Cohen's Handbook of Federal Indian Law

CHAPTER 6 TRIBAL/STATE RELATIONSHIP

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§ 6.04 State Jurisdiction Through Federal Authorization

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[1] Congress's Power to Enact Statutes Authorizing State Jurisdiction

States generally lack civil and criminal jurisdiction over Indians within Indian country, absent federal legislation specifying to the contrary.n263 Despite the adverse consequences for tribal sovereignty, Congress claims--and has exercised--power to authorize state jurisdiction over Indians within Indian country, even without the tribes' consent. When this legislation is imposed on Indian nations without tribal consent, its legitimacy is seriously questionable.n264 Congress has usually invoked the need for law enforcement and civil dispute resolution in Indian country as the justification for empowering the states.n265

Most statutes passed by Congress that chose state jurisdiction over tribal sovereignty to address the problem were passed at a time when federal policy favored assimilation of Indian people into non-Indian social and political communities. Since the 1960s, both Congress and the executive branch have supplanted that policy in favor of one promoting tribal self-determination; nevertheless, Congress has yet to empower tribes to undo the effects of its prior impositions of state law.n266

Courts typically characterize an exercise of federal power authorizing state jurisdiction over Indians in Indian country as a delegation of Congress's otherwise preemptive authority over Indian nations to the states. When a treaty provides that an Indian nation will be immune from state regulation, the Indian law canons suggest that courts should not interpret federal statutes to delegate federal power to the states in the absence of clear and unambiguous language to that effect.n267 Several courts, however, have found such delegations without looking for clear language authorizing state jurisdiction, even in the face of conflicting treaty provisions.n268

A few lower court decisions addressing statutes of this type have upheld state jurisdiction on the theory that states possess inherent jurisdiction over Indians in Indian country, and that this authority lies dormant while federal jurisdiction exists but awakens when federal jurisdiction is withdrawn. On this view, Congress did not confer jurisdiction on the state, but merely abandoned the field.n269 These cases ignored controlling Supreme Court authority holding that the federal Constitution preempted state power over Indians in Indian country and vested that power in the federal government.n270 They further ignored the fact that states lack criminal jurisdiction over Indians even under circumstances, such as minor offenses committed by one Indian against another, in which Congress has not enacted federal criminal sanctions.n271 In addition, federal recognition of tribal governments may itself preempt state power in Indian country. Supreme Court precedent suggests that the states forfeited their inherent authority over Indians by virtue of joining the constitutional order,n272 and that Congress, and Congress alone, may act affirmatively to lift the jurisdictional ban. Under this theory, unless Congress intends otherwise, the state's power resulting from Congress's action will be inherent state jurisdiction, not a federal exercise.n273

Congressional acts authorizing state jurisdiction must, of course, be tested against constitutional or other limits on the exercise of congressional power. As one Idaho appellate court noted, federal statutes delegating jurisdiction to states

should be examined in light of Supreme Court decisions placing limits on the exercise of federal power.n274 More specifically, such statutes should be reviewed to determine whether they are "tied rationally to the fulfillment of Congress's unique obligation toward the Indians."n275 It has been argued that conscientious application of this test yields serious doubt about Congress's power to delegate jurisdiction over Indians to the states without tribal consent. The rationales behind federal statutes delegating jurisdiction to states have been curbing crime on reservations, saving federal law enforcement dollars, and assimilating Indians into the community life of the various states.n276 The first of these justifications, even if factually true, does not warrant the infliction of state jurisdiction on nonconsenting tribes. Federal support for enhanced tribal law enforcement and criminal jurisdiction could effectively address problems of crime control with far less impact on tribal sovereignty.n277 The rationales of federal cost-saving and assimilation are inherently opposed to the federal trust responsibility, which encompasses protection for tribal self-government.n278

Apart from constitutional objections, federal statutes delegating jurisdiction to states have been challenged because they violate federal treaty promises to shield Indian nations from state authority. For example, article X of the Treaty with the Shawnee of 1831 provides that "the United States guarantees that [the lands granted to the Shawnees] shall never be within the bounds of any State or territory, nor subject to the laws thereof."n279 Article VII of the 1794 Treaty with the Senecas creates a mechanism whereby a person injured by a citizen of one government can petition the government of the perpetrator for redress.n280 Other treaty provisions, such as article IX of the Treaty with the Klamath and Modoc of 1870, contain agreements by the Indians to submit to federal law, implicitly excluding the application of state law.n281 In the absence of tribal consent, federal laws delegating jurisdiction to states over these tribes therefore constitute treaty abrogations. Nevertheless, several lower courts have dismissed challenges to such delegations,n282 on the ground that the Supreme Court has held that Congress has the power to abrogate Indian treaties.n283

[2] Principles for Construing Federal Statutes Authorizing State Jurisdiction

Even if Congress is free to authorize state jurisdiction over Indians in Indian country, despite the fact that this abrogates an existing treaty, the question remains whether any given authorization statute should be construed to abrogate treaty obligations. The Supreme Court has held that statutes will be interpreted to abrogate treaty rights only if Congress has made its intent to abrogate "clear and plain,"n284 either through express language or through clear and reliable evidence in the language or legislative history.n285 For example, in *Bowen v. Doyle*,n286 a federal court interpreted the 1950 federal law authorizing New York courts to hear civil suits between Indians or between Indians and others personsn287 to determine whether it allowed the state to hear a suit over internal tribal government affairs. A Seneca Nation of Indians tribal council member, who had been removed from office by the Seneca president, sued in state court to enjoin his removal, claiming violations of tribal rather than federal or state law. The Seneca president, in turn, filed suit in federal court to halt the state court proceeding, arguing that the 1950 law had not conferred jurisdiction on the state. In ruling for the Seneca president, the federal court found that in the Seneca Treaty of 1794, the United States had acknowledged certain territory to be the property of the Seneca Nation, and had promised that "[it] shall remain theirs, until they choose to sell the same to the people of the United States."n288 This promise entailed the right to undisturbed enjoyment of their original rights on the land, including the right of self-government as sovereign entities. Because exclusive jurisdiction over internal governmental affairs is a fundamental aspect of self-government, the court reasoned that only a clear indication from the language and legislative history of the 1950 law could support state jurisdiction over such matters. The statutory language never alluded to internal tribal disputes, however, and the legislative history actually contained statements of intent to avoid impairing any treaty rights. Finding no indications that Congress intended to impinge upon tribal authority over internal matters, the federal court enjoined the state court proceeding.

In contrast, the Tenth Circuit in *Oyler v. Allenbrand,* n289 interpreted the 1940 Kansas Act conferring jurisdiction on the State of Kansas over offenses committed by or against Indians within Indian country,n290 to include state power over the Kansas Shawnee, a tribe that was not federally recognized in 1940, and which was protected by particularly strong treaty language against subjection to state authority.n291 When a member of that tribe was prosecuted under state law, he argued that Congress had never expressed a clear intent to apply state jurisdiction to his tribe. The Tenth Circuit rejected his contention on the ground that the need for law and order on the Shawnee reservation resembled the condition that prompted passage of the Kansas Act.n292 Whether this historical assessment was accurate, the court should have first asked whether the Congress that passed the Kansas Act of 1940 clearly intended to subject a newly federally recognized tribe to state jurisdiction even when this would breach explicit treaty promises to that tribe that it would never be subject to state jurisdiction. When a treaty clearly immunizes an Indian nation from state jurisdiction, the better approach would deny state jurisdiction in the absence of clear congressional intent to abrogate the immunity.n293

In *Washington v. Confederated Bands and Tribes of the Yakima Nation*,n294 the Supreme Court entertained a wholesale challenge to Public Law 280, an omnibus federal delegation statute, on the ground that it authorized future state assumptions of jurisdiction without regard to the particular tribes affected or their specific treaty guarantees. In rejecting this challenge, the Court nodded to the canons of construction, but characterized the tribe's argument as "tendentious."n295 The Court noted that "accepting the Tribe's position would be to hold that Congress could not pass a jurisdictional law of general applicability to Indian country unless in so doing it itemized all potentially conflicting treaty rights that it wished to affect. This we decline to do."n296 The Court's reasoning was based on the policy conclusion that Congress should be able to enact a general law like Public Law 280, and the Court did conclude that "[t]he intent to abrogate inconsistent treaty rights is clear enough from the express terms of Pub. L. 280."n297

Regardless of treaty conflicts, federal laws delegating jurisdiction to states detract from tribal self-government, and thus should be construed in accordance with the canons of construction designed for laws with those effects.n298 Specifically, ambiguities in those laws should be resolved in favor of the preservation of Indian immunities and self-governing authority. Some of the most emphatic affirmations of these canons can be found in court decisions interpreting federal delegations. Notably, in *Bryan v. Itasca County*,n299 the Supreme Court interpreted the most sweeping federal law authorizing state jurisdiction, popularly known as Public Law 280,n300 to deny the affected states jurisdiction to impose the full range of their taxes and regulations on Indians and their property. Even though Public Law 280 conferred civil as well as criminal jurisdiction on affected states, and even though the law specifically prohibited state taxation only with respect to trust property, the Court rejected broader state taxing authority. After finding the statutory language and specific legislative history ambiguous, the Court undertook a broader analysis of the law. It concluded that Public Law 280 was primarily aimed at solving problems of law enforcement and access to civil courts. To extend state authority further by subjecting Indian nations to the full panoply of state regulatory and taxing laws would be inconsistent with Congress's intent to retain the essential governmental character of Indian nations, and would result in the destruction of tribal institutions and values. The Court also took into account that the federal policy of delegating jurisdiction to states without tribal consent had already been repudiated by Congress. In *California v. Cabazon Band of Mission Indians*,n301 the Court reaffirmed the analysis of *Bryan* in a case in which Public Law 280 did not conflict with a specific treaty provision.

Not only have courts interpreted federal authorization or delegation statutes narrowly, they have provided limiting interpretations to the state and tribal laws that implement those statutes. When states or tribes have had to pass laws before the federal delegation could take effect,n302 courts have resolved doubts in favor of denying state jurisdiction.n303

[3] Public Law 280

[a] History of Public Law 280 and Amendments

In 1953, Congress enacted Public Law 83-280,n304 a statute delegating to five,n305 later six,n306 states jurisdiction over most crimes and many civil matters throughout most of the Indian country within their borders. The Act offered any other state the option of accepting the same jurisdiction.n307 Ten of the optional states acted to accept some degree of jurisdiction under the Act's provisions.n308 An amendment to Public Law 280 in 1968 made subsequent assumptions of jurisdiction subject to Indian consent in a special election.n309 Only one state acceptance has occurred since the amendment, and no tribes in that state have consented to the state's jurisdiction.n310 However, in several post-1968 federal statutes affording restoration or federal recognition to individual tribes and settling particular jurisdictional conflicts, Congress has specified that the state must exercise civil and criminal jurisdiction "as if [that] state had assumed such jurisdiction with the consent of the tribe" under Public Law 280 as amended in 1968.n311 Congress has also passed special legislation affording federal recognition and providing that "[n]otwithstanding the provision relating to a special election in [the 1968 amendments to Public Law 280], the reservation [shall be] subject to State jurisdiction to the maximum extent provided in [Public Law 280, as amended]."n312 Finally, Congress has passed settlement or tribal recognition acts since 1968 that simply announce the existence of state civil and criminal jurisdiction, without alluding to Public Law 280 or the general requirement of Indian consent.n313 These post-1968 laws imposing state jurisdiction can be understood as the product of agreement with the Indian nations,n314 or as a response to the recognition of tribal governments that had not yet developed law enforcement or court systems.

The 1968 amendment to Public Law 280 also expressly allows states to partially assume jurisdiction limited to some geographic or subject areas,n315 and permits states to retrocede (return) to the federal government all or part of the ju-

risdiction they had previously assumed under Public Law 280.n316 No other material changes in the Act were made by Congress. References in this Chapter to "Public Law 280" generally mean both the 1953 Act and the 1968 amendments.

[b] Scope of Delegated Jurisdiction

[i] State Jurisdiction Authorized by Public Law 280

Where applicable, Public Law 280 grants states "jurisdiction over offenses" and "civil causes of action," and provides that state "criminal laws" and "civil laws that are of general application to private persons or private property" have the same force and effect in Indian country as they have elsewhere within the state.n317 Yet the consequence of Public Law 280 has *not* been to subject Indian nations to the full range of state law.n318 The statute itself identifies several subject areas where state law does not apply. In addition, judicial interpretations of the grant of jurisdiction have adopted a narrow understanding of the scope of applicable state law. Finally, federal statutes enacted subsequent to Public Law 280 have carved out additional subject areas where state law may not be enforced.

[ii] States Not Granted Regulatory and Taxing Jurisdiction

The federal grant of jurisdiction to the states under Public Law 280 excludes significant subject areas, particularly in the regulatory and tax fields.n319 The Act expressly precludes state taxing and certain other exercises of jurisdiction over trust and restricted Indian property, as well as jurisdiction over federally protected Indian hunting and fishing rights.n320 A possible inference from these exceptions and from the general terms of the Actn321 was that all other jurisdiction is delegated by the Act.n322 But in *Bryan v. Itasca County*,n323 the Supreme Court rejected this construction and concluded that Public Law 280 did not confer on the states any new taxing jurisdiction over Indian country. It therefore invalidated a state property tax on unrestricted Indian property located in a reservation subject to Public Law 280.n324 The Court's rationale also precluded new state regulatory jurisdiction generally.n325 The Court reached this conclusion in *Bryan* after finding the language and legislative history of Public Law 280 ambiguous.n326 In enacting the original statute, Congress's primary concern was with law and order in Indian country, and other civil jurisdiction was something of an afterthought.n327 In view of these factors, the Indian law canons of construction,n328 and the movement of federal Indian policy away from assimilation since 1953, the Court interpreted the scope of Public Law 280's delegation narrowly, treating the grant of civil jurisdiction as confined to private lawsuits such as those based on tort or contract claims.

Bryan's statements about the absence of state regulatory jurisdiction were confirmed when the Supreme Court decided *California v. Cabazon Band of Mission Indians* in 1987.n329 *Cabazon* rejected California's effort to apply its laws regulating charitable bingo to an Indian nation. The Court drew a distinction between criminal laws that are "prohibitory" and laws that are "regulatory," holding that the latter are not included in Public Law 280's authorization of state jurisdiction.n330 If a state law is fundamentally regulatory in nature, it may not be applied to Indians within Indian country even if it contains criminal penalties for violations.n331 The Court explained that "if the intent of a state law is generally to prohibit certain conduct," it falls within Public Law 280's grant of state jurisdiction, but "if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory" and thus falls outside Public Law 280's grant of state jurisdiction.n332 The Court noted that the "shorthand test is whether the conduct at issue violates the State's public policy."n333 Because many forms of gambling were permitted under California law, and the state even sponsored a lottery, the Court concluded that California "regulates rather than prohibits gambling in general and bingo in particular."n334

When it introduced the prohibitory/regulatory distinction in *Cabazon*, the Court acknowledged that it was not creating a "bright-line rule,"n335 and noted that the state laws governing a particular realm of activity would have to be "examined in detail before they can be characterized as regulatory or prohibitory."n336 Nonetheless, the Court expressed some confidence that courts could effectively manage this line-drawing process, pointing to lower federal courts' apparent success in applying a similar distinction under the Indian Country Crimes Act.n337 Subsequent case law, issued largely by state courts, has demonstrated that the Court's confidence was misplaced.n338

With respect to some quintessentially administrative regimes, such as land use and workers' compensation, the courts have had little difficulty applying the regulatory/prohibitory distinction set forth in *Bryan* and *Cabazon*.n339 In contrast, judicial efforts to characterize laws dealing with traffic violations, fireworks, child welfare, and hunting and fishing, among other subject areas, have produced contradictory and confusing results.n340 For example, some courts have found that state laws restricting the sale and use of fireworks are regulatory for purposes of Public Law 280,n341 and

others have declared them prohibitory.n342 The attorney general of Wisconsin has opined that involuntary proceedings to terminate parental rights are regulatory,n343 and a federal district court reached the same result.n344 Yet the Idaho courts have called their comparable laws prohibitory.n345 Courts have also reached conflicting results in deciding whether state laws that address traffic violations such as speeding, and state laws that penalize driving with a revoked or suspended driver's license or without proof of insurance should be treated as regulatory or prohibitory.n346 These different outcomes serve no valid purpose of federalism. Even though Public Law 280 delegated jurisdiction to states with different laws, Congress prescribed uniformity in the categories of law, *i.e.*, prohibitory rather than regulatory, that would be applied within Indian country.

The source of these judicial difficulties appears to be some conflicting signals from *Cabazon* itself. First, the Court uses both narrow and broad language to define the distinction between state regulatory and prohibitory laws. The narrower, or more specific, definition provides that "if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory."n347 The Court then offers a relatively broad definition, stating "[t]he shorthand test is whether the conduct at issue violates the State's public policy."n348 Because these tests often dictate contrary results, state and lower federal courts applying the regulatory/prohibitory distinction have been able to select the formulation that best supports their desired outcome. Courts that characterize state laws as regulatory usually stress that the conduct in question is a subset of a larger, permissible category of conduct. For example, speeding is a subset of driving, or shooting a deer out of season is a subset of hunting. If the subset of outlawed conduct is small relative to the entire class of activity,n349 courts are likely to find the state law regulatory. In contrast, courts that find state laws to be prohibitory usually focus on the fact that state "public policy" opposes the specific conduct in question,n350 often losing sight of the fact that violating any statute would in some sense violate the public policy of the state. One commentator has suggested that public policy "is often used as an excuse for courts that do not want tribes to have exclusive authority [because of] the criminal or regulatory importance of the law to the state."n351

A second reason why the *Cabazon* Court offers confusing signals is because it fails to draw a clear line between its analysis of state gambling laws under Public Law 280 and its separate preemption analysis. A law that is regulatory under a Public Law 280 analysis may nevertheless apply on a reservation if it affects non-Indians and survives the Court's infringement/preemption test.n352 According to this test, state regulation will be preempted "if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."n353 Traditional notions of Indian sovereignty and the congressional goal of Indian self-government form the backdrop for this balancing of governmental interests. Some state and lower federal courts applying the regulatory/prohibitory distinction under Public Law 280 have mistakenly drifted into this kind of balancing analysis, which invites consideration of factors that have no place in interpreting Public Law 280. Thus, for example, courts have erroneously taken into account whether tribal enforcement mechanisms operate as an alternative to state jurisdiction,n354 whether the state law seeks to raise revenue at the expense of tribal efforts to achieve self-sufficiency,n355 and whether tribal and state jurisdiction can coexist effectively.n356

Absent clarification from Congress, the better approach is to focus on the nature of the regulated conduct in relation to other unregulated forms of conduct. If the subset of outlawed conduct is small relative to the entire class of activity, the law is regulatory in nature and outside the scope of state jurisdiction under Public Law 280. Moreover, the Supreme Court's approach in *Cabazon* suggested that the general category of conduct should be defined as comprehensively as possible.n357 Only when the specific conduct outlawed under state law presents substantially different or heightened public policy concerns associated with risks of grave harm to persons or property should the courts find a state law prohibitory and thus within the scope of state jurisdiction conferred by Public Law 280.n358 This analysis effectuates the impulse behind *Cabazon*, which sought to protect tribal sovereignty from state interference by limiting state jurisdiction. *Cabazon* in turn took its inspiration from congressional policy, which since 1968, has been to limit Public Law 280 and protect tribal sovereignty by requiring tribal consent before states may acquire any further jurisdiction. Accordingly, when it is unclear whether state laws are regulatory or prohibitory, courts should follow the canons of construction and deny state jurisdiction under Public Law 280.n359

A related but separate line-drawing problem presented by Public Law 280 has been the distinction between state judicial proceedings that are regulatory in nature and those that constitute private civil actions. *Bryan v. Itasca County* n360 held that only the latter fall within Public Law 280's grant of civil authority to the state. As with the regulatory/prohibitory distinction, courts have struggled with this regulatory/private civil action dichotomy. The dividing line is inevitably obscure, because adjudication of civil controversies normally entails the application of a body of legal rules that regu-

late private conduct. Furthermore, some state regulation reflects public refinement or incorporation of private actions, such as nuisance or contract claims. Some of the most confounding cases have been initiated by state or local government entities, implicating state services such as civil commitment proceedings brought by mental health agencies; petitions by social services agencies to terminate parental rights; and suits by counties on behalf of children against their noncustodial parent to establish paternity, collect reimbursement for state welfare payments, and obtain future support. Courts have had to assess whether the civil suit is handmaiden to an essentially regulatory proceeding, or whether it is more akin to a private lawsuit.

