

CONCURRENT TRIBAL AND STATE JURISDICTION UNDER PUBLIC LAW 280

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INTRODUCTION

Every nation's survival and self-governance hinges on its ability to maintain law and order and secure "comfortable, safe, and peaceable living" among its citizens.¹ Indian nations are no different. Tribal governments need to maintain an adequate measure of justice and peace among their members if they are to survive and develop as viable entities. Tribal justice systems, including tribal courts and law enforcement, are essential institutions of tribal self-government. Currently, many tribal justice systems—widely varied in their relative sophistication and form—find themselves at a pivotal point in their development. Although increasing in number and prominence, uneven political, legal, and financial support impedes the ability of many tribal justice systems to function in full parity with state and federal systems. The challenges facing tribal justice systems are significant and complex: a chronic shortage of resources and technical assistance; an increase in the level and severity of violent crime, including youth and gang violence; disputes and conflicts related to economic development initiatives; congressional limitations on tribal court sentencing authority; insufficient facilities for incarceration and rehabilitation; and confusion over jurisdictional

1. See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 58 (Richard Cox ed., Harlan Davidson, Inc. 1982) (1690).

lines between federal, state, and tribal authorities.²

Recognizing these and other challenges in his recent directive on "Law Enforcement in Indian Country," President Clinton expressed concern that "many Indian citizens receive police, investigative, and detention services that lag far behind even this country's poorest jurisdictions."³ Similarly, the U.S. Department of Justice has noted that "[t]here is a public safety crisis in Indian country"⁴ and that the "violence and crime interfere with the ability of Indian tribes to achieve meaningful self-governance and assure peace and stability in their communities."⁵ The President's August 1997 directive to Secretary of the Interior Bruce Babbitt and Attorney General Reno culminated in the creation of an Executive Committee on Indian Country Law Enforcement Improvements.⁶ The primary task of the Executive Committee was to draft a report on the present state of law enforcement in Indian country.⁷ Research and consultation with

2. See, e.g., Philip Brasher, *Reservation Crime Booming: U.S. Attorneys to Meet with Leaders of Indian Country to Seek Solutions*, ANCHORAGE DAILY NEWS, Aug. 29, 1997, at A3 (explaining that the homicide rate in Indian country has risen in the last five years in contrast to a national declining rate, and that tribal and Bureau of Indian Affairs ("BIA") law enforcement activities are not sufficient); *Feds Urge More Cops on Reservations*, SALT LAKE TRIB., Dec. 19, 1997, at A24 (noting that there are only 1.3 tribal and BIA officers for every 1000 residents in Indian country as compared to 2.9 officers per 1000 residents in "small non-Indian communities"); Don Hunter, *Indian Country Lawsuit Debated in Televised Forum*, ANCHORAGE DAILY NEWS, Oct. 24, 1997, at 1B (discussing the stress on tribal governments created by the absence of state law enforcement); Tom Kizzia, *Whose Law and Order? Tribal Courts Fill Void Left by State, But Critics Say Rights Lost in Process*, ANCHORAGE DAILY NEWS, July 3, 1997, at A1 (recognizing that tribal courts are active but lack state acknowledgment of their authority, that Alaska is unwilling to increase funding for law enforcement and juvenile programs in Native Villages in the face of the "era of state budget cuts," and that adult misdemeanor programs were halted because of current litigation questioning tribal and state jurisdictional authorities).

3. See Presidential Memorandum, 33 WEEKLY COMP. PRES. DOC. 1268 (Aug. 25, 1997).

4. See Memorandum from Kevin V. Di Gregory, Deputy Assistant Attorney General, to Janet Reno, Attorney General, Final Report of the Executive Committee for Indian Country Law Enforcement Improvements 1 (Oct. 31, 1997) <<http://www.usdoj.gov/otj/icredact.htm>> [hereinafter Executive Committee Memorandum]; see also Deborah Baker, *Violence on Indian Lands Up, Study Says*, DENVER POST, Nov. 23, 1997, at B5 (citing a report given by Attorney General Janet Reno and Secretary of the Interior Bruce Babbitt).

5. Letter from Attorney General Janet Reno to All Tribal Leaders 1 (Aug. 27, 1997) (on file with authors) (seeking tribal leaders' support in detailing options to increase law enforcement in Indian country).

6. In 1997, two cabinet members jointly established the Executive Committee for Indian Country Law Enforcement Improvements to study the law enforcement problem and make recommendations. Six tribal leaders joined representatives of the Justice and Interior Departments in forming this body. See Report from the Executive Committee for Indian Country Law Enforcement Improvements to the Attorney General and the Secretary of the Interior, tab h (Oct. 1997) (on file with authors) [hereinafter Executive Committee Report].

7. In 1948, the term "Indian country" was codified in the United States Code. The Code provides:

[T]he term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the

Indian tribal leaders by the Executive Committee in the latter months of 1997, pursuant to the President's directive, detailed the following systemic deficiencies with law enforcement in Indian country:

- Law enforcement, as presently organized, often fails to meet basic public safety needs;
- Serious and violent crime is rising significantly in many parts of Indian country—in stark contrast to national trends;
- The single most glaring problem is a lack of adequate resources in Indian country; and
- The current criminal justice system results in poor coordination and delivery of services.⁸

In response to the Executive Committee's findings, the Justice and Interior Departments have urged an infusion of resources, proposed a reconfiguration of federal Indian country law enforcement services within the Bureau of Indian Affairs ("BIA"), and agreed to maintain primary responsibility for law enforcement with the BIA, provided that the Bureau obtain adequate funding and implement necessary reforms.⁹

The recent emphasis on criminal justice in Indian country at the highest levels of the Federal Government might suggest that the inadequacy of law enforcement in tribal communities is a new phenomenon. This is not so. As early as 1975, a "Task Force on Indian Matters" within the Department of Justice found that "law enforcement on most Indian reservations is in serious trouble."¹⁰ The

borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified as amended at 18 U.S.C. § 1151 (1994)). Although the definition appears in the section of the code governing the federal criminal jurisdiction, the Supreme Court has held that the definition also applies to civil jurisdiction. See Sandra Hansen, *Survey of Civil Jurisdiction in Indian Country 1990*, 16 AM. INDIAN L. REV. 319, 324-25 (1991) (citing *DeCoteau v. District County Court for the Tenth Judicial Dist.*, 420 U.S. 425, 427 n.2 (1975)).

8. See Executive Committee Memorandum, *supra* note 4, at Executive Summary.

9. See Letter from Secretary of the Interior Bruce Babbitt and Attorney General Janet Reno to President Clinton (Jan. 20, 1998) (on file with *The American University Law Review*) (responding to the findings of the Executive Committee).

10. See DORIS MEISSNER, U.S. DEPT. OF JUSTICE, REPORT OF THE TASK FORCE ON INDIAN MATTERS 23 (1975) [hereinafter MEISSNER REPORT]. The major problems identified in the report included confusing jurisdictional schemes, inadequate funding, inadequate training of law enforcement, the lack of centralized command structure in the BIA, and the lack of a clear division of labor between the BIA and the FBI. See *id.* at 25-34. The MEISSNER REPORT also found that there was a widespread lack of confidence in the reservations' law enforcement systems and that residents of several reservations believed there had been a complete breakdown of law and order. See *id.* at 23. The report further found that many citizens were cynical about the willingness and ability of the government to protect persons and property. As a result, in many cases, no effort was made to report crime because of the belief that nothing

Task Force also found that most reservations received inadequate police services given their size and extraordinarily high rate of crime.¹¹ Most significantly, the Task Force found that the complex and often ambiguous overlap of federal, state, and tribal jurisdiction in Indian country left each component of the system uncertain as to the extent of its authority.¹² The Task Force concluded that the root of many of the problems of Indian country law enforcement was the confusion caused by the very federal laws intended to establish clear lines of civil and criminal jurisdictional authority among tribal, federal, and state governments.¹³

These historic underlying problems in the administration of justice in Indian country continue to the present day and demand an immediate response. Law enforcement on Indian lands has never been successfully ameliorated through federal policy. With each successive generation, the criminal justice problem in Indian country manifests itself with renewed intensity and viciousness,¹⁴ periodically invoking heightened federal scrutiny and media attention.¹⁵ It is the

would be done. *See id.*

11. *See id.* at 26. The MEISSNER REPORT found that the violent crime rate was 50 percent higher on Indian reservations than it was in rural America as a whole. *See id.*; *see also* William Claiborne, *As Law Forces Erode, Violent Crime Grows on Indian Lands*, WASH. POST, Oct. 11, 1998, at A3 (describing the national homicide rate as decreasing by 22 percent nationwide and increasing on reservations).

12. *See* MEISSNER REPORT, *supra* note 10, at 54.

13. *See id.* at 76. When the MEISSNER REPORT was issued, legislation had already been introduced in Congress to repeal Public Law 280, "the termination policy law under which states exercise jurisdiction over Indian reservations." *See id.* at 9.

14. One particularly disturbing evolution of the law enforcement problem in Indian country is the emergence of Indian youth gangs. The BIA estimates that there are 375 gangs with approximately 4650 gang members on or near Indian country. *See Criminal Gangs in Indian Country: Hearing Before the Senate Comm. on the Judiciary and Comm. on Indian Affairs*, 105th Cong. 712 (1997) (statement of Kevin V. Di Gregory, Deputy Assistant Attorney General, Criminal Division) [hereinafter *Criminal Gangs in Indian Country*]; *see also* S. REP. NO. 105-108, at 78 n.22 (1997) (citing Di Gregory testimony which acknowledges that recidivism is high among Native American juveniles). The Justice Department also noted that juveniles are responsible for an increasing percentage of all serious crimes committed in Indian country and are committing offenses at younger ages. In particular, gang members in Indian country are frequently engaging in crimes for profit, and do not hesitate to attack law enforcement officers. *See Criminal Gangs in Indian Country, supra*, at 11-12.

15. Since the issuance of the President's Executive Memorandum in August 1997, Indian country crime has been the subject of considerable focus in the press. *See, e.g.*, Baker, *supra* note 4, at B5 ("The problems: not enough police officers, not enough money for criminal investigations, not enough jails, not enough funding for tribal courts."); Claiborne, *supra* note 11 (comparing the 1600 BIA police officers for the over 1.4 million residents residing on reservations to the 3600 police officers protecting 540,000 residents in the District of Columbia); *Feds Urge More Cops on Reservations*, SALT LAKE TRIB., Dec. 19, 1997, at A24 (noting that American Indians receive less than half the police protection provided to other rural communities and discussing a proposal for the Department of Justice's takeover of BIA law enforcement responsibilities); Matt Kelley, *Indian Reservations Harried by Youth-Gang Crime Wave*, L.A. TIMES, Oct. 12, 1997, at B4 (explaining that the number of youth gangs has doubled since 1994 and that increased youth gang activities are putting strains on the "already scarce

purpose of this Article to demonstrate that restructuring or funding alone will not provide an adequate resolution to the problems of law enforcement in Indian country without directly addressing one of the most controversial and detrimental federal statutes affecting Indian tribes: Public Law 83-280 ("Public Law 280").¹⁶

In 1953, ostensibly acting to remedy lapses in law enforcement in Indian country,¹⁷ Congress exercised its power to delegate the Federal Government's jurisdiction¹⁸ over Indian country to the states and enacted Public Law 280.¹⁹ Public Law 280 fundamentally disrupted the traditional allocation of Indian country law enforcement responsibility among the federal, state, and tribal governments by authorizing six states—Minnesota, Alaska, California, Nebraska, Wisconsin, and Oregon (known as the "mandatory states")²⁰—to

resources and threatening to overwhelm tribal police and courts"); *Police on Reservations Fight Losing Battle Against Crime*, OMAHA WORLD-HERALD, Nov. 30, 1997, at A20 (illustrating the stark contrast between public safety throughout Indian country and rest of the United States); Louis Sahagun, *Crime Grips Indian Territory on a Navajo Reservation, the Problem of Violence Rivals that in Large Cities. Police are Overwhelmed*, PHILA. INQUIRER, Jan. 12, 1998, at C12 (discussing the rise of homicide and sexual violence against minors in Navajo Reservations in the midst of the need to increase tribal police recruitment and improve facilities and communication systems).

16. See Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360 (1994)). Public Law 280 was amended on several occasions. See Act of July 10, 1984, Pub. L. No. 98-353, 98 Stat. 342; Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2668; Act of Nov. 25, 1970, Pub. L. No. 91-523, 84 Stat. 1358; Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 73; Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545; Act of Aug. 24, 1954, ch. 910, 68 Stat. 795. The 1968 and 1970 amendments are discussed later in the Article.

17. See *State Legal Jurisdiction in Indian Country: Hearings on H.R. 459, H.R. 3235, and H.R. 3624 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 82d Cong. 16 (1952) (statement of Rep. Wesley A. D'Ewart) (describing "the complete breakdown of law and order on many of the Indian reservations"); S. REP. NO. 83-699, at 5 (1953), reprinted in 1953 U.S.C.C.A.N. 2409, 2411-12 (citing the need to remedy the gap in states' law enforcement authority as the reason for transferring criminal and civil jurisdiction to the states).

18. Throughout this Article the use of the term "jurisdiction" will refer to either judicial jurisdiction, legislative jurisdiction, or both. Legislative jurisdiction concerns whether a legislative body—tribal or otherwise—has the authority to make laws that govern the conduct of individuals, while judicial jurisdiction refers to whether the tribe, state, or federal court has the authority under law to hear and decide a case. See FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 82-83 (1995) (describing the differences between tribal judicial jurisdiction and tribal legislative jurisdiction).

19. See *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 560-61 (9th Cir. 1991), *rev'd on other grounds sub nom.*, *Alaska v. Native Village of Venetie Tribal Gov't*, 118 S. Ct. 948 (1998) (describing the transfer of civil and criminal jurisdiction over Indian country from the Federal Government to the governments of five states); *Anderson v. Gladden*, 293 F.2d 463, 467-68 (9th Cir. 1961) (discussing Public Law 280's enactment and affirming the lower court's opinion regarding congressional power to relinquish its jurisdiction to states).

20. Minnesota, California, Nebraska, Oregon, and Wisconsin were part of the original 1953 enactment and Alaska was added to the list by amendment in 1958. See *supra* note 16 (noting various amendments and citing to the Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545 (codified as amended at 18 U.S.C. § 1162(a), 28 U.S.C. § 1360(a) (1994))). These six states are referred to as the mandatory states because they had little choice in the acceptance of this congressional delegation. See STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES: THE*

assume partial Federal Government criminal²¹ and civil²² jurisdictional

BASIC ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS 114 (2d ed. 1992); *see also Venetie*, 944 F.2d at 560-61 ("[The Act] mandated the transfer . . . to the governments of five states, and permitted other states to assume such jurisdiction voluntarily."). Although the forced nature of the transfer is often spoken about, there is some indication that there was state-federal dialogue on the matter. *See infra* note 171 and accompanying text (detailing state-federal dialogues on transfer).

21. *See* 18 U.S.C. § 1162 (1994). As last amended in 1970, section 1162 provides that:

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the state or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

| State or Territory of | Indian country Affected |
|-----------------------|--|
| Alaska | All Indian country within the State, except that on Annette islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended. |
| California | All Indian country within the State. |
| Minnesota | All Indian country within the State, except the Red Lake Reservation. |
| Nebraska | All Indian country within the State. |
| Oregon | All Indian country within the State, except the Warm Springs Reservation. |
| Wisconsin | All Indian country within the State. |

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of section 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

Id.

22. *See* 28 U.S.C. § 1360 (1994). As last amended in 1970, section 1360 provides that:

(a) Each of the States listed in the following table shall have jurisdiction over civil

responsibilities over Indian country.²³ The tremendous impact of Public Law 280 stems from the fact that while it initially addressed only six states, these states alone contain within their borders 359 of the over 550 federally recognized tribes and Native Villages.²⁴

causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of the State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

| <i>State of</i> | <i>Indian country Affected</i> |
|-----------------|---|
| Alaska | All Indian country within the State. |
| California | All Indian country within the State. |
| Minnesota | All Indian country within the State, except the Red Lake Reservation. |
| Nebraska | All Indian country within the State. |
| Oregon | All Indian country within the State, except the Warm Springs Reservation. |
| Wisconsin | All Indian country within the State. |

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

Id.

23. *But cf.* JACK UTTER, AMERICAN INDIANS: ANSWERS TO TODAY'S QUESTIONS 155 (1993) (explaining that there were limitations to this grant in areas of "water rights, taxation of trust property, regulatory control over trust property . . . [and] tribal activity otherwise protected by treaty or statute, and federally protected hunting, trapping, and fishing rights").

24. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 62 Fed. Reg. 55,270, 55,271-75 (1997) (listing tribal entities recognized and eligible for funding and services from the BIA by virtue of their status as Indian tribes).

The Department of the Interior is responsible for updating the list of federally recognized tribes including Alaskan Native Villages. *See id.* at 55,271. To become federally recognized, a tribe must satisfy certain requirements established by the Department of the Interior. *See* Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 25 C.F.R. §§ 83.1-.13 (1997). Although a group of Indians may recognize themselves as a tribe and be

Public Law 280's deleterious effects, however, are a result of the jurisdictional uncertainty that the law has created. There is no federal, state, or tribal consensus as to the scope of the jurisdictional transfer that has actually occurred as a result of the Act. One argument is that the statute effectuated not only a partial transfer of federal jurisdiction²⁵ over Indian country to these six states, but also a transfer of tribal civil and criminal jurisdiction to the states.²⁶ The better argument, subscribed to by the Departments of Justice and the Interior among others, is that the statute did not divest tribes of their jurisdiction, but rather provided for concurrent²⁷ state and tribal jurisdiction over Indian country.²⁸ Under any interpretation, the

recognized as such by others, a tribe must be federally recognized to be eligible for many of the benefits provided by the BIA. See PEVAR, *supra* note 20, at 14-15, 268-95 (giving an overview of the primary government services available to recognized tribes, covering areas such as housing, health and education).

25. For purposes of this Article, "partial" federal jurisdiction refers to the limited nature of the federal jurisdiction transferred to the states through Public Law 280 and the Federal Government's retained jurisdiction pursuant to statutes of general applicability. See *United States v. Pemberton*, 121 F.3d 1157, 1164 (8th Cir. 1997) (holding that Public Law 280 did not deprive the Federal Government of jurisdiction over members of the Leech Lake Band of Chippewa Indians in Minnesota when the crimes charged were covered by federal laws of general applicability—specifically mail fraud and conspiracy). In *Pemberton*, the Court affirmed its prior position in *United States v. Stone*, 112 F.3d 971, 973 (8th Cir. 1997), stating:

Public Law 280 transfers from the Federal Government to the state of Minnesota jurisdiction over only those crimes encompassed by 18 U.S.C. §§ 1152 and 1153. Crimes of general applicability—that is, actions that Congress has declared illegal regardless of where they occur—are not affected by the enactment of Public Law 280 and remain within the subject-matter jurisdiction of the federal courts.

Id. (citations omitted); see also 18 U.S.C. § 1162(a) (1994) (limiting the states' assumption of federal jurisdiction over Indian country to "offenses committed by or against Indians . . . [only] to the same extent that such state or Territory has jurisdiction over [such] offenses committed elsewhere within the State or Territory"); *supra* note 21 (providing the full text of 18 U.S.C. § 1162). In other words, states cannot create new offenses to prosecute Indians; they may only enforce the offenses they would enforce against their own citizens.

26. See Kizzia, *supra* note 2, at A1 (describing tribal court activity in several Alaskan Native Villages despite the fact that the state does not acknowledge tribal jurisdiction).

27. Throughout this Article, "concurrent" will be used to describe the situation where more than one sovereign has authority to adjudicate a particular case or legislate a particular conduct.

28. In a recent amicus curiae brief filed by the United States, the government acknowledged that "[i]t is the established position of the Department of the Interior that Public Law 280 effected a transfer, from the federal government to certain States, of jurisdiction that the federal government had previously shared with tribal governments, thus leaving room for the possibility of concurrent tribal jurisdiction." Brief for the United States as Amicus Curiae at 26, *John v. Baker*, No. S-08099 (Alaska May 4, 1998) [hereinafter U.S. Brief, *John v. Baker*].

This opinion is consistent with the Department of the Interior's prior position stated in 1976. Read in conjunction with the position of the United States in the *John v. Baker* litigation, the prior litigation by the Alaska State Supreme Court in *Native Village of Nenana v. State of Alaska Department of Health & Social Services*, 722 P.2d 219 (Alaska 1986), should be disregarded. See U.S. Brief, *John v. Baker*, *supra*, at 6. In *Nenana*, the Alaska Supreme Court held that Public Law 280 divests tribal courts in Alaska of all jurisdiction, including jurisdiction over child custody matters. The United States, in urging that *Nenana* and its progeny should no longer be followed, argued that the holding in *Nenana* "is contrary to the vast weight of authority construing the effect of Public Law 280." *Id.*

statute is confusing and perhaps ambiguous as to the scope of residual tribal jurisdiction.

While federally recognized Indian tribes throughout the nation exercise their right to self-government²⁹ and vie for the respect and limited resources of federal and state governments, tribes in Public Law 280 states face an additional obstacle: they must also establish the continued existence of their jurisdiction and concurrent authority with the states. Without a common understanding of the jurisdictional foundations established by Public Law 280, tribal communities experience an uneven administration of justice in terms of respect for their authority, their eligibility for state and federal funding, the effectiveness of their justice systems, and the level of participation and cooperation with state and federal justice systems. As a result, Public Law 280 actually serves to increase lawlessness in Indian country. Even Congress has acknowledged its failure by stating that "Public Law 280 . . . [has] resulted in a breakdown in the administration of justice to such a degree that Indians are being denied due process and equal protection of the law."³⁰

Carole Goldberg, arguably the preeminent scholar of Public Law 280, has documented numerous ways in which Public Law 280 may have increased lawlessness in Indian country, particularly in California.³¹ She asserts that as the import and effect of Public Law 280 are misconstrued and misapplied, members of Indian tribes in

In a 1976 memorandum to the Commissioner of Indian Affairs, Lawrence Aschenbrenner wrote:

What Public Law 280 accomplishes, is a transfer of that jurisdiction which the federal government has over Indian country, to the applicable states. Since the only jurisdiction which the United States has is concurrent with the tribe . . . that part of its concurrent jurisdiction is all that it could transfer to the states. It could not transfer more than what it had, that is, it could not transfer tribal jurisdiction to the states. . . . P.L. 280 gives the states concurrent and not exclusive jurisdiction over Indian country therein. The tribes retain the other part of the concurrent jurisdiction.

Memorandum from Lawrence A. Aschenbrenner, Acting Associate Solicitor, Division of Indian Affairs, U.S. Department of the Interior, Office of the Solicitor, to Commissioner of Indian Affairs 3, 5 (July 13, 1976) [hereinafter Aschenbrenner Memorandum] (on file with authors); see also Telephone Interviews with Russell Bradley, Superintendent, Winnebago Agency, BIA (July 21, 1997 & Nov. 13, 1998) [hereinafter Bradley Interviews] (explaining that concurrent jurisdiction under Public Law 280 did not remove tribes' right to establish their own courts and have their own law enforcement officers); *infra* notes 322-323 and accompanying text (outlining support for concurrent jurisdiction by former Attorneys General of Wisconsin and Nebraska).

29. For purpose of this Article, sovereignty means the inherent right or power to govern. See William C. Canby, Jr., *The Status of Indian Tribes In American Law Today*, 62 WASH. L. REV. 1, 1 (1987).

30. SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 94th Cong., Background Report on Pub. L. 280, 29-30 (Comm. Print 1975) [hereinafter PUBLIC LAW 280 REPORT].

31. See generally CAROLE GOLDBERG-AMBROSE, *PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280* (1997) (discussing at length federal and state fiscal neglect of tribal justice systems in California, resulting in the underdevelopment of these systems and the increased risks to public safety and community welfare).

Public Law 280 states suffer both abuses of authority by state governments and a lack of law enforcement responsiveness.³² For example, in Alaska, tribal justice systems struggle to fill the vacuum caused by the retreat of federal law enforcement and the state's inability or unwillingness to assume its Public Law 280 responsibilities.³³ Public Law 280 has also complicated the delivery of law enforcement services in Nebraska.³⁴ In fact, the Superintendent of the BIA's Winnebago agency has suggested that Public Law 280 is one reason why the Santee Sioux Tribe of Nebraska has struggled in their development of tribal courts and police.³⁵

Although numerous factors and conditions have precipitated the law enforcement dilemma in Indian country, Public Law 280 has been an undeniable source of persistent tribal justice inequity since its enactment.³⁶ The ambiguous language used in the Act,³⁷ the "sparse legislative history,"³⁸ the fact that the law was enacted during a period of antagonism toward tribal self-government,³⁹ and the lack of

32. See *id.* at 12-33. In the chapter "Public Law 280 and the Problem of Lawlessness," Goldberg-Ambrose offers the following case studies to demonstrate both the abuse of authority by state authorities in California and the virtual vacuum of authority that results when parties are uncertain of their jurisdiction to intervene: (1) sludge dumping at Torres Martinez (unresponsiveness of local authorities); (2) evicting undesirables at Coyote Valley (lack of tribal court systems where no state jurisdiction exists); and (3) confrontations with police at Round Valley (abuse of authority through police misconduct). See *id.*

33. See Kizzia, *supra* note 2, at A1 (describing the complexities and obstacles to the effective administration of justice in Alaskan Native Villages).

34. See Bradley Interviews, *supra* note 28 (explaining that when federal law enforcement funding was not forthcoming, state law enforcement over Indian country was conducted "totally inadequately" and in a way that was neither proper nor helpful). Superintendent Bradley also noted that law enforcement worsened because the statute restricts the BIA from getting involved in the resolution of certain civil or criminal matters occurring on the reservation even when it is willing to allocate the time and resources. See *id.* As a result, the tribes must often rely upon the state officials' willingness (or unwillingness) to investigate and prosecute matters. See *id.*

35. See *id.* (noting that the Omaha and Winnebago Tribes in Nebraska may be more favorably situated than the Santee Sioux of Nebraska in terms of law enforcement and tribal court development ever since they were able to get the state to retrocede its Public Law 280 jurisdiction over them); *infra* note 341 and accompanying text (providing more details about retrocession and Public Law 280).

36. See CAROLE GOLDBERG-AMBROSE & DUANE CHAMPAGNE, UCLA AMERICAN INDIAN STUDIES CENTER, A SECOND CENTURY OF DISHONOR: FEDERAL INEQUITIES AND CALIFORNIA TRIBES 49 (1996) (on file with authors) (explaining how tribes in Public Law 280 states have received dramatically less law enforcement funding through the BIA than tribes in non-Public Law 280 states).

37. See *Bryan v. Itasca County*, 426 U.S. 373, 374 (1976) (describing Public Law 280 "as an admittedly ambiguous statute").

38. See *id.* at 379 (observing that lawlessness on Indian reservations and inadequate tribal law enforcement were the primary concerns confronting Congress as gleaned from the "sparse legislative history" of Public Law 280).

39. See *infra* Part II.B.3 (describing the Termination Period, its policy, and its influence on Public Law 280's interpretation).

a conclusive ruling by the Supreme Court⁴⁰ on the complete jurisdictional effect⁴¹ of Public Law 280, have caused the confusion to proliferate.

This Article establishes that Public Law 280 provides for concurrent state and tribal jurisdiction without divesting tribal governments of their authority. Part I provides the general Indian law⁴² context of Public Law 280 by explaining tribal sovereignty, plenary power, state authority over Indian affairs, and general jurisdictional allocations in Indian country. Part II discusses the provisions of Public Law 280 with greater specificity, addresses the distinctions between the civil and criminal sections, and details the statute's policy justifications. Part III analyzes Public Law 280 as a limited transfer of Indian country jurisdiction from the Federal Government to the states without disturbing tribal criminal and civil jurisdiction,⁴³ thereby, preserving concurrent tribal jurisdiction. Lastly, Part IV provides several recommendations to reform law enforcement in Indian country and ameliorate the destructive impact of Public Law 280. Part IV emphasizes that the most meaningful action the Federal Government can take to preserve law and order in Indian country is "to help Indian tribes to strengthen their own justice systems."⁴⁴ With adequate resources, tribal governments are not only the most appropriate institutions to maintain order on reservations,⁴⁵ but have

40. See DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 570 (3d ed. 1993) ("[P]otential concurrent jurisdiction of the tribal courts under Public Law 280 has not been conclusively litigated.").

41. See *infra* Part III.D.1 (discussing cases and commentary interpreting Public Law 280).

42. It is important to note the distinction between what is commonly referred to as "Indian law" and "tribal law." One commentator has described the differences this way: "Indian law refers to the system of federal laws and regulations that govern U.S. relations with the various Indian tribes. In contrast, tribal law is the law that the Indian tribes enact and enforce within their own communities." J. Clifford Wallace, *A New Era of Federal-Tribal Court Cooperation*, 79 JUDICATURE 150, 151 (1995); see also WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 1 (2d ed. 1988) (asserting that "'Indian Law' might better be termed 'Federal Law About Indians'" because it refers primarily to the body of federal laws that defines the status of Indian tribes and their members, their relationship with the Federal Government, and the role that tribal, state, and Federal Governments have in this field).

43. This Article places a stronger emphasis on proving the continued existence of criminal jurisdiction rather than civil jurisdiction. While both are discussed because both are implicated in the context of Public Law 280, the statutory language has created greater speculation and criticism as to the continued existence of residual tribal criminal jurisdiction. In light of the increased crime on reservations, the final reconciliation of the statute's criminal provision is the more pressing issue.

