CLOSING A GAP IN INDIAN COUNTRY JUSTICE: *OLIPHANT*, *LARA*, AND DOJ'S PROPOSED FIX

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I. INTRODUCTION

The current counterintuitive state of federal Indian law makes it extremely difficult to ensure the public's safety in Indian country.[2] National data indicates that Indian country crime rates are significantly greater than the national average.[3] Violent crime victimization rates in particular, for both Indian men and women, are higher than for all other races.[4] At the same time, the "jurisdictional maze" imposed on Indian country by a morass of court decisions, legislation, and agency regulations creates significant obstacles for tribes and tribal law enforcement who are tasked with protecting the public.[5] Arguably,[6] since the passage of the Tribal Law and Order Act, which allowed tribes to exercise limited felony sentencing authority,[7] the most significant remaining barrier to effective law enforcement is a court-created rule that prevents tribes from prosecuting non-Indians who commit crimes in Indian country as an exercise of their inherent sovereign power.[8]

The Obama administration, through the Department of Justice (DOJ) and Associate Attorney General Thomas J. Perrelli specifically, has recognized these problems — especially with regard to domestic violence crimes in Indian country.[9] To this end, on July 21, 2011, Ronald Weich, Assistant Attorney General within the Office of Legislative Affairs, wrote to Joseph Biden in his capacity as President of the United States Senate and proposed an amendment to the Violence Against Women Act that would create a pilot project whereby tribes that meet certain conditions can prosecute non-Indian perpetrators of domestic violence against Indian women.[10] The proposal would "[r]ecognize certain tribes' concurrent criminal jurisdiction to investigate, prosecute, convict, and sentence both Indians and non-Indians who assault Indian spouses, intimate part-

2. It is counterintuitive because the jurisdiction in which these crimes occur are prevented, by law, from adequately responding to those crimes.
3. STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 203097, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992–2002 (2004), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/aic02.pdf [hereinafter *American Indians and Crime*].
4. *Id.*
5. Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976); M. Brent Leonhard, *Returning Washington PL 280 Jurisdiction to its Original Consent-Based Grounds*, 47 GONZ. L. REV. 3 (forthcoming 2012).
6. For those tribes that lack sufficient resources to effectively exercise the sovereign powers they currently have, a lack of money is certainly the most significant barrier.
7. 25 U.S.C. § 1302(b) (2006).
8. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that tribes cannot prosecute non-Indians for crimes committed in Indian country).
9. *Tribal Law and Order Act of 2009: Hearing on S. 797 Before the S. Comm. On Indian Affairs,* 111th Cong. (2009) (statement of Thomas J. Perrelli, Assoc. Att'y General, U.S. Dep't of Justice); *Oversight Hearing on Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters Before the S. Comm. on Indian Affairs,* 112th Cong. (2011) (statement of Thomas J. Perrelli, Assoc. Att'y General, U.S. Dep't of Justice).
10. Letter from Assoc. Att'y Gen. Ronald Weich for Senate President Joe Biden, *available at* http://www.tribaljusticeandsafety.gov/docs/legislative-proposal-violence-against-native-women.pdf [hereinafter DOJ Letter].

ners, or dating partners, or who violate protection orders, in Indian country."[11] In recognizing the concurrent nature of tribal jurisdiction, the proposal would acknowledge the tribal power to prosecute non-Indians as an exercise of their inherent sovereign power as opposed to an exercise of congressionally delegated federal power. Effectively, the proposal would attempt to legislatively reverse — in a limited context and for a specific purpose — the United States Supreme Court decision in *Oliphant v. Suquamish Indian Tribe*.[12]

This paper analyzes whether the DOJ's proposed legislative fix is legally permissible, by closely analyzing the decisions in *Oliphant* and *United States v. Lara*.[13] Given the closely circumscribed requirements for the exercise of such power, and the past opinions of various Supreme Court Justices, this article concludes that it is within Congress' power to recognize the inherent power of tribes to prosecute non-Indians for domestic violence crimes against Indians.

In *Oliphant,* the United States Supreme Court held that "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians."[14] Subsequent to the *Oliphant* decision, the Supreme Court decided *Duro v. Reina.*[15] In *Duro* the issue was whether a tribe could prosecute a non-member Indian for crimes committed in the tribe's Indian country. Surprisingly, the Court held that ". . . the rationale of our decision[ ] in *Oliphant* . . . compels the conclusion that Indian tribes lack jurisdiction over persons who are not trib[al] members."[16] Quick on the heels of that decision, Congress — in recognition of the significant negative impact such a decision would have on the ability to ensure public safety in Indian country — passed legislation specifically authorizing tribes to prosecute non-member Indians as an exercise of their inherent sovereign power (hereinafter referred to as "the *Duro* fix").[17] The legality of the *Duro* fix was challenged in *Lara*.[18] In *Lara* the defendant, an enrolled member of the Turtle Mountain Band of Chippewa Indians, was charged and convicted in the Spirit Lake Tribal Court for committing an act of violence against a policeman in the Indian country of the Spirit Lake Tribe.[19] After he was convicted in tribal court, the United States sought to prosecute Mr. Lara in federal court for essentially the same criminal conduct.[20] He moved to dismiss the federal action by claiming that the Double Jeopardy Clause of the United States Constitution prevented the federal government from prosecuting him twice for the same crime.[21] Implicit in his argument was

11. *Id.*
12. 435 U.S. 191 (1978).
13. 541 U.S. 193 (2004).
14. *Id.* at 212.
15. 495 U.S. 676 (1990).
16. *Id.* at 685.
17. 25 U.S.C. § 1301(2) (2006) (originally enacted as Act of Nov. 5, 1990, §§ 8077(b)–(d), 104 Stat. 1892–93 (temporary legislation); Act of Oct. 28, 1991, 105 Stat. 646 (permanent legislation)).
18. 541 U.S. 193 (2004).
19. *Id.* at 196.
20. *Id.*
21. *Id.* at 193.

that Congress could not legislatively recognize the inherent authority of tribes to prosecute non-Indians, and at best, the *Duro* fix amounted to an improper delegation of federal power.[22] Ultimately a majority of the Supreme Court held that the Double Jeopardy Clause was not violated because "Congress does possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians as the [*Duro* fix] statute seeks to do."[23] In short, the majority held that Congress can legislatively reverse the Supreme Court's prior holding and recognize the inherent sovereign power of tribes to prosecute non-member Indians. However, two of the three concurring Justices raised questions about whether Congress could reverse the Court on the issue of inherent tribal power, but ultimately ruled with the majority for other reasons.[24] Of the Justices in *Lara*, only two who were in the majority remain on the bench, and four of the Justices who dissented or issued skeptical concurring opinions remain on the Court.

Consequently, it is precarious to rely solely on the Court's holding in *Lara* to support the legality of the DOJ's proposed *Oliphant* fix. Nonetheless, after closely parsing the relevant decisions, and given the limited scope of the DOJ's proposal, along with the significant rights tribes must grant non-Indians in order to exercise criminal jurisdiction over them, this paper concludes that the proposal is a legally permissible exercise of congressional power.

II. A PROBLEM THAT DESPERATELY NEEDS FIXING

The level of violence against Indian women in the United States has reached rates that are nothing short of epidemic.[25] One Bureau of Justice Statistics (BJS) report indicates that Indian women are 2.5 times more likely to be sexually assaulted than women in the United States generally.[26] Another study sponsored by the National Institute of Justice and the Centers for Disease Control and Prevention found that more than one-third, 34.1%, of Indian women will be raped in their lifetime.[27] A University of Oklahoma regional study showed that almost 60% of Indian women had been assaulted by their spouses or intimate partners.[28] Another National Institute of Justice study found that while on a national scale, the murder rates of Indian women are second to African American

22. *Id.* at 198–99.
23. *Id.* at 200.
24. United States v. Lara, 541 U.S. 193, 211–31 (2004).
25. AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007) [hereinafter *Maze of Injustice*]; AMERICAN INDIANS AND CRIME, *supra* note 3; PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN (2000), *available at* https://www.ncjrs.gov/pdffiles1/nij/183781.pdf [hereinafter *Consequences of Violence Against Women*] (indicating 31.4% of Indian women will be raped in their lifetime).
26. AMERICAN INDIANS AND CRIME, *supra* note 3.
27. *Consequences of Violence Against Women, supra* note 25, at Exhibit 7.
28. *Oversight Hearing on Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters Before the S. Comm. on Indian Affairs*, 112th Cong. (2011) (statement of Thomas J. Perrelli, Assoc. Att'y General, U.S. Dep't of Justice).

women, statistics specific to Indian country reveal that the murder rates of Indian women can soar to over ten times the national average.[29]

Underscoring this epidemic are equally shocking statistics, related to the race of the perpetrators of crimes against Indians in the United States, as reported in the 2004 BJS study entitled "American Indian Crime."[30] According to the study, in 66% of the violent crimes where the race of the perpetrator was reported, Indian victims indicated that the offender was non-Indian.[31] Over 85% of rape or sexual assault victims described their offenders as non-Indian.[32] Approximately 74% of robbery victims, 68% of aggravated assault victims, and 64% of simple assault victims described their offenders as non-Indian.[33] While the study did not indicate whether a given crime arose in Indian country, it is not far-fetched to assume that many of the crimes reported by Indian victims arose in Indian country.[34]

The rate of violent crime perpetrated against Indians by non-Indians is all the more troubling given the inability of tribal nations to hold those offenders accountable. While tribal nations have a moral obligation to protect their citizens, they are hamstrung by federal court decisions that prevent them from holding non-Indians accountable for their crimes.[35] Consequently, prosecutorial and enforcement obligations fall on the federal government. However, national statistics reveal that crimes that occurred in Indian country and referred for federal prosecution are declined more often than they are prosecuted. Between October 1, 2002 and September 30, 2003, of the cases referred for federal prosecution from the Bureau of Indian Affairs (BIA), 58.8% were declined, compared to the national average of 26.1%.[36] Between October 1, 2003 and September 30, 2004 the declination rate for cases referred by the BIA dropped to 47.9%,

29. Ronet Bachman et al., *Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What is Known* (U.S. Dep't of Justice Research, Working Paper No. 223691, 2008), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf.
30. AMERICAN INDIANS AND CRIME, *supra* note 3, at v.
31. *Id.* at 9.
32. *Id.*
33. *Id.* at 9 tbl.13.
34. According to the 2010 United States Census, 2,932,248 Americans identified themselves as only belonging to the racial category of American Indian or Alaska Native. Of those, approximately 965,000 or 32.9%, were located in an American Indian/Alaska Native area of residence. With nearly 33% of the tribal citizen population living in Indian country, a comprehensive study that includes tribal citizens nationwide likely includes a significant amount of Indian country residents. *See* U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, at 4 tbl.1 (2012), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf. Many individuals in the census described themselves as mixed race, including American Indian/Alaska Native. This note only references those who identify as American Indian/Alaska Native alone as the mixed category likely includes numerous people who view themselves as having American Indian/Alaska Native ancestry but who are not citizens of a federally recognized Indian tribe nor eligible for enrollment in any tribal nation.
35. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
36. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003, at 33 tbl.2.3 (2005), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs03.pdf.

but that rate was still significantly higher than the national average of 21.5% for the same time period.[37] While statistics are not available, one can reasonably assume that declination rates for non-Indian crime are at least as high as the average declination rate for crimes referred by the BIA. Anecdotal evidence suggests that non-Indian criminals often feel that they are untouchable in Indian country.[38]

The United States Department of Justice has also recognized the serious problem of domestic violence in Indian country and the inability of tribes to adequately respond to the public safety needs of their communities, particularly with regard to non-Indian criminal behavior. Associate Attorney General Perrelli recently testified before the Senate Committee on Indian Affairs, noting that:

> [T]ribal courts have no authority at all to prosecute a non-Indian, even if he lives on the reservation and is married to a tribal member. Tribal police officers who respond to a domestic-violence call, only to discover that the accused is non-Indian and therefore outside the tribe's criminal jurisdiction, often mistakenly believe they cannot even make an arrest. Not surprisingly, abusers who are not arrested are more likely to repeat, and escalate their attacks. Research shows that law enforcement's failure to arrest and prosecute abusers both emboldens attackers and deters victims from reporting future incidents. In short, the jurisdictional framework has left many serious acts of domestic violence and dating violence unprosecuted and unpunished.[39]

The epidemic of Indian country domestic violence is real. A significant contributor to the epidemic is the systemic barrier created by federal Indian law that prevents an adequate local response to crime. Even the federal government, to its credit, has acknowledged the seriousness of the problem and inability of the current system to provide adequate protection to Indian country communities. The DOJ's limited proposal is a large step in the right direction.

III. PARSING *OLIPHANT*

Oliphant is the seminal United States Supreme Court case that prevents tribes from prosecuting non-Indians as an exercise of their inherent sovereign power. The majority in *Oliphant* held that "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers '*inconsistent with their status*' . . . By submitting to the overriding sovereignty of the United States, Indian tribes . . . [gave] up their power to try non-Indian citizens of

37. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 33 tbl.2.3 (2006), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs04.pdf.

38. *Cf.* Sarah Kershaw, *Through Indian Lands, Drugs' Shadowy Trail*, N.Y. TIMES, February 19, 2006, § 1.

39. *Legislative Hearing on Senate Bills 872, 1192, and 1763 Before the S. Comm. on Indian Affairs*, 112th Cong. 2 (2011) (statement of Thomas J. Perrelli, Assoc. Att'y General, U.S. Dep't of Justice), *available at* http://www.indian.senate.gov/hearings/upload/Thomas-Perrelli-testimony-2.PDF.

the United States except in a manner acceptable to Congress."[40] Consequently, to adequately analyze whether the proposed DOJ *Oliphant* fix is legally permissible, we must first parse the Court's reasoning in *Oliphant*.

a. The Facts

In 1973 the Suquamish Tribe enacted legislation asserting criminal jurisdiction over all individuals committing crimes on the Port Madison Reservation.[41] Consistent with the tribe's full assertion of jurisdiction, it placed notices at prominent entry points to the reservation. Those notices alerted people that anyone who entered would be deemed to have consented to the jurisdiction of the Suquamish tribal court.[42]

Early in the morning on August 19, 1973, police officers for the Suquamish Tribe were patrolling encampment grounds at the Chief Seattle Days celebration located on the Port Madison Reservation. Mark Oliphant, a non-Indian resident of the reservation, was observed assaulting people who were camping there. When officers attempted to intervene, Oliphant assaulted one of the officers and then tried to run. The Suquamish Tribe police subdued and arrested Oliphant. He was arraigned before the tribe's court, where $200 bail was initially set, but Oliphant was eventually released on his own recognizance.[43] On August 23, 1973 Oliphant filed a habeas corpus petition in federal court, challenging the Suquamish Tribe's jurisdiction to prosecute him, on the basis that he was non-Indian.[44]

On October 12, 1974, Daniel Belgarde, another non-Indian resident of the Port Madison Reservation, was recklessly driving his truck at a high rate of speed on the reservation.[45] Two tribal police cars pursued him, and eventually were forced to block his path, resulting in Belgarde crashing into a tribal police car.[46] Mark Oliphant was in the truck with Belgarde.[47] The tribal officers called Kitsap County Sheriffs, but upon arrival at the scene the Kitsap County police refused to take any action against Belgarde.[48] The tribal police then took Belgarde to a nearby city jail that the Suquamish Tribe had contracted with for jail services. Following his arraignment, Belgarde filed a habeas corpus petition in federal court on November 6, 1974 challenging the tribal court's jurisdiction.[49]

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40. 435 U.S. 191, 208–10 (1978).
41. Brief for the United States as Amicus Curiae Supporting Respondents at 5, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (No. 76-5729).
42. *Id.*
43. *Id.* at 5–6.
44. *Id.*
45. *Id.* at 7.
46. *Id.*
47. Brief for Petitioners at 17, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (No. 76-5729).
48. Brief for the United States as Amicus Curiae Supporting Respondents, *supra* note 41, at 7.
49. *Id.* at 8.

b. The Appellate Court Decision and Argument of the Parties before the United States Supreme Court

The United States District Court for the Western District of Washington denied the defendants' habeas corpus appeals, upon which the defendants filed an appeal to the Ninth Circuit Court of Appeals. In a 2–1 decision, the Ninth Circuit held that the Suquamish Tribe had jurisdiction to prosecute the non-Indian defendants for crimes committed in the tribe's Indian country.[50]

The Ninth Circuit's analysis began by citing the rule that tribal nations were once independent and sovereign, and that they retain those sovereign powers that are consistent with their status as domestic dependent nations, unless expressly terminated by Congress.[51] The court further noted that the power to punish those who violate the laws of the tribe is a "sine qua non" of the tribe's original sovereignty, which remains until either the tribe agrees to removal of that power or the federal government expressly takes it away.[52] The court went on to find that the Suquamish Tribe did not agree to removal of their original sovereign power to prosecute non-Indians, nor did Congress expressly take it away.

In dissent, then Circuit Justice Anthony Kennedy wrote: "I cannot agree with either the premises or the conclusion of the majority opinion."[53] Rather, Kennedy argued that the majority's initial proposition, which states that tribe's retain their inherent sovereign powers in the absence of express congressional intent to the contrary, the term "sovereignty" is a "veil" used by the courts when the issue is one of federal preemption against states' assertion of power over tribes and as such it does not apply to the question of whether tribes have inherent authority to prosecute non-Indians.[54] He also reasoned that the notion of tribal sovereignty did not necessarily include the power to prosecute non-Indians because, unlike the ability to maintain law and order and to exclude undesirables, such power was not essential to a tribe's identity or self-governing status.[55] Consequently, Kennedy went on to analyze whether Congress intended to permit tribes to prosecute non-Indians as an exercise of their inherent sovereign power, and concluded that even though Congress has never explicitly stated tribes lack this inherent power, its historical actions implied that Congress never intended for tribes to exercise such power.[56]

50. Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976).
51. *Id.* at 1009.
52. *Id.* at 1009–10.
53. *Id.* at 1014.
54. *Id.* at 1014–15.
55. *Id.* Kennedy's claim implicitly assumes that the ability to maintain law and order on reservations does not include the ability to prosecute non-Indian violators of tribal laws. This is primarily a factual, not legal, claim. It is also one that is highly questionable, if not proven false, in light of national crime data. Further, as a factual claim, one would assume it is within the power of Congress and administrative agencies to determine, which the Department of Justice in its current proposal and recorded testimony has — and it is contrary to the determination of Justice Kennedy.
56. Oliphant v. Schlie, 544 F.2d 1007, 1019 (9th Cir. 1976).

