Public Law 280 and its Applications: the Oppressive Effects of an Ambiguous Statute

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Prelude

“Public Law 280 is complicated. Many people have differing opinions about it, but I think the general consensus is that it is not working... We would like tribes to be treated with the same autonomy that states are, especially from a sovereignty standpoint, but also from a practical standpoint. Many of these crimes are not being prosecuted.”

-Lauren van Schilfgaarde, Tribal Law Specialist at the Tribal Law and Policy Institute

The experiences of Native Americans in the United States today need to be understood in terms of the framework of Federal Indian Law. Federal Indian Law encompasses an extensive history of treaties, agreements, statutes, and court cases that both define and limit tribal sovereignty.\(^2\) However, this law must not be conceptualized as a cohesive and linear trajectory that defines tribal status. Federal Indian Law is disparate and contradictory, often reflecting the historically racist and discriminatory policies of the United States government.\(^3\) It is important that this law is not misunderstood as one that is defined by tribes. The definition and limits of tribal sovereignty are negotiated among governing bodies at the tribal, state, and federal level. Federal Indian Law is deeply intertwined with histories of Native American oppression. However, this law must also be understood in a contemporary context, as it actively defines the daily realities of Native Americans in the United States today.\(^4\)

There is a duality of both the past and the present ingrained in Federal Indian Law. Public Law 280 must be understood in terms of this duality. Public Law 280 largely determines the quality of life for reservation-residing Native Americans in affected states

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\(^1\) Van Schilfgaarde, Lauren. Personal interview. 8 July 2015.


\(^4\) Ibid., §1.01, 6.
today. However, this is by no means a contemporary law. The law was passed in 1953, in the midst of an era of assimilation and termination-based governmental policies. During this period, the government ceased to recognize the tribal status of many different Native Americans tribes, resulting in the termination of important federal protections and services.\(^5\) The types of policies enacted during this time were designed with a clearly assimilationist agenda to integrate Native Americans with other American citizens.\(^6\)

Although assimilation and termination are no longer the basis of governmental policy, many laws that were historically passed with that intention remain in effect today. As a result, statutes such as Public Law 280 have antiquated goals, but still govern Native American affairs in a very contemporary manner.

The original aim of Public Law 280 was to transfer the federal responsibility of tribes to the state level.\(^7\) Specifically, this law transfers criminal and civil jurisdiction of actions in Indian Country from the federal government to certain states.\(^8\) The reasoning of policy makers behind this law was to assimilate Native Americans to the law enforcement realities of other American citizens.\(^9\) There are a multitude of differences between the rhetoric of the legislation and the manner in which the law was implemented.

States that are impacted by Public Law 280 were intended to have concurrent jurisdiction with tribal law enforcement. In practice, however, government and law enforcement


\(^6\) Ibid. 225. Ideologically, assimilationist policies are clearly ethnocentric. However, in practice, government-mandated assimilation has also been a distinctly racist practice. This will be expanded upon in Chapter 1.


\(^8\) Ibid. The distinctions between mandatory and optional Public Law 280 states will be clarified in Chapter 1. The mandatory states, which are completely affected by all components of Public Law 280 jurisdiction, are California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska.

\(^9\) Ibid. 8-9
officials viewed the state authority dictated by Public Law 280 as superseding and diminishing tribal jurisdiction. Public Law 280 has resulted in a multitude of conflicting court cases, follow-up statutes, and unfounded interpretations that have made the practical implementation of this law impossible to predict.

The complex legal structure of Public Law 280 reflects a long and extensive history of injustice against Native Americans. The inaccessibility of a comprehensive legal understanding of this law creates a specific type of intangible oppression: the oppression of uncertainty. Initially, a state of uncertainty may not seem oppressive. However, the ability of an individual to ensure his or her own well-being is dependent on a governmental system that is predictable and certain. In this country, one is constitutionally guaranteed the right to equal protection by law enforcement. The criminal justice system operates in conjunction with this by ensuring that those who reside in the United States are held accountable to the law. As an American citizen, one must rely on this basic premise in order to feel a sense of safety and to ensure an opportunity to prosper.

However, in Indian country, the government has not properly upheld its law enforcement responsibilities. Explicitly, Native Americans on reservation land are entitled to the same governmental protections. In practice, however, police officers and criminal justice personnel do not operate in a manner that allows for tribal well-being. The jurisdictional divides of Public Law 280 are so complex that neither law enforcement, nor the criminal justice system, properly implements them. As a result, Native Americans are denied the basic right to feel secure on reservation land. Tribal
members cannot properly ensure their own well-being when the government does not create a culture of predictability and certainty.

This thesis will closely examine the manner in which the oppression of uncertainty impacts tribes in Public Law 280 states. The ambiguity associated with this affects Native Americans in two distinct ways. The first issue is that the unclear legal rhetoric of Public Law 280 results in unpredictable legal interpretations and applications. The issue of discrimination and injustice against Native Americans is often viewed in a historical context of explicitly harmful governmental policies. For example, Andrew Jackson’s Indian Removal Act and the resulting Trail of Tears is unequivocally cited as oppression against Native Americans. However, this focus does not address the current manner in which the Federal government implements oppressive policies. Public Law 280 creates an intangible form of oppression through more subtle, far-reaching effects. Native Americans are subjected to inconsistent and unpredictable modern applications of a historic law. The second issue that arises from an oppression of uncertainty is the disempowerment associated with the inability to change this reality. Public Law 280 creates complex jurisdictional and statutory mazes that make counteracting the effects of the law impossible. Not only are Native Americans subjected to an outdated law, but they also have no legal avenue by which to change their own circumstances. In these two ways, an oppression of uncertainty directly impedes upon tribal sovereignty and the insurance of tribal well-being.

The complex scenario created by Public Law 280 and its effects presents an important opportunity for the judicial system. The courts have a deeply rooted obligation to uphold the civil rights and liberties ensured by the Constitution. As a result of the
injustice against Native Americans, both historically and currently, there is a moral obligation to use canons of construction that are favorable to Native Americans. Federal Indian Law canons of construction were established by Chief Justice John Marshall, and are still applicable today. The use of these canons is an important step in replacing a culture of uncertainty with one of empowerment.
Chapter 1: Contextualizing Public Law 280

“Racism is a reason. Some people have racist views. If not racist, then, perhaps, they have stereotypical views of Native Americans. Consciously or subconsciously, those views creep into their decisions.”

-Mark Vezzola, Directing Attorney of California Indian Legal Services

Public Law 280 is a complex piece of legislation that has obscure and far-reaching effects. However, Public Law 280 cannot be fully understood outside of the context of its history. The applications of this law today differ from the original goals and purposes during the time of its passage. Additionally, the original aims of the law can only be understood in the context of the intent behind prior legislation. Although legislation that impacts Native Americans varies in its goals and applications based on the era of passage, there are several overarching and recurring themes. There is a clear history of imbuing Native American law with the goals of assimilation and civilization, where the US government acts unilaterally on behalf of Native Americans. Based on factors such as the predominant ideology of the time, as well as changing leadership, the legislation impacting Native Americans is unpredictable in terms of both rhetoric and application.

I. Assimilation

Although the ideology surrounding Public Law 280, and the resulting Native American experience, can be traced back to colonialism, the law can be more narrowly and specifically understood in terms of the events of the 19th and 20th centuries. The

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10 Vezzola, Mark. Personal interview. 6 Aug. 2015.
11 Civilization policies stem from the historical governmental desire to “civilize” and “acculturate” Native Americans.
Dawes Act was passed in 1887 and framed many of the issues in the following century. It legally dismantled the reservation system by dividing reservations into individual plots that were to be distributed among Native American families. After accepting their designated plot of land, the United States government would then grant citizenship. The head of each family received 160 acres, while single individuals over eighteen years of age and orphaned children both received 80 acres. If a reservation did not have enough land to make such divisions, then land assignments would occur in the same proportion. However, it was often the case that there remained extra land at the end of these assignments. The remaining areas were considered to be “surplus land” and were then sold to white settlers. The money generated from these sales was then deposited into the United States Treasury. The annual interest accumulated was intended to benefit Native Americans in whatever manner the government saw fit.

The justifications for this act largely adhered to assimilation-based ideologies, while masking the less “noble” intent of white settlers and development companies, such as the railroad industry. Reformers at the time asserted that the Native American “race” would “advance more rapidly” with the dissolution of tribal landholdings and tribal leadership. The money from the sale of the land was to be used for the “civilization” of

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13 An Act to Provide for the Allotment of Lands in Severalty to Indians on the Various Reservations (General Allotment Act or Dawes Act), Statutes at Large 24, 388-91, NADP Document A1887.
14 Ibid. The statutory language of the Dawes Act uses the measurements of “one-quarter of a section” and “one-eighth of a section.” These measurements are equivalent to 160 acres and 80 acres, respectively.
17 Ibid. 85
Native American tribes.\textsuperscript{18} Indeed, the US government explicitly furthered this agenda by granting citizenship through land allotments. However, the legislators also clearly used the inevitability of Manifest Destiny ideologies to support white business ventures at the expense of Native Americans. Native American land was viewed as “a barrier against the swelling tide of American commerce”\textsuperscript{19} and as an impediment to “white civilization.”\textsuperscript{20} The provision in the Dawes Act that sold “surplus” land reflected the notion of many legislators that Native Americans should not “occupy” land that they “could not use.”\textsuperscript{21} The intention of the Dawes Act, alone, reveals the recurring issues faced by Native Americans in legal matters. The US government imposed its own values and beliefs on Native Americans in all aspects of life. While goals of “assimilation” and “civilization” were being advocated, no consideration was given to the right of tribal sovereignty and autonomy. The Native American voice should have been emphasized, rather than overpowered by imposed narratives of assimilation and civilization.

Assimilation policy purported to support Native American interests, while it, in fact, prioritized governmental and business interests. Since the Dawes Act was rooted in assimilation ideologies, its passage led to a corrupt and disastrous application of the law. Before the passage of the Dawes Act, Native Americans held 155 million acres of land. By the turn of the century, they held only 77 million acres.\textsuperscript{22} By the time the Dawes Act was officially abandoned, 86 million acres of Native American land had been sold to white settlers and development companies. These companies were often associated with

\textsuperscript{18} Ibid. 88
\textsuperscript{19} Ibid. 86
\textsuperscript{20} Ibid. 87
\textsuperscript{21} Ibid. 86
the railroad industry, which would use this “free land” as an advertising incentive to encourage new settlers. Much of the land acquired by white settlers and development companies was obtained through the “surplus” land provision, while the rest was acquired through debt, fraud, and deception. 23 One of the most large-scale consequences of this was the dissolution of territory promised to the Five “Civilized” Tribes, and the resulting formation of the state of Oklahoma. The Five “Civilized” Tribes, or the Cherokee, Chickasaw, Choctaw, Creek, and Seminole were promised this land as a provision of the Indian Removal Act of 1830. They owned approximately half of what is now eastern Oklahoma, which was land rich in oil, coal, and natural gas. The tribal governments refused to implement the allotment policy of the Dawes Act and sell the “surplus” land. In response, the federal government forced the sale of this land, and broke apart the strong infrastructure that the tribes had developed. The Five “Civilized” Tribes had strong governments and schools, and had even designed plans for incorporating railroad routes into their territory. 24 Instead, mining and railroad companies took control of a good portion of their land in 1902 25, and by 1907, Oklahoma was officially admitted as a state. 26 The Dawes Act resulted in destroying tribal infrastructure and land ownership, and instead encouraged business expansion in the west.

The diminishing landholdings of Native Americans contributed to a larger overarching narrative about the existence of Native American people in general. By the beginning of the 20th century, many Americans felt that the “Indian problem” 27 was

23 Ibid. 304
24 Ibid. 309
25 Ibid. 310
26 Ibid. 312
27 The phrase “Indian problem” demonstrates the ideology of white Americans at this time. The popular view was that in light of the “onslaught of white civilization,” tribal traditions and cultural identities were “irrelevant.” The nature of this ideology is epitomized by Richard Henry Pratt, who believed that the best
over. Compared to the estimated Native American population of 10 million in 1300, the total population by 1900 was at a historic low of 237,196. The dominant ideology of assimilation assumed that this remaining population would disappear entirely when Native Americans inevitably integrated into the larger population. The forcible sale of their lands had the larger impact of enforcing the notion that Native Americans were “vanishing.”

II. “The Indian New Deal”

In 1928, the United States government finally seemed to take accountability for the issues impacting Native Americans. At this time, the Meriam Report was issued, detailing a three-year study of the economic and social conditions of Native Americans. The report revealed the reality of poverty and suffering on reservations, and how the failures of the Dawes Act impeded the ability to form self-sustaining economies on reservations. The report detailed how Native Americans had been relegated to the worst lands, usually locations that were not desired by white settlers. Critical facilities covering needs such as health and education were virtually nonexistent. The report advocated for way to combat the “Indian problem” was to “Kill the Indian, save the man.” Assimilation and civilization was geared towards integration into white society and “killing” the Native American identity.


29 Ibid. 300
30 Ibid. 300
31 Ibid. 330
32 Ibid. 304
structural reforms in land management, support of Native American community life, and investment in schools and hospitals.\textsuperscript{33}

On a congressional level, implementing the suggested reforms became a focal point of John Collier and other social reformers. As Commissioner for the Bureau of Indian Affairs (BIA), Collier proposed a thorough reform of Federal policy dealing with Native Americans.\textsuperscript{34} He developed the Indian Reorganization Bill, which explicitly aimed to reorganize tribal governments and resuscitate reservation economies. Particular focus was placed on building roads, water facilities, and developing small-scale industries. The bill specifically addressed issues resulting from the Dawes Act, calling for the consolidation of fractionalized allotted lands and the return of “surplus” land back to the tribes. Additionally, Collier advocated for the creation of special Native American courts that would have jurisdiction on reservations and would oversee civil and criminal law enforcement.\textsuperscript{35} The Indian Reorganization Bill also emphasized the importance of preserving Native American heritage in education, and having Native Americans hold jobs in the BIA.\textsuperscript{36} Collier’s proposed reforms matched his own beliefs in promoting cultural pluralism rather than assimilation.\textsuperscript{37} Additionally, Collier consulted with Native American tribes before creating the bill. He sent out questionnaires to tribes to learn of

\textsuperscript{33} Ibid. 331
\textsuperscript{35} Ibid. 95
\textsuperscript{37} Ibid. 335
what problems they considered to be central. Prior to 1934, Native American tribes were rarely consulted on legislation, even when introduced for their supposed benefit.\(^{38}\)

Although the intent of the bill was strongly supportive of Native American interests, the House and Senate committees significantly changed the bill. Congressional conservatives and those representing the business interests of railroads and ranchers, all provided intense opposition to the bill. The Indian Reorganization Act, often known as the Indian New Deal, did not consolidate Native American lands or return lost land ownership as a result of the Dawes Act. The provision in the bill regarding special courts was eliminated, and the aims towards improving education and self-government were much abbreviated.\(^{39}\) The Indian Reorganization Act allowed for tribes to constitute themselves as legal entities through the drafting of a constitution and the adopting of it through a tribal referendum.\(^{40}\) The changes to the original bill made the Indian Reorganization Act limited in its effectiveness. However, the greatest influence of the Act was the creation of a network of tribal governments with rights and responsibilities to the federal government.

Although the Indian Reorganization Bill demonstrated the capacity of the US government to prioritize Native American interests, the struggle with its passage demonstrates the recurring problems in the history of Native American legislation. The Meriam Report and the Bill both succeeded in constructing the ideals of Native American empowerment and cultural pluralism, while moving away from the historically dominant


\(^{40}\) Ibid. 336-7
ideologies of assimilation and civilization. Collier even made sure to include Native American input when drafting the Bill.\(^{41}\) However, the process of turning the Meriam Report and the Indian Reorganization Bill into law demonstrates the unpredictability of legislative attempts to correct Native American issues. Conservative congressional members, supported by ranchers and the railroad industry, heavily altered the original legislation. The hard work of many dedicated to Native American rights was not enough to ensure the complete success of the Indian Reorganization Act. Native Americans were forced to rely on a governmental system for their well-being that could not predictably ensure their rights, even when there were the best of intentions. The issue of changing leadership also came into play as a governmental impediment for the insurance of Native American rights. By 1945, Collier was facing increased criticism by conservative legislators and those with business interests, due to his resistance of assimilationist policies. Collier was forced to resign as Commissioner of Indian Affairs and was replaced by Dillon Meyer, the former director of Japanese internment camps.\(^{42}\)

III. Termination

This change in leadership reflected the transition of governmental policy from cultural pluralism to termination. By the late 1940’s, the ideology of the “Indian problem” was reemerging in a new form. During this time, the government had discovered (without any tribe’s knowledge) that Native American reservations held over


one-third of the United States’ mineral resources.\textsuperscript{43} Coinciding with this, was the congressional aim of Republicans from western states to dismantle the reservation system. In 1949, the Hoover Commission proposed that Native Americans be “integrated economically, politically, as well as culturally” into American life and that the government should “terminate” its responsibility for Native American affairs.\textsuperscript{44} In 1953, Senator Arthur Watkins passed legislation to make \textit{termination} the new official policy in dealing with Native Americans. Watkins played a large part in dismantling the programs and services that supported the reservation system, as well as the bureaucracy that administered it. Many tribes were terminated during this time, meaning that they lost significant federal protections and services. Tribes lost their trust status and had to start paying taxes, which often meant selling tribal lands in order to meet tax obligations. These tribes also lost services relating to education and health, and had to finance their own services.\textsuperscript{45}

Public Law 280 was passed in the same year that the governmental termination policy was declared. The main aim of this law was to counteract “lawlessness” on reservations by altering the jurisdictional arrangement of law enforcement.\textsuperscript{46} Before Public Law 280, with the exception of a small number of reservations, criminal jurisdiction on tribal lands was largely a matter between the federal government and the tribes themselves. The jurisdiction of states was limited to crimes on tribal land where both the offender and the victim were non-Native American, or to crimes by non-Native

\textsuperscript{43} Ibid. 306
\textsuperscript{44} Ibid. 352
\textsuperscript{45} Ibid. 355
Americans where there was no victim.\textsuperscript{47} Prior to Public Law 280, the federal government’s criminal jurisdiction over Native Americans on reservations was divided into a few categories. The federal government would have jurisdiction when both Native American and non-Native American people were involved in certain federally and state-defined offenses. This included both major and minor crimes, regardless of who was the offender or the victim. The federal government would have further jurisdiction over certain specified major criminal offenses when one Native American was the offender and another, the victim. Finally, the federal government had jurisdiction in issues relating to trust responsibility, such as liquor control or hunting regulations, regardless of whether or not the crime was committed by a Native American. Prior to Public Law 280, crimes that were less serious and committed by one Native American against another, or were victimless crimes with Native American offenders, would fall under exclusive tribal jurisdiction.\textsuperscript{48}

