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Back to Basics: Special Domestic Violence Jurisdiction in the Violence Against Women Reactivation Act of 2013 and the Expansion of Inherent Tribal Sovereignty

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CARDOZO LAW REVIEW
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BACK TO BASICS: SPECIAL DOMESTIC VIOLENCE
JURISDICTION IN THE VIOLENCE AGAINST WOMEN
REACTIVATION ACT OF 2013 AND THE EXPANSION
OF INHERENT TRIBAL SOVEREIGNTY

Laura C. Saylor[†]

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Now if the police would come. They need to get a statement. They should have been here.

We turned to go back to the room.

Which police? I asked.

Exactly, he said.¹

INTRODUCTION

Indian Country² is home to some of the highest rates of violent crime in the United States.³ Specifically, Indian⁴ women are much more likely—in fact, at least twice as likely—as women in any other demographic to be victims of domestic violence, dating violence, and

¹ LOUSIE ERDRICH, *THE ROUND HOUSE* 12 (2012).

² For the purposes of this Note, the term “Indian Country” refers to those lands identified in 18 U.S.C. § 1151 including reservations, “dependent Indian communities,” and allotments. 18 U.S.C. § 1151 (2012). Section 1151, part of the Major Crimes Act of 1885 and now codified as 18 U.S.C. §§ 1151–1154, defines Indian lands as follows:

Except as otherwise provided in sections 1154 and 1156 of this title, the term ‘Indian country’, as used in this chapter, means (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, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

§ 1151.

³ JANE M. SMITH & RICHARD M. THOMPSON II, CONG. RESEARCH SERV., R 42488, *TRIBAL CRIMINAL JURISDICTION OVER NON-INDIANS IN THE VIOLENCE AGAINST WOMEN ACT (VAWA) REAUTHORIZATION AND SAVE NATIVE WOMEN ACT 1–2* (2012); Kathryn A. Ritcheske, *Liability of Non-Indian Batterers in Indian Country: A Jurisdictional Analysis*, 14 *TEX. J. WOMEN & L.* 201, 227 n.4 (2005).

⁴ There is little consensus on the correct nomenclature for referring to Native peoples in the United States. AMNESTY INT’L, *MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA* iii (2007); Amber Halldin, *Restoring the Victim and the Community: A Look at the Tribal Response to Sexual Violence Committed by Non-Indians in Indian Country Through Non-Criminal Approaches*, 84 *N.D. L. REV.* 1, 1 n.2 (2008). In legal scholarship, the term “Indian” tends to be preferred, and most statutes and case law rely on the definition found at 25 U.S.C. § 1301(4). Legal literature, statutes, and cases also use the term “tribe” to refer to Native Nations. AMNESTY INT’L, *supra*, at iv; Ritcheske, *supra* note 3, at 227 n.1. Other research uses the terms “American Indian” and “Native American.” *See, e.g.*, Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 *CALIF. L. REV.* 799, 800 (2007); Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 *MICH. L. REV.* 709, 711 n.4 (2006). In international forums, the term “indigenous” is increasingly used by community leaders, the United Nations, and human rights organizations. AMNESTY INT’L, *supra*, at iv; *see also* Rebecca Tsosie, *Indigenous Women and International Human Rights Law: The Challenges of Colonialism, Cultural Survival, and Self-Determination*, 15 *UCLA J. INT’L L. & FOREIGN AFF.* 187, 189 n.2 (2010). This Note will use these terms interchangeably, but will follow the general practice in United States legal scholarship and preferentially use the terms “Indian” and “tribe.”

sexual violence.⁵ Most Native American women who are victims of these crimes report that their attacker was non-Indian.⁶

Despite the prevalence of domestic, dating, and sexual violence in Indian Country, these crimes are systematically under-investigated and under-prosecuted.⁷ When a crime is committed in Indian Country, there are three potential sovereigns that may claim jurisdiction: the federal government, the state, and the tribe. Outside of Indian Country, generally the location of the crime and the domicile of the parties determine jurisdiction.⁸ However, in Indian Country, the type of crime, the identity of the victim, and the identity of the perpetrator control whether jurisdiction is tribal, state, or federal.⁹ In Indian Country the

⁵ SMITH & THOMPSON, *supra* note 3, at 1–2. Other literature reports rates even higher: “Statistics published by the Department of Justice in 2004 indicate that Native Americans are 2.5 times more likely to experience rape or sexual assault than all other races in the United States combined. In fact, 31.4% of Native American and Alaska Native women . . . 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 . . .” 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); *see also* Tom F. Gede, *Criminal Jurisdiction of Indian Tribes: Should Non-Indians Be Subject to Tribal Criminal Authority Under VAWA?*, 13 ENGAGE: J. FED. SOC’Y PRAC. GRP. 40, 40 (2012) (citing S. REP. NO. 112-153 (2012)) (stating “nearly three out of five Native American women had been assaulted by their spouses or intimate partners, and a nationwide survey found that one third of all American Indian women will be raped during their life times”); Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CALIF. L. REV. 185, 188–89 (2008) (“Native American women living in Indian Country experience violent crimes 50% more often than do young African American males—a group frequently cited as facing the highest incidence of violent victimization. In fact, 39% of Native American women report being the victims of domestic violence. Native American women are three times as likely to be raped or sexually assaulted as women of any other race.”); Suzianne D. Painter-Thorne, *Tangled Up in Knots: How Continued Federal Jurisdiction over Sexual Predators on Indian Reservations Hobbles Effective Law Enforcement to the Detriment of Indian Women*, 41 N.M. L. REV. 239, 244 (2011) (citing the rate of sexual assault for Native women and two and a half times that of non-Native women). Even more sobering is the Congressional Research Service’s observation that “accurate data on violence against women in Indian country are difficult to find because data about such violence are not systematically collected by Indian tribes and there is a problem of victims underreporting such crimes.” SMITH & THOMPSON, *supra* note 3, at 1 n.2.

⁶ *See, e.g.*, SMITH & THOMPSON, *supra* note 3, at 1 (“Most of this violence involves an offender of a different race.”); Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455, 457 (2005) (reporting that 70% of rapes of Native American women identify a white perpetrator); Hart & Lowther, *supra* note 5, at 189 (“Over 85% of perpetrators in rape and sexual assault against Native American women are described by their victims as being non-Indian.”); Pacheco, *supra* note 5, at 2 (“According to the Department of Justice, nearly 4 in 5 Native American victims of rape and sexual assault reported the offender as White.”); Painter-Thorne, *supra* note 5, at 245 (“According to the Justice Department, 86 percent of sexual assaults against Indian women are perpetrated by non-Indian men.”).

⁷ Samuel E. Ennis, Case Comment, *Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of Oliphant*, 57 UCLA L. REV. 553, 556 (2009).

⁸ Ritcheske, *supra* note 3, at 203.

⁹ *Id.* Because of these complexities, simple jurisdictional uncertainty has also contributed to the lack of criminal investigations and prosecutions in Indian Country. Ennis, *supra* note 7.

interplay of federal statutes, regulations, tribal law, executive orders, case law, and treaties creates a “jurisdictional knot” with criminal jurisdiction overlaps and confusion¹⁰ that results in delays in investigation and lack of prosecution.¹¹

The situation is especially grave in the case of domestic violence, dating violence, and sexual violence, where the perpetrator is often non-Indian.¹² In 1978, Supreme Court held in *Oliphant v. Suquamish Indian Tribe*¹³ that tribes do not have the authority to prosecute non-Indians who commit crimes in Indian Country. The Court reasoned that tribes have been implicitly divested of this right as a result of history, treaties, assumptions of Congress, and their status as “dependent nations.”¹⁴ Since then, in most states, the federal government has exclusive jurisdiction to try cases involving non-Indian defendants.¹⁵ In addition, in a few states, the state court system has statutory jurisdiction to try both criminal and civil cases arising in Indian Country.¹⁶ However,

¹⁰ Painter-Thorne, *supra* note 5, at 246–47.

¹¹ In addition to complexity of applicable jurisdictional laws, sources cite a combination of reasons for the impunity of non-Indian offenders in Indian Country including lack of federal resources, distance from the Indian lands to prosecutors, overburdened prosecutors, cultural and language barriers between investigators, victims, and witnesses, and lag time between when the crime was committed and when an investigation begins. See Pacheco, *supra* note 5, at 23–24 (“[F]ederal prosecutors . . . already burdened with exceedingly heavy workloads and limited resources, tended to plead out these cases or not prosecute them at all.”); SMITH & THOMPSON, *supra* note 3, at 2–3; Hart & Lowther, *supra* note 5, at 189; Painter-Thorne, *supra* note 5, at 241–42, 246–47; Marie Quasius, Note, *Native American Rape Victims: Desperately Seeking an Oliphant-Fix*, 93 MINN. L. REV. 1902, 1906 (2009). For a more searing indictment of the federal role, see Victor H. Holcomb, *Prosecution of Non-Indians for Non-Serious Offenses Committed Against Indians in Indian Country*, 75 N.D. L. REV. 761, 761 (1999) (“Unfortunately, the federal government does not take its responsibilities as seriously as it should, with the result that Indians may often be easy prey for non-Indian criminals, who may target the reservation lands for this very reason. This lax enforcement is particularly pronounced in the area of non-serious offenses, on which the federal government is less inclined to expend its resources.”).

¹² See *supra* note 5 and accompanying text.

¹³ 435 U.S. 191 (1978).

¹⁴ *Id.* In addition, tribal jurisdiction is also limited by statute. After the Major Crimes Act of 1885, tribes generally do not have jurisdiction to try most major crimes, including rape. 18 U.S.C. §§ 1151–1154 (2012). Tribes still retain the right to try Indians (both members and non-members) who commit crimes against other Indians that do not fall into the Major Crimes Act. *United States v. Lara*, 541 U.S. 193, 197–99 (2004); SMITH & THOMPSON, *supra* note 3, at 6–7.

¹⁵ *Oliphant*, 435 U.S. at 191.

¹⁶ Pub. L. No. 280, ch. 505, 67 Stat. 589 (1953) (codified as amended at 18 U.S.C. § 1162 and 28 U.S.C. § 1360). Under Public Law 280, states were either granted mandatory jurisdiction by Congress in 1953, or “opted in” between 1953 and 1968. Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1406–07 (1997). In the wake of termination era policies and perceived “lawlessness” on reservations (as well as possibly in an attempt to reduce federal caseloads), Congress enacted Public Law 280, which delegated congressional jurisdiction over civil and criminal matters in Indian Country to certain state governments. *Id.* at 1406; Peter Nicolas, *American-Style Justice in No Man’s Land*, 36 GA. L. REV. 895, 915–16 (2002). The bill included six mandatory states, Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin, with carve out provisions for the Red Lake Reservation in Minnesota and the Warm Springs Reservation in Oregon. Goldberg-

whether the jurisdictional responsibility falls on state or federal prosecutors, this scheme has in effect created a jurisdictional gap¹⁷ that has wreaked havoc on Native communities.¹⁸

In recent years, human rights groups and the media have highlighted the growing crisis occurring in Indian Country.¹⁹ Indeed, Congress too took notice, and in an effort to address the impunity of non-Indian defendants in cases of domestic violence, dating violence, and sexual violence in Indian Country, passed sections 904 and 905 of the Violence Against Women Reactivation Act of 2013 (VAWA Reactivation Act of 2013).²⁰ Sections 904 and 905²¹ outline special

Ambrose, *supra*, at 1406 n.7. In addition, the law contained an opt-in provision for other states to unilaterally become a “P.L. 280 state” without tribal consent. *Id.* at 1406. Over the next 15 years, nine states opted in to Public Law 280 until, amidst outrage from Native communities and scholars, Congress amended the statute to require tribes to consent to P.L. 280 jurisdiction. *Id.* at 1407–08 (citing 25 U.S.C. § 1326). Since then, no tribe has consented and no new states have gained criminal and civil jurisdiction under P.L. 280. *Id.* at 1408.

¹⁷ Nicolas, *supra* note 16, at 915–16. Thus, “if the federal or state governments choose not to prosecute, the offenders of such violent acts remain unpunished simply because the women they chose to assault happened to be Native.” Pacheco, *supra* note 5, at 3.

¹⁸ Some scholars have noted the particularly devastating effect sexual violence has had on Indian communities because of the confluence of traditional community values and the histories of colonization and its accompanying legacy of violence. *See, e.g.*, Halldin, *supra* note 4, at 3–4; Pacheco, *supra* note 5, at 5–7.

