CLOSING THE GAP OF JUSTICE: PROVIDING PROTECTION FOR NATIVE AMERICAN WOMEN THROUGH THE SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION PROVISION OF VAWA

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INTRODUCTION

Soon after Native American Diane Millich and her non-Indian husband got married, they moved into her home, located on the Southern Ute Indian reservation where she grew up. Millich's husband began routinely abusing her, and within a year she suffered "more than 100 incidents of being slapped, kicked, punched and living in terror[.]"[1] *Millich made numerous attempts to call her local tribal and county police for help during these episodes of violence. In fact after one instance of beating his wife, Millich's husband himself called the sheriff to report what he had done. Because he knew that there was nothing the sheriff could do. That no help would come. That he would never be prosecuted for what he did. Why? Because Millich was a Native American, Millich's husband was not, and he was abusing her on tribal land. And because of these circumstances, as Millich later observed, "The law couldn't touch him."*[2] *Unfortunately Millich's circumstance is not an isolated oversight of the law. Many Indian women have not been able to seek help or justice because they happened to be trapped in this scenario: an Indian victim of a non-Indian abuser on tribal land. A recent amendment to the Violence Against Women Act (VAWA), however, was passed to change all this.*

A historic piece of legislation has recently been enacted which gives Native American victims of domestic abuse a new hope in being able to bring their abusers to justice. Before the passage of this act, a jurisdictional gap existed which permitted non-Indian perpetrators of domestic and sexual abuse to escape prosecution. The Violence Against Women Reauthorization Act of 2013, however, seeks to close this gap by granting tribes special criminal jurisdiction over domestic abuse crimes in Indian country. The legality of

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1 Sari Horwitz, *New Law Offers Protection to Abused Native American Women*, WASH. POST, Feb. 8, 2014, http://www.washingtonpost.com/world/national-security/new-law-offers-a-sliver-of-protection-to-abused-native-american-women/2014/02/08/0466d1ae-8f73-11e3-84e1-27626c5ef5fb_story.html [http://perma.cc/QV4E-CEYV].

2 *Id.*

the unprecedented jurisdiction will undoubtedly be challenged soon after its implementation, and the Supreme Court may have to determine the constitutionality of the Act.

Part I of this Note describes the exigent situation of sexual violence in Indian country against Native Americans (especially by non-Indians) by presenting statistics on the issue. Part II examines how, despite these high rates of domestic violence, the interaction of federal cases, congressional acts, and tribal sovereignty had prevented federal, state, and tribal governments from having the jurisdictional authority and effective means to prosecute non-Indian abusers in Indian country. Part III explores how the latest amendment to the Violence Against Women Act offers a solution to this injustice. Specifically, Title IX of the Act closes the jurisdictional gap by granting tribes "special domestic violence criminal jurisdiction" over non-Indians in Indian country.[3] Finally, Part IV presents the likely claims that will be raised in federal court against the VAWA Amendment. These include challenging Congress's authority to enact the special criminal jurisdiction, and questioning whether fundamental constitutional rights can be upheld in tribal courts under the Act.

I. Domestic Violence Issues in Indian Country

The need for greater protection of Indian[4] women against crimes of domestic and sexual violence is dire, as evidenced by numerous studies. According to the Department of Justice, from 1992 to 2001 the average violent crime rate among Indians was approximately two and one half times the national rate, and Native Americans were twice as likely to experience rape or sexual assault compared to all other races.[5] Another study found "31.4% of Native American and Alaska Native women (that is, every 1 out of 3) are likely to be raped in their lifetimes. Compare this to the 17.7% of White women and 18.8% of African-American women likely to be raped, and the results are staggering."[6]

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3 Violence Against Women Reauthorization Act of 2013, Pub. L. 113–4, § 904 (2013).

4 The term "Indian" is used according to its definition in 25 U.S.C. § 1301, which states, "'Indian' means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, United States Code, if that person were to commit an offense listed in that section in Indian country to which that section applies." 25 U.S.C. § 1301 (2006).

5 STEVE W. PERRY, BUREAU OF JUSTICE STATISTICS, A BJS PROFILE, 1992–2002: AMERICAN INDIANS AND CRIME (2004).

6 Amanda M.K. Pacheco, *Broken Traditions: Overcoming the Jurisdictional Maze to Protect Native American Women from Sexual Violence*, 11 J. L. & SOC. CHALLENGES 1, 2 (2009).

Unfortunately, Indian women mainly experience sexual and domestic violence at the hands of non-Indians. One compilation of the National Crime Victimization Surveys (NCVS) from 1992 to 2005 shows that American Indian and Alaska Native women are almost three times as likely to experience rape or sexual assault as compared to White, African American, or Asian American women.[7] Of the American Indian and Alaska Native women who suffered rape or sexual assault, two-thirds of them identified the offenders as non-Indian.[8] The same compilation also revealed that American Indian and Alaska Native women suffer the highest rates of intimate partner violence (the majority of which are assaults) than women of any other race.[9] Nearly two-thirds of American Indian and Alaska Native women victims of assault reported that the offender was non-Indian.[10] The results of another study were even more damning: "Over 85% of perpetrators in rape and sexual assault against Native American women are described by their victims as being non-Indian."[11] It is clear that Indian women require protection from their non-Indian abusers, as well as legal means to bring them to court. However, the current legal structure in the United States and Indian country prevents effective prosecution of non-Indian perpetrators of domestic violence when such crimes occur in Indian country.[12] A "jurisdictional gap" exists in Indian country that prevents Native American victims of abuse from seeking prosecution of their abusers.

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7 RONET BACHMAN ET AL., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 33 (2008).

8 *Id.* at 38.

9 *Id.* at 47.

10 *Id.* at 51.

11 Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CAL. L. REV. 185, 188–89 (2008).

12 The term "Indian country" is defined as:

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

18 U.S.C. § 1151 (2006).

II. The Jurisdictional Gap

Despite the high rates of domestic and sexual violence experienced by Native American women, the interplay of federal, state, and tribal criminal jurisdiction has formed a jurisdictional gap that permits many non-Indian domestic violence offenders in Indian country to escape prosecution. To understand the origins of this criminal jurisdictional gap, as well as tribal sovereignty and jurisdiction generally, it is necessary to examine the fundamental principles of Indian law developed in the three influential cases written by Chief Justice Marshall in the early nineteenth century: *Johnson v. M'Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*[13]. Though Indian law has greatly expanded and progressed in the nearly two centuries since the Marshall trilogy, several of the holdings and reasoning presented in these cases remain relevant to current determinations of Native American sovereignty and jurisdiction. In considering the specific topic of tribal jurisdiction, it is also imperative to examine the three more recent Supreme Court cases on the topic—*Oliphant v. Suquamish Indian Tribe*, *Duro v. Reina*, and *United States v. Lara*[14]—as well as legislative acts created to regulate criminal jurisdiction in Indian country. These foundational cases and federal statutes define the current legal structure of criminal jurisdiction in Indian country, and thus clarify not only why a jurisdictional gap regarding non-Indian domestic violence offenders in Indian country exists, but also what remedies may be legally pursued to fix the injustice.

A. Historical Foundations of Tribal Sovereignty and Jurisdiction—The Marshall Trilogy

In *Johnson v. M'Intosh*, Chief Justice Marshall determined that the doctrine of discovery was the appropriate legal theory to apply in defining the rights of Native Americans in regard to land possession.[15] Legal title to the lands of North America passed from the European nations that had "discovered" them to their successor, the United States. Consequently, the federal government of the United States held the preemption right, or the "exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest[.]"[16] Native Americans were merely occupants of the lands they inhabited, and

13 Johnson v. M'Intosh, 21 U.S. 543 (1823); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832).

14 Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Duro v. Reina, 495 U.S. 676 (1990); United States v. Lara, 541 U.S. 193 (2004).

