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THE CONSTITUTIONALITY OF VAWA 2022'S SPECIAL TRIBAL CRIMINAL JURISDICTION AND THE NATIVE ORIGINS OF RESTORATIVE JUSTICE IN COMBATTING GENDER-BASED VIOLENCE

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INTRODUCTION

Congress passed the Violence Against Women Act ("VAWA") in 1994, instating domestic violence, sexual assault, dating violence, and stalking as federal crimes.[1] The passage of VAWA was a historic achievement for women in the United States because it was the first piece of federal legislation to recognize these crimes and to devote significant federal resources to combatting gender-based violence.[2] Since 1994, VAWA has been reauthorized and amended four times: in 2000, in 2005, in 2013, and most recently in 2022.[3] The Violence Against Women Reauthorization Act of 2013 ("VAWA 2013") established the consequential jurisdictional doctrine called Special Domestic Violence Criminal Jurisdiction ("SDVCJ"), which this Note examines.[4] The Violence Against Women Reauthorization Act of 2022 ("VAWA 2022"), enacted in October of the same year, renamed SDVCJ as Special Tribal Criminal Jurisdiction ("STCJ"), and this Note will refer to VAWA's grant of tribal jurisdiction as such.[5] As an amendment to the Indian Civil Rights Act of 1968 ("ICRA"),[6] STCJ originally granted inherent sovereign power to tribes to prosecute non-Native perpetrators of domestic violence, sexual assault, stalking, and dating violence when such crimes are committed on tribal lands.[7]

The staggering rates of violence against Native women precipitated the need for and ultimate implementation of STCJ. Violence against Native women traces back to the annihilation of indigenous peoples and cultures upon Christopher Columbus's arrival and to the mass "rape of

1. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1796, 1902 (codified as amended at 34 U.S.C. ch. 121) (hereinafter referred to as the Violence Against Women Act of 1994).

2. *History of the Violence Against Women Act*, LEGAL MOMENTUM, https://www.legalmomentum.org/history-vawa (last visited Oct. 24, 2022) ("[S]tates were failing in their efforts to address [violence against women]. . . . [VAWA] included the first federal criminal law against battering and a requirement that every state afford full faith and credit to orders of protection issued anywhere in the United States.").

3. OFF. ON VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUST., ABOUT THE OFFICE ON VIOLENCE AGAINST WOMEN 1 (2016), https://www.justice.gov/file/29836/download; Press Release, The White House, Fact Sheet: Reauthorization of the Violence Against Women Act (VAWA) (Mar. 16, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/16/fact-sheet-reauthorization-of-the-violence-against-women-act-vawa/.

4. The provision authorizing STCJ is an amendment to the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1304, and is codified as amended at 25 U.S.C. § 1304.

5. § 1304.

6. §§ 1301–1304.

7. *Id.* § 1304. These crimes are encompassed under the term "VAWA Crimes" and constitute the original scope of crimes covered by STCJ.

Native American women by European men."[8] Further, 84.3% of American Indian and Alaska Native women have experienced violence in their lifetime, of whom "56.1 percent . . . have experienced sexual violence . . . [and] 55.5 percent . . . have experienced physical violence by intimate partners in their lifetime."[9] Indigenous women are 1.2 times more likely than white women to experience violence.[10] Adding to these shocking statistics, ninety-six percent of female Native victims and eighty-nine percent of male Native victims are victimized by a non-Native person.[11] Thus, a tribe's ability to prosecute non-Native offenders is paramount to protecting its members, especially Native women.

The 2013 VAWA statute establishing STCJ encompasses significant limitations to the doctrine's scope.[12] The statute created what has become known as the "substantial ties" requirement in that the perpetrator of the offense must either live on the tribe's land, be employed by the tribe on the tribe's land, or be a "spouse, intimate partner, or dating partner" of a member of the tribe or a non-member Native person who lives on the tribe's land.[13] STCJ, as enacted by VAWA 2013, also gives tribes jurisdiction over perpetrators who violate protection orders.[14]

In building upon the original legislation, the Violence Against Women Reauthorization Act of 2018 ("VAWA 2018") and the Violence Against Women Reauthorization Act of 2019 ("VAWA 2019") also addressed tribal jurisdiction over domestic violence crimes,[15] however

8. Amber Halldin, *Restoring the Victim and the Community: A Look at the Tribal Response to Sexual Violence Committed by Non-Indians in Indian Country Through Non-Criminal Approaches*, 84 N.D. L. REV. 1, 3 (2008) (quoting Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455, 458 (2005)).

9. NAT'L CONG. OF AM. INDIANS, RESEARCH POLICY UPDATE: VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN 2 (2018), https://www.ncai.org/policy-research-center/research-data/prc-publications/VAWA_Data_Brief__FINAL_2_1_2018.pdf.

10. ANDRÉ B. ROSAY, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN: 2010 FINDINGS FROM THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 2 (2016), https://www.ojp.gov/pdffiles1/nij/249736.pdf.

11. *See id.* at 11, 18.

12. *See, e.g.*, Alison Burton, *What About the Children? Extending Tribal Criminal Jurisdiction to Crimes Against Children*, 52 HARV. C.R.-C.L. L. REV. 193, 206 (2017).

13. *See* 25 U.S.C. § 1304(b)(4)(B).

14. *Id.* § 1304(c)(2).

15. Violence Against Women Reauthorization Act of 2018, H.R. 6545, 115th Cong. § 906 (2018) (expanding the crimes covered under STCJ's scope to include sex trafficking, child violence, and violence against law enforcement officers); Violence Against Women Reauthorization Act of 2019, H.R. 1585, 116th Cong. § 903 (2019) (affixing to the scope of STCJ the crimes of obstruction of justice and assault of a law enforcement officer or corrections officer in addition to domestic violence, dating violence, stalking, sexual violence, sex trafficking, and child violence). VAWA 2018 was introduced in the House in July 2018 and was temporarily reauthorized as part of a "short-term spending bill" at the

VAWA 2019 was never introduced in the Senate after it passed the House of Representatives given the partisan makeup of both Congress and the executive branch.[16] In March 2021, the House passed House Bill 1620 ("H.R. 1620"),[17] also known as the Violence Against Women Reauthorization Act of 2021, which expanded STCJ in significant ways.[18] One year later, on March 11, 2022, the Senate passed Senate Bill 3623 ("S. 3623"),[19] now the enacted Violence Against Women Reauthorization Act of 2022,[20] which includes the same STCJ provisions and restorative practices provisions as H.R. 1620.[21] VAWA 2022 undertook changes from its inception as H.R. 1620 to S. 3623 to its ultimate enactment in October 2022.[22] However, the Senate bill's elimination of certain provisions of

end of the year, but it expired shortly thereafter in February 2019. *Violence Against Women Act Reauthorization Threatened*, A.B.A. (May 16, 2019), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/may2019/vawa_update/;
H.R.6545 - Violence Against Women Reauthorization Act of 2018, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/house-bill/6545/actions?q=%7B%22search%22%3A%5B%22Violence+against+Women+Act%22%5D%7D&r=6 (last visited Oct. 24, 2022). In April 2019, VAWA 2019 passed in the House, however the Senate refused to consider the bill. *Violence Against Women Act Reauthorization Threatened*, *supra*; Jay Willis, *Why Can't the Senate Pass the Violence Against Women Act?*, GQ (Dec. 13, 2019), https://www.gq.com/story/senate-violence-against-women-act (noting the Republican-led Senate's refusal to bring the Violence Against Women Reauthorization Act of 2019 to a vote in the chamber).

16. *Violence Against Women Act Reauthorization Threatened*, *supra* note 15; Willis, *supra* note 15; *see* Aris Folley, *Lawmakers in Both Parties to Launch New Push on Violence Against Women Act*, HILL (Jan. 2, 2022, 8:00 AM), https://thehill.com/homenews/house/587204-lawmakers-in-both-parties-to-launch-new-push-on-violence-against-women-act.

17. Violence Against Women Reauthorization Act of 2021, H.R. 1620, 117th Cong. (2021) (as passed by House of Representatives, Mar. 17, 2021).

18. *See* Presidential Statement on the House of Representatives Passage of the Violence Against Women Reauthorization Act of 2021, 2021 DAILY COMP. PRES. DOC. 231 (Mar. 17, 2021).

19. Violence Against Women Reauthorization Act of 2022, S. 3623, 117th Cong. (2022) (as passed by Senate, Mar. 11, 2022); *see* Presidential Statement on Senate Action on the Violence Against Women Act Reauthorization Act of 2022, 2022 DAILY COMP. PRES. DOC. 80 (Feb. 9, 2022).

20. Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1796, 1902 (codified as amended at 34 U.S.C. ch. 121).

21. 25 U.S.C. §§ 1301–1304; 34 U.S.C. § 12514; *see* H.R. 1620.

22. Tit. IV, 108 Stat. at 1902. Republican Senators on the Senate Judiciary Committee did not outwardly oppose the restorative justice language of H.R. 1620, however many expressed opposition to the bill's closure of the "boyfriend loophole," which would prevent offenders from buying or owning a firearm. *See* James Walker, *Full List of 172 Republicans Who Opposed the Violence Against Women Act*, NEWSWEEK (Mar. 18, 2021, 6:00 AM), https://www.newsweek.com/full-list-172-republicans-opposed-violence-against-women-act-1577029. Other Republican Senators were not in favor of adding VAWA protections for transgender women, but VAWA 2022 keeps this language. *See* 34 U.S.C. § 12513 (codifying

H.R. 1620, such as the bill's closing of the "boyfriend loophole,"[23] does not affect the constitutionality of VAWA 2022's STCJ provisions.

