ANSWERING CONSTITUTIONAL CHALLENGES TO THE TRIBAL VAWA PROVISIONS

*Kaitlyn Schaeffer**

* J.D., New York University School of Law. Kaitlyn Schaeffer currently works at Arnold & Porter, LLP in New York City. I would like to thank Sally Katzen for her insightful feedback during the drafting process of this Note, as well as the incredible editorial team at the *N.Y.U. Journal of Legislation & Public Policy*. Many thanks to the staff at the Senate Committee on Indian Affairs, without whom I would not have begun this research.

INTRODUCTION

In its infamous *Oliphant* decision, the Supreme Court declared that Indian tribes do not have the power to prosecute non-Indians for crimes they commit against Native Americans in Indian Country.[1] This holding was shocking and far-reaching: prior to this case, tribes had regularly tried non-Indians for committing crimes within their sovereign territory.[2] In the decades that followed, public health and public safety crises erupted in tribal communities.[3] Seeking to regain

1. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 205 (1978).

2. *See, e.g.*, Matthew L.M. Fletcher, *Sawnawgezewog: "The Indian Problem" and the Lost Art of Survival*, 28 AM. INDIAN L. REV. 35, 54 (2003) ("[*Oliphant*] was a huge shock to the Suquamish Tribe and every other tribe.").

3. *See S. 2785, a Bill to Protect Native Children and Promote Public Safety in Indian Country; S. 2916, a Bill to Provide That the Pueblo of Santa Clara May Lease for 99 Years Certain Restricted Land and for Other Purposes; and S. 2920, the Tribal Law and Order Reauthorization Act of 2016: Hearing Before the S. Comm. on Indian Affairs*, 114th Cong. 26 (2016) (statement of Tracy Toulou, Director, Office of Tribal Justice, U.S. Dep't of Justice). The Indian Law and Order Commission, a bipartisan group charged with investigating criminal justice issues in Indian Country, called the waste of money and lives "shocking." INDIAN LAW & ORDER COMM'N, A ROADMAP

control over their territory, and restore law and order to tribal nations, tribes and tribal advocates pushed for a repudiation of the *Oliphant* decision. They achieved partial success on March 7, 2013, when President Obama signed the Violence Against Women Reauthorization Act of 2013 into law ("VAWA 2013").[4] VAWA 2013 included provisions that recognized and reaffirmed tribes' inherent power to prosecute non-Indians for crimes of domestic violence committed against Native Americans in Indian Country.

The tribal VAWA provisions were hard fought. Prior to the 2016 election, tribes and tribal advocates were hopeful that the upcoming VAWA reauthorization, which was supposed to occur in 2018,[5] would constitute an opportunity to expand on the reaffirmation of tribal inherent power.[6] The results of the 2016 general election, however, had many fearing that VAWA 2013 might be overturned or become a dead letter. Some of the loudest voices in opposition to VAWA 2013's tribal provisions had obtained positions of power in the federal government, including Jeff Sessions, as Attorney General,[7] and Senator Chuck Grassley, as Chairman of the Senate Judiciary Committee.[8] As a political outsider, President Trump had no track record of opposing VAWA 2013 or other Native rights issues; however, his public statements prior to becoming President suggested that he was not a propo-

---

FOR MAKING NATIVE AMERICA SAFER, at viii (2013), https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf.

4. The Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, 127 Stat. 120 (2013). The tribal provisions are codified at 25 U.S.C. § 1304 (Supp. I 2013).

5. VAWA was supposed to be reauthorized in 2018, but the government shutdown resulted in delay. The House of Representatives passed the Violence Against Women Reauthorization Act of 2019 on April 4, 2019. At the time of this writing, the Senate has not yet released its version of the reauthorization. *See H.R. 1585—Violence Against Women Reauthorization Act of 2019*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/1585/actions (last visited Sept. 26, 2019).

6. *See, e.g.*, Frances Madeson, *The VAWA Play: Changing the Law, One Show at a Time*, COUNTERPUNCH (Apr. 15, 2016), https://www.counterpunch.org/2016/04/15/the-vawa-play-changing-the-law-one-show-at-a-time/ (discussing the difficulties of a piecemeal solution to the criminal law enforcement gap created by *Oliphant*).

7. *See* Christine Powell, *Sessions Explains Domestic Violence No-Vote in Hearing*, LAW360 (Jan. 10, 2017, 7:00 PM), https://www.law360.com/articles/879328/sessions-explains-domestic-violence-no-vote-in-hearing (reporting that during his Senate Judiciary Committee confirmation hearing, Mr. Sessions replied that his concern about allowing tribes to prosecute non-Indians in tribal courts was one of the main reasons he voted against VAWA in 2013).

8. Senator Grassley contended that "Non-Indian[s] [would not] get a fair trial." Jennifer Bendery, *Chuck Grassley on VAWA: Tribal Provision Means 'The Non-Indian Doesn't Get a Fair Trial,'* HUFFPOST (Feb. 21, 2013), https://www.huffingtonpost.com/2013/02/21/chuck-grassley-vawa_n_2735080.html.

nent of Native rights,[9] and his actions since assuming office have generally confirmed this position.[10] Additionally, Republicans retained control of the Senate in the 2018 midterm elections. Tribal advocates are now on the defensive, readying themselves to aggressively defend the status quo. A lot hangs in the balance—VAWA 2013's tribal provisions were viewed by many as a test case for a full-*Oliphant* fix: if VAWA 2013 is lawful, then a federal statute completely repudiating *Oliphant* should be too.

During VAWA's reauthorization, tribal advocates expect to encounter attacks against the constitutionality of VAWA's tribal provisions, and rightly so: the legislation has sparked considerable constitutional controversy. In multiple opinions, Justice Kennedy questioned whether legislation like VAWA 2013 violates the constitutional principle of the "original and continuing consent of the governed."[11] In the debate surrounding VAWA 2013's tribal provisions, many Republicans contended that Congress lacks the constitutional power to pass legislation granting tribes criminal jurisdiction over non-Indians.[12] Others questioned whether, in passing such legislation, Congress might be violating substantive provisions of the Constitu-

9. Nidhi Subbaraman, *Trump's Decades of Insults Against Native Americans Send Tribal Leaders Toward Clinton*, BUZZFEED NEWS (Sept. 29, 2016, 5:19 PM), https://www.buzzfeednews.com/article/nidhisubbaraman/native-tribes-and-trump.

10. OFFICE OF VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUSTICE, 2017 TRIBAL CONSULTATION REPORT 29 (2017) (noting that while the Trump administration has stated that it is "committed to tribal nations," its "actions in the past year suggest otherwise"); Dan Diamond, *Trump Challenges Native Americans' Historical Standing*, POLITICO (Apr. 22, 2018), https://www.politico.com/story/2018/04/22/trump-native-americans-historical-standing-492794; Tom DiChristopher, *Trump Ignores Question About Standing Rock Sioux After Signing Dakota Access Order*, CNBC (Jan. 24, 2017), https://www.cnbc.com/2017/01/24/trump-ignores-standing-rock-sioux-question-after-dakota-access-order.html; Roey Hadar, *Native American Leaders Ask Trump to Apologize for 'Shameful' Wounded Knee Remarks*, ABC NEWS (Jan. 14, 2019), https://abcnews.go.com/Politics/native-american-leaders-trump-apologize-shameful-wounded-knee/story?id=60374772; Tom Perez, *Trump Is Breaking the Federal Government's Promises to Native Americans*, L.A. TIMES (Aug. 7, 2017) https://www.latimes.com/opinion/op-ed/la-oe-perez-native-american-indians-trump-20170807-story.html; Tom Udall, *High Court Nominee Kavanaugh Is No Friend to Indian Country*, SANTA FE NEW MEXICAN (Sept. 15, 2018), http://www.santafenewmexican.com/opinion/commentary/high-court-nominee-kavanaugh-is-no-friend-to-indian-country/article_7cb2581e-e8b6-5b5c-9d55-4410da586651.html; Kate Wheeling, *What Native Americans Stand to Lose if Trump Opens Up Public Lands for Business*, PAC. STANDARD (Dec. 7, 2017), https://psmag.com/environment/what-native-americans-stand-to-lose-if-trump-opens-up-public-lands-for-business.

11. *See* Duro v. Reina, 495 U.S. 676, 693 (1990), *superseded by statute*, 25 U.S.C. § 1301(2), *as recognized in* United States v. Lara, 541 U.S. 193, 197–98 (2004); United States v. Lara, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring).

12. H.R. REP. NO. 112-480, at 58 (2012).

tion. Non-Indian defendants tried in tribal courts are not afforded constitutional protections because the Constitution does not apply to tribal governments,[13] and because tribal judges are selected by tribes and not given life tenure or salary protections, VAWA 2013 runs afoul of Article II and Article III.[14]

This Note will show that these arguments are not compelling, and the better view is that VAWA 2013 and legislation like it are not unconstitutional. Contrary to Justice Kennedy's concerns, political participation in a sovereign has never been a prerequisite to that sovereign's ability to prosecute those who commit crimes within its sovereign territory;[15] additionally, the commission of a crime within a sovereign's borders constitutes implied consent to the criminal jurisdiction of that sovereign. Congress has the constitutional authority to pass legislation such as VAWA 2013 pursuant to its plenary power over Indian affairs, an unusually broad grant of power that enables Congress to regulate nearly every aspect of tribal life.[16] Congress's plenary power includes the ability to alter the scope of inherent tribal power, so legislation such as VAWA 2013 need not require tribes to conform to the Constitution's edicts when exercising that power.[17] However, even if VAWA 2013 is not a reaffirmation of inherent tribal power, and instead constitutes a delegation of federal authority, there are sound arguments that it is still constitutional.

13. S. REP. NO. 112-153, at 48 (2012) (minority views of Senators John Kyl, Orrin G. Hatch, Jeff Sessions, and Tom Coburn).

14. Paul J. Larkin, Jr. & Joseph Luppino-Esposito, *The Violence Against Women Act, Federal Criminal Jurisdiction, and Indian Tribal Courts*, 27 BYU J. PUB. L. 1, 17–18, 24–25 (2012).

15. Letter from Kevin Washburn, Dean & Professor of Law, Univ. of N.M. Sch. of Law, et al. to Sen. Patrick Leahy, Chairman, Senate Judiciary Comm., et al. 6 (Apr. 21, 2012), turtletalk.files.wordpress.com/2012/04/vawa-letter-from-law-professors-tribal-provisions.pdf. As stated by Justice Brennan in his dissenting opinion:

> [W]e have not required consent to tribal jurisdiction or participation in a tribal government as a prerequisite to the exercise of civil jurisdiction by a tribe, and the Court does not explain why such a prerequisite is uniquely salient in the criminal context. Nor have we ever held that participation in the political process is a prerequisite to the exercise of criminal jurisdiction by a sovereign.

Duro, 495 U.S. at 707 (Brennan, J., dissenting) (internal citations omitted).

16. *See, e.g.*, *Lara*, 541 U.S. at 200.

17. *Id*. at 205.

I.
BACKGROUND

A. *The Relationship Between Tribes and the Federal Government*

Tribes are sovereign nations that predate the existence of the United States. Over the course of history, tribes have retained their sovereignty, albeit in diminished form. Today, tribal sovereignty is unique but ill-defined. Conceptually, federally recognized tribes[18] fall somewhere between foreign nations and domestic states. Tribes retain many aspects of sovereignty, including the power to tax and determine their form of government.[19] Tribes, like foreign nations, communicate directly with the federal government on a sovereign-to-sovereign basis.[20] Like states, however, tribes are subordinate to the federal government.[21] In one of the foundational cases in federal Indian law, the Court described the relationship between tribes and the United States as one "of a ward to its guardian," and labeled tribes "domestic dependent nations."[22] As such, tribes have been impliedly stripped of some of their sovereign powers, such as the power to engage in foreign relations.[23]

The scope of tribal sovereignty can be altered by federal action; states, in contrast, have little power to regulate tribes.[24] The Court has

---

18. This Note does not discuss tribes that are only state recognized.

19. Jessica Greer Griffith, Note, *Too Many Gaps, Too Many Fallen Victims: Protecting American Indian Women from Violence on Tribal Lands*, 36 U. PA. J. INT'L L. 785, 794 (2015).

20. Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 670 (2013).

21. *See* Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 851–83 (1985) (stating that the federal government exercises plenary power over Indian affairs, and providing examples of the federal government's divestiture of inherent tribal powers); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("As the Court [has] recognized, [ ] Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."); United States v. Kagama, 118 U.S. 375, 378–81, 383–84 (1886). *See generally* Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984); Price, *supra* note 20. One commentator has suggested that the only reason the federal government exercises authority over tribes is its military might. STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 56 (4th ed. 2012) ("The United States controls Indian tribes because it has the military power to do so. . . . [T]he fact is that if the United States were not military more powerful, Indian tribes today would exercise the same sovereignty they did prior to the arrival of the Europeans.").

22. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

23. Price, *supra* note 20.

24. *See Kagama*, 118 U.S. at 384 (finding that the power to regulate tribes is a power of Congress); Worcester v. Georgia, 31 U.S. 515, 557 (1832) ("Indian nations [are] distinct political communities, having territorial boundaries, within which their

said that tribes retain all the sovereign powers that the federal government has not abrogated.[25] As the federal government's policy toward tribes has varied over time, the scope of tribal sovereignty has fluctuated accordingly.[26] During the earlier years of our nation's history, the federal government occasionally sought to promote tribal sovereignty, but for the most part it has pursued policies aimed at assimilation, extinguishing tribal culture, and expelling or otherwise seeking to rid the United States of Native peoples altogether.[27] In the 1970s, President Richard Nixon ushered in an era of tribal self-determination. By signing legislation such as the Indian Self-Determination and Educa-

---

authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States."); *id.* at 559 ("Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial. . . ."); *id.* at 561 ("Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties [and Congressional acts].").

25. *See* United States v. Lara, 541 U.S. 193 (2004); Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251 (1992); Okla. Tax Comm'n v. Citizen Band Potawtomi Indian Tribe, 498 U.S. 505 (1991); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); *Santa Clara Pueblo*, 436 U.S. 49; United States v. Wheeler, 435 U.S. 313 (1978); *Worcester*, 31 U.S. at 515; *see also* Price, *supra* note 20, at 671 ("Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.").

26. These shifting policies regarding tribal self-determination are reflected in Court opinions. *See, e.g.*, Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014) (deferring to Congress's judgment as to the scope of tribal sovereign immunity and noting that immunity is a "necessary corollary to Indian sovereignty and self-governance"); Morton v. Mancari, 417 U.S. 535, 540–43 (1974) (determining that the federal government's policy toward tribes is one of self-determination and self-governance and relying on this policy as evidence that in enacting the Equal Employment Opportunities Act, Congress did not impliedly repeal Bureau of Indian Affairs employment preferences for Native Americans). *But see* Alex Tallchief Skibine, *Teaching Indian Law in an Anti-Tribal Era*, 82 N.D. L. REV. 777, 780 (2006) (cataloging cases in which the Court rolled back tribal sovereignty); Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and* United States v. Lara*: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 MICH. J.L. REFORM 651, 674 n.103 (2009) (citing cases that demonstrate the Court's "progressive divestment of tribal sovereignty").

27. PEVAR, *supra* note 21, at 58 ("Congress . . . at various times . . . has assisted tribes while at others it has attempted to destroy them."); Price, *supra* note 20, at 669; *see also* Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1615 (2016) ("Indian country suffers from gross neglect, characterized by a long history of federal law that attempted to make Indians literally and conceptually invisible.").

tion Assistance Act,[28] President Nixon demonstrated the Executive branch's commitment to promoting tribal sovereignty.[29] Congress and the Executive branch continue to promote tribal sovereignty and self-determination,[30] but their efforts have thus far failed to overcome a history of neglect, one that has resulted in public safety and public health crises in tribal communities across Indian Country.[31]

B. Sources of Federal Regulatory Power

The power of the federal government to regulate tribes derives from various sources. The Constitution empowers the federal government to regulate commerce with tribes,[32] and recognizes the ability of the federal government to enter into treaties with Indian nations.[33] These treaties also provide a basis for regulating tribes. Additionally, the Court's characterization of tribes as wards of the federal govern-

28. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 450–450n, 455–458e (2012)).

29. *See also* Indian Tribal Justice Technical Legal Assistance Act, 25 U.S.C. § 3651 (2012) (reaffirming tribal sovereignty and authorizing funds to promote tribal criminal justice systems); Indian Child Welfare Act, *id.* §§ 1901–1963 (granting exclusive jurisdiction over custody proceedings involving Native children residing on reservation land to tribal governments in order to preserve Native culture); Education Amendments of 1972, 20 U.S.C. §§ 887c(a), (d), 1119a (Supp. II 1972) (requiring that federal teacher training programs for Native students give preference to Native teachers); Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000) (establishing principles of recognition and promotion of tribal sovereignty to guide federal policy that implicates Native tribes); *Morton*, 417 U.S. at 538 n.3 (quoting Bureau of Indian Affairs, Personnel Management Letter No. 72-12 (1972)) (stating that the Bureau of Indian Affairs would preference Natives in hiring and promotion within the Bureau to promote greater tribal self-governance); *cf.* General Allotment Act of 1887, ch. 119, 24 Stat. 388, *repealed by* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, § 106(a), 114 Stat. 1991, 2007 (providing that Native Americans could obtain U.S. citizenship by agreeing to the division of their land into allotments and leaving their reservations or cutting ties to their tribes); Act of May 28, 1830, ch. 148, 4 Stat. 411; Rennard Strickland, *The Genocidal Premise in Native American Law and Policy: Exorcising Aboriginal Ghosts*, 1 J. GENDER, RACE & JUST. 325, 328 (1998) (discussing the federal policy that resulted in the sterilization of Native women from the 1940s through the 1980s).

30. *See, e.g.*, Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (codified as amended in scattered sections of 25 and 42 U.S.C.). (granting tribal governments greater power to prosecute and sentence criminal defendants); Exec. Order No. 13,647, 78 Fed. Reg. 39,539 (July 1, 2013) (establishing the White House Counsel on Native American Affairs).

31. *See Hearing Before the S. Comm. on Indian Affairs*, *supra* note 3. The Indian Law and Order Commission, a bipartisan group charged with investigating criminal justice issues in Indian Country, called the waste of money and lives "shocking." INDIAN LAW & ORDER COMM'N, *supra* note 3, at viii; Riley, *supra* note 27, at 1582.

32. U.S. CONST. art. I, § 8, cl. 3.

33. *Id.* art. II, § 2, cl. 2.

ment created a trust responsibility on behalf of the United States that provides a broad basis for regulating tribes.[34] The Court has concluded that the federal trust responsibility provides Congress with both the power and the duty to regulate Indian affairs.[35]

Very little restricts Congress's ability to regulate tribes. While Congress is generally limited in enacting legislation by the enumerated categories of Article I, it faces no such constraint with respect to Indian affairs.[36] Over time, the Court has developed a plenary power doctrine, which grants Congress broad authority to regulate Indian tribes.[37] The source and scope of Congress's plenary power to regulate Indian affairs is complex, but is mostly rooted in the government's federal trust responsibility[38] and the constitutional provisions that pertain to Native Americans.[39] This unusually broad grant of power is limited by the fiduciary duties that accompany the trust responsibility, and the individual rights enumerated in the Constitution.[40]

The judiciary has limited its own role in policing the boundaries of Congress's plenary power to regulate Indian affairs. In *United States v. Kagama*, the Court delegated the responsibility of determining the scope of this power to Congress,[41] and in *Lone Wolf v. Hitch-*

34. Philip J. Prygoski, *From Marshall to Marshall: The Supreme Court's Changing Stance on Tribal Sovereignty*, 12 COMPLEAT LAW. 14, 15–16 (1995).

35. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); United States v. Kagama, 118 U.S. 375, 383–84 (1886).

36. *See* Dorr v. United States, 195 U.S. 138, 142 (1904); *Kagama*, 118 U.S. at 378, 383–84.

37. United States v. Lara, 541 U.S. 193 (2004); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 169 (1982); United States v. Wheeler, 435 U.S. 313, 319 (1978); Morton v. Mancari, 417 U.S. 535, 555 (1974) (as long as legislation can be "tied rationally to the fulfillment of Congress's unique obligation toward the Indians" that legislation is a valid exercise of its power); United States v. Sandoval, 231 U.S. 28 (1913); *Dorr*, 195 U.S. at 142; *Lone Wolf*, 187 U.S. at 565; *see also* Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 787–93 (2014) (discussing the breadth of Congress's plenary power over Indian affairs); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 33–36 (1996) (describing the evolution of the plenary power doctrine).

38. *Kagama*, 118 U.S. at 383–84.

39. U.S. CONST. art. I, § 8, cl. 3; *id.* art. II, § 2, cl. 2; *see Lara*, 541 U.S. at 200 ("[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.' This Court has traditionally identified the Indian Commerce Clause and the Treaty Clause as sources of that power.") (internal citations omitted). *See generally* Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984).

40. Price, *supra* note 20, at 671. For example, the Court in *United States v. Sioux Nation for Indians* found that a statute which transferred ownership of the Black Hills from the Sioux to the federal government in the absence of just compensation violated the Fifth Amendment's Takings Clause. 448 U.S. 371 (1980).

41. *Kagama*, 118 U.S. at 383–84.

cock the Court declared that congressional action in this domain was "conclusive upon the courts."[42] In subsequent cases the Court has walked back this position, holding in *Delaware Tribal Business Committee v. Weeks* that the "power of Congress over Indian affairs may be of a plenary nature, but it is not absolute."[43] Empirically, however, the Court has done little to police congressional action in this area. One commentator noted that judicial review in this area is "unusually lax."[44]

C. Criminal Jurisdiction in Indian Country

A government's ability to prosecute people who commit crimes within its sovereign territory is considered a bedrock principle of sovereignty.[45] However, because tribal governments are not bound by the edicts of the Constitution,[46] and are thus not obligated to provide criminal defendants with the rights outlined therein, both the courts and Congress have taken steps to disaggregate tribal criminal jurisdiction from tribes' territorial sovereignty. The resultant federal statutes and federal case law create a veritable maze of criminal jurisdiction.[47]

At present, the federal government, state governments, and tribal governments share jurisdiction over crimes that occur in Indian Country. Which sovereign has authority over a particular case depends on a variety of factors, including the race of any victim, the race of the alleged perpetrator, where the crime occurred, the severity of the

---

42. *Lone Wolf*, 187 U.S. at 567–68.

43. 430 U.S. 73, 84 (1977) (citing United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946)). *But see* United States v. Jicarilla Apache Tribe, 564 U.S. 162, 175 (2011) (citing *Lone Wolf*, 187 U.S. at 565) (stating that Congress's power over tribes is "not subject to [control] by the judiciary department of the government").

44. Price, *supra* note 20, at 671.

45. Riley, *supra* note 27, at 1576 ("Criminal jurisdiction is of such primary concern to a sovereign that, within the American system, for example, the perpetration of a crime is considered not only to be committed against the victim, but against the sovereign itself. Thus, the state assumes the responsibility of seeking justice as an exercise of its sovereignty."); *see also* PEVAR, *supra* note 21, at 127 ("Normally, a government can exercise its full criminal jurisdiction everywhere within its borders.").

46. 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* Talton v. Mayes, 163 U.S. 376, 376 (1896) (holding that the Fifth Amendment does not constrain tribal government activity).

47. *See generally* Robert Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976). For a helpful table, see Samuel E. Ennis, Note, *Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 UCLA L. REV. 553, 559 (2009).

crime, and sometimes other considerations.[48] Generally, the federal government is responsible for prosecuting crimes that involve Native Americans or that occur in Indian Country.[49] However, tribal governments have concurrent jurisdiction over crimes that involve a Native victim and a Native perpetrator if that crime occurs within their borders.[50] For the most part, state governments have no authority in Indian Country, unless both the victim and the perpetrator are non-Indian.[51] An exception exists for Public Law 280 ("PL-280") states. PL-280 required six state governments to assume both civil and criminal jurisdiction in Indian Country and created an option for other states to assume this authority.[52] Regardless of PL-280 status, many tribes have jurisdiction-sharing agreements with local law enforcement.[53]

One of the most consequential—and most controversial—Supreme Court decisions involving criminal jurisdiction in Indian Country occurred in 1978. In *Oliphant v. Suquamish Indian Tribe*, the Court declared that tribes lack inherent authority to prosecute non-Indians who commit crimes against Native Americans in Indian Country.[54] The issue in *Oliphant* was whether the Suquamish tribe had the authority to prosecute a non-Indian who assaulted a tribal police officer on its reservation. The Court began its analysis by looking back in time to see whether tribes historically had the power to exercise criminal jurisdiction over non-Indians, and concluded they did not.[55]

48. INDIAN LAW & ORDER COMM'N, *supra* note 3, at viii; PEVAR, *supra* note 21, at 127–30.

49. *See* 18 U.S.C. § 1152 (2012); *id.* § 1153. Unless treaty provisions say otherwise, federal criminal law applies generally in Indian Country. *See, e.g.*, Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 115–16 (1960).