15 *Johnson*, 21 U.S. at 572–88.

16 *Id.* at 587.

lacked the power to transfer possession of the land to another party.[17] Marshall also vaguely noted, though, that discovery also granted tribes "a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise."[18] The next case in the trilogy, *Cherokee Nation v. Georgia*, produced a very fragmented opinion. Marshall only wrote for himself and one other Justice when he held that Indian tribes are not "foreign states" as contemplated in Article III of the U.S. Constitution.[19] Instead he described them as "domestic dependent nations[,]" recognizing that tribes did maintain some aspects of sovereignty, and characterized their relation to the United States as one "resembl[ing] that of a ward to his guardian."[20]

The language of the final trilogy case, *Worcester v. Georgia*, however, suggested that a greater degree of tribal sovereignty existed than implied in *Cherokee Nation*. While writing for the 5-1 majority, Marshall never once re-described tribes as "domestic dependent nations" and instead wrote that "Indian nations ha[ve] always been considered as distinct, independent political communities, retaining their original natural rights . . . from time immemorial," with the exception of their right to conduct tribal interactions with other nations.[21] The Court held that state governments do not have the authority to enact laws that affect the "distinct communities" of Indian tribes, and under the U.S. Constitution and laws, the only intercourse between Indian nations and the Unites States occurs through the federal government.[22] Though Indian Law has developed and changed since the Marshall trilogy, several of the Court's holdings have had lasting effects. For example, the reasoning in *Cherokee Nation* and several other Supreme Court cases collectively have come to enumerate the federal government's unique trust responsibility to Native American tribes.[23]

17 *Id.* at 591.

18 *Id.* at 587.

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

20 *Id.* at 17.

21 Worcester v. Georgia, 31 U.S. 515, 559 (1832).

22 *Id.* at 561

23 *See* United States v. Kagama, 118 U.S. 375, 384 (1886) ("The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell."); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) ("Congress possesse[s] a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests."); United States v. Sandoval, 231 U.S. 28, 46 (1913) ("[L]ong continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders.").

Under *Worcester*, states are still prevented from exercising their jurisdictional authority in Indian country, save in a very limited number of circumstances in which the federal government has explicitly authorized such an extension. Furthermore, the concept of implicit divestiture in Indian law was first introduced in *Johnson*—under the doctrine of discovery, Indian tribes lost their ability to independently transfer possession of their land to others without the involvement of the United States—but is later revived in different contexts by subsequent courts.[24]

B. The Modern Legal Structure of Criminal Jurisdiction in Indian Country

The unique legal framework of criminal jurisdiction that exists in Indian country stems from the interplay of Supreme Court cases, federal legislation, and tribal sovereignty. The Supreme Court—through its more recent holdings in *Oliphant*, *Duro*, and *Lara*—and Congress—through various legislative acts—have attempted to establish and clarify the laws governing prosecutorial authority over Indians and non-Indians in Indian country. Unfortunately, their efforts have produced a legal system in which effective legal remedies for Native American victims of domestic violence against non-Indian abusers are nearly nonexistent.

1. Congressional Plenary Power

When examining legal interactions between tribes and the federal government, it is vital to note that Congress has "plenary power" over Indian affairs. In the early twentieth century, the Supreme Court stated that "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning[.]"[25] In *United States v. Lara*, the Court further held that the Constitution (specifically the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, and the Treaty Clause, Art. II, § 2, cl. 2), "grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Court has] consistently described as 'plenary and exclusive.'"[26] Though Congress's plenary power is not equivalent to absolute power, it does permit Congress to "limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."[27] The Court has upheld many federal statutes that abrogate tribal sovereignty, including the Major Crimes

24 *See* United States v. Wheeler, 435 U.S. 313 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

25 *Lone Wolf*, 187 U.S. at 565.

26 United States v. Lara, 541 U.S. 193, 200 (2004) (internal citation omitted).

27 Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978). *See also* Talton v. Mayes, 163 U.S. 376 (1896).

Act of 1885 in the case *United States v. Kagama*[28] and the Indian Civil Rights Act of 1968 ("ICRA") in *Santa Clara Pueblo v. Martinez*.[29] Such expansive authority provides Congress with a wide foundation to enact laws concerning Indian tribes.

2. The Three Principal Supreme Court Cases on Tribal Jurisdiction

The opinions of the Supreme Court in *Oliphant*, *Duro*, and *Lara* trace the development of the Court's understanding of criminal jurisdiction in Indian country. The first, *Oliphant*, holds that tribal court jurisdiction does not extend to non-Indians.[30] The Court's decision in *Duro* stated that tribes could not have criminal jurisdiction over nonmember Indians,[31] but the holding was overruled by a legislative act.[32] The Court in *Lara* was faced with a challenge to that act and held that the prosecution of a nonmember Indian in tribal court pursuant to the congressional statute was a prosecution by a sovereign separate from the United States, and therefore could not violate the Double Jeopardy Clause.[33] The reasoning and holdings presented in these cases help reveal why there is a jurisdictional gap that prevents effective prosecutorial authority over non-Indian perpetrators in Indian country. But they also provide guidance for determining which resolutions can be pursued.

a. *Oliphant v. Suquamish Indian Tribe*

In 1978 in *Oliphant v. Suquamish Indian Tribe*, the Supreme Court considered the issue of tribal criminal jurisdiction over non-Indians.[34] Two non-Indian residents of the Port Madison Reservation of the Suquamish Tribe were arrested by tribal authorities after allegedly committing crimes on the reservation. Both of the non-Indian petitioners contended that the Suquamish Indian Provisional Court could not try them since Indian tribal courts did not have criminal jurisdiction over non-Indians. The Court agreed and held that, due to the "overriding sovereignty of the United States," tribal governments do not have jurisdiction to try and prosecute non-Indian offenders, "except in a manner acceptable

28 *Kagama*, 118 U.S. at 384–385.

29 *Santa Clara Pueblo*, 436 U.S. at 57–58.

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

31 Duro v. Reina, 495 U.S. 676, 688 (1990).

32 *See* Indian Civil Rights Act, Pub. L. No. 90-284, Tit. II–VII, 201–701, 82 Stat. 77 (codified as amended at 25 U.S.C. 1301–1341 (1994)).

33 United States v. Lara, 541 U.S. 193 (2004)

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

to Congress."[35] By examining earlier treaty provisions and congressional policies, the Court found an implied assumption that tribal courts lacked jurisdiction to try non-Indians. But even if the Court were to ignore these implications of past federal precedents, it still held that Native American tribes cannot exercise criminal jurisdiction over non-Indians without an affirmative congressional delegation of such power.[36] This limitation on their authority is a consequence of their incorporation into and acquiescence to the "overriding sovereignty" of the United States.[37]

b. *Duro v. Reina* and the "*Duro* Fix"

The main issue in *Duro v. Reina* was whether a tribe could assert criminal jurisdiction over a nonmember Indian.[38] In this case, the defendant allegedly committed murder within the boundaries of the reservation of the Salt River Pima-Maricopa Indian Community. The accused was an Indian, but a member of a different tribe, so he challenged the jurisdiction of the Pima-Maricopa tribal court.[39] The Court again weakened tribal authority by holding that the retained sovereignty of Indian tribes did not include the power to assert criminal jurisdiction over nonmember Indians within the boundaries of their reservations. "In the area of criminal enforcement . . . tribal power does not extend beyond internal relations among members. . . . For purposes of criminal jurisdiction, petitioner's relations with this Tribe are the same as the non-Indian's in *Oliphant*. We hold that the Tribe's powers over him are subject to the same limitations."[40]

Congress, however, quickly acted to overrule the *Duro* holding. In 1991, congressional legislation amended the Indian Civil Rights Act of 1968[41]—specifically 25 U.S.C. § 1301—by changing the definition of tribal "powers of self government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction

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35 *Id.* at 210.

