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Can California and Indian Nations Just Get Along?

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On three separate fronts, the state of California is challenging assertions of tribal sovereignty. A state Superior Court judge in Riverside is claiming the power to determine whether some members of the Pechanga Tribe have been wrongfully removed from tribal membership rolls. A state Court of Appeal panel has decided that the California Fair Election Practices Commission can sue the Agua Caliente Tribe for violations of state laws regarding the reporting of campaign contributions. And the California Insurance Commissioner is threatening to shut down efforts of several tribes to establish lower-cost alternatives to state-mandated workers' compensation, tribal programs that rely on the tribes hiring employees and then contracting out their services to employers.

What these seemingly different issues share is the prospect of California exercising control over Indian nations. The United States Constitution is a good place to start in figuring out whether the state has that authority. Constitutional text and history teach us that management of Indian affairs is within federal, not state power. Before our Constitution was adopted in 1787, the Articles of Confederation contained ambiguous language that could be read to allow individual states as well as the United States some control over relations with the Indian nations. That division of responsibility between the federal and state governments proved so unworkable that the framers of the 1787 Constitution unmistakably allocated to Congress alone the power to "regulate commerce...with the Indian tribes," linking that authority with federal power to regulate commerce among states and with foreign nations. It was the sovereign, governmental status of Indian nations that justified a unified national policy, coupled with the federal government's responsibility to care for Indian peoples who had often been brought into the American government without their consent. A first principle of this constitutional scheme was that states had no authority over Indians within tribal territory.

The state of California has always played fast and loose with this arrangement. One of the first pieces of legislation ever passed in California, in 1851, asserted control over Native conduct, whether or not it took place on tribal lands. Under this law, Native youth could be seized and held in indentured servitude until well into their adulthood, and any Native person characterized as a "vagrant" could be jailed and discharged into the long-term "custody" of anyone willing to pay the bail. In 1953, Congress passed a law, known as Public Law 280, giving California as well as some other states greater authority within tribal territory than would otherwise exist. But even this law has limits, and California has been much less willing than the other affected states to respect them. For example, California was the last Public Law 280 state to recognize that Indian nations retain their own criminal authority alongside the state's.

The most recent round of disputes suggests California is once again ignoring constitutional limits on its involvement in Indian affairs. For example, even though Public Law 280 limits state civil authority over lawsuits against Indians to claims involving private matters such as auto accidents, a state court is claiming power to inject itself into a matter of tribal governance, namely who is eligible for tribal citizenship. The Fair Election Practices Commission is trying to get state courts to entertain lawsuits against Indian nations, even though the U.S. Supreme Court has announced recently that the sovereign immunity of tribes applies to their activities off the reservation as well as on it. The Court of Appeal panel that agreed with the FEPC suggests that the state's reserved rights under the Tenth Amendment to the U.S. Constitution somehow trump the tribes' sovereign immunity. But that argument is inconsistent with U.S. Supreme Court cases saying that states can't sue tribes to collect sales taxes, even taxes the states may lawfully impose. Finally, it is unclear whether the state's Insurance Commissioner, concerned about the workers' compensation alternatives, will challenge the tribes directly or instead go after the employers who contract for such service. But if he tries to sue the tribes themselves, he should run into the same problem as the FEPC.

In each of these cases, the state has alternatives to direct action against Indian nations. The constitutional scheme envisions states taking their concerns to Congress, not into their own hands. Here the states have a large advantage over the tribes, as states are represented directly in the U.S. Senate. If California is too impatient to follow the constitutional plan and go to Congress, it should negotiate with the tribes, not flex its muscles. Many states have worked out agreements with tribes on matters such as collection of state sales taxes imposed on non-Indian purchasers of cigarettes on reservations.

California may not like the fact that there are more than 100 separate governments located within its boundaries. It may wish to ignore their inherent sovereignty because their territories and populations are relatively small. But that is dangerously close to chutzpah – famously defined as murdering one's parents and then asking for mercy because one is an orphan. It was the state of California, as well as vigilante groups of California citizens, that lobbied to rob California tribes of their lands and carried out policies of wholesale slaughter of Native peoples in the early decades of statehood. The Native Nations that valiantly survived these genocidal policies deserve respect from the state, not lawless interference with their sovereign rights.