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## An Era Of Continued Neglect: Assessing the Impact of Congressional Exemptions for Alaska Natives

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# AN ERA OF CONTINUED NEGLECT: ASSESSING THE IMPACT OF CONGRESSIONAL EXEMPTIONS FOR ALASKA NATIVES

**Abstract:** Although Native Americans in the contiguous United States have benefited from recent congressional reforms, Alaska Native communities were largely ignored. Despite the widely acknowledged crisis of sexual assault and domestic violence in rural Alaska Native communities, Congress has explicitly exempted Alaska from legislation that would otherwise give people in these communities the ability to protect themselves. Although public outcry has prompted pending legislation in Congress to repeal some of these exemptions, such as the Alaska Safe Families and Villages Act, even that legislation does not go far enough to achieve a permanent and effective solution to what is a life-or-death problem for many Alaska Natives. This Note argues that Congress and the State of Alaska should expand Alaska Native tribal sovereignty to give Alaska Native communities the ability to stem the tide of this epidemic.

## INTRODUCTION

In October 2005, a twenty-six year old man in the Alaska Native<sup>1</sup> village of Nunam Iqua beat his wife with a shotgun, pistol-whipped a friend, and raped his thirteen-year-old stepdaughter in front of three other children.<sup>2</sup> This rampage lasted eight hours, exacerbated by a complete absence of law enforcement in this small rural Alaskan village of 200 people.<sup>3</sup> With the closest law enforcement presence 150 miles away and unreachable by roads, it took Alaska State Troopers four hours to arrive at Nunam Iqua and arrest the perpetrator.<sup>4</sup>

Crimes of sexual assault and domestic violence like those experienced in Nunam Iqua are frequent occurrences in rural Alaska.<sup>5</sup> Alaskan women are two

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<sup>1</sup> In this Note, the term “Alaska Native” refers collectively to the indigenous peoples of Alaska, including the Tlingit, Haida, Aleut, Athabascan, Yup’ik, and Inupiat peoples.

<sup>2</sup> See AMNESTY INT’L, MAZE OF INJUSTICE 41 (2007), available at <http://www.amnestyusa.org/pdfs/mazeofinjustice.pdf>, archived at <http://perma.cc/79RR-W3NA>; Laura S. Johnson, *Frontier of Injustice: Alaska Native Victims of Domestic Violence*, 8 THE MODERN AMERICAN 2, 2 (2012), available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1168&context=tma>, archived at <http://perma.cc/55TE-3L3W>; Megan Holland, *Village Man Arrested Following Eight-Hour Rampage*, ANCHORAGE DAILY NEWS, Oct. 25, 2005, at A1.

<sup>3</sup> See Holland, *supra* note 2.

<sup>4</sup> See *id.*

<sup>5</sup> See INDIAN LAW AND ORDER COMM’N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER 41 (2013) [hereinafter ROADMAP], available at <http://www.aisc.ucla.edu/iloc/report/index.html>, archived at <http://perma.cc/T2PM-78W7> (noting that “Alaska Natives are disproportionately affected by

and a half times more likely to experience sexual assault and domestic violence in their lifetime than the national average, and Alaska Native women are ten times more likely to be a victim of such attacks than all other Alaskan women.<sup>6</sup> Over fifty-eight percent of Alaskan women have experienced violence by an intimate partner or other sexual violence in their lifetime, and more than seventy-five communities in Alaska have no law enforcement presence whatsoever.<sup>7</sup>

Because of these problems and others, on November 12, 2013, the Indian Law and Order Commission (“ILOC”) published its recommendations for Native American and Alaska Native criminal justice systems to the President of the United States and Congress.<sup>8</sup> In this report, the ILOC criticized Alaska’s centralized law enforcement system and urged Congress to enact legislation that would grant Alaska Native tribes increased tribal jurisdiction to solve this long-standing problem.<sup>9</sup>

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crime”); *see also* Sari Horwitz, *In Rural Villages, Little Protections for Alaska Natives*, WASH. POST, Aug. 3, 2014, at A1 (detailing how it took law enforcement eleven hours to respond to an apparent homicide of a thirteen-year-old girl in the Alaska Native community of Kake).

<sup>6</sup> *See* Brentin Mock, *Examining Palin’s Record on Violence Against Women*, AMERICAN PROSPECT (Sept. 18, 2008) <http://prospect.org/article/examining-palins-record-violence-against-women>, archived at <http://perma.cc/T5GF-XUH3> (citing Alaska’s high rates of sexual assault and domestic violence).

<sup>7</sup> *See* ROADMAP, *supra* note 5, at 39; STATE OF ALASKA COUNCIL ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT, KEY RESULTS FROM THE 2010 ALASKA VICTIMIZATION SURVEY 2 (2010) [hereinafter 2010 ALASKA VICTIMIZATION SURVEY], available at [http://justice.uua.alaska.edu/research/2010/1004.avs\\_2010/1004.07a.statewide\\_summary.pdf](http://justice.uua.alaska.edu/research/2010/1004.avs_2010/1004.07a.statewide_summary.pdf), archived at <http://perma.cc/CXA3-PSF9>. Estimates of intimate partner and sexual violence tend to be conservative due to a stigma of reporting. *See* 2010 ALASKA VICTIMIZATION SURVEY, *supra* at 2. The lack of law enforcement presence is largely due to a lack of resources. *See* *Legislative Hearing on S. 1192, Alaska Safe Families and Villages Act of 2011, and S. 1763, Stand Against Violence and Empower Native Women Act Before S. Comm. on Indian Affairs*, 112th Cong. 2 (2011) [hereinafter *Masters Testimony*] (written testimony of Joseph Master, Comm’r, Alaska Dep’t of Pub. Safety), available at [http://www.indian.senate.gov/sites/default/files/upload/files/old\\_hearings/JoeMasterstestimony111011&pageid=9515.pdf](http://www.indian.senate.gov/sites/default/files/upload/files/old_hearings/JoeMasterstestimony111011&pageid=9515.pdf), archived at <http://perma.cc/H54V-L763>.

<sup>8</sup> *See* ROADMAP, *supra* note 5, at 185 (describing the ILOC’s findings to the President and Congress); Richard Mauer, *Panel Slams Village Justice System*, ANCHORAGE DAILY NEWS, Nov. 14, 2013, at A1 (noting that the report was released that week). The ILOC was established by the Tribal Law and Order Act of 2010 (“TLOA”). Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 235, 124 Stat. 2261, 2282–86 (2010) (codified as amended in 25 U.S.C. § 2812 (2012)).

<sup>9</sup> ROADMAP, *supra* note 5, at 35, 55 (reporting the ILOC’s conclusion that the centralized form of law enforcement in Alaska fails to properly handle crime in Alaska Native communities and recommending that Congress give the communities criminal jurisdiction); *see* Mauer, *supra* note 8 (characterizing the ILOC’s chapter on Alaska as “blistering”); *see also* Dana Fabe, Chief Justice, Sup. Ct. of Alaska, State of the Judiciary Address (Feb. 13, 2013) [hereinafter *State of the Judiciary*] (transcript available at <http://courts.alaska.gov/soj/state13.pdf>, archived at <http://perma.cc/S9L7-WXAF>) (recalling that Alaska Native communities have needed help for over two decades). Increasing law enforcement in rural Alaska Native communities would not solve the inherent problems associated with administering justice from afar. *See* ROADMAP, *supra* note 5, at 35 (arguing that Alaska Native communities are better positioned to act with law enforcement authority than the State); Interview with Lloyd Benton Miller, Partner, Sonosky, Chambers, Sachse, Endreson & Perry LLP, in Anchorage,

In Alaska's current political climate, the release of the ILOC's report could not have come at a more relevant time.<sup>10</sup> In recent years, the State of Alaska has challenged Alaska Native rights in high profile court cases concerning subsistence hunting and fishing and tribal jurisdiction over child custody cases.<sup>11</sup> After an extensive history of state governmental resistance to the expansion of tribal jurisdiction in the courts, the current administration in Alaska appears willing to explore the possibility of expanding some concurrent criminal jurisdiction to include Alaska Native tribal courts.<sup>12</sup> All of this is occurring against a backdrop of the Alaska Governor's "Choose Respect" media campaign to combat domestic violence and sexual assault in Alaska.<sup>13</sup>

Given the current focus on the subject, this Note proposes meaningful solutions for reversing the problems of sexual assault and domestic violence by

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Alaska (Mar. 4, 2014) (notes on file with author) (characterizing Alaska's centralized law enforcement as the "least able and least responsible").

<sup>10</sup> See Mauer, *supra* note 8 (noting that Alaska's governor submitted a proposal to an Alaska Native tribal coalition the same day that would allow for some misdemeanor prosecutions in tribal courts). Alaska U.S. Senator Mark Begich asked for a hearing on the ILOC's chapter on Alaska shortly after its release. Press Release, U.S. Senator Mark Begich, Begich Calls Findings of Report on Public Safety in Rural Alaska "Horrific" (Nov. 21, 2013) (available at <http://www.begich.senate.gov/public/index.cfm/pressreleases?ID=3ec91689-8cd7-43c7-bc3a-687abfba3b5d>, archived at <http://perma.cc/T4PV-W6UW>) (conveying concern for the "public safety inequalities in Alaska villages").

<sup>11</sup> See *John v. Alaska*, 720 F.3d 1214, 1218 (9th Cir. 2013), cert. denied, 134 S. Ct. 1759 (Mar. 31, 2014) (addressing Alaska Native subsistence rights); *Simmonds v. Parks*, 329 P.3d 995, 998–99 (Alaska 2014) (addressing whether an Alaska Native tribal court could terminate parental rights from a non-member parent); Richard Mauer, *Natives Protest Parnell's Decision*, ANCHORAGE DAILY NEWS, Nov. 6, 2013, at A1 [hereinafter Mauer, *Natives Protest Parnell's Decision*] (reporting on the State of Alaska's petition for writ of certiorari in *John v. Alaska*); Richard Mauer, *State Goes to Bat for Rights of Convicted Wife-Beater*, ANCHORAGE DAILY NEWS, Aug. 26, 2013, at A1 [hereinafter Mauer, *State Goes to Bat for Rights of Convicted Wife-Beater*] (explaining the State of Alaska's lawsuit challenging a tribal court's finding that a parent in a child custody claim was declared an unfit parent).

<sup>12</sup> See Kyle Hopkins, *Parnell: Give Tribes Some Violence, Alcohol Cases*, ANCHORAGE DAILY NEWS, Oct. 25, 2013, at A3 (reporting that Alaska's Governor announced that he is considering giving limited criminal jurisdiction to tribal courts); *Tribal Courts Role Expanded in Rural Alaska*, (KTUU television broadcast Aug. 18, 2014), available at <http://m.ktuu.com/news/tribal-courts-role-expanded-in-rural-alaska/27595624>, archived at <http://perma.cc/P49Y-QXFC> (reporting that the State of Alaska will now partner with Alaska Native tribal courts to allow tribal prosecutions of over forty minor offenses on a voluntary basis without the possibility of incarceration). Some have considered this political posturing in anticipation of the next gubernatorial race. See Julia O'Malley, *Leader Tells of Struggles with Alcohol*, ANCHORAGE DAILY NEWS, Oct. 25, 2013, at A1 (noting that the Governor's announcement preceded a speech given by an Alaska Native gubernatorial challenger).

<sup>13</sup> See *Choose Respect*, OFFICE OF THE GOVERNOR OF ALASKA <http://gov.alaska.gov/parnell/priorities/public-safety/choose-respect.html>, archived at <http://perma.cc/M9CP-666Q> (last visited Sept. 7, 2014) (highlighting the increase in support of his Choose Respect campaign since its announcement in December 2009); John Sutter, *The Rapist Next Door*, CNN (Feb. 4, 2014), <http://www.cnn.com/interactive/2014/02/opinion/sutter-change-alaska-rape/index.html>, archived at <http://perma.cc/DEM2-CYS5> (reporting that Alaska has the highest rate of rape in the country, which is three times above the national average).

granting Alaska Natives increased tribal jurisdiction.<sup>14</sup> Part I provides an overview of the social and legal status of Alaska Natives.<sup>15</sup> Part II then examines recent congressional actions and how both the U.S. Congress and the State of Alaska have been unable to give the necessary authority to Alaska Natives to help police their own communities.<sup>16</sup> Finally, Part III proposes solutions which grant additional tribal jurisdiction to Alaska Native communities while protecting defendants' constitutional rights.<sup>17</sup>

## I. THE FIRST ALASKANS OF THE LAST FRONTIER: AN OVERVIEW OF ALASKA NATIVE TRIBAL JURISDICTION

Native American and Alaska Native law is both obscure and complex, and an understanding of historical context is necessary to appreciate the current legal status of tribal jurisdiction.<sup>18</sup> Section A of this Part begins by explaining the current challenges facing Alaska Natives.<sup>19</sup> Section B summarizes the pertinent statutes and judicial decisions in Native American law over the past two hundred years.<sup>20</sup> Section B then outlines Alaska Native law by deconstructing the relevant statutory and common law.<sup>21</sup>

### *A. Harsh Realities: Contemporary Challenges Facing Alaska Natives*

According to the U.S. Bureau of Indian Affairs, there are 229 tribes in Alaska, comprising roughly forty percent of all federally recognized tribes in the United States.<sup>22</sup> Alaska Natives comprise around fifteen percent of Alaska's population and are fully integrated into the politics and economy of the State.<sup>23</sup>

<sup>14</sup> See *infra* notes 160–244 and accompanying text.

<sup>15</sup> See *infra* notes 18–99 and accompanying text.

<sup>16</sup> See *infra* notes 100–159 and accompanying text.

<sup>17</sup> See *infra* notes 160–244 and accompanying text.

<sup>18</sup> See ROBERT T. ANDERSON ET AL., *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 1, 15 (2d ed. 2010) (describing the complexity and foreign nature of Native American law generally and emphasizing the importance of history in understanding Native American law); see also DAVID S. CASE & DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS* 2–4 (3d ed. 2012) (noting that current Justices still rely on three foundational decisions by Chief Justice John Marshall in deciding Native American issues).

<sup>19</sup> See *infra* notes 22–33 and accompanying text.

<sup>20</sup> See *infra* notes 34–99 and accompanying text.

<sup>21</sup> See *infra* notes 34–99 and accompanying text.

<sup>22</sup> ROADMAP, *supra* note 5, at 35 (noting that Alaska is home to approximately 40% of the federally recognized tribes in the U.S.); *Alaska Region Overview*, U.S. DEP'T OF THE INTERIOR: BUREAU OF INDIAN AFFAIRS, <http://www.bia.gov/WhoWeAre/RegionalOffices/Alaska/index.htm>, archived at <http://perma.cc/58W3-ZZD4> (last visited Sept. 7, 2014) (reporting that there are currently 229 federally recognized tribes in Alaska).

<sup>23</sup> See CASE & VOLUCK, *supra* note 18, at 198 (reporting that about 25% of Alaska's economy is attributable to Alaska Native Regional Corporations); STEPHEN HAYCOX, *FRIGID EMBRACE* 15 (2002) (hypothesizing that Alaska Natives are the most politically empowered Native American group); Kirk Johnson, *Alaska Race Sees Democrat Quit Campaign for Governor*, N.Y. TIMES, Sept. 3,

Due to the climate and vastness of Alaska, the practical challenges faced by Alaska Natives are unlike those faced by Native Americans in the contiguous United States.<sup>24</sup>

Alaska Natives also constitute a diverse array of communities and opinions.<sup>25</sup> With high unemployment forcing large numbers of Alaska Natives to move from rural Alaska into larger cities to find employment, there is a large and growing divide between rural and urban groups of Alaska Natives.<sup>26</sup> Additionally, there is a growing gap between Alaska Natives who are shareholders in an Alaska Native Regional Corporation and those who are not.<sup>27</sup> This structure has been subject to a great deal of criticism about whether these corporations create perverse incentives which pit rural Alaska Natives against those living in urban areas, because urban shareholders may care more about dividends and less about supporting and maintaining life in rural communities.<sup>28</sup>

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2014, at A12 (reporting that an Alaska Native candidate is running for Lieutenant Governor of Alaska); *State and County QuickFacts: Alaska*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/02000.html>, archived at <http://perma.cc/DM7V-NS7C> (last updated July 8, 2014) (finding that 14.8% of Alaska's population identifies itself as "American Indian and Alaska Native alone" in 2012).

<sup>24</sup> See STEPHEN HAYCOX, *ALASKA: AN AMERICAN COLONY*, at vii, x (2002) (characterizing Alaska as "a vast, rugged, beautiful land"); Tegan Hanlon, *Medicaid Ruling Hurts Natives*, ANCHORAGE DAILY NEWS, Dec. 29, 2013, at A1 (describing the third-world conditions in Alaska Native communities is caused by their remoteness); *Anchorage Facts & Figures*, ANCHORAGE CONVENTION & VISITORS BUREAU, <http://www.anchorage.net/media/anchorage-facts>, archived at <http://perma.cc/4A2R-MD7X> (last visited Sept. 7, 2014) (highlighting that Alaska is "1/5 the size of the contiguous" United States). To provide context, Alaska has such a low population density, that if the same average population density was applied to the island of Manhattan, only 28.4 people would live there. *Compare 2010 Census: Table 14*, U.S. CENSUS BUREAU <https://www.census.gov/compendia/statab/2012/tables/12s0014.pdf>, archived at <http://perma.cc/S3GE-KRMB> (reporting Alaska's population density as 1.2 per square mile), with *NYC Statistics*, NYC & Co., <http://www.nycgo.com/articles/nyc-statistics-page>, <http://perma.cc/G3DS-GZRP> (last visited Sept. 7, 2014) (identifying the size of Manhattan as being 23.7 square miles).

