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NOTES

FRAMING CONCURRENT JURISDICTION ISSUES IN THE SELF-DETERMINATION ERA: ACCEPTING THE FIRST CIRCUIT'S ANALYSIS BUT REJECTING ITS APPLICATION TO PRESERVE TRIBAL SOVEREIGNTY

Nathaniel T. Haskins[*]

I. Introduction

In beginning this journey, entertain with me an absurd but salient hypothetical. Assume for a moment that the State of Texas sells a portion of its land to Oklahoma. The terms of the sale stipulate that Texas and Oklahoma retain concurrent jurisdiction over the land. An obvious problem arises. How do the states determine which laws apply? And further, do the laws change depending on the citizenship or status of the parties involved? The absurdity of my hypothetical is clear since the boundaries of our states are geographically defined and unlikely to change; however, as absurd as the situation may seem, these issues are real between Native American tribes and states that retain concurrent jurisdiction over the same land.

Since there is little legal scholarship discussing concurrent jurisdiction, this note will provide a foundational approach to dealing with the application of civil laws in concurrent jurisdiction situations.[1] It will also acknowledge some of the problems likely to arise with concurrent jurisdiction.

The First Circuit's jurisprudence provides a workable test, which can guide states and tribes in determining which laws apply. Referring to the test as the First Circuit Test, this note explains how its application will help guide tribes and states and why this is the analysis that should be applied in these situations. Moreover, it reviews in some detail those steps to show how they should be applied to preserve tribal sovereignty and tribal self-determination. Many civil jurisdiction issues likely to arise in concurrent jurisdiction

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1. As a result of the complexities inherent in the application of criminal laws, this note is mainly intended to provide states and tribes guidance in determining which civil laws apply in concurrent jurisdiction situations. The First Circuit Test can work in the application of criminal laws, as it was derived from a criminal case, but this note cautions against using it in all criminal situations.

situations will fit into one of the prongs of the test, which illustrates its necessity.

A contemporary analysis of this question differs from the analysis that might have been made earlier in United States history, because the federal government's policy towards Native Americans has changed drastically over time.[2] This note provides an historical account of these changes with reasons why the analysis yields a different result today.

II. Brief Overview of the History of Indian Law

Throughout United States history there has been a struggle to balance federal, state, and tribal sovereignty.[3] The Supreme Court has held that Congress may abrogate tribal authority under the plenary power doctrine.[4] Because of the unique history of the United States federal government's activity and treatment of tribal sovereignty within state geographical boundaries, the balance of power between state and tribal sovereignty has proven most challenging for courts. However, recently courts have held that in certain instances tribes and states may maintain concurrent jurisdiction over the same land.[5]

Early in the history of the American colonies, Indian tribes were treated as separate sovereigns.[6] Britain declared general policies, while the colonies were responsible for their implementation.[7] However, in anticipation of the onslaught of the French and Indian War in 1754, the Crown established absolute control over Indian Lands through the Royal Proclamation of 1763, which reserved lands West of the Appalachians for the Indians and prohibited colonists from purchasing lands directly from the Indians without permission from the Crown.[8]

After the Revolutionary War, the United States Constitution removed authority over all Indian affairs from the states and placed it squarely in the

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2. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 9-10 (Nell Jessup Newton et al. eds., 2005) [hereinafter COHEN].

3. *See* Judith Resnik, *Multiple Sovereignties: Indian Tribes, States, and the Federal Government*, 79 JUDICATURE 118 (1995) (discussing the problems inherent in overlapping sovereignty).

4. United States v. Lara, 541 U.S. 193, 201-02 (2004).

5. Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685 (1st Cir. 1994) (*Narragansett I*) (finding that a tribe's grant of civil and criminal jurisdiction to Rhode Island gave the tribe and state concurrent jurisdiction).

6. COHEN, *supra* note 2, at 14-17.

7. *See id.* at 16-17.

8. *Id.* at 18-19.

hands of the federal government.[9] The federal government continued treating Indian tribes as separate sovereigns, largely through treatymaking.[10] Indian sovereignty was not absolute, though; many treaties included language establishing tribes as nations dependent upon the United States government,[11] and Congress passed legislation regulating trade with tribes.[12] Federal jurisdiction was extended to non-Indians who committed crimes against Indians in Indian Territory.[13] Jurisdiction was again extended in 1817 to include crimes by both Native Americans and non-Native Americans. Crimes between Native Americans were handled solely pursuant to tribal law.[14] State law continued to have no force on tribal lands.[15] This was the case even if states wished to assert their authority over non-Indians on reservations. Clearly, the federal government was committed to tribal autonomy during this time and concurrent jurisdiction was nonexistent.

Today, a state's jurisdiction is no longer absolutely barred from tribal lands; the United States Supreme Court has carved out exceptions to the *Worcester* rule, allowing state regulatory authority,[16] as well as state adjudicatory authority within the boundaries of Indian country. In a Termination Era[17] decision the Supreme Court held that tribal sovereignty only bears the application of state judicial jurisdiction when it would interfere with the rights of reservation Indians to make and enforce their own laws.[18] The emerging rule, stated by the Supreme Court in *Mescalero Apache Tribe v. Jones*, was

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9. *Id.* at 21-22, 25; U.S. CONST. art. I, § 8, cl. 3 (granting Congress the authority to regulate commerce with Indian Tribes).

10. COHEN, *supra* note 2, at 28.

11. *Id.*

12. *See, e.g.*, Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743.

13. *See, e.g.*, Act of Aug. 4, 1790, ch. 34, 1 Stat. 138 (regulating non-Indian criminal behavior against Indians).