Oliphant appealed the Ninth Circuit decision to the United States Supreme Court, arguing that "inherent tribal sovereignty" does not exist.[57] He argued that the notion of inherent tribal sovereignty was: (1) inconsistent with principles of international law, in so far as tribes are not sovereign states under the definition of the term "states;" (2) not grounded in prior court decisions, as the exercise of tribal power in those cases did not depend on the notion of inherent tribal sovereignty; and (3) contrary to the United States Constitution and federal statutes.[58]

In response, the Suquamish Tribe essentially argued that Felix Cohen's cardinal principle of federal Indian law[59] applied and that neither the Suquamish Tribe nor Congress expressly divested the Suquamish Tribe of its inherent power to prosecute non-Indians.[60] Felix Cohen's cardinal principle is as follows:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possessed, in the first instance, all the powers of any sovereign State; (2) Conquest rendered the tribe subject to the legislative power of the United States and, in substance, terminated the external powers of sovereignty of the Tribe, e.g., its power to enter into treaties with foreign nations, but did not by itself terminate the internal sovereignty of the tribe, i.e., its powers of local self-government; (3) These internal powers were, of course, subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, many powers of internal sovereignty have remained in the Indian tribes and in their duly constituted organs of government.[61]

In *Oliphant*, the United States Supreme Court took a different path than that proposed by either the petitioner or respondent. Consistent with prior case law, the Court first held that tribes cannot exercise sovereign powers that: (1) have been expressly terminated by Congress; or (2) are inconsistent with a tribe's status as a domestic dependent nation.[62] However, the Court went on to find that the power of tribes to prosecute non-Indians for crimes committed in Indian country conflicted with the overriding sovereign interests of the United States, and as such was implicitly inconsistent with a tribe's status as a domestic dependent nation.[63] The majority came to this second conclusion by way of a rather troubling and tortured analytic trail.

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57. Brief for Petitioners, *supra* note 47, at 19.
58. *Id.* at 19–23.
59. Felix Cohen played a central role in the development of Federal Indian Law in the early to mid-part of the 20th Century, and his impact is still felt today. *See, e.g.*, Kevin K. Washburn, Felix Cohen, Anti-Semitism and American Indian Law, 33 AM. INDIAN L. REV. 583 (2009) (reviewing DALIA TSUK MITCHELL, ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM (Cornell Univ. Press, 2007)).
60. Brief for Respondents at 11–12, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (No. 76-5729).
61. Federal Indian Law 398 (Interior Dept.1958).
62. *Suquamish Indian Tribe*, 435 U.S. at 208.
63. *Id.* at 209–10.

c. The Majority Opinion

i. Footnote six

The *Oliphant* majority began their substantive analysis by noting that the Suquamish Tribe's assertion of adjudicative power over non-Indian criminal defendants was grounded in the Tribe's inherent powers of government, rather than express congressional authorization or treaty language.[64] However, in footnote six the Court acknowledged that the Suquamish Tribe had also argued that both the Indian Reorganization Act of 1934 (IRA) and the Indian Civil Rights Act of 1968 (ICRA) confirmed this exercise of inherent power.

In its brief, the Tribe argued that the IRA was meant to encourage tribes to revitalize their self-government, particularly by encouraging tribal courts to become stronger and more organized.[65] The Tribe went on to note that the IRA, both by its terms and general policy, constituted a federal confirmation of existing tribal power.[66] Of significant importance to the Tribe's line of argument was the fact that contemporaneously with the enactment of the IRA, the Solicitor of the Department of Interior issued an opinion to identify what those existing powers were. That opinion expressly stated that the existing powers referenced in the IRA included the power to punish aliens within a tribe's jurisdiction according to tribal law and custom.[67] Presumably, the term "aliens" referred to all individuals who are not citizens of the tribe—Indians and non-Indians alike. Rather than deal with the highly relevant and illuminating Solicitor Opinion, the majority simply stated that the IRA did not address tribal criminal jurisdiction over non-Indians and that it merely gave tribes the right to organize for their common welfare, adopt appropriate constitutions and bylaws, and gave tribal councils such powers as were vested by existing law.[68] Essentially, the majority ignored the Solicitor Opinion. This is problematic in that the opinion is direct evidence that the federal government, at the time it enacted the IRA in 1934, thought that the powers vested in tribes by existing law included the power to prosecute non-citizens who committed crimes within a tribe's Indian country.

Similarly, the Suquamish Tribe's argument with regard to the ICRA was that both the legislative history and the express terms of the Act confirmed the inherent power of tribes to prosecute non-Indians.[69] The Tribe's brief demonstrates that early in the ICRA bill drafting process, the bill's language referred to various rights conferred on "American Indians."[70] However, prior to enactment, the bill was amended to extend to "any person," instead of only to "American Indians."[71] The idea for this amendment came from the Department of Interior. The amendment indicates two things: (1) that the ICRA by its terms applies to non-Indians,

64. *Id.* at 195–96.
65. Brief for Respondents, *supra* note 60, at 58.
66. *Id.*
67. *Id.* at 59.
68. *Suquamish Indian Tribe*, 435 U.S. at 196 n.6.
69. Brief for Respondents, *supra* note 60, at 60–61.
70. *Id.* at 59–61.
71. *Id.* at 60.

and (2) that Congress and the Department of Interior both believed that it was necessary to expand the scope of the ICRA protections to include non-Indians. It is likewise important to note that the ICRA almost exclusively applies to criminal prosecutions because federal review is limited to a petition for habeas corpus,[72] and a petition for habeas corpus first and foremost requires that there be a restraint on the liberty of the individual seeking review.[73] This, in conjunction with the 1934 Solicitor Opinion addressing the powers vested in tribes, seems to strongly suggest that Congress and the executive branch both implicitly and explicitly believed tribes had the inherent power to prosecute non-Indians for violations of tribal law in Indian country.

Nonetheless, the Court was not persuaded. Rather curiously, the Court interpreted the change in the bill's language as demonstrating Congress' intent that the Act's guarantees extend to non-Indians *if* they come under a tribe's criminal or civil jurisdiction by either treaty or an act of Congress.[74] This is a rather odd interpretation since the Court believed that for most any tribal action that could both be covered by the Act's terms and apply to non-Indians, no tribal jurisdiction existed.[75] Professor Peter Maxfield has aptly pointed out the absurdity of the majority's argument: It overlooks the fact that Congress ended treaty making in 1871, and implausibly renders the ICRA's use of the phrase "any person" to nothing more than a future restriction on Congressional actions.[76] Further, the amendment would have been unnecessary as any inconsistent subsequent legislation would supersede the terms of the ICRA—as such, at best, the phrase "any person" would only serve as a reminder to Congress itself.[77]

ii. The "new phenomenon"/ "tribes had no laws" assertion

The majority goes on to assert that tribal exercise of criminal jurisdiction over non-Indians was a "relatively new phenomenon," and that when attempted in the past, it was found not to exist. The Court continues by quoting an 1834 Commissioner of Indian Affairs argued that, with few exceptions, tribes had no laws.[78] The majority opinion cites to no authority for its contrary claim, other than this bare assertion. This assertion would be news to tribes who had for thousands of years prior to the existence of the United States, or even the Magna Carta,[79] implemented

72. 25 U.S.C. § 1303 (2006).
73. Walton v. Tesuque Pueblo, 443 F.3d 1274, 1279 (10th Cir. 2006).
74. *Suquamish Indian Tribe*, 435 U.S. at 196 n.6.
75. As noted earlier, the limitation of review to a petition for habeas corpus renders the effective scope of the Act's application solely to tribal actions that limit a person's liberty — e.g., criminal prosecution.
76. Peter Maxfield, Oliphant v. Suquamish Tribe*: The Whole is Greater than the Sum of the Parts*, 19 J. CONTEMP. L. 391, 432 (1993).
77. *Id.*
78. *Suquamish Indian Tribe*, 435 U.S. at 197.
79. The Magna Carta was issued in 1215. However, the Columbia River tribes, of which the Confederated Tribes of the Umatilla Indian Reservation is one, have lived in the same area for at least 13,000 years. Celilo Village, which is the Indian country of the Confederated Tribes of the Umatilla Indian Reservation, The Confederated Tribes of

and enforced their laws and customs within their territory. In the book *Wiyaxayxt, As Days Go by: Our History, Our Land, and Our People*,[80] the Confederated Tribes of the Umatilla Indian Reservation describe *tamanwit*, which is literally translated as "throw down," and is the traditional law of the Columbia River tribes.[81] In discussing the federal government's execution of the Cayuse Five, Judge William Johnson describes how the so-called "Whitman massacre" was actually an enforcement of *tamanwit*, whereby ineffective medicine men whose patients died were themselves executed.[82] Clearly, tribes had laws and they did in fact exercise those laws against non-Indians — even to the point of exercising the powers of capital punishment. While the federal government may not have agreed with such assertions of power or the use of such laws against non-Indians, it is simply false to claim that the exercise of criminal jurisdiction over non-Indians was a relatively new phenomenon in the 1970s. The exercise of such power may well have lain dormant for many years, but it was historically exercised by tribes regardless of federal approval.

iii. Footnote eight

Next, the majority asserts that from the earliest treaties with tribes, it was assumed that tribes did not have criminal jurisdiction over non-Indians, absent a congressional statute or treaty provision to that effect. In support of this claim the Court cites the 1830 Treaty with the Choctaw Indian Tribe, whereby the tribe expressly requested authority to punish non-Indian criminals, which ultimately was not forthcoming.[83] The Court goes on to note that when the Choctaw Tribe attempted to assert such authority over non-Indians, the United States Attorney General issued an opinion arguing that the Choctaw did not have such authority because it

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the Warm Springs Reservation of Oregon, The Nez Perce Tribe, and Yakama Nation, has been continuously occupied for approximately 13,000 years. *See* WILLIAM DIETRICH, NORTHWEST PASSAGE: THE GREAT COLUMBIA RIVER 52 (1995). Tamanwit is their traditional law, and it has existed since time immemorial.

80. WIYAXAYXT, AS DAYS GO BY: OUR HISTORY, OUR LAND, AND OUR PEOPLE (Jennifer Karson ed., Oregon Historical Soc'y Press 2006).

81. *Id.* at 77.

82. *Id.* at 172–74. In 1847 there was an outbreak of measles that ravaged many Cayuse members. *Id.* at 172. This occurred despite the medicines they received at the Whitman mission from Dr. Whitman and his followers, who were non-Indians. *Id.* The mission was located in the heart of Cayuse country. *Id.* Dr. Whitman was warned that tribal members were upset because the medicine he gave the Indians did not work on them, but worked on non-Indians. *Id.* He was also warned that tribal law called for the killing of ineffective medicine men whose patients died. *Id.* This legal principle is known as *tewatat*. *Id.* at 64. Despite this warning, he remained at the mission with his followers, which was located in the heart of Cayuse territory. *Id.* at 172. On November 29, 1847, forty Cayuse Indians carried out the tribal law and killed Dr. Whitman, his wife, and twelve other non-Indians at the mission. *Id.* The Cayuse Five were five members of the Cayuse nation who went to Dalles, Oregon to meet with representatives of the Oregon Territory about the incident and were taken into custody and transferred to Oregon City for the killing of the Whitmans. *Id.* They were tried, convicted on May 24, 1850, and hanged on June 3, 1850 for the killing, thereby rendering any appeal of the conviction moot. *Id.* at 173.

83. *Suquamish Indian Tribe*, 435 U.S. at 197.

would be inconsistent with the 1830 treaty provisions.[84] This Attorney General's opinion follows logically from the terms of the 1830 treaty. However, the majority does not explain how explicit language in one leads logically to the conclusion that *no* tribes have such power—especially in the absence of an express treaty provision so limiting tribal power.

Couched in the discussion of the Choctaw treaty is footnote 8, which begins with this rather debatable conclusion: "The history of Indian treaties in the United States is consistent with the principle that Indian tribes may not assume criminal jurisdiction over non-Indians without the permission of Congress."[85] To the contrary, the history of Indian treaty making, understood within the context of the laws that apply to the interpretation of Indian treaties, likely leads to the conclusion that, absent express congressional prohibition, tribes retain their inherent sovereign right to prosecute non-Indians.

At least two basic long-standing principles apply to any interpretation of Indian treaties and need to be kept in mind when analyzing the logic of footnote 8. First, Indian treaties, by their nature, reserved rights that tribal nations already had—they were a grant of rights *from* Indians to the United States, not a grant of rights *to* Indians from the United States.[86] Second, treaties are to be interpreted liberally in favor of tribes such that, if there is a question as to the appropriate interpretation of a given treaty provision, it must read in a way that does not prejudice tribes.[87] With this in mind, let us look at the language of some of the early treaties between tribes and the United States.

The first treaty between the United States and a tribal nation was with the Delaware Indians in 1778.[88] This was three years after the Revolutionary War began, five years before it ended (1775-1783), and nine years before the United States Constitution was adopted in 1787. Presumably, being the first treaty with Indian nations, it should provide insight into the federal government's understanding of post-contact tribal powers.

In Article I the treaty states that "all offenses or acts of hostilities by one, or either of the contracting parties against the other, be mutually forgiven, and buried in the depth of oblivion, never more to be had in remembrance."[89] First and foremost, the United States entered into this

84. *Id.*
85. *Id.* at 199.
86. United States v. Winans, 198 U.S. 371, 381 (1905) ("[T]he treaty was not a grant of rights to the Indians, but a grant of right from them,-a reservation of those not granted.").
87. Worcester v. Georgia, 31 U.S. 515, 582 (1832) ("The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.").
88. Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13, *reprinted in* INDIAN AFFAIRS, LAWS AND TREATIES, VOL. II (Charles J. Kappler ed., Gov't Printing Office 1904), *available at* http://digital.library.okstate.edu/kappler/vol2/treaties/del0003.htm.
89. *Id.* at 3.

treaty seeking a peaceful end to hostilities between itself and the Indian nation. Consistent with this objective, Article II goes on to state that "a perpetual peace and friendship shall from henceforth take place . . . and if either of the parties are engaged in a just and necessary war with any other nation or nations, that then each shall assist the other in due proportion to their abilities . . . ."[90] Not only does Article II indicate the intent to end warring between the parties and to secure a sustained peace, it also clearly indicates that the United States viewed the Delawares as a nation and an important ally in the federal government's conflict with other foreign nations, as it was actively fighting the Revolutionary War. To this end, Article III explicitly states that the "United States [is] engaged in a just and necessary war" against the King of England and that the "Delaware nation . . . stipulate and agree to give a free passage through their country" to the troops of the United States in their fight against England.[91]

Given this nation-to-nation declaration of peace and mutual assistance, Article IV specifically discusses how the two nations will deal with the criminal acts of each other's citizens. It states:

> For the better security of the peace and friendship now entered into by the contracting parties, against all infractions of the same by the citizens of either party . . . neither party shall proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender or offenders by imprisonment . . . till a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws, customs and usages of the contracting parties and natural justice: The mode of such trials to be hereafter fixed by the wise men of the United States in Congress assembled, with the assistance of such deputies of the Delaware nation, as may be appointed to act in concert with them in adjusting this matter to their mutual liking. And it is further agreed between the parties aforesaid, that neither shall entertain or give countenance to the enemies of the other, or protect in their respective states, criminal fugitives, servants or slaves, but the same to apprehend, and secure and deliver to the State or States, to which such enemies, criminals, servants or slaves respectively belong.[92]

In short, *both* the Delaware nation and the United States agreed that when one of their citizens committed a crime against the citizens of the other, they would have a joint trial and apply the laws of *both* nations. Further, *both* nations agreed that if a fugitive from the other nation was in their jurisdiction, they would deliver that fugitive to the other nation. As such, in its first treaty with an Indian nation, the United States viewed tribes not just as having the inherent power to punish citizens of the United States for crimes committed against the tribe, but that the powers

90. *Id.*
91. *Id.*
92. *Id.* at 4.

exercised by Indian nations were essentially the same as the powers exercised by the United States—they were equals as nations.

Article VI underscores this view of tribal nations as equals and the federal government's view of the inherent powers of tribal nations post-contact. After reciting that it was not the intention of the United States to "extirpate the Indians and take possession of their country," the Unites States agreed that the Delawares would have "all their territorial rights in the fullest and most ample manner, as it hath been bounded by former treaties . . . . "[93] Furthermore the United States agreed that "should it for the future be found conducive for the mutual interest of both parties to invite any other tribes . . . to join the present confederation," the United States would "form a state whereof the Delaware nation shall be the head, and have a representation in Congress . . . ."[94]

The next treaty entered into between tribal nations and the United States – the Treaty with the Six Nations[95] — came in 1784, ten years after the Treaty with the Delawares. Article I of this treaty explicitly recognizes that the tribal nations held non-Indian United States citizens as prisoners of war.[96] As such, at the time of the treaty, the nations at least exercised some form of de facto jurisdiction over non-Indians as an aspect of their inherent sovereign powers. The treaty contains no suggestion that the six nations gave up any inherent sovereign power to exercise jurisdiction, of any type, over United States citizens in the future. To the contrary, the treaty contains explicit language recognizing that the six nations in fact exercised *criminal* jurisdiction over United States citizens contemporaneously with the execution of the treaty.