Moreover, VAWA 2022 increases the scope of crimes covered by STCJ to include sex trafficking, child violence, obstruction of justice, assault of tribal justice personnel, violation of a protection order, stalking, dating violence, domestic violence, and sexual violence.[24] The Act also importantly lessens the rigidity of the "substantial ties" requirement delineated in VAWA 2013, increasing the breadth of tribal criminal jurisdiction over VAWA crimes.[25]

Additionally, VAWA 2022 contains requirements for the implementation of restorative practices as an alternative to the criminal justice response to domestic violence.[26] Restorative practices, also referred to as restorative justice in this Note, provide survivors autonomy and control over the response to harm done to them in the gender-based violence setting.[27] Where the criminal justice system's handling of perpetrators of intimate partner violence is ineffective and unsuccessful,[28] restorative justice establishes "a framework for

funding for trauma-informed, victim-centered law enforcement training for cases involving LGBT, including transgender, individuals); Colby Itkowitz & Marianna Sotomayor, *House Votes to Reauthorize Landmark Violence Against Women Act*, WASH. POST (Mar. 17, 2021, 5:18 PM), https://www.washingtonpost.com/politics/house-women-violence-legislation/2021/03/17/afd2ff38-8753-11eb-bfdf-4d36dab83a6d_story.html.

23. By closing the "boyfriend loophole," H.R. 1620 "restricts convicted spousal abusers from accessing firearms." Alana Wise, *Senators Announce a Deal to Reauthorize the Violence Against Women Act*, NPR (Feb. 9, 2022, 6:33 PM), https://www.npr.org/2022/02/09/1079717258/senators-announce-a-deal-to-reauthorize-the-violence-against-women-act. As part of the Senate's compromise bill, VAWA 2022 eliminated the closure of the loophole. *Id.* ("Our bill is a compromise" such that "[i]t doesn't include everything Sen. Feinstein and I wanted, or everything Sen. Ernst and Murkowski wanted. And there are provisions that all four of us very much wanted to include, such as an end to the loophole that allows abusers who harm dating partners to continue to have access to guns." (quoting Senator Dick Durbin)).

24. § 1304(a)(5).

25. *Compare* § 1304(b)(4)(B), *with* § 1304(a)(7) (amending 25 U.S.C. § 1304 (2013)). For the specific statutory language, see *infra* notes 70, 73.

26. § 12514 (codifying VAWA 2022's "Pilot program on restorative practices"); Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 BUFF. L. REV. 635, 640 (2021) ("Restorative [justice practices] share the view that the proper response to an offense should focus not on punishment, but on meeting the needs of the victim, holding the offender accountable for the harm caused, taking steps to repair as much as possible the harm suffered by the victim and the community, and addressing the offender's needs to prevent reoffending and promote reintegration.").

27. Lanni, *supra* note 26, at 643.

28. *See infra* notes 144–48 and accompanying text.

accountability and an opportunity for healing."[29] This restorative justice language in VAWA 2022 is significant because it recognizes a systemic need to confront gender-based violence in a way wholly distinct from our current criminal system.[30] Such language, which honors the customs and traditions of Native peoples,[31] will affect the federal response to gender-based violence.

This Note argues that the Violence Against Women Reauthorization Act of 2022's STCJ provisions are constitutional despite the conspicuous omission of VAWA 2013's original substantial ties requirement and that Congress does not exceed the scope of its powers in legislating VAWA 2022. Correspondingly, VAWA 2022's constitutionality is strongly supported by the Supreme Court's federal Indian law jurisprudence, Congress's unwavering plenary power over Native affairs, and the trend of modern federal courts to validate inherent tribal sovereignty through federal common law.

Secondly, this Note advocates that VAWA 2022's recognition of tribal jurisdiction offers a chance to integrate restorative justice practices that have a long history in tribal justice matters, but much less so in American legal history, as an effective solution to the epidemic of violence against women. The restorative practices provisions offer a jurisprudentially necessary perspective to the federal response to gender-based violence and honor indigenous concepts of tribal justice.

29. AMANDA CISSNER ET AL., A NATIONAL PORTRAIT OF RESTORATIVE APPROACHES TO INTIMATE PARTNER VIOLENCE: PATHWAYS TO SAFETY, ACCOUNTABILITY, HEALING, AND WELL-BEING 3 (2019).

30. § 12514. This recognition is especially significant because the original VAWA was primarily "designed to improve criminal justice responses to domestic violence and increase the availability of services to those victims." *History of the Violence Against Women Act*, *supra* note 2.

31. CISSNER ET AL., *supra* note 29, at 3 (restorative practices are deeply embedded "in traditional indigenous practices, such as family group conferencing in Maori culture, peacemaking in *Diné* (Navajo) culture, circle practice within *T'lingit* First Nations, *Tloque Nahuaque* or interconnected sacredness in the Mexican and American Indian culture, or *ho'oponopono* in Native Hawaiian culture, among many others"); Halldin, *supra* note 8, at 13 (tracing survivor-centered restorative practices to tribes' general reverence and respect for women as compared to "[e]arly American rape laws . . . [that] treated women as subordinate, at best, or as chattel at worst" (quoting Sarah Deer, *Expanding the Network of Safety: Tribal Protection Order for Survivors of Sexual Assault*, 4 TRIBAL L.J. 1, 7 (2003))). *See generally* Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1 (1999).

I. OVERVIEW OF TRIBAL JURISDICTION JURISPRUDENCE

The Special Tribal Criminal Jurisdiction provisions of VAWA 2013 are codified as an amendment to the Indian Civil Rights Act of 1968.[32] STCJ "recognize[s] and affirm[s] the inherent sovereign authority of Indian Tribal governments to exercise criminal jurisdiction over certain" non-Native defendants who commit VAWA crimes on tribal land.[33] The implementation of STCJ has ignited a more fervent conversation about gender-based violence among tribe members and has encouraged participating tribes to implement stronger protections in tribal criminal codes for survivors of gender-based violence.[34]

VAWA 2022 broadens the scope of VAWA 2013's original provisions in two significant ways. First, the law adds sexual violence, sex trafficking, assault of tribal justice personnel, child violence,[35] and obstruction of justice to the scope of crimes covered by STCJ.[36] Secondly, the new law disposes of VAWA 2013's substantial ties requirement.[37] Instead, any remnant of the old statutory language is dispersed in the definition of a perpetrator of domestic violence, which is characterized as a "current or former spouse or intimate partner" of the survivor, one who "shares a child in common" with the survivor, a person who "is cohabitating with or who has cohabitated with the victim as a spouse or intimate partner" or a person designated as such as under tribal domestic violence or family violence laws.[38]

A. An Examination of Oliphant v. Suquamish Tribe *and Its Progeny*

The Supreme Court has historically disfavored and invalidated the right of tribes to have legal authority over tribal land.[39] Further, the

32. 25 U.S.C. §§ 1301–1304 (codified as amended at § 1304).

33. NAT'L CONG. OF AM. INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION (SDVCJ) FIVE-YEAR REPORT 1 (2018).

34. *Id.*

35. § 1304(a)(3) (defining child violence as "the use, threatened use, or attempted use of violence [in the home] against a child proscribed by the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs").

36. *Id.* § 1304(a)(5).

37. *See id.*; Sadie Vermillion, *The 2022 Reauthorization of the Violence Against Women Act: A Space for Celebration, Learning, Support & Growth*, ARIZ. STATE UNIV. AM. INDIAN POL'Y INST., https://aipi.asu.edu/blog/2022/04/2022-reauthorization-violence-against-women-act-space-celebration-learning-support (last visited Oct. 24, 2022).

38. § 1304(a)(7).

39. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978) ("Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty."); Duro v.

Court's jurisprudence regarding inherent tribal sovereignty and tribal criminal jurisdiction largely comes from the seminal case *Oliphant v. Suquamish Indian Tribe*.[40] The Court in *Oliphant* held that tribes do not have inherent criminal jurisdiction to prosecute non-Native perpetrators; however, Congress can authorize such jurisdiction at its discretion.[41] *Oliphant* was one of the first Supreme Court cases to consider the validity of tribal criminal jurisdiction over non-Native defendants and is crucial to any comprehensive understanding of federal Indian law.[42]

Prior to receiving the attention of the Court, the Suquamish Tribe in 1973 established a criminal code giving the tribe criminal jurisdiction over non-Native perpetrators of rape.[43] However, according to the Court, United States history produced an "unspoken assumption" that "tribal criminal jurisdiction over non-Indians, is . . . inconsistent with treaty provisions recognizing the sovereignty of the United States over the territory assigned to the Indian nation and the dependence of the Indians on the United States."[44] Thus, while recognizing the power of Congress over Native affairs, the Court in *Oliphant* reminded the nation of the subordinate stature of Native people in the national hierarchy and of their inability to prosecute non-Native people who commit crimes on tribal land.[45]

The *Oliphant* decision highlighted two fundamental principles of federal Indian law. First, early treaties and legislation in our country's history supported the idea of inherent sovereignty for tribes, albeit limited and subject to the assent and control of the United States.[46] The

Reina, 495 U.S. 676, 686 (1990) ("The power of a tribe to prescribe and enforce rules of conduct for its own members 'does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status.'"); United States v. McBratney, 104 U.S. 621, 624 (1881) ("[A state] in all respects whatever, without any such exception as had been made in the treaty . . . has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory . . . including the Ute Reservation . . . .").