50. *See* Unites States v. Lara, 541 U.S. 193, 210 (2004) (finding that tribes have the authority to prosecute nonmember Indians who commit crimes within their territory); United States v. Wheeler, 435 U.S. 313, 322, 328, 332 (1978) (finding that tribes have at least concurrent jurisdiction over crimes committed by their members within their territories).

51. *See* Worcester v. Georgia, 31 U.S. 515, 561–62 (1832) (finding that state criminal laws are generally inapplicable in Indian Country "but with the assent of the [Indians] themselves, or in conformity with treaties and with the acts of congress"); *see also* United States v. McBratney, 104 U.S. 621, 624 (1882) (holding that states have exclusive jurisdiction over crimes committed by non-Indians against non-Indians in Indian Country).

52. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified in scattered sections of 18, 25, and 28 U.S.C.). These states are Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin.

53. Lorelei Laird, *Reclaiming Sovereignty: Indian Tribes Are Retaking Jurisdiction over Domestic Violence on Their Own Land*, A.B.A. J., Apr. 2015, at 47, 48.

54. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).

55. *Id.* at 191. The Court's historical analysis has been heavily criticized. *See, e.g.*, Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34

Then the Court examined the political branches' assumptions regarding tribes' authority to prosecute non-Indians and determined that both branches implicitly believed that tribes lacked this authority.[56] Ultimately, however, the holding rested on the status of tribes as domestic dependent nations. Disagreeing with the Ninth Circuit's conclusion to the contrary,[57] the Court determined that tribal criminal prosecutions of non-Indians conflict with the overriding sovereign interests of the United States, reasoning that the absence of constitutional protections in tribal prosecutions creates a risk of unwarranted intrusions into the personal liberty of American citizens that the United States has a sovereign interest in protecting.[58]

In the wake of this decision, two competing interpretations of *Oliphant* emerged: on one account, the *Oliphant* Court held that tribes inherently lack power to prosecute non-Indians; on the other, the Court left open the possibility that tribes could be given the authority to prosecute non-Indians by Congress. Proponents of the former read *Oliphant* as a conclusive decision about the scope of tribes' inherent sovereignty.[59] The latter interpretation, also called the "implicit divestiture doctrine," reads *Oliphant* as saying that tribes are implicitly divested of any authority that the Court determines is in conflict with tribes' status as domestic dependent nations, but Congress can override such a decision by recognizing a tribe's inherent authority to take some action.[60] Thus, the implicit divestiture doctrine puts the ball in

---

ARIZ. ST. L.J. 113, 215 (2002) (describing it as "revisionist"); Matthew L.M. Fletcher, *Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty*, 3 ADVANCE 31, 39 (2009) ("Justice Rehnquist's history, which relied upon the legislative history of federal legislation that was never enacted, Interior Solicitor opinions later revoked, and one solitary federal district court case, is too sparse to justify the Court's holding.").

56. *Oliphant*, 435 U.S. at 203.

57. Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976), *rev'd sub nom.* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (finding that tribes, "conquered and dependent" nations, retain those powers that are not inconsistent with their domestic dependent status, including the power to prosecute those who commit crimes on their reservation lands); *see also Oliphant*, 435 U.S. at 212 (Marshall, J., dissenting).

58. *Oliphant*, 435 U.S. at 210 ("[T]he United States has manifested a[ ] . . . great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty.").

59. *See, e.g.*, Larkin & Luppino-Esposito, *supra* note 14, at 17 ("The teaching of *Oliphant* is that tribal courts are not courts of general criminal jurisdiction over non-Indians and are limited to the jurisdiction expressly conferred on them by Congress.").

60. *See* Fletcher, *supra* note 55, at 35; Alex Tallchief Skibine, *Constitutionalism, Federal Common Law, and the Inherent Powers of Indian Tribes*, 39 AM. INDIAN L. REV. 77, 79 (2014).

Congress's court to decide whether some power is within the scope of a tribe's inherent sovereign authority.[61]

Prior to *Oliphant*, *Cohen's Handbook of Federal Indian Law*—the authoritative federal Indian law treatise—stated that there were only two ways in which a tribe could be divested of its sovereign power: (1) if the tribe voluntarily relinquished some aspect of its sovereignty; or (2) if Congress affirmatively divested the tribe of some sovereign power.[62] This fact might militate against the idea that the Court in *Oliphant* was introducing a new way in which tribes could be stripped of their inherent powers, suggesting that *Oliphant* is properly read as drawing a conclusive limit on the scope of a tribe's inherent power. However, subsequent Court decisions demonstrate that *Oliphant* was in fact introducing the implicit divestiture doctrine, and that Congress has the authority to alter the scope of tribes' inherent power, even where doing so includes overriding previous Court decisions.[63]

Duro v. Reina, the "*Duro*-fix" legislation, and *United States v. Lara* demonstrate how the implicit divestiture doctrine works. In *Duro v. Reina*, the Court held that tribes lack the inherent power to prosecute non-member Native Americans who commit crimes on their reservations.[64] The *Duro* Court found that because these non-member Native Americans are U.S. citizens, *Oliphant*'s rationale was applicable: the United States has a sovereign interest in protecting U.S. citi-

61. *Oliphant*, 435 U.S. at 212 ("[Congress can] decid[e] whether Indian tribes should finally be authorized to try non-Indians."); *see also* Ryan D. Dreveskracht, *House Republicans Add Insult to Native Women's Injury*, 3 U. MIAMI RACE & SOC. JUST. L. REV. 1, 23 (2013) ("In *Oliphant*, the Court seemed to signal that inherent criminal jurisdiction did include the power to prosecute non-Indians, and called on Congress to reauthorize the assertion of tribal sovereignty in this area . . . . In *Lara*, the Court appeared to indicate the same.").

62. FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1942).

63. In the 2005 edition of *Cohen's Handbook*, the first edition published after the Court's decision in *Lara*, the executive committee of the board of authors and editors included the implicit divestiture doctrine as a way in which tribes can be divested of inherent sovereign power. FELIX COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 224–26 (Nell Jessup Newton et al. eds., 2005). Many commentators agree that the proper reading of *Oliphant* is that the Court introduced the implicit divestiture doctrine as a novel way in which tribes could be divested of their inherent power. *See* PEVAR, *supra* note 21 at 130; Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 157–59 (2006); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 Yale L.J. 1, 34–36 (1999); Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391, 397 (2008); Tweedy, *supra* note 26, at 695; *cf.* John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes from the* Cohen's Handbook *Cutting-Room Floor*, 38 CONN. L. REV. 731 (2006).

64. Duro v. Reina, 495 U.S. 676, 679, 677 (1990), *superseded by statute*, 25 U.S.C. § 1301(2) (2012), *as recognized in* United States v. Lara, 541 U.S. 193, 196 (2004).

zens from criminal prosecutions by extraconstitutional sovereigns and the concomitant intrusions into personal liberty that accompany these prosecutions. Thus, the Court held that tribes are implicitly divested of the power to prosecute non-member Native Americans on the basis of their status as domestic dependent nations.[65] Additionally, the Court emphasized the relationship between a sovereign's authority to prosecute and political accountability.[66] Justice Kennedy, writing for the majority, reasoned that tribes can exercise criminal jurisdiction over their own members because those members have consented to membership in the tribe.[67] Non-member U.S. citizens, in contrast, have not consented to rule by an extraconstitutional sovereign, so there is no basis on which to allow tribes to prosecute them.[68]

Congress immediately overturned *Duro*.[69] The "*Duro*-fix" legislation stated that Congress, in enacting this law, recognized and reaffirmed "the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians."[70] Congress's ability to legislate the scope of inherent tribal power was tested in *Lara*. In that case, the Spirit Lake tribal court prosecuted Billy Jo Lara, a member of the Turtle Mountain Tribe, for assaulting a Spirit Lake officer on the Spirit Lake reservation, and the federal government sought to prosecute him for the same offense under a statute prohibiting assaults against federal officers.[71] Lara appealed the federal prosecution, arguing that the Double Jeopardy Clause barred the federal government's prosecution, that Congress lacked the constitutional authority to dictate the scope of inherent tribal sovereign power, and that the Due Process Clause prohibits tribal governments from prosecuting non-members.[72] The Court upheld the *Duro*-fix legislation, and found that the tribe was a "separate sovereign" for purposes of double jeopardy, even though the tribe's ability to prosecute Lara was only possible because of congressional action.[73]

To justify its holding in *Lara*, the Court stated that in *Duro* and *Oliphant* it was merely abiding by the legislative and executive

65. *Id.* at 699.
66. *Id.* at 693.
67. *Id.* at 694 ("Retained criminal jurisdiction over members is accepted by [the Court's] precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government . . . .").
68. *Id.* at 693.
69. Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1856, 1892 (1990) (codified as amended at 25 U.S.C. § 1301(2) (2012)).
70. *Id*.
71. United States v. Lara, 541 U.S. 193, 196–97 (2004).
72. *Id.* at 197–98.
73. *Id*. at 210.

branches' explicit demarcation of the scope of tribal sovereignty.[74] Congress, pursuant to its plenary power to legislate over Indian affairs, has the constitutional power to "relax[ ] restrictions" imposed on tribal sovereignty.[75] The *Duro*-fix is such a relaxing of restrictions. By upholding the *Duro*-fix legislation in this way, the Court acknowledged that Congress's plenary power includes the ability to recognize and reaffirm certain powers as part of tribes' inherent sovereignty.[76] The tribe's ability to prosecute Lara as part of its inherent sovereign powers was the key to defeating the double jeopardy claim.

D. The Violence Against Women Reauthorization Act of 2013's Tribal Provisions

It is widely believed that the *Oliphant* decision caused public health and public safety crises in Indian Country.[77] Prior to *Oliphant*, tribal governments possessed authority to prosecute non-Indians who committed crimes within their sovereign borders;[78] the decision gave the federal government nearly exclusive power to prosecute non-Indians who commit crimes on reservations. However, the federal government has failed to be an effective law enforcement presence in Indian Country. The rates at which federal prosecutors decline to prosecute

74. *Id.* at 205–07.

75. *Id.* at 196. "Congress does possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction." *Id*. at 200.

76. The Court stated that it was reserving the due process question. *Id*. at 209. However, because the Court held that Congress reaffirmed the tribe's inherent power to prosecute non-member Native Americans, and because the Constitution does not apply to tribes, it seems to follow that such tribal prosecutions of non-member Native Americans cannot violate constitutional due process. For greater discussion, see Will Trachman, Note, *Tribal Criminal Jurisdiction After* U.S. v. Lara*: Answering Constitutional Challenges to the* Duro *Fix*, 93 CAL. L. REV. 847, 876–90 (2005).

77. *Hearing Before the S. Comm. on Indian Affairs*, *supra* note 3, at 13 (prepared statement of Tracy Toulou, Director, Office of Tribal Justice, U.S. Dep't of Justice); *see, e.g.*, INDIAN LAW & ORDER COMM'N, *supra* note 3, at 13 ("[N]onresponsive State and local entities often left Tribes on their own to face the current reservation public safety crises."); PEVAR, *supra* note 21, at 132 ("Another significant reason for the high crime rate in Indian country is the Supreme Court's decision in *Oliphant* . . . .").

78. *See* COHEN, *supra* note 63, at § 1.02[3]; EILEEN LUNA-FIREBAUGH, TRIBAL POLICING: ASSERTING SOVEREIGNTY, SEEKING JUSTICE 31 (2007); Gavin Clarkson & David DeKorte, *Unguarded Indians: The Complete Failure of the Post*-Oliphant *Guardian and the Dual-Edged Nature of Parens Patriae*, 2010 U. ILL. L. REV. 1119, 1139 (2010); G.D. Crawford, *Looking Again at Tribal Jurisdiction: Unwarranted Intrusions on Their Personal Liberty*, 76 MARQ. L. REV. 401, 420 (1993); Fletcher, *supra* note 55, at 35; Elizabeth Ann Kronk, *Promoting Tribal Self-Determination in a Post*-Oliphant *World: An Alternative Road Map*, 54 FED. LAW. 41, 41 (2007); Nell Jessup Newton, Commentary, *Permanent Legislation to Correct* Duro v. Reina, 17 AM. INDIAN L. REV. 109, 124 (1992).

cases are high, even for serious felonies such as rape and murder.[79] A number of factors contribute to these high declination rates.[80] Despite having expressly authorized the federal government to prosecute crime in Indian Country, Congress has subsequently failed to appropriate the funding necessary to assign investigators and prosecutors to handle the crimes that occur in tribal communities.[81] Because federal investigators and prosecutors often lack ties to tribal communities, are not accountable to them, and reportedly sometimes face internal backlash for spending too much time on Indian Country crimes, the motivation to pursue these crimes can be minimal.[82] Additionally, many structural barriers exist to prosecuting crimes in Indian Country, including burdensome statutory requirements,[83] cross-deputation is-

79. Riley, *supra* note 27, at 1584. In 2011, the government declined to prosecute fifty-two percent of the most serious felonies. Timothy Williams, *Higher Crime, Fewer Charges on Indian Land*, N.Y. TIMES (Feb. 20, 2012), http://www.nytimes.com/2012/02/21/us/on-indian-reservations-higher-crime-and-fewer-prosecutions.html ("Federal prosecutors in 2011 declined to file charges in 52 percent of cases involving the most serious crimes committed on Indian reservations, according to figures compiled by the Transactional Records Access Clearinghouse at Syracuse University, which uses the Freedom of Information Act to recover and examine federal data."). Between 2005 and 2009, the government declined to prosecute two-thirds of sexual abuse cases and nearly half of all sexual assaults. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-167R, DEPARTMENT OF JUSTICE DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS 9 (2010), https://www.gao.gov/assets/100/97229.pdf. Often crimes are not even investigated. Dreveskracht, *supra* note 61, at 14–15.