<sup>25</sup> See CASE & VOLUCK, *supra* note 18, at 198 (noting diversity in Alaska Native communities); ROADMAP, *supra* note 5, at 35 (noting that there are 229 federally recognized tribes in Alaska).

<sup>26</sup> See INSTITUTE OF SOCIAL & ECONOMIC RESEARCH, *STATUS OF ALASKA NATIVES I*, 11, 20 (2004), available at [http://www.iser.uaa.alaska.edu/Publications/8\(a\)/e-book%20layout/B/B.1/Status%20of%20AK%20Natives.pdf](http://www.iser.uaa.alaska.edu/Publications/8(a)/e-book%20layout/B/B.1/Status%20of%20AK%20Natives.pdf), archived at <http://perma.cc/SJV8-TDVG> (recording that around 42% of Alaska Natives live in urban areas as of 2004, with that number expected to climb to over 50% by 2020 and that this drive to urban centers is caused by low job rates in rural areas); Horwitz, *supra* note 5 (reporting that the Alaska Native community of Kake has an unemployment rate of 80%). In fact, one study found unemployment to be more of a problem than alcohol in Alaska Native communities. See Kyle Hopkins, *Village Alcohol Bans Fail to Impact Suicide Rates*, ANCHORAGE DAILY NEWS, May 7, 2014, at A1 (reporting on a study that found villages that banned alcohol were less effective at deterring suicide than villages with economic opportunities).

<sup>27</sup> See CASE & VOLUCK, *supra* note 18, at 190–93, 198 (explaining that potentially as many as half of Alaska Natives today do not have stock because it was issued to those alive on December 18, 1971 and many born since then have not inherited or otherwise been issued stock).

<sup>28</sup> See HAYCOX, *supra* note 23, at 130–33 (highlighting the range of opinions about Alaska Native Regional Corporations and overall influence); Alan Boraas, Op-Ed., *Indian Country Status Could Help Alaska Villages*, ANCHORAGE DAILY NEWS, May 9, 2014, available at <http://www.adn.com/>

Alaska Natives are far more likely to be subject to a host of social ills than most U.S. citizens.<sup>29</sup> For example, Alaska Natives currently make up a disproportionate thirty-seven percent of the state's prison population.<sup>30</sup> Alaska Native women are two and a half times more likely to be victims of domestic violence and assault, and comprise forty-seven percent of the reported rape victims in Alaska.<sup>31</sup> Alaska Native suicide rates are around four times the national average.<sup>32</sup> These striking numbers have concerned leaders in the State of Alaska for decades and continue to be the subject of much debate and effort.<sup>33</sup>

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article/20140509/alan-boraas-indian-country-status-could-help-alaska-villages?sp=99/328//, archived at <http://perma.cc/8C8V-FBUZ> (opining that Alaska Native Regional Corporations “are designed to make money for shareholders, not solve social problems”).

<sup>29</sup> See, e.g., Tribal Law and Order Act, Pub. L. 111-211, 124 Stat. 2258, § 202(a)(5)(B) (2010) (codified as amended in 25 U.S.C. § 2801(a)(5)(B) (2012)) (finding that “34 percent of American Indian and Alaska Native women will be raped in their lifetimes”); Jennifer Canfield, *Report: Safety, Justice Systems in Rural Alaska Worst in U.S.*, JUNEAU EMPIRE, Nov. 29, 2013, at A1, available at <http://juneauempire.com/state/2013-11-29/report-safety-justice-systems-rural-alaska-worst-us#.UuPpFhAo5pg>, archived at <http://perma.cc/CKB5-W56H> (characterizing rural Alaska's safety as “the worst in the United States”); Hanlon, *supra* note 24 (analogizing conditions in rural Alaska to third-world countries).

<sup>30</sup> See 2012 Offender Profile, ALASKA DEP'T OF CORR., 13 (2013) [http://www.correct.state.ak.us/admin/docs/2012Profile07\\_FINAL.pdf](http://www.correct.state.ak.us/admin/docs/2012Profile07_FINAL.pdf), archived at <http://perma.cc/EH2G-7QZF>.

<sup>31</sup> See ROADMAP, *supra* note 5, at 41.

<sup>32</sup> *Id.* at 43.

<sup>33</sup> See Richard Mauer, *House Panel Says It Will Act on Federal Report on Rural Crime*, ANCHORAGE DAILY NEWS, Mar. 12, 2014, at B1 (reporting on a hearing in the Alaska State Legislature on the ILOC's Report); John D. Sutter, *Governor: 'Alaska Has an Epidemic'*, CNN (Feb. 7, 2014), <http://www.cnn.com/2014/02/03/opinion/sutter-alaska-rape-governor/index.html>, archived at <http://perma.cc/WM7Q-5KP8> (reporting that Alaska Governor Sean Parnell characterizes the violence against women in Alaska as an “epidemic”); Press Release, U.S. Senator Mark Begich, *supra* note 10 (emphasizing that the underlying problems plaguing Alaska Native communities “cannot be ignored”); State of the Judiciary, *supra* note 9 (noting that rural Alaskan communities “still ‘cry out’ for meaningful solutions”). Some argue that increasing the police presence in rural Alaska Native communities will help reverse the numbers. See Becky Bohrer, *Alaska Seeks Ways to Bolster Village Public Safety Officers*, FAIRBANKS DAILY NEWS MINER (Feb. 11, 2013), [http://www.newsminer.com/news/alaska\\_news/alaska-seeks-ways-to-bolster-village-public-safety-officers/article\\_7895316e-747c-11e2-a4a7-0019bb30f31a.html](http://www.newsminer.com/news/alaska_news/alaska-seeks-ways-to-bolster-village-public-safety-officers/article_7895316e-747c-11e2-a4a7-0019bb30f31a.html), archived at <http://perma.cc/G279-AD79> (reporting that rural Alaskan communities with a law enforcement presence experience 40% fewer serious injuries caused by assaults and a 350% increase in the likelihood that sexual assault cases will be prosecuted); Interview with Lloyd Benton Miller, *supra* note 9 (applauding Governor Parnell for increasing law enforcement in rural Alaska). *But cf.* Masters Testimony *supra* note 7 (applauding the State of Alaska's efforts at bringing the number of communities without law enforcement down to only seventy-five). Others argue, which is the subject of this Note, that giving Alaska Natives increased tribal jurisdiction can also improve the situation. See ANDERSON ET AL., *supra* note 18, at 532–33 (highlighting the inability of non-tribal law enforcement to police tribal areas); ROADMAP, *supra* note 5, at 35 (arguing that Alaska Native communities are better positioned to act with law enforcement authority than the State); Rachel King, *Bush Justice: The Intersection of Alaska Natives and the Criminal Justice System in Rural Alaska*, 77 OR. L. REV. 1, 46–57 (1998) (recommending that Alaska Native communities be given prosecutorial powers over some criminal matters); Interview with Lloyd Benton Miller, *supra* note 9 (characterizing Alaska's centralized law enforcement as “least able and least responsible”).

### *B. Defining Sovereignty: Alaska Native Tribal Jurisdiction Today*

The relationship between the federal government and Alaska Natives is much different than that of their Native American counterparts in the contiguous United States.<sup>34</sup> Subsection 1 provides context by explaining the scope of Native American tribal jurisdiction.<sup>35</sup> Subsection 2 summarizes the relationship between Alaska Natives and the federal government prior to the Alaska Native Claims Settlement Act (“ANCSA”) of 1971.<sup>36</sup> Subsection 3 focuses on the impacts of ANCSA, and how the U.S. Supreme Court rejected Alaska Native territorial jurisdiction and sovereignty because of the terms of that settlement.<sup>37</sup> Subsection 4 then examines how Alaskan courts have subsequently interpreted federal common law, and the current scope of Alaska Native tribal jurisdiction.<sup>38</sup> Finally, Subsection 5 explains the current uses and functionality of Alaska Native tribal courts.<sup>39</sup>

#### 1. Providing Context: A Brief Examination of Native American Tribal Jurisdiction

The U.S. Constitution grants Congress plenary power to “regulate Commerce . . . with the Indian Tribes.”<sup>40</sup> Because of the Commerce Clause, coupled with the Supremacy Clause,<sup>41</sup> the U.S. Supreme Court has consistently held that Congress has full plenary powers with regard to Native Americans.<sup>42</sup>

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<sup>34</sup> See HAYCOX, *supra* note 23, at 51 (recounting differences between Alaska Natives and Native Americans, including a lack of treaties, recognized tribes, and reservations); DONALD CRAIG MITCHELL, SOLD AMERICAN 11 (1997) [hereinafter MITCHELL, SOLD AMERICAN] (discussing how Alaska Natives were treated differently than Native Americans). Many of these differences can be explained by timing and geography. See MITCHELL, *supra* at 11 (noting how Alaska Natives were different than most Native Americans because Alaska Natives lived in villages and there was little demand for land for settlers in Alaska); Donald Craig Mitchell, *Alaska v. Native Village of Venetie: Statutory Construction or Judicial Usurpation? Why History Counts*, 14 ALASKA L. REV. 353, 357 (1997) [hereinafter Mitchell, *Why History Counts*] (opining about how Congress’s policy toward Native Americans changed at the time of Alaska’s purchase). *But see* ERNEST GRUENING, THE STATE OF ALASKA, at xvii (1968) (arguing that the relationship between Alaska and the Federal government was largely shaped by neglect).

<sup>35</sup> See *infra* notes 40–49 and accompanying text.

<sup>36</sup> See *infra* notes 50–64 and accompanying text.

<sup>37</sup> See *infra* notes 65–79 and accompanying text.

<sup>38</sup> See *infra* notes 80–89 and accompanying text.

<sup>39</sup> See *infra* notes 90–99 and accompanying text.

<sup>40</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>41</sup> See *id.*, art. VI, cl. 2.

<sup>42</sup> See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (“[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.”); *CASE & VOLUCK, supra* note 18, at 20–21 (noting Congress’s assertion of plenary power over Native Americans); see also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (characterizing Native Americans as “domestic dependent nations”). Scholars note that many early foundational decisions relating to Native American law contain undertones of racial prejudice. See *CASE & VOLUCK, supra* note 18, at 3 (highlighting recent scholarly criticism for early Native Ameri-

Congress has exercised its plenary power over Native Americans in a variety of ways that have led to the present legal landscape.<sup>43</sup> Prior to the Civil War, the main congressional policy objective was to use treaties to force Native Americans on to reservations to make room for continued westward expansion.<sup>44</sup> During this period, Congress enacted the Indian Trade and Intercourse Act in 1834, defining “Indian country” as land “west of the Mississippi . . . .”<sup>45</sup> In 1887, Congress advanced a new policy of assimilation by enacting the Indian General Allotment Act, which purported to eventually eliminate the reservation system by educating Native Americans and giving them allotments of land with the hope of incorporating them as American citizens in the future.<sup>46</sup>

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can decisions); Sherry Salway Black, *American Indian Tribes and Structural Racism*, 17 POVERTY & RACE, no. 6, Nov.–Dec. 2008, at 1, 1 (emphasizing that “one cannot overlook . . . the racial basis of many policies . . . that are the hallmarks of federal-Indian relations”); Jill Burke, *Fairbanks Craigslist ‘Rants’ Peel Back Layers of Anti-Native Racism*, ALASKA DISPATCH NEWS, July 19, 2014, <http://www.adn.com/article/20140719/fairbanks-craigslist-rants-peel-back-layers-anti-native-racism>, archived at <http://perma.cc/8BUR-9668> (reporting on contemporary racist undertones in Alaska). Although it is undisputed that Congress’s power is plenary, the U.S. Supreme Court has also held that “[Native American] tribes retain their existing sovereign powers” unless Congress clearly expresses an intent to divest them of their natural power. See *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (holding that tribes retain their sovereignty unless Congress legislates otherwise); *United States v. Ryder*, 110 U.S. 729, 740 (1884) (noting that only intentional congressional authorizations successfully divest tribes of sovereignty); COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[1], at 113 (Nell Jessup Newton ed., 2012) [hereinafter, COHEN’S HANDBOOK] (noting the judicial presumption of “liberally” construing treaties and statutes in favor of Native Americans). *But see* CASE & VOLUCK, *supra* note 18, at 4–5 (opining that current decisions tend to pull back from allowing increased tribal sovereignty).

<sup>43</sup> See Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 504 (1976) (using the term “jurisdictional maze” in reference to law enforcement on Native American lands); Mitchell, *Why History Counts*, *supra* note 34, at 356–59 (explaining early congressional policies toward Native Americans and Alaska Natives in the mid to late nineteenth century).

<sup>44</sup> See COHEN’S HANDBOOK, *supra* note 42, § 1.03[4][a] at 41; Mitchell, *Why History Counts*, *supra* note 34, at 356–60 (outlining federal action toward Native Americans in a manner that “continues to haunt the United States government’s dealings with the descendants of the Native Americans who were the objects of those policies”).

<sup>45</sup> See Act of June 30, 1834, ch. 161, § 1, 4 Stat. 729, 729. The definition of Indian country would later be defined in 1948 to include “any Indian reservation . . . all dependent Indian communities . . . [and] Indian allotments . . . .” Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified as amended in 18 U.S.C. § 1151 (2012)).

<sup>46</sup> See Dawes Act, ch. 119, 24 Stat. 388, 388 (1887) (codified as amended in scattered sections of 25 U.S.C. (2012)) (authorizing the President to allot reservation lands to Indians); COHEN’S HANDBOOK, *supra* note 42, § 1.04 at 72 (explaining that the assimilationist doctrine was originally used to justify the congressional policy of making more room for settlers in the West while keeping the best interests of the Native Americans in mind); Mitchell, *Why History Matters*, *supra* note 34, at 359 (noting that Congress’s policy toward Native Americans changed, at least partially, because they had been beaten militarily). The policy of assimilation is seen by many today as “an unmitigated disaster.” See ANDERSON ET AL., *supra* note 18, at 109, 112 (describing the enormous loss of land for Native American tribes and the genesis of “checkerboards” of Native American land).

Congress has continued to change its policy towards Native Americans in the last century, promoting integration and perpetuating the erosion of tribal sovereignty.<sup>47</sup> This trend continued with the enactment of Public Law 83-280 (“P.L. 280”) in 1953, which gave specific states civil and criminal jurisdiction over Native Americans living within their boundaries.<sup>48</sup> In response to the U.S. Supreme Court’s unwillingness to grant tribal sovereignty, the current national Native American rights movement has strongly advocated for a coordinated approach to increase tribal sovereignty in Indian country and strengthen the power of tribal courts.<sup>49</sup>

## 2. Life Before Oil: Alaska Native Tribal Jurisdiction Prior to ANCSA

When the United States purchased Alaska from Russia in 1867, very little was known about the land or its inhabitants.<sup>50</sup> Although Congress knew that indigenous peoples were living in Alaska at that time, it never implemented the common policy of relocating Native Americans to make room for white settlers in Alaska.<sup>51</sup> Alaska’s purchase also coincided with a shift in societal and con-

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<sup>47</sup> See CASE & VOLUCK, *supra* note 18, at 5 (highlighting the “consistent erosion” of Native American tribal sovereignty that continues today). *But see* Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended in 25 U.S.C. §§ 461–479 (2012)) (repealing the Indian General Allotment Act); COHEN’S HANDBOOK, *supra* note 42, § 1.05 at 81 (discussing some of the changes brought about by the IRA); Mitchell, *Why History Counts*, *supra* note 34, at 364–65 (noting that the IRA strengthened Native American tribal governments).

<sup>48</sup> See Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588–89 (codified as amended in 18 U.S.C. § 1162 (2012) and 28 U.S.C. § 1360 (2012) for criminal and civil jurisdiction respectively) (applying initially to California, Minnesota, Nebraska, Oregon, and Wisconsin). Alaska became a P.L. 280 state in 1958. See Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545, 545 (codified as amended in 18 U.S.C. § 1162 (2012) and 28 U.S.C. § 1360 (2012) for criminal and civil jurisdiction respectively).

<sup>49</sup> See *Tribal Supreme Court Project*, NATIVE AMERICAN RIGHTS FUND, <http://sct.narf.org/index.html>, archived at <http://perma.cc/MQ7R-W33X> (last visited Sept. 7, 2014) [hereinafter *Tribal Supreme Court Project*] (detailing the coordinated efforts of Native Americans to gain tribal sovereignty after “devastating” opinions from the U.S. Supreme Court); see also CASE & VOLUCK, *supra* note 18, at 4–5 (opining that the “high-water mark of the Supreme Court’s modern tribal sovereignty jurisprudence” ended in the 1970s).

<sup>50</sup> See Morgan B. Sherwood, *George Davidson and the Acquisition of Alaska*, 28 PAC. HIST. REV. 141, 141 (1959) (characterizing Alaska at the time of the purchase from Russia as “a vast *terra incognita*”). Alaska Natives have expressed they should have been consulted prior to the purchase. See HAYCOX, *supra* note 24, at 175 (recording that Alaska Natives near Sitka frequently mentioned to the Americans that they still had not given permission for the Americans to be “subjected to their jurisdiction”); MITCHELL, *SOLD AMERICAN*, *supra* note 34, at 31 (noting that sometimes the Alaska Natives threatened to “exact tribute” for allowing the Americans to be in Sitka).