40. *See Oliphant*, 435 U.S. at 212.

41. *See id.*

42. *See id.* at 195 (citation omitted) ("We granted certiorari . . . to decide whether Indian tribal courts have criminal jurisdiction over non-Indians. We decide that they do not.").

43. *See id.* at 193. The Court noted that at the time of the decision, 127 tribes independently exercised criminal jurisdiction and thirty-three tribes exercised such jurisdiction over non-Natives. *Id.* at 196.

44. *Id.* at 199, 203.

45. *See id.* at 209–10 (noting that "Indian tribes' 'power to dispose of the soil at their own will, to whomsoever they pleased,' was inherently lost to the overriding sovereignty of the United States" thus "Indian tribes are 'completely under the sovereignty and dominion of the United States'" (quoting Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831))).

46. United States v. Lara, 541 U.S. 193, 206 (2004).

inherent sovereignty principle validates tribal jurisdiction over offenses committed by tribal members on tribal land and now, after the passage of VAWA 2013, over VAWA crimes committed by non-Natives on tribal land.[47] Secondly, the Court emphasized Congress's plenary power over Native affairs, including its authority to limit, enhance, or terminate allocations of tribal sovereignty, such as tribal criminal jurisdiction.[48]

B. Jurisdiction over Non-Member Natives: Duro v. Reina *and* United States v. Lara

While the Supreme Court has not explicitly validated tribal criminal jurisdiction over non-Natives, it has found a tribe's criminal jurisdiction over non-member Natives constitutional; however, this did not occur until 2004.[49] First, in *Duro v. Reina*, the Court found that tribes lacked criminal jurisdiction over non-member Native people.[50] The Court opined that tribes do not retain such jurisdiction because of their dependent position, yet jurisdiction over non-member Natives could "*only* come from a delegation by Congress."[51]

In response to the *Duro* decision, Congress amended ICRA in 1991 to grant tribes inherent sovereignty for criminal jurisdiction over all Native people on tribal land, regardless of their status as members of that specific tribe.[52] A few years later, when the constitutionality of the legislation was examined in *United States v. Lara*, a case whose persuasive legal analysis supports the constitutionality of VAWA 2022's STCJ provisions, the Court upheld Congress's grant of criminal jurisdiction to tribes over non-member Native people for crimes committed on the tribe's land.[53]

Importantly, *Lara* held that there was not a constitutional restraint on Congress's ability to ease restrictions on tribal sovereignty, including on criminal jurisdiction over non-member Natives.[54]

47. *Id.* at 197–98; 25 U.S.C. §§ 1301–1304.
48. *See Oliphant*, 435 U.S. at 208–09.
49. *See Lara*, 541 U.S. at 210.
50. Duro v. Reina, 495 U.S. 676, 698 (1990).
51. *Id.* at 677 (emphasis added).
52. Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (codified as amended at 25 U.S.C. §§ 1301–1304).
53. *Lara*, 541 U.S. at 210.
54. *See id.* at 204 ("[Respondent] points to no explicit language in the Constitution suggesting a limitation on Congress' institutional authority to relax restrictions on tribal sovereignty previously imposed by the political branches.").

C. Jurisdiction over Non-Native-on-Non-Native Crime: United States v. McBratney *and Its Relevance to VAWA 2022*

Tribes do not have jurisdiction over non-Native-on-non-Native crimes that occur on tribal land.[55] However, neither does the federal government.[56] Rather, states have sole jurisdiction over such crimes.[57] In *United States v. McBratney*, the Court stated that if there was no express exception of tribal jurisdiction made by Congress upon a state's entry into the union, then that state automatically acquired criminal jurisdiction over non-Native-on-non-Native crime on tribal land.[58] For this reason, the constitutionality of federal legislation that authorized *tribal* jurisdiction over non-Native-on-non-Native crime remained an open-ended question following *McBratney*.[59]

The rule that the federal government, rather than a state, retained jurisdiction over non-Native-on-non-Native crime if and only if a state seceded its jurisdiction upon its entry into the union is, according to scholars, a "judicially-created exception" that was not derived from the Major Crimes Act of 1885, 18 U.S.C. § 1153, the General Crimes Act of 1817, 18 U.S.C. § 1152, or any other statute or treaty.[60] In other words, the rule did not evolve from any decisive principle of federal Indian law. *McBratney*'s holdings are relevant to an examination of VAWA 2022's constitutionality because both the House and Senate bills add the crimes of assault of tribal justice personnel and obstruction of justice to STCJ's

55. *See* United States v. McBratney, 104 U.S. 621, 624 (1881).

56. *Id.*

57. *Id.* at 623–24.

58. *Id.*

59. In June 2022, the Supreme Court, in novel fashion, expanded state jurisdiction over certain crimes committed on tribal land. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2505 (2022). In a jurisdictional dispute over the prosecution of the crime of child neglect perpetrated by a non-Native person against a Native child on Cherokee Nation land, the Court in *Oklahoma v. Castro-Huerta* upheld for the first time ever a state's exercise of criminal jurisdiction over an offense committed by a non-Native person *against a Native person* on tribal land. *Id.* at 2491. The Court further held that state and federal government have concurrent jurisdiction over such crimes unless preempted by federal law, thus Oklahoma's prosecution was lawful. *Id.* at 2494 ("[A] State's jurisdiction in Indian country may be preempted (i) by federal law under ordinary principles of federal preemption, or (ii) when the exercise of state jurisdiction would unlawfully infringe on tribal self-government.").

60. Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 524–25 (1976).

scope.[61] Significantly, H.R. 1620 did not indicate whether this officer had to be Native; the officer needed only to be employed by the tribe.[62]

Moreover, the now enacted VAWA 2022 clarified this ambiguity that a tribe does not have criminal jurisdiction if both the victim and defendant are non-Natives, except over the crimes of assault of tribal justice personnel and obstruction of justice.[63] Put plainly, a tribe can now exercise criminal jurisdiction over two non-Native adversaries for the crimes of assault of tribal justice personnel and obstruction of justice when they are committed on tribal land. Thus, VAWA 2022 notably includes the first instance that Congress has provided tribes with criminal jurisdiction, although limited, over non-Native-on-non-Native crimes that occur on tribal land. As such, this exception presents a distinct question of constitutionality under *McBratney*; however, its resolution does not impact the constitutionality of VAWA 2022's STCJ provisions relating to a tribe's criminal jurisdiction over VAWA crimes committed by non-Natives against Natives on tribal land.

II. THE CONSTITUTIONALITY OF SPECIAL TRIBAL CRIMINAL JURISDICTION

This section argues that VAWA 2022's prescription of STCJ, despite the Act's omission of VAWA 2013's substantial ties provision, is constitutional because Congress did not exceed the scope of its powers. Precedent, the congressional plenary power doctrine, and modern pertinent case law support this conclusion.

A. The Substantial Ties Requirement and VAWA 2022's Expansion of Special Tribal Criminal Jurisdiction

VAWA 2013's STCJ provisions empowered tribes to prosecute non-Native perpetrators of domestic violence, dating violence, sexual assault,

61. Violence Against Women Reauthorization Act of 2021, H.R. 1620, 117th Cong. § 903(4)(G)(1) (2021) (as passed by House of Representatives, Mar. 17, 2021) ("The term 'assault of a law enforcement or correctional officer' means any criminal violation of the law of the Indian Tribe that has jurisdiction over the Indian country where the violation occurs that involves the threatened, attempted, or actual harmful or offensive touching of a law enforcement or correctional officer."); Violence Against Women Reauthorization Act of 2022, S. 3623, 117th Cong. § 813(c)(3)(A) (2022) (as passed by Senate, Mar. 11, 2022) ("The terms 'assault of Tribal justice personnel', 'covered crime', 'obstruction of justice', 'protection order', and 'violation of a protection order' have the meanings given the terms in section 204(a) of Public Law 90–284 (25 U.S.C. 1304(a)) (commonly known as the 'Indian Civil Rights Act of 1968').").

62. *See* H.R. 1620, § 903.

63. 25 U.S.C. § 1304(b)(4)(A).

and stalking in tribal courts.[64] The staggering rates of violence against Native women served as the impetus for the provisions.[65] Further, more than four in five American Indian and Alaska Native women have experienced violence in their lifetime.[66] More than one in two Native women have experienced sexual assault and violence, and Alaska Native women face the "highest rate of forcible sexual assault" among all groups of women in the United States.[67] Domestic violence rates among Alaska Native women are ten times higher than the national average.[68] And as noted above, ninety-six percent of female Native victims and eighty-nine percent of male Native victims are violated by a non-Native person.[69] Thus, a tribe's ability to prosecute non-Native offenders of VAWA crimes is imperative to protecting Native women.

Furthermore, VAWA 2013's endowment of STCJ conditioned tribal jurisdiction upon a non-Native defendant's significant ties to the tribe where that defendant committed the offense.[70] In other words, if the perpetrator did not reside on the specific tribe's land, was not employed by the tribe, or was not a spouse, intimate partner, or dating partner of a member of the tribe or a Native person living on the tribe's land, then the tribe did not have jurisdiction over the offender.[71]

VAWA 2022 broadens VAWA 2013's substantial ties requirement.[72] The law does not explicitly reiterate the substantial ties provision but rather provides a broader definition of who a domestic violence

64. *See id.* § 1304.