The reasoning behind the exclusion of state criminal jurisdiction on reservation land stems back to the historical relationship that tribes have shared with the federal government. Established through treaties, statutes, and court cases, Native American tribes have a special government-to-government trust relationship with the US federal government.\textsuperscript{49} The basis for this is that states’ interests in matters such as governing power and resource control often create major conflicts with tribal claims to self-

\textsuperscript{47} Ibid. 5
\textsuperscript{48} Ibid. 6
\textsuperscript{49} The relationship between the Federal government and Native Americans tribes was largely developed through Chief Justice John Marshall’s court decisions. Specifically, three influential cases of his are together known as the “Marshall trilogy,” and are fundamental to Federal Indian Law. The specific “guardian” relationship of the Federal Government over Native Americans was defined in \textit{Cherokee Nation v. State of Georgia} (1831) with the categorization of tribes as “domestic dependent nations.” The importance of Chief Justice Marshall in Federal Indian Law and associated canons of construction is expanded upon in Chapter 5.
governance and territory boundaries. The passage of Public Law 280, for the first time, inserted state criminal jurisdiction into a jurisdictional balance that was previously one between Native American tribes and the United States federal government.\textsuperscript{50}

At the time of its passage, Public Law 280 only applied to five states: California, Minnesota, Nebraska, Oregon, and Wisconsin. The law became applicable to Alaska after it achieved statehood in 1958. In states where Public Law 280 applied, also known as \textit{Public Law 280 states}, two key categories of federal criminal jurisdiction were withdrawn and transferred to state jurisdiction: crimes between Native Americans and non-Native Americans and major crimes involving only Native Americans.\textsuperscript{51} Public Law 280 created an elaborate framework for when state jurisdiction is exclusive and for when tribal jurisdiction can be concurrent on reservation land. When both the offender and the victim are not Native American, the state has exclusive jurisdiction. When the offender is not Native American and the victim is, the state has exclusive jurisdiction. The state continues its exclusive jurisdiction when the offender is not Native American and the crime is victimless. However, when the offender is Native American and the victim is not, the state has jurisdiction that can be concurrent with the tribe. When both the offender and the victim are Native American, the state also has jurisdiction that can be concurrent with that of the tribe. Finally, when the offender is Native American in a victimless crime, concurrent jurisdiction can exist between the state and the tribe.\textsuperscript{52}

Public Law 280 also granted states civil jurisdiction over tribal land. The law declares that states have jurisdiction over “civil causes of action” when Native Americans

\textsuperscript{50} Ibid. 6
\textsuperscript{52} Ibid. 5
are involved.\textsuperscript{53} Specifically, the statute reads that “civil laws that are of general application to private persons or private property” apply in Indian country to the same extent as to the rest of the state.\textsuperscript{54} However, Public Law 280 also explicitly sets limits on state civil jurisdiction in terms of “alienation, encumbrance, taxation, and use of property.”\textsuperscript{55} States cannot exercise jurisdiction over trust and restricted Native American property. This limitation extends to hunting and fishing rights protected by the federal government, as well. Further, states cannot impose state taxes on reservation land.\textsuperscript{56} However, upon its passage, the primary intent of Public Law 280 was to deal with criminal issues rather than civil ones.\textsuperscript{57} As a result, further clarification about state involvement in tribal civil matters was only later defined. \textit{Bryan v. Itasca County} (1976)\textsuperscript{58} and \textit{California v. Cabazon Band of Mission Indians} (1987)\textsuperscript{59} would later seek to clarify the limits to state civil jurisdiction over regulatory matters.

In both civil and criminal matters, Public Law 280 did not explicitly eliminate tribal jurisdiction. Both historically and currently, however, in practice this has often been the case. For example, the Department of Interior has often used this law as justification for denying tribes in Public Law 280 states funding to bolster tribal law enforcement.\textsuperscript{60} Considering the context of assimilation and of dismantling the reservation system, the practical outcome of limiting tribal jurisdiction is consistent with other policies of the time. After World War II, there was an overarching priority to reduce the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{53} Public Law 280. Pub. L. 83-280. 28 USC Sec 1360. 1953
\item \textsuperscript{54} Ibid.
\item \textsuperscript{55} Ibid.
\item \textsuperscript{56} Ibid.
\item \textsuperscript{57} Bryan v. Itasca County, 426 U.S. 373 (1976)
\item \textsuperscript{58} Ibid.
\item \textsuperscript{59} California v. Cabazon Band of Mission Indians, 402 U.S 202 (1987)
\end{itemize}
\end{footnotesize}
size of the federal budget. The Bureau of Indian Affairs was viewed as a good source from which to cut funding, since the ideology of the time favored cultural integration and the elimination of “special treatment.” The rhetoric of the House and Senate Committee reports at the time of Public Law 280’s passage reflect the assimilationist and civilization-based aims of the legislators. In the “explanation” and “background history of this legislation” sections of these reports, the goals of the legislation are articulated. Public Law 280 was intended to “withdraw Federal responsibility” and allow for “termination” of Native American “subjection” to Federal laws. This language mirrors the termination-based ideology of the time. Civilization-based rhetoric is evoked when the legislators express that Native Americans have “reached a stage of acculturation and development” that allows them to benefit from state civil jurisdiction. The historical context of Public Law 280 explains why the law is often used as a means to limit tribal autonomy, despite no explicit indications of this in the law.

This law needs to be understood not only in terms of civil and criminal jurisdiction, but also in terms of its applicability to two categories of states. Public Law 280 states are divided into mandatory and optional states based on the degree of jurisdictional transfer and the date in which this transfer occurred. Mandatory Public Law

61 Ibid. 702
62 The following quotations are stated in both the Senate and House reports, demonstrating that the rationale for Public Law 280 was the same in both houses. As a result, the following citations will reference both publications.
United States, Cong. House. Committee on Interior and Insular Affairs, Amending Title 18, United States Code, Entitled “Crimes and Criminal Procedure,” With Respect to State Jurisdiction over Offenses Committed By or Against Indians in the Indian Country, and to Confer on the State of California Civil Jurisdiction over Indians in the State. 83rd Cong, 1st sess. Report No. 848. July 16, 1953. 3
63 Ibid. Both 3.
64 Ibid. Both 3.
280 states are the ones explicitly mentioned in the 1953 version of the law, with the addition of Alaska after the passage of its statehood in 1958. These states assumed all aspects of federal jurisdiction over tribes as defined by Public Law 280. Optional states, however, assumed this jurisdiction to different degrees. These states differ in their implementation of this law on a case-by-case basis. Additionally, any states that adopted the law after 1968, operate differently than mandatory Public Law 280 states. A long overdue tribal consent clause was added to Public Law 280 in 1968, which changed how future states could implement the law.

IV. The Civil Rights Era

The date of this amendment must be understood in the context of the time period of the 1960s and 70s. 1961 marked the end of the termination era, and instead, saw the beginnings of a national Native American resistance. The National Congress of American Indians held a conference in Chicago and declared termination policies to be “the greatest threat to Indian survival since the military campaigns of the 1800s.” This conference was the largest multi-tribal gathering that had occurred in decades, and paved the way for a new Native American consciousness of resistance. As a result of the conference, President Kennedy created a task force on Native American affairs, which led to the official overturning of the termination policy. Resistance movements in the following

67 Ibid. 6
68 Ibid. 14
69 Ibid. 11
71 Ibid. 361
72 Ibid 362
period would include the creation of the American Indian Movement and the occupation of Alcatraz Island.\textsuperscript{73}

Beginning in 1961, the Senate Subcommittee on Constitutional Rights began to investigate the constitutional rights of Native Americans. The subcommittee conducted extensive hearings and discussed specific bills from their investigative findings.\textsuperscript{74} Eventually, this process led to the development of Senate Bill 1843, which was presented to Congress in December of 1967.\textsuperscript{75} Senator Sam Ervin Jr., the Chairman of the subcommittee, presented a provision to amend Public Law 280 by preventing assertions of state jurisdiction without tribal consent.\textsuperscript{76} Prior to this, states were the only parties that had to legally consent to the assumption of federal jurisdiction. Tribes had no voice in this process, although they were the ones to be directly impacted by state assumption of federal jurisdiction. As referenced in the Congressional Record, Senator Ervin states that tribes were “critical” of Public Law 280 because of its “unilateral application of State law” over all tribes “without their consent.”\textsuperscript{77} He further references the Summary Report of the subcommittee, which reiterates that the states have “erred” by assuming jurisdiction in a manner “clearly against the wishes of the Indian peoples affected.”\textsuperscript{78} Both Senator Ervin and the subcommittee determined that a tribal consent precondition should be implemented before states could assume Public Law 280 jurisdiction.

The Bill that Senator Ervin presented would ultimately result in the Indian Civil Rights Act (ICRA), which amended Public Law 280. Despite the improvements that the

\textsuperscript{73} Ibid 367
\textsuperscript{75} Cong. Rec. 7 Dec, 1967: S181153
\textsuperscript{76} Ibid. S18155
\textsuperscript{77} Ibid. S18156
\textsuperscript{78} Ibid. S18156-7
amendment made, there were still significant issues. The fundamental issue was that ICRA only prevented future assertions of state jurisdiction without tribal consent.\textsuperscript{79} Future tribes would have to agree to their state’s assumption of federal jurisdiction, but states that already had Public Law 280 jurisdiction were allowed to maintain it. This meant that tribes in existing mandatory Public Law 280 states would have no avenue by which to oppose state jurisdiction. The other issue centered on the process of retrocession. ICRA dictated the retrocession process as unilaterally implemented by the states. States had the sole power to determine whether Public Law 280 jurisdiction would be returned back to the federal government. Tribal members, the very people affected by Public Law 280 jurisdiction, could not initiate this retrocession process.\textsuperscript{80}

Public Law 280 was created primarily in light of governmental issues such as the need for budget cuts, with assimilationist ideology used as a justification for the supposed benefit to Native Americans. The history of its passage demonstrates that tribes do not have control over legislation that primarily and directly impacts them. In fact, it was changing leadership in the 1940s that led to the governmental shift in focus from Native American empowerment to assimilation. The amendment passed in 1968 demonstrates the immense unpredictability in governmental legislation. After years of hearings and investigations, the Public Law 280 amendment in 1968 did not change the reality of tribes already living in mandatory Public Law 280 states. Although the amendment demonstrates a limited willingness in enabling Native American autonomy, the overarching reality is that the government prioritizes state interests over tribal well-being. Further, the policy of the federal government to save money rather than to prioritize

\textsuperscript{80} Ibid. 13
Native American interests would lead to future issues of unpredictability in the applications of this law.

One thing is certain: the basic premise of the issues surrounding Public Law 280 mirror the issues of other historical legislation impacting Native Americans. As with the Dawes Act and the official Termination policy, white Americans are being prioritized under the guise of Native American assimilation and civilization. Even when the intentions of legislation are positive, such as with the Meriam Report, the Indian Reorganization Bill, and the 1968 Public Law 280 amendment, the construction of the legislation and its applications remain unpredictable. This unpredictability creates an oppression of uncertainty that has impacted Native Americans both historically and today.
Chapter 2: Practical Effects of the Law

“It is about education. Ideally, it would be nice to avoid having to litigate. But if you have a county saying that a tribe has no criminal jurisdiction on its reservation over Indians, then you do not have much choice.”

- Dorothy Alther, Executive Director of California Indian Legal Services

Public Law 280 was passed in an era where termination-based policies were the primary legislative goal that related to Native Americans. These types of ideologies framed the legislative history of the law, as well as its explicit and implicit goals. Explicitly, Public Law 280 was geared toward eliminating “lawlessness” on reservations. Implicitly, the law was aimed at reducing the federal budget and federal obligation toward Native Americans. However, over sixty years later, the context in which Public Law 280 was originally passed has changed, while the rhetoric of the law has essentially remained the same. Since the time of Public Law 280’s passage, the practical effects of the law have differed from what the law explicitly states. Public Law 280 contributes to an oppression of uncertainty that the Native American community continually must face. The complex jurisdictional divisions dictated by this law have resulted in a lack of its understanding by both law enforcement and criminal justice agencies. These agencies also exhibit resistance and hostility to Public Law 280-related issues. These factors, combined with more tangible issues such as funding, have resulted in the use of the law as a means of inhibiting tribal sovereignty.

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81 Alther, Dorothy. Personal interview. 12 Aug. 2015.
I. Educating Law Enforcement/Criminal Justice Personnel

The practical effects of Public Law 280 are largely prevalent, but they are nonetheless underreported. There is limited academic research with regard to the type and scope of problems that this law creates. As a result, much of the research for this thesis comes from my first hand experience at California Indian Legal Services (CILS). CILS was founded in 1967, and has committed itself to advocating for the rights and interests of Native Americans in the state of California. CILS is a firm that deals with Federal Indian Law, and holds the BIA, law enforcement, and criminal justice agencies accountable for mistreatment, inefficient services, and miscarriages of the law. CILS has four different offices throughout the state of California: in Bishop, Escondido, Eureka, and Sacramento.83 I worked as an intern at the Escondido office during the summer of 2015. During this time, I was able to make contacts within the Native American advocacy community, and was able to discuss Public Law 280-related issues with several employees at the firm. My research on the practical impact of this law is largely gathered from interviews which I conducted during my time at CILS, as well as from first hand experiences that I had while at the firm.

The primary issue that my informants addressed with me was that law enforcement and criminal justice personnel did not have a comprehensive understanding of Public Law 280. Despite the fact that this law creates complex jurisdictional issues that are imperative to understand, most police officers and judges do no receive formal training about Public Law 280 and its implementation. The Executive Director of CILS,

Dorothy Alther, described to me how a key component of her job is “education.” As an officially designated Public Law 280 “trainer,” she has facilitated over one hundred Public Law 280 presentations, and has trained hundreds of district attorneys and local law enforcement agents. The main goal of Alther’s presentations is to clarify “what Public Law 280 did, and more importantly, what it didn’t do.” The largest misconception that she encounters is that Public Law 280 is a “divestiture piece of legislation” that has resulted in Public Law 280 states assuming total jurisdiction. Most law enforcement and criminal justice personnel understand that the law allows for state jurisdiction, but few are aware that this jurisdiction is intended to be concurrent with tribal law enforcement. This misconception is largely shaped by the history of Public Law 280’s passage. Despite the law explicitly allowing for concurrent tribal and state jurisdiction, the original intent of the law was, in no manner, geared towards encouraging tribal sovereignty. The intention of the law was to save the federal government money, rather than to prioritize Native American interests. As a result, the rhetoric of Public Law 280 that maintains tribal sovereignty is easily overlooked, since lawmakers at the time of its passage never intended to prioritize it.

Sentiments regarding the importance of continuing education on Public Law 280 are reiterated by Mark Vezzola, the Directing Attorney at the Escondido location of CILS. Vezzola emphasizes how politicians, government agents, and county police officers need to understand the limitations that this law places on their rights in Indian

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84 Alther, Dorothy. Personal interview. 12 Aug. 2015.
85 Ibid.
86 Ibid.
87 Ibid.
Country. He emphasizes that although the law was passed over sixty years ago, “it is still very misunderstood.”\(^89\) Confusion regarding jurisdictional divides creates a climate that enables state abuse of authority. Vezzola discusses how although there are issues with the rhetoric of Public Law 280, the primary concern lies in the interpretation. Specifically, he remarks, “So the law is written down. Could it be improved? Yes, but some people aren’t following it, even the way that it’s written.”\(^90\) By educating people “on what the law actually says,”\(^91\) Native American interests will be furthered. Although a large part of an attorney’s job at CILS is to litigate issues, Vezzola explains that non-legal avenues can have a significant impact on the manner in which Public Law 280 is implemented.\(^92\) Education of law enforcement and criminal justice personnel can potentially have more far-reaching effects in furthering the stated provisions of Public Law 280.

The complexity of this law creates a distinct challenge when attempting to educate both the public and governmental employees on its various components. This issue was highlighted for me when I interviewed Lauren van Schilfgaarde, a Tribal Law Specialist at the Tribal Law and Policy Institute (TLPI), in West Hollywood, California. I met van Schilfgaarde through connections that I forged at CILS. TLPI is a non-profit Native American organization that promotes the enhancement of justice in Indian Country through trainings, research, and technical assistance programs.\(^93\) Van Schilfgaarde specifically provides technical assistance to tribal courts and researches legal and policy issues that impede tribal sovereignty. As a result, van Schilfgaarde is

\(^89\) Vezzola, Mark. Personal interview. 6 Aug. 2015.
\(^90\) Ibid.
\(^91\) Ibid.
\(^92\) Ibid.
familiar with Public Law 280 and the complications that it presents. She describes how
the fact that “case law is changing all the time” furthers this complexity. A great deal of
her work at TLPI is education, alone. Specifically, Van Schilfgaarde educates people on
the tribal, state, and federal levels about Public Law 280 and describes the great difficulty
in doing so. She discusses how if one lives on a reservation, Public Law 280
“dramatically affects your life,” yet without a law school education, “it’s hard to figure
this out.” Dorothy Alther echoed a similar sentiment to me, describing that due to the
intricacy of the law, an individual’s “head is spinning” by the end of a presentation.

Public Law 280 has immense ramifications for Native Americans residing in
Indian Country. Yet, due to the complex jurisdictional issues that the law creates, many
law enforcement officers, criminal justice agents, and community members do not
understand what Public Law 280 dictates. The very people in charge of enforcing this law
do not understand its boundaries, and the people that the law impacts do not understand
the rights it affords them. This outcome clearly demonstrates how an inaccessibility of
understanding leads to an oppression of uncertainty.

II. Managing Hostile Attitudes

Additionally, inaccurate jurisdictional divides can be so engrained in law
enforcement and criminal justice personnel, that education is met with confusion and
hostility. Dorothy Alther explained to me that the historical misrepresentation of Public
Law 280 has proven to be challenging when educating people on the parameters of the

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94 Van Schilfgaarde, Lauren. Personal interview. 8 July 2015.
95 Ibid.
96 Alther, Dorothy. Personal interview. 12 Aug. 2015.
law. She specifically described to me an encounter that she had after conducting a Public Law 280 presentation for employees at the California State Attorney General’s office. An employee approached Alther and complimented her on the presentation, but he told her that she was mistaken when referencing that tribes have concurrent criminal jurisdiction on reservations in the state. He claimed that states, in fact, have exclusive criminal jurisdiction on the reservation. He felt so strongly about this fact that he believed that the Executive Director of a law firm, specializing in Federal Indian Law, who has given hundreds of similar presentations, was mistaken. Alther remarked to me, "It's 2015, and this man is an Attorney General." She described to me how "shocking it is, in this day and age...that you could still have individuals that just don't get it." The reaction of the Attorney General reflects not only ignorance, but also clear opposition to understanding Federal Indian Law in a manner that furthers Native American interests. Despite all of the litigation and work that CILS has accomplished, individuals still adamantly ignore the basic tents of Public Law 280.

