UNPRINCIPLED PREEMPTION: WHY THE SUPREME COURT WAS WRONG IN *OKLAHOMA v. CASTRO-HUERTA* TO ABANDON EXCLUSIVE FEDERAL JURISDICTION OVER CRIMES BY NON-INDIANS AGAINST INDIANS IN INDIAN COUNTRY

Eric Ramoutar[*]

Abstract

The division of criminal jurisdiction in Indian Country has been a source of controversy since the earliest days of the republic. The contemporary arrangement is the product of a complex interaction between treaties, federal statutes, and common law gloss. Since 1881, the prevailing understanding has been that while states have jurisdiction to prosecute crimes in Indian Country that do not involve Indians, jurisdiction over crimes by or against Indians lies with the federal government and the tribes.

In Oklahoma v. Castro-Huerta*, the Supreme Court upended that understanding, holding for the first time that states have jurisdiction, unless expressly preempted by federal law, to prosecute crimes by non-Indians against Indians in Indian Country. This Article argues that the Supreme Court's decision was grounded in an ahistorical understanding of the scope of federal authority over Indian Country, an incorrect reading of the relevant case law, and a dubious application of the Indian Country Preemption Doctrine that caused the Court to ignore the preemptive effect of the Indian Civil Rights Act of 1968. The Article concludes by arguing that, legal errors notwithstanding, the impact of the Court's decision may be blunted by Oklahoma state law.*

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* J.D. Candidate 2024, Harvard Law School; B.S. 2017, Duke University.

Introduction

The division of criminal jurisdiction in Indian Country reflects a centuries-long struggle between three sovereigns: the federal government, tribes, and the states. The current jurisdictional arrangement is the product of a complex interaction between federal statutes, treaties, and common law pronouncements on the extent to which states may assert their general police powers in Indian Country.[1] Regardless of which sovereign or branch of government is purporting to carve up jurisdictional responsibilities, a few cornerstone principles are paramount. First, tribes are pre-constitutional and extra-constitutional sovereigns that retain all aspects of sovereignty unless or

1. 18 U.S.C. § 1151. This section defines Indian Country as, except as provided in 18 U.S.C. §§ 1154, 1156,

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

Id.

until Congress amends the boundaries of a tribe's sovereign authority.[2] Second, the federal government has a trust responsibility as to Indian tribes, which, from the earliest days of the republic, has included a duty to protect tribes from hostile state encroachment.[3] Third, partly as a virtue of this duty of protection, the federal government enjoys plenary power over Indian affairs.[4]

Despite these principles, states have persistently and aggressively sought to assert authority in Indian Country.[5] Early efforts by the states to assume jurisdiction were met with stalwart resistance from the Supreme Court. Indeed, Chief Justice John Marshall's famous declaration in *Worcester v. Georgia* that Indian tribes are "distinct political communities" "in which the laws of [states] can have no force" has remained a jurisprudential lodestar.[6] As the political relationship between Indian tribes, states, and the federal

2. *See* Oklahoma v. Castro Huerta, 142 S. Ct. 2486, 2505 (2022) (Gorsuch, J., dissenting); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) ("The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians.").

3. *See* Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942) ("In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust."); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 2 (1831) ("[Tribes'] relations to the United States resemble that of a ward to his guardian. They 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.").

4. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."); United States v. Kagama, 118 U.S. 375, 384 (1886) (holding tribes "owe no allegiance to the states, and receive from them no protection . . . [that] the people of the states where they are found are often their deadliest enemies . . . [and that the United States] alone can enforce its laws on all the tribes"). *Lone Wolf* and *Kagama* together established the "plenary power doctrine." *See* Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 222 (1984).

5. *See generally* Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999 (2014) (detailing repeated state incursions onto Indian land); *Worcester*, 31 U.S. at 542 ("[T]he acts of the legislature of Georgia seize on the whole Cherokee country, parcel it out among the neighbouring counties of the state, extend her code over the whole country, abolish its institutions and its laws, and annihilate its political existence.").

6. *Worcester*, 31 U.S. at 557, 561.

government has evolved, subsequent courts have refined the principle delineated by Chief Justice Marshall in *Worcester*, but none have ever claimed to overrule it.[7] In the 2022 term in *Oklahoma v. Castro-Huerta*, the Supreme Court was once again asked to bless a state incursion into Indian Country.[8] The Court ceded to Oklahoma's request, holding that states have jurisdiction, concurrent with the federal government, to try and punish crimes committed by non-Indians against Indians in Indian Country.[9]