¹⁹ In 2006, Amnesty International published an extensive report detailing many of the historical, jurisdictional, and social barriers to bringing perpetrators of domestic violence and sexual violence to justice in Indian Country. AMNESTY INT’L, *supra* note 4. The report found that there are also significant practical problems in both enforcement and effective gathering of forensic evidence in crimes of sexual and domestic violence in Indian Country. Noting that “[o]ver the past decade, federal government studies have consistently shown that American Indian and Alaska Native women experience much higher levels of sexual violence than other women,” *id.* at 2, the report urged for the collection of more data and congressional action to help mitigate the human rights abuses occurring in Indian Country. *Id.* at 5, 8. In addition, the issue gained national recognition when in 2007 as part of a two part series, NPR reported on the lack of investigation in domestic violence and sexual violence cases on Indian lands and the jurisdictional issues facing tribal, federal, and state law enforcement. Laura Sullivan, *Legal Hurdles Stall Rape Cases on Native Lands*, NAT’L PUB. RADIO (July 26, 2007), <http://www.npr.org/templates/story/story.php?storyId=12260610>; Laura Sullivan, *Rape Cases on Indian Lands Go Uninvestigated*, NAT’L PUB. RADIO (July 25, 2007), <http://www.npr.org/templates/story/story.php?storyId=12203114>. National media sources continue to highlight the ongoing struggle with lawlessness and domestic violence in Indian Country. *See, e.g.*, Editorial, *Lawlessness on Indian Land*, N.Y. TIMES, Nov. 22, 2012, at A34.

²⁰ The Senate passed Violence Against Women Act of 2013, S. 47, 113th Cong. (2013), on February 12, 2013. *See, e.g.*, Jennifer Bendery, *VAWA Vote: Senate Overwhelmingly Passes Violence Against Women Act*, THE HUFFINGTON POST (Feb. 12, 2013), http://www.huffingtonpost.com/2013/02/12/vawa-vote_n_2669720.html. The House passed S. 47 on February 28, 2013. *See, e.g.*, Ashley Parker, *House Renews Violence Against Women Measure*, N.Y. TIMES, Mar. 1, 2013, at A13.

²¹ The Violence Against Women Reactivation Act of 2013, Pub. L. No. 113-4, §§ 904–05, 127 Stat. 54; *see also* Violence Against Women Reactivation Act of 2013, H.R. 11, 113th Cong. (2013) (enacted); Violence Against Women Reactivation Act of 2013, S. 47, 113th Cong. (2013) (enacted); Violence Against Women Act of 2012, S. 1925, 112th Cong. (as passed by Senate, Apr. 26, 2012). Each of these bills, as well as the final passed legislation contained the provisions discussed in this Note identified as §§ 904 and 905. Thus, citation to §§ 904 and 905 refers to the

domestic violence jurisdiction that tribes may exercise over certain non-Indian defendants who commit crimes of domestic violence, dating violence, and sexual violence in Indian Country.²² President Barack Obama signed these provisions on March 7, 2013,²³ and they will go into effect on March 7, 2015.²⁴

From introduction to passage,²⁵ sections 904 and 905 have sparked heated debate amongst politicians, tribes, news media, and advocacy groups.²⁶ At their core, these debates can be distilled into an inquiry into

identical language in Violence Against Women Reactivation Act of 2013 and all three bills.

²² The Violence Against Women Reactivation Act of 2013, Pub. L. No. 113-4, 127 Stat. 54. The provisions ultimately passed in the Violence Against Women Act were first introduced in October of 2011 in the SAVE Native Women Act, S. 1763. In early 2012, each house incorporated these provisions into drafts of the Violence Against Women Reactivation Act of 2012 in S. 1925 and H.R. 4970. The provisions passed in the Senate in S. 1925 but were removed from the final version of H.R. 4970 passed in the house. Both bills remained unresolved at the close of the 112th Congress. *Compare* S. 1925, with H.R. 4970. On January 22, 2013, the House and the Senate again reintroduced the VAWA Reactivation Act of 2013 as House Bill 11 and Senate Bill 47. Violence Against Women Act of 2013, H.R. 11, 113th Cong. (2013); Violence Against Women Act of 2013, S. 47, 113th Cong. (2013). The language of both these bills is identical to that found in the passed version in the Senate of Violence Against Women Act of 2012, S. 1925, 112th Cong. (2012), and the proposed versions of the Violence Against Women Act of 2012, H.R. 4970, 112th Cong. (2012), the SAVE Native Women Act, H.R. 4154, 112th Cong. (2011), and the SAVE Native Women Act, S. 1763, 112th Cong. (2011).

²³ The Violence Against Women Reactivation Act of 2013, Pub. L. No. 113-4, 127 Stat. 54. *See also*, Joseph Biden & Barack Obama, *Remarks by the President and Vice President at Signing of the Violence Against Women Act*, Transcript, U.S. DEP'T OF THE INTERIOR (March 7, 2013), <http://www.whitehouse.gov/photos-and-video/video/2013/03/07/lets-move-faith-and-communities-challenge-winners#transcript>.

²⁴ According to a Department of Justice fact sheet published after the passage of VAWA, “[a]lthough tribes can issue and enforce civil protection orders now, generally tribes cannot criminally prosecute non-Indian abusers until at least March 7, 2015.” U.S. DEP'T OF JUSTICE, OFFICE OF TRIBAL JUSTICE, VAWA 2013 AND TRIBAL JURISDICTION OVER NON-INDIAN PERPETRATORS OF DOMESTIC VIOLENCE (2013), [OFFICE OF TRIBAL JUSTICE], available at <http://www.justice.gov/tribal/docs/vawa-2013-tribal-jurisdiction-over-non-indian-perpetrators-domesticviolence.pdf> (last revised June 14, 2013) (emphasis omitted). However, “[a] tribe can start prosecuting non-Indian abusers sooner than March 7, 2015 if [(1) t]he tribe’s criminal justice system fully protects defendants’ rights under federal law; [(2) t]he tribe asks to participate in the new Pilot Project; and [(3) t]he Justice Department grants the tribe’s request and sets a starting date.” *Id.*

²⁵ The first proposed legislation included the Stand Against Violence and Empower (SAVE) Native Women Act, S. 1763, 112th Cong. (2011), introduced in October 2011. The House counterpart was introduced as Stand Against Violence and Empower (SAVE) Native Women Act, H.R. 4154, 112th Cong. (2011). Since then, similar provisions have been introduced in the Violence Against Women Act of 2013, H.R. 11, 113th Cong. (2013); Violence Against Women Act of 2013, S. 47, 113th Cong. (2013); Violence Against Women Act of 2012, H.R. 6625, 112th Cong. (2012); Violence Against Women Act of 2012, H.R. 4970, 112th Cong. (2012); Violence Against Women Act of 2012, H.R. 4271, 112th Cong. (2012); Violence Against Women Act of 2012, H.R. 4982, 112th Cong. (2012); and Violence Against Women Act of 2012, S. 1925, 112th Cong. (2011).

²⁶ *See, e.g.*, Laura Clawson, *Weakened, Flawed, Republican Violence Against Women Act Passes House*, DAILY KOS (May 16, 2012, 2:31 PM), <http://www.dailykos.com/story/2012/05/16/1092180/-Weakened-flawed-Republican-Violence-Against-Women-Act-passes-House#>; Jonathan Weisman, *Measure to Protect Women Stuck on Tribal Land Issue*, N.Y. TIMES, Feb. 10, 2013, at A11; Drew White, *Lame Duck Update: VAWA Does Violence to the U.S. Constitution*, HERITAGE

the source of Congress's power to pass such legislation and the limits, if any, on that power. Some have argued that Congress has the authority to "expand" the limits it has historically placed on inherent tribal jurisdiction to prosecute crimes committed in Indian Country.²⁷ Conversely, others have noted that if Congress has already implicitly or explicitly extinguished tribes' inherent sovereignty, this legislation should be considered a delegation of congressional jurisdictional power.²⁸ The Supreme Court has yet to weigh in on this question. However, some Supreme Court opinions seem to indicate that the Court would consider the VAWA Reactivation Act of 2013 a delegation of Congress's power,²⁹ while others indicate that the Court would find the Act to be an expansion of inherent sovereignty.³⁰

Upon such a challenge, the Court would be required to determine the source of Congress's power to enact the legislation: either under a theory of delegation or a theory of inherent sovereignty.³¹ However, both would require the Court to partially overrule its decision in *Oliphant* that divested tribes of the right to try non-Indians who commit crimes on Indian land.³² Scholars have long argued for Congress to pass this type of legislation that would overrule *Oliphant*,³³ and statutory abrogation of a prior Supreme Court decision is not without precedent in federal Indian law.³⁴ In *United States v. Lara*,³⁵ the Court upheld

ACTION FOR AM.: THE FORGE BLOG (Dec. 13, 2012), <http://heritageaction.com/2012/12/lame-duck-update-vawa-does-violence-to-the-u-s-constitution>; Betsy Woodruff, *No Way to Protect the Vulnerable: Democrats' Changes to the Violence Against Women Act Are Just Political Posturing*, NAT'L REV. ONLINE (Dec. 24, 2012, 4:00 AM), <http://www.nationalreview.com/articles/336143/no-way-protect-vulnerable-betsy-woodruff>. See also *supra* notes 5–7, 19 and accompanying text.

²⁷ See, e.g., Ennis, *supra* note 7, at 573–76. For a discussion of the inherent sovereignty theory, see *infra* Part II.A.

²⁸ SMITH & THOMPSON, *supra* note 3, at 7–14; Gede, *supra* note 5, at 44.

²⁹ See *United States v. Lara*, 541 U.S. 193, 227 (2004) (Souter, J. and Scalia, J., dissenting) (“[A]ny tribal exercise of criminal jurisdiction over nonmembers necessarily rests on a ‘delegation’ of federal power.”); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978) (“Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress.”). For further explanation of the delegation theory, see *infra* Part II.A.

³⁰ *Lara*, 541 U.S. at 194 (upholding the validity of Congress's actions “enact[ing] a new statute, relaxing restrictions on the bounds of the inherent tribal authority that the United States recognizes”). For further explanation of the inherent sovereignty theory, see *infra* Part II.A.

³¹ See *infra* Part II.A.

³² Gede, *supra* note 5, at 40.

³³ *Id.* (“Scholarly literature, policy studies and political analysis have heavily criticized the decision . . . *Oliphant* has long been considered by tribes and tribal advocates as a wound in the side of federal Indian law and policy; it has been described as ‘the most serious judicial onslaught on tribal territorial sovereignty.’” (quoting Judith V. Royster, *Oliphant and Its Discontents: An Essay Introducing the Case for Reargument Before the American Indian Nations Supreme Court*, 13 KAN. J.L. & PUB. POL’Y 59, 62 (2003))).

³⁴ *Lara*, 541 U.S. at 193. In *Lara*, the Court considered “a congressional statute ‘recogniz[ing] and affirm[ing]’ the ‘inherent’ authority of a tribe to bring a criminal misdemeanor prosecution against an Indian who is not a member of that tribe—authority that this Court previously held a tribe did not possess . . . [and] whether Congress has the constitutional power to

congressional action that amended the Indian Civil Rights Act of 1968 and expanded inherent tribal jurisdiction to non-members,³⁶ explicitly abrogating the Court's earlier decision in *Duro v. Reina*.³⁷ Following this legislative abrogation model, as well as the theory of inherent tribal sovereignty approved in *Lara*, sections 904 and 905 of the VAWA Reactivation Act of 2013 legislatively correct the mistakes of *Oliphant* through an expansion of the bounds of inherent tribal sovereignty.³⁸ Now, upon the foreseeable challenge to this law,³⁹ the Supreme Court will be asked to determine the source of congressional power to enact these special domestic violence jurisdiction provisions.

While *Lara* provides a good model for the procedure required to validate sections 904 and 905 of the VAWA Reactivation Act of 2013, substantively the Court's reasoning need not, and should not, rely solely on that case.⁴⁰ Rather, the Court should couple any reliance on recent jurisprudence with a back-to-basics analysis that incorporates the early theories of sovereignty and self-determination that underpin federal Indian law, including a close textual reading of the Constitution and the normative rules of early case law. The twists and turns of Federal Indian law have created convoluted jurisprudence that has allowed the Court to select from a variety of policy perspectives each time a case is argued before it. However, this Note argues that in moving forward justly in federal Indian law, upon a constitutional challenge to the special domestic violence jurisdiction of sections 904 and 905, the Court should return to the texts that form the basis of the early outlook on tribal

relax restrictions that the political branches have, over time, placed on the exercise of a tribe's inherent legal authority. [The Court] conclude[d] that Congress does possess this power." *Id.* at 196.

³⁵ See *id.* at 206–07 (upholding a congressional amendment to the Indian Civil Rights Act which overruled *Duro v. Reina*, 495 U.S. 676 (1990), and granted tribes the right to try non-member Indians in tribal court under a theory of expansion of inherent tribal sovereignty).