44. *Criminal Gangs in Indian Country*, *supra* note 14, at 10 (testimony of Kevin V. Di Gregory); see also Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113, 114 (1995) ("[T]ribal justice systems are ultimately the most appropriate institutions for maintaining order in tribal communities.... Fulfilling the federal government's trust responsibility to Indian nations means not only adequate federal law enforcement in Indian country, but enhancement of tribal justice systems as well.").

45. Attorney General Janet Reno, testifying before the Senate Committee on Indian

demonstrated their capacity to keep the peace and resolve disputes on Indian lands.⁴⁶

For the United States' policy toward Indian tribes to have value and meaning, tribal law enforcement systems must be regarded as equal and essential components to our country's "multilayered justice system."⁴⁷ This can only be accomplished if appropriate federal, state, and tribal authorities directly confront the issues surrounding Public Law 280 and engage in meaningful dialogue despite the political and fiscal maelstroms that may ensue. Recent law enforcement reforms such as the recommendations of the Departments of Justice and the Interior, transmitted to the President pursuant to his August 1997 directive, are noticeably silent regarding Public Law 280. This Article is written in the hope that future tribal justice reforms will include a commitment to assure that tribes in Public Law 280 jurisdictions can fully achieve meaningful self-governance.

I. BACKGROUND TO JURISDICTION IN INDIAN COUNTRY

A. *Three Sovereigns, Four Principles*

In the context of a government's sovereignty, jurisdiction is an integral, inherent aspect of authority, involving the power to make and enforce rules, resolve disputes and conflict within the community, and maintain a stable and safe environment through the application of criminal laws. Jurisdiction in Indian country has

Affairs, stated that "[t]ribal police are best situated to respond to and gather information about violence and criminal activity" and that "most effective federal initiatives to combat violence recognize the need to strengthen tribal law enforcement in Indian Country." See Statement of U.S. Attorney General Janet Reno Before Comm. on Indian Affairs, U.S. Senate, The President's Initiative on Law Enforcement in Indian Country, 11 *available at* <<http://www.senate.gov/scia/1998hrsgs/0603-jr.htm>> [hereinafter Reno Statement]; see also Douglas B.L. Endreson, *The Challenges Facing Tribal Courts Today*, 79 JUDICATURE 142, 146 (1995) (asserting that reservation communities are expanding and only tribal governments can attend to the "social, economic, political and legal" needs of such communities); Gloria Valencia-Weber, *Custom and Innovative Law*, 24 N.M. L. REV. 225, 262 (1994) (maintaining that because tribal courts "affirm and sustain cultural values," they generate law that is most appropriate for those communities).

46. Tribal courts' adjudication over an increasing range of subjects indicates that Indians and non-Indians alike are increasingly more confident in their ability to administer justice. See Endreson, *supra* note 45, at 145-46 (discussing the increasing efficacy of tribal courts' adjudication of tribal disputes without the intervention of the federal courts); Valencia-Weber, *supra* note 45, at 263 (discussing tribal courts' commitment to the protection of individual rights).

Despite criticism that tribal courts may be underdeveloped and lack impartiality, a review of their decisions shows that they are "legitimated by fairness in procedure and result." See *id.* at 262-63. Moreover, tribal courts are "willing to respond to claims of unfairness based on tribal law or the Indian Civil Rights Act." Endreson, *supra* note 45, at 146; see also *infra* notes 159, 333-42 and accompanying text (providing additional information on the Indian Civil Rights Act).

47. See Wallace, *supra* note 42, at 152.

evolved as a shifting, precarious balance of power among multiple sovereigns.⁴⁸ Federal, state, and tribal governments share jurisdiction in Indian country, at times seamlessly, though more often with some degree of conflict and controversy⁴⁹ resulting from "the tensions that sharing jurisdiction imposes."⁵⁰ Moreover, the rules and principles that shape the parameters of jurisdiction in Indian country have long defied mechanistic application and uniformity.⁵¹ Profound differences of history, sociology, and politics⁵² assure that notions of justice and fairness will differ markedly among tribal, state, and federal governments.⁵³ Each government seeks formalized recognition of its autonomy and sovereignty, but may lack adequate resources to realize full authority over the lands and people under its control.⁵⁴

Issues of state federalism pervade the discussion of jurisdiction in Indian country and therefore Public Law 280.⁵⁵ Some states oppose assertions of tribal governmental authority within state boundaries

48. See *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 118 (1993) (recognizing that tribal governments are part of "the family of governments in the federal constitutional system") (citation omitted); Address of Justice Sandra Day O'Connor Before the Indian Sovereignty Symposium IX, Lessons from the Third Sovereign: Indian Tribal Courts 11 (June 1996) (on file with *The American University Law Review*) [hereinafter O'Connor Address] (asserting that the tribal courts' role in our nation's administration of justice is important and expanding, and that each sovereign can learn from the other's strengths and weaknesses); Valencia-Weber, *supra* note 45, at 227-28 (noting that while tribal government is a third sovereign, its authority is still "indeterminate" and "unlike the federal and state governments").

49. See Judith Resnik, *Multiple Sovereignties: Indian Tribes, States, and the Federal Government*, 79 JUDICATURE 118, 118 (1995) (observing that overlapping sovereignty over Indian country is often problematic).

50. See *id.* (stating that while the U.S. Constitution grants Congress jurisdiction over Indians, it also recognizes Indian tribes' separate status).

51. See Canby, *supra* note 29, at 1-2 (canvassing the issues surrounding fundamental assumptions about federal Indian law, in particular the effect certain legal developments in the Supreme Court have had on these assumptions).

52. See Resnik, *supra* note 49, at 118 (speaking more specifically about the relationship between states and tribes).

53. See Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 128-29 (1995) (providing a comparative chart on the differences between indigenous and American "justice paradigms").

54. See Hunter, *supra* note 2, at 1B (describing Alaska's assertions of jurisdiction despite statements by Colonel Glen Godfrey, Director of the Alaska State Troopers, that his agency is already "spread thin because of lack of money and manpower").

55. See SIDNEY L. HARRING, CROW DOG'S CASE 25 (1994) (explaining that federal Indian law evolved in the battle between the states and the Federal Government over control of Indian people and their lands). In fact, one of the premier cases in Indian Law is *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). In *Worcester*, the Court ruled that state laws had no force in the Cherokee territory and the state had no authority to prosecute a missionary who entered the Cherokee Nation territory without obtaining a prior permit from the Georgia Governor pursuant to an 1830 enactment of the legislature. See *id.* at 520. Although *Worcester* is cited as a victory for tribal jurisdiction, the primary issue in *Worcester* was federalism, not tribal sovereignty. See HARRING, *supra*, at 55.

and resist federal governmental primacy over Indian affairs.⁵⁶ Many Indian tribes are forced to make a Hobson's choice: they can uncomfortably argue in favor of federal plenary power over Indian affairs,⁵⁷ or subject themselves to increased interference from the states.⁵⁸

The basic principles which have shaped the tripartite division of authority in Indian country and informed the discussion of Public Law 280 include: (1) inherent tribal sovereignty; (2) the plenary power of the Federal Government over Indian affairs; (3) the states' limited power over Indians absent an express delegation from Congress; and (4) the Federal Government's trust responsibility to the tribes and their resources.⁵⁹ A brief summary of each of these principles follows.

1. *Inherent tribal sovereignty*

Indian tribes are self-governing political communities whose original sovereignty predates that of the United States.⁶⁰ Accordingly, Indian tribes have long been recognized as "domestic dependent nations,"⁶¹ vested with inherent tribal sovereignty.⁶² The self-

56. See Carole Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. REV. 535, 537-38 (1975) (setting the background for future conflicts between the sovereigns that arise under Public Law 280).

57. See JEWELL P.W. JAMES, COORDINATOR OF THE LUMMI TREATY PROTECTION TASK FORCE, LUMMI INDIAN BUSINESS COUNCIL, TESTIMONY OF THE LUMMI INDIAN NATION ON "THE GOVERNMENT-TO-GOVERNMENT RELATIONSHIP—A QUESTION OF POLITICAL INTEGRITY IN INDIAN COUNTRY" 1-2 (not dated) (on file with *The American University Law Review*) (reciting the testimony of the Lummi Indian Nation describing the American Indian belief that the powers of the United States over Indians are "legal fictions . . . for justifying the taking of Indian rights and resources" that have resulted in the "worsening erosion of [tribal] jurisdiction and sovereign powers").

58. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567 (1903) (noting that tribes have no allegiance to individual states, do not look to them for protection, and "[b]ecause of the local ill feeling, the people of the States where they are found are often their deadliest enemies"); see also Goldberg, *supra* note 56, at 545 (explaining that Indians often prefer federal jurisdiction over state jurisdiction for fear of being discriminated against in state courts through longer sentences, and out of concern that state law enforcement will ignore crimes where the victim is Indian and not white).

59. See Canby, *supra* note 29, at 1-2 (proposing that these four principles pervade every area of federal Indian law); see also PEVAR, *supra* note 20, at 129-30 (listing these four key principles in context of a discussion on criminal jurisdiction). Pevar's four principles mirror Canby's except in one instance. Pevar adds the fact that tribal jurisdiction does not extend over non-Indians. See *id.*

60. See Brief for the United States as Amicus Curiae in Support of Petitioner, Kiowa Tribe v. Manufacturing Techs., 118 S. Ct. 333 (1997) (No. 96-1037) [hereinafter U.S. Brief for Kiowa] (noting that federal law did not create tribal sovereignty since it was already in existence at the dawn of the Republic).

61. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 2, 16 (1831) (declaring that the Cherokee Nation is in fact "a distinct political society, separated from others, capable of managing its own affairs and governing itself"); see also Robert Laurence, *Dominant-Society Law and Tribal Court Adjudication*, 25 N.M. L. REV. 1, 1 (1995) (explaining that tribal government's power "is inherent, neither deriving from nor depending upon the United States. This ability

governing powers of tribes are not federally delegated, but derive from aboriginal possession and occupancy; therefore tribes maintain a self-governing political status that predates the European settlement of the Americas.⁶³ Similarly, the Constitutional Convention, while significant to the extent that it established federal primacy over Indian affairs, did not diminish the sovereignty of tribes.⁶⁴

The Supreme Court has interpreted relevant treaties and statutes against this "backdrop" of Indian sovereignty.⁶⁵ In so doing, the Court has found that the incidents of inherent tribal sovereignty include: (1) the power to "regulat[e] their internal and social relations";⁶⁶ (2) sovereign immunity from suit;⁶⁷ and (3) the power to prescribe laws for their community and enforce these laws against their members.⁶⁸ The Court has also held that the power of a tribe to

to exercise power over people, not all of whom consent to each individual exercise of that power, is the center about which all of Indian Law revolves").

62. See *United States v. Kagama*, 118 U.S. 375, 381-82 (1886) (describing tribes' power to regulate their internal relations as being outside the laws of the state in whose territorial boundaries they reside).

63. See U.S. Brief for Kiowa, *supra* note 60, at 15 (recognizing that a judicial decision could not create tribal sovereignty as it already exists); Richard Monette, Comment, *Indian Country Jurisdiction and the Assimilative Crimes Act*, 69 OR. L. REV. 269, 273 & n.25 (1990) (stating that tribal jurisdiction is an aspect of sovereignty maintained by tribes before the European arrival to the New World, and terming such a phenomenon the "Reserved Rights Doctrine"); see also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (acknowledging that tribal sovereignty existed before the Constitution); *Talton v. Mayes*, 163 U.S. 376, 384-85 (1896) (holding that the Due Process Clause of the Fifth Amendment does not diminish or alter tribal sovereignty as possessed by the Indians before the U.S. Constitution was written); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 573 (1823) (explaining the principle whereby the discovery of land by Europeans gave their respective governments title against other European governments). This principal is now known as the "Doctrine of Discovery." See Monette, *supra*, at 280 n.71.

It should be noted that while the Supreme Court recognizes that tribes retain inherent sovereignty, the Court also recognizes that tribes do not possess the degree of sovereignty of an independent, foreign state, but rather a sovereignty subject to congressional plenary power. See *Kagama*, 118 U.S. at 381-82 (asserting that tribes have a semi-independent status whereby they have a possessory right to land but no title to transfer land without consent of the U.S. Government).

64. See *Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028, 2034 (1997) (reasoning that the Constitutional Convention did not surrender tribes' immunity from the states); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991) (noting that tribes, like foreign sovereigns, could not surrender immunity from suits by states at the Constitutional Convention since they were not a party to the Convention).

65. See *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123-24 (1993) (explaining that the "Indian sovereignty doctrine", while historically giving state law no role within tribal boundaries, provides a context within which the courts must consider treaties and federal statutes); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973) (noting that the Indian sovereignty doctrine is not definitive, but rather a relevant consideration in the interpretation of treaties and statutes).

66. *Kagama*, 118 U.S. at 382.

67. See *Oklahoma Tax Comm'n v. Citizens Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (finding that a tribe does not waive its right to sovereign immunity by filing an action for injunctive relief).

68. See *Santa Clara Pueblo*, 436 U.S. at 54-55 (finding that the Indian Civil Rights Act did not

prosecute its members was not lost, even implicitly, by virtue of its dependent status,⁶⁹ its location within the United States, or its subjection to “ultimate federal control.”⁷⁰ Most importantly, the inherent tribal powers of self-government are not subject to judicial defeasance,⁷¹ and remain unless expressly limited or extinguished by Congress through treaty or statute.⁷²

2. *Federal plenary power over Indian affairs*

The sovereignty of Indian tribes and the right of self-governance are subject to the broad powers of Congress to regulate and modify.⁷³ The Supreme Court has acknowledged that this power is plenary, giving Congress exclusive authority over the Indians, their tribal

give a female member of an Indian tribe authorization (i.e., did not waive tribal sovereign immunity) to seek declaratory and injunctive relief against a tribal officer for denying her children tribal membership); *United States v. Wheeler*, 435 U.S. 313, 323-24 (1978) (stating that the right to create tribal law and hold tribal members accountable to it is inherent to all sovereign tribal communities); *see also* *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (noting that “Indian tribes are a unique aggregation possessing attributes of sovereignty over both their members and their territory”).

69. *See Wheeler*, 435 U.S. at 326 (acknowledging that the power to self-government is not lost by a tribe’s dependent status).

70. *See id.* at 322 (stating that tribes retain sovereignty over internal matters notwithstanding federal control).

71. An awkward phenomenon has evolved in recent Supreme Court jurisprudence. Recently, Congress, to whom the power over Indian affairs is exclusively committed in the Constitution, has been notably silent, while the Supreme Court has acted as the arbiter of the scope of tribal authority. *See infra* notes 91, 93 and accompanying text (discussing judicial disregard and lack of deference for tribal sovereignty in the face of state interference); *see also* *South Dakota v. Yankton Sioux Tribe*, 118 S. Ct. 789, 793 (1998) (finding that tribal jurisdiction is diminished and ruling in favor of state land-use regulation on ceded lands of the reservation); *Idaho v. Coeur d’Alene Tribe*, 117 S. Ct. 2028, 2034 (1997) (holding that the Eleventh Amendment prevents suit by a tribe against a state); *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997) (ruling that the tribal court lacked jurisdiction over a vehicle collision between non-Indians on a state highway); *Seminole Tribe v. Florida*, 517 U.S. 44, 56-57, 66 (1996) (holding that the Eleventh Amendment barred suit by a tribe against Florida under the Indian Gaming Regulatory Act). These cases listed above demonstrate that the present Supreme Court has not exhibited much deference or regard for tribal authority when it abuts state jurisdiction, despite the rule that only Congress should have the power to reduce or repeal tribal jurisdiction. *See infra* note 75 and accompanying text (defining “plenary power”).

72. *See Keeble v. United States*, 412 U.S. 205, 205 (1997) (affirming that unless expressly limited by Congress, tribes maintain jurisdiction over crimes committed by Indians on Indian lands); *Wheeler*, 435 U.S. at 323 (stating that Indian sovereignty “exists only at the sufferance of Congress and is subject to complete defeasance”); *Bryan v. Itasca County*, 426 U.S. 373, 381 (1976) (ruling that Public Law 280 did not remove tribal immunities from state taxation because any congressional mention of “such a sweeping change in the status of tribal government and reservation Indians” was absent in both the committee reports and the floor discussion); *see also* *Powers of Indian Tribes*, 55 Interior Dec. 14, 22 (1934) (explaining that internal sovereignty is still vested in tribes and can be freely exercised absent express restriction or limitation by Congress); FELIX S. COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 241-42 (1982) (noting that tribal sovereign powers are subject to the following limitations: tribal sovereignty is internal only; tribes have no external powers; and tribal powers are subject to qualification by treaty or by express congressional legislation).

73. *See Canby, supra* note 29, at 1; *see also Wheeler*, 435 U.S. at 323 (recognizing that tribal sovereignty “exists only at the sufferance of Congress and is subject to complete defeasance”).

relations, and their tribal property.⁷⁴ This constitutionally-based principle has evolved in federal common law as the Plenary Power Doctrine.⁷⁵ While the legitimacy of such plenary power raises questions as to its source and breadth,⁷⁶ it has been repeatedly recognized by the Supreme Court.⁷⁷ The existence of congressional plenary authority over Indian affairs is an obstacle that continually confronts tribes when congressional action threatens destructive or detrimental effect.⁷⁸

74. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (ruling that "Congress has plenary authority to limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess"); *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (basing plenary power on treaty history with Indians and their guardianship status with the United States); *Winton v. Amos*, 255 U.S. 373, 391 (1921) (asserting that Congress has plenary power to legislate issues of tribal property because of the dependent relationship the Indians have with the U.S. Government); see also *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (asserting that tribal sovereignty is subject to the "supreme legislative authority of the United States").

75. See Laurence M. Hauptman, *Congress, Plenary Power, and the American Indian, 1870 to 1992*, in *EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS, AND THE U.S. CONSTITUTION* 317, 318 (Oren R. Lyons et al. eds., 1992) (defining the doctrine as that which allows Congress "to unilaterally intervene and legislate over a wide range of Indian affairs, including the territory of Indian Nations").

76. The Supreme Court has justified Congress' power over Indians by looking to the Constitution. See Vine Deloria, Jr., *The Application of the Constitution to American Indians*, in *EXILED IN THE LAND OF THE FREE*, *supra* note 75, at 298-301 (detailing the following constitutional sources of power over Indians as asserted by the courts: U.S. CONST. art. I, § 2, cl. 3 (Indians not taxed); U.S. CONST. art. I, § 8, cl. 3 (Indian Commerce Clause); U.S. CONST. art. I, § 8, cls. 1, 4, 7, 9, 11, 12, 15-17 (War Powers); U.S. CONST. art. II, § 2, cl. 2, (Treaty Clause); U.S. CONST. art. VI, cl. 2 (Property Clause)). Furthermore, in a rather circular manner, the Supreme Court has justified the power by stating that it exists in Congress because it "never has existed anywhere else," see *United States v. Kagama*, 118 U.S. 375, 384 (1886), and because "the power has been exercised by Congress from the beginning," see *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). Nevertheless, despite the Court's attempts to justify the source of Congress' authority over Indian affairs, there is considerable criticism over whether such a justification is possible. See *id.* at 567-68; see also *Red Lake Band of Chippewa Indians v. Swimmer*, 740 F. Supp. 9, 11-12 (D.D.C. 1990) (explaining that the notion of congressional plenary power arose from cultural and racial prejudice and a need to justify acquisition of Indian land); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 195-98 (1984) (detailing the doctrine of plenary authority and the failings in its alleged origins).

77. See Canby, *supra* note 29, at 2-6 (discussing the early development of case law on congressional plenary authority); *supra* note 74 (discussing Supreme Court cases affirming plenary power).

78. In the 105th Congress, Senator Slade Gorton (R-WA) introduced riders to the Department of the Interior's appropriations bill that would have limited the sovereign immunity of certain tribes and imposed means-testing for certain federal benefits. Among the riders introduced by Senator Gorton were sections 118 and 120 of the Fiscal Year 1998 Interior and Related Agencies Appropriations Bill. Section 118 would have prohibited distribution of certain Tribal Priority Allocation ("TPA") funds unless the BIA developed a means-testing formula. Section 120 provided that acceptance of TPA funding by tribes would constitute a waiver of any claim of sovereign immunity by the tribe and subject the tribe to federal court jurisdiction. See Letter from Bruce Babbitt, Secretary of the Interior, to Senator Ted Stevens, Chairman, Committee on Appropriations 1 (July 21, 1997) (opposing the bill because it "singles out Indian tribal governments to undermine the principle of government-to-government relations") (on file with authors); see also Letter from Andrew Fois, Assistant Attorney General, U.S. Dep't of Justice, to Senator Ted Stevens, Chairman, Committee on Appropriations 1 (July

3. *The states' limited authority over Indian country*

One of the clearest and most persistent themes involving Indian sovereignty has been the continuous struggle by the states to assert greater control over Indian reservations, usually at the expense of federal or tribal governments.⁷⁹ Over time, the Supreme Court has softened its longstanding restrictive view of permissible state incursions into Indian country.

In 1832 Justice Marshall ruled in *Worcester v. Georgia*⁸⁰ that state laws would have no force or effect in Indian country.⁸¹ The Supreme Court has since held that states have only limited authority over Indian country absent an express grant by Congress.⁸² Thus, although *Worcester* has never been expressly overruled or diminished, the Supreme Court has ruled that states may exert some authority over Indian country. For instance, the Supreme Court in *United States v. McBratney*⁸³ found that states possess exclusive jurisdiction over crimes committed by non-Indians against non-Indians in Indian country⁸⁴ and over victimless crimes committed by non-Indians.⁸⁵

The cases since *Worcester* have modified the test to determine the

22, 1997) (on file with authors) (noting that the Justice Department "strongly opposes these measures because they are contrary to the United States' longstanding protection of tribal self-government and the federal trust responsibility").

79. See ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW: CASES AND MATERIALS* 493 (3d ed. 1973).

80. 31 U.S. (6 Pet.) 515, 561, 590-95 (1832) (holding that the laws of Georgia have no force on the Cherokee Nation).

81. See *id.* at 520; see also *Williams v. Lee*, 358 U.S. 217, 220 (1959) ("Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation.").

82. See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 202, 207 (1987) (disagreeing with the state that Public Law 280 entailed express permission by Congress to apply its gaming ordinance); *Bryan v. Itasca County*, 426 U.S. 373, 390 (1976) (ruling that if Congress intended Public Law 280 to give the states general civil regulatory power over reservations, "it would have expressly said so"); *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 180-81 (1973) (holding that Arizona exceeded its authority by taxing Navajo Indians' income derived from reservations); *Williams*, 358 U.S. at 220-21 (ruling that states cannot have civil jurisdiction over cases involving non-Indians and Indians over matters arising on reservations); see also *Op. Att'y Gen. Neb. No. 48* (1985), available at 1985 WL 168524, at *1 (Neb. A.G.) (confirming that without a specific delegation via a federal statute, jurisdiction in Indian country was shared exclusively between the federal and tribal governments).

83. 104 U.S. 621 (1881).

84. See *id.* at 624 (rejecting federal jurisdiction in favor of state jurisdiction in the case of a non-Indian murdering a non-Indian on the Ute reservation in Colorado); see also *Draper v. United States*, 164 U.S. 240, 247 (1896) (upholding state jurisdiction over the non-Indian murder of a non-Indian on the Crow Reservation in Montana).

85. See *Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984) (providing a summary of criminal jurisdiction in Indian country within a case concerning a rape committed by an enrolled member of the Cheyenne River Sioux Tribe). State jurisdiction over victimless crimes is based upon the notion, illogical as it might be, that if the crime is really victimless, then no Indian interest has been affected. See COHEN, *supra* note 72, at 353 (explaining that the allocation of jurisdiction over victimless crimes is based on the Assimilative Crimes Act and General Crimes Act).

permissibility of state jurisdiction over Indian lands. In *Williams v. Lee*,⁸⁶ the Court ruled that in the absence of a congressional act conferring authority to the state, it would consider whether "the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."⁸⁷ Using this test, the Court determined that state courts had no authority over a civil suit by a non-Indian against an Indian when the action arose in Indian country.⁸⁸ By 1973, however, the Court had moved towards the anomalous rule that states have certain powers over Indian country unless federal laws or treaties preempt them.⁸⁹

In the ensuing years, the Supreme Court made a series of decisions⁹⁰ that contain some puzzling, and even contradictory

86. 358 U.S. 217 (1959).

87. *Id.* at 220 (holding that a tribal court, not a state court, would have jurisdiction over a case involving a non-Indian store owner on a Navajo Reservation trying to collect an unpaid debt from a Navajo patron). The ruling set forth in *Williams* established the "infringement test." See CLINTON ET AL., *supra* note 79, at 504 (noting that some state courts regard the infringement test as justification for state jurisdiction over incidents in Indian country presumed not to involve tribal self-government); POMMERSHEIM, *supra* note 18, at 145 (explaining the infringement test).

88. See *Williams*, 358 U.S. at 223. In so doing, the Supreme Court clarified that the states could have jurisdiction only "where essential tribal relations . . . [were] not involved and where the rights of Indians would not be jeopardized." *Id.* at 219.

89. See *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 172 (1973) (holding that Arizona could not collect state income tax from a Navajo tribal member whose earnings were generated on the reservation). This ruling established the "preemption test." See POMMERSHEIM, *supra* note 18, at 144 (suggesting that recent cases have abandoned the infringement and preemption tests); see also Canby, *supra* note 29, at 11-15 (discussing the preemption test and tracing the judicial evolution of state power in Indian country and concluding that inherent tribal sovereignty has been replaced with a preemption analysis mandating a balance of state and tribal interest—with the latter being narrowly viewed).

90. See, e.g., *South Dakota v. Bourland*, 508 U.S. 679, 690 (1993) (holding that the tribe lost exclusive zoning authority over an "open" part of the reservation that had a large non-Indian population due to the prior excessive allotment); *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 128 (1993) (holding that it is presumed that a state has no jurisdiction to tax tribal members living and working in Indian country "[a]bsent explicit congressional direction"); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 432-33 (1989) (applying the *Montana* test and deciding that tribal jurisdiction is exclusive in the closed areas of the reservation—where non-members are not permitted without tribal permission—and that tribal jurisdiction is concurrent with state jurisdiction in open areas); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191-93 (1989) (ruling that New Mexico could impose a severance tax on the production of oil and gas by a non-Indian lessee on a reservation); *Rice v. Rehner*, 463 U.S. 713, 733-35 (1983) (allowing California to regulate the sale of liquor on reservations); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 325 (1983) (affirming that New Mexico state laws on hunting and fishing are preempted by federally approved tribal laws regulating hunting and fishing by Indians and non-Indians on reservations); *Montana v. United States*, 450 U.S. 544, 565-66 (1981) (holding that tribes can regulate activities of non-Indians on fee lands within the reservation if a consensual relationship exists between the non-Indian and the tribe or member, or when the non-Indian "conduct threatens or has some direct effect on the political integrity, economic security, or health or welfare of the tribe"); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 162-63 (1980) (concluding that the state cannot tax non-Indian contractors engaged in business on the reservation with the tribes); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 148-50 (1980) (prohibiting state taxation of a non-Indian company contracting with the tribe to cut

themes and rules.⁹¹ These cases reveal the highly fact-specific nature of judicial assessments of jurisdiction, as well as the unpredictability of outcomes along any firm, doctrinal lines. Recently, the Supreme Court has decided several Indian law cases, in most instances finding against the tribal interests asserted and in favor of the states' interests.⁹² Taken as a whole, these opinions seem to demonstrate that this Court will not hesitate to nullify congressional action on behalf of Indian tribes, disturb historical precedent favorable to tribes, and minimize tribal adjudicatory jurisdiction. Apparently, this Supreme Court has not been convinced of the "prominent position of tribal governments in the federal system and [has] fail[ed] to identify a constitutional framework for their authority and jurisdiction."⁹³

4. *The federal trust responsibility*

Another distinct aspect of federal Indian law is the special trust relationship⁹⁴ that exists between the Federal Government and Indian tribes, which the Supreme Court first acknowledged in the 1831 case of *Cherokee Nation v. Georgia*.⁹⁵ This "unique obligation,"⁹⁶ known as the federal Indian trust responsibility, has been continuously acknowledged by courts,⁹⁷ Congress,⁹⁸ and the executive branch of the

timber on the reservation because an existing federal regulation preempted the state action, and noting that an inquiry into the nature of state, federal and tribal interests at stake must be made); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 161 (1980) (noting that state taxation of non-member Indians did not intrude on the rights of tribal self-governance since the subject of the tax was not a member of the tribe); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 468 (1976) (determining that the state could tax cigarette sales made by an Indian store owner on a reservation to non-members of the tribe).

91. See POMMERSHEIM, *supra* note 18, at 144 (listing recent cases that seem doctrinally incoherent).

92. See *supra* note 71 (discussing judicial disregard and lack of deference for tribal sovereignty in the face of state interference).

93. Frank Pommersheim, *Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy*, 58 MONT. L. REV. 313, 330 (1997).

94. In allowing Indian allottees of forested land in the Quinault Reservation to sue the United States for money damages resulting from the Department of the Interior's mismanagement of its timber resources, the Court described the duty the government owed to the tribes as a fiduciary one in which the trustee (the Indians) could sue for a breach of the established trust. See *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (finding that the government's "elaborate control over forests and property belonging to Indians" creates a fiduciary relationship).