<sup>51</sup> See MITCHELL, *SOLD AMERICAN*, *supra* note 34, at 11. One explanation for this was the abundance of land in Alaska and a small population. HAYCOX, *supra* note 24, at 199 (stating that only 4,298 white settlers were counted in Alaska in the 1890 census); MITCHELL, *SOLD AMERICAN*, *supra* note 34, at 11 (discussing how Alaska Natives were needed by settlers for work at a time when labor was in high demand).

gressional opinion about indigenous peoples, resulting in the beginning of a distinct experience of tribal sovereignty for Alaska Natives.<sup>52</sup>

For seventeen years after the purchase, the U.S. government considered Alaska a military district, with enforcement over the area shifting between the Army, the Navy, and a customs collector.<sup>53</sup> During these years, the military treated Alaska as if it were Indian country for the purpose of prohibiting the importation and sale of alcohol.<sup>54</sup> This treatment, however, was rejected in 1872 by a Federal District Court in Oregon, forcing Congress to reestablish Indian country to all of Alaska the following year.<sup>55</sup>

When Congress finally authorized limited powers of civil governance in Alaska by enacting the First Organic Act in 1884, Alaska Natives were treated just like everybody else, as U.S. citizens without separate sovereignty.<sup>56</sup> In fact, in 1886, in *In re Sah Quah*, the U.S. District Court for the District of Alaska held that “the Indians of Alaska are under the control of, and subject to the laws of, the United States.”<sup>57</sup> Furthermore, the court noted the long-standing congressional policy of considering Alaska Natives to be “dependent subjects” without any independent sovereignty.<sup>58</sup> This apparent lack of distinction between the status of Alaska Natives and non-Natives is further highlighted by the language in the First Organic Act, which directed the federal Bureau of Education to provide education services to the children of Alaska “without reference to race.”<sup>59</sup> Some legal scholars argue that the legislative history of the First Organic Act

<sup>52</sup> See COHEN’S HANDBOOK, *supra* note 42, § 1.04 at 71–72 (noting that Congress’s policy of assimilation began shortly after the end of “treaty making in 1871”); Mitchell, *Why History Counts*, *supra* note 34, at 359. For additional commentary and criticism about this policy, see *supra* note 46 and accompanying text.

<sup>53</sup> GRUENING, *supra* note 34, at 33, 53.

<sup>54</sup> See Mitchell, *Why History Counts*, *supra* note 34, at 371–72 (noting that Alaska was treated as Indian country prior to the decision in *United States v. Seveloff*, 27 F. Cas. 1021 (D. Or. 1872)). Enforcement of a prohibition on alcohol was extremely limited and ineffective. See HAYCOX, *supra* note 24, at 180 (characterizing the smuggling of alcohol into Alaska as “rife” and arrests relating to alcohol as “common”); MITCHELL, *SOLD AMERICAN*, *supra* note 34, at 137–38 (explaining the relative ease of smuggling alcohol into Alaska by avoiding the infrequent enforcement visits of the Revenue Marine cutter).

<sup>55</sup> See Act of Mar. 3, 1873, ch. 227, 17 Stat. 510, 530 (establishing Indian country “over all the mainland, islands, and waters” of Alaska); *Seveloff*, 27 F. Cas. at 1024 (finding that Indian country cannot apply to Alaska without explicit congressional authorization).

<sup>56</sup> See Organic Act of Alaska, May 17, 1884, ch. 53, § 1, 23 Stat. 24, 24 (establishing a civil government in Alaska); CASE & VOLUCK, *supra* note 18, at 24–25 (noting that Alaska Natives were given the same rights to land as non-Natives under the First Organic Act); Mitchell, *Why History Counts*, *supra* note 34, at 360 (showing that Alaska Natives were intended to be subjected to the American laws).

<sup>57</sup> *In re Sah Quah*, 31 F. 327, 329, 331 (D. Alaska 1886) (holding that Alaska Natives did not have the sovereignty to own slaves).

<sup>58</sup> See *id.* at 329 (“The United States has at no time recognized any tribal independence or relations among these Indians . . . [and] it is clearly inferable that they have been and now are regarded as dependent subjects . . . subject to the jurisdiction of . . . the United States.”).

<sup>59</sup> See § 13, 23 Stat. at 27–28.

demonstrates that Congress intended to treat Alaska Natives as American citizens.<sup>60</sup>

The United States' relationship with Alaska Natives became increasingly complex in the twentieth century.<sup>61</sup> A series of congressional acts and executive declarations began to distinguish the legal relationships and rights between Alaska Natives and the rest of the country, including the formation of a number of reservations and tribal constitutions under the authority of the Indian Reorganization Act ("IRA").<sup>62</sup> Before congressional sentiment changed in 1949, executive designations created millions of acres of reservation land in Alaska.<sup>63</sup> Congress also enacted P.L. 280 in 1953—later extended to include Alaska in 1958—an important piece of legislation that granted complete criminal and civil jurisdiction over all Indian country to the territorial (and later, state) government.<sup>64</sup>

### 3. The Alaska Native Claims Settlement Act: An Historic Settlement with Far-Reaching Impacts

Spurred largely by the complicated patchwork of laws and the discovery of oil on the North Slope of Alaska, Congress enacted ANCSA in 1971.<sup>65</sup> This

<sup>60</sup> See, CASE & VOLUCK, *supra* note 18, at 24–25; Mitchell, *Why History Counts*, *supra* note 34, at 360; see also S. REP. NO. 47-457, at 12 (1880) (recounting congressional testimony advocating for Alaska Natives to be treated as U.S. citizens).

<sup>61</sup> See CASE & VOLUCK, *supra* note 18, at 26 (recording many changes with the relationship between the United States and Alaska Natives starting in 1904). *But see* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278 (1955) (concluding that Alaska Natives had not received “any permanent rights in the lands of Alaska occupied by them” because Congress “merely [intended] to retain the *status quo*” after the First Organic Act); Mitchell, *Why History Counts*, *supra* note 34, at 361–62 (characterizing congressional acts as not leading to any material changes in federal law).

<sup>62</sup> See Indian Reorganization Act, ch. 576, § 17, 48 Stat. 984, 988 (1934) (codified as amended in 25 U.S.C. §§ 461–479 (2012)) (allowing the issuance of Indian charters); Act of May 1, 1936, ch. 254, § 1, 49 Stat. 1250, 1250 (applying the IRA to Alaska); CASE & VOLUCK, *supra* note 18, at 28–30 (explaining how the IRA, expanded to include Alaska Natives in 1936, allowed Alaska Natives to create constitutions and gave the Department of the Interior authority to designate land for reservations); Mitchell, *Why History Counts*, *supra* note 34, at 365–71 (emphasizing the limited impact the IRA inclusion of Alaska and the zeal displayed by Department of Interior officials in declaring reservation land in Alaska).

<sup>63</sup> See Mitchell, *Why History Counts*, *supra* note 34, at 370–71 (explaining congressional outrage over an outgoing Secretary of the Interior's designation of nearly two million acres of reservation land, effectively putting an end to reservation designations in Alaska).

<sup>64</sup> See Act of Aug. 15, 1953, Pub. L. No. 83-280, §§ 2, 4, 67 Stat. 588, 588–89 (codified as amended in 18 U.S.C. § 1162 (2012) and 28 U.S.C. § 1360 (2012)) for criminal and civil jurisdiction respectively); Act of Aug. 8, 1958, Pub. L. No. 85-615, §§ 1–2, 72 Stat. 545, 545 (extending P.L. 280 to Alaska); John v. Baker, 982 P.2d 738, 745 (Alaska 1999) (holding that P.L. 280 gave Alaska “jurisdiction over all civil and criminal matters arising in Indian country”); CASE & VOLUCK, *supra* note 18, at 33 (characterizing P.L. 280 as congressional recognition of Alaska Natives' inherent sovereignty).

<sup>65</sup> See Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified in 43 U.S.C. §§ 1601–1624 (2006 & Supp. 2011)); HAYCOX, *supra* note 23, at 83, 97–98 (noting that the oil industry “broke the deadlock” preventing ANCSA's passage); Eric K. Yamamoto, *Racial Repara-*

landmark piece of legislation has been noted as one of the most important and generous settlements for indigenous peoples in the United States.<sup>66</sup> ANCSA awarded Alaska Natives almost one billion dollars and approximately forty-four million acres of land in exchange for extinguishing all title and sovereignty to their land.<sup>67</sup> ANCSA also created twelve Alaska Native Regional Corporations to manage the land and assets and distribute the benefits to Alaska Native shareholders and their descendants.<sup>68</sup> Although there are differing opinions as to whether ANCSA was the best deal for Alaska Natives, most people have viewed it as a positive piece of legislation.<sup>69</sup>

In the early 1980s, however, Alaska Natives began to advocate for tribal sovereignty.<sup>70</sup> The villagers' desire to capture a greater share of the economic benefit of oil production and to obtain a greater say in hunting and fishing regulation was a major reason for this push for tribal sovereignty.<sup>71</sup> Additionally, advocates recognized the growing need to better deal with crime and self-policing

*tions: Japanese American Redress and African American Claims*, 30 B.C. L. REV. 477, 498 (1998) (noting that "the primary impetus" for ANCSA "was the need to clear land title for development of the Alaska oil pipeline"). Another impetus for ANCSA's passage was U.S. Secretary of the Interior Stewart Udall's "land freeze" in 1967 to protect Alaska Native's claim to the land. *See* HAYCOX, *supra* note 23, at 92–93.

<sup>66</sup> *See* HAYCOX, *supra* note 23, at 97–98 (characterizing ANCSA as being a generous settlement); DONALD CRAIG MITCHELL, TAKE MY LAND, TAKE MY LIFE 10 (2001) ("ANCSA remains the most generous and innovative aboriginal claims settlement in U.S. history.").

<sup>67</sup> *See* § 1603, 85 Stat. 688 (completely extinguishing all "aboriginal title in Alaska based on use and occupancy"); § 1605 (detailing the \$962.5 million financial component of the settlement); §§ 1611–1613 (detailing the way Alaska Native villagers could claim land under the settlement); ANDERSON ET AL., *supra* note 18, at 841 (definitively noting that "ANCSA's extinguishment of aboriginal title was unambiguous"); HAYCOX, *supra* note 24, at 315 (estimating the amount of land conveyed to Alaska Natives at forty-four million acres).

<sup>68</sup> *See* § 1602(b), 85 Stat. 688 (defining an Alaska Native as someone who is "one-fourth degree or more Alaska [Native]"); § 1606 (establishing twelve Alaska regional corporations); § 1606(g)(1)(B) (detailing that shares of settlement stock are to go to "Natives born after December 18, 1971, and . . . descendants of Natives born after December 18, 1971").

<sup>69</sup> *See, e.g.*, ANDERSON ET AL., *supra* note 18, at 219 (noting that some have called ANCSA "a victory for the tribes"); HAYCOX, *supra* note 24, 283 (emphasizing that Alaska Natives were fully integrated in the enactment of ANCSA at every step); MITCHELL, SOLD AMERICAN, *supra* note 34, at 12 (noting the inherent difficulties of conducting a cost/benefit analysis of ANCSA); MITCHELL, *supra* note 66, at 10 (characterizing ANCSA as "the most generous and innovative aboriginal claims settlement in U.S. history"). *But see* ANDERSON ET AL., *supra* note 18, at 219–20 (positing that ANCSA contained provisions that continue to hurt Alaska Natives, going so far as to call some of the impacts a "poison pill"); HAYCOX, *supra* note 23, at 132 (noting that some Alaska Native villagers were dissatisfied with ANCSA immediately after its enactment).

<sup>70</sup> *See* Mitchell, *Why History Counts*, *supra* note 34, at 391–92, 394 (characterizing the Alaska Native sovereignty group movement as beginning to exist in the early 1980s as a counter to ANCSA). *But see* CASE & VOLUCK, *supra* note 18, at 373 (stating that United States recognition of tribal sovereignty existed since the 1830s).

<sup>71</sup> *See* CASE & VOLUCK, *supra* note 18, at 374 (explaining that tribal sovereignty generally connotes power to regulate hunting, fishing, and "conduct of nonmembers"); Mitchell, *Why History Counts*, *supra* note 34, at 412 (describing how the impetus for asserting tribal jurisdiction concerned oil and gas taxation).

in rural Alaskan villages.<sup>72</sup> At the genesis of this movement, the State of Alaska fought vigorously against tribal jurisdiction, declaring that “Alaska is one country, one people” and positing that ANCSA specifically extinguished tribal sovereignty in Alaska.<sup>73</sup>

After the U.S. Court of Appeals for the Ninth Circuit published multiple opinions in support of tribal jurisdiction,<sup>74</sup> in 1998, in *Alaska v. Native Village of Venetie Tribal Government* (“*Venetie*”), the U.S. Supreme Court unanimously held that Alaska Natives gave up their tribal territorial jurisdiction when they agreed to the terms of ANCSA in 1971.<sup>75</sup> The Court found that ANCSA treated Alaska Natives differently from other Native Americans by giving the land in the settlement agreement in fee simple title, rather than establishing reservations.<sup>76</sup> The Court was quick to point out that this was done “to avoid a ‘lengthy wardship or trusteeship’” and to give Alaska jurisdiction over Alaska Natives along with its other citizens.<sup>77</sup> Analyzing the legislative history of ANCSA, the U.S. Supreme Court determined that virtually all of the Alaska Native land in Alaska does not constitute “Indian country” as defined by 18 U.S.C. § 1151.<sup>78</sup> Conse-

<sup>72</sup> See Susanne Di Pietro, *Tribal Court Jurisdiction and Public Law 280: What Role for Tribal Courts in Alaska?*, 10 ALASKA L. REV. 335, 337 (1993) (explaining how Alaska Native tribal courts are used for dispute resolution); see also Mitchell *Why History Counts*, *supra* note 34, at 393 n.175 (opining that early Alaska Native tribal sovereignty advocates were interested in defining the scope of Alaska Native tribal territorial jurisdiction); *State of the Judiciary*, *supra* note 9, at 7–8 (recalling the long-standing difficulties of administering justice in rural Alaska).

<sup>73</sup> See 43 U.S.C. § 1601(b) (2006) (declaring that the goal of ANCSA is to avoid “creating a reservation system or lengthy wardship or trusteeship”); Alaska Admin. Order No. 125 (1991) (signed by Gov. Walter J. Hickel), available at <http://www.gov.state.ak.us/admin-orders/125.html>, archived at <http://perma.cc/WN5J-NCX2> (revoking a prior administrative order inconsistent with the principal that “Alaska is one country, one people”); Di Pietro, *supra* note 72, at 342 (noting that the Alaska State Supreme Court and the Governor initially opposed efforts to expand Alaska Native tribal sovereignty); see also Mitchell, *Why History Counts*, *supra* note 34, at 385–91 (discussing ANCSA’s congressional history and the goal of avoiding the creation of reservations).

<sup>74</sup> *Alaska v. Native Vill. of Venetie*, 856 F.2d 1384, 1387 (9th Cir. 1988) (*Venetie I*) (holding that tribal sovereignty analysis does not end with existing statutes); *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 101 F.3d 1286, 1289 (9th Cir. 1996) (*Venetie II*) (concluding that ANCSA did not extinguish Alaska Native tribal sovereignty or Indian country in Alaska), *rev’d*, 522 U.S. 520 (1998).

<sup>75</sup> See *Venetie*, 522 U.S. at 523 (holding that the land held by Alaska Natives as a result of ANCSA is not Indian country).

<sup>76</sup> *Venetie*, 522 U.S. at 533; see § 1601(b), 85 Stat. 688. The Court emphasized that a primary purpose of ANCSA was “to end paternalism in federal Indian relations.” *Venetie*, 522 U.S. at 534. Fee-simple title is “the broadest property interest allowed by law.” BLACK’S LAW DICTIONARY 691 (9th ed. 2009).

<sup>77</sup> *Venetie*, 522 U.S. at 533; see § 1601(b), 85 Stat. 688.

<sup>78</sup> *Venetie*, 522 U.S. at 532 (holding that ANCSA lands do not fall under any definition in § 1151 and therefore cannot be considered Indian country); see 18 U.S.C. § 1151 (2012) (defining Indian country as “land within the limits of any Indian reservation . . . all dependent Indian communities . . . [and] all Indian allotments”). The Court limited recent judicial expansions of the definition of Indian country to the specific fact patterns of those cases. See *Venetie*, 522 U.S. at 528, 530. This holding has been characterized by some legal scholars as ANCSA’s “poison pill.” See ANDERSON ET AL., *supra* note 18, at 220. Others have noted that this definitional expansion of the courts is where the Ninth

quently, with ANCSA lands designated as fee simple and not Indian country, the U.S. Supreme Court decision essentially extinguished territorial tribal jurisdiction for Alaska Natives.<sup>79</sup>

#### 4. The Continued Perseverance of Alaska Native Tribal Sovereignty in the Wake of *Venetie*

Shortly after the U.S. Supreme Court's decision in *Venetie*, the Alaska Supreme Court interpreted *Venetie*'s implications to determine whether Alaska Natives still had inherent tribal sovereignty unrelated to territory.<sup>80</sup> In 1999, in *John v. Baker*, the Alaska Supreme Court examined whether Alaska Native tribal courts had concurrent jurisdiction to adjudicate child custody cases among Alaska Natives.<sup>81</sup> Despite the U.S. Supreme Court's holding in *Venetie* that abolished Alaska Native territorial sovereignty under the federal definition of Indian country, the Alaska Supreme Court held that not *all* aspects of tribal sovereignty were divested through ANCSA.<sup>82</sup> The court reasoned that, even without territorial jurisdiction, Alaska Natives still have inherent tribal jurisdiction to regulate "domestic relations among members."<sup>83</sup>

Explaining that tribal sovereignty had historically included both territorial and membership components, the Alaska Supreme Court reasoned that Alaska Natives did not give up this aspect of self-governance through ANCSA.<sup>84</sup> The court noted that, according to federal common law, indigenous rights cannot be

Circuit strayed. *See Mitchell, Why History Counts, supra* note 34, at 425 (explaining the expansion of the judicial definition of Indian country as starting with *United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971)). The only currently existing reservation in Alaska is Metlakatla, in Southeast Alaska. *See* § 1618(a), 85 Stat. 688 (exempting "the Metlakatla Indian community of the Annette Island Reserve" from ANCSA's revocation of rights); *Venetie*, 522 U.S. at 524 (noting that Metlakatla is the only remaining reservation in Alaska since it was exempted from ANCSA).

