CONCURRENT TRIBAL AND STATE JURISDICTION UNDER PUBLIC LAW 280

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SOO C. SONG

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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. 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

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

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\(^2\) 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).


\(^5\) 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
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
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").

In 1953, ostensibly acting to remedy lapses in law enforcement in Indian country, Congress exercised its power to delegate the Federal Government's jurisdiction over Indian country to the states and enacted Public Law 280. 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")—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).


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).


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 criminal\textsuperscript{21} and civil\textsuperscript{22} jurisdictional

\textit{Basic ACLU Guide to Indian and Tribal Rights} 114 (2d ed. 1992); \textit{see also Venetie}, 944 F.2d at 560-61 ("[The Act] mandated the transfer \ldots 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. \textit{See infra} note 171 and accompanying text (detailing state-federal dialogues on transfer).

\textsuperscript{21.} \textit{See} 18 U.S.C. \textsection\textsection 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:

<table>
<thead>
<tr>
<th>State or Territory of</th>
<th>Indian country Affected</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>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.</td>
</tr>
<tr>
<td>California</td>
<td>All Indian country within the State.</td>
</tr>
<tr>
<td>Minnesota</td>
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<td>Nebraska</td>
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<tr>
<td>Oregon</td>
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<tr>
<td>Wisconsin</td>
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</table>

(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.

\textit{Id.}

\textsuperscript{22.} \textit{See} 28 U.S.C. \textsection 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. 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.

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").


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

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(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.
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 jurisdiction over Indian country to these six states, but also a transfer of tribal civil and criminal jurisdiction to the states. 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 concurrent state and tribal jurisdiction over Indian country. 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 Chipewa 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-government 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." 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. 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).


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. 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. Public Law 280 has also complicated the delivery of law enforcement services in Nebraska. 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.

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. The ambiguous language used in the Act, the "sparse legislative history," the fact that the law was enacted during a period of antagonism toward tribal self-government, and the lack of
a conclusive ruling by the Supreme Court\textsuperscript{40} on the complete jurisdictional effect\textsuperscript{41} 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 law\textsuperscript{42} 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,\textsuperscript{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."\textsuperscript{44} With adequate resources, tribal governments are not only the most appropriate institutions to maintain order on reservations,\textsuperscript{45} but have

\begin{itemize}
\item \textsuperscript{40} See David H. Getches et al., \textit{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.").
\item \textsuperscript{41} See infra Part III.D.1 (discussing cases and commentary interpreting Public Law 280).
\item \textsuperscript{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, \textit{A New Era of Federal-Tribal Court Cooperation}, 79 \textit{Judicature} 150, 151 (1995); see also William C. Canby, Jr., \textit{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).
\item \textsuperscript{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.
\item \textsuperscript{44} Criminal Gangs in Indian Country, supra note 14, at 10 (testimony of Kevin V. Di Gregory); see also Janet Reno, \textit{A Federal Commitment to Tribal Justice Systems}, 79 \textit{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.").
\item \textsuperscript{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.\textsuperscript{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."\textsuperscript{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 \textlangle}http://www.senate.gov/scia/1998hrgs/0603-jr.htm\textrangle\ [hereinafter Reno Statement]; see also Douglas B.L. Endreson, \textit{The Challenges Facing Tribal Courts Today}, 79 \textit{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, \textit{Custom and Innovative Law}, 24 \textit{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. \textit{See} Endreson, \textit{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, \textit{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." \textit{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, \textit{supra} note 45, at 146; \textit{see also infra} notes 159, 333-42 and accompanying text (providing additional information on the Indian Civil Rights Act).

47. \textit{See} Wallace, \textit{supra} note 42, at 152.
evolved as a shifting, precarious balance of power among multiple sovereigns. Federal, state, and tribal governments share jurisdiction in Indian country, at times seamlessly, though more often with some degree of conflict and controversy resulting from "the tensions that sharing jurisdiction imposes." Moreover, the rules and principles that shape the parameters of jurisdiction in Indian country have long defied mechanistic application and uniformity. Profound differences of history, sociology, and politics assure that notions of justice and fairness will differ markedly among tribal, state, and federal governments. 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.