For example, in suits by local governments to obtain reimbursement for welfare payments, courts in different Public Law 280 states have arrived at opposite conclusions regarding the proper characterization of these matters as regulatory or civil actions and hence disagreed on whether state jurisdiction is authorized. On one hand, courts that have found the proceedings to be regulatory and thus outside state jurisdiction, have stressed the "public, regulatory character" of the agency acting to recoup the welfare payments and obtain support orders, the extent of state interest in and control over the proceeding, and the resemblance between the collection scheme and taxation because of assessment of collection charges.n361 On the other hand, courts that have found that these proceedings involve private civil actions, and thus resolved this issue in favor of state jurisdiction, have pointed out that "the test is one of substance rather than form," and that the presence of a government party should not automatically transform the action into a regulatory matter if the suit is essentially a suit on behalf of a private party.n362 These same courts have dismissed as irrelevant the existence of additional administrative methods for collecting child support, and analogize collection charges to ordinary court costs for private parties.n363 Finally, the courts that have allowed these suits in state court under Public Law 280 have noted the absence of tribal courts with jurisdiction over child support cases,n364 a consideration that should have no bearing on the determination of whether Public Law 280 authorized state jurisdiction.

There is no neat, surgical way to separate regulatory matters from private civil suits for purposes of Public Law 280. In matters susceptible to opposing conclusions, however, the Indian law canons of construction suggest that courts should deny state jurisdiction.n365 On this basis, for example, the Wisconsin attorney general has determined that suits brought by state agencies to terminate parental rights are regulatory and thus outside state jurisdiction.n366 Nevertheless, as a practical matter, states shouldering the burden of federal obligations to provide services to reservation Indians are going to feel disposed to assert jurisdiction over associated matters so long as no tribal court or other appropriate tribal forum exists.

[iii] Local Laws Are Inapplicable

Public Law 280 provides that civil laws of the state "that are of general application to private persons or private property shall have the same force and effect within such Indian country ... as they have elsewhere within the State."n367 The Supreme Court has interpreted this language to mean that state courts have jurisdiction only over private civil actions and claims that are prohibitory in nature, but they do not have jurisdiction over state laws that are regulatory in nature.n368 In *Santa Rosa Band v. Kings County*,n369 the Ninth Circuit held that the Act applied only to the civil laws of the state itself, and did not subject Indian country to local regulation by a county.n370 According to the *Santa Rosa* court: "Congress had in mind a distribution of jurisdiction which would make the tribal government over the reservation more or less the equivalent of a county or local government in other areas within the state."n371 Under this scheme, the tribe would have the power "to regulate matters of local concern within the area of its jurisdiction."n372

This decision is consistent with the language and purpose of Public Law 280. It would substantially undermine tribal institutions to deprive them of the governmental authority of even small municipalities. Thus, Public Law 280 preserves a significant role for tribal governments in matters of local concern.n373 Most local laws would be deemed regulatory in any event, and for that independent reason outside the scope of state jurisdiction conferred by Public Law 280. But since the regulatory/prohibitory distinction has been difficult for courts to apply, the availability of this alternative ground for denying application of state law has proven useful for the courts.n374

The language of Public Law 280 conferring criminal jurisdiction on the state differs from the language conferring civil jurisdiction in that there is no requirement on the criminal side that state laws enforced against reservation Indians be of "general application to private persons or private property ... elsewhere within the state."n375 Public Law 280 simply states that "the criminal laws of such State ... shall have the same force and effect within such Indian country as they have elsewhere within the State."n376 Whether this language will be read to include county and municipal criminal ordinances has not been determined by the courts.

[iv] Internal Tribal Matters

Some types of private civil litigation touch on fundamental matters of tribal organization and membership, such as challenges to tribal elections,n377 and suits to establish paternity.n378 When these suits have been filed in state court pursuant to Public Law 280 or similar federal statutes authorizing state jurisdiction, defendant tribal members have argued that state jurisdiction should not exist because Congress never envisioned that state courts would become enmeshed in internal tribal affairs normally subject to exclusive tribal jurisdiction.n379 Intrusions of this sort, they argue, should only be permitted when Congress has expressly authorized them, and Public Law 280 provides no such congressional endorsement.

At least one court has accepted these arguments, in a case involving a disputed tribal election.n380 Other courts have been less receptive to limiting state jurisdiction in domestic relations cases, indicating that Public Law 280 encompasses all matters of domestic relations involving tribal members, so long as they are raised in a private civil action.n381 In addressing these questions, state courts have taken into account the existence of a tribal court or other forum,n382 a factor that does little to contribute to an analysis of the state's public policy. To resolve these cases, courts may want to distinguish internal matters with political implications for the tribe, such as elections, qualification for membership, etc., from general domestic relations, finding only the latter within state jurisdiction under Public Law 280. The failure of Public Law 280 to authorize suits against tribes or to waive tribal sovereign immunity,n383 reinforces the view that states were not to become involved in tribal politics. It is difficult to imagine that Congress enacted Public Law 280 to afford a state forum for political matters that have no reference points in state law and which go to the heart of tribal self-government.

If a state court should insist on taking jurisdiction over internal tribal matters, the court would be obliged to heed Public Law 280's dictate that state courts hearing civil actions involving tribal members are required to apply tribal laws, including customary laws, whenever they are "not inconsistent with any applicable civil law of the State."n384 Because state law has no place governing internal tribal matters such as political or membership disputes, tribal law would not be inconsistent with state law as to those issues. Of course, the very inapplicability of state law is a strong argument in favor of denying state courts jurisdiction under Public Law 280 in the first place.

[v] Public Law 280 Does Not Authorize Suits Against Indian Nations

The civil jurisdiction provision of Public Law 280 allows states to hear "civil causes of action between Indians or to which Indians are parties."n385 Because this language refers only to individual Indians and does not mention suits against Indian nations, tribal defendants sued in Public Law 280 states have argued that the states lack jurisdiction altogether. Alternatively, they have asserted that tribal sovereign immunity survives the federal authorization of state jurisdiction. Their claim of no state jurisdiction is premised on the requirement that authorizations be express.n386 Their assertion of sovereign immunity rests on the doctrine that waivers must be clearly expressed and strictly construed.n387

State and federal authorities have supported both tribal positions. With respect to lack of state jurisdiction, the Supreme Court's opinion in *Bryan v. Itasca County* n388 observes that "there is notably absent [from Public Law 280] any conferral of state jurisdiction over the tribes themselves."n389 The Supreme Court has also stated that Public Law 280 does not waive Indian nations' sovereign immunity. As the Court stated in *Three Affiliated Tribes v. Wold Engineering*:n390

> Public Law 280 certainly does not constitute a 'governing Act of Congress' which validates ... interference with tribal immunity and self-government. We have never read Pub. L. 280 to constitute a waiver of tribal sovereign immunity, nor found Pub. L. 280 to represent an abandonment of the federal interest in guarding Indian self-governance.

[vi] Statutory Exceptions

Public Law 280 excepts from its authorization jurisdiction that would affect Indian trust or restricted property, as well as jurisdiction over certain federally protected Indian hunting, fishing, and trapping rights.n391 These exceptions demonstrate that Congress did not intend to sever its overall trust relationship with Indian nations affected by Public Law 280 or to render itself liable for "taking" Indian property.n392 As these exceptions constitute statutes "passed for the benefit of dependent Indian tribes," they "are to be liberally construed, doubtful expressions being resolved in favor of the Indi-

ans."n393 Broad application of these exceptions is also consistent with their expansive language and with Congress's evident intent to maintain an exclusive tribal-federal relationship with regard to matters essential for tribal survival.n394

One proviso of Public Law 280 precludes application of state laws that would allow for the "alienation, encumbrance, or taxation" of Indian trust or restricted property.n395 This same exception also prohibits application of state regulatory laws to trust or restricted property "in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto," and denies state courts jurisdiction "to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."n396 When states and local governments first invoked Public Law 280 as authority to apply zoning and other regulatory laws to trust lands, tribes raised this proviso as a defense. After lower courts offered different responses,n397 the issue was swept aside by the Supreme Court's decision in *Bryan v. Itasca County*,n398 which precluded all state regulatory jurisdiction under the Act, without regard to the particular terms of the proviso.

After *Bryan,* most questions concerning the scope of the trust property exception have arisen in the context of private litigation. When interests in trust property are acknowledged to be the basis for the lawsuit, the proviso clearly operates to bar state jurisdiction. Thus, for example, state jurisdiction under Public Law 280 does not encompass unlawful detainer actions, *i.e.*, evictions,n399 quiet title or ejectment actions,n400 or suits to establish the existence of a state easement,n401 where reservation or trust allotments are involved. The exception applies to all forms of trust property, including shares in a trust account,n402 personal property held in trust,n403 and property subject to exemptions from alienability by section 16 of the Indian Reorganization Act.n404 Not only are state courts unable to hear these cases, but state law may not be applied to disputes of these types when they find their way into federal court via bankruptcy proceedings or otherwise.n405

The exception should also apply when the purpose of a private lawsuit is to test whether property is in fact Indian trust or restricted property. For example, in *Boisclair v. Superior Court*,n406 the California Supreme Court rejected state jurisdiction over a declaratory judgment action to affirm a private or public easement for a road across tribal trust land, in which the plaintiff argued and the tribe denied that the road had lost its trust status.n407 The fact that one possible outcome of the lawsuit was a finding that the land was trust land, and hence no easement could have been created, was sufficient to defeat state jurisdiction. If a state court could reject the existence of trust property altogether, then it could too easily circumvent the prohibition on impairing those property rights.

Likewise, the exception should be applied to deny state jurisdiction when the effect of state litigation on trust property is indirect rather than direct. In *Hoopa Valley Tribe v. Blue Lake Forest Products, Inc.*, n408 for example, a secured creditor of a bankrupt purchaser of tribal logs contended with the tribe over proceeds of the bankrupt's sale of the logs. At issue in this federal proceeding was whether state law should govern the relative rights of the contending parties. The federal court held that Public Law 280's trust property proviso prevented application of state law, even though technically the creditor's claim was against the non-Indian bankrupt's sale proceeds, not against the logs, which were the trust property in question. The court stated that "it is at least arguable that enforcing a state law lien so as to give the Bank priority over the Tribe in proceeds from logs as to which title, under federal law, never left the United States in trust for the Tribe (and where the logs, themselves, no longer exist), is the 'effective' alienation of tribal trust property."n409

In state court domestic relations lawsuits under Public Law 280, special care is needed to avoid direct or indirect effects on trust property in violation of *28 U.S.C. § 1360(b)*. A state court order in a marital dissolution case may not divide trust property belonging to one or both of the spouses.n410 More difficult issues arise, however, when the state court seeks to take the value of trust property into account in ordering a property distribution, spousal support, or child support. Ordinarily, the state court hearing a divorce action should resolve property distribution issues without regard to the value of the trust property, leaving matters associated with the trust property to a tribal court.n411 When support is at issue, a state court may not seize trust property to secure the payment of support obligations. When a divorcing spouse's sole income is from trust property, it may seem tantamount to a seizure--and hence an indirect impairment of rights to trust property--to base support obligations on that stream. At least one lower court has held, however, that so long as the support obligation is strictly separated from the source of payment, there is no violation of section 1360(b).n412

Public Law 280 also excepts from its authorization jurisdiction that would "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."n413 The scope of this exception depends

on identification of the rights protected by "treaty, agreement, or statute," and the Supreme Court has declined an opportunity to provide a definitive interpretation.n414 Supplying a definition has become less essential, however, since the Court determined in *Bryan* and *Cabazon* that regulatory laws are excluded from a state's Public Law 280 jurisdiction.n415 Nearly all state hunting and fishing laws establish a permitting system, making them regulatory rather than prohibitory.n416 It would also be contrary to the language and purpose of Public Law 280 preserving the jurisdictional status quo on the excepted matters to permit any state regulation or control of Indian fishing or hunting.n417

[c] Concurrent Tribal/State Jurisdiction and Exhaustion of Tribal Remedies

The nearly unanimous view among tribal courts,n418 state courtsn419 and lower federal courts,n420 state attorneys general,n421 the Solicitor's Office for the Department of the Interior,n422 and legal scholars,n423 is that Public Law 280 left the inherent civil and criminal jurisdiction of Indian nations untouched. This conclusion flows naturally from the Indian law canons of construction, which establish that federal statutes should not be interpreted to remove tribal government powers unless the statutes expressly so provide.n424 Public Law 280 did not specifically extinguish any tribal court jurisdiction, and the legislative history reflects no such congressional intent. Indeed, the primary purpose of Public Law 280 was to improve law enforcement within Indian country,n425 which suggests that Congress would not want to eliminate any functioning or potentially effective criminal jurisdiction. Federal policy since the passage of Public Law 280 has only reinforced this reading of congressional intent, as Congress has weighed in heavily in favor of tribal self-government and tribal court development.n426 Although the Bureau of Indian Affairs has used Public Law 280 as an excuse for declining to fund law enforcement and tribal court development for affected tribes,n427 a growing number of tribes have been taking advantage of concurrent jurisdiction.n428

The only doubts about Congress's intent derive from two 1970 amendments to Public Law 280. One described state criminal jurisdiction for mandatory states as "exclusive,"n429 and the other characterized the jurisdiction of the Metlakatla Indian Community in Alaska as "concurrent" with the state's.n430 Opponents of concurrent jurisdiction in Public Law 280 states have argued that the reference to "exclusive" jurisdiction precludes concurrent tribal jurisdiction. However, the preferable reading of this amendment is that it is intended to exclude only federal jurisdiction.n431 The description of Metlakatla's jurisdiction as "concurrent" could be read to imply that *only* Metlakatla may exercise jurisdiction, leaving all other tribes without concurrent authority. A more likely explanation for this language can be found in the unique circumstances of the Metlakatla's reservation, however. Because it was unclear whether that community's territory constituted "Indian country,"n432 the drafters may have believed that the reference to concurrent jurisdiction was necessary to establish tribal jurisdiction.n433

The consensus about concurrent tribal and state jurisdiction under Public Law 280 has developed relatively recently, leaving both sets of courts and law enforcement officers with the task of developing principles of coexistence and comity.n434 In criminal cases, the *Double Jeopardy Clauses of the Constitution*n435 and the Indian Civil Rights Actn436 permit multiple prosecutions so long as the prosecutions are carried out by separate sovereigns.n437 The Supreme Court has held that Indian nations are separate from the federal government for this purpose,n438 and the same reasoning dictates that Indian nations are separate sovereigns from the states.n439

Nevertheless, about half of the states have enacted laws that either limit or extinguish the power of their own state to prosecute a defendant after another sovereign or government has already done so.n440 While these laws typically fail to mention Indian nations as among those sovereigns whose prior exercise of criminal jurisdiction will bar the state's own prosecution, most state courts have interpreted general statutory language referring to "territories," "jurisdictions," or "governments" to include tribes.n441 The only state court to conclude otherwise relied heavily on inferences from the statute's failure to mention tribes. Yet in cases involving other governments besides tribes, statutory silence as to those governments did not carry as much weight.n442

The more informal procedures used in tribal court and the less frequent specification of imprisonment as punishment may present state courts with the question of whether a prior tribal proceeding actually constituted a criminal prosecution. Respect for tribal traditions and practices for achieving public safety and community well-being suggests that states should strive to characterize tribal court proceedings in the same way as the Indian nations themselves.

In civil cases, concurrent tribal and state jurisdiction under Public Law 280 leads to the possibility of each disputant racing to litigate in the forum of choice.n443 Public Law 280 does not give state courts the power to restrict the exercise of tribal jurisdiction, even when the first litigant to file chooses state court.n444 If each sovereign is under some obliga-

tion to respect the judgments of the other,n445 then the first forum to reach a judgment will determine the outcome, regardless of the duration or extent of completion of the parallel proceeding.n446 If the sovereigns do not view themselves as under any compulsion to respect one another's judgments, the litigants may be subjected to conflicting and mutually inconsistent orders.n447

One state court in a mandatory Public Law 280 state has indicated that states and Indian nations would do well to establish protocols to govern situations of overlapping suits filed in both state and tribal court systems, much as the federal and state governments have done for matters within concurrent jurisdiction. In *Teague v. Bad River Band of the Lake Superior Chippewa Indians*,n448 the Supreme Court of Wisconsin initially refused to enforce a tribal judgment because of lack of coordination and consultation between the state and tribal courts over allocation of jurisdiction regarding two overlapping suits in tribal and state court.n449 The Wisconsin high court then took the extraordinary action of remanding for a conference between the two court systems. Following remand, a state appellate court and the Chippewa tribal courts actually drafted and agreed to protocols.n450 Even after availing themselves of the procedures and criteria set forth in the protocol, however, the two court systems still could not resolve their differences, and neither would agree to withdraw its judgment. Accordingly, the Supreme Court of Wisconsin resumed jurisdiction over the case, invoked the doctrine of comity, and found that the state court should respect the tribal judgment.n451

Judge-made doctrine may also function to limit conflicts. One valuable source of guidance is the doctrine of exhaustion of tribal remedies that has been crafted by the Supreme Court for situations in which Indian nations and the United States share authority over the same matters. According to this doctrine of comity, federal courts will normally decline to invoke their federal question or diversity jurisdiction until the litigants have presented the issues and obtained a resolution from the tribal court system.n452 Some legal issues, such as the extent of tribal jurisdiction, will remain for possible relitigation in federal court; even then, the federal court will grant some deference to the tribal court's underlying findings of fact.

The federal exhaustion doctrine is designed to avoid interference with Indian nations' self-government and to afford federal courts the benefits of tribal consideration of matters within the tribes' realm of special expertise.n453 Arguably, this doctrine embodies a federal common law of deference to tribal courts that binds state and federal courts.n454 Even if the doctrine is not binding on state courts as a matter of federal common law, however, the same considerations of comity and efficiency that animate the federal exhaustion doctrine counsel in favor of state courts establishing an identical rule of deference.

A growing number of state courts have embraced such an exhaustion doctrine, requiring plaintiffs to bring their claims to tribal court even though the state may possess concurrent jurisdiction under Public Law 280.n455 Most of the state cases exemplifying this development have involved suits against tribal entities or officers, with attendant issues of sovereign immunity and privilege. Exhaustion in the name of respect for tribal self-government is particularly appropriate in these cases. But just as the federal exhaustion doctrine has been applied to private lawsuits,n456 so arguably should the state exhaustion doctrine. Respect for an Indian nation's power of self-government implies that the tribe should have primary responsibility for activities that occur within its boundaries, and therefore a state court possessing concurrent jurisdiction under Public Law 280 should stay its hand pending exhaustion of tribal remedies. Two intermediate state appellate courts have rejected this view in personal injury actions against tribal members.n457 These courts emphasize the state's interest in assuring full compensation of injured persons, the fact that Public Law 280 was designed to make a forum available for private suits against Indians, and the absence of any state (as opposed to federal) power to review tribal decisions regarding their jurisdiction. Yet these opinions fail to acknowledge that Public Law 280 was enacted at a time when most of the affected tribes lacked their own court systems. Given the Indian law canons of construction,n458 and the subsequent development of congressional policies favoring tribal self-determination and tribal courts,n459 it is proper to read Public Law 280 as incorporating a state exhaustion requirement where tribal courts exist.n460

[d] Relationship of Public Law 280 to Other Federal Indian Country Statutes

[i] Indian Country Criminal Laws

The original version of Public Law 280 specifically provided that the Major Crimes Actn461 and the Indian Country Crimes Actn462 would not apply in areas of Indian country subject to the Public Law 280. In 1970, this provision was amended to clarify that "states shall have exclusive jurisdiction" with respect to the offenses covered by those two federal Indian country statutes in the reservations included in the mandatory states.n463 By implication, other federal In-

dian country criminal laws remain in force.n464 To the extent these laws are exclusive of state jurisdiction over the same subject, they remain exclusively federal under Public Law 280.n465

A more puzzling question is whether federal criminal jurisdiction under the Indian Major Crimes Act and the Indian Country Crimes Act remains in force, either as exclusive or concurrent jurisdiction, on reservations in states that exercised the option to assume Public Law 280 jurisdiction or in states that assumed jurisdiction under federal statutes incorporating the terms of Public Law 280.n466 For the mandatory Public Law 280 states, it is clear that federal jurisdiction is removed.n467 In some other federal statutes that delegated criminal jurisdiction to states, Congress expressly stated that the Major Crimes Act and the Indian Country Crimes Act were to remain in force.n468 But for the optional states, as well as for some states that received jurisdiction under statutes separate from Public Law 280,n469 Congress failed to address the question in statutory language, and the legislative history is regrettably unenlightening. As a result, courts trying to solve the puzzle of federal criminal jurisdiction in optional Public Law 280 states have floundered.

Three different and mutually exclusive solutions are conceivable. Either federal criminal jurisdiction under the Major Crimes Act and Indian Country Crimes Act (1) disappears in the optional states, just as it does by statutory prescription in the mandatory states; (2) remains, but operates concurrently with state (and tribal) jurisdiction; or (3) remains, and continues to preempt state jurisdiction over the same offenses, leaving these Public Law 280 states with jurisdiction only over minor offenses between Indians. Remarkably, federal and state decisions can be found to support each of these distinct and incompatible choices.

