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UNTANGLING THE COURT'S SOVEREIGNTY DOCTRINE TO ALLOW FOR GREATER RESPECT OF TRIBAL AUTHORITY IN ADDRESSING DOMESTIC VIOLENCE

LAUREN OPPENHEIMER*

Domestic violence in Indian country has increasingly become a subject of concern for Congress over the past fifty years. While domestic violence is a systemic problem throughout the United States, Native American women experience higher rates of domestic violence than any other group.¹² Indeed, “American Indian and Alaska Native women ‘are 2.5 times more likely to be raped or sexually assaulted than women in the United States in general.’”³ The Centers for Disease Control and Prevention (“CDC”) estimates that roughly forty-six percent of American Indian and Alaska Native women have been physically abused by an intimate partner.⁴ Further, the U.S. Department of Justice reports that approximately sixty percent of Native American women have been victimized by an intimate partner.⁵

The pressing problems posed by the disproportionately high incidence of domestic violence against Native American women are further exacerbated by the “‘complex patchwork of federal, state, and tribal law,’ govern-

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1. This Comment adopts the U.S. Department of Justice’s use of the term “domestic violence,” which defines the term “as a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner.” *Domestic Violence*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/ovw/domestic-violence> (last visited Apr. 2, 2017).

2. *United States v. Bryant*, 136 S. Ct. 1954, 1959 (2016) (citing 151 CONG. REC. 9061 (2005) (remarks of Sen. McCain)).

3. *Id.* (quoting ATTORNEY GEN.’S ADVISORY COMM. ON AM. INDIAN/ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE, U.S. DEPT. OF JUSTICE, ENDING VIOLENCE SO CHILDREN CAN THRIVE 38 (2014), https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2015/03/23/ending_violence_so_children_can_thrive.pdf).

4. *Id.* (citing MICHAEL BLACK ET AL., NAT’L CTR. FOR INJURY PREVENTION & CONTROL, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 2010 SUMMARY REPORT 40 (2011), https://www.cdc.gov/ViolencePrevention/pdf/NISVS_report2010-a.pdf).

5. Memorandum from Ronald Weich, Assistant Attorney General, U.S. Dep’t of Justice, to Joseph R. Biden, Jr., Vice President of the United States (July 21, 2011).

ing Indian country.”⁶ Tribal courts, for example, have struggled to enforce their tribes’ criminal laws against Native American perpetrators of domestic violence because state and federal laws have curbed their sentencing authority.⁷ It was not until the latter part of the twentieth century that Congress extended the federal government’s jurisdiction through the Major Crimes Act to address criminal offenses for which both the perpetrator and the victim are Native Americans.⁸ This intervention, however, has not been entirely positive.⁹ In fact, arguably, it has undermined tribal sovereignty and the ability of Native American tribes to directly address the violence that occurs in their communities.¹⁰ The Supreme Court’s recent decision in *United States v. Bryant*,¹¹ which upheld a repeat offender law that expands federal authority over Native American domestic violence offenders, affirms the notion that Congress enjoys virtually unchecked power in this area.¹² The Court’s decision could further minimize the degree of respect or deference Congress accords tribal sovereignty.¹³ Less respect for or deference to tribal sovereignty would impede Native American tribes’ authority to address domestic violence in their communities and potentially undermine the effectiveness of related policies.¹⁴

This Comment analyzes legal and academic positions regarding tribal sovereignty,¹⁵ applies these positions to the difficulties tribes face in enforcing domestic violence laws,¹⁶ and advocates for a shift in the mainstream understanding of tribal sovereignty toward one that is more respectful of tribal autonomy.¹⁷ This Comment additionally addresses what that shift must entail when considering whether a law respects tribal sovereignty¹⁸ and proposes amending the law at issue in *United States v. Bryant* to potentially include a waiver provision that would both increase the degree of con-

6. *Bryant*, 136 S. Ct. at 1959–60 (quoting *Duro v. Reina*, 495 U.S. 676, 680 n.1 (1990)).

7. *Id.* at 1960. For instance, at the time Congress passed 18 U.S.C. § 117(a), the Indian Civil Rights Act limited tribal court sentences to a maximum of one year of imprisonment. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 77 (1968). While Congress has since increased the court’s sentencing authority to a maximum of three years of imprisonment, “few tribes have employed this enhanced sentencing authority.” *Bryant*, 136 U.S. at 1960.

8. 18 U.S.C. § 1153 (2012); *see also Bryant*, 136 S. Ct. at 1961.

9. *See infra* Parts II.A, II.C.

10. *See infra* Part II.A.

11. 136 S. Ct. at 1954.

12. *Cf. id.* at 1968–69 (Thomas, J., concurring) (“[U]ntil the Court rejects the fiction that Congress possesses plenary power over Indian affairs, our precedents will continue to be based on the paternalistic theory that Congress must assume all-encompassing control . . .”).

13. *Id.*

14. *See infra* Part II.C.

15. *See infra* Part I.B.

16. *See infra* Part II.C.

17. *See infra* Part II.D.

18. *See infra* Part II.C.

trol accorded to the tribes in prosecuting repeat domestic violence offenders and safeguard sovereignty.¹⁹

I. BACKGROUND

Section A of this Part provides a general overview of the prevalence of domestic violence among Native Americans.²⁰ Section B then outlines the majority opinion in *United States v. Bryant*, which contained only a minimal analysis of tribal sovereignty.²¹ Section C focuses specifically on how the Court has analyzed tribal sovereignty over time by tracing the doctrine from its Marshall-era roots to Justice Thomas's concurrence in *Bryant*.

19. See *infra* Part II.D.

20. As an initial matter, because there are many different terms used to refer to similar subjects within this body of law, this Comment will use the term "Native American," except in quoted materials. It should be noted that there is a great deal of debate regarding proper terminology in this field. Michael Yellow Bird, *What We Want to Be Called: Indigenous Peoples' Perspectives on Racial and Ethnic Identity Labels*, 23 AM. INDIAN Q. 1, 1–2 (1999) (noting that, while some terms such as "American Indian" and "Native American" may be more commonly used than others, "no clear consensus exists on which label is most preferable"). The federal government uses the terms "Indian," "Indian tribe," and "tribe," in the following manner: "Indian" refers to all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

5 U.S.C. § 479 (2012). "Indian tribe" and "tribe" refers to "any Indian Tribe, organized band, pueblo, or the Indians residing on one reservation." *Id.* The term "Indian Country" is used refer to:

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

18 U.S.C. § 1151 (2012).

21. The Court's sovereignty analysis with respect to Congress's purported plenary power over Native American tribes is relegated to roughly one paragraph. See *Bryant*, 136 S. Ct. at 1961–62 (majority opinion). That paragraph reads:

Although federal law generally governs in Indian country, Congress has long excluded from federal-court jurisdiction crimes committed by an Indian against another Indian. In the Major Crimes Act, Congress authorized federal jurisdiction over enumerated grave criminal offenses when the perpetrator is an Indian and the victim is "another Indian or other person . . ."

Id. (citations omitted) (first quoting 18 U.S.C. § 1152 (2012), and then quoting *id.* § 1153)). Justice Thomas observed that the majority's reliance on a case that is over one century old to support its position that Congress enjoys plenary power over Native American tribes demonstrates the minimal effort that given in analyzing whether the law offended tribal sovereignty. See *id.* at 1968 (Thomas, J., concurring) ("Over a century later, *Kagama* endures as the foundation of this doctrine, and the Court has searched in vain for any constitutional justification for this unfettered power.").

This Part, by comparing background information on domestic violence with the Court's tribal sovereignty jurisprudence separately, reflects the Court's failure to develop a jurisprudence that recognizes Native American autonomy to address domestic violence in their communities.

A. *Domestic Violence in Indian Country*

Domestic violence continues to affect Native American women at disproportionately high rates.²² For instance, compared to Caucasian women who experience battery at a rate of 8 per 1,000, "Indian women experience battery at a rate of 23.2 per 1,000."²³ Native American women experience sexual assaults at a rate of 7 per 1,000, "compared with 4 per 1,000 among Black Americans, 3 per 1,000 among Caucasians, and 2 per 1,000 among Hispanic women, and 1 per 1,000 among Asian women."²⁴ Congress, in researching the Violence Against Women Act ("VAWA"), even found that from 1979–1992, not only was homicide among the leading causes of death for Native American women in the fifteen-to-thirty-four age bracket, but also that seventy-five percent of those deaths were perpetrated by the victim's family or acquaintances.²⁵

Recognizing these harsh realities for Native American women, Congress included a new title in the 2005 VAWA Reauthorization Act to target "the epidemic of violence" against women in Indian country.²⁶ Congress enacted Title IX of the VAWA, which specifically applies to Native Americans, to "decrease the incidence of violent crimes against Indian women; strengthen the capacity of Indian tribes to exercise their sovereign authority to respond to violent crimes committed against Indian women; and . . . ensure that perpetrators of violent crimes committed against Indian women are held accountable for their criminal behavior."²⁷

22. This is particularly alarming because rates of domestic violence among women in general, regardless of demographic group, are unacceptably high. According to the CDC's National Intimate Partner and Sexual Violence Survey, approximately "24 people per minute are victims of rape, physical violence, or stalking by an intimate partner in the United States." S. REP. NO. 112-153, at 2 (2012). This statistic reflects intimate partner violence experienced by Americans at large, without regard to specific demographic identifiers. *See id.*

23. *United States v. Kirkaldie*, 21 F. Supp. 3d 1100, 1102 (D. Mont. 2014), *rev'd*, No. 14-30109, 2016 WL 6441060, at *1 (9th Cir. Nov. 1, 2016); Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 901, 119 Stat. 2960, 3077 (2006) (codified as amended in scattered sections of 8, 18, 20 & 42 U.S.C.) [hereinafter VAWA 2005].