Issues of state federalism pervade the discussion of jurisdiction in Indian country and therefore Public Law 280. 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).


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

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. 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. Accordingly, Indian tribes have long been recognized as "domestic dependent nations," vested with inherent tribal sovereignty. The self-
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. Similarly, the Constitutional Convention, while significant to the extent that it established federal primacy over Indian affairs, did not diminish the sovereignty of tribes.

The Supreme Court has interpreted relevant treaties and statutes against this "backdrop" of Indian sovereignty. 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"; (2) sovereign immunity from suit; and (3) the power to prescribe laws for their community and enforce these laws against their members. The Court has also held that the power of a tribe 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. Hayes, 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.


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, its location within the United States, or its
subjection to "ultimate federal control." Most importantly, the
inherent tribal powers of self-government are not subject to judicial
defeasance, and remain unless expressly limited or extinguished by
Congress through treaty or statute.

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.
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
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
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-
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 (1994) (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.\textsuperscript{74} This constitutionally-based principle has evolved in federal common law as the Plenary Power Doctrine.\textsuperscript{75} While the legitimacy of such plenary power raises questions as to its source and breadth,\textsuperscript{76} it has been repeatedly recognized by the Supreme Court.\textsuperscript{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.\textsuperscript{78}

\textsuperscript{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").

\textsuperscript{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").

\textsuperscript{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, cl. 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).

\textsuperscript{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).

\textsuperscript{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.\textsuperscript{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 \textit{Worcester v. Georgia}\textsuperscript{80} that state laws would have no force or effect in Indian country.\textsuperscript{81} The Supreme Court has since held that states have only limited authority over Indian country absent an express grant by Congress.\textsuperscript{82} Thus, although \textit{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 \textit{United States v. McBratney}\textsuperscript{83} found that states possess exclusive jurisdiction over crimes committed by non-Indians against non-Indians in Indian country\textsuperscript{84} and over victimless crimes committed by non-Indians.\textsuperscript{85}

The cases since \textit{Worcester} have modified the test to determine the
permissibility of state jurisdiction over Indian lands. In *Williams v. Lee*, 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." 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. 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.

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

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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 "absent 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. 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. 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.

4. The federal trust responsibility

Another distinct aspect of federal Indian law is the special trust relationship that exists between the Federal Government and Indian tribes, which the Supreme Court first acknowledged in the 1831 case of Cherokee Nation v. Georgia. This "unique obligation," known as the federal Indian trust responsibility, has been continuously acknowledged by courts, Congress, and the executive branch of the
Federal Government. In Cherokee, the Court depicted Indians as in a "state of pupilage," 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." Pursuant to the trust responsibility, the United States should "preserve public safety for the citizens of Indian country."

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. 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. 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.

"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").


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 DEPT 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, 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. 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." 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 Act and the Major Crimes Act of 1885. 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.

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,\textsuperscript{110} which explains the allocation of jurisdictional authority in Indian country.\textsuperscript{111}

1. \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{114} In all three circumstances, tribes retain exclusive jurisdiction.\textsuperscript{115}

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

\textit{Id.}

\textsuperscript{110} See 18 U.S.C. § 1162(c) (1994).

\textsuperscript{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 \textit{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 \textit{id.}

\textsuperscript{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'").

\textsuperscript{113} See 18 U.S.C. § 1152; \textit{Pommersheim, supra} note 18, at 80.


\textsuperscript{116} See \textit{Pommersheim, supra} note 18, at 80.

\textsuperscript{117} 104 U.S. 621 (1881).

\textsuperscript{118} See \textit{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).

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, more commonly known as Ex parte Crow Dog or simply Crow Dog's case. 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. 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. In so doing, the Supreme Court, while expressing some contempt for tribal justice institutions, 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. 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.

