COMMENT

SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FOR INDIAN TRIBES: INHERENT TRIBAL SOVEREIGNTY VERSUS DEFENDANTS' COMPLETE CONSTITUTIONAL RIGHTS

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INTRODUCTION

The question presented is …

… whether Indian tribes' inherent sovereignty includes the ability, endorsed by Congress, to punish criminals who terrorize Indian victims through domestic violence or dating violence.

… whether non-Indian defendants should receive the full panoply of federal constitutional rights when being prosecuted in tribal courts for crimes of domestic violence or dating violence.

These twin "questions presented" are on the table as the nation waits to see whether courts will uphold the provisions in the Violence Against Women Reauthorization Act of 2013 (VAWA 2013) that give Indian tribes "special domestic violence criminal jurisdiction" over non-Indian defendants.[1] Given the current tribal–federal framework,[2] answering "yes"

[1] *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §§ 904, 908, 127 Stat. 54, 120-23, 125-26 (Mar. 7, 2013) (codified at 25 U.S.C. § 1304 & note on effective dates and pilot project (Supp. 2013)) (authorizing "[t]ribal jurisdiction over crimes of domestic

to both questions presented is impossible. One of the two interests—inherent tribal sovereignty or non-Indian defendants' full federal constitutional rights—must be compromised.

Special domestic violence criminal jurisdiction for Indian tribes took effect nationally on March 7, 2015,[3] and it was a historic moment for the tribes. Ever since the Supreme Court's 1978 decision in *Oliphant v. Suquamish Indian Tribe*, tribes had been powerless to exercise criminal jurisdiction over non-Indian defendants.[4] Because the Court held that "Indian tribes do not have inherent jurisdiction to try and punish non-Indians,"[5] an unfortunate gap in enforcement resulted: for crimes committed in Indian country, where states' criminal jurisdiction is limited[6] and where

violence," as well as "pilot projects" for tribes that showed readiness to implement such jurisdiction "on an accelerated basis"); *see also* Tom Gede, *Criminal Jurisdiction of Indian Tribes: Should Non-Indians Be Subject to Tribal Criminal Authority Under VAWA?*, ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS, July 2012, at 40, 44 (opining that special domestic violence criminal jurisdiction brings "significant constitutional and prudential questions that will likely have to be tested at the highest levels").

2 *See infra* notes 4–6 and accompanying text.

3 Violence Against Women Reauthorization Act of 2013 § 908(b)(1), 127 Stat. at 125 (declaring that special domestic violence criminal jurisdiction, as described in section 904 of VAWA 2013, will take effect [n]ot later than"2 years after the date of enactment").

4 *See* 435 U.S. 191, 210 (1978) ("By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.").

5 *Id.* at 212.

6 *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) (holding that state law "can have no force" within Indian country); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.01[2] (Nell Jessup Newton ed., 2012) (explaining how the *Worcester* holding has endured for state criminal jurisdiction over Indians, even as Indian country has become more integrated with non-Indian lands).

States do, however, retain criminal jurisdiction over *non-Indian* defendants in Indian country. *See* United States v. McBratney, 104 U.S. 621, 624 (1881) (holding that a state could exercise criminal jurisdiction over non-Indians "throughout the whole of the territory within its limits," which extends to any Indian reservations therein); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra*, § 6.01[3] (explaining that, though the *McBratney* decision is "far from clear," its rule "remains valid as precedent"); *id.* § 9.03[1] (noting that *McBratney* is "settled precedent" and is consistently followed in state criminal prosecutions of non-Indians for offenses against non-Indian victims).

Certain states also have statutory criminal jurisdiction over *Indian* defendants under Public Law 280. As originally enacted, Public Law 280 gave Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin criminal jurisdiction within Indian country, though these states may now "retrocede" this grant of jurisdiction back to the federal government. *See* 18 U.S.C. § 1162(a) (2012); Act of Aug. 15, 1953, Pub. L. No. 280, sec. 2, § 1162(a), 67 Stat. 588, 588 (codified as amended at 18 U.S.C. § 1162 (2012)); *see also* 25 U.S.C. § 1323(a) (2012) (authorizing retrocession). The Public Law 280 framework was amended in 1968 to give other states the option to assume Public Law 280 jurisdiction over Indian defendants in Indian country, if these added states obtained tribal consent. *See* Act of Apr. 11, 1968, Pub. L. No. 90-284, § 401(a), 82 Stat. 73, 78

the federal government lacks the resources to prosecute crimes effectively,[7] non-Indian offenders regularly escaped prosecution.[8] This problem was particularly disturbing in the context of domestic violence and related crimes. For example, sixty-seven percent of the sexual abuse and related offenses committed in Indian country and charged in fiscal years 2005–2009 were left unprosecuted by the federal government.[9]

(codified as amended at 25 U.S.C. § 1321(a) (2012)); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra*, § 6.04[3][a] (discussing Public Law 280 and its subsequent history).

Despite *McBratney* and Public Law 280, states by and large cannot or do not prosecute non-Indians for offenses committed against Indian victims—and domestic violence crimes committed by non-Indians on Indian victims make up the majority of domestic violence crimes in Indian country. *See* sources cited *infra* note 8.

7 *See* S. REP. NO. 112-153, at 9 (2012) (noting that federal law enforcement authorities are sometimes "hours away and are often without the tools or resources needed to appropriately respond to domestic violence crimes while also addressing large-scale drug trafficking, organized crime, and terrorism cases"); Ryan D. Dreveskracht, *House Republicans Add Insult to Native Women's Injury*, 3 U. MIAMI RACE & SOC. JUST. L. REV. 1, 15 (2013) (illustrating how federal prosecution of sexual assaults on some remote reservations is impossible, "given the short timeframes for properly using a 'rape kit'"); Shefali Singh, Note, *Closing the Gap of Justice: Providing Protection for Native American Women Through the Special Domestic Violence Criminal Jurisdiction Provision of VAWA*, 28 COLUM. J. GENDER & L. 197, 210 (2014) (reporting how, because of limited resources, the federal government regularly declines to prosecute crimes of violence that occur in Indian country).

8 *See generally* Singh, *supra* note 7, at 209-10 (describing the jurisdictional gap in enforcement). Non-Indian offenders commit most of the domestic violence offenses committed against Indian victims. S. REP. NO. 112-153, at 9 (2012); *see also* AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 4 (2007), http://www.amnestyusa.org/pdfs/MazeOfInjustice.pdf [http://perma.cc/5HYF-GXH8] ("According to the US Department of Justice, in at least 86 per cent of reported cases of rape or sexual assault against American Indian and Alaska Native women, survivors report that the perpetrators are non-Native men."); STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, NCJ 203097, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992-2002, at v (2004), http://bjs.ojp.usdoj.gov/content/pub/pdf/aic02.pdf [http://perma.cc/9NC2-5EPR] ("Approximately 60% of American Indian victims of violence . . . described the offender as white."); Dreveskracht, *supra* note 7, at 14 ("Non-Indians commit over eighty percent of the rapes and sexual assaults against Indian women."); Troy A. Eid, *Making Native America Safer and More Just for All Americans*, 40 A.B.A. HUM. RTS., no. 4, 2014, at 7, 9 ("[N]on-Native men commit a disproportionate number of domestic violence acts against Native women.").

Due to insufficient law enforcement funding, infrequent prosecution of non-Indian defendants remained the norm even in states that had criminal jurisdiction over Indian country under Public Law 280. *See* AMNESTY INT'L, *supra*, at 29, (noting that in Public Law 280 states, "tribal and state authorities have not received sufficient funds to assume their respective law enforcement responsibilities"); Singh, *supra* note 7, at 209-10 ("Lack of funding and numerous other factors have contributed to the reality that state and local law enforcement agencies in Indian country acting under P.L. 280 criminal jurisdiction have generally provided unsatisfactory service and ineffective crime control.").

9 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-167R, U.S. DEPARTMENT OF JUSTICE DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS 9 (2010), http://www.gao.gov/new.items/d11167r.pdf [http://perma.cc/JB9N-XXMN].

Enter VAWA 2013 and special domestic violence criminal jurisdiction for Indian tribes. Recognizing that "much of the violence against Indian women is perpetrated by non-Indian men" who "regularly go unpunished," Congress intended special domestic violence criminal jurisdiction to fill the prosecutorial enforcement gap for domestic violence offenses.[10] Codified at 13 U.S.C. § 1304, the new provisions recognize tribes' "inherent power . . . to exercise special domestic violence criminal jurisdiction over all persons"[11]—including non-Indians.

Although tribes and their advocates have celebrated VAWA 2013's partial override of the *Oliphant* decision,[12] special domestic violence criminal jurisdiction has yet to withstand constitutional scrutiny at the Supreme Court. In the debates before VAWA 2013's passage, tribal jurisdiction over non-Indians sparked controversy because legislators and commentators understood that non-Indian defendants prosecuted and tried in tribal court would not receive the full protection of the federal Constitution.[13] This

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10 S. REP. NO. 112-153, at 9. The legislation came after years of advocacy from tribes, domestic violence survivors, and their allies. Tribal voices used- many means, including the arts, to call attention to the pervasive problems in Indian country. For instance, a play titled *Sliver of a Full Moon* narrates the stories of Indian domestic violence survivors and their fight to obtain the VAWA 2013 provisions that created special domestic violence criminal jurisdiction. *See* SLIVER OF A FULL MOON, http://www.sliverofafullmoon.org, [http://perma.cc/C7ZX-WDG6] (last visited Sept. 19, 2015).

11 25 U.S.C. § 1304(b)(1) (Supp. 2013).

12 *See, e.g.*, Lorelai Laird, *Indian Tribes Are Retaking Jurisdiction over Domestic Violence on Their Own Land*, ABA J. (Apr. 1, 2015, 6:02 AM), http://www.abajournal.com/magazine/ article/ indian_tribes_are_retaking_jurisdiction_over_domestic_violence_on_their_own [perma.cc/DS5N-LTKJ] ("[M]any Indian legal observers see Section 904 [the special domestic violence criminal jurisdiction provisions] as a major step toward safer reservations and, perhaps, full tribal criminal jurisdiction.").

13 *See* S. REP. NO. 112-153, at 48-49 (Minority Views from Sens. Kyl, Hatch, Sessions, and Coburn) (arguing against tribal jurisdiction over non-Indians because non-Indians "would enjoy few meaningful civil-rights protections" and "the absence of separation of powers and an independent judiciary in most tribal governments makes them an unsuitable vehicle for ensuring the protection of civil rights"); Paul J. Larkin, Jr. & Joseph Lupino-Esposito, *The Violence Against Women Act, Federal Criminal Jurisdiction, and Indian Tribal Courts*, 27 BYU J. PUB. L. 1, 8-9, 17-39 (2012) (arguing that tribal jurisdiction over non-Indian defendants would raise questions under Articles II and III of the federal Constitution); Jennifer Bendery, *Chuck Grassley on VAWA: Tribal Provision Means 'The Non-Indian Doesn't Get a Fair Trial,'* HUFFINGTON POST (Feb. 21, 2013, 5:33 PM), http://www.huffingtonpost.com/2013/02/21/chuck-grassley-vawa_n_2735080.html [http://perma.cc/5GWS-F3Y3] (commenting on remarks made by Senator Chuck Grassley, who expressed concern that allowing tribal court juries to try non-Indians may violate non-Indians' federal constitutional rights to a jury trial and to the equal protection of the law); *see also* Laird, *supra* note 12 (reporting on the controversy surrounding special domestic violence criminal jurisdiction and VAWA 2013's passage). *But see* Letter from Kevin Washburn, Dean and Professor of Law, University of New Mexico School of Law, et al. to Sen. Patrick Leahy et al., Constitutionality of Tribal Government Provisions in VAWA Reauthorization (Apr. 21, 2012), http://lawprofessors.typepad.com/files/vawa-

constitutional question—whether the Constitution applies in full force in prosecutions brought under special domestic violence criminal jurisdiction—turns on whether the expanded tribal jurisdiction is an exercise of "inherent" tribal sovereignty or delegated federal authority. If the new jurisdiction is an exercise of inherent tribal sovereignty, then tribes are not obligated to provide non-Indian defendants with the full protection of the federal Constitution. But if the new jurisdiction is delegated federal authority, then non-Indian defendants would be entitled to the full panoply of rights under the federal Constitution—including, potentially, the right to an Article III judge appointed by the President and confirmed by the Senate under Article II of the Constitution. The bounds of inherent tribal sovereignty could thus determine whether special domestic violence criminal jurisdiction lives or dies.[14]

This Comment begins in Part I by outlining the history of tribal criminal jurisdiction in Indian country, with a focus on the law most relevant to analyzing the bounds of tribes' inherent sovereignty to adjudicate crimes over non-Indians. Part II explains VAWA 2013's special domestic violence criminal jurisdiction in more detail and summarizes how it has been implemented since the statute's enactment. Part III discusses the arguments for and against finding that tribes have inherent tribal sovereignty to exercise special domestic violence criminal jurisdiction, and why the outcome matters for both tribes and non-Indian defendants. Part

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letter-from-law-professors-tribal-provisions.pdf [http://perma.cc/9ZTS-2W5P] (arguing for special domestic violence criminal jurisdiction's passage and defending its constitutionality).