36 *Id.* at 208.

37 *Id.* at 209.

38 Duro v. Reina, 495 U.S. 676 (1990).

39 *Id.* at 679–82.

40 *Id.* at 688.

41 Indian Civil Rights Act, Pub. L. No. 90-284, Tit. II-VII, 201-701, 82 Stat. 77 (codified as amended at 25 U.S.C. 1301-1341 (1994)).

over *all* Indians."[42] The revision, which clearly recognizes the authority of tribes to exercise criminal jurisdiction within their reservation over Indians regardless of their membership in the prosecuting tribe, became generally known as the "*Duro* fix."[43]

c. *United States v. Lara*

The latest major Supreme Court case considering tribal criminal jurisdiction produced a split decision. Only five Justices joined the majority holding in *United States v. Lara*.[44] Respondent Lara, an Indian but nonmember of the Spirit Lake Tribe, was prosecuted for "violence to a policeman" in the Spirit Lake Tribal Court, where he was sentenced and served 90 days in jail.[45] After his tribal conviction, Lara was charged in a federal district court with a substantially similar crime. Lara challenged the federal prosecution for assaulting a federal police officer as violating the Double Jeopardy Clause.[46] In its opinion, the Court observed that resolving Lara's claim would depend on whether the source of the tribe's criminal jurisdiction over nonmembers was the tribe's inherent tribal sovereignty, or delegated federal authority.[47] The majority held that the tribal court's power to prosecute nonmember Indians originated from Congress "relaxing" previous federal restrictions on the inherent sovereign authority of Native American tribes, per the language in the "*Duro* fix."[48] The congressional amendment to 25 U.S.C. § 1301 which empowered tribes to bring charges against nonmember Indians explicitly states that a tribe's "powers of self government" means "the *inherent* power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."[49] "Congress, with this Court's approval, has interpreted the Constitution's 'plenary' grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority."[50] In prior cases such as *Oliphant* and *Duro*, the Court only considered the reach

42 25 U.S.C. § 1301(2) (2006) (emphasis added).

43 BENJAMIN J. CORDIANO, UNSPOKEN ASSUMPTIONS: EXAMINING TRIBAL JURISDICTION OVER NONMEMBERS NEARLY TWO DECADES AFTER DURO V. REINA, 41 CONN. L. REV. 265, 268 (2008).

44 United States v. Lara, 541 U.S. 193 (2004).

45 *Id.* at 196.

46 *Id.* at 197.

47 *Id.* at 199.

48 *Id.* at 199–200.

49 25 U.S.C. § 1301(2) (2006) (emphasis added).

50 *Lara*, 541 U.S. at 202.

of tribal sovereignty at the time the Court formed its holdings, and did not present any limits on Congress's plenary power to adjust the sovereign status of tribes in the future. Since the tribe's prosecution of Lara stemmed from its inherent power as a separate sovereign, and not delegated federal power, the Double Jeopardy Clause was not violated.

3. Federal Statutes

Congress's plenary power has permitted it to enact very influential federal legislation regarding criminal jurisdiction in Indian country, and delegate jurisdictional power between the federal, state, and tribal governments (mostly to the detriment of tribal sovereignty). These acts add another layer of complexity to understanding how Indians and non-Indians may be prosecuted for crimes committed in Indian lands.

a. General Crimes Act and Major Crimes Act

The General Crimes Act of 1817, sometimes referred to as the Indian Country Crimes Act, states:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.[51]

Consequently, the Act only applies federal criminal law to non-major crimes committed by non-Indians against Indians and to non-major crimes committed by Indians against non-Indians, in Indian country. The Act does not apply to crimes when the offending Indian has already been punished by the tribe, nor to crimes over which treaty provisions grant a tribe exclusive jurisdiction.

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51 18 U.S.C. § 1152 (2006).

The Major Crimes Act of 1885, on the other hand, grants federal criminal jurisdiction over fifteen (originally seven) major crimes perpetrated by Indians in Indian country, regardless of whether the victim is Indian or not.[52] Congress passed this Act to overturn the Supreme Court decision in *Ex Parte Crow Dog*, which held that there was no federal criminal jurisdiction over an Indian who allegedly murdered another Indian in Indian country, because the General Crimes Act did not extend to crimes committed by one Indian against another.[53] The legislature expanded federal criminal jurisdiction to include Indian perpetrators of the major offenses of: murder, manslaughter, kidnapping, maiming, a felony under chapter 109A (sexual abuse), incest, a felony assault under 18 U.S.C. § 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under 18 U.S.C. § 661 (embezzlement and theft).[54] The Supreme Court held that the Major Crimes Act and its substantial abrogation of tribal sovereignty are a valid exercise of congressional power due to the dependent "ward" status of tribes.[55]

b. Public Law 280

Several states play a prominent role in regulating criminal jurisdiction in certain areas of Indian country due to the enactment of Public Law 280 (P.L. 280).[56] In 1953, Congress mandated the transfer of federal jurisdictional authority over specific regions of Indian country to five (later six) states: California, Minnesota, Nebraska, Oregon, and Wisconsin. Alaska became a mandatory P.L. 280 state five years later.[57] The criminal and civil jurisdiction conferred by P.L. 280 on the six specified states is codified at 18 U.S.C.

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52 18 U.S.C. § 1153 (2006).

53 Ex parte Crow Dog, 109 U.S. 556 (1883).

54 18 U.S.C. § 1153 (2006).

55 United States v. Kagama, 118 U.S. 375, 383–85 (1886).

56 Act of Aug. 15, 1953, Pub. L. No. 280, ch. 505, 67 Stat. 588 (criminal provisions codified as amended in 18 U.S.C. § 1162 (2006) and 28 U.S.C. § 1360 (2006)).

57 Nancy Thorington, *Civil and Criminal Jurisdiction over Matters Arising in Indian Country: A Roadmap for Improving Interaction Among Tribal, State and Federal Governments*, 31 MCGEORGE L. REV. 973, 997 (2000).

§ 1162(a).[58] In short, the six listed states were granted the power to enforce their state criminal laws in the corresponding listed Indian country. The General Crimes Act and the Major Crimes Act no longer apply to the specified Indian country areas in these six mandatory states.[59] Originally, P.L. 280 permitted all other states to voluntarily assume civil and criminal jurisdiction over Indian country within their borders regardless of the tribal preference. However, several amendments to P.L. 280 were passed as part of the Indian Civil Rights Act in 1968,[60] including one which created a tribal consent provision in P.L. 280. Thus no state can be granted P.L. 280 jurisdiction without the affirmative vote of the affected Indians from a special election.[61] Another amendment allows states to

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58 (a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.
California	All Indian country with the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country with the State.
Oregon	All Indian country with the State, except the Warm Springs Reservation.
Wisconsin	All Indian country with the State.

18 U.S.C. § 1162(a) (2006).

59 18 U.S.C. § 1162(c) (2006).

60 Indian Civil Rights Act, Pub. L. No. 90-284, Tit. II-VII, 201-701, 82 Stat. 77 (codified as amended at 25 U.S.C. 1301-1341 (1994)).