Many members of Congress expressed outrage 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. Section 1153(a) lists a series of major crimes

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"), superseded 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.\textsuperscript{128}

The Major Crimes Act, however, did not disturb tribal \textit{concurrent} jurisdiction over the enumerated offenses.\textsuperscript{129} As a result, tribes may prosecute major crimes and the federal courts have upheld their right to do so.\textsuperscript{130} To the extent there is any question about concurrent tribal jurisdiction over major crimes,\textsuperscript{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 \textit{United States v. Antelope},\textsuperscript{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."\textsuperscript{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

\textsuperscript{128}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).


\textsuperscript{129}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. \textit{See 8 TRIBAL CT. REC. (Nat'l Indian Justice Ctr., Petaluma, Cal.), Winter/Spring 1995, at 30 (on file with \textit{The American University Law Review}); supra notes 108, 114 and accompanying text (discussing exceptions to federal jurisdiction enumerated in the General Crimes Act).}

\textsuperscript{130}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).

\textsuperscript{131}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).

\textsuperscript{132}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. \textit{See 18 U.S.C. § 1153 (1994); see also supra note 109 (providing statutory text).}

\textsuperscript{133}430 U.S. 641 (1977).

\textsuperscript{134}See id. at 645 n.2.
enumerated offenses, but only that its jurisdiction was no longer exclusive. 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." 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.

The characterization of the Major Crimes Act as a "limited intrusion" was reaffirmed in *Ex parte Wilson* and again in *United States v. Wheeler*. 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. In *Wheeler*, under the Major Crimes Act, the Federal Government prosecuted the defendant for rape, while the tribe was still permitted to prosecute the defendant for the same offense.

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*, 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." The Court observed that during the legislative debate on the Act, Congressman Budd moved to amend and strike the phrase "and not otherwise," arguing that preserving concurrent jurisdiction with the tribal governments was consistent
with the objectives of the Major Crimes Act. 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. Thus, concurrent, not exclusive, jurisdiction was authorized.

More recently, the Ninth Circuit addressed the issue of concurrent jurisdiction over major crimes committed by members of Indian tribes. In *Wetsit v. Stafne,* a tribal member was charged and convicted of manslaughter in tribal court after having been acquitted of the same crime in federal district court. Relying heavily upon *United States v. Wheeler,* 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." In addition to cited decisions and treatises, the Ninth Circuit asserted two logical bases for this conclusion: first, the fact that federal jurisdiction is not always assured (indeed, "virtually nonexistent") 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, exclusive federal jurisdiction would effectively pre-empt a large portion of a tribe's criminal jurisdiction. 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.
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 systems\^{158} and congressionally imposed limitations on tribal court sentencing authority\^{159} 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.\ldots
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).
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:

<table>
<thead>
<tr>
<th>Crimes by Parties</th>
<th>Jurisdiction</th>
<th>Statutory Authority</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Crimes by Indians against Indians:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>i. &quot;Major&quot; crimes.</td>
<td>Federal or tribal (concurrent)</td>
<td>18 U.S.C. § 1153</td>
</tr>
<tr>
<td>ii. Other crimes.</td>
<td>Tribal (exclusive)</td>
<td></td>
</tr>
<tr>
<td>b. Crimes by Indians against non-Indians:</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
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, Public Law 280 is clearly the most sweeping and significant of such delegations. In passing Public Law 280, Congress disrupted the traditional distribution of power over Indian country principally shared by the

<table>
<thead>
<tr>
<th>i. &quot;Major&quot; crimes.</th>
<th>Federal or tribal (concurrent)</th>
<th>18 U.S.C. § 1153</th>
</tr>
</thead>
<tbody>
<tr>
<td>ii. Other crimes.</td>
<td>Federal or tribal (concurrent)</td>
<td>18 U.S.C. § 1152</td>
</tr>
<tr>
<td>c. Crimes by Indians without Victims:</td>
<td>Tribal (exclusive)</td>
<td></td>
</tr>
<tr>
<td>e. Crimes by non-Indians against Non-Indians:</td>
<td>State (exclusive)</td>
<td></td>
</tr>
<tr>
<td>f. Crimes by non-Indians without Victims:</td>
<td>State (exclusive)</td>
<td></td>
</tr>
</tbody>
</table>

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.