Similar challenges were echoed by other CILS attorneys that I interviewed when describing the issues that they face regarding Public Law 280. Mark Radoff, the Senior Staff attorney at the Escondido office of CILS, highlights this as a primary issue that he has faced. He described that he witnesses “prejudice” and “hostility” towards the tribes from local governments. Lauren van Schilfgaarde describes that the prevalent attitude of local law enforcement in attending to Native American issues is “a general unwillingness to do it.” Dorothy Alther highlights how the relationship between tribes

\[\text{\textsuperscript{97}}\] Ibid.  
\[\text{\textsuperscript{98}}\] Ibid.  
\[\text{\textsuperscript{99}}\] Radoff, Mark. Personal interview. 7 Aug. 2015.  
\[\text{\textsuperscript{100}}\] Van Schilfgaarde, Lauren. Personal interview. 8 July 2015.
and local law enforcement/criminal justice personnel varies on a “county by county” basis. In counties that lack this cooperation, she remarks that the situation creates additional problems.\(^{101}\) Tribal dissatisfaction with these agencies is often rooted in difficult relations that lack friendliness and trust. The resistance of local law enforcement stems from complicated histories and experiences with Native Americans. Historical Native American oppression, combined with historically combative law enforcement practices, continue to define several aspects of these relations today.

Further, resistance surrounding education of Public Law 280 is reflective of a larger divide between tribes and the state law enforcement/criminal justice personnel. Federal and state agencies generally share a common culture regarding the roles and procedures of police departments and court systems. This common culture is rooted in a shared history that is often assumed to be shared with the public, as well. However, this understanding and history is not shared with Native Americans living on reservations. Rather, Native Americans have a shared understanding in the importance of tribal government, cultures, and community. These elements are integral to the furthering of tribal sovereignty.\(^{102}\) Historically, tribes each had their own methods of criminal justice that largely deviated from the American adjudication system. They focused on the restoration and preservation of relations, rather than on punishing the offender.\(^{103}\) As a result, the manner in which local law enforcement operates deeply conflicts with fundamental Native American ideas of justice. Further, law enforcement and criminal justice personnel are generally uninformed about tribal histories and cultures, which only

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\(^{101}\) Alther, Dorothy. Personal interview. 12 Aug. 2015.
\(^{103}\) Ibid. 31
furthers the problem. In this manner, issues regarding the understanding and implementation of Public Law 280 stem from larger challenges relating to fundamentally different ideas of justice. As a result of this cultural divide, the conception of “concurrent” jurisdiction was, by its definition, bound to create confusion and uncertainty. Cultural sensitivity training of state law enforcement and criminal justice personnel could potentially have far-reaching effects in mending this divide.

Although problematic historical relations may implicitly account for the resistant attitude of law enforcement, a more explicit reason directly relates to issues of taxation. Public Law 280 could be considered an early form of an unfunded mandate. An unfunded mandate is federal legislation that imposes requirements on lower governments and agencies without providing accompanying federal funding. The result of unfunded mandates is that the lack of funding displaces the other essential services of lower governments. In 1995, the Unfunded Mandates Reform Act was passed by Congress in an attempt to curb the passage of this type of legislation. However, Public Law 280 was passed long before this in 1953. The law largely resembles an unfunded mandate by imposing counties in Public Law 280 states to assume jurisdiction on tribal land without providing a monetary base for these services. Trust land on reservations is exempt from county property taxes, and residents of reservations are exempt from state taxes if money earned and purchases made occur on reservation land. As a result, states and counties are at a monetary disadvantage that is not true on the federal level. Considering that tribes and states have conflicting interests, and have historically been at

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104 Ibid. 32
105 Ibid. 115
106 Ibid. 44
107 Ibid. 115
odds with one another, the state burden of jurisdiction without an accompanying financial base only further contributes to poor relations.\(^{108}\)

III. Tribal Response to Inadequate State Law Enforcement Services

Hostile attitudes of state personnel, combined with no monetary base, have resulted in inadequate state law enforcement services in Indian Country. Local law enforcement provides better service to county residents, and those on reservations are often ignored.\(^{109}\) Reservation residents in Public Law 280 states report slow response times and minimal coverage.\(^{110}\) Local law enforcement is usually based off of the reservation, and due to the size of many reservations, officers may be over one hundred miles away from a caller’s location. Due to such significant distances, law enforcement may take several hours to reach an area\(^{111}\), or may choose to disregard the call altogether.\(^{112}\) Even in light of these distance-related issues, there are too few patrolling officers assigned to cover these gaps.\(^{113}\) When law enforcement does investigate crimes, reservation residents report that these investigations are less thorough.\(^{114}\)

Additionally, poor relationships between tribal and local police officers have resulted in jurisdictional gaps in the enforcement of the law. One issue that Dorothy

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\(^{108}\) Ibid. 44
\(^{109}\) As part of Goldberg and Valdez Singleton’s report to the DOJ, they conducted a statistical study of how Public Law 280 reservation residents viewed law enforcement. Among these residents (n=158), 63% believe that county law enforcement underserves Indian Country, and provides better coverage to the rest of the county.


\(^{112}\) Ibid. 76

\(^{113}\) Ibid. 77

\(^{114}\) Ibid. 78
Alther described to me was the lack of enforcement by local police officers of domestic violence protection orders issued by tribal courts. Under both federal and state law, local law enforcement is mandated to enforce these protection orders.\textsuperscript{115} However, since these orders are not being registered with a state court, they are not being inputted into the California Law Enforcement Telecommunications System,\textsuperscript{116} or CLETS.\textsuperscript{117} Tribes are often denied access to systems like CLETS because they contain criminal history information on federal, state, and local levels. This type of access would overstep tribal jurisdiction. However, local law enforcement relies on CLETS when they encounter an individual to see if there is a domestic violence protection order or an outstanding warrant. Since tribal law enforcement cannot access CLETS, and they are not being inputted by state personnel, local law enforcement is not enforcing domestic violence protection orders.\textsuperscript{118} Despite the fact that it is illegal to use this as a justification, it is a practical effect of poor relations and the jurisdictional divides mandated by Public Law 280. As a result, Alther has had to consider pursuing litigation.\textsuperscript{119}

Tribes in Public Law 280 states have attempted to counteract these issues by developing tribal law enforcement agencies and criminal justice systems. In fact, a large component of the work done at CILS is to aid in this development. With this, tribes can act on their concurrent jurisdiction and exert their tribal sovereignty. Mark Vezzola described that CILS primarily assists in the drafting of laws, codes, and ordinances, which serve as the foundation for asserting jurisdiction. CILS also aids in training tribal

\textsuperscript{115} Alther, Dorothy. Personal interview. 12 Aug. 2015.
\textsuperscript{117} Alther, Dorothy. Personal interview. 12 Aug. 2015.
\textsuperscript{118} Ibid.
\textsuperscript{119} Ibid.
judges, police officers, and leaders. Lauren van Schilfgaarde, through her position at TLPI, assists tribal courts across the country. She describes the importance in empowering tribes “to take care of their own” through tribal jurisdiction in order to prevent “cases falling through the cracks.” Tribes that are able to exercise tribal sovereignty, through the development of law enforcement and criminal justice infrastructure, are more likely to create stable and productive environments. Tribal law enforcement and criminal justice personnel are more familiar with those residing on reservations, and have greater cultural and community understanding. Since state and local law enforcement agencies provide inadequate services, tribes have realized that the best way to deal with crime is to develop their own services.

However, the development of this type of infrastructure requires funding. Many tribes do not have police departments or courts because this type of funding is difficult to access. With the rise of tribal gaming in the 1990s, a growing number of tribes in Public Law 280 states have been able to use their own funds in order to develop these types of services. However, many tribes have not undertaken gaming operations, and those that have, often do not yield high revenues. Even successful tribal casinos must contend with a long history of poverty and low income on reservations. Throughout the 20th century, Native Americans residing on reservations were the poorest identifiable

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120 Vezzola, Mark. Personal interview. 6 Aug. 2015.
121 Van Schilfgaarde, Lauren. Personal interview. 8 July 2015.
123 Ibid. 80
124 Ibid. 20
126 Ibid. 6-2. Casino enterprises in Indian Country correlate to a degree of economic concentration among a relatively small number of tribes. 20 tribes generate 50.5% of total tribal gambling revenue, and 85 different tribes generate 41% of total revenue.
Due to both the historical and current realities of reservation life, tribes in Public Law 280 states are reliant on federal funding to develop tribal law enforcement and criminal justice systems. However, the Bureau of Indian Affairs (BIA) frequently denies funding requests or underfunds tribes in Public Law 280 states. The BIA has historically cited Public Law 280 as a justification for denying federal funding. Specifically, the BIA has not recognized the right of tribes to have concurrent jurisdiction. Further, the BIA asserts that Public Law 280 allows for the availability of state law enforcement, thereby deeming that tribes have less need for funding than non-Public Law 280 states. This reasoning completely disregards the rhetoric of the statute and denies rights guaranteed to tribes. This results in tribal law enforcement and criminal justice in Public Law 280 states that is largely undeveloped when compared to similar institutions in non-Public Law 280 states. The BIA’s misinterpretation of the law, combined with its resulting effects, demonstrates the use of Public Law 280 as a means of inhibiting tribal sovereignty.

IV. Deputization and Law Enforcement Services Agreements

In light of inadequate state law enforcement and lack of monetary resources, tribes have formed agreements with neighboring county police departments. Depending on the level of development of a tribe’s own law enforcement, there are different types of cooperative agreements that certain tribes have utilized. One option available to tribes is

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129 Ibid. 52
131 Ibid. 204-5
deputization agreements. These agreements allow tribal police officers to be deputized to act as county sheriffs. This enables tribal law enforcement to have the authority of local police in circumstances where, otherwise, they would not have jurisdiction.\textsuperscript{132} For example, tribal jurisdiction in Indian Country does not allow for the enforcement of law over those who are not Native American.\textsuperscript{133} However, if the tribal officer has been deputized as a county sheriff, then he or she is empowered to enforce state law over anyone on reservation land, regardless of Native American identity. Since county police departments provide inadequate services, deputization agreements empower tribal law enforcement to provide these same services, themselves.\textsuperscript{134} Further, tribal officers are looked upon more favorably by reservation residents, due to a greater understanding and sensitivity to the needs of the community.\textsuperscript{135}

However, deputization agreements are far from a complete solution to the jurisdictional issues resulting from Public Law 280. Although these agreements do offer benefits for reservations, they pose both logistical and conceptual issues. The main logistical issues center around funding. Despite the fact that tribes enter into deputization agreements due to a lack of funds for their own tribal law enforcement, these agreements often omit exactly \textit{how} enhanced law enforcement services will be funded. Since enhanced police services are especially focused on the increased duties of tribal officers, deputization agreements could potentially exacerbate a tribe’s monetary burden.\textsuperscript{136}

Although this depends on the specific circumstances and the terms of the agreement,

\textsuperscript{132} Ibid. 143
\textsuperscript{133} Oliphant v. Suquamish Indian Tribe, 435 U.S 191 (1978)
\textsuperscript{135} Ibid. 80
\textsuperscript{136} Ibid. 148
tribes are at risk to be disproportionately funding agreements that also benefit the state. This is because deputized tribal officers are enforcing both tribal and state law, thereby increasing the number of officers enforcing state law. Conceptually, deputization agreements are problematic because they do not address the larger problem of county police practices that impede tribal sovereignty. These types of agreements usually do not have provisions that foster a climate of cultural understanding, such as mandated cultural sensitivity training of county police officers. Since deputized tribal officers work alongside local law enforcement, reservation residents are still subject to the overstepping of authority by county police. Deputization agreements need to hold local law enforcement accountable for respecting tribal sovereignty.

Deputization agreements are reliant upon a developed tribal law enforcement agency. When a tribe does not have a law enforcement agency, the other option is to form a law enforcement services agreement with the county police department. Due to the historical denial of funds from the BIA to tribes in Public Law 280 states, many tribes do not have law enforcement agencies. A law enforcement services agreement with local law enforcement allows a tribe to pay county police for enhanced services on its reservation. Unlike deputization agreements, law enforcement services agreements allow tribes to play an active role in county police service on their reservations. This includes participating in the selection of officers, mandating cultural sensitivity training, and determining the number of deputies that patrol the reservation. However, most tribes cannot negotiate law enforcement services agreements because of the cost. Only tribes that have substantial resources from economic development, such as gaming, can utilize

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137 Ibid. 147
138 Ibid. 150
such services. Further, the basis of this arrangement normalizes the concept of tribes paying for police service. The wealth of a tribe does not contribute to a Public Law 280 state’s legal obligation to provide law enforcement services both on and off the reservation. Local police departments need to provide adequate and equal law enforcement to all areas in its jurisdiction. Tribes should not be expected to pay for state services that they are entitled to.

The factors leading to the implementation of deputization and law enforcement services agreements demonstrate the larger challenges of Public Law 280. Due to the complexity and inaccessibility of Public Law 280, law enforcement and criminal justice personnel do not have a uniform understanding and implementation of the law. The inadequate law enforcement of county police officers reflects the unpredictable effects that the law yields. Due to this inadequacy, tribes have created deputization and law enforcement services agreements in an attempt to ensure effective police services. However, these very agreements are rooted in uncertainty. They are reliant on a cooperative effort between law enforcement agencies that, both historically and presently, experience conflict. A shift in the political climate on either a county or state level could destabilize these arrangements. The fact that politics can directly impact the safety of reservation residents demonstrates the unpredictability that Public Law 280 yields. Native Americans are unable to ensure their own tribal well being, since they are forced to be dependent on unreliable and inconsistent law enforcement.

The oppression of uncertainty that Native Americans face connects directly to the elaborate jurisdictional divisions that Public Law 280 creates. Ambiguous understandings

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139 Ibid. 206
140 Ibid. 155
of the law by the very people in charge of enforcing it only further exacerbate tensions between reservation residents and law enforcement/criminal justice personnel. Although Public Law 280 includes provisions that allow for the maintenance of tribal sovereignty, the practical implementation of the law has undermined it. Due to the fact that Public Law 280 was originally passed over sixty years ago, in a vastly different context, the practical effects of the law need to be recognized and addressed. In the modern context, criminal justice personnel should interpret Public Law 280 in a manner that fosters a culture of empowerment for Native Americans and serves to further tribal sovereignty.
Chapter 3: Legislative Barriers to Retrocession

“There were many things that tribes of Public Law 280 states were advocating to have included in the [Tribal Law and Order Act] that did not show up there; including the opportunity to retrocede from Public Law 280 without having to get the prior agreement of the state. That never found its way into the law.”

- Carole Goldberg, Vice Chancellor of the University of California, Los Angeles141

The practical effects of Public Law 280 on law enforcement and criminal justice systems are greatly expansive, and thus, difficult to quantify. However, despite limited research on the subject, there is one truth that is unambiguously clear. The very systems in place that are constitutionally responsible for protecting Native Americans are inhibiting the well-being and sovereignty of tribal members. As a result, tribes in affected states are interested in both retrocession and in mitigating the negative effects of Public Law 280 jurisdiction. Tribal leaders have limited legislative avenues for counteracting this jurisdiction, which have been defined by provisions in the Indian Civil Rights Act (ICRA) and the Tribal Law and Order Act of 2010 (TLOA). However, these statutes do not properly address the predicament of Public Law 280 tribes. Instead, ICRA and the TLOA create a complex set of legislative regulations that form a “statutory maze.” The framework established by these Acts creates a confusing and disjointed process that serves as a barrier within itself to tribal sovereignty. Further, the statutes are only applicable on a tribe-by-tribe basis, preventing tribes from Public Law 280 states from collectively counteracting widespread concerns. While ICRA and the TLOA provide limited benefits for tribes, the overall issues presented by Public Law 280 still go largely unaddressed.

I. The Indian Civil Rights Act

The language in the original legislation of Public Law 280 created a power imbalance through the process of allowing state assumption of federal jurisdiction. Specifically, this initial legislation accounted only for state approval in enacting the statute, rather than also incorporating tribal consent. Section 7 of the original version of this law stated that “the consent of the United States” was granted to “any other State” that wished to “assume jurisdiction.” This consent was predicated on the fact that “the people of the State” would “obligate and bind” the State to such assumption “by affirmative legislative action.” Although the statute explicitly references “the people of the State,” the tribes, themselves, are not explicitly identified. States were expected to assume Public Law 280 jurisdiction through the necessary processes of State legislative bodies, but the tribal governments of the very people affected were not given an explicit avenue for involvement. The language of this section was also problematic for states, since it failed to acknowledge a retrocession process. The legislation was based on the idea that assumption of jurisdiction would remain final. Due to the financial burden of assuming Public Law 280 jurisdiction, not all states that assumed such jurisdiction wished to maintain it. Public Law 280 initially created a complex circumstance in which only states could adopt its jurisdiction, and neither tribes, nor states, could initiate a process to retrocede this jurisdiction, if need be.

142 Public Law 280. Pub. L. 83-280. Sec. 7. 15 August 1953
143 Ibid.
145 Ibid. 165
Due to the concerns expressed by both the tribes and the states, committees in both the House and the Senate conducted hearings and investigated the matter. Eventually, these efforts would lead to a provision in the Indian Civil Rights Act of 1968 (ICRA), which directly addressed this issue. However, in a manner that is recurrent in federal and tribal relations, the statute disproportionately benefitted states over tribes. ICRA authorized the states to initiate the process of returning jurisdiction back to the federal government, but did not grant the same privilege to the tribes.\(^{146}\) As codified in 25 USC §1323 (a), the United States government will “accept a retrocession by any state” (emphasis added).\(^{147}\) Tribes, the very entities that are directly impacted by Public Law 280, have no independent legal method of requesting retrocession. Additionally, ICRA addressed the issue of tribal consent in future assumptions of Public Law 280 jurisdiction, but not as it pertains to tribes that presently reside in Public Law 280 states.\(^{148}\) In 25 USC §1321(a) and §1322(a), the law states that the “consent of the United States” over further assumptions is dependent upon “the consent of the tribe…which would be affected by such assumption.”\(^{149}\) This language repeals Section 7 of Public Law 280, which is noted in 25 USC §1323(b). However, 25 USC §1323(b) also states that this repeal “shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.”\(^{150}\) Essentially, this section provides a limited amendment to Public Law 280 that applies in the future, but does not affect decisions that were made in the past. States that had

\(^{146}\) Ibid. 13
\(^{147}\) 25 USC Sec. 1323(a). 1968
\(^{149}\) 25 USC Sec. 1321 (a). 1968 and 25 USC Sec. 1322 (a). 1968. Section 1321 (a) addresses criminal jurisdiction, while Section 1322 (a) addresses civil causes of action.
\(^{150}\) 25 USC Sec. 1323 (b). 1968
imposed Public Law 280 jurisdiction onto tribes before 1968 were allowed to maintain that jurisdiction without current tribal consent.