Article II states that the "Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled."[97] Article III, with respect to the other Indian nations, sets out boundaries for their peaceful settlement and cedes certain lands to the United States.[98] In consideration for the agreement, Article IV provides that the United States will order goods to be delivered to the six nations for "their use and comfort."[99] Throughout the treaty, the United States continues to refer to the Indian tribes as "nations" and treats them as such

The third and fourth treaties between the United States and Indian nations came the next year, two years prior to adoption of the United States Constitution. These agreements were the Treaty with the Wyandot, Delaware, Chippewa, and Ottawa nations on January 21, 1785 (three

93. *Id.*
94. Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13, *reprinted in* INDIAN AFFAIRS, LAWS AND TREATIES, VOL. II 5 (Charles J. Kappler ed., Gov't Printing Office 1904), *available at* http://digital.library.okstate.edu/kappler/Vol2/treaties/del0003.htm.
95. Treaty with the Six Nations, Oct. 22, 1784, 7 Stat. 15, *reprinted in* INDIAN AFFAIRS, LAWS AND TREATIES, VOL. II (Charles J. Kappler ed., Gov't Printing Office 1904), *available at http://digital.library.okstate.edu/kappler/Vol2/treaties/nat0005.htm.*
96. *Id.*
97. *Id.*
98. *Id.* at 6.
99. Treaty with the Six Nations, Oct. 22, 1784, 7 Stat. 15, *reprinted in* INDIAN AFFAIRS, LAWS AND TREATIES, VOL. II 6 (Charles J. Kappler ed., Gov't Printing Office 1904), *available at http://digital.library.okstate.edu/kappler/Vol2/treaties/nat0005.htm.*

months after the treaty with the Six Nations),[100] and the Treaty with the Cherokee on November 28, 1785.[101]

With regard to the Wyandot treaty, Article I — similar to Article I of the Six Nations Treaty – required that the tribes return all non-Indian prisoners back to the United States government.[102] Again, this provision provides explicit evidence that tribal nations at least exercised de facto jurisdiction over non-Indian citizens of the United States.

Unlike the Treaty with the Six Nations, in Article V of the Wyandot treaty, the United States explicitly agreed to the following:

> If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands allotted to the Wiandot (sic) and Delaware nations in this treaty, except on the lands reserved to the United States in the preceding article, such person shall forfeit the protection of the United States, and the Indians may punish him as they please.[103]

Similarly, the Indian nations agreed, in Article IX, that:

> If any Indian or Indians shall commit a robbery or murder on any citizen of the United States, the tribe to which such offenders may belong, shall be bound to deliver them up at the nearest post, to be punished according to the ordinances of the United States.[104]

It is hard to read these provisions as anything other than a recognition of the inherent power of tribal nations to exercise at least concurrent criminal jurisdiction over non-Indians who commit crimes, provided they reside within the tribe's territory. Further, the agreement on the part of the tribes, to both have their citizens be subject to the criminal jurisdiction of the United States and to deliver the accused to the federal government, appears to imply that absent such language, tribal nations could refuse to subject their citizens to the jurisdiction of the United States.

The 1785 Treaty with the Cherokee contains similar, but slightly different, language in Articles V and VI.[105] In Article V the United States agreed that any of its citizens attempting to settle on Cherokee lands — including those already settled there who did not leave within six months of the signing of the treaty — would be subject to the criminal jurisdiction of the tribal nation.[106] In Article VI the Cherokee agreed that any person, Indian or non-Indian, residing among them or taking refuge in their nation, who committed certain crimes against a citizen of the United States,

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100. Treaty with the Wyandot, Etc., Jan. 21, 1785, 7 Stat. 16, *reprinted in* INDIAN AFFAIRS, LAWS AND TREATIES, VOL. II (Charles J. Kappler ed., Gov't Printing Office 1904), *available at* http://digital.library.okstate.edu/kappler/Vol2/treaties/wya0006.htm [hereinafter 1785 Treaty with the Wyandot].
101. Treaty with the Cherokee, Nov. 28, 1785, 7 Stat. 18 *reprinted in* INDIAN AFFAIRS, LAWS AND TREATIES, VOL. II (Charles J. Kappler ed., Gov't Printing Office 1904), *available at* http://digital.library.okstate.edu/kappler/Vol2/treaties/che0008.htm [hereinafter 1785 Treaty with the Cherokee].
102. 1785 Treaty with the Wyandot, *supra* note 100, at 6–7.
103. *Id.* at 7.
104. *Id.* at 8.
105. *Id.* at 9, 10.
106. *Id.* at 9. Excepted from this provision were people settled between the fork of French Broad and Holstein rivers.

would be delivered to the United States for punishment under the laws of the United States, provided the punishment was the same as it would have been if committed by one citizen of the United States against another.[107] Additionally, in Article VII, the United States agreed that if a non-Indian committed a certain crime against an Indian, he or she would be punished by the United States as though the crime were committed against a citizen of the United States, and that any punishment would be in the presence of the Cherokees if they so desired.[108]

In all, there appear to be at least nine treaties between the United States and tribal nations that explicitly recognize the power of tribes to exercise criminal jurisdiction over non-Indian citizens of the United States.[109] Four of these treaties pre-date the adoption of the United States Constitution, and five post-date it.[110] Curiously, in footnote eight of the *Oliphant* decision, the Court claims these treaty provisions do not represent recognition of inherent Indian criminal jurisdiction over non-Indians, but rather were a means of discouraging non-Indian settlement.[111] Certainly, these provisions would have discouraged settlement by those who did not want to live with, or abide by, the customs and traditions of tribal nations. However, the idea that these provisions discouraged non-Indian settlement is not mutually exclusive of the United States' explicit recognition of the tribal nations' power to exercise criminal jurisdiction over non-Indians. The majority also fails to recognize the fact that Indian nations exercised criminal jurisdiction over non-Indians at the time the treaties were being written, in so far as certain treaty provisions involved the exchange of prisoners from tribes to the United States. Perhaps the provisions can be read narrowly to only recognize inherent tribal criminal jurisdiction over non-Indians when they resided in Indian country. However, the provisions most certainly evidence a recognition of the inherent power of tribal nations to punish non-Indians for criminal behavior when

107. *Id.* at 9–10.

108. 1785 Treaty with the Wyandot, *supra* note 100, at 10.

109. Treaty with the Wyandot, Etc., *supra* note 100, at art. 5, Jan. 21, 1785, 7 Stat. 16 ("If any citizen of the United States . . . shall attempt to settle on any of the lands allotted to the Wiandot and Delaware nations . . . such person shall forfeit the protection of the United States, and the Indians may punish him as they please."); Treaty with the Cherokee, *supra* note 101, at art. 5, Nov. 28, 1785, 7 Stat. 18 (similar language); Treaty with the Choctaw, art. 4, Jan. 3, 1786, 7 Stat. 21 (similar language); Treaty with the Chickasaw, art. 4, Jan. 10, 1786, 7 Stat. 24 (similar language); Treaty with the Shawnee, art. 7, Jan. 31, 1786, 7 Stat. 26 (similar language); Treaty with the Wyandot, Etc., *supra* note 100, at art. 9, Jan. 8, 1789, 7 Stat. 28 (similar language); Treaty with the Creeks, art. 6, Aug. 7, 1790, 7 Stat. 35 (similar language); Treaty with the Cherokee, *supra* note 101, at art. 8, July 2, 1791, 7 Stat. 39 (similar language); Treaty with the Wyandots, Delewares, Shawanoes, Ottawas, Chipewas, Putatwatimes, Miamis, Eel-river, Weeas, Kickapoos, Piankashaws, and Kaskaskias, art. 6, Aug. 3, 1795, 7 Stat. 52. ("If any citizen of the United States . . . shall presume to settle upon the lands now relinquished by the United States, such citizen . . . shall be out of the protection of the United States; and the Indian tribe . . . may drive off the settler, or punish him in such manner as they shall think fit . . . .").

110. *Id.* The fact that four treaties pre-date and five post-date the Constitution suggests that the drafters of the Constitution believed such provisions were not constitutionally prohibited.

111. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 197–98 (1978).

they fell within the scope of the treaty language. This is particularly true given the near equal nation-to-nation status between the United States and the Indian Nations indicated in the early treaties.

In footnote 8, the Court goes on to point out that the settler jurisdiction language was dropped in later treaties and replaced with a provision that settlers would be removed by the United States, referencing the Treaty with the Sacs and Foxes of 1804 as support for this claim.[112] While it is true that the 1804 treaty with the Sacs and Fox nations provided for removal of non-Indian settlers rather than subjecting them to tribal criminal jurisdiction, the language of one treaty does not negate the language of another, unrelated treaty.

In 1815 the United States entered into another treaty with the Wyandot, which explicitly confirmed the provisions of the 1795 treaty.[113] Similarly, in 1817 the United States entered into an additional treaty with the Cherokee that explicitly acknowledged that the former treaty language remained in full force and effect.[114] Consequently, as late as 1817, United States treaties explicitly recognized the power of tribes to exercise criminal jurisdiction over non-Indian residents.

Aside from the 1804 Sac and Fox treaty, it was not until 1825 that treaties between the United States and tribal nations began to regularly limit the exercise of tribal criminal jurisdiction over non-Indian settlers. Article 10 of the 1825 treaty with the Kansa arguably subjected non-Indian offenders to the jurisdiction of the United States, regardless of whether they resided in the tribe's territory, when it stated: " . . . if any robbery, violence, or murder, shall be committed on any Indian or Indians belonging to said nation, the person or persons so offending shall be tried, and, if found guilty, shall be punished in like manner as if the injury had been done to a white man."[115] Given that the treaty deals with criminal jurisdiction and no other provision in the treaty refers to non-Indian offenses in the tribe's territory, it is reasonable to assume that this provision subjected non-Indian offenders to the sole jurisdiction of the United States.[116]

In addition to the 1825 Treaty with the Kansa, there appear to be eleven other treaties that contain similarly limiting language.[117] However,

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112. *Id.* at 199.
113. Treaty with the Wyandot, Etc., art. 4, Sept. 8, 1815, 7 Stat. 131, *reprinted in* INDIAN AFFAIRS, LAWS AND TREATIES, VOL. II (Charles J. Kappler ed., Gov't Printing Office 1904), *available at* http://digital.library.okstate.edu/kappler/Vol2/treaties/wya0117.htm
114. Treaty with the Cherokee, art. 5, July 8, 1817, 7 Stat. 156, *reprinted in* INDIAN AFFAIRS, LAWS AND TREATIES, VOL. II (Charles J. Kappler ed., Gov't Printing Office 1904), *available at* http://digital.library.okstate.edu/kappler/Vol2/treaties/che0140.htm.
115. Treaty with the Kansas, art. 10, June 3, 1825, 7 Stat. 244, *reprinted in* INDIAN AFFAIRS, LAWS AND TREATIES, VOL. II (Charles J. Kappler ed., Gov't Printing Office 1904), *available at* http://digital.library.okstate.edu/kappler/Vol2/treaties/kan0222.htm.
116. However, it could be argued that in absence of language to the contrary, this language only indicates that the federal government will exercise concurrent criminal jurisdiction over such offenses. *See* Maxfield, *supra* note 76, at 415.
117. Treaty with the Kansas, art. 10, June 3, 1825, 7 Stat. 244; Treaty with the Ponca, art. 5, June 9, 1825, 7 Stat. 247; Treaty with the Teton, Etc., Sioux, art. 5, June 22, 1825, 7 Stat. 250; Treaty with the Sioune and Oglala Tribes, art. 5, July 5, 1825, 7 Stat. 252; Treaty with the Cheyenne Tribe, art. 5, July 6, 1825, 7 Stat. 255; Treaty with the Hunkpapa

it should also be noted that all of these provisions were negotiated over a four month period in 1825. Presumably, the limiting language was standard at the time. Additionally, given the history of negotiated treaty language involving tribal criminal authority over non-Indians and the very short time period in which this language arose, it is reasonable to assume that the language only applied to those treaties. Further, consistent with the principle that when language is unclear, treaties must be interpreted in a manner that favors tribes and the understanding that treaties are a grant of rights from tribes to the United States and not the other way around, the absence of such language in a treaty should lead to the conclusion that tribes retain their inherent criminal authority over non-Indians. At the very least, the absence of language in a treaty on this issue should be read such that the tribal nations retain their inherent criminal authority over non-Indians who reside in Indian country.

However one interprets the language of the various early treaties between tribal nations and the United States, one thing is clear: Between 1776 and 1825, for the first fifty years of the nation's existence, the United States often explicitly acknowledged and accepted tribal exercise of criminal jurisdiction over non-Indian United States citizens who resided in the territory of many tribal nations. This exercise of authority was not conferred on tribal nations by the federal government, but rather was an acknowledgement of the inherent powers of tribal nations that persisted after United States' founding. If tribes did not have this inherent power, there would have been no need for language on the issue, other than perhaps a simple clarification that no such authority existed. However, many early treaties between tribal nations and the United States addressed the issue of who was to have criminal jurisdiction over each other's citizens and how that jurisdiction was to be exercised. The fact that between the nation's founding and 1825, only one treaty with an Indian nation provided for the removal of non-Indian settlers from Indian country, provides strong empirical evidence that the founding fathers understood tribal nations to have had inherent criminal jurisdiction over all persons in Indian country. The existence of nine treaties that explicitly recognize the power of tribes to exercise criminal jurisdiction over non-Indians who settle in their territory—four pre-dating and five post-dating the Constitution– is incontrovertible empirical evidence that from the earliest days of this nation's founding, the United States recognized such inherent power of tribal nations.

iv. Ex parte Kenyon*; 1790 Trade and Intercourse Act; and the General Crimes Act*

In support of its claim that Indian courts did not historically exercise the power to try non-Indians, the Court cites *Ex parte Kenyon*, an 1878

Band of the Sioux Tribe, art. 5, July 16, 1825, 7 Stat. 257; Treaty with the Arikara Tribe, art. 6, July 18, 1825, 7 Stat. 259; Treaty with the Belantse-Etoa or Minitaree Tribe, art. 6, July 30, 1825, 7 Stat. 261; Treaty with the Mandan Tribe, art. 6, July 30, 1825, 7 Stat. 264; Treaty with the Crow Tribe, art. 5, Aug. 4, 1825, 7 Stat. 266; Treaty with the Pawnee Tribe, art. 5, Sept. 30, 1825, 7 Stat. 279; Treaty with the Makah Tribe, art. 5, Oct. 6, 1825, 7 Stat. 282.

Western District of Arkansas case.[118] However, *Kenyon* cannot reasonably be read for this proposition.

Mr. Kenyon filed a petition for habeas corpus after the court of the Cherokee Nation found him guilty of larceny and sentenced him to five years in jail.[119] The larceny conviction was grounded in Mr. Kenyon's handling of a colt and mare that originally belonged to his wife.[120] Mr. Kenyon had married a tribal citizen and lived with her in the territory of the Cherokee nation for six years before her death. After her death, he took her property, including a mare and colt, and moved himself and their children to the State of Kansas.[121]

The court made two key rulings in the case. First, it held that the Cherokee Nation had no jurisdiction because the alleged crime occurred outside of the nation's territory, in the State of Kansas. The Court asserted that no crime could have occurred until after Kenyon's wife's death, and after he converted the colt and mare to his own use in Kansas.[122] Second, the court held that at the time of the commission of the alleged offense, the nation did not have jurisdiction over Kenyon.[123] On this point, the court noted that Kenyon left his domicile in Indian country and moved to the State of Kansas, thereby abandoning his residence in the Indian territory.[124] The court wrote: "This domicile had been acquired at the time of the commission of this offense, if any was committed; hence, the petitioner had clearly abandoned the Indian nation, and was then only subject to the laws of the place of his domicile. He was a citizen of the United States, and was subject to the laws of the state of Kansas. Therefore, the court which convicted him did not have jurisdiction over his person."[125]

The *Kenyon* court essentially held that the offense did not occur within the tribe's territory, and that the tribe therefore did not have personal jurisdiction over Mr. Kenyon because he was domiciled in the State of Kansas at the time the alleged crime occurred. Right or wrong, the decision of the court did not turn on whether Mr. Kenyon was an Indian or whether the Cherokee nation had the inherent power to exercise criminal jurisdiction over non-Indians.

Regardless, the majority in *Oliphant* seized on the *Kenyon* court's dicta, that stated: "to give [the court of the Cherokee Nation] jurisdiction of the person of an offender, such offender must be an Indian, and the one against whom the offense is committed must also be an Indian."[126] The *Kenyon* court cited Rev. St. 1873 § 2146 as its sole legal support for this assertion.[127] Section 2146 is part of what is now referred to as the General Crimes Act, and is, in particular, the part of the Act that excludes from

118. *Ex parte* Kenyon, 14 F. Cas. 353 (C.C.W.D. Ark. 1878).
119. *Id.* at 353.
120. *Id.*
121. *Id.*
122. *Id.* at 355.
123. *Id.*
124. *Ex parte* Kenyon, 14 F. Cas. 353 (C.C.W.D. Ark. 1878).
125. *Id.*
126. *Id.*
127. *Id.*

federal jurisdiction Indian-on-Indian crime and any other crime committed by Indians (including crimes against non-Indians) when it has been punished by the local law of the tribe.[128] Except for *Kenyon,* this portion of the General Crimes Act has never been read as a limitation on tribal court jurisdiction, but rather as a limitation on the exercise of federal jurisdiction.[129] Reliance on the dicta of a court that completely misreads the federal statute on which that court bases its assertion is troubling.