164. See COHEN, supra note 72, at 344 (discussing the scope of Public Law 280).
Federal Government and the tribes.  

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, California, Minnesota, Nebraska, Oregon, and Wisconsin. These six states are commonly referred to as the “mandatory” Public Law 280 states. 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. 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 Metlakatlā, 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 L.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.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.


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. 425, 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 "exclude[] 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. 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. Congress' primary goal was to deal with the "lawlessness" on reservations and the "absence of adequate tribal institutions for law enforcement." In fact, the statute, as originally introduced, was concerned with law enforcement problems in the State of California exclusively. The Senate eventually decided to extend the statute's coverage to the other "mandatory" states believed to share similar law enforcement problems.

The Senate noted a serious jurisdictional problem in Indian country resulting from the existing federal scheme of concurrent tribal-federal jurisdiction. 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. 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.” 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.

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.”

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. 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.

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


193. See Bryan, 426 U.S. at 382 (citing the statement of Representative Sellery that transfer
terminating a costly federal responsibility.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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 Pottawatamie 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 to be "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.\textsuperscript{198}

A significant impetus in the evolution of the termination policy was the 1949 Hoover Commission Report on the state of Indian affairs.\textsuperscript{199} In its report, the Commission offered several recommendations to remedy the "Indian Problem."\textsuperscript{200} Its principal suggestion was to promote the "gradual integration of all Indians into the general population and economy."\textsuperscript{201} Although the Hoover Commission report first recommended assimilation, it was the 1953 House Concurrent Resolution 108\textsuperscript{202} that crystallized the Termination Period's goals into official congressional policy and set the assimilation process in motion.\textsuperscript{203}

Public Law 280 was enacted during the Termination Period,\textsuperscript{204}

\textsuperscript{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").


\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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 assimilating 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.

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. 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, 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, 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].\textsuperscript{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.\textsuperscript{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,\textsuperscript{212} were exempt because "each . . . ha[d] a tribal law-and-order organization that function[ed] in a reasonably satisfactory manner."\textsuperscript{213} Congress' desire was to resolve specifically designated law enforcement inadequacies.\textsuperscript{214} As stated above, this could best be achieved if Congress supplemented tribal jurisdiction with state jurisdiction, rather than supplant it.\textsuperscript{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.

\section*{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,\textsuperscript{216} it is no surprise that its criminal provision is more controversial. The questions that arise in relation to the criminal

\begin{footnotesize}
\begin{enumerate}
\item[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").
\item[211.] See Bryan, 426 U.S. at 379.
\item[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.
\item[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.
\item[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).
\item[215.] See supra note 187 and accompanying text.
\item[216.] See supra note 186 and accompanying text (detailing how civil jurisdiction was merely an afterthought).
\end{enumerate}
\end{footnotesize}
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. The civil section, section 1360, "contemplates the continued vitality and operation of the tribal government" 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. 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. Unfortunately, unlike its civil counterpart, there is no language in the criminal provision that expressly recognizes a parallel residual tribal authority over criminal matters. 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.

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." As outlined, the term "exclusive" is problematic because it could signify that the state's jurisdiction

218. Santa Rosa Band of Mission Indians v. Kings County, 532 F.2d 655, 663 (9th Cir. 1975).
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").
over criminal matters is exclusive of both federal and tribal jurisdiction rather than just federal jurisdiction.\textsuperscript{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.\textsuperscript{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

\textsuperscript{224} See generally infra Part IIIC (discussing exclusive state jurisdiction).
\textsuperscript{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."

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"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, 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. 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.

   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. For instance, in subsection (b) of the criminal section, section 1162, Congress lists the activities with which the state should not interfere. 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. However, it did not include such express language

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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. 715, 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").