Special domestic violence criminal jurisdiction in Alaska was particularly contentious—so much so that VAWA 2013 included a statutory exemption for the state of Alaska. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, § 910, 127 Stat. 54, 126 (Mar. 7, 2013) (codified at 18 U.S.C. § 2265 note (Supp. 2013)) ("In the State of Alaska, the amendments made by sections 904 and 905 shall only apply to the Indian country . . . of the Metlakatla Indian Community, Annette Island Reserve."). Tremendous disfavor toward the "Alaska exemption" prompted its repeal in December 2014. *See* Act of Dec. 18, 2014, Pub. L. 113-275, 128 Stat. 2988, 2988 (repealing section 910 of VAWA 2013); Troy A. Eid & Affie Ellis, *Indian Law and Order Commission Proposals Gain Ground*, FED. LAW., June 2015, at 17, 17-18 (discussing the reforms that made federal officials more accountable to Alaska Indian communities); Sari Horwitz, *Senator Tries to Repeal Divisive Provision She Inserted in Violence Against Women Act*, WASH. POST (Aug. 2, 2014), https://www.washingtonpost.com/world/national-security/senator-tries-to-repeal-divisive-provision-she-inserted-in-violence-against-women-act/2014/08/02/c918f854-05ef-11e4-8a6a-19355c7e870a_story.html [http://perma.cc/3S79-KT7P] (reporting on the desperate need for greater tribal law enforcement in Alaska, which spurred the repeal of the Alaska exemption).

14 See *infra* Section III.A for a more detailed discussion of this analysis. Part IV takes up a similar but related issue—the bounds of congressional power to legislate inherent tribal sovereignty that denies non-Indian defendants federal constitutional rights. Both analytical routes could support or dismantle special domestic violence criminal jurisdiction as envisioned by Congress. *See infra* Part V.

IV takes an aside to note the lurking influence of the congressional plenary power doctrine, which gives Congress broad authority to legislate in the realm of Indian affairs. And Part V outlines how courts' ultimate rulings (and their underlying reasoning) would affect special domestic violence criminal jurisdiction's future. The Conclusion addresses the underlying questions: What are the bounds of tribes' inherent sovereignty? From what does that sovereignty derive? The answer will affect not just special domestic violence criminal jurisdiction under VAWA 2013, but also possible future expansions of tribal criminal jurisdiction by Congress.

I. TRIBAL CRIMINAL JURISDICTION IN INDIAN COUNTRY

A. *Historical Origins*

When analyzing the bounds of inherent tribal sovereignty, the Supreme Court often begins by looking to the earliest records of tribal–federal relations.[15] The earliest federal treaties with Indian tribes do address whether tribes could prosecute and punish non-Indian criminal offenders—but without clearly answering whether, absent a treaty, a tribe's inherent sovereign authority would have included these powers.

The first ratified treaty between the United States and an Indian tribe was the 1778 Treaty with the Delawares.[16] The treaty forbade both the United States and the tribe from inflicting "punishments on the citizens of the other" until "a fair and impartial trial" was held before judges or juries of both the United States and the tribe.[17] Under the treaty, therefore, the Delawares lacked the independent jurisdiction to prosecute and punish non-Indians who were citizens of the United States.

Later treaties went further and declined to give tribes any power to prosecute or punish United States citizens who "commit[ted] a robbery or

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15 *See, e.g.*, Duro v. Reina, 495 U.S. 676, 688-92 (1990) (examining historical sources and how they bear on whether tribes may prosecute nonmember Indian defendants), *superseded by statute*, Act of Nov. 5, 1990, Pub. L. No. 101-511, sec. 8077(b)–(c), § 201(2), 104 Stat. 1856, 1892-93 (codified at 25 U.S.C. § 1301(2), (4) (2012)), *as recognized in* United States v. Lara, 541 U.S. 193 (2004); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 192-93, 195-206 (1978) (same, for non-Indian defendants).

16 Treaty with the Delawares, U.S.–Del., Sept. 17, 1778, 7 Stat. 13; *see* Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 118 (2002) (identifying the Treaty with the Delawares as "the nation's first ratified treaty with an Indian tribe").

17 Treaty with the Delawares, *supra* note 16, art. IV, 7 Stat. at 14.

murder, or other capital crime, on any Indian."[18] Instead, the treaties allowed punishment and prosecution of non-Indians under only federal law and using only federal procedure, to the exclusion of any tribal justice system.[19] And these later treaties did not even permit the tribes to prosecute and punish *Indian* offenders who committed crimes against United States citizens; rather, the treaties obliged the tribes to extradite Indian offenders to the United States for punishment by a federal tribunal.[20]

But these treaty provisions do not necessarily stand for the notion that, historically, tribes' inherent sovereignty did not include the power to prosecute and punish non-Indians. One could interpret the treaties as either (1) *codifying* then-current understanding of inherent tribal sovereignty, or (2) *restricting* aspects of the then-current understanding of the tribe's inherent sovereignty.[21] In *Oliphant v. Suquamish Indian Tribe*, the Supreme Court took the first view: "From the earliest treaties with these tribes, it was apparently assumed that the tribes did not have criminal jurisdiction

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18 Treaty with the Chickasaws, U.S.–Chickasaw Nation, Jan. 10, 1786, art. VI, 7 Stat. 24, 25; Treaty with the Choctaws, U.S.–Choctaw Nation, Jan. 3, 1786, art. VI, 7 Stat. 21, 22; Treaty with the Cherokees, U.S.–Cherokees, Nov. 28, 1785, art. VII, 7 Stat. 18, 19.

19 *See, e.g.*, Treaty with the Creeks, U.S.–Creek Nation, Aug. 7, 1790, art. IX, 7 Stat. 35, 37; Treaty with the Indian Nations in the Northern Department and with the Wiandot, Delaware, Ottawa, Chippewa, Pattawatima and Sac Nations, Jan. 9, 1789, art. V, 7 Stat. 28, 29 [hereinafter Treaty with the Indian Nations]; *id.* at "Separate Article," 7 Stat. 32; Treaty with the Shawnees, U.S.–Shawanoe Nation, Jan. 31, 1786, art. III, 7 Stat. 26, 26; Treaty with the Chickasaws, *supra* note 18, art. VI, 7 Stat. at 25; Treaty with the Choctaws, *supra* note 18, art. VI, 7 Stat. at 22; Treaty with the Cherokees, *supra* note 18, art. VII, 7 Stat. at 19. One treaty also contemplated exclusive federal *civil* jurisdiction over Indians pressing claims against United States citizens for stolen horses. Treaty with the Indian Nations, *supra*, art. VI, 7 Stat. at 29-30; *id.* at "Separate Article," 7 Stat. at 32.

20 Treaty with the Creeks, *supra* note 19, art. VIII, 7 Stat. at 37; Treaty with the Indian Nations, *supra* note 19, art. V, 7 Stat. at 29; *id.* at "Separate Article," 7 Stat. at 32; Treaty with the Shawnees, *supra* note 19, art. III, 7 Stat. at 26; Treaty with the Chickasaws, *supra* note 18, art. V, 7 Stat. at 25; Treaty with the Choctaws, *supra* note 18, art. V, 7 Stat. at 22; Treaty with the Cherokees, *supra* note 18, art. VI, 7 Stat. at 19; Treaty with the Wiandot, Delaware, Chippawa, and Ottawa Nations, Jan. 21, 1785, art. IX, 7 Stat. 16, 17.

21 In the public international law context, commentators have disagreed over whether a treaty (1) can merely codify preexisting rules governing relations between different sovereigns or (2) must inevitably change those rules even as it attempts only to write them down. *Compare* GIDEON BOAS, PUBLIC INTERNATIONAL LAW: CONTEMPORARY PRINCIPLES AND PERSPECTIVES 72 (2012) ("Besides crystallizing a custom and influencing subsequent crystallization, a treaty may 'codify' pre-existing custom, giving it a definite wording."), *with* R.Y. Jennings, *The Progressive Development of International Law and its Codification*, 24 BRITISH Y.B. INT'L L. 301, 304-05 (1947) (noting that "so-called *declaratory* treaties," which purport to codify existing customary international law, are in tension with the axiom that a treaty binds only those states that are parties to it, because third-party states are bound by customary international law even if this law is given written expression in a treaty to which these states are not party). However, situating the interpretation of federal–tribal treaties within this debate exceeds the scope of this Comment.

over non-Indians absent a congressional statute or treaty provision to that effect."[22] The second view, however, is equally plausible. Professor Robert Clinton has criticized the *Oliphant* view for being "revisionist"[23]—a charge that gains support from some other early treaty provisions, which dealt with non-Indian settlers on tribal lands.

Seven of the eight earliest recorded treaties included language disclaiming federal protection over non-Indian settlers on tribal lands.[24] Six of those seven treaties further declared that the tribes could punish those non-Indian violators as they wished.[25] In contrast to the treaty provisions about common law crimes, these land-related provisions *did* contemplate tribal jurisdiction to punish non-Indians. Although *Oliphant* dismisses these provisions as simply "a means of discouraging non-Indian settlements on Indian territory,"[26] they could equally be viewed as recognizing tribes' inherent sovereign authority to punish all unwelcome trespassers on their lands.[27] As Professor Clinton has commented, *Oliphant* appears to swat away the land-related treaty provisions to achieve the result the Court wanted: a historical narrative that denied inherent tribal authority to prosecute and punish non-Indians.[28]

All in all, the early treaties are inconclusive data. Advocates and judges can use them both to support and to deny the notion that early conceptions of inherent tribal sovereignty included tribal authority to prosecute and punish non-Indians. Someone looking to early treaties to reveal the bounds of "ancient inherent tribal power"[29] will be disappointed.

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22 435 U.S. 191, 197 (1978); *see also id.* at 197-99 n.8 (concluding that the early treaties and their provisions "were not necessary to remove criminal jurisdiction over non-Indians from the Indian tribes," but rather "clarif[ied] jurisdictional limits of the Indian tribes").

23 Clinton, *supra* note 16, at 215.

24 Treaty with the Creeks, *supra* note 19, art. VI, 7 Stat. at 36; Treaty with the Indian Nations, *supra* note 19, art. V, 7 Stat. at 30; Treaty with the Shawnees, *supra* note 19, art. VII, 7 Stat. at 27; Treaty with the Chickasaws, *supra* note 18, art. IV, 7 Stat. at 25; Treaty with the Choctaws, *supra* note 18, art. IV, 7 Stat. at 22; Treaty with the Cherokees, *supra* note 18, art. V, 7 Stat. at 19; Treaty with the Wiandot, Delaware, Chippawa, and Ottawa Nations, *supra* note 20, art. V, 7 Stat. at 17.

25 Treaty with the Creeks, *supra* note 19, art. VI, 7 Stat. at 6; Treaty with the Indian Nations, *supra* note 19, art. IX, 7 Stat. at 30; Treaty with the Chickasaws, *supra* note 18, art. IV, 7 Stat. at 25; Treaty with the Choctaws, *supra* note 18, art. IV, 7 Stat. at 22; Treaty with the Cherokees, *supra* note 18, art. V, 7 Stat. at 19; Treaty with the Wiandot, Delaware, Chippawa, and Ottawa Nations, *supra* note 20, art. V, 7 Stat. at 17.

26 *Oliphant*, 435 U.S. at 198 n.8.

27 *See* Clinton, *supra* note 16, at 122 (emphasizing how the early treaties recognized the "complete territorial sovereignty of Indian tribes" over tribal lands).