80. In 2006, the federal government filed only 606 criminal cases in Indian Country, which is about one case per tribe. N. Bruce Duthu, *Broken Justice in Indian Country*, N.Y. TIMES (Aug. 11, 2008), http://www.nytimes.com/2008/08/11/opinion/11duthu.html. The National Congress of American Indians (NCAI) estimates that federal prosecutors decline to prosecute about eighty-five percent of felony cases that are referred by tribal law enforcement. *Law Enforcement in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 46 (2007) (statement of Joe Garcia, President, National Congress of American Indians). Misdemeanors are virtually never pursued. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 79, at 9.

81. Letter from James S. Richardson, Sr., President, Fed. Bar Ass'n, to Senate Indian Affairs Comm. 2 (July 2, 2008), http://www.fedbar.org/GR_indian-affairs_070208.pdf (noting that federal resources are "stretched too thin to provide the level of support needed by tribal communities to adequately confront this problem"); *see also* PEVAR, *supra* note 21, at 131.

82. Federal authorities lack ties to tribal communities and are not accountable to them. Riley, *supra* note 27, at 1584. Additionally, prosecutors reportedly sometimes face internal backlash for spending too much time on Indian Country crimes. *Id*. at 1587 (citing Matthew L.M. Fletcher, *Sovereign Comity: Factors Recognizing Tribal Court Criminal Convictions in State and Federal Courts,* 45 CT. REV. 12, 19 (2009)) ("Testimony around [the Tribal Law and Order Act] even revealed that federal prosecutors have been 'punished' internally for focusing too much on Indian country crimes.").

83. Federal prosecutors must prove that the crime occurred in Indian Country, the race of the defendant, and the race of the victim. Fletcher, *supra* note 55, at 36.

sues,[84] geographic constraints,[85] and cultural barriers.[86] Moreover, tribal community members—for a variety of reasons—often lack faith in outside law enforcement agencies and are therefore reluctant to trust and cooperate with these agencies, which can make it difficult for even the most dedicated federal agents to do their jobs.[87] Thus, *Oliphant* in effect created a gap in law enforcement for non-Indians, a gap that is significant—of the 4.6 million people who live in Indian Country, 3.5 million are non-Indian.[88]

Tribes' lack of prosecutorial power is compounded by congressionally imposed obstacles to law and order on reservations. For example, prior to the Tribal Law and Order Act of 2010 ("TLOA"), tribes were unable to impose sentences on any offender for greater

84. Because it often takes days for federal authorities to respond to calls, evidence is best gathered by tribal authorities who can respond in a timely manner. 160 CONG. REC. 26, S940–43 (Feb. 12, 2014) (statement of Sen. Leahy) (noting that federal authorities "can take hours or days . . . to respond to allegations, if they respond at all"). In the absence of agreements between law enforcement agencies to cross-deputize tribal authorities, however, the evidence gathered by tribal authorities cannot always be used in federal court. Many cases are dismissed for lack of evidence. *See Examining Federal Declinations to Prosecute Crimes in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 37–39 (2008) (statement of Thomas B. Heffelfinger, former United States Attorney for the District of Minnesota).

85. Generally, U.S. Attorney's Offices ("USAOs") and federal courthouses are located far from tribal land. Fletcher, *supra* note 55, at 36. This makes it difficult for prosecutors and investigators to reach Indian Country, and for witnesses to reach USAO offices and federal courthouses. *Id*. For example, the nearest federal district courthouse to the Fort Peck reservation in Montana is over 400 miles away. Driving Directions from Fort Peck to U.S. District Court in Helena, MT, GOOGLE MAPS, https://www.google.com/maps (follow "Directions" hyperlink; then search starting point field for "Fort Peck Indian Reservation" and search destination field for "U.S. District Court") (last visited Mar. 27, 2019).

86. Tribal officers, who come from the communities they serve, often have better rapport with tribal members and are better at building trust with victims of violence. Federal investigators and prosecutors often lack these characteristics. *Hearing Before the S. Comm. on Indian Affairs*, *supra* note 3, at 21 (statement of Dana Buckles, Councilman, Fort Peck and Assiniboine & Sioux Tribes).

87. *Concurrent Jurisdiction Is Not Working*, INDIAN COUNTRY TODAY (Sept. 17, 2010), http://tloa.ncai.org/news.cfm?view=display&aid=21.

88. U.S. CENSUS, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, at 13–14 (2012), https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf. In a 1999 report, the Department of Justice found that seventy percent of violent crime committed against Native Americans on reservation land is committed by non-Indians. U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME 6 (1999), https://www.bjs.gov/content/pub/pdf/aic.pdf. The gaps in law enforcement in Indian Country have been poignantly described as "a total vacuum of criminal jurisdiction." Carole Goldberg, *State Jurisdiction Overlooked Problem in Criminal Justice Debate*, INDIAN COUNTRY TODAY (July 13, 2007), http://www.tribal-institute.org/lists/overlooked_problem.htm.

than one year, regardless of the seriousness of the crime.[89] Reservations became hideouts for non-Indians seeking refuge from state police.[90] Non-Indian offenders on reservation land knew they could commit crimes with virtual impunity. Native people stopped reporting crimes committed by non-Indians to the police because they knew tribal officers could not do much about it,[91] and Native communities generally lost faith in law enforcement.[92] Public safety issues led to public health issues, with members of tribal communities suffering from physical and mental health problems at disproportionate rates.[93] Public safety issues also had negative impacts on tribal economies, many of which are still struggling to develop.[94]

Women have borne the brunt of this lawlessness in Indian Country.[95] Violent crimes committed by non-Indians against Native women go largely unpunished. On some reservations, the murder rate of Na-

89. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (codified as amended in scattered sections of 25 and 42 U.S.C.). TLOA raised the cap on the maximum sentence to three years for any single offense and allowed for stacked sentences up to nine years. 25 U.S.C. § 1302(a)(7)(C), (D) (2012).

90. Alfred Urbina testified that his tribe had extradited thirty people to state governments in the past few years. *Hearing Before the S. Comm. on Indian Affairs*, *supra* note 3, at 34 (prepared statement of Alfred Urbina, Att'y Gen., Pascua Yaqui Tribe) ("In the past few years, the office has extradited murder suspects, sex offenders, burglary suspects, witnesses, and people who were evading justice in other jurisdictions by hiding on our reservation.").

91. Studies show that many Indian women and girls decline to report violent crime or sexual assault committed by non-Indians on the reservation because they do not believe there will be justice. Laird, *supra* note 53, at 49 (quoting Brent Leonhard, attorney for the Confederated Tribes of the Umatilla Indian Reservation: "'[w]here the partner was non-Indian, we found that over 80 percent chose not to go to the police.'").

92. Riley, *supra* note 27, at 1583.

93. For example, Native children experience post-traumatic stress disorder ("PTSD") at a rate of twenty-two percent, which is the same level at which Iraq and Afghanistan war veterans experience it. *See* Ryan Seelau, *Regaining Control Over the Children: Reversing the Legacy of Assimilative Policies in Education, Child Welfare, and Juvenile Justice that Targeted Native American Youth*, 37 AM. INDIAN L. REV. 63, 72 (2012).

94. *See* Riley, *supra* note 27, at 1583 (citing 3 TRIBAL LAW AND ORDER ACT OF 2010: A LEGISLATIVE HISTORY OF PUBLIC LAW 111-211, at 53 (2012) (prepared statement of Hon. Joe A. Garcia, President, National Congress of American Indians)) ("Without basic public safety, communities deteriorate: . . . tribes and individual tribal members cannot engage in economic development, attract business, or grow tourism.").

95. *See, e.g.*, AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 27–39 (2007) (explaining that the jurisdictional issues and other limits on tribal prosecutorial authority have disproportionately harmed Native women).

tive women is ten times the national average.[96] A 2010 study by the Government Accountability Office found that federal prosecutors declined to prosecute two-thirds of sexual assault cases referred from Indian Country.[97] Domestic violence in particular flourished. Non-Indian perpetrators of domestic violence are cognizant of their immunity and use it as a weapon to demonstrate their control.[98] By the time Congress passed the Violence Against Women Reauthorization Act of 2013 ("VAWA 2013"),[99] which contains provisions reaffirming tribes' inherent power to prosecute non-Indian perpetrators of domestic violence, violence against Native women had reached "epidemic rates."[100] Native women living on reservations were suffering domestic violence and physical assault at rates far exceeding those of women of other races living in other locations.[101] A 2010 National Institute of Justice study found that more than half of American Indian and Alaska Native women experience intimate partner violence during their lifetime, and of those, ninety percent experience that violence at the hands of a non-Indian partner.[102]

VAWA 2013 marked the first time since *Oliphant* that tribes could prosecute non-Indian offenders. The legislation was received favorably throughout Indian Country; Alfred Urbina, the attorney general of Arizona's Pascua Yaqui tribe, called it "historic."[103] Despite

96. Mary Anette Pember, *Missing and Murdered: No One Knows How Many Native Women Have Disappeared*, INDIAN COUNTRY TODAY (Apr. 11, 2016), https://indiancountrymedianetwork.com/news/native-news/missing-and-murdered-no-one-knows-how-many-native-women-have-disappeared/.

97. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 79, at 9.

98. Laird, *supra* note 53, at 47–48 (relaying the story of a Southern Ute woman whose non-Indian partner called tribal police himself during a domestic incident because he knew those officers would not be able to arrest or prosecute him); *see also* M. Brent Leonhard, *Implementing VAWA 2013*, 40 HUM. RTS. 18, 19 ("[Indian victims] know that historically non-Indian domestic violence crimes went unprosecuted and unpunished. If no one gets prosecuted, a victim isn't going to report the crime. Reporting the crime in this situation will make the victims *less* safe, and both anger and embolden the perpetrator.").

99. Pub. L. No. 113-4, 127 Stat. 120 (codified at 25 U.S.C. § 1304 (Supp. V 2018)).

100. Letter from Ronald Weich, Assistant Attorney Gen., to Vice President Joseph Biden 1 (July 21, 2011), https://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/legislative-proposal-violence-against-native-women.pdf. For example, from October 2013 through September 2014, the Roosevelt County/Fort Peck Tribes' 911 center received 718 domestic violence reports, which is nearly two per day. *Hearing Before the Comm. on Indian Affairs*, *supra* note 3, at 22 (prepared statement of Dana Buckles, Councilman for the Fort Peck Assiniboine & Sioux Tribes).

101. Fletcher, *supra* note 55, at 31.

102. André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, NIJ J., Sept. 2016, at 38, 39, 42, https://www.ncjrs.gov/pdffiles1/nij/249821.pdf.

103. Laird, *supra* note 53, at 48–49.

this high praise, VAWA 2013's tribal provisions are very narrow. VAWA 2013 allows tribes to prosecute certain non-Indian defendants who commit certain crimes pursuant to what the statute calls "special domestic violence criminal jurisdiction" ("SDVCJ").[104] In order for a tribe to be able to exercise SDVCJ over a non-Indian defendant, that defendant must have sufficient ties to the tribe—he or she must reside in the Indian country of the participating tribe, be employed in the Indian country of the participating tribe, or be a current or former spouse, intimate partner, or dating partner of the Native victim.[105] Additionally, to exercise SDVCJ in any case where a defendant faces potential jail time, tribes must provide non-Indian defendants with all of the applicable protections enumerated in the Indian Civil Rights Act ("ICRA")[106] and the TLOA,[107] as well as other rights, including the right to counsel, the right to a trial by an impartial jury that is drawn from a fair cross section of the community, and "all other rights whose protection is necessary under the Constitution."[108] ICRA incorporates many of the protections enshrined in the Constitution, but does not include all of them. For example, ICRA does not require tribes to obtain grand jury indictments.[109] Additionally, ICRA rights are not always interpreted as their constitutional counterparts have been.[110]

In constructing VAWA 2013, Congress adopted the same inherent power language it used when enacting the *Duro*-fix: "[t]he powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise spe-

104. 25 U.S.C. § 1304 (Supp. V 2018). Tribal jurisdiction over domestic violence crimes, dating violence crimes, and criminal violations of protective orders was restored. *Id*. § 1304(c).