95. 30 U.S. (5 Pet.) 1 (1831); see also Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility*, 27 STAN. L. REV. 1213, 1215 (1975).

96. *Morton v. Mancari*, 417 U.S. 535, 555 (1974) (noting that "[o]n numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment").

97. See, e.g., *Mitchell*, 463 U.S. at 228 (holding that the United States is liable for money damages for breach of its trust responsibility to manage timber sources properly within the Quinault Indian Reservation); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (noting that

Federal Government.⁹⁹ In *Cherokee*, the Court depicted Indians as in a "state of pupillage," likened their relationship with the United States to that of a "ward to his guardian," and asserted that "they look to our government for protection; rely upon its kindness and its power; [and] appeal to it for relief to their wants."¹⁰⁰ Pursuant to the trust responsibility, the United States should "preserve public safety for the citizens of Indian country."¹⁰¹

The trust responsibility that the United States has to protect Indian nations and act in their best interest is an essential, but complex aspect of Indian law. In theory, the trust responsibility should serve as a check on the ability of Congress to enact laws that are destructive to Indian tribes' self-government and the ability of the Executive to act unjustifiably against tribal interests.¹⁰² In practice, tribes do not appear to have successfully invoked the trust responsibility as a judicially cognizable barrier to congressional or other federal actions that would appear to breach the trust responsibility.¹⁰³ The following analysis of Public Law 280 evokes the question of whether the statute can, through any interpretation, be squared with the federal trust responsibility.¹⁰⁴

"Indians stand in a special relationship to the federal government") (quoting *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 613-14 (1943) (Murphy, J., dissenting)); *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) (acknowledging "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people").

98. See, e.g., Indian Tribal Justice Act, Pub. L. No. 103-176, 107 Stat. 2004 (1993) (codified at 25 U.S.C. §§ 3601-3602, 3611-3614, 3621, 3631 (1994)) (stating that the United States has a trust responsibility to each tribal government that includes the protection of their sovereignty).

99. See, e.g., Janet Reno, *The Tribal-Federal Partnership*, NATION TO NATION (Dep't of Justice, Office of Tribal Justice), Aug. 1996, at 1 (stating that the enhancement of tribal sovereignty was necessary to fulfill the government's federal trust responsibility); UNITED STATES DEP'T OF THE INTERIOR, AMERICAN INDIANS AND ALASKA NATIVES 13 (not dated) (on file with *The American University Law Review*) [hereinafter INFORMATIONAL PAMPHLET] (stating that the trust responsibility was "a legally enforceable fiduciary obligation . . . to protect tribal lands, assets, resources, and treaty rights").

100. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 2 (1831).

101. See Reno Statement, *supra* note 45, at 2, 6 (proposing solutions for increasing law enforcement on Indian country).

102. The trust responsibility is shared by the Federal Government and actively protected through the Executive. See INFORMATIONAL PAMPHLET, *supra* note 99, at 13 (stating that the Department of the Interior has an "affirmative duty to protect tribal health and safety, to fulfill all treaty and statutory obligations and to exercise utmost good faith in all dealings with the tribes"); see also Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes, 61 Fed. Reg. 29,424 (1996) (defining the trust responsibility in both a narrow and broad sense and reaffirming that the implementation of the trust responsibility is committed to Congress and the executive branch). Felix Cohen also asserted that the trust responsibility should govern all executive agencies, not just the BIA. See COHEN, *supra* note 72, at 225.

103. See Chambers, *supra* note 95, at 1223-38 (speaking about guardianship status as a source of plenary authority and the possibility that congressional actions are judicially reviewable when such actions seem contrary to motivations behind the trust responsibility).

104. In many respects, the Federal Government's fulfillment of its trust responsibility seems

B. Primary Criminal Jurisdiction Statutes

Since Public Law 280 effectuated a partial transfer of the jurisdiction exercised by the Federal Government to the mandatory Public Law 280 states,¹⁰⁵ it is helpful to describe how the Federal Government and tribes shared jurisdiction prior to the passage of Public Law 280.

Criminal jurisdiction is one aspect of a tribe's inherent power of self-government.¹⁰⁶ Nevertheless, consistent with its plenary power to legislate on behalf of federally recognized tribes, Congress has been held to have "undoubted constitutional power to prescribe a criminal code applicable in Indian country."¹⁰⁷ Prior to the 1953 passage of Public Law 280, Congress enacted two statutes which collectively form the primary basis for assertions of federal jurisdiction over crimes in Indian country. These statutes are known as the General Crimes Act¹⁰⁸ and the Major Crimes Act of 1885.¹⁰⁹ Public Law 280 makes

inconsistent with the stated federal objectives of tribal self-government and self-determination as promulgated by the executive and legislative branches. For example, it is a stated policy that tribes should be enabled to assume the delivery of law enforcement, educational, judicial, and health services to their communities through Public Law 638 in contracting and self-governance compacting processes. See Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 450-458h (1994)).

105. See *id.* § 450a (declaring Congress' commitment to recognize redirected self-determination to Indian people).

106. See *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978) (asserting that the power of tribal courts to enforce their own criminal laws is part of the tribes' self-governance).

107. See *United States v. Antelope*, 430 U.S. 641, 648 (1977) (stating that Congress has the authority to dictate a criminal code in Indian territory).

108. 18 U.S.C. § 1152 (1994). The General Crimes Act is also known as the Indian Country Crimes Act or the Federal Enclaves Act of 1834. Section 1152 provides:

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This Section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Id.

109. 18 U.S.C. § 1153 (1994). This section provides:

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

explicit reference to both of these statutes in its criminal section,¹¹⁰ which explains the allocation of jurisdictional authority in Indian country.¹¹¹

1. *The General Crimes Act (18 U.S.C. § 1152)*

The General Crimes Act was enacted in 1817 to provide for federal prosecutions of federally defined offenses committed within Indian country.¹¹² The Act generally permits federal jurisdiction over "interracial crimes" occurring in Indian country, where either (1) the victim is an Indian and the offender is not; or (2) the offender is an Indian and the victim is not and the crime is not an enumerated major crime.¹¹³ In recognition of tribal sovereignty, the General Crimes Act did not extend federal criminal jurisdiction in three circumstances: (1) where an Indian committed a crime against another Indian; (2) where an Indian defendant was already prosecuted by the local law of the tribe; and (3) where the exclusive jurisdiction of a particular offense was already granted to the tribe through a prior treaty.¹¹⁴ In all three circumstances, tribes retain exclusive jurisdiction.¹¹⁵

The General Crimes Act did not originally specify whether it applied when both the victim and defendant were non-Indians.¹¹⁶ In 1881, however, the Supreme Court in *United States v. McBratney*¹¹⁷ affirmed that in such a circumstance, federal jurisdiction would not be applicable under the Act, and the state would adjudicate such offenders.¹¹⁸

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

Id.

110. See 18 U.S.C. § 1162(c) (1994).

111. Another federal criminal statute not referred to in Public Law 280 or discussed in detail throughout this Article is the Assimilative Crimes Act, 18 U.S.C. § 13 (1994). This statute is a law of general applicability, however, via the General Crimes Act it was made applicable to Indian country. See POMMERSHEIM, *supra* note 18, at 80. The Assimilative Crimes Act allows federal prosecution of crimes prohibited by state laws when no applicable federal substantive criminal law exists. See *id.*

112. 18 U.S.C. § 1152 (1994); *United States v. Wheeler*, 435 U.S. 313, 324 (1978) (affirming that "federal criminal jurisdiction was extended to crimes committed within Indian country by 'any Indian, or other person or persons'").

113. See 18 U.S.C. § 1152; POMMERSHEIM, *supra* note 18, at 80.

114. See 18 U.S.C. § 1152; *supra* note 108 (quoting relevant portion of 18 U.S.C. § 1152).

115. See 18 U.S.C. § 1152; *Ex parte Wilson*, 140 U.S. 575, 578 (1891).

116. See POMMERSHEIM, *supra* note 18, at 80.

117. 104 U.S. 621 (1881).

118. See *id.* at 624 (declaring that the circuit court had no jurisdiction over a murder by one "white man against another white man" on the Ute Reservation in Colorado).

2. *The Major Crimes Act (18 U.S.C. § 1153)*

Congress enacted the Major Crimes Act in 1885 as a direct response to the public outcry to the Supreme Court decision in *Ex parte Kan-gi-shun-ca*,¹¹⁹ more commonly known as *Ex parte Crow Dog* or simply Crow Dog's case.¹²⁰ In 1881, Crow Dog fatally shot a Brule Sioux chief by the name of Sin-ta-ga-le-scka (Spotted Tail) because of a personal, and perhaps political, disagreement.¹²¹ The Supreme Court reversed a Dakota territorial court's conviction that Crow Dog should be hanged and ruled that the murder of one Indian at the hands of another was within the exclusive jurisdiction of the tribe pursuant to the General Crimes Act.¹²² In so doing, the Supreme Court, while expressing some contempt for tribal justice institutions,¹²³ nonetheless deferred to the sovereign right of the Brule Sioux tribe to determine the resolution of the killing under Brule law and existing Brule dispute resolution mechanisms.¹²⁴ Thus, the efforts by the BIA and Justice Department to extend federal and state law to the reservations and impose a death sentence on Crow Dog failed.¹²⁵

Many members of Congress expressed outrage¹²⁶ at the Supreme Court's ruling and consequently enacted the Major Crimes Act to ensure federal jurisdiction over murder and other serious offenses committed by Indians.¹²⁷ Section 1153(a) lists a series of major crimes

119. See WILCOMB E. WASHBURN, *RED MAN'S LAND WHITE MAN'S LAW* 170 (2d ed. 1995) (explaining the effect *Ex parte Crow Dog* had on the development of Indian courts).

120. 109 U.S. 556 (1883). The Supreme Court case itself noted the English name of Crow Dog in its case title. See *id.*

121. One historical analysis disputes the sensationalization of Spotted Tail's murder as sinister political in-fighting. See HARRING, *supra* note 55, at 108-09.

122. See *Ex parte Crow Dog*, 109 U.S. at 557, 572.

123. See *id.* at 571 (noting the existence of "red man's revenge" and the "strongest prejudices of their savage nature").

124. The means of resolving the killing under the dispute resolution mechanisms of Brule law included adjudication by the tribal council and reconciliation through gifts of property. See HARRING, *supra* note 55, at 104-05. In the *Crow Dog* case, both families met and following tribal law, settled the matter for "\$600, eight horses, and one blanket." See *id.* at 110.

125. See COHEN, *supra* note 72, at 236 (discussing the Federal Government's argument that federal jurisdiction was established by an agreement with the Sioux Nation, which the Supreme Court rejected).

126. See WASHBURN, *supra* note 119, at 170 (stating that Congress viewed the decision as "outrageous" and as a result extended federal criminal jurisdiction to murder).

127. It is important to note that when federal criminal statutes, including Public Law 280, speak of Indians they do not clarify whether the Indian must be a member of the tribe or simply an Indian. In *United States v. Wheeler*, 435 U.S. 313 (1978), the Court noted that a tribe acts as an independent sovereign when it criminally punishes a member for a violation of tribal law. See *id.* at 313. However, the meaning of the term "Indian" remained unclear. See *Duro v. Reina*, 495 U.S. 676, 682 (1990) (discussing the lower court's ruling that *Wheeler's* reference to member and nonmember Indians was "indiscriminate" and should be given "little weight"), *superceded in part by statute*, 25 U.S.C. § 1301 (1994). It was not until 1990 that the Court defined the term "Indian" and definitively ruled that a tribe only had criminal jurisdiction over member-Indians.

over which the federal courts have jurisdiction despite the prior tribal exceptions listed in the General Crimes Act.¹²⁸

The Major Crimes Act, however, did not disturb tribal *concurrent* jurisdiction over the enumerated offenses.¹²⁹ As a result, tribes may prosecute major crimes and the federal courts have upheld their right to do so.¹³⁰ To the extent there is any question about concurrent tribal jurisdiction over major crimes,¹³¹ the court rulings regarding the Major Crimes Act and the Act's legislative history clearly support the retention of tribal concurrent jurisdiction. For instance, in *United States v. Antelope*,¹³² the Supreme Court recognized that tribes have exclusive jurisdiction over all offenses in Indian country committed by enrolled Indians against other Indians "except for the offenses enumerated in the Major Crimes Act."¹³³ In the Court's detailed analysis of the Act and the tribe's jurisdiction, it never held that the tribe lacked concurrent jurisdiction over these

See id. at 688-92 (holding that tribal jurisdiction over its members is consistent with a tribe's inherent sovereign power to control its internal affairs and preserve its ways, whereas jurisdiction of an "outsider" was not essential to the realization of this right).

This ruling presented a problem, because it left a jurisdictional gap. For example, if an Oglala Sioux tribal member entered the Crow Indian Reservation and committed a non-major crime against a Crow woman, the tribal court would have no jurisdiction. The federal court has no jurisdiction under section 1153, and the state—having no jurisdiction over Indian parties—also has no jurisdiction. Who prosecutes the defendant? Because of the potential for the commission of crimes with impunity, Congress legislated an overturning of the Court's ruling in *Duro* in 1991. *See* Department of Defense Appropriations Act, Pub. L. No. 101-511, § 8077, 104 Stat. 1856, 1892-93 (1990), (amended by Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (codified as amended at 25 U.S.C. §1301 (1994))). Through this Act, Congress vested the tribes with criminal jurisdiction over violations committed by non-member Indians in Indian country. *See id.* *See generally* Nell Jessup Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 AM. INDIAN L. REV. 109 (1992) (discussing legislative action taken in response to *Duro*).

128. Since the statute was enacted, it has expanded from seven major crimes to fourteen. The fourteen major crimes are: murder, manslaughter, kidnapping, maiming, a felony under Chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against a person under sixteen years of age, arson, burglary, robbery, and a felony under Section 661. *See* 8 TRIBAL CT. REC. (Nat'l Indian Justice Ctr., Petaluma, Cal.), Winter/Spring 1995, at 30 (on file with *The American University Law Review*); *supra* notes 108, 114 and accompanying text (discussing exceptions to federal jurisdiction enumerated in the General Crimes Act).

129. *See* Melton, *supra* note 53, at 129 (claiming that tribes have concurrent jurisdiction over the felony crimes listed in the Act); Bradley Interviews, *supra* note 28 (explaining that he interpreted the Act as providing for concurrent jurisdiction); Telephone Interview with Randy Wurtz, Chief Prosecutor of Omaha Tribal Council (July 22, 1997) (explaining his belief that there is concurrent tribal-state jurisdiction over major crimes and exclusive tribal jurisdiction over minor offenses); *see also infra* note 162 (providing a chart depicting concurrent tribal jurisdiction for the enumerated major crimes).

130. *See* *Wetsit v. Stafne*, 44 F.3d 823, 825-26 (9th Cir. 1995) (upholding a tribal court conviction for manslaughter and noting concurrent jurisdiction under the Major Crimes Act).

131. The text of section 1153 provides no express language clarifying whether the Federal Government's assumption of jurisdiction over major crimes is in lieu of tribal jurisdiction or in addition to it. *See* 18 U.S.C. § 1153 (1994); *see also supra* note 109 (providing statutory text).

132. 430 U.S. 641 (1977).

133. *See id.* at 643 n.2.

enumerated offenses, but only that its jurisdiction was no longer exclusive.¹³⁴ In fact, the Court characterized federal jurisdiction under the Act as simply a "limited intrusion of federal power into the otherwise exclusive jurisdiction of the Indian tribe."¹³⁵ The Major Crimes Act would clearly not amount to a "limited intrusion" into tribal jurisdiction if it terminated tribal jurisdiction altogether, rather than merely enabling concurrent federal jurisdiction.¹³⁶

The characterization of the Major Crimes Act as a "limited intrusion" was reaffirmed in *Ex parte Wilson*¹³⁷ and again in *United States v. Wheeler*.¹³⁸ The *Wheeler* Court specifically held that as both the Navajo Tribe and the Federal Government were separate sovereigns, the tribe was not barred by the double jeopardy clause to prosecute the Indian defendant for the sexual assault of a minor even if first prosecuted by the Federal Government.¹³⁹ In *Wheeler*, under the Major Crimes Act, the Federal Government prosecuted the defendant for rape,¹⁴⁰ while the tribe was still permitted to prosecute the defendant for the same offense.¹⁴¹

Further bolstering the argument for concurrent jurisdiction under the Major Crimes Act, the Supreme Court observed that Congress' original intent under the Act may have been to maintain concurrent tribal jurisdiction. In *Oliphant v. Squamish Indian Tribe*,¹⁴² the Supreme Court noted that the original text of the Major Crimes Act stated that the enumerated crimes would be punished by the United States "and not otherwise."¹⁴³ The Court observed that during the legislative debate on the Act, Congressman Budd moved to amend and strike the phrase "and not otherwise,"¹⁴⁴ arguing that preserving concurrent jurisdiction with the tribal governments was consistent

134. See *id.*

135. See *id.* at 643 n.1 (quoting *Keeble v. United States*, 412 U.S. 205, 209 (1973)).

136. The effect of concurrent jurisdiction is not necessarily positive. Under the aegis of concurrent jurisdiction, tribal authority may be undercut by state and federal governments. See John J. Harte, *Validity of a State Court's Exercise of Concurrent Jurisdiction over Civil Actions Arising in Indian Country: Application of the Indian Abstention Doctrine in State Court*, 21 AM. INDIAN L. REV. 63, 65 (1997) (asserting that concurrent state court jurisdiction questions the validity of the tribal court systems and undermines the effect of tribal laws).

137. 140 U.S. 575, 578 (1891) (holding that when the Federal Government assumed criminal jurisdiction in 1885 over offenses listed in the Major Crimes Act, the jurisdiction it assumed was "limited").

138. 435 U.S. 313, 325 (1978) (quoting *Antelope*, 430 U.S. at 643 n.1, and discussing congressional treatment of the "Intra-Indian offense exception").

139. See *id.*

140. See *id.* at 315-16.

141. See *id.* at 329-30.

142. 435 U.S. 191 (1978).

143. See *id.* at 203-04 & n.14 (discussing a statement by Rep. Budd, 16 CONG. REC. 934-35 (1885), and discussing the tribal court's lack of jurisdiction over non-Indians).

144. See *id.*

with the objectives of the Major Crimes Act.¹⁴⁵ The Court finally observed that although the issue was not resolved at that session, it was seemingly resolved by the time the Act emerged in final form, because the provision was enacted without the limiting phrase.¹⁴⁶ Thus, concurrent, not exclusive, jurisdiction was authorized.¹⁴⁷

More recently, the Ninth Circuit addressed the issue of concurrent jurisdiction over major crimes committed by members of Indian tribes. In *Wetsit v. Stafne*,¹⁴⁸ a tribal member was charged and convicted of manslaughter in tribal court after having been acquitted of the same crime in federal district court.¹⁴⁹ Relying heavily upon *United States v. Wheeler*,¹⁵⁰ the Ninth Circuit found that "[a] tribal court, which is in compliance with the Indian Civil Rights Act is competent to try a tribal member for a crime also prosecutable under the Major Crimes Act."¹⁵¹ In addition to cited decisions and treatises,¹⁵² the Ninth Circuit asserted two logical bases for this conclusion: first, the fact that federal jurisdiction is not always assured (indeed, "virtually nonexistent")¹⁵³ over crimes such as burglary or robbery enumerated in the Major Crimes Act; and, second, because lesser included offenses are prosecutable under the Major Crimes Act,¹⁵⁴ exclusive federal jurisdiction would effectively pre-empt a large portion of a tribe's criminal jurisdiction.¹⁵⁵ As a policy matter, the Ninth Circuit astutely observed that "[r]etention of this [concurrent] jurisdiction by the tribes can only increase their

145. See *id.*

146. See *id.*

147. See generally Powers of Indian Tribes, 55 Interior Dec. 14, 59-60 (1934) (discussing the retained tribal jurisdiction and stating that although the statute has been construed as removing all tribal jurisdiction over the enumerated crimes, the statute might be interpreted as conferring only concurrent jurisdiction because it never expressly terminated tribal jurisdiction).

148. 44 F.3d 823 (9th Cir. 1995).

149. See *id.* at 824.

150. 435 U.S. 313 (1978).

151. 44 F.3d at 825.

152. The Ninth Circuit in *Wetsit* relied upon several "distinguished authorities" including William C. Canby, see CANBY, *supra* note 42, at 35 (stating that the crime of theft is included in the original Major Crimes Act), and David H. Getches, see GETCHES ET. AL., *supra* note 40, at 403 (noting that the crime of theft on reservations was unchecked by federal law enforcement authorities).

153. See *Wetsit*, 44 F.3d at 825 (citing CANBY, *supra* note 42, at 135).

154. Defendants may be convicted of lesser included offenses, even though the government could not have originally charged the lesser offense. See *Keeble v. United States*, 412 U.S. 205, 214 (1973) (discussing the scope of the Major Crimes Act); *United States v. Walking Eagle*, 974 F.2d 551, 556 (4th Cir. 1992) (noting that the Act does not require that the defendant be deprived of instruction on the lesser included offense); *United States v. Johnson*, 967 F.2d 1431, 1436 (10th Cir. 1992) (discussing the Assimilative Crimes Act and finding that the jury instruction on the lesser included state offense of aggravated battery was properly given).

155. See *Wetsit*, 44 F.3d at 826 (insisting that jurisdiction in the instant case is proper and that to disallow it would infringe on the tribe's criminal jurisdiction).

responsibility for efficient and fair justice.”¹⁵⁶

Although the Major Crimes Act supports the existence of concurrent tribal criminal jurisdiction, in practice, external factors frequently deter and impede tribes from fully and effectively exercising their criminal jurisdiction, particularly over major crimes.¹⁵⁷ For example, chronic underfunding of tribal justice systems¹⁵⁸ and congressionally imposed limitations on tribal court sentencing authority¹⁵⁹ have severely impeded tribes in their ability to deter meaningfully crime, compensate victims, and punish violators. Although some tribes may currently lack the means to assert concurrent jurisdiction over major crimes, or even minor crimes, the existence of such jurisdiction is not diminished.¹⁶⁰

Criminal jurisdiction in Indian country generally, in the absence of Public Law 280, is a “complex patchwork of federal, state, and tribal law.”¹⁶¹ Navigating its jurisprudence requires careful consideration of the location of the crime, the Indian or non-Indian status of the actors, and the relative seriousness of the crime.¹⁶² Because the

156. *Id.* at 826.

157. *See, e.g.*, Resnik, *supra* note 49, at 123 (describing how Supreme Court decisions have limited the ability of tribes to maintain order on their lands).

158. *See* U.S. COMM’N ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT, REPORT 40-41 (1992) (compiling five years of hearings and investigations on tribal courts and justice systems and concluding that a shortage of funds has handicapped the administration of justice in Indian country).

159. *See, e.g.*, Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1994). Section 1302 provides: No Indian tribe in exercising powers of self-government shall— . . . require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of \$5,000, or both. . . .

Id. § 1302.

160. *See* United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695, 697 (D. Neb. 1879) (No. 14,891) (holding that the power and authority of jurisdiction do not cease to exist because of non-use).

161. *See* Duro v. Reina, 495 U.S. 676, 680 (1990).

162. Given the complexity of criminal jurisdiction in Indian country, the reader may find it helpful to refer from time to time to the chart below:

| <i>Crimes by Parties</i> | <i>Jurisdiction</i> | <i>Statutory Authority</i> |
|--|-----------------------------------|----------------------------|
| a. Crimes by Indians against Indians: | | |
| i. “Major” crimes. | Federal or tribal (concurrent) | 18 U.S.C. § 1153 |
| ii. Other crimes. | Tribal (exclusive) | |
| b. Crimes by Indians against non- Indians: | | |

maintenance of law and order is so central to the assertion of self-government and sovereignty, be it tribal, state, or federal, tensions necessarily underlie the criminal justice paradigm in Indian country and manifest themselves in cases involving criminal jurisdiction.

II. THE PASSAGE OF PUBLIC LAW 280

Although Congress has exercised its power to delegate Indian country jurisdiction to the states in other contexts,¹⁶³ Public Law 280 is clearly the most sweeping and significant of such delegations.¹⁶⁴ In passing Public Law 280, Congress disrupted the traditional distribution of power over Indian country principally shared by the

| | | |
|--|-----------------------------------|------------------|
| i. "Major" crimes. | Federal or tribal (concurrent) | 18 U.S.C. § 1153 |
| ii. Other crimes. | Federal or tribal (concurrent) | 18 U.S.C. § 1152 |
| c. Crimes by Indians without Victims: | Tribal (exclusive) | |
| d. Crimes by non- Indians against Indians: | Federal (exclusive) | 18 U.S.C. § 1152 |
| e. Crimes by non- Indians against Non-Indians: | State (exclusive) | |
| f. Crimes by non- Indians without Victims: | State (exclusive) | |

CANBY, *supra* note 42, at 142 (noting that the chart in its original form actually referred to U.S.C.A. rather than the U.S.C. as used here); *see also* PEVAR, *supra* note 20, at 132 (providing an equally useful chart).

It should be noted that tribes have no criminal jurisdiction over non-Indians absent congressional authorization. *See* *Oliphant v. Squamish Indian Tribe*, 435 U.S. 191, 197-99, 212 (1978) (declaring that the tribe has no jurisdiction over two non-Indian residents of Port Madison Reservation unless Congress specifically authorizes such jurisdiction). The Court reasoned that such jurisdiction would be inconsistent with the tribe's dependent status. *See id.* at 199-208.

163. *See, e.g.*, Act of Sept. 13, 1950, ch. 947, 64 Stat. 845 (codified at 25 U.S.C. § 233 (1994) (conferring jurisdiction to New York for civil actions between Indians or to which Indians are a party); Act of July 2, 1948, ch. 809, 62 Stat. 1224 (codified at 25 U.S.C. § 232 (1994)); Act of June 30, 1948, ch. 759, 62 Stat. 1161 (granting Iowa jurisdiction over offenses committed by or against Indians on Sac & Fox Indian Reservations); Act of May 31, 1946, ch. 279, 60 Stat. 229 (conferring jurisdiction to North Dakota over violations committed by or against Indians on the Devils Lake Indian Reservation); Act of June 8, 1940, ch. 276, 54 Stat. 249 (codified as amended at 18 U.S.C. § 3243 (1994) (detailing jurisdiction of state of Kansas over crimes committed on Indian reservations)).

164. *See* COHEN, *supra* note 72, at 344 (discussing the scope of Public Law 280).

Federal Government and the tribes.¹⁶⁵

A. *Public Law 280's Primary Provisions*

Public Law 280 unilaterally transferred federal civil and criminal jurisdiction "over offenses committed by or against Indians" within Indian country to the six designated states of Alaska,¹⁶⁶ California, Minnesota,¹⁶⁷ Nebraska, Oregon,¹⁶⁸ and Wisconsin.¹⁶⁹ These six states are commonly referred to as the "mandatory" Public Law 280 states.¹⁷⁰ These states received no federal subsidies to ease the financial burden of their new responsibilities, were precluded from taxing reservation lands to raise their own revenues, and received jurisdiction without tribal consent.¹⁷¹ It was the lack of tribal consent

165. See GETCHES ET AL., *supra* note 40, at 478 (noting that Public Law 280 is the principle example of assimilationist policies that developed during the Termination Period).

166. The Annette Islands, or Metlakatla, were exempted from Public Law 280. The application of Public Law 280 to Alaska has become increasingly complicated in light of litigation regarding the status of Indian lands in Alaska. See *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 562 (9th Cir. 1991), *rev'd on other grounds sub nom. Alaska v. Native Village of Venetie Tribal Gov't*, 118 S. Ct. 948 (1998) (holding that Alaska must give full faith and credit to the Native Village's child custody decision); see also *infra* note 321 and accompanying text (discussing the *Venetie* decision).

167. The Red Lake Reservation was exempted from Public Law 280 when enacted. See 18 U.S.C. § 1162(a) (1994).

168. The Warm Spring Reservation was exempted in the passage of Public Law 280. See *id.*

169. The Menominee Reservation was initially exempted from Public Law 280. See *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 471-73 (1979) (indicating that Wisconsin held jurisdiction over all Indian country in the state except the Menominee Reservation); see also PEVAR, *supra* note 20, at 113 (noting the Menominee Reservation as one of the three exceptions to the jurisdiction conferred to the six mandatory states by Public Law 280); WASHBURN, *supra* note 119, at 87 (same).

170. See *supra* note 20 and accompanying text (referring to these states as such because they had little choice in acceptance of the congressional delegation).

171. See Goldberg, *supra* note 56, at 538, 540, 546 (describing tribal discontent with Public Law 280's affront to tribal autonomy, state displeasure with the government's tight rein on the federal purse, and the Federal Government's deviation from past practices of engaging in extensive consultations with affected states and tribes to assure greater consensus before jurisdictional transfers were effectuated).

It should be noted, however, that the BIA did engage in some "consultations" with various affected tribes and the states being considered for the mandatory and immediate transfers—then California, Minnesota, Nebraska, Nevada, Oregon, Washington, and Minnesota (note the absence of Alaska). See S. REP. NO. 83-699, at 6 (1953), *reprinted in* 1953 U.S.C.A.N. 2409, 2412-13 (noting that all states were agreeable to the transfer with exception of Nevada, which was divided on the issue because of the statute's lack of accompanying federal assistance).