24. VAWA 2005 § 901, 119 Stat. at 3077.

25. *Id.* § 901, 119 Stat. at 3077–78.

26. S. REP. NO. 112-153, at 2 (2012). President Bush signed the 2005 VAWA Reauthorization Act into law on January 5, 2006. Press Release, Office of Communications, The White House, President Signs H.R. 3402, The "Violence Against Women and Department of Justice Reauthorization Act of 2005" (Jan. 5, 2006).

27. VAWA 2005 § 902, 119 Stat. at 3078.

Several significant provisions of Title IX are outlined below. Section 903 of Title IX requires the Attorney General to consult annually with and seek recommendations from tribal governments relating to how the programs and grants established under the VAWA are administered and seek recommendations from tribes for future administration of these provisions.²⁸ Section 904 builds upon the Tribal Law and Order Act by extending jurisdiction to tribal governments over non-Native Americans in a limited set of circumstances.²⁹ Section 906 amends Part T of Title I of the Omnibus Crime Control and Safe Streets Act of 1968 by adding grant provisions to Native American tribal governments.³⁰ Section 907 amends Part T of Title I of the Omnibus Crime Control and Safe Streets Act of 1968 to create a new position, Deputy Director for Tribal Affairs, in the Office of Violence Against Women.³¹

Of greatest significance to this Comment is Section 909, which amends Chapter 7 of Title 18 of the United States Code by adding Section 117, entitled “Domestic assault by an habitual offender.”³² Section 117 establishes a separate criminal charge for persons with at least two other domestic violence convictions who commit a subsequent act of domestic violence in Indian country.³³ Since its enactment, some courts have interpreted

28. *Id.* § 903, 119 Stat. at 3078.

29. *Id.* § 904, 119 Stat. at 3078–79; S. REP. NO. 112-153, at 10–11 (2012). This provision is based on the underlying premise of the Tribal Law and Order Act “that tribal nations with sufficient resources and authority will be best able to address violence in their own communities.” S. REP. NO. 112-153, at 10 (2012). Note that feminist legal scholarship has recently emphasized addressing jurisdiction-based problems that arise when non-Native American offenders perpetrate domestic violence against Native American persons in Indian Country thus mitigating the effects of the Court’s jurisdiction in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (holding that tribes do not have inherent jurisdiction to criminally penalize non-Native American offenders); *see also, e.g.*, OFFICE ON VIOLENCE AGAINST WOMEN, U.S. DEP’T OF JUSTICE, 2015 TRIBAL CONSULTATION REPORT: WORKING TOGETHER TO END THE VIOLENCE 76 (2015) (compiling feedback on the newly-implemented Special Domestic Violence Criminal Jurisdiction pilot program to extend limited jurisdiction to some tribes to prosecute certain Native American and non-Native American domestic violence offenders); Memorandum from Ronald Weich, *supra* note 5 (suggesting that Congress look for solutions that will empower tribal courts to prosecute non-Native American offenders of domestic violence).

30. VAWA 2005 § 906, 119 Stat. at 3078.

31. *Id.* § 907, 119 Stat. at 3080–82.

32. *Id.* § 909, 119 Stat. at 3084.

33. *Id.* The law specifically provides that:

Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings [for offenses detailed in sub-sections (1) and (2)] shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from a violation under this section, the offender shall be imprisoned for a term of not more than 10 years.

Id.

Section 117 as “obligat[ing] the federal Government to hold repeat domestic violence offenders accountable as part of the ‘[f]ederal trust responsibility to assist tribal governments in safeguarding the lives of Indian women.’”³⁴ Nevertheless, Section 117’s constitutionality has been challenged several times, specifically over the federal government’s authority to try Native American defendants based on prior tribal court convictions in which the defendant was not represented by counsel, or “uncounseled convictions.”³⁵

B. *United States v. Bryant*

In 2016, one of these constitutional challenges made it to the Supreme Court.³⁶ In *United States v. Bryant*, the defendant, Michael Bryant, was an enrolled member of the Northern Cheyenne Tribe who was convicted of more than 100 tribal-court convictions, several of which were uncounseled domestic violence misdemeanors.³⁷ In 2011, a federal grand jury indicted him under Section 117.³⁸ Bryant moved to dismiss the charges, arguing that even though his prior tribal court convictions were not themselves unconstitutional, had the convictions occurred in federal or state court, they would have violated the Sixth Amendment because he received prison sentences but was not appointed counsel.³⁹ As a result, he argued that those convictions could not be used to qualify him as a “habitual offender” under Sec-

34. *United States v. Kirkaldie*, 21 F. Supp. 3d 1100, 1102 (D. Mont. 2014), *rev’d*, No. 14-30109, 2016 WL 6441060, at *1 (9th Cir. Nov. 1, 2016) (quoting VAWA 2005 § 901, 119 Stat. at 3077).

35. Courts have reached inconsistent results. *Compare* *United States v. Shavanaux*, 647 F.3d 993, 997 (10th Cir. 2011) (holding, *inter alia*, that the government’s use of Shavanaux’s prior uncounseled convictions in tribal court did not render his prosecution under Section 117 invalid under the Sixth Amendment), *with* *Kirkaldie*, 21 F. Supp. 3d at 1109 (concluding that introduction of the prosecution’s evidence under Section 117 against Kirkaldie violated his Sixth Amendment rights).

36. *United States v. Bryant*, 136 S. Ct. 1954 (2016).

37. *Id.* at 1963.

38. The first count was based on an incident in February 2011 in which the defendant dragged his then-girlfriend off the bed, pulled her hair, and punched and kicked her repeatedly. *Id.* The second count was based on an incident in May of that same year, in which the defendant awoke a different live-in girlfriend by yelling that he could not find the keys to his truck and choked her until she almost lost consciousness. *Id.* He admitted that he assaulted this girlfriend three times over the course of their two-month relationship. *Id.*

39. *Id.* at 1964. The Indian Civil Rights Act (“ICRA”), 25 U.S.C. §§ 1301–04 (2012), unlike the Sixth Amendment, requires that tribal defendants be appointed counsel only when a prison sentence of more than one year is imposed. 25 U.S.C. §§ 1302. For sentences *greater than one year*, the ICRA guarantees the defendant “‘the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution,’ including appointment of counsel for an indigent defendant at the tribe’s expense.” *Id.* § 1302(c)(1), (2). For sentences *less than one year*, “the tribal court must allow a defendant only the opportunity to obtain counsel ‘at his own expense.’” *Id.* § 1302(a)(6).

tion 117, and that he consequently could not be charged under the statute. The United States District Court for the District of Montana disagreed and sentenced him to consecutive terms of forty-six months in prison for each count.⁴⁰ The United States Court of Appeals for the Ninth Circuit then reversed the district court's decision and found, based on its opinion in *United States v. Ant*,⁴¹ that use of the defendant's uncounseled tribal court convictions when considering whether Bryant was a habitual offender violated the Sixth Amendment.⁴² This decision created a circuit split between the Ninth Circuit and the Eighth and Tenth Circuits over whether the repeat offender provision in Section 117 violates the Sixth Amendment because Native American defendants in tribal court are not offered the same procedural protections as they would receive in federal court.⁴³

The United States Supreme Court granted certiorari to resolve this circuit split and reversed the Ninth Circuit's decision.⁴⁴ The Court found that because tribal courts are not bound by the Constitution, the procedural safeguards contained in the Indian Civil Rights Act ("ICRA")⁴⁵ were sufficiently similar to those in the Bill of Rights and unanimously upheld Section 117 as constitutional under both the Fifth and Sixth Amendments.⁴⁶

In analyzing the Sixth Amendment issue, the Court determined that the Sixth Amendment "does not apply to tribal-court proceedings."⁴⁷ The

40. *Bryant*, 136 S. Ct. at 1964.

41. 882 F.2d 1389, 1396 (9th Cir. 1989) (reversing the lower court's denial of a motion to suppress a guilty plea made in tribal court because the guilty plea would have violated the Sixth Amendment in federal court, thereby making it inadmissible in a federal proceeding).

42. *Bryant*, 136 S. Ct. at 1964.

43. *Compare* *United States v. Bryant*, 769 F.3d 671, 677 (9th Cir. 2014), *rev'd*, 136 S. Ct. 1954 (holding that tribal court convictions used in subsequent prosecutions violate the Sixth Amendment where the right to trial in tribal court offers less protection than the Sixth Amendment right), *with* *United States v. Cavanaugh*, 643 F.3d 592, 594 (8th Cir. 2011) (finding no Sixth Amendment violation in using uncounseled tribal court convictions in a Section 117 prosecution, even though the tribal court proceedings would have violated the Amendment if they occurred in federal court), *and* *United States v. Shavanaux*, 647 F.3d 993, 997, 1000 (10th Cir. 2011) (concluding that using uncounseled tribal court convictions in a Section 117 prosecution does not violate defendant's Sixth Amendment rights because tribal prosecutions are not constrained by the Bill of Rights).