28 *See id.* at 214 ("[T]o solidify its historical point, the Court was forced to marginalize early treaties that expressly provided that Indian tribes could punish illegal white settlers.").

29 United States v. Lara, 541 U.S. 193, 211 (2004) (Stevens, J., concurring).

B. Oliphant: *No Jurisdiction over Non-Indians*

In 1978, the Supreme Court decisively answered the question of whether tribes have criminal jurisdiction over non-Indian defendants. And the answer was "no."

The Supreme Court case *Oliphant v. Suquamish Indian Tribe* grew out of the Suquamish tribe's prosecutions of two non-Indian residents of the Port Madison Reservation.[30] One was charged with assaulting a tribal officer and resisting arrest; the other, with "recklessly endangering another person" and injuring tribal property after an alleged high-speed race on reservation highways.[31] The two defendants sought habeas relief and argued that the tribe lacked criminal jurisdiction over non-Indians such as themselves.[32] Although the lower courts rejected their arguments, the Supreme Court ruled for the non-Indian defendants and held that the tribe did indeed lack criminal jurisdiction over non-Indians.[33]

The Court's opinion began by looking to historical precedents, which it concluded did not support tribal criminal jurisdiction over non-Indians.[34] It next gave "considerable weight" to "the commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians."[35] But the core of the Court's reasoning flowed from its view of tribes' powers as "constrained" by "incorporation into the territory of the United States . . . so as not to conflict with the . . . overriding sovereignty" of the federal government.[36] The tribes' subordinate status meant not only limitations on land transfers and foreign relations powers, but also limitations on "their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."[37] Despite recognizing tribal courts' increased sophistication, the procedural rights guaranteed by the Indian Civil Rights Act of 1968 (ICRA), and the prevalence of non-Indian crime on reservations, the Court maintained that the tribes lacked inherent jurisdiction to try and punish

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30 435 U.S. at 194. Although under an 1855 treaty the Suquamish were Port Madison Reservation's designated occupants, by the 1970s only thirty-seven percent of the reservation was Indian-owned and only fifty tribe members lived on the reservation. *Id.* at 192-93 & 192 n.1.

31 *Id.* at 194.

32 *Id.*

33 *Id.* at 194-95.

34 *Id.* at 195-206; *see also supra* Section I.A (discussing the Court's one-sided interpretation of early treaties).

35 *Oliphant*, 435 U.S. at 206.

36 *Id.* at 209.

37 *Id.* at 209-10.

non-Indians.[38] The countervailing considerations were waved aside: they were matters for Congress, not the Court, to weigh.[39]

C. Duro*, the* Duro *Fix, and* Lara*: Jurisdiction over Nonmember Indians*

Until VAWA 2013's special domestic violence criminal jurisdiction, *Oliphant* was the rule for tribal criminal jurisdiction over non-Indians. But on the issue of tribal criminal jurisdiction over *nonmember Indians*, the last three decades saw a significant dialogue between Congress and the Court—a dialogue that may preface the coming debate over the extent to which *Oliphant* endures, post–VAWA 2013.

In May 1990, the Supreme Court held in *Duro v. Reina* that tribes lacked criminal jurisdiction over Indians who were not members of the respective prosecuting tribes.[40] Because the historical argument for denying jurisdiction was weaker here than in *Oliphant*,[41] the Court rested its conclusion in large part on the principle that a tribe's authority should derive "from the consent of its members."[42] Given that tribal courts did not provide nonmember defendants with the full guarantees of the federal Constitution, the Court held that a tribe's criminal jurisdiction over its *members* was justified by "the voluntary character of tribal membership," but that the tribes' criminal jurisdiction could not extend to *nonmembers*, who by definition had not given voluntary consent.[43] As the Court had done in *Oliphant*, the *Duro* Court emphasized that Congress—not the Court—should solve insufficient criminal-law enforcement problems on Indian lands.[44]

Congress's response was swift. In November of that same year, Congress passed legislation that overruled *Duro*'s holding and granted tribes criminal jurisdiction to prosecute nonmember Indians.[45] The key statutory change was a new provision that defined "Indian" for purposes of tribal

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38 *Id.* at 211-12.

39 *Id.* at 212.

40 Duro v. Reina, 495 U.S. 676, 679 (1990), *superseded by statute*, Act of Nov. 5, 1990, Pub. L. No. 101-511, sec. 8077(b)–(c), § 201(2), 104 Stat. 1856, 1892-93 (codified at 25 U.S.C. § 1301(2), (4) (2012)), *as recognized in* United States v. Lara, 541 U.S. 193 (2004).

41 *See id.* at 688-91 (noting that "[t]he historical record in this case is somewhat less illuminating than in *Oliphant*" and that "[e]vidence on criminal jurisdiction over nonmembers is less clear," but nonetheless concluding that the evidence "on balance supports the view that inherent tribal jurisdiction extends to tribe members only").

42 *Id.* at 693.

43 *Id.* at 693-94.

44 *Id.* at 698.

45 *See* Act of Nov. 5, 1990, Pub. L. No. 101-511, sec. 8077(b)–(c), § 201(2), 104 Stat. 1856, 1892-93 (codified at 25 U.S.C. § 1301(2), (4) (2012)).

criminal jurisdiction as "any person" who would be subject to federal criminal jurisdiction under the Major Crimes Act, 18 U.S.C. § 1153.[46] Under *United States v. Rogers*, this definition of "Indian" includes persons with (1) some Indian blood, who are (2) associated with a federally recognized tribe—but it contains no restriction on the specific tribe with which an Indian is associated.[47] The new statute therefore extended tribal criminal jurisdiction to all "Indians"—including nonmember Indians.

Congress also clearly stated that tribal criminal jurisdiction over nonmember Indians flowed from "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."[48] This inherent-power provision communicated Congress's direct disagreement with the Supreme Court's view that inherent tribal authority did not include the power to punish nonmembers in tribal court.[49]

When Congress's "*Duro* fix"[50] came to the Supreme Court for review in 2004, the Court upheld it in the face of a double jeopardy challenge brought by a nonmember Indian.[51] In *United States v. Lara*, the Court declared that "Congress has the constitutional power to relax restrictions that the political branches have, over time, placed on the exercise of a tribe's inherent legal authority."[52]

The Court did not just affirm Congress's ability to enact the *Duro* fix; it also overruled *Duro* by endorsing the notion that tribal criminal jurisdiction over nonmember Indians flowed from tribes' inherent sovereignty.[53] The Court's inherent-sovereignty justification was key to defeating the defendant's double jeopardy claim: his claim depended on his initial tribal prosecution being an exercise of delegated *federal* authority, so that his subsequent

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46 *Id.* sec. 8077(c), § 201(4), 104 Stat. at 1892-93 (codified at 25 U.S.C. § 1302(4) (2012)).

47 United States v. Rogers, 45 U.S. (4 How.) 567, 572-73 (1846) (holding that, for federal criminal jurisdiction under the Major Crimes Act, a man without Indian blood who was adopted into a tribe "is not an Indian" and thus could not receive the exception from federal criminal jurisdiction for Indian-on-Indian crimes); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 6, § 3.03[4] ("The common test that has evolved after *United States v. Rogers*, for use with both of the federal Indian country criminal statutes, considers Indian descent, as well as recognition as an Indian by a federally recognized tribe.").

48 Act of Nov. 5, 1990, sec. 8077(b), § 201(2), 104 Stat. at 1892 (codified at 25 U.S.C. § 1301(2) (2012)).

49 *Cf. Duro*, 495 U.S. at 694 ("[N]o delegation of authority to a tribe has to date included the power to punish nonmembers in tribal court. We decline to produce such a result through recognition of inherent tribal authority.").

50 *See* United States v. Lara, 541 U.S. 193, 216 (2004) (Thomas, J., concurring in the judgment) (using the term).

51 *Id.* at 196-99 (majority opinion). *See gemerally* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .").

52 *Id.* at 196.

53 *Id.* at 199.

federal prosecution would be an impermissible second prosecution brought under federal auspices.[54] But because the tribal prosecution was an exercise of inherent tribal authority rather than of federal power, and because the Constitution's Double Jeopardy Clause "does not bar successive prosecutions by *separate sovereigns*," the Court rejected the defendant's double jeopardy claim.[55]

The *Duro–Duro* fix–*Lara* dialogue between Congress and the Court was about tribal criminal jurisdiction over nonmember Indians. For tribal criminal jurisdiction over *non-Indians*, we have the two first steps of an analogous dialogue: *Oliphant*,[56] followed by VAWA 2013's special domestic violence criminal jurisdiction.[57] What is left—and what tribal observers are waiting for[58]—is the final step. Will the Supreme Court mimic its approach in *Lara* if special domestic violence criminal jurisdiction comes before the Court for review?

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54 *Id.* at 196-99.

55 *Id.* at 197, 210. The Court also rejected the defendant's due process claim on similar grounds. *Id.* at 207-09.

56 *See generally supra* Section I.B.

57 *See generally supra* notes 3–14 and accompanying text. Part II, *infra*, discusses in more detail how VAWA 2013 partially overrides *Oliphant*.

58 *See* Laird, *supra* note 12 (noting how tribes are "very aware" of a possible legal challenge and have even encouraged defendants to appeal in hope that a tribe-friendly vehicle will reach the Court for review).

Table 1: Tribal Criminal Jurisdiction

	Over Nonmember Indians	**Over Non-Indians**
Initial Supreme Court Ruling	Tribes lack jurisdiction, because they lack nonmember Indians' voluntary consent. –*Duro*, 1990[59]	Tribes lack jurisdiction, because the federal government's overriding sovereignty constrains them. –*Oliphant*, 1978[60]
Congressional Reply	Tribes have jurisdiction because of their inherent power. –*Duro* fix, 1990[61]	Tribes have jurisdiction because of their inherent power. –*VAWA* 2013[62]
Supreme Court Response: Ruling on the Constitutionality of the Congressional Reply	Tribes' jurisdiction is constitutional because of tribes' inherent sovereignty. –*Lara*, 2003[63]	*To be determined*

II. SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION UNDER VAWA 2013

A. *Narrowly Expanded Tribal Criminal Jurisdiction over Non-Indian Defendants*

Before examining how and why the Supreme Court might rule,[64] it is worth examining the nuanced choices Congress made when enacting special domestic violence criminal jurisdiction. While the *Duro* fix was a general override of the Supreme Court's holding in *Duro*, special domestic violence criminal jurisdiction overrides *Oliphant* only partially: It applies only to

59 *See generally supra* notes 40–44 and accompanying text.
60 *See generally supra* Section I.B.
61 *See generally supra* notes 45–49 and accompanying text.
62 *See generally supra* note 11 and accompanying text.
63 *See generally supra* notes 50–55 and accompanying text.
64 *See infra* Parts III–IV.

certain acts involving certain people committed on certain territory. And it also applies only when accompanied by appropriate safeguards to protect defendants' rights.

VAWA 2013 defines special domestic violence criminal jurisdiction as "criminal jurisdiction that a participating tribe may exercise under [VAWA 2013] but could not otherwise exercise."[65] A participating tribe is "an Indian tribe that elects to exercise special domestic violence criminal jurisdiction over the Indian country of that tribe."[66] Under the statute, "Indian country" has the same definition as the one used for the Major Crimes Act in 18 U.S.C. § 1153, and it covers reservation land, dependent Indian communities, and Indian allotments.[67] Thus, special domestic violence criminal jurisdiction is territorially limited.

The statute also limits special domestic violence criminal jurisdiction based on defendants' and victims' personal attributes. Either the defendant or the victim must be Indian;[68] special domestic violence criminal jurisdiction is not allowed if neither is Indian.[69] A victim may be Indian or non-Indian, so long as he or she is "specifically protected by a protection order that the defendant allegedly violated."[70] As for the defendant, he or she must have ties to the prosecuting Indian tribe: the defendant must (1) reside in the tribe's Indian country, (2) be employed in the tribe's Indian country, or (3) be the spouse, intimate partner, or dating partner of a member of the tribe or an Indian who resides in the tribe's Indian country.[71]

Special domestic violence criminal jurisdiction also has subject-matter limitations. A tribe may prosecute only acts of dating violence, acts of domestic violence, and violations of protective orders.[72] The new jurisdiction does not, therefore, cover stranger rape or other assaults where the victim has no prior "social relationship of a romantic or intimate nature"[73] with the defendant.[74]

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65 25 U.S.C. § 1304(a)(6) (Supp. 2013).