The Opinion of the Court, authored by Justice Kavanaugh, approached the central question as one of ordinary federal preemption, imbuing its analysis with only a cursory sliver of the history and background principles that have caused the Court to apply a different preemption standard in Indian law cases than it has applied to the balance of its docket. In truth, the Court's interest in historical context seemed cabined to the preceding two years. In 2020, the Court ruled in *McGirt v. Oklahoma* that the Creek reservation in present-day Oklahoma was never disestablished by an act of Congress and, therefore, remains Indian Country.[10] That area, and subsequent reservations that have been re-recognized in the wake of *McGirt*, includes most of Eastern Oklahoma, including the city of Tulsa, and has a population of about two million people.[11] This, according to the Court in *Castro-Huerta*, "created a significant challenge for the federal government and for the people of Oklahoma" because the ruling seemed to mandate a mass transfer of jurisdictional responsibility from the state to the federal government and opened prior state convictions in Indian Country to appellate reversal.[12]

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7. *See, e.g.*, United States v. McBratney, 104 U.S. 621 (1881) (holding that states exercise exclusive jurisdiction over crimes committed by non-Indians against non-Indians in Indian Country).

8. 142 S. Ct. 2486 (2022) (majority opinion).

9. *Id.*

10. 140 S. Ct. 2452 (2022).

11. *See Castro-Huerta*, 142 S. Ct. at 2491–92.

12. *Id.* at 2492. *McGirt* mandated a mass transfer of cases from the state to the federal government because, prior to *Castro-Huerta*, both Oklahoma and the federal government believed jurisdiction in Indian Country over crimes committed by or against Indians to be exclusive to the federal government or, in the case of intra-tribal crimes not subject to the 1885 Major Crimes Act, concurrent with tribal governments. *Id.* at 2491–92. The Court also implies that the federal government does not have the resources to deal with this case burden, noting that "[a]t the end of fiscal year 2021, the U.S. Department of Justice was opening only 22% and 31% of all felony referrals in the Eastern and Northern Districts of Oklahoma." *Id.* at 2492. But of course, prior to *McGirt* in 2020, the federal government had no occasion to allocate outsized resources to Oklahoma because the federal government believed that the Creek reservation had been disestablished and thus the state had exclusive jurisdiction. *See McGirt*, 140 S. Ct. at 2482 (Roberts, C.J., dissenting) ("[U]nbeknownst to anyone for the past

In endeavoring to remedy the "challenge" created by *McGirt*, the Court in *Castro-Huerta* offers an analysis of criminal jurisdictional arrangements in Indian Country that is unfaithful to the Court's most canonical pronouncements on state authority in Indian Country, antithetical to contemporary developments in Indian law jurisprudence and inconsistent with the historical origins of the relevant treaties and statutes. The Court's opinion proceeds in three parts. The first argues that states possess "inherent . . . prosecutorial authority in Indian country" because "Indian country within a State's territory is part of a State, not separate from a State."[13] Consequently, the opinion concludes, "States have jurisdiction to prosecute crimes committed in Indian country unless preempted."[14] Second, having established this default rule, the Court decides that neither the 1834 General Crimes Act nor Public Law 280 preempt this inherent prosecutorial authority in Indian Country.[15] Third, the opinion acknowledges that even if state authority is not explicitly preempted by a federal statute, state assertion of authority may be void "if the exercise of state jurisdiction would unlawfully infringe upon tribal self-government."[16] But here, the Court says, state jurisdiction over crimes committed by non-Indians against Indians in Indian Country does not infringe upon tribal self-government because (1)

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century, a huge swathe of Oklahoma is actually a Creek Indian reservation, on which the State may not prosecute serious crimes committed by Indians like McGirt."). The federal government has now begun to ramp up prosecutions in the wake of *McGirt*. *See Castro-Huerta*, 142 S. Ct. at 2527 (Gorsuch, J., dissenting) ("[T]he Tribes—those most affected by all this supposed lawlessness within their reservations—tell us that, after a period of adjustment, federal prosecutors are now pursuing lower level offenses vigorously too.").

13. *Castro-Huerta*, 142 S. Ct. at 2499, 2504 (majority opinion).

14. *Id.* at 2494.

15. As explained later in the Article, the 1834 General Crimes Act and Public Law 280 are two of the most important federal statutes dealing with criminal jurisdiction in Indian Country. The General Crimes Act declared that "the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country." 18 U.S.C. 1152. Passed in 1953, Public Law 280 mandated a transfer of federal criminal jurisdiction to the state government in Indian Country in six states, with certain reservation-specific carve-outs, and empowered the remaining states to assume jurisdiction after amending prohibitory statutes and state constitutional provisions. Act of Aug. 15, 1953 (Public Law 280), Pub. L. No. 83–280, 67 Stat. 588 (codified at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–1326, and 28 U.S.C. § 1360). Public Law 280 was amended in the 1968 Indian Civil Rights Act to, among other changes, require tribal consent for a non-mandatory state to assume criminal jurisdiction over crimes "by or against Indians." 25 U.S.C. § 1321.