³⁶ *Id.* at 210. A non-member of a particular tribal jurisdiction is a person who is a member of another tribe, but not a member of the prosecuting tribe.

³⁷ *Duro v. Reina*, 495 U.S. 676, 679 (1990) (holding "that the retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership").

³⁸ See, e.g., Ennis, *supra* note 7; Elise Helgesen, *Allotment of Justice: How U.S. Policy in Indian Country Perpetuates the Victimization of American Indians*, 22 U. FLA. J.L. & PUB. POL'Y 441 (2011); M. Brent Leonhard, *Closing a Gap in Indian Country Justice: Oliphant, Lara, and DOJ's Proposed Fix*, 28 HARV. J. ON RACIAL & ETHNIC JUST. 117 (2012); Washburn, *supra* note 4.

³⁹ With the exception of an opt-in Pilot Project, §§ 904 and 905 will go into effect March 7, 2015. OFFICE OF TRIBAL JUSTICE, *supra* note 24.

⁴⁰ Some scholars have argued that the Supreme Court should overturn *Oliphant* based on the reasoning present in *Lara*. Pacheco, *supra* note 5, at 40–41; Laura E. Pisarello, Comment, *Lawless by Design: Jurisdiction, Gender and Justice in Indian Country*, 59 EMORY L.J. 1515, 1532–33 (2010); 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 U. MICH. J.L. REFORM 651, 699–701 (2009).

sovereignty—namely the Constitution and the Marshall Trilogy.⁴¹ Within these foundational principles of inherent tribal sovereignty, the Court should, as it has many times in past federal Indian law cases,⁴² look to the legislative intent of Congress to confirm that Congress has validly exercised its power to expand inherent tribal sovereignty. However, the Court should not stop there. In explicating the source of Congress’s power to enact the VAWA Reactivation Act of 2013, the Court should clarify that the source of Congress’s power to enact such legislation is not governed by the sweeping doctrine of plenary powers.⁴³ Rather, it is consistent with a more limited view of Congress’s power to legislate in Indian Country that requires legislation to be rationally related to Congress’s unique obligations to the Indian tribes.⁴⁴ In taking this approach, this Note argues that the Court should find that sections 904 and 905⁴⁵ are both a valid exercise of Congress’s power to expand tribal inherent sovereignty and consistent with Congress’s unique obligation to the tribes.

Part I of this Note outlines the VAWA Reactivation Act of 2013, as well as the case law that it seeks partially to abrogate. Part II.A examines the delegation and inherent sovereignty theories more closely, and argues that inherent tribal sovereignty is the superior mechanism for

⁴¹ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823). See *infra* Part II.B and Part II.C.

⁴² Examples where the Court considered extensively legislative history in the context of the questions discussed in this Note include *United States v. Lara*, 541 U.S. 193, 199–204 (2004); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 201–06 (1978); and *Morton v. Mancari*, 417 U.S. 535, 541–48 (1974).

⁴³ Eric D. Jones, Note, *The Indian Gaming Regulatory Act: A Forum for Conflict Among the Plenary Power of Congress, Tribal Sovereignty, and the Eleventh Amendment*, 18 VT. L. REV. 127, 137 (1993). The plenary powers doctrine was initially described in *United States v. Kagama*, 118 U.S. 375 (1886). There the Court found a statute, the Major Crimes Act of 1885, was constitutional not under the commerce clause as argued by the parties, but rather under a new doctrine of plenary powers, which the Court explained as: “[t]he power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, [which] is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.” *Id.* at 384–85.

⁴⁴ *Morton v. Mancari*, 417 U.S. 535, 555 (1974) (“As long as the special treatment can be tied rationally to the fulfillment of Congress’s unique obligation toward the Indians, such legislative judgments will not be disturbed.”). See *infra* Part III. In explicating this “unique obligation,” the Court held that the federal government has a fiduciary obligation to the tribes. *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942) (“[T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct . . . should therefore be judged by the most exacting fiduciary standards.”).

⁴⁵ See *infra* Part I.A.

validating the Act. Parts II.B, II.C, and II.D review the basic textual authority that should form the foundation of the Court's analysis, and conclude that this authority supports recognition of inherent tribal sovereignty. Part III addresses counter arguments to this approach, and argues that, in upholding sections 904 and 905, the Court need not affirm the sweeping doctrine of plenary powers, but rather may validate these sections under a more limited test of Congress's role in Indian Country which requires that any congressional action be rationally related to Congress's unique obligation to the tribes. This Note concludes that, in analyzing the VAWA Reactivation Act of 2013, the Court should uphold the congressional action as a valid expansion of inherent tribal sovereignty while carefully clarifying that this validation does not necessitate an affirmation of the plenary power doctrine, but rather is linked to a more limited approach of congressional power to legislate in Indian Country.

I. BACKGROUND

A. *The Violence Against Women Act and the 2013 Reactivation Bill*

In 1994, Congress passed the Violence Against Women Act (VAWA) as part of the Violent Crime Control and Law Enforcement Act of 1994.⁴⁶ The law provided comprehensive education, prevention programs, and victims' services to combat domestic violence and dating violence.⁴⁷ VAWA has since been reauthorized three times, in 2000, 2005, and 2013.⁴⁸ The most recent version of VAWA, passed in 2013, includes new provisions outlining concurrent "special domestic violence criminal jurisdiction"⁴⁹ of tribes in Indian Country.⁵⁰ Sections 904 and

⁴⁶ Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1796, 1902 (1994) (codified as amended in scattered sections of 8, 16, 18, 20, 28, and 42 U.S.C. (2012)).

⁴⁷ *Id.*; see also Helgesen, *supra* note 38, at 463 ("This federal legislation applied to the victims of sexual violence all over America, including Indian country. On American Indian lands, the effect of VAWA was to provide awareness of the suffering of victims of domestic violence, dating violence, sexual assault and stalking, as well as to provide a greater array of services for those victims."); Robin R. Runge, *The Evolution of a National Response to Violence Against Women*, 24 HASTINGS WOMEN'S L.J. 429, 429 (2013) ("The Violence Against Women Act of 1994 (VAWA 1994) was the first comprehensive legislative effort to create a national response to the epidemic of violence against women. VAWA 1994 had lofty goals, including shifting attitudes regarding violence against women through the creation of specific legal protections, improved enforcement, increased access to existing legal structures, funding for public education, training for service providers, and expanded services for victims.")

⁴⁸ Runge, *supra* note 47, at 430. The funding provisions of VAWA must be reauthorized every five years. See Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

⁴⁹ Specifically, Pub. L. No. 113-4, § 904(b)(1) recognizes "the powers of self-government of

905 of the VAWA Reactivation Act of 2013 declare that tribes will have concurrent⁵¹ jurisdiction with the federal government to prosecute dating, sexual, and domestic violence crimes occurring in Indian Country.⁵² The Act recognizes the power of tribes to exercise special domestic violence jurisdiction⁵³ based on their inherent powers of sovereignty.⁵⁴ However, the language is “narrowly crafted and satisfies a clearly identified need”:⁵⁵ the provisions specifically apply to domestic violence, dating violence, and protective order violations, crimes where lack of reporting, investigation, and prosecution in Indian Country are the highest. The Act does not include other violent crime.⁵⁶

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.” The Act defines “special domestic violence criminal jurisdiction” as “the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.” Pub. L. No. 113-4, § 904(a)(6). These provisions were first introduced as part of the Stand Against Violence and Empower Native Women Act (SAVE Native Women Act), H.R. 4154 and S. 1763, 112th Cong. (2011), which was originally proposed “[t]o decrease the incidence of violent crimes against Indian women, to strengthen the capacity of Indian tribes to exercise the sovereign authority of Indian tribes to respond to violent crimes committed against Indian women, and to ensure that perpetrators of violent crimes committed against Indian women are held accountable for that criminal behavior” H.R. 4154 and S. 1763. These provisions were reintroduced in 112th Congress in the Violence Against Women Act of 2012, S. 1925, 112th Cong. (2011), but died without a vote at the end of 2012. VAWA was reintroduced in the 113th Congress and passed, with §§ 904 and 905, in 2013. Sections 904 and 905 were taken nearly in their entirety from S. 1763 in drafting S. 1925, and these sections were again replicated in Pub. L. No. 113-4, § 904-05. Compare S. 1925, with S. 1763, and Pub. L. No. 113-4 § 904-05; see also S. REP. NO. 112-153, at 8 (2012).

⁵⁰ Pub. L. No. 113-4, § 904(a)(3). The bill defines Indian Country per 18 U.S.C. § 1151 (2012). See *supra* note 2.

⁵¹ Pub. L. No. 113-4, § 904(b)(2).

⁵² Pub. L. No. 113-4, § 904(b)(1). This provision, originally proposed in the SAVE Native Women Act, was the result of years of direct consult with tribal leaders and Senate Committee on Indian Affairs hearings from 2007 to 2011. S. REP. NO. 112-153, at 8 & n.20 (2012). As a product of these meetings which specifically addressed public safety and violence against women, as well as consultations and hearings by the Senate Committee on Indian Affairs, the SAVE Native Women Act was introduced on October 31, 2011. *Id.* at 8. Sections 904 and 905 “incorporat[ed] a provision almost identical to section 201 of the SAVE Native Women Act into th[e] reauthorization of VAWA.” *Id.* at 9.

⁵³ The bill “recognize[s] and affirm[s]” that “the powers of self-government of a participating tribe include the inherent power of that tribe . . . to exercise special domestic violence criminal jurisdiction over all persons.” Pub. L. No. 113-4, § 904(b)(1). The term “participating tribe” means a tribe that elects to exercise the special jurisdiction. *Id.* § 904(a)(4).

⁵⁴ The Act thus explicitly recognizes what has been termed the “inherent tribal sovereignty theory.” Scholarly proponents of this theory argue that since tribes retain their inherent sovereignty that has only been constrained by Congress, under the proposed legislation, Congress may remove those constraints and restore tribes’ power to prosecute non-Indian perpetrators of domestic, dating and sexual violence. Ennis, *supra* note 7, at 556. See *infra* Part II.A for a full discussion of this theory.

⁵⁵ S. REP. NO. 112-153, at 10 (2012).

⁵⁶ Pub. L. No. 113-4, § 904(c) (“A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories: (1) domestic violence and dating violence . . . (2) violations of protective orders.”); see also S. REP. NO. 112-153, at 9.

The special domestic violence criminal jurisdiction does not apply when neither the victim nor the defendant is Indian,⁵⁷ nor when the defendant lacks sufficient ties to the community.⁵⁸ Further, a defendant prosecuted under this bill is protected by the rights enumerated under the Indian Civil Rights Act section 202(c),⁵⁹ the right to trial by a jury that contains a fair cross section of the community including non-Indians,⁶⁰ and all other rights “necessary” for Congress to “recognize and affirm the inherent power” of a participating tribe to exercise this special jurisdiction.⁶¹ In sum, sections 904 and 905 apply only to crimes of domestic violence, dating violence, and sexual violence by a non-Indian who has sufficient ties to the participating tribe’s community.⁶² Thus,

⁵⁷ Pub. L. No. 113-4, § 904(b)(4)(A)(i); *see also* S. REP. NO. 112-153, at 9.

⁵⁸ Pub. L. No. 113-4, § 904(b)(4)(B). The tribe may only exercise this special jurisdiction if the defendant resides in Indian Country of the participating tribe, is employed in the Indian Country of the participating tribe, or is a spouse, intimate partner, or dating partner of a member of the participating tribe, or is an Indian who resides in the Indian Country of the participating tribe. *Id.* § 904(b)(4)(B)(i)–(iii).

⁵⁹ Pub. L. No. 113-4, § 904(d)(2) (citing 25 U.S.C. § 1302(c) (2012)). In cases where the defendant is eligible for a term of incarceration of more than one year, the defendant has the right to effective assistance of counsel and to the appointment of counsel at the tribe’s expense if the defendant is indigent. The tribe is also required to have a presiding judge with “sufficient legal training” who is barred in at least one state to practice law, to have the tribal laws and court procedural rules freely available, and to record the court proceedings. 25 U.S.C. § 1302(c) (2012). Under the Tribal Law and Order Act (TLOA) of 2010, Congress expanded the maximum incarceration sentence from one to three years if the tribe provides a right to effective assistance of counsel and counsel free of charge for indigent defendants. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (2010) (as amended in scattered sections of 18, 21, 25, 28, and 42 U.S.C. (2012)).

⁶⁰ Pub. L. No. 113-4, § 904(d)(3).