44. *United States v. Bryant*, 136 S. Ct. 690, 690 (2015) (mem.).

45. 25 U.S.C. §§ 1301-04 (2012). "The ICRA is not co-extensive with the Sixth Amendment." *Bryant*, 136 S. Ct. at 1962.

46. *Bryant*, 136 S. Ct. at 1965. The Court very briefly addressed Bryant's Fifth Amendment argument, noting that the ICRA requires tribes to "accord[] defendants specific procedural safeguards resembling those contained in the Bill of Rights and the Fourteenth Amendment" and ensure "due process of the law." *Id.* at 1966. The Court determined that proceedings in compliance with the ICRA "sufficiently ensure the reliability of tribal-court convictions." *Id.* On these bases, the Court concluded that the use of Bryant's tribal court convictions did not violate his right to due process under the Fifth Amendment. *Id.*

47. *Id.* at 1958; *see also id.* at 1962 ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed

Court then addressed the predicate offense aspect of Section 117 in conjunction with the Sixth Amendment, the *Burgett* principle, and the *Nichols* exception.⁴⁸ Specifically, the *Bryant* Court noted that following *Nichols*, “enhancement statutes”—laws that increase sentencing for a crime committed by a repeat offender—do not change the penalty that was imposed for the predicate conviction; rather, enhancement statutes punish the defendant only for the offense before the trial court.⁴⁹ The Court thereby concluded that the *Nichols* exception rather than the *Burgett* principle applied to Bryant’s case.⁵⁰ The Court reasoned that the *Nichols* exception indicated that using Bryant’s prior, uncounseled tribal court convictions in his prosecution under Section 117 did not render his tribal court convictions, which were valid under tribal law, invalid under federal law.⁵¹ Accordingly, the Court concluded that there was “no cause to distinguish for § 117(a) purposes between valid but uncounseled convictions resulting in a fine and valid but uncounseled convictions resulting in imprisonment not exceeding one year.”⁵² The Court justified its holding as remaining consistent with precedent.⁵³

Justice Thomas drafted a forward-looking concurring opinion, discussed in depth below, in which he cautioned that much of the congressionally enacted law affecting Native Americans is based upon several assumptions that lack direct constitutional basis.⁵⁴ Specifically, Justice Thomas critiqued the Court’s development of the tribal sovereignty doctrine over

specifically as limitations on federal or state authority.” (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)).

48. *Id.* at 1962–63. The *Bryant* Court first stated the general rule, the “*Burgett* principle,” which holds that “a conviction obtained in violation of a defendant’s Sixth Amendment right to counsel cannot be used in a subsequent proceeding ‘either to support guilt or enhance punishment for another offense.’” *Bryant*, 136 S. Ct. at 1962 (quoting *Burgett v. Texas*, 389 U.S. 109, 115 (1967)). Then, it addressed a limitation to this general rule, the “*Nichols* exception,” noting that “an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction.” *Id.* at 1965 (quoting *United States v. Nichols*, 511 U.S. 738, 748–49 (1994)).

49. *Id.* at 1965.

50. *Id.*

51. *Id.* at 1966. Accordingly, the Court found that “Bryant’s 46-month sentence for violating § 117(a) punishes his most recent acts of domestic assault, not his prior crimes prosecuted in tribal court.” *Id.* at 1965.

52. *Id.* The Court thought it “odd to say that a conviction untainted by a violation of the Sixth Amendment triggers a violation of that same amendment when it’s used in a subsequent case where the defendant’s right to appointed counsel is full and respected.” *Id.* (quoting *United States v. Bryant*, 769 F.3d 671 (9th Cir. 2014) (Watford, J., concurring), *rev’d and remanded*, 136 S. Ct. at 1954)).

53. *Id.* at 1966 (“In keeping with *Nichols*, we resist creating a ‘hybrid’ category of tribal-court convictions, ‘good for the punishment actually imposed but not available for the sentence enhancement in a later prosecution.’” (quoting *Nichols*, 511 U.S. at 744)).

54. *Id.* at 1967 (Thomas, J., concurring).

time and questioned whether Congress actually possesses authority, plenary or otherwise, over Native American tribes in this regard.⁵⁵

C. *The Court's Sovereignty Doctrine*

The *Bryant* Court admitted, “[t]he ‘complex patchwork of federal, state, and tribal law’ governing Indian country, has made it difficult to stem the tide of domestic violence experienced by Native American women.”⁵⁶ Notwithstanding this point, the Court barely addressed where Congress’s authority to prescribe domestic violence crimes originates.⁵⁷ The doctrine underlying Congress’s purported authority to prescribe this offense, in addition to Justice Thomas’s commentary on the doctrine in *Bryant*, are discussed below.

1. *Roots of the Supreme Court's Sovereignty Doctrine*

The Court’s tribal sovereignty doctrine dates back to the early years of the Republic, during which the Marshall Court issued three pivotal opinions: *Johnson v. M’Intosh*,⁵⁸ *Cherokee Nation v. Georgia*,⁵⁹ and *Worcester v. Georgia*.⁶⁰ These three cases are collectively referred to as “the Marshall Trilogy.”

M’Intosh is perhaps the most significant of all of the cases. Addressing the issue of whether individuals could purchase land from Native Americans,⁶¹ the Court held that no such transactions could occur because Native Americans were incapable of possessing title.⁶² In arriving at this conclusion, the Court embraced a sovereignty-through-conquest theory⁶³ through

55. *Id.* at 1968.

56. *Id.* at 1959–60 (majority opinion) (quoting *Duro v. Reina*, 495 U.S. 676, 689 n.1 (1990)).

57. The Court’s reliance on *Ex Parte Crow Dog* does little, if anything, to explain the basis for congressional authority in this regard. *See id.* at 1960–61 (“Although federal law generally governs Indian country, Congress has long excluded from federal-court jurisdiction crimes committed by an Indian against another Indian.” (citing 18 U.S.C. § 1152; *Ex Parte Crow Dog*, 109 U.S. 556, 572 (1883))). The Court’s citation to *Santa Clara Pueblo* similarly fails to explain the source of Congress’s authority. *Id.* at 1962 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)); *see also supra* note 21 (noting that the *Bryant* Court dedicated only one paragraph to discussing the roots of the tribal sovereignty doctrine).

58. 21 U.S. (8 Wheat.) 543 (1823).

59. 30 U.S. (5 Pet.) 1 (1831).

60. 31 U.S. (6 Pet.) 515 (1832).

61. *M’Intosh*, 21 U.S. (8 Wheat.) at 563 (“[T]he only question in this case must be, whether it be competent to *individuals* to make such purchases [of Native American land], or whether that be the exclusive prerogative of government.”).

62. *Id.* at 591.

63. The sovereignty-through-conquest theory provides, “[c]onquest gives a title to which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.” *Id.* at 588.

its adoption of the discovery rule.⁶⁴ Under the discovery rule, the rights of Native Americans who lived in a country prior to its discovery by Englishmen or others “were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired.”⁶⁵ A necessary premise underpinning this conclusion was the assumed inferiority of Native Americans: “the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title of others.”⁶⁶ Consequently, however, the Court articulated the foundations for a tribal sovereignty doctrine.

Subsequently, in *Cherokee Nation*, the Court held that it did not have jurisdiction over claims involving a tribal nation within the territorial boundaries of the United States.⁶⁷ The Court noted that, as early as 1831, the sovereignty relationship between the United States and tribal nations was complex: “[t]he condition of the Indians in relation to the United States, is perhaps unlike that of any other two people in existence.”⁶⁸ The Court additionally held that Native American tribes were neither foreign nations nor domestic states but, instead, were more likely “denominated domestic dependent nations.”⁶⁹ The Court explained that as denominated domestic dependent nations,⁷⁰ Native American tribes “are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion [sic] with them, would be considered as an invasion of our territory and an act of hostility.”⁷¹ *M’Intosh* and *Cherokee Nation*, taken together, suggest that the Court began to adopt a view of tribal sovereignty that emphasized the power of the federal gov-

64. *Id.* at 573 (“[D]iscovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.”).

65. *Id.* at 574.

66. *Id.* at 591. In discussing this idea of inferiority, the Court highlighted that, “the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness.” *Id.*

67. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 80 (1831). Note that over time, the strength of this holding eroded, and the Court now reviews such cases. See, e.g., *United States v. Bryant*, 136 S. Ct. 1954 (2016) (reviewing the constitutionality of a tribal court sentence by a Native American tribe within the territorial boundaries of the United States).

68. *Cherokee Nation*, 30 U.S. (5 Pet.) at 16.

69. *Id.* at 17.

70. *Id.* The *Cherokee Nation* Court addressed Native American sovereignty with a similar tone to that of the *M’Intosh* Court. See *id.* at 15 (“A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms . . .”).

71. *Id.* at 17–18.

ernment to interact with Native American tribes in any manner they wished, subject to virtually no limitations.