16. *Castro-Huerta*, 142 S. Ct. at 2501 (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142–43 (1980)).

state jurisdiction does not "deprive the tribe of any of its prosecutorial authority" or "involve the exercise of state power over any Indian or over any tribe,"[17] (2) "a state prosecution of a non-Indian likewise would not harm the federal interest in protecting Indian victims"[18] because a state prosecution would "supplement . . . not supplant" a federal prosecution,[19] and (3) "the State has a strong sovereign interest in ensuring public safety and criminal justice within its territory, and in protecting all crime victims . . . includ[ing] both Indian and non-Indian victims."[20]

This Article will address the failings of the Court's opinion in four parts. Part I will detail the history of criminal jurisdiction in Indian Country, laying out the relevant treaties, federal statutes, and common law gloss from the Founding to the present. Part II will briefly summarize the facts and procedural posture in *Castro-Huerta*. Part III will offer three critiques of the Court's opinion. First, when Congress passed the General Crimes Act in 1834, state assertions of jurisdiction were field preempted by a Founding-era centralization of Indian affairs in the federal government, obviating the need for Congress to explicitly preempt state law in the text of the General Crimes Act. Second, the Court's reliance on the *McBratney* line of cases to establish that states enjoy full jurisdiction in Indian Country, unless explicitly preempted by federal law, is erroneous.[21] Third, the Court's opinion applies the wrong standard of preemption to federal statutes concerning Indian affairs, and, when applied to the proper preemption standard, the Indian Civil Rights Act's amendments to Public Law 280 preempts unilateral assertions of criminal jurisdiction. Part IV will briefly analyze a suggestion by Justice Gorsuch in dissent that, notwithstanding the Court's decision, assumption of criminal jurisdiction over crimes committed by non-Indians against Indians in Indian Country is illegal as a matter of Oklahoma state law.

17. *Id.*

18. *Id.*

19. *See* Gamble v. United States, 139 S. Ct. 1960 (2019) (holding that prosecution by both the state and the federal government does not offend the Constitution's Double Jeopardy Clause because the two prosecutions are undertaken by separate sovereigns).

20. *Castro-Huerta*, 142 S. Ct. at 2501–02.

21. United States v. McBratney, 104 U.S. 621 (1881).

I. Historical Overview of Criminal Jurisdictional Arrangements in Indian Country

A. The Founding-Era Approach to Management of Indian Affairs

Management of relations with Indian tribes caused tremendous instability in the early days of the republic. Initially, the newly independent United States believed that they had conquered the Indians and divested them of all land claims by defeating the British.[22] During negotiations with the Six Nations of the Iroquois Confederacy in New York, a member of the congressional delegation told the tribes,

> You are mistaken in supposing that having been excluded from the United States and the King of Great Britain, you are become a free and independent nation, and may make what terms you please. . . . You are a subdued people; you have been overcome in war which you entered into with [the United States], not only without provocation, but in violation of most sacred obligations.[23]

The Six Nations were simply told by the United States that they would be forced to give up all their land west of the Pennsylvania boundary and that they should be happy with their residual land in light of their reprehensible conduct towards the United States during the war.[24]

Tribes who had their boundaries dictated to them quickly grew resentful and began to push back against the terms of the treaties. By 1786, the Indians of the Old Northwest (current-day Ohio) ramped up hostilities on the frontier, emboldened by British refusal to leave the Northwest posts and actively encouraged by British officials to thwart American expansion.[25] Other tribes refused to be dictated to. In 1786, the United States was able to get only one new tribe[26] (the Shawnee) to attend a treaty conference at the mouth of the Great Miami on the Ohio River.[27] Many tribes scoffed at the notion that they had been conquered and that they should abandon their land claims as punishment for their support of the British. In the tribes' view, the Revolutionary War was merely another chapter in their episodic struggle

22. *See* REGINALD HORSMAN, EXPANSION AND AMERICAN INDIAN POLICY 1783-1812, at 5 (1967).

23. *Id.* at 19.

24. *Id.*

25. *Id.* at 23.

26. *Id.* Two other tribes, the Wyandots and the Delawares, came to the conference to renew the Treaty of Fort McIntosh. *Id.*

27. *Id.* at 22.

against foreign powers; they saw no need to pay for the sin of British support.[28]