The language that ICRA uses to define the retrocession process creates a multitude of barriers for tribes in Public Law 280 states. By authorizing states, and only the states, to initiate retrocession, tribes must lobby state governments to pursue the process. If the state approves this, the Department of the Interior (DOI) is then responsible for reviewing petitions. The Secretary of the Interior must meet with the US Attorney General, and then decides whether to grant a retrocession request. However, the basis for accepting or rejecting a request is highly subjective, due to the fact that there are no formal guidelines that regulate how the DOI should review requests.151 Due to the fact that tribes cannot initiate the retrocession process, and combined with the political complexity of doing so, most tribes have difficulty implementing this provision of ICRA.

II. Barriers to Accessing ICRA Retrocession

Public Law 280 affects over one hundred fifty tribes in the contiguous United States, and over two hundred and thirty-five tribes and Native villages in Alaska alone. Yet, despite this, only thirty-one tribes have successfully implemented the retrocession provision in ICRA. Of these retrocessions, only seven are from mandatory Public Law 280 states, which are the states most heavily impacted by the law. Alaska and California, two of the states with the largest number of tribes, have had no tribe successfully eliminate Public Law 280 jurisdiction.152 Due to the practical effects of Public Law 280,

152 Ibid. 166
and the resulting widespread dissatisfaction with the law, these low numbers of retrocession reflect political and legal barriers.

Although these barriers are evident on the state and federal levels, typically the most serious obstacles often stem from local governments. Local governments usually do not have adequate resources to provide effective law enforcement and criminal justice services for tribes. However, despite this, these same governments often present great opposition to the retrocession of tribes in their jurisdiction.\textsuperscript{153} In the cases of the Winnebago\textsuperscript{154} and Salish & Kootenai tribes\textsuperscript{155}, the local governments attempted to maintain their jurisdiction, despite inadequate services for tribal members. In the case of the Shoshone Bannock tribes, although they were able to secure support from the sheriff, other local officials were resistant.\textsuperscript{156} These officials questioned the ability of the tribes to provide effective services, even in light of the inadequacies of local law enforcement.

This resistance can partly be attributed to those who are not Native American, but live in Indian Country. Both non-Native Americans and Native Americans, alike, would be directly under tribal and federal jurisdiction in the event of retrocession. Due to the fact that non-Native Americans in Indian Country may be receiving more adequate services from local law enforcement, they are more likely to oppose retrocession.\textsuperscript{157} Resistance from these residents contributes to the already palpable resistance of local governments. The ICRA provision that necessitates state governmental approval for retrocession ignores this fundamental issue. Despite state and local inability, or aversion, to

\textsuperscript{153} Ibid. 190
\textsuperscript{154} Ibid. 171
\textsuperscript{155} Ibid. 179
\textsuperscript{156} Ibid. 177
\textsuperscript{157} Ibid. 190
adequately provide services in Indian Country, there is also an unwillingness to relinquish jurisdictional authority.

Tribes seeking retrocession also must face the more intangible barrier of financial considerations. They must be able to fund their own law enforcement and criminal justice systems.\footnote{158 Ibid. 190} However, tribes in Public Law 280 states have historically been denied funding for law enforcement by the BIA.\footnote{159 Ibid. 150} Although certain tribes have the monetary means due to gambling revenues, centuries of impoverishment have prevented many tribes from having the financial capabilities to do so. In the current process for petitioning retrocession, the DOI has the capability to allot money to tribes for law enforcement related purposes. However, the DOI has been reluctant to provide funds for this.\footnote{160 Ibid. 190} As a result, the general understanding of tribes seeking retrocession is that they will be primarily responsible for funding a new jurisdictional arrangement.

Tribes that have successfully retroceded under the ICRA provision have had to overcome financial, political, and legal barriers. Resistance on the local, state, and federal level has resulted in tribes using strategic measures to navigate through the barriers of this process. The most common approach to securing the support of officials has been to retrocede certain components of the jurisdiction, while maintaining local law enforcement for other components. For example, the Omaha tribe was able to secure retrocession by specifically excluding traffic offenses, thereby maintaining state jurisdiction over that area of law.\footnote{161 Ibid. 190} In a manner similar to this, the Winnebago tribe maintained state civil jurisdiction, and the Salish & Kootenai tribes excluded felonies
from its retrocession.\textsuperscript{162} Such limitations on complete retrocession are the result of these tribes appealing to local community concerns in order to secure support from officials. Tribes also have successfully negotiated retrocession by making it contingent upon cooperative agreements with local law enforcement. Cooperative agreements, such as contracting local law enforcement services or deputization agreements, have been especially useful in offsetting the fears of non-Native American residents that tribal law enforcement is ineffective. In cases where neither of these tactics has worked, tribes have secured retrocession by creating public relations campaigns and appealing to the local community.\textsuperscript{163}

The practical effects of the ICRA provision only further complicate the already existing jurisdictional issues of Public Law 280. Tribes are also forced to use their right to public safety as a bargaining chip. However, despite the barriers to retrocession, the negative impact of Public Law 280 has motivated tribes, that are financially able, to pursue the process. Tribes that have returned state jurisdiction back to the federal government have reported high levels of satisfaction. Retrocession has made law enforcement more accountable to tribal concerns, and more trusted by reservation residents. Additionally, in many of the tribes that have retroceded, their reservations have experienced a notable drop in crime.\textsuperscript{164} Tribes that have retroceded are better enabled to counter the uncertainty that Public Law 280 creates, through the enhancing of tribal sovereignty.

\textsuperscript{162} Ibid. 181
\textsuperscript{163} Ibid. 190
\textsuperscript{164} Ibid. 191
III. The Tribal Law and Order Act

The barriers in the ICRA provision to accessing retrocession remained unaddressed by the government until the passage of the Tribal Law and Order Act of 2010 (TLOA). The TLOA was enacted by Congress as a measure to address concerns regarding law enforcement and criminal justice systems in Indian Country. The issues specifically experienced by tribes in Public Law 280 states are addressed in three sections of the statute. Section 221 allows tribes to directly appeal to the Federal government to be under its jurisdiction. This section explicitly states that “after consultation with and consent by the Attorney General,” the jurisdiction of these tribes is “concurrent among the Federal government, State governments, and, where applicable, tribal governments.” This provision enables tribes to bypass legislative barriers from state governments, and exist under the jurisdiction of the government at the federal, state, and tribal levels. Section 221 allows tribes in Public Law 280 states to be under federal jurisdiction without diminishing the authority that local and state law enforcement has over these tribes. To officially fall under federal jurisdiction has the added potential to help tribes in historically underfunded Public Law 280 states to access federal funding for police and court services.

Sections 222 and 231 do not address retrocession, but are designed to aid tribes in developing their law enforcement under a Public Law 280 framework. Due to a lack of monetary resources and underdeveloped law enforcement and criminal justice systems, many tribes engage in cooperative agreements with local police departments. Section 222 allows the Attorney General to provide “technical and other assistance” to tribes

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166 The Tribal Law and Order Act. Pub. L. 111-211. Sec. 221. 29 July 2010
engaging in these types of agreements. The provision specifies that cooperative agreements are important in “improving law enforcement effectiveness,” “reducing crime” and “developing successful cooperative relationships.”\textsuperscript{167} By explicitly stating the benefits of such agreements, the TLOA is encouraging co-governance and acknowledging tribal sovereignty. Section 231 addresses the training and credentials associated with being a tribal police officer. By addressing the “standards of education and experience and classification” of being a tribal police officer\textsuperscript{168}, the TLOA attempts to counteract resistance from county and state law enforcement to accepting tribal police officers as legitimate. Indeed, concurrent jurisdiction is only possible if the tribal criminal justice system is viewed as legally valid. The provision reiterates this by stating that the training of tribal police officers “shall be consistent with the standards accepted by the Federal Law Enforcement Training Accreditation commission.”\textsuperscript{169} This language reaffirms the need for state authorities to recognize federally commissioned tribal police officers as federal officers.

IV. The Limited Applicability of the TLOA in Public Law 280 States

Sections 221, 222, and 231 have the clear intention of assisting tribes in Public Law 280 states. However, these provisions address a narrow set of considerations in a much more expansive problem. As a result, the TLOA is only of limited success for tribes in Public Law 280 states. Addressing the practical effects of Public Law 280 requires more than the TLOA. The provisions encouraging cooperative agreements and reiterating the credentials of tribal police officers are not expansive enough to counteract

\textsuperscript{167} The Tribal Law and Order Act. Pub. L. 111-211, Sec. 222. 29 July 2010
\textsuperscript{168} The Tribal Law and Order Act. Pub. L. 111-211, Sec. 231. 29 July 2010
\textsuperscript{169} Ibid.
the many issues presented by state jurisdiction. The provision that allows tribes to individually access federal jurisdiction does not properly counteract the state jurisdiction that was collectively imposed on all tribes in Public Law 280 states. As a result, the TLOA does not allow tribes to negate the practical effects of Public Law 280 or to effectively move past state legislative and political barriers in removing Public Law 280 jurisdiction.

The limited effectiveness of the TLOA for tribes in Public Law 280 states is largely due to the scope of the law and the intended purpose of its passage by Congress. Although the TLOA amends Public Law 280, the overall aim of the act was not to address the specific concerns of tribes in Public Law 280 states. Instead, the TLOA was designed to address the overall national concern regarding the crime rates and adequacy of law enforcement and criminal justice services in Indian Country. The Congress that drafted and passed the TLOA did not acknowledge the interconnected nature of the inadequacy of these services with the passage of Public Law 280. This omission may stem from the fact that Public Law 280 does not apply to all states and tribes. However, due to the practical effects of this law, many of the states that are the most severely impacted by issues of law enforcement in Indian Country are, in fact, Public Law 280 states.

Congress’s disconnected understanding of the relationship between crime and Public Law 280 is evident in the TLOA, itself, and in Congress’s report on the act. At no point in the TLOA is Public Law 280 referenced, except where 18 USC §1162 and 25

USC §1321 are cited in order to amend the law. In Congress’s report of the TLOA, which constitutes an important component of its legislative history, Public Law 280 is only cited once, in a footnote explaining the nature of the law. In the first section of the report, which details the purpose of the TLOA, it is not mentioned at all. Although this section of the report briefly references the existence of state law enforcement agencies and state jurisdiction, there is no mention of the role that Public Law 280 plays in creating the jurisdictional confusion that impacts many tribes today. The footnote that references this law only appears in the next section, titled “II. The Criminal Justice System on Indian Lands.” However, this footnote only defines Public Law 280 in one sentence, referencing that the law was enacted in 1953 by 18 USC §1162. The footnote does not indicate that Public Law 280 also encompassed 28 USC §1360 in 1953, and today also includes 25 USC §1321, §1322, §1323, §1324, §1325, and §1326. In the fifth section, which analyzes the key provisions of the TLOA, Public Law 280 is also not mentioned. This section highlights provisions covering tribal court sentencing, tribal jails, domestic violence, and even jurisdictional issues. However, Public Law 280, itself, is not mentioned as a key provision, and the report does not connect any of these issues to the law. Considering that Public Law 280 affects a large number of tribes, the

171 The Tribal Law and Order Act. Pub. L. 111-211. Sec. 221. 29 July 2010
173 Ibid. 1-3
174 Ibid. 1
175 Ibid. 3
176 Ibid. 3n11
179 Ibid. 16
180 Ibid. 8
181 Ibid. 19
182 Ibid. 9
decision to omit the law as a key provision reflects the disconnect by Congress in understanding the barriers that impact tribes. The TLOA cannot properly address the inadequacies of state law enforcement in Indian Country when the legislation does not even fully acknowledge the existence of Public Law 280.

Due to the fact that Congress did not focus on Public Law 280, and barely acknowledged it in both the law and in its report, the TLOA has limited applicability in Public Law 280 states. Although there are three provisions that directly apply to tribes in these states, the key provisions of the act are largely inapplicable. The TLOA was directed at non-Public Law 280 states, which operate only by federal and tribal jurisdiction. In these states, the federal government has jurisdiction over serious crimes and over crimes committed by non-Native Americans. Tribal jurisdiction in these states is primarily responsible for handling the remainder of crimes that occur on reservations. Since the non-Public Law 280 states operate in this manner, the provisions in the TLOA are geared toward this system. For example, a key provision in the TLOA requires federal prosecutors to submit reports in circumstances where they decline to prosecute cases in Indian Country. The goal of this provision is to “improve coordination between federal and tribal justice officials” and to reiterate the “accountability” required of the federal government “to investigate and prosecute reservation crime.” This provision is designed to help tribes in non-Public Law 280 states, but has no effect in Public Law 280 states. Due to the fact that Public Law 280 transferred federal jurisdiction to the states, the states are responsible for these criminal matters. Despite the inapplicability of this

provision to a large number of tribes, the TLOA does not present an alternative method for improving “coordination” and “accountability” in Public Law 280 states. This provision could have been expanded upon to address the fact that state law enforcement often does not investigate crimes in Indian Country, and therefore, crimes are not being prosecuted. The inapplicability of this provision is reflective of the larger issue of the TLOA, in that the act could have been constructed in order to be more effective in Public Law 280 states. The TLOA largely fails in both improving state law enforcement services and in aiding tribes in the retrocession process.

V. The Practical Effects of the TLOA

Although the provisions of the TLOA and the act’s legislative history provide valuable insight, they present a limited perspective on the practical effects of the law. Due to the recent passage of the law, and the already limited information about Public Law 280, there is minimal academic research about the practical effects of the TLOA. Consequently, interviews with attorneys specializing in Federal Indian Law constitute the main source of information for my understanding of these practical effects. Specifically, through connections forged at CILS, I was able to reach out to Carole Goldberg.

Goldberg has been a faculty member of UCLA School of Law for over forty years, and currently serves as the Vice Chancellor at UCLA. She has published several works and has led several clinics focusing on various aspects of Federal Indian Law. Much of her
scholarship focuses on Public Law 280, and as a result, she has served as a preeminent legal authority on the subject matter.\textsuperscript{185}

Goldberg described to me both the successes and the shortcomings of the TLOA in impacting tribal members in Public Law 280 states. An important benefit of the TLOA has been the establishment of the Indian Law and Order Commission. The TLOA created this commission, and President Barack Obama appointed Goldberg to it.\textsuperscript{186} The commission analyzed issues that were not fully addressed by the TLOA, and specifically recommended a future provision for tribe-initiated retrocession. However, in the current “absence of the ability to compel retrocession,”\textsuperscript{187} Goldberg highlighted the two primary concerns held by tribes with regard to the practical effects of Public Law 280. These concerns center on the “lack of responsiveness of state officials” and the “lack of support for tribal justice systems.”\textsuperscript{188} She continued to explain that while the TLOA did not address the latter of these two concerns, the act does address the failures of state law enforcement through Section 221, which allows tribes to access concurrent federal jurisdiction.\textsuperscript{189} However, Goldberg envisions that future legal action to be taken by tribes, as a result of this provision, may be more useful than the provision itself. She explained that having federal jurisdiction “could serve as a first step towards retrocession,” since the process of retrocession encompasses “the elimination of state jurisdiction and the restoration of federal jurisdiction.”\textsuperscript{190} Half of the process of retrocession is completed through this provision, and tribes can become “accustomed to the situation that would


\textsuperscript{186} Ibid.

\textsuperscript{187} Goldberg, Carole. Personal interview. 24 Feb. 2016.

\textsuperscript{188} Ibid.

\textsuperscript{189} Ibid.

\textsuperscript{190} Ibid.
exist after retrocession.”  

This process that Goldberg describes demonstrates a manner in which tribes can counteract the barriers to retrocession presented by the TLOA.

However, Goldberg is not optimistic about the usefulness of the federal jurisdiction itself, as Section 221 defines it. She states that “it would be naïve” for tribes to think that concurrent federal, state, and tribal jurisdiction “would solve all of their problems.”  

Her skepticism of the effectiveness of federal jurisdiction, itself, is based on the fact that tribes in non-Public Law 280 states “complain about non-responsive of federal authorities in ways analogous to the complaints of Public Law 280 tribes about state law enforcement and criminal justice.”  

In my interview with Lauren van Schilfgaarde, from the Tribal Law and Policy Institute, van Schilfgaarde echoed these same reservations. She described that in non-Public Law 280 states, U.S attorney’s offices fail to “prioritize Indian Country.”  

She explained that federal officials focus on major drug cartels, white collar crimes and mail crimes. As a result, for federal officials, Indian Country becomes “one piece of their full agenda that they have to be prosecuting.”  

Goldberg adds that due to these priorities, U.S Attorneys do not primarily handle “the kind of crimes that are Indian Country crime.”  

According to the Bureau of Justice Statistics, the most common violent crimes on reservations are aggravated assault, rape, and robbery. The most common property crimes are larceny-theft, burglary, and motor vehicle theft.  

As opposed to issues like mail fraud, “Indian

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191 Ibid.
192 Ibid.
193 Ibid.
194 Van Schilfgaarde, Lauren. Personal interview. 8 July 2015.
195 Ibid.
Country crime” reflects the type of crime that affects the average person. By the federal government focusing on less commonly prevalent types of crime, Native Americans are further being oppressed through negligence. Therefore, although Public Law 280 states experience many challenges that non-Public Law 280 states do not, federal jurisdiction, itself, is limited in its ability to aid tribes.

The limited benefits of federal jurisdiction, combined with the difficulty of obtaining it, create significant barriers for tribes accessing the TLOA. Although Section 221 allows tribes to bypass state governments, the obtaining of consent from the Attorney General occurs on a tribe-to-tribe basis, and is a slow process. Since the passage of the TLOA in 2010, only two tribes have successfully obtained concurrent federal jurisdiction. Tribal applications for this jurisdiction are published as public notices in the federal register. If a tribe is able to successfully obtain the consent of the Attorney General, then the federal register updates the public on this. White Earth Nation in Minnesota was noticed in 2012, and obtained the jurisdiction in 2013. Mille Lacs Band of Ojibwe Reservation in Minnesota was noticed in 2013, and successfully obtained federal jurisdiction in 2016. Considering the widespread impact of Public Law 280, the fact that only two tribes have obtained this jurisdiction demonstrates the inadequacy of the TLOA in addressing the issue. Further, four additional tribes applied

for this jurisdiction in 2012, and as of 2016, have not yet received the consent of the Attorney General. The likely probability of not achieving this consent, despite the extensive process of applying for this jurisdiction, demonstrates the clear barriers that the TLOA creates.