The term "consultation" appears in quotes to highlight the fact that these discussions were clearly not intended to secure tribal permission for the transfers. Regardless of tribal approval, the transfers would occur if the Federal Government so decided. For example, during these discussions it became known that several tribes opposed the transfers: the Red Lake Band of Chippewa Indians in Minnesota argued that state law would not benefit the tribe and suggested the need for a tribal referendum on the issue; the Warm Springs Tribe in Oregon feared unfair treatment of tribal members in state courts; the Colville and Yakima Tribes in Washington feared discrimination in state courts and further loss of tribal rights; and the Menominee Tribe in Wisconsin asserted that it was capable of maintaining order and lacked the readiness to accede to state laws. See *id.* Despite the Menominee Tribes' objections, however, it was not one

in particular that prompted President Eisenhower, on the day that he signed the Act into law, to remark that he had "grave doubts as to the wisdom of certain provisions" of Public Law 280.¹⁷²

The Act further provided for a similar assumption of jurisdiction by the remaining states containing Indian country at some time in the future.¹⁷³ Because of the discretionary language, these remaining states are referred to as the "optional" states.¹⁷⁴ Before "optional" states could assume jurisdiction, however, they were required to adopt affirmative legislation and where necessary, pass an amendment to their constitutions.¹⁷⁵

B. Congressional Intent

The problems caused by Public Law 280 directly result from its ambiguous legislative history, imprecise drafting, and lack of an express statement of the statute's objective. The sparse legislative history, however, does emphasize the need to improve law enforcement and curb federal expenditures, and the historical context of the statute reflects the then pervasive policy of

of the reservations exempt from the transfer. See *supra* notes 21-22 (providing the text of Public Law 280's civil and criminal provisions illustrating absence of Menominee Tribe from exempt reservations).

172. See Statement by the President upon Signing Bill Relating to State Jurisdiction over Cases Arising on Indian Reservations, 165 PUB. PAPERS 564, 564-65 (Aug. 15, 1953) [hereinafter Eisenhower Signing Statement] ("The failure to include in these provisions a requirement of full consultation in order to ascertain the wishes and desires of the Indians and of final Federal approval, was unfortunate."). In fact, in the same signing papers, the President actually requested that the Act be amended to provide for such consultations during Congress' next session. See *id.* at 565.

173. See 25 U.S.C. § 1324 (1994). It should be noted that while the original enactment did not require states to obtain consent from the affected tribes, the 1968 amendments made tribal consent a requirement for future assumptions of jurisdiction and allowed states to assume only partial jurisdiction. See Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 25 U.S.C. § 1324 (1994)); see also *infra* Part III.D.2 (discussing subsequent amendments to Public Law 280).

174. See GETCHES ET AL., *supra* note 40, at 484 (detailing the extent to which Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington have exercised this option).

175. See *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 474 (1979) (acknowledging that Public Law 280 authorized states "to amend where necessary their state constitutions or existing statutes to remove any legal impediment to the assumption of jurisdiction under the Act") (internal quotation omitted); *Kennerly v. District Court*, 400 U.S. 423, 427 (1971) (holding that absent affirmative legislation, Montana could not exercise jurisdiction over Indian country simply because a tribal law permitted it); see also 99 CONG. REC. 10,782 (1953) (statements of Reps. Case, Barret, and Thye) (explaining constitutional impediments precluding the assumption of jurisdiction for certain states).

Affirmative legislation was needed before an optional state could assume jurisdiction under Public Law 280 because of the enabling acts issued by Congress when the states were first admitted into the Union. See Deloria, *supra* note 76, at 301-02. As Vine Deloria, Jr. explains, Congress had exclusionary clauses placed in the states' enabling acts to "exempt[] Indian property and rights from state control." See *id.* at 302. Until these provisions were amended, they were a constant bar to state jurisdiction.

assimilation.¹⁷⁶ In interpreting Public Law 280, the challenge becomes how to give effect to congressional intent while acknowledging significant subsequent shifts in policy.

1. Lawlessness

As noted above, Congress expressed three concerns when enacting Public Law 280: lawlessness on reservations, the desire to assimilate Indian tribes into the population at large, and a shrinking federal budget for Indian affairs.¹⁷⁷ Congress' primary goal was to deal with the "lawlessness" on reservations and the "absence of adequate tribal institutions for law enforcement."¹⁷⁸ In fact, the statute, as originally introduced, was concerned with law enforcement problems in the State of California exclusively.¹⁷⁹ The Senate eventually decided to extend the statute's coverage to the other "mandatory" states¹⁸⁰ believed to share similar law enforcement problems.¹⁸¹

The Senate noted a serious jurisdictional problem in Indian country resulting from the existing federal scheme of concurrent tribal-federal jurisdiction.¹⁸² States were curtailed in exercising authority over crimes in Indian country and the Federal Government's authority was restricted by the Major Crimes Act to

176. See *infra* notes 195-215 and accompanying text (discussing the Termination Period and its impact on Public Law 280).

177. See *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. at 488 (discussing the concerns that motivated Congress to enact Public Law 280).

178. See *Bryan v. Itasca County*, 426 U.S. 373, 379 (1976); see also *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 202 (1987) (ruling that Congress' principal goal was to "combat lawlessness"); *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. at 505 (holding that § 1963's assumption of partial jurisdiction "undermines an important purpose behind Pub. L. 280"—the gap in law enforcement); *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 560 (9th Cir. 1991) (affirming congressional desire to "remedy" law enforcement problems on "some" reservations), *rev'd on other grounds sub nom. Alaska v. Native Village of Venetie Tribal Gov't*, 118 S. Ct. 948, 954 (1998) (noting examples of congressional "protections" extended to "dependent Indian communities"); S. REP. NO. 83-699, at 5 (1953), *reprinted in* 1953 U.S.C.C.A.N. 2409, 2412 (recognizing that "a hiatus in law-enforcement authority" existed that justified a transfer of jurisdiction to states who were willing and able to combat lawlessness on reservations); 99 CONG. REC. 10,783 (1953) (detailing letters received by Senator Thye that indicate Minnesota's desire to have such jurisdiction to address law enforcement problems on reservations); Goldberg, *supra* note 56, at 540-42 (explaining that it was a congressional response to "lawlessness on the reservations and the accompanying threat to Anglos living nearby").

179. See S. REP. NO. 83-699, at 1-6 (noting that when presented as H.R. 1063, the Act provided for California to extend its criminal laws over Indian country and have jurisdiction over civil controversies in Indian country).

180. See *supra* note 20 (discussing mandatory states).

181. See *infra* note 178.

182. See S. REP. NO. 83-699, at 5; see also *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. at 505-06 (affirming that the "hiatus in law-enforcement authority" on Indian reservations was a result of the division of jurisdiction between federal, state and tribal governments) (internal quotation omitted).

serious offenses.¹⁸³ In deciding to extend the breadth of the statute, the Senate observed that "[t]he enforcement of law and order among the Indians in the Indian country had been left largely to the Indian groups . . . [and] tribes [were] not adequately organized to perform that function."¹⁸⁴ Interestingly, the Senate report containing the justification for Public Law 280 never acknowledged some of the central problems of Indian country law enforcement: the Federal Government's continued reluctance to invest resources in reservation law enforcement and to investigate adequately and prosecute crimes in Indian country.¹⁸⁵

The legislative history's emphasis on criminal jurisdiction and the congressional desire to improve law enforcement, supports the view that the statute's extension of civil jurisdiction to the states was not a priority, but merely an "afterthought."¹⁸⁶

In addition, Congress' focus on lawlessness supports the interpretation that the statute provided for concurrent jurisdiction, because improvement of law enforcement would more likely result if Congress "*supplemented*" tribal jurisdiction with state jurisdiction, rather than "*supplanted*" it.¹⁸⁷ Supplementing tribal jurisdiction would augment jurisdiction and increase the prospects for adequate law enforcement in Indian country. Supplanting tribal jurisdiction, however, would merely replace the underfunded tribal justice systems with similarly challenged state systems.¹⁸⁸

2. *A need to decrease federal spending*

With the enactment of Public Law 280, legislators withdrew a significant aspect of the Federal Government's responsibility for law

183. See S. REP. NO. 83-699, at 5 (commenting on the State's limited ability to prosecute many offenses occurring in Indian country and the limited applicability of federal criminal laws to the "so-called 10 major crimes").

184. See *id.* at 5; see also Bradley Interviews, *supra* note 28 (explaining that at the time of the Act's passage there were no tribal courts in Nebraska).

185. See PEVAR, *supra* note 20, at 133 (explaining that to the Federal Government, "reservation crime [is] a low priority"); Goldberg, *supra* note 56, at 541 (noting that federal jurisdiction was "typically neither well-financed nor vigorous").

186. *Santa Rosa Band of Mission Indians v. Kings County*, 532 F.2d 655, 661 (9th Cir. 1975) (observing that there is little in the legislative history of the Act that indicates a "congressional rationale" for extending state civil jurisdiction over the tribes); see also *Bryan v. Itasca County*, 426 U.S. 373, 380-81 (1976) (acknowledging that section 1162 "was the central focus of Pub. L. 280" and the total absence of legislative history regarding Public Law 280's civil provision is proof of this conclusion); Goldberg, *supra* note 56, at 543 (suggesting that civil jurisdiction was added because it was "convenient and cheap" and in accord with assimilationist undertones).

187. *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 560 (9th Cir. 1991) (declaring that Public Law 280 did not divest tribes of their jurisdiction), *rev'd on other grounds sub nom. Alaska v. Native Village of Venetie Tribal Gov't*, 118 S. Ct. 948 (1998).

188. For more information on the financial problems associated with the Public Law 280 transfer of jurisdiction to the states, see *supra* Part II.B.2.

enforcement in Indian country and took their financial support with them. Unfortunately, Congress expressed little interest in ensuring that the mandatory states could adequately fund their new responsibilities.¹⁸⁹ Instead, the Federal Government was more concerned with relieving itself from the financial burdens of its trust responsibility.¹⁹⁰ In fact, during the debates prior to Public Law 280's passage, one Representative made a point of noting that in the year 1800, Indian affairs cost the United States \$31 while in 1951, the annual expenditure had "expanded tremendously" to \$74,707,320.¹⁹¹ Although Congress stated as one of its "coordinate aims" the "withdrawal of Federal responsibility for Indian affairs wherever practicable,"¹⁹² it was not a gesture intended simply to end Indian wardship status and bestow Indians with a feeling of equality with state citizens.¹⁹³ The fundamental objective was to begin a process of

189. See Goldberg, *supra* note 56, at 551 (opining that Congress' "insensitivity" to the states' financial worries was the result of the inherent conflict between its desire to improve law enforcement while lacking the will to finance the initiative). Unlike the mandatory states, the optional states were given the opportunity to refrain from assuming jurisdiction until they had adequate finances. See *Washington v. Confederate Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 505 (1979) (noting that the concerns of the states prompted Congress to give the optional states time to decide when they were capable of assumptions).

The mandatory states were forced to assume jurisdiction without any promises or guarantees of federal subsidies or the lifting of the tax exempt trust status of Indian lands. See Goldberg, *supra* note 56, at 538. While Congress consulted with these affected states and learned of their "agreeableness to the proposed transfer of jurisdiction," see S. REP. NO. 83-699, at 6 (1953), *reprinted in* 1953 U.S.C.C.A.N. 2409, 2413, it appears that the agreeableness was with respect to the jurisdiction, not to the lack of funds that would accompany it. Cf. *Bryan*, 426 U.S. at 381-83 (quoting Representative Young of Minnesota who expressed concern with the financial burden that jurisdiction would have imposed on his state and that the Federal Government should provide these states either with financial assistance or the means to obtain needed revenues through additional taxation powers).

190. See 99 CONG. REC. 9263 (1953) (statement of Rep. Harrison) (noting that the total expenditures from 1789 to 1951 would reach the two billion dollar mark and suggesting that the time had come to enact legislation that would allow the BIA to "begin going out of business in an orderly manner"); see also *Bryan*, 426 U.S. at 381-82 (noting the lack of any congressional intent to grant states any financial assistance).

In *Bryan*, the Supreme Court recounted a key discussion between Representatives Sellery and Young that encapsulates this issue. See *id.* at 381-83. In this discussion, Representative Young inquired as to why the Federal Government did not feel its assistance should be required since no taxation was permitted to offset the additional costs. See *id.* at 382-83. Representative Sellery acknowledged the lack of revenue raising ability, but nevertheless stated: "federal financial assistance or substitution of law enforcement activities among the Indians . . . might turn out to be a rather costly program, and it is a problem which the States should deal with and accept without Federal financial assistance . . ." See *id.* at 382. Interestingly, prior to Public Law 280's passage, Congress was informed that transfers of the federal services to the states would ultimately decrease federal expenditures. The initial cuts, however, should be delayed while the Federal Government assisted the states in their new role until the government permitted additional state taxation of Indian income and lands. See COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF GOV'T, INDIAN AFFAIRS: A REPORT TO CONGRESS, H.R. DOC. NO. 81-129, at 75 (1949). Congress, however, ignored this recommendation.

191. See 99 CONG. REC. 9263 (1953) (statement of Rep. Harrison).

192. S. REP. NO. 83-699, at 3.

193. See *Bryan*, 426 U.S. at 382 (citing the statement of Representative Sellery that transfer

terminating a costly federal responsibility.¹⁹⁴

3. *Assimilation, not termination*

Some commentators believe that Public Law 280 cannot be reconciled with the period during which it was enacted unless it is interpreted to provide for full divestiture of tribal jurisdiction.¹⁹⁵ No interpretation of Public Law 280 can be persuasive unless it both acknowledges and is reconciled with the fact that it was enacted during a time in American history that is now referred to as the "Termination Period."¹⁹⁶ Such an acknowledgment, however, does not foreclose an interpretation of Public Law 280 that provides for concurrent tribal and state jurisdiction.

To comprehend fully the conflict surrounding Public Law 280 and its enactment history, it is necessary first to understand the Termination Period itself. Spanning from roughly 1940 to 1962, the period was marked by a distinctive philosophy and accompanied by legislation designed to promote the termination of Indian tribes.¹⁹⁷ During this time, Congress enacted legislation promoting (1) the assimilation of Indians into the mainstream of society; (2) the termination of federal supervision over Indian affairs, including the protected trust status, the application of federal laws to Indian territories and federal benefits and services; and (3) the eventual relinquishment of federal control over Indian affairs to state and

will give Indians a "feeling of a conviction that they are in the same status and have access to the same services, including the courts, as other citizens of the State that are not Indians"); H.R. Con. Res. 108, 83d Cong. 1 (1953) (declaring the congressional policy of terminating Indian wardship status and granting "them all of the rights and prerogatives pertaining to American citizenship").

194. On June 9, 1953, Congress set into motion a process by which Indian tribes and individual members of tribes located in the states of California, Florida, Texas, New York, and Iowa, and the Flathead Tribe of Montana, the Klamath Tribe of Oregon, the Menominee Tribe of Wisconsin, the Osage Tribe of Oklahoma, the Potawatamie Tribe of Kansas and Nebraska, and the Chippewa Tribal members located on the Turtle Mountain Reservation in North Dakota, were to be "freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians." See H.R. Con. Res. 108, 83d Cong. 1-2. Once the above entities were "freed" from federal control, the BIA and all of its offices serving these tribes were to be abolished and the Secretary of the Interior was charged with the duty to examine all existing legislation relating to these tribes and to advise Congress on further actions to accomplish a complete relinquishment of federal responsibility. See *id.* at 2.

195. See Philip Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1165 (1990) (explaining that some believe Public Law 280 reflects "a clear diminishment of tribal sovereignty"); see also CLINTON ET AL., *supra* note 79, at 158 (stating that Public Law 280 gave states jurisdiction over Indian country previously exercised by both the federal and tribal governments).

196. See CLINTON ET AL., *supra* note 79, at 155 (noting that this period lasted from 1940-1962).

197. See Hauptman, *supra* note 75, at 321 (describing the philosophy as a movement to encourage assimilation and bring forth a cessation of federal responsibilities).

local authorities.¹⁹⁸

A significant impetus in the evolution of the termination policy was the 1949 Hoover Commission Report on the state of Indian affairs.¹⁹⁹ In its report, the Commission offered several recommendations to remedy the "Indian Problem."²⁰⁰ Its principal suggestion was to promote the "gradual integration of all Indians into the general population and economy."²⁰¹ Although the Hoover Commission report first recommended assimilation, it was the 1953 House Concurrent Resolution 108²⁰² that crystallized the Termination Period's goals into official congressional policy and set the assimilation process in motion.²⁰³

Public Law 280 was enacted during the Termination Period,²⁰⁴

198. See *id.* at 329-30 (describing the existence of four general categories of termination laws enacted during the Truman and Eisenhower Administrations that ended federal recognition of 109 Indian groups and affected over 1,365,801 acres of land); see also CLINTON ET AL., *supra* note 79, at 158 (explaining the "winding up" of affairs for select Indian tribes, termination of tribal "eligibility for federal benefits, and from coverage under federal Indian laws," and eventual transfer to state authority); WASHBURN, *supra* note 119, at 83-90 (postulating that congressional acceptance of the termination policy was a result of many factors including, but not limited to, a feeling of congressional guilt over the wrongs done to Indians, a desire to duplicate the freedom movements of the Eastern Europe satellite countries, a misguided hope that passage of Public Law 280 and House Concurrent Resolution 108 would make Indians self-reliant, and the power of a few members of Congress with "dedicated philosophical convictions" over "unconcern and ignorance of the majority").

199. See COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV'T, INDIAN AFFAIRS, H.R. DOC. NO. 81-129, at 53 (1949).

200. See *id.* at 63. Based on the Commission's report, it seemed the "Indian Problem" was a combination of the Indians' continued low socio-economic standard of living in the face of the general prosperity of the nation as a whole, and federal inability—through the BIA—to make advances in Indian welfare despite the enormous outlay of federal resources for Indian affairs. See *id.* at 59-62. It appears that the Commission did not believe that the BIA was providing Indians with a proportionate return on the Federal Government's investment in the "health, welfare, and general vocational education" of Indian peoples. *Id.* at 73.

201. *Id.* at 60. To accomplish this integration, the report suggested several things, including: transfer of federal social programs and federal medical service programs to the states; termination of the tax exemption for Indian lands; an increase in Indian participation in the political and civil life of the states; encouragement of young employable Indians to leave the reservation and "set themselves up on the land or in business"; and eventual discontinuance of all specialized federal activities serving Indians, including the dissolution of the BIA through the transfer of all of its duties to a successor body called the Federal Security Agency. See *id.* at 66-67, 71.

202. H.R. Con. Res. 108, 83d Cong. 1 (1953). Resolution 108 provides in relevant part:

Whereas it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States . . . [I]t is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes . . . should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians . . .

Id.

203. See CLINTON ET AL., *supra* note 79, at 157 (suggesting that the policy "reach[ed] its peak in 1953" with the resolution's passage).

204. See WASHBURN, *supra* note 119, at 86-87 (noting that Public Law 280 was passed just two weeks after House Concurrent Resolution 108).

which included the aim of assimilating²⁰⁵ tribes into society at large. Public Law 280 contains a strong assimilationist bent and there may be language in the statute's legislative history that could support an assimilationist agenda.²⁰⁶

Although Public Law 280 bears the imprint of the Termination Period, there is no reason to reach a divestiture interpretation as a result of this factor alone.²⁰⁷ By acknowledging the statute's provision for state intrusion into tribal affairs and judicial recognition of tribes' subjection to state jurisdiction, the original intent of Congress can be inferred. By enacting Public Law 280, Congress disregarded the historical trust relationship that existed between the Federal Government and the Indian tribes. Indian country law enforcement was predominantly a federal-tribal sphere only,²⁰⁸ but with Public Law 280, Congress ignored history and tradition and treated Indians *like any other citizens*, removing their historic insulation from state authority. The imprint of assimilationist policies should be acknowledged, yet not made determinative.

While gradual assimilation of Public Law 280 tribes was set in motion by the statute,²⁰⁹ total assimilation and hence, total termination of tribal justice systems was not provided for in the statute. The Court has repeatedly ruled that Public Law 280 "was plainly not meant to effect *total assimilation* . . . and nothing in its

205. Especially appealing to Congress was the fact that assimilation was much cheaper than continuing the expensive obligations of the trust relationship. See Goldberg, *supra* note 56, at 536.

206. See S. REP. NO. 83-699, at 3 (1953), *reprinted in* 1953 U.S.C.C.A.N. 2409, 2409 (stating the congressional aim of the "termination of subjection of the Indians to Federal laws applicable to Indians as such"); *id.* at 5 (suggesting that Public Law 280 is "desirable" because Indians had "reached a state of acculturation and development" that made them amenable to these changes); see also *Bryan v. Itasca County*, 426 U.S. 373, 382 (1976) (expressing the desire to place Indians on equal footing by giving them "same status and . . . access to the same services, including the courts, as other citizens of the State who are not Indians" (quoting Mr. Sellery, Chief Counsel of the Bureau of Indian Affairs)); 99 CONG. REC. 9263 (1953) (statement of Rep. Harrison) (postulating that some tribes were ready for "complete freedom from Federal supervision and wardship" and that Public Law 280 would allow Indians to become "self-supporting and ultimately free and equal citizens"). Despite language in the legislative history indicating that tribes were ready for assimilation, the lack of any serious investigation into the actual state of the "social development" of the tribes prior to Public Law 280's passage indicates that Congress neither "knew or cared about the Indians' readiness for state jurisdiction." See Goldberg, *supra* note 56, at 543.

207. See *Santa Rosa Band of Mission Indians v. Kings County*, 532 F.2d 655, 661-62 (9th Cir. 1975) (rejecting the county's argument that the court must find the broadest grant of jurisdiction to the state because Public Law 280 is "assimilationist in tone" and was passed with an "eye towards eventual termination of Federal supervision over Indian tribes and Indian trust territory").

208. See Bradley Interviews, *supra* note 28 (explaining how Indians were accustomed to the federal system of protection and not used to being subject to state and county courts where prejudices against Indians were often encountered).

209. See *supra* notes 200-01 (describing the Hoover Commission's recommendations).

legislative history suggests [otherwise]."²¹⁰ The reason why Congress stopped short of total termination is because it had a competing and overriding intent. Congress' "primary concern" in Public Law 280's enactment was not assimilation but "lawlessness" on reservations.²¹¹

In fact, the very language of the Act affirms this hierarchy in priorities. In section 1162(a), Congress expressly exempted several tribal reservations from Public Law 280's provisions, two of which, the Red Lake Band of Chippewa Indians of Minnesota and the Warm Springs Tribe of Oregon,²¹² were exempt because "each . . . ha[d] a tribal law-and-order organization that function[ed] in a reasonably satisfactory manner."²¹³ Congress' desire was to resolve specifically designated law enforcement inadequacies.²¹⁴ As stated above, this could best be achieved if Congress *supplemented* tribal jurisdiction with state jurisdiction, rather than *supplant* it.²¹⁵ Clearly, the better reading of Public Law 280 gives effect both to the agenda of assimilation and the overriding need to decrease lawlessness through the preservation of tribal jurisdiction.

C. Criminal Versus Civil Provisions

Given that Public Law 280's purpose was primarily to address the criminal problems within Indian country rather than its civil dilemmas,²¹⁶ it is no surprise that its criminal provision is more controversial. The questions that arise in relation to the criminal

210. *Bryan*, 426 U.S. at 387-89 (emphasis added) (arguing that the same Congress had "enacted several termination statutes" so it most certainly knew how expressly to terminate tribal jurisdiction rather than do what it did in Public Law 280); see also *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208-10 (1987) (reaffirming the *Bryan* position); *Santa Rosa Band of Mission Indians*, 532 F.2d at 661 (ruling that "general statements of assimilationist intent" are unpersuasive); Goldberg, *supra* note 56, at 537 (suggesting that Public Law 280, rather than intending complete assimilation, was more of a "compromise between wholly abandoning the Indians to the states and maintaining them as federally protected wards").

211. See *Bryan*, 426 U.S. at 379.

212. For discussion on the exemption of the Metlakatla community that came after the statute's original enactment, see *infra* note 282 and accompanying text.

213. See S. REP. NO. 83-699, at 6-7 (1953), reprinted in 1953 U.S.C.C.A.N. 2409, 2413-14 (citing letter from Assistant Secretary of the Interior Orme Lewis). Secretary Lewis' letter also discusses the exemption of the Colville and Yakima Tribes of Washington, but, as noted, a bill for the transfer of jurisdiction was not before Congress at that particular time. See Eisenhower Signing Statement, *supra* note 172, at 565 (detailing President Eisenhower's statement that the Red Lake Band of Chippewa, Warm Springs Tribe, and Menominee Tribe "have effective law and order organizations of their own" and would therefore be exempted from the bill). The Menominee Tribe was eventually not excluded.

214. See *Bryan*, 426 U.S. at 385-86 & n.12 (determining that Congress only meant Public Law 280 to give state courts the ability to decide civil and criminal matters arising on reservations that were "not so organized"—referring to the adequacy of exempt reservations).

215. See *supra* note 187 and accompanying text.

216. See *supra* note 186 and accompanying text (detailing how civil jurisdiction was merely an afterthought).

sections are fueled by the textual differences between the criminal and civil sections and the Supreme Court's interpretative rulings on both.

The continued existence of tribal civil jurisdiction is more apparent from textual support in the statute than tribal criminal jurisdiction.²¹⁷ The civil section, section 1360, "contemplates the continued vitality and operation of the tribal government"²¹⁸ by recognizing that tribal ordinances or customs will still be given "full force and effect in the determination of civil causes of action" when they are not inconsistent with any applicable state law.²¹⁹ The wording of section 1360 should not only be understood as an express recognition of continued tribal authority, but also as a recognition of the application of tribal laws in state courts.²²⁰ Unfortunately, unlike its civil counterpart, there is no language in the criminal provision that expressly recognizes a parallel residual tribal authority over criminal matters.²²¹ To further complicate the analysis, the Supreme Court has declared that while Public Law 280 prohibits the state from imposing its "civil/regulatory" laws over tribal lands, the statute does permit the state to enforce its "criminal/prohibitory" laws on tribal lands.²²²

In addition, the criminal provision, section 1162, contains controversial language in subsection (c) that is not found in the civil provision. A 1970 amendment to Public Law 280 added language to section 1162(c) that makes reference to "areas over which the several states have exclusive jurisdiction."²²³ As outlined, the term "exclusive" is problematic because it could signify that the state's jurisdiction

217. Criminal jurisdiction was specifically transferred to the states by 18 U.S.C. § 1162 (1994), while civil jurisdiction was conferred by 28 U.S.C. § 1360 (1994).

218. *Santa Rosa Band of Mission Indians v. Kings County*, 532 F.2d 655, 663 (9th Cir. 1975).

219. 28 U.S.C. § 1360(c) (1994).

220. See COHEN, *supra* note 72, at 344. In fact, in 1976, the Supreme Court clarified that section 1360 conferred state jurisdiction over "private civil controversies" involving Indians in state court, but did not extend general state civil regulatory power over Indian country. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208-10 (1987) (reaffirming Court's ruling in *Bryan*); *Bryan v. Itasca County*, 426 U.S. 373, 385 (1976) (deciding that Minnesota could not impose a personal property tax on a mobile home owned by a Minnesota Chippewa tribal member and situated on tribal trust land); see also *Santa Rosa Band of Mission Indians*, 532 F.2d at 661 (extending *Bryan* ruling to bar local county civil regulations).

221. Compare 28 U.S.C. § 1360(c) (1994) (stating that any tribal ordinance or custom adopted before or after by an Indian tribe, band, or community shall be given full force and effect in the determination of any civil causes of action, as long as it is not inconsistent with any applicable civil law of the state), with 18 U.S.C. § 1162 (1994) (containing no similar provision).

222. See *Cabazon*, 480 U.S. at 209 (stating that Public Law 280 granted California "criminal jurisdiction").

223. See Act of Nov. 25, 1970, Pub. L. No. 91-523, 84 Stat. 1358 (codified as amended at 25 U.S.C. § 1162(c) (1994)); *infra* note 262 and accompanying text (quoting relevant portion of 25 U.S.C. § 1162(c)).

over criminal matters is exclusive of both federal and tribal jurisdiction rather than just federal jurisdiction.²²⁴ To summarize, the interpretation of section 1162 is even more complex than its civil counterpart for three reasons: (1) the absence of express language recognizing residual jurisdiction; (2) the permitted state application of criminal laws to Indian lands; and (3) the 1970 "exclusive" amendment.

III. NOT A DIVESTITURE STATUTE

Public Law 280 should be read narrowly to affirm that tribes were never divested of their criminal and civil jurisdiction, and also that the states merely stepped into the shoes of the Federal Government by only assuming the jurisdictional authority of the Federal Government and not that of the tribes. Such an interpretation of Public Law 280 derives from the continued recognition of tribal civil and criminal jurisdiction over hunting, fishing, water, and treaty rights; the absence of language expressly divesting tribes of jurisdiction; the application of statutory construction canons in favor of Indians; the fact that section 1162(c) could not terminate tribal jurisdiction where the Major Crimes Act or General Crimes Act did not; and subsequent Supreme Court rulings and congressional legislation clarifying that the Act did not terminate tribal jurisdiction.