61 25 U.S.C. §§ 1321–22, 1326 (2006).

retrocede jurisdiction back to the federal government.[62] Furthermore, the General Crimes Act and Major Crimes Act were only repealed in the six mandatory states, not the states that later opted for P.L. 280 jurisdiction.[63]

C. The Jurisdictional Gap—Where Federal, State and Tribal Law Fail to Serve Indian Victims of Domestic Violence

The prosecutorial authority in Indian country held by the tribal, state, and federal governments create a complex system of law. This system, however, fails to reach non-Indian perpetrators of sexual and domestic violence against Native American women in Indian country. "[N]on-Indian men victimize American Indian women because there is literally nothing stopping them from treating their partners in any manner they choose . . . . [T]he laws against domestic violence have no deterrent effect when it comes to non-Indian on Indian crimes because these crimes are not prosecuted."[64]

Firstly, tribal courts cannot assert their jurisdictional authority over non-Indians within their territory due to the holding of *Oliphant*—at least not without an "affirmative delegation of such power by Congress."[65] Secondly, states without P.L. 280 jurisdiction are unable to enforce their criminal law in Indian country over non-Indians (and Indians alike) due to the holding in *Worcester*. States with P.L. 280 jurisdiction received the substantial increase in criminal jurisdiction, along with its demand for more judges, prosecutors, local law enforcement agents, detention centers and other resources, absent any increase in federal funding.[66] Since reservation lands kept in trust cannot be taxed by states—a point reiterated by Public Law 280 in provision 18 U.S.C. § 1162(c)—P.L. 280 states lack access to their main sources of funding for law enforcement.[67] Lack of funding and numerous other factors have contributed to the reality that state and local law enforcement agencies in Indian country acting under P.L. 280 criminal jurisdiction have generally provided

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62 25 U.S.C. § 1323 (2006).

63 United States v. High Elk, 902 F.2d 660 (8th Cir. 1990).

64 Amy Radon, *Tribal Jurisdiction and Domestic Violence: The Need for Non-Indian Accountability on the Reservation*, 37 U. MICH. J. L. REFORM 1275, 1282 (2004).

65 Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978).

66 Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 704 (2006).

67 *Id.*

unsatisfactory service and ineffective crime control.[68]

Lastly, the General Crimes Act does grant the federal government criminal jurisdiction in Indian country when a non-Indian commits a crime against an Indian. However, the federal government

> often does not exercise this jurisdiction for reasons which include lack of federal law enforcement investigation into crimes of domestic violence and the failure to prioritize the prosecution of domestic violence. Further exacerbating the problem is the issue of limited resources; the federal government does not have the financial or personnel resources to effectively manage the high level of criminal activity experienced in Indian Country.[69]

The Government Accountability Office reported in December 2010 that U.S. Attorneys declined to prosecute approximately 52 percent of violent crimes that occurred in Indian country. Sixty-seven percent of sexual abuse related cases that occurred in Indian country were also declined.[70] This refusal to intervene exacerbates the already grave situation of domestic violence in Indian country. Thus Native American victims of domestic violence in Indian country are left without effective means to prosecute their non-Indian assaulters at the federal, state, or tribal level. However, this gap is being bridged by the newly enacted Violence Against Women Reauthorization Act of 2013.

III. Congressional Efforts to Combat Domestic Violence in Indian Country—The Violence Against Women Act

A. The Creation and Evolution of VAWA

The desperate situation faced by Native American victims of sexual and domestic violence has not gone unnoticed by the federal government. To address the pervasive issue of the abuse of women throughout the United States, Congress enacted the Violence

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68 *Id.* at 711–29.

69 Hart & Lowther, *supra* note 11, at 204. *See also* Samuel E. Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of Oliphant*, 57 UCLA L. REV. 553, 556–67 (2009); Radon, *supra* note 64, at 1282–83 (2004).

70 U.S. Gov't Accountability Office, GAO-11-167R, *U.S. Department of Justice Declinations of Indian Country Criminal Matters* (2010).

Against Women Act ("VAWA") in 1994,[71] after years of petitioning by hundreds of organizations and individuals concerned with women's rights.[72] VAWA was at the time "the federal government's first attempt at a comprehensive response to the social and legal problems posed by domestic violence, rape, and other forms of gender-motivated violence."[73] However, it was not until the 2005 amendment to VAWA that the legislature first implemented provisions targeted at fighting domestic violence in Indian country.[74] Congress at the time recognized that "Indian tribes require additional criminal justice and victim services resources to respond to violent assaults against women; and the unique legal relationship of the United States to Indian tribes creates a Federal trust responsibility to assist tribal governments in safeguarding the lives of Indian women."[75] Consequently the 2005 renewal had three Native American-focused goals:

> (1) to decrease the incidence of violent crimes against Indian women;
>
> (2) to strengthen the capacity of Indian tribes to exercise their sovereign authority to respond to violent crimes committed against Indian women; and
>
> (3) to ensure that perpetrators of violent crimes committed against Indian women are held accountable for their criminal behavior.[76]

Despite this and subsequent amendments, though, VAWA continued to inadequately address the domestic violence issues faced by Native American women, including the jurisdictional gap that allows their abusers to escape prosecution. The recently passed Violence Against Women Reauthorization Act of 2013[77] ("VAWA Amendment"), however, contains an historic provision that grants tribes limited criminal jurisdiction over non-Indian offenders of domestic violence in Indian country.

71 Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (1994).

72 Sally Goldfarb, *The Civil Rights Remedy of the Violence Against Women Act: Legislative History, Policy Implications & Litigation Strategy*, 4 J.L. & POL'Y 391, 394 (1996).

73 Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 5–6 (2000).

74 Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162, 119 Stat. 2960 (2006).

75 *Id.* at §§ 901(5)–(6).

76 *Id.* at § 902.

77 Violence Against Women Reauthorization Act of 2013, Pub. L. 113–4 (2013).

B. The Violence Against Women Reauthorization Act of 2013

The VAWA Amendment, specifically Title IX, aims to significantly reduce the epidemic of violence against Indian women by amending the Indian Civil Rights Act of 1968 to grant tribal courts concurrent "special domestic violence criminal jurisdiction" over non-Indian offenders for crimes of domestic violence, dating violence, and violations of protection orders committed in Indian country.[78] The Act permits this jurisdiction by observing, "the powers of self-government of a participating tribe include the *inherent* power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons."[79] Only a non-Indian who resides in the Indian country of the prosecuting tribe, is employed by the Indian country of the prosecuting tribe, or is a spouse, intimate partner, or dating partner of a member of the prosecuting tribe or an Indian who resides in the Indian country of the prosecuting tribe can be subject to this "special" jurisdiction.[80]

The Act also explicitly states that the concurrent criminal jurisdiction of the United States, a State, or both over the Indian country will remain unaffected.[81] While exercising its domestic violence criminal jurisdiction, the participating tribe is required to uphold all of the rights of the accused as defined in the Indian Civil Rights Act, in addition to the right to a trial by an impartial jury drawn from a "fair cross section of the community."[82] The Indian Civil Rights Act lists many constitutional rights defendants must be granted in tribal court. Included are a majority of the individual rights protected by the U.S. Constitution.[83] Furthermore, a "constitutional catch-all" provision in the VAWA Amendment states that tribes must maintain "all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant."[84]

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78 Pub. L. 113–4 § 904(b)(3).

79 Pub. L. 113–4 § 904(b)(1) (emphasis added).

80 Pub. L. 113–4 § 904(b)(4)(B).

81 Pub. L. 113–4 § 904(b)(2).

82 Pub. L. 113–4 § 904(d).

83 25 U.S.C. § 1302 (2006).

84 Violence Against Women Reauthorization Act of 2013, Pub. L. 113–4 § 904(d)(4).

IV. Legal Challenges to the Reauthorization Act as Considered by the Supreme Court

On March 7, 2013, President Obama signed the VAWA Amendment into law, including the provision granting special domestic violence criminal jurisdiction to tribal courts.[85] Though tribal courts will not be able to begin prosecuting non-Indian perpetrators of domestic violence under this criminal jurisdiction until 2015 (at the earliest),[86] it is likely that once tribal courts do start to convict non-Indians, the constitutionality of the special jurisdiction will be challenged. Several possible challenges could be raised in federal court, from questioning Congress's authority to create such jurisdiction to contending that defendants' individual constitutional rights are not fully protected. Assuming that such challenges are granted a writ of certiorari by the Supreme Court, past court holdings and legislative acts will be key to determining if the special domestic violence jurisdiction provision will be upheld.