The Indian Civil Rights Act and the Tribal Law and Order Act offer limited solutions to a highly expansive issue. Public Law 280 is a complex framework that both directly and indirectly oppresses Native American tribes in affected states. Counteracting Public Law 280 through legislative means has proven to be a cumbersome and ineffective process with bureaucratic and legal barriers. Combined with the fact that legislative reforms only impact certain individual tribes, the overall practical effects of Public Law 280 remain unchanged. The inability for tribes to access legislative avenues to address the issue of Public Law 280 contributes to an oppression of uncertainty. The perpetuation of such oppression prevents tribes from taking control of their own well-being and asserting tribal sovereignty.

202 These tribes consist of the following California tribes: Los Coyotes Band of Cahuilla and Cupeno Indians, Elk Valley Rancheria, Hoopa Valley Tribe, and Table Mountain Rancheria.


Solicitation of Comments on Request for United States Assumption of Concurrent Federal Criminal Jurisdiction; Table Mountain Rancheria, 28 CFR 50.25 (October 22, 2012), Federal Register: The Daily Journal of the United States
Chapter 4: Judicial Barriers to Counteracting the Effects of Public Law 280

“In an ideal world, there would never be a need for lawyers, because everything would go exactly as it should. But the chasm between those two things is, many times, between the facts and the law. There are cases where courts get it wrong, or there are disagreements about how broadly the court should interpret Indian law.”

-Mark Radoff, Senior Staff Attorney of California Indian Legal Services

Public Law 280 enables oppression through its unpredictable application and disjointed interpretations, from both various law enforcement and criminal justice personnel. However, this oppression of uncertainty extends beyond the practical effects of the law itself. The process of counteracting Public Law 280 is unclear and ineffective. Legislative measures such as the Indian Civil Rights Act and the Tribal Law and Order Act create a statutory maze that contributes to the larger and overarching problems of Public Law 280. Since tribes have been unable to secure retrocession, they have attempted to use the court system as an avenue to address the practical effects of Public Law 280. The failures of the court system in addressing these criminal justice concerns parallel the failures of Congress in passing legislation that empowers tribal members. The recent case of Los Coyotes Band of Cupeno Indians v. Salazar demonstrates the failure of the court system in addressing issues related to state criminal jurisdiction. Rather than clarify the meaning of legislation, the judiciary adds to the overall confusion created by

203 Radoff, Mark. Personal interview. 7 Aug. 2015.
204 Pursuant to Fed. R. App. P. 43(c)(2), which regulates the substitution of parties, different defendants represented the federal government in the appeal of this case. This thesis will refer to the case with respect to the original defendants in the District Court case.
   Los Coyotes Band of Cupeno Indians v. Salazar, Case No. 10cv1448 AJB (NLS). United States District Court, S.D. California (2011)
Public Law 280. The court system only further presents barriers to the creation of a culture of tribal empowerment.

I. Contextualizing the Los Coyotes case

The Los Coyotes case is situated in an extensive history of the BIA denying law enforcement funds to Public Law 280 states, especially in California. After the passage of the law, the BIA withdrew funds from tribes located in these states.205 The Bureau justified this decision by asserting that tribes were adequately served by state services,206 and that Public Law 280 diminished tribal authority.207 In California, the effects of this decision were particularly compounded by the termination era. Forty-one reservations and their residing tribal members, out of over one hundred in the state, lost federal trust status.208 The termination era and Public Law 280 formed a “toxic brew” that the BIA used to justify its decision to deplete tribes in California of funding opportunities.209 In the 1960s, tribes in non-Public Law 280 states began to develop their judicial and law enforcement systems. While the BIA increased funding for these purposes, California and other Public Law 280 states still failed to receive this critical funding.210 Despite the invalid basis for the BIA’s fund distribution, disproportionate funding has historically persisted, and continues today.

As a result of this, several legislative measures that were designed to aid tribal governments have not impacted tribes in California and other Public Law 280 states. In

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206 Ibid. 52
207 Ibid. 50
208 Ibid. 81
209 Ibid. 81
210 Ibid. 82
1975, the Indian Self-Determination and Education Assistance Act (ISDEAA), or Public Law 93-638, formalized procedures for tribal subcontracting. This allowed tribal governments to make contracts with the federal government and directly receive funding, with tribes having autonomy in administering these funds. Often referred to as “638 contracts,” tribes can receive grants specifically for developing their own law enforcement and court systems.\(^{211}\) For non-Public Law 280 states, this serves as an initial step in replacing federal BIA authority with tribal police departments and judicial systems.\(^{212}\) However, tribes in Public Law 280 states have largely been prevented from accessing these contracts.

*Los Coyotes Band of Cupeno Indians v. Salazar* is the first court case to address the issue of tribal inaccessibility to 638 contracts in Public Law 280 states. In the plaintiff’s motion for summary judgment,\(^{213}\) Dorothy Alther and Mark Radoff describe the issues that the Los Coyotes Band of Cupeno Indians experienced in attempting to obtain this contract. The tribe was denied funding because the ISDEAA states that the government may deny the contract if the amount of funding being requested exceeds the amount that would have otherwise been provided to operate the program. The Office of Justice Services (OJS) of the BIA claimed that since they historically and currently provide no law enforcement funding to tribes in California, the allocation of any funds to the tribe would be in excess of what would normally be provided.\(^{214}\) The decision of the OJS was in keeping with their internal and unwritten policy of not providing law enforcement funding to tribes.

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\(^{212}\) Ibid. 36


\(^{214}\) Ibid. 1-2
enforcement funds to tribes in Public Law 280 states.\textsuperscript{215} Despite the BIA’s responsibilities to all federally recognized tribes, the reasoning behind rejecting the contract reflects a position of indifference to tribal concerns.

Before seeking legal council and filing a motion for summary judgment, the plaintiff proceeded through all proper legal channels provided by the OJS.\textsuperscript{216} Although the tribe achieved the desired outcome through these channels, the OJS did not uphold the decision. When the Los Coyotes Band of Cupeno Indians was initially denied the contract,\textsuperscript{217} the tribe utilized the OJS’s appeals process by requesting an informal conference. During this conference, OJS representatives explicitly stated that there is an unwritten policy to deny funding to tribes in Public Law 280 states. After both parties discussed the matter, the designated OJS representative recommended a decision that favored the tribe. The representative stated that the “underlying rational” of the OJS was “not valid” due to the fact that Public Law 280 does not divest tribes of their criminal jurisdiction or the federal government of its law enforcement responsibility.\textsuperscript{218} The representative then stated that the policy was “arbitrarily implemented,” violated “equal protection and due process of the law,” and violated “the mandates of the APA.”\textsuperscript{219} The OJS then attempted to appeal the decision of their own designated representative. The Internal Board of Indian Appeals (IBIA) determined that the OJS could not appeal. However, the IBIA also did not explicitly state that the representative’s decision was binding. As a result, the OJS simply did not uphold the decision of its own

\textsuperscript{215} Ibid. 1
\textsuperscript{216} The explanation of actions taken by the tribe before litigation was pursued is detailed in the section “Statement of Undisputed Facts.” 3-6.
\textsuperscript{217} The Los Coyotes Band of Cupeno Indians was denied a 638 contract on July 29\textsuperscript{th}, 2010, under the ISDEAA.
\textsuperscript{218} Ibid. 4
\textsuperscript{219} Ibid. 5
representative.\textsuperscript{220} This process demonstrates the barriers that tribes face in addressing the effects of Public Law 280 before the issues are even adjudicated. The tribe participated in all of the appropriate processes, and the issues were even decided in the plaintiff’s favor. Yet, despite this, the OJS was simply allowed to disregard the recommended decision because it did not favor their interests. The overly complicated and ultimately futile process presented by the BIA reflects the lack of concern that the administrators have for tribal well-being.

II. The Legal Argument of the Tribe

Given that the tribe could not force the OJS to uphold its decision, the Los Coyotes Band of Cupeno Indians had no other option but to pursue litigation. The tribe presented its legal argument on the basis of four main points. The plaintiff’s first argument was that the OJS’s policy violated the ISDEAA.\textsuperscript{221} Section 450k(a)(1) of the Act states that the defendants cannot “promulgate any regulation, nor impose any non-regulatory requirement, relating to self-determination contracts or the approval, award, or declination of such contracts.” If the government wished to impose a regulation, it must do so in accordance to the rulemaking provisions of the Administrative Procedure Act.\textsuperscript{222} In fact, in 1987 the defendants did attempt to formalize their unwritten policy of not granting contracts to Public Law 280 states. However, the BIA was denied this, and instead was directed to provide law enforcement contracts on the basis of need rather than

\begin{itemize}
\item \textsuperscript{220} Ibid. 6
\item \textsuperscript{221} Ibid. 6
\item \textsuperscript{222} Ibid. 7
\end{itemize}
on Public Law 280 status.\textsuperscript{223} Therefore, the government’s unwritten policy is not a regulation, but, instead, a non-regulatory requirement that violates the ISDEAA.\textsuperscript{224}

The second main argument presented by the tribe was that the policy violated the Administrative Procedure Act by being “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance to the law.”\textsuperscript{225} When the OJS declined the request of the Los Coyotes Band of Cupeno Indians for a 638 contract, they included a list of all tribes that had received 638 contracts for law enforcement. The purpose of attaching this list was to demonstrate that the OJS has historically not funded law enforcement in California. However, on the list were three tribes in California that received funding due to having portions of their reservation in Nevada and Arizona, both non Public Law 280 states. Additionally, other tribes on the list were, in fact, located in Public Law 280 states. Tribes in the mandatory states of Minnesota and Wisconsin and in the optional state of Florida were granted 638 contracts for law enforcement.\textsuperscript{226} The plaintiff argued that this clearly demonstrated that the unwritten policy is not consistently applied, and therefore is arbitrary and discriminatory.\textsuperscript{227} The inconsistent nature inherent in this unwritten policy is reflective of the government’s extensive history in creating an unpredictable political environment for Native Americans. The arbitrary application of the BIA’s distribution of contracts directly parallels this oppression of uncertainty.

The plaintiff’s third argument stems from the discriminatory aspect of this, stating that the defendants violated the equal protection philosophy of the Fifth Amendment of the Constitution. The Los Coyotes Band of Cupeno Indians argued that by arbitrarily and

\begin{itemize}
\item \textsuperscript{223} Ibid. 5-6
\item \textsuperscript{224} Ibid. 8
\item \textsuperscript{225} Ibid. 8
\item \textsuperscript{226} Ibid. 11
\item \textsuperscript{227} Ibid. 12
\end{itemize}
disproportionately funding tribes, the OJS was violating the tribe’s constitutional rights.\textsuperscript{228} The plaintiff reiterated that there was no “rational basis” for denying the tribe the contract.\textsuperscript{229} Not only do tribes in Public Law 280 states need funding, but their status as such heightens their need for these contracts.\textsuperscript{230} The plaintiff argued that combined with the fact that other California and Public Law 280 tribes receive funding, the unwritten policy of the defendant is irrational and violates equal protection of the law.

The last argument of the Los Coyotes Band of Cupeno Indians stated that the policy of the defendants violates the federal trust responsibilities.\textsuperscript{231} The plaintiff argued that through treaties and statutes, the Federal government has a special trust relationship that extends to the BIA’s responsibility to police.\textsuperscript{232} The plaintiff specifically cited the TLOA as recent legislation that reaffirms this relationship, as well as reaffirming federal responsibilities.\textsuperscript{233} Therefore, the defendant should be empowering tribes to provide public safety through resources. The tribe argued that by denying a 638 contract, the government was neglecting its federally mandated responsibility.

III. The Opposing Legal Argument of the Government

The defendants’ cross motion for summary judgment focused on their legal basis for rejecting the contract and refuting the plaintiff’s “larger policy arguments.”\textsuperscript{234} There are five specific instances, or “permissible statutory reasons,” in which the BIA can

\begin{itemize}
\item \textsuperscript{228} Ibid. 12
\item \textsuperscript{229} Ibid. 18
\item \textsuperscript{230} Ibid. 18
\item \textsuperscript{231} Ibid. 18
\item \textsuperscript{232} Ibid. 19
\item \textsuperscript{233} Ibid. 20
\item \textsuperscript{234} Memorandum of Points and Authorities in Opposition to Plaintiff’s Motion for Summary Judgment and in Support of Defendant’s Cross Motion for Summary Judgment. Los Coyotes Band of Cupeno Indians v. Salazar, Case No. 10cv1448 AJB (NLS). United States District Court, S.D. California (2011) 1.
\end{itemize}
legally reject a 638 contract.\textsuperscript{235} One of these instances occurs when “the amount of funds proposed under the contract is in excess of the applicable funding level for the contract.”\textsuperscript{236} Since the plaintiff argued that this denial of funding is based on an unwritten policy, the government was therefore affirming a legal reason for not granting the contract. Thus, the defendants argued that the plaintiff did not “challenge” their “valid basis” for denying the Los Coyotes Band of Cupeno Indians the 638 contract.\textsuperscript{237} The government then framed the remainder of its argument by stating that it was legally in its right to deny the contract, and the tribe’s arguments were based on what “it believes should be the budgetary priorities of the agency.”\textsuperscript{238} Instead, the defendants argued that allocating funds from a “lump-sum appropriation” is agency discretion, citing \textit{Lincoln v. Vigil}.\textsuperscript{239}

The most concerning aspect of the government’s argument was its conception of Public Law 280. Despite the plaintiff’s inclusion of Carole Goldberg’s extensive research on the highly negative impacts of Public Law 280, the government framed the law as a factor that aids affected tribes. The defendants claimed that the tribe “attacks”\textsuperscript{240} their fund allocation based on its “dissatisfaction”\textsuperscript{241} with California’s state and local law enforcement. This language implies that the Los Coyotes Band of Cupeno Indians have a personal and unique problem with Public Law 280 jurisdiction, rather than it being representative of a heavily researched and widespread issue. The defendants further

\textsuperscript{235} Ibid. 1
\textsuperscript{236} Ibid. 5
\textsuperscript{237} Ibid. 1
\textsuperscript{238} Ibid. 1
\textsuperscript{239} \textit{Lincoln v. Vigil}, 508 U.S 182 (1993)
\textsuperscript{241} Ibid. 15
distorted the reality of Public Law 280 by claiming that the plaintiff “ignores” the fact that the OJS has to grant contracts to tribes in non Public Law 280 states, “for whom state and local law enforcement options are altogether unavailable.” The government further argued that tribes in Public Law 280 states “benefit” from state criminal jurisdiction, and that tribes in non Public Law 280 states do not “enjoy” these “benefits.” These arguments completely disregard the highly detrimental effects of Public Law 280, both historically and currently.

IV. The Opinion of the District Court

The process of adjudicating this case paralleled the tribe’s appeal process within the OJS, in that the tribe experienced initial success but overall defeat. The district court ruled in the plaintiff’s favor, only to have the decision overturned by the Ninth Circuit Court of Appeals. The district court found that the government denied the 638 contract as a result of the tribe’s location in a Public Law 280 state, thereby violating the ISDEAA, the APA, and the equal protection requirements of the Fifth amendment. The court found that while the “stated reason” of the government for denying the contract was the statutory reason of requesting more funds than would otherwise be provided, the “actual reason” was the unwritten policy against Public Law 280 states. The court explained that the application of the Los Coyotes Band of Cupeno Indians was “dead on

242 Ibid. 15
243 Ibid. 20
244 Los Coyotes Band of Cupeno Indians v. Salazar, Case No. 10cv1448 AJB (NLS). United States District Court, S.D. California (2011)
247 Ibid. 6
arrival” and therefore “not provided proper review.” The court specifically addressed “the reason why the ‘applicable funding level’ is zero,” rather than simply referencing the government’s adherence to the “permissible statutory reasons” for denying a 638 contract in ISDEAA. The district court only granted the defendants cross motion for summary judgment on the argument that they had violated their federal trust responsibilities. The court stated that the plaintiff did not specify a specific duty of the federal government in its citation of the TLOA and other statutes.

The district court’s decision was critical in analyzing the complex invisible factors that oppress tribes. Rather than simply analyzing the language of the ISDEAA, the court accounted for the extensive history of discriminatory practices by the OJS and the BIA. The judicial system must account for the manner in which laws are implemented, and the reasoning behind this implementation, rather than simply focusing on narrow statutory interpretation. By addressing the intangible methods through which the government creates oppressive policies, the courts aid in addressing the oppression of uncertainty. The district court’s ruling would have been an important step in empowering tribes.

V. The Opinion of the Ninth Circuit Court of Appeals

The Ninth Circuit Court of Appeals took an opposite approach in analyzing the merits of the case. Rather than focusing on the unwritten policy or the reasons that OJS funding has not historically or currently existed in California, the Court asserted the legality of the government’s denial of the contract. The Court declared that the contract

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248 Ibid. 6
249 Ibid. 6
250 Ibid. 12
was “properly rejected.” The “statutory basis” was cited as grounds for justification that a contract can be denied if the “amount of funds proposed under the contract is in excess of the applicable funding level for the contract.” The Court further claimed that the tribe’s arguments citing other sections of the ISDEAA do not impact the decision, due to the fact that these sections do not “undermine” the “statutory basis” of denying the contract. The Court also agreed with the defendants’ citation of Lincoln v. Vigil in asserting that agencies have discretion with allocating lump-sum funds. The Court denied the tribe’s claim that equal protection had been violated, asserting that there was a clear distinction between Public Law 280 and non Public Law 280 states. According to the Court, the other Public Law 280 states and California tribes that received 638 contracts had “specific reasons” stated by the government. While the district court thoroughly analyzed the context and underlying processes by which tribes in Public Law 280 states were discriminated against by the BIA, the Appeals Court narrowly looked at the statutory basis for the rejection.