66 *Id.* § 1304(a)(4).

67 *See id.* § 1304(a)(3) (giving "Indian country" the meaning given in 18 U.S.C. § 1151); *see also* 18 U.S.C. § 1151 (2012) (listing the three "Indian country" categories). *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 6, § 3.04[2][c] (providing more context and background about the three categories).

68 "Indian" is not defined in the statute. *See* 25 U.S.C. § 1304(a). Courts will likely apply the definition of Indian developed in *United States v. Rogers* and its progeny. *See supra* note 47 and accompanying text.

69 25 U.S.C. § 1304(b)(4)(A)(i) (Supp. 2013).

70 *Id.* § 1304(b)(4)(A)(ii).

71 *Id.* § 1304(b)(4)(B).

72 *Id.* § 1304(c) (Supp. 2013).

73 *Id.* § 1304(a)(1).

Last but not least, Congress expressly required prosecuting tribes to provide defendants with particular individual rights:

- for defendants at risk of imprisonment, all the rights of defendants guaranteed in the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302(c), which include
    - "the effective assistance of counsel at least equal to that guaranteed by the United States Constitution,"
    - "a defense attorney licensed to practice law,"
    - a judge who is licensed to practice law and "has sufficient legal training to preside over criminal prosecutions,"
    - publicly available criminal laws, rules of evidence, and rules of criminal procedure, and
    - a record of the criminal proceeding;[75]
- an impartial jury that "reflect[s] a fair cross section of the community" and does not discriminate against non-Indians;
- "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant"; and
- the right to seek habeas relief in federal court.[76]

Apart from the VAWA 2013 statute, defendants must also receive other constitutional rights guaranteed by ICRA:

- the right "against unreasonable searches and seizures," so that probable cause is required before a search or seizure,
- the right against double jeopardy,
- the right against self-incrimination,
- the right to a speedy and public trial,

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74 As defined in the statute, "dating violence" requires at least a "social relationship of a romantic or intimate nature" to qualify as subject matter that tribes may prosecute. *Id.* "Domestic violence" requires even more from the prior relationship: domestic violence is defined under the statute as "violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim." *Id.* § 1304(a)(2). Violations of protective orders require the victim to have had a prior relationship with the defendant that was sufficient to obtain the requisite "injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, [the victim]." *Id.* § 1304(a)(5).

75 *Id.* § 1302(c) (2012).

76 *Id.* § 1304(d), (e) (Supp. 2013).

- the right to be "confronted with the witnesses against him" and to subpoena friendly witnesses,
- the right against excessive bail, excessive fines, and "cruel and unusual punishments,"
- the right against bills of attainder or ex post facto laws, and
- the right to a trial by a jury of at least six persons.[77]

Congress passed VAWA 2013's special domestic violence criminal jurisdiction with all these territorial, personal, subject-matter, and rights-based limitations. And, as with tribal jurisdiction over nonmember Indians in the *Duro* fix, Congress intended special domestic violence criminal jurisdiction to flow from inherent tribal sovereignty: "The powers of self-government of a participating tribe include *the inherent power of that tribe, which is hereby recognized and affirmed*, to exercise special domestic violence criminal jurisdiction over all persons."[78]

Given Congress's view that tribes act as independent sovereigns when exercising special domestic violence criminal jurisdiction, the statute also allows for concurrent state and federal jurisdiction to prosecute these crimes in Indian country.[79] The statute thus contemplates that states exercising criminal jurisdiction in Indian country under Public Law 280[80] may still do so.[81] And if the federal government prosecutes a defendant for the same

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77 *Id.* § 1302(a). A defendant may invoke the rights listed in § 1302(a) against any "Indian tribe exercising powers of self-government." *Id.* "Powers of self-government" are defined to include "the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all *Indians*." *Id.* § 1301(2) (2012) (emphasis added). VAWA 2013 added that, "in addition to all powers of self-government recognized and affirmed by section[] 1301 . . . , the powers of self-government of a participating tribe include the inherent power of that tribe . . . to exercise special domestic violence criminal jurisdiction over *all persons*." *Id.* § 1304(b)(1) (Supp. 2013) (emphasis added); *see also* H.R. REP. NO. 112-480, at 58 (2012) (noting that ICRA would apply in prosecutions brought under special domestic violence criminal jurisdiction).

78 25 U.S.C. § 1304(b)(1) (emphasis added).

79 *Id.* § 1304(b)(2).

80 See *supra* note 6 for a discussion of Public Law 280 and how it confers criminal jurisdiction in Indian country to select states.

81 Even if special domestic violence criminal jurisdiction is found to be a tribal exercise of delegated federal authority, a state prosecution brought before or after a tribal prosecution for the same crime would not present a double jeopardy problem. Federal and state authorities may bring separate prosecutions for the same conduct, because the federal and state governments are separate sovereigns. *See* Abbate v. United States, 359 U.S. 187, 193-95 (1959) (declining to overrule the separate-sovereigns principle); Bartkus v. Illinois, 359 U.S. 121, 122-23 (1959) (rejecting the defendant's double jeopardy claim when "[t]he state and federal prosecutions were separately conducted"); Orin Kerr, *Cert Petition Asks Court to Overturn "Dual Sovereignty" Doctrine in Double Jeopardy Law*, VOLOKH CONSPIRACY (June 13, 2013, 3:29 AM), http://volokh.com/2013/06/13/cert-petition-asks-court-to-overturn-dual-sovereignty-doctrine-in-double-jeopardy-law [http://perma.cc/DAJ5-26PQ] ("Despite its text, the Double Jeopardy clause has been interpreted by the Supreme

crime before or after a tribal prosecution under VAWA 2013's special domestic violence criminal jurisdiction, the statute implies that a double jeopardy challenge to either prosecution would not succeed—the "separate sovereigns" doctrine would allow both prosecutions to go on.[82]

B. *Pilot Projects*

Although special domestic violence criminal jurisdiction took effect nationwide on March 7, 2015, VAWA 2013 authorized "pilot projects" whereby select tribes could commence exercising the jurisdiction on an accelerated basis before the nationwide start date, so long as the pilot project tribes had demonstrated to the Attorney General and Secretary of the Interior that they had "adequate safeguards in place to protect defendants' rights."[83] Five tribal pilot project applications were approved prior to March 7, 2015: those of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation in Montana, of the Confederated Tribes of the Umatilla Indian Reservation in Oregon, of the Pascua Yaqui Tribe of Arizona, of the Sisseton Wahpeton Oyate of the Lake Traverse Reservation in South Dakota, and of the Tulalip Tribes of Washington.[84]

The Pascua Yaqui Tribe was among the first to bring prosecutions. By April 2014, the Pascua Yaqui had already arrested and charged three defendants.[85] By June 2014, the number had increased to twelve.[86] And by

Court to allow both the federal government and a state government to bring charges for the same conduct because they are separate sovereigns."). A recent petition for certiorari asked the Court to revisit the dual-sovereignty doctrine, but the Court declined to do so. *See* Roach v. Missouri, 134 S. Ct. 118 (2013) (denying the petition for certiorari); Petition for a Writ of Certiorari at i, *Roach*, 134 S. Ct. 118 (No. 12-1394) ("The question presented is whether the Double Jeopardy Clause bars a state prosecution for a criminal offense when the defendant has previously been convicted of the same offense in federal court.").

82 *See supra* note 55 and accompanying text.

83 Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 908(2), 127 Stat. 54, 125-26 (Mar. 7, 2013) (codified at 25 U.S.C. § 1304 note on effective dates and pilot project (Supp. 2013)).

84 *VAWA 2013 Pilot Project*, U.S. DEP'T JUST., http://www.justice.gov/tribal/vawa-2013-pilot-project [http://perma.cc/XF5B-HSJ2] (last updated Mar. 13, 2015).

85 *See* Sari Horwitz, *Arizona Tribe Set to Prosecute First Non-Indian Under a New Law*, WASH. POST (Apr. 18, 2014), http://www.washingtonpost.com/national/arizona-tribe-set-to-prosecute-first-non-indian-under-a-new-law/2014/04/18/127a202a-bf20-11e3-bcec-b71ee10e9bc3_story.html[http://perma.cc/6FTS-STTW] (noting the then-pending cases against defendants Eloy Figueroa Lopez, Tony R. Slaton, and Myxay Yongbanthom); Steve Straeley, *First Trial of a Non-Native American in a Tribal Court*, ALLGOV (Apr. 21, 2014), http://www.allgov.com/news/ controversies/first-trial-of-a-non-native-american-in-a-tribal-court-140421?news=852965 [http://perma.cc/EA48-7ZP2] (discussing Lopez's case).

86 *See* Jacelle Ramon-Sauberan, *VAWA Already Improving Life for the Pascqua Yaqui Tribe*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (June 9, 2014), http://indiancountrytoday

March 2015, it was at least sixteen.[87] The tribe's first VAWA trial took place in November 2014 and dealt with an atypical same-sex partnership case.[88] In that closely watched trial, the defendant was acquitted because the jury failed to find the intimate relationship required for special domestic violence criminal jurisdiction (the defendant argued that he was a roommate, not a romantic partner).[89]

Other pilot project tribes had to change their laws and court procedures before receiving pilot project approval,[90] but they too began exercising special domestic violence criminal jurisdiction prior to March 7, 2015: of the twenty-three defendants prosecuted under special domestic violence criminal jurisdiction by March 2015, sixteen had been prosecuted by the Pascua Yaqui, five by the Tulalip Tribes, and two by the Confederated Tribes of the Umatilla Indian Reservation.[91] Although many of the cases are pending as of this writing, nine had already ended in plea deals.[92]

The implementing tribes were aware that special domestic violence criminal jurisdiction could face legal challenge, and they aimed "to implement the law well, so that when some case comes along, it's a good vehicle."[93] The Umatilla Tribes even offered to waive tribal exhaustion

medianetwork.com/2014/06/09/vawa-already-improving-life-pascuayaqui-tribe-155209?page=0%2C1 [http://perma.cc/8MP3-2N2K] ("The tribe currently has 12 VAWA investigations that have lead to arrests of non-Native Americans . . . .").

87 *See* Laird, *supra* note 12 ("As of March, the three tribes [approved for pilot projects] had prosecuted 23 defendants on a total of 38 criminal counts: 16 defendants by Pascua Yaqui, five by Tulalip and two by Umatilla."); Laurel Morales, *Native Americans Can Prosecute Non-Natives in Tribal Court*, FRONTERAS DESK (Mar. 16, 2015), http://www.fronterasdesk.org/content/9971/native-americans-can-prosecute-non-natives-tribal-court [http://perma.cc/3GL9-NVNU] (noting the Pascua Yaqui Attorney General's comments about the tribe's nineteen VAWA cases).

88 Laird, *supra* note 12.

89 *Id.*

90 *See Criminal Court Directive*, CONFEDERATED TRIBES UMATILLA INDIAN RESERVATION (Jan. 22, 2014), http://ctuir.org/system/files/Criminal%20Court%20Directive%201-22-24.pdf [http://perma.cc/67DZ-K6CJ] (implementing new procedural rules); Richard Peterson, *Prosecution of Non-Indians Now Under Tribal Jurisdiction*, FORT PECK J. ONLINE (Mar. 12, 2015), http://www.fortpeckjournal.net/2015/03/12/ prosecution - of - non - indians - now - under - tribal - jurisdiction/#sthash.Km4DHhZT.dpbs [http://perma.cc/6QDX-29D7] ("Fort Peck had to change parts of its code and some court procedures to give non-Indians their constitutional rights in tribal court . . . ."). Some tribes have also organized a working group to provide "peer-to-peer" advice and information about how best to implement special domestic violence criminal jurisdiction. *See About ITWG*, NAT'L CONG. AM. INDIANS, http://www.ncai.org/tribal-vawa/pilot-project-itwg/about-itwg [http://perma.cc/6BQN-EDMB] (last visited Sept. 19, 2015) (describing the Intertribal Technical-Assistance Working Group on Special Domestic Violence Criminal Jurisdiction (ITWG)).