⁶¹ Pub. L. No. 113-4, § 904(d)(4). The precise meaning of this language goes to the heart of the inherent sovereignty and delegation debate. However, in clarifying these requirements, the Senate Majority debates on Senate Bill 1925 verified that Congress considers the language to invoke a theory of inherent sovereignty. The Senate Majority stated “tribes would be required to protect effectively the same constitutional rights as guaranteed in State court criminal proceedings. Rather than finding their basis in the Constitution, these rights are guaranteed through the Indian Civil Rights Act of 1968 as amended in 1986 and 1990, and through the Tribal Law and Order Act.” S. REP. NO. 112-153, at 10 (2012). Incorporating § 904(d)(1)–(4), all defendants in tribal court would be guaranteed at least the right to effective assistance of counsel, the right of indigent defendants to assistance of a licensed attorney, the right against unreasonable search and seizure, the right against double jeopardy, the privilege against self-incrimination, the right to a speedy and public trial, the right to know what the defendant is accused of, the right against excessive bail or fines, the right against cruel and unusual punishment, the right to not be deprived of property without due process of law, the right to trial by jury of no less than six persons when the offense is punishable by imprisonment, and the right to petition a Federal Court for habeas corpus.

⁶² As the Office of Tribal Justice’s fact sheet clarifies, “covered offenses will be determined by tribal law. But tribes’ criminal jurisdiction over non-Indians will be limited to the following, as defined in VAWA 2013: [d]omestic violence; [d]ating violence; and [c]riminal violations of protection orders.” OFFICE OF TRIBAL JUSTICE, *supra* note 24. What is not covered is crimes committed outside Indian Country; crimes between two non-Indians, crimes between two strangers, including sexual assaults; crimes committed by a person who lacks sufficient ties to the tribe; child abuse or elder abuse that does not involve the violation of a protective order. *Id.*

from a practical perspective, while not necessarily simplifying the “jurisdictional maze”⁶³ that is federal Indian law, the Act creates a jurisdictional overlap that will at least fill what has become an empirical jurisdictional void in Indian Country.⁶⁴

Although the passage of sections 904 and 905 of the VAWA Reactivation Act of 2013 were hotly debated on both sides of the aisle,⁶⁵ the dialogue urging the passage of this type of legislation is not new: scholars of federal Indian law and advocates for women’s and Native rights have called for action such as that found in sections 904 and 905 for over thirty years.⁶⁶ Since *Oliphant v. Suquamish Indian Tribe* held that tribes had been implicitly divested of their right to try non-Indians as a result of history, treaties, assumptions of Congress, and their status as “dependent nations,”⁶⁷ many have argued that *Oliphant* should be overturned,⁶⁸ and in particular, scholars and advocates have urged Congress to statutorily abrogate the decision in order to restore tribal criminal jurisdiction. Now that Congress has done so, the Supreme Court should uphold the VAWA Reactivation Act of 2013 as a valid expansion of inherent tribal sovereignty.⁶⁹

⁶³ This term was first coined by Robert N. Clinton in his 1976 article *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 503–04 (1976). Scholars continue to use this term, and terms like it. See Joseph Chilton, *Jurisdictional “Haze”: An Examination of Tribal Court Contempt Powers over Non-Indians*, 90 N.C. L. REV. 1189 (2012); Pacheco, *supra* note 5, at 1.

⁶⁴ SMITH & THOMPSON, *supra* note 3, at 1.

⁶⁵ See *supra* note 26 and accompanying text.

⁶⁶ See, e.g., Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979). The line of cases that scholars have urged to abrogate initiated with *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) and *United States v. Wheeler*, 435 U.S. 313 (1978), which established the doctrine of “implicit divestiture.” This doctrine argues that in addition to those rights explicitly divested from tribes, tribes have also been divested of additional rights “implicitly” as a result of historical practice and their unique status.

⁶⁷ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). That same year the Court also decided *United States v. Wheeler*, 435 U.S. 313 (1978), which affirmed the holding of *Oliphant*.

⁶⁸ See Ezekiel J.N. Fletcher, *Trapped in the Spring of 1978: The Continuing Impact of the Supreme Court’s Decisions in Oliphant, Wheeler, and Martinez*, FED. LAW., Mar./Apr. 2008, at 37; Gede, *supra* note 5, at 40; Kevin Meisner, *Modern Problems of Criminal Jurisdiction in Indian Country*, 17 AM. INDIAN L. REV. 175, 186 (1992); Pisarello, *supra* note 40, at 1518; Amy Radon, *Tribal Jurisdiction and Domestic Violence: The Need for Non-Indian Accountability on the Reservation*, 37 U. MICH. J.L. REFORM. 1275, 1290 (2004); Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779 (2006).

⁶⁹ See, e.g., N. Bruce Duthu, Op-Ed., *Broken Justice in Indian Country*, N.Y. TIMES, Aug. 11, 2008, at A17; Ennis, *supra* note 7, at 553, 556; Pisarello, *supra* note 40, at 1532–33, 1551–52; 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, 299–300 (2009); Helgesen, *supra* note 38, at 469–71; Holcomb, *supra* note 11, at 799; Pacheco, *supra* note 5, at 40; Radon, *supra* note 68, at 1275; Washburn, *supra* note 4, at 775–76; Lindsey Trainor Golden, Note, *Embracing Tribal Sovereignty to Eliminate Criminal Jurisdiction Chaos*, 45 U. MICH. J.L. REFORM 1039, 1066–67 (2012).

B. *The Legacy of Oliphant*

The Court's controversial 1978 decision in *Oliphant* garnered a significant negative response from scholars.⁷⁰ In *Oliphant*, the Suquamish Indian tribe brought proceedings in tribal court in two separate cases against defendants Mark David Oliphant and Daniel M. Belgrade.⁷¹ Oliphant was prosecuted for assaulting a tribal officer and resisting arrest.⁷² Belgrade was charged with reckless endangerment and damage to tribal property.⁷³ Oliphant and Belgrade challenged the Suquamish tribe's jurisdiction to prosecute them as non-Indians.⁷⁴ The Court held that without an affirmative delegation from Congress, tribes do not have jurisdiction to try non-Indians.⁷⁵ In reaching this decision, the Court relied heavily on the "implicit" historical understanding of tribal power and the intentions of Congress based on statute and treaties,⁷⁶ as well as some selected case law.⁷⁷ The Court reasoned that "[u]pon incorporation" tribes relinquished some sovereign powers to Congress, and over time implicitly were divested of others.⁷⁸ Thus, tribes could not exercise those powers expressly terminated by Congress, nor those that had been implicitly divested because those powers would be "*inconsistent with their status.*"⁷⁹

The Court's conclusion that tribes did not have jurisdiction to try non-Indians sent shockwaves through Native communities and scholars of Federal Indian law.⁸⁰ Since that time, many scholars have specifically criticized *Oliphant* and called for the case to be overturned or statutorily abrogated.⁸¹ Most recently, scholars have advocated for Congress to

⁷⁰ N. BRUCE DUTHU, *NATIVE AMERICANS AND THE LAW* 20–21 (2008).

⁷¹ *Id.* at 194.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 212.

⁷⁶ *Id.* at 203–08.

⁷⁷ *Id.* at 208.

⁷⁸ *Id.* at 209.

⁷⁹ *Id.* (citing *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976), *rev'd*, 435 U.S. 191 (1978)).

⁸⁰ See, e.g., Barsh & Henderson, *supra* note 66; William D. Holyoak, Comment, *Tribal Sovereignty and the Supreme Court's 1977–1978 Term*, 1978 B.Y.U. L. REV. 911 (1978); Steven M. Johnson, Note, *Jurisdiction: Criminal Jurisdiction and Enforcement Problems on Indian Reservations in the Wake of Oliphant*, 7 AM. INDIAN L. REV. 291 (1979).

⁸¹ See, e.g., DUTHU, *supra* note 70; Fletcher, *supra* note 68; Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C. L. 45, 100 (2012); 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, 34–39 (1999); John P. LaVelle, *Suquamish Indian Tribe, Petitioner v. Oliphant et al., Respondents*, 13 KAN. J.L. & PUB. POL'Y 69 (2003); Frank Pommersheim, *At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty*, 55 S.D. L. REV. 48 (2010); Judith V. Royster, *Oliphant and Its Discontents: An Essay Introducing the Case for Reargument Before the American Indian Nations Supreme Court*, 13 KAN. J.L. & PUB. POL'Y 59, 62 (2003).

abrogate the decision in *Oliphant*, a so-called “*Oliphant-fix*,” modeled after similar congressional action⁸² that statutorily overturned the Supreme Court decision in *Duro v. Reina*.⁸³ In *Duro*, the Court considered a related jurisdictional question: whether a tribe has jurisdiction to try an Indian defendant who is a non-member of that particular tribe when the individual commits a crime on the tribe’s land.⁸⁴

Initially, the Supreme Court answered this question in the negative.⁸⁵ In *Duro v. Reina*, an Indian who was a non-member of the prosecuting tribe, the Salt River Pima-Maricopa, allegedly shot and killed a member of a third tribe on the Pima-Maricopa’s reservation.⁸⁶ The Defendant filed for a writ of habeas corpus, challenging the Pima-Maricopa’s jurisdiction over him because he was a non-member.⁸⁷ Relying on *Oliphant*, the Supreme Court held that the tribe did not have jurisdiction to try a non-member Indian who committed a crime on that tribe’s land.⁸⁸ However, six months after this decision was handed down, Congress passed legislation that amended the Indian Civil Rights Act (IRCA) which explicitly recognized a tribe’s right to try a non-member Indian for crimes committed in Indian Country.⁸⁹ Specifically, this legislation stated that tribes do in fact have inherent jurisdiction to try non-member Indians.⁹⁰

In 2004, the Court had the opportunity to weigh in on this “*Duro-fix*” legislation. In *United States v. Lara*,⁹¹ the Court, after noting the clear directive of Congress, found that the tribe did have jurisdiction to try a non-member who committed a crime on the prosecuting tribe’s reservation.⁹² In that case, Billy Jo Lara, an enrolled member of the

⁸² The statute, which abrogated the holding of *Duro v. Reina*, 495 U.S. 676 (1990), is referred to as the “*Duro-fix*.” Ennis, *supra* note 7, at 556. The *Duro-fix* is codified at 25 U.S.C. § 1301(2) (2012).

⁸³ 495 U.S. 676.

⁸⁴ *Id.* at 679 (“We address in this case whether an Indian tribe may assert criminal jurisdiction over a defendant who is an Indian but not a tribal member.”).

⁸⁵ *Id.*

⁸⁶ *Id.* at 679–80. Duro was a member of the Torres-Martinez Band of Cahuilla Mission Indians. At the time of the incident, Duro was temporarily living on the reservation with a member of the Pima-Maricopa and was working for PiCopa Construction Company, which is owned by the Pima-Maricopa tribe. The victim, a fourteen-year-old boy, was a member of the Gila River Indian Tribe of Arizona. *Id.* at 679.

⁸⁷ *Id.* at 681–82.

⁸⁸ *Id.* at 684–86.

⁸⁹ 25 U.S.C. § 1301(2) (2012).

⁹⁰ *Id.* (“The ‘powers of self-government’ means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.”).

⁹¹ *United States v. Lara*, 541 U.S. 193 (2004).

⁹² *Id.* at 200.

Turtle Mountain Band of Chippewa Indians in North Dakota, assaulted a police officer while on the Spirit Lake Reservation, a reservation also in North Dakota but of a different tribe.⁹³ The tribe charged Lara with the crime of violence to a police officer, and Lara pled guilty.⁹⁴ Subsequently, federal prosecutors charged Lara with assaulting a federal officer.⁹⁵ In the federal case, Lara argued that this second prosecution was in violation of the Double Jeopardy Clause.

To answer this question, the Court first had to decide whether the authority recognized by Congress to try Indian non-member Lara derived from inherent sovereignty, or from a delegation of congressional power.⁹⁶ If the power was delegated by Congress, the federal prosecution would constitute a second prosecution by the same sovereign and thus be in violation of the Double Jeopardy Clause.⁹⁷ However, if the power derived from inherent sovereignty, then the federal government, as a separate sovereign, could bring its own case against Lara.⁹⁸ In analyzing the ICRA amendment,⁹⁹ recognizing tribes' power to try non-Indians, the Court found that the tribe's authority to try Lara derived from inherent sovereignty because Congress did in fact have the constitutional authority to lift the restrictions formerly applied on tribal sovereignty.¹⁰⁰ Thus, while Lara would have ordinarily had double jeopardy protections,¹⁰¹ because two separate sovereigns brought their own prosecutions, Lara could be tried for the same crime twice.¹⁰²

While *Lara* has been hailed by many as a step toward increased tribal sovereignty and self-determination, it stops short of paving a path toward overruling *Oliphant*.¹⁰³ The *Lara* Court carefully limited the

⁹³ *Id.* at 196.