The first alternative, *i.e.*, no federal criminal jurisdiction under the two primary Indian country statutes in optional states, is reflected in the Tenth Circuit's opinion in *United States v. Burch*.n470 Colorado had convicted a member of the Southern Ute Indian Tribe for the crime of manslaughter committed within the town of Ignacio on the Southern Ute reservation. A special federal law enacted in 1984 had provided for state jurisdiction within that town "as if" the state had assumed jurisdiction under Public Law 280 as amended in 1968.n471 On a petition for a writ of habeas corpus, defendant argued that the offense was within exclusive federal jurisdiction under the Major Crimes Act, noting that Congress had not disavowed jurisdiction, which normally operates to preempt state criminal authority. The Tenth Circuit rejected this position, holding instead that the introduction of Public Law 280 had eliminated federal criminal jurisdiction over the same offense, and therefore *state* jurisdiction was exclusive. Without carefully probing the statutory differences in treatment of mandatory and optional states, without discussing the Indian law canons of construction,n472 and without examining opposing authority,n473 the court asserted that optional states would acquire exactly the same jurisdiction as their mandatory counterparts. The absence of support for this pronouncement is striking. All the Tenth Circuit could muster to bolster its declaration of exclusive state jurisdiction was language in the House and Senate reports indicating that the United States would retain its "existing jurisdiction" everywhere within the reservation boundaries except incorporated municipalities such as Ignacio, where the state would exercise authority.n474 The court's interpretation of these statements is hardly the only logical reading, however. It is equally consistent with these statements to conclude that Congress envisioned a regime of exclusive federal jurisdiction in the unincorporated areas ("existing jurisdiction") and concurrent federal and state jurisdiction within the municipalities.

In *United States v. High Elk*,n475 a federal district court in South Dakota adopted this second alternative of concurrent federal and state jurisdiction over crimes identified in the Major Crimes Act and the Indian Country Crimes Act. South Dakota had attempted to assume optional Public Law 280 jurisdiction that was limited to state highway rights-of-way within Indian country. Because this assumption of jurisdiction was conditioned on federal reimbursement for costs of the additional state responsibility, a cloud of invalidity hung over state prosecutions.n476 Before the Eighth Circuit ruled on this question, rejecting the state's authority,n477 the federal district judge in *High Elk* was confronted with the question of federal criminal jurisdiction under the Major Crimes Act over a vehicular homicide that occurred on a state highway within a reservation. The district judge reasoned that even if the state had properly acquired Public Law 280 jurisdiction, the federal court could proceed with its prosecution because Major Crimes Act jurisdiction would survive Public Law 280, albeit as concurrent rather than exclusive jurisdiction.n478 In the court's view, the Major Crimes Act was "an integral part of federal criminal jurisdiction in Indian country for over a century," and "[s]uch a policy of long standing is not to be discarded absent a clear legislative mandate."n479 Public Law 280's noteworthy silence on the subject of continuing federal criminal jurisdiction in optional states left the court to conclude that jurisdiction should continue concurrent with any properly assumed state jurisdiction. In an oblique reference, the district judge acknowledged that this analysis might contradict the canon of construction requiring ambiguous legislative enactments to be interpreted in favor of Indians.n480 Without further reflection, however, the court approved a regime in which Indians

would be subject to federal, state, and tribal prosecutions for the same offense. While this scheme might be justified as furthering the law enforcement objectives of Public Law 280, it is not clear that multiplying sources of law enforcement responsibility results in reduced criminal activity. If both the federal government and the state no longer perceive themselves as shouldering the job of Indian country law enforcement, each set of authorities might pass its responsibilities onto the others, leaving Indian country with no service at all.n481

Statements by the Idaho courts suggest that they have chosen the third alternative of retained *and* exclusive federal jurisdiction under the Indian Major Crimes and Indian Country Crimes Acts in optional Public Law 280 states.n482 Without any appreciable analysis of the interplay between federal criminal statutes and Public Law 280, the Idaho Supreme Court simply assumed the continued operation of exclusive federal jurisdiction notwithstanding state efforts to assume criminal authority. The upshot of this approach is that federal jurisdiction is delegated to the optional states under Public Law 280 only for less serious offenses committed by one Indian against another.

In Idaho, where the state elected to exercise Public Law 280 jurisdiction over a very limited range of subjects absent tribal consent,n483 the consequences of adopting this alternative may not be very momentous. There is minimal overlap between applicable federal criminal offenses and the criminal jurisdiction that the state has attempted to assert.n484 In other optional states that have attempted to assume more sweeping criminal jurisdiction, the third alternative would significantly limit the role of state law enforcement. Yet this alternative has much to recommend it. It limits the number of jurisdictions that may prosecute Indians for on-reservation crimes, thereby focusing the attention of authorities responsible for law enforcement regarding particular crimes within Indian country. Especially since Congress could not anticipate the vigor with which optional states would exercise their Public Law 280 jurisdiction, it is reasonable to retain primary federal accountability for most crimes. The federal trust responsibility and canons of construction also suggest that federal involvement and control should be maintained vis-a-vis the states unless Congress has clearly eschewed that role.

[ii] Indian Child Welfare Act of 1978

In 1978, Congress enacted the Indian Child Welfare Act (ICWA),n485 which lays out the jurisdictional scheme for voluntary and involuntary child welfare proceedings involving Indian children.n486 In the case of off-reservation Indian children, the Act promotes transfer of cases from state to tribal court.n487 When Indian children are domiciled or residing on a reservation or are wards of a tribal court, the Act mandates exclusive tribal jurisdiction "except where such jurisdiction is otherwise vested in the State by existing Federal law."n488 Public Law 280 is the most prominent of these federal laws that vests jurisdiction in the states.

Because Public Law 280 authorizes state jurisdiction only over criminal proceedings and private lawsuits, not regulatory matters, ICWA's reference to concurrent state jurisdiction over on-reservation children should be similarly limited. Thus, for example, involuntary state proceedings to terminate parental rights or to place children in temporary foster care involving on-reservation children have been found to be regulatory, and therefore to remain within exclusive tribal jurisdiction under ICWA.n489 These involuntary proceedings are regulatory in nature because they form part of a broader state regulatory scheme for children's services. Concurrent state civil jurisdiction pursuant to Public Law 280 should be confined to voluntary state proceedings for foster care, relinquishment, or adoptive placement of on-reservation Indian children, which are more in the nature of private civil actions.n490

This understanding of the relation between ICWA and Public Law 280 is consistent with ICWA's provision allowing tribes affected by Public Law 280 and similar statutes to "reassume" jurisdiction over child custody proceedings. ICWA empowers such tribes to file petitions with the Secretary of the Interior for "reassumption" of jurisdiction over these matters.n491 Tribes have welcomed ICWA's provision for reassumption of jurisdiction as the first federal statute that allows Indian nations to take the initiative to remove federally authorized state authority.n492 Because Public Law 280 does not authorize state jurisdiction over involuntary child welfare proceedings, reassumption should be necessary only for tribes to acquire exclusive jurisdiction over voluntary proceedings. In addition, because ICWA became law less than two years after the Supreme Court's decision in *Bryan*,n493 reassumption may have been regarded as a useful means of dispelling uncertainty about whether particular state child welfare proceedings were regulatory, and hence outside the state's jurisdiction under Public Law 280.

Some states initially interpreted the reassumption provision in ICWA to mean that absent a successful petition, tribes in Public Law 280 states lack jurisdiction over child welfare matters altogether.n494 The better reading, and the one

adopted by the Secretary of the Interior, the Ninth Circuit, and eventually by the Alaska Supreme Court, is that reassumption operates to make tribal jurisdiction exclusive rather than concurrent in voluntary child welfare proceedings, and to avoid burdensome litigation over the domains of tribal and state courts in child welfare cases.n495

The need for tribal courts or other types of justice systems in Public Law 280 states, as well as funding to support social welfare services for involuntary child welfare proceedings, is obvious where those tribes have exclusive jurisdiction. Historically, tribes in these states have not received their appropriate share of federal support for development of those systems.n496 However, ICWA includes a provision allowing tribes to enter into agreements with states regarding jurisdiction over child custody proceedings, "including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes."n497 These agreements can enable sharing of resources and intergovernmental cooperation with respect to the placement of Indian children.

[iii] Indian Gaming Regulatory Act of 1988

Tribal gaming is subjected to comprehensive federal regulation through the Indian Gaming Regulatory Act of 1988 (IGRA).n498 Although IGRA does not mention Public Law 280, IGRA operates to oust delegated state jurisdiction under that Act because it is a more recent statute that asserts exclusive federal control. Thus, for example, IGRA's provision for exclusive federal jurisdiction over tribal violations of state gaming laws precludes state criminal enforcement of those laws, notwithstanding Public Law 280.n499 Also, IGRA establishes exclusive federal jurisdiction over civil actions involving Indian gaming and gaming contract disputes, thereby supplanting any civil jurisdiction over private lawsuits that states might have acquired over such matters under Public Law 280.n500

Although IGRA removes some state jurisdiction authorized under Public Law 280, it may also create a new source of delegated state jurisdiction. IGRA authorizes states and Indian nations to enter into compacts associated with the operation of certain forms of tribal gaming known as Class III gaming.n501 The statute provides that compacts may include provisions concerning "the application of the criminal and civil laws and regulations of the Indian tribe or the State" related to gaming, as well as "the allocation of criminal and civil jurisdiction between the State and the Indian tribe" necessary to enforce such laws and regulations, remedies for breach of contract, and other gaming-related matters.n502 Thus, a Class III gaming compact may give rise to state jurisdiction that otherwise would be preempted by virtue of the failure to comply with Public Law 280.n503

[e] Preemptive Effect of Public Law 280

The impact of Public Law 280 has been felt in states other than those named in the Act or accepting jurisdiction under its terms. Because all states were given the opportunity to acquire criminal jurisdiction over offenses by and against Indians, as well as civil jurisdiction over actions to which Indians are parties, Congress arguably intended the specific methods provided in Public Law 280 as the sole means by which states could assert jurisdiction.n504 Furthermore, the exceptions to state jurisdiction laid out in Public Law 280 could reasonably serve, *a fortiori*, as limitations on other states' claims to jurisdiction over the excepted subjects. Accordingly, when non-Public Law 280 states have asserted jurisdiction in Indian country, their failure to assume jurisdiction pursuant to the Act has been cited as an indication that the state lacked the jurisdiction it claimed.n505

In civil and criminal proceedings against Indians arising within Indian country, many courts have denied state jurisdiction on the ground that the state had not accepted Congress's invitation to take jurisdiction under Public Law 280.n506 Once state jurisdiction is deemed preempted by Public Law 280, it makes no difference whether the exercise of that jurisdiction would pass any test based on infringement of tribal sovereignty.n507 Likewise, several courts in non-Public Law 280 states have concluded that any lawsuit encompassed by the exceptions to Public Law 280 is necessarily beyond their jurisdiction.n508

The preemptive effect of Public Law 280 is inapplicable to actions that states had authority to decide before 1953, when Public Law 280 was enacted. As the Supreme Court has stated: "Pub. L. 280's requirements simply have no bearing on jurisdiction lawfully assumed prior to its enactment."n509 Examples of state jurisdiction left untouched by Public Law 280 are jurisdiction over suits by tribal members against non-Indians arising in Indian country,n510 and jurisdiction over suits against Indians arising outside Indian country.n511 Because Public Law 280 does not differentiate between member and nonmember Indians for purposes of conferring state jurisdiction, its preemptive effect should arguably ex-

tend to Indians in both categories.n512 However, there is also authority suggesting that nonmember Indians are equivalent to non-Indians for purposes of state jurisdiction,n513 which would mean that states had some jurisdiction over those individuals even before Public Law 280 was enacted.n514

The preemptive effect of Public Law 280 extends to methods of acquiring state jurisdiction as well as the exercise of that jurisdiction. Even a tribal resolution consenting to state jurisdiction will be ineffective if the requirements of Public Law 280 have not been met.n515 In *Kennerly v. District Court,* n516 the Supreme Court invalidated Montana's jurisdiction over an action on a debt by a non-Indian against a tribal member, despite a tribal resolution, because jurisdiction had not been obtained in conformity with Public Law 280.n517 The Court held that Public Law 280 was a "governing act of Congress" that preempted other means of acquiring jurisdiction.n518 In keeping with the Indian law canons of construction,n519 the procedural requirements of Public Law 280 have been interpreted strictly for preemption purposes.n520

[f] Methods of Assuming Jurisdiction

[i] Jurisdiction Assumed Between 1953 and 1968

Public Law 280 presented several problems regarding what state actions were necessary to comply with the Act during the period between its enactment and the amendments of 1968 requiring Indian consent. Most of these problems have been resolved by the courts or clarified in the 1968 amendments.n521 Challenges to the procedures for acquiring Public Law 280 jurisdiction have also been raised by tribes subjected to post-1968 laws prescribing state jurisdiction "as if" the terms of Public Law 280, as amended, had been satisfied.

Section 6 of the original Act gave the consent of the United States to any state to amend "where necessary" its state constitution or statutes to remove "any legal impediment" to the assumption of jurisdiction under the Act.n522 The same section also removed the barrier of "the provisions of any Enabling Act for the admission of a State." The basis for this section was that the eleven states admitted to the Union between 1889 and 1959 were required to disclaim jurisdiction over Indian lands as a condition of their admission.n523 Each state complied by insertion of an appropriate disclaimer in its state constitution, and these disclaimers cannot be repealed without federal consent.n524

Seven "disclaimer" states acted legislatively to accept some jurisdiction under Public Law 280 without amending their state constitutions.n525 The issue arose whether these actions were invalid, because section 6 required these states to amend their constitutions to acquire jurisdiction under the statute. In *Washington v. Confederated Bands and Tribes of Yakima Indian Nation,*n526 the Supreme Court held that amendment is not required by federal law.n527 Removal of the "impediment" to Public Law 280 jurisdiction of state constitutional disclaimers was found to be solely a question of state law. State courts have concluded that state constitutional amendments are unnecessary.n528

Litigants in two of the mandatory Public Law 280 states contended that these states must enact legislation accepting the jurisdiction before it would be valid, but the courts rejected the argument.n529 It is clear, however, that the Act's requirement of "affirmative legislative action" by the optional states precluded any valid assumption by these states by other means prior to 1968.n530 Under the Act as amended in 1968, the state action required to assume jurisdiction appears to be solely a question of state law.n531

Another issue under the original Act was whether actions by optional states to assume part but not all of the jurisdiction offered by Public Law 280 were valid.n532 The 1968 amendment expressly authorizes partial assumptions, but the wording of the original Act left uncertainties. In *Washington v. Confederated Bands and Tribes of Yakima Indian Nation,*n533 the Supreme Court sustained Washington's statute taking partial Public Law 280 jurisdiction, against challenges that the scheme was inconsistent with Public Law 280 and so irrational as to violate constitutional guarantees of equal protection.n534 Critical to the Court's decision, however, was the fact that Washington had agreed to take full civil and criminal jurisdiction with tribal consent. The United States had contended that selective Public Law 280 assumptions would violate the intent of Congress to reduce federal law enforcement financial burdens in Indian country, because a state could reject burdensome areas of jurisdiction and select only lucrative ones. Because of Washington's tribal consent provision, the Court was satisfied that the state had manifested sufficient willingness to undertake the full responsibilities associated with jurisdiction in Indian country. In contrast, South Dakota's partial assumption has been found invalid,n535 because it asserted authority only over the revenue-rich realm of law enforcement and civil actions arising on state highways, conditioning full jurisdiction on federal reimbursement.n536 This attempt to accept highly

selective Public Law 280 jurisdiction neither addressed Congress's concerns about improving reservation law enforcement nor indicated the state's willingness to assume the burdens of jurisdiction.

[ii] Jurisdiction Assumed After 1968

Passage of the 1968 amendments requiring Indian consent for all future delegations under Public Law 280 has raised questions about the validity of state jurisdiction over later recognized tribes, later established state offenses, and later acquired reservation lands in Public Law 280 states. Must there be Indian consent in accordance with the amendments before Public Law 280 applies to those tribes, offenses, or lands? State courts have answered this question in the negative, while recognizing that their own state laws may impose additional consent requirements.n537 These state court decisions may go too far in denying a consent requirement, especially when after-recognized tribes or broad new realms of offenses are involved.n538 When either mandatory or optional states agreed to the delegations, they assumed responsibility for law enforcement based on existing conditions, including the number of reservations, range of offenses, and extent of Indian country. The states may not be equipped or willing to assume a broadened responsibility. Furthermore, if a tribe recognized after 1968 is subjected to Public Law 280 jurisdiction that was assumed before the consent requirement, basic participatory values are thwarted. In an optional Public Law 280 state, that tribe would not have had the incentive or standing to oppose the state's original assumption of jurisdiction. It is noteworthy that in some post-1968 statutes recognizing individual tribes in Public Law 280 states, Congress has declared that the state shall exercise jurisdiction "in accordance with Public Law 280,"n539 which would appear unnecessary if after-recognized tribes automatically become subject to the Act.

A special set of procedural problems has emerged in states such as Connecticut and Texas, where tribes were recognized in federal laws that provided for state jurisdiction "as if" the tribe had consented to jurisdiction under the 1968 amendments to Public Law 280. It has not always been clear whether these statutes dispensed with the need for tribal consent to state jurisdiction. Under the Connecticut Indian Land Claims Settlement Act of 1983,n540 for example, statutory language applicable to the Mashantucket Pequot Tribe discarded the special election requirement of the 1968 amendments to Public Law 280, but the Settlement Act still tied state jurisdiction to a provision in those amendments that anticipated Indian consent, prompting one criminal defendant to claim that the state could not exercise jurisdiction until the affected Indians voted to accept it. The Connecticut Supreme Court rejected this claim,n541 and later applied the same reasoning to state civil jurisdiction under the Settlement Act.n542 In reaching these results, the Connecticut Supreme Court may not have given adequate deference to the Indian law canons of construction.n543 Other recent congressional acts providing for tribal recognition and land settlement have been more explicit about the immediate authorization of state jurisdiction, suggesting that Congress knows how to be definitive in dispensing with consent requirements.n544

[g] Retroceding Jurisdiction

As originally enacted, Public Law 280 made no provision for states to return any jurisdiction to the United States. The question received almost no attention during the debates on the Act and similar bills that had been introduced earlier. Responding to Indian dissatisfaction with state jurisdiction and states' unhappiness over the financial burdens of law enforcement in Indian country, Congress in 1968 provided for retrocessions of "all or any measure of the criminal or civil jurisdiction, or both," acquired by both mandatory and optional states pursuant to the provisions of Public Law 280 as it existed prior to the 1968 amendments.n545 Curiously, Congress failed to provide any means for retroceding post-1968 state assumptions of jurisdiction,n546 although the flexible terms of the amended Act may allow tribes or states to condition their respective consents to jurisdiction on the future possibility of retrocession. Retrocession provisions are also lacking in the post-1968 recognition and land settlement acts that authorize state jurisdiction "as if" the affected Indians had consented under Public Law 280.n547

The President has delegated authority to the Secretary of the Interior to accept a state's offer to relinquish full or partial jurisdiction under the Act after consultation with the Attorney General.n548 Full or partial retrocessions have been accepted for more than twenty-five reservations covered by Public Law 280 or statutes linked to Public Law 280.n549 Public Law 280's provision for retrocession requires no particular form of state action to initiate a return of jurisdiction. Both an apparently valid governor's proclamation,n550 and a resolution of a state legislature,n551 have been found sufficient for federal purposes.n552 Furthermore, the Secretary may accept less than all the jurisdiction offered by a state, thereby requiring the state to retain the rest.n553 By selective acceptance, the Secretary can respond to tribal preferences concerning jurisdiction. Selective acceptance also provides an opportunity to assure that the resulting jurisdic-

tional scheme is workable and does not return to the federal government the most burdensome law enforcement tasks while leaving the state with the most lucrative.

Although Secretarial consultation may provide tribes with some influence over the retrocession decision, the statute gives Indian nations no power to initiate retrocessions or to veto those initiated by states.n554 This denial of initiative to Indian nations is a serious flaw in the statutory scheme. Recent court decisions confirming that tribes possess concurrent jurisdiction, coupled with more frequent deference by state courts to their tribal counterparts, may render retrocession a less compelling need for some tribes. Nevertheless, state jurisdiction still works at cross purposes to many native forms of dispute resolution and social control, and Public Law 280 still operates to diminish the flow of federal support for tribal law enforcement and court development. The absence of provision for tribally initiated retrocession thus contradicts the concept of consensual, government-to-government relations. Even tribes that initially consented to state jurisdiction should be empowered to reclaim their exclusive authority and to reinstate shared jurisdiction with the United States if conditions change.