In 1832, the Marshall Court elaborated once again on its sovereignty principles, but in a slightly different manner.⁷² The Court's opinion in *Worcester* effectively minimized the authority that the states had over Native American tribes by drawing a distinction between federal and state powers.⁷³ Interestingly, the Court also highlighted the independent character of Native American tribes in a manner that arguably suggested that the tribes, though governed by the federal government, still enjoyed some measure of sovereignty:

From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.⁷⁴

The Marshall Court's position on sovereignty, therefore, centers on the propositions that (1) Native Americans are inferior to those of European ancestry and enjoy minimal rights,⁷⁵ (2) the federal government, rather than state governments, is largely responsible for interactions with Native Americans,⁷⁶ and (3) while Native American tribes are not foreign nations,⁷⁷ they constitute somewhat independent entities from the United States despite their perceived inferiority.⁷⁸

Fifty-three years after *Worcester*, the Court issued another significant sovereignty opinion in *United States v. Kagama*,⁷⁹ once again acknowledging the complexity of tribal sovereignty doctrine.⁸⁰ The *Kagama* Court not-

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

73. *See id.* at 557 ("The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.").

74. *Id.* at 556-57.

75. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 605 (1823).

76. *Worcester*, 31 U.S. (6 Pet.) at 515, 596.

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

78. *Worcester*, 31 U.S. (6 Pet.) at 519.

79. 118 U.S. 375, 385-86 (1886) (holding that the federal law regulating murder on Native American reservations as criminal did not violate sovereignty).

80. *Id.* at 381 ("The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States, has always been an anomalous one, and of a complex character.").

ed, the “Constitution of the United States is almost silent in regard to the relations of the government which was established by it to the numerous tribes of Indians within its borders.”⁸¹ Further, it determined that the references to “Indians” in the taxation provision of the Fourteenth Amendment⁸² and the Commerce Clause⁸³ were not explicit enough to confer federal power over non-economic interactions with Native American tribes.⁸⁴ Instead, the Court held that this power is found “from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else.”⁸⁵ The Court then rejected the arguments of the Native American defendants and determined that Native Americans are wards of the government.⁸⁶ As a result of this wardship relationship, the Court found that the federal government assumes both a duty to protect the tribes as well as plenary power over them.⁸⁷

2. Justice Thomas’s Concurrence in *Bryant*

Justice Thomas offered two views of sovereignty in his concurrence in the *Bryant* decision. First, Justice Thomas briefly discussed the theory that tribes have “core sovereignty.”⁸⁸ He suggested that under this view of sovereignty, because Native American tribes are “separate sovereigns pre-existing the Constitution,” criminal prosecutions by tribes are not circumscribed by the restrictions imposed on the state and federal governments by the U.S. Constitution.⁸⁹

Second, Justice Thomas addressed the proposition that Congress has an “‘all-encompassing’ [plenary] power over all aspects of tribal sovereignty.”⁹⁰ Under such a view, Congress has a duty to make certain that repeat

81. *Id.* at 378.

82. U.S. CONST. amend. XIV, § 2 (“Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”).

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

84. *Kagama*, 118 U.S. at 378.

85. *Id.* at 380.

86. *See id.* at 384. The Court declared:

From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

Id.

87. *Id.*

88. *United States v. Bryant*, 136 S. Ct. 1954, 1967 (2016) (Thomas, J., concurring).

89. *Id.* (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)).

90. *Id.* at 1968 (quoting *United States v. Wheeler*, 45 U.S. 313, 319 (1978)).

offenders of domestic violence in Indian country are sufficiently punished in order to protect victims of domestic violence.⁹¹ This view appears to stem from a single quote in *Kagama*: “The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection. . . . It must exist in that government, because it has never existed anywhere else.”⁹² Justice Thomas disapproved of this view of sovereignty and argued that no single enumerated power in the Constitution bestows Congress with “such sweeping authority.”⁹³ Justice Thomas also suggested that the Court created this sweeping power because it could not find an enumerated power that would justify punishing crimes committed by Native Americans in Indian country.⁹⁴ Given that the *Bryant* Court did not question this “paternalistic”⁹⁵ and seemingly outdated view of tribal sovereignty, Justice Thomas cautioned that “[u]ntil the Court ceases treating all Indian tribes as an undifferentiated mass, our case law will remain bedeviled by amorphous and ahistorical assumptions about the scope of tribal sovereignty.”⁹⁶

II. ANALYSIS

Justice Thomas’s concurring opinion opens up a broader conversation about sovereignty, which draws on a concentrated body of scholarly work. This Part will evaluate various widely recognized conceptions of tribal sovereignty with respect to traditional police powers of the state.⁹⁷ This Part then argues, regarding Section 117, that any appropriate conception of sovereignty must respect the authority of tribal governments to address domestic violence in their own communities.⁹⁸ This Part concludes by proposing that a renewable jurisdictional waiver provision could bring Section 117 within this theory of tribal sovereignty.⁹⁹

91. *Id.* Justice Thomas further argued, “[t]hus, even though tribal prosecutions of tribal members are purportedly the apex of tribal sovereignty, Congress can second-guess how tribes prosecute domestic abuse perpetrated by Indians against other Indians on Indian land by virtue of its ‘plenary power’ over Indian tribes.” *Id.*

92. *Id.* at 1968 (quoting *United States v. Kagama*, 118 U.S. 375, 384 (1886)).

93. *Id.*

94. *Id.*

95. *Id.* at 1969.

96. *Id.* at 1968.

97. *See infra* Part II.B.

98. *See infra* Part II.C.

99. *See infra* Part II.D.

A. *Introduction to the Sovereignty Debate in the Domestic Violence Context*

Understanding the modern Native American sovereignty debate requires first understanding that Native Americans are United States citizens.¹⁰⁰ This is important to note at the outset because when the Supreme Court initially began to address issues of Native American sovereignty, Native Americans were not considered U.S. citizens.¹⁰¹ As a result, the Court may have felt less obligated to account for their interests.¹⁰² Presently, however, the Court recognizes that tribal powers include taxing “transactions occurring on Indian land,”¹⁰³ punishing members of their respective tribe for violations of tribal law,¹⁰⁴ and “govern[ing] themselves.”¹⁰⁵ Tribes still may not, however, “establish their own international commercial and foreign affairs policies”¹⁰⁶ or, with some exceptions, “try non-Indians in tribal courts.”¹⁰⁷ Despite these relatively settled principles, there still appears to be a great deal of confusion and lack of consistent interpretation of Native American sovereignty among Justices on the Supreme Court.¹⁰⁸

The federal judiciary presently views Native American tribes as “enjoying some measure of sovereignty.”¹⁰⁹ Nevertheless, the Court has deferred to congressional determinations about the extent to which tribal sovereignty is to be respected.¹¹⁰ The judiciary additionally appears to

100. In 1924, Congress conferred citizenship on all “non-citizen Indians born within the territorial limits of the United States.” An Act To Authorize the Secretary of the Interior to Issue Certificates of Citizenship to Indians, Pub. L. No. 68-175, 43 Stat. 253 (1924).

101. *See id.* (noting that Native Americans born within the territorial limits of the United States were not automatically given citizenship until 1924).

102. *See, e.g., Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831) (“The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. In the general, nations not owing a common allegiance are foreign to each other. The term *foreign nation* is, with strict propriety, applicable by either to the other.”).

103. Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1075–76 (2004).

104. *Id.* at 1076.

105. *Id.*

106. *Id.* at 1075.

107. *Id.* An example of such an exception is contained in the Violence Against Women Act of 2013, which allows tribes to try any perpetrator for domestic violence against Native Americans that was committed in Indian country. Violence Against Women Act of 2013, Pub. L. No. 113-4, § 904 127 Stat. 54, 120–24 (2013).

108. *See infra* Part II.B.1.

109. Prakash, *supra* note 103, at 1075.

110. *See* Elizabeth Burleson, *Tribal, State, and Federal Cooperation to Achieve Good Governance*, 40 AKRON L. REV. 207, 210 (2007) (noting that in *United States v. Lara*, 541 U.S. 193 (2004), the Court deferred to “Congress[s] authority to determine the extent of inherent sovereign power of Indian tribes under federal law” (quoting Philip Burnham, *Reading the Supreme Court*, INDIAN COUNTRY TODAY (Jan. 11 2005), <http://www.indiancountry.com/content.cfm?id=1096410130>).

subscribe to the argument that the federal government, as opposed to the states, has plenary power over Native American tribes, and Congress specifically has authority to “limit, modify, or eliminate any aspect of tribal governance or tribal law.”¹¹¹

Because tribal affairs often involve issues that fall within the traditional police powers of the states, the federal government may be ill-equipped to address these problems.¹¹² Nevertheless, the judiciary’s tribal sovereignty doctrine has the practical effect of extending extreme deference to Congress’s policy determinations and expanding federal authority over the areas traditionally left to the states.¹¹³ The expansion of authority has resulted in a number of problems in addition to those addressed by Justice Thomas.¹¹⁴ This Comment focuses on one of these problems, the “patchwork of laws affecting Indian country,” which has resulted in a jurisdictional gap in which the federal government and tribal governments are unsure as to who should address various problems that arise.¹¹⁵ This jurisdictional gap has proven to be particularly problematic in addressing domestic violence.¹¹⁶

For example, prior to the enactment of the most recent VAWA, federal, state, and tribal law enforcement officials often did not know whether they had the authority to respond to reports of domestic violence. Upon receiving a report of domestic violence, federal agents generally first asked if the incident occurred in Indian country.¹¹⁷ If it did, the federal officers often left the scene, claiming that they lacked authority to address the situa-

111. Prakash, *supra* note 103, at 1076.

112. *See infra* Part II.C.