The experience of the Los Coyotes Band of Cupeno Indians demonstrates the failure of both the BIA and the judicial system in creating an environment that encourages self-determination and sovereignty. Initially, tribes in Public Law 280 states have attempted to rectify the issues created by the law by pursuing legislative avenues. The result of this has been a statutory maze that fails to address the widespread impact of Public Law 280. Yet, the Ninth Circuit Court of Appeals and the defendant, tasked with

252 Ibid. 14
253 Ibid. 20
254 Ibid. 24
255 Ibid. 29
aiding Native Americans, both do not reflect an understanding of these barriers. For example, when providing background information in the decision, the Court cited the TLOA as an example of Congress “recognizing the problem of crime in Indian Country.”\textsuperscript{256} Although the Court acknowledges that the TLOA “falls short”\textsuperscript{257} in resolving many of the issues, the Court does not address the fact that the TLOA disproportionately failed to address the concerns of tribes in Public Law 280 states. Considering that the case largely centered on Public Law 280, this would have been relevant knowledge to include. The government similarly did not recognize the experience of tribes by stating in its cross motion for summary judgment that the issues of the Los Coyotes Band of Cupeno Indians “are best addressed through the political process.”\textsuperscript{258} Not only does this statement minimize the legal merit of the plaintiff’s case, but it also blatantly overlooks the tremendous effort that tribes have put forth in utilizing the political process.

The largest issue with the decision of the Ninth Circuit Court of Appeals was its narrow interpretation of a complex issue. Even though the OJS technically complied with the precise language of a specific section of the ISDEAA, the agency violated the spirit of the law. Statutory interpretation must be accompanied by practical context. While the district court accounted for this type of context, the appeals court actively avoided it. As with Public Law 280, the complexities of Federal Indian Law cannot be fully understood from statutory language. The court system must account for legislative histories, intent, and actual implementation when dealing with matters related to Federal Indian Law.

\textsuperscript{256} Ibid. 12  
\textsuperscript{257} Ibid. 13  
The practical effects of Public Law 280 play a significant role in inhibiting tribal sovereignty. However, the case of *Los Coyotes Band of Cupeno Indians v. Salazar* demonstrates that the courts are not aiding tribes in combatting these effects. Not only are tribes unable to guarantee retrocession, but they are also unable to mitigate the effects of a law that was passed without their consent. The legislative branch and the judicial branch have both failed to fully recognize criminal justice issues of tribes in Public Law 280 states. As a result, tribes experience continued oppression in their inability to effectively counteract the widespread implications of Public Law 280.
Chapter 5: The Role of Federal Indian Law Canons of Construction in Tribal Gaming

“Pre-gaming, tribes were invisible. They were easy [for the states] to ignore. They were just these poor communities that [states] did not have to worry about. But now, with gaming, they have money, and they have traffic.”

-Lauren van Schilfgaarde, Tribal Law Specialist at the Tribal Law and Policy Institute

The extensive history of oppressive policies and attitudes towards Native Americans in the United States has often manifested itself in all three branches of the government. The history of Federal Indian law is defined by over four thousand treaties and statutes, and thousands of reported judicial decisions, rife with broken promises and misguided policies and decisions. This law dominates the daily realities of Native Americans, yet is often not understood by the very people tasked with enforcing it. As a result, the American court systems are often viewed by Native Americans as unreliable. Indeed, the *Los Coyotes Band of Cupeno Indians v. Salazar* case demonstrates the courts’ failure to address the problematic effects of criminal jurisdiction as defined by Public Law 280. However, courts have the opportunity to counteract the oppression of uncertainty caused by Public Law 280 through the use of Federal Indian Law canons of construction. These canons of construction support the inherent rights of tribes to tribal sovereignty and self-determination. The use of these canons of construction by the courts, combined with contextualization of Native American history, had revolutionary effects in

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259 Van Schilfgaarde, Lauren. Personal interview. 8 July 2015.
260 Pursuant to Fed. R. App. P. 43(c)(2), which regulates the substitution of parties, different defendants represented the federal government in the appeal of this case. This thesis will refer to the case with respect to the original defendants in the District Court case.
   Los Coyotes Band of Cupeno Indians v. Salazar, Case No. 10cv1448 AJB (NLS). United States District Court, S.D. California (2011)
Indian Country towards the end of the 20th century. *California v. Cabazon Band of Mission Indians*\textsuperscript{261} facilitated the nationwide spread of tribal gaming, which was made possible by the framework for interpretation of Public Law 280 defined in *Bryan v. Itasca County*.\textsuperscript{262} Tribal gaming is a direct result of the courts using canons of construction to replace a culture of oppression with a culture of empowerment.

I. Federal Indian Law Canons of Construction

Canons of constructions are developed by the federal courts, particularly the Supreme Court, as a mechanism for interpreting ambiguous language in a statute or treaty. Courts use canons of construction to determine the intent of a legislator or a treaty signatory in the use of certain terms in a legal document.\textsuperscript{263} However, this process of determining the intended meaning of language can only be used when the language itself is determined to be ambiguous. An ambiguous phrase is one in which people who are “reasonably well-informed” can understand the language of the document in “two or more senses.”\textsuperscript{264} Otherwise, the language has “plain meaning.”\textsuperscript{265} This rule, which itself is a canon of construction, determines if other canons can be applied. When language is determined to be ambiguous, canons of construction allow courts to determine intent through analysis of legislative history, floor debates, and committee reports.\textsuperscript{266}

\begin{itemize}
\item \textsuperscript{261} *California v. Cabazon Band of Mission Indians*, 402 U.S 202 (1987)
\item \textsuperscript{262} *Bryan v. Itasca County*, 426 U.S. 373 (1976)
\item \textsuperscript{263} Rossum, Ralph A. *The Supreme Court and Tribal Gaming*. Lawrence: University Press of Kansas, 2011. Print. 49-50
\item \textsuperscript{264} Ibid. 50
\item \textsuperscript{265} Ibid. 50
\item \textsuperscript{266} Ibid. 50
\end{itemize}
Specifically, the development of Federal Indian Law canons of construction is rooted in the “Marshall Trilogy.”267 The Marshall Trilogy consists of three cases that define certain basic tenets of Federal Indian Law: *Johnson v. M’Intosh*,268 *Cherokee Nation v. Georgia*,269 and *Worcester v. Georgia*.270 The development of canons of construction from these cases was rooted in the constitutional duty of the Supreme Court to interpret treaties. Chief Justice John Marshall determined that treaty interpretation needed to be understood in terms of the disadvantaged bargaining position of Native Americans during these negotiations. Marshall recognized that treaties were initiated and drafted by the federal government, rather than through a collaborative effort sought out by both parties.271 Further, these treaties were written down in English for tribes where “most probably could not read” and “no chief was capable of signing his name.”272 As a result of this linguistic barrier, tribes had to rely on representatives to relay the meaning of these treaties, and had to place faith in the federal government with regard to what the treaties dictated.273 Marshall also characterized the relationship between a tribe and the federal government as “a ward to his guardian,” and thereby defined tribes as “domestic dependent nations.”274 As a result of this relationship, Federal Indian Law canons of construction were developed to aid in rectifying the disadvantaged circumstances of tribal treaty negotiations.

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268 *Johnson v. M’Intosh*, 21 U.S. 543 (1823)
269 *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831)
274 *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831)
Although Federal Indian Law canons of construction were initially developed to specifically interpret treaties, a series of Supreme Court cases has extended this to treaty substitutes, statutes, and executive orders.\textsuperscript{275} In a modern context, these canons of construction require that ambiguous language be liberally construed in favor of Native Americans.\textsuperscript{276} Specifically, treaties and treaty substitutes should be construed by the courts in a manner that reflects how Native Americans would have understood them. In statutes and executive orders, as well as treaties and treaty substitutes, ambiguities in the language should be understood in a manner that favors Native Americans and preserves tribal sovereignty and property rights. However, if the language clearly expresses intent by Congress to the contrary, then Federal Indian Law canons of construction cannot be applied.\textsuperscript{277} Federal Indian Law canons of construction are so strongly emphasized, that when applicable, weaken the force of other canons,\textsuperscript{278} such as \textit{noscitur a sociis}\textsuperscript{279} and \textit{ejusdem generis}.\textsuperscript{280} However, Federal Indian Law canons cannot be understood as inflexible rules for interpretation. As with other canons, the courts have the discretion to either apply or ignore the rules.\textsuperscript{281}

Using Federal Indian Law canons of construction, the courts have the potential to counteract the oppressive effects that result from Public Law 280. In order to do so, Public Law 280 would have to be considered a statute containing ambiguous language.

\textsuperscript{276} Ibid. 113
\textsuperscript{277} Ibid. 114
\textsuperscript{278} Rossum, Ralph A. \textit{The Supreme Court and Tribal Gaming}. Lawrence: University Press of Kansas, 2011. Print. 51
\textsuperscript{279} This canon of construction uses the context of words or phrases immediately surrounding ambiguous language in order to determine meaning.
\textsuperscript{280} This canon of construction dictates that when general words follow more specific ones, the general terms must be construed as only referencing categories similar to the specific language.
\textsuperscript{281} Rossum, Ralph A. \textit{The Supreme Court and Tribal Gaming}. Lawrence: University Press of Kansas, 2011. Print. 52
One of the first court cases to overtly accomplish this was *Santa Rosa Band of Indians v. Kings County*, decided by the Ninth Circuit Court of Appeals. This case centered on the applicability of Kings County’s zoning ordinance and building code over the Santa Rosa Band of Indian’s reservation. Judge Koelsch ruled in favor of the Santa Rosa Band, on the basis of a liberal construction of Public Law 280, in accordance with Federal Indian Law canons of construction. Koelsch determined that two specific phrases in the law were ambiguous. The first phrase, “civil laws of [the] State…that are of general application…within that State…,” can be interpreted in two ways. The first interpretation is that the only civil laws that apply in Indian Country are those passed by the state legislature, and meant for statewide application. The other possible interpretation is that county or municipal ordinances apply on the Santa Rosa Band’s reservation because they are civil laws equally applicable to both Native Americans and non-Native Americans. Koelsch resolves this ambiguity by referencing *Worcester v. Georgia*, stating that “ambiguities in Federal treaties or statutes dealing with Indians must be resolved favorably to the Indians.” Koelsch states that by “applying that principle of construction here,” the court had “little difficulty in concluding” that tribes in Public Law 280 states are subject only to the civil laws of the state, not to local

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284 28 U.S.C §1360 (a) (1953)
285 25 U.S.C §1322 (a) (1968)
regulation. The other ambiguity that Koelsch cites is the use of the term “encumbrance” in Public Law 280. The statute references that states cannot authorize “encumbrance…of any real or personal property…held in trust by the United States.”

The language of this statute does not clearly express whether trust lands are exempted from state zoning and land use regulations. Koelsch states that by “relying on the canon of construction applied in favor of Indians” the Court “broadly construed” the term encumbrance to deny the state the power to apply zoning regulations to trust property. Koelsch’s decision in Santa Rosa Band of Indians v. Kings County was one of the first to directly apply Federal Indian Law canons of construction to Public Law 280.

II. The Rise of Tribal Enterprises

The use of canons of construction favoring Native Americans, such as in Santa Rosa Band of Indians v. Kings County, can have far reaching effects in furthering tribal sovereignty. However, these canons can only be used if Federal Indian Law cases are actively being pursued. The liberal construction of Public Law 280 by the courts was only made possible through the proliferation of these types of cases. In 1975, Carole Goldberg published an influential work that offered context for the increase in these types of cases, as well as providing an analysis of the merit of different arguments presented to the courts. During this time period, the areas surrounding reservations

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288 Ibid.
289 Ibid.
290 28 U.S.C §1360(b) (1953)
experienced an increase in urbanization. The two compounding factors resulted in a greater number of non-Native Americans coming onto reservation land. Public Law 280 states viewed this phenomenon as “enclaves” that were “free of state control.” This fear was furthered by the fact that state citizens were leasing land from Native Americans to pursue their own business enterprises. In a more all-encompassing manner than in past eras, Native American reservation activity had direct off-reservation effects. In order to mitigate these effects, as well as to prevent the formation of “enclaves,” Public Law 280 states became increasingly motivated to have regulatory power in instances relating to land use and taxation.

The changing realities of both reservations and the surrounding metropolitan areas resulted in changing priorities of both state and tribal authority figures. Tribal governments wanted the autonomy to conduct their business ventures without the oversight of the state, while Public Law 280 states wanted control of actions that were impacting non-Native Americans off of the reservation. As a result, an influx of cases was being presented to the courts regarding the extent of state civil jurisdiction in Public Law 280 states. Due to this context, Carole Goldberg’s work was crucial in analyzing the validity of differing arguments presented in court cases. The recurring issues in these cases focused on whether state civil jurisdiction was limited to causes of action, rather than regulatory power, and if civil laws on both the state and county levels were

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293 Ibid. 538
294 Ibid. 538-9
295 Ibid. 583
296 Ibid. 583
297 Ibid. 584
298 Ibid. 584-5
299 Ibid. 538
300 Ibid. 538
Goldberg argued that ambiguities in Public Law 280, as well as the legislative history of the act, demonstrates a strong basis in determining these arguments in favor of Native Americans. Goldberg asserts that based on the legislative history of Public Law 280, the primary intent of Congress was to counteract lawlessness on reservations. Legislators viewed the transference of criminal jurisdiction from the federal government to states as a convenient and inexpensive way to handle the issue. The transference of civil jurisdiction, however, is largely unaddressed in the legislative history, and was likely an afterthought. Goldberg further argues that due to the ambiguities of both the legislative history and the act itself, a modern context must be applied. In the 1970’s, tribal self-determination was supported in President Nixon’s 1970 Message to Congress. Therefore, Goldberg argues that current federal policy, combined with the realities of Public Law 280’s legislative history, indicate that the law should be interpreted to limit state civil jurisdiction.

III. *Bryan v. Itasca County*

Together, Goldberg’s work and the decisions of lower courts, such as in *Santa Rosa Band of Indians v. Kings County*, factored heavily into the Supreme Court decision in *Bryan v. Itasca County*. The expressed issue at hand related to property taxes. The petitioner, Russell Bryan, resided in a mobile home on the Leech Lake Reservation in

301 Ibid. 575
302 Ibid. 594
303 Ibid. 541
304 Ibid. 543
305 Ibid. 536n8
Minnesota. Bryan brought the case to court on the basis that taxation by the state and county of personal property on a reservation was contrary to federal law. This case was based in the ambiguities surrounding the extent of Public Law 280 state civil jurisdiction. Public Law 280 explicitly states certain exclusions to this jurisdiction, such as state taxation over trust and restricted Native American property. However, a possible interpretation of Public Law 280 is that beyond these stated exceptions, all other jurisdiction is delegated to the states. This meant that Bryan’s attorneys faced the obstacle of fighting the interpretation that Public Law 280 states were authorized to issue personal property taxes. Although the Minnesota District Court and the Minnesota Supreme Court both ruled in favor of Itasca county, the Supreme Court determined that Public Law 280 did not grant affected states this new taxing jurisdiction. However, Justice Brennan’s decision had a much broader holding than this narrow tax issue. In a unanimous decision, the Court held that Public Law 280 did not grant states “general state civil regulatory authority” over Native American reservations. This Court decision determined that Public Law 280 did not allow for regulatory control on a state or county level over reservation land, but rather, simply granted jurisdiction over civil causes of action.

308 Ibid. 924
312 Ibid. 934
313 Ibid. 951
314 Ibid. 953
The Supreme Court’s opinion expanded upon a principle established in

_McClanahan v. Arizona State Tax Commission_315 and _Moe v. Salish & Kootenai Tribes_.316 According to Justice Brennan, these decisions determined that a county in a Public Law 280 state lacks the authority to tax Native Americans on reservations in the absence of congressional consent. The question that faced the Court was whether Public Law 280 provided this type of consent.317 The Minnesota Supreme Court determined that “Public Law 280 is a clear grant of the power to tax.”318 The Supreme Court disagreed on the basis of “the legislative history of Public Law 280 and the application of canons of construction applicable to congressional statues claimed to terminate Indian immunities.”319 The Court determined that due to the absence of discussion in the legislative history of congressional intent to grant states taxation authority, Federal Indian Law canons of construction should be applied. Justice Brennan emphasizes that Public Law 280 is an “admittedly ambiguous statute” where these canons apply.320 Specifically, these canons dictate that “doubtful” phrases “be liberally construed” and “resolved in favor of the Indians.”321 Using both Federal Indian Law canons of construction and analysis of the legislative history, the Supreme Court’s conclusions expanded far past the narrow issue of taxation on Russell Bryan’s mobile home. Justice Brennan determined that the legislative history not only lacked jurisdiction for taxation, but also lacked “anything remotely resembling an intention to confer general state civil regulatory

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319 Bryan v. Itasca County, 426 U.S. 373 (1976)
320 Ibid.
321 Ibid.
control over Indian reservations.”\textsuperscript{322} Rather, based on the repeated use of the term “civil causes of action” in both the legislative history and Public Law 280, itself,\textsuperscript{323} the Supreme Court determined that the primary intent of the law was to grant jurisdiction to states over private civil litigation involving Native Americans on reservations.

IV. The Development of Tribal Gaming

The broad scope of the \textit{Bryan v. Itasca County} decision would have tremendous impact in the following decade in a manner far beyond the narrow issue of taxation. Beginning in the late 1970s and continuing into the 1980s, tribes realized that gambling could serve as a key source of economic development. Particularly in California and Florida, tribes began to engage in high stakes bingo operations.\textsuperscript{324} As these operations expanded and grew more successful, state and local officials believed that tribal gaming was expanding past the limited forms of bingo that their state regulatory laws permitted. Both of these states cited Public Law 280 as the legal basis for challenging tribal bingo operations.\textsuperscript{325} Although Florida is an optional Public Law 280 state, it is the only optional state that chose to assume all components of Public Law 280 jurisdiction for all tribes within the state.\textsuperscript{326} Therefore, Florida had the ability to make this argument to the same degree as the mandatory state of California.

In light of this context of gambling, the question remained as to what extent the \textit{Bryan v. Itasca County} ruling was applicable. The \textit{Bryan} decision raised two main

\textsuperscript{322} Ibid.
\textsuperscript{323} Ibid.
\textsuperscript{325} Ibid. 288
questions that future rulings would need to confront. The first issue was whether the
*Bryan* decision related only to taxation, despite the broad language that was used. The
second issue was that if the decision was applicable, then the distinction of a “civil
regulatory” law,\(^{327}\) as opposed to other types of laws, was ambiguous. These questions
were first addressed in two cases in the United States Courts of Appeals: *Seminole Tribe of Florida v. Butterworth*\(^ {328}\) and *Barona Group of the Capitan Grande Band of Mission Indians, San Diego, California v. Duffy*.\(^ {329}\) Both of these cases determined that the *Bryan*
decision applied, and created framework for determining if laws, such as those related to
bingo enterprises, are of a regulatory nature. The opinions of these cases created a
dichotomous framework between laws that are civil/regulatory and
criminal/prohibitory.\(^ {330}\) Based on the *Bryan* decision, laws that are civil/regulatory cannot
be enforced on reservations due to the limitations of Public Law 280.