In 1978, Congress enacted the Indian Child Welfare Act,n555 one section of which authorizes tribes affected by Public Law 280 or any other federal delegation statute to "reassume" jurisdiction over child custody proceedings.n556 Under Public Law 280, Indian nations lost no jurisdiction,n557 and states acquired only limited authority over child welfare matters, most of which are regulatory in nature.n558 Hence, the main function of the reassumption provision is to restore exclusive rather than concurrent tribal jurisdiction over voluntary child welfare proceedings, which are private civil actions, and therefore covered by Public Law 280. Tribes may also employ the reassumption process to erase any doubts or resolve conflicts about their exclusive or concurrent jurisdiction.n559 A reassumption is initiated by submitting a petition to the Secretary that includes a plan for exercising jurisdiction. The Secretary has authority to approve or reject the petition and to accept all or part of the jurisdiction sought by a tribe based on specified criteria.n560

[4] Other Statutes Applicable to Specific Locations

[a] New York

Before 1942, the state of New York regularly exercised or claimed the right to exercise jurisdiction over the New York reservations,n561 but a federal court decision in that year raised questions about the validity of state jurisdiction.n562 On the recommendation of a New York state legislative committee, Congress passed the Act of July 2, 1948, conferring on the state of New York criminal jurisdiction over offenses committed by or against Indians on all reservations in the state,n563 except for jurisdiction over hunting and fishing by Indians pursuant to agreement, treaty, or custom.n564 Unlike the mandatory provisions of Public Law 280,n565 the New York delegation statute does not expressly renounce federal Indian country criminal jurisdiction. Accordingly, federal courts have found that the New York statute does not preclude exercise of federal jurisdiction concurrent with state and tribal jurisdiction.n566 In 1950, Congress conferred jurisdiction on the courts of New York "under the laws of such State" over civil actions and proceedings between Indians or between Indians and other persons.n567 The sole purpose of this authorization of jurisdiction was to remedy the perceived absence of civil courts in which individuals could bring reservation-based claims against tribal members. The statute confers both judicial jurisdiction and authority to apply state law to cases involving Indians heard in state court, although courts are directed to give effect to tribal laws and customs when they have been proven to the courts' satisfaction.n568 Tribal law has been applied in numerous state court cases.n569

Excepted from the state's civil jurisdiction is the power to require tribes or their members to obtain state licenses for hunting and fishing protected by agreement, treaty, or custom, and the power to tax, execute upon, or alienate reservation lands.n570 Although these exceptions relate to regulatory jurisdiction, it does not follow that Congress conferred other regulatory jurisdiction on New York. The Supreme Court has interpreted similar wording in Public Law 280 not to confer regulatory jurisdiction on the states.n571 Given the identity of purposes and policies between the two laws, the New York authorization statute should be read as not granting the state general power to tax and regulate Indians on reservations.n572 Other interpretations of the New York statute have followed interpretations of Public Law 280. For example, tribal jurisdiction remains concurrent with state jurisdiction;n573 litigants should exhaust tribal court remedies before invoking the state's concurrent jurisdiction;n574 state jurisdiction does not extend to matters of tribal membership and governance;n575 and the authorization of state jurisdiction does not abrogate any tribal sovereign immunity or authorize suits against Indian nations.n576

The New York statutes also resemble Public Law 280 in their debilitating effects on tribal court development and tribal self-government more generally.n577 Federal support for tribal court development has been retarded by the existence of state jurisdiction. And tribal governments have witnessed their decisions countermanded by state courts. As a consequence, citizens of Indian nations are less likely to rely on or participate in their own tribal governments. The New York statutes contain no provisions that would permit the state or the tribes to initiate retrocession of state jurisdiction back to the federal government, an omission that ought to be remedied.n578

[b] Kansas, North Dakota, and Iowa

In 1940, Congress conferred partial criminal jurisdiction on the state of Kansas over all reservations within the state,n579 and in 1946 and 1948, Congress passed similarly worded statutes for the Devil's Lake (now Spirit Lake) Reservation in North Dakotan580 and the Sac and Fox Reservation in Iowa.n581 These pre-Public Law 280 statutes include provisions retaining federal jurisdiction over "offenses defined by the laws of the United States committed by or against Indians on Indian reservations."n582 In *Negonsott v. Samuels*,n583 the Supreme Court rejected the argument that this language retaining federal Indian country criminal jurisdiction denied Kansas jurisdiction over the same offenses. Although federal Indian country criminal jurisdiction is ordinarily exclusive of state jurisdiction, the Court found the language and legislative history of the Kansas statute perfectly clear in providing for state legislative power to define offenses that overlap with those under the federal law.n584 Hence, it declined to invoke the Indian law canons of construction.n585 Interestingly, the Court took this approach in the face of a prior conflicting federal circuit court opinion that had found considerable ambiguity in both aspects of the law.n586

A further problem with these statutes is posed by criminal laws enforcing regulatory schemes in such areas as hunting and fishing, taxation, and land use.n587 The statutes authorizing state jurisdiction are applicable only to criminal jurisdiction and do not confer on the states any civil regulatory or taxing jurisdiction.n588 Cases decided under Public Law 280 have made it clear that states cannot gain regulatory jurisdiction in Indian country indirectly through a federal grant of state criminal jurisdiction; the fact that criminal penalties may be attached to what is essentially a state regulatory scheme does not enable the state to gain regulatory jurisdiction it would otherwise lack.n589

[c] Post-1968 Federal Restoration and Recognition Statutes

Since 1968, when Congress prohibited further state jurisdiction under Public Law 280 absent Indian consent, Congress has passed some individual tribal restoration or recognition acts that have authorized state jurisdiction.n590 Sometimes, but not always, these enactments have incorporated the terms of Public Law 280 through language directing that the state is to have jurisdiction "as if" the members of the tribe had approved state jurisdiction under Public Law 280. When this "as if" language is present and applicable, courts should interpret the scope of state jurisdiction in accordance with Public Law 280.n591

Post-1968 federal statutes conferring state civil and criminal jurisdiction outside the terms of Public Law 280 do not use uniform or standard language to describe the scope of state jurisdiction thereby authorized.n592 Sometimes these statutes refer to the operation of the federal Indian country criminal statutes following assumption of state jurisdiction;n593 often they do not.n594 Some statutes expressly affirm concurrent tribal jurisdiction,n595 while others are silent on this subject. Some have been interpreted to waive the tribe's sovereign immunity from suit,n596 and others have not.n597 Some purport to apply state laws prohibiting gaming,n598 while most do not address this subject. Some disclaim state jurisdiction over internal tribal affairs that may include legal issues regarding tribal employment of nonmembers.n599 These variations may reflect the particular political negotiations underlying enactment of each law, or they may be the product of inattention to the full dimensions of federal statutory authorizations.

State jurisdiction has been a central issue in recent tribal restoration and recognition bills because of concern that newly empowered tribes will lack the legal infrastructure necessary to implement law enforcement and dispute resolution. Of course, imposition of state jurisdiction was only one possible federal response to this problem.n600

[5] State Jurisdiction Over Specific Subjects

[a] Health and Education

In 1929, Congress enacted a statute permitting state officers under regulations promulgated by the Secretary of the Interior to enter Indian lands to inspect health and education conditions and to enforce sanitation and quarantine regula-

tions.n601 This law was amended in 1946, to authorize Secretarial regulations permitting enforcement of state compulsory school attendance laws on any reservation where the governing tribe adopts a resolution consenting to enforcement.n602

This statute has implementing regulations only for school conditions and compulsory attendance.n603 Although the statute says that the Secretary "shall" permit state inspection and enforcement, the longstanding position of the Department of the Interior is that the statute does not compel the Secretary to allow state inspection or enforcement.n604 Thus the statute authorizes only those state activities allowed by Secretarial regulations.n605

There have been few interpretations of the statute's reach. One court has held that jurisdiction over proceedings to declare Indian children dependent and to terminate parental rights is not within its scope.n606 An Interior Solicitor's opinion held that the statute does not authorize the application of state health and sanitation laws on reservations "if their enforcement, directly or indirectly, would impact or involve the regulation of trust property in any significant way."n607 This opinion reflects the Interior Department's longstanding view that one feature of the trust status of restricted Indian lands is absence of state jurisdiction to regulate land use.n608

[b] Taxing Jurisdiction

Congress has passed several statutes authorizing state taxation of mineral production from certain tribal lands.n609 It has also allowed state taxation of allotted lands once they are patented in fee.n610 Other statutes may also bear on state taxing jurisdiction in Indian country.n611

[c] Water Rights Adjudications

The McCarran Amendmentn612 consents to the joinder of the United States as a defendant in any suit "for the adjudication of rights to the use of water of a river system or other source." It has been interpreted to apply to state court as well as federal court adjudications,n613 and to include the adjudication of water rights which the United States holds in trust for Indians and tribes.n614 The statute confers judicial jurisdiction only; federal and Indian water rights continue to be determined by federal substantive law.n615

[d] Gaming

The Indian Gaming Regulatory Act of 1988n616 allows for the extension of state jurisdiction over matters "directly related to" tribal gaming operations through the mechanism of a tribal-state compact.n617 States are required to negotiate compact provisions in good faith.n618 In addition, several specific federal acts restoring or recognizing particular tribes include language authorizing the state in question to enforce its gaming laws within the particular tribe's reservation.n619

[e] Liquor

Federal lawn620 prohibits liquor sales in Indian country unless they conform with both tribal and state law.n621 In *Rice v. Rehner*,n622 the Supreme Court held that this language authorizes states to enforce their liquor regulations, including permit requirements, within Indian country. The Court found that Congress's intent was clear enough from the language and legislative history of the statute to satisfy the Indian law canon of construction requiring express delegations of jurisdiction to states in derogation of tribal sovereignty.n623

[f] Federal Adoption of State Legislative Standards

Several federal Indian country criminal statutesn624 and allotment lawsn625 incorporate state law definitions into federal substantive law. State legislative standards are applied, but the states have no enforcement authority under these laws.n626

[g] Jurisdiction Over Allottees

Section 6 of the General Allotment Act provides that Indian allottees who receive a fee patent will be subject to the criminal and civil laws of the states.n627 Some early decisions relied on this provision to defeat federal Indian country jurisdiction over Indians who received fee patents under section 6.n628 But the Supreme Court has held that this provision does not render Indians within Indian country personally subject to state authority.n629

[h] Restricted Land in Oklahoma

Several statutes confer on the Oklahoma courts jurisdiction over matters relating to restricted Indian land in that state.n630 These laws also apply certain state substantive laws on such matters as heirship, partition, descent, and distribution of estates. When state legislative standards are not specified, federal substantive law continues to govern restricted Indian property.n631

FOOTNOTES:

(n1)Footnote 263. *See* § 6.03[1].

(n2)Footnote 264. The broadest legislation of this type, Public Law 280, was criticized from the beginning by Indians and non-Indians alike because it lacked any provision for tribal consent to state jurisdiction. President Eisenhower noted this objection sympathetically at the time he signed the bill, and called for amendment. Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535, 546 n.54 (1975).*

(n3)Footnote 265. Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country, 44 UCLA L. Rev. 1405 (1997);* Robert B. Porter, *The Jurisdictional Relationship between the Iroquois and New York State: An Analysis of 25 U.S.C. §§ 232, 233 , 27 Harv. J. Legis. 497, 526 (1990).* Congress could have achieved the same ends without undermining tribal sovereignty if it had chosen instead to support the development or improvement of tribal courts, law enforcement, and other tribal governing institutions. *See* Vanessa J. Jiminez & Soo C. Song, *Concurrent Tribal and State Jurisdiction under Public Law 280, 47 Am. U. L. Rev. 1627, 1673-1679 (1998).*

(n4)Footnote 266. These effects have included inhibiting the development of tribal legal systems and creating legal vacuums that contribute to law enforcement problems. *See* Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian country, 44 UCLA L. Rev. 1405, 1424 (1997).*

(n5)Footnote 267. *See* Ch. 2, § 2.02.

(n6)Footnote 268. *Oyler v. Allenbrand, 23 F.3d 292 (10th Cir. 1994)* (Kansas Act); *United States v. Burns, 725 F. Supp. 116 (N.D.N.Y. 1989)* (N.Y. Act); *Idaho v. Fanning, 759 P.2d 937 (Idaho Ct. App. 1988)* (Public Law 280); *Robinson v. Sigler, 187 N.W.2d 756 (Neb. 1971)* (Public Law 280), *on habeas review, Robinson v. Wolff, 349 F. Supp. 514 (D. Neb. 1972)* (Public Law 280).

(n7)Footnote 269. *Robinson v. Sigler, 187 N.W.2d 756 (Neb. 1971) , on habeas review, Robinson v. Wolff, 349 F. Supp. 514 (D. Neb. 1972) ; Anderson v. Britton, 318 P.2d 291 (Or. 1957) , on habeas review, Anderson v. Gladden, 293 F.2d 463 (9th Cir. 1961) . Accord, United States v. Burch, 169 F.3d 666, 670-671 (10th Cir. 1999) .*

(n8)Footnote 270. *See, e.g., Worcester v. Georgia, 31 U.S. 515 (1832) .*

(n9)Footnote 271. *See* Ch. 9, §§ 9.01, 9.03.

(n10)Footnote 272. *See* Ch. 1, § 1.02; Ch. 5, § 5.02.

(n11)Footnote 273. Whether the resulting state jurisdiction should be treated as the exercise of a federal power for purposes of applying protections afforded by the *Bill of Rights* and the "separate sovereigns" exception to the *Double Jeopardy Clause* is analogous to the question posed for tribal jurisdiction in *United States v. Lara, 541 U.S. 193 (2004) .* No court has ever suggested, for example, that a state court to which Congress has delegated jurisdiction over Indians is obligated to provide indictment by a grand jury in criminal cases under the *fifth amendment*, or the right to trial by jury in civil cases in accordance with the *seventh amendment*. Neither of these constitutional protections is guaranteed under the *fourteenth amendment* against encroachment by the states. *Cf. United States v. Enas, 255 F.3d 662, 680 n.5 (9th Cir. 2001)* (en banc) (Pregerson, J., concurring) (observing in concurring opinion that under *interstate commerce clause*, states are constitutionally prohibited from exercising jurisdiction over commerce, but when Congress lifts constitutional ban, resulting exercise of state power is wholly state, not federal, in nature).

(n12)Footnote 274. *See Idaho v. Fanning, 759 P.2d 937 (Idaho Ct. App. 1988) .* Although this court recognized the need for constitutional analysis, its analysis of constitutional validity was cursory.

(n13)Footnote 275. *Morton v. Mancari, 417 U.S. 535, 555 (1974) . See* Ch. 5, § 5.04[2][d].

(n14)Footnote 276. Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535, 541-544 (1975).*

(n15)Footnote 277. Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country, 44 UCLA L. Rev. 1405, 1436 (1997).*

(n16)Footnote 278. *See* Ch. 5, § 5.04[4]; *see also People v. Cook, 365 N.Y.S.2d 611 (Onondoga County Ct. 1975)* (*25 U.S.C. § 232*, conferring criminal jurisdiction on state of New York over crimes committed by or against Indians, was not intended to destroy self-government, but merely to resolve uncertainties about allocation of jurisdiction over reservations in New York).

(n17)Footnote 279. Treaty with the Shawnee, 1831, *7 Stat. 355.*

(n18)Footnote 280. Treaty with the Six Nations, 1794, *7 Stat. 44.*

(n19)Footnote 281. Treaty with Klamath and Modoc, 1870, *16 Stat. 707.*

(n20)Footnote 282. *See, e.g., Oyler v. Allenbrand, 23 F.3d 292 (10th Cir. 1994)* ; *United States v. Burns, 725 F. Supp. 116 (N.D.N.Y. 1989)* ; *State v. St. Clair, 560 N.W.2d 732 (Minn. Ct. App. 1997)* ; *People v. Boots, 434 N.Y.S.2d 850 (Franklin County Ct. 1980)* . Most of these cases rely on the implicit approval of treaty abrogation found in *Washington v. Confederated Bands & Tribes of the Yakima Nation, 439 U.S. 463, 479 n.22 (1979)* . For an argument that the Supreme Court's rationale does not apply to delegations focused on a specific and small number of tribes, see Robert B. Porter, *The Jurisdictional Relationship Between the Iroquois and New York State: An Analysis of 25 U.S.C. §§ 232, 233* , *27* Harv. J. Legis. 497, 526 (1990).

(n21)Footnote 283. *See* Ch. 5, § 5.01[2].

(n22)Footnote 284. *United States v. Dion, 476 U.S. 734, 738 (1986)* .

(n23)Footnote 285. *See* Ch. 2, § 2.02.

(n24)Footnote 286. *Bowen v. Doyle, 880 F. Supp. 99 (W.D.N.Y. 1995)* (interpreting *25 U.S.C. § 233*).

(n25)Footnote 287. *25 U.S.C. § 233.*

(n26)Footnote 288. Treaty with the Six Nations, 1794, Art. II, *7 Stat. 44.*

(n27)Footnote 289. *Oyler v. Allenbrand, 23 F.3d 292 (10th Cir. 1994)* .

(n28)Footnote 290. *18 U.S.C. § 3243.*

(n29)Footnote 291. Treaty with the Shawnee, 1831, *7 Stat. 355. See* § 6.04[1].

(n30)Footnote 292. *Oyler v. Allenbrand, 23 F.3d 292 (10th Cir. 1994)* .

(n31)Footnote 293. *See* Ch. 2, § 2.02.

(n32)Footnote 294. *Washington v. Confederated Bands & Tribes of the Yakima Nation, 439 U.S. 463 (1979)* .

(n33)Footnote 295. *Washington v. Confederated Bands & Tribes of the Yakima Nation, 439 U.S. 463, 479 n.22 (1979)* .

(n34)Footnote 296. *Washington v. Confederated Bands & Tribes of the Yakima Nation, 439 U.S. 463, 479 n.22 (1979)* (quoting opposition of Yakima at time Public Law 280 was enacted).

(n35)Footnote 297. *Washington v. Confederated Bands & Tribes of the Yakima Nation, 439 U.S. 463, 479 n.22 (1979)* .

(n36)Footnote 298. *See* Ch. 2, § 2.02.

(n37)Footnote 299. *Bryan v. Itasca County, 426 U.S. 373 (1976)* . For an analysis of *Bryan,* see Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law, 107 Harv. L. Rev. 381, 429-432 (1993).*

(n38)Footnote 300. *See* § 6.04[3].

(n39)Footnote 301. *California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)* .

(n40)Footnote 302. For a discussion of methods of assuming jurisdiction under Public Law 280 in "optional" states as defined by that law, see § 6.04[3][f].

(n41)Footnote 303. Thus, for example, a state law and tribal ordinance that accepted Public Law 280 jurisdiction over actions arising out of "the operation of motor vehicles" was read to exclude contract disputes over auto insurance policies. American States Ins. Co. v. McDougall, 18 Indian L. Rep. 3075 (D. Mont. 1991) . A state law and tribal ordinance that accepted Public Law 280 jurisdiction over "public welfare" was limited to economic assistance to the needy, and read to exclude claims relating to the general welfare of the community, such as extortion of a public official. *Liberty v. Jones, 782 P.2d 369 (Mont. 1989)* . And a state law and tribal ordinance that accepted Public Law 280 jurisdiction over domestic relations and over care of the infirm was read to exclude state jurisdiction over a suit against an Indian for medical expenses incurred by her spouse. *Balyeat Law, PC v. Pettit, 967 P.2d 398 (Mont. 1998) . But see State v. Barros, 957 P.2d 1095 (Idaho 1998)* (requiring courts to narrowly construe state laws extending jurisdiction into Indian country, but finding that state law allowing jurisdiction over offenses on highways encompassed off-highway arrests for those offenses); *State v. Squally, 937 P.2d 1069 (Wash. 1997)* (interpreting state's assumption of jurisdiction pursuant to tribal consent to encompass lands acquired after 1968 and not included in pre-1968 tribal resolution indicating its consent); *State v. Cooper, 928 P.2d 406 (Wash. 1996)* (interpreting state's assumption of full nonconsensual jurisdiction outside established reservations to encompass trust allotments that constitute federally defined Indian country).

(n42)Footnote 304. Act of Aug. 15, 1953, *67 Stat. 588* (codified as amended at *18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. §§ 1360, 1360* note). For a detailed analysis of Public Law 280, see Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535 (1975).*

(n43)Footnote 305. California, Minnesota (except Red Lake Reservation), Nebraska, Oregon (except Warm Springs Reservation), and Wisconsin (except Menominee Reservation). *See 18 U.S.C. § 1162(a); 28 U.S.C. § 1360(a)* .

(n44)Footnote 306. Alaska Territory was added by Pub. L. No. 85-615, § 1, *72 Stat. 545 (1958)* (codified *18 U.S.C. § 1162(a), 28 U.S.C. § 1360(a)*). Alaska became a state in 1959. The Act was subsequently amended to authorize concurrent criminal jurisdiction over the Annette Islands Reservation by the Metlakatla Indian Community. Pub. L. No. 91-523, § 1, *84 Stat. 1358 (1970)* (codified at *18 U.S.C. § 1162(a)*).