65. "The fundamental goals of VAWA are to prevent violent crime, respond to the needs of crime victims, learn more about violence against women, and change public attitudes about domestic violence." LISA N. SACCO, CONG. RSCH. SERV., R42499, THE VIOLENCE AGAINST WOMEN ACT: OVERVIEW, LEGISLATION, AND FEDERAL FUNDING 17 (2015), https://sgp.fas.org/crs/misc/R42499.pdf.

66. H.R. 1620, § 901(a)(2).

67. *Ending Violence Against Native Women*, INDIAN L. RES. CTR., https://indianlaw.org/issue/ending-violence-against-native-women (last visited Oct. 24, 2022).

68. *Id.*

69. ROSAY, *supra* note 10, at 11. Native women are victimized by American Indian or Alaska Native perpetrators, in contrast, thirty-five percent of the time. NAT'L INST. OF JUST., U.S. DEP'T OF JUST., FIVE THINGS ABOUT VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN 2 (2016), https://www.ojp.gov/pdffiles1/nij/249815.pdf. For men, it is thirty-three percent. *Id.*

70. *See* 25 U.S.C. § 1304(b)(4)(B) (amended 2022) ("A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant—(i) resides in the Indian country of the participating tribe; (ii) is employed in the Indian country of the participating tribe; or (iii) is a spouse, intimate partner, or dating partner of—(I) a member of the participating tribe; or (II) an Indian who resides in the Indian country of the participating tribe.").

71. *See id.*

72. *See supra* Part I.

perpetrator is.[73] The only major remnant of the "substantial ties" language is that a perpetrator recognized under VAWA 2022 is still a "current or former spouse or intimate partner" of the survivor.[74] Thus, there is a less rigid definition of who can be held accountable under VAWA 2022, indicating an inconspicuous yet productive expansion of STCJ.

Nonetheless, VAWA 2022's breadth still does not cover crimes committed by non-Natives on tribal land who are strangers or acquaintances to the victim.[75] While domestic violence and sex offenses most commonly occur between two individuals who know one another or who have been romantically involved,[76] there are many other instances of gender-based violence that STCJ does not cover. Particularly, a stranger perpetrator of gender-based violence is much more likely to commit a violent victimization, such as assault, and is more likely to use a weapon when committing a domestic violence or sex offense.[77] Therefore, if a non-Native stranger perpetrator enters tribal land to go to a casino or is invited onto tribal land for any other reason, they cannot be held responsible by tribal courts for committing an often violent VAWA crime against a Native woman.[78] While this gap proves that a future reauthorization of VAWA must continue to expand upon STCJ for

73. § 1304(a)(7) (A perpetrator is defined as either "(A) a current or former spouse or intimate partner of the victim; (B) a person with whom the victim shares a child in common; (C) a person who is cohabitating with or who has cohabitated with the victim as a spouse or intimate partner; or (D) a person similarly situated to a spouse of the victim under the domestic- or family-violence laws of the Indian tribe that has jurisdiction over the Indian country where the violation occurs.").

74. *Id.*

75. Sheena L. Gilbert et al., *Decolonizing VAWA 2021: A Step in the Right Direction for Protecting Native American Women*, 16 FEMINIST CRIMINOLOGY 447, 455 (2021) (citations omitted) ("This omission must be recognized within the context of the 'real rape' myth—an attack by a stranger perpetrator—and consider if White women would be left unprotected from such assaults? Further, would a U.S. state or the federal government ever be expected to allow a non-citizen impunity for a crime of violence committed within its borders? It is imperative that tribal jurisdiction cover all VAWA crimes committed by non-Natives irrespective of their relationship with the victim, given that non-Natives make up a large part of the population on Indian reservations, and victimization of Native women is largely inter-racial.").

76. *See* MATTHEW R. DUROSE ET AL., FAMILY VIOLENCE STATISTICS 8–9 (2005); *see also* OFF. FOR VICTIMS OF CRIME, U.S. DEP'T OF JUST., INTIMATE PARTNER VIOLENCE FACT SHEET 1 (2017).

77. DUROSE ET AL., *supra* note 76, at 8, 13–15. Strangers were more likely to commit violent victimizations than were well-known or casual acquaintances. JENNIFER L. TRUMAN & RACHEL E. MORGAN, NONFATAL DOMESTIC VIOLENCE, 2003–2012 5, 9 tbl.7 (2014).

78. *See* Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get Away With Almost Anything*, ATLANTIC (Feb. 22, 2013), https://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/.

the jurisdictional doctrine's full efficacy in reducing incidences of gender-based violence and protecting Native women,[79] VAWA 2022 certainly makes progress by granting a moderate level of expanded agency to tribes to prosecute VAWA crimes on tribal land.

At the same time, it must be noted that many tribes want a full *Oliphant*-fix, which would give tribes complete inherent tribal sovereignty and overrule crucial Supreme Court decisions, such as *Oliphant v. Suquamish Indian Tribe*, which limit such sovereignty.[80] A VAWA reauthorization bill, however, likely could not cover the magnitude of such a jurisdictional expansion because a full *Oliphant*-fix goes beyond STCJ. Indeed, it would cover all non-VAWA criminal offenses and would expand tribal jurisdiction beyond VAWA's restrictions as to who qualifies as a perpetrator. For example, a full *Oliphant*-fix would afford tribes jurisdiction over all non-Native-on-non-Native crime occurring on tribal land,[81] not just over VAWA 2022's narrow exception for assault of tribal justice personnel and obstruction of justice.[82] A full *Oliphant*-fix requires the affirmative vote of both

79. Scholars and advocates recommend that future VAWA legislation go even further by allowing tribes to write their own sexual assault laws to expand STCJ to include "stranger and acquaintance violence" and by creating a more transparent and secure way for tribes to receive the funds and resources that VAWA provides. *See* Gilbert et al., *supra* note 75, at 455–57.

80. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978); Marie Quasius, *Native American Rape Victims: Desperately Seeking an Oliphant-Fix*, 93 MINN. L. REV. 1902, 1926 n.187 (2009). Each year, the U.S. Department of Justice's Office on Violence Against Women holds a tribal consultation for tribal governments to provide recommendations on improving the administration of financial grants and funding and on strengthening protections and the federal government's response to gender-based violence, among other topics. *See* generally OFF. ON VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUST., TRIBAL CONSULTATION ANNUAL REPORT (2021); OFF. ON VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUST., TRIBAL CONSULTATION ANNUAL REPORT (2020); OFF. ON VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUST., TRIBAL CONSULTATION ANNUAL REPORT (2019); OFF. ON VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUST., TRIBAL CONSULTATION ANNUAL REPORT (2018); OFF. ON VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUST., TRIBAL CONSULTATION ANNUAL REPORT (2017); OFF. ON VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUST., TRIBAL CONSULTATION ANNUAL REPORT (2016) (highlighting in each report extensive tribal support for a full *Oliphant*-fix).

81. *See* Quasius, *supra* note 80, at 1930 ("Before *Oliphant*, many tribes extended criminal jurisdiction to non-Indians . . . .").

82. 25 U.S.C. § 1304(b)(4)(A); *see* NAT'L CONG. OF AM. INDIANS, COMBATTING NON-INDIAN DOMESTIC VIOLENCE AND SEXUAL ASSAULT: A CALL FOR A FULL OLIPHANT FIX 2 (2016). *Compare* Violence Against Women Reauthorization Act of 2021, H.R. 1620, 117th Cong. § 903(4)(G)(1) (2021) (as passed by House of Representatives, Mar. 17, 2021) (stating that the definition for assault of a tribal enforcement or correctional officer does not require that officer be Native; they only must be employed by the tribe), *with* Violence Against Women Reauthorization Act of 2022, S. 3623, 117th Cong. § 813(c)(3)(A) (2022) (as passed by Senate, Mar. 11, 2022) (rejecting tribal jurisdiction over non-Native-on-non-Native crime

houses of Congress, so it is unlikely to gain the needed support. Nevertheless, it is a critical jurisdictional solution that would allow tribes to resolve the legislative gaps presented by STCJ and general tribal criminal jurisdiction that VAWA cannot fix or address.

B. The Congressional Plenary Power Doctrine

The congressional plenary power doctrine, an essential principle of federal Indian law, supports the legal conclusion that VAWA 2022's STCJ provisions are constitutional notwithstanding the Act's elimination of VAWA 2013's rigid substantial ties requirement. The plenary power doctrine establishes that Congress has the "plenary and exclusive" power over Native affairs, which grants the legislative branch the ability to strengthen, restrict, or fashion tribal jurisdiction as it sees fit.[83] It is thus grounded in the principle that there is not a constitutional limitation on Congress's authority over tribal sovereignty and affairs.[84]

Further, the doctrine developed from federal Indian law, a body of law historically characterized by the Supreme Court as federal common law, rather than constitutional law, and governed by history, tribal treaties, and legislation.[85] According to the Court, Congress has the power to increase or decrease the scope of the "inherent prosecutorial authority" of tribes as it sees proper.[86] Such authority has constitutional roots as it is derived from the Commerce Clause, which states that "Congress shall have Power to . . . regulate Commerce with . . . the Indian tribes."[87] However, Congress's power over tribal sovereignty, and thus tribal criminal jurisdiction, evolved largely from "extraconstitutional, inherent powers" resulting from territorial conquest and the forced submission of Native peoples to colonization.[88] The crucial congressional

occurring on tribal land except in the pilot program in Alaska for the crimes of obstruction of justice or assault of tribal justice personnel).

83. Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 470–71 (1979).

84. United States v. Lara, 541 U.S. 193, 205 (2004).

85. *See id.* at 201 (acknowledging that, while the Constitution's treaty power authorizes the President, and not Congress, to make treaties, Article II treaties "can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.'" (quoting Missouri v. Holland, 252 U.S. 416, 433 (1920))).

86. *Id.* at 205 ("*Oliphant* and *Duro* make clear that the Constitution does not dictate the metes and bounds of tribal autonomy, nor do they suggest that the Court should second-guess the political branches' own determinations.").

87. U.S. CONST. art. I, § 8, cl. 3.

88. *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 25 (2002); *see* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831);

plenary power doctrine is used to justify tribal criminal jurisdiction over non-member Natives and is cited in *Oliphant* and *McBratney* as a mechanism for Congress to implement—or restrict—jurisdiction in the face of a tribe's own prescription of tribal jurisdiction.[89]

Moreover, the constitutionality of VAWA 2022 does not depend on a substantial ties provision as supported by the Supreme Court's furtherance of the plenary power doctrine in its tribal jurisdiction jurisprudence. Notable is the reasoning of the Court in its recent case upholding Congress's authority to relax restrictions on tribal sovereignty and criminal jurisdiction, *United States v. Lara*.[90] In response to the Court's earlier decision in *Duro v. Reina*, which held that tribes lacked criminal jurisdiction over non-member Natives, Congress amended ICRA to establish tribal criminal jurisdiction over non-member Natives, effectively overruling the *Duro* decision.[91] The Court in *Lara* reviewed the constitutionality of Congress's actions and found that the Constitution itself does not pinpoint any limitation to Congress's "institutional authority" to strengthen tribal jurisdiction and therefore rendered the amendment constitutional.[92]

Identically, by expanding the definition of a perpetrator of domestic violence under VAWA 2022's STCJ provisions, Congress is practicing its long-recognized constitutional, and institutional, authority "to modify the degree of autonomy enjoyed by a dependent sovereign."[93] There is no constitutional provision limiting Congress's plenary authority to "relax restrictions on tribal sovereignty" in VAWA 2022, and the Court is historically hesitant to second-guess Congress's decisions relating to this area of law.[94] Precedential cases such as *Oliphant*, which denigrate the concept of inherent tribal sovereignty, "are not determinative" because VAWA 2022 is a newly enacted statute.[95] Adopting the same reasoning as the Court in *Lara*, tribal criminal jurisdiction is an area fully within Congress's plenary power over Native affairs.[96] Therefore, VAWA 2022's

Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 587–89 (1823); United States v. Kagama, 118 U.S. 375, 379–80 (1886).

89. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 201–04 (1978); *see also* United States v. McBratney, 104 U.S. 621, 623–24 (1881).

90. *Lara*, 541 U.S. at 200–05.

91. *See* Duro v. Reina, 495 U.S. 676, 698 (1990); Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (codified as amended at 25 U.S.C. §§ 1301–1304).

92. *Lara*, 541 U.S. at 204.

93. *See id.* at 203.

94. *Id.* at 204–05.

95. *Id.* at 207 ("*Wheeler*, *Oliphant*, and *Duro*, then, are not determinative because Congress has enacted a new statute, relaxing restrictions on the bounds of the inherent tribal authority that the United States recognizes. And that fact makes all the difference.").

96. *See id.* at 201–03.

STCJ provisions do not require a substantial ties requirement to survive constitutionally because Congress, akin to its response to the *Duro* decision, has full constitutional authority to strengthen and fashion tribal criminal jurisdiction as it sees fit.[97]

It is possible that the Supreme Court could change course and limit the scope of the plenary power doctrine and consequently Congress's power over tribal criminal jurisdiction.[98] However, the Court would likely struggle to find a basis for such a decision because Congress's plenary power over Native affairs derives predominantly from federal common law rather than any enumerated constitutional provision.[99] In other words, the Court would be challenged to find a constitutional basis to invalidate VAWA 2022's delegation of tribal criminal jurisdiction. Additionally, the Court has been given multiple opportunities to limit Congress's ability to grant tribal jurisdiction, and thus to invalidate STCJ, but it has not done so.[100] In fact, the Court has consistently enlarged tribal jurisdiction through the plenary power doctrine.[101]

In June 2021, *United States v. Cooley* presented the Court with a chance to reconsider the plenary power doctrine, yet in reaching its conclusion, it emphasized that "[i]n all cases, tribal authority remains subject to the plenary authority of Congress."[102] Although *Cooley* involved a question of civil jurisdiction and did not pertain to a specific statute granting tribal jurisdiction like VAWA 2022, the Court held that a tribal police officer has the authority to temporarily detain and search non-Native people who speed on any highway running through a reservation.[103] The Court deferred to existing federal statutes that related to the issue as well as to legislative intent to determine how Congress sought to resolve the question of tribal sovereignty.[104] In the

97. *Id.*

98. *See* Margaret H. Zhang, *Special Domestic Violence Criminal Jurisdiction for Indian Tribes: Inherent Tribal Sovereignty Versus Defendants' Complete Constitutional Rights*, 164 U. PA. L. REV. 243, 274–75 (2015).

99. *Lara*, 541 U.S. at 207 (alteration in original) ("[F]ederal common law is 'subject to the paramount authority of Congress.'" (quoting New Jersey v. New York, 283 U.S. 336, 348 (1931))); United States v. Enas, 255 F.3d 662, 673 (9th Cir. 2001) ("*Duro* is not a constitutional decision but rather . . . [is] founded on federal common law. Although the Court speaks throughout of sovereignty—a term with constitutional implications—the decision does not rest on any constitutional provision.").

100. *See infra* Section II.C.

101. *See infra* Section II.C.

102. United States v. Cooley, 141 S. Ct. 1638, 1643 (2021). Further, the Court noted that, "no treaty or statute has explicitly divested Indian tribes of the policing authority at issue." *Id.*

103. *Id.* at 1646.

104. *Id.* at 1645–46.

end, the Court upheld, and even expanded, tribal jurisdiction.[105] Thus, the plenary power doctrine, which provides Congress with the authority to legislate largely without limitation and with limited judicial review, remains untouched by the Supreme Court to this day. It supports the findings that Congress did not exceed its plenary authority in legislating VAWA 2022 and that the Act's STCJ provisions are constitutional.[106]

C. VAWA 2013 in the Supreme Court

In the ten years since the passage of VAWA 2013, the Supreme Court has declined, albeit implicitly, to address the constitutionality of VAWA 2013 and its substantial ties requirement.[107] While this fact does not automatically imply that the substantial ties provision is not a constitutional requirement or that STCJ's constitutionality is outside the Court's purview, it does support a finding that Congress's grant of STCJ is not of grave constitutional concern to the Court. Although there has not been a case before the Supreme Court since the passing of VAWA 2013 that explicitly interprets STCJ's constitutionality, two cases impliedly indicate that *Oliphant* and its progeny do not require a substantial ties requirement in VAWA 2022 and that the law's STCJ provisions are constitutional.[108]

The first case in which the Court addressed the substantial ties provision of STCJ was briefly in 2016 in *United States v. Bryant*, which involved a Native defendant who was convicted of several domestic violence charges by a tribal court that did not provide him with legal representation.[109] The issue presented was whether such convictions amounted to a predicate offense for his conviction under a separate federal statute.[110] Justice Ginsburg, in her opinion, briefly explained VAWA 2013's STCJ provisions and the corresponding procedural safeguards required for non-Native criminal defendants, yet she ultimately determined that the Court "express[ed] no view on the validity of those provisions."[111] Though it seems like an insubstantial contribution by the judiciary, especially because the case involved a Native defendant, it was the first—and only—instance wherein the Supreme Court addressed VAWA 2013 and the potential constitutional invalidity of STCJ.

105. *See id.* at 1646.
106. *See* Zhang, *supra* note 98, at 274–76.
107. *See infra* notes 109–16 and accompanying text.
108. *See infra* notes 109–16 and accompanying text.
109. United States v. Bryant, 579 U.S. 140, 142–43 (2016).
110. *Id.* at 143.
111. *Id.* at 146 n.4.

Secondly, in 2020, the Supreme Court declined to grant certiorari to consider *Spurr v. Pope*.[112] The Sixth Circuit case contemplated whether VAWA 2013's STCJ provisions applied to a tribal court's exercise of *civil jurisdiction* over a civil personal protection order violation.[113] While STCJ was somewhat relevant to the legal analysis, the court resolved the civil jurisdiction question separately.[114] Nevertheless, the Sixth Circuit, in dicta, recognized the validity of STCJ,[115] and upon appeal, the Court declined to reconsider the Sixth Circuit's findings.[116]

Moreover, the Court's procedural actions as they relate to *United States v. Bryant* and *Spurr v. Pope* indicate that it has implicitly declined to decide STCJ's constitutionality. Correspondingly, this observation, combined with the Court's strong deference to Congress's plenary power over Native affairs, suggest that the Court is unlikely to find that Congress exceeded its plenary power in legislating VAWA 2022 without a substantial ties requirement. Thus, VAWA 2022's STCJ provisions are constitutional.