113. *See, e.g.*, United States v. Bryant, 136 S. Ct. 1954, 1967 (Thomas, J., concurring) (“Congress ordinarily lacks authority to enact a general federal criminal law proscribing domestic abuse. But, the Court suggests, Congress must intervene on reservations to ensure that prolific domestic abusers receive sufficient punishment.” (citations omitted) (citing United States v. Morrison, 529 U.S. 598, 610–13 (2000))).

114. *See* Burleson, *supra* note 110, at 219, 229 (discussing how expansion of federal authority has resulted in problems relating to civil jurisdiction over non-Native Americans, water rights, staggeringly high rates of drug addiction within tribal communities, in addition to domestic violence).

115. Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts to Protect Native Women from Domestic Violence*, 96 CALIF. L. REV. 185, 203 (2008).

116. *See* Beth Azar, *When Tribal Law Conflicts with Federal Law*, AM. PSYHOL. ASS’N (April 2011), <http://www.apa.org/monitor/2011/04/tribal-law.aspx> (“Crime and health problems in Indian Country stem from a complex combination of an unclear chain of authority, underfunding and misplaced priorities that have resulted from decades of marginalization and trauma.”); Jeana Petillo, Note, *Domestic Violence in Indian Country: Improving the Federal Government’s Response to this Grave Epidemic*, 45 CONN. L. REV. 1841, 1843 (2013) (“The complex scheme of criminal jurisdiction in Indian country, created by the federal government, significantly impedes law enforcement’s ability to respond to domestic violence.”).

117. Petillo, *supra* note 116, at 1856.

tion.¹¹⁸ Tribal officials responding to such calls acted similarly due to confusion about their authority resulting from jurisdictional gap.¹¹⁹

This problem extends beyond uncertainty over who responds to domestic violence calls. It also implicates prosecutions of domestic violence offenses. For instance, many tribes have shied away from prosecuting domestic violence offenses because of a mistaken belief that they lack jurisdiction or that the federal government is already working on the case.¹²⁰ Further, it is not uncommon for the federal government to fail to inform tribal governments about their decisions to prosecute the cases in which they share concurrent jurisdiction with the tribes.¹²¹ This jurisdictional gap may be due, at least in part, to the inflexible adversarialism of the Anglo-American legal tradition and the unwillingness of the federal government to incorporate non-western tribal customs in addressing domestic violence.¹²²

The federal government's arguably unresolved relationship with tribal governments, which inherently differs from its relationship with the states,¹²³ could further contribute to the persistence of these problems. Native American tribes, themselves, have suggested that the nature of their relationships to the federal government interferes with their ability to obtain government assistance in addressing domestic violence in a manner not experienced by the states.¹²⁴ Reconciling the Court's tribal sovereignty doctrine with these issues is therefore paramount to combating the domestic violence epidemic in Native American communities.

118. *Id.*

119. *Id.*

120. *Id.* at 1851–52.

121. *See id.* at 1856 (“In some cases, the federal authorities do not inform tribes that they have decided not to prosecute a case until after the tribe’s statute of limitations has run out. In other cases, the federal authorities never tell the tribe that they have declined to prosecute a case.” (footnote omitted) (citing Timothy Williams, *High Crime but Fewer Prosecutions on Indian Land*, N.Y. TIMES, Feb. 21, 2012, at A14)).

122. Hart & Lowther, *supra* note 115, at 196 (“Tribal conceptions of sovereignty differed significantly from the Western perspective espoused by early U.S. Supreme Court cases which codified the systematic categorization of tribal sovereignty as both inferior and easily disregarded by other branches.”); Marie Quasius, Note, *Native American Rape Victims: Desperately Seeking an Oliphant-Fix*, 93 MINN. L. REV. 1902, 1919 (2009) (“Anglo-American courts differ from tribal courts in that the Anglo-American system focuses on individual rights in an adversarial system and resolves criminal disputes through punishment and removal of the offender from the community.”).

123. Professor Prakash notes that “[u]nlike cities and counties, tribes are not the subunits of another sovereign.” Prakash, *supra* note 103, at 1076.

124. Raymond Buelna, a tribal councilman of the Pascua Yaqui, told the federal government in an annual consultation with other tribes that “[t]ribes need permanent funding and access to resources and services that are available to state, county, and municipal governments.” OFFICE ON VIOLENCE AGAINST WOMEN, *supra* note 29, at 10. Additionally, Lenora Hootch, Tribal Councilmember of the Nature Village of Emmonak and Executive Director of the Yup’ik Women’s Coalition, suggests that if tribes were treated like states, rather than the way they are now, their funding problems could be resolved. *Id.* at 35.

B. Theories of Sovereignty

1. The Founders and the Supreme Court

Though courts and scholars have struggled to determine how the Founders viewed tribal sovereignty, history reveals that they “regarded Indians as distinct nations to be dealt with diplomatically and at arm’s length.”¹²⁵ The Supreme Court, by contrast, has had ample opportunity to articulate its position on Native American sovereignty. Though the Court’s jurisprudence on this subject remains somewhat unresolved, it has nevertheless consistently accepted the premise that the federal government is supreme over tribal governments.¹²⁶

a. The Treaty Power and Sovereignty

The Court has acknowledged that treaties between the federal government and Native American tribes established the standards for their interactions for a significant portion of U.S. history.¹²⁷ This method of governing Native American tribes, as authorized through the Article II treaty power,¹²⁸ has been notably critiqued by Justice Thomas. In his concurrence in *United States v. Lara*,¹²⁹ Justice Thomas argued, “[t]he treaty power does not, as the Court seems to believe, provide Congress with free-floating power to legislate as it sees fit on topics that could potentially implicate some unspecified treaty.”¹³⁰ Justice Thomas further argued that the majority’s suggestion that a broad power to legislate Native American tribes exists through the treaty power “is especially ironic in light of Congress’ enacted prohibition on Indian treaties.”¹³¹

125. Prakash, *supra* note 103, at 1080.

126. *See id.* at 1076 (“However confusing or contradictory it may be in other respects, federal Indian law is quite clear about the federal government’s complete supremacy.”).

127. *United States v. Lara*, 541 U.S. 193, 201 (2004). While the government no longer uses treaties as a vehicle for governing Native American tribes as it did in the earlier years of the republic, scholars argue that while these treaties were in effect, a trust relationship between the federal government and the Native American tribes emerged. Petillo, *supra* note 116, at 1846. Pursuant to this trust relationship, which is sometimes referred to as the “doctrine of trust responsibility,” the “federal government would respect the tribes’ independence, protect the tribes, and provide supplies and services to the tribes” in exchange for large parcels of Native American land in the 1700s and early 1800s. *Id.*

128. U.S. CONST. art. II, § 2. The treaty power states that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.” *Id.*

129. 541 U.S. at 215 (Thomas, J., concurring in the judgment).

130. *Id.* at 225.

131. *Id.*

b. Plenary Power and Sovereignty

Though the Court never overturned its earlier conclusion that the Article II treaty power no longer empowers the federal government to regulate Native American affairs, it is more likely to rely on other Constitutional provisions and doctrines to decide tribal sovereignty cases. For example, the Court would be more likely to find that Congress possesses plenary power over Native American tribes through the Commerce Clause and by relying on constitutional history.¹³²

i. Plenary Power Through Conquest and Wardship

The Court has principally relied on two theories of Native American sovereignty when interpreting common law and historical traditions to confer upon Congress plenary power over Native American tribes: the conquest theory and the wardship theory.¹³³ The Marshall trilogy¹³⁴ established the foundation for the conquest theory.¹³⁵ In these cases, “the Supreme Court incorporated the international colonial doctrine of discovery into United States law, divested tribes of foreign nation status, and recognized that States have no power over Native American affairs.”¹³⁶ *M’Intosh* was the first case in which the Court articulated this conquest theory.¹³⁷ The Court found that Europeans had a right to take title to the land in the United States upon arrival, “notwithstanding the occupancy of the natives, who were heathens,”¹³⁸ because Native Americans were incapable of possessing land in fee simple and therefore only had a present right to occupancy.¹³⁹ In *Worcester*, the Court summarized the conquest theory, previously articulated in *M’Intosh*, explaining, “power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend.”¹⁴⁰ Relatedly, in *Cherokee Nation*, the Court determined that Native American tribes were “domestic dependent

132. *See id.* (arguing that the treaty should not be the basis for establishing plenary power over the tribes because it “is especially ironic in light of Congress’ enacted prohibition on Indian treaties.”); *see also* Prakash, *supra* note 103, at 1070–71 (“Irrespective of a particular tribe’s treaties with the United States or its pattern of land ownership, the Court has declared that the federal government enjoys a ‘plenary power’ over all Indian tribes.”).

133. Prakash, *supra* note 103 at 1078, 1106.

134. As previously noted, the “Marshall Trilogy” refers to *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

135. Prakash, *supra* note 103, at 1072. The Court has also referred to this conquest theory as the “discovery” rule. *M’Intosh*, 21 U.S. (8 Wheat.) at 574.