(n45)Footnote 307. Act of Aug. 15, 1953, § 7, *67 Stat. 588* (*repealed and reenacted* 1968) (codified as amended at *25 U.S.C. §§ 1321-1322*). States that had disclaimed jurisdiction over Indian lands in their constitutions as a condition of admission to statehood were authorized to amend their constitutions or statutes to remove legal impediments to jurisdiction. Act of Aug. 15, 1953, § 6, *67 Stat. 588* (codified as amended at *25 U.S.C. § 1324*).

(n46)Footnote 308. Arizona accepted jurisdiction over air and water pollution only. Ariz. Rev. Stat. §§ 36-1801, 36-1865 (air pollution provision renumbered in 1987, as Ariz. Rev. Stat. § 49-561). The state subsequently repealed both the provision concerning water pollution (*repealed by* Ariz. Laws 1986, § 19, Subsec. B (1987)) and air pollution (*repealed by* Ariz. Laws 2003, § 4 (2003)). Because this jurisdiction was almost entirely regulatory in nature, it was probably invalid under the principles of *Bryan v. Itasca County, 426 U.S. 373 (1976)* . Florida assumed full Public Law 280 jurisdiction. *Fla. Stat. § 285.16*. Idaho accepted jurisdiction over seven subject areas and full Public Law 280 jurisdiction with tribal consent. *Idaho Code §§ 67-5101-67-5103*. Iowa assumed civil jurisdiction over the Sac and Fox Reservation, Tama County. *Iowa Code §§ 1.12-1.14* ; *see also* § 6.04[4][b] (delegation of partial criminal jurisdiction to Iowa in earlier statute). In Montana, the governor was empowered to proclaim state criminal or civil jurisdiction at the request of any tribe and with the consent of affected counties. Tribal consent was revocable within two years of the governor's proclamation. *Mont. Code §§ 2-1-301-2-1-306*. The Confederated Salish and Kootenai Tribes consented to jurisdiction under this provision, some of which was subsequently retroceded by the state. Nevada originally accepted full Public Law 280 jurisdiction, but permitted individual counties to exclude themselves from acceptance of jurisdiction. This provision was amended in 1971 to require tribal consent. A 1973 amendment provided for retrocession, except for those tribes already subject to the Act who consented to continue. *Nev. Rev. Stat. § 41.430*. Jurisdiction now has been retroceded for most reservations. North Dakota accepted civil jurisdiction only, subject to tribal or individual consent. *N.D. Cent. Code §§ 27-19-01-27-10-13*. Both the condition of individual acceptance and the condition of tribal acceptance [*N.D. Cent. Code §§ 27-19-05, 27-19-06*] have been declared invalid under federal law. *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C., 476 U.S. 877 (1986)* (tribal acceptance); *Nelson v. Dubois, 232 N.W.2d 54 (N.D. 1975)* (individual acceptance). South Dakota assumed jurisdiction only over criminal offenses and civil causes of action arising on highways, and conditioned acceptance of full Public Law 280 jurisdiction on federal government reimbursement for the cost of the additional jurisdiction assumed. *S.D. Codified Laws §§ 1-1-12-1-1-21*. This acceptance of only the most financially lucrative form of state jurisdiction was ruled invalid in *Rosebud Sioux Tribe v. South Dakota, 900 F.2d 1164 (8th Cir. 1990)* . Utah has a post-1968 statute accepting jurisdiction when tribes consent. *Utah Code §§ 9-9-201-9-9-213*. No tribe has consented. Washington assumed full Public Law 280 jurisdiction

over non-Indians and over Indians on fee land. Jurisdiction over Indians on trust land was limited to eight subject areas, unless a tribe consents to full Public Law 280 jurisdiction. *Wash. Rev. Code §§ 37.12.010, 37.12.021, 37.12.030, 37.12.040*-37.12.050, 37.12.070.

(n47)Footnote 309. *25 U.S.C. § 1326*. Enrolled Indians within the affected area of Indian country must accept state jurisdiction by a majority vote of adults voting at a special election called by the Secretary, the tribal council, or twenty percent of the enrolled adults. Congress substituted the new mechanism for accepting Public Law 280 in optional states but preserved all jurisdiction previously acquired pursuant to the mechanism it replaced.

(n48)Footnote 310. In 1971, Utah passed legislation accepting jurisdiction subject to subsequent tribal consent. *Utah Code §§ 9-9-201-9-9-213*.

(n49)Footnote 311. *See, e.g.*, Pub. L. No. 100-89, *101 Stat. 666 (1987)* (codified at *25 U.S.C. §§ 1300g-1300g-7, 25 U.S.C. §§ 731-737*) (jurisdiction conferred on Texas over Ysleta del Sur Pueblo and Alabama-Coushatta Tribe). In restoring the Coquille Tribe, which was located in Oregon, a mandatory Public Law 280 state, Congress specified that the state "shall exercise criminal and civil jurisdiction" in accordance with the mandatory provisions of Public Law 280." *25 U.S.C. § 715(d)*.

(n50)Footnote 312. Connecticut Indian Land Claims Settlement Act of 1983, *25 U.S.C. § 1755* (conferring jurisdiction on State of Connecticut over Mashantucket Pequot Tribe).

(n51)Footnote 313. *See, e.g.*, Rhode Island Indian Claims Settlement Act of 1978, *25 U.S.C. § 1708(a)* ; Maine Indian Claims Settlement Act of 1980, *25 U.S.C. § 1725(a)*.

(n52)Footnote 314. *See Charles v. Charles, 701 A.2d 650, 655 n.15 (Conn. 1997)* .

(n53)Footnote 315. *25 U.S.C. §§ 1321(a)* (criminal jurisdiction), 1322(a) (civil jurisdiction) (state may assume "such measure of jurisdiction ... within ... Indian country or any part thereof as may be determined by such State"). No provision was made in the original Act for partial assumptions, although several states took less than the full scope of jurisdiction offered.

(n54)Footnote 316. *25 U.S.C. § 1323*. Tribal consent to retrocession is not required, although the Secretary of the Interior presumably would have an obligation to consult with the affected tribe before accepting a state's offer to retrocede. *See* § 6.04[3][g].

(n55)Footnote 317. *18 U.S.C. § 1162(a)*; *25 U.S.C. §§ 1321(a), 1322(a)*; *28 U.S.C. § 1360(a)*.

(n56)Footnote 318. Carole Goldberg-Ambrose, *Public Law 280: From Termination to Self-Determination*, in American Indian Policy and Cultural Values: Conflict and Accommodation 39 (Jennie Joe ed., American Indian Studies Center 1986).

(n57)Footnote 319. One state court has rejected the argument that the references to civil and criminal jurisdiction in Public Law 280, coupled with the failure to mention juvenile jurisdiction, indicate that states did not receive jurisdiction over juvenile proceedings. *State v. Spotted Blanket, 955 P.2d 1347 (Mont. 1998)* . Because the Supreme Court has generally prescribed a narrow reading of the scope of state jurisdiction under Public Law 280, *see* § 6.04[3][b][i], states that characterize juvenile proceedings as distinct from civil and criminal matters may have difficulty defending the exercise of jurisdiction over Indian youth within Indian country.

(n58)Footnote 320. *18 U.S.C. § 1162(b)*; *25 U.S.C. §§ 1321(b), 1322(b)*; *28 U.S.C. § 1360(b)*.

(n59)Footnote 321. *See* § 6.04[3][b][i].

(n60)Footnote 322. *Compare* Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law, 78 Cal. L. Rev. 1137, 1165-1166 (1990)* (explaining that, in light of "Termination Era" in which Act was passed, Public Law 280 could be read as a "clear congressional diminishment of tribal sovereignty"), *with* Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction under Public Law 280, 47 Am. U. L. Rev. 1627, 1662 (1998)* (arguing that acknowledging Public Law 280 was passed in Termination Era "does not foreclose an interpretation of Public Law 280 that provides for concurrent tribal and state jurisdiction").

(n61)Footnote 323. *Bryan v. Itasca County, 426 U.S. 373 (1976)* .

(n62)Footnote 324. *Bryan v. Itasca County, 426 U.S. 373, 390 (1976)* .

(n63)Footnote 325. *Bryan v. Itasca County, 426 U.S. 373, 388-390 (1976)* .

(n64)Footnote 326. *Bryan v. Itasca County, 426 U.S. 373, 392 (1976)* .

(n65)Footnote 327. *See Bryan v. Itasca County, 426 U.S. 373, 379-387 (1976)* ; S. Rep. No. 83-699, 83rd Cong., 1st Sess. (1953). *See generally* Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535, 542-544 (1975).*

(n66)Footnote 328. *See* Ch. 2, § 2.02.

(n67)Footnote 329. *California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)* .

(n68)Footnote 330. *California v. Cabazon Band of Mission Indians, 480 U.S. 202, 210 (1987)* .

(n69)Footnote 331. *California v. Cabazon Band of Mission Indians, 480 U.S. 202, 211 (1987)* .

(n70)Footnote 332. *California v. Cabazon Band of Mission Indians, 480 U.S. 202, 209 (1987)* .

(n71)Footnote 333. *California v. Cabazon Band of Mission Indians, 480 U.S. 202, 209 (1987)* .

(n72)Footnote 334. *California v. Cabazon Band of Mission Indians, 480 U.S. 202, 211 (1987)* .

(n73)Footnote 335. *California v. Cabazon Band of Mission Indians, 480 U.S. 202, 210 (1987)* .

(n74)Footnote 336. *California v. Cabazon Band of Mission Indians, 480 U.S. 202, 211 (1987)* .

(n75)Footnote 337. *See* Ch. 9, § 9.02[1].

(n76)Footnote 338. For an example of a court struggling to determine whether laws penalizing possession of marijuana are regulatory or prohibitory, see *State v. LaRose, 673 N.W.2d 157 (Minn. Ct. App. 2003)* .

(n77)Footnote 339. For zoning cases, see *Confederated Tribes & Bands of the Yakima Indian Nation v. Whiteside, 828 F.2d 529, 532 (9th Cir. 1987)* , *aff'd in part & rev'd in part sub nom. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989)* ; *Santa Rosa Band of Indians v. Kings County , 532 F.2d 655 (9th Cir. 1975)* . For workers' compensation cases, see *Middletown Rancheria v. Workers' Comp. Appeals Bd., 71 Cal. Rptr. 2d 105 (Ct. App. 1998)* ; *Tibbetts v. Leech Lake Reservation Bus. Comm., 397 N.W.2d 883 (Minn. 1986)* .

(n78)Footnote 340. *See generally* Arthur F. Foerster, *Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/Regulatory Distinction, 46 UCLA L. Rev. 1333 (1999).*

(n79)Footnote 341. *State v. Cutler, 527 N.W.2d 400 (Wis. Ct. App. 1994)* (unpublished table decision).

(n80)Footnote 342. *Quechan Indian Tribe v. McMullen, 984 F.2d 304 (9th Cir. 1993)* .

(n81)Footnote 343. 70 Op. Wis. Att'y Gen. 237 (1981).

(n82)Footnote 344. *Doe v. Mann, 285 F. Supp. 2d 1229, 1235-1237 (N.D. Cal. 2003)* .

(n83)Footnote 345. *Idaho v. Marek, 777 P.2d 1253 (Idaho Ct. App. 1989)* .

(n84)Footnote 346. *Compare Rosebud Sioux Tribe v. South Dakota, 709 F. Supp. 1502 (D.S.D. 1989)* , *judgment vacated by, 900 F. 2d 1164 (8th Cir. 1990)* (South Dakota's speeding statute is prohibitory) *and State v. Warden, 127 Idaho 763, 906 P.2d 133 (Idaho 1995)* (Idaho traffic infraction laws are criminal), *with Confederated Tribes of the Colville Reservation v. Washington, 938 F.2d 146 (9th Cir. 1991)* (Washington speeding laws are regulatory). *Compare also St. Germaine v. Circuit Ct., 938 F.2d 75 (7th Cir. 1991)* (Wisconsin's prohibition on operating motor vehicle with suspended license is criminal), *with State v. Johnson, 598 N.W.2d 680 (Minn. 1999)* (Minnesota's law prohibiting driving after license revocation is regulatory). State and federal courts seem to agree that the offense of driving without proof of insurance is regulatory. Craig v. James, 19 Indian L. Rep. 3111 (.E.D. Wash., 1992); *State v. Stone, 572 N.W.2d 725 (Minn. 1997)* . But state courts have treated as prohibitory the offenses of driving under the influence of alcohol [*State v. Couture, 587 N.W.2d 849 (Minn. App. 1999)]* , reckless driving [*Harrison v. State, 784 P.2d 681 (Alaska Ct. App. 1989)]* , and driving after cancellation of a license as inimical to public safety [*State v. Busse, 644 N.W.2d 79 (Minn. 2002)]* .

(n85)Footnote 347. *California v. Cabazon Band of Mission Indians, 480 U.S. 202, 209 (1987)* .

(n86)Footnote 348. *California v. Cabazon Band of Mission Indians, 480 U.S. 202, 209 (1987)* .

(n87)Footnote 349. For example, there may be many exceptions to the prohibited conduct. *See Twenty-Nine Palms Band of Mission Indians v. Wilson, 925 F. Supp. 1470 (C.D. Cal. 1996) , vacated, 156 F.3d 1239 (9th Cir. 1998)* (unpublished table decision). *Compare State v. Robinson, 572 N.W.2d 720 (Minn. 1997)* (state laws against underage consumption of liquor are prohibitory because there are very few exceptions to ban on such drinking).

(n88)Footnote 350. *See, e.g., St. Germaine v. Circuit Ct., 938 F.2d 75 (7th Cir. 1991)* ; *Jones v. State, 936 P.2d 1263 (Alaska Ct. App. 1997)* .

(n89)Footnote 351. Arthur F. Foerster, *Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/Regulatory Distinction, 46 UCLA L. Rev. 1333, 1358 (1999).*

(n90)Footnote 352. *See* § 6.01[3]. With respect to state jurisdiction over Indians, Public Law 280 itself normally determines the outcome of applying the preemption test. If a state has not assumed jurisdiction under Public Law 280, it may not acquire jurisdiction over Indians independent of that Act. *See* § 6.04[3][e]. However, when non-Indian activities are involved, as in gaming, the state may claim jurisdiction via the infringement/preemption test applied outside the Public Law 280 context. *See* § 6.03[2].

(n91)Footnote 353. *California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987)* .

(n92)Footnote 354. *See Confederated Tribes of the Colville Reservation v. Washington, 938 F.2d 146, 149 (9th Cir. 1991)* ; *State v. Stone, 557 N.W.2d 588, 589 (Minn. Ct. App. 1996) , aff'd, 572 N.W.2d 725 (Minn. 1997)* ; *In re Commitment of Burgess, 665 N.W.2d 124, 132 (Wis. 2003)* .

(n93)Footnote 355. *See Rosebud Sioux Tribe v. South Dakota, 709 F. Supp. 1502, 1512 (D.S.D. 1989)* ; *People v. Lowry, 34 Cal. Rptr. 2d 382, 385* (App. Dep't Super. Ct. 1994) .

(n94)Footnote 356. *See St. Germaine v. Circuit Ct., 938 F.2d 75, 77-78 (7th Cir. 1991)* ; *Confederated Tribes of the Colville Reservation v. Washington, 938 F.2d 146, 149 (9th Cir. 1991)* ; *State v. Stone, 557 N.W.2d 588, 591-592 (Minn. Ct. App. 1996) , aff'd, 572 N.W.2d 725 (Minn. 1997)* .

(n95)Footnote 357. Thus, *Cabazon* considered not only the activity of high-stakes bingo, but also compared this prohibited activity to the more general conduct of gambling, including lotteries and horse racing. *California v. Cabazon Band of Mission Indians, 480 U.S. 202, 210 (1987)* . Similarly, courts should compare driving with a suspended license to the more general conduct of driving. Invariably, some judgment is involved in determining the similarity or relatedness of all forms of conduct within a general category.

(n96)Footnote 358. *See State v. Johnson, 598 N.W.2d 680, 686 (Minn. 1999)* .

(n97)Footnote 359. *See* § 6.04[2].

(n98)Footnote 360. *Bryan v. Itasca County, 426 U.S. 373 (1976)* .

(n99)Footnote 361. *State Dep't of Human Servs. v. Whitebreast, 409 N.W.2d 460, 463-464 (Iowa 1987)* .

(n100)Footnote 362. County of Inyo v. *Jeff, 277* Cal. Rptr. 841, 845 (Ct. App. 1991) .

(n101)Footnote 363. *Becker County Welfare Dep't v. Bellcourt, 453 N.W.2d 543 (Minn. Ct. App. 1990)* .

(n102)Footnote 364. County of Inyo v. *Jeff, 277* Cal. Rptr. 841, 843 n.4 (Ct. App. 1991) ; *Becker County Welfare Dep't v. Bellcourt, 453 N.W.2d 543, 544 (Minn. Ct. App. 1990)* ; *see also In re Commitment of Burgess, 665 N.W.2d 124, 132 (Wis. 2003)* (upholding state jurisdiction to hear civil proceedings for commitment of sexually violent persons).

(n103)Footnote 365. *See* Ch. 2, § 2.02.

(n104)Footnote 366. 70 Op. Wis. Att'y Gen. 237 (1981). According to the attorney general, the fact that the state initiated the suit and the existence of a large administrative system to address child abuse and neglect rendered the matter regulatory rather than a civil action.

(n105)Footnote 367. *25 U.S.C. § 1322(c); 28 U.S.C. § 1360(a).*

(n106)Footnote 368. *See* § 6.04[3][b][ii].

(n107)Footnote 369. *Santa Rosa Band v. Kings County, 532 F.2d 655 (9th Cir. 1975)* .

(n108)Footnote 370. *Santa Rosa Band v. Kings County, 532 F.2d 655, 659-664 (9th Cir. 1975)* ; *cf. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 212 n.11 (1987)* (noting that "it is doubtful that Pub. L. 280 authorizes the application of any local laws to Indian reservations," but stating that it was not necessary to resolve that question).

(n109)Footnote 371. *Santa Rosa Band v. Kings County, 532 F.2d 655, 663 (9th Cir. 1975)* .

(n110)Footnote 372. *Santa Rosa Band v. Kings County, 532 F.2d 655, 663 (9th Cir. 1975)* .

(n111)Footnote 373. *See Bryan v. Itasca County, 426 U.S. 373, 389 n.14 (1976)* .

(n112)Footnote 374. *See, e.g., Segundo v. City of Rancho Mirage, 813 F.2d 1387 (9th Cir. 1987)* ; *United States v. County of Humboldt, 615 F.2d 1260 (9th Cir. 1980)* (rejecting application of local zoning laws and building codes); *Zachary v. Wilk, 219 Cal. Rptr. 122 (Ct. App. 1985)* (rejecting application of local rent control ordinances under Public Law 280).

(n113)Footnote 375. *25 U.S.C. § 1322(a)*; *28 U.S.C. § 1360(a)*.

(n114)Footnote 376. *18 U.S.C. § 1162(a)*; *25 U.S.C. § 1321(a)*.

(n115)Footnote 377. *Bowen v. Doyle, 880 F. Supp. 99, 115 (W.D.N.Y. 1995)* ("[t]hese [state court] Orders purport to decide who may serve on the Nation's Council; to direct when the Council, as constituted by the State Court, is to meet and how it is to conduct its business; to void actions taken by the Council and the President at a prior meeting of the Council; and to compel the Seneca Tribal Police to enforce the State Court's Orders against the President of the Nation").

(n116)Footnote 378. *See Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C., 476 U.S. 877, 889 (1986)* .

(n117)Footnote 379. *See Bowen v. Doyle, 880 F. Supp. 99 (W.D.N.Y. 1995)* ; County of Inyo v. *Jeff, 277* Cal. Rptr. 841 (Ct. App. 1991) ; *State Dep't of Human Servs. v. Whitebreast, 409 N.W.2d 460 (Iowa 1987)* .

(n118)Footnote 380. *Bowen v. Doyle, 880 F. Supp. 99, 115 (W.D.N.Y. 1995)* .

(n119)Footnote 381. *See e.g., State Dep't of Human Servs. v. Whitebreast, 409 N.W.2d 460 (Iowa 1987)* ; *Charles v. Charles, 701 A.2d 650 (Conn. 1997)* (upholding state jurisdiction over action for dissolution of marriage). *But cf. St. Germaine v. Chapman, 505 N.W.2d 450 (Wis. Ct. App. 1993)* (court declined to exercise Public Law 280 jurisdiction over domestic abuse injunction involving tribal members when tribe had its own domestic abuse ordinance and means of enforcement). In *Estate of Cross v. Comm'r, 891 P.2d 26 (Wash. 1995)* , the Washington Supreme Court opined that Public Law 280 enabled the state to apply its community property laws to income earned by a tribal member on the reservation. The Internal Revenue Service had sought a ruling from the court on this matter in order to assess income tax. In the absence of a private civil action, however, it is doubtful that state rather than tribal law of marital property should have applied to this income.