Criminal/prohibitory laws, however, can be equally enforced by the state, both on and off
the reservation. Both cases determined that state laws regarding bingo games were of a
civil/regulatory nature, and therefore could not be applicable on reservation land.\(^ {331}\)

The initial *Bryan* ruling, in conjunction with the decisions in the lower courts,
relied heavily on Federal Indian Law canons of construction. Not only is the distinction
between civil/regulatory and criminal/prohibitory ambiguous, but the designation of laws
relating to bingo games is also unclear. The courts determined that due to Federal Indian

\(^{327}\) *Bryan v. Itasca County*, 426 U.S. 373 (1976)

\(^{328}\) *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310. United States Court of Appeals for the Fifth
Circuit (1981)

\(^{329}\) *Barona Group of the Capitan Grande Band of Mission Indians, San Diego, California v. Duffy*, 694 F.2d

\(^{330}\) *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310. United States Court of Appeals for the Fifth
Circuit (1981)

\(^{331}\) Ibid.
Law canons of construction, the ambiguity of this distinction must be determined in favor of Native Americans. The usage of these canons in relation to gambling issues demonstrates the importance of Federal Indian Law canons of construction on a larger scale. The federal government has historically defined its relationship with Native Americans through the implementation of exploitative measures that tribes were powerless to counteract. Federal Indian Law canons of construction are the only legal tool of the courts that fully address this problematic history. Furthermore, these canons are the main way in which courts can identify current issues in Federal Indian Law as a legacy of this history. The issues of interpreting Public Law 280 and applying the dichotomous framework of civil/regulatory and criminal/prohibitory laws are modern applications of a historic problem. The initial philosophy of the Marshall trilogy still resonates in a more recent context when addressing issues of tribal gaming.

V. California v. Cabazon Band of Mission Indians

The use of Federal Indian Law canons of construction not only created legal precedent, but also had direct social and economic consequences. The bingo enterprises of the 1970’s, which were supported by court rulings in the 1980’s, set the stage for the gambling enterprises of the Cabazon Band. The Cabazon Band of Mission Indians was a tribe in Southern California with arid reservation land and no natural resources. Due to this, the tribe had no revenue to operate its tribal government, and the unemployment rate of its tribal members was high. In order to counteract this, the tribe enacted ordinances that authorized and regulated bingo games and a card club. However, three days after the

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card club opened, it was raided and shut down by local law enforcement.\textsuperscript{333} Even after the card club was legally allowed to reopen,\textsuperscript{334} local law enforcement later raided the card club again. Thirty-one tribal members, employees, and patrons of the card club were issued misdemeanor citations for violating a county ordinance.\textsuperscript{335} Due to the actions of local law enforcement, the Cabazon Band was forced to engage in prolonged legal battles with the state. These legal battles would ultimately culminate in the Supreme Court case \textit{California v. Cabazon Band of Mission Indians}.

The issues that were to be addressed in the \textit{Cabazon} case were rooted in the manner in which the \textit{Bryan} decision was interpreted. The practical matter at hand for the Supreme Court to determine was whether the scope of Public Law 280 jurisdiction allowed for tribal gaming enterprises. Specifically, the main question was whether \textit{Bryan}’s statements regarding the prohibition of state regulatory authority applied.\textsuperscript{336} The State of California and its amici submitted briefs to the Supreme Court asserting that \textit{Bryan} should be narrowly interpreted, applying only to cases involving state tax laws.\textsuperscript{337} In the Cabazon Band’s brief, it asserted that the “overriding concern” in both cases was to protect the “economic security” of tribes from “unwarranted state intervention.”\textsuperscript{338} Although \textit{Bryan} provided the legal theory that would be used to justify tribal gaming, the \textit{Cabazon} case would ultimately determine if this was a legal principle.

\begin{footnotesize}
\begin{enumerate}
\item Ibid. 10
\item Ibid. 12
\item Ibid. 13
\item Ibid. 24
\item Ibid. 23
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In a six member majority, the Supreme Court ruled in favor of the Cabazon Band of Mission Indians, with Justice White delivering the opinion of the Court. The Supreme Court’s opinion focused on legally categorizing the nature of the California Penal Code §326.5 and Riverside County Ordinances 331 and 558. The California Penal Code only allows bingo to be played when charitable organizations are operating and staffing the events. Those organizing the bingo gaming must not be paid for their services and the profits must only be used for charitable purposes. The county ordinances regulate bingo and prohibit card games, such as draw poker. In determining whether these statutes applied to reservation land, Justice White reaffirmed the decision of the lower courts to interpret the Bryan ruling as creating a “prohibitory/regulatory distinction.” However, Justice White also determined that while the personal property tax in Bryan was “unquestionably civil in nature,” California Penal Code §326.5 could not be “so easily categorized.” Violation of the statute is a misdemeanor, meaning that these laws are enforceable by both criminal and civil means. However, Justice White explains that this does not “necessarily convert it into a criminal law within the meaning of Public Law 280.” Otherwise, the distinction in Public Law 280 between civil and criminal “could easily be avoided.” Therefore, the Court determined that even though one could make “an argument of some weight” that the California bingo statute was prohibitory, the statute was more strongly regulatory. Justice White based this decision on the fact that California does not prohibit all types of gambling, such as pari-mutuel horse race betting.

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341 Ibid.
342 Ibid.
343 Ibid.
344 Ibid.
345 Ibid.
In fact, the Court asserted that the State of California “actually promotes” gambling enterprises by operating a state lottery. Justice White supports this determination by expanding upon the economic necessity of gambling for tribes. He explains that the bingo games and card club are the “sole source of income” and “major sources of employment” for the Cabazon Band of Mission Indians. Due to the lack of natural resources on their reservation land, self-determination and economic development “are not within reach” in the absence of gaming. Therefore, these tribal interests “obviously parallel the federal interests.” The regulatory distinction of the California laws, combined with the Court’s interest in empowering tribal economic development, all factored into the ruling in favor of the Cabazon Band.

VI. The Indian Gaming Regulatory Act

The *Cabazon* decision determined that state authorities lack the jurisdiction to regulate bingo games. However, the decision also left many questions unanswered. Justice White’s opinion did not convey whether tribal gaming operations were legal on a federal level, and did not expand upon distinctions between different types of gaming. At this time, the Johnson Act of 1951 made the use or possession of mechanical gambling devices on reservation land illegal. Additionally, there was the potential for the federal government to use the Organized Crime Control Act of 1970 to prevent bingo gaming on reservations. In order to address logistical issues related to the implementation of the

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346 Ibid.
347 Ibid.
348 Ibid.
349 Ibid.
*Cabazon* ruling, Congress passed the Indian Gaming Regulatory Act (IGRA). The law categorized gambling into three different divisions. Class I gaming consists of social gaming with limited prizes, as well as all forms of traditional Native American gaming connected to ceremonies and celebrations. Class II gaming consists of bingo and non-banked card games such as poker. Class III gaming refers to all other types of gambling, such as banked card games, casino games, slot machines, and pari-mutuel betting.\(^{351}\) IGRA then determined different levels of regulation based on the class of gaming. Class I gaming is exclusively regulated by the tribe and is legal in all circumstances. Class II gaming is only legal in states where such gaming is legalized for any purpose by any entity. In the event that a statute of this nature is in effect, Class II tribal gaming is regulated by tribal ordinances approved by the National Indian Gaming Commission. The legality of Class III gaming and its regulations are determined in a similar manner to Class II gaming. However, in addition to this, tribes engaging in Class III gaming must negotiate a compact with the state that is subject to approval by the secretary of the interior.\(^{352}\)

Despite the choice of Congress to involve states in the creation of tribal Class III gaming enterprises, the intention was not to inhibit tribal economic development. In order to prevent states from simply refusing to enter into compacts, IGRA included provisions that mandated the states to negotiate in good faith with tribes. IGRA even detailed a process by which tribes could sue a state in federal court in order to compel the state to

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enter into negotiations.\footnote{Ibid. 152} Unfortunately, much of the language used in IGRA that protected tribes was ruled as unconstitutional in *Seminole Tribe of Florida v. Florida*. In a five-member majority, Chief Justice Rehnquist ruled that Congress lacked the authority to order states to negotiate with tribes in good faith.\footnote{Ibid. 162} Although this decision theoretically could have impeded tribal gaming, in practice, it only proved to be a minor obstacle. Tribes were able to incentivize states to enter into negotiations, without being federally mandated, by including revenue-sharing provisions. Both historically and currently, tribes include monetary incentives for states in compacts, in exchange for varying degrees of exclusive tribal authorization of casino operations.\footnote{Ibid. 180}

While IGRA determined the logistical and regulatory issues of gaming, the *Bryan* and *Cabazon* decisions created the framework to ensure the legality of tribal gambling enterprises. These decisions, combined with several decisions from lower courts, have had profound effects on the socio-economic realities of Native American reservations. Native Americans have historically experienced the highest rates of poverty and unemployment of any minority group in the United States. Almost one out of every three Native Americans live below the poverty line, with their families, on average, earning less than two-thirds of the income of non-Native American families.\footnote{United States. Cong. National Gambling Impact and Policy Commission. *National Gambling Impact Study Commission Report*. 104th. Washington: GPO, 1999. Print. 6-5} Equally concerning statistics impact Native Americans in relation to education, employment, housing, health care and incarceration. Tribal gaming has enabled Native Americans to reverse this cycle of impoverishment to a degree that no federal policy or program has ever accomplished. As of 2013, Native American gaming enterprises had generated a
gross revenue totaling 28.5 billion dollars.\textsuperscript{357} Out of the 562 federally recognized tribes in the United States,\textsuperscript{358} 486 of them have gaming operations in twenty-eight states.\textsuperscript{359} Tribal casino enterprises have enabled tribes to reduce welfare dependency, increase educational opportunities, and finance infrastructure such as schools and roads.\textsuperscript{360} It is important to emphasize that tribal gaming does not impact all tribes, and that not all tribal casinos are hugely profitable. Further, even tribes with highly profitable gaming ventures must counteract centuries of destitute reservations.\textsuperscript{361} However, gaming is the single most successful form of tribal economic development to impact the Native American people.

The socio-economic success of tribal gaming is rooted in its reliance upon tribal government. Historically, Native Americans have been forced to rely on the federal government for the furthering of Native American interests. The Federal government is unpredictable, and the prioritization of Native American interests depends on a constantly shifting political climate. Through the cases of Bryan v. Itasca County and California v. Cabazon Band of Mission Indians, the Supreme Court provided the legal basis of interpreting Public Law 280 in a manner that empowered Native Americans. The use of canons of construction enabled tribes to use gaming as a method of asserting tribal sovereignty. The canons of construction and the contextualization of Native American history, cited in the Supreme Court decisions, prevented state civil regulatory law over enterprises such as gambling. This, in turn, allowed the economic success of tribal gaming to be directly connected to tribal self-government. The Supreme Court directly

\textsuperscript{357} NIGC Fact Sheet. National Indian Gaming Commission, August 2015.
\textsuperscript{359} NIGC Fact Sheet. National Indian Gaming Commission, August 2015.
\textsuperscript{361} Ibid. 6-2
used canons of construction to create a culture of empowerment for Native Americans, instead of one of uncertainty, perpetuated by inconsistent federal and state governmental policies and laws. By creating this culture of empowerment, the court system is fulfilling its long-established role of helping the disenfranchised by upholding the Constitution.
Chapter 6: The Legacy of Cabazon and its Potential Legal Justification for Marijuana Distribution in Indian Country

“I think that there is a good argument to be made. Once the state has made medical marijuana legal, any attempt to criminalize it in Indian Country is outside of the scope of Public Law 280 jurisdiction.”

- Carole Goldberg, Vice Chancellor of the University of California, Los Angeles

The Supreme Court’s empowerment of tribal sovereignty in the decision of California v. Cabazon Band of Mission Indians reflects the traditional role of the judicial branch. The court system defends the civil rights and liberties of Americans by determining if a law is unconstitutional. However, this role of the courts is not limited to the Cabazon case and tribal gaming enterprises. The opinion of this case created a judicial test, categorizing the laws in Public Law 280 states as either criminal/prohibitory or civil/regulatory. The use of this test in future adjudication presents an opportunity for the courts to continue to enable tribal self-determination. Currently, a new trend in Indian Country presents a situation that parallels tribal gaming. Marijuana growth and distribution on reservation land presents an important opportunity for economic development. Due to the Cabazon test, this issue has a strong legal argument. This exact issue has never been adjudicated, and the courts have an opportunity to create important legal precedent. The courts have a moral obligation to utilize the Cabazon test in a manner that is consistent with Federal Indian Law canons of construction and contextualization of Native American history. This obligation relates to the larger role of

the judicial branch in determining unconstitutional laws on two fronts: rhetorical analysis and practical application.

I. The Cabazon Test and its Applications

*California v. Cabazon Band of Mission Indians* and the cases preceding it have distinctly defined the manner in which Public Law 280 applies to state laws. While Public Law 280 states unequivocally have sole or concurrent jurisdiction over criminal matters, civil jurisdictional authority has been tremendously limited.\(^{364}\) However, the distinction between the categories of criminal jurisdiction and civil jurisdiction are not always immediately apparent. While the tax issues in *Bryan v. Itasca County* were clearly seen as a civil regulation, the *Cabazon* court had to determine how future, more contentious subjects would be distinguished. In order to accomplish this, the *Cabazon* decision specified a judicial test that future courts would implement when determining jurisdictional classifications.\(^{365}\) The Supreme Court determined that if the “intent” of a law in a Public Law 280 state was “generally to prohibit certain conduct,” then it would be classified as criminal/prohibitory.\(^{366}\) However, if the law of the state “generally permits the conduct at issue,” but is “subject to regulation,” then it must be considered as “civil/regulatory.”\(^{367}\) The Court clarifies that Public Law 280 does not “authorize” state enforcement of civil/regulatory laws in Indian Country.\(^{368}\) Criminal/prohibitory laws, on the other hand, are encompassed by Public Law 280’s designation of criminal jurisdiction

\(^{365}\) Ibid. 458  
\(^{367}\) Ibid.  
\(^{368}\) Ibid.
to the states. The difference between civil/regulatory and criminal/prohibitory must be determined by the stated distinctions, and not by the criminal penalties associated with regulatory statutes.\textsuperscript{369} Otherwise, the classifications would be futile.\textsuperscript{370} The Court concludes by then explicitly stating that this “shorthand test” shall be used to determine “whether the conduct at issue violates the State’s public policy.”\textsuperscript{371} This language allows future court decisions to account for the larger legal principles that impact and determine state law.

Lower federal courts have been using the Cabazon test to address a wide variety of legal issues in Public Law 280 states, which has resulted in differing interpretations in different states. For example, Minnesota\textsuperscript{372} and Washington\textsuperscript{373} have determined that traffic statutes are civil/regulatory, while Wisconsin\textsuperscript{374} and Idaho\textsuperscript{375} (which is an optional Public Law 280 state) have determined these laws to be criminal prohibitory.\textsuperscript{376} The reason behind this contention is because while the act of driving, itself, is generally permitted (subject to regulations), dangerous driving is distinctly prohibited. Issues such as speeding and driving under the influence can easily be interpreted as prohibitory. In \textit{State v. Stone}, the Minnesota Court of Appeals summarized the general role of the courts in these issues by stating that the “interest in preventing speeding” must be balanced by

\begin{itemize}
\item \textsuperscript{369} Garrison, Emma. "Baffling Distinctions Between Criminal And Regulatory: How Public Law 280 Allows Vague Notions of State Policy to Trump Tribal Sovereignty." \textit{The Journal of Gender, Race, & Justice} 8 (2004): 449-81. 458
\item \textsuperscript{370} Ibid. 458-9
\item \textsuperscript{371} California v. Cabazon Band of Mission Indians, 402 U.S 202 (1987)
\item \textsuperscript{372} \textit{See} State v. Stone, 557 N.W.2d 588, Minnesota Court of Appeals (1997)
\item \textsuperscript{373} \textit{See} Confederated Tribes v. Washington, 938 F.2d 146, United States Court of Appeals for the Ninth Circuit (1991)
\item \textsuperscript{374} \textit{See} St. Germaine v. Circuit Court for Vilas County, 938 F.2d 75, United States Court of Appeals for the Seventh Circuit (1991)
\item \textsuperscript{375} \textit{See} State v. George, 905 P.2d 626, Idaho Supreme Court (1995).
\item \textsuperscript{376} Garrison, Emma. "Baffling Distinctions Between Criminal And Regulatory: How Public Law 280 Allows Vague Notions of State Policy to Trump Tribal Sovereignty." \textit{The Journal of Gender, Race, & Justice} 8 (2004): 449-81. 460
\end{itemize}
“the protection of Indian sovereignty from state interference.” Other contradictory decisions center on family law (with differing decisions in Idaho and California), and fireworks (with differing decisions in California and Wisconsin).

The differing legal interpretations on a state-by-state basis may initially seem to reflect an issue with the Cabazon test. In fact, the inconsistent opinions relate to the fact that certain courts are expanding upon the Cabazon test in order to better address the issue of tribal sovereignty. Specifically, many courts are determining civil/regulatory and criminal/prohibitory classifications based on factors such as the existence of tribal enforcement mechanisms, tribal interests in economic development, and existing concurrent jurisdiction measures. The varying legal interpretations relate to whether the courts are applying the Cabazon test more narrowly, or are expanding upon it using congruent reasoning. The expansion of the Cabazon test that occurs, in practice, is an important step in the courts more uniformly supporting tribal sovereignty.

In a modern context, future cases centering on the Cabazon test will likely be related to marijuana production in Indian Country. The circumstances that have encouraged this interest are not only comparable to tribal gaming, but are also directly intertwined with it. Prior to the development of gambling enterprises, urbanization in

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377 State v. Stone, 557 N.W.2d 588, Minnesota Court of Appeals (1997)
382 See Quechan Indian Tribe v. McMullen, 984 F.2d 304, United States Court of Appeals for the Ninth Circuit (1993)
383 See State v. Cutler, 189 Wis. 2d 494; 527 N.W.2d 400, Wisconsin Court of Appeals (1994)
surrounding areas impacted reservations.\textsuperscript{385} It created an environment where more non-Native Americans were coming onto reservation land.\textsuperscript{386} Although this currently continues to remain the case, tribal gaming has also resulted in increasing urbanization on reservation land itself. The enormous success of gambling enterprises in Indian Country has resulted in mass influxes of customers that would otherwise not be present. The development of casinos has led to the development of other associated businesses, such as hospitality and food service. Marijuana cultivation and sale on tribal lands presents a viable form of economic development that benefits both tribes with casinos and those without. Tribes with casinos can provide an additional offering to already existing customers. Tribes that do not have gaming enterprises can attract new customers as an alternative to opening a casino. Most importantly, marijuana production can provide another avenue for counteracting centuries of impoverishment. Marijuana distribution in Indian Country could serve as an important means for financing Native American housing, education, health care, and other related services.