105. *Id.* § 1304(b)(4).

106. *Id.* § 1304(d)(1); *see* 25 U.S.C. § 1304 note (Supp. V. 2018) ("This Act, referred to in subsec. (d)(1), probably means title II of Pub. L. 90-284, Apr. 11, 1968, 82 Stat. 77, popularly known as the Indian Civil Rights Act of 1968, which is classified generally to this subchapter."). The Indian Civil Rights Act of 1968 is currently codified at 25 U.S.C. §§ 1301–1304 (2012 & Supp. V. 2018).

107. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258.

108. 25 U.S.C. § 1304(d)(4).

109. Some of the constitutional rights that do not appear in ICRA are also not binding on the states; the right to a grand jury is an example. Not all of the rights enumerated in the Bill of Rights apply against state governments because the Bill of Rights itself does not bind state action. Instead, the Court has over the past several decades incorporated individual constitutional rights from the first ten amendments to apply against state action using the Fourteenth Amendment. *See generally* Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L. J. 253 (1982).

110. *See, e.g.*, *Oliphant*, 435 U.S. at 194 ("Pursuant to [ICRA], defendants are entitled to many of the due process protections accorded to defendants in federal or state criminal proceeds. However, the guarantees are not identical. Non-Indians, for example, are excluded from Suquamish tribal court juries.").

cial domestic violence criminal jurisdiction over all persons."[111] Tribes have been exercising SDVCJ with great caution, pursuing only those cases that fall squarely within VAWA 2013's jurisdictional language. Currently, twenty-four tribes are exercising SDVCJ.[112] The Department of Justice and tribes implementing SDVCJ have reported that VAWA 2013 has been successful in helping combat domestic violence in tribal communities.[113] However, public safety crises still exist in tribal communities.[114] Many tribes and tribal organizations are advocating for a full-*Oliphant* fix—a complete repudiation of the *Oliphant* decision—restoring criminal jurisdiction over non-Indians for any crime they commit in Indian Country, regardless of their ties to the tribe.[115] Many viewed VAWA 2013 as a test case for a full-*Oliphant* fix;[116] if VAWA 2013 is constitutional, then a full fix should be too.

The inclusion of tribal provisions in the 2013 VAWA reauthorization package made the bill contentious: "[r]arely has federal legislation involving tribal jurisdiction garnered th[is] kind of front-page publicity."[117] The bill barely made it out of committee in the Senate, with seven members of the Judiciary Committee voting

111. 25 U.S.C. § 1304(b)(1).

112. TRIBAL LAW & POLICY INST., IMPLEMENTATION CHART: VAWA ENHANCED JURISDICTION AND TLOA ENHANCED SENTENCING (2018), http://www.tribal-institute.org/download/VAWA/Chart.pdf.

113. *See Hearing Before the Comm. on Indian Affairs*, *supra* note 3, at 15 (prepared statement of Tracy Toulou, Director, Office of Tribal Justice, U.S. Dep't of Justice) (stating that the U.S. Attorneys "have been making good use of their new ability to seek more robust federal sentences for certain acts of domestic violence in Indian country" and that "over the past three years, federal prosecutors have indicted more than 100 defendants on strangulation or suffocation charges"). During the first years of implementation, the number of non-Indian prosecutions pursued by the Confederated Tribes of the Umatilla Region doubled the number ever prosecuted by the U.S. Attorney. Riley, *supra* note 27, at 1604 n.200. Many of the people arrested under SDVCJ are habitual offenders. For example, the fifteen non-Indian defendants prosecuted by the Pascua Yaqui tribe during the first years of implementation had more than eighty documented prior tribal police contacts among them. *Id*. at 1604. Additionally, most had state or federal criminal records. *Id*.

114. *Hearing Before the Comm. on Indian Affairs*, *supra* note 3, at 26 (prepared statement of Alfred Urbina, Attorney General, Pascua Yaqui Tribe).

115. *Combatting Non-Indian Domestic Violence and Sexual Assault: A Call for a Full* Oliphant *Fix*, NAT'L CONGRESS OF AM. INDIANS, http://www.ncai.org/resources/resolutions/combatting-non-indian-domestic-violence-and-sexual-assault-a-call-for-a-full-oliphant-fixf (last visited Mar. 28, 2019).

116. *See, e.g.*, Laird, *supra* note 53, at 49 ("[M]any Indian legal observers see Section 904 [of VAWA 2013] as a major step toward safer reservations, and, perhaps, full tribal criminal jurisdiction.").

117. Tom Gede, *Criminal Jurisdiction of Indian Tribes: Should Non-Indians Be Subject to Tribal Criminal Authority Under VAWA?*, 13 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 40 (2012).

against it along party lines.[118] The Republican-controlled House also objected to the tribal provisions, passing a VAWA reauthorization package that did not include them because some Republican House members believed they were unconstitutional.[119]

Two standalone bills were introduced in the Senate in 2017 seeking to expand and build on the tribal jurisdiction reaffirmed under VAWA 2013: The Justice for Native Survivors of Sexual Violence Act ("JNSSVA") and the Native Youth and Tribal Officer Protection Act ("NYTOPA"). JNSSVA[120] would reaffirm tribal jurisdiction over sexual assault, sex trafficking, stalking, and related crimes committed by non-Indians.[121] The bill would also repeal the requirement that a defendant have sufficient ties to the tribe, allowing tribes to prosecute non-Indians who do not live on reservation land, or who commit crimes against people they do not know.[122] NYTOPA is narrower, seeking to clarify the definition of what constitutes violence and reaffirm tribal jurisdiction over crimes that co-occur with VAWA 2013 crimes that are committed against children, tribal law enforcement personnel, and court officials ("attendant crimes").[123] NYTOPA does not remove the sufficient ties requirement. JNSSVA and NYTOPA were both conceived under Democratic administrations;[124] with a VAWA reauthorization on the horizon, Democratic lawmakers and tribal advocates were hopeful that at least one of these bills would be incorporated into the VAWA reauthorization package, expanding on VAWA 2013.

In July 2018, Representative Sheila Jackson Lee introduced such a bill. The Reauthorization of the Violence Against Women Act of

118. Larkin & Luppino-Esposito, *supra* note 14, at 5–6.

119. *See* H. R. REP. NO. 112-480, at 58 ("It is an unsettled question of constitutional law whether Congress has the authority under the Indian Commerce Clause to recognize inherent tribal sovereignty over non-Indians."). The House eventually voted to pass the Senate version of the bill that included the tribal provisions. *See* H. R. REP. NO. 113-10 (2013).

120. S. 1986, 115th Cong. (2017).

121. *Id*. at § 2(2)–(3).

122. *Id.* at § 2(4).

123. S. 2233, 115th Cong. § 3(2)(G) (2017). For example, if a non-Indian defendant commits a VAWA 2013-covered domestic violence offense against a Native person on a reservation, and in the course of doing so also assaults a child, or resists a lawful arrest by a tribal police officer responding to that domestic violence call, that defendant could be prosecuted for those co-occurring crimes.

124. JNSSVA was drafted during Obama's second administration and first introduced in 2016. S. 3523, 114th Cong. (2016). An earlier, more expansive version of NYTOPA was drafted and first introduced in 2016. S. 2785, 114th Cong. (2016). This version sought to bring drug crimes under tribal jurisdiction as well, because many domestic violence incidents also involve drug offenses. *See id.* § 4.

2018 incorporated portions of both JNSSVA and NYTOPA, expanding SDVCJ to include attendant crimes that are committed against children, tribal police officers, and witnesses, as well as the crimes of sexual assault, stalking, and sex trafficking.[125] However, with Republicans in control of the White House and the Senate, lawmakers and advocates were less sanguine about achieving a full-*Oliphant* fix in the near future, and some worried about losing what little headway had been made. Representative Jackson Lee's bill has no Republican co-sponsors.[126] Additionally, because none of the non-Indian defendants prosecuted under the tribal VAWA provisions have challenged SDVCJ in a habeas appeal, the constitutionality of these provisions remains untested; thus, Republicans' most prominent objection to the tribal provisions has not been explicitly put to rest.

II.
Responses to Constitutional Arguments Against Granting Tribes the Authority to Prosecute Non-Indians Who Commit Crimes Against Native Americans in Indian Country

Many arguments have been put forward against the constitutionality of the tribal VAWA provisions. Some, notably Justice Kennedy, have suggested that Congress cannot empower tribes to prosecute non-Indians because this would violate the constitutional principle of the "original and continuing consent of the governed."[127] Others have argued that Congress does not have the authority to enact legislation that grants tribes the power to prosecute non-Indians.[128] Finally, some have argued that VAWA's tribal provisions violate substantive constitutional provisions, namely (1) the substantive constitutional rights of non-Indian defendants[129] and (2) the Appointments Clause and Article III requirements that give federal judges life tenure and salary protections.[130]

Each of the above arguments will be addressed in turn. Contrary to Justice Kennedy's concerns, the claim that VAWA 2013's tribal provisions are unconstitutional because they violate the principle of the consent of the governed is mistaken. Political participation is not a

125. H.R. 6545, 115th Cong. (2018).
126. *H.R. 6545: Violence Against Women Reauthorization Act of 2018*, ProPublica, https://projects.propublica.org/represent/bills/115/hr6545 (last visited Mar. 28, 2019).
127. United States v. Lara, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring).
128. H.R. Rep. No. 112-480, at 58.
129. S. Rep. No. 112-153, at 48 (minority views of Senators John Kyl, Orrin G. Hatch, Jeff Sessions, and Tom Coburn).
130. Larkin & Luppino-Esposito, *supra* note 14, at 8.

constitutionally necessary prerequisite for the exercise of criminal jurisdiction; additionally, crossing into the border of a sovereign territory and committing a crime there constitutes implicit consent to the criminal authority of that sovereign. Contrary to the House Republicans' concern, legislation, like VAWA 2013, that vests criminal jurisdiction over non-Indians in tribal courts is not outside the scope of Congress's constitutional authority—on the contrary, Congress has expansive authority to legislate with respect to Indian affairs under the plenary power doctrine. Finally, because SDVCJ is an exercise of inherent tribal power, the claim that VAWA 2013 runs afoul of substantive constitutional provisions is inapposite. However, even if SDVCJ is not an exercise of inherent tribal power, there are still sound arguments that VAWA 2013's tribal provisions are constitutional.

A. The Role of Consent in Criminal Jurisdiction

1. Argument: VAWA 2013 Is Unconstitutional Because it Violates the Constitutional Principle of the Consent of the Governed

Justice Kennedy voiced concern in *Duro*[131] and again in *Lara*[132] that congressional reaffirmation of tribal sovereign power to prosecute non-member U.S. citizens violates constitutional principles because those citizens are being tried—and in some cases punished—by a sovereign to whose jurisdiction they have not consented.[133] This argument is rooted in concerns relating to political representation and participation. The argument is as follows: (1) U.S. citizens not members of the prosecuting tribe have not consented to rule by that tribe; (2) Congress cannot subject American citizens to the authority of other governments where those citizens face a risk of unwarranted intrusions into their personal and political liberties if those citizens have not consented to rule by that sovereign; and (3) this conclusion is underscored by the fact that tribes are not constrained by the Constitution.

131. Duro v. Reina, 495 U.S. 676, 693 (1990), *superseded by statute*, 25 U.S.C. § 1301(2), *as recognized in* United States v. Lara, 541 U.S. 193, 196 (2004).

132. *Lara*, 541 U.S. at 211–14 (Kennedy, J., concurring).

133. "The Constitution is based on a theory of original, and continuing, consent of the governed. Their consent depends on the understanding that the Constitution has established the federal structure, which grants the citizen the protection of two governments, the Nation and the State . . . . Here, contrary to this design, the National Government seeks to subject a citizen to the criminal jurisdiction of a third entity. . . ." *Id.* at 212.