136. Burleson, *supra* note 110, at 209.

137. *M’Intosh*, 21 U.S. (8 Wheat.) at 573.

138. *Id.* at 576–77.

139. *Id.*

140. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543 (1832).

nations,”¹⁴¹ thereby “enable[ing] Congress to lower Native Americans affairs from the sphere of international law to domestic law.”¹⁴²

Following its adoption of the conquest theory, the Court began to formulate the related “wardship theory,” which was also premised on the inferiority of Native Americans.¹⁴³ Indeed, in *Kagama*, the Court for the first time “definitively asserted” a federal plenary power over Native American tribes based on a this theory.¹⁴⁴ Namely, the *Kagama* Court viewed Native Americans as “wards of the nation.”¹⁴⁵ Based on this view, the Court held, “[t]he power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell.”¹⁴⁶

Among the many critics of the Court’s conquest and wardship theories, and perhaps the most salient and insightful critic of them all is Professor Saikrishna Prakash.¹⁴⁷ Professor Prakash suggests that both theories, and the wardship theory in particular, are problematic because “there is no determinate means of judging whether a nation is weak and helpless.”¹⁴⁸ Perhaps in light of this critique, while courts continue to cite to *Kagama* in support of the proposition that the federal government has plenary power over Native American tribes, “the Court in recent times has retreated from the assertion that Indian dependency authorizes plenary power.”¹⁴⁹

ii. Plenary Power Through the Commerce Clause

Courts slowly began to abandon the conquest and wardship theories of Native American tribal sovereignty in favor of the idea that Congress’s ple-

141. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

142. *Burleson*, *supra* note 110, at 209 n.8.

143. Prakash, *supra* note 103, at 1077. Prakash argues that the Court’s wardship theory was formed “not by virtue of anything in the Constitution’s text, but because of tribal ‘weakness and helplessness.’” *Id.* at 1078 (quoting *United States v. Kagama*, 118 U.S. 375, 384 (1886)).

144. *Id.* at 1077. The *Kagama* Court, however, was not the first to find that a wardship relationship existed between the federal government and Native American tribes, but it was the first to base its position of tribal sovereignty on the relationship. *Kagama*, 118 U.S. at 384 (determining that federal power over Native American tribes is necessary to ensure their protection as a “race once powerful, now weak and diminished in numbers”). The Court in *Cherokee Nation* had previously described the relationship between the federal government and Native Americans as “resembl[ing] that of a ward to his guardian” and noted 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.” *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

145. *Kagama*, 118 U.S. at 382.

146. *Id.* at 384.

147. Prakash, *supra* note 103, at 1069.

148. *Id.* at 1103.

149. *Id.* at 1078–79. Indeed, Professor Prakash argues that the Court’s retreat could be due to potential embarrassment “by the nontextual foundations of the wardship theory” and the “paternalistic flavor” of *Kagama*. *Id.*

nary power over Native American tribes stems from the Commerce Clause.¹⁵⁰ For example, in *United States v. Cavanaugh*,¹⁵¹ the United States Court of Appeals for the Eighth Circuit held that “Congress, however, enjoys broad power to regulate tribal affairs and limit or expand tribal sovereignty through the Indian Commerce Clause.”¹⁵² The Supreme Court has even asserted, “the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.”¹⁵³

Similar to its other doctrines that favor limiting tribal sovereignty,¹⁵⁴ the Court’s conclusion that Congress enjoys plenary power over Native American tribes pursuant to the Commerce Clause has its critics.¹⁵⁵ Even the *Kagama* Court was critical of this argument, noting that the provisions of the criminal statute at issue, which do not relate to commerce in any way, would not fall under Congress’s commerce power without drastically torturing the Court’s interpretation of the Commerce Clause.¹⁵⁶

The Court’s justifications for its view that Congress enjoys plenary power over Native Americans are founded upon outdated notions of Native American inferiority, principles that lack constitutional support, or a combination thereof. This suggests that the Court should re-examine the government’s source of power over Native American tribes in order to reach an acceptable articulation of its tribal sovereignty doctrine.¹⁵⁷ As demonstrated above, the Court’s theory of tribal sovereignty leaves much to be desired.

2. A New Framework for Tribal Sovereignty

Professor Prakash authored a well-regarded law review piece, *Against Tribal Fungibility*, critiquing the Supreme Court’s tribal sovereignty jurisprudence and proposing a new framework for analyzing sovereignty questions.¹⁵⁸ Indeed, Justice Thomas even cited to and advanced Professor Pra-

150. *E.g.*, *McLanahan v. Ariz. Tax Comm’n*, 411 U.S. 164, 172 n.7 (1973) (“The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making.”).

151. 643 F.3d 592 (8th Cir. 2011).

152. *Id.* at 595.

153. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989).

154. *See supra* Parts II.B.1.a, II.B.1.b.i.

155. *See, e.g.*, Prakash, *supra* note 103, at 1079 (“Although these pronouncements at least are tied to the Constitution’s text, the Court has never explained how seemingly modest grants of authority might ever grant plenary authority over all Indian tribes. Indeed, in its latest foray into this area, the Court blithely repeated these claims without pausing to make sense of them.”).

156. *United States v. Kagama*, 118 U.S. 375, 378–79 (1886).

157. *See discussion supra* Part I.C.2.

158. *See generally* Prakash, *supra* note 103.

kash's theory in his *Bryant* concurrence.¹⁵⁹ In his article, Professor Prakash casts the relationship between Native American tribes and the federal government in a novel light:

We should not regard all tribes as the sovereign wards of the federal government because the Constitution, by itself, does not enshrine the federal government as their all-powerful constitutional guardian. At the same time, we should not regard every Indian nation as completely independent of the United States, as if they were all equals of France or Germany. The Constitution allows for far more variety and complexity where America's relations to the domestic dependent nations are concerned.¹⁶⁰

Professor Prakash's theory on tribal sovereignty contains two significant propositions. First, Professor Prakash argues that because tribes are not identical entities, the federal government's authority over tribal activity should be addressed on a "tribe-by-tribe basis."¹⁶¹ Second, Professor Prakash advocates a treaty-like framework for federal authority over tribal affairs.¹⁶²

Professor Prakash's approach appears to suggest that a federal plenary power over Native American tribes is not inherently offensive to tribal sovereignty, so long as the tribe has explicitly authorized it.¹⁶³ Although Professor Prakash's approach is more respectful of tribal sovereignty than the positions articulated by the Court, it faces a significant obstacle to implementation because the government no longer enters into "treaties" with Native American tribes.¹⁶⁴ Despite this obstacle, Professor Prakash's framework nevertheless provides a helpful starting point for re-framing how sovereignty should be addressed in the courts.

159. *United States v. Bryant*, 136 S. Ct. 1954, 1968 (2016) (Thomas, J., concurring) (citing Prakash, *supra* note 103, at 1070–74, 1107–10).

160. Prakash, *supra* note 103, at 1074.

161. *Id.* at 1073.

162. *Id.* at 1111. Specifically, Professor Prakash suggests that "a treaty could clearly provide that the U.S. government could exercise plenary (or some lesser) power And when a treaty's best reading indicates that the United States may exercise plenary power over an Indian tribe, the federal government has secured the power to regulate all aspects of that tribe." *Id.* at 1111–12 (footnote omitted).

163. *Id.* at 1118 ("Rejection of across-the-board plenary power does not mean that the federal government cannot acquire a broad power over those tribes that see some wisdom in plenary federal power.").

164. As of 1871, Congress forbids the federal government from entering into treaties with Native Americans. *See* 25 U.S.C. § 71 (2012).

C. Sovereignty Considerations for Evaluating Federal Domestic Violence Measures

As Professor Prakash suggests, the impact on tribal sovereignty of a law that regulates tribal activity is an important factor that should be considered by lawmakers, but is often glossed over by the Court.¹⁶⁵ A paradox logically arises when applying this consideration to the domestic violence context: “tribes seek to reinforce their sovereignty and yet must rely on Congress to buttress the very sovereignty they wish to assert.”¹⁶⁶ Given this paradox, a very fine balance must be struck; a new theory of sovereignty must maximize the efficacy of domestic violence regulations while still respecting tribal sovereignty. To achieve this balance, courts and legislatures reviewing and creating these regulations should consider (1) whether the policymakers themselves have addressed tribal sovereignty in drafting the law at issue, (2) whether the law would foster cooperation between the federal and tribal governments, and (3) whether the law acknowledges the importance of tribal control over domestic violence solutions.

First, whether the policymakers considered the impact on tribal sovereignty in their deliberations is suggestive of the degree of respect that a given law has for tribal sovereignty.¹⁶⁷ For instance, a legislative body’s failure to note a law’s impact on tribal sovereignty may indicate that problems implicating a tribe’s sovereignty could later arise.

Second, laws and judicial opinions that address the need for cooperation between the federal government and tribal governments regarding concurrent jurisdiction over domestic violence are more likely to promote tribal sovereignty.¹⁶⁸ Domestic violence in Indian country is an issue that both tribal governments and the federal government have an interest in resolving.¹⁶⁹ The federal government has an interest in protecting Native Americans, who are U.S. citizens, from domestic violence just as they have an in-

165. *Cf. supra* Prakash, *supra* note 103, at 1120 (proposing that the proper way to determine the extent of federal power on a given tribal issue is to take the specific circumstances of each tribe into account and “[o]nly then will America’s sovereign wards truly come of age”).