D. Analogous Supporting Case Law

Additional modern case law regarding tribal jurisdiction also supports the constitutionality of VAWA 2022's STCJ provisions notwithstanding the Act's removal of the substantial ties language. There are not many cases examining tribal criminal jurisdiction over non-Natives, so cases involving analogous tribal jurisdiction issues, while distinguishable, are useful in analyzing VAWA 2022's constitutionality. It is seemingly the trend of federal courts across the country to utilize the congressional plenary power doctrine to uphold the legality of tribal criminal jurisdiction—and tribal civil jurisdiction—over non-Natives and non-member Natives alike. *Lara*'s legal analysis is frequently cited to justify Congress's authority to expand tribal jurisdiction and its control over Native affairs.[117]

112. *See* Spurr v. Pope, 936 F.3d 478 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 850 (2020).
113. *Id.* at 481.
114. *See id.*
115. *See id.* at 488–89 (citations omitted) ("Not one of § 1304's jurisdictional hooks—domestic violence or dating violence or violations of protection orders—were satisfied. As defined by the statute, Spurr did not engage in acts of dating or domestic violence. Nor did the tribal court exercise jurisdiction over Spurr for the *violation* of a protection order. Rather, as discussed above, the tribal court exercised *civil* jurisdiction to issue a *civil* PPO for stalking.") (describing the provisions of 25 U.S.C. § 1304 and the requirements of the substantial ties provision).
116. *See Spurr*, 936 F.3d 478, *cert. denied*, 140 S. Ct. 850.
117. *See infra* notes 118–25.

For example, in *United States v. Smith*, a non-Native defendant was charged with the murder of a Native victim on tribal land by a federal court.[118] Although *Smith* validates the authority of the *federal* government over non-VAWA offenses committed by non-Native defendants and reaches a different policy outcome than VAWA 2022 aims to purport, the District Court for the District of New Mexico justified its decision by interpreting Congress's power over Native affairs as unqualified.[119] The case concerned the Indian Pueblo Land Act Amendments of 2005 in which Congress delineated concurrent jurisdiction to the federal government over crimes committed by or against a Native person, to the State of New Mexico over crimes committed by non-Natives, and to the Pueblo over crimes committed by Natives on tribal land.[120] The court considered whether Congress's jurisdictional delegation to the federal government over a non-Native defendant violated the Constitution by expanding the scope of Congress's authority.[121] Using the same legal analysis as the Supreme Court did in *Lara*, the district court held that Congress had the authority to enact the 2005 Amendments given its plenary power over Native affairs.[122] Therefore, Congress has the power to both increase and decrease the scope of tribal jurisdiction over non-Native perpetrators.

Additionally, *Kelsey v. Pope*, a 2016 Sixth Circuit case, is a modern example of a federal appellate court's exercise of discretion in upholding the inherent sovereignty of a tribe even though the case is distinguishable from the STCJ analysis because the defendant in *Pope* was a Native person.[123] The defendant appealed his sentence of misdemeanor sexual assault, claiming that the tribe lacked criminal jurisdiction over him because the crime he committed occurred on land owned by the tribe but not within the reservation itself.[124] The district court granted his habeas corpus petition; however, on appeal, the Sixth

118. United States v. Smith, 482 F. Supp. 3d 1164, 1167 (D.N.M. 2020).

119. *See id.* at 1176 (in terms of Congress's plenary power over Native affairs, "[t]here is a presumption of constitutionality, and courts only invalidate a law 'upon a plain showing that Congress has exceeded its constitutional bounds'").

120. *Id.* at 1170; Indian Pueblo Land Act Amendments of 2005, Pub. L. No. 109-133, 119 Stat. 2573 (amending Act of June 7, 1924, Pub. L. No. 68-253, 43 Stat. 636).

121. *Smith*, 482 F. Supp. 3d at 1176.

122. *See id.* at 1176–77 (affirming that Congress has "the power . . . to fix the jurisdiction of federal courts over crimes by or against Indians even though committed on patented land within an Indian reservation" stemming from its "plenary powers and the Indian Commerce Clause to enact the 2005 Amendment. Congress has authority to enact legislation dealing with Indians and Indian affairs within the exterior boundaries of reservation lands." (quoting Hilderbrand v. Taylor, 327 F.2d 205, 207 (10th Cir. 1964))).

123. Kelsey v. Pope, 809 F.3d 849, 852–53, 868 (6th Cir. 2016).

124. *Id.* at 852.

Circuit reversed the relief, holding that tribes "have the inherent sovereign authority to try and prosecute members on the basis of tribal membership."[125] While this case does not implicate VAWA 2022's constitutionality because it involves a non-member Native perpetrator, it is a notable and modern example of a federal appellate court confirming and justifying inherent tribal sovereignty by applying the *Lara* analysis and the plenary power doctrine.

In conclusion, VAWA 2022's constitutionality is strongly supported by the Supreme Court's federal Indian law jurisprudence, Congress's unwavering plenary power over Native affairs, and the current trend of federal courts to validate inherent tribal sovereignty through federal common law. Neither did Congress exceed its authority in legislating VAWA 2022. Thus, VAWA 2022 is constitutional notwithstanding a substantial ties provision.

III. AN EXAMINATION OF RESTORATIVE PRACTICES IN DOMESTIC VIOLENCE PREVENTION

This section articulates that VAWA 2022's recognition of tribal jurisdiction offers a chance to integrate restorative practices with a long history in tribal justice as an effective solution to the epidemic of violence against Native and indigenous women. Thus, while the expansion of the scope of STCJ is a legally necessary solution to mitigating violence because it broadens the substantial ties requirement and adds additional VAWA crimes, VAWA 2022's restorative justice provisions also offer a jurisprudentially necessary perspective by including an alternative conception of justice to address violence against women, particularly Native women.

A. Restorative Justice: A Presidential Priority and VAWA 2022

Restorative justice as a response to gender-based violence is an alternative to the highly punitive, divisive, and discriminatory criminal justice system, which often fails both to protect survivors of domestic violence and to rehabilitate and reduce recidivism of offenders.[126] A

125. *Id.* at 860. The court further reasoned that tribal criminal jurisdiction over member Natives comes from the "*voluntary character of tribal membership* and the concomitant right of participation in a tribal government." *Id.* at 859 (quoting Duro v. Reina, 495 U.S. 676, 677–78 (1990)).

126. *See* Leigh Goodmark, *Reimagining VAWA: Why Criminalization Is a Failed Policy and What a Non-Carceral VAWA Could Look Like*, 27 VIOLENCE AGAINST WOMEN 84, 89 (2021) (VAWA's "continued reliance on criminalization reflects a belief that criminalization is working to lower rates of intimate partner violence or deter violent behavior. That belief

typical restorative justice practice consists of having a conference between the survivor, the perpetrator, and community members who share the common goals of empowering the survivor to resolve how she or he will heal, holding the perpetrator responsible, and preventing recidivism without ostracizing the perpetrator from the community.[127]

Restorative justice is an essential element of responding to and resolving crime and violence within indigenous communities, and restorative practices are commonly used by tribes to combat gender-based violence while simultaneously to keep the community intact and close-knit.[128] Each tribe varies in its interpretation and implementation of restorative justice practices;[129] however, the underlying goal of restorative justice is to include community members in the process to increase awareness, decrease stigma, and mitigate domestic violence on a community-wide level.[130]

Significantly, for the first time in the legislation's history,[131] VAWA 2022 incorporates restorative practices language into the law.[132] Previous versions of VAWA have solidified the role of the criminal justice system in addressing and reducing violence against women and have provided substantial funding for various programs within the United States Department of Justice's Office on Violence Against Women that focus

is unwarranted. If 'working' is measured by lowering rates of intimate partner violence more than other forms of violent crime that are not receiving similar resources, criminalization is not working.").

127. *See* Lanni, *supra* note 26, at 644–49.

128. *See infra* note 129.

129. *See generally* Jon'a F. Meyer, *History Repeats Itself: Restorative Justice in Native American Communities*, 14 J. CONTEMP. CRIM. JUST. 42 (1998). A few specific examples include the Navajo concept of justice, which is rooted in distributive justice "where helping a victim is more important than determining fault" and where the concern lies "with the well-being of everyone in a community." Robert Yazzie, *"Life Comes From It": Navajo Justice Concepts*, 24 N.M. L. REV. 175, 185 (1994). The Native Hawaiian Ho'oponopono justice process "focuses on repentance, forgiveness, and reconciliation" and concentrates "on improving the self-esteem" of the perpetrator to uphold "the integrity of the family." Brenda V. Smith, *Battering, Forgiveness, and Redemption*, 11 AM. U. J. GENDER SOC. POL'Y & L. 921, 950–51 (2003). The Grand Traverse Band of Ottawa and Chippewa Indians has a Peacemaker Court, known in Ottawa as mnaweejeendiwin, where "[t]he disputants and other participants are then encouraged to speak freely, working toward a common understanding of the problem at hand and building a sense of community within the peacemaking circle." Jessica Metoui, *Returning to the Circle: The Reemergence of Traditional Dispute Resolution in Native American Communities*, 2007 J. DISP. RESOL. 517, 530–31 (2007).

130. *See* CISSNER ET AL., *supra* note 29, at 47–48.

131. Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1796, 1902 (codified as amended at 34 U.S.C. ch. 121).