14. *See, e.g.*, Act of Mar. 3, 1817, ch. 92, 3 Stat. 383 (recognizing that courts' criminal jurisdictions included conduct between Indians and non-Indians, but did not extend to acts committed between Indians on reservations).

15. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1831) (holding that the laws of Georgia can have no force within the boundaries of the Cherokee nation).

16. Nevada v. Hicks, 533 U.S. 353, 361-62 (2001).

17. COHEN, *supra* note 2, at 90-91 (noting that the period after World War II saw a rise of pro-assimilation social forces and a shift in Congress toward a new policy of moving Indians from "special status" to "full citizenship").

18. Williams v. Lee, 358 U.S. 217, 223 (1959) (holding that an Arizona court was not permitted to exercise jurisdiction over a suit by a non-Indian against an Indian concerning matters that occurred on a reservation because to do so would interfere with the right of the Indians to govern themselves).

that in certain situations "even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law."[19] *In McClanahan v. State Tax Commission of Arizona*, the Court went on to explain that modern cases deciding whether state laws apply should look to applicable treaties and statutes that establish the limits of state power.[20]

Also during this era, Public Law 280 (PL-280) was enacted.[21] PL-280 originally granted criminal and civil jurisdiction over Indian lands to five states, and gave the other states the option to assume jurisdiction without tribal consent.[22] Today there are six PL-280 states: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin.[23] In this period, concurrent jurisdiction not only came into existence but was forced onto the tribes.

The period from 1961 to the present is considered the Self-Determination Era, an era in which the federal government encourages tribal self-determination and management.[24] Proof of this is the enactment by Congress of the Indian Civil Rights Act (ICRA),[25] which prohibited states from assuming PL-280 jurisdiction absent tribal consent.[26] In this era we see a partial return towards preserving tribal sovereignty and tribal self-determination. Tribes, however, still maintain the right to waive their sovereignty. This fact, along with the general policy of self-determination, is quite crucial in analyzing concurrent jurisdiction situations because the intentions of the tribes and Congress are of paramount importance in determining which laws apply.

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19. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973) (citing Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962)).

20. McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 172 (1973).

21. Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (1953) (codified at 18 U.S.C. § 1162 (2000) and 28 U.S.C. § 1360 (2000)).

22. Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 537-38 (1974-1975).

23. 28 U.S.C. § 1360(a) (2000) (granting states civil jurisdiction over Indian country in Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin); 18 U.S.C. § 1162(a) (2000) (granting states criminal jurisdiction over Indian country in Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin).

24. COHEN, *supra* note 2, at 97-98; *see* Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 229-30 (1996).

25. 25 U.S.C. §§ 1301-1341 (2000).

26. *Id.* § 1326.

Federal Indian law has been described as Congress' operation of distinctly different models of interaction between Native Americans and the states.[27] One model focuses on including Indian reservations within state boundaries, granting Indians the rights of state citizens, and assimilating Indians into the mainstream of the American culture. Another model focuses on tribal sovereignty, autonomy, economic development, and insulation from the interference of state laws.[28] Between these extremes are models that favor either tribal assimilation or autonomy, but allow the federal government to arbitrate between the tribe and the state to prevent severe abuses on one by the other.[29]

One scholar has asserted that assimilation is cheaper for the federal government and preferred by those states that dislike Indian sovereignty within their borders, and the only reasons this policy is not consistently followed are feelings of respect and responsibility owed to Native American by the federal government.[30] A moderate model is appropriate for the Self-Determination Era. Accordingly, jurisdictional issues which arise should be interpreted with an emphasis on preserving tribal sovereignty and autonomy, unless expressly waived by the tribe.

III. When Concurrent Jurisdiction Arises

As a foundation, it is important to explain how concurrent jurisdiction arises. There are three main situations that may lead to state and tribal concurrent jurisdiction. The first is through mutual agreement to settle a land dispute. This occurs when both a state and tribe claim entitlement to the same land. To settle the dispute, the state may agree to grant title to the tribe and in return, among other things, the state's civil and criminal laws will apply therein. Second, to a more limited extent, the state and tribe may enter into compacts pursuant to the Indian Gaming and Regulation Act (IGRA),[31] and as a result, may concurrently regulate class III gaming with the state on tribal lands.[32] Third, a state and tribe may hold concurrent jurisdiction pursuant to

27. Goldberg, *supra* note 22, at 536.

28. *Id.*

29. *Id.*

30. *Id.*

31. 25 U.S.C. §§ 2701-2721 (2000).

32. Texas v. United States, 497 F.3d 491, 511 (5th Cir. 2007) (citing 25 U.S.C. § 2710(d)(5) (2000)) (holding that by agreement a tribe and state may concurrently regulate class III gaming on Indian lands).

PL-280.[33] However, it is important to note that regardless of how concurrent jurisdiction is established, it requires the cooperation of three entities — Congress, the state, and the tribe — as each has its own interests and responsibilities.

To illustrate the first scenario, the First Circuit Court of Appeals in *Rhode Island v. Narragansett Indian Tribe* (*Narragansett I*)[34] considered Rhode Island's argument that the Narragansett Tribe did not have jurisdiction over 1800 acres of land (Settlement Lands), as it had ceded criminal and civil jurisdiction to the State in the Settlement Act of 1978.[35] The court held that the mere fact that the Tribe ceded power to the State did not mean that the Tribe lacked similar authority.[36] Rather, the court found that the Tribe and State maintained concurrent jurisdiction over the Settlement Lands.[37] In arriving at its conclusion, the court read the federal statute against a backdrop of Indian sovereignty.[38] The court determined that the tribes retained their sovereignty unless withdrawn by treaty or statute, and that jurisdiction was an aspect of that sovereignty.[39] The court stopped short of determining whether aspects of its sovereignty included criminal, civil adjudicatory, and civil regulatory jurisdiction.[40]

While the first two scenarios are similar, the third is quite different. The differences stem from the fact that in the first two examples involving negotiated agreements, the tribe acted voluntarily; however, in the third, the tribe had the state's laws thrust upon it.[41] One could argue that for this reason, case law from PL-280 states should not be applicable in determining which laws should apply when the tribe acted voluntarily, nor should guidelines from the First Circuit Test be applied to PL-280 states.