A. *Residual Hunting and Fishing Rights*

Although questions arise over what jurisdiction tribes may have lost under Public Law 280 and what states allegedly may have gained, there is no textual justification for the position that Public Law 280 divested tribes of *all* of their jurisdiction. It is well understood that tribes can still exercise authority over areas from which the states have traditionally been excluded, such as the regulation of hunting, trapping, and fishing rights guaranteed to tribes by statute or treaty.²²⁵ The criminal section of Public Law 280 specifically states that nothing in the statute

shall authorize the alienation, encumbrance or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation

224. See generally *infra* Part III.C (discussing exclusive state jurisdiction).

225. See *Criminal Jurisdiction of Utah over Non-Indians Hunting on the Uintah and Ouray Reservation in Violation of State Law*, 78 Interior Dec. 101, 101 (1971); see also WASHBURN, *supra* note 119, at 195 (asserting that nothing in Public Law 280 speaks of depriving Indians of hunting, fishing, and trapping rights secured to them by federal treaties).

imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal Treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.²²⁶

In the process of expressly detailing all the areas over which the states could not extend their newly acquired criminal jurisdiction, Congress never placed any limits, express or implied under Public Law 280, on the jurisdictional rights that tribes retained over these enumerated areas.²²⁷ Therefore, a tribe in a mandatory state may not only continue to regulate and protect its hunting, fishing and trapping rights through its governmental processes and authority, civil or criminal, but should also be eligible for federal assistance to achieve meaningful enforcement and regulation of these rights. The consequence of broadly interpreting state jurisdiction under Public Law 280 is that Public Law 280 tribes could be denied access to federal programs intended to provide direct assistance to tribes because the administrators of the programs could deem such assistance unnecessary if the tribe's entire law enforcement is exclusively handled by the state.²²⁸

226. 18 U.S.C. § 1162(b). The companion civil section reads verbatim until "thereto" and does not specifically refer to the "hunting, trapping, or fishing." See 28 U.S.C. § 1360(b). However, when read together with its provision that recognizes the "full force and effect" of "tribal ordinances and customs," 28 U.S.C. § 1360(c), it is apparent that tribal jurisdiction over these rights is equally respected by the civil section.

227. When a reservation is established by treaty, statute, or agreement there is an implied right to hunt and fish on that land absent state regulation. See *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968). While it is presumed that Congress can amend or repeal a statute, Congress can also abrogate treaties with Indians. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) (ruling that a challenged federal allotment statute abrogated a prior treaty with the tribe requiring consent of three-fourths of the tribal members before reservation allotment); *Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1871) (permitting federal taxation of tobacco sold on the reservation despite an existing treaty exempting the tribe from the same). Such abrogations can only be accomplished, however, when Congress' intention to do so is "clear and plain." See *United States v. Dion*, 476 U.S. 734, 738 (1986) (discussing the effects of the Endangered Species Act on hunting and fishing rights of the Yankton Sioux Tribe). Where legislative intent is unclear, as in Public Law 280, abrogation "is not to be lightly imputed to the Congress." *Menominee Tribe of Indians*, 391 U.S. at 413 (ruling that federal supervision ended and state laws became applicable after the Termination Act of 1954 became effective).

228. See Bradley Interviews, *supra* note 28 (explaining that once the Omaha and Winnebago Tribes in Nebraska came under Public Law 280, the tribes ceased to receive federal funds directed at law enforcement). One law enforcement program that has been available to tribes regardless of Public Law 280 is the Department of Justice's Office of Community Oriented Policing Services ("COPS"), which was established under the Violent Crime Control and Law Enforcement Act of 1994. See Public Safety Partnership and Community Policing Act of 1994, Pub. L. No. 103-322, 108 Stat. 1808 (codified at 42 U.S.C. §§ 3796dd-1 to 8 (1994)). Through its programs, COPS helps tribes control crime by providing federal funds to assist in the hiring

B. Express Language and the Canons of Indian Legislation

The Supreme Court has ruled that when the provisions of a piece of legislation are "clear and explicit," the Court must uphold the express meaning in its interpretation.²²⁹ When a treaty or statute's text is ambiguous, the Court looks to the legislative history and surrounding circumstances for clarification.²³⁰ In the instant case, neither the text of the statute nor the legislative history provide an unequivocal explanation. In such circumstances, the Court must balance the words of various congressmen against an infinite number of contradicting canons of construction that our courts have established over time.²³¹ In other words, for every traditional canon of statutory interpretation that favors divestiture, there seems to be another canon mandating a contrary approach that favors tribal sovereignty.²³²

As a result, the continuation of residual tribal jurisdiction must be anchored in principles that have proven to be both immutable and without contra-interpretations. In the context of federal Indian law there are two such principles: (1) the need for express language to divest tribes of sovereign powers; and (2) the application of specific canons of construction that have been fashioned solely for use with

of more police and the expansion of their law enforcement systems. *See Grants and Funding, NATION TO NATION*, 1 (Dep't of Justice, Office of Tribal Justice), Aug. 1996, at 10.

229. *See Dion*, 476 U.S. at 738 (discussing the need for language in a statute to be express if it is to effectuate abrogation of treaty rights).

230. *See Frickey*, *supra* note 195, at 1143 (stating that legislative history and the general historical context in which Congress has acted are used to determine congressional intent).

231. *See generally* KARL N. LLEWELLYN, *THE COMMON LAW TRADITION DECIDING APPEALS* 522 app. (1960) (Canons on Statutes) (providing a detailed list of over 45 canons of statutory construction and citing for each of these canons a corresponding canon that effectively states the opposite).

232. *See id.* Karl Llewellyn provides the following four examples of canons that contradict each other:

"There is no need to refer to the legislative history where the statutory language is clear" *versus* "But words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on superficial examination."

"The heading of a statute, or a section thereof, may not be used to . . . restrict the language of the statute itself" *versus* "The heading here considered is part of the context of the statute"

"The meaning of a word may be ascertained by reference to the meaning of words associated with it" *versus* "A word may have a character of its own not to be submerged by its association"

"Words are to be interpreted according to the proper grammatical effect of their arrangement within the statute" *versus* "Rules of grammar will be disregarded where strict adherence would defeat purpose"

Id. (citations omitted).

statutes dealing with Indian matters.

1. *Congress' failure to use express language in Public Law 280*

Although Congress has the sole power to limit tribal sovereignty,²³³ Public Law 280 does not contain the express language required to accomplish that end. As previously mentioned, the Supreme Court has made it clear that in order to interfere with the inherent powers of tribes, Congress must do so expressly.²³⁴ This requirement affirms the Court's respect for tribal sovereignty and its reluctance to infer the abrogation of tribal sovereignty by mere implication in an ambiguous statute.²³⁵

As Public Law 280 did not use express and clear language to abrogate tribal sovereignty in the area of civil and criminal jurisdiction, tribal sovereignty should have remained intact.²³⁶ For instance, in subsection (b) of the criminal section, section 1162, Congress lists the activities with which the state should not interfere.²³⁷ Congress could also have included in this section, "tribal criminal jurisdiction is hereby [extinguished or limited]." Congress is more than capable of writing express language terminating tribes and their rights.²³⁸ However, it did not include such express language

233. See *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (recognizing that tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance").

234. See *supra* note 72 and accompanying text.

235. See *Rice v. Rehner*, 463 U.S. 713, 719-20 (1983) (sanctioning the imposition of a California liquor licensing regulation upon an Indian general store owner because the Court found no evidence of tribal self-governance in this area); *Bryan v. Itasca County*, 426 U.S. 373, 387-93 & nn.13-14 (1976) (recognizing Public Law 280 as ambiguous, and ruling that absent clear language in the statute or legislative history, the Court will not imply termination, destruction of tribal self-governance, or waiver of tribal taxation immunity); *cf. United States v. Dion*, 476 U.S. 734, 738-39 (1986) (affirming the need for "clear and plain" language to abrogate treaty rights); *Menominee Tribe v. United States*, 391 U.S. 404, 412-13 (1968) (stating that abrogation or modification of Indian treaty rights is "not to be lightly imputed to the Congress" by the Court, nor will Congress be able to accomplish the same through a "backhanded way" absent explicit statements to do so) (citation omitted).

236. See *Walker v. Rushing*, 898 F.2d 672, 675 (8th Cir. 1990) (holding that divestiture did not occur because the court found "no such clear expression of congressional intent in Public Law 280").

237. See 18 U.S.C. § 1162(b) (1994); *supra* note 21 (providing full statutory text).

238. See, e.g., *Bryan*, 426 U.S. at 389 & n.15 (ruling that the same Congress which enacted several termination acts also wrote Public Law 280 and that it "knew well how to express its intent directly"). For examples of express termination language see *Klamath Termination Act* of Aug. 13, 1954, ch. 732, 68 Stat. 718 (codified at 25 U.S.C. §§ 564 to 564w-2 (1994)) (ending special trust relationship with the Federal Government and transferring tribal lands over to the state); *Act of Sept. 1, 1954*, ch. 1207, 68 Stat. 1099 (codified at 25 U.S.C. §§ 741-60 (1994)) (terminating Paiute Indians of Utah); *Act of Aug. 23, 1954*, ch. 831, 68 Stat. 768 (codified at 25 U.S.C. §§ 721-728 (1994)) (terminating Alabama and Coushatta Tribes of Texas); *Menominee Indian Termination Act* of Jun. 17, 1954, ch. 303, 68 Stat. 250 (codified as amended at 25 U.S.C. §§ 891-902) (1994)) (terminating Menominee Tribe);

It should be noted that each of the tribes listed above were later restored to their previous relationship with the Federal Government. See *Act of Aug. 27, 1986*, Pub. L. No. 99-398, 100

in Public Law 280 and declined to do so during subsequent amending processes.²³⁹ In fact, "nothing in the wording of either the civil or criminal provisions of Public Law 280 or its legislative history precludes concurrent tribal court authority."²⁴⁰

Tribal courts are essential institutions of tribal self-governance²⁴¹ and their disestablishment would have grave consequences.²⁴² For these reasons the termination of a tribe's sovereign right of jurisdiction should not be implied from ambiguous language and a conjectural supposition of congressional intent. Instead, it should be presumed to exist until Congress uses the required express language to remove it.²⁴³ Congress did not use such language in Public Law 280 and therefore tribal jurisdiction survives Public Law 280.

2. *Applicability of canons*

Once a court determines that a particular statute affects Indian tribes or individuals, it should apply canons of construction favoring the creation and preservation of tribal rights.²⁴⁴ While statutory interpretation may involve contradictory and numerous interpretive maxims described above,²⁴⁵ the Supreme Court has established a set of specific and limited canons of construction for matters of Indian

Stat. 849 (codified as amended at 25 U.S.C. §§ 566-566h (1994)) (restoring the Klamath Tribe); Act of Aug. 18, 1887, Pub. L. No. 100-89, 101 Stat. 669 (codified at 25 U.S.C. §§ 731-737 (1994)) (restoring the Alabama and Coushatta Tribes of Texas); Act of Apr. 3, 1980, Pub. L. No. 96-227, 94 Stat. 317 (codified at 25 U.S.C. §§ 761-768 (1994)) (restoring the Paiute Indians of Utah); Act of Dec. 22, 1973, Pub. L. No. 93-197, 87 Stat. 770 (codified at 25 U.S.C. §§ 903-903f (1994)) (restoring the Menominee Tribe).

239. See *supra* note 16 (listing subsequent amendments to Public Law 280).

240. COHEN, *supra* note 72, at 344.

241. See Indian Tribal Justice Act of 1993, Pub. L. No. 103-176, § 2, 107 Stat. 2004, 2004 (codified at 25 U.S.C. § 3601(5) (1994)) (recognizing that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments"); O'Connor Address, *supra* note 48, at 3 (explaining that the "effective operation" of tribal courts is essential to the realization of tribal sovereignty and self-governance); Reno, *supra* note 44, at 113 (stating that the Department of Justice believes that the promotion of tribal self-governance means support for tribal justice systems).

242. As the Supreme Court has observed, the stripping of a "tribe's jurisdiction to punish its members for infractions of tribal law would detract substantially from tribal self-government," *United States v. Wheeler*, 435 U.S. 313, 332 (1978), and "result in the destruction of tribal institutions and values." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987); see also Hon. William C. Canby, Jr., *Tribal Courts, Viewed from a Federal Judge's Perspective*, 9 TRIBAL CT. REC. (Nat'l Indian Justice Ctr., Petaluma, Cal.), Spring/Summer 1996, at 15, 16 (on file with *The American University Law Review*) (explaining that "the disappearance of the tribal court system would be a judicial disaster" for tribes and our national system of justice).

243. See *Powers of Indian Tribes*, 55 Interior Dec. 14, 19 (1934) (affirming that "acts of Congress which appear to limit the powers of an Indian tribe are not to be unduly extended by doubtful inference").

244. See CLINTON ET AL., *supra* note 79, at 230.

245. See *supra* note 231 and accompanying text (detailing examples of contradictory canons of construction).

law. These canons form "a system of background norms and conventions against which the Court will read statutes."²⁴⁶ When these interpretative rules are applied, one concludes that Public Law 280 could not divest tribal jurisdictional authority.

The Supreme Court has ruled that statutes passed for the benefit of Indians should be liberally construed, with doubtful expressions resolved in favor of the Indians.²⁴⁷ Furthermore, statutes should be construed not "according to their technical meaning,"²⁴⁸ but as the Indians would have understood them.²⁴⁹ Application of these canons of statutory construction has also been extended to treaties with Indian tribes.²⁵⁰

The Supreme Court established these tenets to ensure that Congress exercised its power in a manner most consistent with the trust responsibility it owed the Indians.²⁵¹ Derived from the trust responsibility is the presumption that Congress' intentions toward tribes are beneficial to and protective of Indian tribes.²⁵² Accordingly, the canons promote narrow constructions that prevent intrusion upon Indian interests²⁵³ and provide an extra defense for Indians

246. See William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 65-66 (1994) (describing the contributions that such an "interpretive regime" can provide while cautioning against its use as a result of Karl Llewellyn's criticisms that "there are two opposing canons on almost every point of statutory interpretation").

247. See *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918) (holding that an Alaskan statute creating a reservation for Metlakatla Indians included adjacent waters and submerged land to protect Indian fishing supply); see also *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 467 U.S. 138, 149-50 (1984) (applying the canon to the interpretation of Public Law 280's provision for optional states); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (quoting and affirming *Alaska Pacific Fisheries*); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930) (stating that the canon should be applied to protect "the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith"); *CLINTON ET AL.*, *supra* note 79, at 231 (stating that ambiguities in statutes dealing with Indian matters are resolved in favor of Indians).

248. See *Carpenter*, 280 U.S. at 367 (discussing the need to protect Indians because they are "wards of the nation"); *Jones v. Meehan* 175 U.S. 1, 11 (1899) ("[The] treaty must therefore be construed not according to the technical meaning of its words to learned lawyers.").

249. See *Carpenter*, 280 U.S. at 367 (explaining the courts' preference for the plain meaning of the words as naturally construed by Indians).

250. See *Oliphant v. Squamish Indian Tribe*, 435 U.S. 191, 208 n.17 (1978) (deciding whether a treaty with Washington tribes gave the tribe jurisdiction over non-Indians); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174-75 (1973) (applying the canon together with the principle of "Indian independence" and concluding that a Navajo treaty of 1868 precluded extension of state law to the Navajo Reservation).

251. See *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 660 (9th Cir. 1975) ("[The principle] is an interpretive device, early framed by John Marshall's legal conscience for ensuring the discharge of the nation's obligations to the conquered Indian tribes.").

252. See COHEN, *supra* note 72, at 221 (stating that the trust responsibility also led to the development of the canon of construction that federal laws should be read as protecting Indians).

253. See Frickey, *supra* note 195, at 1141 (describing courts' desire to prevent invasion of Indian interests).

against the plenary power of Congress.²⁵⁴

Because Public Law 280 is ambiguous, and because the "sparse legislative history"²⁵⁵ does not clarify Public Law 280's effect on tribal justice systems, the interpretive canons of Indian law should be applied.²⁵⁶ In the context of Public Law 280, the Supreme Court has already begun to apply these canons.²⁵⁷ As the Court has held, the canons require a reading of the statute's ambiguous language in the light most favorable to the Indians. In so doing, it is significant that tribal justice systems "preserve tribal culture and customs" and ensure "public health and safety and the political integrity of tribal governments."²⁵⁸ A statutory interpretation that divests tribal jurisdiction would not just be unfavorable to Indians, but would instead "result in the destruction of tribal institutions and values."²⁵⁹ It is clear that these canons were specifically intended to prevent such impacts on tribes.²⁶⁰ Consequently, the application of the canons yields only one reasonable conclusion: the ambiguous language of Public Law 280 is not enough to justify the abrogation of tribal jurisdiction, a critical attribute of tribal sovereignty.²⁶¹

C. *No Grant of Exclusive State Jurisdiction in Section 1162*

In 1970, subsection (c) of the criminal provision, section 1162, was

254. See *id.* (asserting that canons of interpretation encourage broad interpretation, thereby limiting congressional power).

255. *Bryan v. Itasca County*, 426 U.S. 373, 383 (1976).

256. It has been argued, however, that Public Law 280 is not beneficial to the tribes and therefore the canons should not apply. See Frickey, *supra* note 195, at 1167-68 (stating that Public Law 280 is "designed to undermine, not enhance, the authority of tribes"). This argument is tenuous at best because the Supreme Court has never determined how it decides what legislation is beneficial to Indians. Is it based on Congress' alleged intent, the Indian's perception of the legislation, or its effect? Congress stated that Public Law 280 would help Indians by giving them equal status with other U.S. citizens. See *supra* note 193 and accompanying text. Others assert that Public Law 280 deprived tribal courts of their jurisdiction. See CLINTON ET AL., *supra* note 79, at 158 (stating that Public Law 280 gave states both federal and tribal jurisdiction over crimes and civil causes of action).

257. See *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 467 U.S. 138, 149-50 (1984) (recognizing the canon when discussing the ambiguity of North Dakota's Enabling Act); *Bryan*, 426 U.S. at 392 (asserting that canons are applicable to congressional statutes that are detrimental to tribes, such as those that "abolish . . . Indian tax immunities").

258. See *Reno*, *supra* note 44, at 113-14 (discussing why tribal courts are the most appropriate institutions to maintain order in tribal communities); see also *United States v. Wheeler*, 435 U.S. 313, 332 (1978) (explaining that stripping "a tribe's jurisdiction to punish its members for infractions of tribal law detracts substantially from tribal self-government").

259. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987) (construing § 1360 and its implication for the extension of state civil regulatory laws over Indian country).

260. See COHEN, *supra* note 72, at 221-25 (discussing protections of tribal treaty rights and self-governance and the use of canons to implement the trust relationship).

261. See *Bryan*, 426 U.S. at 375 (holding that canons cannot support the eradication of tribal tax immunities under Public Law 280).

amended to read "[t]he provisions of section 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section *as areas over which the several States have exclusive jurisdiction*."²⁶² The presence of the term "exclusive" in the criminal statute does not reflect a congressional intent to leave the states as the only sovereigns with jurisdiction over criminal matters in Indian country. This conclusion is supported by the fact that: (1) Public Law 280 could not accomplish a divestiture of tribal jurisdiction when the related statutes of the General Crimes Act (18 U.S.C. § 1152) and the Major Crimes Act (18 U.S.C. § 1153) did not; (2) the legislative history surrounding the term's inclusion does not expressly or implicitly suggest a divestiture interpretation; and (3) the term is ambiguous and not explicit as required for abrogations or limitations of tribal powers.

1. Prior use of the "exclusive" term

Section 1162(c) of Public Law 280 refers to both the Major Crimes Act and the General Crimes Act.²⁶³ Each of these statutes uses the term "exclusive" to modify the jurisdiction of the United States.²⁶⁴ By analogy, a determination as to the term's resulting effect on tribal jurisdiction can provide insight into the meaning of Public Law 280.²⁶⁵ Despite the use of the "exclusive" term neither act terminated tribal jurisdiction, and by analogy, Public Law 280 should not have terminated tribal jurisdiction either.

Felix S. Cohen, author of the definitive treatise on federal Indian law, stated that "[t]he basic intent of the criminal law section [of Public Law 280] was to substitute state for federal jurisdiction under

262. Act of Nov. 25, 1970, Pub. L. No. 91-523, 84 Stat. 1358 (codified at 18 U.S.C. § 1162(c) (1994)) (italics representing the added phrase); see also *supra* note 21 (providing the complete language of section 1162). Section 1152 is the General Crimes Act, or Indian Country Crimes Act, and Section 1153 is the Indian Major Crimes Act. See *supra* Part I.B (discussing both acts).

263. See 18 U.S.C. § 1162(c) (1994) ("The provisions of section 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.").

264. The General Crimes Act refers specifically to the "sole and exclusive jurisdiction of the United States." 18 U.S.C. § 1152 (1994). Similarly, the Major Crimes Act speaks of the "[f]ederal law in force within the *exclusive jurisdiction of the United States*." 18 U.S.C. § 1153 (1994) (emphasis added); see also *supra* notes 108-09 (providing full text of both statutes).

265. When a particular word is used consistently in related statutes, the term should be read similarly unless an alternative definition is provided. Cf. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (asserting that the Court "generally presume[s] that Congress is knowledgeable about existing law pertinent to the new legislation it enacts"); *NLRB v. Amalgamated Coal Co.*, 453 U.S. 322, 329 (1981) (recognizing that when Congress uses a word with a settled meaning, courts should infer that such meaning is meant by Congress unless the statute says otherwise); *ICC v. Parker*, 326 U.S. 60, 65 (1945) (recognizing that when an amendment of an act employs the same words as used previously in the act, their prior meaning will continue to prevail throughout).

the Indian Country Crimes Act [or General Crimes Act] and the Indian Major Crimes Act.”²⁶⁶ The argument follows that since these statutes provided for *concurrent* jurisdiction between the Federal Government and the tribes, the Federal Government could only transfer to the states that part of the concurrent jurisdiction that it possessed and not the tribes’ jurisdiction as well.²⁶⁷ As a result, the better reading of Public Law 280 is that it could not divest tribes in the mandatory states of their criminal jurisdiction anymore than either the Major Crimes Act or General Crimes Act did.²⁶⁸

The Supreme Court has examined the significance of the term “exclusive” in the context of the Major Crimes Act and the General Crimes Act. The Major Crimes Act specifically refers to “[f]ederal law in force within the exclusive jurisdiction of the United States.”²⁶⁹ In *United States v. Wheeler*,²⁷⁰ the Supreme Court interpreted the Major Crimes Act and found that the statute provides for federal jurisdiction over enumerated crimes to the exclusion of state jurisdiction.²⁷¹ However, the statute does not expressly provide for federal jurisdiction to the exclusion of tribal jurisdiction. In fact, it is logical that the Major Crimes Act provides for retained exclusive tribal jurisdiction over the non-enumerated crimes and more than likely, concurrent tribal jurisdiction over the enumerated major

266. COHEN, *supra* note 72, at 344; *see also* *United States v. Pemberton*, 121 F.3d 1157, 1164 (8th Cir. 1997) (“Public Law 280 transfers from the federal government to the state of Minnesota jurisdiction over only those crimes encompassed by 18 U.S.C. §§ 1152 and 1153.”); *United States v. Stone*, 112 F.3d 971, 973 (8th Cir. 1997) (“Section 1162 transferred the federal jurisdiction provided in sections 1152 and 1153 to . . . [the mandatory states].”); *Anderson v. C.T. Gladden*, 293 F.2d 463, 466 (9th Cir. 1961) (ruling that “Public Law 280 withdrew federal jurisdiction” from mandatory states and replaced it with state jurisdiction); *cf.* UTTER, *supra* note 23, at 155 (“When Public Law 280 was applied . . . the General Crimes Act and the Indian Major Crimes Act, specifically, and the Assimilative Crimes Act, by default, no longer applied to Indian country within the states—except for the [exempted] reservations . . .”). In other words, the statutes authorized the Federal Government to take jurisdiction in certain situations, but after Public Law 280, the states would assume such jurisdiction.

267. *See* Aschenbrenner Memorandum, *supra* note 28, at 3 (“[The Federal government] could not transfer more than what it had, that is, it could not transfer tribal jurisdiction to the states.”).

268. While the general understanding is that federal jurisdiction was partially withdrawn within the Public Law 280 mandatory states, there is speculation as to whether it was equally withdrawn in the optional states. An Eighth Circuit case ruled that sections 1152 and 1153 are still in force in states which voluntarily assumed jurisdiction under Public Law 280. *See United States v. High Elk*, 902 F.2d 660, 661 (8th Cir. 1990) (holding that in optional states federal courts still have jurisdiction under the Major Crimes Act to prosecute a defendant for manslaughter). The *High Elk* court made this ruling despite the fact that it later concluded that the state in question, South Dakota, had not successfully become an optional state. *See id.*

269. 18 U.S.C. § 1152(b) (1994).

270. 435 U.S. 313 (1978).

271. *See id.* at 332; *see also* *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 359 (1962) (ruling that Washington State was barred from trying an Indian charged with burglary committed within reservation bounds).

crimes.²⁷² In short, tribal jurisdiction was not foreclosed by the Major Crimes Act.

The General Crimes Act also provides for residual, concurrent tribal jurisdiction. Through this Act, Congress extended to Indian country "the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States."²⁷³ However, as early as 1891, the Supreme Court, in *Ex parte Wilson*,²⁷⁴ ruled that this phrase did not signify that the Federal Government possessed sole jurisdiction over crimes in Indian country, because the paragraph immediately following this language specifically provided for three exceptions where residual tribal criminal jurisdiction would prevail over federal jurisdiction.²⁷⁵

The above discussion supports the conclusion that the "sole and exclusive jurisdiction" language of the General Crimes Act did not represent a divestiture of tribal criminal jurisdiction,²⁷⁶ nor did the Major Crimes Act's reference to "exclusive jurisdiction." It follows, then, that Public Law 280's use of the "exclusive" language in section 1162(c) similarly could not effectuate a divestiture.

2. *The amendment's legislative history*

In addition to the prior use of the term "exclusive" in criminal jurisdiction statutes, a close examination of legislative history surrounding the 1970 insertion of the "exclusive" language clarifies that it was not added to the statute to effectuate a divestiture of tribal criminal jurisdiction. For instance, in an effort to clarify the purpose of the added phrase, Assistant Secretary of the Interior, Harrison Loesch, stated:

[The] new language . . . [was] not intended . . . to have any bearing on actual or potential arrangements between States and the tribes which [sic] respect to the allocation of law enforcement responsibility between them . . . [and] no effect on whatever inherent jurisdiction particular tribes may have retained in states which were given or have assumed jurisdiction pursuant to . . . [Public Law 280] as amended.²⁷⁷

272. See *supra* Part I.B.2 (describing the breadth of the Act's implications).

273. See 18 U.S.C. § 1152.

274. 140 U.S. 575 (1891).

275. See *id.* at 576-79 (holding that the Federal Government had jurisdiction over a murder committed on White Mountain Indian Reservation by a non-Indian against a non-Indian); see also *supra* notes 114-15 and accompanying text.

276. See *supra* notes 114-15 and accompanying text (describing three instances of residual tribal jurisdiction).

277. 116 CONG. REC. 37,353, 37,355 (1970)

Similar sentiments were echoed by others in the Congressional Record.²⁷⁸ These congressional statements indicate that Congress recognized that the amendment did not divest tribes of their inherent jurisdiction or confirm that such divestiture had already been effectuated by Public Law 280, but that the amendment was simply meant to clarify, not alter, the intent of the original text.²⁷⁹ According to Assistant Secretary of the Interior Loesch, the amendment was a clarification that should have been made earlier in the legislative process.²⁸⁰ Since listed areas of Indian country in section 1162(a) included areas that were both under state jurisdiction and not under state jurisdiction (i.e., the exempted reservations such as Red Lake and Warm Springs Reservation), this amendment was supposed to emphasize that the General Crimes Act and the Major Crimes Act were only applicable to the exempted reservations.²⁸¹ The need for clarification was the only reason for this particular 1970 amendment.²⁸²

278. See *id.* at 37,354-55 (statement of Senators Stevens, Gravel, and Ervin) ("The additional language is not intended to have any bearing on actual or potential arguments between states and the tribes with respect to allocation of law enforcement responsibility between them.").

279. See *id.*

280. See *id.* at 37,355 (commenting that a later amendment "is perhaps not as persuasive").

281. See *id.* This reasoning follows logically from the fact that both Acts described a federal-tribal responsibility to Indian country law enforcement, while Public Law 280, where it applied, focused mainly on a state-tribal responsibility.

282. At the time of the 1970 amendment to section 1162(c), section 1162(a) was also amended. See Act of Nov. 25, 1970, Pub. L. No. 91-523, §§ 1, 2, 84 Stat. 1358, 1358 (codified at 18 U.S.C. § 1162(a)-(c) (1994), 25 U.S.C. § 1360(a) (1994)). The two amendments were enacted by the same bill, House Report 6782 and Senate Bill 902. See 116 CONG. REC. 37,353 (1970). As a result, they share the same legislative history. Because of this, the reasoning for each amendment is often intertwined. A careful reading of that history, however, demonstrates that the congressional intentions behind each amendment were quite independent of each other.

The amendment to subsection (a) is worth discussing because it includes an implication that Public Law 280 did divest tribes of jurisdiction. See COHEN, *supra* note 72, at 345 ("A 1970 amendment to the criminal law section of Public Law 280 may support an inference that the amending Congress assumed that the original transfer to state jurisdiction was exclusive of all other jurisdiction, including tribal."). The purpose of the amendment to subsection (a), however, was to add the Annette Islands of Alaska—home of the Metlakatla Community—to the list of Indian country that would not be effected by Public Law 280. See H.R. REP. NO. 91-1545, at 4-5 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4786-87. As described in the House Report, section 1162(a) read:

All Indian country within the [state of Alaska], except that on the Annette Islands the Metlakatla Indian community may exercise jurisdiction over the offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended . . .

Id. at 5.

The potential problem is that despite their mutual exclusivity, there is a tendency to apply the legislative statements pertaining to the Metlakatla amendment as additional reasoning for the addition of the "exclusive" language to subsection (c). See COHEN, *supra* note 72, at 345 (arguing that while there is some indication that the exclusive language of section 1162(c) was only meant to mean exclusion of federal jurisdiction, it may also have been added to clarify confusion over whether Annette Islands Reserve was Indian country); see also 116 CONG. REC.

3. *Not an express term*

Finally, in considering the meaning of the word "exclusive," it is necessary to remember the requirement of express language when dealing with the abrogation of tribal sovereign powers.²⁸³ The term "exclusive," without more, does not effectuate a divestiture of tribal

37,354 (1970) (statement of Senators Stevens, Gravel and Ervin) (providing an example of how the wording of the Senators' statements could lead one to believe that the amendments shared the same reasoning and explanations).

The legislative statements surrounding the Metlakatla amendments stand alone and in stark contrast to all the other legislative history surrounding Public Law 280 because, for the first time since 1953, there are congressional statements clearly supporting a divestiture interpretation of Public Law 280. In one instance, the legislative history states that if a tribe does not have an exempted status, the communities' police and courts are powerless. See H.R. REP. NO. 91-1545, at 3. It further implies that only the exempted communities (Warm Springs Reservation and Red Lake Reservation) may exercise concurrent jurisdiction over minor offenses with the state. See *id.* at 2-3.

Under the circumstances, these statements should not be confused with what Congress had already made abundantly clear was the reason for the addition of the "exclusive" language to subsection (c)—lawlessness. See *supra* Part III.B.1 (discussing Congress' failure to use express language and the primary reason for the addition of the "exclusive" language to section 1162(c)). However, the potential impact of negative legislative statements surrounding the Metlakatla amendments must be accounted for in some fashion. The Metlakatla amendments should not be given considerable weight for two reasons. First, in 1986, the Supreme Court noted that when neither the statute nor contemporary legislation support the words of an official, such "statements by individual legislators should not be given controlling effect." See *Brock v. Pierce County*, 476 U.S. 253, 263 (1986) (stressing that statements by an official consistent with statutory language provide evidence of congressional intent). As previously noted, no express language of divestiture can be found in Public Law 280. See *supra* Part III.B.1. In fact, Congress had the opportunity to clarify the existence of concurrent tribal jurisdiction either in the amendment itself or the accompanying legislative statements. Congress exercised neither option. The contemporary legislation of the period—specifically the 1968 Indian Civil Rights Act and the amendments it made to Public Law 280—supported tribal self-governance and autonomy, and not divestiture.

Second, the circumstances surrounding the Metlakatla Indian community are so distinct from the other Indian communities affected by Public Law 280 that the legislative statements surrounding the amendment should not be read too broadly. See COHEN, *supra* note 72, at 345 ("The matter may be unique because of the peculiar history of the Metlakatla Reservation."). The Metlakatla Indian community was not like other traditional Native American tribes in that it was not originally from Alaska. See 116 CONG. REC. 37,354 (1970). The community was invited by President Cleveland in 1887 to move to the Annette Islands which the United States would set apart as a reservation for the community and any other Alaskan Natives that would join them. See *id.* The community has a federally recognized government and its own local authorities and police to enforce its laws. See *id.* It appears that the Under Secretary of the Interior suggested that the amendment was necessary to accomplish what the Alaska legislature previously tried to do. The legislature, reasoning that the Annette Islands were not Indian country within the meaning of Public Law 280, attempted to pass a bill to retrocede criminal jurisdiction over the Annette Islands to the Federal Government. The Governor vetoed it. See *id.* (statement of Fred J. Russell, Under Secretary of the Interior); COHEN, *supra* note 72, at 345 n.138 (noting that the Department of the Interior advised that the amendment was necessary based in part on Alaska's belief that the Annette Islands Reserve was not Indian country).

In other words, the crux of this amendment does not clarify the intent of Public Law 280 generally, but deals with the unique situation of Alaska's Native Villages and Indian country or lack thereof. Therefore, the amendment's application to the Public Law 280 interpretative process should be limited.

283. See Part III.B.1 (discussing how Congress must provide language that expressly abrogates tribal sovereign powers).

jurisdiction. For this reason, the more logical interpretation of the statute recognizes concurrent state and tribal jurisdiction.²⁸⁴ Thus, the prior use of the term, the legislative history, and the lack of express language mandates a narrow interpretation of Public Law 280 that acknowledges the continuance of tribal jurisdiction.

D. *Changing Times, Changing Intent?*

As discussed in Part II.B.3, complicating the Public Law 280 analysis is the fact that the statute was enacted in a period where national policy was hostile toward Indians,²⁸⁵ yet the courts are currently called upon to interpret Public Law 280 in the context of a contemporary national policy that rejects the philosophy of 1953 and promotes tribal sovereignty, self-governance, and self-determination.²⁸⁶ This dynamic is a pervasive problem of statutory construction that often arises in federal Indian law.²⁸⁷ The Public Law 280 analysis raises the question as to whether it is the role of the courts to interpret Public Law 280 based solely on the intent and policies of the enacting Congress in 1953,²⁸⁸ or in light of subsequent shifts in federal Indian policy that reflect Indian self-governance and self-sufficiency rather than assimilation.²⁸⁹

284. If Congress' intention was to improve law enforcement, it would have made little sense to reduce the number of sovereigns responsible for Indian country and pretend that the states alone could carry the full burden. As previously mentioned, the more sound method would be to supplement tribal jurisdiction, not supplant it. See *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 560 (9th Cir. 1991) (declaring that Public Law 280 did not divest tribes of their jurisdiction), *rev'd on other grounds sub nom. Alaska v. Native Village of Venetie Tribal Gov't*, 118 S. Ct. 948 (1998).

285. See *supra* Part II.B.3 (discussing the Termination Period and an era of general hostility toward Indians).

286. See, e.g., Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450-558h (1994)) (recognizing that tribal well-being would be better served if tribes assumed responsibility for the administration of federal Indian programs); Indian Tribal Justice Act of 1993, Pub. L. No. 103-176, 107 Stat. 2004 (codified at 25 U.S.C. § 3601 (1994)) (affirming congressional recognition of tribal "self-determination, self-reliance" and Indian tribes' "inherent authority to establish their own form of government, including tribal justice systems").

287. See generally Frickey, *supra* note 195 (explaining that although the courts' role is usually to defer to and respect Congress' original intent in interpretation of statutes, in the field of federal Indian law this canon has been subordinated in favor of an approach that considers the tenuous sources of plenary power, drastic changes in national policy toward Indians, greater assertions and support for tribal self-governance, and the ongoing process of decolonization).

288. See *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930) (noting that the original meaning of a tax exemption clause could not later "be narrowed by any subsequently declared intention of Congress").

289. See *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 663 (9th Cir. 1975) (stating that the court will not "strain to implement a policy Congress has now rejected"); CLINTON ET AL., *supra* note 79, at 164 (postulating that while the Supreme Court in *Bryan v. Itasca County*, 426 U.S. 373 (1976), interpreted Public Law 280 in light of current congressional statements and policies of self-determination, in *Washington Confederated v. Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 488 (1979), the Court acknowledged policy shifts but still

The following review of cases and opinions relating to Public Law 280 reveals that the courts have found concurrent tribal jurisdiction under Public Law 280. These cases and opinions neither reflect a rejection of the original intent of Public Law 280's enacting Congress nor a wholesale disregard for the assimilation motives of its legislators. They merely reflect a clarification that while tribes were in fact assimilated to the extent that they became partially subject to state laws and courts like non-Indians, they were not totally assimilated.²⁹⁰ Congress' primary intention to decrease lawlessness in Indian country required the continued assistance of tribal justice systems, not the termination of those systems. Moreover, subsequent amendments and post-enactment factors reaffirm the need to interpret Public Law 280 narrowly to preserve concurrent state and tribal jurisdiction.

1. *Public Law 280 cases and opinions*

As previously noted, no case has yet been considered by the Supreme Court to define specifically the effect of Public Law 280 on tribal jurisdiction. There are two cases, however, *Bryan v. Itasca County*²⁹¹ and *California v. Cabazon Band of Mission Indians*,²⁹² that are predominantly viewed as representing the Supreme Court's support of a non-divestiture interpretation of Public Law 280.²⁹³ In both of these cases, the Court was asked to define the scope of the mandatory states' jurisdictional grant.²⁹⁴ Interestingly, while each case provided an appropriate setting to conclude otherwise, the Court declined to limit tribal jurisdiction or find it preempted by the states' authority. On the contrary, the Court demonstrated a notable respect for tribal

looked to original intent); see also Eskridge & Frickey, *supra* note 246, at 56 (noting that some legislators may even prefer that courts adapt statutes to changes in circumstances to avoid "frustrating statutory purposes" and that "erosion in allegiance to the enacting Congress is coupled with a second role for the Court: applying statutes to new circumstances").

290. See *supra* Part II.B.3 (discussing the impact of the Termination Period on Public Law 280's interpretation).

291. 426 U.S. 373 (1976).

292. 480 U.S. 202 (1987).

293. See *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 560 (9th Cir. 1991) (ruling that through *Cabazon* and *Bryan* the Supreme Court adopted the view that Public Law 280 is not a divestiture statute), *rev'd on other grounds sub nom. Alaska v. Native Village of Venetie Tribal Gov't*, 118 S. Ct. 948 (1998); see also Herbert A. Becker, then Director, Department of Justice, Office of Tribal Justice, Tribal Sovereignty and Jurisdiction in Indian Country, Presentation at Native American Issues Seminar 15 (June 13-16, 1996) (on file with authors) (citing *Cabazon* and stating that Public Law 280 did not divest tribes of their civil and criminal jurisdiction).

294. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 205, 205-06 (1987) (deciding whether Public Law 280 permits a state to apply provisions of its penal code and two gaming ordinances to the tribe); *Bryan*, 426 U.S. at 375 (deciding whether Public Law 280 gave state authority to impose personal property taxes on reservation lands).

sovereignty. A discussion of each case and subsequent support for their rulings follows.

a. *Bryan v. Itasca County*

In *Bryan*,²⁹⁵ the Supreme Court ruled that under Public Law 280 Minnesota lacked the authority to impose a personal property tax on a mobile home located on tribal trust land and owned by an enrolled member of the Minnesota Chippewa Tribe.²⁹⁶ Upon review of the language of 28 U.S.C. § 1360(a),²⁹⁷ the Court held that under Public Law 280, states did not possess general civil regulatory power over the tribe, but only adjudicatory power over private civil litigation.²⁹⁸ In so holding, the Court never concluded that giving Indians access to state courts for causes of actions preempted the right of a tribal court to hear the same case.²⁹⁹ However, while concurrent state and tribal jurisdiction in civil matters were not specifically defined, the Court went out of its way not only to reject any significant effect the assimilationist period may have had on the statute's true purpose,³⁰⁰ but also to affirm its reading that tribal sovereignty was not altered.³⁰¹ For example, the Court stated:

[N]othing in its [Public Law 280] legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than 'private, voluntary organizations'³⁰²

Moreover, the Court affirmed that the "sparse legislative history" demonstrates that Congress' "primary concern" in Public Law 280's enactment was not assimilation but "lawlessness" on reservations.³⁰³ It further ruled that Public Law 280 "was plainly not meant to effect *total assimilation*," and that nothing in its legislative history suggests

295. 426 U.S. 373 (1976).

296. See *Bryan*, 426 U.S. at 375, 393.

297. Note that in *Bryan*, 28 U.S.C. § 1360 is primarily referred to as section 4 of Public Law 280, and 18 U.S.C. § 1162 is referred to as section 2 of Public Law 280. See *id.*

298. See *Bryan*, 426 U.S. at 384-85.

299. Cf. Robert B. Porter, Note, *The Jurisdictional Relationship Between the Iroquois and New York State: An Analysis of 25 U.S.C. §§ 232, 233, 27* HARV. J. ON LEGIS. 497, 536-38 (1990) (comparing the federal statute transferring civil jurisdiction over Indian country to New York state to Public Law 280, and citing the *Bryan* interpretation as reason to conclude that the New York statute did not impede previous functions of the Iroquois Government and its tribal laws).

300. See *Bryan*, 426 U.S. at 387 (stating that Public Law 280 was not intended to effect total assimilation).

301. See *id.* at 388.

302. *Id.* at 388 (citing *United States v. Mazurie*, 419 U.S. 544, 577 (1975)).

303. See *id.* at 379.

otherwise.³⁰⁴

b. *California v. Cabazon Band of Mission Indians*

In *Cabazon*,³⁰⁵ the Court expanded on its ruling in *Bryan*. The Court ruled that the attempt by Riverside County in California to enforce a penal code section that would regulate bingo and prohibit the playing of draw poker inside reservation boundaries was an unauthorized extension of state civil regulatory power not granted under Public Law 280.³⁰⁶ In so holding, it declared that when a state tries to enforce one of its laws in Indian country, it must first determine if the law is civil/regulatory or criminal/prohibitory in nature.³⁰⁷ If the law is criminal/prohibitory, it is enforceable under Public Law 280.³⁰⁸ If it is civil/regulatory, as in the *Cabazon* case, the state law is unenforceable.³⁰⁹

California asserted that it was merely trying to prevent the proliferation of organized crime.³¹⁰ However, despite the Court's determination that Public Law 280's main purpose was to combat lawlessness, the Court declined to subordinate tribal self-governance to the state's interest.³¹¹ As in *Bryan*, the Court in *Cabazon* further defined the parameters of the state's jurisdiction,³¹² but never stated that this authority preempted tribal criminal jurisdiction. Instead the Court reaffirmed *Bryan's* position that total assimilation was not the statute's purpose³¹³ and stressed tribal self-governance and the

304. See *id.* at 387 (emphasis added).

305. 480 U.S. 205, 212 (1987).

306. See *id.* at 202.

307. See *id.* at 208. *Cabazon* also clarified two other points raised by *Bryan*: (1) that "an otherwise regulatory law" enforceable both by criminal and civil means "is not necessarily convert[ed] into a criminal law within the meaning of Pub. Law 280"; and (2) that Public Law 280 was not meant to "authorize[]" the application of any local laws to the reservations" given the statute's specific reference to "state" not county or province. See *id.* at 211-12 & n.11.

308. See *id.* at 208.

309. See *id.* at 209 (explaining that, in this case, the penal code that the state sought to impose on the Cabazon and Morongo Indian Reservations was only "regulating" the practice of bingo, a practice which is permitted by California's Riverside County and therefore its enforcement is not authorized by Public Law 280).

310. See *id.* at 211.

311. See Monette, *supra* note 63, at 277 (stating that in its "federal preemption analysis" the *Cabazon* Court gave greater weight to the federal policy to promote Indian self-determination than to states' interest in curbing organized crime). In *Cabazon*, the Court seemed to agree with the tribes that there is no express congressional grant of authority to the state or county, and therefore the approval of this authority entails a determination of whether the states' interest in the law's application would be incompatible with federal or tribal interests. See *Cabazon*, 480 U.S. at 214-17. In this case, "the congressional goal of self-government" and "tribal self-sufficiency and economic development" were not only "parallel" to the tribal interest, but also superior to the state's interest. See *id.* at 216-19.

312. See *Cabazon*, 480 U.S. at 208 (permitting the enforcement of criminal/prohibitory laws on Indian reservations).

313. See *id.* (citing *Bryan v. Itasca County*, 426 U.S. 373, 387 (1976), stating "[t]he Act

protection of tribal interests,³¹⁴ such as encouraging tribal "self-sufficiency and economic development."³¹⁵

c. Subsequent support for Cabazon and Bryan

Cases following *Cabazon* and *Bryan* further support the argument that Public Law 280 was purely a jurisdictional transfer between the state and the Federal Government, with no effect on existing tribal jurisdiction. For instance, in 1978 (twenty-five years after Public Law 280's enactment), the Supreme Court reviewed statutes establishing federal criminal jurisdiction over crimes involving Indians and admitted that "far from depriving Indian tribes of their sovereign power to punish offenses against tribal law by members of a tribe, Congress has repeatedly recognized that power and declined to disturb it."³¹⁶ In 1986, the Court reaffirmed in *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*,³¹⁷ that it has never "found Pub. L. 280 to represent an abandonment of the federal interest in guarding Indian self-governance."³¹⁸ In 1987, apparently undeterred by Public Law 280, Justice Thurgood Marshall acknowledged that "[t]ribal courts play a vital role in tribal self-government... and the Federal Government has consistently encouraged their development."³¹⁹

Further support can be found in federal courts of appeals cases. In 1990, the Eighth Circuit ruled that "Public Law 280 did not itself divest Indian tribes of their sovereign power to punish their own members for violations of tribal law. Nothing in the wording of Public Law 280 or its legislative history precludes concurrent tribal authority."³²⁰ The following year, the Ninth Circuit held that Alaska must give full faith and credit to the child-custody determinations made by the Alaskan Native Village's governing bodies because neither the Indian Child Welfare Act nor Public Law 280 prevented

plainly was not intended to effect total assimilation of Indian tribes into mainstream American society").

314. See *id.* at 216 n.19 (citing the Indian Self-Determination and Educational Assistance Act of 1975, 25 U.S.C. § 450 (1982), as an example of the federal commitment to these goals).

315. See *id.* at 216.

316. *United States v. Wheeler*, 435 U.S. 313, 325 (1978) (footnote omitted). Although the *Wheeler* Court did not specifically address Public Law 280, the fact that it made this statement while analyzing statutes that were enacted as far back as 1790, certainly affirms the idea that the Court believed it had not yet seen any express legislation that abrogated tribal criminal jurisdiction.

317. 476 U.S. 877 (1986).

318. *Id.* at 892.

319. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987) (footnote omitted).

320. *Walker v. Rushing*, 898 F.2d 672, 675 (8th Cir. 1990) (ruling that Public Law 280 did not divest tribes of their power to prosecute a tribal member who killed two other members).

the Native Villages from exercising concurrent jurisdiction over such matters.³²¹

There is also evidence that even the mandatory states themselves continue to recognize tribal jurisdiction. In 1981, the Attorney General of Wisconsin stated that "[f]or nonregulatory proceedings, such as voluntary termination of parental rights, the tribal courts and state courts pursuant to Pub. L. No. 280, have concurrent jurisdiction."³²² In 1985, the Attorney General of Nebraska declared that Public Law 280's grant of jurisdiction to the states "extended only to matters over which the federal government had earlier had authority and that it was not meant to detract from tribal jurisdiction as it existed."³²³ Accordingly, he concluded that tribal jurisdiction remained intact and that the states shared jurisdiction with them in the same manner that the tribes once shared the jurisdiction with the Federal Government.³²⁴

The sentiments of the Wisconsin and Nebraska Attorneys General were also consistent in a 1976 memorandum from Lawrence A. Aschenbrenner, Acting Associate Solicitor of the Division of Indian Affairs.³²⁵ In the memorandum, Aschenbrenner stated that "P.L. 280 gives the states concurrent and not exclusive jurisdiction over Indian country therein. The tribes retain the other part of the concurrent jurisdiction."³²⁶ Moreover, in 1978, then-Assistant Attorney General

321. See *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 562 (9th Cir. 1991), *rev'd on other grounds sub nom. Alaska v. Native Village of Venetie Tribal Gov't*, 118 S. Ct. 948 (1998). In fact, the court explained that "[b]roadly put, Public Law 280 gave to certain enumerated states concurrent jurisdiction over criminal and civil matters involving Indians, where jurisdiction had previously vested only in federal and tribal courts." *Id.* at 555 n.8.

322. See 70 Op. Att'y Gen. Wisc. 237, 243 (1981), available at 1981 WL 157271 (Wisc. A.G.) (responding to a letter of inquiry from the Secretary of the Department of Health and Social Services regarding an interpretation of jurisdictional provisions of the Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 2, 92 Stat. 3069, 3069 (codified at 25 U.S.C. § 1901 (1994))).

323. See 0p. Att'y Gen. Neb. No. 48 (1985), available at 1985 WL 168524, at *2 (Neb. A.G.) (responding to Senator Goll's request for an explanation of the effects of retrocession on the Winnebago Reservation as permitted by a 1968 amendment to Public Law 280).

324. See *id.*

325. See Aschenbrenner Memorandum, *supra* note 28, at 3 (asserting that through Public Law 280 the Federal Government only transferred to mandatory states jurisdiction that the Federal Government previously held).

326. *Id.* at 5; see also *supra* note 28 and accompanying text (explaining Aschenbrenner's reasoning and comments in greater detail). It should be noted that the Supreme Court has ruled that "considerable weight" and "deference" should be given to an administrative agency's construction of a statute when that agency is charged with the administration of that particular act. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984) (holding that an agency's interpretation of a statute should be accepted because Congress delegated power to interpret the statute to an agency). The Department of the Interior is vested with the responsibility to manage all matters dealing with Indian affairs or arising out of Indian affairs. See 25 U.S.C. § 2 (1994). While Acting Associate Solicitor Aschenbrenner's opinion is not the equivalent of an official decision of the Department of the Interior, given Public Law 280's ambiguity and the Supreme Court's ruling in *Chevron*, it is quite reasonable to

for Legislative Affairs, Patricia M. Wald made statements affirming that the Department of Justice viewed Public Law 280 as providing for concurrent jurisdiction between the states and tribes.³²⁷

2. *Subsequent amendments*

The opinions described above clearly illustrate that a narrower interpretation of Public Law 280, one that permits tribal residual jurisdiction, is the operative trend. These rulings and opinions, however, do not negate the statute's assimilationist undertones.³²⁸ They merely stand for the premise that the assimilationist notions of years past cannot justify a divestiture interpretation when (1) the Supreme Court has clearly determined that total assimilation was never the primary intent of Congress;³²⁹ and (2) the courts' task is not only to give effect to Congress' original intent, but also to new congressional purposes that have become part of the statute through subsequent amendments.³³⁰

The courts have appropriately recognized that more than the national Indian policy has changed in the past twenty-three years; the statute itself has changed.³³¹ In fact, one could argue that the original Public Law 280 statute of 1953 has been substantially superceded. When Congress amended the statute in 1968, it created a "new Act"³³² that carried with it a new congressional intent, one that was still committed to improving law enforcement, but now also committed to supporting tribal sovereignty, self-governance, and self-

place significant weight on its interpretation.

327. See H.R. REP. NO. 95-1386, at 35 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7558. In a letter to the Honorable Morris K. Udall, Assistant Attorney General Patricia Wald stated:

As you may be aware, the courts have consistently recognized that tribal governments have exclusive jurisdiction over the domestic relationships of tribal members located on reservations, unless a State has assumed concurrent jurisdiction pursuant to Federal legislation such as Public Law 83-280.

Id.

328. See *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 488 (1979) (acknowledging the assimilationist imprint upon Public Law 280, but failing to conclude that congressional policy invalidated tribal justice systems).

329. See *supra* notes 210-11 and accompanying text (discussing *Bryan's* ruling).

330. *Cf. Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 663 (9th Cir. 1975) (recognizing the importance of original intent in its analysis of Public Law 280, yet refusing to "strain" to interpret an ambiguous statute to reflect a rejected assimilation policy "where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship").

331. Public Law 280 was amended on several occasions. See Act of July 10, 1984, Pub. L. No. 98-353, 98 Stat. 342; Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2668; Act of Nov. 25, 1970, Pub. L. No. 91-523, 84 Stat. 1358; Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 73; Act of Aug. 8, 1958, Pub. L. No. 85-615, § 2, 72 Stat. 545; Act of Aug. 24, 1954, ch. 910, § 2, 68 Stat. 795.

332. See *Kennerly v. District Court*, 400 U.S. 423, 429 (1971) (observing that the 1968 amendments made Public Law 280 a "new Act").

determination.

In 1968, Congress passed the Indian Civil Rights Act ("ICRA").³³³ The Act essentially made many, but not all of the provisions of the Bill of Rights, applicable to tribes.³³⁴ As part of the Act, amendments were made to Public Law 280. As previously mentioned, at the time of Public Law 280's enactment, tribes had criticized the law for permitting states unilaterally to assume jurisdiction over Indian country without tribal consent.³³⁵ By doing so, it set a tone of disregard for tribal sovereignty.³³⁶ Under Title IV of the ICRA,³³⁷ Public Law 280 was amended to make tribal consent³³⁸ a prerequisite for future assumptions of jurisdiction.³³⁹ The amendment also permitted states in the future to assume only partial jurisdiction over certain subject matter.³⁴⁰

The ICRA amendments to Public Law 280 also permit the states to retrocede any jurisdiction previously acquired under Public Law 280

333. See Act of Apr. 11, 1968, Pub. L. No. 90-284, § 201, 82 Stat. 73, 77 (codified as amended at 25 U.S.C. §§ 1301-1303 (1994)).

334. See CLINTON ET AL., *supra* note 79, at 384; see also Act of Apr. 11, 1968 § 202, 82 Stat. at 77 (including such rights as freedom of speech, press, religion and right to counsel, but omitting prohibitions on establishment of religion and the government's obligation to provide and pay for counsel).

335. See WASHBURN, *supra* note 119, at 87 (noting that President Eisenhower approved Public Law 280, while chastising it for its lack of required tribal consultation).

336. See Goldberg, *supra* note 56, at 545 (citation omitted) (noting that Indians felt their lack of consent to Public Law 280 was a "deliberate slight" to tribal sovereignty).

337. Act of Apr. 11, 1968 § 401, 82 Stat. at 78 (codified at 25 U.S.C. § 1321 (1994)).

338. Tribal consent means a "majority vote of the enrolled Indians within the affected area of Indian country." See *Kennerly v. District Court*, 400 U.S. 423, 429 (1971) (footnote omitted).

339. See Act of Apr. 11, 1968, §§ 401-03, 82 Stat. at 78 (codified at 25 U.S.C. §§ 1321-1322 (1994)). Section 1321 provided the tribal consent requirement for the criminal provision, while section 1322 made tribal consent a prerequisite for future state assumptions of jurisdiction under the civil provision, and section 1326 provided the definition of tribal consent.

The 1968 Tribal consent provision, however, was not made retroactive so it did not "displace jurisdiction previously assumed." See *Three Affiliated Tribes of the Berthold Reservation v. Wold Eng'g*, 467 U.S. 138, 150-51 (1984). It should be noted, however, that since the creation of the consent amendment, no tribe has given such consent. See *GETCHES ET AL.*, *supra* note 40, at 482 n.81.

340. See 25 U.S.C. § 1321(a) (providing that states can assume criminal jurisdiction "over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State"); 25 U.S.C. § 1322(a) (providing that the assumption of civil jurisdiction could be made over "any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State").

It has been noted, however, that even before the assumption of partial jurisdiction was permitted by 25 U.S.C. §§ 1321-1322, some of the optional states had already chosen to limit their assumptions of jurisdiction to: "(1) less than all the Indian reservations in the state, (2) less than all the geographic areas within an Indian reservation, or (3) less than all subject matters of the law." See *PEVAR*, *supra* note 20, at 115 (describing partial jurisdictional assumptions of Montana, Arizona, Idaho, and Washington and the approval of this practice by the Supreme Court in 1979); see also *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 499 (1979) (stating that the voluntary system of partial jurisdiction attempts to respond to the needs of both Indians and non-Indians within a reservation).

back to the Federal Government.³⁴¹ This provision clarifies that even if Congress' original intentions included eventual termination of tribal jurisdiction, this intention was superceded by the intent to promote self-governance in 1968. As the Supreme Court has recognized, "the 1968 amendments to Pub. L. 280 pointedly illustrate the continuing congressional concern over tribal sovereignty."³⁴² While the imprint of the period's assimilation policy can still be observed throughout Public Law 280, the 1968 ICRA amendments also imprinted the prevailing national policy upon Public Law 280—a policy that rejects termination in favor of self-government. This policy must also be given effect.

3. *Post-enactment factors*

"As statutes evolve, the text loses some of its focal power, and other considerations become increasingly important in statutory interpretation—the purpose of the law, the surrounding legal terrain, and statutory precedents."³⁴³ In the case of Public Law 280, post-enactment factors such as subsequent legislation and a changing national policy toward Indian tribes not only suggest that the statute does not effectuate a divestiture of tribal jurisdiction, but they also provide the courts with more justifications for narrowly interpreting Public Law 280.

In the early 1960's, support for the termination policies had deteriorated significantly³⁴⁴ and a new national Indian policy was articulated, ushering in the "Self-Determination" era, which continues through the present.³⁴⁵ Under this current national policy,

341. See Act of Apr. 11, 1968 § 403, 82 Stat. at 79. Section 1323(a) requires states that are interested in retrocession to send a resolution to the Secretary of the Interior requesting such action. The Secretary then has the opportunity to accept or deny the request. See Goldberg, *supra* note 56, at 558 (noting that the states' financial dilemmas with Public Law 280 implementation made this retrocession provision necessary). While regrettably the retrocession is left to the unilateral decisions of the states, the Federal Government is unlikely to accept retrocession if an affected tribe does not approve. See PEVAR, *supra* note 20, at 117 (explaining that states did not have power to force their will upon tribes).

342. *Three Affiliated Tribes of the Fort Berthold Reservation*, 476 U.S. at 892.