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-governance\(^ {241}\) 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


\(239. \) 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. 102-176, § 2, 107 Stat. 2004, 204 (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." 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. Furthermore, statutes should be construed not "according to their technical meaning," but as the Indians would have understood them. Application of these canons of statutory construction has also been extended to treaties with Indian tribes.

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. Derived from the trust responsibility is the presumption that Congress' intentions toward tribes are beneficial to and protective of Indian tribes. Accordingly, the canons promote narrow constructions that prevent intrusion upon Indian interests 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. 573, 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) ("[T]he 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.\textsuperscript{254}

Because Public Law 280 is ambiguous, and because the "sparse legislative history"\textsuperscript{255} does not clarify Public Law 280's effect on tribal justice systems, the interpretive canons of Indian law should be applied.\textsuperscript{256} In the context of Public Law 280, the Supreme Court has already begun to apply these canons.\textsuperscript{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."\textsuperscript{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."\textsuperscript{259} It is clear that these canons were specifically intended to prevent such impacts on tribes.\textsuperscript{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.\textsuperscript{261}

C. No Grant of Exclusive State Jurisdiction in Section 1162

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

\begin{footnotes}

\item[254] See id. (asserting that canons of interpretation encourage broad interpretation, thereby limiting congressional power).


\item[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).

\item[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").

\item[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").


\item[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).

\item[261] See Bryan, 426 U.S. at 375 (holding that canons cannot support the eradication of tribal tax immunities under Public Law 280).
\end{footnotes}
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." 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. Each of these statutes uses the term "exclusive" to modify the jurisdiction of the United States. By analogy, a determination as to the term's resulting effect on tribal jurisdiction can provide insight into the meaning of Public Law 280. 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 IB (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.").


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. Amax 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.


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. 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." However, as early as 1891, the Supreme Court, in Ex parte Wilson, 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.

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, 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.

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. 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. According to Assistant Secretary of the Interior Loesch, the amendment was a clarification that should have been made earlier in the legislative process. 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. The need for clarification was the only reason for this particular 1970 amendment.

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. The term "exclusive," without more, does not effectuate a divestiture of tribal powers.

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 Metlakahla 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. 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, 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. This dynamic is a pervasive problem of statutory construction that often arises in federal Indian law. 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, or in light of subsequent shifts in federal Indian policy that reflect Indian self-governance and self-sufficiency rather than assimilation.

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).


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. 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* and *California v. Cabazon Band of Mission Indians*, that are predominantly viewed as representing the Supreme Court's support of a non-divestiture interpretation of Public Law 280. In both of these cases, the Court was asked to define the scope of the mandatory states' jurisdictional grant. 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

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


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).

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

a. Bryan v. Itasca County

In *Bryan*, 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. Upon review of the language of 28 U.S.C. § 1360(a), 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. 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. 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, but also to affirm its reading that tribal sovereignty was not altered. 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’ . . . .

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. It further ruled that Public Law 280 “was plainly not meant to effect total assimilation,” and that nothing in its legislative history suggests

296. See *Bryan*, 426 U.S. at 375, 393.
298. See *Bryan*, 426 U.S. at 384-85.
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.\footnote{304}

\textit{b. California v. Cabazon Band of Mission Indians}

In \textit{Cabazon},\footnote{305} the Court expanded on its ruling in \textit{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.\footnote{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.\footnote{307} If the law is criminal/prohibitory, it is enforceable under Public Law 280.\footnote{308} If it is civil/regulatory, as in the \textit{Cabazon} case, the state law is unenforceable.\footnote{309}

California asserted that it was merely trying to prevent the proliferation of organized crime.\footnote{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.\footnote{311} As in \textit{Bryan}, the Court in \textit{Cabazon} further defined the parameters of the state's jurisdiction,\footnote{312} but never stated that this authority preempted tribal criminal jurisdiction. Instead the Court reaffirmed \textit{Bryan}'s position that total assimilation was not the statute's purpose\footnote{313} and stressed tribal self-governance and the