A. Congressional Authority to Expand Tribal Criminal Jurisdiction

An obvious challenge to the VAWA Amendment would be contesting whether Congress has over-stepped its authority by enacting Title IX and expanding tribal criminal jurisdiction to non-Indian U.S. citizens without sufficiently protecting their inextinguishable constitutional rights. To decide this issue, the Court will have to determine whether Congress is acting pursuant to the delegation of its federal authority (the "delegated Congressional authority" approach) or through the recognition of inherent tribal sovereign powers (the "inherent tribal authority" approach). Identifying which approach Congress utilized is a threshold determination for all possible constitutional challenges.

1. The Delegated Federal Authority Approach versus the Inherent Tribal Authority Approach

The delegated authority approach holds that when Native American tribes were forced to "submit" to the sovereignty of the United States, and thus became "wards" and "domestic dependent nations," they ceded to Congress their authority to exercise criminal jurisdiction

85 Jackie Calmes, *Obama Signs Expanded Anti-Violence Law*, N.Y. TIMES, Mar. 7, 2013, http://thecaucus.blogs.nytimes.com/2013/03/07/obama-signs-expanded-anti-violence-law/ [http://perma.cc/9YRT-AG5E].

86 According to the Department of Justice, "Although tribes can issue and enforce civil protection orders now, generally tribes cannot criminally prosecute non-Indian abusers until at least March 7, 2015." *Violence Against Women Act (VAWA) Reauthorization 2013*, THE U.S. DEP'T OF JUSTICE, http://www.justice.gov/tribal/vawa-tribal.html [http://perma.cc/8YLT-GMQV] (last visited May 10, 2013).

over nonmember Indians and Indians within their lands.[87] Thus Congress has the discretion to decide whether it will expressly delegate these powers back to tribes, and "any such 'delegation' would not be a restoration of prior inherent sovereignty."[88] Because the powers are delegated from the federal government, tribal courts would be required to uphold all the protections of the Constitution during criminal proceedings against nonmembers and non-Indians.[89] Under the inherent tribal powers approach, tribes never extinguished their sovereign powers, including their authority to adjudicate criminal cases within their territory. When tribes were incorporated into the United States, Congress erected restraints on tribal sovereignty. But Congress can eliminate these restrictions at any time, thus permitting tribes to exercise their original, separate, pre-colonial inherent powers.[90] Such powers are not subject to the Constitution,[91] but only to statutory constraints, such as the Indian Civil Rights Act.

2. Federal Common Law

The two main cases the Court will look to for precedent, in determining whether Congress intended to delegate federal power to tribes or recognize tribal inherent power in enacting the VAWA Amendment, are *Oliphant* and *Lara*. The Court in *Oliphant* specifically addressed the issue of tribal jurisdiction over non-Indians by holding that Indian tribes do not have inherent criminal jurisdiction over non-Indians, even those within Indian country.[92] "While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, [the Court made] express [its] implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions."[93] Tribal incorporation into the United States has caused the implicit divestiture of several of their sovereign powers. "By submitting to the overriding sovereignty of the United States, Indian tribes . . . necessarily give up their power to try non-Indian citizens of

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87 United States v. Lara, 541 U.S. 193, 226 (2004) (Souter, J., dissenting).

88 *Id.* at 227.

89 JANE M. SMITH & RICHARD M. THOMPSON, CONG. RESEARCH SERV., R42488, TRIBAL CRIMINAL JURISDICTION OVER NON-INDIAN IN THE VIOLENCE AGAINST WOMEN ACT (VAWA) REAUTHORIZATION AND SAVE NATIVE WOMEN ACT 7 (2012).

90 *Lara*, 541 U.S. at 196–201.

91 SMITH & THOMPSON, *supra* note 89, at 7.

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

93 *Id.* at 204.

the United States except in a manner acceptable to Congress."[94] The Court even expressly stated, "Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress."[95] The language of the Court implies that Congress can determine if and in what manner tribal courts can have jurisdiction over non-Indians, but it appears to do so under the delegation of federal powers approach. The Court recognizes that the factors it considered while forming its decision are ultimately "considerations for Congress to weigh in deciding whether Indian tribes should finally be *authorized* to try non-Indians."[96] However, scholars, political analysts, and policy researchers all have "heavily criticized" the holding in *Oliphant*, and many have argued for an "*Oliphant* fix" that would parallel the *Duro* fix.[97] In particular, many scholars support, under the theory of inherent tribal sovereignty, a "fix" that remedies the widespread, critical situation of non-Indian perpetrators of domestic and sexual abuse of Indian women, by extending limited tribal criminal jurisdiction over non-Indians.[98]

Lara, the more recent decision written by Justice Breyer, however, clearly follows the inherent tribal sovereign authority approach, as shown by its observation that Congress's plenary power over Indian affairs authorizes it to "enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority."[99] The Court in *Lara*, though, was only concerned with whether Congress has the constitutional power to repeal limits on tribes' criminal jurisdiction over nonmember Indians, not non-Indians. But the reasoning used by the majority in analyzing the congressional recognition of tribal criminal jurisdiction over nonmembers, as presented in the amended Indian Civil Rights Act, can be used to examine the constitutionality of the expansion of tribal domestic violence criminal jurisdiction over non-Indian offenders, as stated in Title IX of the VAWA Amendment.[100]

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94 *Id.* at 210.

95 *Id.* at 208.

96 *Id.* at 212 (emphasis added).

97 Tom F. Gede, *Criminal Jurisdiction of Indian Tribes: Should Non-Indians Be Subject to Tribal Criminal Authority Under VAWA?*, ENGAGE: J. FED. SOC'Y PRACTICE GRP. 40 (2012).

98 *See* Ennis, *supra* note 69, at 589–604; Matthew Handler, *Tribal Law and Disorder: A Look at A System of Broken Justice in Indian Country and the Steps Needed to Fix It*, 75 BROOK. L. REV. 261 (2009); Hart & Lowther, *supra* note 11, at 226–28; M. Brent Leonhard, *Closing A Gap in Indian Country Justice:* Oliphant, Lara, *and DOJ's Proposed Fix*, 28 HARV. J. RACIAL & ETHNIC JUST. 117 (2012); Radon, *supra* note 64, at 1301–02.

99 United States v. Lara, 541 U.S. 193, 202 (2004).

100 Pub. L. 113–4 §§ 901-10.

The Court determined that because the *Duro* fix states that Congress "recognize[s] and affirm[s]" the "inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians[,]"[101] the federal government is not delegating jurisdictional power to Indian tribes, but instead is removing the federally imposed limitations that prevented tribes from exercising such jurisdiction.[102] In the VAWA Amendment, Congress also "recognize[s] and affirm[s]" the "inherent power of [the participating] tribe . . . to exercise special domestic violence criminal jurisdiction over all persons[.]"[103] The purposely almost-identical plain language of the *Duro* fix and the VAWA Amendment suggests that the Supreme Court will find that the VAWA Amendment also constitutionally eliminates congressional restrictions on inherent tribal sovereign power, though in this case with regard to domestic violence criminal jurisdiction over non-Indians.

In *Lara*, the Court then considered several different factors in determining whether Congress has the constitutional power to repeal limits on tribes' criminal jurisdiction over nonmember Indians. Congress's plenary power, or constitutionally granted "broad general powers to legislate in respect to Indian tribes,"[104] has provided it with the authority to create and eliminate restrictions on Indian sovereign powers since the founding of the Nation.[105] This capability, the Court claims, is and always has been an obvious congressional necessity since "the Government's Indian policies, applicable to numerous tribes with diverse cultures, affecting billions of acres of land, of necessity would fluctuate dramatically as the needs of the Nation and those of the tribes changed over time."[106] There is an exigent need to change the federal policies that attempt to address the continually high rates of sexual and domestic violence committed against Native American women, and to close the jurisdictional gap that prevents victims from seeking justice against their abusers. Given that our modern legal structure has failed to effectively mitigate these issues, a new and unprecedented congressional policy designed to eliminate them would be an appropriate federal response. As acknowledged by the Court in *Lara*, "major policy changes inevitably involve major changes in the metes and bounds of tribal sovereignty."[107]

101 25 U.S.C. § 1301(2) (2006).