166. Hart & Lowther, *supra* note 115, at 225.

167. *See generally* United States v. Bryant, 136 S. Ct. 1954, 1967 (2016) (Thomas, J., concurring) (suggesting that Congress’s current approach to evaluating sovereignty is outdated but is nevertheless an important question in addressing federal-tribal relationships).

168. Hart & Lowther, *supra* note 115, at 225 (“Given the current relationship between tribes and the federal government, it is unlikely that bona fide solutions for Native American women exist that will not implicate the cooperation between both sovereigns.”).

169. Daniel Coriz, a Tribal Official of Kewa Pueblo, described this shared goal when addressing the federal government: “we are here today because we share common goals: to restore peace in our tribal communities, to ensure the safety of Native women and children, and to support offender accountability.” OFFICE ON VIOLENCE AGAINST WOMEN, *supra* note 29, at 19.

terest in protecting any other U.S. citizen from domestic violence.¹⁷⁰ The government's interest is furthered by the fact that tribes are not equipped with sufficient resources to address domestic violence in their communities without assistance.¹⁷¹ Still, the federal government's authority over the tribes must have a limit.¹⁷² Coordination is necessary to balance tribal sovereignty with the federal government's interest in taking action, because as the U.S. Department of Justice notes, "[i]f the state and tribes are going to work together, we have to come together in a good way where all opinions are valued and respected."¹⁷³

Third, domestic violence measures that acknowledge the need for tribal control over the issue are more likely to preserve tribal sovereignty.¹⁷⁴ Because the tribes are best positioned to understand what is needed to address domestic violence in their communities, if they are given sufficient control, they can make sure the resources allotted and measures enacted are

170. The federal government's interest in protecting Native Americans from domestic violence is particularly strong, given that Native Americans have been regarded by the international human rights community as needing special protection. See Burleson, *supra* note 110, at 239 ("International human rights based claims have provided indigenous communities the greatest protection to date."). Tribal leaders have discussed the federal government's strong interest in protecting Native Americans from domestic violence as well given their status as U.S. citizens. See OFFICE ON VIOLENCE AGAINST WOMEN, *supra* note 29, at 26 (testimony of Bonnie Juneau, Tulalip Board Member) ("The government has a greater responsibility to tribes because we are dual citizens. We are citizens of our tribes, and we are citizens of the United States. Therefore, the U.S. government has double the responsibility.").

171. See Petillo, *supra* note 116, at 1849–50 ("Due to the lack of infrastructure in many parts of Indian country, many incidents of domestic violence are likely unreported or undocumented because, for example, victims are unable to obtain assistance from the police or are unable to get a medical provider." (footnote omitted) (citing Kathy Dobie, *Tiny Little Laws: A Plague of Sexual Violence in Indian Country*, HARPER'S MAG., Feb. 2011, at 59)); see also OFFICE ON VIOLENCE AGAINST WOMEN, *supra* note 29, at 14 ("Many small tribes do not have the infrastructure or general funds to carry a [victim services] program without additional state or federal dollars.").

172. See Prakash, *supra* note 103, at 1116–17 ("While the conferral of citizenship [to Native Americans] might have enhanced federal power, it did not and could not yield a plenary power over the new citizens. After all, the federal government does not have plenary power over all U.S. citizens. Indeed, U.S. citizenship is neither necessary nor sufficient for the exercise of plenary federal power over some individual or group." (footnote omitted)); Petillo, *supra* note 116, at 1864–65 ("By preventing tribes from addressing some crimes in Indian country through tribal law enforcement and the tribal court system, the federal government 'robs the tribal community of leadership in one of the most important areas of governance: maintenance of public safety and criminal justice.'" (quoting Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 738 (2006))).

173. OFFICE ON VIOLENCE AGAINST WOMEN, *supra* note 29, at 13; see also Burleson, *supra* note 110, at 252–53 ("Transparent, legitimate, and accountable governments are the most likely to be able to achieve good governance and cooperate with one another in international decision-making forums.").

174. See Hart & Lowther, *supra* note 115, at 192 ("Tribal remedies not only bolster the sovereignty of tribes, but they aid Native American women in reclaiming self-determination over their bodies.").

functioning appropriately.¹⁷⁵ Indeed, as former Assistant Attorney General Reich noted, “[t]ribal governments, police, prosecutors, and courts—should be essential parts of the response to these crimes.”¹⁷⁶

Tribal leaders consistently advocate the need for greater control over domestic violence cases involving their members.¹⁷⁷ Julie and Nikki Finkbonner of the Lummi Nation explained to the federal government at the 2015 annual consultation why tribal control is needed: “when we do receive DOJ funding, trust that we are going to find the right way to accomplish what we put in our proposal. Do not tell us, ‘This is inappropriate,’ or ‘You can’t use the dollars for this or that.’ We know what works for our people.”¹⁷⁸

Scholars and advocates stress that respect for tribal customs and jurisdiction as well as “culturally-appropriate law enforcement” are key to the efficacy of federal policies addressing domestic violence.¹⁷⁹ Accordingly, analyses of federal domestic violence laws that evaluate whether the lawmakers considered issues of tribal sovereignty when drafting the domestic violence measures, whether such measures acknowledge the need for cooperation between federal and tribal governments, and whether those measures empower tribal control over the issue, are most likely to ensure that these laws are both effective and respectful of tribal sovereignty.

D. Applying Sovereignty Considerations to Section 117

Applying the foregoing analysis, Section 117, as it currently stands, does not sufficiently respect tribal sovereignty. First, Section 117 undermines tribal decisions regarding penalties for Native American offenders. Second, it does not appear that all tribes subject to the law consented to its enactment. Extending the logic of Professor Prakash’s treaty-based theory to traditional police powers of the state and, more specifically, to federal and tribal efforts to reduce domestic violence, provides an appropriate way of incorporating a sovereignty analysis in this context.¹⁸⁰

175. See *id.* at 233 (“[B]oth tribal self-governance and public safety are better served when tribes exercise a central role in providing public safety and criminal justice on Indian reservations.” (quoting *Law Enforcement in Indian Country: Hearing Before S. Comm. on Indian Affairs*, 110th Cong. 1 (2007) (statement of Professor Kevin K. Washburn))).

176. Memorandum from Ronald Weich, *supra* note 5.

177. See *Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 8–9 (2011) (prepared statement of Thomas J. Perrelli, Associate Attorney General) (“[T]he common thread that ran through nearly all the tribal input focused on the need for greater tribal jurisdiction over domestic-violence cases.”).

178. OFFICE ON VIOLENCE AGAINST WOMEN, *supra* note 29, at 15.

179. Hart & Lowther, *supra* note 115, at 233.

180. See *supra* Part II.B.2 (discussing Professor Prakash’s theory).

For Section 117 to be respectful of tribal sovereignty, the law should only be operative through a waiver. Under this framework, the federal government will not be permitted to enforce Section 117 unless tribes elect to waive their sovereignty and allow the federal government to intervene against repeat offenders.¹⁸¹ The waiver must be renewed after a term of years and should be administered on a tribe-by-tribe basis.¹⁸² Hart and Lowther argue that waivers could be effective tools for addressing the uncertainty regarding criminal jurisdiction over domestic violence in Indian country, which has been fueled by underlying sovereignty questions.¹⁸³ Further, this solution applies the logic underlying Professor Prakash's treaty-based theory by taking the form of a waiver.¹⁸⁴ By allowing a waiver, legislatures could allow tribes to enter into consensual agreements implicating their tribal sovereignty. Because the waiver is not an actual treaty, the government would not have to amend 25 U.S.C. § 71.¹⁸⁵

This proposed waiver process accounts for the "pitfalls of making sweeping claims about federal power over Indian tribes."¹⁸⁶ In particular, it acknowledges that while the federal government does not have plenary power over all Native American tribes, "one cannot conclude that each and every Indian tribe is the equivalent of Mexico or Canada, with the federal government utterly powerless to regulate internal tribal affairs."¹⁸⁷ By incorporating Professor Prakash's argument regarding fungibility,¹⁸⁸ this

181. In addition to respecting tribal sovereignty, this amendment could have positive practical consequences. It could function to conserve the federal government's resources by concentrating prosecutions in those tribes that explicitly wish to work with the federal government. It could also bolster communication between tribal and federal governments, such that tribes would be more likely to know whether the federal government is acting on a given case.

182. Though this proposed amendment is based on Professor Prakash's theory, it differs in several ways. For instance, unlike the treaties that Professor Prakash suggests would endow Congress with plenary power to "regulate all aspects of that Indian tribe," this waiver process would only address the federal government's ability to override tribal sovereignty over repeat Native American domestic violence offenders. Prakash, *supra* note 103, at 1111–12.

183. Hart & Lowther, *supra* note 115, at 226. Professors Hart and Lowther note:

Perhaps the most controversial and potentially most effective mechanism for ensuring the safety of Native American women who are the victims of domestic violence would be a federal congressional statute waiving the jurisdictional restrictions outlined by the Supreme Court in *Oliphant*, which held that tribes do not have criminal jurisdiction over non-Indians who commit crimes in Indian Country.

Id.

184. *See infra* Part II.D.1.