(n120)Footnote 382. *See, e.g., Bowen. v. Doyle, 880 F. Supp. 99, 115 (W.D.N.Y. 1995)* (noting the Seneca Nation operated a Peacemaker Court that had attempted to assert jurisdiction over the same dispute); County of Inyo v. *Jeff, 277* Cal. Rptr. 841, 843 n.4 (Ct. App. 1991) (noting the Bishop Paiute/Shoshone Tribe did not have a forum with jurisdiction over the dispute).

(n121)Footnote 383. *See* § 6.04[f].

(n122)Footnote 384. *25 U.S.C. § 1322(c)*; *28 U.S.C. § 1360(c)*.

(n123)Footnote 385. *28 U.S.C. § 1360(a)*.

(n124)Footnote 386. *Bryan v. Itasca County, 426 U.S. 373 (1976)* .

(n125)Footnote 387. *See* Ch. 7, § 7.05[1].

(n126)Footnote 388. *Bryan v. Itasca County, 426 U.S. 373 (1976)* .

(n127)Footnote 389. *Bryan v. Itasca County, 426 U.S. 373, 389 (1976) . Accord, Great Western Casinos, Inc. v. Morongo Band of Mission Indians, 88 Cal. Rptr. 2d 828, 842 (Ct. App. 1999)* ; *Seminole Tribe of Florida v. Houghtaling, 589 So.2d 1030 (Fla. Dist. Ct. App. 1991)* , *aff'd sub nom. Houghtaling v. Seminole Tribe of Florida, 611 So.2d 1235 (Fla. 1993)* ; *Meier v. Sac & Fox Tribe, 476 N.W.2d 61 (Iowa 1991)* ; *Gavle v. Little Six, Inc., 555 N.W.2d*

284, 289 (Minn. 1996) (does not extend to "tribal entities"). *But see Friends of East Willits Valley v. County of Mendocino, 123 Cal. Rptr. 2d 708 (Ct. App. 2002)* (Public Law 280 authorizes suits in state court against tribes that have waived their sovereign immunity).

(n128)Footnote 390. *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C., 476 U.S. 877, 892(1986)* ; *accord, Val/Del Inc. v. Super. Court, 703 P.2d 502, 508 n.2 (Ariz. Ct. App. 1985)* ; *Middletown Rancheria v. Workers' Comp. Appeals Bd., 60 Cal. App. 4th 1340, 71 Cal. Rptr. 2d 105 (Ct. App. 1998)* ; *Gross v. Omaha Tribe of Nebraska, 601 N.W.2d 82 (Iowa 1999)* ; *Silva v. Ysleta Del Sur Pueblo, 28 S.W.3d 122, 124-125 (Tex. Ct. App. 2000)* . Insofar as tribal officers and enterprises share in an Indian nation's sovereign immunity, Public Law 280 does nothing to disturb that protection. *Great Western Casinos, Inc. v. Morongo Band of Mission Indians, 88 Cal. Rptr. 2d 828 (Ct. App. 1999)* .

(n129)Footnote 391. *28 U.S.C. § 1360(b)*; *18 U.S.C. § 1162(b)*.

(n130)Footnote 392. This feature of Public Law 280 stands in notable contrast with the termination statutes. *See* Ch. 1, § 1.06.

(n131)Footnote 393. *Bryan v. Itasca County, 426 U.S. 373, 392 (1976)* ; *see also Hoopa Valley Tribe v. Blue Lake Forest Prods., Inc., 143 B.R. 563 (N.D. Cal. 1992)* , *aff'd, 30 F.3d 1138 (9th Cir. 1994)* ; *In re Humboldt Fir, Inc., 426 F. Supp. 292, 296 (N.D. Cal. 1977)* , *aff'd, 625 F.2d 330 (9th Cir. 1980)* ; *Boisclair v. Super. Ct., 801 P.2d 305, 312-313 (Cal. 1990)* .

(n132)Footnote 394. *Boisclair v. Super. Ct., 801 P.2d 305, 310 (Cal. 1990)* .

(n133)Footnote 395. *18 U.S.C. § 1162(b)*; *25 U.S.C. §§ 1321(b)*, *1322(b)*; *28 U.S.C. § 1360(b)*.

(n134)Footnote 396. *18 U.S.C. § 1162(b)*; *25 U.S.C. §§ 1321(b)*, *1322(b)*; *28 U.S.C. § 1360(b)*.

(n135)Footnote 397. *Compare Santa Rosa Band v. Kings County, 532 F.2d 655, 664-668 (9th Cir. 1975)* (zoning laws excluded on trust land by this proviso), *with People v. Rhoades, 90 Cal. Rptr. 794 (Ct. App. 1970)* (allowing application of state fire break law to trust land). The Interior Department has long viewed state land use laws as inapplicable to Indian trust lands without federal authorization. *See* Op. Sol. Int., M-36768 (Feb. 7, 1969); *58 Interior Dec. 52 (1942).*

(n136)Footnote 398. *Bryan v. Itasca County, 426 U.S. 373 (1976)* .

(n137)Footnote 399. *Minnesota Chippewa Tribal Hous. Auth. v. Reese, 978 F. Supp. 1258 (D. Minn. 1997)* ; All *Mission Indian Hous. Auth. v. Silvas, 680 F. Supp. 330, 332 (C.D. Cal. 1987)* . The absence of state jurisdiction has given rise to a jurisdictional vacuum on reservations where tribes have not created their own court systems to hear eviction actions, because most federal courts have concluded that these actions do not arise under federal law. *Minnesota Chippewa Tribal Hous. Auth. v. Reese, 978 F. Supp. 1258 (D. Minn. 1997)* ; *Round Valley Indian Hous. Auth. v. Hunter, 907 F. Supp. 1343 (N.D. Cal. 1995)* ; *see* Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country, 44 UCLA L. Rev. 1405, 1431 (1997).*

(n138)Footnote 400. *State of Alaska, Dep't Pub. Works v. Agli, 472 F. Supp. 70 (D. Alaska 1979)* .

(n139)Footnote 401. *Heffle v. State, 633 P.2d 264 (Alaska 1981)* .

(n140)Footnote 402. *Ollestead v. Native Village of Tyonek, 560 P.2d 31 (Alaska 1977)* .

(n141)Footnote 403. *Calista Corp. v. Mann, 564 P.2d 53 (Alaska 1977)* .

(n142)Footnote 404. *See* Ch. 4, § 4.04[3][a]; *Hydaburg Coop. Ass'n v. Hydaburg Fisheries, 925 P.2d 246 (Alaska 1996)* .

(n143)Footnote 405. *In re Humboldt Fir, Inc., 426 F. Supp. 292, 296 (N.D. Cal. 1977)* , *aff'd, 625 F.2d 330 (9th Cir. 1980)* ; *Hoopa Valley Tribe v. Blue Lake Forest Prods., Inc., 143 B.R. 563 (N.D. Cal. 1992)* , *aff'd, 30 F.3d 1138 (9th Cir. 1994)* .

(n144)Footnote 406. *Boisclair v. Super. Court, 801 P.2d 305, 312-314 (Cal. 1990)* .

(n145)Footnote 407. *See also Inland Casino Corp. v. Super. Ct., 10 Cal. Rptr.2d 497 (Ct. App. 1992)* (foreclosure of mechanic's lien on property that arguably was trust property). *But see Jacobs v. Jacobs, 405 N.W.2d 668 (Wis. Ct. App. 1987)* (including tribal members' home in property division upon marriage dissolution, even though trust status of

house was in dispute). The *Jacobs* court was eager to assert state jurisdiction over the property division because at that time, the tribe had no tribal court that could provide an alternative forum. Nonetheless, it was improper for a state court to determine whether the house involved was completely separable from the trust land on which it was located.

(n146)Footnote 408. *Hoopa Valley Tribe v. Blue Lake Forest Prods., Inc., 143 B.R. 563, 568 (N.D. Cal. 1992), aff'd, 30 F.3d 1138 (9th Cir. 1994)*.

(n147)Footnote 409. *But see Jacobs v. Jacobs, 405 N.W.2d 668 (Wis. Ct. App. 1987)*, in which the court included the value of what was arguably trust property in determining property division at the dissolution of the marriage of two tribal members. While the court did not directly divide the property in question, it valued the property and determined an offset from other property.

(n148)Footnote 410. *In re Marriage of Wellman, 852 P.2d 559, 563 (Mont. 1993)*. Such an order would conflict with the federal government's direct interest in the property. Although *Wellman* did not involve a reservation subject to Public Law 280, the court determined that the trust property proviso of *28 U.S.C. § 1360(b)* was preemptive and controlling.

(n149)Footnote 411. *In re Marriage of Wellman, 852 P.2d 559 (Mont. 1993)*. In *Sheppard v. Sheppard, 655 P.2d 895 (Idaho 1982)*, the court ordered the non-Indian spouse compensated for his share of the community contributions that had gone into acquisition of trust property. This order did not require a valuation or indirect distribution of the property itself. *But see Jacobs v. Jacobs, 405 N.W.2d 668 (Wis. Ct. App. 1987) and Landauer v. Landauer, 975 P.2d 577 (Wash. Ct. App. 1999)*, in which the courts valued and ordered an offsetting property allocation with respect to trust land. The reasoning in *Jacobs* suffers from a failure to differentiate federal preemption in an Indian context from ordinary preemption, as well as from an overemphasis on the assimilationist objectives of Public Law 280. The court also erred in assuming that Public Law 280's objective of affording a forum for suits against Indians in Indian country invariably overcomes tribes' interests in controlling the disposition of Indian property. While this argument has extra force in situations such as *Jacobs,* in which the relevant tribe (Stockbridge-Munsee) had no court at that time that could divide the trust property, a tribe's interest in avoiding adjudication by an outside sovereign remains potent even under those circumstances. Since *Jacobs* was decided, the Stockbridge-Munsee Tribe has established its own court system with domestic relations jurisdiction.

(n150)Footnote 412. *In re Marriage of Purnel, 60 Cal. Rptr. 2d 667 (Ct. App. 1997)*. Notably, this case involved a tribe without a court system.

(n151)Footnote 413. *18 U.S.C. § 1162(b)*; *25 U.S.C. § 1321(b)*.

(n152)Footnote 414. *See Mattz v. Arnett, 412 U.S. 481, 483 (1973)*.

(n153)Footnote 415. *See* § 6.04[3][b][i].

(n154)Footnote 416. Arthur F. Foerster, *Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/Regulatory Distinction, 46 UCLA L. Rev. 1333, 1347 (1999); see also Quechan Indian Tribe v. McMullen, 984 F.2d 304, 307 (9th Cir. 1993)* (characterizing hunting and fishing as "regulatory schem[e]" because "a person who wants to hunt or fish merely has to pay a fee and obtain a license"). *But see Jones v. State, 936 P.2d 1263 (Alaska Ct. App. 1997)*. The exceptional cases may be those in which taking of animals is prohibited because of concerns about endangered species. *See State v. Billie, 497 So.2d 889 (Fla. Dist. Ct. App. 1986)*. In those cases, state regulation may be permitted, regardless of treaty or other guarantees to the tribes, for the limited purpose of conservation. *See* Ch. 18, § 18.03.

(n155)Footnote 417. Generally, states lack jurisdiction to regulate Indian fishing or hunting on reservations. *See* Ch. 18, § 18.02. *But see Puyallup Tribe v. Dep't of Game, 433 U.S. 165 (1977)* (indicating that in some circumstances states may regulate reservation fishing if necessary for conservation of species).

(n156)Footnote 418. Southern Ute Tribe v. Frost, 19 Indian L. Rep. 6132 (S. Ute. Tr. Ct. 1992).

(n157)Footnote 419. Fawcett v. Fawcett, 13 Indian L. Rep. 5063 (Alaska Super. Ct. 1986); *State v. Schmuck, 850 P.2d 1332 (Wash. 1993)*; *Cordova v. Holwegner, 971 P.2d 531 (Wash. Ct. App. 1999)*; *Teague v. Bad River Band of the Lake Superior Chippewa Indians, 665 N.W.2d 899 (Wis. 2003)*.

(n158)Footnote 420. *TTEA v. Ysleta Del Sur Pueblo, 181 F.3d 676, 685 (5th Cir. 1999)*; *Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 562 (9th Cir. 1991)*; *Walker v. Rushing, 898 F.2d 672, 675 (8th Cir. 1990)*;

Cabazon Band of Mission Indians v. Smith, 34 F. Supp. 2d 1195, 1205 (C.D. Cal. 1998) ; Confederated Tribes of the Colville Reservation v. Beck, 6 Indian L. Rep. F8 (E.D. Wash. 1979).

(n159)Footnote 421. *70 Op. Att'y Gen. Wis. 237, 243 (1981)* ; Op. Att'y Gen. Neb. No. 48 (1985).

(n160)Footnote 422. Op. Sol. Int., M-36907 (Nov. 14, 1978).

(n161)Footnote 423. Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction under Public Law 280, 47 Am. U. L. Rev. 1627 (1998);* Timothy Carr Seward & Carole Goldberg-Ambrose, *Tribal Courts in California: Hope for the Future*, in Carole Goldberg-Ambrose, Planting Tail Feathers: Tribal Survival and Public Law 280 141-171 (American Indian Studies Center 1997).

(n162)Footnote 424. *See* Ch. 2, § 2.02.

(n163)Footnote 425. *See* § 6.04[3][a].

(n164)Footnote 426. Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction under Public Law 280, 47 Am. U. L. Rev. 1627, 1658 (1998).*

(n165)Footnote 427. *See* Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country, 44 UCLA L. Rev. 1405, 1418 (1997).*

(n166)Footnote 428. Examples include the Cabazon, Yurok, and Hoopa Valley Tribes in California, the Stockbridge-Munsee and Ho-Chunk Tribes in Wisconsin, and the Shakopee Sioux in Minnesota.

(n167)Footnote 429. Pub. L. No. 91-523, *84 Stat. 1358 (1970)* (codified at *18 U.S.C. § 1162(c)*).

(n168)Footnote 430. Pub. L. No. 91-523, §§ 1, 2, *84 Stat. 1358 (1970)* (codified at *18 U.S.C. § 1162(a)-(c), 28 U.S.C. § 1360(a)*).

(n169)Footnote 431. Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction under Public Law 280, 47 Am. U. L. Rev. 1627, 1673-1679 (1998).*

(n170)Footnote 432. *See* H.R. Rep. No. 1545, 91st Cong., 2d Sess. (1970).

(n171)Footnote 433. The matter may be unique because of the peculiar history of the Metlakatla Reservation. The reservation was established by statute for the Metlakatla Indians, who had recently migrated from Canada. Act of March 3, 1891, § 15, *26 Stat. 1095* (codified at *25 U.S.C. § 495*); *see Metlakatla Indian Cmty. v. Egan, 369 U.S. 45, 48 (1962)* . In *United States v. Booth, 161 F. Supp. 269 (D. Alaska 1958)* , a territorial judge held that the reservation was not Indian country within the meaning of *18 U.S.C. § 1151*. The reasoning of that case is extremely doubtful. The *Booth* case was cited uncritically in *Metlakatla Indian Community v. Egan, 369 U.S. 45, 51 (1962)* . The matter was further confused by the fact that the Metlakatlans, isolated on their island reservation, had in fact exercised internal criminal jurisdiction over minor crimes for many years. But the tortured history of the Metlakatla makes it difficult to derive any general inference from that amendment. Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction under Public Law 280, 47 Am. U. L. Rev. 1627, 1676 n.282 (1998).*

(n172)Footnote 434. Cross-deputization agreements can be helpful in allocating overlapping law enforcement responsibilities. *See* David H. Getches, *Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding Self-Government*, 1 Rev. Const. Stud. 1 (1993); *see also State v. Manypenny, 662 N.W.2d 183 (Minn. Ct. App. 2003)* (these agreements are consistent with Public Law 280). In the absence of such agreements, costly and time-consuming litigation can erupt between states and Indian nations. *See, e.g., Cabazon Band of Mission Indians v. Smith, 249 F.3d 1101 (9th Cir. 2001) , opinion withdrawn, 271 F.3d 910 (9th Cir. 2001)* (conflict over tribal police vehicles' use of light bars while chasing suspects between geographically separated parts of the reservation).

(n173)Footnote 435. *U.S. Const. amend. VI.*

(n174)Footnote 436. *25 U.S.C. § 1302(3).*

(n175)Footnote 437. *Bartkus v. Illinois, 359 U.S. 121 (1959)* (United States Constitution); *Ramos v. Pyramid Lake Tribal Ct., 621 F. Supp. 967 (D. Nev. 1985)* (Indian Civil Rights Act).

(n176)Footnote 438. *United States v. Wheeler, 435 U.S. 313 (1978)* .

(n177)Footnote 439. *Ramos v. Pyramid Lake Tribal Ct., 621 F. Supp. 967 (D. Nev. 1985)* ; *Booth v. Alaska, 903 P.2d 1079, 1085 (Alaska Ct. App. 1995)* ; *People v. Morgan, 785 P.2d 1294 (Colo. 1990)* .

(n178)Footnote 440. Laurie L. Levenson, *Double Trouble: Under What Circumstances Can a Defendant Be Prosecuted for the Same Act Under Different Statutory Provisions?* Los Angeles Lawyer, June 1999, 40, 42.

(n179)Footnote 441. *Booth v. Alaska, 903 P.2d 1079, 1086 (Alaska Ct. App. 1995)* ("territories"); *People v. Morgan, 785 P.2d 1294 (Colo. 1990)* ("jurisdictions"); *Hill v. Eppolito, 772 N.Y.S.2d 634 (App. Div. 2004)* ("jurisdictions"). *But see State v. Moses, 37 P.3d 1216 (Wash. 2002)* ("jurisdictions"). California's double jeopardy statute refers to any "government," a term that should encompass Indian nations, which have a "government-to-government" relationship with the United States. *Cal. Pen. Code § 656.*

(n180)Footnote 442. *State v. Moses, 37 P.3d 1216, 1217-1219 (Wash. 2002)* .

(n181)Footnote 443. *Teague v. Bad River Band of the Lake Superior Chippewa Indians, 612 N.W.2d 709 (Wis. 2000)* . In a Public Law 280 state, state and tribal courts with concurrent jurisdiction might choose to apply different bodies of law to the dispute. State courts are directed to apply tribal law, but only if that law does not conflict with state law. In the *Teague* case, for example, the Wisconsin state court was prepared to apply Wisconsin law regarding the validity of a contract made between the tribal gaming corporation and one of its employees.

(n182)Footnote 444. *Teague v. Bad River Band of the Lake Superior Chippewa Indians, 612 N.W.2d 709, 717-718 (Wis. 2000)* . Some states may provide that their own courts must decline jurisdiction if a prior suit involving the same dispute and litigants was previously filed in another court with concurrent jurisdiction, such as a tribal court. *Matsch v. Prairie Island Indian Cmty., 567 N.W.2d 276, 278 (Minn. Ct. App. 1997)* .

(n183)Footnote 445. *See* Ch. 7, § 7.07.

(n184)Footnote 446. *See Teague v. Bad River Band of the Lake Superior Chippewa Indians, 665 N.W.2d 899 (Wis. 2003)* (Crooks, J., concurring).

(n185)Footnote 447. *See Balyeat Law, PC v. Pettit, 967 P.2d 398, 408 (Mont. 1998)* .

(n186)Footnote 448. *Teague v. Bad River Band of the Lake Superior Chippewa Indians, 612 N.W.2d 709, 720 (Wis. 2000)* .

(n187)Footnote 449. The state court action had been filed first, but the tribal court action had gone to judgment first.

(n188)Footnote 450. Tribal/State Protocol for the Judicial Allocation of Jurisdiction Between the Four Chippewa Tribes of Northern Wisconsin and the Tenth Judicial District of Wisconsin (2001), *cited in* Carol Tebben, *Trifederalism in the Aftermath of Teague: The Interaction of State and Tribal Courts in Wisconsin,* 26 Am. Indian L. Rep. 177, 194-196 (2001-2002).

(n189)Footnote 451. *Teague v. Bad River Band of the Lake Superior Chippewa Indians, 665 N.W.2d 899 (Wis. 2003)* .

(n190)Footnote 452. *See* Ch. 7, § 7.04[3].

(n191)Footnote 453. *See* Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction, 31 Ariz. L. Rev. 329 (1989).*

(n192)Footnote 454. *Drumm v. Brown, 716 A.2d 50, 60-63 (Conn. 1998)* .

(n193)Footnote 455. *See, e.g., Cohen v. Little Six, Inc., 543 N.W.2d 376, 381 n.3 (Minn. Ct. App. 1996)* , *aff'd, 561 N.W.2d 889 (Minn. 1997)* ; *Gavle v. Little Six, Inc., 555 N.W.2d 284 (Minn. 1996)* ; *see also Drumm v. Brown, 716 A.2d 50 (Conn. 1998)* (limiting exhaustion requirement to situations in which parallel proceeding is pending in tribal court).

(n194)Footnote 456. *See* Ch. 7, § 7.04[3].