II. Legal Changes Surrounding Marijuana Growth

The social context that makes marijuana production appealing in Indian Country is only furthered by shifting legal realities on both the state and federal levels. Prior to 1996, marijuana possession was illegal in every state, including Public Law 280 states. However, this has been increasingly changing. California was the first state to legalize medical marijuana with the Compassionate Use Act.\textsuperscript{387} For the past two decades, more

\begin{footnotes}
\item[386] Ibid. 583
\end{footnotes}
states followed this trend. In 2012, Washington\textsuperscript{388} and Colorado\textsuperscript{389} were the first states to legalize recreational marijuana. These changes have allowed tribes to conceptualize marijuana as a form of economic development that otherwise would not have been legally possible. Currently, marijuana is fully legal in the Public Law 280 states of Oregon\textsuperscript{390} and Alaska,\textsuperscript{391} and legal for medical purposes in California\textsuperscript{392} and Minnesota.\textsuperscript{393}

Tribal interest in marijuana production was only further compounded when the Department of Justice (DOJ) published a memorandum regarding the issue in 2013.\textsuperscript{394} This memorandum, referred to as the Cole Memorandum, was published specifically in response to the legalization of marijuana on the state level. In light of these laws, and the limited resources of the department, the memorandum highlights eight priorities that the DOJ will focus on in marijuana enforcement. These priorities outline issues including distribution to minors, revenue funneling into criminal enterprises, and driving under the influence.\textsuperscript{395} Although the Cole Memorandum was only a guide for “investigative and prosecutorial discretion,”\textsuperscript{396} it ignited interest in whether marijuana production adhering to these priorities would be prosecuted by the federal government. Specifically, Native Americans were interested in how these enforcement priorities related to tribal lands. This interest led to the publication of a memorandum in 2014, titled “Policy Statement

\begin{thebibliography}{99}
\bibitem{389} Colorado Amendment 64, Co. Const. art. XVII, §16, November 2012.
\bibitem{390} Oregon Ballot Measure 91. Ore. Const. amend. Sec. 5 chap. 1 (November 2014).
\bibitem{391} Alaska Ballot Measure 2. November 2014.
\bibitem{395} Ibid.
\bibitem{396} Ibid.
\end{thebibliography}
Regarding Marijuana Issues in Indian Country.\[^{397}\] This memorandum explains that the priorities stated in the Cole Memorandum will “guide United States Attorneys’ marijuana enforcement efforts in Indian Country.”\[^{398}\] Furthermore, the memorandum states that the eight enforcement priorities will remain the same, even “in the event that sovereign Indian Nations seek to legalize the cultivation or use of marijuana in Indian Country.”\[^{399}\] Like the Cole Memorandum, this memorandum does not have the force of law and is not a legal defense. However, the memorandum still reinforces tribal sovereignty, including in relation to marijuana distribution. Although this does not constitute federal endorsement or legalization, its publication, nonetheless, served as a reaffirming factor in encouraging tribes to pursue business ventures in marijuana.

Due to the legal context on both the state and federal levels, Public Law 280 could potentially play a large role in serving as the legal basis for tribal marijuana distribution. According to the Cabazon test, if conduct is “generally” permitted, but subject to regulations, then the laws governing it are civil/regulatory and cannot be enforced on reservations.\[^{400}\] Considering the varying degrees of marijuana regulation in Minnesota, California, Oregon, and Alaska, there is a strong legal argument that these laws are civil/regulatory. If they are, in fact, civil/regulatory, then the state does not have the authority to enforce them in Indian Country. In states where recreational marijuana is legal, state limitations to its possession and production would not be applicable on reservation lands. For example, regulations relating to how many ounces of marijuana one could have, or the number of plants one could grow, could not be enforced. Tribes

\[^{398}\] Ibid.
\[^{399}\] Ibid.
would have the authority to determine these laws for themselves. In states where marijuana usage is restricted to medical needs, regulations relating to both production and usage would not be enforceable in Indian Country. Tribes would be able to determine for themselves whether marijuana distribution would be impacted by medical or recreational needs. These tribes could also determine issues relating to production in the same manner as tribes in Public Law 280 states where recreational use is legal. Although the federal government could still dismantle tribal marijuana production, the DOJ has not expressed a concerted interest in doing so, unless the eight priorities are violated.\textsuperscript{401} This non-interference stance of the DOJ only supports the fact that Public Law 280 could serve as an important basis for legalizing marijuana distribution on tribal lands.

Although this issue has not been determined in court, Oregon’s legislative branch has made important strides in addressing the issue. While the Oregon Ballot Measure 91, passed in 2014, legalized the use and sale of recreational marijuana,\textsuperscript{402} it did not initially address tribal marijuana production. This year, the 78\textsuperscript{th} Legislative Assembly of Oregon passed House Bill 4014, which addressed the role of tribes in the state’s newly reformed marijuana laws.\textsuperscript{403} This bill is the first of its nature to be passed in a mandatory Public Law 280 state. Specifically, the House Bill allows for the Governor of the state, or a designated representative of the Governor, to create agreements with federally recognized tribes in Oregon. The agreements would allow tribes to negotiate with the state about issues relating to “cross-jurisdictional coordination” and the “enforcement of marijuana-

\textsuperscript{402} Oregon Ballot Measure 91. Ore. Const. amend. Sec. 5 chap. 1 (November 2014).
related businesses” on tribal land.\textsuperscript{404} The agreements that Oregon authorizes draw a distinct parallel to the compacts that tribes with Class III gaming enterprises enter into with the state. The use of Public Law 280 to facilitate these types of agreements over marijuana enterprises in other states could be an important legacy of the Cabazon ruling and the Indian Gaming Regulatory Act.

III. The Potential Future Role of the Courts

The changing legal climate, and the legal theory that supports tribal marijuana production, are important factors for the court system to consider in the event that this issue is adjudicated. Although there is a legal argument that marijuana laws are criminal/prohibitory, this interpretation of the Cabazon test does not account for Federal Indian Law canons of construction or contextualization of Native American history and marijuana laws. Not only is Public Law 280 an ambiguous statute, but the Cabazon test is ambiguous in the manner by which it is applied. This ambiguity serves as a direct legal basis for implementing Federal Indian Law canons of construction. Furthermore, by using these canons, in addition to historical contextualization, the courts can more uniformly account for issues related to existing tribal enforcement mechanisms and economic development. These legal considerations, combined with the strong argument that marijuana laws are civil/regulatory, present the court system with the opportunity to help empower a disadvantaged group of people.

Creating legal precedent that allows tribes to utilize marijuana production as a means for economic development could have revolutionary effects comparable to the Cabazon case. Initially, the issue of no existing legal precedent may appear to be a barrier

\textsuperscript{404} Ibid.
for judges when engaging in statutory interpretation. Indeed, the importance of precedent in determining court decisions is evident in *California v. Cabazon Band of Mission Indians*. The opinion heavily referenced *Bryan v. Itasca County* and several decisions from lower courts. However, although the direct issue of tribal marijuana production has not been adjudicated, there has been one case that has utilized the Cabazon test in relation to marijuana. This case, *State v. LaRose* (2003), may serve as an important case in enabling the courts to create more clear and direct legal precedent.

The case centers on Franklin William LaRose, an enrolled tribal member who resides on the Leech Lake Reservation in Minnesota. He was arrested by state law enforcement for marijuana possession in his home on the reservation. The Court of Appeals of Minnesota was tasked to determine whether the marijuana law was civil/regulatory or criminal/prohibitory, thereby determining if the state could enforce the law on reservation lands. Although the court ruled in the state’s favor, the reasoning by which it did so would no longer be applicable in the current legal climate. In fact, if the court had implemented the same reasoning today, the case would have been decided in LaRose’s favor. The court determined that in *Cabazon*, since “some parts of California” engaged in gambling, “California could not forbid it on Indian reservations.”

Demonstrating that gambling was “generally permitted,” the court then points out that the use of marijuana “is not permitted any place in Minnesota.” The Court further declares that in order for LaRose “to liken it to Cabazon,” there must be a situation where “in different parts of California, people could legally possess or possess with intent to

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405 State v. LaRose, 673 N.W.2d 157, Court of Appeals of Minnesota (2003)
406 Ibid.
407 Ibid.
408 Ibid.
sell…marijuana.” 409 This would demonstrate that California did not “totally prohibit” marijuana, unlike in Minnesota, where it was illegal. 410 However, in a modern context, this reasoning would cause the court to rule in favor of LaRose. After the passage of Senate Bill 420 in California in 2004, medical marijuana was, and continues to be, possessed and sold throughout the state, but not in Indian Country. Marijuana is no longer completely illegal in Minnesota, because medical marijuana has recently been legalized there. By this reasoning, marijuana is “generally permitted” in both California and Minnesota. The courts could consider the reasoning used in the LaRose decision in a modern context, as initial precedent to be expanded upon.

IV. The Practical Effects of Legal Changes Surrounding Marijuana

The court’s moral obligation to use a contextual, rather than narrow, interpretation of the Cabazon test becomes heightened when considering practical consequences. Although there is a strong legal argument for a civil/regulatory classification of marijuana laws, the law in a rhetorical sense differs from its practical effects. Due to the increased interest among tribal members of marijuana production, attorneys at CILS have had to navigate a careful balance between legal potential and the logistical effects of both marijuana production and litigation. Most of the attorneys that I interviewed agreed that there was a legal argument in favor of a civil/regulatory interpretation. Mark Vezzola explained to me that since “marijuana use and growth is allowed in California under some circumstances,” it could not be considered “totally prohibited.” 411 This, by definition, would designate it as a “regulating activity” that does “not apply on California

409 Ibid.
410 Ibid.
411 Vezzola, Mark. Personal interview. 6 Aug. 2015.
Indian reservations."\textsuperscript{412} Dorothy Alther describes that although she would hesitate to present her legal opinion as a civil/regulatory classification, she could “argue it probably either way.”\textsuperscript{413} However, the fact that there is a legal argument does not mean that CILS encourages tribes to grow marijuana. Mark Radoff described that at the moment, laws relating to marijuana growth are “very unclear.”\textsuperscript{414} He discusses how even if tribes follow the priorities of the Cole Memorandum, there is still the issue of “transporting” to other states and “going across state lines.”\textsuperscript{415} Nicole Scott, the Marketing and Development Director of CILS and the founder of Legal Cannabis Institute, adds that this issue continues off of the reservation, as well.\textsuperscript{416} If a tribe decides to “do a massive grow,” while this might be fine in Indian Country, the problem centers around “when they leave the reservation and walk outside.”\textsuperscript{417} Scott continues that “the minute they leave the reservation,” there can be “a sheriff waiting to arrest them.”\textsuperscript{418} The inability of state law enforcement to uphold civil/regulatory laws in Indian Country does not apply in settings off of reservation land.

However, the strongest reason that CILS does not encourage marijuana production relates to the position of the state and federal governments, in practice. Despite the publication of the two memorandums, and the passage of state laws that legalize and regulate marijuana, tribal marijuana facilities are being raided by law enforcement. Last year, the BIA and the Drug Enforcement Administration partnered with state and local law enforcement to shut down the marijuana growth of the Pit River

\textsuperscript{412} Ibid.
\textsuperscript{413} Alther, Dorothy. Personal interview. 12 Aug. 2015.
\textsuperscript{414} Radoff, Mark. Personal interview. 7 Aug. 2015.
\textsuperscript{415} Ibid.
\textsuperscript{416} Scott, Nicole. Personal interview. 5 Dec. 2015
\textsuperscript{417} Ibid.
\textsuperscript{418} Ibid.
and Alturas tribes. Nicole Scott describes how no other tribe had “ever tried to do that in the state of California” and that “no one has successfully done it, thus far.” Due to the fact that the memorandums do not have the “force of law,” any tribe that attempts this is a “test case.” The realities of law enforcement, despite any potential legal argument, play a significant role in the legal advice that CILS can offer to its clients.

However, if a tribe does, indeed, bring this issue to court, then judges must consider how practical implementation furthers an oppression of uncertainty. Although the Cole Memorandum and its 2014 counterpart are not legally binding, they explicitly give tribes the impression that drug raids in Indian Country are not a priority of the DOJ. Due to centuries of impoverishment among Native American people, it is important for tribes to implement economic strategies for self-determination. By the DOJ intentionally publishing misleading memorandums, the government is deliberately creating confusion for a historically disadvantaged minority. Due to the manner in which the government is handling tribal interest in marijuana production, the court system must combine legal interpretation with historical and current contextualization. The legal argument in favor of marijuana production in Indian Country is strong, and is only further strengthened by the continued barriers that the government imposes on Native American tribes.

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Scott, Nicole. Personal interview. 5 Dec. 2015

Ibid.
Conclusion

“My dad was born in the ‘40s. His mom had to get him off of the reservation quickly, because they were taking children and putting them in Indian Schools… [My dad] would always say, ‘Don’t tell people you’re Indian.’ It is all about timing. Now they are celebrating being Indian and they are learning the language [Oglala].”

- Nicole Scott, Marketing and Development Director of CILS

The United States government, as dictated by the Constitution, operates on several legal principles that are often taken for granted. The purpose of law is to uphold social order, while preserving individual freedom and agency. In order to be effective, law must be known and certain. However, Federal Indian Law, and the specific statute of Public Law 280, runs counter to this dominant ideal of government. Public Law 280 is the antithesis of “known and certain,” and as a result, it severely impedes individual freedom and agency. The social order that is upheld as a result of this is highly discriminatory. In this manner, Public Law 280 creates an oppression of uncertainty that, while intangible in nature, is deeply experienced by all impacted tribes.

The ambiguity associated with this impacts tribes in a multilayered manner. The uncertainty of the law means that Native Americans cannot predict how Public Law 280 will be applied. Law enforcement and criminal justice personnel are largely ignorant to the complexities of the law, and tend to adopt a disposition of defensiveness with regard to education on the topic. Tribal sovereignty, which is guaranteed to tribes by the United States government, is frequently obstructed by inaccurate applications of the law. This oppression of uncertainty is only further compounded by the disempowered position of

422Younkin’s summarization of Friedrich Hayek’s work

tribes to counteract these circumstances. The government expressly provides statutory and judicial outlets for tribes to counteract Public Law 280. However, in practice, bureaucratic and legal mazes actively prevent tribes from successfully doing so. The Indian Civil Rights Act, the Tribal Law and Order Act, and the Los Coyotes case only further demonstrate this challenge.

The complex circumstances of this injustice can best be addressed by the court system. The judicial branch of the United States government has the important role of creating precedent, as well as limiting the power of Congress through judicial review. The court system has long aided the disempowered by upholding civil rights and liberties. In the context of Public Law 280, the judicial branch can best uphold its historic and current responsibilities through the implementation of Federal Indian Law canons of construction. There is a distinct legal basis for determining statutes in favor of Native Americans in the event of ambiguous language. The court opinions that led to the legalization of tribal gaming demonstrate the ability of the court to legally create a culture of empowerment.

However, Public Law 280, and its impact, must be understood beyond its immediate effects. The law is steeped in an extensive history of governmental oppression against Native Americans. Through assimilation and termination, the government has continually denied tribes the ability to ensure their own well-being. The legal legacy of this is woven throughout Federal Indian Law as a whole. Federal Indian Law is disparate, contradictory, and largely unknown. The utilization of canons that favor Native Americans is only the first step in addressing a much larger issue. The Federal
government has a moral obligation to address centuries of injustice by creating a legal climate that enables tribal sovereignty.
Appendix: Public Law 83-280
(As currently codified in the United States Code)\(^4\)

18 U.S.C. § 1162. STATE JURISDICTION OVER OFFENSES COMMITTED BY OR AGAINST INDIANS IN THE INDIAN COUNTRY

(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>
<td>All Indian country within the State, except the Red Lake Reservation.</td>
</tr>
<tr>
<td>Nebraska</td>
<td>All Indian country within the State</td>
</tr>
<tr>
<td>Oregon</td>
<td>All Indian country within the State, except the Warm Springs Reservation.</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>All Indian country within the State.</td>
</tr>
</tbody>
</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 sections 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.

28 U.S.C. § 1360. STATE CIVIL JURISDICTION IN ACTIONS TO WHICH INDIANS ARE PARTIES

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil

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\(^4\) Compiled by the Tribal Court Clearinghouse, a project of the Tribal Law and Policy Institute that makes Federal Indian Law more accessible.

laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

<table>
<thead>
<tr>
<th>State</th>
<th>Indian country affected</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>All Indian country within the State.</td>
</tr>
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<td>California</td>
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</tr>
<tr>
<td>Oregon</td>
<td>All Indian country within the State, except the Warm Springs Reservation.</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>All Indian country within the State.</td>
</tr>
</tbody>
</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 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.

25 U.S.C. § 1321. ASSUMPTION BY STATE OF CRIMINAL JURISDICTION

(a) Consent of United States; force and effect of criminal laws
The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Alienation, encumbrance, taxation, and use of property; hunting, trapping, or fishing
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.

25 U.S.C. § 1322. ASSUMPTION BY STATE OF CIVIL JURISDICTION

(a) Consent of United States; force and effect of civil laws
The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated
within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction 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 to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Alienation, encumbrance, taxation, use, and probate of property
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) Force and effect of tribal ordinances or customs
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.

25 U.S.C. § 1323. RETROCESSION OF JURISDICTION BY STATE

(a) Acceptance by United States
The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of title 18, section 1360 of title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Repeal of statutory provisions
Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

25 U.S.C. § 1324. AMENDMENT OF STATE CONSTITUTIONS OR STATUTES TO REMOVE LEGAL IMPEDIMENT; EFFECTIVE DATE

Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

25 U.S.C. § 1325. ABATEMENT OF ACTIONS

(a) Pending actions or proceedings; effect of cession
No action or proceeding pending before any court or agency of the United States immediately prior to any cession of jurisdiction by the United States pursuant to this subchapter shall abate by reason of that cession. For the purposes of any such action or proceeding, such cession shall take effect on the day following the date of final determination of such action or proceeding.

(b) Criminal actions; effect of cession
No cession made by the United States under this subchapter shall deprive any court of the United States of jurisdiction to hear, determine, render judgment, or impose sentence in any criminal action instituted against any person for any offense committed before the effective date of such cession, if the offense charged in such action was cognizable under any law of the United States at the time of the commission of such offense. For the purposes of any such criminal action, such cession shall take effect on the day following the date of final determination of such action.
25 U.S.C. § 1326. SPECIAL ELECTION

State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.
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