<sup>79</sup> *See Venetie*, 522 U.S. at 523.

<sup>80</sup> *See Baker*, 982 P.2d at 744 (noting that the Alaska Supreme Court requested a supplemental briefing in the wake of the U.S. Supreme Court's holding in *Venetie*); *id.* at 748–49 ("Today we must decide for the first time . . . [whether] Alaska Native villages have inherent, non-territorial sovereignty. . . . [W]e hold that Alaska Native tribes, by virtue of their inherent powers as sovereign nations, do possess that authority.")

<sup>81</sup> *See id.* at 743, 748–49. Concurrent jurisdiction is when jurisdiction can "be exercised simultaneously by more than one court over the same subject matter and within the same territory." BLACK'S LAW DICTIONARY 928 (9th ed. 2009).

<sup>82</sup> *See Baker*, 982 P.2d at 748 (finding that the Indian Child Welfare Act and P.L. 280 do not apply in this case as a result of the U.S. Supreme Court's holding in *Venetie*); *id.* at 751–52 (declaring that Alaska Natives "retain their sovereign powers to regulate internal domestic affairs unless Congress specifically" exercises its plenary power to take it away).

<sup>83</sup> *See id.* at 758.

<sup>84</sup> *See id.* at 753 (emphasizing that "Congress did not intend for ANCSA to divest tribes of their powers to adjudicate domestic disputes between members"); *id.* at 754 (holding that "the nature of tribal sovereignty stems from two intertwined sources: tribal *membership* and tribal *land*").

terminated without Congress expressly doing so.<sup>85</sup> By extending this logic, the court determined that Alaska Natives' "sovereign power to regulate the internal affairs of its members" applies to child custody cases.<sup>86</sup>

Recently, the Alaska Supreme Court reaffirmed its decision in *Baker* and its support for Alaska Native tribal sovereignty and concurrent jurisdiction.<sup>87</sup> In 2011, in *McCrary v. Ivanof Bay Village*, the Alaska Supreme Court, in affirming the underlying logic of *Baker*, reasoned that because the Alaska Native village of Ivanof Bay had sovereign immunity, the party seeking damages from Ivanof Bay for breach of contract had no remedy in state court.<sup>88</sup> In 2014, in *Simmonds v. Parks*, the Alaska Supreme Court legitimized Alaska Native tribal court appeals, holding that state jurisdictional and due process claims can only be brought after exhausting tribal court remedies.<sup>89</sup>

## 5. Alaska Native Tribal Courts: Alternative Justice in Alaska

As a result of this unique historical and legal framework, Alaska Native tribal courts differ significantly from most Native American tribal courts.<sup>90</sup> Because many Alaska Native communities are small and geographically spread out, and it has been difficult for Alaska Natives to assert their tribal sovereignty, the Alaska Native tribal courts tend to be underdeveloped compared to other Native American tribal courts.<sup>91</sup> Even when Alaska Native communities have a tribal

<sup>85</sup> See *id.* at 752 ("Courts must resolve ambiguities in statutes affecting the rights of Native Americans in favor of Native Americans."); see also COHEN'S HANDBOOK, *supra* note 42, § 2.02, at 113 (explaining a long held judicial presumption of "liberally" construing treaties and statutes in favor of Native Americans).

<sup>86</sup> *Baker*, 982 P.2d at 759.

<sup>87</sup> See *Simmonds*, 329 P.3d at 1008 (holding that in order to challenge tribal court child custody proceedings, one must first "exhaust available tribal court remedies" before filing "minimum due process and jurisdictional claims in Alaska state court"); *McCrary v. Ivanof Bay Vill.*, 265 P.3d 337, 338–39, 342 (Alaska 2011) (declining unanimously to overturn *Baker* and holding that federally recognized Alaska Native villages enjoy sovereign immunity).

<sup>88</sup> See 265 P.3d at 342 ("Because Ivanof Bay is a federally recognized tribe, it is entitled to sovereign immunity.").

<sup>89</sup> See 329 P.3d at 1008 (holding that one must first "exhaust available tribal court remedies" before filing "minimum due process and jurisdictional claims in Alaska state court").

<sup>90</sup> Compare Sari Horwitz, *Arizona Tribe Set to Prosecute First Non-Indian Under a New Law*, WASH. POST, Apr. 18, 2014, [http://www.washingtonpost.com/national/arizona-tribe-set-to-prosecute-first-non-indian-under-a-new-law/2014/04/18/127a202a-bf20-11e3-bcec-b71ee10e9bc3\\_story.html](http://www.washingtonpost.com/national/arizona-tribe-set-to-prosecute-first-non-indian-under-a-new-law/2014/04/18/127a202a-bf20-11e3-bcec-b71ee10e9bc3_story.html), archived at <http://perma.cc/3J2B-Z243> (describing the importance having a "\$21 million state-of-the-art courthouse" for convincing conservative Republicans that the Pascua Yaqui Indians were capable of fairly trying non-Indians for domestic violence cases), with Di Pietro, *supra* note 72, at 337 (conceding the presence of only a handful of "well-established" tribal courts in Alaska); see Telephone Interview with Donald Craig Mitchell, attorney and author on federal Indian law (Nov. 6, 2013) (notes on file with author) (implying that Alaska Native tribal courts are unlike the tribal courts of the Navajo).

<sup>91</sup> See CASE & VOLUCK, *supra* note 18, at 438 (noting that there are "[o]ver one hundred tribal courts and councils . . . actively resolving disputes" on a voluntary basis in Alaska Native communi-

court system, each court system is vastly different from the next in regards to administration and protections for defendants.<sup>92</sup>

It is well established that Alaska Native tribal courts do not have criminal jurisdiction over non-member defendants without express authority from either Congress or the Alaska State Legislature.<sup>93</sup> If courts tried to assert this type of criminal jurisdiction in Alaska Native courts, they would directly conflict with the U.S. Supreme Court's holding that Alaska Native land is not considered Indian country, and therefore cannot be under tribal territorial sovereignty.<sup>94</sup> Furthermore, the State of Alaska retains exclusive criminal jurisdiction within its boundaries as a P.L. 280 State.<sup>95</sup>

Even with these barriers, there are a few Alaska Native communities that have established active tribal court systems.<sup>96</sup> For example, in the Alaska Native village of Kake, the tribal court engages in "Circle Peacemaking," a form of dispute resolution.<sup>97</sup> When all of the parties agree, State courts allow for these non-

ties); Di Pietro, *supra* note 72, at 336–37 (observing that the reliance on tribal courts in Alaska has fluctuated over time). *But see* *Simmonds*, 329 P.3d at 1007–08 (legitimizing the Alaska Native tribal court appeals process).

<sup>92</sup> See COHEN'S HANDBOOK, *supra* note 42, § 4.07[3][d][i] at 352 (noting the historical variation of Alaska Native tribal governments).

<sup>93</sup> See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978) (holding that "Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress"); CASE & VOLUCK, *supra* note 18, at 439 (recognizing the difficulty of tribal courts asserting criminal jurisdiction without any territorial jurisdiction in the wake of *Venetie*); COHEN'S HANDBOOK, *supra* note 42, § 9.04 at 765–66 (explaining how congressional and judicial actions have defined the scope of tribal criminal jurisdiction); Telephone Interview with Donald Craig Mitchell, *supra* note 90 (noting that everyone agrees there cannot be any criminal jurisdiction unless Congress affirmatively bestows it). *But cf.* CASE & VOLUCK, *supra* note 18, at 440 (arguing that the Alaska Supreme Court could expand the uses of tribal courts).

<sup>94</sup> See *Venetie*, 522 U.S. at 526 (holding that because there is no Indian country in Alaska, Alaska Natives are "sovereigns without territorial reach"); ANDERSON ET AL., *supra* note 18, at 220 (explaining that the holding in *Venetie* means that there are no "lands over which a Native village can exercise territorial jurisdiction"); Geoffrey D. Strommer & Stephen D. Osborne, "Indian Country" and the Nature and Scope of Tribal Self-Government in Alaska, 22 ALASKA L. REV. 1, 5–6 (2005) (noting that the Court in *Venetie* held that there could be no Indian country in Alaska, which relates to criminal jurisdiction).

<sup>95</sup> See Act of Aug. 15, 1953, Pub. L. No. 83-280, §§ 2, 4, 67 Stat. 588, 588–89 (codified as amended in 18 U.S.C. § 1162 (2012) and 28 U.S.C. § 1360 (2012)) for criminal and civil jurisdiction respectively); Act of Aug. 8, 1958, Pub. L. No. 85-615, §§ 1–2, 72 Stat. 545, 545 (extending P.L. 280 to Alaska); Telephone Interview with Donald Craig Mitchell, *supra* note 90 (emphasizing that Alaska's exclusive criminal jurisdiction is well settled).

<sup>96</sup> See Di Pietro, *supra* note 72, at 337 (highlighting the Minto and Sitka Tribal courts as being "well-established"); David Avraham Voluck, *Counterpoint: Alaska's Sister Sovereign: Federally Recognized Tribal Courts by Judge David Voluck*, ALASKA B. RAG 3 (Apr.–June 2014) (stating that, although "[t]he full scope of activity for Alaska's tribal courts remain largely unmeasured, . . . it is well understood in the field that Alaska's tribal courts divert and reduce some of the crushing weight of the civil docket . . . from an already overburdened Alaska Court System").

<sup>97</sup> See Lisa Rieger, *Circle Peacemaking*, 17 ALASKA JUST. F., no. 4, Winter 2001, at 1, 7; Horwitz, *supra* note 5. This form of "restorative justice" is loosely modeled after system based in the Yukon Territory in Canada. Rieger, *supra*, at 1. To date, the process in Kake has been used largely in

binding discussions to substitute for formal hearings in some criminal proceedings.<sup>98</sup> This is largely an exception, however, and most tribal courts are limited to cases set out by the Alaska Supreme Court.<sup>99</sup>

## II. FAILING TO ACT: EXAMINING THE TRIBAL LAW AND ORDER ACT, THE VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT, AND THE ALASKA SAFE FAMILIES AND VILLAGES ACT FROM ALASKA'S PERSPECTIVE

In recent years, Congress has enacted two significant pieces of legislation expanding the criminal jurisdiction of Native American tribal governments.<sup>100</sup> Yet these recent enactments explicitly exempt Alaska Natives.<sup>101</sup> Recently, in response to political pressure regarding these conspicuous exemptions, Alaska's U.S. Senate delegation jointly sponsored new legislation to address the criticism.<sup>102</sup> Section A of this Part examines the changes the Tribal Law and Order Act ("TLOA") made to American Indian criminal jurisdiction and why Alaska was largely exempted.<sup>103</sup> Section B looks at the most recent reauthorization of

cases involving alcohol. *See id.* at 7; *see also* NEIL NESHEIM, EVALUATING RESTORATIVE JUSTICE IN ALASKA: THE KAKE CIRCLE 41 (2010). Alaska Native tribal courts are considered effective at combating social ills, partially because they "do so in more culturally sensitive ways than State courts." Geoffrey Wildridge, *Access to Justice: The Continuing Debate over the Role of Tribal Courts in Rural Alaska*, ALASKA B. RAG 3 (Apr.–July 2014).

<sup>98</sup> *See State of the Judiciary*, *supra* note 9, at 11 (emphasizing the ability of parties in civil cases to engage in "local dispute resolution" through tribal courts). Research on restorative justice is limited, but generally points to lower rates of recidivism. *See* NESHEIM, *supra* note 97, at 31–32.

<sup>99</sup> *See, e.g.,* CASE & VOLUCK, *supra* note 18, at 440 (explaining instances where the Alaska Supreme Court has allowed for an expanded use of tribal courts in the wake of *Venetie*, primarily child custody cases); Strommer & Osborne, *supra* note 94, at 8–10 (noting that tribal jurisdiction is limited in Alaska to tribal membership, which has been articulated by the Alaska Supreme Court); Suzanna Caldwell, *Tanana Moves to Banish Two Residents in the Wake of Trooper Shooting*, ANCHORAGE DAILY NEWS, May 8, 2014, <http://www.adn.com/article/20140508/tanana-moves-banish-two-residents-wake-trooper-shooting>, archived at <http://perma.cc/4Q7V-WKRM> (reporting on an attempt to banish two members from an Alaska Native village after two Alaska State Troopers were shot and killed). *But see In re C.R.H.*, 29 P.3d 849, 851, 852 n.9 (Alaska 2001) (holding that "P.L. 280 does not apply to those Alaska Native tribes that do not occupy Indian country").

<sup>100</sup> *See* Violence Against Women Reauthorization Act (VAWA) of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified as amended in scattered sections of 18, 22, 25, and 42 U.S.C.); Tribal Law and Order Act (TLOA) of 2010, Pub. L. No. 111-211, 124 Stat. 2261 (codified as amended in scattered sections of 25 U.S.C. (2012)).

<sup>101</sup> *See* § 910, 127 Stat. at 126 ("In the State of Alaska, the amendments made . . . shall only apply to the Indian country . . . of the Metlakatla Indian Community . . ."); § 205, 124 Stat. at 2264 ("Nothing in this Act limits, alters, expands, or diminishes the civil or criminal jurisdiction of the State of Alaska, any subdivision of the State of Alaska, or any Indian tribe in that State.").

<sup>102</sup> *See* Alaska Safe Families and Villages Act, S. 1474, 113th Cong. (2013); ROADMAP, *supra* note 5, at 33 (calling Alaska's recent exemption from the VAWA "unconscionable"); Natalie Landreth, Editorial, *Alaska Native Women Lose in Violence Against Women Act Renewal*, ALASKA DISPATCH, Mar. 12, 2013, <http://www.alaskadispatch.com/article/20130312/alaska-native-women-lose-violence-against-women-act-renewal>, archived at <http://perma.cc/QZ5K-AQ6V> (criticizing Alaska's exemption from the reauthorization of the VAWA).

<sup>103</sup> *See infra* notes 107–118 and accompanying text.

the Violence Against Women Reauthorization Act (“VAWA”) and explains why Alaska Natives do not benefit from many protections it provides.<sup>104</sup> Section C explains some of the underlying opposition from both Congress and the State of Alaska to expanding Alaska Native tribal sovereignty.<sup>105</sup> Finally, Section D reviews proposed legislation in the U.S. Senate (the Alaska Safe Families and Villages Act), and explains its genesis, intent, and possible impacts on Alaska Natives.<sup>106</sup>

### *A. Strengthening Tribal Courts: The Tribal Law and Order Act of 2010*

With much fanfare, President Barack Obama signed the Tribal Law and Order Act of 2010 on July 29, 2010.<sup>107</sup> Flanked by Native American leaders and victims of sexual assault on reservations, the President declared that this piece of legislation would help bring justice to Native American reservations.<sup>108</sup> Among other things, the TLOA expanded tribal criminal jurisdiction on reservations and increased the maximum penalties that a tribal court can impose.<sup>109</sup> The TLOA

<sup>104</sup> See *infra* notes 119–125 and accompanying text.

<sup>105</sup> See *infra* notes 126–149 and accompanying text.

<sup>106</sup> See *infra* notes 150–159 and accompanying text.

<sup>107</sup> See Tribal Law and Order Act (TLOA) of 2010, Pub. L. No. 111-211, 124 Stat. 2261; Jodi Gillette, *President Signs Tribal Law and Order Act*, OFF. PUB. ENGAGEMENT BLOG, (July 30, 2010, 06:34 PM), <http://www.whitehouse.gov/blog/2010/07/30/president-signs-tribal-law-and-order-act>, archived at <http://perma.cc/XKY3-LK69>; Rob Capriccioso, *Do Congress and Obama Really Support the Tribal Law and Order Act?*, INDIAN COUNTRY TODAY MEDIA NETWORK, Dec. 19, 2011, <http://indiancountrytodaymedianetwork.com/2011/12/19/do-congress-and-obama-really-support-tribal-law-and-order-act-68002>, archived at <http://perma.cc/FHX6-YSPK>.

<sup>108</sup> See Gillette, *supra* note 107; Signing of the Tribal Law and Order Act of 2010, WHITE HOUSE.GOV (July 29, 2010) [hereinafter Signing of the TLOA], <http://www.whitehouse.gov/blog/2010/07/29/tribal-law-and-order-act-2010-a-step-forward-native-women>, archived at <http://perma.cc/8W9F-S9Z8>. Legal scholars have criticized the TLOA for not going far enough. See, e.g., Gideon M. Hart, *A Crisis in Indian Country: An Analysis of the Tribal Law and Order Act of 2010*, 23 REGENT U. L. REV. 139, 176–84 (2011) (critiquing the TLOA and proposing legislation that could improve it); David Patton, *Tribal Law and Order Act of 2010: Breathing Life into the Miner’s Canary*, 47 GONZ. L. REV. 767, 798–800 (2012) (arguing that the TLOA does not go far enough toward helping Native Americans); Jasmine Owens, Comment, “Historic” in a Bad Way: How the Tribal Law and Order Act Continues the American Tradition of Providing Inadequate Protection to American Indian and Alaska Native Rape Victims, 102 J. CRIM. L. & CRIMINOLOGY 497, 521–24 (2012) (proposing changes to increase the effectiveness of the TLOA).