343. See Eskridge & Frickey, *supra* note 246, at 62.

344. See CLINTON ET AL., *supra* note 79, at 158-59 (statement of Stewart L. Udall, Secretary of the Interior) (noting that the cornerstone of the termination policy, House Concurrent Resolution 108, "died with the 83rd Congress and is of no legal effect at the present time"); see also *supra* notes 202-03 and accompanying text (discussing the resolution's impact on the Termination Period).

345. A turning point for the initiation of this policy came in 1970 when President Nixon declared the termination policy a failure and informed Congress that from that day forward, he would push a policy directed at strengthening tribal self-governance. See Richard Nixon, Special Message to Congress on Indian Affairs, 1970 PUB. PAPERS 564 (July 8, 1970) (providing the complete text of President Nixon's message to Congress); see also Endreson, *supra* note 45, at 142 (stating that the Self-Determination policy introduced by President Nixon changed the

the Federal Government supports and promotes tribal self-governance and makes efforts toward establishing greater tribal economic self-sufficiency and self-determination.³⁴⁶ Relevant to the Public Law 280 analysis is the fact that Congress enacted legislation pursuant to this new policy and initiated new federal programs otherwise inconsistent with Public Law 280 if interpreted to include the divestiture of tribal jurisdiction.³⁴⁷ The mere fact that Congress did not declare Public Law 280 an obstacle or seek to repeal it, supports an argument that Congress itself did not interpret Public Law 280 to divest tribes of their criminal and civil jurisdiction.³⁴⁸ For instance, Congress did not find Public Law 280 inconsistent with the Indian Self-Determination and Education Assistance Act of 1975,³⁴⁹

cycle of Indian policy).

346. See Endreson, *supra* note 45, at 1 (discussing the fact that tribes can accomplish these ends when their resources and time are not devoted solely to defense of their existence).

347. See *supra* notes 98 & 286 and *infra* notes 349-55 and accompanying text (describing the Indian Tribal Justice Act and the Indian Self-Determination and Education Assistance Act).

348. See *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (stating that it is generally presumed that Congress is aware of existing law that may be relevant to any new legislation it enacts). Any Congressional declaration that Public Law 280's "divestiture" was a serious impediment to the realization of its new goals is notably absent.

Though not discussed at length in this Article, it should be noted that Congress' continued reluctance to clarify how a new act should be implemented in light of Public Law 280 is also problematic. For instance, in the case of the Indian Child Welfare Act of 1978 ("ICWA"), Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1902, 1911-1923, 1931-1934, 1951-1952, 1961-1963 (1994)), section 1911(a) states that "[a]n Indian tribe shall have jurisdiction exclusive as to any State over child custody proceedings involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law." See *id.* § 1911(a). The section could implicate a Public Law 280 question as to whether a tribe under Public Law 280 would maintain concurrent jurisdiction. See CLINTON ET AL., *supra* note 79, at 660 (discussing *Native Village of Venetie I.R.A. Council v. Alaska*, 687 F. Supp. 1380 (D. Alaska 1988), which held that there was no concurrent jurisdiction and that the tribe could only regain exclusive jurisdiction if retrocession occurred). The district court's holding in *Venetie* regarding the lack of concurrent jurisdiction was reversed by the Ninth Circuit. See *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 559-62 (9th Cir. 1991) (holding that Public Law 280 did not divest tribes of jurisdiction and that under the ICWA, Alaskan Native Villages could exercise concurrent jurisdiction with the state over child custody issues), *rev'd on other grounds sub nom. Alaska v. Native Village of Venetie Tribal Gov't*, 118 S. Ct. 948 (1998).

When enacting the ICWA, Congress likely recognized that Public Law 280 provided concurrent tribal and state jurisdiction. See H.R. REP. NO. 95-1386 (1978), *reprinted in* 1978 U.S.C.A.N. 7558 (including a Department of Justice letter acknowledging exclusive tribal jurisdiction over domestic relations "unless a state has assumed concurrent jurisdiction pursuant to Federal legislation such as Public Law 83-280").

The United States appears to have found this aspect of ICWA's legislative history persuasive. See U.S. Brief, John v. Baker, *supra* note 28, at 25 (noting that the legislative history of ICWA indicates that "Congress understood Public Law 280 as providing for concurrent jurisdiction among state and tribal courts). Because the tribes encountered difficulty asserting jurisdiction under the ICWA as a result of this provision, the National Congress of American Indians resolved to work with experts in the field to explore potential amendments to ICWA that would clarify the language and its implementation in conjunction with Public Law 280. See *Protection of Public Law 280 Tribe Regarding Amendments to the Indian Child Welfare Act*, National Congress of American Indian Res. TLS-96-007B (June 3-5, 1996).

349. See Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450-458h

although Congress clearly recognized that tribes were unlikely to relinquish control over their members and territory to another sovereign.³⁵⁰

Congress also did not perceive that Public Law 280 was inconsistent with the goals of the Indian Tribal Justice Act of 1993³⁵¹ which was enacted to promote "the expansion and effective use of tribal courts by making federal funding available for facilities, libraries, and publications," without regard to whether tribes were in Public Law 280 jurisdictions.³⁵²

Under this particular Act, Congress reaffirmed the legitimacy of tribal justice systems,³⁵³ acknowledged the importance of those systems to Indian self-governance,³⁵⁴ and, most notably, stated that "Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights."³⁵⁵ Certainly, if Congress believed that Public Law 280 actually terminated tribal jurisdiction in the mandatory states, or any of the optional states for that matter, these policy statements would be meaningless.

Furthermore, in April of 1994, President Clinton issued his Executive Memorandum on Government-to-Government Relations between the United States and Indian Tribes, affirming the Federal Government's respect for tribal sovereignty and its unique relationship with Indian tribes.³⁵⁶ Shortly thereafter, the Office of

(1994)) (noting that Indians were the most qualified to assume responsibility for the planning and administration of federal programs designed and provided for their benefit).

350. See 25 U.S.C. § 450(a)(2) ("Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.").

351. Pub. L. No. 103-176, 107 Stat. 2004 (codified at 25 U.S.C. §§ 3601-3602, 3611-3614, 3621, 3631 (1994)).

352. See Resink, *supra* note 49, at 121 (noting, however, that as of yet, federal funding has not been forthcoming).

353. See 25 U.S.C. § 3601(4) (1994) ("[I]ndian tribes possess the inherent authority to establish their own form of government, including tribal justice systems . . .").

354. See *id.* § 3601(5) ("[T]ribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments . . .").

355. See *id.* § 3601(6).

356. See Remarks to Native American and Alaskan Tribal Leaders, 1994 PUB. PAPERS 800 (Apr. 29, 1994). Among other things, the Executive Memorandum directed that all executive departments and agencies act in a "knowledgeable, sensitive manner respectful of tribal sovereignty," consult more extensively with federally recognized tribes on matters affecting them, and to remove procedural impediments that impede working directly with tribes on issues affecting their self-governance and trust properties. See Memorandum on Government to Government Relations with Native American Tribal Governments, 30 WEEKLY COMP. PRES. DOC. 936, 936 (Apr. 29, 1994); see also Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations, 61 Fed. Reg. 29,424, 29,425 (1996) ("The Department shall be guided by principles of respect for Indian tribes and their sovereign authority.").

Tribal Justice was established within the Department of Justice,³⁵⁷ and various tribal court initiatives were developed, including the Tribal Courts Project³⁵⁸ to assist Indian tribes in developing and strengthening their justice systems and obtaining needed funds.³⁵⁹ In May of 1998, President Clinton expanded on the government-to-government policy with Indian tribes by signing an Executive Memorandum of Consultation and Coordination with Indian Tribal Governments. Under this Memorandum, wherever possible, Executive agencies are directed to consult with tribes on regulatory or programmatic proposals, remove obstacles to meaningful participation in federal processes, and offer waivers of burdensome financial and administrative requirements.³⁶⁰

In light of these various post-enactment factors, it is easy to see why the court rulings during the Self-Determination Period³⁶¹ reflected the judiciary's reluctance to interpret an ambiguous Public Law 280 statute as accomplishing anything more than a transfer of federal jurisdiction to the states. With Public Law 280, the courts face a text that is unclear,³⁶² an original congressional intent that focuses primarily on combating lawlessness,³⁶³ and a subsequent history that offers no ongoing, congressional allegiance to an assimilationist-divestiture reading.³⁶⁴

357. The Office's principal mission is to realize the government-to-government relationship by acting as a liaison between the Department of Justice and tribal representatives to ensure full communication and understanding and by coordinating federal Indian policy with the various federal agencies that act within, or in ways that affect, Indian country. See OFFICE OF TRIBAL JUSTICE, DEP'T OF JUSTICE MISSION OF THE OFFICE OF TRIBAL JUSTICE (not dated) (on file with *The American University Law Review* and the Office of Tribal Justice).

358. See 8 TRIBAL CT. REC. *supra* note 128, at 27 (reprinting the complete text of the DOJ's November 14, 1994 memorandum announcing the Tribal Courts Project); see also Reno, *supra* note 44, at 114 (explaining that the Department provides federal assistance, training and technical assistance, and strives to increase awareness about tribal justice systems and to "increase visibility of tribal courts as essential participants in the nationwide administration of justice").

359. See *Tribal Courts Project*, NATION TO NATION (Dep't of Justice, Office of Tribal Justice), Aug. 1996, at 5. Forty-five tribes were selected as partnership tribes and tribes in Public Law 280 states were included in the initiative. The list of selected tribal courts was provided by the Tribal Courts' Project of the Department of Justice (document dated September 11, 1995) (on file with *The American University Law Review*).

360. Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998).

361. See *supra* Part III.D.1 (discussing *Bryan v. Itasca County, California v. Cabazon Band of Mission Indians, United States v. Wheeler, Native Villages of Venetie I.R.A. Council v. Alaska, Walker v. Rushing, and Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*); see also *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 663 (9th Cir. 1975) (finding that Public Law 280 did not divest tribes of their jurisdiction and stating that the court will not "strain to implement a policy Congress has now rejected").

362. See *supra* Part III.B and Part III.C.3 (discussing the need for express language when reviewing the ambiguity of "exclusive" language used in 18 U.S.C. § 1162(c) (1994)).

363. See *supra* Part II.B (discussing congressional intent of controlling lawlessness, decreasing federal spending, and assimilation when enacting Public Law 280).

364. See *supra* Parts III.D.2-3 (discussing subsequent amendments and subsequent acts and

When the canons of statutory construction relevant to Indian law are applied³⁶⁵ and Public Law 280 is analyzed in the context of increasing recognition of tribal self-government and the development of tribal justice systems,³⁶⁶ it is reasonable to hope that in the future courts will move further away from an interpretation of Public Law 280 that abrogates any tribal rights of self-government.

IV. RECOMMENDATIONS

To the extent that Public Law 280 was intended to improve the administration of justice on Indian reservations, it has not been successful by most estimations.³⁶⁷ Today, the problems in Indian country law enforcement pervade Public Law 280 and non-Public Law 280 states alike. Many tribal leaders in Public Law 280 states perceive a law enforcement vacuum and believe that Public Law 280 exacerbates this vacuum. In addition, tribal leaders complain that state and local law enforcement officials are often unresponsive when tribes do summon them.³⁶⁸ These lingering destructive impacts to tribal justice systems have qualitatively affected civil and criminal justice in Indian country. The mandatory states vested with major crimes jurisdiction over Indian country apparently lack both the means and, at times, the will to assure enforcement of the laws.³⁶⁹ Consequently, it has been argued that Public Law 280 has actually increased lawlessness in many areas.³⁷⁰

The confusion surrounding the precise impact of Public Law 280 has created an environment in which tribes challenge and question

programs consistent with tribal self-governance); *see also* Eskridge & Frickey, *supra* note 246, at 65 (highlighting the Supreme Court's use of subsequent legislative history as a guide to the current Congress' "attitudes toward ongoing statutory implementation").

365. *See supra* Part III.B.2 (reviewing the canons of construction applicable to federal Indian law); *see also* Eskridge & Frickey, *supra* note 246, at 68 (concluding that the canons are not dispositive in and of themselves, but useful "tiebreaker[s] in close cases").

366. *See* Eskridge & Frickey, *supra* note 246, at 63 (commenting that the changes in social and political power of the parties affected by law can play an important role in statutory interpretation).

367. *See* PUBLIC LAW 280 REPORT, *supra* note 30.

368. *See* GOLDBERG-AMBROSE, *supra* note 31, at 31 (discussing the legal vacuum type of lawlessness resulting from Public Law 280); Hunter, *supra* note 2, at 18 (noting tribal leader's sentiment regarding the vacuum left by absence of state law enforcement).

369. *See* Goldberg, *supra* note 56, at 552 (asserting that the lack of necessary funds translated into unsatisfactory law enforcement on reservations where the states assumed jurisdiction under Public Law 280). Carole Goldberg specifically notes that in Nebraska, a Public Law 280 mandatory state, the Omaha and Winnebago Reservations were left without any law enforcement after the state assumed jurisdiction and the federal law enforcement officials left. *See id.*

370. MEISSNER REPORT, *supra* note 10, at 21 ("[T]he chaotic state of the law regarding a wide range of Indian jurisdiction issues is the source of many of the law enforcement problems Indians face.").

the legitimacy of state law enforcement and states themselves second-guess the scope of their rightful jurisdiction under the Act. Further, judicially imposed limitations with respect to the applicability of criminal prohibitions versus regulatory state laws make the prompt and effective delivery of law enforcement services—especially emergency response—difficult.³⁷¹

The jurisdictional confusion created by Public Law 280 has hindered the development of tribal justice systems in the mandatory states for several reasons. First, tribal justice systems in Public Law 280 states are more vulnerable to state challenges to its legitimacy.³⁷² This has effectively deterred some tribes from exercising jurisdiction and further developing their justice systems.³⁷³ Second, in a climate where funding for tribal justice systems is already grossly inadequate, some traditional funding streams have been unavailable to tribal justice systems in Public Law 280 states.³⁷⁴ Finally, the jurisdictional confusion created by Public Law 280 has impeded the negotiation of cooperative and mutual aid agreements, in the interest of effective maintenance of law and order between neighboring jurisdictions. Such agreements assume heightened significance in Public Law 280 jurisdictions because the inability of state and tribal authorities to agree on the jurisdictional status quo can foreclose a consensus on the more complicated issues of major versus misdemeanor crimes, Indian versus non-Indian offenders, and prohibitory versus regulatory state laws.

Repairing the negative impact to tribal self-government wrought by

371. See B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 472 (1998); GOLDBERG-AMBROSE & CHAMPAGNE, *supra* note 36, at 55 (explaining that the response time for a murder may be an hour, whereas anything else might be three days); Hunter, *supra* note 2, at B1 ("State Troopers sometimes are days away when emergencies arise." (quoting Will Mayo, President of Tanana Chiefs Conference)).

372. See Jones, *supra* note 371, at 472 (observing that "Public Law 280 has proved to be an impediment to tribal court development both in the mandatory states and in optional states where some form of state court jurisdiction was adopted"). As another example, the tribal courts in one mandatory state have been described as operating "in a legal twilight." See Kizzia, *supra* note 2, at A1.

373. See Bradley Interviews, *supra* note 28 (explaining that tribal courts did not develop in the Omaha and Winnebago Tribes of Nebraska until retrocession, and that the Sioux tribal court development lags behind Omaha and Winnebago because it is still subject to Public Law 280); see also GOLDBERG-AMBROSE & CHAMPAGNE, *supra* note 36, at 52 (asserting that "as a practical matter tribes without law enforcement funds may find it infeasible to operate a court system or to support a system of alternative dispute resolution").

374. See Aschenbrenner Memorandum, *supra* note 28, at 5 (asserting that the BIA was not justified in denying Public Law 280 tribes access to LEAA discretionary grants under the reasoning that they no longer had jurisdiction). A recent exception has been the Department of Justice COPS Program which has funded tribal law enforcement in mandatory Public Law 280 states, notably Alaska and California, presumably under the theory that tribes maintain concurrent jurisdiction. See *supra* note 228 (describing the COPS program).

Public Law 280 requires a commitment to comprehensive reform by tribes, states, and the Federal Government. Specific reform measures must include: statutory amendments granting tribes the ability to initiate retrocession, clarification and harmonization of the statute's judicial interpretations, and related jurisdictional statutes, and concerted efforts by Congress and the Executive to assure necessary funding for the adequate administration of civil and criminal justice in Indian country. The goal of such reforms should be to enable the participation of tribes as full partners in the nationwide administration of justice. With adequate recognition and funding, tribal justice systems would be well-situated to seek incremental expansions in their jurisdictions to include major crimes and offenses by non-Indians, at least on a discretionary basis.³⁷⁵

A. *Proposed Amendments and Judicial Cooperation*

As a threshold matter, Congress should consider three amendments to Public Law 280:

(1) Amend Public Law 280 to clarify that nothing in the Act precludes tribal jurisdiction and that only a transfer of partial federal jurisdiction took place. This would preserve some degree of exclusive tribal jurisdiction and concurrent jurisdiction with the states where it previously was concurrent with the Federal Government.³⁷⁶

(2) Amend Public Law 280 to provide a procedure by which a tribe in any Public Law 280 state—mandatory or optional—can initiate the retrocession process, ideally in conjunction with the state.³⁷⁷

375. For example, proposed Senate Bill 10, Juvenile Justice Reauthorization legislation introduced by Senator Hatch in the 105th Congress, would have directed the Attorney General of the United States to study tribal justice systems, including their capacity to administer lengthier penalties. *See* Violent and Repeat Juvenile Offender Act of 1997, S. 10, 105th Cong. § 112. During the hearing on Youth Gangs in Indian Country, the Department of Justice was asked whether an increase in tribal court penalties under the Indian Civil Rights Act would better enable tribal courts to address juvenile delinquency and crime. *See* S. REP. NO. 105-108, at 80 (1997). Deputy Assistant Attorney General Kevin V. Di Gregory and Tom LeClaire, Director of the Office of Tribal Justice, responded that such an increase in penalties without adequate funding for tribal courts, tribal law enforcement, and tribal detention facilities would not be sufficient. *See Gang Activity Within Indian Country: Hearing on S. 10 Before the Senate Comm. On the Judiciary and Senate Comm. On Indian Affairs* (1997) 105th Cong., available in 1997 WL 615584.

376. *See* Letter from Frederick G. Miller, Senior Staff Attorney and Project Director, National Center for State Courts, to Honorable Elbridge Coochise, Chief Judge, Northwest Intertribal Court System 4 (Mar. 9, 1994) (on file with *The American University Law Review*) [hereinafter *Building on Common Ground*] (attaching the Center's Building on Common Ground strategy memorandum that includes numerous recommendations for fostering tribal, state, and federal cooperation).

377. *See id.* ("Congress should amend Public Law 280 to vest Indian tribes with authority to unilaterally retrocede any or all assertions of state jurisdiction over Indian country."); *see also* National American Indian Court Judges Association Statement Prepared for Tribal Leaders

The current state of the law permits states to initiate the process without regard to tribal consent or support. This is highly inconsistent with the prevailing federal policies of government-to-government relations and tribal self-government and determination.³⁷⁸ Restoring the voice and influence of tribes in the retrocession process will enhance the potential for constructive tripartite cooperation and will assure the realistic assessment of the tribe's funding needs and existing justice systems to ensure effective post-retrocession law enforcement.³⁷⁹

(3) Amend Public Law 280 to require retroactive tribal consent to all assumptions of jurisdiction that were undertaken by mandatory and optional states alike.³⁸⁰ Incorporating tribal governmental consent is the only means to restore moral and legal force to the statute.

Public Law 280 has tainted tribal-state-federal governmental relations since its enactment and symbolizes, to many tribal governments, the apotheosis of federal assimilationist and terminationist policies. Acknowledging these attitudes in 1975, the Department of Justice Task Force on Indian Matters reported that "[m]ost Indian organizations and tribes abhor P.L. 280."³⁸¹ Rather than dissipating since 1953, the negative sentiment has only increased with time.³⁸²

Whether or not the Executive and the tribal leaders can muster the necessary political momentum to enact such amendments to Public Law 280, it will be important to monitor closely the judicial interpretations of Public Law 280. Given the current Supreme

Meeting with Pres. Clinton (Apr. 29, 1994) [hereinafter NAICJA Statement] (supporting a retrocession amendment in absence of complete repeal).

378. See *supra* note 286 and accompanying text (discussing the new federal policy promoting tribal self-government and self-determination).

379. While the authors suggest consideration of retrocession, complete repeal of Public Law 280 should not be foreclosed, if appropriately balanced with necessary resource enhancements. Realistically, because Public Law 280 has weakened tribal governments, tribal justice systems simply may not be financially or administratively able to take on the case loads previously assumed by states. See Letter from Robert B. Porter, Associate Professor of Law and Director of Tribal Law and Government Center, to Hon. Janet Reno, Attorney General 1 (Dec. 17, 1995) (on file with *The American University Law Review*) [hereinafter Porter Letter] (noting also that some tribes may have become dependent on or accustomed to federal and state government authority or assistance). For this reason, communication between the three sovereigns will ensure that if retrocession does occur, it will be when the tribes are fully funded to take on the responsibility.

380. See NAICJA Statement, *supra* note 377, at 3 (requesting an amendment that makes the 1968 tribal consent provision retroactive).

381. MEISSNER REPORT, *supra* note 10, at 20.

382. At the historic 1994 Listening Conference in Albuquerque, New Mexico, tribal leaders expressed their dissatisfaction with Public Law 280 to Attorney General Reno, Secretary of the Interior Babbitt, and then Secretary of Housing and Urban Development Henry Cisneros. See Video Tape: The Path of Hope (Listening Conference 1994) (on file with authors).

Court's relatively low threshold for what constitutes a clear and express statement by Congress,³⁸³ a negative decision by the Court on the extent of tribal jurisdiction in Public Law 280 states could undercut existing precedent supporting tribal concurrent jurisdiction.³⁸⁴

B. *Retrocession Plus*

Through retrocession the Federal Government reassumes its jurisdictional responsibility, namely jurisdiction under the Major Crimes Act and the General Crimes Act.³⁸⁵ By establishing clear jurisdictional boundaries, retrocession inevitably vests tribes with heightened responsibility for the welfare of their communities.³⁸⁶ Retrocession alone, however, will not improve the administration of justice in mandatory Public Law 280 jurisdictions. To be effective, retrocession must be accompanied by a long-term augmentation of funding and resources for tribal justice systems, the institutionalization of formal mechanisms to facilitate inter-governmental cooperation among tribes, states, and the Federal Government,³⁸⁷ and enhanced respect for and recognition of tribal justice systems, including law enforcement, traditional dispute resolution, and tribal orders and judgments.³⁸⁸

383. See, e.g., *South Dakota v. Yankton Sioux Tribe*, 118 S. Ct. 789 (1998); *Alaska v. Native Village of Venetie Tribal Gov't*, 118 S. Ct. 948 (1998).

384. Cf. Goldberg, *supra* note 56, at 594 (suggesting that the Supreme Court should interpret Public Law 280 to limit state jurisdiction given its unclear statutory language and legislative history).

385. Under section 1162(c), the Major Crimes Act and the General Crimes Act were rendered inapplicable in the mandatory states. See *supra* note 262 and accompanying text (discussing section 1162(c)).

386. Retrocession does not mean that tribes will suddenly possess all jurisdiction over Indian country, it simply means that the jurisdictional dynamic that was present before the statute's passage will resume—leaving principally a jurisdictional division between the Federal Government and tribes.

387. See Reno, *supra* note 99, at 1 (affirming that improving federal-tribal relations is essential to the realization of a government-to-government relationship and to the federal trust responsibility to promote tribal sovereignty); Building on Common Ground, *supra* note 376, at 3 (recommending some measures that tribal, state, and federal courts can take to resolve jurisdictional disputes).

One measure taken to facilitate such cooperation was the formation of the National Sheriffs' Association Indian Country-Sheriffs Cooperation Committee to "enhance working relationships between law enforcement agencies whose jurisdictions include Indian lands and its residents. See *National Sheriff's Association Indian Country-Sheriffs Cooperation Committee Formed*, 8 TRIBAL CT. REC. (Nat'l Indian Justice Ctr., Petaluma, Cal.), Winter/Spring 1995, at 22 (on file with *The American University Law Review*). The Committee hopes that through joint discussions, research, and meetings, the sheriffs and tribal, federal, and other law enforcement officials will be able to provide improved services that the community expects. See *id.*

388. See O'Connor, *supra* note 48, at 4-5 (stating that the tribal court decision-making process sometimes differs from state and federal courts due to the incorporation of traditional values and customs and that such variances are not only acceptable, but often helpful in

The Supreme Court has acknowledged that "[t]ribal courts play a vital role in tribal self-government . . . and the Federal government has consistently encouraged their development."³⁸⁹ The increasing activity and sophistication of most tribal justice systems in their struggle to realize the legitimate right of tribes to self-government has transformed courts into the primary forum for determining the scope of tribal authority. Tribal justice systems in Public Law 280 states must assume their roles as equal and essential components of our nation's "multilayered justice system."³⁹⁰

Currently, there are at least 200 tribal law enforcement departments and 250 Indian court systems³⁹¹ among over 550 federally recognized Indian tribes.³⁹² As a result of the historic lack of resources and the jurisdictional uncertainties created by Public Law 280, however, the number and relative sophistication of tribal justice systems in Public Law 280 states appear to lag behind their non-Public Law 280 counterparts.³⁹³

Although retrocession may be a preferred option for some Public Law 280 jurisdictions,³⁹⁴ it will not solve all of the law enforcement problems in Indian country as long as the governments that remain

reaching alternative dispute resolution practices not available in U.S. court systems).

389. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987).

390. See Wallace, *supra* note 42, at 152.

391. See Joseph A. Myers & Elbridge Coochise, *Development of Tribal Courts: Past, Present, and Future*, 79 JUDICATURE 147, 149 (1995) (explaining that 232 tribal judicial systems and 22 courts of Indian offenses were identified in the BIA budget request for fiscal year 1995); see also 25 U.S.C. §§ 1311-1312 (1994) (authorizing the development of a model code governing courts of Indian offenses); 25 C.F.R. § 11.100-1115 (1997) (explaining the courts of Indian offenses, their regulations, procedures, and detailed offenses); POMMERSHEIM, *supra* note 18, at 61-70 (tracing the emergence of tribal courts and their struggle for judicial legitimacy); Fredric Brandfon, *Tradition and Judicial Review in the American Indian Tribal Court System*, 38 UCLA L. REV. 991, 998-99 (1991) (outlining the BIA's initiation of the "Courts of Indian Offenses" in 1883 and the enactment of 1934 Indian Reorganization Act ("IRA") that permitted tribes to adopt their own constitutions and establish their own court systems); Margery H. Brown & Brenda C. Desmond, *Montana Tribal Courts: Influencing the Development of Contemporary Indian Law*, 52 MONT. L. REV. 211, 217-20 (1991) (detailing tribal court development); Valencia-Weber, *supra* note 45, at 235-37 (recounting the emergence of tribal courts).

392. See *supra* note 24 (describing the number of federally recognized Indian tribes and the recognition process).

393. Not all Public Law 280 states, however, are created alike. Goldberg-Ambrose makes a persuasive argument that California tribes, given their number and need, have received the least federal assistance and support: "[n]ot surprisingly, tribal courts and police forces are exceedingly rare among the more than 100 Californian tribes, even as these institutions have taken root and flourished on reservations elsewhere in the country." GOLDBERG-AMBROSE & CHAMPAGNE, *supra* note 36, at 3. Other mandatory states have witnessed advances among their tribal courts. Tribes in Wisconsin and Oregon do receive tribal court and law enforcement funds from BIA, according to GOLDBERG-AMBROSE & CHAMPAGNE. See *id.* at 52.

394. See MEISSNER REPORT, *supra* note 10, at 20 (discussing retrocession as a means of improving law enforcement on reservations). Senate Bill 1328, proposed in 1975 by Senator Abourezk of South Dakota, would have authorized tribes to adopt resolutions to retrocede jurisdiction back to the federal and tribal governments unilaterally, without the requirement of state or federal consent. See S. 1328, 94th Cong. §§ 101-05 (1975).

responsible lack adequate funding. While tribes in Public Law 280 states face heightened challenges and struggles in the administration of justice, it should be obvious that tribes in non-Public Law 280 states also struggle to eradicate crime and maintain a baseline level of safety. Ironically, retrocession without adequate funding and support threatens to replicate the negative indirect effects of Public Law 280 itself: law enforcement "vacuums" and non-responsive law enforcement.³⁹⁵ In this respect, the recent efforts by the Departments of Justice and the Interior to obtain greater resources for Indian country law enforcement are well-grounded and laudable.³⁹⁶ Hopefully, federal efforts will also draw upon the lessons of the Public Law 280 experience and consider meaningful jurisdictional reforms in conjunction with increased funding.

The struggles of tribal governments in their attempts to assure safety and stability have been well-documented and attempts at reform are not a new phenomenon. The Indian Law Enforcement Reform Act³⁹⁷ was intended to professionalize tribal law enforcement through the Bureau of Indian Affairs and to enhance the level of coordination with the Department of Justice and the Federal Bureau of Investigation.³⁹⁸ The Department of Justice has tried to demonstrate its dedication to law enforcement in Indian country through the initiation of various programs and grants to augment available funding through the BIA.³⁹⁹ True meaningful reform,

395. The Federal Government's continued interest in decreasing its financial obligations pursuant to its trust responsibility may be as important now as it was at the time of Public Law 280's passage. Moreover, the fact remains that tribal faith in federal promises is not assured. See JOSEPH A. MYERS, NATIONAL INDIAN JUSTICE CTR., STATEMENT FOR THE RECORD 6 (Feb. 9, 1995) (stating that such promises are often "meaningless"). In addition, where the Federal Government currently bears responsibility for law enforcement, it is often inadequate. See Memorandum from the Acting Deputy Commissioner of Indian Affairs, Department of the Interior, to All BIA Area Directors 1 (Apr. 25, 1994) (on file with *The American University Law Review*) (asking that area directors advise BIA police officers under their jurisdiction that they should no longer be delinquent in their obligations to "adhere to tribal court orders and related appearance/testimony in tribal courts").