132. 34 U.S.C. § 12514.

solely on criminal justice.[133] In VAWA 2022, the term "restorative practices" is mentioned substantively numerous times,[134] marking a shift not only in the language of the law but also in the attitude and awareness toward the federal response to the country's crisis of gender-based violence.[135]

In addition to these restorative provisions, President Biden committed, and Congress passed, momentous federal funding for the restorative practices highlighted in VAWA 2022.[136] In his proposed budget for Fiscal Year 2022 to the Department of Justice's Office on Violence Against Women, President Biden recommended a total of $28,000,000 in funding for "restorative justice programs, including $25 million in new funding for grants to support restorative justice responses" to gender-based violence.[137] The President's 2022 budget passed the Senate in an omnibus appropriations bill in March 2022, which ultimately provided $11,000,000 for "restorative justice responses to domestic violence, dating violence, sexual assault, and stalking" and $3,000,000 for a "national center on restorative justice."[138] According to the Department of Justice, restorative practices will serve as a remedy to the underreporting of VAWA crimes that occurs as a result of a survivor's ambivalence, fear, or distrust of the criminal justice system.[139]

133. *See OVW Grants and Programs*, U.S. DEP'T OF JUST., https://www.justice.gov/ovw/grant-programs#about (last visited Jan. 22, 2023) (notably, such grant programs include Grants to Support Families in the Justice System; Improving the Criminal Justice Response to Sexual Assault, Domestic Violence, Dating Violence, and Stalking Program; Legal Assistance for Victims Grant Program; and most relevant, Grants to Tribal Governments to Exercise Special Tribal Criminal Jurisdiction).

134. *See* § 12514. *See generally* Violence Against Women Reauthorization Act of 2022, S. 3623, 117th Cong. (2022) (as passed by Senate, Mar. 11, 2022). VAWA 2022

> would authorize the development and implementation of restorative practices in grant programs to encourage improvements and alternatives to the criminal justice system; to support families in the justice system, creating hope through outreach, options, services, and education . . . for children and youth; and to combat violent crimes on campuses.

EMILY J. HANSON & LISA N. SACCO, CONG. RSCH. SERV., R46742, THE VIOLENCE AGAINST WOMEN ACT (VAWA) REAUTHORIZATION: ISSUES FOR CONGRESS 9 (2021), https://sgp.fas.org/crs/misc/R46742.pdf.

135. *See* § 12514.

136. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2022 18 (2021); Michael Crowley, *Biden's Budget Steps up Spending for Criminal Justice Reform*, BRENNAN CTR. FOR JUST. (June 25, 2021), https://www.brennancenter.org/our-work/analysis-opinion/bidens-budget-steps-spending-criminal-justice-reform.

137. Crowley, *supra* note 136; *see* OFF. OF MGMT. & BUDGET, *supra* note 136, at 18.

138. Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, 136 Stat. 49, 122, 124.

139. U.S. DEP'T OF JUST., FY 2022 BUDGET REQUEST: ADDRESSING GENDER-BASED VIOLENCE 2 (2021), https://www.justice.gov/jmd/page/file/1398856/download ("[President Biden's] substantial investment will enable [the Office on Violence Against Women]

While critics of restorative justice do not think it offers strict enough punishment or deterrence for offenders of gender-based violence, many survivors do not seek assistance through the criminal justice system at all, and therefore many perpetrators remain immune from punishment.[140] In fact, one study found that between 2006 to 2015, law enforcement was not involved in "44% of incidents of intimate partner violence."[141] Many survivors fear retaliation and revictimization or do not have the legal resources and knowledge to navigate the criminal justice system.[142] Accordingly, President Biden's funding importantly incentivizes this portion of the survivor population to access justice and safety through an alternative, and less punitive, avenue to the criminal justice system.[143]

B. Can Restorative Practices Help Combat Domestic Violence?

The failures of the criminal justice system in responding to intimate partner violence and domestic violence have led to the urgent need for another solution.[144] The system fails to curb the high recidivism rates of

to test the efficacy of [restorative] practices and their uses in different types of communities."); STEWART WAKELING ET AL., POLICING ON AMERICAN INDIAN RESERVATIONS 13 (2001).

140. Lanni, *supra* note 26, at 675; BRIAN A. REAVES, POLICE RESPONSE TO DOMESTIC VIOLENCE, 2006-2015, at 3–6 (2017).

141. Goodmark, *supra* note 126, at 95.

142. *Id.*; *see* WAKELING ET AL., *supra* note 139, at 13 (citations omitted) ("[U]nderreporting is attributable to cultural and demographic factors that are highly characteristic of Indian Country. The extensive research literature on underreporting of crime cites distrust of police, the shame or humiliation associated with certain kinds of crime, and fear of retaliation as strong predictors of underreporting. These factors are unusually common in Native American communities."); *see also* Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native American Women from Domestic Violence*, 96 CALIF. L. REV. 185, 191 (2008) ("Statistics [on rates of violence against Native and indigenous women] are based solely on reported incidents and, therefore, overlook the large segment of crimes that go unreported. Incidents of domestic violence 'are significantly under-reported at all levels of society' . . . .").

143. U.S. DEP'T OF JUST., *supra* note 139, at 2 ("Restorative justice also has been identified as a strategy for addressing underreporting of sexual assault, domestic violence, and dating violence by offering victims an option for remedying the harm while also responding to their concerns about how they will be treated by the criminal justice systems.").

144. Laurie S. Kohn, *What's So Funny About Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention*, 40 SETON HALL L. REV. 517, 521 (2010) ("Although formal intervention systems vary from jurisdiction to jurisdiction, the consistent prevalence of intimate violence and homicide suggests that our current approach is not as effective as we might hope. Increasingly, advocates and system actors are acknowledging the shortcomings of our current interventions.").

perpetrators of domestic violence and the heightened risk of re-abuse.[145] Likewise, the mandatory intervention regimes employed by law enforcement agencies "tend to have an insignificant effect on victim safety" and in some instances may increase the risk of violence for victims.[146] Orders of protection are not a uniformly effective solution to combatting gender-based violence because they expire after a few years, and, for many survivors, there are too many legal, monetary, and social barriers to successfully getting one in the first instance.[147] Similarly, trials are often convoluted, time-consuming, and traumatic for survivors who relive their trauma in the courtroom without the definite assurance of obtaining a restraining order or of having their voice heard.[148]

Further, the term "restorative justice" encompasses a wide variety of processes and procedures, including victim-offender mediation, family group conferences, and sentencing circles.[149] Other practices include "victim–offender dialogue, victim impact panels, community reparation boards, circles of support . . . and conferencing."[150] Common to all of these practices is the emphasis on victim safety, perpetrator accountability, and a community-led reconciliation of the two.[151]

Scholars cite three essential theories to justify implementing a restorative justice model in domestic violence matters, as formulated by Dr. Lawrence W. Sherman.[152] The first theory is called "reintegrative shaming," which condemns the act instead of the actor, in direct contrast to the personal criminality attributed to the defendant in the criminal justice system.[153] The second theory is one of "procedural fairness," which emphasizes healing the emotions, particularly the prevailing trait of

145. *See id.* at 572–73, 573 nn.263–64.

146. *Id.* at 526.

147. *See id.* at 527 ("One very recent study of nearly 700 women found that three out of five women who obtained protection orders experienced recurrent violence in the ensuing period."); *see also* TK Logan et al., *Protective Orders: Questions and Conundrums*, 7 TRAUMA, VIOLENCE, & ABUSE 175, 185–86 (2006).

148. *See* Steven Cammiss, *The Management of Domestic Violence Cases in the Mode of Trial Hearing: Prosecutorial Control and Marginalizing Victims*, 46 BRIT. J. CRIMINOLOGY 704, 706 (2006).

149. Mary P. Koss, *The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes*, 29 J. INTERPERSONAL VIOLENCE 1623, 1624 (2014).

150. *Id.*

151. *See* Metoui, *supra* note 129, at 525–28.

152. Smith, *supra* note 129, at 938–39 ("Sherman asserts that restorative justice increases accountability of the offender through shaming mechanisms, while also allowing him to feel that he is treated fairly. He also believes that the process provides victims with more closure, as they are an integral part of the justice process and their emotional needs are explicitly addressed." (citing Lawrence W. Sherman, *Domestic Violence and Restorative Justice: Answering Key Questions*, 8 VA. J. SOC. POL'Y & L. 263, 270–72 (2000))).

153. *See id.* at 937–38.

anger, among perpetrators of domestic violence.[154] Lastly, the third theory is "routineness," which includes the active involvement of the family and community in reducing recidivism and offenders' re-abuse.[155]

Moreover, in many Native communities, restorative justice practices focus significantly on reintegrating the offender back into society because perpetrators often share a child with the survivor or live on the tribe's reservation.[156] Thus, the separate levels of criminality do not exist in a restorative system; all parties are equally members of the community and share the responsibility and power to rehabilitate and heal.[157] Restorative practices reform perpetrators through accountability because they "emphasize[] the wrongfulness of the offense while still maintaining respect for the offender."[158] Punishment, on the other hand, removes the offender from the tribal community, thereby inhibiting the opportunity to "develop[] ethical relationships within a community context."[159] As a result, heightened animosity and conflict lead to continued cycles of violence against women, particularly against Native and indigenous women.[160]

Furthermore, a Native conception of restorative justice relies on horizontal and community-centered practices, which are also traditional aspects of indigenous legal systems.[161] Many Native American communities commonly use a peacemaking circle, which resolves to consider the crime's impact and seeks "redress on all parties and the community as a whole."[162] For the Navajo Nation, as an example, indigenous custom requires that there be a consensus reached by communal dialogue and ceremony before resolving the conflict between perpetrator and survivor.[163] This consensus emerges from the

154. *See id.* at 938.