Justice Kennedy takes a "structuralist" interpretive approach to the Constitution in this argument.[134] Just as the rights and freedoms enshrined in the text are enforceable by citizens, so too are the "structural guarantees of personal and political liberty."[135] Even though American citizens have consented to rule by Congress, which has great power to legislate in the field of Indian affairs, the Constitution, according to this argument, places structural limits on Congress's ability to subject American citizens to the criminal jurisdiction of an extraconstitutional sovereign.[136]

2. *Response: Political Participation Is Not a Condition Precedent to a Sovereign's Criminal Jurisdiction*

These concerns are unfounded. As several constitutional law professors have pointed out, political participation has never been a necessary prerequisite to being tried by a sovereign for violating that sovereign's criminal code.[137] For example, the United States regularly prosecutes people who do not or cannot vote without facing criticism in this vein. Examples include federal prosecutions of corporations,[138] permanent resident aliens,[139] and other documented or undocumented immigrants.[140] The United States also prosecuted Native Americans for violations of federal law before granting them the right to vote in 1924.[141] States prosecuting nonresidents for violations of their criminal codes also falls into this category.[142] Additionally, the Court has

134. N. BRUCE DUTHU, SHADOW NATIONS: TRIBAL SOVEREIGNTY AND THE LIMITS OF LEGAL PLURALISM 155–56 (2013).

135. *Id*.

136. *Duro*, 495 U.S. at 693 ("This Court's cases suggest constitutional limits even on the ability of Congress to subject citizens to criminal proceedings before a tribunal, such as a tribal court, that does not provide constitutional protections as a matter of right.").

137. Letter from Kevin Washburn et al. to Sen. Patrick Leahy et al., *supra* note 15, at 6; *see also Duro*, 495 U.S. at 707 (Brennan, J., dissenting) ("[W]e have not required consent to tribal jurisdiction or participation in tribal government as a prerequisite to the exercise of civil jurisdiction by a tribe, and the Court does not explain why such a prerequisite is uniquely salient in the criminal context. Nor have we ever held that participation in the political process is a prerequisite to the exercise of criminal jurisdiction by a sovereign." (internal citations omitted)); Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 81 (1978) (holding that city criminal jurisdiction over non-voting portions of surrounding areas did not violate the Constitution).

138. Letter from Kevin Washburn et al. to Sen. Patrick Leahy et al., *supra* note 15, at 7.

139. Laird, *supra* note 53, at 52.

140. Letter from Kevin Washburn et al. to Sen. Patrick Leahy et al., *supra* note 15, at 7.

141. *Id.* at 6.

142. *Duro*, 495 U.S. at 707 (Brennan, J., dissenting).

upheld the prosecution of U.S. citizens in extraconstitutional courts in other contexts.[143] Neither constitutional due process nor a more abstract structural interpretation of constitutional rights and liberties makes political participation a condition precedent to a sovereign's criminal jurisdiction, even when that sovereign is not bound by the Constitution.

Further, it could be argued that an individual who enters a sovereign's territory and commits crimes against that sovereign's members has impliedly consented to the criminal jurisdiction of that sovereign.[144] A sovereign's criminal law is enacted to protect the community. Sovereigns have a fundamental interest in ensuring that activity within their borders remains lawful and that their members remain safe.[145] While this interest does not trump everything, criminal prosecutions involve the invasion of individual liberties, and the protection of individual liberty must be balanced against public safety. By entering a sovereign's borders and committing criminal acts, an individual impliedly consents to the sovereign's criminal jurisdiction.[146] An anal-

143. Downes v. Bidwell, 182 U.S. 244, 287 (1901) (finding that the Constitution was not fully applicable to the newly acquired territory of Puerto Rico since it had not been expressly or impliedly incorporated into the United States); Reid v. Covert, 354 U.S. 1, 53 (1957) (citing *Downes* for the proposition that Congress can subject U.S. citizens to extraconstitutional forums). Additionally, the United States extradites its own citizens to stand trial in foreign countries when required to do so by treaty. *See, e.g.*, Charlton v. Kelly, 229 U.S. 447, 476 (1913) (finding an American citizen extraditable to Italy).

144. *Duro*, 495 U.S. at 707 (Brennan, J., dissenting) ("The commission of a crime on the reservation is all the 'consent' that is necessary to allow the tribe to exercise criminal jurisdiction . . . ."); *see also* Geoffrey C. Heisey, Note, Oliphant *and Tribal Criminal Jurisdiction Over Non-Indians: Asserting Congress's Plenary Power to Restore Territorial Jurisdiction*, 73 IND. L.J. 1051, 1070 (1998) ("[T]here is no reason to believe that a non-Indian who leaves the confines of the state, enters Indian country, puts herself within the boundary of tribal authority, and commits a crime there should not be subject to the jurisdiction of the tribe); *cf.* Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973, 992 (2010) (arguing that VAWA 2013 can be defended by arguing that when non-Indians commit crimes against Native Americans in Indian Country they have hypothetically consented to rule by that sovereign).

145. The Ninth Circuit, in the decision preceding *Oliphant*, described the sovereign's ability to prosecute those who commit offenses within the sovereign's territory "sine qua non" of inherent sovereign power. Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976), *rev'd sub nom.* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) ("Surely the power to preserve order on the reservation, when necessary by punishing those who violate tribal law, is sine qua non of [inherent] sovereignty.").

146. *See, e.g.*, *Duro*, 495 U.S. at 707 (Brennan, J., dissenting) ("The commission of a crime on the reservation is all the 'consent' that is necessary to allow the tribe to exercise criminal jurisdiction over the nonmember Indian."); C.S. Nino, *A Consensual Theory of Punishment*, 12 PHIL. & PUB. AFF. 289, 299 (1983) ("[T]he fact that the individual has freely consented to make himself liable to [the sovereign's] punishment

ogy might be drawn to early civil procedure cases that found out-of-state citizens within the personal jurisdiction of state courts when those out-of-staters voluntarily used state-funded highways.[147]

B. Congress's Authority to Legislate

1. Argument: Legislation that Subjects Non-Indians to Tribal Criminal Jurisdiction Is Unconstitutional Because Congress Is Not Constitutionally Empowered to Pass Such Legislation

In the House Report accompanying VAWA 2013, Republicans objecting to the tribal provisions included among their concerns the assertion that Congress lacks the constitutional authority to pass such legislation.[148] House Republicans stated that they do not believe the Constitution empowers them to pass legislation like VAWA 2013's tribal provisions: because tribal governments are not subject to the government limits enumerated in the Constitution, "it is an unsettled question of constitutional law whether Congress has the authority . . . to recognize inherent tribal sovereignty over non-Indians."[149]

2. Response: Congress's Plenary Power over Indian Affairs Authorizes it to Pass Legislation Like VAWA 2013

The Court's plenary power doctrine, first developed in 1886[150] and still recognized today,[151] gives Congress expansive authority to legislate in respect to Indian affairs. Under this doctrine, Congress acts as a "sort of super-legislature" over tribal sovereign bodies and has the authority to regulate nearly every aspect of the tribes themselves and

(by performing a voluntary act with the knowledge that the relinquishment of his immunity is a necessary consequence of it) provides a prima facie moral justification for exercising the correlative legal power of punishing him.").

147. *See, e.g.*, Hess v. Pawloski, 274 U.S. 352, 356–57 (1927) (expanding the reach of state courts' personal jurisdiction to non-residents involved in car accidents on state highways).

148. H.R. REP. NO. 112-480, at 58.

149. *Id*.

150. *See* Frickey, *supra* note 37, at 35 ("*Kagama* was the first case in which the Supreme Court essentially embraced the doctrine that Congress has plenary power over Indian affairs.").

151. For example, in *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 787–93 (2014), the Court discussed Congress's plenary power over Indian affairs, and remarked on the broadness of the doctrine.

the nation's relationship to them.[152] This includes the authority to alter the scope of inherent tribal powers.

The *Lara* Court held that Congress has the constitutional authority to relax restrictions that the political branches have imposed on tribes' exercise of inherent sovereign powers, including the ability to prosecute non-members.[153] The metes and bounds of inherent tribal sovereignty have shifted as the political branches' policies toward tribes has shifted: when Congress and the executive branch promote tribal self-determination, inherent tribal sovereignty expands; when those branches pursue policies of assimilation and termination, inherent tribal sovereignty contract.[154] The Court reconciled the holdings in *Oliphant* and *Duro* with its holding in *Lara* by stating that those decisions reflected "the Court's view of the tribes' retained sovereign status *as of the time* the Court made them."[155] In other words, the *Lara* Court recognized that Congress's plenary power gives it the ability to overturn common law restrictions that have been placed on tribes' inherent power. The *Lara* decision emphasized that the Court has never held that the Constitution dictates the metes and bounds of tribal sovereignty.[156] In fact, Justice Breyer noted that he was unable to find anything in the Constitution that "suggest[ed] a limitation on Congress' institutional authority to relax restrictions on tribal sovereignty."[157] The Court's holding in *Duro* was a federal common law decision, not a constitutional one.[158] Thus, the Court concluded, Congress's plenary power gives it the constitutional authority to alter the scope of inherent tribal sovereignty, and this includes the power to overturn previous Court decisions.[159]

---

152. Price, *supra* note 20, at 671 (citing United States v. Lara, 541 U.S. 193, 203 (2004)); *see also* Fletcher, *supra* note 63, at 165 (describing Congress's plenary power as "unlimited and absolute.").

153. United States v. Lara, 541 U.S. 193, 200 (2004) (noting that the *Duro*-fix legislation merely "relaxes the restrictions, recognized in *Duro* that the political branches had imposed on the tribes' exercise of inherent prosecutorial power").

154. *Lara*, 541 U.S. at 201–05.

155. *Id.* at 205.

156. *Id.*

157. *See id.* at 204.

158. *Id.* at 220 (Thomas, J., concurring) ("*Duro* [was] a . . . federal-common-law decision."); *see also* Trachman, *supra* note 76, at 892 ("Since the *Duro* ruling was not a constitutional one, Congress neither violated the Constitution, nor permitted tribes to do so, by enacting the *Duro* Fix; instead, it simply reversed a decision made on the basis of common law principles.").

159. *Lara*, 541 U.S. at 207.

Like *Duro*, *Oliphant* was a federal common law decision.[160] As legislation altering the scope of tribes' inherent sovereign authority by relaxing common law restrictions that have been placed on that sovereignty, VAWA 2013's tribal provisions are a constitutionally permissible exercise of congressional power. *Lara* states clearly that Congress is empowered to relax restrictions imposed on tribes' inherent sovereign powers using their plenary power over Indian affairs. Congress structured VAWA 2013's tribal provisions to mirror the *Duro*-fix legislation, recognizing and reaffirming the tribes' inherent power to prosecute a category of persons not previously subject to their criminal authority. *Lara* upheld the *Duro*-fix law as a constitutionally permissible exercise of congressional power, and VAWA 2013's tribal provisions are not meaningfully different.

In upholding the *Duro*-fix legislation, the Court emphasized that the "change at issue . . . is a limited one," concerning only events that occur on the tribe's own land.[161] VAWA 2013 is similarly narrow: it too only concerns events that occur on tribal land, and only authorizes a tribe to prosecute individuals who have sufficient ties to the tribe, and only for a certain category of offenses. Thus, VAWA 2013 hardly expands the *Duro*-fix legislation, which reaffirmed tribal authority to prosecute non-member Native Americans. The only difference between a non-member Native American and a non-Indian is the assumption of some shared collective identity that links all Native Americans, all members of the 573 federally-recognized, culturally and politically distinct tribes.[162] Such a generalized heritage and culture does not exist, and therefore should not matter for the purposes of

160. *Id.* ("[W]e do not read [*Oliphant*] as holding that the Constitution forbids Congress to change 'judicially made' federal Indian law through . . . legislation."); *see also* Skibine, *supra* note 60, at 78–79 ("The Court in *Lara* held that decisions, such as *Oliphant* and *Duro*, were decisions of federal common law. Congress could therefore recognize and affirm the tribes' prosecutorial power over non-member Indians.").

161. *Lara*, 541 U.S. at 204 ("[T]he change at issue here is a limited one. It concerns a power similar in some respects to the power to prosecute a tribe's own members––a power that this Court has called 'inherent.' In large part it concerns a tribe's authority to control events that occur upon the tribe's own land. . . . [T]he tribes' possession of this additional criminal jurisdiction is consistent with our traditional understanding of the tribes' status as 'domestic dependent nations.'" (internal citations omitted)).

162. *See, e.g.*, Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069 (2004) (arguing that the distinctions among tribes warrant individualized treatment from the federal government); Karl Jeffrey Erhart, Note, *Jurisdiction over Non-member Indians on Reservations*, 1980 ARIZ. ST. L.J. 727, 755 (1980) (arguing that the cultural and legal diversity among tribes is as great as between tribes and non-Indian political communities); *see also* Ennis, *supra* note 47, at 598–99 (arguing that tribes cannot be treated as fungible, and that the distinction between non-member Indians and non-Indians is illogical).