396. See *supra* notes 8-9 and accompanying text (describing Departments of Justice and Interior's joint law enforcement initiative).

397. 25 U.S.C. §§ 2801-2809 (1994).

398. See *id.*

399. In fiscal year 1996, the BIA's funding was reduced by \$160 million or nine percent. See Peter Carlson, *The Unfashionable*, THE WASH. POST MAG., Feb. 23, 1997, at 9. The Department of Justice has undertaken several initiatives to help ease the hardships of the budget cuts. For example, recognizing that misdemeanor crimes on reservations committed by non-Indians against Indians often go unprosecuted, the Department's Office of Tribal Justice has begun to encourage some tribes to consider the convening of federal courts directly on the reservations using magistrate judges to hear these particular cases. See *Law Enforcement, NATION TO NATION* (Dep't of Justice, Office of Tribal Justice), Aug. 1996, at 5, 9 (stating that OTJ is working to improve prosecution of reservation crime and noting that the Magistrate Project attempts to address a law enforcement vacuum). On the Warm Springs Reservation, (which is expressly exempt from Public Law 280), in the mandatory Public Law 280 State of Oregon, a federal

however, will need to include more comprehensive changes, including:

- (1) congressional clarification, through a legislative amendment, that the Major Crimes Act provides for concurrent tribal jurisdiction over the enumerated crimes;⁴⁰⁰
- (2) congressional amendment of the Indian Civil Rights Act ("ICRA") to expand the tribal court sentencing options;⁴⁰¹
- (3) a congressional enactment to overturn the holding in *Oliphant v. Squamish Indian Tribe*⁴⁰² and work with tribal justice systems to enable the effective exercise of criminal jurisdiction over non-Indians;⁴⁰³
- (4) consistent with the Unfunded Mandates Reform Act⁴⁰⁴ of 1995,

magistrate convenes court periodically and the tribal prosecutor is cross-designated to prosecute the crime in that federal forum. See *id.* (discussing the development of innovative solutions to fill law enforcement gap); see also *Grants and Funding*, *supra* note 228, at 10 (listing several more allocated grants); *Contact List*, NATION TO NATION (Dep't of Justice, Office of Tribal Justice), Aug. 1996, at 11 (listing agencies that provide assistance in area of law enforcement).

400. See *Building on Common Ground*, *supra* note 376, at 4 ("Congress should amend Public Law 280 . . . and similar laws to clarify that these laws do not preclude tribal court jurisdiction over the same conduct, despite sentencing limitations."); see also Porter Letter, *supra* note 379, at 3-4 (recommending that Public Law 280 and related statutes be amended to permit exclusive jurisdiction for tribes over civil actions arising in Indian country and concurrent tribal-federal jurisdiction over crimes and an "opt-out" provision for tribes wishing to resume state jurisdiction where appropriate).

401. See Porter Letter, *supra* note 379, at 4 (noting that if tribal jurisdiction over major crimes is clarified as concurrent, those tribes having "law-trained judges" should not be confined by ICRA's sentencing limitations); see also *Building on Common Ground*, *supra* note 376, at 4 (stating that evaluation of tribal court due process safeguards may need to accompany the increased power); *supra* note 159 (discussing ICRA's sentencing limitations).

402. 435 U.S. 191 (1978).

403. See *Building on Common Ground*, *supra* note 376, at 4 (stating that Congress should authorize tribal authority over crimes committed by non-Indians); NAICJA Statement, *supra* note 377, at 3 (recommending that Congress take action to overturn *Oliphant v. Squamish Indian Tribe*, 435 U.S. 191 (1978)); see also Porter Letter, *supra* note 379, at 2 (requesting the recognition of tribal jurisdiction over misdemeanors committed in Indian country by non-Indians); *supra* note 162 (discussing *Oliphant*).

404. See Unfunded Mandate Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified at 2 U.S.C. §§ 1501-1571) (Supp. I 1997).

The purposes of this Act include:

- (1) to strengthen the partnership between the Federal government and State, local, and tribal governments;
- (2) to end the imposition, in the absence of consideration by Congress, of Federal mandates on State, local, and tribal governments without adequate Federal funding, in a manner that may displace other essential State, local, and tribal governmental priorities; . . . to begin consideration of the effect of previously imposed Federal mandates, including the impact on State, local, and tribal governments of Federal court interpretations of Federal statutes and regulations that impose Federal intergovernmental mandates.

2 U.S.C. § 1501 (Supp. I 1997).

The precise issues raised by Public Law 280 are articulated in the Unfunded Mandate Reform Act. They include questions regarding the mandatory nature of the transfer of jurisdiction in the original states, the lack of funding to accompany the transfer, and the impact on tribal,

a thorough consideration of the fiscal, political, and legal impact of Public Law 280 on state, local, and tribal governments; and

(5) full implementation of the Indian Law Enforcement Act and the Tribal Justice Act of 1993.⁴⁰⁵

The underfunding of tribal justice systems, and its impact on the ability of tribal governments to maintain law and order and resolve disputes, has been well-documented and acknowledged by Congress.⁴⁰⁶ Under the Indian Tribal Justice Act,⁴⁰⁷ over \$58.4 million dollars annually was authorized for tribal court systems for the fiscal years of 1994-2000.⁴⁰⁸ In addition, the Act provides resources for a comprehensive survey of tribal judicial systems to assess their resources, funding, and functions.⁴⁰⁹ However, to date the BIA has

state, and local governments. See § Pub. L. No. 104-4, 109 Stat. 48.

405. See MYERS, *supra* note 395, at 6 (stating that funding for tribal courts pursuant to the Tribal Justice Act was placed in the hands of the BIA and without congressional pressure the BIA will not implement it); see also NAICJA Statement, *supra* note 377, at 1 (calling for the Indian Tribal Justice Act's implementation and citing the tribal courts' need for "adequate funding, resources, support, training or authority").

406. See 8 TRIBAL CT. REC., *supra* note 128, at 30 (declaring that resource problems are evident and reminding readers of Senator McCain's 1993 statements that there is an "overwhelming need for resources . . . made evident . . . [by] witnesses detail[ing] the lack of funding for basic tribal court functions, including personnel, reporting, records management, standards development and facilities").

The article specifically notes that the \$48,000 allocated per year for each tribal court system—as requested under the 1995 BIA budget—is woefully inadequate when it is considered that no state or federal justice system operates on less than \$200,000. See *id.*; see also Senator Ben Nighthorse Campbell, *Introduction*, 24 N.M. L. REV. 171, 172 (1994) (asserting that despite the fact that tribal courts are pulled in many directions, they do not operate full-time, they function with minuscule budgets, and are understaffed).

407. Pub. L. No. 103-176, 107 Stat. 2004 (1995) (codified at 25 U.S.C. §§ 3601-3602, 3611-3614, 3621, 3631 (1994)).

408. See 25 U.S.C. § 3621(b); Ted Quasula, *Will Republican Coup Destroy Gains in Indian Country?*, 8 TRIBAL CT. REC. (Nat'l Indian Justice Ctr., Petaluma, Cal.), Winter/Spring 1995, at 6-7 (on file with *The American University Law Review*) (discussing funding for fiscal years 1994-1996).

The NAICJA succinctly summarized the legislation's authorizations:

1. \$50 Million for base funding for Tribal Courts;
2. \$7 Million for training, enhancement of tribal justices, technical assistance, etc.;
3. \$500,000 for administrative expenses for Tribal Judicial Conferences;
4. \$500,000 for administrative expense [sic] for the Office [Section 3611 of the Act establishes within the BIA the "Office of Tribal Justice Support"];
5. \$400,000 for survey (one time only). [Section 3612 of the Act authorizes the Secretary of Interior to contract with a non-federal body to conduct surveys of tribal justice systems].

Memorandum from Judge Elbridge Coochise, President, National American Indian Court Judges Association, to Tribal Court Judges 1 (Jan. 21, 1994) (on file with *The American University Law Review*).

409. See 25 U.S.C. § 3612 (authorizing the survey of tribal court systems). The Act further states that the Secretary of the Interior will update the information annually. See *id.* § 3612(a). In so doing, he shall assess such areas as the people served, the volume and complexity of caseloads, the capacity of the system, the state of current facilities, personnel needs, and training and technical assistance needs. See *id.* § 3612(c). The Act also requires consultation with the tribes during the survey process. See *id.*

not requested the funding authorized in the Act apart from \$500,000 to conduct the survey of tribal justice systems.⁴¹⁰

C. Tribal-State-Federal Cooperation

The successful administration of law enforcement in any community is best secured through coordination and cooperation with adjacent jurisdictions.⁴¹¹ Although tribes should be empowered with decision-making authority over retrocession, the success of such jurisdictional realignment inevitably hinges on the effective communication and collaboration among state, federal, and tribal justice systems. Only through a collaborative process can each party evaluate its desire to exercise jurisdiction and most importantly, its financial and structural ability to do so. This involves a mutual respect for each government's justice systems⁴¹²—including a respect for variations in court systems and traditional dispute resolution.⁴¹³

Regardless of the amount of communication and collaboration, however, "the strong adversarial features of the American justice paradigm will always conflict with the communal nature of most tribes."⁴¹⁴ Tribal justice systems may exhibit distinct dispute resolving mechanisms and *modus operandi*;⁴¹⁵ however, state and federal counterparts can make a concerted effort to extend comity to tribal courts without insisting they become clones of the federal and state adversarial courts.⁴¹⁶ State and federal governments can learn much

410. See Myers & Coochise, *supra* note 391, at 148 ("Tribal courts have yet to receive a single benefit under the Indian Tribal Justice Act."); MYERS, *supra* note 395, at 3-6 (outlining the BIA's dealings with the Act). The survey, which has been in progress since 1995 remains uncompleted. See Statement of Jill Shibbes, President, National American Indian Court Judges Association, Before Comm. on Indian Affairs, U.S. Senate, Tribal Justice Programs, June 3, 1998, available in 1998 WL 288992.

411. See NAICJA Statement, *supra* note 377, at 3 (agreeing that while some progress has been made in this area, much is left to be done).

412. See Stanley G. Feldman & David L. Withey, *Resolving State-Tribal Jurisdictional Dilemmas*, 79 JUDICATURE 154, 155-56 (1995) (addressing tribal-state efforts in response to jurisdictional dilemmas in Indian country); Wallace, *supra* note 42, at 153 (addressing specifically tribal-federal court cooperation).

413. See Feldman & Withey, *supra* note 412, at 155 (discussing the benefits of comity and full faith and credit as options to overcoming state-tribal jurisdictional conflicts).

414. Melton, *supra* note 53, at 133.

415. Ada Pecos Melton does an outstanding job of summarizing many of the differences between tribal courts and what she refers to as the "American Justice Paradigm." See *id.* at 126-28. She explains that one of the principal differences between our justice system and those of the tribes is the tribes' concentration on "restorative and reparative" concepts and their focus on healing both the victim and offender and restoring harmony to their community. See *id.* at 126-27; see also *id.* at 128-29 (contrasting American and indigenous court systems in chart form); Carey N. Vicente, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE 133, 135 (1995) (explaining that tribal courts differ from courts of the "non-Indian" world because of a differing view of culture: for the Indian it is "pervasive, encircling, all-inclusive" and for the American it is just an "elective identity").

416. See generally Building on Common Ground, *supra* note 376, at 1 (observing that state

from tribes regarding community-based traditions, problem solving, and dispute resolution, and tribes can learn much from state and federal justice systems such as the importance of judicial independence.⁴¹⁷ With constructive inter-governmental cooperation, the effectiveness and fairness of the administration of justice in state, tribal, and federal justice systems will be enhanced.⁴¹⁸ There are many possible ways to enhance this communication and collaboration:

- (1) fund and encourage tribal automation and data collection systems for crime statistics, court documents and orders, and sex offender registration and release;
- (2) increase federal and state court use of certification procedures when questions of tribal law are at issue;⁴¹⁹
- (3) provide for greater state, federal, and tribal agreements/compacts to: share resources, settle jurisdictional disputes, address such issues as reciprocity and extradition;⁴²⁰ and discuss the modified application of the "exhaustion rule"⁴²¹ calling

courts frequently do not understand tribal courts and refuse to accept them as legitimate decision makers).

417. See Canby, *supra* note 242, at 17 (describing the variations between tribal courts in the level of protection they possess from "political or external influences").

418. See *id.* at 8. The National Center for State Courts makes the following suggestions for resolving jurisdictional conflicts: design specific educational programs for state and federal judges; provide joint education opportunities for all three sovereigns' personnel; create Indian law divisions within the state bar associations and American Bar Association; integrate federal Indian law material into the required curriculum of law students; and have tribal courts make greater efforts in the public availability and distribution of their decisions, codes, and common law. See *id.*; see also O'Connor, *supra* note 48, at 3-5 (explaining that many state and federal law principles have been incorporated into tribal codes and that tribal courts can offer state and federal systems many innovative methods of alternative dispute resolution ("ADR")); Wallace, *supra* note 42, at 153 ("Federal courts would do well to look to traditional tribal courts for alternative dispute resolution methods").

419. Federal courts may utilize this judicial procedure when ambiguous or unsettled issues of state or tribal law arise in a federal proceeding. The process not only gives the sovereign the opportunity to clarify its view of the law, but also demonstrates a respect and deference for each sovereign's authority to determine what is best for the population it serves. See *Tribal Courts Project*, *supra* note 359, at 5 (noting that the court rules of the Navajo Nation provide for the receipt of certified questions); see also Building on Common Ground, *supra* note 376, at 5 (highlighting that certification questions to tribal courts on who is an "Indian" are particularly needed).

420. See Building on Common Ground, *supra* note 376, at 6 (supporting agreements for "cross-utilization of facilities, programs, and personnel"); NAICJA Statement, *supra* note 377, at 4 (supporting congressional action permitting state-tribal agreements on "reciprocity, cross-deputization, civil jurisdiction, criminal jurisdiction over non-Indians, enforcement of orders, extradition, provision of services, utilization of programs and facilities, probation and jail transfers, [and] access to files"); see also Porter Letter, *supra* note 379, at 4 (suggesting that, following the pattern of Indian Child Welfare Act and Indian Gaming Regulatory Act, Congress should enact legislation permitting establishment of state-tribal compacts to deal with jurisdictional problems).

421. See Endreson, *supra* note 45, at 142 (discussing that under the "exhaustion rule" a case is first heard in tribal court even when legitimacy of federal jurisdiction is not in question). Endreson explains that the rule is based on the Federal Government's policy to support and

upon the states to "stay their hands" while tribes are given the "first opportunity to decide their own jurisdiction" before the state can exercise its jurisdiction;⁴²²

(4) ensure that each government makes its court records available to the other;⁴²³

(5) assure full faith and credit and comity to judgments and court orders;⁴²⁴ and

(6) sustain a tribal, state, and federal dialogue on the administration of justice in Indian country and develop objective criteria for measuring progress in terms of the reduction of crime and ability to meet legal needs.⁴²⁵

promote tribal self-governance, foster orderly administration of justice, and reap the benefits of tribal courts' expertise. See *id.* at 144.

Two cases are often cited for the source of this doctrine. First, in *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), the federal court, having legitimate diversity jurisdiction (the plaintiff was an Indian and the defendant a non-Indian), permitted the tribal court to first determine its own jurisdiction. See *LaPlante*, 480 U.S. at 978 ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty . . ."). Second, in *National Farmers Union Insurance Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), the Supreme Court required an exhaustion of tribal remedies so that the tribal court first had the opportunity to determine the limits of its jurisdiction before a federal forum was permitted review. See *National Farmers Union Ins. Co.*, 471 U.S. at 845-47 (involving a state school district seeking relief in federal court from an allegation by an Indian student initially made in tribal court). In the Court's ruling, Justice Stevens specifically stated that tribal courts are uniquely capable to "provide other courts with the benefit of their expertise in such matters in the event of further judicial review." See *id.* at 857.

In his article, *Exhaustion of Tribal Remedies in the Lower Courts After National Farmer's Union and Iowa Mutual: Toward a Consistent Treatment of Tribal Courts by the Federal Judicial System*, Timothy W. Joranko urges the application of a clear test for exhaustion. Joranko observes that "adherence to principles announced in *Iowa Mutual* and *National Farmers Union* and the rule of respect for the judiciary's limited role in defining the parameters of tribal sovereignty dictate application of the bright line rules requiring exhaustion." 78 MINN. L. REV. 259, 307 (1993).

In *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997), however, the Supreme Court appears to have diluted the precedent supporting broad tribal court jurisdiction, at least as it applies to non-Indians. See *id.* at 1404 (holding that the tribal court lacked exclusive jurisdiction over personal injury action between non-Indian parties that arose on a state highway). To affirm its interest in strong tribal justice systems, Congress could clarify the narrow applicability of the *A-1 Contractors* decision.

422. Cf. Canby, *supra* note 242, at 15 (describing the exhaustion rule as applied in the federal-tribal context).

423. See Building on Common Ground, *supra* note 376, at 4 (recommending actions to assure cross-recognition of each court system's judgments).

424. See Feldman & Withey, *supra* note 412, at 155 (calling for the adoption of state court rules making recognition of tribal court judgments on a "mandatory (full faith and credit) or discretionary (comity) basis"); NAICJA Statement, *supra* note 377, at 4 (requesting state-tribal compacts on the issue and the expansion of full faith and credit provision in the Indian Child Welfare Act).

425. The Department of Justice's Office of Tribal Justice demonstrated progress in this area. See Myers & Coochise, *supra* note 391, at 149 (praising the Department of Justice for taking "substantial" steps in this area despite its "minimal funds"). Since its establishment in 1995 by Attorney General Janet Reno, the OTJ has sponsored several "listening conferences" throughout the nation where tribal leaders, along with federal and state officials have come together to discuss issues relating to tribal self-governance, tribal courts and law enforcement, and the protection of tribal environment and natural resources. See *Listening Conferences*,

The above recommendations are not new but rather recurring themes that never achieve full implementation. The failure to effectuate these recommendations has exacted a high cost. The findings of the 1975 Task Force Report and the 1997 Executive Committee Report uncannily resemble the legislative history of Public Law 280 as they describe the break-down of law enforcement in some parts of Indian country.⁴²⁶ For this reason, prior solutions have undeniable, contemporary relevance and merit reconsideration.

One historical proposal that is interesting to consider is Senate Bill 2502,⁴²⁷ a 1978 bill proposed by Senator James Abourezk, then Chairman of the Senate Select Committee on Indian Affairs.⁴²⁸ The bill's purpose was "[t]o authorize the States and the Indian tribes to enter into mutual agreements and compacts respecting jurisdiction and governmental operations in Indian country."⁴²⁹ Most importantly, in its original form, the bill recognized that the "jurisdictional controversies which surround the relationships between Indian tribes and the States . . . are the logical consequence of . . . historical vacillation[s] and inconsistenc[ies]"⁴³⁰ and that meaningful solutions could not be restricted to "one statutory formula," or resolved by the judicial processes alone.⁴³¹ The bill affirmed that jurisdictional issues "are local in nature and should, wherever possible, be resolved at the local level . . ."⁴³² With that foundation, the bill provided for agreements and compacts based

NATION TO NATION (Dep't of Justice, Office of Tribal Justice), Aug. 1996, at 6-7.

426. Both the 1975 and 1997 reports contain discussion of law enforcement crises, or lawlessness, on Indian reservations, similar to that in the legislative history of Public Law 280. For example, the 1975 Task Force Report states:

Law enforcement on Indian reservations is in serious trouble. . . . The major crimes rate is 50% higher on Indian reservations than it is in rural American as a whole. The murder rate among Indians is three times that in rural areas, while the assault rate is nine times as high.

MEISSNER REPORT, *supra* note 10 at 77.

427. S. 2502, 95th Cong. (1978). The Executive Committee Report of 1997 raised similar concerns: "There is a public safety crisis in Indian country. . . . According to a 1996 IHS Report, the homicide rate for Indian males is almost three times higher than the rate for white males." Executive Committee Report, *supra* note 6, at 1-2.

428. The Senate Report on the bill, S. REP. NO. 95-1178 (1978), clearly indicated what language was added and stricken on the Senate floor. Because the authors of this article believe that much of the bill's original language and intent is worth reviving, the authors have cited to text that was both stricken and added. If the language the authors quote was stricken in the final bill—though never passed—we have indicated as such.

429. S. 2502, § 1.

430. S. 2502, § 2 (a) (stricken text) This citation is to section 2 of the original bill; however the language quoted in the text of this article was subsequently deleted from the bill and its sections were renumbered.

431. S. 2502, § 2(c)-(d) (noting that states and tribal authorities have been expressing greater interest in engaging in such compacts); *see also* S. REP. NO. 95-1178 (stricken text).

432. S. 2502, § 2(c); *see also* S. REP. NO. 95-1178 (stricken text).

only on mutual consent;⁴³³ judicial enforcement of the agreements and compacts;⁴³⁴ and federal assistance for personnel or administrative expenses incurred through the execution of the agreements or compacts.⁴³⁵ Moreover, the bill clarified that jurisdictional statutes such as Public Law 280 were not a bar to the making of said agreements and acknowledged that ongoing federal involvement and supervision of this process was a duty of the Federal Government rising out of its trust responsibility not only to "preserve and protect Indian tribes," but also to ensure that "a legal framework" existed that would enable states and tribes to exist in harmony and engage in cooperative efforts.⁴³⁶ Under the bill, the federal presence in Indian country law enforcement was assured through: continued federal financing,⁴³⁷ mandatory Secretary of the Interior approval of all agreements and compacts,⁴³⁸ a commitment to encourage the

433. See S. 2502, § 2 (stating that the United States should establish a legal framework through which "viable intergovernmental agreements" between tribes and states based on mutual consent may be established).

434. See S. REP. NO. 95-1178, § 301 (added text) (granting original jurisdiction to federal courts over any actions for equitable relief—including injunctive and declaratory—actions to enforce any agreement or compact).

435. The revised version of the bill provided that:

[T]he United States, upon agreement of the parties and the Secretary, *may* provide financial assistance to such party for costs of personnel or administrative expenses in an amount up to 100 per centum of costs actually incurred as a consequence of such agreement or compact, including indirect costs of administration which are clearly attributable to the services performed under the agreement or compact.

Id. § 102 (added text).

436. See *id.* S. 2502, § 2 (added text). In reference to Public Law 280 and any statute or state constitutional provision which might be interpreted to preclude such compacts, the bill explained:

Notwithstanding the Act of August 15, 1953 (67 Stat. 588), as amended, or any other Act transferring civil or criminal jurisdiction over Indians . . . to the various states, or establishing a procedure for such transfers, and notwithstanding the provisions of any enabling Act for the admission of a State into the Union . . . the States and the Indian tribes . . . are hereby authorized to enter into compacts and agreements . . .

S. 2502, § 101(a).

437. See *id.* § 102 (authorizing federal assistance). The bill provided a list of eight factors that the Secretary of the Interior could consider to determine the extent of federal financial assistance. These eight factors were: (1) whether parties were already obligated to perform the function; (2) whether federal assistance would allow that party to perform the function even better; (3) the financial capacities of the parties; (4) the extent to which the program's success depended on the money; (5) the program's capacity to foster better Indian and non-Indian relationships; (6) the program's ability to protect Indian and non-Indian resources; (7) the cost to the Federal Government to perform the same functions alone; and (8) the extent to which federal assistance is already provided through other federal programs, grants or revenue sharing. See S. REP. NO. 95-1178, § 102(a) (added text).

The bill, presented in 1978, authorized the appropriation of \$10,000,000 for the fiscal year of 1980 and authorized that Congress appropriate additional money in each subsequent fiscal year. See S. 2502, § 102(g) (stricken text). The final bill indicated that \$10,000,000 may be appropriated in fiscal year of 1980 if necessary. See S. REP. NO. 95-1178, § 102(g) (added text).

438. The original bill provided for Secretary approval but this requirement was stricken on the Senate floor. See *id.* § 101(b); S. REP. NO. 95-1178 (stricken text). Instead, the final bill provided that the agreements and compacts could be revoked by either party upon six months

formation of state and tribal boards and councils,⁴³⁹ and an authorization to all federal departments, agencies, and executive branches to support the implementation of these agreements through technical assistance, material support and personnel.⁴⁴⁰

Senate Bill 2502 is noteworthy in its apparent recognition of the need to preserve the integrity of tribal and state sovereignty. The bill recognized the perils of unfunded mandates, such as Public Law 280, provided for and encouraged local solutions, and embraced the logical conclusion that the best way to improve law enforcement was not to withdraw resources and actors, but rather to maximize the players, their choices, and their resources. It is in the spirit of such ideas that future cooperative efforts should be promoted.

CONCLUSION

To assure the peace and safety of its people, a government must exercise the power to "preserve the innocent and restrain offenders."⁴⁴¹ In the interest of tribal self-government, Indian tribes strive to maintain safe and peaceful communities. Public Law 280 impedes the full realization of tribal self-government, not only because it intrudes upon tribal authority, but because it creates uncertainty regarding the scope of tribal authority.

There are many grounds upon which to challenge the legitimacy of Public Law 280: its conflict with the trust responsibility to Indian tribes borne by the Federal Government; the lack of tribal consent provisions and dissonance with the Jeffersonian concept of the consent of the governed; pragmatic assessments of the detrimental impact of the statute on tribal justice systems; and possible increased "lawlessness."

Federal, state, and tribal governmental institutions need to cultivate a new paradigm regarding Public Law 280 and tribal justice generally. Current reforms initiated by the Departments of Justice and the Interior in response to President Clinton's 1997 directive on Indian country law enforcement demonstrate an unprecedented federal commitment to assist tribes in improving the administration

written notice. See S. REP. NO. 95-1178, §101(b) (added text). The final bill did, however, require the Secretary to post the agreements and compacts in the Federal Register which were properly filed with the Secretary "within thirty days of consummation." See *id.* § 1010(c) (added text).

439. See S. 2502, § 201 (encouraging the establishment of planning and monitoring boards).

440. See *id.* § 102(e) (authorizing federal support to implement compacts formed under the Act). The Federal Government is also permitted to make arrangements with other federal agencies and departments for the transfer and contribution of funds to the designated programs. See *id.* § 102(d).

441. LOCKE, *supra* note 1, at 5.

of justice on Indian lands and to provide a comparable level of safety for citizens living in Indian communities. The assistance advocated by Attorney General Reno, in conjunction with reforms through the Office of Law Enforcement Services at the Department of the Interior (discussed throughout paper) is an essential first step in procuring meaningful improvements in Indian country law enforcement. However, despite their laudable intentions, the reforms are conspicuously silent with respect to Public Law 280.⁴⁴²

Truly comprehensive law enforcement reform must address Public Law 280. Consequently, responsible policy makers, attorneys, and law enforcement personnel should not ignore the complicated questions presented by Public Law 280 as they contemplate future initiatives. They must be willing to challenge the statute's ambiguity, aggressively assert and put into practice a non-divestiture interpretation, and regularly argue that Public Law 280 has failed to achieve its primary goal of improving law and order in Indian country.

The Termination Period is over, and the contemporary federal policy is one of self-determination. Except for a few misguided and nostalgic individuals, most see the mutual benefit in working toward enhanced tribal self-governance and self-sufficiency. Tribal justice systems are critical components in the nation-wide administration of justice⁴⁴³ and their continued viability bears directly on the quality of life in tribal communities. The prevailing federal policy emphasizes community-based solutions and community policing as the appropriate means of reducing the level of crime throughout the nation. To accomplish this, however, Indian tribes must have within their means the appropriate tools and support to mete out justice in their inherently community-based endeavors.

The administration of justice is not just a challenge for tribal government.⁴⁴⁴ Our actions must be informed by the recognition that

442. See generally Reno Statement, *supra* note 45 (outlining proposed reforms and budget requests).

443. See Canby, *supra* note 242, at 16 (explaining from the perspective of a federal judge that "tribal courts are doing a huge business, and . . . the federal and state judiciary could not do without them").

444. Felix Cohen aptly noted the interrelatedness of United States Indian policy by likening the Indian to "the miner's canary" which marks the shift from fresh air to poison gas in our political atmosphere and "our treatment of Indians reflects the rise and fall in our democratic faith." See Felix Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953). The analogy of the "miner's canary" has since become a ubiquitous phrase for numerous subjects closely and remotely related to Indian law. See *Chapoose v. Clark*, 607 F. Supp. 1027, 1036 (D. Utah 1985) (quoting Cohen's miner's canary analogy in discussing importance of safeguarding Indian rights); Rennard Strickland, *Indian Law and the Miner's Canary: The Signs of Poison Gas*, 39 CLEV. ST. L. REV. 483, 484 (1991) (noting Cohen's contention that Indian law acts as a miner's canary—a barometer for society).

the rights enjoyed by all citizens under the justice system of the United States are only as secure as the right to swift and effective justice in Indian country. Addressing Public Law 280 and the legacy of its ambiguity will demonstrate the commitment of the United States to meaningful self-government and justice for Indian tribes and their members.