However, as mentioned earlier, the ICRA now requires tribal consent before a state may assume PL-280 jurisdiction.[42] Today, if a tribe were to consent to

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33. Doe v. Mann, 415 F.3d 1038, 1050, 1052 n.17 (9th Cir. 2005) (citing Native Vill. of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 562 (9th Cir. 1991) (holding that PL-280 vests a state and tribe with concurrent jurisdiction)).

34. 19 F.3d 685 (1st Cir. 1994) (*Narragansett I*).

35. 25 U.S.C. § 1708(a) (2000).

36. *Narragansett I*, 19 F.3d at 701.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. Goldberg, *supra* note 22, at 538 (noting that disruptions arose between Indians and the states over PL-280 mainly because Indians did not want the state's laws thrust upon it).

42. 25 U.S.C. § 1326.

PL-280 it would also, in effect, consent to courts' interpretation and application of that law. For this reason, the use of PL-280 case law is relevant, assuming that the language in PL-280 is significantly similar to the language in the other agreements between the state and the tribe.[43] A state or tribe should make sure that there is this similarity before using a PL-280 case to support its proposition. Moreover, in the future, the First Circuit's Test will most certainly be relevant to determine which laws apply, as any subsequent grant of authority will be voluntary.

IV. The First Circuit Test

The First Circuit Test is primarily derived from *Narragansett Indian Tribe v. Rhode Island* (*Narragansett II*),[44] decided in 2006. Though not explicitly announced in its decision, the court conducted a five-part analysis which can be used to provide guidance to tribes and states on concurrent jurisdiction issues. This analysis is as follows: (1) First determine if the land over which the state and tribe have concurrent jurisdiction is Indian land; (2) Look at the express language of any acts of Congress that enforce agreements between states and tribes, and also incorporate the language of any other documents concerning those agreements, and the circumstances surrounding those agreements, to determine what laws apply; (3) Look to see if Congress gave the tribe certain authority; if so, that authority is presumed unless and until the tribe or Congress expressly removes it; further, this authority may supersede a previous grant of federal authority to a state if that intent is indicated; (4) Consider over whom the state attempts to exert its authority, the tribe or its members; if a tribe, then determine whether the tribe waived its sovereign immunity; (5) Determine whether the law interferes with tribal self-government; if it does, the state has exceeded its authority unless the tribe has waived its right.

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43. The language granting civil jurisdiction to the states in PL-280 is as follows:

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

28 U.S.C. § 1360(a) (2000).

44. Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16 (1st Cir. 2006) (*Narragansett II*).

Although this test cannot solve all jurisdictional disputes, it can provide an operational framework for the tribes, states, and courts seeking to settle jurisdictional disputes. Moreover, it provides a foundation on which scholars may build and develop in this complicated area that requires further research.

In *Narragansett II*, the court considered whether the State had the authority to enforce its cigarette sales and excise tax against a tribally-owned smoke shop.[45] The Rhode Island State Police raided the smoke shop, located on Settlement Lands, to obtain contraband cigarettes.[46] In so doing, the police arrested eight tribal members, including the Tribe's chief.[47]

The Tribe filed suit in federal district court seeking a declaration that its sovereign status prevented the State from extending its tax to the Tribe's sale of cigarettes on Settlement Lands.[48] Further, it argued that its sovereignty insulated it from state criminal jurisdiction, and thus, protected the tribal members involved in operating the smoke shop from arrest.[49] The district court ruled in favor of the State, and the First Circuit upheld the trial court's decision on appeal.[50]

In so holding, the court considered most of the factors set forth in the First Circuit Test. However, the court did not expressly deal with the first factor, that of determining whether the Settlement Lands qualified as Indian country. This determination was not necessary, as the Settlement Lands were clearly Indian country.[51]

Next, the court considered the agreement between the Tribe and the State and reviewed its surrounding history to better understand the application of the agreement. Specifically, the court sought to determine whether the Settlement Act allowed the State to enforce its jurisdiction against the tribe.[52] In so doing, the court looked at the history of the relationship between the Narragansett Tribe and the State of Rhode Island.[53] The court noted that, pursuant to the Joint Memorandum of Understanding (J-Mem) between Rhode Island and the Narragansett Tribe, the State gave the Tribe control over 1800 acres of land in

45. *Id.* at 20.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 21.
51. The settlement lands qualified as Indian country under 18 U.S.C. § 1151(c) because they had been taken into trust by the United States for the tribe. *See id.* at 19-20; 18 U.S.C. § 1151(c) (2000); 25 U.S.C. § 1708(a) (2000).
52. *Narragansett II*, 449 F.3d at 20.
53. *Id.* at 18-20.

and around Charlestown, with the caveat that "all laws of the State of Rhode Island [were] in full force and effect on the Settlement Lands."[54] The court further noted that, pursuant to the Settlement Act, the Settlement Lands were not subject to state hunting and fishing regulations, the State was to create an Indian corporation to hold the Settlement Lands, and those lands were exempt from local taxation.[55]

The court next reviewed the third element of its analysis, that of determining whether Congress expressly granted the tribe authority over the subject matter in question. As a rationale for doing this, it held that it was required to weigh the competing state, federal, and tribal interests.[56] The court's analysis was brief, as it maintained that "Congress [had] not granted the Tribe any special powers with respect to the specific subject matter involved here."[57] Its analysis was correct, as Congress has not expressly granted tribes any authority concerning cigarette taxation.