⁹⁴ *Id.*

⁹⁵ *Id.* at 197.

⁹⁶ The Court phrased the issue as: "What is the source of the power to punish nonmember Indian offenders, inherent tribal sovereignty or delegated federal authority?" *Id.* at 199 (internal quotation marks omitted).

⁹⁷ *Id.* at 198.

⁹⁸ *Id.*

⁹⁹ The amendment states: "[The] powers of self-government. . . mean[] the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2) (2012) (internal quotation marks omitted).

¹⁰⁰ *Lara*, 541 U.S. at 197.

¹⁰¹ *Id.*

¹⁰² *Id.* at 210. The Court reasoned that under the dual sovereignty doctrine, a crime is technically considered a crime against the individual sovereign. Since the Double Jeopardy Clause does not prohibit successive prosecutions by separate sovereigns, here the tribe and the federal government, the second prosecution by the federal government was not in violation of Lara's right to not be put in jeopardy for the same crime twice. *Id.* at 197.

¹⁰³ Anna Sappington, *Is Lara the Answer to Implicit Divestiture? A Critical Analysis of the Congressional Delegation Exception*, 7 WYO. L. REV. 149 (2007); David P. Weber, *United States v. Lara: Federal Powers Couched in Terms of Sovereignty and a Relaxation of Prior Restraints*, 83 N.D. L. REV. 735 (2007).

scope of its opinion.¹⁰⁴ Specifically, the Court noted that it was not required to decide in *Lara* what constitutional limits constrain Congress's power to expand inherent tribal sovereignty.¹⁰⁵ While the Court did find that Congress had the power to expand the inherent sovereignty of tribes to try non-member Indians, it has yet to weigh in on the same question for non-member, non-Indians. And this is the question that sections 904 and 905 of the Violence Against Women Act of 2013 raise.

II. SPECIAL DOMESTIC VIOLENCE JURISDICTION IS AN EXPANSION OF INHERENT TRIBAL SOVEREIGNTY

A. *The Delegation Theory Versus the Inherent Sovereignty Theory*

The scholarly Federal Indian law literature has identified two camps for recognizing Congress's power to enact the VAWA Reactivation Act of 2013:¹⁰⁶ Congress can enact sections 904 and 905 either under a theory of delegation of congressional power,¹⁰⁷ or under a theory of inherent tribal sovereign power.¹⁰⁸ Thus, the question the

¹⁰⁴ *Lara*, 541 U.S. at 199.

¹⁰⁵ *Id.* at 205 (“We are not now faced with a question dealing with potential constitutional limits on congressional efforts to legislate far more radical changes in tribal status.”).

¹⁰⁶ The Violence Against Women Reactivation Act of 2013, Pub. L. No. 113-4, 127 Stat. 54. Recently, at least one scholar has approached this question from the perspective of “divided sovereignty,” offering a unified theory for the sovereignty issues presented in Indian Country, other U.S. territories, and the states. Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 660 (2013). Analysis of this argument, however, is beyond the scope of this Note.

¹⁰⁷ Under this theory, the proposed amendments to VAWA would act as a specific act of Congress, delegating jurisdiction to tribes to try non-Indian defendants. This theory argues that tribes' inherent sovereignty to try non-Indians is extinguished, and thus Congress is the source of the jurisdictional power. Under this model, tribes must provide constitutional protections, and not just the protections in ICRA and the TLOA to non-Indian defendants. *See, e.g., Lara*, 541 U.S. at 211 (Kennedy, J., concurring); SMITH & THOMPSON, *supra* note 3, at i (“It may be that Congress can only delegate federal power to the tribes to try non-Indians.”); Gede, *supra* note 5, at 43–44; Weber, *supra* note 103, at 761 (“[O]nce that power [criminal jurisdiction over non-members] is delegated to the tribes, it must be treated as a delegation . . .”).

¹⁰⁸ The inherent sovereignty theory argues that tribes retain inherent sovereignty, and that Congress may relax restraints it has put on this never-extinguished sovereignty. *Lara*, 541 U.S. at 199 (noting that Congress may relax the restrictions on a tribe's inherent tribal sovereignty). Because a theory of inherent sovereignty represents a reaffirmation of tribal self-governance and self-determination, most scholars argue that the Court should uphold an *Oliphant*-fix under this theory. MATTHEW L.M. FLETCHER, STATEMENT OF THE MICH. STATE UNIV. COLLEGE OF LAW, INDIGENOUS LAW AND POLICY CTR. ON TRIBAL LAW & ORDER ACT 8 (Nov. 10, 2011) (“We recommend reaffirming and recognizing inherent jurisdiction.”); Ennis, *supra* note 7, at 553 (arguing that “tribal court jurisdiction over non-Indians has been a dormant tribal power ever since the tribes were incorporated in the United States, and . . . this power is merely held in trust by the federal government until such time as tribes are able to assume such jurisdictional responsibility”).

Supreme Court will have to answer upon a constitutional challenge to this legislation is whether tribes still have inherent powers held in trust by Congress to try non-Indians that pre-date the Constitution, or whether they only have these powers pursuant to explicit delegation of Congress.¹⁰⁹

The argument under the delegation theory proceeds as follows: at some point, implicitly or explicitly,¹¹⁰ Indian tribes' pre-colonial territorial sovereignty to prosecute crimes committed on their lands was completely extinguished.¹¹¹ Congress subsumed this power, and like other powers of Congress, Congress may also delegate it as it sees fit.¹¹² In sections 904 and 905, Congress delegated this power back to the tribes.¹¹³ Under this theory, because the power is delegated, the protections of the Constitution, including the full Bill of Rights, would apply to any and all tribal adjudications.¹¹⁴

Under an inherent sovereignty theory, the tribe's power to adjudicate cases arising in Indian country was never extinguished.¹¹⁵ Rather, upon incorporation, Congress held this sovereignty in trust, and is free to relax the restraints it placed on tribal sovereignty.¹¹⁶ Because this sovereignty derives its form and characteristics from the tribes' pre-colonial, inherent powers as sovereign governments, it is not subject to the Constitution.¹¹⁷ Rather, under this theory, when invoking jurisdiction to try crimes committed in Indian Country, tribes would be required to observe the statutory requirements of ICRA and the TLOA.¹¹⁸ As scholars have pointed out, while the protections under ICRA and TLOA provide important statutory due process rights, they are not the same as the Constitutional rights that a defendant would receive had he committed the crime on non-Indian land and was tried in an Article III court.¹¹⁹ In sum, the question of inherent sovereignty

¹⁰⁹ Weber, *supra* note 103, at 740.

¹¹⁰ Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); *see also* Gede, *supra* note 5, at 40–42.

¹¹¹ Gede, *supra* note 5, at 40–42.

¹¹² *Id.*; *see also* SMITH & THOMPSON, *supra* note 3, at 7.

¹¹³ SMITH & THOMPSON, *supra* note 3, at i; Gede, *supra* note 5, at 40.

¹¹⁴ SMITH & THOMPSON, *supra* note 3, at 7; Gede, *supra* note 5, at 44.

¹¹⁵ Ennis, *supra* note 7, at 556–57.

¹¹⁶ *Id.* at 601.

¹¹⁷ *Id.*

¹¹⁸ SMITH & THOMPSON, *supra* note 3, at 15–16; Gede, *supra* note 5, at 42. These rights include the right to effective assistance of counsel, the right of indigent defendants to assistance of a licensed attorney, the right against unreasonable search and seizure, the right against double jeopardy, the privilege against self-incrimination, the right to a speedy and public trial, the right to know what the defendant is accused of, the right against excessive bail or fines, the right against cruel and unusual punishment, the right to not be deprived of property without due process of law, the right to trial by jury of no less than six persons when the offense is punishable by imprisonment, and the right to petition a Federal Court for habeas corpus. *See supra* notes 59, 61, and accompanying text.

¹¹⁹ U.S. CONST. art. III; *see also* Gede, *supra* note 5, at 41.

versus delegated power has important implications for both the practical implementation of the VAWA Reactivation Act of 2013, as well as the validation of a policy of self-determination and greater autonomy in the relationship between Congress and the tribes.¹²⁰

From a tribal rights perspective, recognition of inherent sovereignty would represent a victory for tribal self-determination.¹²¹ Under the inherent sovereignty model, rather than dictating what tribes should do and how they should do it, the Courts and Congress would recognize that to best promote Native peoples and communities, they must allow tribes to determine and execute their own rules that are self-designed and reflect each tribe's specific characteristics, including population, land rights, culture, and traditions. It is against this backdrop that the VAWA Reactivation Act of 2013 should be read as a reaffirmation of tribes' inherent sovereignty derived not from Congress but from their original, pre-colonial sovereign status.

While federal Indian law has undulated through eras of promoting and suppressing tribal rights,¹²² in arriving at this conclusion the Court should return to the basic ideology and normative rules for tribal sovereignty set forth in the Constitution and early case law.¹²³ Applying early concepts of tribal sovereignty to the legislative intent of the VAWA Reactivation Act of 2013, the Court should find that Congress has validly expanded the inherent tribal sovereignty to adjudicate non-member, non-Indians with sufficient ties to the community who commit crimes of domestic violence, dating violence, and sexual violence in Indian Country.¹²⁴

B. *Constitutional Support for the Inherent Sovereignty Theory*

The language of the Constitution implicitly supports tribal sovereignty.¹²⁵ Indian tribes are mentioned three times in the

¹²⁰ SMITH & THOMPSON, *supra* note 3, at i (“The dichotomy between delegated and inherent power of tribes has important constitutional implications. If Congress is deemed to delegate its own power to the tribes to prosecute crimes, all the protections accorded criminal defendants in the Bill of Rights will apply. If, on the other hand, Congress is permitted to recognize the tribes’ inherent sovereignty, the Constitution will not apply.”).

¹²¹ Generally, few scholars of Native American law advocate for a delegation theory because it supports further divestment of tribal sovereignty and self-determination. *See* Ennis, *supra* note 7, at 574.

¹²² *See, e.g.,* Helen A. Gaebler, *The Legislative Reversal of Duro v. Reina: A First Step Toward Making Rhetoric a Reality*, 1991 WIS. L. REV. 1399, 1406–09; Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 758–59 (1989).

¹²³ *See infra* Parts II.B–C.

¹²⁴ Violence Against Women Reauthorization Act of 2011, S. 1925, 112th Cong. (2011).

¹²⁵ U.S. CONST. art. I, § 2; U.S. CONST. art. I, § 8; U.S. CONST. amend. XIV, § 2; *see also* Tweedy, *supra* note 40, at 658–60.

Constitution,¹²⁶ and those provisions either exclude them from taxes or representation, or mention tribes as parallel to foreign nations and states.¹²⁷ The text implies that tribes were considered by the Framers to retain their separate, original sovereignty, and that “sovereignty operates largely outside the Constitutional framework.”¹²⁸

In Article I and the Fourteenth Amendment, the Constitution refers to Indians regarding the representative and tax apportionment clause, which explicitly excludes them from taxation: “Indians not taxed.”¹²⁹ More substantively, tribes are mentioned in the Commerce Clause of Article I § 8, which allows Congress to regulate commerce with the Indian tribes.¹³⁰ While Congress has interpreted this clause as general free rein to pen laws affecting not only commerce but also general life in Indian Country,¹³¹ a review of the Constitutional text reveals the Framers’ understanding that tribes would retain their separate sovereignty.¹³²

In Article I § 8, Congress pairs Indian tribes with two other government entities—the states and foreign nations.¹³³ By grouping tribes with other sovereigns, the Framers necessarily understood Indian tribes to retain their separate sovereignty and thought that they should be treated accordingly.¹³⁴ The Framers further understood Indian tribes

¹²⁶ U.S. CONST. art. I, § 2; U.S. CONST. art. I, § 8; U.S. CONST. amend. XIV, § 2; Tweedy, *supra* note 40, at 665–66.

¹²⁷ U.S. CONST. art. I, § 2; U.S. CONST. art. I, § 8; U.S. CONST. amend. XIV, § 2.

¹²⁸ Tweedy, *supra* note 40, at 658–60; *see also* Gloria Valencia-Weber, *The Supreme Court’s Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 419 (2003) (arguing that in excluding the states from having jurisdiction in Indian country, the “Articles of Confederation and the Constitution were the products of a continuous internal debate and interim attempts to resolve the western lands and Indians problem”).

¹²⁹ U.S. CONST. art. I, § 2; U.S. CONST. amend. XIV, § 2.

¹³⁰ “The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3.