185. *See supra* note 164 and accompanying text.

186. Prakash, *supra* note 103, at 1114.

187. *Id.*

188. *Id.* at 1074 ("Once we stop stereotyping the tribes, we can begin to appreciate how the Constitution authorizes various types of relationships with Indian nations, and, indeed, any nation.").

waiver process is consistent with how the tribes wish to be treated.¹⁸⁹ For example, as advocated by a leader of the Tulalip Tribes, “[t]ribes are unique. We are sovereign governments and we have unique needs, and need to be treated as such.”¹⁹⁰

1. *The Structure of the Waiver Program Respects Tribal Sovereignty*

That this proposed amendment adopts the procedural requirement of a waiver is noteworthy because waivers have been regarded as a procedural tool for safeguarding tribal sovereignty.¹⁹¹ First, waivers function to “remedy the enforcement void faced by Native American women who attempt to prosecute their abusers.”¹⁹² Second, waivers “allow tribes to choose whether to accept jurisdiction, thus avoiding problems for those tribes lacking the institutional mechanisms for effective tribal law enforcement and prosecution.”¹⁹³ The procedural format of a waiver will expand tribal control in the realm of criminal domestic violence jurisdiction by requiring explicit consent,¹⁹⁴ and, therefore, will be consistent with the considerations that indicate whether a law respects tribal sovereignty.¹⁹⁵

2. *The Waiver Program Is Constitutional*

A treaty-based waiver program that would grant plenary power over all aspects of a particular Native American tribe could be consistent with the Congress’s power in the Constitution, so long as the waivers are con-

189. *See supra* note 172.

190. OFFICE ON VIOLENCE AGAINST WOMEN, *supra* note 29, at 26.

191. Hart & Lowther, *supra* note 115, at 226–28. Note that the waiver or opt-in format has been proposed as a policy solution in the similar, but slightly different context of non-Native American perpetrators of domestic violence against Native American victims in Indian country. *Id.*

192. *Id.* at 227.

193. *Id.*

194. Marie Quasius suggests a waiver program that would address jurisdiction over non-Native American defendants. Quasius, *supra* note 122, at 1940. The differences between her proposed waiver program and the waiver provision advocated herein are significant and should therefore be noted. The most obvious difference is that the waiver program advocated herein addresses criminal jurisdiction over only Native American perpetrators of domestic violence, and specifically in the context of Section 117, over only repeat offenders. Additionally, the some of the programs Quasius suggests involve an affirmative assumption of jurisdiction by the tribes; whereas, the waiver program articulated in this Comment could involve either an acknowledgment that the criminal jurisdiction of the tribe is not exclusive or an abrogation of criminal jurisdiction over repeat offenders entirely, depending on the specific provisions of the waiver adopted by the specific tribe. *Id.*

195. *See supra* Part II.C.

ducted on a tribe-by-tribe basis.¹⁹⁶ As previously noted, however, this waiver program would not confer plenary power over all aspects of the specific Native American tribe that agrees to it; rather, it only provides notice to the federal government that the tribe acknowledges its concurrent criminal jurisdiction granted by Section 117 and grants permission to prosecute offenders pursuant to that jurisdiction.¹⁹⁷ If a treaty-based program that grants plenary power over all aspects of tribal life can be constitutional, it follows that a waiver that confers a narrower scope of authority to Congress over that tribe would also be constitutional.¹⁹⁸

Marie Quasius has discussed the possibility of adopting waiver-based or opt-in programs concerning tribal criminal jurisdiction over non-Native Americans who perpetrate domestic violence against Native Americans explored the constitutionality of such proposals.¹⁹⁹ In discussing a proposed opt-in program, Quasius argues that the Supreme Court has affirmed the inherent authority of tribes to prosecute and punish non-Native Americans.²⁰⁰ She notes that when a tribe's authority is inherent rather than delegated,²⁰¹ "the source of the power is the tribe and the tribe is not limited to the fulfillment of a narrow congressional directive."²⁰² Though Quasius's argument does not address whether a tribe's authority to prosecute domestic violence perpetrated by one of its members against another is inherent or delegated, the Court's discussion of Section 117 in *Bryant* suggests that tribal authority in this area is appropriate.²⁰³ Accordingly, a waiver program, which seeks to respect tribal sovereignty over criminal jurisdiction such as the one proposed herein,²⁰⁴ is constitutional because it functions to

196. U.S. CONST. art. I, § 2, cl. 2; *see also* Prakash, *supra* note 103, at 1073 (noting that even though the Constitution does not grant plenary power over Native American tribes generally, it "establishes a framework that allows the federal government to acquire plenary power over tribes").

197. *See supra* Part II.D.1.

198. Logically, if a waiver confers plenary power over all aspects of the tribe, that would include the tribe's criminal jurisdiction. Accordingly, if Congress could be constitutionally capable of assuming power over the tribe's criminal jurisdiction through a grant of plenary power in a waiver, it should also be constitutionally capable of assuming power over the tribe's criminal jurisdiction in a waiver without a grant of plenary power over all other aspects of tribal life.

199. *Id.* at 1924–25 ("An opt-in program would provide a gradual transition to full tribal jurisdiction over sexual assault and other criminal matters and would assuage any concerns that non-Indian defendants will not receive due process.").

200. *Id.* at 1925–26.

201. Tribal authority is delegated when "the source of the power is Congress, and the tribe merely exercises the narrow powers granted by Congress." *Id.* at 1926.

202. *Id.*

203. *United States v. Bryant*, 126 S. Ct. 1954, 1960 (2016) ("Although federal law generally governs in Indian country, Congress has long excluded from federal-court jurisdiction crimes committed by an Indian against another Indian.").

204. *See supra* Part II.D.1.

recognize and bolster the scheme of inherent versus delegated authority that has been adopted by the Court.²⁰⁵

3. *The Waiver Program Is Consistent with the Structure and Goals of the Native American Provisions of the VAWA*

The proposed waiver program is consistent with the structure and goals of the provisions governing crimes against Native American women in the most recent VAWA.²⁰⁶ Congress had at least three goals in enacting the Native American provisions of the 2005 VAWA: “1) decreasing violence against Native American women; 2) bolstering tribal sovereignty to enable tribes to better respond to Native American victims of domestic violence; and 3) ensuring perpetrator accountability for violence.”²⁰⁷

The proposed waiver program would further each of these goals. First, by requiring increased coordination between the tribal and federal governments in handling prosecutions of repeat Native American domestic violence offenders, this waiver program would function to increase the efficacy of the offense created in Section 117 in minimizing domestic violence.²⁰⁸ Second, by selecting a structure that procedurally maximizes tribal sovereignty and control, this waiver program would further the second goal of the VAWA to reinforce tribal sovereignty by helping tribes better attend to the needs of domestic violence victims.²⁰⁹ Last, the increased coordination that will occur as a result of increased communication between the government and the tribes regarding their waivers will provide tribal courts and federal prosecutors with greater notice about who will prosecute a given case.²¹⁰

205. See Quasius, *supra* note 122, at 1926 (discussing the Court’s scheme of authority, as addressed in *Duro* and applied in *Lara*, and noting that “the Supreme Court affirmed the inherent, not delegated, authority of tribes to prosecute and punish nonmember Indians”).

206. This Comment discusses the goals of the Native American provisions of the 2005 VAWA for two reasons. First, because the *Bryant* Court emphasized the 2005 VAWA over the 2013 VAWA; second, because Section 117 was first enacted in the 2005 VAWA, the specific goals that Congress had in mind in enacting Section 117 are particularly relevant in the discussion of a possible amendment of the policy.

207. Hart & Lowther, *supra* note 115, at 221–22. Congress is not the only branch of the federal government that has articulated goals in this area. The executive branch has also stated that it has “placed a high priority on combating violence against women in tribal communities.” Memorandum from Ronald Weich, *supra* note 5.

208. See *supra* Part II.C.

209. Hart & Lowther, *supra* note 115, at 221–22; see also *supra* Parts II.C, Part II.D.

210. See *supra* Part II.A.

III. CONCLUSION

A close examination of the Supreme Court's tribal sovereignty doctrine in the domestic violence context reveals that it is outdated and lacks sufficient constitutional grounding to support²¹¹ the conclusion that Congress has plenary power over all Native American tribes.²¹² This revelation, combined with the predominant view among scholars and tribal leaders that increased tribal control is necessary to effectively minimize domestic violence,²¹³ suggests that both the Court and Congress must incorporate greater respect for tribal sovereignty into tribal law to combat the epidemic of domestic violence in Indian country effectively.²¹⁴

The Court's decision in *United States v. Bryant*, which upholds Section 117 of the VAWA, is indicative of the problems that underlie the current approach to sovereignty.²¹⁵ After analyzing the effects of Section 117 on tribal sovereignty, the law as it currently stands must be amended to accord greater respect to the authority of the tribes. This Comment suggests that a waiver program requiring each individual tribe to consent to the federal government's authority to prosecute repeat offenders before the government can take action is a potential solution for balancing the interests of the federal government against respect for tribal sovereignty.²¹⁶

211. *See supra* Part I.C.2.

212. *See supra* Part II.B.1.

213. *See supra* Part II.C.

214. *See supra* Part I.A.

215. *See supra* Part II.A.

216. *See supra* Part II.D.1.