91 Laird, *supra* note 12.

92 *Id.*

93 *Id.* (quoting John Dossett, General Counsel of the National Congress of American Indians).

requirements, hoping that their first defendant would bring a habeas suit, but the defendant declined to do so.[94]

C. *Nationwide Launch*

After March 7, 2015, tribes nationwide could implement special domestic violence criminal jurisdiction without going through the pilot project process. According to the Department of Justice in May 2015, about forty tribes planned to exercise special domestic violence criminal jurisdiction, and they were "gearing up to ensure that the requisite legal safeguards are in place."[95] In June 2015, the Eastern Band of Cherokee Indians was preparing to implement special domestic violence criminal jurisdiction, and the tribe had already signed a new ordinance allowing for an impartial jury.[96] Government agencies continue to support tribal efforts to begin VAWA 2013 prosecutions.[97]

As more tribes implement VAWA 2013, more prosecutions of non-Indian defendants are inevitable—and so are legal challenges to the jurisdictional framework. Objections about special domestic violence criminal jurisdiction's constitutionality have not abated.[98] The next Parts explore possible legal challenges to the jurisdictional framework, how courts might analyze them, and how their eventual outcome could impact special domestic violence criminal jurisdiction.

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[94] *Id.* Dossett speculated that most defendants "want to get over it and get on with their lives" and "don't want to be the big test case." *Id.* After all, thirteen years elapsed between the *Duro* fix and the Supreme Court's decision to uphold it in *Lara*. *Id.*

[95] Miranda S. Spivack, *Tribal Law on Domestic Violence Takes Effect*, WOMEN'S ENEWS (May 13, 2015), http://womensenews.org/story/domestic-violence/150512/tribal-law-domestic-violence-takes-effect [http://perma.cc/3KZC-4LTP].

[96] *See* Scott McKie, *Tribe Asserts DV Jurisdiction over Non-Indians*, CHEROKEE ONE FEATHER (June 16, 2015), http://theonefeather.com/2015/06/tribe-asserts-dv-jurisdiction-over-non-indians [http://perma.cc/U2TT-YT8J.

[97] *See, e.g.*, Press Release, Bureau of Indian Affairs Office of Justice Services, U.S. Dep't of the Interior, BIA Office of Justice Services in Conjunction With the Tulalip Tribes Will Co-Host VAWA Tribal Trial Advocacy Skills Training in September (Aug. 26, 2015), http://www.indianaffairs.gov/cs/groups/public/documents/text/idc1-031537.pdf [http://perma.cc/L96W-9AKF].

[98] *See, e.g.*, Stephen Fee et al., *Tribal Justice: Prosecuting Non-Natives for Sexual Assault on Reservations*, PBS NEWSHOUR (Sept. 5, 2015, 1:08 PM), http://www.pbs.org/newshour/bb/tribal-justice-prosecuting-non-natives-sexual-assault-indian-reservations [http://perma.cc/VCV6-EBLV] (reporting on former U.S. Senator Tom Coburn's criticisms, and quoting him as saying that "this provision will eventually be thrown out, be challenged, and on appeal they'll lose, because you cannot guarantee American citizens their constitutional rights if they're non-tribal members in a tribal court").

III. ARGUMENTS FOR AND AGAINST INHERENT TRIBAL SOVEREIGNTY TO PROSECUTE NON-INDIANS UNDER VAWA 2013

A. *Why Inherent Tribal Sovereignty Matters*

When the eventual test case does come before a federal court for review, VAWA 2013's framework for special domestic violence criminal jurisdiction will likely force the court to adjudicate the bounds of inherent tribal sovereignty.[99] The scope of inherent tribal sovereignty matters a great deal for non-Indian defendants, because it determines whether the non-Indian defendants must receive all the federal constitutional rights that they would receive in federal or state court. If defendants' tribal prosecutions are a delegation of federal authority, then the defendants have a colorable legal claim that they should receive the full panoply of federal constitutional rights. But if the tribal prosecutions are actions of a separate sovereign, then the federal Bill of Rights—and much of the federal Constitution—is inapplicable.[100] The defendant would thus receive only those federal constitutional protections codified in the Indian Civil Rights Act (ICRA),[101] and required by statute under VAWA 2013.[102] The defendant would not receive, for example, the benefit of the Fifth Amendment's grand jury indictment requirement.[103]

Thus, when federal constitutional rights *not* codified in ICRA or VAWA 2013 will determine the outcome of a defendant's case, the bounds of inherent tribal sovereignty become very important indeed. And, in practice, the gap between (1) all federal constitutional rights and (2) defendants' rights under ICRA and VAWA 2013 is more than just the number of rights missing in ICRA and VAWA 2013; tribal courts interpreting ICRA rights need not always interpret them identically to the corresponding federal

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99 *See infra* notes 115–17 and accompanying text (showing how the inherent-sovereignty question could affect the analysis of non-Indian defendants' constitutional challenges).

100 *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."); *see also* H.R. REP. NO. 112-480, at 58-59 (2012) ("Non-Indians tried within the Indian Tribal government system would not be guaranteed their full constitutional rights . . . ."); S. REP. NO. 112-153, at 48 (2012) (Minority Views from Sens. Kyl, Hatch, Sessions, and Coburn) ("Courts have held, for example, that tribal governments are not bound by the Constitution's First, Fifth, or Fourteenth Amendments.").

101 25 U.S.C. §§ 1301–1303 (2012).

102 *See supra* Section II.A for a list of express protections that VAWA provides to defendants.

103 *See Martinez*, 436 U.S. at 63 n.14 ("[Section] 1302 does not require tribal criminal prosecutions to be initiated by grand jury indictment . . . .").

constitutional rights.[104] For example, some federal common law constitutional rights, such as the right to *Miranda* warnings under the Fifth and Sixth Amendments,[105] are not imputed into the analogous ICRA and VAWA 2013 provisions.[106] Additionally, though both ICRA and the federal Constitution provide defendants with the right against double jeopardy, the inherent-sovereignty question will determine whether tribal and federal prosecutions brought consecutively would violate the federal Double Jeopardy Clause: as shown by *Lara*, if tribal criminal jurisdiction derives from inherent tribal sovereignty, then no double jeopardy problem exists.[107] Figure 1 illustrates the difference between (1) federal constitutional rights and (2) ICRA and VAWA 2013 rights.

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104 *See generally* Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 496 (1998) ("[T]he courts routinely have ruled that the meaning and application of the ICRA is not determined by Anglo-American constitutional interpretations."); *id.* at 513 (concluding that, in tribal courts, "cultural considerations sometimes contribute to unique interpretations" of ICRA rights).

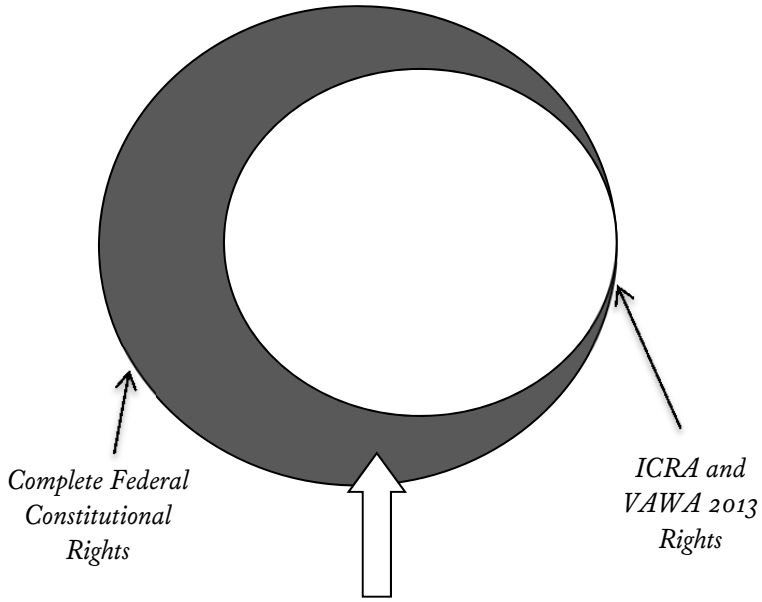
105 *See* Miranda v. Arizona, 384 U.S. 436, 478-79 (1966) (holding that, to protect a criminal defendant's Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel, the defendant "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires"). *But see* Singh, *supra* note 7, at 223-25 (discussing *Miranda* rights and concluding that the constitutional "catch-all" provision could resolve any constitutional defects created by *Miranda* and other federal common law rights).

106 The ICRA analogue to the Fifth Amendment right against self-incrimination is codified at 25 U.S.C. § 1302(a)(4) (2012).

The VAWA 2013 analogue to the Sixth Amendment right to counsel is codified at 25 U.S.C. § 1304(d)(2) (Supp. 2013), which incorporates by reference, for defendants facing imprisonment, rights guaranteed under ICRA to defendants facing imprisonment for longer than one year. *See* 25 U.S.C. § 1302(c) (2012). Those rights include "the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution." *Id.* § 1302(c)(1). But even if the VAWA 2013 right to counsel mirrors the federal right to counsel, the ICRA right against self-incrimination would not necessarily replicate the federal right against self-incrimination. *See supra* note 102 and accompanying text. Thus, *Miranda* rights are not presumed to apply to tribal arrests.

107 *See supra* note 55 and accompanying text. The answer to the inherent-sovereignty question would also answer the antecedent question about whether the federal Double Jeopardy Clause or the ICRA double jeopardy provision governs the tribal prosecution. If special domestic violence criminal jurisdiction flows from inherent tribal sovereignty, then the ICRA double jeopardy provision would apply, and consecutive tribal and federal prosecutions for the same conduct would be permissible (so long as the tribe does not prosecute the defendant more than once for the same conduct). But if special domestic violence criminal jurisdiction is delegated federal authority, then the federal Double Jeopardy Clause is in play, and consecutive tribal and federal prosecutions would violate the Clause, because both prosecutions would be federal.

Figure 1: Inherent Tribal Sovereignty's Significance to Defendants' Rights



Rights that Turn on Whether Special Domestic Violence Criminal Jurisdiction Flows from Inherent Tribal Sovereignty or Delegated Federal Authority

(e.g., the federal right against double jeopardy,
the Fifth Amendment right to indictment by a grand jury,
Article II and Article III separation of powers structural guarantees,
federal constitutional rights with analogues in ICRA and VAWA 2013
that are less defendant-protective
in tribal courts than in federal courts)

Of course, to some extent, VAWA 2013's constitutional "catch-all" provision[108] resolves the gap between (1) federal constitutional rights and (2) ICRA and VAWA 2013 rights; it requires tribes to provide defendants with "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant."[109] So, even if a

108 *See* Singh, *supra* note 7, at 225 (using the term).

109 25 U.S.C. § 1304(d)(4) (Supp. 2013).

prosecution is found unconstitutional for failure to provide a defendant with a particular right guaranteed by the federal Constitution,[110] later tribal prosecutions in other cases could solve the problem by ensuring defendants receive rights identical to those under the federal Constitution.

But even the "catch-all" provision would not be enough to overcome double jeopardy, Article II, or Article III concerns. *United States v. Lara*[111] is the obvious example of why inherent tribal sovereignty will always matter to a defendant bringing a double jeopardy claim. If tribal prosecutions of non-Indian defendants flow from delegated federal authority, then a tribe could not prosecute conduct that was already the subject of a federal prosecution, no matter how many rights the defendants would have under tribal criminal procedure. To avoid double jeopardy problems, federal and tribal prosecutors would have to cooperate and agree not duplicate each other's efforts.[112]

But such pragmatic solutions do not exist for the Article II and Article III problems that might surface if a court adjudicates any federal constitutional claim brought by a defendant and refuses to find inherent tribal sovereignty to prosecute non-Indian defendants. As Paul Larkin, Jr., and Joseph Lupino-Esposito of the Heritage Foundation have argued,[113] Article II requires federal judges to be appointed by the President and confirmed by the Senate,[114] and Article III mandates life tenure and undiminished compensation for federal judges.[115] Larkin and Lupino-Esposito opine that "[b]ecause tribal judges don't necessarily have those guarantees and are appointed by tribes," they do not meet the Constitution's Article II and Article III requirements, and special domestic violence criminal jurisdiction is therefore impermissible as a delegation of

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110 A tribal prosecution could be found unconstitutional by the tribal trial court itself, by an appellate tribal court, or by a federal court on habeas review. ICRA guarantees federal habeas review of tribal criminal convictions, and VAWA 2013's special domestic violence criminal jurisdiction incorporates that protection by reference. *See supra* note 76 and accompanying text.