In the fourth element of its analysis, the court noted that although the State was asserting its authority over a tribe, the Tribe's sovereign immunity was not a bar to jurisdiction.[58] First, the court looked to the broad language of the Settlement Act and the J-Mem to determine if its application was limited to tribal members, but not the Tribe.[59] The court concluded both agreements arose after intense negotiations, and although the negotiations offered some limiting exceptions, they offered none that distinguished enforcement between tribal members and the Tribe itself.[60]

Next, the court found that the tribe had abrogated its sovereign immunity because the J-Mem provided that the State may demand the Tribe's compliance with its laws, and that the State may fully enforce any noncompliance.[61] The court rejected the idea espoused in *Aroostook Band of Micmacs v. Ryan*[62] that there was a distinct difference between a tribe's

54. *Id.* at 19.
55. *Id.*
56. *Id.* at 23.
57. *Id.*
58. *Id.* at 24.
59. *Id.* at 21.
60. *Id.* at 22.
61. *Id.* at 21.
62. Aroostook Band of Micmacs v. Ryan, 404 F.3d 48, 68 (1st Cir. 2005) (finding a distinction between tribal sovereignty and trial sovereign immunity).

sovereignty and its sovereign immunity.[63] Rather, it held that tribal sovereign immunity is an incident of tribal sovereignty.[64]

Therefore, in this case, it did not matter that the State attempted to exercise its jurisdiction over a tribe as opposed to its members. The court considered the tribe's sovereign immunity when determining what laws apply. This consideration was correct even though arguably the court came to the wrong conclusion by misapplying fundamental principles of Indian law — an argument discussed later in this note.[65]

Lastly, the court considered whether allowing the State to exercise this authority interfered with the Tribe's right to self-govern.[66] In so doing, the court reviewed the Tribe's continued autonomy over matters of local governance. Although the Tribe has the right to generate revenue from social programs without state interference, the court found that interest weak when the revenue is generated by selling goods made by outsiders to which the Tribe has only a small commercial connection.[67]

V. Analysis of the First Circuit Test

The factors comprising the First Circuit's Test combine to provide functional tools for determining what laws apply when jurisdictional questions arise. A more penetrating look at these factors and the associated issues will now be undertaken, with particular attention to the third and fourth factors. Moreover, an additional First Circuit decision, *Narragansett I*, will help illustrate the best application of these factors for preserving tribal self-determination and sovereignty.

A. Factor 1: Indian Lands

Before any concurrent jurisdiction issues may arise, it must be established that the tribe has jurisdiction. Moreover, it must be established that the state has been given jurisdiction over the land in question. For example, PL-280 gives jurisdiction to certain states over some areas of Indian country within those states.[68]

63. *Narragansett II*, 449 F.3d at 25.
64. *Id.*
65. *See* discussion *infra* Part V.D.
66. *Narragansett II*, 449 F.3d at 23.
67. *Id.*
68. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987).

Congress has established three types of Indian country:

> a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including any rights-of-way running through the reservation, b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[69]

The first thing that must be determined is if the land fits within one of these definitions. However, simply because it fits within one of these definitions does not mean this step in the analysis is complete. For instance, there are some circumstances in which, for specific purposes, Congress changes the definition of Indian country. A clear example of this is found in the IGRA,[70] which provides its own definition of "Indian lands,"[71] and under which certain lands are expressly excluded that, but for the limitation, would be included.[72] Thus, even if the land in question is Indian country, it must also be asked whether there are any limitations that would take the land out of the ordinary definition.

B. Factor 2: Language of the Act

If the land in question qualifies as Indian lands, the next step in the analysis is to determine what the parties intended in granting concurrent jurisdiction. The language of an act reflecting a concurrent jurisdiction agreement most likely contains the clearest indication of what authority a tribe intends to assign to a state. For example, a tribe may grant concurrent jurisdiction on tribal lands for criminal matters only, or for both criminal and civil matters. The language of the act should clearly show its intent.

However, sometimes the language of the act is not clear, and it becomes necessary to read the language of the legislation in conjunction with the history surrounding the agreement.[73] In *Narragansett II* there was little question as to

69. 18 U.S.C. § 1151 (2000).

70. *See supra* note 36.

71. *See* 25 U.S.C. § 2703(4) (2000).

72. *See id.* § 1708(b).

73. *See e.g.*, United States v. Mo. Pac. R.R. Co., 278 U.S. 269, 278 (1929) (recognizing that when the meaning of a statute is not clear, extraneous material may be considered to determine

whether the tribe consented to the State's criminal and civil jurisdiction since the statute read, "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island."[74] There may, however, be future situations in which a statute is not as clear. In such situations, this prong of the analysis will be of paramount importance in the interpretation of the statute.

Moreover, because today is the era of Self-Determination,[75] the influence of the times is to promote tribal governance and decision making and to reduce the government's supervision of Indian affairs.[76] For these reasons, statutes and surrounding legislative histories should be read in favor of tribal self-determination. Further, it is equally important to the preservation of tribal sovereignty that the legislative history is not used to change laws defining the parameters of concurrent jurisdiction further than the tribe intended.

C. Factor 3: Federal Grant of Authority

Some scholars question the legitimacy of the federal government's authority over the tribes while others accept that legitimacy so long as the federal government drafts laws favorable to the tribe.[77] This debate is beyond the scope of this note; for these discussion purposes, the plenary power of Congress is presumed to be valid. Because Congress has plenary power over tribes, the next step in the analysis is to determine whether there was a preceding or subsequent federal grant of authority that may prove outcome determinative.