¹³¹ The first justification for the sweeping powers of Congress was in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). In that decision, the Court insisted that Congress had plenary powers over tribes. *Id.* at 565. Throughout the nineteenth century, the plenary power doctrine has been used to decrease tribal sovereignty. Sappington, *supra* note 103, at 177; Weber, *supra* note 103, at 737. While there has been much commentary on the negative effects of this plenary power, some authors have argued that the Court may rely on the plenary power doctrine to uphold §§ 904 and 905 because they are beneficial to Native communities. Tweedy, *supra* note 40, at 663. Certainly this broad historical reading insulates the VAWA amendments from a claim that the legislation is not within Congress’s power to enact. However, this reading is not without its faults. By recognizing the VAWA amendments through the plenary power doctrine, the Court would be opening the door to the undesirable result of allowing Congress to not only expand tribal sovereignty, but contract it as well. *See infra* Part III.

¹³² Resnick, *supra* note 122, at 691 (“To the extent Indian tribes are discussed in the Constitution, they seem to be recognized as having a status outside its parameters.”).

¹³³ U.S. CONST. art. I, § 8.

¹³⁴ Resnick, *supra* note 122, at 691–92. Resnick notes that the Constitution treats “Indian tribes . . . as entities with whom to have commerce and to make treaties As many scholars have discussed, one might describe the relationship between the Indian tribes and the United

would retain their inherent sovereignty and powers of self-government, and that Congress should be able to regulate trade with tribes, just like it regulates trade between states or with foreign nations.¹³⁵

The final portion of the Constitution relevant for federal Indian law is Article II, § 2. This section states that the “[President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties”¹³⁶ Treaty-making is an activity recognized between two separate sovereigns, and the very first president extended this power between Congress and the tribes.¹³⁷ Moreover, both before and after the Constitution was ratified, treaties were made with hundreds of Indian tribes.¹³⁸ These treaties affirmed tribes’ sovereignty, land base, and hunting and fishing rights.¹³⁹ Thus, the treaty clause through both its text and practice provides an inference that Indian tribes were considered separate sovereigns. The president’s power to make treaties—and the widespread use of treaties in early Indian policy—verifies early recognition that tribes, upon incorporation, still retained their inherent tribal sovereignty.¹⁴⁰

States as that between two sovereigns, and locate the relevant legal discourse as that of international law.” *Id.* at 691.

¹³⁵ U.S. CONST. art. I, § 8; *see also* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 26 (2002).

¹³⁶ U.S. CONST. art. II, § 2.

¹³⁷ In the words of one commentator:

Supreme Court and constitutional scholars have long recognized that the Framers intended treaties to be the exclusive instruments of sovereign entities possessing control over foreign affairs. Constitutional history shows the treaty power was intended historically, functionally, and structurally to be exercised between sovereign entities, and as long as the Supreme Court has been interpreting the Treaty Clause, the Court has implicitly supported this requirement of sovereignty.

Erik Laakkonen, Note, *Mistreating the Treaty Clause*, 28 T. JEFFERSON L. REV. 237, 237–38 (2005) (criticizing the Ninth Circuit’s decision in *Wang v. Masaitis*, 416 F.3d 992 (9th Cir. 2005)).

¹³⁸ Phillip M. Kannan, *Reinstating Treaty-Making with Native American Tribes*, 16 WM. & MARY BILL RTS. J. 809, 815 (2008) (“Until 1871, treaty-making was the predominate means of implementing federal Indian policy.”); Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1620 (2000) (“[A]s an historical matter, treaties with Indian nations and treaties with foreign nations share a common status: They are negotiated accords between separate political sovereigns designed to secure the mutual advantage of both parties.”).

¹³⁹ Hope M. Babcock, *A Civic-Republican Vision of “Domestic Dependent Nations” in the Twenty-First Century: Tribal Sovereignty Re-Envisioned, Reinvigorated, and Re-Empowered*, 2005 UTAH L. REV. 443, 458 (“For Indian tribes, these treaties are foundational documents, which affirmed tribal sovereignty over their lands and members, set the physical boundaries of their reservations, and established their off-reservation fishing and hunting rights.”); Tsosie, *supra* note 138, at 1620 (“The capacity of Indian nations to enter into treaties is a powerful testament to their inherent sovereign authority as separate nations and governments.”).

¹⁴⁰ Although the practice of treaty making ended in 1871, some authors have argued that laws limiting the power to make treaties with Indian tribes are unconstitutional. *See, e.g.*, Kannan, *supra* note 138, at 811.

Finally, no part of the Constitution states or implies the loss of tribal sovereignty, or any absolute power of Congress to eliminate tribal sovereignty.¹⁴¹ Rather, the Treaty Clause and Indian Commerce Clause, coupled with the lack of any affirmative language to the contrary, support the conclusion that the Constitution recognizes tribes as unique and separate sovereigns, and that the Framers of the Constitution considered tribes to retain that inherent sovereignty.¹⁴²

C. *Early Common Law Support for the Inherent Sovereignty Theory*

Federal Indian law is notorious for being convoluted, contradictory, counter-intuitive,¹⁴³ and even “schizophrenic.”¹⁴⁴ Within the body of applicable case law, the Supreme Court in almost two hundred years of jurisprudence has struggled to define (1) what elements of pre-Constitutional sovereignty tribes still retain, (2) what elements they have forever forfeited, and (3) what elements have been limited, with the possibility of restoration by Congress. Under the category of “retained powers,” the Court has found that tribes have the right of occupancy of their land,¹⁴⁵ to make their own laws without Constitutional imposition,¹⁴⁶ to tax,¹⁴⁷ and to try non-member Indians for crimes committed on Indian lands.¹⁴⁸ Powers that have been forever forfeited have been characterized as the power to engage in “external” relations, including for example, the power to transact with foreign countries.¹⁴⁹ It is the third category—those inherent powers temporarily limited by Congress—where there are possibilities for combating domestic violence in Indian Country and contributing to federal Indian jurisprudence through values of self-determination and self-governance. While the Court has previously seemed to lean towards putting the congressional power for sections 904 and 905 of the VAWA Reactivation Act of 2013 into the delegation box,¹⁵⁰ the early case law, like the Constitution, calls for the Court to find that by enacting these

¹⁴¹ Tweedy, *supra* note 40, at 663; *see also* Frickey, *supra* note 81, at 3.

¹⁴² Tweedy, *supra* note 40, at 662–63.

¹⁴³ Nicolas, *supra* note 16, at 900. Commenting on the jurisdictional jurisprudence for civil actions involving Indians or Indian Country, Nicolas observes: “[I]n no area of law are the[] issues so complex and unsettled, the outcomes so harsh and counterintuitive . . .” *Id.*

¹⁴⁴ *United States v. Lara*, 541 U.S. 193, 219 (2004) (Thomas, J., concurring).

¹⁴⁵ *See Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

¹⁴⁶ *See Talton v. Mayes*, 163 U.S. 376 (1896).

¹⁴⁷ *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

¹⁴⁸ *See Lara*, 541 U.S. at 193.

¹⁴⁹ *See* Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within “Our Federalism”*: *Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667 (2006) (citing FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* (1942)).

¹⁵⁰ *See Lara*, 541 U.S. at 193.

provisions, Congress has expanded the tribes' previously curtailed inherent tribal sovereignty.¹⁵¹

In the 1830s, the Supreme Court decided three cases involving Indians that laid the initial foundation of federal Indian law.¹⁵² Commonly referred to as the Marshall Trilogy because of their common author, the decisions established that Indians have a right to occupancy of homelands subject to extinguishment by Congress,¹⁵³ that Indian tribes do not qualify as a foreign nation under Article III,¹⁵⁴ and that state laws do not apply in Indian Country.¹⁵⁵ These cases provide the basis for the early understanding of tribal sovereignty and certain canons of construction for Indian policy.¹⁵⁶ Since Chief Justice Marshall wrote these opinions, federal Indian policy has at times strayed far from its initial premises.¹⁵⁷ And despite the paternalistic and, at times, racist language present in all three decisions,¹⁵⁸ these cases importantly establish that tribes were not divested of their inherent sovereignty to govern their own affairs upon incorporation into the United States.¹⁵⁹

In *Johnson v. McIntosh*,¹⁶⁰ the Court was asked to decide what rights Indians have to their ancestral lands. After a lengthy discussion of the European acceptance of the “doctrine of discovery,” and some of the conquests of colonizing powers, the Court concluded that the United States, too, accepted the doctrine of discovery, which gave title to the colonizer subject to the occupancy of Indian tribes.¹⁶¹ While much of the decision reads as a supposed justification for the policies of colonization, a close reading reveals that Chief Justice Marshall did not consider tribes to have given up their internal sovereign rights.¹⁶² Marshall noted that upon acquisition of title through the discovery doctrine, tribes ceded their right to transact with other colonizers and acknowledged the United States' exclusive right to do so.¹⁶³ Thus, while

¹⁵¹ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

¹⁵² See *supra* note 151.

¹⁵³ See *Johnson*, 21 U.S. (8 Wheat.) 543.

¹⁵⁴ See *Cherokee Nation*, 30 U.S. (5 Pet.) 1.

¹⁵⁵ See *Worcester*, 31 U.S. (6 Pet.) 515.

¹⁵⁶ Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)construction of the Indian Canons*, 35 VT. L. REV. 623, 686 (2011); Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 628–29 (2006).

¹⁵⁷ Resnik, *supra* note 122, at 692–93.

¹⁵⁸ Some authors have specifically examined the racist language in Court beginning with these decisions. For a comprehensive discussion, see ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE HISTORY OF RACISM IN AMERICA* (2005).

¹⁵⁹ See *Worcester*, 31 U.S. (6 Pet.) 515; *Cherokee Nation*, 30 U.S. (5 Pet.) 1; *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

¹⁶⁰ 21 U.S. (8 Wheat.) 543.

¹⁶¹ *Id.* at 586–87.

¹⁶² *Id.* at 574.

¹⁶³ *Id.* at 573.

Marshall recognized that tribes have lost their right to external relations as sovereigns, he said nothing to diminish a tribe's right to maintain its internal sovereignty, including the tribe's inherent power to try crimes committed on its land.¹⁶⁴

The Court reinforced this holding in *Cherokee Nation v. State of Georgia*.¹⁶⁵ There the Court faced the question of subject matter jurisdiction: was the Cherokee Nation a "foreign state" for purposes of Article III?¹⁶⁶ In the decision, the Court emphasized Indian tribes' unique relationship with the federal government,¹⁶⁷ and coined the term "domestic dependent nations" to describe what Marshall considered to be a guardian-ward relationship between the federal government and the Indian Nations.¹⁶⁸ With this definition in mind, the Court emphasized tribes' unique status as sovereigns that had relinquished their right to externally trade or transact with other foreign powers, but still retained their rights to govern their internal affairs.¹⁶⁹ Although Marshall stated that the Cherokee Nation "admit[ted] that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper,"¹⁷⁰ this observation was further clarified in the final case of the Marshall Trilogy as referring to the trade affairs of Native communities, and not their general, internal affairs.¹⁷¹

The final case in the Marshall Trilogy is *Worcester v. Georgia*.¹⁷² The case also holds special importance for the question of inherent tribal sovereignty because the Court was required for the first time to specifically assess the nature of the tribes' sovereignty in the context of unilateral state action that affected Indian tribes.¹⁷³ In *Worcester*, a priest who resided on the Cherokee Nation's land with the tribe's permission was charged with violating a state statute that prohibited non-Indians from living on Indian land without state permission.¹⁷⁴ The Court found that the Cherokee Nation retained sovereignty from its treaties to govern its internal affairs, and thus the state of Georgia could not impose its laws on the Nation.¹⁷⁵ In explaining its conclusion, the

¹⁶⁴ Frickey, *supra* note 81, at 9–10.

¹⁶⁵ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

¹⁶⁶ *Id.* at 16.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 17.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

¹⁷² *Id.* at 553–54 ("To construe the expression 'managing all their affairs,' into a surrender of self-government, would be, we think, a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them.")

¹⁷³ *Worcester*, 31 U.S. (6 Pet.) at 515–16.

¹⁷⁴ *Id.* at 515.

¹⁷⁵ *Id.* at 561 ("The Cherokee [N]ation, then, is a distinct community occupying its own

Court characterized the tribes as “distinct, independent political communities” that “retain[] their original natural rights,” except for external interactions with other nations.¹⁷⁶ Further, despite the ethnocentric and paternalistic language¹⁷⁷ characterizing the United States government as the stronger power and tribes as the weaker, Chief Justice Marshall also noted that tribes did not surrender their independence upon taking the protection of the United States, but rather still retain their sovereignty and right to self-government.¹⁷⁸

Through the Marshall Trilogy the Court carefully explained that while Indian tribes had given up their rights to external foreign relations, they still maintained their internal, inherent sovereignty as distinct nations and their right to self-government.¹⁷⁹ Coupled with the language of the Constitution, these early texts form a foundation that recognizes that tribes’ inherent sovereignty was never extinguished.