<sup>109</sup> See § 234, 124 Stat. at 2279–80 (increasing maximum penalties for tribal courts to impose, upping the maximum sentence of incarceration from one to three years per offense and increasing the maximum criminal fine from \$5,000 to \$15,000); Gregory S. Arnold, *Tribal Law and Order Act and Violence Against Women Act: Enhanced Recognition of Inherent Tribal Sovereignty Creates Greater Need for Criminal Defense Counsel in Indian Country*, 61 FED. LAW. 4, 4 (Feb. 2014) (noting that as of October 2013, two tribal courts “have already sentenced a defendant to prison for a term in excess of one year”); Michael J. Bulzomi, *Indian Country and the Tribal Law and Order Act of 2010*, FBI L. ENFORCEMENT BULL. (May 2012), <http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/may-2012/indian-country-and-the-tribal-law-and-order-act-of-2010>, archived at <http://perma.cc/UKJ4-FU4R>. But cf. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-658R, TRIBAL LAW AND

also increased funding for federal prosecutions on reservation land, improved channels of communication between federal and tribal governments, and created the Indian Law and Order Commission (“ILOC”) to publish a comprehensive report on crime and justice throughout the United States.<sup>110</sup>

Despite the fact that a large percentage of the United States’ indigenous population resides in Alaska and an Alaskan U.S. Senator co-sponsored the TLOA, the congressional delegation from Alaska was conspicuously absent from the signing ceremony.<sup>111</sup> This is because the TLOA explicitly exempted Alaska from the legislation.<sup>112</sup> Although Alaska’s entire congressional delegation sat on the relevant committees for the bill, the only parts of the bill that impacted Alaska were small components inserted as amendments by Alaska’s U.S. Senator Lisa Murkowski.<sup>113</sup> Although these sections provide increased funding to address crime in Alaska Native villages, the exemption from the main provisions of the bill indicates that Alaska Natives did not significantly benefit from the TLOA.<sup>114</sup>

To date, no legal scholarship specifically addresses why the TLOA exempts Alaska.<sup>115</sup> The most likely reason is that, since Alaska Native tribal courts currently do not have any criminal jurisdiction, including Alaska in the substantive portions of the TLOA would potentially create huge changes in the scope of

ORDER ACT, 3 (2012) (finding that as of May 2012, no tribal court had exercised the “TLOA’s new sentencing authority,” and cited the problem as a lack of funding).

<sup>110</sup> See § 205, 124 Stat. at 2264–2301; Bulzomi, *supra* note 109. *But see* Capriccioso, *supra* note 107 (lamenting the impact of congressional budget cuts on the efficacy of the TLOA).

<sup>111</sup> See Signing of the TLOA, *supra* note 108; 156 CONG. REC. S5324 (daily ed. June 23, 2010) (adding Alaska Senator Mark Begich as a co-sponsor of the TLOA).

<sup>112</sup> See § 205, 124 Stat. at 2264 (“Nothing in this Act limits, alters, expands, or diminishes the civil or criminal jurisdiction of the State of Alaska, any subdivision of the State of Alaska, or any Indian tribe in that State.”).

<sup>113</sup> See S. REP. NO. 111-93, at 6 (2009) (noting that Senator Murkowski offered two amendments that were accepted through a unanimous voice vote “to address concerns relating specifically to Alaska Native Villages”).

<sup>114</sup> See § 205, 124 Stat. at 2264. However, some components of the TLOA do impact Alaska Natives in a limited fashion. See § 235, 124 Stat. at 2282; § 247, 124 Stat. at 2296–97; § 266, 124 Stat. at 2301. The TLOA created the ILOC, which wrote an entire chapter detailing the status of tribal justice in Alaska along with recommendations on how to improve it. See § 235, 124 Stat. at 2282–86; ROADMAP, *supra* note 5, at 33. The TLOA also directed the Comptroller General of the United States to conduct a study about enforcement response capabilities for sexual assault and domestic violence claims from Alaska Native villages. See § 266, 124 Stat. at 2301 (directing the Comptroller General to conduct the study for both Alaska Native villages and “remote Indian reservations”). Finally, the TLOA also allows Alaska Native communities to apply for funding to help support Village Public Safety Officers (“VPSOs”). See § 247, 124 Stat. at 2296–97. The TLOA also allows VPSOs to participate in training programs “at the Indian Police Academy of the Federal Law Enforcement Training Center.” See § 247(d)(1), 124 Stat. at 2297.

<sup>115</sup> See, e.g., Hart, *supra* note 108, at 162–76 (discussing the TLOA and failing to explain the exemption); Patton, *supra* note 108, at 795 (mentioning Alaska only once with regard to the TLOA); Owens, *supra* note 108, at 510–13 (discussing practical problems with law enforcement for Native Americans and Alaska Natives without taking Alaska’s unique jurisdictional framework into account).

Alaska Native tribal sovereignty.<sup>116</sup> Congress likely did not want to spend the time required to examine the myriad issues associated with an expansion of Alaska Native tribal jurisdiction.<sup>117</sup> Additionally, concerns about the lack of Constitutional protections for defendants make it politically difficult to change Alaska Native criminal jurisdiction.<sup>118</sup>

*B. Protecting the Most Vulnerable: The Violence Against Women  
Reauthorization Act of 2013*

On the heels of an expansion of tribal jurisdiction with the TLOA, in 2013, as part of the Violence Against Women Reauthorization Act,<sup>119</sup> Congress included provisions that allowed prosecution of non-Native Americans in tribal courts for domestic violence and sexual assault.<sup>120</sup> During negotiations regarding the adoption of the VAWA, opponents' main fear was that defendants in these cases would not be afforded full constitutional protections and would not be able to appeal to federal court.<sup>121</sup> These controversial provisions are poised to go into full effect on March 7, 2015.<sup>122</sup>

At the request of Senator Murkowski in an amendment on the floor of the U.S. Senate, however, the reauthorization for the VAWA does not apply to Alaska.<sup>123</sup> Similar to the TLOA, the legislation contains explicit language saying that

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<sup>116</sup> See *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 523 (1998) (holding that ANCSA lands are not Indian country).

<sup>117</sup> See MITCHELL, *SOLD AMERICAN*, *supra* note 34, at 13–14 (positing that the major congressional roadblocks concerning Alaska Natives are ignorance and apathy).

<sup>118</sup> See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 51–52 (1978) (holding that alleged violations based on the Indian Civil Rights Act cannot be heard in federal court); Telephone Interview with Donald Craig Mitchell, *supra* note 90 (pointing out that there is no habeas corpus remedy in federal court if a tribal court violates constitutional protections).

<sup>119</sup> See Violence Against Women Reauthorization Act (VAWA) of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified as amended in scattered sections of 18, 22, 25, and 42 U.S.C.).

<sup>120</sup> See Johnathan Weisman, *Measure to Protect Women Stuck on Tribal Land Issue*, N.Y. TIMES, Feb. 11, 2013, at A11. This portion of the VAWA will likely get around the U.S. Supreme Court's holding in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), that prevents Native Americans from criminally prosecuting non-Indian defendants who are charged with committing crimes in Indian country. See Laura C. Saylor, Note, *Back to Basics: Special Domestic Violence Jurisdiction in the Violence Against Women Reauthorization Act of 2013 and the Expansion of Inherent Tribal Sovereignty*, 2014 CARDOZO L. REV. DE NOVO 1, 13, [http://www.cardozolawreview.com/content/denovo/SAYLER\\_2014\\_1.pdf](http://www.cardozolawreview.com/content/denovo/SAYLER_2014_1.pdf), archived at <http://perma.cc/Q4EK-Z4TG>. Funding for the Violence Against Women Act exists only when Congress reauthorizes it every five years. See *id.* at 10 n.48.

<sup>121</sup> See Weisman, *supra* note 120 (explaining that a majority of the opposition came from conservative Republicans in the U.S. House of Representatives).

<sup>122</sup> See Saylor, *supra* note 120, at 6. There has been little criticism of the VAWA nationally because this controversial component has not yet taken full effect and it is still early for legal scholarship to become generated. See *id.*

<sup>123</sup> See 159 CONG. REC. S598, S611–12 (daily ed. Feb. 12, 2013) (statement of Sen. Leahy); Harvard Law Review Ass'n, *Indian Law—Tribal Courts—Congress Recognizes and Affirms Tribal Courts' Special Domestic Violence Jurisdiction over Non-Indian Defendants.—the Violence Against Women Reauthorization Act of 2013*, Pub. L. No. 113-4, 127 HARV. L. REV. 1509, 1511 n.23 (charac-

its passage should not be construed to change the Alaska Native sovereignty or jurisdiction within Alaska.<sup>124</sup> Again, the majority of the legislation applies to Indian country, which the U.S. Supreme Court previously determined does not exist in Alaska.<sup>125</sup>

### C. *Left Out in the Cold: Roadblocks to Reform*

Despite Congress's plenary power, there are a number of factors making it difficult for Congress to pass legislation to assist Alaska Natives.<sup>126</sup> First, given Alaska's distance and isolation from Washington D.C., and the fact that Alaska's congressional delegation is very small, there is a profound lack of first-hand knowledge among congressional members about the reality of tribal jurisdiction in Alaska.<sup>127</sup> Second, there may be some hesitation by members of Congress to enact sweeping reforms regarding Alaska Native tribal sovereignty given the long history of continued lobbying and reforms after enacting major legislation.<sup>128</sup> Moreover, today's Congress has been rendered immobile by partisan-

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terizing Alaska's exemption as inexplicable); Sari Horwitz, *Senator from Alaska Reverses Her Divisive Stance on Women's Law*, WASH. POST, Aug. 3, 2014, at A11 (characterizing this "Alaska exception" as previously having bipartisan support in 2012). The exemption for Alaska generated a vocal response. See ROADMAP, *supra* note 5, at 33 (calling the exemption "unconscionable"); Landreth, *supra* note 102 (hypothesizing that Senator Murkowski put in the exemption at the request of the Alaska Attorney General's office in spite of constant Alaska Native lobbying efforts opposing the exclusion). Senator Murkowski appears to have changed her position. See Horwitz, *supra* (noting that Murkowski has reversed "her position and [is now] trying to repeal the provision she inserted").

<sup>124</sup> See § 910, 127 Stat. at 126 ("In the State of Alaska, the amendments made . . . shall only apply to the Indian country . . . of the Metlakatla Indian Community . . .").

<sup>125</sup> See VAWA, Pub. L. No. 113-4, 127 Stat. 54 (2013); *Venetie*, 522 U.S. at 532. *But see* Landreth, *supra* note 102 (arguing that the portions of the VAWA for which Alaska was exempt would have given tribal courts in Alaska additional authority to issue protective orders in domestic violence and sexual assault cases). One portion of the VAWA does explicitly apply to Alaska, directing the Attorney General to report to Congress within one year with recommendations on whether to re-fund the Alaska Rural Justice and Law Enforcement Commission. See § 909, 127 Stat. at 126. The Alaska Rural Justice and Law Enforcement Commission, established in 2004, was seen as "a catalyst" for making the VPSO program more effective. See Alex DeMarban, *Does Alaska's Rural Justice Commission Have a Future?*, ALASKA DISPATCH, Feb. 19, 2012, <http://www.alaskadispatch.com/article/does-alaskas-rural-justice-commission-have-future>, archived at <http://perma.cc/GRA8-G2H2>.

<sup>126</sup> See Rob Capriccioso, *Sen. Begich Speaks Out on Indian & Alaska Native Concerns*, INDIAN COUNTRY TODAY MEDIA NETWORK, Feb. 26, 2014, <http://indiancountrytodaymedianetwork.com/2014/02/26/sen-begich-speaks-out-indian-alaska-native-concerns-153747>, archived at <http://perma.cc/6GDA-DJ3P> (lamenting how the congressional process can get in the way of reform).

<sup>127</sup> MITCHELL, SOLD AMERICAN, *supra* note 34, at 13 (recounting how former Alaska U.S. Senator Ted Stevens identified Alaska Natives' biggest challenge in Congress as overcoming ignorance and apathy).

<sup>128</sup> See CASE & VOLUCK, *supra* note 18, at 165 (noting that ANCSA has been modified almost every year since its enactment in 1971).

ship, with resulting gridlock and rampant criticism over the imperfect nature of any legislation that requires compromise.<sup>129</sup>

In contrast, some recent developments signal the possibility of future congressional action towards Alaska Natives.<sup>130</sup> First, Alaska's entire congressional delegation sits on the relevant committees in both the House and Senate.<sup>131</sup> Second, the ILOC, created by the TLOA, devoted an entire chapter to Alaska in its mandated report to Congress.<sup>132</sup> This chapter identifies five ways for Congress to help Alaska Native villages, generally recommending a legislative expansion of Indian country to include Alaska.<sup>133</sup> Hearings about the ILOC's report have generated renewed congressional focus on the issue, with Senator Begich calling for hearings to see how Congress should react, specifically to the ILOC's chapter on Alaska.<sup>134</sup> Despite the increased focus on Alaska Native tribal sovereignty, however, reforms remain stalled in the U.S. Senate, and with so many demands on congressional time, it is hard to imagine that Congress will grant additional Alaska Native tribal sovereignty in the near future.<sup>135</sup>

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<sup>129</sup> See Dan Friedman, *Gridlock in Congress Expected to Worsen with Midterm Elections Looming*, N.Y. DAILY NEWS, Jan. 5, 2014, <http://nydn.us/11HZChJ>, archived at <http://perma.cc/4S8A-W8QA> (noting that Congress enacted the lowest number of laws in 2013 (fifty-eight) since Congress began counting in the 1940s).

<sup>130</sup> See Capriccioso, *supra* note 126 (expressing optimism at the prospect of enacting legislation); Richard Mauer, *What Now for Law & Order Panel's Report?*, ANCHORAGE DAILY NEWS, Dec. 8, 2013, at A1 (highlighting the recent pressure on political leaders to change the jurisdictional framework for Alaska Native tribal courts).

<sup>131</sup> See *113th Congress Committees*, U.S. HOUSE OF REPRESENTATIVES, <http://www.house.gov/committees/>, archived at <http://perma.cc/NYB2-CL3D> (last visited Sept. 8, 2014) (listing Alaska Representative Don Young as a member of the Natural Resources committee); *113th Congress Committee Assignments*, U.S. SENATE [https://www.senate.gov/general/committee\\_assignments/assignments.htm](https://www.senate.gov/general/committee_assignments/assignments.htm), archived at <http://perma.cc/B4F9-TTUZ> (last visited Sept. 8, 2014) (listing both Senators Mark Begich and Lisa Murkowski as members of the Committee on Indian Affairs).

<sup>132</sup> See Tribal Law and Order Act (TLOA) of 2010, Pub. L. No. 111-211, 124 Stat. 2261 (establishing the ILOC). Section 235(f) of the TLOA requires that the ILOC publish a report to Congress and the President, and section 235(d)(5) allows the ILOC to investigate "other subjects as the Commission determines relevant." See § 235, 124 Stat. at 2284. Part of the ILOC's success in Alaska is from all of the positive press coverage generated in local newspapers. See Mauer, *supra* note 33; Mauer, *supra* note 8; Mauer, *supra* note 130. But see TLOA, § 235(l), 124 Stat. at 2286 (terminating the ILOC "90 days after . . . the report").

<sup>133</sup> See ROADMAP, *supra* note 5, at 51–53, 55. This includes a recommendation that Congress "affirm the inherent criminal jurisdiction of Alaska Native Tribal governments over their members within the external boundaries of their villages." See *id.* at 55.

<sup>134</sup> See Capriccioso, *supra* note 126; Press Release, U.S. Senator Mark Begich, *supra* note 10.

<sup>135</sup> See Capriccioso, *supra* note 126 (emphasizing congressional roadblocks); Mike Mason, "Alaska Safe Families and Villages Act of 2014" Ready for a Vote in the Senate, KDLG (May 22, 2014), <http://kdig.org/post/alaska-safe-families-and-villages-act-2014-ready-vote-senate>, archived at <http://perma.cc/F4UD-VLEH> (reporting that the Alaska Safe Families and Villages Act in its current form is awaiting a vote in the Senate); Jonathan Weisman & Ashley Parker, *Congress Off for the Exits, but Few Cheer*, N.Y. TIMES, Aug. 2, 2014, at A2 (characterizing the 113th Congress as being "in a race to the bottom . . . for the 'do nothing' crown"). Furthermore, if Senator Begich is not re-elected in November, it could become significantly more difficult for Alaska Native tribal sovereignty

Jurisdictional reforms also face significant problems with the State of Alaska itself.<sup>136</sup> Since the beginning of the Alaska Native tribal sovereignty movement, the State of Alaska has actively opposed efforts to expand Alaska Native tribal jurisdiction through litigation and administrative actions.<sup>137</sup> This general policy against the expansion of Alaska Native tribal sovereignty continues, as the State maintains a strong disapproval of the ILOC's findings on Alaska.<sup>138</sup>

The State of Alaska opposes granting Alaska Natives additional tribal sovereignty for five general reasons.<sup>139</sup> First, the State argues that Alaska has a much different history than that of Native Americans in the rest of the United States, and that Alaska Natives forfeited much of their tribal sovereignty when they agreed to the terms of ANCSA.<sup>140</sup> Second, various administrations have struggled with defining the territorial scope of Alaska Native tribal jurisdiction in the wake of the *Venetie* decision which declared that Indian country does not

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advocates to gain traction in Congress. See Heather Kendall-Miller & Lloyd Miller, Op-Ed., *Examining Sullivan's and Begich's Record on Alaska Native Issues*, ALASKA DISPATCH NEWS, Aug. 31, 2014, available at <http://www.adn.com/article/20140831/examining-sullivans-and-begichs-records-alaska-native-issues>, archived at <http://perma.cc/8K8B-XAGP> (characterizing Dan Sullivan, Senator Begich's challenger in November, as being "a staunch opponent of Native rights"). But cf. Lisa Reimers et al., Op-Ed., *Alaska's Problems Shouldn't Be Exploited for Political Gain*, ALASKA DISPATCH NEWS, Sept. 7, 2014, available at <http://www.adn.com/article/20140907/alaskas-problems-shouldnt-be-exploited-political-gain>, archived at <http://perma.cc/48CM-ZCMB> (countering that Dan Sullivan has done a lot for public safety in rural Alaska).