In *Narragansett I*, the court dealt with a dispute between the Tribe and the State concerning whether the IGRA[78] applied to the Settlement Lands.[79] The State sought a declaration that the IGRA does not apply to the Settlement Lands, as the tribe had granted the State criminal and civil jurisdiction, and the gaming act did not remove that jurisdiction in the gaming context.[80] The

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its meaning).

74. 25 U.S.C. § 1708(a).

75. *See* discussion *supra* Part II.

76. David M. Blurton, *ANCSA Corporation Lands and the Dependent Indian Community Category f Indian Country*, 13 ALASKA L. REV. 211, 234 (1996).

77. David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403 (1994) (discussing congressional legitimacy concerning laws relating to Indians).

78. *See* 25 U.S.C. §§ 2701-2721 (2000).

79. Rhode Island v. Narrangansett Indian Tribe, 19 F.3d 685, 688 (1st Cir. 1994) (*Narragansett I*).

80. *Id.* at 701.

court rejected the State's argument and found that the act did apply because the IGRA canceled, in part, the jurisdiction granted by the Settlement Act and the Tribe's jurisdiction over the Settlement Lands was sufficient for its application.[81]

In arriving at its conclusion, the court explained how federal statutes that touch on the same subject matter are to be interpreted.[82] Its analysis (if followed) will aid states and tribes in understanding what authority Congress maintains and grants to the state, if any. The court acknowledged that if the statutes may coexist, then each should be given effect.[83] Moreover, the court acknowledged three important considerations to determine whether the statutes were capable of coexistence, and if not, which should control: (1) the order in which the statutes were passed; (2) the express language of the statute; and (3) the weight given to the legislative history.[84]

In *Narragansett I*, the Settlement Act came first, making the IGRA binding unless it could be shown that Congress intended otherwise.[85] To make this determination, the court looked to the express language of the IGRA to see if it intended to leave intact the jurisdictional grant set forth ten years earlier in the Settlement Act.[86] No language was found to suggest this.[87]

The State contended, however, that such a reading was not consistent with its intention as evidenced by the surrounding legislative history.[88] That history showed the Settlement Act as originally proposed[89] expressly protected the

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81. *Id.* at 702, 705.

82. *Id.* at 703 (finding that when statutes touch on the subject matter, they are both to be given effect if their coexistence is possible, but if they cannot coexist then the second repeals the first).

83. *Id.*

84. *Id.* at 698, 704.

85. *See e.g.*, Passamaquoddy Tribe v. Maine, 75 F.3d 784, 787, 794 (1st Cir. 1996) (finding that the IGRA did not apply to the state of Maine because Congress did not make it specifically applicable within the state as required by the Maine Indian Claims Settlement Act of 1980).

86. *Narragansett I*, 19 F.3d at 697.

87. *Id.* at 700.

88. *See id.* at 697-98.

89. In the proposed Settlement Act, section 23 read as follows:

> Nothing in this Act may be construed as permitting gaming activities, except to the extent permitted under the laws of the State of Rhode Island, on lands acquired by the Narragansett Indian Tribe under the Rhode Island Indian Claims Settlement Act or on any lands held by, or on behalf of, such Tribe.

Narragansett I, 19 F.3d at 698, n.13.

terms of the Settlement Agreement, even if it was not passed with that language.[90]

Further, the State submitted as evidence a discussion between two senators concerning the amended language of the Act. In that discussion, senators from Rhode Island were assured that the amended the IGRA, which omitted the language expressly protecting it from affecting the Settlement Act, would in no way limit Rhode Island's jurisdiction.[91] While the court was sympathetic to the predicament the Rhode Island senators were in, the court relied heavily on the rules of statutory interpretation and noted that when the words of a statute were not ambiguous, they must be taken as congressional intent.[92]

This analysis was complicated because a strong dissent in this case objected to the majority's treatment of the legislative history.[93] The dissent cited *Watt v. Alaska*[94] as support for a more weighty treatment of the legislative history.[95] The argument espoused was that the IGRA and the Settlement Act were in irreconcilable conflict, and for that reason, more weight should be given to the legislative history.[96] However, the dissent's argument fails, as the majority's analysis is consistent with our Nation's current policy towards Native Americans. In addition, *Watt* is distinguishable from the facts present in *Narragansett I*.

In *Watt*, the court dealt with two tax statutes that appeared to contradict each other.[97] However, before it was willing to declare the statutes as an irreconcilable conflict and therefore hold the more recent statute as controlling, the court looked to the legislative history surrounding the statutes to determine if the statutes were in fact conflicting.[98] After a review of the statutes, the court found them distinguishable and interpreted their meanings accordingly.[99]

Conversely, in *Narragansett I*, the court held that the statutes were in irreconcilable conflict as the Gaming Act expressly granted power to the Tribe in gaming matters that was previously held by the State pursuant to the Settlement Act.[100] The dissent argued that a reading of the legislative history

90. *See id.*
91. *Id.* at 698 (citing 134 CONG. REC. S12,650 (daily ed. Sept. 13, 1988)).
92. *Id.* at 700 n.17 (citing Caminetti v. United States, 242 U.S. 470, 490 (1917)).
93. *Id.* at 706 (Coffin, J., dissenting).
94. Watt v. Alaska, 451 U.S. 259 (1981).
95. *Narrangansett I*, 19 F.3d at 705.
96. *Id.* at 706 (Coffin, J., dissenting).
97. *Watt*, 451 U.S. at 266.
98. *Id.*
99. *Id.* at 273.
100. *Narragansett I*, 19 F.3d at 704.