102 *Lara*, 541 U.S. at 199.

103 Violence Against Women Reauthorization Act of 2013 Pub. L. 113–4 § 904(b)(1), 127 Stat. 54 (emphasis added).

104 *Lara*, 541 U.S. at 200.

105 *Id.* at 202.

106 *Id.*

107 *Id.*

The Court in *Lara*, however, also described the change of expanding tribal criminal jurisdiction to nonmember Indians as "a limited one[,]" since it involves a power similar to tribes' inherent power to prosecute their own members.[108] On the other hand, the Court may not view permitting tribes to prosecute non-Indians, as a "limited" change. The VAWA Amendment's grant of tribal prosecutorial authority over non-Indians is unprecedented since *Oliphant*, though arguably it is limited in its own way. The jurisdiction is restricted to crimes of domestic violence, dating violence, and violations of protection orders committed in Indian country, and only applies to people with significant ties to the prosecuting tribe. The grant of special domestic violence criminal jurisdiction "[i]n large part . . . concerns a tribe's authority to control events that occur upon the tribe's own land[,]"[109] a factor taken into consideration in *Lara*. It does not interfere with the State or federal governments' ability to assert their criminal jurisdiction in Indian country (since concurrent jurisdiction is maintained), and it requires tribal courts to uphold many individual constitutional rights of the defendant.[110] Thus the Court may find that the domestic violence criminal jurisdiction is also limited or, if not, is at least not an overreaching, unsupportable change.

The *Lara* majority additionally reviewed Congress's purpose in amending the Indian Civil Rights Act—"to modify the degree of autonomy enjoyed by a dependent sovereign that is not a State"—and found that the goal of the amendment was not unusual considering past analogous government alterations to the autonomy of dependent entities.[111] Because Congress's objective in the VAWA Amendment is the same, the Court should perceive that goal to be the same. Breyer also notes that the Court's past cases that define limits on tribal criminal jurisdiction, including *Oliphant* and *Duro*, are not "determinative" in *Lara* "because Congress has enacted a new statute, relaxing restrictions on the bounds of the inherent tribal authority that the United States recognizes. And that fact makes all the difference."[112] A similar change has occurred with the enactment of the VAWA Amendment, and therefore such cases should not be considered "determinative" in analyzing this Act either.

There are many intentional parallels, in both language and effects, between the *Duro* fix and the VAWA Amendment. If the Court follows its reasoning and precedents laid down

108 *Id.* at 204.

109 *Id.*

110 Pub. L. 113–4 § 904(d).

111 *Lara*, 541 U.S. at 203–04.

112 *Id.* at 207.

in *United States v. Lara*, and recognizes that the special domestic violence jurisdiction has been formed "in a manner acceptable to Congress[,]"[113] as required by *Oliphant*, and pursuant to the inherent tribal sovereignty approach, as supported by *Lara*, then it should find that Congress enacted Title IX of the VAWA Amendment under a theory of inherent tribal sovereignty.

3. Legislative History

As mentioned in the preceding Section, the Supreme Court in both *Oliphant* and *Lara* gave significant consideration to legislative history when determining if Congress was following the delegated approach or the inherent tribal sovereignty approach. Delving into the legislative history of the VAWA Amendment reveals further support for the contention that Congress intended to invoke the inherent tribal authority approach. In the Senate Committee Report, concerning Senate Bill 1925, the Senate majority stated, "Congress has the power to recognize and thus restore tribes' 'inherent power' to exercise criminal jurisdiction over all Indians and non-Indians[,]" as recognized by the Supreme Court in *Oliphant* and *Lara*.[114] Even though the Senate Minority Views Report, written by Senators Kyl, Hatch, Sessions and Coburn, and the House Committee Report for House Bill 4970 both rejected the special jurisdiction provisions of Title IX, they both did agree that the criminal jurisdictional authority derived from tribes' *inherent* sovereign authority. The minority Senators cited *Santa Clara Pueblo* while asserting, "American Indian tribes are regarded as deriving their powers from a 'source of sovereignty [that is] . . . foreign to the constitutional institutions of the federal and state governments.' The tribes' powers are not delegated or created by the federal government—rather, they are 'inherent powers of a limited sovereignty which has never been extinguished.'"[115] The House majority agreed with the Senate majority that "S. 1925 achieves its goal of tribal jurisdiction over non-Indian defendants by recognizing 'inherent' sovereign authority rather than by delegating Federal authority. Therefore, only ICRA and TLOA [(Tribal Law and Order Act)] apply."[116]

The plain language of the VAWA Amendment, the exceptionally on-point reasoning and conclusions of *Lara*, and the legislative history of the Amendment all indicate that Congress operated within its power and enacted the VAWA Amendment under the

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113 Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978).

114 S. REP. NO. 112–153, at 9 n. 23 (2012).

115 S. REP. NO. 112–153, at 48 (2012) (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71 (1978)).

116 H.R. REP. NO. 112–480, at 59–60 (2012).

inherent tribal authority approach. Consequently tribes will be acting pursuant to their own sovereign powers under Title IX, powers to which the U.S. Constitution does not directly apply. However, there are still many constitutional concerns that can be brought against the VAWA Amendment's special jurisdiction, which will challenge the sufficiency of Congress's protection of individual constitutional rights.

B. Challenges to Individual Constitutional Protections

The VAWA Amendment will likely also be challenged as violating individual constitutional rights, rights that are considered sacred under American law. Since the "special domestic violence criminal jurisdiction" provision is unprecedented, a large variety of challenges may be brought. Claims based on rights ranging from indigent defendants' Sixth Amendment right to counsel to citizens' common law *Miranda* rights will be argued to convince the courts that the VAWA Amendment is unconstitutional. However each argument can, and should, for one reason or other, be held unsubstantiated, and subsequently be struck down.

1. Providing All Indigent Defendant Citizens with Counsel Under the Sixth Amendment

A Sixth Amendment argument (which scholars often raised in regard to the Indian Civil Rights Act) could be raised by contending that the VAWA Amendment fails to provide all indigent defendants with access to counsel. The VAWA Amendment states that all the rights listed in the Indian Civil Rights Act must be upheld,[117] but the Indian Civil Rights Act only requires Indian tribes to give free counsel to indigent defendants who are charged with crimes with a sentence of more than one year.[118] Thus a defendant may argue that indigent defendants facing charges that can only lead to sentences of less than one year of imprisonment could be tried in a tribal court without counsel, a violation of the Sixth Amendment. This claim, however, would be dismissed due to a lack of careful reading of the VAWA Amendment. The Act also states, "if a term of imprisonment of *any length* may be imposed," a tribe must provide "all rights described in section 202(c)" of the Indian Civil Rights Act,[119] which includes "providing an indigent defendant the assistance of a

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117 Violence Against Women Reauthorization Act of 2013, Pub. L. 113–4, § 904(d), 127 Stat. 54

118 25 U.S.C. § 1302(c)(2) (2006).

119 Violence Against Women Reauthorization Act of 2013, Pub. L. 113–4, § 904(d)(2), 127 Stat. 54 (emphasis added).

defense attorney licensed to practice law[.]"[120] Consequently, the VAWA Amendment does not withhold access to counsel from any criminal indigent defendant and thus does not violate the Sixth Amendment.