155. *Id.* at 938–39.

156. *See* Linda G. Mills, *The Justice of Recovery: How the State Can Heal the Violence of Crime*, 57 HASTINGS L.J. 457, 476 (2006); Yazzie, *supra* note 130, at 182.

157. Metoui, *supra* note 129, at 520.

158. Lanni, *supra* note 26, at 647.

159. Halldin, *supra* note 8, at 17.

160. *See id.* at 16–17.

161. Metoui, *supra* note 129, at 520 (footnotes omitted) ("A horizontal system of justice, by contrast, distributes power equally without regard to hierarchy. Under this model, participants within a conflict, whether direct or indirect, form equally important links in the chain of conflict resolution. Robert Yazzie, Chief Justice of the Supreme Court of the Navajo Nation, likens a horizontal justice system to a circle. Yazzie explains that 'in a circle, there is no right or left, nor is there a beginning or an end; every point (or person) on the line of a circle looks to the same center as the focus.'" (quoting Yazzie, *supra* note 129, at 180)).

162. *Id.* at 527.

163. Yazzie, *supra* note 129, at 184–85; Meyer, *supra* note 129, at 49 (citations omitted) ("The European concept of 'crime' is instead referred to by Navajos as 'disharmony'; the

involvement of and participation from the community.[164] Bringing justice to a survivor is more important than attributing fault to a perpetrator in a system of distributive justice like that of the Navajo Nation.[165]

While the scholarship on the efficacy of restorative justice in addressing gender-based violence has not reached any definitive conclusion, there is some promising research noting its success.[166] For example, in studies analyzing whether restorative justice conferences reduced recidivism in domestic violence crimes, the results revealed that "on average, [restorative justice conferences] cause[d] a modest but highly cost-effective reduction in the frequency of repeat offending."[167] Another study found that survivors who are randomly assigned to participate in restorative practices "are more likely to show future psychological benefits from the [restorative] process" than survivors assigned to the traditional criminal justice process, proving that the methodology's emphasis on survivor safety and healing advances survivor satisfaction.[168] Importantly, the emphasis on honest dialogue allows survivors of gender-based violence to process trauma and reclaim their narratives by remembering and speaking about the traumatic

primary goals of the traditional Navajo system are to restore victims and, most important, the rule breakers themselves to harmony.").

164. Meyer, *supra* note 129, at 51.

165. Yazzie, *supra* note 129, at 185.

166. *See, e.g.*, Linda G. Mills et al., *A Randomized Controlled Trial of Restorative Justice-Informed Treatment for Domestic Violence Crimes*, 3 NATURE HUM. BEHAVIOUR 1284, 1287 (2019); Lawrence W. Sherman et al., *Effects of Face-to-Face Restorative Justice on Victims of Crime in Four Randomized, Controlled Trials*, 1 J. EXPERIMENTAL CRIMINOLOGY 367, 390–91 (2005). For an examination of a feminist criticism of restorative practices for gendered violence, see Melanie Randall, *Restorative Justice and Gendered Violence? From Vaguely Hostile Skeptic to Cautious Convert: Why Feminists Should Critically Engage with Restorative Approaches to Law*, 36 DALHOUSIE L.J. 461, 486–87 (2013) ("The failings of restorative justice in relation to gendered violence to date . . . are largely failings because the restorative approach has not been done properly (or has not been tried at all) . . . . Insider knowledge of the complex gendered dynamics of sexual violence and violence against women in intimate relationships is the critical starting point and touchstone for the development of any appropriate restorative justice approaches to crimes of gendered violence.").

167. Mills et al., *supra* note 166, at 1287.

168. *See* Sherman et al., *supra* note 166, at 372. The caveat, however, is that the effectiveness of restorative justice practices relies heavily on the victim's desire to resolve the conflict with the perpetrator. *See id.* at 390 ("If the victim's own commitment to shared morality is best indicated by the level of the victim's willingness to obey the law, then [restorative justice] clearly increases that commitment. Victim desire for violent revenge against the offender is consistently and strongly reduced by random assignment to [restorative justice].").

events, thereby offering immense psychological benefits that the criminal justice system often cannot provide.[169]

The predominant results of restorative justice's efficacy in combatting gender-based violence, albeit hopeful, are limited. However, VAWA 2022's restorative practices provisions will have a great impact on the national response to violence against women on the federal, state, local, and tribal levels. Partisanship always holds a grip over any piece of legislation and over the federal branches of government. Nevertheless, with the implementation of VAWA 2022, survivors across the country, many of whom are unable to utilize and ultimately benefit from the criminal justice system, have an alternate and promising avenue of justice whose efficacy will likely be proven over time and with the support of VAWA's delegated federal resources.

C. Does Restorative Justice's Efficacy Even Matter?

While VAWA 2022's importance stems from the substantive rights it provides, its restorative practices provisions offer a novel opportunity to frame the national conversation on how to confront gender-based violence. Opponents argue that the restorative justice language should be omitted from VAWA because the results of its efficacy in preventing instances of gender-based violence are inconclusive.[170] But maybe that is not the point after all. VAWA 2022's restorative justice provisions, moreover, honor a holistic concept of justice, one that includes practices traditional to various Native communities in this country.

If nothing else, the restorative practices language recognizes, honors, and empowers a tribal conception of justice underlying the entire jurisdictional debate between tribes, the federal government, and states that the doctrine of STCJ seeks to resolve. By offering this alternative

169. *See* C. Quince Hopkins, *Tempering Idealism with Realism: Using Restorative Justice Processes to Promote Acceptance of Responsibility in Cases of Intimate Partner Violence*, 35 HARV. J.L. & GENDER 311, 322–24, 335 (2012).

170. *See, e.g.*, Barbara Hudson, *Restorative Justice and Gendered Violence: Diversion or Effective Justice?*, 42 BRIT. J. CRIMINOLOGY 616, 622–24 (2002); Ruth Lewis et al., *Law's Progressive Potential: The Value of Engagement with the Law for Domestic Violence*, 10 SOC. & LEGAL STUD. 105, 108, 123 (2001) ("Conferencing represents the most recent entrant into a long list of previous attempts to 'divert' violence against women away from the justice system and into the hands of others."); Sara Cobb, *The Domestication of Violence in Mediation*, 31 LAW & SOC'Y REV. 397, 414–16, 421 (1997) (arguing that mediation does not punish perpetrators or protect victims and that it abrogates the wrongness element of the crime); C. Quince Hopkins et al., *Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23 ST. LOUIS. U. PUB. L. REV. 289, 302–03 (2004) (describing a feminist concern that restorative justice's "face-to-face approach may either intentionally or unintentionally pressure the victim into returning to a potentially dangerous relationship").

means to combat gender-based violence, VAWA 2022 admits that despite the incredible significance the legislation has had over multiple decades, more must be done. Furthermore, restorative justice's efficacy, while obviously influential in understanding how to address violence against women, is not the limit by which the impact of the Act's restorative practices provisions must be judged.[171] VAWA 2022's restorative practices provisions offer a novel and necessary jurisprudential viewpoint to combat gender-based violence and meaningfully honor indigenous cultures and traditions, especially those pertaining to conceptions of tribal justice.

CONCLUSION

The Violence Against Women Reauthorization Act of 2013 created Special Domestic Violence Criminal Jurisdiction, a doctrine that delegates to tribes the inherent power to prosecute non-Native individuals with substantial ties to a tribe where they committed a VAWA crime. The Violence Against Women Reauthorization Act of 2022 expands upon VAWA 2013's original SDVCJ provisions, renaming the doctrine Special Tribal Criminal Jurisdiction. The 2022 Act increases the scope of crimes encompassed under STCJ and subtly curtails VAWA 2013's substantial ties requirement, thereby increasing the breadth of tribal criminal jurisdiction over VAWA crimes committed on tribal land. Additionally, VAWA 2022 also includes, for the first time, restorative practices provisions. Restorative justice is often used in tribal legal systems as an alternative to a retributive criminal justice system and emphasizes community-wide participation in confronting and reducing gender-based violence.

Further, the Supreme Court's federal Indian law jurisprudence, Congress's plenary power over Native affairs, and modern case law support the constitutionality of VAWA 2022's STCJ provisions, despite

171. A common criticism to restorative justice as a response to gender-based violence is that it appears effective in theory but not in practice. However, change comes after failure in practice, and theory is a prerequisite for practice:

> Reform movements inevitably take their impetus in large part from failings in practice, and the replacement has to be argued for in theory before it can be put into practice. The point . . . here is . . . why after several years of consciousness-raising, of efforts to improve police practice through the use of specialized officers in domestic violence units, rape suites and the like, of a certain amount of legal reform in respect of rape, of a greater willingness to hear women's support groups and feminist psychologists as "expert witnesses" in domestic violence cases, domestic and sexual violence cases are still regarded as massively under-reported, and conviction rates for rape appear to have declined rather than increased.

Hudson, *supra* note 170, at 623.

the Act's exclusion of VAWA 2013's substantial ties requirement. As such, Congress did not exceed the scope of its powers in legislating VAWA 2022, thus the law and specifically its STCJ provisions are a constitutional delegation of congressional authority. Finally, VAWA 2022's restorative practices provisions offer a novel jurisprudential perspective on justice for survivors, rooted in tribal justice and tradition, which will ultimately improve the federal response to combatting gender-based violence.