shows that the statutes were not in conflict because the Gaming Act was never intended to apply to the Rhode Island Settlement Lands.[101] The majority disagreed, stating that "words free from doubt should be taken as a final interpretation of legislative intent."[102] Moreover, they rationalized that a floor exchange that was inconsistent with the language of the statute should not be given priority in the statutory interpretation.[103]

The majority's analysis is more persuasive for four reasons. First, its reasoning, cited above, provides a more sound basis for statutory interpretation. Second, where Congress includes limiting language in the initial draft of a bill, but removes it before the bill is enacted, the limitation is intended.[104] If such interpretation of intention is held as true with reference to drafts of a bill, how much more true should it be when the limitation occurs only in senate hearings? Third, Congress may withdraw powers from the states in matters concerning Indian affairs.[105] Thus, requiring Congress to expressly state that its laws apply to all states and tribes is absurd, as such an interpretation has been presumed. Fourth, as a matter of policy, statutes should be interpreted in favor of tribal self-governance in this Self-Determination Era.[106]

Thus, the holding in *Narragansett I* not only preserved tribal sovereignty, but it in no way prohibited Congress from taking the opportunity to clarify its purpose in the event that it did in fact intend that the IGRA should not apply to the Settlement Lands. Congress took that opportunity by amending the Settlement Act in 1996, and adding section (b) which states that "[f]or purposes of the [IGRA] (25 U.S.C. 2701 et seq.), settlement lands shall not be treated as Indian lands."[107] Thus, the analysis in *Narragansett I,* which takes a strong stance to preserve Indian sovereignty, in no way interfered with Congress' authority.

D. Factor 4: Indian Sovereign Immunity

The next step in the analysis is to consider against whom the laws are enforced, the tribe or its members. A state can circumvent the sovereign

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101. *Id.* at 706-08 (Coffin, J., dissenting).

102. *Id.* at 700 n.17.

103. *Id.*

104. Russello v. United States, 464 U.S. 16, 23-4 (1983).

105. *See* Draper v. United States, 164 U.S. 240, 242-43 (1896).

106. *See* Allen Buchanan, *Federalism, Secession, and the Morality of Inclusion,* 37 ARIZ. L. REV. 53, 54 (1995) (arguing that rights of self-determination are political rights that include the right of self-government).

107. 25 U.S.C. § 1708(b) (2000).

immunity problem if it seeks enforcement of its laws against tribal members, and also may be permitted to seek enforcement against tribal officers acting in their official capacity.[108]

An analysis of this factor should be simple. Even if a state is granted concurrent jurisdiction, it is prohibited from judicial or quasi-judicial proceedings enforcing state laws against a tribe due to its sovereign immunity, absent any clear indication that the tribe has waived its immunity.[109] However, the holding in *Narragansett II* has complicated matters somewhat. As argued by the dissent in that case, the Tribe's allowance of state criminal and civil jurisdiction alone is not sufficient to show a waiver of its sovereign immunity.[110] Rather, some clear indication that the Tribe intended to waive its sovereign immunity is required. A person without an understanding of Indian law may think this conclusion absurd. But it is quite the opposite: not only is it in absolute accord with the law, but with the policy behind the law.

The U.S. Supreme Court has long held that Indian tribes possess the common-law immunity from suit enjoyed by sovereign powers.[111] Further, the Court has held that this aspect of a tribe's sovereignty is subject to the control of Congress, and that absent express authorization by Congress, a tribe is not subject to suit.[112] Thus, the doctrine of tribal sovereign immunity suggests that a tribe may not be sued unless Congress or the tribe grants that authority.[113] The Court has consistently upheld this rule even when Congress authorized the extension of state civil and criminal laws to the tribes pursuant to PL-280.[114] If the congressional authorization of concurrent jurisdiction does not waive a tribe's sovereign immunity, should the tribe's?

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108. *See* Lisa R. Hasday, *Tribal Immunity and Access for the Disabled*, 109 YALE L.J. 1199, 1200 (2000) (arguing that the doctrine of *Ex parte Young* applies to tribes in the same manner that it does to states).

109. *See* Kiowa Tribe v. Mfg. Techs., 523 U.S. 751, 754 (1998).

110. Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16, 34 (1st Cir. 2006) (*Narragansett II*) (Lipez, J., dissenting) (citing Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877 (1986) (concluding that Public Law 280 jurisdiction does not abrogate tribal sovereign immunity).

111. Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509 (1991); Puyallup Tribe, Inc. v. Wash. Dept. of Game, 433 U.S. 165, 172-73 (1977); United States v. U.S. Fidelity & Guaranty Co., 309 U.S. 506, 512-13 (1940); Turner v. United States, 248 U.S. 354, 358 (1919).

112. *U.S. Fidelity & Guaranty Co.*, 309 U.S. at 512.

113. *Kiowa Tribe*, 523 U.S. at 754 (finding that a tribe was protected from a suit on a promissory note that it had signed).

114. Puyallup Tribe, Inc. v. Dep't of Game of State of Wash., 433 U.S. 165 (1977); *see Three Affiliated Tribes*, 476 U.S. at 892-93; Bryan v. Itasca County, 426 U.S. 373 (1976).

The strict rule that the waiver must be expressly stated may be removed if the tribe expresses clearly and unequivocally that they intend to waive its immunity.[115] Moreover, the Court has held that there is no requirement that the phrase "sovereign immunity" be expressly used to determine waiver, as long as the Tribe's intent to waive is clear.[116] Some argue that this rule is no longer fitting in our society,[117] but with the exception of *Narragansett II*, it is still the law of our land.