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\item See id. at 387 (emphasis added).
\item 480 U.S. 205, 212 (1987).
\item See id. at 202.
\item See id. at 208. \textit{Cabazon} also clarified two other points raised by \textit{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.
\item See id. at 208.
\item 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).
\item See id. at 211.
\item See Monette, supra note 63, at 277 (stating that in its "federal preemption analysis" the \textit{Cabazon} Court gave greater weight to the federal policy to promote Indian self-determination than to states' interest in curbing organized crime). In \textit{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 \textit{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.
\item See \textit{Cabazon}, 480 U.S. at 208 (permitting the enforcement of criminal/prohibitory laws on Indian reservations).
\item See id. (citing Bryan v. Itasca County, 426 U.S. 373, 387 (1976), stating "[t]he Act
protection of tribal interests, such as encouraging tribal "self-sufficiency and economic development."

**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." In 1986, the Court reaffirmed in *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering* that it has never "found Pub. L. 280 to represent an abandonment of the federal interest in guarding Indian self-governance." 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."

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." 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

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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.
318. Id. at 892.
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.


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. See 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.\footnote{327}

2. \textit{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.\footnote{326} 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;\footnote{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.\footnote{350}

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.\footnote{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"\footnote{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-

\footnote{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.}

\footnote{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).}

\footnote{329. See supra notes 210-11 and accompanying text (discussing Bryan's ruling).}

\footnote{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").}


\footnote{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"). The Act essentially made many, but not all of the provisions of the Bill of Rights, applicable to tribes. 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. By doing so, it set a tone of disregard for tribal sovereignty. Under Title IV of the ICRA, Public Law 280 was amended to make tribal consent a prerequisite for future assumptions of jurisdiction. The amendment also permitted states in the future to assume only partial jurisdiction over certain subject matter.

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

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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).


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).
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." 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." 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 significantly and a new national Indian policy was articulated, ushering in the "Self-Determination" era, which continues through the present. 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 regretfully 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 FEVAR, 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{348} For instance, Congress did not find Public Law 280 inconsistent with the Indian Self-Determination and Education Assistance Act of 1975,\textsuperscript{349} cycle of Indian policy).

\textsuperscript{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).

\textsuperscript{347} See supra notes 98 & 280 and infra notes 349-55 and accompanying text (describing the Indian Tribal Justice Act and the Indian Self-Determination and Education Assistance Act).

\textsuperscript{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, 1931-1994, 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.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, 1998).

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

Congress also did not perceive that Public Law 280 was inconsistent with the goals of the Indian Tribal Justice Act of 1993\footnote{351} 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\footnote{352}.

Under this particular Act, Congress reaffirmed the legitimacy of tribal justice systems,\footnote{353} acknowledged the importance of those systems to Indian self-governance,\footnote{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.”\footnote{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.\footnote{356} Shortly thereafter, the Office of

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


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

\footnote{353}{See 25 U.S.C. § 3601(4) (1994) (“Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems . . . .”).}

\footnote{354}{See id. § 3601(5) (“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 . . . .”).}

\footnote{355}{See id. § 3601(6).}

\footnote{356}{See Remarks to Native American and Alaskan Tribal Leaders, 1994 PUBL. 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 effecting 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 Project\(^{358}\) 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 Period\(^{361}\) 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.\(^{364}\)

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\(^{357}\) 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).


\(^{361}\) 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 applied and Public Law 280 is analyzed in the context of increasing recognition of tribal self-government and the development of tribal justice systems, 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. 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. 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. Consequently, it has been argued that Public Law 280 has actually increased lawlessness in many areas.

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 Kizzie, 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.\(^\text{375}\)

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.\(^\text{376}\)

(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.\(^\text{377}\)

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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. 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.

(3) Amend Public Law 280 to require retroactive tribal consent to all assumptions of jurisdiction that were undertaken by mandatory and optional states alike. 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." Rather than dissipating since 1953, the negative sentiment has only increased with time.

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


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, 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.

