States Supreme Court recently issued an opinion involving Indian tribes in *United States v. Lara* (2004) __ U.S. __, (*Lara*) [124 S.Ct. 1628; 158 L.Ed.2d 420]. However, *Lara* does not have any bearing on the case before us. In *Lara*, a nonmember Indian was prosecuted in a tribal court for public intoxication, resisting arrest and violence against a police officer on an Indian reservation. After he was convicted and served his sentence, the federal government sought to prosecute him in federal court for the same offense.

The issue in *Lara, supra*, __ U.S. __, [124 S.Ct. 1628], was whether the federal court prosecution was barred by the double jeopardy clause of the Fifth Amendment. The tribal prosecution was pursuant to a federal statute "recogniz[ing] and affirm[ing]" the "inherent power" of tribes to exercise criminal jurisdiction over all Indians. (25 U.S.C. § 1301(2).) The

federal statute was enacted shortly after a United States Supreme Court case holding tribes had lost their inherent sovereign power to prosecute members of other tribes for offenses committed on their reservations. (*Lara, supra*, 124 S.Ct. at p. 1632.) The question in *Lara* was whether the federal statute validly restored the tribes' sovereign power to prosecute members of other tribes (rather than delegating federal prosecutorial power to the tribes) such that a federal prosecution following a tribal prosecution for offenses with the same elements was valid under the double jeopardy clause.

The United States Supreme Court in *Lara* observed the central function of the Indian commerce clause is to provide Congress with plenary power to legislate in the field of Indian affairs. (*Lara, supra*, __ U.S. __, [124 S.Ct. 1628, 1633].) *Lara* held (1) the source of the tribe's power to prosecute and punish the defendant for violence to a policeman was inherent tribal sovereignty rather than delegated federal authority; (2) Congress possessed constitutional power to lift or relax restrictions on Indian tribes' criminal jurisdiction over nonmember Indians that political branches of government had previously imposed; and (3) the double jeopardy clause could not bar federal prosecution of the defendant for assaulting a federal officer after the Indian tribe's prosecution and punishment of him for violence to a policeman, absent any showing that the source of the tribal prosecution was federal power. (*Id.* at pp. 1636-1639.)

Lara, supra, __ U.S. __, [124 S.Ct. 1628], does not undermine our conclusion in this case. Deciding that the doctrine of tribal immunity does not apply does not interfere with any power of Congress. Assuming without deciding that Congress would enact a law granting the tribe immunity in a suit such as this,[10] it has not done so. The doctrine of tribal immunity is a court-made doctrine. It is a court, not Congress, that created the doctrine, and holding that it does not apply in this case limits the power of a court, but not the power of Congress.

The Tribe argues tribal immunity is inherent in a tribe's status as a separate and distinct sovereign, predates the United States Constitution, and is not subject to limitation by the Constitution because tribes were not represented at the Constitutional Convention. However, it is immaterial that the doctrine of tribal immunity may predate the federal Constitution. The doctrine is still a creature of common law. Much common law predates the Constitution, but it is the rule that "any principle of common law in conflict [with the Constitution] is void." (16 Corpus Juris Secundum (1984) § 3, p. 25.)

Moreover, the Tribe's position is inconsistent with its concession that the doctrine of tribal immunity is subject to limitation by Congress pursuant to the federal Constitution's delegation of powers to Congress.

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[10] We question whether Congress could do so, since this is not a commerce case and there is no treaty.

Finally, the authorities cited by the Tribe do not establish an inherent tribal immunity from suit that would trump a state's rights under the federal Constitution. To the contrary, *Idaho v. Coeur D'Alene Tribe of Idaho* (1997) 521 U.S. 261 [138 L.Ed.2d 438], held the Eleventh Amendment (immunizing states from lawsuits by citizens of other domestic or foreign states) barred a tribe's claims against Idaho officials for declaratory and injunctive relief as to the tribe's alleged interest in beds and banks of navigable waters on the tribe's reservation. The Tribe also cites *Blatchford v. Native Village of Noatak* (1991) 501 U.S. 775 [115 L.Ed.2d 686], which held the Eleventh Amendment barred federal suits by Indian tribes against states because, among other reasons, (1) traditional principles of sovereign immunity applied to suits against states by sovereigns like Indian tribes, and (2) the states did not waive their immunity against Indian tribes in the "plan of the convention" when they adopted the Constitution. (*Id*. at pp. 781-782.)