The *Oliphant* majority sought to bolster the erroneously grounded dicta in *Kenyon* by citing a 1970 Solicitor Opinion which was withdrawn in 1974 and never replaced.[130] On this issue, the Court notes that the opinion was withdrawn, but states in footnote eleven that no reason was given for the withdrawal.[131] The very fact that the Opinion was withdrawn and never replaced, combined with the *Kenyon* court's clear error in interpreting the General Crimes Act,[132] the 1934 Solicitor Opinion that accompanied passage of the IRA,[133] and the actions of the Department of Interior while the ICRA was being crafted in the late 1960s,"[134] ought to have given the Court some reason to believe the 1970 Solicitor Opinion was withdrawn either because the Department of Interior believed it to have have been issued in error or was otherwise wrong.

The *Oliphant* majority also invokes the Trade and Intercourse Act of 1790 to support its claim that tribal nations did not historically exercise criminal jurisdiction over non-Indians.[135] In that Act, the federal government asserted criminal jurisdiction over non-Indians who committed offenses against Indians, provided that the act punished was considered a crime in the state or district in which the offense arose.[136] While true, this does not provide conclusive evidence that tribes lacked criminal jurisdiction over non-Indians. As discussed above, there were at least six treaties in place before this Act was passed that explicitly recognized either joint federal/tribal criminal jurisdiction over non-Indians or recognized the power of tribes to independently prosecute non-Indians who settled in the their territory.[137] After the Trade and Intercourse Act passed, three additional treaties recognized this exercise of power.[138] As a result, in 1790, the Trade and Intercourse Act necessarily only amounted to an assertion of concurrent federal jurisdiction over non-Indian crimes in Indian country, at least with respect to the above mentioned treaty tribes.

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128. 18 U.S.C. § 1152 (2006).
129. *See, e.g., Ex Parte* Kan-Gi-Shun-Ca *(Crow Dog*), 109 U.S. 556, 570 (1883) ("It must be remembered that the question before us is whether the express letter of section 2146 of the Revised Statutes, which excludes from the jurisdiction of the United States the case of a crime committed in the Indian country by one Indian against the person or property of another Indian, has been repealed.").
130. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 201 & n.11 (1978).
131. *Id.*
132. *See supra notes* 127–29 and accompanying text.
133. *See supra* notes 65–68 and accompanying text.
134. *See supra* notes 69–73 and accompanying text.
135. *Suquamish Indian Tribe,* 435 U.S. at 201, n.11.
136. The Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137 (1790).
137. *See supra* note 109 and accompanying text.
138. *Id.*

After invoking the Trade and Intercourse Act, the Court also looks to the General Crimes Act to support its position.[139] The General Crimes Act of 1817 extended federal enclave law to cover interracial crimes in Indian country[140]. However, the enactment of the General Crimes Act also coincided with reaffirmation of the 1785 treaty with the Wyandot in 1815 and reaffirmation of the 1785 treaty with the Cherokee in 1817.[141] Both of these treaties contain explicit provisions recognizing the tribes' ability to enforce their criminal laws against non-Indians residing in their territory.[142] With an understanding of this context, the General Crimes Act cannot be read as proof that tribes did not have the power to exercise criminal jurisdiction over non-Indians. Rather, at least with respect to those tribes who had treaty provisions explicitly authorizing the exercise of authority over non-Indians, this language in the General Crimes Act can only reasonably be read as an assertion of concurrent federal jurisdiction.

v. The failed Western Territory Bill, 1854 amendment to the Trade and Intercourse Act, and the Major Crimes Act

In 1834 Congress debated passage of the Western Territory Bill.[143] Although the Bill was never enacted, among its provisions was a proposal to create an Indian territory in the West that would eventually become a state of the Union.[144] The idea of conferring statehood upon tribes was not new, as it was expressly discussed in the 1778 treaty with the Delawares.[145] Unlike the treaty with the Delawares, but similar to many of the other pre-1825 Indian treaties,[146] the Western Territory Bill would have given tribes criminal jurisdiction over non-Indians who settled in the Western Territory. The only exceptions to jurisdiction were allowed for those residing in Indian country for the purpose of carrying out federal government business, and those merely passing through.[147]

Oddly, as with the pre-1825 treaties, the *Oliphant* majority read the Bill's language acknowledging tribal criminal jurisdiction over non-Indian residents of the Western Territory not as evidence of tribal sovereign authority to exercise criminal jurisdiction over non-Indians, but merely discouragement of non-Indian settlement in Indian country.[148] However, the language and legislative history of the Bill reveal that Congress' understanding was that tribes would have jurisdiction over non-Indians who committed offenses unless expressly limited.

139. *Suquamish Indian Tribe*, 435 U.S. at 201.
140. General Crimes Act, ch. 92, 3 Stat. 383 (1817) (codified at 18 U.S.C. § 1152 (2006)).
141. *See supra* notes 113–14 and accompanying text.
142. *Id.*
143. H.R. REP. NO. 474, 23d Cong. (1st Sess. 1834).
144. *See id.* at § 6.
145. *See supra* note 94 and accompanying text.
146. *See supra* note 109 and accompanying text.
147. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 202 & n.13.
148. *Id.*

Two sections of the proposed bill addressed criminal jurisdiction and reflect the opposite conclusion arrived at by the *Oliphant* majority: these are sections eight and nine. Section eight states:

> *And be it further enacted,* That all officers and persons in the service of the United States, and all persons employed under treaty stipulations, and all persons travelling in or through said country, *and not residing therein*, shall, within said Territory, be under the protection of, and subject to, the laws of the United States. And if any such officer or person shall, within said Territory, commit any offense against the laws of the United States, it shall be the duty of the Governor to cause such officer or person to be apprehended and removed for trial to the Territory or district having jurisdiction of such offence. And if any such officer or person shall commit any offence against the laws of any tribe, it shall be the duty of the Governor, on the complaint of such tribe, forthwith to cause such person to be removed from the limits of such tribe.[149]

By its terms, the bill assumed tribes had criminal jurisdiction over non-Indians, but specifically removed from their reach federal officials and non-resident individuals who were traveling through the Territory. However, those officers and persons excluded from tribal jurisdiction would be subject to punishment and removal under the laws of the United States. Section nine stated:

> Sec. 9. *And be it further enacted*, That whenever an Indian of one tribe shall commit murder, or any other offence against the person or property of an Indian of any other tribe, he shall be apprehended in such manner as the General Council shall direct, and he shall receive such punishment as may be previously provided by the regulations of the said council. And such offender shall be kept in confinement at any of the military posts of the United States, and shall be tried by five chiefs belonging neither to the tribe of which such offender nor the party injured was a member, to be summoned by the Governor; and the sentence of such chiefs shall be immediately carried into effect, unless the Governor, for good reasons, shall suspend the same until the pleasure of the President shall be known. And in all cases when a person *not a member of any tribe* shall be convicted of an offence, the punishment whereof by the laws of the tribe shall be death, the judgment shall be forthwith reported to the Governor, who may, for good reasons, suspend the execution thereof until the pleasure of the President shall be known.[150]

The second part of this section is most telling about the present issue. It clearly assumes that non-Indians will be not only subject to the criminal jurisdiction of tribes, but that this punishment could include the infliction of capital punishment, pending the approval of the President of the United States.

149. H.R. 490, 23d Cong. (1st Sess. 1834) (second emphasis added).
150. *Id.* (second emphasis added).

On June 25, 1834 Representative Horace Everett, the bill's sponsor, addressed the House to clarify misunderstandings about the bill.[151] With regard to sections eight and nine he stated the following:

> The eighth section did nothing more than place the officers, and others employed in the United States service, and persons travelling through the Indian territory, under the protection of the United States. This was obviously proper.
>
> The ninth section contained a restriction on the *natural rights of the Indians*, but one which was expedient and necessary. The Government was allowed, in all capital cases, to suspend the punishment until the pleasure of the President should be known. If gentlemen would take into consideration the extensive intercourse of the Indian tribes with the whites; that they were new in legislation, and, above all, that they were a people of deep passion . . . they must admit the propriety of putting some restriction on the power of inflicting death at pleasure upon whom they would.[152]

Far from reflecting the view that tribes do not have the inherent sovereign authority to exercise criminal jurisdiction over non-Indians, this passage suggests that a key member of Congress, who was directly involved in drafting and advocating passage of the Western Territory Bill, and was also a member of the Committee on Indian Affairs, had quite the opposite understanding. This language suggests that as late as 1834, Congress believed that tribes had the authority to exercise criminal jurisdiction over anyone within their territory, up to and including the authority to impose capital punishment. Presumably, this authority would be an exercise of inherent power. At the very least Congress believed that tribes retained this power until it was explicitly revoked by the federal government. This understanding would also explain why nine years earlier, in 1825, the federal government felt there was a need to explicitly restrict tribal criminal jurisdiction over non-Indians in its treaties with twelve tribes over a four-month period.[153]

Nonetheless, the *Oliphant* majority used the Western Territory Bill's discussion of criminal jurisdiction as a contrast to Indian treaties that were silent on the question, particularly with regard to treaties that involved Indian country near non-Indian settlements.[154] The court wrote: "The contrast suggests that Congress shared the view of the Executive Branch and lower federal courts that Indian tribal courts were without jurisdiction to try non-Indians."[155] Absent from this contrasting and summary conclusion is any discussion or review of the bill's actual language and what appropriate conclusions can be drawn from it. As discussed above, the bill's language and congressional record reveal that Congress believed tribes had jurisdiction over non-Indians unless explicitly restricted. Otherwise, there would have been little need to discuss criminal

151. 10 Reg. Deb. 4764 (1834), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llrd&fileName=019/llrd019.db&recNum=295.
152. *Id.* at 4767 (second emphasis added).
153. *See supra* note 117 and accompanying text.
154. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 203 (1978).
155. *Id.*

jurisdiction in the bill, other than a simple clarification that tribes had no such authority over non-Indians.

The *Oliphant* majority next moves to a discussion of the 1854 amendment to the Trade and Intercourse Act and the Major Crimes Act as evidence of an "unspoken assumption" that tribes did not have criminal jurisdiction over non-Indians.[156] The 1854 amendment, now part of the General Crimes Act, added an exception to the extension of federal enclave law into Indian country: federal courts do not have jurisdiction over cases involving Indian-on-Indian crime or where an Indian defendant has already been punished by a tribe.[157] The Court correctly noted that no similar provision applied to non-Indians who had been punished by a tribe.[158] Oddly, the Court believed this point to be of some weight to its ultimate conclusion because if tribes had such jurisdiction, Congress would have also provided an exception for non-Indians punished by the local law of a tribe.[159] This conclusion does not follow. The whole point of the General Crimes Act, by its terms, was to extend federal law into Indian country over interracial crimes.[160] The federal government has good reason to ensure its laws apply to the behavior of its citizens in Indian country. Non-Indian crime in Indian country did, at the time and to this day, strain federal/tribal relations in so far as it involves criminal acts of a foreign nationals against tribal nations and their citizens within a tribe's geographic territory. At the same time there is good reason to limit the exception to offenses committed by Indians that had already been punished by a tribe: at the time, Congress was not interested in meddling in what were essentially deemed intra-tribal affairs.[161]

Invocation of the Major Crimes Act as evidence of the "unspoken assumption" is also of little avail. The Major Crimes Act was enacted in response to the killing of Crow Dog and the application of the General Crimes Act exception.[162] It had nothing to do with non-Indian crime issues.

In 1883 the United States Supreme Court decided *Ex Parte Crow Dog*.[163] This case involved the murder of one Brule Sioux Indian (Spotted Tail, a well respected Chief) by another (Crow Dog). The murder occurred in Indian country and Crow Dog was tried and convicted in territorial court.

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156. *Id.*
157. Act of March 27, 1854, ch. 26, 10 Stat. 269 (1854) (codified at 18 U.S.C. § 1152 (2006)).
158. *Suquamish Indian Tribe*, 435 U.S. at 203.
159. *Id.*
160. This is the effect of its terms and the interplay of other federal Indian law cases. The act extends the general laws of the United States to Indian country with the exception of Indian on Indian crimes and Indian on non-Indian crimes where the Indian has been punished by the tribe. 18 U.S.C. § 1152. This effectively narrows most applications to non-Indian crimes. However, states have exclusive jurisdiction over non-Indian on non-Indian and non-Indian victimless crimes. *United States v. McBratney*, 104 U.S. 621 (1881); *Draper v. United States*, 164 U.S. 240 (1896); *Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984). Consequently, it mostly applies to non-Indian crimes against Indians.
161. Robert N. Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 959 (1975).
162. *Id.* at 962–64.
163. 109 U.S. 556 (1883).

He moved to dismiss the conviction because the alleged crime involved one Indian against another, which was expressly exempted from federal jurisdiction in the General Crimes Act.[164] The prosecution alleged that despite the language of that Act, the exception was effectively repealed by the language of a treaty with the tribe.[165] The Supreme Court held that nothing in the treaty expressly repealed the Act, and that the territorial court did not otherwise have jurisdiction to prosecute Crow Dog, as his case fell within the General Crimes Act exception.[166] Before the government could bring an action against Crow Dog in federal court, the Brule Sioux nation resolved the case in accordance with the its own law. Pursuant to custom and tradition, the families of both Spotted Tail and Crow Dog agreed that Crow Dog would provide Spotted Tail's dependents with reparations.[167] In response to the outcome, Congress passed the Major Crimes Act.[168] As reflected in the congressional record, Congress believed that leaving the punishment of Indians for serious crimes to tribes would amount to the application of no law at all.[169]

Rather than discuss the actual intent of Congress when enacting the Major Crimes Act, the *Oliphant* majority invoked the Act as support for the "unspoken assumption". The Court reasoned, if non-Indians were subject to tribal jurisdiction, then the Major Crimes Act would have also been extended to cover serious non-Indian crimes.[170] The Court's conclusion lacks support, in light of a discussion of the General Crimes Act;

164. *Id.* at 557–58.
165. *Id.* at 562.
166. *Id.* at 572.
167. VINE DELORIA JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 168–71 (Univ. of Texas Press 1983).
168. 18 U.S.C. § 1153 (2006).
169. *See* 16 Cong. Rec. 934 (1885) (Representative Cutcheon, sponsor of the Act, stated: "Thus Crow Dog went free. He returned to his reservation, feeling, as the Commissioner says, a great deal more important than any of the chiefs of his tribe. The result was that another murder grew out of that — a murder committed by Spotted Tail, Jr., upon White Thunder. And so these things must go on unless we adopt proper legislation on the subject. It is an infamy upon our civilization, a disgrace to this nation, that there should be anywhere within its boundaries a body of people who can, with absolute impunity, commit the crime of murder, there being no tribunal before which they can be brought for punishment. Under our present law there is no penalty that can be inflicted except according to the custom of the tribe, which is simply that the 'blood-avenger' — that is, the next of kin to the person murdered — shall pursue the one who has been guilty of the crime and commit a new murder upon him . . . . If . . . an Indian commits a crime against an Indian on an Indian reservation, there is now no law to punish the offense except, as I have said, the law of the tribe, which is just no law at all." Representative Cutcheon also quoted a remark from the Secretary of the Interior contained in the Secretary's annual report, as follows: "If offenses of this character cannot be tried in the courts of the United States, there is no tribunal in which the crime of murder can be punished. Minor offenses may be punished through the agency of the 'court of Indian offenses,' but it will hardly do to leave the punishment of the crime of murder to a tribunal that exists only by the consent of the Indians of the reservation. If the murderer is left to be punished according to the old Indian custom, it becomes the duty of the next of kin to avenge the death of his relative by either killing the murderer or some one of his kinsmen. . . ."); Keeble v. United States, 412 U.S. 205, 211–12 n.11 (1973).
170. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 203 (1978).

Congress already asserted very broad criminal jurisdiction over non-Indian crimes in Indian country before the Major Crimes Act was even enacted.

The General Crimes Act was enacted in 1817. . It deals primarily with non-Indian crime.[171] The General Crimes Act is broader in scope than the Major Crimes Act, which was enacted in 1885. This result occurs because the General Crimes Act incorporates the Assimilative Crimes Act.[172] The Assimilative Crimes Act was enacted in 1825.[173] It makes state law applicable to unlawful conduct occurring on federal lands, including Indian country, when the conduct is not otherwise punishable by federal statute.[174] The interplay of the General and Assimilative Crimes Acts makes crimes occurring in Indian country involving non-Indians subject to federal jurisdiction, based on state criminal law. As such, not only are the crimes listed in the Major Crimes Act covered by the Assimilative and General Crimes Acts, but all other crimes covered by state law are included as well. Non-Indian on non-Indian crime or non-Indian victimless crimes occurring in Indian country have been subject to exclusive state jurisdiction at least as early as 1881.[175]

The majority's position on the Major Crimes Act could only have logical import if if the federal exercise of authority over Indians committing serious crimes in Indian country was exclusive of tribes. Presumably, if tribes no longer had the authority to try their own members for serious crimes, it would make no sense that they would retain that authority over non-Indians. However, the Major Crimes Act's extension of limited federal criminal authority over Indian crime in Indian country is concurrent with that of a tribe's authority.[176]

vi. Ex parte Mayfield *and a 1960 Senate Report*

The majority next moves to a discussion of *Ex parte Mayfield*.[177] *Mayfield* was an 1891 United States Supreme Court case that involved a petition for habeas corpus by a Cherokee Indian. The accused was convicted in federal court for the crime of adultery, despite the fact that the alleged crime occurred within the territory of the Cherokee Nation.[178] The Court

171. *See supra* note 160.
172. By extending the general laws of the United States to Indian country, the General Crimes Act necessarily extended the Assimilative Crimes Act. 18 U.S.C. § 1152 (2006).
173. Williams v. United States, 327 U.S. 711, 722 (1946).
174. 18 U.S.C. § 13 (1996).
175. United States v. McBratney, 104 U.S. 621 (1881) (finding exclusive state jurisdiction with regard to non-Indian on non-Indian crime); Draper v. United States, 164 U.S. 240 (1896) (affirming *McBratney* despite certain state enabling act language); Solem v. Bartlett, 465 U.S. 463, 465 n.2 (1984) (explicitly noting, in a footnote, that the *McBratney* rule applies to non-Indian victimless crimes).
176. United States v. Young, 936 F.2d 1050, 1055 (9th Cir. 1991) (overruled on other grounds); Wetsit v. Stafne, 44 F.3d 823, 825 (9th Cir. 1995); United States v. Gallaher, 624 F.3d 934, 942 (9th Cir. 2010); United States v. Arcoren, 1999 WL 638244, *6 (D.S.D. July 27, 1999).
177. *Ex parte* Mayfield, 141 U.S. 107 (1891) (referred to by the majority in *Oliphant* as *In re Mayfield*).
178. *Id.*

held that neither the 1866 treaty with the Cherokee Nation nor the General Crimes Act provided for federal jurisdiction over the case.[179]

In dicta the *Mayfield* court wrote: "The general object of these statutes is to vest in the courts of the nation jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceedings, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side."[180] The *Oliphant* court referenced this language to support its "implicit conclusion of nearly a century ago that Congress consistently believed [the lack of tribal criminal jurisdiction over non-Indians to be the] necessary result of its repeated legislative actions."[181] However, this conclusion is not supported by the *Mayfield* dicta, let alone its holding.