B. Retrocession Plus

Through retrocession the Federal Government reassumes its jurisdictional responsibility, namely jurisdiction under the Major Crimes Act and the General Crimes Act. By establishing clear jurisdictional boundaries, retrocession inevitably vests tribes with heightened responsibility for the welfare of their communities. 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 intergovernmental cooperation among tribes, states, and the Federal Government, and enhanced respect for and recognition of tribal justice systems, including law enforcement, traditional dispute resolution, and tribal orders and judgments.


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." 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."  

Currently, there are at least 200 tribal law enforcement departments and 250 Indian court systems among over 550 federally recognized Indian tribes. 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.  

Although retrocession may be a preferred option for some Public Law 280 jurisdictions, 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).

390. See Wallace, supra note 42, at 152.
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. 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. 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 Act 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. 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. True meaningful reform,
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;

(2) congressional amendment of the Indian Civil Rights Act ("ICRA") to expand the tribal court sentencing options;

(3) a congressional enactment to overturn the holding in Oliphant v. Squamish Indian Tribe and work with tribal justice systems to enable the effective exercise of criminal jurisdiction over non-Indians;

(4) consistent with the Unfunded Mandates Reform Act 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).


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).


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.


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.\footnote{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.\footnote{406} Under the Indian Tribal Justice Act,\footnote{407} over $58.4 million annually was authorized for tribal court systems for the fiscal years of 1994-2000.\footnote{408} In addition, the Act provides resources for a comprehensive survey of tribal judicial systems to assess their resources, funding, and functions.\footnote{409} However, to date the BIA has

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\footnote{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").}

\footnote{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 detailing the lack of funding for basic tribal court functions, including personnel, reporting, records management, standards development and facilities").}


\footnote{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.\textsuperscript{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.\textsuperscript{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 systems—\textit{modus operandi};\textsuperscript{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.\textsuperscript{416} State and federal governments can learn much

\textsuperscript{410} See Myers \& Coochise, \textit{supra} note 391, at 148 ("Tribal courts have yet to receive a single benefit under the Indian Tribal Justice Act."); \textit{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 Shibles, President, National American Indian Court Judges Association, Before Comm. on Indian Affairs, U.S. Senate, Tribal Justice Programs, June 3, 1998, \textit{available in} 1998 WL 288992.

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


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

\textsuperscript{414} Melton, \textit{supra} note 53, at 133.

\textsuperscript{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 \textit{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 \textit{id.} at 126-27; see also \textit{id.} at 128-29 (contrasting American and indigenous court systems in chart form); Carey N. Vicente, \textit{The Reemergence of Tribal Society and Traditional Justice Systems, 79 JUDICATURE} 139, 195 (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”).

\textsuperscript{416} See generally \textit{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. With constructive inter-governmental cooperation, the effectiveness and fairness of the administration of justice in state, tribal, and federal justice systems will be enhanced. 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;
3. provide for greater state, federal, and tribal agreements/compacts to: share resources, settle jurisdictional disputes, address such issues as reciprocity and extradition; and discuss the modified application of the “exhaustion rule” 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;\(^4\)

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

(5) assure full faith and credit and comity to judgments and court orders;\(^4\)

(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.\(^4\)

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-I 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-I 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 276, 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 breakdown of law enforcement in some parts of Indian country. For this reason, prior solutions have undeniable, contemporary relevance and merit reconsideration.

One historical proposal that is interesting to consider is Senate Bill 2502, a 1978 bill proposed by Senator James Abourezk, then Chairman of the Senate Select Committee on Indian Affairs. 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.” 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]” and that meaningful solutions could not be restricted to “one statutory formula,” or resolved by the judicial processes alone. The bill affirmed that jurisdictional issues “are local in nature and should, wherever possible, be resolved at the local level ...” With that foundation, the bill provided for agreements and compacts based

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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; judicial enforcement of the agreements and compacts; and federal assistance for personnel or administrative expenses incurred through the execution of the agreements or compacts. 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. Under the bill, the federal presence in Indian country law enforcement was assured through: continued federal financing, mandatory Secretary of the Interior approval of all agreements and compacts, 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) (striken 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 (striken 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, 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.

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." 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

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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").

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.