<sup>136</sup> See, e.g., ROADMAP, *supra* note 5, at 233–47 (outlining the State of Alaska's opposition to the ILOC's conclusions); Mauer, *Natives Protest Parnell's Decision*, *supra* note 11 (highlighting the State of Alaska's petition for writ of certiorari in a subsistence case); Mauer, *State Goes to Bat for Rights of Convicted Wife-Beater*, *supra* note 11 (explaining the State of Alaska's opposition to a tribal court terminating a non-member's parental rights).

<sup>137</sup> See, e.g., Mauer, *State Goes to Bat for Rights of Convicted Wife-Beater*, *supra* note 11 (highlighting the State's opposition to a tribal court terminating a non-member's parental rights); Mitchell, *Why History Counts*, *supra* note 34, at 392–93 (describing the State of Alaska's initial response to the Bureau of Indian Affairs' attempt to issue tribal constitutions); Wildridge, *supra* note 97, at 3 (noting that the scope of Alaska Native sovereignty has "been the subject of legal challenges by the State of Alaska for many years"). But see Di Pietro, *supra* note 72, at 342 (recalling that Governor Cowper's administration did not oppose the expansion of tribal sovereignty).

<sup>138</sup> See ROADMAP, *supra* note 5, at 233–47 (articulating the State of Alaska's opposition to the ILOC's conclusions).

<sup>139</sup> See *id.* In a way, the State of Alaska's position of sticking with a centralized form of justice runs counter to the libertarian rhetoric and sentiment to which many citizens of Alaska relate. See Steve Haycox, Op-Ed., *U.S. Exceptional in Its Stand on Rights*, ANCHORAGE DAILY NEWS, Sept. 20, 2013, at A10; Michael Powell, *Leery of Washington, Alaska Feasts on its Dollars*, N.Y. TIMES, Aug. 18, 2010, at A1 (discussing Alaskan's general disdain for the federal government, despite receiving the most federal dollars per capita). This seems inconsistent with the ILOC's chapter on Alaska, which reports that one of the major problems with the administration of justice in Alaska Native villages is the over-centralization of the system and an inability to cover an area so large and sparsely populated. See ROADMAP, *supra* note 5, at 35, 43–47, 49 (concluding that Alaska's centralized administration of justice "falls short of local needs").

<sup>140</sup> See ROADMAP, *supra* note 5, at 234–36.

exist in the vast majority of Alaska.<sup>141</sup> Third, if Alaska Natives were recognized as tribal sovereigns with some form of territorial reach, the State is concerned that it “would create a confusing patchwork quilt of jurisdiction.”<sup>142</sup> Fourth, the State has an underlying concern about the lack of constitutional protections that would be afforded to defendants subject to tribal court jurisdiction.<sup>143</sup> Finally, the State believes that the current scope of Alaska Native tribal sovereignty, such as the ability to adjudicate child custody cases, is sufficient when coupled with the State’s recent efforts to address rural problems.<sup>144</sup>

Despite these justifications, the combination of a number of high profile court cases and the ILOC report has put some political pressure on Alaska’s Governor to grant greater autonomy to Alaska Native tribal courts.<sup>145</sup> Although the State continues to oppose Alaska Native tribal jurisdiction in some cases, the Attorney General for the State of Alaska appears to have been at least partially influenced by the ILOC, and has been working with Alaska Native leaders on ways to expand their tribal authority.<sup>146</sup>

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<sup>141</sup> See *id.* at 239–40 (explaining the confusion that would likely ensue by not knowing which jurisdiction a person in an Alaska Native village would be subject to).

<sup>142</sup> See *id.* But see *Oneida Tribe v. Village of Hobart*, 732 F.3d 837, 839 (7th Cir. 2013) (characterizing overlapping jurisdictions as “a familiar feature of American government”).

<sup>143</sup> See Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302 (2012) (providing some constitutional rights to defendants in tribal courts); *Santa Clara Pueblo*, 436 U.S. at 51–52 (holding that alleged violations based on the ICRA cannot be heard in federal court); Michael C. Geraghty, *Point: Tribal Courts, State Perspectives by Alaska Attorney General Michael C. Geraghty*, ALASKA B. RAG 3 (Apr.–June 2014) (arguing that it would be “unfair to subject an Alaskan to the jurisdiction of a tribal government that she has no right to participate in”); Mauer, *State Goes to Bat for Rights of Convicted Wife-Beater*, *supra* note 11 (noting that some constitutional protections, like the right to an attorney in court, are not constitutionally protected in tribal courts); Telephone Interview with Donald Craig Mitchell, *supra* note 90 (opining that congressional drafters did not construct the ICRA correctly, and as such there is no remedy for constitutional violations in tribal courts).

<sup>144</sup> See ROADMAP, *supra* note 5, at 241–47. For example, both the ILOC and the State of Alaska agree that Alaska’s recent enactment of legislation to arm VPSOs is a positive development. See *id.* at 37, 39 (criticizing the VPSO program for officers’ inability to carry firearms); Kyle Hopkins, *Firearm Training for VPSOs Could Begin in January; Some Villages May Opt Out*, ALASKA DISPATCH NEWS, July 30, 2014, <http://www.adn.com/article/20140730/firearm-training-vpsos-could-begin-january-some-villages-may-opt-out>, archived at <http://perma.cc/X8VV-UWFQ> (reporting that Governor Parnell signed legislation to arm VPSOs on July 18, 2014). VPSOs are found in many Alaska Native villages, are funded by Alaska Native Regional Corporations and the State of Alaska, report directly to the Alaska State Troopers, and are available as “basic law enforcement and emergency first response.” See *About VPSO Program*, ALASKA DEP’T OF PUB. SAFETY (last visited Sept. 8, 2014), <http://dps.alaska.gov/ast/vpso/about.aspx>, archived at <http://perma.cc/NKJ2-GJ2B>; ROADMAP, *supra* note 5, at 39; Troy A. Eid, *Book Review: Alaska Natives and American Laws*, 30 ALASKA L. REV. 223, 229 (2013) (reviewing CASE & VOLUCK, *supra* note 18); Andre Rosay et al., *A Brief Look at VPSOs and Violence Against Women Cases*, 28 ALASKA JUST. F., no. 2–3, Summer/Fall 2011, at 10, 10 (emphasizing the “essential” role VPSOs play in rural Alaska Native communities).

<sup>145</sup> See Mauer, *Natives Protest Parnell’s Decision*, *supra* note 11; Mauer, *supra* note 8; Mauer, *State Goes to Bat for Rights of Convicted Wife-Beater*, *supra* note 11.

<sup>146</sup> See KTUU, *supra* note 12 (reporting that the State of Alaska will allow certain types of misdemeanors to be prosecuted in some tribal courts on a voluntary basis without prison sentences); see

Yet even with these recent developments, many remain skeptical that the State of Alaska will initiate or succeed at creating changes to Alaska Native tribal jurisdiction in a way that will substantially grant additional tribal sovereignty to Alaska Natives.<sup>147</sup> So far, announcements by Governor Sean Parnell and agreements with Alaska Native communities have been limited in scope.<sup>148</sup> Furthermore, even with small positive changes, as there have been before, the next administration or Attorney General could easily reverse course, which emphasizes Congress's unique role in expanding Alaska Native tribal sovereignty.<sup>149</sup>

#### *D. A Step in the Right Direction: The Alaska Safe Families and Villages Act*

Despite these roadblocks in Congress and Alaska, there is potential for positive change on the federal level.<sup>150</sup> On August 1, 2013, Alaska's two U.S. Sena-

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also Geraghty, *supra* note 143, at 3, 5 (recognizing "tribal courts and tribal governments as essential partners in improving public safety and increasing access to justice in rural Alaska" and declaring that "the State wants to collaborate").

<sup>147</sup> See Mauer, *supra* note 33 (reporting that Alaska State House members are not "sure what they could do" in response to the ILOC's Report). Alaska Governor Sean Parnell did not mention Alaska Natives once in his most recent State of the State address. See Governor Sean Parnell, State of the State Address (Jan. 22, 2014), available at <http://gov.alaska.gov/parnell/press-room/full-press-release.html?pr=6713>.

<sup>148</sup> See Hopkins, *supra* note 12.

<sup>149</sup> See HAYCOX, *supra* note 23, at 156–57 (recounting when Governor Knowles considered expanding Alaska Native tribal sovereignty); Di Pietro, *supra* note 72, at 342 (noting the changes in State policy based on administration between Governors Cowper and Hickel).

<sup>150</sup> See Capriccioso, *supra* note 126 (expressing optimism about the enactment of the Alaska Safe Families and Villages Act ("ASFVA")); see also Mason, *supra* note 135 (reporting that the ASFVA can now be voted on by the full Senate). There has also been a recent burst of optimism from proposed regulations by the Bureau of Indian Affairs to allow Alaska Natives to apply for their tribal lands to be put into trust. See Richard Mauer, *Interior Rules Would Create "Indian country" in Alaska*, ANCHORAGE DAILY NEWS, May 1, 2014, at A1 (reporting that regulations, which would replace the existing ones from 1980, were proposed on April 30, 2014). Alaska Native tribal sovereignty advocates have applauded these new proposed regulations. See ROADMAP, *supra* note 5, at 52–53, 55 (asking Congress to amend ANCSA to allow Alaska Natives to have lands placed into trust); Boraas, *supra* note 28 (arguing that trust designations for Alaska Natives would be a positive development and urging others to comment on the proposed regulations); Rob Capriccioso, *Federal Policy Shift: Key Players Favor Alaska Tribal Trust Lands*, INDIAN COUNTRY TODAY MEDIA NETWORK (May 12, 2014), <http://indiancountrytodaymedianetwork.com/2014/05/12/federal-policy-shift-key-players-favor-alaska-tribal-trust-lands-154829?page=0%2C0>, archived at <http://perma.cc/UA3E-WX8U> (noting that "[t]ribal reactions have been widely supportive"). However, the proposed regulations are unlikely to lead to any significant changes, if there is any change at all, in the next few years. See Mary Bishop, *Issues Unresolved in Proposal for Alaska Native Land in Federal Trust*, ALASKA DISPATCH, June 25, 2014, <http://www.adn.com/article/20140625/issues-unresolved-proposal-alaska-native-land-federal-trust>, archived at <http://perma.cc/T9Y2-GMV4> (arguing against the proposed regulations); Capriccioso, *supra* (recognizing that any changes from the proposed regulations are unlikely to happen quickly). Future courts will have to reconcile these new regulations with the U.S. Supreme Court's decision in *Venetie*, which appeared to have left the issue for Congress. See *Venetie*, 522 U.S. at 534 ("Whether the concept of Indian country should be modified is a question entirely for Congress.").

tors jointly introduced Senate Bill 1474, also known as the Alaska Safe Families and Villages Act (“ASFVA”).<sup>151</sup> The Act’s stated goal is to grant law enforcement opportunities to tribal courts in Alaska and improve the situation for Alaska Natives in rural Alaska through a pilot program coordinated by the State of Alaska.<sup>152</sup> The goal of the ASFVA is to empower Alaska Native villages to fight basic alcohol abuse and domestic violence issues in places where there is currently no law enforcement presence.<sup>153</sup> The ASFVA would provide Alaska Native villages with authority to negotiate with the State of Alaska to obtain this form of limited jurisdiction.<sup>154</sup> Section 6 of the ASFVA also repeals the Alaska exemption in the VAWA 2013 reauthorization.<sup>155</sup>

This is not the first time that Senator Begich has introduced the ASFVA, but it is the first time both of Alaska’s U.S. Senators have co-sponsored the legislation.<sup>156</sup> This version of the bill is different from previous versions in two main ways.<sup>157</sup> First, in previous versions, instead of the State of Alaska administering and coordinating the pilot programs, the Federal Government would take the lead.<sup>158</sup> Second, there was a funding component included in the previous legislation that is absent from the current version of the ASFVA.<sup>159</sup>

### III. REVERSING THE HISTORY OF NEGLECT: PROACTIVE SOLUTIONS FOR EXPANDING ALASKA NATIVE TRIBAL JURISDICTIONAL

Since 1867, Congress, the judiciary, and Alaska’s governments have grappled with Alaska Native sovereignty.<sup>160</sup> All three entities play an important role

<sup>151</sup> See Alaska Safe Families and Villages Act, S. 1474, 113th Cong. (2013).

<sup>152</sup> *Id.*

<sup>153</sup> See Carey Restino, *Federal Bill Takes Aim at Drug, Alcohol-Fueled Ills of Rural Alaska*, ALASKA DISPATCH, Aug. 16, 2013, <http://www.alaskadispatch.com/article/20130816/federal-bill-takes-aim-drug-alcohol-fueled-ills-rural-alaska>, archived at <http://perma.cc/C2HT-HH9F>. One of the persistent problems with justice and safety in rural Alaska is the centralized aspect of law enforcement, which is difficult to administer when many communities live off of the road system. See ROADMAP, *supra* note 5, at 35 (criticizing the centralized administration of justice in Alaska).

<sup>154</sup> See S. 1474, § 4.

<sup>155</sup> See *id.* at § 6.

<sup>156</sup> See Alaska Safe Families and Villages Act of 2011, S. 1192, 112th Cong. (2011); Alaska Safe Families and Villages Act of 2010, S. 3740, 111th Cong. (2010).

<sup>157</sup> Compare S. 1474, § 4 (2013) (directing the Attorney General to make grants with Alaska Native villages to allow them to work with the State of Alaska), with S. 1192, § 4 (directing the Department of Justice to carry out the program with up to nine Alaska Native villages), and S. 3740, § 4 (same).

<sup>158</sup> See Capriccioso, *supra* note 126 (explaining that the language had to be softened to get Senator Murkowski on board as a co-sponsor).

<sup>159</sup> Compare S. 1474, § 5 (2013) (omitting any specific appropriation amount), with S. 1192, § 6(c) (appropriating two million dollars to the pilot program), and S. 3740, § 6(c) (same).

<sup>160</sup> See Treaty with Russia, U.S.-Russ., art. 3, Mar. 30, 1867, 15 Stat. 539 (declining to extend U.S. citizenship to Alaska Natives at the time of the purchase, but instead subjecting them “to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country”); *In re Sah Quah*, 3 F. 327, 331 (D. Alaska 1886) (holding that Alaskan Natives did

in developing initiatives to increase tribal jurisdiction, and specific actions by any of these three entities could help remedy the difficulties faced by Alaskan Natives through their inaction.<sup>161</sup> This Part proposes four ways to expand Alaska Native tribal sovereignty so that local communities can better combat alcohol abuse, domestic violence, and sexual assault.<sup>162</sup> Section A proposes two congressional actions to help Alaska Natives and address the difficult conditions found in many rural communities.<sup>163</sup> Section B suggests that Alaska, independent of congressional efforts, should help Alaska Natives by allowing increased local control.<sup>164</sup> Finally, Section C argues that the Alaska Supreme Court should expand on prior precedent and find Alaska Native inherent tribal sovereignty to include limited criminal jurisdiction over members.<sup>165</sup>

### *A. Giving Power to the People: Congress Should Expand Alaska Native Tribal Sovereignty*

With its plenary power, congressional action regarding Alaska Native sovereignty and tribal jurisdiction is the most effective at instituting change.<sup>166</sup> Although Congress has recently enacted two pieces of legislation that had potential to help Alaska Native communities, it failed to take advantage of this opportunity.<sup>167</sup> By explicitly exempting Alaska Natives from the Tribal Law and Order Act of 2010 (“TLOA”) and the reauthorization of the Violence Against Women Reauthorization Act of 2013 (“VAWA”), Congress failed to address the unacceptably high rates of domestic violence and abuse that plague Alaska Native communities.<sup>168</sup>

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not have sovereignty); MITCHELL, *SOLD AMERICANS*, *supra* note 34, at 44 (characterizing Alaska’s early military government as positioned to fight Alaska Natives if needed).

<sup>161</sup> See *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (defending the “existing sovereign powers” of Native Americans); Capriccioso, *supra* note 126 (noting the roles of Congress and the State of Alaska).

<sup>162</sup> See *infra* notes 166–244 and accompanying text.

<sup>163</sup> See *infra* notes 166–212 and accompanying text.

<sup>164</sup> See *infra* notes 213–228 and accompanying text.

<sup>165</sup> See *infra* notes 229–244 and accompanying text.

<sup>166</sup> See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (holding that Congress’s Constitutional powers with regard to Native Americans “are not limited by any restrictions”); see also *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 534 (1998) (recognizing that defining Alaska Native’s jurisdictional framework “is a question entirely for Congress”).

<sup>167</sup> See Violence Against Women Reauthorization Act (VAWA) of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified as amended in scattered sections of 18, 22, 25, and 42 U.S.C.); Tribal Law and Order Act (TLOA) of 2010, Pub. L. No. 111-211, 124 Stat. 2261 (codified as amended in scattered sections of 25 U.S.C. (2012)).

<sup>168</sup> See § 910, 127 Stat. at 126 (“In the State of Alaska, the amendments made . . . shall only apply to the Indian country . . . of the Metlakatla Indian Community . . .”); § 205, 124 Stat. at 2264 (“Nothing in this Act limits, alters, expands, or diminishes the civil or criminal jurisdiction of the State of Alaska, any subdivision of the State of Alaska, or any Indian tribe in that State.”).