The courts have heard a variety of cases which claim that a tribe waived its sovereign immunity. In *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*[118] the Court held that the Tribe had not waived its sovereign immunity when it filed suit seeking an injunction against the Oklahoma Tax Commission's attempt to collect cigarette taxes.[119] Thus, it barred the Tax Commission's counter claims against the tribe to collect back taxes on cigarettes sold to non-tribal members, and to enjoin the tribe from selling cigarettes in the future without collecting taxes.[120] The conclusion in this case shows that while a tribe may be subject to certain state laws, the state may be barred from judicially enforcing those laws.

In *Wyandotte Nation v. City of Kansas City, Kansas*, the United States District Court for the District of Kansas held that the Tribe waived its right to sovereign immunity, and was thus subject to the city's quiet title counter claim after it had filed its original quiet title action.[121] The court reasoned that the Tribe, by filing its suit, effectively asked the court for a title determination of the land in question, and by so doing, had waived its sovereign immunity for

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115. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978).

116. C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 418-20 (2001).

117. One such argument is as follows:

> Both state and federal courts are suffering growing pains with respect to tribal immunity. Tribal immunity has become much like a high school prom outfit taken from the back of the closet; it no longer fits like it once did. Instead of letting out the seams, the court insisted it still fit. Currently, tribal immunity improperly denies potential plaintiffs a judicial remedy. It no longer serves its original purposes, nor is it necessary to further the Congressional policies of cultural autonomy, self-determination, and economic security.

Heath Oberloh, *Calvello v. Yankton Sioux Tribe: Shoring up Tribal Sovereign Immunity Against the Flood of Commercial Transactions Involving Tribally Owned Businesses*, 44 S.D. L. REV. 746, 782 (1998-1999).

118. 498 U.S. 505 (1991).

119. *Id.* at 507.

120. *Id.*

121. 200 F. Supp. 2d 1279 (D. Kan. 2002).

any subsequent quiet title counterclaim.[122] This holding in no way takes away from the bright line rule that to waive a tribe's sovereign immunity it must state this intent clearly and unequivocally, as the tribe's lawsuit was one such statement.

In *Narragansett II*, the court held that a tribe waived its sovereign immunity by agreeing that a state's civil and criminal laws would apply to the Settlement Lands.[123] They arrived at this holding by noting that tribal sovereign immunity was an incidence of tribal sovereignty.[124] And since the tribe had agreed to allow all state criminal and civil laws to be in "full force and effect on the [S]ettlement [L]ands"[125] it had subjugated its autonomy and consequently its sovereign immunity. As mentioned earlier, the court's analysis in this case is clearly erroneous.

The court cited *C & L Enterprises v. Citizen Band Potawatomi Indian Tribe*, which noted that no express language was required to waive sovereign immunity.[126] But what they fail to consider is that the cases are significantly distinguishable. In *C & L Enterprises*, the Tribe contracted to put a new roof on its building.[127] The contract contained an arbitration agreement that stated that any disputes would be settled in arbitration, and the rulings of the arbitration would be binding and enforceable in a court of law.[128] Thus, in this case, the Tribe contracted for something solely for its own use, and the terms of the contract expressly dealt with violation of the agreement by the tribe.

Conversely, in *Narragansett II*, while the tribe did expressly agree that the State's laws were in full force and effect on the Settlement Lands, there was no language concerning the enforcement of the laws against the Tribe. Rather, the language of the Settlement Act mirrored that of PL-280, which the Court has already held does not limit a tribe's sovereign immunity.[129] To circumvent this problem, the court produced a work of fiction when it noted that tribal sovereign immunity was an incident of its sovereignty, and therefore, when the tribe subjugated its autonomy by consenting to concurrent jurisdiction, it did the same to its sovereign immunity.[130] As the abovementioned cases illustrate,

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122. *Id.* at 1284.

123. Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16, 31 (1st Cir. 2006) (*Narragansett II*).

124. *Id.* at 25.

125. *Id.*

126. *Id.*

127. *C & L Enters.*, 532 U.S. at 418.

128. *Id.* at 418-19.

129. *Narragansett II*, 449 F.3d at 34 (Lipez, J., dissenting).

130. *See id.* at 31.

there are many instances in which a tribe lacks authority to perform a certain activity, but retains its sovereign immunity. Moreover, the Supreme Court has held that there is a difference between a state's rights to demand that a tribe comply with its laws and the means available for enforcing that compliance.[131]

More recently, in *Aroostook Band of Micmacs v. Ryan*,[132] the First Circuit again found that state laws applied to a tribe as well as its members. However, that case was not decided on the express or implied authorization of the tribe. The decision rested on Congress' express authorization pursuant to the Maine Indian Claims Settlement Act (MICSA).[133] The pertinent provision of the MICSA was that:

> [A]ll Indians, Indian nations, or tribes or bands of Indians in the State of Maine . . . shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.[134]

The Settlement Act in *Narragansett II* contained no such language. There is an argument, though perhaps weak, that the MICSA's language only limited the Tribe's inherent sovereignty, not its sovereign immunity. Nonetheless, there is a subtle but distinct difference between Congress establishing that laws shall apply to a tribe, and a tribe recognizing that state laws apply to its lands. While the court in *Aroostook Band of Micmacs* reached its conclusion based the MICSA's[135] language, it did recognize that the First Circuit, based on *Narragansett II*, rejected the distinction between inherent sovereignty and sovereign immunity.[136]

Native Americans equate tribal sovereign immunity with self-determination.[137] Again, because we are in the Self-Determination Era, it is

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131. Kiowa Tribe v. Mfg. Techs., 523 U.S. 751, 755 (1998) (holding that a tribe is only subject to suit when Congress so authorizes or when the tribe waives its rights).