Accordingly, we reject the Tribe's position that an inherent tribal immunity trumps the United States Constitution. The reverse is the case.

In the case before us, the trial court improperly granted the Tribe's motion to quash service of summons. The trial court has jurisdiction to adjudicate this complaint.

This case confirms the wisdom of Justice Holmes's observation that "The life of the law has not been logic: it has been experience." (Holmes, *The Common Law* (1881) p. 1.)

DISPOSITION

The order granting the Tribe's motion to quash is reversed and the case is remanded to the trial court for further proceedings. The parties shall bear their own costs in this appeal. (Cal. Rules of Court, rule 27(a)(4).)

SIMS, J.

I concur:

SCOTLAND, P.J.

ROBIE, J.

I respectfully dissent.

Let me begin by identifying that much of my colleagues' opinion with which I agree.

I agree that the power to maintain a republican form of government is one of the powers reserved to the states that are referred to in the Tenth Amendment to the United States Constitution.

I agree that the reserved right of the state to maintain a republican form of government necessarily includes the right to protect against corruption of the political process.

I agree that statutes like the Political Reform Act (Gov. Code, § 81000 et seq.) (PRA), requiring campaign contribution disclosures, serve to protect the integrity of the electoral process by ensuring a better-informed electorate and preventing corruption of the political process.

I therefore agree that enactment of the PRA was a valid exercise of the state's reserved powers.

Finally, I agree that resort to the judicial process is essential to effective enforcement of the campaign contribution disclosure requirements of the PRA, and that the power to bring suit against a campaign donor for violation of those requirements is an integral part of the state's reserved power to maintain a republican form of government, which the state is entitled to exercise *absent any limitation by the federal Constitution*.

It is on this last point my colleagues and I part ways.

Initially, it is important to note that the guarantee clause (U.S. Const., art. IV, § 4) does not provide a constitutional source for the claimed power of the state to sue an Indian tribe for campaign contribution disclosure violations. The guarantee clause imposes an obligation on Congress to "guarantee to every state in this union a republican form of government." (See *Highland Farms Dairy v. Agnew* (1937) 300 U.S. 608, 612 [81 L.Ed. 835, 840] ["the enforcement of that guaranty, according to settled doctrine, is for Congress, not the courts"].) The clause does *not* grant any right or power to the states in that regard. Whatever power the state has to sue an Indian tribe for campaign contribution disclosure violations is an inherent power that derives from the state's sovereignty. As the Tenth Amendment makes clear, however, the state retains that sovereign power *only* to the extent the exercise of that power is not prohibited by the federal Constitution or inconsistent with the federal government's exercise of powers delegated to it by the Constitution.

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." "The Tenth Amendment does not operate as a limitation upon the powers, expressed or implied, delegated to the national government." (*Fernandez v. Wiener* (1945) 326 U.S. 340, 362 [90 L.Ed. 116, 134].) Instead, "the Tenth Amendment 'states but a truism that all is retained which has not been surrendered.'" (*New York v. United States* (1992)

505 U.S. 144, 156 [120 L.Ed.2d 120, 137].) "The 10th Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the states or to the people. It added nothing to the instrument as originally ratified . . . ." (*United States v. Sprague* (1931) 282 U.S. 716, 733 [75 L.Ed. 640, 645].) "The States unquestionably do 'retai[n] a significant measure of sovereign authority.' [Citation.] They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." (*Garcia v. San Antonio Metro.* (1985) 469 U.S. 528, 549 [83 L.Ed.2d 1016, 1033].)