111 541 U.S. 193 (2004); *see also supra* Section I.C (discussing *Lara*).

112 *See, e.g.*, OR. DEP'T OF JUSTICE, OREGON DEPARTMENT OF JUSTICE CRIME VICTIMS' SERVICES DIVISION TRIBAL NATION LISTENING TOUR 1-2 (2013), http://www.tribal-institute.org/2014/E11HandOut2.pdf [http://perma.cc/C4GR-L6SJ] (discussing Oregon's statewide VAWA implementation plan, administered with cooperation from the Oregon Department of Justice, tribal representatives, and the U.S. Department of Justice); Ernestine Chasing Hawk, *Tribes Discuss Prosecution of Non-Indians on Tribal Lands*, NAVAJO TIMES (Apr. 8, 2015), http://navajotimes.com / wires-wp / index.php?id=1595618643&kid = SmB5ZcRvalt332nL [http://perma.cc/SF2G-CACZ] (reporting that federal prosecutors in Oregon, North Dakota, and South Dakota met with tribal officials to discuss how to jointly implement VAWA 2013).

113 *See* Larkin & Lupino-Esposito, *supra* note 13, at 8-9, 17-39.

114 U.S. CONST. art. II, § 2.

115 *Id.* art. III, § 1.

federal authority.[116] A full treatment of these issues lies beyond the scope of this Comment, but suffice it to say that these structural defects could prove impossible for tribes to cure.[117]

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116 Laird, *supra* note 12 (paraphrasing Larkin); *see also* Larkin & Lupino-Esposito, *supra* note 13, at 8-9, 17-39.

117 If courts rule that special domestic violence criminal jurisdiction stems from delegated federal authority rather than inherent tribal sovereignty, tribes could answer the Article III contentions by arguing that the jurisdiction is still valid as an exercise of jurisdiction by a congressionally sanctioned non-Article III court—i.e., an Article I court created by the legislature. *See generally* 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3528 (3d ed. 2015) (examining the jurisprudence surrounding Article I legislative courts); Larkin & Lupino-Esposito, *supra* note 13, at 26 ("The Supreme Court has held in several different contexts that Congress may vest in other courts, known as 'Article I courts,' the authority to adjudicate rights and responsibilities of parties to a dispute even if judges who lack life tenure and salary protection enjoyed by Article III judges preside over those courts.").

But the Supreme Court's jurisprudence surrounding Article I legislative courts is not settled, and it is difficult to predict how the Supreme Court might view a claim that tribal courts are actually Article I legislative courts. Larkin and Lupino-Esposito argue that the Court would invalidate tribal courts because they do not fall under the traditional categories of Article I legislative courts upheld by the Supreme Court. Larkin & Lupino-Esposito, *supra* note 13, at 26-39; *see also* Stern v. Marshall, 131 S. Ct. 2594, 2610 (2011) (following the categorical approach to Article I courts adopted by *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)); *Northern Pipeline, 458 U.S.* at 64-70 (recognizing three valid categories of Article I courts: (1) territorial courts and District of Columbia courts, (2) military courts-martial, and (3) courts and agencies created to adjudicate "public rights"). The Supreme Court could, however, follow a less-categorical balancing approach, like the one endorsed in *CFTC v. Schor*. *See* 478 U.S. 833, 851 (1986) (adopting an approach to reviewing Article III challenges that "weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect . . . on the constitutionally assigned role of the federal judiciary"). Indeed, the Court's recent decisions about the validity of bankruptcy courts appear to veer towards the *Schor* approach. *See* Wellness Int'l Network v. Sharif, 135 S. Ct. 1932, 1942-44 (2015) (citing and discussing *Schor* with approval); Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2173 (2014) (retreating in part from *Stern*'s strict categorical approach); Daniel Bussel, *Commentary:* Wellness *after* Stern, SCOTUSBLOG (May. 28, 2015, 10:19 AM), http://www.scotusblog.com/2015/05/commentary-wellness-after-stern [http://perma.cc/LPF2-7NHK] ("*Wellness* and *Arkison* both eschew the formalism of *Stern* and adopt functionalist perspectives to Article III to uphold pre-*Stern* practices.").

The Article II contentions, on the other hand, could prove even more difficult to surmount than the Article III issues. Even if tribal courts are Article I legislative courts, Article II and the Appointments Clause would apply to tribal judges exercising delegated federal authority. *See* Larkin & Lupino-Esposito, *supra* note 13, at 20. And Article II would constrain not just tribal judges, but also tribal prosecutors, who might—like U.S. Attorneys—likewise fall under the Appointments Clause's reach. *See* United States v. Lara, 541 U.S. 193, 216 (2004) (Thomas, J., concurring in the judgment) (noting that "the power to bring federal prosecutions, which is part of the putative delegated power, is manifestly and quintessentially executive power" and Congress cannot transfer it "to individuals who are beyond meaningful Presidential control" (internal quotation marks omitted)).

Remedying the Article II issues might hypothetically require tribes to submit to presidential appointment and Senate confirmation of tribal judges and prosecutors. But this course of action is objectionable from the tribal perspective. Tribes are already concerned about "losing the features

B. *No Inherent Tribal Sovereignty to Prosecute Non-Indians:* Oliphant*, History, and Political Representation Concerns*

On the actual question of whether special domestic violence criminal jurisdiction flows from inherent tribal sovereignty, credible justifications exist for both possible answers. A court adjudicating the issue will have to choose which set of justifications it finds more persuasive.

A non-Indian defendant could begin by arguing that *Oliphant*'s reasoning is still applicable, even if Congress partially overrode its holding. In other words, even if Congress gave tribes *statutory* jurisdiction to try and punish non-Indians, Indian tribes still "do not have *inherent* jurisdiction to try and to punish non-Indians."[118] Further, *Oliphant* rested its holding on the notion that inherent criminal jurisdiction over non-Indians was inconsistent with tribes' status as dependent nations,[119] and there is no reason to believe that this underlying presumption has changed. Although *Oliphant* did seem to contemplate that tribes might have power "to try non-Indian citizens of the United States . . . *in a manner acceptable to Congress*" (which would appear to endorse upholding VAWA 2013's special domestic violence criminal jurisdiction),[120] a non-Indian defendant could counter with the argument that *Oliphant*'s dictum merely referred to statutory delegations of federal authority—not inherent tribal authority to punish.[121]

Apart from *Oliphant*, a defendant might also argue that history does not support inherent tribal authority to prosecute non-Indians. As discussed above, early treaties might support the notion that tribes were not, at the beginning of the Republic, understood to have authority to prosecute non-Indians (though, of course, the early treaties might also support the opposite

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of their own justice traditions" through VAWA 2013's special domestic violence criminal jurisdiction. Laird, *supra* note 12; *see also* Alex Tallchief Skibine, Duro v. Reina *and the Legislation that Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767, 801 (1993) (noting how applying even the Bill of Rights to tribal prosecutions "would seriously interfere with tribal culture and the values incorporated in tribal laws"). Imposing additional federal oversight would only exacerbate these concerns.

118 Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) (emphasis added).

119 *Id.* at 206-11; *see also supra* notes 36–37 and accompanying text (discussing *Oliphant*'s holding).

120 *Oliphant*, 436 U.S. at 210.

121 Post-*Oliphant*, the Supreme Court has affirmed that "[i]n the main . . . the inherent sovereign powers of an Indian tribe—those powers a tribe enjoys apart from express provision by treaty or statute—do not extend to the activities of nonmembers of the tribe." Strate v. A-1 Contractors, 520 U.S. 438, 445-46 (1997) (quoting Montana v. United States, 450 U.S. 544, 565 (1981) (internal quotation marks omitted)). These precedents, however, came before the 2004 *Lara* decision, which upheld Congress's decision to extend tribes' inherent sovereign powers to nonmembers (specifically, nonmember Indians). *See* United States v. Lara, 541 U.S. 193, 196 (2004). Thus, allusions to *Strate* and *Montana* would have limited weight in a challenge to VAWA 2013's special domestic violence criminal jurisdiction.

proposition as well).[122] A defendant could also point to ICRA, which did *not* include criminal jurisdiction over non-Indians in its recognition of tribes' "inherent power," even after the *Duro* fix.[123] However, the *Duro* fix to ICRA, enacted twenty-five years ago in 1990,[124] could simply reflect Congress's choice to "relax restrictions"[125] on inherent tribal sovereignty to a lesser extent at that time; Congress might have intended to further relax former restrictions by enacting special domestic violence criminal jurisdiction. To this, a defendant could argue that, Congress still cannot give tribes more inherent sovereignty than they ever possessed before. The defendant could then cite early treaties and the like to support the underlying assumption that tribes' inherent sovereignty never included criminal jurisdiction over non-Indians. In Justice Kennedy's words, "[i]t is a most troubling proposition to say that Congress can relax the restrictions on inherent tribal sovereignty in a way that extends that sovereignty beyond . . . historical limits."[126]

From a policy perspective, a defendant arguing against inherent tribal sovereignty can continue to echo Justice Kennedy by citing political representation concerns, which Justice Kennedy raised in both his *Lara* concurrence and his opinion for the Court in *Duro*. In *Lara*, he opined that subjecting a defendant "to a sovereignty outside the basic structure of the Constitution" violates the basic constitutional theory of "original, and continuing, consent of the governed."[127] Though a given tribe's members consent to that tribe's extraconstitutional sovereignty, nonmember Indians—and certainly non-Indians—do not.[128] Hence, in *Duro*, Justice Kennedy wrote for the Court that "in the criminal sphere membership marks the bounds of tribal authority."[129] And even if non-Indians have consented to *Congress*'s ability (as the federal legislature) to act in the field of Indian affairs, a defendant could argue that there are "constitutional limitations even on the ability of Congress to subject American citizens to criminal

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122 *See supra* Section I.A.

123 *See* 25 U.S.C. § 1301(2) (2012) ("'[P]owers of self-government' means . . . the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over *all Indians* . . . ." (emphasis added)); *see also supra* notes 45–47 and accompanying text (discussing how the *Duro* fix codified the statutory bounds of tribal criminal jurisdiction so that it would reach nonmember Indians, but not non-Indians).

124 *See* Act of Nov. 5, 1990, Pub. L. No. 101-511, sec. 8077(b)–(c), § 201(2), 104 Stat. 1856, 1892-93 (codified at 25 U.S.C. § 1301(2), (4)).

125 *Lara*, 541 U.S. at 196.

126 *Id.* at 212 (Kennedy, J., concurring in the judgment).

127 *Id.*

128 *Id.*

129 Duro v. Reina, 495 U.S. 676, 693 (1990), *superseded by statute*, Act of Nov. 5, 1990, § 8077(b)–(c), 104 Stat. at 1892-93, *as recognized in Lara*, 541 U.S. 193.

proceedings before a tribunal that does not provide constitutional protections as a matter of right."[130]

C. *Inherent Tribal Sovereignty to Prosecute Non-Indians: History,* Lara*, the Executive Branch, and Public Policy*

To support inherent tribal authority to exercise special domestic violence criminal jurisdiction, a tribe can credibly raise numerous arguments to rebut the defendant's arguments discussed above. A tribe could cite history and early treaties just as easily as a defendant, but for the opposite purpose: to show that early treaties did in fact recognize inherent tribal authority to try and punish non-Indians.[131] Further, pre-*Oliphant* tribal codes asserted criminal jurisdiction over non-Indians.[132]

The tribe could also draw easy analogies to *Lara*: The *Duro* fix language at issue in *Lara* and the VAWA 2013 language at issue here contain very similar clauses recognizing and affirming tribes' inherent sovereignty.[133] The statutory inherent-power language was important to the Court's decision in *Lara*,[134] so it should carry weight as a signal of congressional intent here.[135]

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130 *Id*. A tribe might also defend special domestic violence criminal jurisdiction by arguing "hypothetical consent," whereby consent is presumed when "a reasonable person subjected to government control would consent to such control." Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973, 991 (2010). Professor Fletcher suggests that "Justice Kennedy's rhetoric invoking the consent of the governed rings hollow at least in cases where a reasonable person would not object to tribal laws." *Id.* at 991-92. But allowing hypothetical consent in a civil matter is not the same as doing so in a criminal matter, where more fundamental intrusions on personal liberty are at stake. *See* Gede, *supra* note 1, at 43 (contrasting the civil and criminal contexts). A hypothetical-consent argument would appear to respond inadequately to the political representation concerns that VAWA 2013 presents.