Although Congress has yet to enacted legislation to help Alaska Native communities, Congress has a history of taking time to enact such sweeping legislation.<sup>169</sup> This Section argues that there are two reasonable actions that Congress should take to give Alaska Native communities additional local control.<sup>170</sup> Subsection 1 argues that Congress should enact the Alaska Safe Families and Villages Act (“ASFVA”) as a first step towards giving Alaska Natives the tribal sovereignty they need to address social ills in their communities.<sup>171</sup> Subsection 2 advocates for the congressional enactment of a new kind of Indian country that gives Alaska Natives limited criminal jurisdiction over members within their rural communities.<sup>172</sup>

### 1. Congress Should Enact the Alaska Safe Families and Villages Act and Repeal Section 910 of the VAWA

The easiest way for Congress to give Alaska Natives more resources to combat some of the life-threatening social ills found in rural communities is to enact the ASFVA.<sup>173</sup> Although the proposed legislation falls short in many respects, it should be the first of many steps in the right direction.<sup>174</sup> With bipartisan co-sponsors from Alaska’s delegation, there may now be enough momentum in Congress to enact this legislation.<sup>175</sup>

In its current form, ASFVA gives Alaska Native communities without any law enforcement presence the authority to negotiate with the State of Alaska to obtain the local control needed to combat alcohol abuse and domestic violence.<sup>176</sup> Given the lawless reality in these communities where victims do not have anyone to turn to for help, this change has the potential to increase coopera-

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<sup>169</sup> See, e.g., MITCHELL, *SOLD AMERICANS*, *supra* note 34, at 377–78 (noting that an initial attempt at an Alaska Native Settlement Act, eventually enacted in 1971, was made as early as 1946); Capriccioso, *supra* note 126 (discussing congressional difficulty in reversing the 2009 U.S. Supreme Court decision in *Carciari v. Salazar*, 555 U.S. 379, 395–96 (2009), that held that the United States cannot place tribal lands into trust for tribes recognized after 1934).

<sup>170</sup> See *infra* notes 173–212 and accompanying text.

<sup>171</sup> See *infra* notes 173–193 and accompanying text.

<sup>172</sup> See *infra* notes 194–212 and accompanying text.

<sup>173</sup> See Alaska Safe Families and Villages Act, S. 1474, 113th Cong. (2013); Mason, *supra* note 135 (reporting that the ASFVA is out of committee and waiting for a vote in the Senate).

<sup>174</sup> See Oversight Hearing to Receive Testimony on “The Indian Law and Order Commission Report: A Roadmap for Making Native America Safer” Before the S. Comm. on Indian Affairs, 113th Cong. (2014) [hereinafter Jerue Testimony], 3–4 (statement of Tami Truett Jerue, Tribal Administrator and Director of Social Services, Anvik Tribal Council, Alaska), available at <http://www.indian.senate.gov/sites/default/files/upload/files/021214Tami%20Truett%20Jerue.pdf>, archived at <http://perma.cc/EYD6-8EHX> (urging that a previous, stronger version of S. 1474 replace the current version); Capriccioso, *supra* note 126 (reporting that Senator Mark Begich, one of S. 1474’s primary sponsors, believes that the proposed legislation does not go far enough).

<sup>175</sup> See Capriccioso, *supra* note 126 (expressing optimism of S. 1474’s passage now that it has bipartisan support).

<sup>176</sup> Restino, *supra* note 153.

tion and communication between Alaska Native villages and the State of Alaska.<sup>177</sup>

Another key component of the ASFVA is the repeal of Alaska's exemption in the VAWA.<sup>178</sup> Alaska's exemption in the VAWA, found in Section 910 of the enacted legislation, engendered a great deal of criticism in Alaska and nationally.<sup>179</sup> This may partially be explained by how the exemption became part of the legislation through an amendment offered by Alaska U.S. Senator Lisa Murkowski.<sup>180</sup> Furthermore, the criticism also stems from the fact that without the exemption, Alaska Native tribal courts may have otherwise been able to issue civil protection orders and "use other appropriate mechanisms" to protect victims from perpetrators in Alaska Native communities.<sup>181</sup> However the repeal of Section 910 from the VAWA happens, such an action is the easiest way for Congress to have an immediate impact on Alaska Native communities.<sup>182</sup>

Still, there are many shortcomings to the ASFVA.<sup>183</sup> For instance, the ASFVA would only encourage Alaska Native communities to partner with the State of Alaska, where the State would retain full discretion and could choose

<sup>177</sup> See S. 1474, § 4 (requiring cooperation between Alaska Native communities and the State of Alaska); John D. Sutter, *The Lawless 'End of the Land,'* CNN (Feb. 4, 2014), [http://www.cnn.com/2014/02/03/opinion/sutter-alaska-rape-lawless/index.html?iid=article\\_sidebar](http://www.cnn.com/2014/02/03/opinion/sutter-alaska-rape-lawless/index.html?iid=article_sidebar), archived at <http://perma.cc/J8FB-ALSR> (characterizing Nunam Iqua, an Alaska Native village without any law enforcement presence, as "lawless").

<sup>178</sup> See S. 1474, § 6 ("Section 910 of the Violence Against Women Reauthorization Act of 2013 . . . is repealed.").

<sup>179</sup> See, e.g., ROADMAP, *supra* note 5, at 33 (finding Senator Murkowski's exclusion of Alaska from sections 904 and 905 of the VAWA "unconscionable"); Horwitz, *supra* note 123 (reporting on the pressure Senator Murkowski faced after her support for the Alaska exclusion); Landreth, *supra* note 102 (correcting statements from Senator Murkowski claiming that section 910 of the VAWA was an "inclusion" for Alaska).

<sup>180</sup> Compare 159 CONG. REC. S611 (daily ed. Feb. 12, 2013) (statement of Sen. Patrick Leahy) ("[T]he distinguished Senator from Alaska, Ms. Murkowski, has filed amendment No. 11, a *technical fix* to ensure that VAWA's tribal provisions apply to Alaska. I now offer the amendment on her behalf." (emphasis added)), with *id.* at S611–12 (exempting Alaska from Sections 904 and 905 of the VAWA, except for the one reservation in Alaska).

<sup>181</sup> See VAWA, Pub. L. No. 113-4, § 905, 127 Stat. 54, 124 (codified as amended in 18 U.S.C. § 2265(e) (2013)) ("[A] court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders . . . to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country . . . or otherwise within the authority of the Indian tribe."); Landreth, *supra* note 102 (arguing that Section 905 of the VAWA would have given Alaska Native tribal courts the ability to issue and enforce civil protective orders).

<sup>182</sup> See *Jerue Testimony*, *supra* note 174, at 3 (asking for the repeal of Section 910 of the VAWA); ROADMAP, *supra* note 5, at 33 (characterizing Section 910 of the VAWA as "unconscionable"); Landreth, *supra* note 102 (arguing that Alaska Native communities would benefit from the repeal of Section 910 of the VAWA).

<sup>183</sup> See *Jerue Testimony*, *supra* note 174, at 2–4 (asking, as an amendment, that the ASFVA allow the Department of the Interior to place Alaska Native tribal lands into trust); Capriccioso, *supra* note 126 (recognizing that the ASFVA could and should give federally recognized Alaska Native tribes jurisdiction over non-Indians for crimes of sexual assault and domestic violence).

not to participate.<sup>184</sup> Given the State's long-standing opposition to granting Alaska Natives additional tribal sovereignty, the immediate impact of ASFVA's enactment is difficult to predict.<sup>185</sup> Additionally, because the proposed legislation would only create a pilot program, the status quo would become a default position.<sup>186</sup> Finally, unlike earlier versions of the ASFVA, there is no federal funding attached.<sup>187</sup> This lack of funding may make the legislation's changes prohibitively expensive for rural Alaska Native communities that cannot afford law enforcement in the first place.<sup>188</sup>

Despite these shortcomings, Congress should enact the ASFVA.<sup>189</sup> By exempting Alaska from the TLOA and the VAWA, Congress failed to remedy the disproportionate rates of domestic violence and sexual assault found in Alaska Native villages.<sup>190</sup> To combat this epidemic, Congress must enact legislation that specifically addresses these unique issues.<sup>191</sup> Enacting the ASFVA would also give Congress an opportunity to assess the impact of the legislation.<sup>192</sup> This could help Congress in the future to find solutions to combat social ills found in Alaska Native communities.<sup>193</sup>

## 2. Congress Should Enact Legislation that Establishes a New Type of Indian Country in Alaska

As noted by the U.S. Supreme Court in 1998 in *Alaska v. Native Village of Venetie Tribal Government*, Congress has the unique ability to either expand the

<sup>184</sup> See Alaska Safe Families and Villages Act, S. 1474, 113th Cong., § 4 (2013) (“The State . . . and Indian tribes in the State are encouraged to enter into intergovernmental agreements relating to the enforcement of certain State laws by the Indian tribe.”).

<sup>185</sup> See S. 1474, § 4 (declining to mandate partnerships between the State and Alaska Native communities). This possible lack of impact could be explained by the State's position that the status quo is working. ROADMAP, *supra* note 5, at 241–47 (detailing actions the State of Alaska has taken that the administration deems as sufficient).

<sup>186</sup> See S. 1474, § 4 (encouraging the State of Alaska to partner with Alaska Native communities).

<sup>187</sup> Compare S. 1474, § 5 (omitting any specific appropriation amount), with S. 1192, § 6(c) (2011) (appropriating two million dollars to the pilot program), and Alaska Safe Families and Villages Act of 2010, S. 3740, 111th Cong. (2010) (same).

<sup>188</sup> See *Masters Testimony*, *supra* note 7 (suggesting the difficulty of funding law enforcement in every rural Alaskan community).

<sup>189</sup> See Capriccioso, *supra* note 126 (advocating for the Alaska Safe Families and Villages Act's passage); Restino, *supra* note 153 (reporting that Alaska Natives are supportive of the proposed legislation).

<sup>190</sup> See Canfield, *supra* note 29 (characterizing rural Alaska's safety as being “the worst in the United States”).

<sup>191</sup> See *Jerue Testimony*, *supra* note 174, at 2–4 (urging Congress to give Alaska Natives “the tools necessary to combat drug and alcohol abuse, domestic violence, and violence against women”).

<sup>192</sup> See S. 1474, § 4; cf. DeMarban, *supra* 125 (highlighting the role the Alaska Rural Justice and Law Enforcement Commission played in combating alcohol abuse in rural Alaska Native communities).

<sup>193</sup> See Restino, *supra* note 154 (noting that the proposed legislation would promote collaboration between State and tribal governments).

definition of Indian country to include Alaska or create a different jurisdictional framework.<sup>194</sup> Given Alaska's unique background and the extinguishment of Indian country through the Alaska Native Claims Settlement Act ("ANCSA"), Congress should establish a new tribal jurisdictional framework for Alaska.<sup>195</sup> This new definition could be added to the definition of Indian country found in 18 U.S.C. § 1151, and could grant more limited rights to Alaska Natives in comparison to those enjoyed by other Native Americans.<sup>196</sup> By doing so, Congress would have the ability to give Alaska Natives the level of tribal sovereignty needed to protect members from domestic violence and sexual assault while ensuring that the constitutional protections of defendants remain intact.<sup>197</sup>

Although Congress could simply extend Indian country to include ANCSA lands or even the entire State of Alaska, doing so would likely create a number of problems.<sup>198</sup> In particular, some argue that Indian country as it existed in the contiguous United States never really existed in Alaska.<sup>199</sup> Such an extension of Indian country would also create many more problems relating to sovereign immunity within Alaska and could have a serious impact on State and local tax revenues.<sup>200</sup> Another concern is that defendants in tribal courts would be without

<sup>194</sup> See *Venetie*, 522 U.S. at 534 ("Whether the concept of Indian country should be modified [with regard to Alaska] is a question entirely for Congress.")

<sup>195</sup> See Alaska Native Claims Settlement Act, Pub. L. No. 92-203, § 4(b), 85 Stat. 688, 690 (1971) (codified in 43 U.S.C. § 1603(b) (2006)) (extinguishing all aboriginal title); cf. ROADMAP, *supra* note 5, at 51–53, 55 (urging congressional action to change the definition of Indian country in Alaska).

<sup>196</sup> See 18 U.S.C. § 1151 (2012) (defining Indian country as "land within the limits of any Indian reservation . . . all dependent Indian communities . . . [and] all Indian allotments"); Strommer & Osborne, *supra* note 94, at 33–34 (recommending changes to the definition of Indian country to apply to Alaska); cf. ROADMAP, *supra* note 5, at 234–36 (detailing how the State of Alaska distinguishes Alaska Natives from Native Americans in their experience with Indian country).

<sup>197</sup> See Hart, *supra* note 108, at 149 ("Many Native Americans must rely upon . . . prosecutors, who are often hundreds of miles away, to prosecute even minor crimes. Not surprisingly, this leaves many offenses, even very serious ones, unprosecuted."); see also King, *supra* note 33, at 46–52 (recommending that Alaska Native communities be given prosecutorial powers over some criminal matters); Strommer & Osborne, *supra* note 94, at 29–33 (detailing some of the benefits of expanding tribal jurisdiction in Alaska).

<sup>198</sup> See *Venetie*, 522 U.S. at 534 (emphasizing Congress's role in defining the bounds of Indian Country in Alaska); ROADMAP, *supra* note 5, at 236 (demonstrating that the State forcefully objects to the creation of any additional Indian country in Alaska). But see ROADMAP, *supra* note 5, at 51–53, 55 (recommending that Congress extend Indian country to parts of Alaska). One criticism of the ILOC is that no member of the committee is Alaskan. See *id.* at 191–97 (showing a lack of experience in Alaska in all of the ILOC's commissioner biographies).

<sup>199</sup> See *Sah Quah*, 3 F. at 329 (holding that there is no Indian country in Alaska); ROADMAP, *supra* note 5, 234–36 (detailing the State's argument that the unique history of Alaska had a much different relationship with Indian country than many Native Americans); Mitchell, *Why History Counts*, *supra* note 34, at 372 (explaining the lack of traditional Indian country in Alaska). But see CASE & VOLUCK, *supra* note 18, at 391 (positing that there may indeed be Indian country in Alaska at Alaska Native town sites and allotments).

<sup>200</sup> See *McCrary v. Ivanof Bay Vill.*, 265 P.3d 337, 342 (Alaska 2011) (concluding that Ivanof Bay "is entitled to sovereign immunity[,] and is therefore "immune from suit in state court"); Mitch-

recourse if their constitutional rights are violated in the adjudicatory process.<sup>201</sup> Finally, ANCSA was a settlement between Alaska Natives and Congress where “[a]ll aboriginal titles . . . [were] extinguished.”<sup>202</sup> Especially given the active participation of Alaska Native leaders in drafting ANCSA, it might be difficult for Congress to grant additional protections and tribal sovereignty to Alaska Natives after what has been viewed by many as a generous settlement.<sup>203</sup>

Regardless of Congress’s opposition to extending Indian country to Alaska, expanding local control through a limited form of territorial jurisdiction for Alaska Natives would likely help communities confront serious problems with domestic violence and sexual assault.<sup>204</sup> For example, the State of Alaska is concerned with constitutional protections for defendants in Alaska Native tribal courts, especially since tribal courts in Alaska vary widely.<sup>205</sup> To address this concern, Congress could grant appellate jurisdiction over tribal decisions to either State or Federal courts.<sup>206</sup> Congress could then give Alaska Natives concurrent jurisdiction over domestic violence and sexual assault cases, in a limited fashion similar to the authority Congress granted to American Indians in the rest of the country with the enactment of the TLOA and the VAWA.<sup>207</sup> Additionally, Congress could limit the territorial scope of this new type of Indian country to Alaska Native town sites, which are more easily identifiable than some Indian

ell, *Why History Counts*, *supra* note 34, at 412 (explaining that some of the first major posturing for Alaska Native sovereignty concerned the possibility of taxing oil and gas companies).

<sup>201</sup> See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 51–52 (1978) (holding that alleged violations based on the Indian Civil Rights Act cannot be heard in federal court); Michalyn Steele, *Comparative Institutional Competency and Sovereignty in Indian Affairs*, 85 U. COLO. L. REV. 759, 760 (2014) (noting that approximately seventy percent “of the violent crimes against Native Americans and Alaska Natives” are committed by non-Indian offenders).

<sup>202</sup> See 43 U.S.C. § 1603(b) (2012) (contemplating the relinquishment of some Alaska Native tribal sovereignty in exchange for the creation of funded Alaska Native Regional Corporations).

<sup>203</sup> See HAYCOX, *supra* note 23, at 97–98 (characterizing ANCSA as being a generous settlement); MITCHELL, *SOLD AMERICAN*, *supra* note 66, at 10 (opining that “ANCSA remains the most generous and innovative aboriginal claims settlement in U.S. history”). *But see* CASE & VOLUCK, *supra* note 18, at 191–93 (noting the increased share dilution since ANCSA’s enactment).

<sup>204</sup> See ROADMAP, *supra* note 5, at 35 (arguing that Alaska Native communities are better positioned to act with law enforcement authority than the State); King, *supra* note 33, at 46–52 (recommending that Alaska Native communities be given some limited criminal jurisdiction).

<sup>205</sup> See ROADMAP, *supra* note 5, at 240; *Santa Clara Pueblo*, 436 U.S. at 51–52 (holding that the Indian Civil Rights Act does not allow suits for alleged violations to be brought in federal court).

<sup>206</sup> *Cf. Santa Clara Pueblo*, 436 U.S. at 51–52 (holding that alleged violations of the Indian Civil Rights Act cannot be brought in federal court); *Simmonds v. Parks*, 329 P.3d 995, 1008 (Alaska 2014) (permitting appeals from tribal court decisions in state court after the exhaustion of the tribal court’s appeals process).