2. Impartial Jury Requirement of the Sixth Amendment

Another claim that is usually directed towards the insufficiency of the Indian Civil Rights Act, but has been remedied in the VAWA Amendment, is that a criminal non-Indian defendant in Indian country may not have access to a jury that is impartial and representative of his peers. The creators of the VAWA Amendment appear to have had this constitutional concern in mind when they wrote § 904(d)(3), which states:

> (d) RIGHTS OF DEFENDANTS.—In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant—
>
> . . . (3) the right to a trial by an impartial jury that is drawn from sources that—
>
> (A) reflect a fair cross section of the community; and
>
> (B) do not systematically exclude any distinctive group in the community, including non-Indians[.][121]

The Amendment has explicitly incorporated the "fair cross section" of the community requirement created by the Supreme Court under federal common law.[122] Thus, while this may have been a constitutional issue under the Indian Civil Rights Act, the VAWA Amendment has eliminated this concern for non-Indian defendants being prosecuted by tribal courts under the special domestic violence jurisdiction.

3. Double Jeopardy Clause of the Fifth Amendment

A defendant could contend that the VAWA Amendment violates the Double Jeopardy Clause of the Fifth Amendment by arguing that the source of the expanded tribal criminal

120 25 U.S.C. § 1302(c)(2) (2006).

121 Violence Against Women Reauthorization Act of 2013, Pub. L. 113–4, § 904(d)(3), 127 Stat. 54.

122 *See* Taylor v. Louisiana, 419 U.S. 522, 531 (1975).

jurisdiction over non-Indians in Indian country comes from delegated federal authority. Thus if the defendant was charged in both a tribal court and a federal court for a domestic violence-related crime, the prosecutorial authority of both courts would stem from the federal government, and the defendant would be "twice put in jeopardy of life or limb" for the same offense by the same sovereign.[123] As shown in Section IV-A of this Note however, Congress intended, and plainly did, enact the VAWA Amendment pursuant to its power to "adjust" inherent tribal sovereign authority.

The Court observed in *Lara* that Congress's plenary power grants it the authority to recognize the inherent sovereignty of tribes and to "to relax restrictions that the political branches have, over time, placed on the exercise of a tribe's inherent legal authority."[124] The express language of the Indian Civil Rights Act indicates that Congress intends for tribes to draw their power to prosecute nonmember Indians from their "inherent" tribal power, "not delegated federal power."[125] Nearly identical language is used in the VAWA Amendment, which also explicitly states that tribal domestic violence criminal jurisdiction is founded in "the inherent power" of tribes.[126] The legislative history and plain language of the VAWA Amendment support this conclusion.[127] Thus a tribe participating in the special domestic violence criminal jurisdiction will be acting as a separate sovereign when it properly uses this limited jurisdiction to convict non-Indians. There can be no Double Jeopardy claim when there are two separate sovereigns convicting.[128] The prosecution of a non-Indian defendant under special domestic violence criminal jurisdiction does not amount to a federal prosecution and thus, as in *Lara*, the Double Jeopardy Clause will not be violated if the federal government charges the defendant with a substantially similar crime.

4. Grand Jury Indictment Requirement of the Fifth Amendment

Another potentially cognizable Fifth Amendment claim is the argument that the VAWA Amendment violates the federal right not to be prosecuted for a serious crime in the absence of a grand jury indictment. Neither the Amendment nor the Indian Civil Rights Act includes a statutory requirement for grand jury indictments for felonies in tribal courts. In

123 U.S. CONST. amend. V.

124 United States v. Lara, 541 U.S. 193, 196 (2004).

125 *Id.* at 199.

126 Violence Against Women Reauthorization Act of 2013, Pub. L. 113–4, § 904(b)(1), 127 Stat. 54.

127 *See supra* Section IV-A(3).

128 *Lara*, 541 U.S. at 198.

Talton v. Mayes, though, the Supreme Court held that the Fifth Amendment did not apply to the Cherokee Nation.[129] According to the Court, this is due to the fact that the grand jury indictment guarantee "had for its sole object to control the powers conferred by the Constitution on the National Government."[130] Observing that tribes are quasi-sovereign entities subject to the supreme authority of the federal government, the Court held that the Cherokee Nation's enforcement of its laws was an exercise of its "local powers[,]" not an exercise of delegated federal powers based in the U.S. Constitution.[131] "Just as in the state and territorial contexts, there would seem to be no compelling reason to require grand jury indictment in tribal courts (as *Talton* squarely held). There also seem to be grounds to allow substantial variation from federal jury practice, provided resulting procedures remain systematically fair; at a minimum, allowing tribes the same flexibility as states with respect to jury size and verdict unanimity seems appropriate."[132] These arguments against the necessity of Fifth Amendment grand jury indictments are not dependent on the fact that the crime in *Talton* occurred between two Cherokee Indians, not between an Indian and a non-Indian.[133] Therefore, based on the "sole object" of the grand jury indictment requirement and the lack of a "compelling reason" to apply the requirement in tribal courts, it is not a violation of a non-Indian's constitutional rights or the VAWA Amendment's "constitutional catch-all" provision[134] to not provide grand jury indictments under the special domestic violence criminal jurisdiction for non-Indians in tribal courts.

5. Possible Due Process Requirement—"Commensurate Consent"

In his *Plains Commerce Bank v. Long Family Land & Cattle Co.* opinion, written for the five-Justice majority, Chief Justice Roberts suggested that even when tribes have inherent jurisdiction over civil disputes, nonmember defendants must give "commensurate consent," in part because the "Bill of Rights does not apply to Indian tribes" and "nonmembers have no part in tribal government."[135] Thus in order for tribal "laws and regulations" to be "fairly imposed on nonmembers[,]" the nonmember must consent, "either expressly or by his

129 Talton v. Mayes, 163 U.S. 376 (1896).

130 *Id.* at 384.

131 *Id.*

132 Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 112 COLUM. L. REV. 657, 724 (2013).

133 *Talton*, 163 U.S. at 379.

134 Violence Against Women Reauthorization Act of 2013, Pub. L. 113–4, § 904(d)(4), 127 Stat. 54.

135 Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 337 (2008).

actions."[136] Though currently this "commensurate consent" doctrine may not be relevant to the VAWA Amendment, since the Amendment only confers *criminal* jurisdiction, there is a substantive due process concern when a U.S. citizen is subjected to laws (especially criminal laws) of a government he has not consented to. The VAWA Amendment, however, contains strict jurisdictional requirements to ensure that the tribe is only adjudicating crimes involving people with strong ties to the tribe. There is no special criminal jurisdiction over non-Indians under the VAWA Amendment if the tribe fails to prove that the defendant or victim lives in the Indian country of the tribe; is employed in the Indian country of the tribe; or is a spouse, intimate partner, or dating partner of a member of the tribe or an Indian who resides in the Indian country of the tribe.[137] The legislative history of the Amendment shows that Congress intended for the tribal criminal jurisdiction to be restricted to only those non-Indians who have strong ties to the prosecuting tribe. In its report, the Senate majority asserted that the selective requirements given in Title IX of the VAWA Amendment "provides tribes special domestic-violence criminal jurisdiction to hold non-Indian offenders accountable in very limited circumstances. First, it extends only to the crimes of domestic violence, dating violence, and violations of protection orders that are committed in Indian country. Second, it covers only those non-Indians with significant ties to the prosecuting tribe[.]"[138] Furthermore, the Senate majority expressly stated, "Extending that jurisdiction in a very narrow set of cases over non-Indians who *voluntarily and knowingly established significant ties to the tribe* is consistent with" extending authority to tribes only when the necessary procedural protections are established (as in the Tribal Law and Order Act), "responsive to the epidemic of violence experienced by Native women, and within the authority of Congress to do."[139] Given the strict conditions Congress requires before a tribe can assert jurisdiction, and the fact that the Senate majority viewed these conditions as being so selective that they would only apply to a person who has "*voluntarily and knowingly established significant ties to the tribe,*" the VAWA Amendment will likely satisfy Roberts' "commensurate consent" requirement if it is extended to criminal cases.