The *Mayfield* Court did not state that the federal government's reserving jurisdiction over crimes involving non-Indians was exclusive of tribes. Nor could it have accurately made such an assertion because such an assertion would have been false. The General Crimes Act, which the Court analyzed, quoted in the decision, and presumably had in mind when it wrote the above dicta, states: "This section shall not extend to . . . any Indian committing *any offense* in the Indian country who has been punished by the local law of the tribe . . . ."[182] While the version quoted by the *Mayfield* court differs slightly from the modern version, the substance of this exception was the same then as it is now.[183] Pursuant to the General Crimes Act, an Indian who commits a crime against a non-Indian in Indian country, and who has been punished by the local law of a tribe, is within the exclusive jurisdiction of the *tribe*.[184] The federal government lacks jurisdiction, absent a Major Crimes Act case or a crime of nationwide applicability. Either the *Mayfield* court's dicta was an assertion of potential concurrent authority or was incorrect, as demonstrated by the Court's own recitation of the scope and applicability of the General Crimes Act exceptions.

The *Oliphant* majority also cites a 1960 Senate Report concerning the passage of a law that would criminalize hunting, fishing, and trapping in Indian country by non-Indians without proper authorization.[185] Criminal

179. *Id.* at 112–13.
180. *Id.* at 116.
181. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 204 (1978).
182. 18 U.S.C. § 1152 (2006) (emphasis added).
183. *Mayfield*, 141 U.S. at 112 ("'The preceding section shall not be construed to extend to [crimes committed by one Indian against the person or property of another Indian, nor to] any Indian committing any offense in the Indian country who has been punished by the local law of the tribe. . ..'").
184. 18 U.S.C. § 1152 (2006) ("This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing *any* offense in the Indian country who has been punished by the local law of the tribe. . . .") (emphasis added).
185. *Suquamish Indian Tribe*, 435 U.S. at 205. The Report noted that the legislation was necessary to protect Indian property owners because non-Indians were not subject to the jurisdiction of tribal courts for trespass charges. While the report did indeed state this, it is an odd conclusion, particularly in the context of a non-Indian trespassing on Indian lands, because tribes have always had the inherent power to exclude anyone trespassing on their land. New Mexico v. Mescalero Apache Tribe,

jurisdiction aside, the report appears to express the opinion that tribes did not have the ability to exercise civil adjudicatory jurisdiction over non-Indians in removing non-Indian trespassers.[186] Even after *Oliphant,* this is false.[187] Any authoritative reliance on such a questionable report ought to be suspect.

vii. Implicit divesture

Ultimately, the *Oliphant* majority rested its conclusion on an implicit divesture theory. The Court wrote that "an examination of our earlier precedents satisfies us that, even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress."[188] Pursuant to this newly created theory, tribes still retain elements of quasi-sovereign authority, as outlined in *Cherokee Nation v. Georgia.*[189] However, unlike Felix Cohen's cardinal principle, the retained powers of tribes are not solely limited by express restrictions in treaties and congressional legislation.[190] The limitations also extend to those powers that the *Court* determines are implicitly inconsistent with a tribe's status as a domestic dependent nation.[191]

With regard to the issue of inherent criminal jurisdiction over non-Indians, the majority asserted that "from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested [a] . . . great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty."[192] The Court then went on to conclude that "[t]he power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty[,]" and that "[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in an manner acceptable to Congress."[193]

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462 U.S. 324, 333 (1983) ("A tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is . . . well established."). From the language of the Senate Report, Congress appears to have been under the false impression that Indian property owners did not have this power. *Suquamish Indian Tribe*, 435 U.S. at 205 ("'Indian property owners should have the same protection as other property owners. For example, a private hunting club may keep nonmembers off its game lands or it may issue a permit for a fee. One who comes on such lands without permission may be prosecuted under State law but a non-Indian trespasser on an Indian reservation enjoys immunity. *This is by reason of the fact that Indian tribal law is enforceable against Indians only; not against non-Indians.*'" (quoting the 1960 Senate Report)).

186. *Id.*
187. Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 805 (9th Cir. 2011).
188. *Suquamish Indian Tribe*, 435 U.S. at 208.
189. Cherokee Nation v. Georgia, 30 U.S. 1 (1831).
190. *Suquamish Indian Tribe*, 435 U.S. at 208.
191. *Id.*
192. *Id.* at 210.
193. *Id.*

Of course, as detailed above, the conclusion the Court came to does not follow from the actual policies, statutes, and treaties of the United States. Beginning with the Treaty with the Six Nations in 1784, tribes, as the majority phrases it, "submitted to the overriding sovereignty of the United States." For example, the preamble to that treaty states: "The United States of America give peace to the Senecas, Mohawks, Onodagas and Cayugas, and receive them into their protection upon the following conditions . . . ."[194] Similarly, Article II of the 1785 Treaty with the Wyandot states: "The said Indian nations do acknowledge themselves and all their tribes to be under the protection of the United States and of no other sovereign whatsoever."[195] This almost identical language is in Article III of the 1785 Treaty with the Cherokee.[196] Regardless, both the Wyandot and Cherokee treaties expressly recognized the authority of those tribes to exercise criminal jurisdiction over non-Indians residing in their territory.[197] Presumably, the United States government did not assume these provisions to be in conflict. The fact that tribes "submitted to the overriding sovereignty of the United States" did not preclude those same tribes from exercising criminal jurisdiction over non-Indians. Further, both of these provisions existed in a number of Indian treaties until at least 1825.[198]

The only logical saving grace to the majority's conclusion that tribes "necessarily" gave up their right to try non-Indians by submitting to the protection of the United States, is the caveat that they did so "except in a manner acceptable to Congress."[199] Otherwise, the conclusion would be demonstrably false (even if one were to believe that the sole reason why Congress recognized this power of tribes in early treaties was to discourage non-Indian settlement) because tribes actually did have criminal jurisdiction over non-Indians. It should also be noted that, to be consistent with long established theories of Indian treaty interpretation, exercise of that power would have been an exercise of a tribe's inherent sovereign authority.[200]

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194. Treaty with the Six Nations, Oct. 22, 1784, 7 Stat. 15, *reprinted in* INDIAN AFFAIRS, LAWS AND TREATIES, VOL. II (Charles J. Kappler ed., Gov't Printing Office 1904), *available at* http://digital.library.okstate.edu/kappler/Vol2/treaties/nat0005.htm.

195. Treaty with the Wyandot, Etc., Jan. 21, 1785, 7 Stat. 16, *reprinted in* INDIAN AFFAIRS, LAWS AND TREATIES, VOL. II (Charles J. Kappler ed., Gov't Printing Office 1904), *available at* http://digital.library.okstate.edu/kappler/Vol2/treaties/wya0006.htm.

196. Treaty with the Cherokee, Nov. 28, 1785, 7 Stat. 18 *reprinted in* INDIAN AFFAIRS, LAWS AND TREATIES, VOL. II (Charles J. Kappler ed., Gov't Printing Office 1904), *available at* http://digital.library.okstate.edu/kappler/Vol2/treaties/che0008.htm.

197. *See supra* notes 100–10 and accompanying text.

198. *Id.*

199. *Suquamish Indian Tribe*, 435 U.S. at 210.

200. *See* United States v. Winans, 198 U.S. 371, 381 (1905) ("[T]he treaty was not a grant of rights to the Indians, but a grant of right from them,-a reservation of those not granted."); Worcester v. Georgia, 31 U.S. 515, 582 ("The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.")

d. The Dissenting Opinion

Justice Marshall, along with Chief Justice Burger, dissented. Justice Brennan took no part in the case. The entirety of the dissenting opinion is as follows:

> I agree with the court below that the "power to preserve order on the reservation . . . is a sine qua non of the sovereignty that the Suquamish originally possessed." In the absence of affirmative withdrawal by treaty or statute, I am of the view that Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation. Accordingly, I dissent.[201]

In other words, the dissenting Justices disagreed with the majority's implicit divesture theory and adhered to Felix Cohen's cardinal principle and the reasoning of the Ninth Circuit majority below.

IV. *DURO* AND THE *DURO* FIX

Albert Duro is a member of the Torres-Martinez Band of Cahuilla Mission Indians.[202] In the spring of 1984 he was living and working on the Salt River Pima-Maricopa Indian Community reservation.[203] On June 15, 1984, while on the Salt River reservation, he shot and killed a 14-year old member of the Gila River Indian Tribe.[204] In addition to being charged with murder in federal court, he was also charged with illegally firing a weapon in the Salt River Pima court, pursuant to the tribe's criminal code.[205]

Mr. Duro filed a petition for writ of habeas corpus in federal court, challenging tribal jurisdiction on the basis that he was not a member of the Salt River Pima-Maricopa Indian Community.[206] The District Court granted his petition, which was overturned by a divided panel of the Ninth Circuit Court of Appeals.[207] He then appealed to the United States Supreme Court.

Writing for the majority in *Duro*, Justice Anthony Kennedy, stated that the Court's decisions in *Oliphant* and *United States v. Wheeler*[208] provided the analytic framework to resolve the issue.[209] *Oliphant* established that

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201. *Suquamish Indian Tribe*, 435 U.S. at 212.
202. Duro v. Reina, 495 U.S. 676, 679 (1990).
203. *Id.*
204. *Id.*
205. *Id.* at 679–81.
206. *Id.* at 681–82.
207. *Id.*at 682.
208. 435 U.S. 313 (1978). Wheeler was decided 14 days after *Oliphant* and involved a tribal member being prosecuted by his own tribe. At issue was whether tribes retained the inherent power to prosecute their own members as Mr. Wheeler was claiming he could not be tried in both tribal and federal court. In that opinion the court wrote that tribes did not have inherent criminal jurisdiction over "nonmembers" rather than "non-Indians". The Ninth Circuit majority in *Duro* reasoned that the *Wheeler* use of the term "nonmembers" was essentially an indiscriminate casual reference and not intended to apply to nonmember Indians. *Duro v. Reina*, 821 F.2d 1358 (1987).
209. *Duro,* 495 U.S. at 684.

tribes did not retain the inherent sovereign power to prosecute non-Indians for crimes committed in their Indian country.[210] *Wheeler* reaffirmed inherent tribal criminal jurisdiction over a tribe's own members.[211] The issue left to be decided was whether tribes retained inherent criminal jurisdiction over non-member Indians. Ultimately, the Court held that the reasoning in *Oliphant* and *Wheeler* leads to the conclusion that tribes do not retain inherent criminal jurisdiction over non-member Indians. The majority maintained that the only retained inherent powers of a tribe were those "needed to control their own internal relations, and to preserve their own unique customs and social order."[212] The Court held that tribes had otherwise been implicitly divested of sovereign powers involving relations between the tribe and others.[213]

A significant factor in Justice Kennedy's reasoning was the fact that non-member Indians did not give consent to be governed by other tribes and that as citizens of the United States, they would normally be guaranteed certain constitutional protections, which are not necessarily available in tribal courts. He wrote:

> The special nature of the tribunals at issue makes a focus on consent and the protections of citizenship most appropriate. While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve . . . It is significant that the Bill of Rights does not apply to Indian tribal governments . . . The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts . . . .
>
> Our cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right . . . .
>
> Tribal authority over members, who are also citizens, is not subject to these objections. Retained criminal jurisdiction over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent . . . .
>
> With respect to such internal laws and usages, the tribes are left with broad freedom not enjoyed by any other governmental authority in this country . . . This is all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system.[214]

210. *Id.* at 682.
211. *Id.* at 685.
212. *Id.* at 685–86.
213. *Id.*
214. *Duro*, 435 U.S. at 693–94.

This analysis is consistent with Justice Kennedy's unique libertarian jurisprudence. Unlike many of his conservative colleagues, Justice Kennedy rejects the theory of originalism and embraces a liberty-focused moral reading of the United States Constitution.[215] For him, the judiciary should be particularly focused on ensuring that the Constitution's guarantee of "liberty" is given its full and necessary meaning.[216] Justice Kennedy's view is a type of "presumption of liberty" approach that focuses on the protection of all rights retained by all citizens equally, regardless of constitutional enumeration.[217] This approach is in contrast to a "presumption of constitutionality" approach, which presumes that legislatures carefully consider constitutional protections before acting.[218] Kennedy's majority opinion in *Duro,* his dissenting opinion at the Ninth Circuit in *Oliphant,* and his concurring opinion in *Lara* need to be read with this background jurisprudential theory in mind when analyzing the legality of the DOJ's recent proposed *Oliphant* fix—or at least with regard to how he would or should view the legality of such a fix. Justice Kennedy's opinion should be read particularly closely because his may likely be the deciding vote, with regard to the constitutionality of a limited *Oliphant* fix.

The Court's holding in *Duro* created a massive jurisdictional void in Indian country. The State cannot prosecute an Indian who commits a crime in Indian country, unless subject to the reaches of Public Law 280.[219] Federal criminal jurisdiction over Indians in Indian country only extends to the very limited scope of the Major Crimes Act and cases falling within General Crimes Act. Consequently, absent a federal crime of general applicability or an offense falling within the scope of the Major Crimes Act, crimes involving a non-member Indian assaulting another Indian fall through the cracks—no one has the jurisdiction to prosecute such crimes.

In response to *Duro*, on November 5th of the same year, Congress passed emergency legislation by amending the Indian Civil Rights Act.[220] The new legislation defined the "powers of self-government" of a tribe to include "the inherent power of Indian tribes, hereby recognized and af-

215. FRANK J. COLUCCI, JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY 8 (Univ. Press of Kansas 2009).

216. *Id.* at 9.

217. *Id.* at 9, 11.

218. *Id.* at 11.

219. Public Law 280 confers criminal jurisdiction over Indian country to certain states that are either mandated by statute to take on such jurisdiction (18 U.S.C. § 1162), or who have opted to assert such jurisdiction (25 U.S.C. § 1321). Pub. L. 83-280, August 15, 1953 (codified as 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321–26 (2006)). *See generally* M. Brent Leonhard, *Returning Washington PL 280 Jurisdiction to its Original Consent-Based Grounds,* 47 GONZ. L. REV. 3 (forthcoming 2012).