Congress's constitutional power to relax the common law barriers that have been placed on the exercise of tribal inherent powers—both non-member Native Americans and non-Indians are U.S. citizens, not members of the prosecuting tribe. From the perspective of the prosecuting tribe, non-member Native Americans and non-Indians stand on equal footing: while people from both groups may live, work, or visit the reservation, they cannot vote or ever become members of that tribe. VAWA 2013 merely extends the *Duro*-fix legislation to cover other non-members, but for a narrower class of offenses where the sufficient-ties requirement is met. To find VAWA 2013 unconstitutional because Congress lacks the authority to issue such legislation would require the Court to overturn *Lara*.[163]

163. Dreveskracht, *supra* note 61, at 23; Fletcher, *supra* note 63, at 167; Skibine, *supra* note 60, at 78–79; Ennis, *supra* note 47, at 599-600 (noting that the reasoning that allowed *Lara* to uphold tribal court jurisdiction over nonmember Indians "applies equally to the argument that tribal court criminal jurisdiction should be expanded to include non-Indians"); *cf.* Gede, *supra* note 117, at 41 ("[I]t is now reasonably settled that, at least as to non-member Indians, nothing in the Constitution prevents Congress from relaxing the restrictions on tribal criminal jurisdiction."). Some have argued that Congress's plenary power does not extend to authorizing a tribe to violate the constitutional rights of U.S. citizens. *See, e.g.*, Trachman, *supra* note 76, at 859 ("Congress may not overcome relevant constitutional limitations merely by invoking its 'plenary' power over Indian affairs . . . ."); Margaret H. Zhang, Note, *Special Domestic Violence Criminal Jurisdiction for Indian Tribes: Inherent Tribal Sovereignty Versus Defendants' Complete Constitutional Rights*, 164 U. PA. L. REV. 243, 269–70 (2015) (citing Duro v. Reina, 495 U.S. 676, 677 (1990)) ("[Our] cases suggest constitutional limitations even on the ability of Congress to subject citizens to criminal proceedings before a tribunal, such as a tribal court, that does not provide constitutional protections as a matter of right."). Additionally, federal Indian law scholars do not expect prior Court precedent to be a dispositive factor. *See* Russell Lawrence Barsh & James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609, 609 (1979) ("The judicial pursuit of principles in Indian law has been a little like Lewis Carroll's hunting of the snark: an aimless voyage towards an unknown objective."); Tweedy, *supra* note 26, at 698 ("[A]ny Indian law student knows that relying on precedent in the Indian law context has become like expecting the earth to remain steady during an earthquake."). DUTHU, *supra* note 134 (quoting Memorandum from Justice Antonin Scalia to Justice William J. Brennan, Jr. (Apr. 4, 1990) (available in The Papers of Thurgood Marshall, Library of Congress)) ("[O]ur opinions in this field have not posited an original state of affairs that can subsequently be altered only by explicit legislation, but have rather sought to discern what the current state of affairs ought to be by taking into account all legislation, and the congressional 'expectations' that it reflects, down to the present day.").

C. VAWA 2013 and Substantive Provisions of the Constitution

1. Argument: VAWA 2013 Violates Substantive Provisions of the Constitution

Many have argued that VAWA's tribal provisions violate substantive provisions of the Constitution. These arguments generally fall into one of two camps: (1) U.S. citizens are entitled to certain criminal procedural rights by the Constitution, and because tribes are not subject to the Constitution, granting tribes criminal jurisdiction over U.S. citizens violates the citizens' substantive constitutional rights; and (2) VAWA 2013 skirts Article II and Article III requirements. Both arguments assume that SDVCJ is not, as Congress stated, a reaffirmation of inherent tribal sovereign authority, but instead constitutes delegated federal authority—an outsourcing of federal power to tribal governments. The exercise of delegated federal authority, so the argument goes, is constrained by the Constitution; thus, any exercise of SDVCJ is constrained by the Constitution's substantive provisions.

a. VAWA 2013 Violates the Substantive Constitutional Rights of Non-Indians

In Senate Report 153, Senators John Kyl, Orrin Hatch, Jeff Sessions, and Tom Coburn argued that tribal jurisdiction over non-Indians would violate those citizens' constitutional rights because they would "enjoy few meaningful civil rights protections" in tribal courts.[164] Subjecting non-Indian U.S. citizens to the criminal jurisdiction of tribal governments would violate their substantive constitutional guarantees such as their rights to due process, equal protection, and a jury of their peers.[165] While tribes are required to provide all criminal defendants tried in tribal courts with the rights guaranteed under ICRA, not every right in the Constitution appears in ICRA; and even where ICRA's text mirrors the Constitution's, tribal court systems do not always interpret ICRA's protections to be coterminous with their federal counterparts, as noted above.[166]

b. VAWA 2013 Violates Article II and Article III

After VAWA 2013 was introduced, two members of the Heritage Foundation, Paul J. Larkin and Joseph Luppino-Esposito, published a paper questioning the tribal provisions' compliance with Article II and

164. S. REP. NO. 112-153, at 48 (minority views of Senators John Kyl, Orrin G. Hatch, Jeff Sessions, and Tom Coburn).
165. *Id.*
166. *See supra* notes 106–110 and accompanying text.

Article III of the Constitution: "A decision by Congress to empower tribal courts to enter judgments in a criminal case against a non-Indian raises questions under the Appointments Clause of Article II as well as the judicial Vesting and Power Clauses of Article III."[167] Their position is that the tribal VAWA provisions, as an act of Congress, must conform to both Article II and Article III in order to be a permissible exercise of authority. Article II sets forth procedures for the appointment of federal judges—namely, these judges must be nominated by the President and confirmed by the Senate in order to take the bench.[168] Article III provides that federal judges receive lifetime appointments and prohibits the government from reducing federal judges' salaries during their tenure.[169] Because tribal judges are selected by tribes and not given Article III's job security, VAWA 2013 runs afoul of these constitutional mandates.

Article II requires that "officers of the United States" be appointed in a particular way; generally, only the President, a court, or the head of a department may appoint these federal officers.[170] Larkin and Luppino-Esposito contend that VAWA 2013's tribal provisions "effectively would make tribal judges 'officers of the United States' for Article II purposes."[171] This is because, they argue, the term "officers of the United States," as used in Article II, includes any person who exercises the power of the federal government.[172] Further, they assert that the power to imprison an American citizen for violating a federal offense is "an archetypical example of the exercise of government power that can only be exercised by a person properly appointed under Article II."[173] Thus, because VAWA 2013 is a federal statute which gives tribes the authority to imprison American citizens, tribal judges must be appointed according to the Appointments Clause's procedures.[174]

Larkin and Luppino-Esposito intimate that VAWA 2013 also violates Article II because it does not include a mechanism by which the

167. Larkin & Luppino-Esposito, *supra* note 14, at 8.

168. U.S. CONST. art. II, § 2, cl. 2.

169. *Id*. art. III, § 1.

170. Myers v. United States, 272 U.S. 52 (1926). "Superior Officers" must be appointed by the President and then confirmed by the Senate. "Inferior Officers" can be appointed in this way too; however, Congress can also delegate their appointment to the President only, the courts, or heads of departments. *See* Burnap v. United States, 252 U.S. 512, 515 (1920).

171. Larkin & Luppino-Esposito, *supra* note 14, at 20.

172. *Id*. at 18.

173. *Id*. at 21.

174. *Id*.

President can remove tribal judges.[175] In *Myers v. United States*, the Court reasoned that because Article II charges the President with taking care that the law be faithfully executed, the President must have some authority to remove the personnel he is responsible for supervising.[176] Thus, restrictions on the President's ability to remove an officer of the United States are generally invalid by Article II. Because VAWA 2013 makes tribal judges officers of the United States for the purposes of Article II, and because it does not provide a way for the President to remove tribal judges, this too constitutes an Article II infringement.

Finally, Larkin and Luppino-Esposito argue that, in general, only Article III courts have the power to enter judgments in federal criminal cases and sentence those offenders to prison.[177] Article III provides federal judges with life tenure and salary protections, which are necessary for preserving an independent judiciary.[178] Tribal judges are not necessarily appointed for life or given salary protections, and VAWA 2013 does not require that tribal judges be given these protections. Thus, by vesting tribal courts with criminal jurisdiction over non-Indians, Larkin and Luppino-Esposito contend, VAWA 2013 violates Article III.[179]

2. *Response: VAWA 2013 Reaffirms Inherent Tribal Power or Constitutes a Constitutionally Permissible Exercise of Delegated Federal Authority*

a. The Power to Prosecute Non-Indians Is an Inherent Power

The Court in *Oliphant*, like the Court in *Duro*, found that tribes lacked the inherent power to prosecute a category of persons for

175. *Id*. at 21–22 ("The Court has never . . . ruled that the President, a court of law, and the head of a department can all be ousted from the appointment and removal process entirely. Were that ever the case, the result would be that no one could be held legally or politically accountable for whatever intentional misconduct, negligent defaults, or simple mistakes are made by a federal official. . . . But, that is precisely the scenario the Senate bill would create.").

176. Myers v. United States, 272 U.S. 52, 94–95 (1926).

177. Larkin & Luppino-Esposito, *supra* note 14, at 24.

178. *Id.* at 25 (citing William R. Castro, *If Men Were Angels*, 35 HARV. J.L. & PUB. POL'Y 663, 666 (2012)) ("The Founders believed that government abuse could be limited by separating the powers of government into three co-equal branches and that the judicial branch would curb misconduct by the legislative and executive branches. An important part of the judiciary's participation in this balance of powers scheme was the power to refuse to give effect to unconstitutional misconduct by the other branches through judicial review. Finally, the power of judicial review would be significantly less effective if the other branches could effectively control the judiciary. Hence arose the need for judicial independence.").

179. Larkin & Luppino-Esposito, *supra* note 14, at 31.

crimes committed in Indian Country absent explicit authorization from Congress. When Congress enacted the *Duro*-fix, it used its plenary power to relax the restriction that had been placed on the tribes' sovereign powers, expressly recognizing and reaffirming tribal inherent power to prosecute non-member Native Americans; Congress's ability to do this was upheld in *Lara.* The *Lara* Court found that the *Duro*-fix legislation did not constitute a delegation of federal power, and that tribal prosecutions of non-member Native Americans was undertaken pursuant to the tribe's inherent power. When Congress was drafting VAWA 2013's tribal provisions, it used the *Duro*-fix legislation as a model[180]—it used its plenary power over Indian affairs to craft a narrowly tailored statute that recognized and reaffirmed inherent tribal power to prosecute non-Indians for certain crimes they commit against Native persons in Indian Country.

Prior to the creation of the United States, tribes were fully sovereign entities that wielded local police power.[181] The Court's decision in *Oliphant* stripped tribes of their inherent police power to prosecute non-Indians using the newly devised implicit divestiture doctrine. In VAWA 2013, Congress explicitly recognized and reaffirmed this inherent power. Because tribes predate the existence of the Constitution, inherent tribal power is not bound by its substantive provisions.[182] Thus, the exercise of SDVCJ, which constitutes an explicit congressional reaffirmation of tribes' inherent sovereign power, is not constrained by the Constitution.[183] Tribes exercising SDVCJ need not

180. Comment, *Congress Recognizes and Affirms Tribal Courts' Special Domestic Violence Criminal Jurisdiction Over Non-Indian Defendants*, 127 HARV. L. REV. 1509, 1515–16 (2014).

181. Frickey, *supra* note 63, at 68 n.322 ("Before European discovery of this continent, tribes had the local police power.").

182. *See, e.g.*, Nevada v. Hicks, 533 U.S. 353, 383 (2001) ("[I]t has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes.").

183. Many commentators agree that *Lara* suggests that Congress in VAWA 2013 permissibly exercised its plenary power to recognize and reaffirm tribes' power to prosecute non-Indians as an inherent power. *See* Dreveskracht, *supra* note 61, at 23; Fletcher, *supra* note 63, at 167–68 ("The Court [in *Lara*] concluded that Congress does indeed have the power to ratchet up tribal inherent authority, recognizing congressional authority to reverse the Court's implicit-divestiture cases."); Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. F. ON C.L. & C.R. 1, 39 (2003) (arguing that a statute structured like the *Duro*-fix legislation would reaffirm inherent tribal power, not constitute a delegation of federal power); Ennis, *supra* note 47, at 601–03 ("[A statute abrogating *Oliphant*], like the *Duro*-fix, would simply authorize Indian tribes to reassume an inherent sovereign power that they had possessed before being incorporated within the United States.") (internal citation removed). *But see* Gede, *supra* note 117, at 44 (describing *Oliphant*-fix legislation as delegated federal

provide criminal defendants with the same constitutional protections they would receive were they tried in state or federal court, and tribal judges need not be appointed pursuant to Article II nor receive the salary protections or tenure outlined in Article III.

b. Even if VAWA 2013 Grants Tribes Delegated Federal Authority to Prosecute Non-Indians, There Are Still Sound Arguments That the Tribal Provisions Are Constitutional

Even assuming, *arguendo*, that SDVCJ is delegated federal authority, there are still sound arguments that VAWA's tribal provisions are constitutional. Many federal statutes empower non-federal actors to assume federal responsibilities, but those actors need not conform to the Constitution as the federal government must when they exercise that authority. For example, the federal government has delegated aspects of federal law to the states in at least two contexts, and the exercise of that authority is treated as an exercise of state, not federal, power for constitutional purposes.