<sup>207</sup> See Tribal Law and Order Act (TLOA) of 2010, Pub. L. No. 111-211, § 234, 124 Stat. 2261, 2279–80 (2010) (codified as amended in 25 U.S.C. § 1302) (increasing maximum penalties for tribal courts); Violence Against Women Reauthorization Act (VAWA) of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 121 (codified as amended in 25 U.S.C. § 1304) (2013) (giving tribes the concurrent jurisdiction “to exercise special domestic violence criminal jurisdiction over all persons”).

country in the contiguous United States.<sup>208</sup> Finally, congressional action could have a greater impact than ANCSA on Alaska Natives who live in rural communities today, due to birth rates and emigration from the villages.<sup>209</sup>

Congress has the ultimate authority and obligation to protect Alaska Native citizens.<sup>210</sup> And regardless of what Congress decides to do, the reality is that the status quo is not working.<sup>211</sup> Therefore, Congress can and should give local control back to Alaska Native communities in a way that protects all Alaskans.<sup>212</sup>

*B. Supporting Local Government: The State of Alaska Should Grant Additional Authority to Alaska Native Tribal Courts to Combat Domestic Violence and Sexual Assault in Rural Alaska*

Although the State of Alaska may lack plenary powers with regard to Alaska Natives, it is better positioned to find a long-term and meaningful solution to Alaska Native tribal jurisdictional issues than Congress.<sup>213</sup> Alaska's government is well-versed in the problems plaguing rural Alaska Native communities, and Alaskans would likely be less resentful of change if it came from the state rather

<sup>208</sup> See CASE & VOLUCK, *supra* note 18, at 390–91 (arguing that the holding in *Venetie* leaves open a question about whether Alaska Natives retain some sovereignty with regard to town sites); ROADMAP, *supra* note 5, at 45 (arguing that the decision in *Venetie* did not address “Alaska Native town site land or Alaska Native allotments”). Alternatively, Congress can define jurisdiction based on the U.S. Census Bureau’s system for defining areas in Alaska, called Alaska Native Village Statistical Areas. See *Alaska Native Village Statistical Area 2010 Block Maps*, U.S. CENSUS BUREAU [http://www.census.gov/geo/maps-data/maps/block/2010/aianhh/dc10blk\\_anvsa.html](http://www.census.gov/geo/maps-data/maps/block/2010/aianhh/dc10blk_anvsa.html), archived at <http://perma.cc/TX47-MTLH> (last updated Jan. 24, 2013) (providing maps of each rural community in Alaska); Interview with Lloyd Benton Miller, *supra* note 9 (suggesting the use of Alaska Native Village Statistical Areas to define Alaska Native jurisdictional boundaries).

<sup>209</sup> See CASE & VOLUCK, *supra* note 18, at 191–93 (noting that the effective power of an ANCSA share today is only worth 30% of what it was forty years ago); INSTITUTE OF SOCIAL & ECONOMIC RESEARCH, *supra* note 26, at 1 (finding that around 42% of Alaska Natives live in urban areas as of 2004, with that number expected to climb to over 50% by 2020).

<sup>210</sup> See *Venetie*, 522 U.S. at 534 (holding that “[w]hether the concept of Indian country should be modified [in Alaska] is a question entirely for Congress”); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (noting that Native Americans “look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father”).

<sup>211</sup> See ROADMAP, *supra* note 5, at 41, 43 (listing many social ills that Alaska Natives face disproportionately); Shannyn Moore, Op-Ed., *Governor Fails in Combatting Sexual Assault*, ANCHORAGE DAILY NEWS, Jan. 5, 2014, at B5 (noting that Alaska’s forcible rape rate has increased in the last five years); Sutter, *supra* note 13 (reporting that Alaska has the highest rate of rape in the country, which is three times above the national average).

<sup>212</sup> See 43 USC § 1601(b) (2006) (“[T]he settlement should be accomplished . . . without establishing any permanent racially defined institutions . . . .”); *id.* § 1601(c) (“[N]o provision [shall] . . . relieve, replace, or diminish any obligation of the United States . . . to protect and promote the rights or welfare of Natives as citizens of the United States . . . .”).

<sup>213</sup> See Capriccioso, *supra* note 126 (highlighting how the State of Alaska can act without any further congressional action).

than the federal government.<sup>214</sup> Additionally, as a P.L. 280 state, Alaska has the jurisdictional authority to dictate the scope of Alaska Native tribal jurisdiction in the absence of congressional action.<sup>215</sup>

The State of Alaska should help Alaska Natives combat domestic violence and sexual assault in rural Alaska by abandoning its broken centralized administration and rely more on localized tribal courts.<sup>216</sup> As noted by the Indian Law and Order Commission (“ILOC”), Alaska’s reliance on a centralized form of law enforcement to cover an extremely sparsely populated land mass should be reconsidered.<sup>217</sup> Giving tribal courts the ability to prosecute and incarcerate members in a village while allowing for appeals to State courts would go a long way toward restoring faith in law enforcement in rural Alaska Native communities.<sup>218</sup>

The State of Alaska has many legitimate concerns with granting additional tribal jurisdiction to Alaska Natives.<sup>219</sup> After all, the American Indian model of having a complicated patchwork of legal jurisdictions because of reservations would not work well in Alaska.<sup>220</sup> The State has legitimate concerns about the territorial scope of Alaska Native tribal court jurisdiction.<sup>221</sup> With Alaska Natives being largely politically and socially integrated into Alaskan society, concerns about funding and constitutional rights for defendants are also well founded.<sup>222</sup>

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<sup>214</sup> See Richard Mauer, *Alaska A.G. Criticizes Report on Bush Justice*, ANCHORAGE DAILY NEWS, Apr. 9, 2014, at A1 (reporting about hearings in the Alaska State Legislature on the ILOC’s report); Powell, *supra* note 149 (noting Alaskan’s general dislike and distrust of the federal government).

<sup>215</sup> See Di Pietro, *supra* note 72, at 359 (explaining that the State of Alaska could grant additional jurisdiction to Alaska Native tribal courts). There remains some question about the scope of the State’s jurisdictional authority under P.L. 280 after *Venetie*. See *In re C.R.H.*, 29 P.3d 849, 851, 852 n.9 (Alaska 2001) (emphasizing that P.L. 280 only applies to Indian country).

<sup>216</sup> See ROADMAP, *supra* note 5, at 45 (urging the State of Alaska to change course in the interest of public safety); King, *supra* note 33, at 46–57 (recommending that Alaska Native communities be given increased authority to prosecute crimes and punish members).

<sup>217</sup> See ROADMAP, *supra* note 5, at 45.

<sup>218</sup> See Tribal Law and Order Act (TLOA) of 2010, Pub. L. No. 111-211, § 202(a)(2)(B), 124 Stat. 2261, 2262 (2010) (codified as amended in 25 U.S.C. § 280 (2012)) (finding that “tribal justice systems are often the most appropriate institutions for maintaining law and order” in Native American communities); Wildridge, *supra* note 97, at 2 (“Tribal courts have proven to be integral in addressing public safety and other concerns in rural Alaska, given the absence of other effective means to combat problems of enormous magnitude.”).

<sup>219</sup> See ROADMAP, *supra* note 5, at 233–47; *supra* notes 136–149 and accompanying text (detailing the State of Alaska’s opposition to the expansion of Alaska Native tribal jurisdiction).

<sup>220</sup> See ROADMAP, *supra* note 5, at 240; Clinton, *supra* note 43, at 504 (using the term “jurisdictional maze” in reference to law enforcement on Native American lands).

<sup>221</sup> See ROADMAP, *supra* note 5, at 240.

<sup>222</sup> See HAYCOX, *supra* note 23, at 98; ROADMAP, *supra* note 5, at 240 (emphasizing the high costs associated with expanding tribal jurisdiction in Alaska).

Yet it is precisely for all of these reasons that the State of Alaska is in the best position to define the scope of Alaska Native tribal jurisdiction.<sup>223</sup> If the State of Alaska were to grant additional limited tribal sovereignty to Alaska Native communities, Congress would see less reason for federal involvement.<sup>224</sup> Nothing prevents the State from granting tribal jurisdiction to Alaska Native communities where everything is appealable to State courts and is limited in territorial reach, subject matter, and the parties involved.<sup>225</sup> In fact, making these changes could relieve burdens on the State's prison population, lower recidivism rates, and decrease costs borne by the judiciary.<sup>226</sup>

If the State of Alaska really is "one country, one people," it is time for the State to truly commit to protecting its most vulnerable citizens, even if it creates added complexity and grants some concurrent jurisdiction to Alaska Native tribal courts.<sup>227</sup> By taking the lead in granting additional tribal jurisdiction to Alaska Natives, the State will be able to ensure that concerns about scope and constitutional protections are appropriately addressed.<sup>228</sup>

*C. "Domestic Dependent" No More: The Judiciary Should Expand the Holding in John v. Baker by Giving Alaska Native Tribal Courts Inherent Sovereignty over Members in Limited Criminal Matters*

In 1998, in *John v. Baker*, the Alaska State Supreme Court held that Alaska Natives retain tribal sovereignty and authority with regard to internal tribal relations based on Federal common law.<sup>229</sup> In her 2013 State of the Judiciary address, the author of that opinion, Alaska State Supreme Court Chief Justice Dana Fabe, implored the Alaska State Legislature to partner with Alaska Native com-

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<sup>223</sup> See COHEN'S HANDBOOK, *supra* note 42, § 1.06 at 89, 91–92 (explaining that P.L. 280 was part of a broader legislative agenda of Congress attempting to terminate the federal relationship with Native Americans by giving jurisdictional authority to certain States).

<sup>224</sup> See Capriccioso, *supra* note 126 (explaining how further congressional action is necessary only because the State of Alaska is not stepping up to the plate).

<sup>225</sup> See Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545, 545 (codified as amended in 18 U.S.C. § 1162 (2012) and 28 U.S.C. § 1360 (2012) for criminal and civil jurisdiction respectively) (extending P.L. 280 to the State of Alaska); see also KTUU, *supra* note 12 (allowing limited voluntary prosecutions by Alaska Native tribal courts).

<sup>226</sup> See *Crime Summit Before the S. Judiciary Comm.* 27th Leg., 2d Sess. (Alaska 2012) (fact sheet by Walt Monegan, President and CEO, Alaska Native Justice Center), available at [http://www.legis.state.ak.us/basis/get\\_documents.asp?session=27&docid=6777](http://www.legis.state.ak.us/basis/get_documents.asp?session=27&docid=6777), archived at <http://perma.cc/XRR3-M3LG>.

<sup>227</sup> See Admin. Order No. 125, *supra* note 73 (declaring that "Alaska is one country, one people"); Violence Against Women Reauthorization Act (VAWA) of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 121 (codified as amended in 25 U.S.C. § 1304) (2013) (granting tribes the concurrent jurisdiction "to exercise special domestic violence criminal jurisdiction over all persons").

<sup>228</sup> See ROADMAP, *supra* note 5, at 240.

<sup>229</sup> See 982 P.2d 738, 748–49 (Alaska 1999).

munities to effectively administer justice in the State.<sup>230</sup> Chief Justice Fabe emphasized how the judiciary has worked on these problems for twenty years to help ensure that justice in Alaska Native rural communities is not “delivered in a far-off court by strangers,” but noted that there is still a long way to go.<sup>231</sup> Although she could give no definitive solutions or clear indications as to how the court would decide pending cases, Chief Justice Fabe appeared ready to extend the same reasoning used in *Baker*.<sup>232</sup>

Chief Justice Fabe’s address is an indication that Alaska’s jurisprudence could continue to develop favorably for Alaska Native tribal sovereignty advocates.<sup>233</sup> Since courts have played a vital role in determining the scope of Native American sovereignty for centuries, the Alaska Supreme Court’s willingness to expand the scope of Alaska Native inherent tribal sovereignty in the absence of federal or state statutory guidance demonstrates that there is another way Alaska Natives can achieve greater local control.<sup>234</sup>

The Alaska Supreme Court and federal courts should expand the interpretation of federal common law to hold that Alaska Natives retain inherent sovereignty with regard to regulating and punishing tribal members within their own community.<sup>235</sup> The Alaska State Supreme Court can simply expand the list of inherent tribal activities for which an Alaska Native tribe remains sovereign to include specific criminal acts like domestic violence and sexual assault.<sup>236</sup> By employing a narrow reading of the U.S. Supreme Court’s decision in *Venetie*, the court should hold that while Alaska Natives have no jurisdiction based on Indian country, they do retain authority to “resolve . . . disputes between their own members” within the confines of their town sites.<sup>237</sup>

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<sup>230</sup> *State of the Judiciary*, *supra* note 9, at 9; *see Baker*, 982 P.2d at 743 (indicating that Chief Justice Fabe wrote for the majority).

<sup>231</sup> *State of the Judiciary*, *supra* note 9, at 8.

<sup>232</sup> *See id.*, *supra* note 9, at 7–14 (emphasizing the importance of using local judicial structures); Interview by Steve Heimel with Dana Fabe, Chief Justice of the Alaska Sup. Ct. (Nov. 22, 2013), available at <http://www.alaskapublic.org/2013/11/22/the-law-in-alaska/>, archived at <http://perma.cc/6XK6-NSJW> (explaining that judges cannot comment on pending cases).

<sup>233</sup> *See State of the Judiciary*, *supra* note 9, at 7–14; *see also Simmonds*, 329 P.3d at 1007–08 (supporting, through the State judiciary, appeals in tribal courts).

<sup>234</sup> *See McCrary*, 265 P.3d at 342 (upholding *Baker* unanimously); *Simmonds*, 329 P.3d at 1007–08.

<sup>235</sup> *See Baker*, 982 P.2d at 748–49 (holding that “Alaska Native tribes, by virtue of their inherent powers as sovereign nations” may “resolve domestic disputes between their own members”).

<sup>236</sup> *See id.*

<sup>237</sup> *See id.*; CASE & VOLUCK, *supra* note 18, at 390–91 (interpreting *Venetie* as not extinguishing Indian country for Alaska Native town sites and allotments); ROADMAP, *supra* note 5, at 45 (arguing that the decision in *Venetie* did not address “Alaska Native town site land or Alaska Native allotments”).

Despite these compelling reasons, such a sweeping change in the scope of Alaska Native tribal sovereignty could lead to some consequences.<sup>238</sup> First, the Alaska Supreme Court or any other court would be unable to extend tribal sovereignty to include jurisdiction over non-Natives without congressional action.<sup>239</sup> Second, any ruling must consider existing federal laws, including P.L. 280, the Major Crimes Act, and ANCSA's extinguishment of Indian country in Alaska.<sup>240</sup> Furthermore, a court would need to consider the implications of such a holding, and the likelihood that the State of Alaska would appeal the decision to the U.S. Supreme Court, which has been perceived as hostile to Native American and Alaska Native sovereignty movements.<sup>241</sup>

Still, given the legal nature of these questions, it is inevitable that questions concerning the scope of Alaska Native tribal sovereignty for criminal matters are heard by the Alaska State Supreme Court.<sup>242</sup> When that time comes, the court should hold that Alaska Natives have inherent tribal sovereignty over a limited number of criminal cases in their communities.<sup>243</sup> Such a decision could provide an alternative form of justice to help the rural Alaska Native communities that need it the most.<sup>244</sup>

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<sup>238</sup> See *Baker*, 982 P.2d at 766 (Matthews, C.J., dissenting) (warning the court that changes to tribal jurisdiction means the “[t]he doors of Alaska’s courts will no longer be open to all Alaskans”).

<sup>239</sup> See Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (codified as amended in 25 U.S.C. § 1301(2) (2012)) (extending tribal jurisdiction to include non-member Indians); *United States v. Lara*, 541 U.S. 193, 211 (2004) (Kennedy, J., concurring) (opining that congressional action “demonstrates Congress’s clear intention to restore to the tribes an inherent sovereign power to prosecute nonmember Indians”); *Duro v. Reina*, 495 U.S. 676, 679 (1990) (holding that tribes do not have criminal jurisdiction over non-member Indians); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978) (holding that “Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress”).

<sup>240</sup> See *Venetie*, 522 U.S. at 523 (holding that there is no Indian country as a result of ANCSA); *id.* at 534 (reversing the 9th Circuit for holding that Indian country exists in Alaska); *In re C.R.H.*, 29 P.3d at 851, 852 n.9 (emphasizing that P.L. 280 only applies to Indian country).

<sup>241</sup> See *Tribal Supreme Court Project*, *supra* note 49 (emphasizing the importance of coordinated legal tactics to overcome recent U.S. Supreme Court decisions that erode tribal sovereignty).

<sup>242</sup> See Interview by Steve Heimel with Dana Fabe, *supra* note 232 (declining to discuss tribal jurisdictional issues because of pending cases).

<sup>243</sup> *Cf. Baker*, 982 P.2d at 748–49 (holding that Alaska Natives have the inherent authority to “resolve . . . disputes between their own members”). A narrow holding only concerning members is more likely to withstand review by the U.S. Supreme Court. See *Duro*, 495 U.S. at 679 (holding that tribes do not have criminal jurisdiction over non-member Indians); *Oliphant*, 435 U.S. at 208 (finding that “Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress”).

<sup>244</sup> See *State of the Judiciary*, *supra* note 9, at 8 (emphasizing the need to focus on rural Alaskan communities); ANDERSON ET AL., *supra* note 18, at 532–33 (criticizing non-tribal law enforcement in tribal areas); ROADMAP, *supra* note 5, at 35 (positing that local tribal governments would be more effective at administering justice).

## CONCLUSION

Rural Alaska Native villages continue to search for solutions to what amounts to an epidemic of alcohol abuse, domestic violence, and sexual assault in their communities. The current legal framework developed piecemeal by Congress, the State of Alaska, and the judiciary does not allow Alaska Native communities to police themselves through the tribal governments and courts that have been in place for centuries in some communities. To solve these problems, Congress, the State of Alaska, and the courts should grant Alaska Natives additional limited tribal jurisdiction to combat these deep-seated problems with tactics tailored to and rooted in the community itself. Currently proposed solutions, like the Alaska Safe Families and Villages Act, although a step in the right direction, do not go far enough to protect the lives of Alaska Natives. As long as basic constitutional protections remain in place for criminal defendants, ceding local control back to the communities who must deal with these rampant social ills on a daily basis seems like the best solution to what is, quite literally, a matter of life and death.

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