131 *See supra* Section I.A (explaining how the early treaties could support both broad and narrow views of inherent tribal criminal jurisdiction over non-Indian defendants).

132 *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 196 (1978) ("Of the 127 reservation court systems that currently exercise criminal jurisdiction in the United States, 33 purport to extend that jurisdiction to non-Indians.").

133 *Compare* Act of Nov. 5, 1990, sec. 8077(b), § 201(2), 104 Stat. at 1892 ("[T]he inherent power of Indian tribes, hereby recognized and affirmed, [includes the power] to exercise criminal jurisdiction over all Indians[.]"), *with* 25 U.S.C. § 1304(b)(1) (Supp. 2013) ("[T]he inherent power of [a participating tribe,] hereby recognized and affirmed, [includes the power] to exercise special domestic violence criminal jurisdiction over all persons.").

Part IV, *infra*, discusses Congress's role in more detail and focuses on the possible significance of the congressional plenary power doctrine.

134 *See Lara*, 541 U.S. at 199; *see also id.* at 211 (Kennedy, J., concurring) ("Congress was careful to rely on the theory of inherent sovereignty, and not on a delegation. . . . I would take Congress at its word.").

135 The actual legislative history of VAWA 2013's Indian country provisions also supports the notion that Congress intended special domestic violence criminal jurisdiction to flow from inherent tribal sovereignty. *See* S. REP. NO. 112-153, at 9 n.23 (2012) ("[T]he Supreme Court has

Additionally, the expansion of tribal criminal jurisdiction is narrow,[136] and the Court upheld the *Duro* fix in *Lara* because it made a similarly "limited" change to the existing tribal criminal jurisdiction.[137] VAWA 2013's special domestic violence criminal jurisdiction extends tribal criminal jurisdiction to a narrow subset of possible non-Indian defendants, whose prosecutions must have specific territorial, personal, subject-matter, and rights-based prerequisites required by statute.[138]

To the extent that a court may want to defer to the Executive Branch,[139] it is noteworthy that federal administrators support special domestic violence criminal jurisdiction as it was enacted in VAWA 2013. In fact, the key VAWA 2013 Indian country provisions were first drafted and proposed by the Department of Justice in 2011.[140] And the Department of Justice has made at least one federal–tribal agreement in which it designated a tribal prosecutor as a "Special Assistant U.S. Attorney with expanded authority over domestic violence cases."[141]

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indicated that Congress has the power to recognize and thus restore tribes' 'inherent power' to exercise criminal jurisdiction over all Indians and non-Indians." (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206-12 (1978))); *see also* Singh, *supra* note 7, at 218 (summarizing the legislative history).

136 *See supra* Section II.A.

137 *Lara*, 541 U.S. at 204 (majority opinion).

138 *See supra* Section II.A.

139 *See Lara*, 541 U.S. at 205 (noting that the shared presumption of the Executive Branch, Congress, and the lower courts would carry considerable weight); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 20 (1831) (holding nonjusticiable the Cherokee Nation's suit for relief against the state of Georgia's efforts to obtain control over tribal lands, and noting that the matter was "too much [like] the exercise of political power to be within the proper province of the judicial department"). *See generally* 13C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3534.2 (2014) (discussing how federal Indian law cases have invoked the political question doctrine to defer to the Executive Branch's judgment about Indian policy).

140 *See* Letter from Tony West, Acting Assoc. Attorney Gen., U.S. Dep't of Justice, to Tribal Leader (Apr. 16, 2013), http://www.tribal-institute.org/download/Drug%20Court/Invitation%20to%20Tribal%20Consultation%20April%202013.pdf [http://perma.cc/AU5X-YL2X] ("[B]oth [sections 904 and 908 of VAWA 2013] . . . were initially drafted and proposed to Congress by the Department of Justice in 2011.").

141 Chris Winters, *Tulalips Wield New Power Against Domestic Violence*, HERALDNET (July 14, 2014, 9:17 PM), http://heraldnet.com/article/20140714/NEWS01/140719464/Tulalips-wield-new-power-against-domestic-violence [http://perma.cc/92FX-FZL8]. The designation "Special U.S. Attorney" could appear to imply that the tribal prosecutor acts under delegated federal authority, but the Tulalip Tribes have received pilot project approval to exercise special domestic violence criminal jurisdiction in their own tribal courts and using their own tribal judges. *See* OFFICE OF THE RESERVATION ATTORNEY, TULALIP TRIBES OF WASH., TULALIP TRIBES FINAL APPLICATION QUESTIONNAIRE FOR THE VAWA PILOT PROJECT ON TRIBAL CRIMINAL JURISDICTION (2013), http://www.justice.gov/tribal/docs/appl-questionnaire-tulalip.pdf [http://perma.cc/KHD6-353G]; *see also VAWA 2013 Pilot Project*, *supra* note 84 (noting that the Tulalip Tribes had received pilot-project approval).

Last but not least, tribes can cite compelling policy considerations to support upholding special domestic violence criminal jurisdiction as flowing from inherent tribal sovereignty. Most compellingly, expanded tribal jurisdiction seeks to ameliorate the much-documented high rate of domestic violence against Indian women, which is perpetuated by the law enforcement gap in prosecutions of non-Indians in Indian country.[142] Furthermore, from an institutional competence perspective, a tribe could argue—and cite *Lara* for the proposition—that Congress is better equipped than the Court to resolve and decide these jurisdictional issues.[143]

As the past two Sections detail, colorable arguments exist on both sides of the inherent tribal sovereignty question. But one of the arguments—the weight of congressional intent[144]—carries such historical force in federal Indian law[145] that it could play more than the supporting role that it did in *Lara*.[146] The next Part takes a brief look at the congressional plenary power doctrine and how advocates and courts could give it a leading role in litigation over special domestic violence jurisdiction's future.

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142 *See* S. REP. NO. 112-153, at 7-9 (2012) (acknowledging and describing the "crisis" of domestic violence and sexual assault against tribal victims); AMNESTY INT'L, *supra* note 8, at 2 (reporting that Indian women "are more than 2.5 times more likely to be raped or sexually assaulted than women in the USA in general"); Singh, *supra* note 7, at 198-99 (summarizing the "dire" need for more protection for Indian women against domestic and sexual violence); Laird, *supra* note 12 (reporting that "two out of five Indian women reported being battered in their lifetimes" and that eighty-eight percent of perpetrators of violent crimes against Indian women are non-Indian); *see also supra* notes 6–9 and accompanying text (discussing the enforcement gap).

143 *See Lara*, 541 U.S. at 205 (expressing disapproval for the Court "second-guessing" the political branches' determinations); *see also* Duro v. Reina, 495 U.S. 676, 706-07 (Brennan, J., dissenting) ("The touchstone in determining the extent to which citizens can be subject to the jurisdiction of Indian tribes, therefore, is whether such jurisdiction is acceptable to Congress.").

144 *See supra* notes 133–135 and accompanying text.

145 See *infra* Section IV.A for historical background.

146 The *Lara* opinion mentioned Congress's plenary power over Indian affairs as just one of six reasons for finding inherent tribal criminal jurisdiction over nonmember Indians. *See Lara*, 541 U.S. at 200 (discussing Congress's "plenary and exclusive" powers in the Indian law arena); *id.* at 200-07 (listing and discussing six justifications for upholding the *Duro* fix).

IV. CONGRESS'S PLENARY POWER OVER INDIAN AFFAIRS AND HOW IT COULD AFFECT SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION

A. *The Congressional Plenary Power Doctrine*

Beginning in the late nineteenth century, Congress's plenary power over Indian affairs became a central tenet of federal Indian law.[147] The major case distilling this principle is *United States v. Kagama* from 1886.[148] In *Kagama*, the Supreme Court derived the plenary power principle from tribes' status as domestic dependent nations[149]: "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell."[150] The Court found federal plenary power necessary to protect the tribes from often-malicious state governments.[151] Of course, federal plenary power also meant that little could protect the tribes from malicious acts of the federal government itself.[152]

At the turn of the twentieth century, the Court began using the word "plenary" to describe the scope of Congress's power over Indian affairs.[153]

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147 *See* Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 207, 212-19 (1984) (labeling "1877-1930's" as "The Plenary Power Era," and recounting the plenary power doctrine's rise during that period).

148 118 U.S. 375 (1886); *see also* Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 34 (1996) ("*Kagama* was the first case in which the Supreme Court essentially embraced the doctrine that Congress has plenary power over Indian affairs.").

149 See *supra* notes 36–37 for a discussion about similar reasoning used in *Oliphant* to justify the lack of inherent tribal criminal jurisdiction over non-Indians.

150 *Kagama*, 118 U.S. at 384.

151 *See id.* ("Because of the local ill feeling, the people of the States where [Indians] are found are often their deadliest enemies."). In the nineteenth century, non-Indian settlers seeking land in the western states were particularly hostile to Indians there, and newly formed state governments sometimes endorsed anti-Indian actions—including state-sanctioned murders of Indians. *See, e.g.*, gjohnsit, *The Great California Genocide*, DAILY KOS (Aug. 14, 2008) http://www.dailykos.com/story / 2008 / 08 / 15 / 567667 / -The-Great-California-Genocide [http://perma.cc / 9P9C-5NM8] (reporting that the state of California "paid about $1.1 Million in 1852 to militias to hunt down and kill [I]ndians"). Of course, the federal government was also responsible for its share of Indian massacres. *See generally Indian Massacre*, WIKIPEDIA, https://en.wikipedia.org/wiki/Indian_massacre [http://perma.cc/QM44-P8D6] (last visited Sept. 19, 2015) (listing Indian killings in history and including those perpetrated by both state and federal forces in the nineteenth century).

152 *See* Newton, *supra* note 147, at 216-28 (elaborating on how during the late nineteenth and early twentieth centuries, "[federal] policymakers denied tribal Indians the basic freedoms accorded other Americans" and cited the plenary power doctrine as their justification).

153 *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning . . . ."); Frank R. Pommersheim, *Tribal-State Relations: Hope for the Future?*, 36 S.D. L. REV. 239, 247 (1991) (citing

In the 1903 case *Lone Wolf v. Hitchcock*, the Court noted that Congress had exercised plenary power over tribal relations "from the beginning," and so Indian affairs "were solely within the domain of legislative authority."[154] What is more, the Court ruled that Congress's actions in this domain were "conclusive upon the courts."[155] As Professor Pommersheim has written, this doctrine, "in its potentially sweeping and pristine form, is awesome" in scope.[156] Not only does it endorse congressional authority to legislate without limitation, but it also exempts that authority from judicial review.[157]

The congressional plenary power doctrine has endured to the present day.[158] It was cited in *Lara* to support the Court's finding of inherent tribal authority to prosecute and punish nonmember Indians.[159] And as recently as 2014, the Supreme Court has noted Congress's "plenary control" over Indian tribes.[160] Because of its historical import, the plenary power doctrine could emerge as a key topic for courts to consider in their deliberations over special domestic violence jurisdiction's constitutionality.

B. *How the Congressional Plenary Power Doctrine Could Affect Special Domestic Violence Criminal Jurisdiction*

A court could follow *Lara* and treat congressional plenary power the way the Supreme Court did in that case: as a mere additional argument to support finding inherent tribal criminal jurisdiction over nonmember Indians.[161] But a court could also reverse the order of operations and address the plenary power doctrine first: under this analytical route, a court might hold that if Congress has explicitly legislated that special domestic violence criminal jurisdiction is an exercise of inherent tribal sovereignty, then

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Lone Wolf as the first instance in which the Supreme Court expounded on the "extravagant concept" of congressional plenary power).

154 *Lone Wolf*, 187 U.S. at 565, 567-68.

155 *Id.* at 567-68.

156 Pommersheim, *supra* note 153, at 247.

157 *Id.*

158 *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 6, § 5.02[1] (discussing how courts continue to recognize Congress's "plenary and exclusive authority over Indian affairs" (internal quotation marks omitted)).

159 *See* United States v. Lara, 541 U.S. 193, 200 (2004) ("[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'"); *see also supra* note 146 (explaining the role played by the plenary power doctrine in *Lara*'s reasoning).

160 Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2030 (2014).