Thus, the state has the reserved sovereign power to sue an Indian tribe for civil penalties under the PRA (thereby maintaining a republican form of government) *provided* the state has not been divested of that power by the federal Constitution. In my view, the state *has* been divested of that power.

"By providing for final review of questions of federal law in [the United States Supreme] Court, Article III [of the federal Constitution] curtails the sovereign power of the States' judiciaries to make authoritative determinations of law." (*Garcia v. San Antonio Metro.*, *supra*, 469 U.S. at p. 549 [83 L.Ed.2d at p. 1032].) Moreover, under the supremacy clause (U.S. Const., art. VI, cl. 2), the federal "Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the

judges in every state shall be bound thereby, any thing in the Constitution or the laws of any state to the contrary notwithstanding." Thus, "[o]n a federal question, the decisions of the United States Supreme Court are binding on state courts." (*Irwin v. City of Hemet* (1994) 22 Cal.App.4th 507, 520, fn. 8; see also *Donaldson v. Superior Court* (1983) 35 Cal.3d 24, 30 [state courts are "[b]ound in matters of federal law by the United States Supreme Court"].)

The United States Supreme Court has broadly and plainly held that "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." (*Kiowa Tribe v. Manufacturing Tech.* (1998) 523 U.S. 751, 754 [140 L.Ed.2d 981, 985].) Moreover, despite repeated requests, the court has declined to abrogate this immunity doctrine, or even limit it, instead "defer[ing] to the role Congress may wish to exercise in this important judgment." (*Id.* at p. 758 [140 L.Ed.2d at p. 987].)

For our purposes, it does not matter whether the tribal immunity doctrine recognized in *Kiowa* and its progenitors is "a creature of the common law power of the United States Supreme Court," as my colleagues posit, rather than "a constitutional [or] a statutory doctrine." Because even in exercising its power to declare federal common law, the United States Supreme Court exercises a power granted to it by *the federal Constitution* -- that is, the Article III power to say what federal law is. Once the Supreme Court has exercised that

power, we are precluded from saying that federal law is something different. More importantly, once the Supreme Court has declared what federal law is, the state has no reserved sovereign power to act contrary to the Supreme Court's declaration.

Thus, even though the state may have a reserved sovereign power to bring suit against those who violate its campaign contribution disclosure laws, that sovereign power does *not* encompass the power to sue an *Indian tribe* because the United States Supreme Court, in the exercise of its constitutional power to declare what federal law is, has declared that Indian tribes are immune from suit except where Congress has authorized the suit or the tribe has waived its immunity. The state cannot claim a reserved sovereign power to act in a way that contravenes federal law as declared by the United States Supreme Court, whatever the source of that law may be. The supremacy clause will not allow it.

The flaw in my colleagues' decision is that it elevates the reserved powers of a state referred to (but not granted by) the Tenth Amendment above the powers delegated to the federal government by the Constitution. But the converse is true: Where the federal government, including the Supreme Court, exercises powers delegated to it by the Constitution, then the state has no reserved sovereign power to act in a contrary manner.

For this reason, I cannot agree with my colleagues' conclusion that "[t]he constitutional right of the State to sue

to preserve its republican form of government trumps the common law doctrine of tribal immunity."[1] Consequently, I would affirm the order granting the Tribe's motion to quash.

ROBIE, J.

[1] Because I believe the United States Supreme Court's announcement and repeated reaffirmations of the tribal immunity doctrine are sufficient to resolve this case, I need not address whether the fact that "Congress has consistently reiterated its approval of the immunity doctrine" (*Oklahoma Tax Com. v. Potawatomi Tribe* (1991) 498 U.S. 505, 510 [112 L.Ed.2d 1112, 1120]) provides a separate basis for determining that the federal government has, in the exercise of its powers under the Constitution, established tribal immunity as a matter of federal law that "trumps" any reserved sovereign right of the state to sue for violation of the PRA.