220. Department of Defense Appropriations Act of 1991, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1856 (1990). This temporary legislation was later replaced with identical permanent legislation on October 28, 1991. *See* 25 U.S.C. § 1301(2) (2006) ("[A]nd means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians").

firmed, to exercise criminal jurisdiction over *all* Indians," effectively overruling the *Duro* court decision.[221]

After Congress enacted the *Duro* fix, a question remained as to whether Congress could effectively overrule the United States Supreme Court's decision by legislation. That issue, which is of particular concern to the question of the legality of the DOJ's proposed *Oliphant* fix, was addressed and decided in *Lara*.[222]

V. PARSING *LARA*

On June 13, 2001 Billy Jo Lara, a member of the Turtle Mountain Band of Chippewa Indians, was arrested for public intoxication on the Spirit Lake Nation Reservation where he resided with his children and wife, a member of the Spirit Lake Nation.[223] After being transported to the tribal jail, he was informed by BIA officers that there was an order excluding him from the Spirit Lake Nation Reservation.[224] In response, Mr. Lara struck BIA Officer Byron Swan.[225] Mr. Lara was charged with numerous violations of the Spirit Lake Tribal Code, including violence to a policeman, trespassing, and public intoxication.[226] He pled guilty to three charges in tribal court on June 15, 2001 and was sentenced to 155 days in jail.[227]

On August 29, 2001 Mr. Lara was also charged in federal court for crimes arising out of the same conduct for which he was convicted and sentenced in tribal court.[228] He moved to dismiss the indictment. Among his arguments was the assertion that federal prosecution violated the Double Jeopardy Clause[229] because the tribe's exercise of criminal jurisdiction pursuant to the *Duro* fix was an unlawful exercise of delegated federal power.[230] The District Court and initial panel of the Eighth Circuit denied his motion, but an en banc panel of the Eighth Circuit Court of Appeals reversed.[231]

The government appealed the en banc decision to the United States Supreme Court, which granted review and reversed in a fractured 5-3-2 decision.[232] Of those in the majority, only two remain on the bench; Justices Breyer and Ginsburg. Justice Breyer also authored one of the three

221. *Id.*
222. 541 U.S. 193 (2004).
223. *Lara*, 541 U.S. at 196.
224. Brief for Respondent at 3, United States v. Lara, 324 F.3d 635, 636 (8th Cir. 2003) (No. 01-3695).
225. United States v. Lara, No. C2-01-58, 2001 WL 1789403, at *1 (D.N.D. Nov. 29, 2001) [hereinafter Lara District Court Decision].
226. *Id.*
227. *Id.*
228. *Id.*
229. The federal government and tribal governments are separate sovereigns. For this reason, dual prosecution does not constitute double jeopardy if they are each exercising that power by operation of their inherent sovereign authority. United States v. Wheeler, 435 U.S. 313 (1978).
230. Lara District Court Decision, *supra* note 225, at 1–4.
231. United States v. Lara, 324 F.3d 635 (8th Cir. 2003).
232. United States v. Lara, 541 U.S. 193 (2004). It was a 4-3-2 decision insofar as Stevens voted both with the majority and issued a concurring opinion.

concurring opinions. Of the remaining concurring and dissenting Justices, three remain on the bench: Justices Kennedy, Thomas, and Scalia.

a. The Majority Opinion

Despite the court's prior rulings in *Oliphant* and *Duro*, a majority of the United States Supreme Court upheld the district court decision, finding that the Spirit Lake Nation's exercise of criminal jurisdiction was an exercise of its inherent power, as recognized by the *Duro* fix legislation.[233]

The majority began by noting that the *Duro* fix legislation was not intended to grant federal prosecutorial powers to tribes, but rather to enlarge the inherent powers of tribes to exercise criminal jurisdiction over *all* Indians.[234] The Court then appropriately phrased the question to be decided as whether Congress possessed the constitutional power to reverse the Supreme Court.[235]

In answer to the newly phrased question, the majority began by referencing Congress' broad "plenary and exclusive" power to legislate with respect to Indian affairs.[236] They grounded this congressional power in the Indian Commerce Clause and Treaty Clause, citing numerous Supreme Court cases identifying those clauses as such.[237] The Court also found support for congressional plenary authority in the pre-constitutional powers necessarily inherent in any federal government, in so far as, during the nation's formative years, dealings with Indian nations were more an aspect of military and foreign policy than domestic or municipal law.[238] These powers are "necessary concomitants of nationality" and are not derived from affirmative grants of the Constitution.[239]

After grounding congressional plenary power over tribes in the text of the Constitution and pre-constitutional concomitants of nationality, the majority noted that the Constitution's plenary grants of power to Congress include the power to enact legislation that either restricts or relaxes tribal sovereign authority.[240] The Court wrote: "From the Nation's beginning Congress' need for such legislative power would have seemed obvious."[241] To bolster this claim they identified the very different national policies toward tribes over the years, including removal, assimilation, allotment, reorganization, termination, and self-determination.[242] The Court went on to write that: "Such major policy changes inevitably involve major changes in the metes and bounds of tribal sovereignty."[243]

As an example of Congress' power to change the metes and bounds of tribal sovereignty, the majority identified the 1871 legislation ending

233. *Id.*
234. *Id.* at 199–200.
235. *Id.*
236. *Id.* at 200.
237. *Id.*
238. *Lara*, 541 U.S. at 201.
239. *Id.*
240. *Id.* at 202.
241. *Id.*
242. *Id.*
243. *Id.*

treaty making.[244] Even more persuasively, the majority identified congressional actions that recognized, terminated, and restored tribes.[245] From the perspective of the federal government, there is nothing more basic than recognition, which permits a tribe to exercise sovereign powers, and termination that ends those abilities. If Congress has the power to both create and terminate the exercise of inherent tribal sovereign powers, it is hard to understand how it could not also make more minor adjustments to the metes and bounds of those powers by restriction or enhancement.

The majority also indicated that this exercise of broad legislative power over dependent governing entities is not unique.[246] The Court has recognized Congress' power to annex the Republic of Hawaii,[247] surrender the United States' right of sovereignty over—and recognize the independence of—the Philippine Islands,[248] and permit Puerto Rico to organize a government pursuant to its own constitution.[249]

The majority went on to find no constitutional language that would restrict Congress' ability to exercise this broad legislative power over Indian affairs.[250] The Court recognized that the *Duro* fix was limited to a tribe's ability to control events on its own lands, as opposed to a more radical change that would diminish state powers.[251] The majority also noted that the expansion of criminal jurisdiction was consistent with the Court's traditional understanding of tribes as domestic dependent nations.[252] Finally, the majority concluded that Congress' ability to relax restrictions on tribal sovereign powers was consistent with prior case law, in so far as *Oliphant* and *Duro* did not establish constitutional limits on the powers of Congress, but only reflected the Court's understanding of the retained sovereign powers of tribes.[253]

b. The Dissenting Opinion

Justices Souter and Scalia dissented in *Lara.* Writing the dissenting opinion, Souter recognized that Congress intended the *Duro* fix to be a recognition and expansion of inherent tribal sovereign power, not a delegation of federal power.[254] Nevertheless, Souter wrote that the Court's implicit divesture doctrine, as announced in *Oliphant* and *Duro*, was constitutional in nature rather than based on court created common law, and as such, Congress had no power to reverse those cases through legislation.[255]

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244. *Id.*
245. *Lara*, 541 U.S. at 201.
246. *Id.* at 203.
247. Hawaii v. Mankichi, 190 U.S. 197, 209–11 (1903).
248. 22 U.S.C. § 1394 (2006).
249. Cordova & Simonpiertri Ins. Agency Inc. v. Chase Manhattan Bank N.A., 649 F.2d 36, 39–41 (1st Cir. 1981).
250. *Lara*, 541 U.S. at 204.
251. *Id.* at 204–05.
252. *Id.*
253. *Id.* at 205–07.
254. *Id.* at 231.
255. *Id.* at 228–29.

Souter began his analysis by noting that tribal/federal relations are anomalous and complex, and that neither the domestic dependent nature of tribal nations nor their legal status as "wards" of the United States goes very far in determining questions of tribal jurisdiction.[256] He went on to note that prior case law clearly establishes that tribes retain those inherent sovereign powers necessary to protect self-government and control internal relations, even if those powers are not exclusive of, and can be abrogated by, the federal government.[257] Despite announcing this premise, throughout his opinion Souter fails to answer the question it begs: If Congress has the power to abrogate inherent tribal powers, how is it that it does not also have the power to expand them? Presumably, if Congress has the power to take away tribal powers it would likewise have the power to give them back. This is at least true in light of the majority's discussion of the Treaty and Indian Commerce Clauses, as well as the pre-Constitutional powers of the federal government. . But nowhere does Justice Souter point to language in the Constitution that would establish such a bar, whether in the form of an enumerated or inherent prohibition.

Instead of looking to the Constitution, Justice Souter recites language contained in prior Court precedent, particularly *Duro* and *South Dakota v. Bourland*.[258] He cites *Duro*, for the proposition that tribal exercise of criminal jurisdiction over non-member Indians could only be granted to tribes "by delegation from Congress."[259] Similarly, he cites a *Bourland* footnote that states: "tribal sovereignty over non-members cannot survive without express congressional delegation, and is therefore *not* inherent."[260] While it is true that those cases use this language, they fail to resolve the issue that is before the Court. Arguably, these prior cases merely indicate that future tribal exercise of criminal jurisdiction is dependent on congressional action. The fact that the word "delegation" is used does not resolve, let alone address, whether Congress can expand inherent sovereign powers. If the limit on tribal power is established by common law, Congress can expand it through legislative action. If a constitutional bar exists, then there must be language in the Constitution to that effect. The dissent never suggests where such language resides or how there could be a constitutionally based prohibition absent such language.

A quick review of the portion of *Bourland* referenced by the dissent illustrates the paucity of their argument. The relevant portion of *Bourland,* including the footnote, is as follows:

> Having concluded that Congress clearly abrogated the Tribe's pre-existing regulatory control over non-Indian hunting and fishing, we find no evidence in the relevant treaties or statutes that Congress intended to allow the Tribe to assert regulatory jurisdiction over these lands pursuant to inherent sovereignty.[FN15]
>
> FN15. The dissent's complaint that we give 'barely a nod' to the Tribe's inherent sovereignty argument . . . is simply another mani-

256. *Lara*, 541 U.S. at 226.
257. *Id.*
258. 508 U.S. 679 (1993).
259. *Duro*, 495 U.S. at 686.
260. *Bourland*, 508 U.S. at 695 n.15.

> festation of its disagreement with *Montana* . . . While the dissent refers to our 'myopic focus,' . . . on the Tribe's prior treaty right to 'absolute and undisturbed use and occupation' of the taken area, it shuts both eyes to the reality that after *Montana,* tribal sovereignty over nonmembers 'cannot survive without express congressional delegation,' . . and is therefore *not* inherent.[261]

This passage refers to two things. First, Congress abrogated the inherent sovereign powers of tribes to regulate non-Indian hunting and fishing. Second, Congress, whether by treaty or statute, did not intended to allow the tribe at issue to exert regulatory power over non-Indian hunting and fishing as a function of its inherent sovereignty. This language seems to indicate that the *Bourland* Court believed that: (1) Congress has the power to abrogate inherent tribal powers over non-Indian conduct, and (2) Congress has the power to expand those inherent powers by treaty or statute. The Court's reference to language in *Montana* notes that, because exercise of certain tribal powers requires congressional action, those powers cannot be considered inherent. That proposition is correct. However, *Montana* does not address Congress' ability to restore inherent tribal powers. Moreover, the *Bourland* court's language suggests that it believed Congress had this ability. To this end, Justice Thomas, who wrote the majority opinion in *Bourland*, interprets the Court's prior relevant decisions to be assertions of common law, not constitutional law.[262]

Nevertheless, Souter concluded that "our explanations in *Oliphant* and *Duro* . . . hold that Congress cannot reinvest tribal courts with inherent criminal jurisdiction over nonmember Indians."[263] With regard to the persuasiveness of this conclusion, it should be added that *Oliphant* was written by Justice Rehnquist who, as part of the *Lara* majority, interpreted prior case law on this issue as developing the common law. Consequently, despite Justice Souter's assertion of the Court's prior holdings, the authors of at least *Oliphant* and *Bourland* themselves believed that the cases were announcements of federal common law. As such, it is implausible that the Court's prior decisions were intended to create, or otherwise announce, a constitutional bar on the power of Congress to change the metes and bounds of tribal jurisdiction.

c. Kennedy's Concurring Opinion

Justice Kennedy, the author of the Ninth Circuit dissenting opinion in *Oliphant* and majority opinion in *Duro*, wrote a separate opinion in *Lara*, concurring only in the result.[264] As to the ultimate decision, Kennedy noted that Congress clearly intended for the *Duro* fix to confer upon tribes the inherent sovereign authority to prosecute non-member Indians. To that end, Justice Kennedy took Congress at its word and found that the double jeopardy argument failed—tribal exercise of authority is not a fed-

261. *Id.*
262. *See infra* Section V(d) discussing Thomas' concurring opinion. *See also Lara*, 541 U.S. at 221.
263. *Lara*, 541 U.S. at 231.
264. *Id.* at 211–14.

erally delegated power.[265] In Kennedy's view, Mr. Lara should have challenged the tribe's exercise of jurisdiction over him, not the federal government's, because before double jeopardy can attach a court must first have jurisdiction.[266]

Kennedy wrote separately to criticize the broader reasoning of the majority opinion. Namely, he criticized the notion that the Constitution authorizes Congress to expand inherent tribal sovereign authority to include prosecution of nonmember Indians.[267] Referring to *Wheeler*, Kennedy asserts that the Court's justification for finding inherent tribal sovereign authority to prosecute even their own members was derived entirely from their historic power over the relations among members of a tribe. To bolster his claim, Kennedy also cites *Strate v. A-1 Contractors*,[268] which in turn quotes *Montana*, to the effect that inherent tribal sovereign powers do not normally extend to nonmember activity.[269] The section of *Wheeler* cited by Justice Kennedy actually reads:

> These limitations (powers tribes implicitly lost) rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.[270]

This quote does not equate to an assertion that an independent exercise of tribal sovereignty is limited entirely to intra-tribal affairs, as it appears Kennedy would have it.

Montana itself expresses the implicit limitation on tribal power as that which is "necessary to protect tribal self-government or to control internal relations."[271] This limitation is more expansive than what Justice Kennedy would have, in so far as the class of matters "necessary to protect self-government" is intended to include matters that would not otherwise be included in the category of "internal relations." If inherent tribal powers were limited to intra-tribal affairs or "relations among the members of a tribe," presumably, they would be subsumed by the "internal relations" class. In fact, the "internal relations" class itself is more inclusive, in that it contains matters involving non-Indians who enter into voluntary consensual relations with tribes. As the *Montana* court wrote: "To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual rela-

265. *Id.* at 211, 214.
266. *Id.* at 214.
267. *Id.*
268. 520 U.S. 438, 445–46 (1997).
269. *Id.*
270. United States v. Wheeler, 435 U.S. 313, 326 (1978) (parenthesis added).
271. Montana v. United States, 450 U.S. 544, 564 (1981).

tionships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[272]

Regardless of his reading of prior cases, and unlike the dissent, Justice Kennedy does point to the Constitution to justify his belief that the it prohibits Congress from subjecting non-member citizens to the exercise of tribal criminal jurisdiction. In this regard, Justice Kennedy makes special note of the fact that Mr. Lara is a citizen of the United States.[273] This fact is of key importance to Justice Kennedy. As discussed above, he believes that the judiciary should be focused on ensuring that the Constitution's guarantee of liberty is given its full and necessary meaning regardless of textual enumeration.[274] Consistent with this jurisprudential theory, Kennedy writes in *Lara* that "[t]o hold that Congress can subject [Mr. Lara], within our domestic borders, to a sovereignty outside the basic structure of the Constitution is a serious step."[275]

Justice Kennedy believes that the Constitution is based on a consent-of-the-governed theory and that the consent granted is in turn grounded in an expectation that the governed will be subject to the protections of just two governments — state and federal.[276] Justice Kennedy goes on to note that the *Duro* fix subjects citizens to a "third entity" (tribes) within the domestic borders of the United States.[277] According to Justice Kennedy, this is unprecedented. Justice Kennedy argues that the constitutional structure itself, independent of the Bill of Rights, guarantees an individual liberty interest against being subject to the jurisdiction of a domestic "third entity" like tribes.[278] He claims that historically, the only exceptions to the consent theory are Indian citizens who, as tribal members, consent to the jurisdiction of their own tribe.[279] Presumably, Kennedy's consent theory would be a bar regardless of whether the congressional grant of power is viewed as delegated or inherent.

As discussed above with regard to early treaties, such an exercise of power is hardly "unprecedented."[280] Many of those treaties explicitly subject United States citizens to the authority of tribes without any state or federal protection. This is true regardless of the reason for the provisions. If Justice Kennedy's constitutional structure argument is to survive historical fact, he must either claim those treaty provisions were nonetheless barred by the Constitution, or that the individuals subject to those provisions consented to the exercise of tribal authority.

It has never been suggested that the government's early treaties, which recognized the power of tribal nations to prosecute United States' citizens, were unconstitutional nor is this remotely plausible. Four of those treaties predate adoption of the Constitution.[281] Five were entered

272. *Id.* at 565.
273. *Lara*, 541 U.S. at 212.
274. *See supra* notes 220–23 and accompanying text.
275. *Lara,* 541 U.S. at 212.
276. *Id.*
277. *Lara*, 541 U.S. at 212.
278. *Id.* at 214.
279. *Id.*
280. *See supra* note 109 and accompanying text.
281. *See supra* note 109.

into after the Constitution was adopted.[282] Two signatories to the United States Constitution, James Madison, Jr. and William Blount, were witnesses to several of the relevant pre-constitutional treaties.[283] They both signed the 1785 Treaty with the Cherokees, which in Article 5 establishes tribal criminal jurisdiction over non-Indian residents.[284] William Blount also signed the 1786 Treaty with the Choctaw and 1786 Treaty with the Chickasaw, which both have similar language.[285] The son of former United States Supreme Court Chief Justice John Rutledge — who was on the Supreme Court bench at the time and was a principle author of the United States Constitution —[286] signed the 1790 post-constitutional Treaty with the Creeks, which also contained language subjecting non-Indian residents to tribal criminal jurisdiction.[287]

It is inconceivable that these individuals, who created the constitutional structure Kennedy relies on for his argument, believed that provisions of the treaties they signed both before and after adopting the Constitution were nonetheless prohibited by it. To the contrary, the language of these treaties, and direct involvement of the Constitution's drafters in their creation, suggest that the Constitution's structure and terms fully contemplate tribal exercise of such authority — at least with regard to those residing in Indian country. Nor does the reason for these provisions matter; if there is a liberty-based right to be free from tribal authority embedded in the Constitution's structure, then it exists regardless of the reason the federal government may have subjected its citizens to that authority.

To withstand historical fact, Kennedy's theory must either bend to the reality that the Constitution contemplated citizens being subject to the authority of "third entity" tribal nations, or find justification for early treaty provisions in consent theory. Consent could plausibly be found if non-member citizens were aware of treaty provisions that subjected them to the exercise of tribal authority, but nonetheless made the individual choice to reside in tribal territory. In fact, this type of consent is a more plausible justification for limitations on liberty than the kind of tacit consent usually relied on by consent theorists[288] because it is contingent on

282. *Id.*

283. Treaty with the Cherokee, *supra* note 101, at art. 5, Nov. 28, 1785, 7 Stat. 18 (listed witnesses are: *Wm. Blount*, Sam'l Taylor, John Owen, Jess. Walton, Jno. Cowan, Thos. Gregg, W. Hazzard, *James Madison*, and Arthur Cooley); Treaty with the Choctaw, Jan. 3, 1786, art. 4, 7 Stat. 21 (listed witnesses are: *Wm. Blount*, John Woods, Saml. Taylor, Robert Anderson, Benj. Lawrence, John Pitchlynn, and James Cole); Treaty with the Chickasaw, Jan. 10, 1786, art. 4, 7 Stat. 24 (listed witnesses are: *Wm. Blount*, Wm. Hazzard, Sam. Taylor, and James Cole).