However, in the wake of the Marshall Trilogy, both the Courts and Congress began to stray significantly from these founding principles. Throughout the nineteenth century, Congress implemented a policy of assimilation, which included the Indian Removal Act of 1830¹⁸⁰ and the General Allotment Act of 1887.¹⁸¹ These policies of forcible eviction and division of tribal lands, coupled with attempts to change Indian culture, religion, dress, and land use practices, were enacted in hopes to “assimilate” Native Americans.¹⁸² In 1924, Congress again pushed for further assimilation of Native Americans through the Citizenship Act.¹⁸³ From World War II until the late 1960s, these policies escalated into a period now known as termination, where Congress terminated federal support and derecognized tribes.¹⁸⁴ In the midst of termination-era policies, the movements of the 1960s began to take hold in Indian policy as well.¹⁸⁵ In 1968, Congress passed the Indian Civil Rights Act,

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 with the acts of congress.”)

¹⁷⁶ *Id.* at 559.

¹⁷⁷ See *supra* note 158 and accompanying text.

¹⁷⁸ *Worcester*, 31 U.S. (6 Pet.) at 560-61.

¹⁷⁹ Radon, *supra* note 68, at 1288.

¹⁸⁰ Ch. 148, 4 Stat. 411–12 (1830).

¹⁸¹ Ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331–358 (2012)).

¹⁸² See Christina D. Ferguson, Comment, *Martinez v. Santa Clara Pueblo: A Modern Day Lesson on Tribal Sovereignty*, 46 ARK. L. REV. 275, 283–84 (1993).

¹⁸³ Gaebler, *supra* note 122, at 1407.

¹⁸⁴ See, e.g., Dewi Ioan Ball, *Williams v. Lee (1959)—50 Years Later: A Reassessment of One of the Most Important Cases in the Modern-Era of Federal Indian Law*, 2010 MICH. ST. L. REV. 391, 392 n.2 (2010); Harry S. Jackson III, Note, *The Incomplete Loom: Exploring the Checkered Past and Present of American Indian Sovereignty*, 64 RUTGERS L. REV. 471, 477 (2012). This era included the implementation of P.L. 280 and the express termination of the sovereignty status of several tribes. See *supra* note 16 and accompanying text; see also Gaebler, *supra* note 122, at 1407–08; Resnick, *supra* note 122, at 692 n.97.

¹⁸⁵ See Jackson, *supra* note 184, at 488–89.

which marked a new era of self-determination in Indian Country.¹⁸⁶

As the eras delineated above demonstrate, federal Indian law has often strayed from the grounding of the Marshall Trilogy.¹⁸⁷ In fact, many scholars have commented on the undulation of Indian law as the Court and Congress have vacillated between very different policy perspectives on Native Americans.¹⁸⁸ However, scholars have also noted that despite the lack of congruity in the case law, the founding principles of the Marshall Trilogy still continue to define the bounds of tribal sovereignty.¹⁸⁹ Thus, in analyzing the Violence Against Women Act of 2013, the Court should form the foundation of its analysis by returning to the basics of the original texts that established federal Indian policy: the Constitution and Marshall Trilogy. It is through this lens that the Court should analyze the language of sections 904 and 905 and ultimately conclude that these provisions should be upheld as an expansion of inherent tribal sovereignty.

D. *Legislative Support for the Inherent Sovereignty Theory*

Since the passage of the Indian Civil Rights Act (ICRA) in 1968,¹⁹⁰ Congress has gradually recognized and affirmed more robust forms of sovereignty and tribal rights as it has embraced tribal self-determination. After ICRA, Congress passed the Indian Child Welfare Act (ICWA),¹⁹¹ the American Indian Religious Freedom Act (AIRFRA),¹⁹² the Native American Graves Protection and Repatriation Act (NAGPRA),¹⁹³ and the *Duro*-fix amendments to ICRA.¹⁹⁴ As this legislation evinces, Congress has continued to identify, verify, and confirm tribal governance rights to determine, enforce, administer, and support their own laws, programs, cultural practices, and community development.¹⁹⁵

¹⁸⁶ See Gaebler, *supra* note 122, at 1408–09.

¹⁸⁷ Ball, *supra* note 184, at 393.

¹⁸⁸ *Id.*; see also Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1174 (1990) (noting the “incoherence” of Federal Indian law); Frank Pommersheim, *A Path near the Clearing: An Essay on Constitutional Adjudication in Tribal Courts*, 27 GONZ. L. REV. 393, 403 (1991) (calling Federal Indian law “bifurcated, if not fully schizophrenic”).

¹⁸⁹ See David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1589 (1996); Ball, *supra* note 184, at 391–94.

¹⁹⁰ 25 U.S.C. §§ 1301–1341 (2012).

¹⁹¹ *Id.* §§ 1901–1963.

¹⁹² 42 U.S.C. § 1996.

¹⁹³ 25 U.S.C. §§ 3001–3013; 18 U.S.C. § 1170.

¹⁹⁴ 25 U.S.C. § 1301(2).

¹⁹⁵ Scholars have generally commented on this trend, labeling it the “self-determination” era of federal Indian law. In the words of one scholar, “modern-day congressional policy . . . eschews

This trend continues in the VAWA Reactivation Act of 2013. Both the legislation passed in 2013 and the 2012 debates on the same language demonstrate the intent of Congress to invoke inherent tribal jurisdiction.¹⁹⁶ The legislative intent is particularly clear here because the Court has already interpreted similar language in construing the *Duro-fix* in *Lara*,¹⁹⁷ and in the VAWA Reactivation Act of 2013, Congress has re-employed the same language.¹⁹⁸ In *Lara*, the Court observed that Congress intended to derive the power to expand criminal jurisdiction to non-member Indians from the tribe's inherent sovereignty.¹⁹⁹ Similar to the VAWA Reactivation Act of 2013, the Court noted that the statutory amendment in *Lara* explicitly recognized and affirmed the inherent sovereignty of tribes, and the legislative history confirmed that Congress intended to recognize this power under an inherent sovereignty, and not a delegation, theory.²⁰⁰ The Court then went on to cite committee reports from the House of Representatives and the Senate, and senator and representative remarks from the Congressional Record, all of which noted congressional intent to recognize the inherent jurisdiction of tribes.²⁰¹

Similar language and legislative record exist for the VAWA Reactivation Act of 2013, and the Court should similarly find that Congress has validly expanded the bounds of the inherent tribal sovereignty.²⁰² First, the Court should examine the plain language of the Act, which specifically states that the special jurisdiction derives from an expansion of tribal sovereignty.²⁰³ Second, in comparing the language present in the Act to the Court's interpretation of similar language in *Lara*, the Court should also find that sections 904 and 905 represent a valid expansion of inherent authority.²⁰⁴ The legislation at issue in *Lara* stated that "'powers of self government' . . . means the inherent power of Indian tribes, hereby recognized and affirmed, to

state and federal incursions into tribal sovereignty . . ." See Nicolas, *supra* note 16, at 901.

¹⁹⁶ Violence Against Women Reauthorization Act of 2011, S. 1925 § 904 (2011).

¹⁹⁷ *United States v. Lara*, 541 U.S. 193, 199 (2004) ("The statute says that it 'recognize[s] and affirm[s]' in each tribe the '*inherent*' tribal power (not delegated federal power) to prosecute nonmember Indians for misdemeanors." (alterations in original)).

¹⁹⁸ Compare 25 U.S.C. § 1301(2), with Pub. L. No. 113-4, § 904.

¹⁹⁹ *Lara*, 541 U.S. at 199.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² See, e.g., Violence Against Women Reactivation Act of 2013, Pub. L. No. 113-4, 127 Stat. 54; Violence Against Women Reactivation Act of 2013, S. 47, 113th Cong. (2013) (enacted); Violence Against Women Reactivation Act of 2013, H.R. 11, 113th Cong. (2013) (enacted); Violence Against Women Reauthorization Act of 2011, S. 1925, 112th Cong. (2011); Violence Against Women Act of 2012, H.R. 6625, 112th Cong. (2012); H.R. REP. NO. 112-480 (2012); S. REP. NO. 112-153 (2012).

²⁰³ Ennis, *supra* note 156, at 624-25.

²⁰⁴ *Lara*, 541 U.S. at 193.

exercise criminal jurisdiction over all Indians.”²⁰⁵ In the VAWA Reactivation Act of 2013, the language states: “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.”²⁰⁶ Thus, the Court has already recognized this language as validly invoking inherent tribal jurisdiction; it should do the same here.

In addition, the language of the VAWA Reactivation Act of 2013 contains significant legislative history from 2012 demonstrating that Congress intended it to invoke inherent tribal sovereignty. In the Senate Committee Report, published just before Senate Bill 1925’s passage, the Senate majority noted that Congress does indeed have the power to recognize and restore tribes’ inherent tribal sovereignty held in trust.²⁰⁷ As authority, the Senate majority invoked both *Oliphant* and *Lara*, arguing that these cases give Congress the power both to determine whether tribes may exercise criminal jurisdiction and to expand their inherent sovereignty to do so.²⁰⁸ This view is not exclusive to the majority either: in their Minority Views Report rejecting sections 904 and 905, Senators Kyl, Hatch, Sessions, and Coburn affirm that tribes’ powers derive not from the federal government, but from their own inherent sovereignty which has never been extinguished.²⁰⁹

²⁰⁵ 25 U.S.C. § 1301(2) (2012).

²⁰⁶ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904(b)(1), 127 Stat. 54.

²⁰⁷ “Congress has the power to recognize and thus restore tribes’ ‘inherent power’ to exercise criminal jurisdiction over all Indians and non-Indians.” S. REP. NO. 112-153, at 9 n.23.

²⁰⁸ *Id.* (“In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court suggested that Congress has the constitutional authority to decide whether Indian tribes should be authorized to try and to punish non-Indians In *United States v. Lara* . . . the Court held that Congress has the constitutional power to relax restrictions that have been imposed on the tribes’ inherent prosecutorial authority.”) It should be noted that the senators that joined in the Minority Views to Senate Bill 1925 disagreed with this conclusion. They believe that “the law today makes clear that there is no inherent power of tribes to do anything of the sort the bill says Because tribes lack this power, it is untrue to say that Congress can recognize and affirm it.” S. REP. NO. 112-153, at 38.

²⁰⁹ Citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978), the Minority Views Report explains: “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.’ ” S. REP. NO. 112-153, at 48. After recognizing the inherent sovereignty of tribes, and thus the inapplicability of the Constitution to tribal governments, the Minority View senators go on to argue that tribes are not required to follow the Constitution. The senators highlight that tribes need not follow the First, Fifth, or Fourteenth Amendments, that tribal governments do not follow the principles of separation of powers, and that tribes do not need follow the same sovereign immunity practices as state or the federal government. S. REP. NO. 112-153, at 48–50. In an interesting attempt to “turn the tables,” the Minority View Senators seem to argue that the proposed amendments would create a “lawlessness” in Indian Country—when in reality the real lawlessness is a result of decades of failed federal policies. Even if the Minority’s characterizations were true, these facts are not relevant to the debate. Only if tribes’ adjudication

The House Report for House Bill 4970, the 2012 House version of the bill that ultimately did not include the special jurisdiction provisions, commented on the omission of sections 904 and 905.²¹⁰ While the House majority did not accept that Congress has the right to expand tribal sovereignty because of the lack of constitutional protections, they did accept the Senate's statement that the special jurisdiction derives from inherent sovereignty.²¹¹

In addition to the explicit statements that the special jurisdiction finds its source in inherent sovereignty, other provisions of the Act also assume and reaffirm a non-delegation basis for jurisdiction.²¹² For example, the Act guarantees the protections of certain due process rights for all defendants prosecuted under its provisions.²¹³ In reaffirming that the source of power is non-delegated (and therefore does not require Constitutional protections) the Senate majority confirmed that the rights afforded to defendants under the proposed bill would derive from ICRA and the TLOA.²¹⁴

When the Court ultimately analyzes the language of sections 904 and 905, the Court should engage in a careful textual analysis of the bill and its legislative history, using the *Lara*'s statutory analysis as a model. The language of the VAWA Reactivation Act of 2013 and the 2012 Reports and Hearings reflect congressional intent to recognize special domestic violence criminal jurisdiction through the tribes' inherent sovereignty. Moreover, the language of the statute mimics similar language already interpreted by the Court as reaffirming an inherent sovereignty theory. The Court thus should find that the

powers are delegated by Congress does their compliance with the Constitution come into play. And considering that these senators already acknowledged that the special domestic violence jurisdiction at issue is derived from inherent sovereignty, these arguments highlighting the lack of constitutional protections in tribal court are moot.