First, under PL-280, the federal government delegated its federal authority to prosecute crime in Indian Country to the states.[184] Under PL-280, states apply their state criminal laws to offenses that would otherwise be prosecuted under the federal code.[185] Courts treat these state prosecutions as state action, not delegated federal action, for the purposes of constitutional law.[186] This is so even though courts and

authority). The fact that the Court in *Lara* explicitly said it was reserving the due process question presented has created concern. *See* Alex Tallchief Skibine, United States v. Lara, *Indian Tribes, and the Dialectic of Incorporation*, 40 TULSA L. REV. 47, 60 (2004) (noting that the *Lara* court's reservation to take up the due process question indicates that "the Court is content to allow Congress the task of integrating Indian tribes as third sovereigns within the political and legal system of the United States . . . [but] that the Court is reserving for itself the right to tell Congress when it has gone too far. Thus, the Court remains the ultimate arbiter of tribal status."); Comment, *Congress Recognizes and Affirms Tribal Courts' Special Domestic Violence Criminal Jurisdiction Over Non-Indian Defendants*, *supra* note 180, at 1515–16 (arguing that while VAWA 2013 is almost identical to the *Duro* fix and tailored to withstand constitutional scrutiny, the unique procedural posture of *Lara* allowed the Court in that decision to avoid the due process issues central to the opinion in *Duro*).

184. *See supra* note 52 and accompanying text.

185. Act of Aug. 15, 1953, Pub. L. No. 280, § 2, 67 Stat. 588, 588 (codified as amended at 18 U.S.C. § 1162 (2012)).

186. *See* COHEN, *supra* note 63 § 6.04[1], at 539 n.273 ("No court has ever suggested . . . that a state court to which Congress has delegated jurisdiction over Indians is obligated to provide indictment by a grand jury in criminal cases under the fifth amendment . . . ."); Anderson v. Britton, 318 P.2d 291, 301–02 (Or. 1957), *superseded by statute on other grounds*, OR. REV. STAT. § 138.550, *as recognized in* Delaney v. Gladden, 374 P.2d 746 (Or. 1962) (rejecting a Native defendant's claim that his

commentators consistently describe PL-280 as a delegation of federal authority.[187] Indeed, despite discussing PL-280 in their article as a statute requiring certain states to assume federal criminal responsibilities, Larkin and Luppino-Esposito do not contend that PL-280 is unconstitutional.[188]

Second, under the "dormant commerce clause," the federal government delegates aspects of federal authority to the states. Under the Tenth Amendment, states have plenary authority to legislate within their borders; they are limited only by the constitutional constraints that apply to them and acts of Congress that preempt their authority. The Commerce Clause provides Congress with two ways in which it can preempt state lawmaking: it provides an affirmative grant of power to regulate interstate commerce, and it also entails a negative power. This so-called "dormant commerce clause" prohibits state regulation that excessively burdens interstate commerce as well as laws that would discriminate against interstate commerce, unless such regulation provides the only reasonable way to advance an important local purpose.[189] However, Congress has the power to relax these restrictions, lifting these negative limits on state authority; in so doing, it authorizes states to regulate interstate commerce in otherwise impermissible ways. One way in which states may regulate interstate commerce where such negative restrictions are relaxed is by enacting criminal laws that burden or discriminate against interstate commerce. These state criminal laws, which are enacted only pursuant to federal authorization, have been held to be "an exertion of [the state's] own power" for the purposes of constitutional law.[190] Thus, the constitutional limits that apply to the enforcement of these laws are only those that apply to ordinary state action.

Similar to both PL-280 and the dormant commerce clause, VAWA 2013 authorizes a sovereign body to exercise jurisdiction, including criminal jurisdiction, that it is otherwise prohibited from exercising. Tribes exercising authority pursuant to VAWA 2013 should be

---

conviction should be overturned because PL-280 constitutes an unconstitutional delegation of federal authority);

187. Burgess v. Watters, 467 F.3d 676, 682 (7th Cir. 2006); United States v. Wadena, 152 F.3d 831, 840 n.12 (8th Cir. 1998); Timbisha Shoshone Tribe v. Kennedy, 714 F. Supp. 2d 1046, 1071 (E.D. Cal. 2010); COHEN, *supra* note 63, at 538 ("Courts typically characterize an exercise of federal power authorizing state jurisdiction over Indians in Indian Country as a delegation of Congress's otherwise preemptive authority over Indian nations to the states."); Price, *supra* note 20, at 695.

188. Larkin & Luppino-Esposito, *supra* note 14, at 15.

189. Dep't of Revenue v. Davis, 533 U.S. 328, 337–38 (2008).

190. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 438 n.51 (1946).

viewed as analogues to states under PL-280 and the dormant commerce clause. Much as states, tribes are singularly concerned with the safety, health, and welfare of their tribal members, as well as others who live in tribal communities. The Ninth Circuit, in an opinion later overturned by *Oliphant*, argued that "the power to preserve order on the reservation, when necessary by punishing those who violate tribal law, is sine qua non of . . . sovereignty."[191] The Court has found that the enforcement of local criminal law is a traditional area of state concern[192] because states, as sovereigns, have an acute interest in the "health, safety, and welfare" of their citizens.[193] A tribe's interest in enforcing its tribal code does not differ from a state's interest in enforcing its criminal laws, so a tribe's exercise of local law enforcement authority conducted pursuant to federal authorization should be treated the same for constitutional purposes as a state's enforcement of local criminal law under PL-280. This is underscored by the fact that tribal prosecutions undertaken pursuant to SDVCJ are a "vindication of local values, reflected in locally enacted law and enforced by local authorities."[194] Further, as is the case for states under the dormant commerce clause, a tribe is granted the power to prosecute non-Indians by a congressional relaxing of limits imposed on tribes' sovereign authority. A state criminal law enacted and enforced pursuant to federal authorization under the dormant commerce clause is functionally equivalent to a tribe's exercise of SDVCJ, so it should be limited only by the constraints that ordinarily apply to the exercise of tribal government power.[195] Thus, even if VAWA 2013 constitutes delegated federal authority, the exercise of SDVCJ need not conform to Article II and Article III, and tribes need not provide the full panoply of consti-

191. Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976), *rev'd sub nom.* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

192. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 561, 567 (1995).

193. Gonzales v. Raich, 545 U.S. 1, 66 (2005) (Thomas, J., dissenting).

194. Price, *supra* note 20, at 664.

195. *See* Philip S. Deloria & Nell Jessup Newton, *The Criminal Jurisdiction of Tribal Courts over Non-Member Indians*, 38 FED. BAR NEWS & J. 70, 74 (1991) (arguing that the Court approaches issues involving tribal inherent power the same way they approach dormant commerce clause issues); Price, *supra* 20, at 692; Skibine, *supra* note 60, 107–16 (arguing that the dormant commerce clause jurisprudence should be applied to the implicit divestiture doctrine to give coherence and predictability to the doctrine); Trachman, *supra* note 76, at 893 (analogizing the *Duro*-fix law to legislation enacted by states pursuant to Congress's dormant commerce clause power); Ennis, *supra* note 47, at 590 (arguing that *Lara* indicates that tribes' inherent powers became dormant at the time of colonization, and Congress can relax these restrictions using its plenary power). *But see* Frickey, *supra* note 63, at 68–73 (arguing that approaching congressional reaffirmations of tribal inherent power using a dormant commerce clause analysis would be "particularly inapt.").

tutional rights to non-Indian defendants, in order for the statute to be constitutional.[196]

Finally, there are good reasons to believe that tribal judges exercising power pursuant to SDVCJ should never be considered officers of the United States for the purposes of Article II or given salary protections and life tenure pursuant to Article III. The Court has held that to qualify as an "officer of the United States" for the purposes of Article II, the officer in question must hold a public station or employment within the federal government and have significant authority pursuant to federal law.[197] Tribal judges, arguably, have neither. Tribal judges hold office in tribal governments, not in the federal government, and even when they exercise SDVCJ, that power is substantially rooted in tribal law because every case arises as a result of a tribal code violation.[198] If tribal judges are not officers of the United States for the purposes of Article II, then they need not be appointed under the Appointments Clause, and the President does not require a mechanism for their removal. Additionally, both territorial court systems, such as the court system in Puerto Rico, and D.C. local courts are authorized to exercise jurisdiction pursuant to federal statutes, and these judges are locally chosen and do not necessarily receive life tenure or enjoy salary protection.[199] Like tribal judges exercising authority pursuant to VAWA 2013, local D.C. courts and territorial courts exercise power pursuant to federal statutes. Yet, D.C. local court judges and territorial court judges are not constrained by Article II or Article III.[200]

196. In the unlikely event that the Court determines that SDVCJ constitutes delegated federal authority encumbered by all the Constitution's substantive provisions, Congress can use its plenary power to ensure that statutes like VAWA 2013 are constitutionally compliant. For example, Congress can legislate to fill in any gaps between the rights outlined in ICRA and their federal counterparts, and it can require that tribal judges be given life tenure and salary protections.

197. *See* Buckley v. Valeo, 424 U.S. 1, 141 (1976) (per curiam); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 485–86 (2010).

198. VAWA 2013 grants tribes jurisdiction to prosecute non-Indians for crimes of domestic violence, dating violence, and criminal violations of protection orders as those crimes appear in tribal codes. 25 U.S.C. § 1304 (Supp. V. 2018).

199. Price, *supra* note 20, at 702.

200. In the alternative, the Court might recognize tribal courts exercising SDVCJ to be validly exercising delegated federal authority as Article I courts. Article I courts, or congressionally-sanctioned non-Article III courts, need not conform to Article III's proscriptions. *See generally* 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3528 (3d ed. 2015) (examining the jurisprudence surrounding Article I legislative courts). So far, the Court has recognized several categories of Article I courts, and these categories are not exclusive; the Court's Article I court jurisprudence is still developing. For example, in *Commodity Futures Trading Commission v. Schor*, the Court applied a balancing approach, not a strict categorical approach, to determine whether bankruptcy courts were valid Article I courts. 478 U.S. 833, 847–48 (1986).

Conclusion

There are sound arguments that VAWA 2013's tribal provisions, and similar legislation, are constitutional. Contrary to Justice Kennedy's concerns, political participation is not a constitutionally necessary prerequisite to criminal jurisdiction, and, in any event, the commission of a crime within a tribe's sovereign borders should be sufficient consent to that government's criminal jurisdiction. The Court in *Lara* made clear that Congress, through its plenary power over Indian affairs, has the constitutional authority to enact legislation that alters the scope of inherent tribal power by relaxing restrictions that have been placed on that power. Because Congress exercised its plenary power when enacting VAWA 2013 and used it to recognize and reaffirm tribes' inherent sovereign authority to prosecute non-Indians, the exercise of SDVCJ need not conform to the substantive provisions of the Constitution. Even if SDVCJ constitutes delegated federal authority, however, VAWA 2013 need not be amended to conform to the Constitution's substantive requirements in order to remain valid law. Nevertheless, with Republicans still in control of the Senate and the White House, VAWA 2013, and important legislation that seeks to build on it, will continue to encounter resistance of the types outlined herein.

Under a balancing approach, the Court could find that tribal courts constitute valid Article I courts. Tribal courts are very similar to both territorial courts and the D.C. court system. In *Palmore v. United States*, the Court found that the local D.C. court system was legitimate by analogizing to territorial court systems and state courts. The *Palmore* Court reasoned that Article III's requirements are most applicable where national law and affairs of national concern are at stake, and that under certain circumstances Congress can legislate with respect to particular areas that require specialized treatment. 411 U.S. 389, 407–09 (1973). Thus, the Court concluded, the congressionally enacted local D.C. court system, which is charged with the "responsibility for trying and deciding those distinctively local controversies that arise under local law, including local criminal laws having little, if any, impact beyond the local jurisdiction," need not conform to the requirements of Article III. *Id*. at 409. Similarly, tribal courts exercising SDVCJ would be handling local criminal matters that would have little, if any, impact outside of tribal communities. *See* United States v. Lara, 541 U.S. 193, 204 (2004) (finding that tribes' authority to prosecute nonmember Indians who commit crimes within their territory is a power that gives tribes control over their own land). Thus, like territorial courts and D.C. courts, tribal courts exercising SDVCJ could be found to be valid Article I courts.