284. *Id.*

285. *Id.*

286. HENRY FLANDERS, THE LIVES AND TIMES OF THE CHIEF JUSTICES OF THE SUPREME COURT OF THE UNITED STATES chs. 8, 14 (1858).

287. Treaty with the Creeks, art. 6, Aug. 7, 1790, 7 Stat. 35 (listed witnesses are: Richard Morris, chief justice of the State of New York, Richard Varick, mayor of the city of New York, Marinus Willet, Thomas Lee Shippen, *John Rutledge jun'r*, Joseph Allen Smith, Henry Izard, and Joseph Cornell).

288. *See, e.g.*, John G. Bennett, *A Note on Locke's Theory of Tacit Consent*, 88(2) PHIL. REV. 224, 224–34 (1979).

intentional and overt individual choice and action. However, if this is the basis on which to explain away historic fact, there is no reason why such consent would not exist in an individual who, after being informed that her conduct in Indian country is subject to the criminal jurisdiction of tribes, nonetheless chooses to enter Indian country. That individual's conduct would be a knowing and voluntary act that could have easily been avoided. The *Duro* fix fits this bill.

Having said this, in all fairness to Justice Kennedy, none of the other opinions in *Lara* directly addressed his theoretical approach. Consequently, he never had the opportunity to address what appear to be serious problems with his position, given historical facts. In his *Oliphant* dissent Justice Kennedy did address the early treaties, but concluded that they represented two things: The language implies a congressional grant of power that would not exist otherwise, and that grant of power is limited to those residing in Indian country and as such, other non-Indians are not subject to tribal jurisdiction.[289] However, these interpretations of the early treaty provisions do not resolve Justice Kennedy's dilemma. If a liberty interest is embedded in the structure of the Constitution, presumably this liberty interest would exist regardless of whether the congressional grant of power is a delegation of federal power or a relaxation of inherent tribal sovereignty. In either case Congress, would subject a citizen to the jurisdiction of a domestic "third entity," which consent theorists argue is prohibited by the Constitution's structure. This outcome would be true no matter how narrowly tailored the congressional grant of authority.

d. Thomas' Concurring Opinion

Of all the opinions in *Lara*, Thomas' concurring opinion is most feared by Indian law practitioners, as he appears ready and willing to do away with the notion of tribal sovereignty altogether. Ominously, his opinion begins:

> As this case should make clear, the time has come to reexamine the premises and logic of our tribal sovereignty cases. It seems to me that much of the confusion reflected in our precedent arises from two largely incompatible and doubtful assumptions. First, Congress (rather than some other part of the Federal Government) can regulate virtually every aspect of the tribes without rendering tribal sovereignty a nullity . . . Second, the Indian tribes retain inherent sovereignty to enforce their criminal laws against their own members . . . These assumptions, which I must accept as the case comes to us, dictate the outcome of this case, and I therefore concur in the judgment.[290]

This paragraph is the summation of the logic Thomas uses throughout his concurrence. Long-standing precedent has recognized that Congress has plenary authority with respect to tribes.[291] The Court has also established

289. Oliphant v. Schlie, 544 F.2d 1007, 1016, n.5 (9th Cir. 1976).
290. *Lara*, 541 U.S. at 214.
291. *Id.* at 218.

that tribes retain inherent sovereignty, however limited.[292] Consequently, Congress can expand inherent inherent sovereignty.[293] Justice Thomas wrote a concurrence, however, specifically to call attention to the tension between these two fundamental principles of federal Indian law and to express his desire to address that tension.[294]

Unlike the majority, Justice Thomas does not believe that the Constitution grants Congress plenary power to adjust the metes and bounds of inherent tribal sovereignty. He finds no such authority in the Treaty Clause or the Indian Commerce Clause.[295] But if such power exists, Thomas doubts the validity of the result in *Wheeler*.[296] For Thomas, the notion of congressional plenary power is mutually exclusive of the concept of tribal sovereignty, and prior case law which maintains otherwise is untenable.[297] Thomas' claim is not without support among Indian law scholars.[298] However, unlike many scholars, Thomas appears to be willing to hold that the federal government retains full authority over Indian affairs and that tribes lack any vestiges of sovereignty.

Justice Thomas begins by noting that *Wheeler* viewed tribes as self-governing sovereigns that exercise inherent powers, such as the power to exercise criminal jurisdiction over its own members, provided those powers are executed in a manner consistent with federal policy.[299] Nonetheless, Thomas doubts this conclusion. While he finds it sensible to view tribes as sovereigns with limited inherent powers, he believes that this sovereignty is inconsistent with the notion of plenary power.[300] He reasons that the essence of sovereignty independent existence, not subject to the whim of another government.[301] Thomas appears to posit that a necessary attribute of sovereignty is that a government exists independent of the plenary authority of another government.

After asserting that the essence of power is freedom from the whims of another government, Thomas quickly turns to the obvious flaw in his premise: states retain sovereign powers despite being subject to the powers of the federal government.[302] In some instances the federal government's power over states is plenary, as with the Interstate Commerce Clause.[303] Furthermore, if the federal government so decided, a state could presumably be removed from the Union—at least by constitutional amendment.[304] If the very notion of sovereignty prohibits a sovereign

292. *Id.* at 217.
293. *Id.* at 215.
294. *Id.* at 214.
295. *Id.*
296. *Lara*, 541 U.S. at 214.
297. *Id.*
298. *See, e.g.*, Robert Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002); Robert Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201 (2007).
299. *Lara*, 541 U.S. at 217.
300. *Id.* at 218.
301. *Id.*
302. *Id.*
303. United States v. Wrightwood Dairy Co., 315 U.S.110, 119 (1942).
304. U.S. CONST. art. V.

from existing at the whim of another, then states appear to lack sovereignty as well. Thomas attempts to explain away this dilemma by noting that states, unlike tribes, are part of a constitutional framework that allocates sovereignty between the states and federal government and expressly grants Congress authority to legislate with respect to them.[305] In contrast, Thomas maintains that tribes are not part of the constitutional framework and their sovereignty is not guaranteed by the Constitution.[306] But explanation does little work to save his original premise, as state sovereign authority can still be altered by constitutional amendment, and states nonetheless are subject to at least some federal plenary power.

For Justice Thomas'original proposition to be workable, there would need to be an exception to the definition of sovereignty, to the effect that a government can be a sovereign subject to the whim of another government only if the powers between them are allocated by a constitution or other agreement. However, there is nothing obviously inherent in the notion of a sovereign or the term "sovereignty" to suggest that this kind of ad hoc exception is embedded. Moreover, even if such an exception existed, there is no obvious reason to exclude Indian treaties or other avenues of federal recognition from the list of potentially acceptable arrangements between sovereigns. While limitations on the the sovereign powers of states requires constitutional change and limitations on the sovereignty of tribes requires legislative change, nothing in the difference between the two processes renders one government sovereign and the other not. Both ultimately exist at the whim of the federal government. While tribes may be "terminated" by legislative enactment, arguably, states can be "terminated" or otherwise removed from the Union through constitutional amendment.[307]

Pursuant to Article V of the United States Constitution, limitations on the sovereign powers of states through constitutional amendment requires the consent of three-fourths of the states.[308] Perhaps one could view this level of state participation as removing states from the jaws of Thomas' prohibition on sovereigns existing at the whim of other sovereigns. However, state consent in such a circumstance only exists because of Article V. If, in an alternate world, Article V did not require state consent, states would presumably still be considered sovereign. Likewise, in an alternate world where federal plenary power over tribes existed, but the federal government actually abided by treaties and only passed legislation effecting tribes when tribes consented to such legislation, there would be little question about the sovereign status of tribes. As such, it

305. *Lara*, 541 U.S. at 218–19.

306. *Id.* at 219.

307. U.S. CONST. art. V.

308. *Id.* ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress. . . .").

does not appear that a government's independent existence is a necessary condition for sovereignty.[309]

The very existence of tribes in the United States also belies Thomas' premise. The Supreme Court Tribes has held that tribes have attributes of inherent sovereignty at least since 1831.[310] This is true despite the Supreme Court's 1899 description of congressional power to legislate with respect to tribes as "plenary".[311] While these two doctrines can at times be in tension with one another, until Thomas' sole concurring opinion in *Lara,* they have never been considered mutually exclusive. Inherent tribal

309. Late Medieval European governments also appear to serve as a counterexample to Thomas' proposition. In 1356, Emperor Charles IV of the Holy Roman Empire issued the Golden Bull which, among other things, recognized significant existing sovereign powers of four secular electoral princes with regard to the governance of their respective territories. *See, e.g.*, THE GOLDEN BULL OF THE EMPEROR CHARLES IV ch. 25 (1325), *available at* http://avalon.law.yale.edu/medieval/golden.asp ("We decree, therefore, and sanction, by this edict to be perpetually valid, that from now on unto all future time the distinguished and magnificent principalities, viz.: the kingdom of Bohemia, the county palatine of the Rhine, the duchy of Saxony and the margravate of Brandenburg, their lands, territories, homages or vassalages, and any other things pertaining to them, may not be cut, divided, or under any condition dismembered, but shall remain forever in their perfect entirety. The first born son shall succeed to them, and to him alone shall jurisdiction and dominion belong. . . ."). *See also id.* at ch. 8 ("Inasmuch as, through our predecessors the divine emperors and kings of the Romans, it was formerly graciously conceded and allowed to our progenitors and predecessors the illustrious kings of Bohemia, also to the kingdom of Bohemia and to the crown of that same kingdom; and was introduced, without hindrance of contradiction or interruption, into that kingdom at a time to which memory does not reach back, by a laudable custom preserved unshaken by length of time, and called for by the character of those who enjoy it; that no prince, baron, noble, knight, follower, burgher, citizen-in a word no person belonging to that kingdom and its dependencies wherever they may be, no matter what his standing, dignity, pre-eminence, or condition-might, or in all future time may, be cited, or dragged or summoned, at the instance of any plaintiff whatsoever, before any tribunal beyond that kingdom itself other than that of the king of Bohemia and of the judges of his royal court: *therefore of certain knowledge, by the imperial authority and from the plenitude of imperial power, we renew and also confirm such privilege, custom and favour*. . . ."). Yet, those electoral princes were nonetheless subject to the overriding sovereign power and whim of the Emperor and the Holy Roman Empire as it was the Empire itself that recognized and permitted the exercise of these sovereign powers. *See, e.g.*, *id*. at pmbl. ("Inasmuch as we, through the office by which we possess the imperial dignity, are doubly-both as emperor and by the electoral right which we enjoy-bound to put an end to future danger of discords among the electors themselves, to whose number we, as king of Bohemia are known to belong: we have promulgated, decreed and recommended for ratification the subjoined laws for the purpose of cherishing unity among the electors, and of bringing about a unanimous election, and of closing all approach to the aforesaid detestable discord and to the various dangers which arise from it. This we have done in our solemn court at Nuremberg, in session with all the electoral princes, ecclesiastical and secular, and amid a numerous multitude of other princes, counts, barons, magnates, nobles and citizens; after mature deliberation, from the fullness of our imperial power; sitting on the throne of our imperial majesty, adorned with the imperial bands, insignia and diadem; in the year of our Lord 1356, in the 9th Indiction, on the 4th day before the Ides of January, in the 10th year of our reign as king, the 1st as emperor.").

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

311. Stephens v. Cherokee Nation, 174 U.S. 445 (1899).

sovereignty and congressional plenary power have existed in tandem at least since *Stephens*. Nor is it unusual for tensions between fundamental norms to exist in American law: a clear example being the tension between individual liberty and social obligation that appears to exist at the core of American property law.[312] Tensions in the law do not necessarily require that one norm to bend and break for the other.

After discussing his view of sovereignty, and contrasting tribes with states, Justice Thomas turns to his interpretation of federal policy to argue that passage of the 1871 Act ending treaty making, "reflects the view of the political branches that the tribes had become a purely domestic matter."[313] Justice Thomas provides no independent support for this assertion. However, even if true this assertion says nothing about the inability of that same federal government, by a different legislative act, to begin to treat tribes as sovereigns once again. Thomas then goes on to note that federal Indian policy is at the very least schizophrenic.[314] This observation seems like an accurate assessment of federal Indian policy, insofar as the Supreme Court's incongruous common law decisions have made it so, primarily due to the Court's failure to adjust the common law to comport with obvious changes in federal regulatory policy. However, Justice Thomas' observation says nothing about the ability of Congress to recognize tribal sovereignty or adjust the metes and bounds of that sovereignty.

The remainder of Thomas' concurrence is premised on his acceptance of the result in *Wheeler*, which necessarily includes acceptance of the notion that tribes have inherent sovereign powers independent of the federal government.[315] He reads *Wheeler, Duro, Oliphant, Montana,* and *Bourland* as obvious pronouncements of common law and criticizes the dissent's attempt to elevate them to constitutional law.[316] Justice Thomas also criticizes the majority's adherence to the congressional plenary power doctrine, as he sees no support for it in the Indian Commerce Clause or Treaty Clause.[317] However, it appears that Thomas might find that federal plenary power resides in the President under the Treaty Clause.[318]

In conclusion, Thomas writes that the Court should admit its failure to find a source of congressional power to adjust the metes and bounds of tribal sovereignty, and instead focus on determining whether Congress (as opposed to the President) even has this power in the first instance.[319] Such a focus, he believes, would serve as a foundation by which to analyze tribal sovereignty issues, wherein the Court may find that either

312. *See, e.g.*, Gregory S. Alexander, *The Social Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009); Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959 (2009); Gregory S. Alexander, *The Complex Core of Property*, 94 CORNELL L. REV. 1063 (2009).
313. *Lara*, 541 U.S. at 218.
314. *Id.*
315. *Id.* at 220.
316. *Id.* at 220–24.
317. *Id.* at 224.
318. *Id.* at 225–26.
319. *Id.* at 226.

Congress does not have this power or that tribes lack any meaningful sense of sovereignty.[320] Given his analysis leading up to this conclusion, Thomas' proposed focus is chilling to Indian law practitioners. Thomas seems likely to conclude that Congress lacks such power, but that the Treaty Clause vests such power in the Executive who exercises it through federal agencies in day-to-day dealings with tribes. Consistent with Thomas' discomfort with the majority's understanding of sovereignty, he is likely to conclude that, as a matter of constitutional law, tribes lack any vestiges of inherent sovereignty. Of course, any such conclusion would be contrary to the entire history of the development of federal Indian law, which has always maintained since its first treaties[321] and earliest court pronouncements[322] that tribal nations, while dependent, are nonetheless sovereign. Furthermore, the fundamental premise upon which such a conclusion would rely — that a government cannot possess sovereign powers while subject to the plenary power of another government — is belied by the United States' constitutional structure itself.[323]

VI. DOJ'S PROPOSAL

The Department of Justice proposed solution to the problem of non-Indian domestic violence in Indian country is twofold.[324] First, the proposal would allow qualifying tribes to exercise limited concurrent criminal jurisdiction over non-Indian domestic and dating violence crimes that occur in the tribe's territory.[325] Second, the proposal clarifies that tribes have full inherent jurisdiction to issue and enforce protection orders involving matters that arise in their territory, regardless of race or tribal affiliation.[326] Given the complexities of federal Indian law jurisdiction and the space required to adequately address both criminal and civil jurisdiction in Indian country, this paper only focuses on the first part of the DOJ proposal.

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320. Lara, 541 U.S. at 226.
321. *See supra* notes 88–118 and accompanying text.
322. Worcester v. Georgia, 31 U.S. 515, 519 (1832) ("The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial; with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term 'nation,' so generally applied to them, means 'a people distinct from others.' The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.").
323. *See supra* notes 302–09 and accompanying text.
324. DOJ Letter, *supra* note 10.
325. *Id.* at § 2, proposed 25 U.S.C. § 1304(b) and (c).
326. *Id.* at § 3, proposed amendment to 18 U.S.C. § 2265(e).

Under the DOJ's proposal, a number of conditions must be met in order for tribes to exercise criminal jurisdiction over non-Indian domestic violence crimes. First, the offense must arise within the tribe's Indian country.[327] Second, an Indian must be either the alleged perpetrator or victim of the crime.[328] Third, the victim or defendant must have sufficient ties to the tribe, meaning the defendant or victim resides or is employed in tribal territory, or is a spouse or intimate partner of a member of the prosecuting tribe.[329] Fourth, the tribe must ensure the defendant is given all of the rights contained in the Indian Civil Rights Act, including those that pertain to felony sentencing jurisdiction, as well as all of the rights guaranteed by the United States Constitution.[330] Fifth, the defendant has the right to petition for a writ of habeas corpus under 25 U.S.C. §1303. The federal court shall grant a stay of detention if there is a substantial likelihood that the petition will be granted and the court finds, by clear and convincing evidence, that the petitioner is not likely to flee or pose a danger to the community if released.[331]

In addition to the above conditions, a defendant has the right to bring a pre-trial motion to dismiss the case, either on the ground that the crime did not involve any Indian or on the ground that he or she has insufficient ties to the tribe.[332] If a defendant fails to bring a pretrial motion to dismiss on these grounds, his right to dismissal will be deemed to have been waived.[333]

The specific rights afforded a defendant under the DOJ's proposal are significant. A non-Indian defendant appearing in tribal court would have a right to:

1. The free exercise of religion,
2. Free speech,
3. Assemble,
4. Petition for redress of grievances,
5. Reasonable searches and seizures,
6. Warrants based on probable cause,
7. Double jeopardy,
8. Not to be compelled as a witness against themselves,
9. Against takings without just compensation,
10. A speedy trial,
11. A public trial,
12. Be informed of accusations,
13. Confront witnesses against them,
14. Compulsory process,
15. An attorney, and a public attorney if one cannot be afforded,
16. Not have excessive bail or fines placed on them,
17. Not be subject to cruel and unusual punishment,

327. *Id.* at § 2, proposed 25 U.S.C. § 1304(c)(1).
328. *Id.* at § 2, proposed 25 U.S.C. § 1304(d)(1).
329. *Id.* at § 2, proposed 25 U.S.C. § 1304(d)(2).
330. *Id.* at § 2, proposed 25 U.S.C. § 1304(e).
331. *Id.* at § 2, proposed 25 U.S.C. § 1304(f).
332. *Id.* at § 2, proposed 25 U.S.C. § 1304(d)(1)–(2).
333. *Id.* at § 2, proposed 25 U.S.C. § 1304(d)(3).