(n195)Footnote 457. *Lemke v. Brooks, 614 N.W.2d 242 (Minn. Ct. App. 2000)* ; *McCrea v. Denison, 885 P.2d 856 (Wash. Ct. App. 1994)* .

(n196)Footnote 458. *See* Ch. 2, § 2.02.

(n197)Footnote 459. *See* Ch. 1, § 1.07.

(n198)Footnote 460. The Alaska Supreme Court refused to apply the tribal exhaustion doctrine in a contract dispute, reasoning that a clause in the contract authorized parties to sue in state court, and expressing concern that there was no evidence that a functioning tribal court existed. *Nenana Fuel Co. Inc. v. Native Village of Venetie, 834 P.2d 1229 (Alaska 1992)* ; *see also Larrivee v. Morigeau, 602 P.2d 563 (Mont. 1979)* (declining to apply exhaustion doctrine, but decided before the Supreme Court articulated federal court exhaustion requirement).

(n199)Footnote 461. *18 U.S.C. §§ 1153, 3242. See* Ch. 9, § 9.02[2].

(n200)Footnote 462. *18 U.S.C. § 1152. See* Ch. 9, § 9.02[1].

(n201)Footnote 463. Pub. L. No. 91-523, *84 Stat. 1358 (1970)* (codified at *18 U.S.C. § 1162(c)*); *see* Vanessa J. Jiminez and Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280, 47 Am. U. L. Rev. 1627, 1673-1679 (1998).*

(n202)Footnote 464. *See* Ch. 9, § 9.01; *see also United States v. Pollmann, 364 F. Supp. 995, 1002 (D. Mont. 1973) . A fortiori,* federal laws of general applicability, which operate regardless of the location of the offense are unaffected by Public Law 280. *See, e.g, United States v. Wadena, 152 F.3d 831 (8th Cir. 1998) .*

(n203)Footnote 465. The Indian country liquor laws are not exclusive. *Fort Belknap Indian Cmty. of the Ft. Belknap Indian Reservation v. Mazurek, 43 F.3d 428 (9th Cir. 1994) .* With enactment of the Indian Gaming Regulatory Act [*25 U.S.C. §§ 2701-2721*], federal criminal jurisdiction over tribal gaming became exclusive. *Sycuan Band of Mission Indians v. Roache, 38 F.3d 402, 407 (9th Cir. 1994) , amended, 54 F.3d 535 (1995)* ; *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 743 F. Supp. 645, 652 (W.D. Wis. 1990) .* Some of the other federal criminal statutes applicable to Indian country are exclusive as to Indians but concurrent over other persons. *See* Ch. 9, § 9.02[1].

(n204)Footnote 466. *See* § 6.04[4].

(n205)Footnote 467. *See United States v. Hoodie, 588 F.2d 292 (9th Cir. 1978) .*

(n206)Footnote 468. Pub. L. 80-846, *62 Stat. 1161 (1948)* (criminal jurisdiction conferred on state of Iowa); *18 U.S.C. § 3243* (criminal jurisdiction conferred on state of Kansas). A question remained whether the federal jurisdiction mentioned in these statutes was exclusive or concurrent. In *Negonsott v. Samuels, 507 U.S. 99 (1993)* , the Supreme Court found in favor of concurrent jurisdiction.

(n207)Footnote 469. *See, e.g., 25 U.S.C. § 232.*

(n208)Footnote 470. *United States v. Burch, 169 F.3d 666 (10th Cir. 1999) .*

(n209)Footnote 471. Pub. L. No. 98-290, § 5, *98 Stat. 202 (1968).*

(n210)Footnote 472. *See* Ch. 2, § 2.02.

(n211)Footnote 473. *United States v. High Elk, 715 F. Supp. 285 (D.S.D. 1989)* ; *Idaho v. Marek, 736 P.2d 1314 (Idaho 1987)* ; *Idaho v. Major, 725 P.2d 115 (Idaho 1986) .*

(n212)Footnote 474. *United States v. Burch, 169 F.3d 666, 670 (10th Cir. 1999) .*

(n213)Footnote 475. *United States v. High Elk, 715 F. Supp. 285 (D.S.D. 1989) , aff'd, 990 F.2d 660 (8th Cir. 1990)* ; *see also State v. Hoffman, 804 P.2d 577 (Wash. 1991)* ; *State v. Bertrand, 378 P.2d 427 (Wash. 1963) .*

(n214)Footnote 476. *See In re Hankin's Petition, 125 N.W.2d 839 (S.D. 1964) .*

(n215)Footnote 477. *See Rosebud Sioux Tribe v. South Dakota, 900 F.2d 1164 (8th Cir. 1990) .*

(n216)Footnote 478. *United States v. High Elk, 715 F. Supp. 285, 287 (D.S.D. 1989) , aff'd, 902 F.2d 660 (8th Cir. 1990) .*

(n217)Footnote 479. *United States v. High Elk, 715 F. Supp. 285, 287 (D.S.D. 1989) , aff'd, 902 F.2d 660 (8th Cir. 1990) .*

(n218)Footnote 480. For an argument in favor of continued federal criminal jurisdiction in states that have received delegated jurisdiction, see Robert Porter, Note: *The Jurisdictional Relationship Between the Iroquois and New York State: An Analysis of 25 U.S.C. §§ 232, 233 , 27 Harv. J. Legis. 497, 521 (1990).*

(n219)Footnote 481. Robert Porter, Note: *The Jurisdictional Relationship Between the Iroquois and New York State: An Analysis of 25 U.S.C. §§ 232, 233 , 27 Harv. J. Legis. 497, 519-522 (1990)* (addressing implications of silence about federal Indian country criminal jurisdiction in *25 U.S.C. § 232*, which delegated jurisdiction to State of New York).

(n220)Footnote 482. *Idaho v. Marek, 736 P.2d 1314, 1319 (Idaho 1987)* ; *Idaho v. Major, 725 P.2d 115, 121, 122 (Idaho 1986)* . Neither of these cases involved a direct conflict between federal and state criminal jurisdiction. In *Marek*, the defendant was charged with two offenses. The court determined that one was a federally defined offense that was not within the state's assumption of jurisdiction under Public Law 280, and the other was within the state's assumption of Public Law 280 jurisdiction but not a federal offense. In *Major*, the court concluded that the offense with which the defendant was charged was neither a federal offense nor an offense covered by the state's assumption of Public Law 280 jurisdiction.

(n221)Footnote 483. *Idaho Code § 67-5101.*

(n222)Footnote 484. Idaho limited its nonconsensual jurisdiction under Public Law 280 to compulsory school attendance; juvenile delinquency and youth rehabilitation; dependent, neglected, and abused children; insanities and mental illness; public assistance; domestic relations; and operation of motor vehicles on state or locally maintained roads. With tribal consent, Idaho has also acquired jurisdiction over some offenses covered by the Major Crimes Act, such as kidnapping.

(n223)Footnote 485. *25 U.S.C. §§ 1901-1963.*

(n224)Footnote 486. *See* Ch. 11, *Indian Child Welfare Act.*

(n225)Footnote 487. *25 U.S.C. § 1911(b).*

(n226)Footnote 488. *25 U.S.C. § 1911(a).*

(n227)Footnote 489. *70 Op. Att'y Gen. Wis. 237 (1981) . But cf. Idaho v. Marek, 777 P.2d 1253, 1256 (Idaho Ct. App. 1989)* (suggesting that child dependency proceedings are not regulatory for purposes of Public Law 280). The statutes of Idaho and Washington accepting Public Law 280 jurisdiction purport to cover child dependency, abuse, and neglect proceedings, and at least one case has upheld state jurisdiction over involuntary proceedings based on these provisions. *Idaho Code § 67-5101*; *Wash. Rev. Code § 37.12.010*; *Comenout v. Burdman, 525 P.2d 217, 222 (Wash. 1974)* . These statutes, and the cases applying them, were enacted and decided before *Bryan* and *Cabazon* elaborated the distinction between regulatory and prohibitory laws as well as the distinction between regulatory proceedings and private civil lawsuits. *See* § 6.04[3][b][ii]. Hence, their continued validity is doubtful. In *Doe v. Mann, 285 F. Supp. 2d 1229, 1235-1237 (N.D. Cal. 2003)* , a federal district court found that involuntary child welfare proceedings were regulatory for purposes of Public Law 280, but then interpreted ICWA as restoring concurrent jurisdiction over those matters to states affected by Public Law 280 and similar federal legislation. Although the court's reading of Public Law 280 in that case is sound, its construction of ICWA is highly questionable. The entire thrust of ICWA was to limit state authority, not to expand it. *See* Ch. 11, § 11.02.

(n228)Footnote 490. *70 Op. Att'y Gen. Wis. 237 .*

(n229)Footnote 491. *25 U.S.C. § 1918*; *25 C.F.R. §§ 13.11-13.16.*

(n230)Footnote 492. *See* § 6.04[3][g].

(n231)Footnote 493. *Bryan v. Itasca County, 426 U.S. 373 (1976)* (*see* § 6.04[3][b][ii]).

(n232)Footnote 494. *See Native Village of Nenana v. State, Dep't of Health & Soc. Servs., 722 P.2d 219 (Alaska 1986) , overruled, In re C.R.H., 29 P.3d 849 (Alaska 2001) .*

(n233)Footnote 495. *Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 562 (9th Cir. 1991)* . At the time ICWA was adopted, courts had not yet established that tribal jurisdiction survived Public Law 280. It is now the consensus among lower federal courts as well as many state courts that Public Law 280 left tribal jurisdiction intact. *See* § 6.04[3][c]. Hence, there is no reason for Indian nations to file reassumption petitions in order to obtain concurrent or referral jurisdiction. *In re C.R.H., 29 P.3d 849 (Alaska 2001)* (reassumption provision of ICWA has no bearing on tribe's transfer jurisdiction under ICWA). The opinion in *Doe v. Mann, 285 F. Supp. 2d 1229, 1235-37 (N.D. Cal. 2003)* , holding that the reassumption provision precludes a finding of exclusive tribal jurisdiction over involuntary child wel-

fare matters involving on-reservation children in Public Law 280 states, strains both the statutory fabric and the legislative history of ICWA.

(n234)Footnote 496. *See* Carole Goldberg-Ambrose & Duane Champagne, A Second Century of Dishonor: Federal Inequities and California Tribes (Report Prepared for the Advisory Council on California Indian Policy 1996), available at <<
www.sscnet.ucla.edu/indian/ca/Tribes1.htm>.

(n235)Footnote 497. *25 U.S.C. § 1919(a).*

(n236)Footnote 498. *25 U.S.C. § 2701-2721. See* Ch. 12, *Indian Gaming.*

(n237)Footnote 499. *Sycuan Band of Mission Indians v. Roache, 38 F.3d 402, 407 (9th Cir. 1994) , amended, 54 F.3d 535 (1995)* ; *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 743 F. Supp. 645 (W.D. Wis. 1990) .*

(n238)Footnote 500. *Great Western Casinos, Inc. v. Morongo Band of Mission Indians, 88 Cal. Rptr. 2d 828 (Ct. App. 1999) .*

(n239)Footnote 501. *25 U.S.C. § 2710(d).*

(N240)Footnote 502. *25 U.S.C. § 2710(d)(3)(C).*

(n241)Footnote 503. *See* § 6.04[3][e].

(n242)Footnote 504. *See Kennerly v. Dist. Ct., 400 U.S. 423 (1971) .*

(n243)Footnote 505. *See, e.g., Fisher v. Dist. Ct., 424 U.S. 382, 388 (1976)* ; *McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 177-178 (1973) .*

(n244)Footnote 506. *See, e.g., Seneca-Cayuga Tribe v. State, 874 F.2d 709 (10th Cir. 1989)* ; *Langley v. Ryder, 778 F.2d 1092, 1096 (5th Cir. 1985)* ; *Tohono O'Odham Nation v. Schwartz, 837 F. Supp. 1024 (D. Ariz. 1993)* ; *Schaghticoke Indians v. Potter, 587 A.2d 139 (Conn. 1991)* ; *Balyeat v. Pettit, 967 P.2d 398, 409 (Mont. 1998)* ; *State v. Pena, 873 P.2d 274 (N.M. Ct. App. 1994) .*

(n245)Footnote 507. *See* § 6.03[2].

(n246)Footnote 508. *Richardson v. Malone, 762 F. Supp. 1463 (N.D. Okla. 1991)* ; *In re Marriage of Wellman, 852 P.2d 559 (Mont. 1993)* ; *Ahboah v. Hous. Auth. of Kiowa Tribe, 660 P.2d 625 (Okla. 1983) .*

(n247)Footnote 509. *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C., 467 U.S. 138, 151 n.11 (1984)* . Some states have used this statement to support jurisdiction over tribal members within Indian country that was of doubtful validity even before Public Law 280 came into being. *See, e.g., Wildcatt v. Smith, 316 S.E.2d 870 (N.C. Ct. App. 1984) .*

(n248)Footnote 510. *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C., 467 U.S. 138 (1984)* . These cases were deemed within concurrent state and tribal jurisdiction.

(n249)Footnote 511. *Jicarilla Apache Tribe v. Bd. of County Comm'rs, 883 P.2d 136 (N.M. 1994)* . Before the Supreme Court's decision in *Nevada v. Hicks, 533 U.S. 353 (2001)* , state courts disagreed about whether Public Law 280 preempts state authority to arrest an Indian on the reservation for an off-reservation offense. *Compare State v. Spotted Horse, 462 N.W.2d 463 (S.D. 1990)* (state's action treated as on-reservation exercise of jurisdiction, and hence preempted), *with State v. Lupe, 889 P.2d 4 (Ariz. Ct. App. 1994)* (state's action treated as exercise of off-reservation jurisdiction, and therefore not preempted). In dicta supporting state jurisdiction in *Hicks*, the Supreme Court did not discuss the Public Law 280 preemption issue. Subsequent to *Hicks*, the South Dakota Supreme Court rejected a state claim of authority to pursue an Indian onto the reservation to effect an arrest for an off-reservation offense, thereby implicitly reconfirming the court's previous position in *Spotted Horse* concerning the preemptive effect of Public Law 280. *State v. Cummings, 679 N.W.2d 484, 486-487 (S.D. 2004)* . For a fuller discussion of *Hicks*, see Ch. 4, § 4.02[3][c][ii].

(n250)Footnote 512. *Cf. Topash v. Comm'r of Revenue, 291 N.W.2d 679 (Minn. 1980) . But see Minnesota v. R.M.H., 617 N.W.2d 55 (Minn. 2000)* , which the Minnesota Supreme Court determined that Public Law 280 did not authorize the state to exercise jurisdiction over nonmember Indians, but proceeded to find jurisdiction based on a balancing of state, tribal, and federal interests. In a strong dissent, three justices pointed out that the analysis under Public

Law 280 should have ended the inquiry, given the preemptive effect of that statute on all state exercise of jurisdiction over Indians within Indian country. *Id. at 65-67* .

(n251)Footnote 513. *Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 160 (1980)* .

(n252)Footnote 514. *See Wacondo v. Concha, 873 P.2d 276, 278 (N.M. Ct. App. 1994)* (allowing state court jurisdiction over suit between members of two different tribes arising within Indian country).

(n253)Footnote 515. Whether a state assumption of jurisdiction pursuant to tribal consent prior to enactment of Public Law 280 is valid and, if so, whether it remains effective after Public Law 280, is a question the United States Supreme Court left open in *Fisher v. District Court, 424 U.S. 382, 388 n.12 (1976)* .

(n254)Footnote 516. *Kennerly v. Dist. Ct., 400 U.S. 423 (1971)* .

(n255)Footnote 517. *Kennerly v. Dist. Ct., 400 U.S. 423, 427 (1971)* .

(n256)Footnote 518. *Kennerly v. Dist. Ct., 400 U.S. 423, 426-427 (1971)* . The state had not taken affirmative steps to assert jurisdiction as required by the Act, and the tribe had not consented in accordance with the post-1968 procedure specified in the Act. *See 25 U.S.C. §§ 1322(a), 1326.*

(n257)Footnote 519. *See* Ch. 2, § 2.02.

(n258)Footnote 520. *See Schaghticoke Indians v. Potter, 587 A.2d 139 (Conn. 1991)* ; *Ahboah v. Hous. Auth. of Kiowa Tribe, 660 P.2d 625 (Okla. 1983)* .

(n259)Footnote 521. *25 U.S.C. § 1326.*

(n260)Footnote 522. Act of Aug. 15, 1953, § 6, *67 Stat. 590* (codified as amended at *25 U.S.C. § 1324*).

(n261)Footnote 523. These are North Dakota, South Dakota, Montana, Washington, Idaho, Wyoming, Utah, Oklahoma, Arizona, New Mexico, and Alaska.

(n262)Footnote 524. *See, e.g., Wash. Const. Art. 26(2).*

(n263)Footnote 525. These states are Arizona, Idaho, Montana, North Dakota, South Dakota, Utah, and Washington. However, Arizona's assumption was limited to control of air and water pollution, regulatory matters outside the scope of the state's power under Public Law 280. *See* § 6.04[3][b][ii].

(n264)Footnote 526. *Washington v. Confederated Bands & Tribes of the Yakima Nation, 439 U.S. 463 (1979)* .

(n265)Footnote 527. *Washington v. Confederated Bands & Tribes of the Yakima Nation, 439 U.S. 463, 484-493 (1979)* .

(n266)Footnote 528. *See Idaho v. Marek, 736 P.2d 1314 (Idaho 1987)* ; *State v. Dist. Ct., 496 P.2d 78 (Mont. 1972)* ; *State v. Hook, 476 N.W.2d 565 (N.D. 1991)* . South Dakota's assumption of partial Public Law 280 jurisdiction was invalidated on other grounds. *Rosebud v. South Dakota, 900 F.2d 1164 (8th Cir. 1990)* . Two other disclaimer states, Arizona and Utah, have passed partial legislative assumptions which have not been challenged in court. An attempt to amend the state constitution failed in Wyoming. *See* Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535, 547 (1975); Washington v. Confederated Bands & Tribes of the Yakima Nation, 439 U.S. 463, 483 n.27, 493 n.39 (1979)* .

(n267)Footnote 529. *Anderson v. Gladden, 188 F. Supp. 666 (D. Or. 1960)* , *aff'd, 293 F.2d 463 (9th Cir. 1961)* ; *Robinson v. Sigler, 187 N.W.2d 756 (Neb. 1971)* ; *Anderson v. Britton, 318 P.2d 291 (Or. 1957)* ; *see Washington v. Confederated Bands & Tribes of the Yakima Nation, 439 U.S. 463, 471-472, 497 (1979)* . The *Anderson* and *Robinson* decisions also rejected constitutional challenges to Public Law 280.

(n268)Footnote 530. *See Washington v. Confederated Bands & Tribes of the Yakima Nation, 439 U.S. 463, 493 (1979)* ; *Kennerly v. Dist. Ct., 400 U.S. 423 (1971)* .

(n269)Footnote 531. The only federal procedural requirement now appears to be tribal consent by referendum. *25 U.S.C. §§ 1321, 1322, 1326*; *see Kennerly v. Dist. Ct., 400 U.S. 423, 428-430 (1971)* .

(n270)Footnote 532. Partial assumptions were made in several forms: Over some areas of Indian country, depending on Indian or local county consent; over some legal subjects; and over nontrust lands but not trust lands. Another tack

was assumption conditional on federal reimbursement for the cost. *See* Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535, 553-558 (1975).*

(n271)Footnote 533. *Washington v. Confederated Bands & Tribes of the Yakima Nation, 439 U.S. 463 (1979)* .

(n272)Footnote 534. *Washington v. Confederated Bands & Tribes of the Yakima Nation, 439 U.S. 463, 493-499 (1979)* .

(n273)Footnote 535. *Rosebud Sioux Tribe v. South Dakota, 900 F.2d 1164 (8th Cir. 1990)* .

(n274)Footnote 536. *S.D. Codified Laws Ann. §§ 1-1-12-1-1-21.*

(n275)Footnote 537. *See State v. McCormack, 793 P.2d 682 (Idaho 1990)* (upholding jurisdiction to apply new procedures and increased penalties established after 1968, when those do not constitute "substantial change" in law); *State v. Squally, 937 P.2d 1069 (Wash. 1997)* (jurisdiction over 30 acres added to reservation after 1968 in optional state); *State v. Cooper, 928 P.2d 406, 410-411 (Wash. 1996)* (jurisdiction over tribe recognized after 1968 in optional state).

(n276)Footnote 538. State jurisdiction over additions of trust land to existing reservations may be justifiable to avoid an unmanageable patchwork of authorities.

(n277)Footnote 539. *See, e.g.,* Pub. L. 101-42, § 6, *103 Stat. 92 (1989)* (restoring Coquille Indian Tribe of Oregon).

(n278)Footnote 540. *25 U.S.C. § 1755.*

(n279)Footnote 541. *State v. Spears, 662 A.2d 80 (Conn. 1995)* .