6. Federal Common Law Rights and Requirements—*Miranda* and Other Rights

Lastly, the VAWA Amendment may be challenged for not requiring tribal courts to

136 *Id.*

137 Violence Against Women Reauthorization Act of 2013, Pub. L. 113–4, § 904(b)(4)(B), 127 Stat. 54.

138 S. REP. NO. 112–153, at 9 (2012).

139 *Id.* at 10–11. (emphasis added).

generally follow federal common law in regards to how constitutional rights should be interpreted or protected. Several of such implied rights are already protected by the Indian Civil Rights Act or the VAWA Amendment. As mentioned in Section IV-B(2), section 904(d) of the Amendment requires that tribal courts maintain the federal common law "fair cross section" requirement of Sixth Amendment. The Indian Civil Rights Act also contains a provision nearly identical to the implied Fifth Amendment right against self-incrimination[140] (derived from the prohibition of compelling any person "to be a witness against himself").[141] However, rights such as the court-created *Miranda* rights are not explicitly covered by either Act.

In *Miranda v. Arizona*, the Supreme Court held that a suspect held in custody must be informed of the right to consult with counsel and the right against self-incrimination before any questioning occurs. If the suspect is not informed of these rights, and incriminating statements are elicited from the suspect, the admission of these statements at trial would violate the suspect's Fifth and Sixth Amendment rights.[142] *Miranda* warnings are not expressly mandated by the Bill of Rights, yet they are considered indispensible to the maintenance of citizens' Fifth and Sixth Amendment rights. The Supreme Court went so far as to declare *Miranda* "a constitutional decision" of the Court, and "may not be in effect overruled by an Act of Congress[.]"[143]

Consequently, if a tribal court does not uphold a non-Indian defendant's *Miranda* rights (or other important court created rights), it might be a violation of the defendant's constitutional rights. "[A]utonomy interests of the tribe might support allowing prosecution in accordance with traditional procedures of the particular prosecuting tribe, but only insofar as . . . the tribe's procedural tradition does not unduly burden the individual interests underlying an asserted procedural right."[144] The VAWA Amendment also provides a solution for such issues. Since it would be impractical, if not impossible, for Congress to write into the Amendment every current and possible future federal common law right, it instead wrote a "catch-all" constitutional provision to allow courts to read into the Amendment the

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140 25 U.S.C. §1302. ("No Indian tribe in exercising powers of self-government shall . . . compel any person in any criminal case to be a witness against himself[.]").

141 U.S. CONST. amend V.

142 Miranda v. Arizona, 384 U.S. 436 (1966).

143 Dickerson v. United States, 530 U.S. 428, 432 (2000).

144 Price, *supra* note 132, at 723.

rights they feel are "necessary under the Constitution."[145] For a more complete analysis of the constitutional provision, see Section IV-C.

C. Constitutional "Catch-all" Provision

The constitutional "catch-all" provision of the VAWA Amendment, in full, states:

> In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant—
>
> . . .
>
> (4) all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.[146]

All unclear constitutional claims against the VAWA Amendment will be greatly influenced by the Court's interpretation of this constitutional rights provision. The plain meaning of this provision indicates that tribal courts must additionally provide defendants with any crucial constitutional rights not specifically enumerated in the Indian Civil Rights Act or the VAWA Amendment. Thus it effectively guarantees that defendants will be granted all constitutional rights that would normally be upheld in federal or state criminal proceedings. According to the Senate majority report on S. 1925, this was the intent of Congress: Section 904 "effectively guarantees that defendants will have the same rights in tribal court as in State court, including due-process rights and an indigent defendant's right to free appointed counsel meeting Federal constitutional standards"[147] and "tribes would be required to protect effectively the same Constitutional rights as guaranteed in State court criminal proceedings[.]"[148] This functional and practical provision permits the VAWA Amendment to adapt to future law, keeps the Act concise and cohesive by not having to provide extensive lists on which rights are necessary under the Constitution, and generally helps courts to maintain the constitutionality of the Amendment. If Congress disagrees with a court's ruling or balancing of how far tribal courts must follow federal

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145 Violence Against Women Reauthorization Act of 2013, Pub. L. 113–4, § 904(d)(4), 127 Stat. 54.

146 *Id.*

147 S. REP. NO. 112–153, at 32 (2012).

148 *Id.* at 10.

court precedents with maintenance of tribes' inherent sovereignty, it may enact legislation to address the issue. Given the legislative intent and the careful yet comprehensive language of the constitutional rights provision, it appears to be sufficiently designed to prevent Title IX from being overturned by many if not all challenges concerning the preservation of individual constitutional protections.

CONCLUSION

The Violence Against Women Reauthorization Act of 2013 is a remarkable and unparalleled attempt to provide Native American victims of domestic abuse with the power to seek justice. Native American women experience an enormously disproportionate amount of domestic and sexual violence. They experience this abuse more than any other race, and it is mainly perpetrated by non-Indians. But until the VAWA Amendment is implemented, an inequitable system that permits domestic violence offenders in Indian country to avoid being brought to justice in a federal, state, or tribal court will persist. A jurisdictional gap prevents tribes from being able to protect their own people on their own lands. Most states are unable or unwilling to intervene. And the federal government simply does not prosecute domestic violence crimes committed in Indian country. A combination of finite funds, limited staff, large areas to cover, and low prioritization of domestic violence often prevents the only law enforcement around with jurisdiction from stopping, preventing, or punishing horrible crimes of abuse. This gap is maintained by a web of federal case law, congressional legislation, and general failures to act.

Title IX of the VAWA Amendment and its controversial but concisely structured special domestic violence jurisdiction has been designed to unravel this web. Tribes will finally be able to eliminate the escape route of non-Indian perpetrators of domestic abuse by having the criminal jurisdictional authority to prosecute them, if they or their victims have significant ties to the tribe. Once convictions begin, though, non-Indians defendants will seek federal review to challenge this special jurisdiction anyway they can in an attempt to have Title IX overturned as unconstitutional. Many will likely contend that Congress has overstepped its authority in enacting the VAWA Amendment, and as a consequence the Amendment impedes on individual constitutional rights. The plain language of the Amendment, the precedent set by the Supreme Court in *Lara*, and the legislative history of the Act, however, all support the conclusion that the Amendment is a valid exercise of Congress's power to recognize inherent tribal sovereign power.

Defendants will also bring individual rights claims against the Amendment. The VAWA Amendment expressly strengthens several constitutional protections of the Indian

Civil Rights Act, including the right to an impartial jury and the right to counsel in all cases involving jail time if the defendant is indigent. Since Congress has recognized the inherent authority of tribes to act in the Amendment, a Double Jeopardy Clause claim would fail under the same reasoning as *Lara*. Some rights, given their purpose, should not be considered necessary or important enough to be required in tribal courts (such as the grand jury indictment requirement of the Fifth Amendment). And the possible future due process challenge under Roberts' holding in *Plains Commerce* should be found to be lacking because the VAWA Amendment (as shown by its plain language and legislative history) is specifically tailored to only grant tribal jurisdiction over crimes that involved abusers or victims with strong ties to the prosecuting tribe.

However, even if all of this reasoning in regards to protecting constitutional rights fails, the Amendment contains a "catch-all" constitutional provision. If a court determines that a constitutionally required right is not present in a tribal criminal proceeding, it only has to look to the constitutional provision for a remedy instead of having to contemplate striking down all of Title IX. This provision makes the Act adaptable and effective. Thus the Violence Against Women Reauthorization Act of 2013 is a constitutional, long-awaited means for Native American victims of domestic abuse to finally have access to true justice.

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