18. Due process,
19. Equal protection of the laws,
20. Not be subject to bills of attainder,
21. Not be subject to ex post facto laws,
22. A jury of not less than six persons,
23. Not be subject to more than 1 year of imprisonment unless previously convicted for a comparable offense, or the offense would be considered a felony by the federal government or any State within the United States,
24. Effective assistance of counsel,
25. Law licensed and trained judge,
26. Have the laws publicly available, as well as rules of evidence and criminal procedure,
27. Recorded proceedings, and
28. Any other right guaranteed by the United States Constitution that must be afforded to a defendant for a tribe to exercise criminal jurisdiction over the defendant.

Insofar as non-Indian individuals would be guaranteed these rights when prosecuted under the Indian Civil Rights Act, it appears that the DOJ's proposal grants non-Indian defendants greater rights than are enumerated in the United States Constitution.

VII. THE LEGALITY OF THE DOJ'S PROPOSAL

Regardless of whether it was correctly decided, the majority opinion in *Oliphant* is the law and it is very unlikely that the Court will overturn its decision in the future. Given this, there remains a question as to whether *Oliphant* is a pronouncement of common law or constitutional law. This is the critical question, as the Court's view on the constitutionality of the proposal will most likely turn on whether *Oliphant* is deemed a pronouncement of common law subject to adjustment by corrective congressional action. If the rule announced by the majority in *Oliphant* was grounded in common law, Congress has the power to effectively overturn it. If it was a pronouncement of constitutional law, Congress does not have this power. Additionally, the arguments raised by Justice Kennedy and Justice Thomas in *Lara* present independent grounds on which Congress may lack the power to legislatively overturn *Oliphant*.

Given the structure of the *Oliphant* opinion and the position taken by its author, Chief Justice Rehnquist, in *Lara*, it is clear that *Oliphant* was a pronouncement of common law. With regard to Justice Kennedy's independent analysis as a concurring Justice in *Lara*, the particulars of the DOJ's limited proposed fix seem to address his liberty and constitutional structure/consent concerns although he probably would not agree. Justice Thomas' potential stance is more difficult to predict. He clearly believes that prior pronouncements of the implicit divesture doctrine were statements about the common law, including *Oliphant*,[334] and therefore he will likely uphold the constitutionality of the DOJ's proposal. However, Thomas may be ready and willing to conclude tribes retain no sovereign

334. *See supra* note 316.

powers. But, in doing so, he would have to ignore the entire history of federal Indian law which holds otherwise.

a. Oliphant *is grounded in common law*

As indicated above, the *Oliphant* majority's opinion ultimately turned on the Court's analysis and interpretation of historical federal Indian policy with regard to the exercise of criminal jurisdiction over non-Indians.[335] The bulk of the majority opinion involved an analysis of federal laws, treaties, lower court decisions, and federal official reports or opinions.[336] Even the Court's implicit divesture analysis was ultimately grounded in the Court's interpretation of federal policy.

The *Oliphant* court also discussed the Indian Reorganization Act and the Indian Civil Rights Act.[337] The Court announced that tribal exercise of criminal authority over non-Indians was a new phenomenon, citing an 1834 statement by a Commissioner on Indian Affairs, claiming tribes had no laws.[338] The Court proclaimed that early treaties with tribes indicated an assumption that tribes lacked jurisdiction over non-Indians, citing a post-1825 treaty with the Choctaw and an Attorney General Opinion with regard to that specific treaty.[339] The Court invoked *Ex Parte Kenyon*, the 1790 Trade and Intercourse Act, and the General Crimes Act to support its argument that tribes did not historically have the power to prosecute non-Indians.[340] *Ex Parte Kenyon* itself involved dicta that referenced a federal statute, as opposed to constitutional language or structure.[341] The failed Western Territory Bill was discussed and explained away.[342] An 1854 amendment to the Trade and Intercourse Act and the Major Crimes Act were invoked as evidence of an unspoken assumption that tribes lacked such jurisdiction.[343] Dicta in the 1891 *Ex Parte Mayfield* case was discussed as support for the Court's "implicit conclusion of nearly a century ago that *Congress* consistently believed [lack of jurisdiction over non-Indians] to be the necessary result of its repeated *legislative* actions."[344] The majority even cited a more recent 1960 Senate Report to support its analysis.[345]

The *Oliphant* majority indicated that this analysis of historic federal Indian policy alone was insufficient to support its conclusion.[346] The Court ultimately grounded its decision on implicit divesture.[347] However, the implicit divesture announced in *Oliphant* appears to be ultimately grounded in the Court's interpretation of historic federal policy, not the

335. *See supr*a Section III(c).
336. *Id.*
337. *Id.*
338. *See supra*, Section III(c)(ii).
339. *Id.* at III(c)(iii).
340. *Id.* at III(c)(iv).
341. *See supra* notes 126–29 and accompanying text.
342. *See supra* notes 143–55 and accompanying text.
343. *See supra* notes 156–70 and accompanying text.
344. *See supra* Section III(c)(vi).
345. *See supra* notes 185–87 and accompanying text.
346. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978).
347. *Id.* at 208–10.

United States Constitution. For one thing, when discussing implicit divesture, the Court never mentions or cites to an enumerated power or prohibition in the Constitution. The Court's belabored discussion of historic federal Indian policy would have been superfluous if its decision was grounded in the Constitution. Finally, the court explicitly stated the common law basis for the decision, noting: "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States *except in a manner acceptable to Congress*."[348]

The most persuasive evidence of *Oliphant's* common law basis is the fact that the author of *Oliphant* sided with the majority in *Lara.*[349] In siding with the majority in *Lara*, Justice Rehnquist believed that Congress had the power to overturn the court's decision in *Duro*.[350] He supported the majority in *Lara* despite the fact that the two-justice dissenting opinion asserted that both *Oliphant* and *Duro* were pronouncements of constitutional law.[351] If Rehnquist believed his opinion in *Oliphant* was grounded in constitutional law, he would have joined the dissent in *Lara.* The other Justice in *Lara,* who was on the bench when *Oliphant* was decided, was Justice Stevens. Like Rehnquist, Justice Stevens sided with the majority in both *Oliphant* and *Lara.*[352] Justice Stevens even wrote a concurring opinion in *Lara*, in which he not only supported the majority's analysis, but added that since Congress has the power to enhance the constitutionally limited powers of states, there is nothing exceptional in it having the power to expand the inherent powers of tribes.[353] Consequently, all of the Justices in *Lara* who were involved in deciding the *Oliphant* case believed that *Lara* was a pronouncement of common law and that Congress had the power to overturn the court's decision.

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348. *Id.* at 210 (emphasis added).

349. *See Suquamish Indian Tribe*, 435 U.S. 191 (Mr. Justice Rehnquist delivered opinion of the court); United States v. Lara, 541 U.S. 193 (2004) (Breyer, J. delivered opinion of the court in which Rehnquist joined).

350. *Lara*, 541 U.S. at 196 ("We must decide whether Congress has the constitutional power to relax restrictions that the political branches have, over time, placed on the exercise of a tribe's inherent legal authority. We conclude that Congress does possess this power.").

351. *Id.* at 227 ("[A]ny tribal exercise of criminal jurisdiction over nonmembers necessarily rests on a "delegation" of federal power and is not akin to a State's congressionally permitted exercise of some authority that would otherwise be barred by the dormant Commerce Clause. . . . It is more like the delegation of lawmaking power to an administrative agency, whose jurisdiction would not even exist absent congressional authorization.").

352. *See Suquamish Indian Tribe*, 435 U.S. 191; *Lara*, 541 U.S. 193.

353. *Lara*, 541 U.S. at 210–11. ("While I join the Court's opinion without reservation, the additional writing by my colleagues prompts this comment. The inherent sovereignty of the Indian tribes has a historical basis that merits special mention. They governed territory on this continent long before Columbus arrived. In contrast, most of the States were never actually independent sovereigns, and those that were enjoyed that independent status for only a few years. Given the fact that Congress can authorize the States to exercise-as *their own*-inherent powers that the Constitution has otherwise placed off limits. . . . I find nothing exceptional in the conclusion that it can also relax restrictions on an ancient inherent tribal power.").

b. Kennedy's libertarian jurisprudence should not prohibit the DOJ's proposal

For Justice Kennedy, the key problem with Congress' ability to relax the metes and bounds of tribal sovereignty is his belief that the Constitution is based on a theory of consent, and the consent granted does not contemplate tribal power over United States citizens.[354] Rather, Kennedy believes that the consent granted by American citizens is based on their understanding that the Constitution's structure would only subject them to the power of two governments; the federal and governments.[355] For Justice Kennedy, the idea that Congress can subject a United States citizen to the jurisdiction of a third government –tribes– is unprecedented and doubtful.[356] While Kennedy may not recognize Congress' power to subject a United States citizen to the inherent powers of a tribal nation, his unique jurisprudence should not preclude this result.

Assume with Justice Kennedy that the United States' citizens, "the governed" in his words, consented to being subject to the powers of the state and federal governments. Also assume that, consistent with a libertarian view and presumably Kennedy's views,[357] consent is the only legitimate basis upon which to limit an individual's liberty interests. If these propositions are true, these same citizens consented to be governed by the individuals elected to Congress, the President, and the laws they pass. These citizens also consented to be subject to the powers that the Constitution grants to the federal government and the pre-constitutional powers necessarily inherent in a federal government. Among these, setting Thomas' views aside, is the ability of the federal government to exercise plenary power over tribal nations.[358] Why then have the governed not also consented to be subject to the power and jurisdiction that their federal elected officials confer on tribal nations, as an exercise of federal plenary power (absent an enumerated bar to the exercise of such power)?[359]

Under consent theory, restraints on such grants of power are necessary to ensure that United States citizens retain the rights they are otherwise guaranteed under the United States Constitution. If one believes consent theory,[360] it is reasonable to also believe that the exercise of power over those who consent is limited by the individual rights enumerated in and guaranteed by the Constitution. This restraint may in turn reasonably lead to the inference that the exercise of such power is ultimately subject to review by federal or state governments. The right of review could

354. *See supra* Section V(c).
355. *Id.*
356. *Id.*; *Lara*, 541 U.S. at 212–13.
357. *See supra* notes 276–79 and accompanying text.
358. *See Lara*, 451 U.S. at 200–01.
359. There appears to be nothing inherent in the notion of plenary power that would preclude the ability to confer power on an entity over which one exercises plenary power. Any bar on the exercise of such authority would have to come elsewhere. If one consents to be governed by an entity that exercises plenary authority over another entity, presumably this entails consent to being subject to the full exercise of that plenary authority.
360. The author does not subscribe to this theory.

be viewed as necessary to ensure that the power exercised by the government does not violate the citizens' constitutionally guaranteed rights.

The DOJ's limited proposal appears to meet these requirements. Under the proposal, non-Indians subject to tribal criminal jurisdiction would be guaranteed greater rights than those enumerated in the Constitution.[361] Additionally, these individuals would have a right to habeas corpus review in the federal courts through which they can seek an independent review of whether their statutorily gauranteed rights had been violated.[362] The DOJ proposal may not satisfy Justice Kennedy, particularly if he maintains his view on consent articulated in *Lara*, which fails to acknowledge that those who consented to be governed by the United States Constitution also consented to the government's full exercise of plenary authority over tribal nations. Nonetheless, the DOJ's limited proposal does appear to be consistent with consent theory and assures that the Constitution's guarantee of liberty is given its full and necessary meaning, insofar as individuals subjected to tribal jurisdiction would be granted greater individual rights than are enumerated in the Constitution.

c. The Uncertainty of Thomas

Justice Thomas believes that *Oliphant* and its progeny are assertions of federal common law, not constitutional law.[363] As such, there is no immediate barrier to Congress' ability to pass the DOJ's proposal and partially reverse *Oliphant* in a limited context. However, independent of this line of analysis, Thomas has made clear that he is uncomfortable with the idea that any government can possess sovereign powers while still subject to the plenary power of another.[364] In particular, Justice Thomas is not comfortable with the idea that the federal government possesses plenary power over Indian tribes, while at the same time maintaining that tribes possess some inherent sovereign powers.[365]

No one knows for certain if Justice Thomas would use a challenge to the DOJ's proposal as an opportunity to force a discussion of the tension between plenary power and inherent tribal sovereignty. In *Lara*, Thomas was unable to persuade any other Justices to explore this issue. Additionally, one cannot be certain if Justice Thomas would rule that tribes lack inherent sovereignty or that Congress lacks plenary power over tribes. Based on some of the language Thomas used in his concurring opinion, Thomas might find that Congress has no such plenary power, but would find that, based on the Treaty Clause, such power exists in the Executive branch.[366] In that event, Thomas would likely hold that tribal sovereignty is inconsistent with executive plenary power over tribes. There is a remote possibility that Thomas would find that tribes retain inherent sovereignty and that the federal government does not possess plenary power

361. *See supra* Section VI.
362. *Id.*
363. *See supra* note 316 and accompanying text.
364. *See supra* notes 301-06 and accompanying text.
365. *Id.*
366. *See supra* notes 317–18 and accompanying text.

over tribes, but given his history of decisions in federal Indian law that result appears to be highly unlikely.

If Justice Thomas were to take up his challenge in *Lara,* it is unlikely that he would have very many adherents. The idea that plenary power and tribal sovereignty are mutually exclusive is contrary to the history of federal Indian law and would result in drastic changes to Indian law and federal Indian policy. Not to mention, such a result would be devastating to tribes and tribal communities.[367] The notion of mutual exclusivity between plenary power and sovereignty also appears to be contrary to the United States' constitutional federal/state structure, the history of federal/tribal relations, and the historical political structure of empires.[368] Furthermore, the tension between fundamental principles in the law is not unique to federal Indian law, and in any case, such a tension does not provide sufficient reason to throw out either of the competing principles. If tension between fundamental principles alone were justification to reverse significant underpinnings of an entire field of law, then at the very least modern American property law rests on perilous foundations.[369]

d. Conclusion

The Department of Justice's limited proposal to allow tribes to prosecute non-Indian perpetrators of domestic violence is both politically necessary and legally permissible. The DOJ proposal is politically necessary because domestic violence has risen to epidemic proportions in Indian country.[370] Federal research indicates that the majority of Indian victims of violent crimes have identified the offender as non-Indian.[371] While the research does not indicate whether the offense occurred within Indian country, one can reasonably assume that some, if not most, of those crimes against Indian victims occurred in Indian country.[372] Those crimes also often go unprosecuted because tribes lack authority over non-Indians and tribal communities must rely on outside jurisdictions to investigate and pursue such matters. For whatever reason, statistics show that this fractured jurisdictional framework has disproportionately failed to protect Indian victims of violence.[373] A large part of this is due to the anemic response from the multiple governments that have fractured jurisdiction over these crimes. That feeble response will continue to weaken until the jurisdictional maze created by federal Indian law is unified in the tribal government where the crime occurs and upon whom the public relies for their safety. Change is necessary as a matter of public safety. The DOJ's proposal seeks to create that change with regard to what are arguably the

367. Without sovereign powers a tribal nation would be rendered more like a private club that governs the conduct of its members rather than a government exercising inherent authority over its citizens.
368. *See supra* note 309 (regarding the political structure of the Holy Roman Empire) and notes 302–08 and accompanying text.
369. *See supra* note 312.
370. *See generally supra* Section II.
371. *See supra* notes 30–35 and accompanying text.
372. *See supra* note 3.
373. *See supra* notes 36–39 and accompanying text.

most difficult and dangerous Indian country crimes – domestic violence.[374]

The proposal is also legally permissible. *Oliphant's* implicit divesture theory is grounded in common law, not constitutional law.[375] It was an attempt by the Court to align the common law regarding the inherent powers of tribes with the Court's perception of unwritten federal policy.[376] *Lara* was correctly decided in this regard and the attempt by the dissenting justices in *Lara* to tie the implicit divesture theory to the constitution is neither supported by the Constitution nor prior case law.[377] As such, Congress has the power to provide for a limited *Oliphant* fix as proposed by the Department of Justice. The independent analyses of Justices Kennedy and Thomas present different issues. Nonetheless, their arguments are not convincing. DOJ's proposal falls within Justice Kennedy's unique consent theory by ensuring defendants retain certain fundamental rights.[378] Justice Thomas' attempt to render the doctrines of plenary power and sovereignty mutually exclusive is neither supported by law or fact, and rendering them so would unnecessarily reverse a foundational concept in federal Indian law — that tribes are domestic dependent nations with attributes of inherent sovereignty.[379]

In proposing a limited *Oliphant* fix to address the serious public safety issues tribal communities face, the Department of Justice is on solid legal and political footing. It is a step that must be taken if society wants to deal with Indian country crime in a serious manner. It allows the local community and government to fully respond to local crime while ensuring that those subjected to the local laws are guaranteed the rights they would otherwise have under the United States Constitution. It also provides for an avenue of federal court review to ensure those rights have been afforded to defendants. Because the law announced in *Oliphant* was an expression of common law, it is well within the power of Congress to pass such a law. While Kennedy and Thomas present potentially independent grounds for questioning congressional authority to make this change, those grounds appear to be either unconvincing, consistent with the DOJ's limited proposal, or both.

374. *See id.*
375. *See supra* Section III.
376. *Id.*
377. *See supra* Section V.
378. *See supra,* Sections V(c) and VII(b).
379. *See supra* Sections V(d) and VII(c).