161 See *supra* note 146 for a discussion of the Court's use of the plenary power doctrine in *Lara*.

Congress's word is dispositive.[162] Following this reasoning, courts are beholden to Congress under the plenary power doctrine, and so they simply cannot overturn Congress's explicit legislation.

This second analytical route is deceptively simple. To be sure, it quickly and easily answers the inherent tribal sovereignty question in the affirmative. But a more complex analysis lurks in the background. Instead of scrutinizing the metes and bounds of inherent tribal sovereignty, a court might be asked to determine the scope of Congress's plenary power: Does it allow Congress, in the Indian law context, to deny non-Indian U.S. citizens the federal constitutional rights they would otherwise receive in a state or federal prosecution?[163] Indeed, this question was one mentioned and avoided by the *Lara* Court, which chose not to address "potential constitutional limits on congressional efforts to legislate far more radical changes in tribal status."[164]

The sources and scope of Congress's plenary power over Indian affairs are myriad and complex,[165] and giving them a thorough treatment in the special domestic violence criminal jurisdiction context is beyond the scope of this Comment. Can Congress deny non-Indian defendants their rights to an Article III judge appointed pursuant to Article II of the U.S. Constitution?[166] Can Congress refuse non-Indian defendants the grand jury indictments and other constitutional rights they would receive in a federal prosecution?[167] If a court relies on congressional plenary power to uphold tribes' inherent authority to exercise special domestic violence criminal jurisdiction, then these lurking constitutional questions could rise to the surface.[168]

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162 *See generally* Lone Wolf v. Hitchcock, 187 U.S. 553, 567-68 (1903) (declaring congressional action "conclusive upon the courts" when it concerns Indian affairs); *supra* note 155 and accompanying text.

163 For domestic violence crimes committed on Indian country in the absence of special domestic violence criminal jurisdiction, jurisdiction to prosecute non-Indian defendants rests with the state and with the federal government. *See generally supra* notes 4–8 (describing the jurisdictional framework in Indian country). States need not provide defendants with all their federal constitutional rights, but they must provide defendants with certain rights—like *Miranda* rights—that tribes are not required to provide. *See supra* note 105 and accompanying text.

164 *Lara*, 541 U.S. at 205.

165 *See generally* Newton, *supra* note 147 (providing an extensive treatment of the issue).

166 *See supra* notes 14, 111–17 and accompanying text (discussing these concerns).

167 *See supra* notes 99–117 and accompanying text (discussing the possible differences between a tribal prosecution and a federal prosecution).

168 One might answer these constitutional questions with the position that tribes must offer defendants at least as many protections as they would receive in a state prosecution. E-mail from Troy Eid, Chairman, Indian Law & Order Comm'n, to author (Sept. 5, 2015) (on file with author). For instance, the Indian Law and Order Commission, appointed to study these issues by the Tribal Law and Order Act, has taken the view that tribes should "ensure that defendants'

Thus, a tricky analysis lies ahead for a court adjudicating special domestic violence criminal jurisdiction's constitutionality, even if it relies on congressional plenary power in the first instance to justify tribes' inherent authority to exercise special domestic violence criminal jurisdiction. Either (1) the court relies on plenary power and should consider the permissible scope of that power, or (2) the court must follow the template created by *Lara* and analyze myriad possible authorities on inherent tribal sovereignty [169] to determine whether special domestic violence criminal jurisdiction qualifies as an exercise of that inherent tribal sovereignty.[170]

V. POTENTIAL CONSEQUENCES OF POSSIBLE SUPREME COURT HOLDINGS

If in the future the Supreme Court rules on whether special domestic violence criminal jurisdiction flows from inherent tribal sovereignty,[171] VAWA 2013's current jurisdictional framework could be dismantled, upheld, or perhaps subjected to a tribe-by-tribe analysis. And even if the Supreme Court decides the issues from the congressional plenary power perspective,[172] similar outcomes are possible.

If the Court were to rule that no inherent tribal sovereignty exists to prosecute non-Indians, then, as noted above, savvy litigants could potentially engineer the dismantling of the entire jurisdictional framework as enacted, by arguing that tribes' delegated federal authority violates structural guarantees in the federal Constitution.[173] Despite VAWA's constitutional "catch-all" provision, valiant tribes' efforts to enforce the full panoply of

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Federal constitutional rights are fully protected" but "retain retain full and final authority over the definition of the crime [and] sentencing options." INDIAN LAW & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFE: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES 24 (Nov. 2013), http://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf [http://perma.cc/F863-WLNV]; E-mail from Troy Eid, *supra* (interpreting the roadmap as taking the position that "all U[.]S[.] citizens, Indian and non-Indian alike, must have their federal constitutional rights protected by tribal courts at an equivalent level to what states provide"). *See generally* INDIAN L. & ORD. COMMISSION, http://www.aisc.ucla.edu/iloc/index.html [http://perma.cc/96YW-HQ89] (last visited Sept. 19, 2015) (providing background about the Commission).

169 *See Lara*, 541 U.S. at 200-07 (listing and discussing six justifications); *supra* Sections III.B–III.C (listing and discussing multiple arguments for and against inherent tribal authority to exercise special domestic violence criminal jurisdiction).

170 See *supra* Section III.A for an explanation of how the scope of inherent tribal sovereignty affects the constitutionality of special domestic violence criminal jurisdiction.

171 See *supra* Part III for possible arguments and reasoning in this vein.

172 See *supra* Part IV for considerations surrounding this alternative analytical route.

173 *See supra* notes 111–117 and accompanying text.

federal constitutional rights, and careful federal–tribal prosecutorial cooperation, tribes (and the federal government) are unlikely to find a way to address all the constitutional concerns in a way that allows the current jurisdictional framework to continue as envisioned by Congress.[174]

From the congressional plenary power perspective, the Supreme Court might hold that Congress's plenary power does not include the power to deny non-Indian defendants their Article II and Article III rights. Because tribes would not be able to provide these rights to non-Indian defendants,[175] the jurisdictional framework envisioned by VAWA 2013 would be similarly dismantled.

If the Court were to hold that tribes do have inherent authority to prosecute non-Indians, then special domestic violence criminal jurisdiction would be permissible using the structure envisioned by Congress. The "dual sovereignty" doctrine would quash defendants' double jeopardy arguments.[176] Other federal constitutional issues would not present problems, so long as tribes are careful to provide defendants with statutory rights required under ICRA and VAWA 2013, as well as any rights courts may find necessary under VAWA 2013's constitutional "catch-all" provision.[177] Similarly, Article II and Article III concerns would not hold water, because Article II's appointment provisions apply only to "officers of the United States,"[178] and Article III's life tenure and compensation provisions apply only to judges vested with "the judicial power of the United States."[179] Tribal judges exercising inherent tribal authority to adjudicate would not be federal officers and would not be vested with federal judicial power. Article II appointment and Article III life tenure and compensation would not constrain their authority.

The Court could also reach this result from the congressional plenary power perspective. If the Court were to uphold the unlimited scope of Congress's plenary power over Indian affairs,[180] non-Indian defendants' loss of federal constitutional rights would not pose a concern—in Indian country, Congress's word trumps all. Special domestic violence criminal jurisdiction,

174 *See id.*
175 *See id.*
176 *See supra* note 55 and accompanying text.
177 *See supra* Section III.A.
178 U.S. CONST. art. II, § 2.
179 *Id.* art. III, § 1..
180 *See generally* Section IV.A (providing background on the plenary power doctrine).

as envisioned by Congress, could continue unabated—so long as it has Congress's imprimatur.[181]

One other possible approach the Court could take is a tribe-by-tribe approach, where the source of each tribe's special domestic violence criminal jurisdiction—be it inherent tribal sovereignty, delegated federal authority, or Congress's plenary power—depends on fact-based determinations. For example, the Court might hold that a given tribe has *inherent* special domestic violence criminal jurisdiction over non-Indians if and only if the tribe in question has a compelling historical argument for criminal jurisdiction over non-Indians. Each tribe might be required to justify its assertion of inherent sovereignty by reference to historical treaties, historical tribal practice, and the like. The Court has taken a similar tribe-by-tribe approach in its cases on whether surplus land acts have diminished Indian reservations: some surplus land acts diminish Indian reservations and others do not, depending on "the language of the act and the circumstances surrounding its passage."[182] But though a tribe-by-tribe approach may be more equitable in some respects,[183] it would further complicate an already complicated jurisdictional framework. Because of the allotment policies of the late nineteenth and early twentieth centuries, federal, state, and tribal law enforcement authorities sometimes share jurisdiction over "checkerboard" lands where enforcement jurisdiction varies by the individual land parcel.[184] And, given that Congress has only opened special domestic violence criminal jurisdiction to those tribes who can afford to provide defendants with the rights guaranteed by VAWA 2013,[185] Congress itself has created a tribe-specific means of allowing and disallowing tribal jurisdiction over non-Indians. Adding another layer of complexity would

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181 Of course, what Congress gives, Congress can take away. Even if tribes have inherent authority to prosecute and punish non-Indians, Congress can impose restrictions on that inherent authority just as easily as it can relax restrictions. *Cf.* United States v. Lara, 541 U.S. 193, 196 (2004) (concluding that Congress may "relax restrictions" on tribal authority, but after noting that "the political branches have, over time, placed [those restrictions] on the exercise of a tribe's inherent legal authority").

182 Solem v. Bartlett, 465 U.S. 463, 469 (1984); *see also id.* at 469-70 n.10 (discussing examples).

183 *See generally* Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1114 (2004) (warning against "the pitfalls of making sweeping claims" about Indian tribes, because "meaningful variations across the Indian tribes make for varying degrees of federal [and tribal] power").

184 *See generally* CAROLE E. GOLDBERG ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 24-30 (6th ed. 2010) (describing allotment policies and providing an illustrative map of the checkerboard land ownership that resulted on the Lac Courte Oreilles Reservation in Wisconsin). These jurisdictional complexities deter effective law enforcement. *See* AMNESTY INT'L, *supra* note 8, at 27-39.

185 *See supra* notes 75–76 and accompanying text.

likely do more harm than good, so it seems unlikely that the Court will adopt this approach.

CONCLUSION: FROM WHAT DOES INHERENT TRIBAL SOVEREIGNTY DERIVE?

Oliphant derived the lack of inherent tribal sovereignty to prosecute non-Indians from its conception of history and of Indian tribes' dependent status.[186] *Duro* derived the lack of inherent tribal sovereignty to prosecute nonmember Indians from the notion that tribe members give voluntary consent to tribal jurisdiction.[187] And *Lara* derived its finding of inherent tribal sovereignty to prosecute nonmember Indians from congressional intent and the notion that Congress can relax federally imposed restrictions on inherent tribal sovereignty.[188] From what will the VAWA 2013 test case derive inherent tribal sovereignty—or the lack thereof?

This Comment has highlighted a number of considerations, any of which could be used by the courts to justify or refute inherent tribal authority to exercise special domestic violence criminal jurisdiction under VAWA 2013. Depending on a given court's preferred justifications—history, congressional power, voluntary political membership, etc.—it can reasonably rule either for or against inherent tribal authority to exercise special domestic violence criminal jurisdiction. For non-Indian defendants, the scope of their federal constitutional rights is at stake. For the tribes, what it means to be sovereign.

The tribes, however, might have more at stake than just their authority to exercise special domestic violence criminal jurisdiction. A decision on their inherent criminal jurisdiction over non-Indians will affect not just their jurisdiction under VAWA 2013, but also any future statutory grants of jurisdiction to criminally prosecute non-Indians. Indeed, some tribal advocates see special domestic violence criminal jurisdiction as a stepping stone to complete tribal criminal jurisdiction over non-Indian offenders for crimes committed in Indian country—a complete *Oliphant* override.[189] Depending on how courts rule, VAWA 2013's special domestic violence criminal jurisdiction could be the dead end for these hopes—or it could be the beginning of a new era, in which tribes enjoy a breadth of criminal

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186 *See supra* Section I.B.

187 *See supra* notes 41–42 and accompanying text.

188 *See supra* notes 50–52 and accompanying text.

189 *See* Laird, *supra* note 12 ("[M]any Indian legal observers see Section 904 [of VAWA 2013] as a major step toward safer reservations, and, perhaps, full tribal criminal jurisdiction.").

jurisdiction unprecedented since, perhaps, before the founding of the United States.