(n280)Footnote 542. *Charles v. Charles, 701 A.2d 650 (Conn. 1997)* .

(n281)Footnote 543. *See* Ch. 2, § 2.02.

(n282)Footnote 544. When restoration of recognition was provided to one tribe in a mandatory Public Law 280 state, Congress announced that "[t]he State shall exercise criminal and civil jurisdiction within the boundaries of the reservation in accordance with [Public Law 280]." Pub. L. 101-42, § 6,*103 Stat. 92 (1989)* (restoring Coquille Indian Tribe of Oregon).

(n283)Footnote 545. *25 U.S.C. § 1323.*

(n284)Footnote 546. *See* Carole Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535, 559 n.112 (1975).*

(n285)Footnote 547. The explanation for the absence of retrocession language in these statutes may be that state jurisdiction is conferred "as if" it had been obtained pursuant to Public Law 280 as amended in 1968 to require tribal consent. These 1968 amendments authorized retrocession only for the reservations that had been subjected to state jurisdiction in the 1953-1968 period, when consent was not required. In one exceptional case, Congress allowed for retrocession as part of the restoration of federal recognition to the Coquille Tribe of Oregon. Congress provided that "[r]etrocession of [state jurisdiction] may be obtained pursuant to section 403 of the Act of April 11, 1968." *25 U.S.C. § 715d.*

(n286)Footnote 548. Exec. Order No. 11,435, *33 Fed. Reg. 17,339 (1968)* .

(n287)Footnote 549. *65 Fed. Reg. 75,948 & 77,905 (2000)* (Tulalip); *60 Fed. Reg. 33,318 (1995)* (Salish-Kootenai); *54 Fed. Reg. 19,959 (1989)* (Confederated Tribes of the Chehalis Reservation, Quileute Reservation and the Swinomish Tribal Community); *53 Fed. Reg. 5837 (1988)* (Ely Colony); *52 Fed. Reg. 8372 (1987)* (Colville); *51 Fed. Reg. 24,234 (1986)* (Winnebago); *50 Fed. Reg. 34,555 (1985)* (Pascua Yaqui Reservation); *46 Fed. Reg. 2195 (1981)* (Umatilla Reservation); *41 Fed. Reg. 8516 (1976)* (Menominee Reservation); *40 Fed. Reg. 27,501 (1975)* (fifteen Nevada reservations); *40 Fed. Reg. 4026 (1975)* (Nett Lake Reservation); *37 Fed. Reg. 7353 (1972)* (Port Madison Reservation); *35 Fed. Reg. 16,598 (1970)* (Omaha Reservation); *34 Fed. Reg. 14,288 (1969)* (Quinault Reservation).

(n288)Footnote 550. *United States v. Lawrence, 595 F.2d 1149 (9th Cir. 1979)* .

(n289)Footnote 551. *Omaha Tribe v. Village of Walthill, 334 F. Supp. 823 (D. Neb. 1971)* , *aff'd, 460 F.2d 1327 (8th Cir. 1972)* .

(n290)Footnote 552. The Secretary's interpretation of the effectiveness of the Act is controlling, and the Secretary's acceptance of jurisdiction will not be set aside subsequently based on questions about the validity of the offer. *Omaha Tribe v. Village of Walthill, 334 F. Supp. 823 (D. Neb. 1971)* , *aff'd, 460 F.2d 1327 (8th Cir. 1972)* ; *United States v. Brown, 334 F. Supp. 536 (D. Neb. 1971)* . This reliance on federal determinations to validate retrocession contrasts notably with the legal principles applied to assumptions of jurisdiction, in which state requirements control. *See* § 6.04[3][f][i]. State rather than federal law will control, however, when the question is whether a retroceding state saved jurisdiction over pending cases involving pre-retrocession offenses. With respect to pre-retrocession offenses, the federal government has put no resources into prosecutions, and thus has no interest in upholding its exercise of jurisdiction. *Tyndall v. Gunter, 681 F. Supp. 641 (D. Neb. 1987)* , *aff'd, 840 F.2d 617 (8th Cir. 1988)* ; *see also United States v. Strong, 778 F.2d 1393 (9th Cir. 1985)* .

(n291)Footnote 553. *Omaha Tribe v. Village of Walthill, 334 F. Supp. 823 (D. Neb. 1971)* , *aff'd, 460 F.2d 1327 (8th Cir. 1972)* .

(n292)Footnote 554. The legislative history does not explain the absence of a provision for tribal initiation or participation in retrocession decisions. *See* Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535, 558-562 (1975).* States are under no obligation to condition their actions on tribal consent, although some have done so. A number of state assumptions under the original Act were conditioned on tribal consent. *See* § 6.04[3][f][i]. The only state to authorize Public Law 280 jurisdiction since 1968, Utah in 1971, provided that Indian nations have the right to initiate full or partial retrocessions. 1971 Utah Laws 539, § 7 (codified at *Utah Code Ann. § 9-9-207*). The effectiveness of the provision is uncertain, because the Secretary only has express authority to accept retrocessions of jurisdiction assumed under Public Law 280 as it existed before 1968. *See* Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535, 559 n.112 (1975).* In view of the fact that no tribe has consented to Utah's jurisdiction, the issue is probably moot.

(n293)Footnote 555. *25 U.S.C. § 1901-1963.*

(n294)Footnote 556. *25 U.S.C. § 1918*; 25 C.F.R. Pt. 13. *See* § 6.04[3][d][ii].

(n295)Footnote 557. *See* § 6.04[3][c].

(n296)Footnote 558. *See* § 6.04[3][d][ii].

(n297)Footnote 559. *25 C.F.R. § 13.1(b).*

(n298)Footnote 560. *25 U.S.C. § 1918(b).*

(n299)Footnote 561. *See* Hearings on S. 1683, S. 1686, S. 1687 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs, 80th Cong., 2d Sess. 13 (1948); J. Whipple, Report of Special Committee to Investigate the Indian Problem of the State of New York Appointed by the Assembly of 1889, N.Y. Legis. Doc. No. 51 (1889).

(n300)Footnote 562. *United States v. Forness, 125 F.2d 928 (2d Cir. 1942)* .

(n301)Footnote 563. Act of July 2, 1948, *62 Stat. 1224* (codified at *25 U.S.C. § 232*).

(n302)Footnote 564. *25 U.S.C. § 232*; *see People v. Redeye, 358 N.Y.S.2d 632 (Cattaraugus County Ct. 1974)* .

(n303)Footnote 565. *See* § 6.04[3][d][i].

(n304)Footnote 566. *United States v. Markiewicz, 978 F.2d 786 (2d Cir. 1992)* ; *United States v. Cook, 922 F.2d 1026 (2d Cir. 1991)* ; *see* Robert B. Porter, Note, *The Jurisdictional Relationship between the Iroquois and New York State: An Analysis of 25 U.S.C. §§ 232, 233* , *27 Harv. J. Legis. 497, 526-533 (1990).*

(n305)Footnote 567. Act of Sept. 13, 1950, § 1, *64 Stat. 845* (codified at *25 U.S.C. § 233.*

(n306)Footnote 568. This provision stands in sharp contrast to the analogous provision in Public Law 280, which requires state courts to apply tribal law only if only if it is not inconsistent with state law. *25 U.S.C. § 1360*(c). New York's authorization statute also gave the tribes two years in which to record any customs they wished to preserve. Such recorded customs would become the rules of decision in all reservation-based civil cases involving tribal members. *25 U.S.C. § 233.* No tribe took advantage of the opportunity to record its customs, so that aspect of the provision has never been used. Robert B. Porter, Note, *The Jurisdictional Relationship between the Iroquois and New York State: An Analysis of 25 U.S.C. §§ 232, 233* , *27 Harv. J. Legis. 497, 541 (1990).*

(n307)Footnote 569. *See e.g., Bennett v. Fink Constr. Co., 262 N.Y.S.2d 331 (Sup. Ct. 1965)* .

(n308)Footnote 570. *25 U.S.C. § 233.*

(n309)Footnote 571. *See* § 6.04[3][c].

(n310)Footnote 572. *United States v. Cook, 922 F.2d 1026, 1035 (2d Cir. 1991)* ; *Bowen v. Doyle, 880 F. Supp. 99 (W.D.N.Y. 1995)* , *aff'd, 230 F.3d 525 (2d Cir. 2000)* ; 87 Op. N.Y. Att'y Gen. 35 (1987) (no regulatory power); 77 Op. N.Y. Att'y Gen. 76 (1977) (no taxing power).

(n311)Footnote 573. *Bowen v. Doyle, 880 F. Supp. 99 (W.D.N.Y. 1995)* , *aff'd, 230 F.3d 525 (2d Cir. 2000)* . *See* § 6.04[3][c].

(n312)Footnote 574. *Bowen v. Doyle, 880 F. Supp. 99 (W.D.N.Y. 1995)* , *aff'd, 230 F.3d 525 (2d Cir. 2000)* . *See* § 6.04[3][c].

(n313)Footnote 575. *Bowen v. Doyle, 880 F. Supp. 99 (W.D.N.Y. 1995)* , *aff'd, 230 F.2d 525 (2d Cir. 2000)* . *See* § 6.04[3][b][iv].

(n314)Footnote 576. *Bowen v. Doyle, 880 F. Supp. 99 (W.D.N.Y. 1995)* , *aff'd, 230 F.3d 525 (2d Cir. 2000)* ; *John v. Hoag, 500 N.Y.S.2d 950, 952-954 (Cattaraugus County Ct. 1986)* . *See* § 6.04[3][b][v]. In the guise of resolving private disputes, however, state courts have sometimes rendered decisions that have the effect of disrupting tribal governing decisions and systems. *See* Robert B. Porter, Note, *The Jurisdictional Relationship between the Iroquois and New York State: An Analysis of 25 U.S.C. §§ 232, 233, 27* Harv. J. Legis. 497, 564-569 (1990).

(n315)Footnote 577. *See* Robert B. Porter, Note, *The Jurisdictional Relationship between the Iroquois and New York State: An Analysis of 25 U.S.C. §§ 232, 233, 27* Harv. J. Legis. 497, 559-572 (1990).

(n316)Footnote 578. *See* § 6.04[3][g].

(n317)Footnote 579. Act of June 8, 1940, *54 Stat. 249* (codified as amended at *18 U.S.C. § 3243*).

(n318)Footnote 580. Act of May 31, 1946, *60 Stat. 229.* That statute was invalidated nine years later by the state's supreme court, because of the state's failure to amend its constitutional disclaimer of Indian country jurisdiction. *State v. Lohnes, 69 N.W.2d 508 (N.D. 1955)* . In 1991, state jurisdiction was revived when the North Dakota Supreme Court overruled itself. *State v. Hook, 476 N.W.2d 565 (N.D. 1991)* .

(n319)Footnote 581. Act of June 30, 1948, *62 Stat. 1161.* Iowa later took civil jurisdiction under Public Law 280. *See* § 6.04[3][a].

(n320)Footnote 582. Act of June 30, 1948, *62 Stat. 1161;* Act of May 31, 1946, *60 Stat. 229; 18 U.S.C. § 3243.* In contrast, Public Law 280 repeals such jurisdiction for mandatory states, and is silent with respect to optional states. *See* § 6.04[3][d][i].

(n321)Footnote 583. *Negonsott v. Samuels, 507 U.S. 99 (1993)* .

(n322)Footnote 584. *Negonsott v. Samuels, 507 U.S. 99, 110 (1993)* .

(n323)Footnote 585. *Negonsott v. Samuels, 507 U.S. 99, 110 (1993)* . For discussion of the Indian law canons of construction, see Ch. 2, § 2.02.

(n324)Footnote 586. *Youngbear v. Brewer, 415 F. Supp. 807 (N.D. Iowa 1976)* , *aff'd, 549 F.2d 74 (8th Cir. 1977)*

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(n325)Footnote 587. Neither the Kansas nor Iowa statute adverts at all to these subjects. The North Dakota statute states that nothing in it shall "deprive any Indian of any protection afforded by Federal law, contract, or treaty against the taxation or alienation of any restricted property." Act of May 31, 1946, *60 Stat. 229.* In context, it is unlikely that this clause made the scope of this statute any different from the other two, because taxation and alienation are essentially not criminal law subjects. It was probably included to prevent any claims of *fifth amendment* taking of treaty-protected property rights.

(n326)Footnote 588. *See Iowa Tribe of Indians of Kansas & Nebraska v. Kansas, 787 F.2d 1434 (10th Cir. 1986)* .

(n327)Footnote 589. *California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)* ; *see* § 6.04[3][b]. An Eighth Circuit decision to the contrary was decided before the Supreme Court had fully clarified this point. *Sac & Fox Tribe v. Licklider, 576 F.2d 145 (8th Cir. 1978)* .

(n328)Footnote 590. *See* § 6.04[3][a].

(n329)Footnote 591. *See, e.g., Val/Del Inc. v. Super. Ct., 703 P.2d 502, 508 (Ariz. Ct. App. 1985)* . *But see Texas v. Ysleta del Sur Pueblo, 79 F. Supp. 2d 708, 711 (W. D. Tex. 1999)* , *summarily aff'd, 237 F.3d 631 (5th Cir. 2000)* .

(n330)Footnote 592. *Compare, e.g., 25 U.S.C. § 1725(a)* (state civil and criminal jurisdiction under Maine Indian Claims Settlement Act over tribes other than Passamaquoddy and Penobscot), *with 25 U.S.C. § 1775d* (state criminal jurisdiction under Mohegan Nation (Connecticut) Land Claims Settlement Act) *and 25 U.S.C. § 1771g* (state and local civil and criminal jurisdiction under Massachusetts Indian Land Claims Settlement Act).

(n331)Footnote 593. *See, e.g., 25 U.S.C. § 1775d(b)* (stating that "[t]he assumption of criminal jurisdiction by the State ... shall not be construed as a waiver of the jurisdiction of the United States under *section 1153 of title 18, United States Code*"); *25 U.S.C. § 1725(c)* (disavowing federal criminal jurisdiction under variety of Indian country criminal statutes).

(n332)Footnote 594. *See, e.g., 25 U.S.C. §§ 1771-1771i* (Massachusetts Indian Land Claims Settlement Act).

(n333)Footnote 595. *See, e.g., 25 U.S.C. § 1725(f)* (Maine Indian Claims Settlement Act); *25 U.S.C. § 1775d(b)* (Mohegan Nation (Connecticut) Land Claims Settlement Act).

(n334)Footnote 596. *See, e.g., Texas v. Ysleta del Sur Pueblo, 79 F. Supp. 2d 708, 711 (W. D. Tex. 1999)* (interpreting Ysleta del Sur Pueblo and Alabama & Coushatta Indian Tribes of Texas Restoration Act, *25 U.S.C. § 1300g-6*).

(n335)Footnote 597. *See, e.g.*, Wampanoag Tribe of Gayhead v. Massachusetts Comm'n against *Discrimination, 63 F. Supp. 2d 119 (D. Mass. 1999)* (interpreting Massachusetts Indian Claims Settlement Act, *25 U.S.C. §§ 1771-1726*).

(n336)Footnote 598. *25 U.S.C. § 737(a)* (Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act); *see, e.g., Alabama-Coushatta Tribes of Texas v. Texas, 208 F. Supp. 2d 670 (E.D. Tex. 2002)* .

(n337)Footnote 599. *See, e.g., Penobscot Nation v. Fellencer, 164 F.3d 706 (1st Cir. 1999)* (non-Indian employee of Penobscot Nation who was discharged from her job could not sue Nation in state administrative agency on discrimination claim because jurisdiction would interfere with "internal tribal matters" and was thus not authorized by Maine Indian Claims Settlement Act, *25 U.S.C. §§ 1721-1735* , which incorporated provisions of Maine Implementing Act, *Me. Rev. Stat. Ann. tit. 30, §§ 6201-6214*).

(n338)Footnote 600. *See* § 6.04[3][a].

(n339)Footnote 601. Act of Feb. 15, 1929, *45 Stat. 1185* (codified as amended at *25 U.S.C. § 231*).

(n340)Footnote 602. Act of Aug. 9, 1946, *60 Stat. 962* (codified at *25 U.S.C. § 231*).

(n341)Footnote 603. *25 C.F.R. § 273.52* (authorizing state inspection of education conditions and enforcement of compulsory attendance where governing tribe consents). Although the statute requires tribal consent only for compulsory attendance laws, the Secretary's requirement of consent for education inspection laws as well seems within lawful administrative discretion. *See* Ch. 5, § 5.03. The Secretary has also invoked *25 U.S.C. § 231* with respect to compulsory attendance at federal Indian schools. *25 C.F.R. § 31.4*. This seems clearly beyond the statute's scope.

(n342)Footnote 604. *57 Interior Dec. 162, 167-168 (1940)* .

(n343)Footnote 605. *57 Interior Dec. 162, 167-168 (1940)* ; Op. Sol. Int., M-36768 (Feb. 7, 1969).

(n344)Footnote 606. *State ex rel. Adams v. Super. Ct., 356 P.2d 985 (Wash. 1960)* ; *In re Colwash, 356 P.2d 994 (Wash. 1960)* . The Indian Child Welfare Act [*25 U.S.C. §§ 1901-1963*] has since established the proper realm of state jurisdiction in these matters. *See* Ch. 11, *Indian Child Welfare Act*.

(n345)Footnote 607. Op. Sol. Int., M-36768 (Feb. 7, 1969).

(n346)Footnote 608. *See, e.g., 25 C.F.R. § 1.4*; *58 Interior Dec. 52 (1942)* .

(n347)Footnote 609. *25 U.S.C. §§ 398, 398c, 401. See* Ch. 8, § 8.03[1].

(n348)Footnote 610. *25 U.S.C. § 239; see Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998)* ; *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992)* . *See* Ch. 8, § 8.03[1].

(n349)Footnote 611. *See, e.g., 4 U.S.C. §§ 104-110* (exempting Indians on reservations from state taxes with exception of gasoline and other fuels).

(n350)Footnote 612. *43 U.S.C. § 666.*

(n351)Footnote 613. *United States v. Dist. Ct., 401 U.S. 520 (1971)* .

(n352)Footnote 614. *Colorado River Water Cons. Dist. v. United States, 424 U.S. 800, 809-813 (1976)* . *See* Ch. 19, § 19.05[1].

(n353)Footnote 615. *Colorado River Water Cons. Dist. v. United States, 424 U.S. 800, 813 (1976)* .

(n354)Footnote 616. *25 U.S.C. §§ 2701-2721.*

(n355)Footnote 617. *25 U.S.C. § 2710(d)(3)(C)*. *See* 6.04[3][d][iii].

(n356)Footnote 618. *25 U.S.C. § 2710(d)(3)(a)*. *See* Ch. 12, § 12.05.

(n357)Footnote 619. *See, e.g., 25 U.S.C. § 737* (Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act); *25 U.S.C. § 1771g* (Massachusetts Indian Land Claims Settlement Act); *cf. 25 U.S.C. § 1708(b)* (provision of Rhode Island Indian Claims Settlement Act precluding treatment of settlement lands as "Indian lands" for purposes of Indian Gaming Regulatory Act).

(n358)Footnote 620. *18 U.S.C. § 1161.*

(n359)Footnote 621. *See* Ch. 13, *Federal Indian Liquor Law.*

(n360)Footnote 622. *Rice v. Rehner, 463 U.S. 713 (1983)* .

(n361)Footnote 623. *Rice v. Rehner, 463 U.S. 713, 732-735 (1983)* . *See* Ch. 2, § 2.02.

(n362)Footnote 624. *See 18 U.S.C. §§ 13, 1152, 1153. See also* Ch. 9, § 9.02.

(n363)Footnote 625. *See 25 U.S.C. §§ 348, 357. See also* Ch. 16, § 16.03.

(n364)Footnote 626. *See, e.g., Minnesota v. United States, 305 U.S. 382 (1939)* (allotment law). The constitutionality of federal adoption of state legislative standards, including future changes in them, was sustained in *United States v. Sharpnack, 355 U.S. 286 (1958)* .

(n365)Footnote 627. Act of May 8, 1906, *34 Stat. 182* (codified at *25 U.S.C. § 349*).

(n366)Footnote 628. *See, e.g., Louie v. United States, 274 F. 47 (9th Cir. 1921)* .

(n367)Footnote 629. *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 477-479 (1976)* ; *see also County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 261-264 (1992)* .

(n368)Footnote 630. *See, e.g., 25 U.S.C. §§ 355, 375, 375a*; Act of Aug. 4, 1947, § 10, *61 Stat. 731* (codified at *25 U.S.C. § 502*); Act of May 27, 1908, §§ 6, 8, *35 Stat. 312* . Affected tribes have sought to repeal these laws because they detract from the exercise of tribal self-determination. *See, e.g.*, H.R. 5308, 106th Cong., 2d Sess. (2000). *See also* Ch. 4, § 4.07[1].

(n369)Footnote 631. *See Parker v. Richard, 250 U.S. 235, 239 (1919)* .