²¹⁰ H.R. REP. NO. 112-480, at 58 (2012).

²¹¹ "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 apply." H.R. REP. NO. 112-480, at 58. Despite this observation, House Bill 4970 eliminates §§ 904 and 905 of Senate Bill 1925. In explaining why these provisions are not necessary, the House Majority claims that domestic violence, and particularly inter-racial domestic violence is not a problem in Indian Country. *Id.* at 59–60. The House Majority specifically refutes many of the statistics universally reported in scholarly work, as cited in notes 5-6, *supra*, including the high incidence of domestic violence generally among Native women and the high incidence of reported non-Indian perpetrators.

²¹² Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904(b), (d) 127 Stat. 54.

²¹³ *Id.* § 904(d).

²¹⁴ "Rather than finding their basis in the Constitution, these rights are guaranteed through the Indian Civil Rights Act of 1968, as amended in 1968 and 1990, and through the Tribal Law and Order Act." S. REP. NO. 112-153, at 10; *see also* S. REP. NO. 112-153, at 32 ("[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.").

legislative history and statutory intent mandate a conclusion that Congress validly expanded inherent tribal sovereignty when it passed sections 904 and 905.

III. COUNTER ARGUMENTS AND THE DOCTRINE OF PLENARY POWER

This Note has argued that in upholding the special domestic violence jurisdiction provision of the VAWA Reactivation Act of 2013, the Court should recognize the legislation as validly invoking Congress's power to relax the restraints on tribal sovereignty. However, this argument does not address the underlying basis of this power, and the limits, if any, of Congress's power to legislate in Indian Country. Although, as argued above, the Marshall Trilogy²¹⁵ laid out a framework that affirmed tribes' retained sovereign rights and unique status, in the years following the 1830s, these ideas were selectively applied, and, at points, completely ignored.²¹⁶ Since then, treatment of the tribes has "swung like a pendulum," through eras of removal, allotment, reorganization, termination, and self-determination.²¹⁷ The extensive policies—and their disparate approaches—in Indian Country have been generally justified under the theory of congressional plenary powers in Indian affairs, sourced in the Commerce Clause of the Constitution.²¹⁸ While it is unlikely that legislation like that found in the Act could be challenged under a theory that Congress does not have the power to implement this type of legislation in Indian Country,²¹⁹ that does not mean that upon constitutional challenge to the legislation, the Court should rely on the plenary powers doctrine. Rather, the Court should base the underlying authority for Congress's power to relax the restraints on inherent tribal sovereignty in the rational relationship test articulated in *Morton v. Mancari* that requires acts of Congress that affect Indian Country to be rationally related to Congress's unique trust obligations to the tribes.²²⁰

²¹⁵ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

²¹⁶ See *supra* note 188 and accompanying text. See also Resnick, *supra* note 122, at 692; Gaebler, *supra* note 122, at 1406–07.

²¹⁷ DUTHU, *supra* note 70, at 165.

²¹⁸ Ferguson, *supra* note 182, at 276–77 (1993); Jones, *supra* note 43, at 137; Cleveland, *supra* note 135 at 26; Frickey, *supra* note 188, at 1176.

²¹⁹ See, e.g., Ennis, *supra* note 7, at 573.

²²⁰ 417 U.S. 535 (1974).

A. *Plenary Power and Sections 904 and 905*

The plenary power doctrine is sourced in the Constitution.²²¹ According to the Commerce Clause, Congress has the power to regulate the commerce with the Indian tribes.²²² This clause has over time been effectively interpreted as a “free reign” over Indian affairs.²²³ While scholars argue that plenary power does not mean absolute or complete power,²²⁴ the Court has consistently stated that issues of governance and sovereignty are within Congress’s power to regulate, and has yet to strike down legislation because it exceeded the powers delineated in the Commerce Clause.²²⁵

Based on the argument in Part II of this Note, a sweeping interpretation of Congress’s powers seems favorable when viewed against the end goal of alleviating the humanitarian crisis in Indian Country: affirming sections 904 and 905 under the plenary powers doctrine does not leave room for a constitutional challenge to Congress’s power to enact the legislation in the first place. However, without addressing the means to that policy end, critics of the arguments presented thus far could argue that the analysis in this Note fails to address the underlying problems of plenary power, and in so doing, actually validates a destructive doctrine which has often produced very negative consequences in Indian Country.²²⁶

Advocating for the passage of the special domestic violence jurisdiction, however, does not require validating the plenary power doctrine. In 1974, the Supreme Court articulated a new test for the constitutionality of congressional action in Indian Country.²²⁷ In *Morton v. Mancari*, the Supreme Court considered whether Indian hiring preferences in the Bureau of Indian Affairs (BIA) were

²²¹ U.S. CONST. art. I, § 8, cl. 3; *see also* Weber, *supra* note 103, at 737.

²²² U.S. CONST. art. I, § 8, cl. 3 (“To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

²²³ The plenary power doctrine was first articulated in *United States v. Kagama*, 118 U.S. 375 (1886). MacKenzie T. Batzer, Note, *Trapped in a Tangled Web* *United States v. Lara: The Trouble with Tribes and the Sovereignty Debacle*, 8 CHAP. L. REV. 283, 289 (2005). Since then, Congress has used that power to implement policies in tribal lands, including, but not limited to: forcibly evicting tribes from their homelands, dividing up tribal lands, usurping criminal and civil jurisdiction from tribal courts, enacting civil rights legislation, specifying gaming regulations, and determining adoption rights and practices. *See* DUTHU, *supra* note 70 at xv–xix.

²²⁴ Will Trachman, Comment, *Tribal Criminal Jurisdiction After U.S. v. Lara: Answering Constitutional Challenges to the Duro Fix*, 93 CALIF. L. REV. 847, 857–58 (2005).

²²⁵ Ferguson, *supra* note 182, at 279.

²²⁶ *See, e.g.*, DUTHU, *supra* note 70, at 187–88. Not all scholars would take this approach however. Some have argued that a legislative abrogation of *Oliphant* should be considered consistent with the plenary powers doctrine. Ennis, *supra* note 7, at 573. Others have argued that “as tribes appear to be stuck with plenary power for the time being, an exploration of the positive uses that can be made of such power serves tribal interests.” Tweedy, *supra* note 40, at 663.

²²⁷ *Morton v. Mancari*, 417 U.S. 535, 553–54 (1974).

unconstitutional.²²⁸ Rather than relying on blanket plenary powers, the Court held that in order to determine the constitutionality of an act of Congress, the Court must ask whether the action to be taken is rationally related to the federal government's unique fiduciary duties to Indian tribes.²²⁹ This rule, the rational relationship test,²³⁰ expressed a basis for Congress's continuing power in Indian Country, while providing limits to ensure that the policies implemented were consistent with Congress's trust relationship with tribes and the principles of self-determination.²³¹ Today, *Mancari* provides a framework for validating the legislation found in the VAWA Reactivation Act of 2013 under a theory of inherent tribal sovereignty without blindly affirming the plenary powers doctrine that has historically been so destructive in Indian Country.

B. *Morton v. Mancari and the Rational Relationship Test*

In *Morton v. Mancari*, the Court was asked to decide whether the Indian hiring preferences for the BIA as enacted in the Indian Reorganization Act of 1934 were either necessarily repealed upon the passage of the Equal Employment Opportunity Act of 1972²³² or a violation of due process under the Fifth Amendment.²³³ After addressing the purpose of the hiring preferences and the lack of express congressional intent to repeal them, the Court first concluded that the hiring preferences were not repealed as a result of the Equal Employment Opportunity Act.²³⁴ The Court then moved on to address whether the legislation violated the Fifth Amendment.²³⁵ The Court first explained that because of tribes' unique status within the United States, the federal government has trust obligations to act in the interest of tribes.²³⁶ Although Congress has both explicit and implicit plenary powers from the Commerce Clause, in keeping with its unique relationship to the tribes, Congress may implement legislation which treats tribes or tribal interests specially or differently, as long as this different treatment is rationally related to Congress's fiduciary obligations to Native peoples.²³⁷ The Court therefore held that the hiring

²²⁸ *Id.* at 539.

²²⁹ *Id.* at 541–42.

²³⁰ *Id.* at 555 (“As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed.”).

²³¹ *Id.* at 553–54.

²³² *Id.* at 545–47.

²³³ *Id.* at 551.

²³⁴ *Id.* at 547.

²³⁵ *Id.* at 551.

²³⁶ *Id.* at 551–52.

²³⁷ *Id.* at 551–52, 554.

practices, aimed at furthering Native self-governance and policy participation, should not be disturbed.²³⁸

In applying this reasoning to sections 904 and 905, the Court should find that Congress has exercised its power consistent not with the sweeping plenary powers that have characterized much of federal Indian law, but with the more limited standard in *Mancari*, which is more conscientious of Congress's need to effectively execute its trust responsibilities, while giving deference to Indian self-governance and self-determination.²³⁹ Like the legislation in *Mancari* which addressed a specific, identified problem and aimed to combat that problem through purposeful legislation,²⁴⁰ the VAWA Reactivation Act of 2013 also aims to ameliorate a defined problem in Indian Country which has devastated Native communities,²⁴¹ again through targeted legislation which reflects Congress's fiduciary responsibilities to tribes. By recognizing the basis of the powers under the *Mancari* rational relationship test, the Court will ensure that validation of sections 904 and 905 does not only create the right tools to combat the problem of interracial domestic violence in Indian Country, but also implements those tools in a way that affirms and amplifies tribal self-determination.

CONCLUSION

Statistics show that levels of domestic violence, sexual violence, and dating violence have reached crisis proportions in Indian Country.²⁴² While scholars have long proposed an *Oliphant*-fix and debated the source of Congress's power to enact such legislation, since the VAWA Reactivation Act of 2013's recent passage, these debates have converted from theoretical inquiries of proposed solutions into a practical and timely interpretation of recent legislation that soon will make its way into the courts.²⁴³ This Note proposes a method of interpretation for this new legislation. It argues that in analyzing the Act

²³⁸ *Id.* at 554.

²³⁹ *Id.*

²⁴⁰ *Id.* at 554. The Court noted that “[t]he purpose of these preferences, as variously expressed in the legislative history, has been to give Indians a greater participation in their own self-government; to further the Government’s trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life.” *Id.* at 541–42 (footnotes omitted).

²⁴¹ See *supra* notes 5–6 and accompanying text.

²⁴² *Id.*

²⁴³ While the provisions of §§ 904 and 905 will not go into effect until March 7, 2015, tribes may participate in a prior to that date in Pilot Project. § 908(b)(1). Under the Pilot Project, tribes must have submitted preliminary expressions of interest to be designated as a participating tribe on an accelerated basis by July 15, 2013; comments on these proposals were due on September 12, 2013. Pilot Project for Tribal Jurisdiction over Crimes of Domestic Violence, 78 Fed. Reg. 35,961, 35,961–62 (June 14, 2013).

and the source of Congress's power to pass such legislation, the Court should go back to the basic texts—the Constitution,²⁴⁴ the early case law,²⁴⁵ and legislative history.²⁴⁶ In so doing, the Court should find that sections 904 and 905 validly invoke inherent tribal sovereignty.

However, the Court should not stop its analysis there. In addressing the inevitable application of the plenary power doctrine, the Court should carefully delineate that the VAWA Reactivation Act of 2013 does not represent an exercise of the plenary power that has typically characterized much of federal Indian jurisprudence in the twentieth century, but rather falls into a more limited view of Congress's power consistent with its fiduciary responsibilities in Indian Country.²⁴⁷ It is through this analysis that the Court should validate the legislation on the twin prongs of inherent tribal sovereignty and limited plenary powers, principles that reinforce Indian self-governance and self-determination.

Although federal Indian law has been plagued by failed policies and inconsistent case law, in considering sections 904 and 905, the Court should not shy away from the opportunity to correct the mistakes of the past, nor feel required to incorporate highly criticized case law that exemplifies a misapprehension of tribes' sovereign status. Partial abrogation of *Oliphant* and recognition of inherent tribal sovereignty will create at least two positive results: a practical mechanism to reduce the rates of domestic violence, dating violence, and sexual violence on Indian Country, and a resounding affirmation of tribal rights. It is through a validation of Congress's power as a fiduciary to enact sections 904 and 905 under a theory of inherent tribal sovereignty that the Court may contribute to not only the confirmation of tribal self-governance and self-determination, but also the growth of safer and stronger Native communities.

²⁴⁴ See *supra* Part II.B.

²⁴⁵ See *supra* Part II.C.

²⁴⁶ See *supra* Part II.D.

²⁴⁷ See *supra* Part III.