132. 484 F.3d 41 (1st Cir. 2007) (finding that a state's employment discrimination laws applied equally to the tribe and its members).

133. *Id.* at 64.

134. 25 U.S.C. § 1725(a) (2000).

135. While the court based its decisions on its interpretation of the MICSA, its dissent argued that a subsequent statute, the Aroostook Band of Micmacs Settlement Act, restored the Tribe's sovereign immunity. *Compare Aroostook Band of Micmacs*, 484 F.3d at 60-61, *with id.* at 65-66 (Lipez, J., dissenting). This argument is identified to caution both tribes and states to carefully review conflicting statutes when determining which apply, and also illustrates that statutory interpretation may again prove determinative as it did in the third factor.

136. *Id.* at 64.

137. Hasday, *supra* note 108, at 1200.

important to read statutes with the backdrop of Congress' policy of promoting self-determination. Laws are also to be read against a backdrop of Indian sovereignty.[138] Further, tribal immunity is supposed to be privileged from diminution by states.[139] Thus, it makes sense from a policy standpoint to require that a tribe either expressly waive its right to sovereign immunity, or must impliedly do so by filing suit or agreeing to certain forms of enforcement. Neither was done by the tribe in *Narragansett II*. The tribe in *Narragansett II* merely limited its own authority by consenting to the application of state civil and criminal laws. This represents the important distinction between a tribe mitigating its right to govern and expressly waiving its sovereign immunity. Moreover, absent from the record was an express intent by Congress to remove the Tribe's sovereign immunity. Even so, the court abrogated the Tribe's immunity by its interpretation of the Settlement Agreement.

If *Narragansett II* stands and is followed by other circuits, then an analysis of this factor will be different. However, for the foregone reasons, there is a strong possibility that this case will not be followed and also subsequently overruled.[140] Thus, the law should be unequivocal in stating that when a tribe expressly consents to allow a state's criminal and civil laws to apply to its lands whether by consenting to PL-280 or other agreement, it has not necessarily waived its sovereign immunity. Consequently, when determining if its laws apply to lands to which it has concurrent jurisdiction, a state must first ask if it is attempting to enforce its laws against a tribal member or against the tribe. If the answer is the latter, the state must understand that while it may have the right to demand application, it has no right to judicially enforce that application.

E. Factor 5: Tribe's Right to Self-Governance

Lastly, even if it is determined that a tribe has waived its sovereign immunity a state's action may be bared if it interferes with a tribe's right to self-governance. A tribe's right to self-governance has longstanding recognition and is necessary for its survival.[141] A tribe's "right . . . to make their own laws

138. *See* McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 172 (1973).

139. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 891 (1986).

140. This case is still good law in the First Circuit. Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16 (1st Cir. 2006) (*Narragansett II*), *cert. denied*, 75 U.S.L.W. 3283 (U.S. Nov. 27, 2006) (No. 06-414).

141. *See* Vanessa J. Jimenez, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1678 (1998).

and be ruled by them" bars state court jurisdiction in some circumstances.[142] As discussed earlier, in *Narragansett II*, the court found that a tribe's right to generate revenue was weak when done by selling commercial goods made by outsiders to which it had a limited commercial connection.[143] However, the court could have easily gone the other way, as the tribe's survival requires its ability to generate revenue. For example, a court has found a tribe's right to the bounty from its own land more compelling than a state's right to tax that bounty.[144]

The first and most logical question to consider under this factor is what conduct concerns the tribe's right to self-governance? This question is very fact specific, and thus will not be answered in this note, but will be left to the facts and circumstances of each case. Next, it is important to discuss what happens if the terms or circumstances surrounding the agreement conflict with the tribe's right to self-governance. Generally, for the policy reasons discussed throughout this note, the tribe's right to self-governance must prevail. However, as discussed earlier, this is the Self-Determination Era, and a Tribe should be permitted to expressly limit its own rights. Therefore, we should permit a tribe to waive its rights should they so choose even if such a waiver interferes with its right to self-governance. The fact that a law interferes with a tribe's right to self-governance is not necessarily outcome determinative. If the tribe has waived that right, a state may be permitted to enforce its law. First, it is necessary to determine if a tribe has waived part or all of its right to self-governance.

VI. Conclusion

The law is at its best and the people are most well served when both the letter and the spirit of the law are in absolute accord. The First Circuit Test provides a workable framework which, if applied correctly, can supply the necessary balance between the letter and the policy of the law.

The First Circuit Test takes all necessary factors into consideration, including the intent of the parties in agreeing to maintain concurrent jurisdiction, the federal government's absolute authority, and any rights over specific matters it previously granted to the state or tribe. The First Circuit's Test also considers whether the law is to be enacted against a tribe in an effort to preserve a tribe's sovereign immunity, and its right to self-govern.

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142. Williams v. Lee, 358 U.S. 217, 220 (1959).

143. *See supra* text accompanying notes 66-67.

144. *See* Crow Tribe of Indians v. Montana, 650 F.2d 1104, 1117 (9th Cir. 1981).

Moreover, the order in which the factors are given offer a logical, step-by-step process that states, tribes, and courts may use in determining which laws apply. Of paramount importance to the test is the interpretation that needs to be accomplished in the analysis of each step. This note illustrates the importance of interpreting each step against the backdrop of tribal self-determination, and how such interpretation preserves tribal sovereignty without interfering with congressional authority.

Although the First Circuit Test does not answer all of the possible disputes that may arise in concurrent jurisdiction states, it does provide a solid framework in which to operate. When disputes arise, states, tribes, and the courts will be able to carefully work through each step to determine which laws should apply.