At the same time, the federal government was increasingly unable to put its muscle behind land demands. The newly independent United States was financial depleted after the war and badly needed Indian lands to sell to eager settlers and land companies to fill its barren coffers.[29] But the United States could not afford perpetual conflict on the frontier, and it needed a new approach to peaceably manage Indian affairs. In a December 1786 letter to Thomas Jefferson, John Jay argued that it would be "wiser . . . gradually to extend our settlements, as want of room should make it necessary."[30] A few months later, Henry Knox, the Secretary of War in the Confederation, issued instructions for the superintendents of Indian affairs which stipulated that the "[m]ost important consideration render it necessary that the United States should be at peace with the Indians, provided it can be obtained and preserved consistently with the justice and dignity of the nation."[31] To that end, the federal government abandoned the notion that it had acquired all Indian lands by virtue of their victory over the British (and were benevolently giving a piece of that conquered land back to the tribes) and instead sought to purchase pieces of Indian-controlled land directly from the tribes. In a 1787 report to Congress, Secretary Knox advocated for a return "to the custom of Britain" who "thought a treaty and purchase money for land was the most prudent measure and in no degree dishonorable to the nation."[32]

The federal government's attempts to deal with Indian affairs more peacefully were ignored by several states. New York, Pennsylvania, Georgia, and North Carolina all thought that the federal government's land acquisition policy was a violation of their sovereignty. Georgia was particularly notorious for negotiating illegal and ill-conceived treaties with Southern Indians. In the first 1783 Treaty of Augusta, Georgia secured land between the Tugalo and Apalachee Rivers from the Cherokee only to discover that the land actually belonged to the Creek.[33] So, Georgia found a few Creeks who claimed to (but did not) speak for the Tribe and signed the second Treaty of Augusta, which ceded to Georgia the same tract of land the Cherokees had passed to the State.[34] North Carolina didn't bother with treaties, and in May

28. *Id.* at 15.
29. *Id.* at 5.
30. *Id.* at 35.
31. *Id.*
32. *Id.* at 38.
33. *Id.* at 27.
34. *Id.*

1783 decided to seize all Indian lands within North Carolina save a small area of Cherokee land between the French Broad and Tennessee Rivers.[35]

States were also emboldened to disregard federal policy by the incoherent allocation of powers over Indian affairs in the Articles of Confederation, which assigned to the federal government the power over "regulating the trade and managing all affairs with the Indians" while simultaneously stipulating that "the legislative right of any state within its own limits be not infringed or violated."[36] States, while generally prohibited from engaging in war without the authorization of the Congress of the Confederation, also retained the right to defend themselves from an imminent tribal attack upon "receiv[ing] certain advice of a resolution being formed by some nation of Indians to invade such state."[37] Ambitious states reasoned that this tension annulled the power held in the central government, and they sought to manage relations with Indian tribes without consulting the federal government.[38]

State noncompliance was a clear threat to the federal plan. In August 1787, a committee report to Congress on the Southern Indians explained that settlers from Georgia and North Carolina were steadily encroaching on Creek and Cherokee land and that the tribes were turning to the Spanish for arms and other goods.[39] The report blasted the states for their assertion of sovereignty over Indian lands, declaring "that it has long been the opinion of the country, supported by Justice and humanity, that the Indians have just claims to all land occupied by and not fairly purchased from them."[40] The federal policy in the final years of the Confederation was thus clear: tribes were to be dealt with as sovereigns.

The desire to prevent states from plunging the country into a series of financially unsustainable and politically unproductive frontier wars led the Constitutional Convention to centralize control over Indian affairs in the federal government.[41] Although the only explicit mention of federal power

35. *Id.* at 28.

36. ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 4.

37. *Id.* art. VI, para. 5.

38. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) (noting that North Carolina and Georgia believed the contradictions in the Articles of Confederation voided congressional control over Indian affairs).

39. *See* HORSMAN, *supra* note 22, at 40.

40. *Id.*

41. *See* Ablavsky, *supra* note 5, at 1026 ("Reporting to Congress in July 1787, [Secretary of War Henry Knox] observed 'that the finances of the United States . . . render them utterly unable to maintain an Indian war with any dignity or prospect of success.'") (citing 33 J. OF THE CONT'L CONG. 1774–1789, at 388 (Roscoe R. Hill ed., 1936)).

over Indian affairs in the Constitution is found in the Indian Commerce Clause, which gives Congress the power to "regulate Commerce . . . with the Indian tribes,"[42] federal primacy was understood to have been established by an interaction of the Indian Commerce Clause and the other federal powers normally used to deal with foreign nations, namely the treaty power and the war power.[43] Writing in support of ratification, James Madison argued in *Federalist* No. 42 that the constitutional structure had remedied the incoherent loci of power in the Articles because the Indian Commerce Clause was "very properly unfettered from two limitations in the articles of Confederation, which render[ed] the provision obscure and contradictory."[44]

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42. U.S. CONST. art. I, § 8.

43. *See* Newton, *supra* note 4, at 200 ("[T]he same powers that sufficed to give the federal government a free rein in the international arena were viewed as sufficient to enable the new government to deal adequately with the Indian tribes."). At various points the Court has suggested that plenary power over Indian affairs resides exclusively in the federal government solely by virtue of the Indian Commerce Clause. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 62 (1996) ("[T]he Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal government than does the Interstate Commerce Clause. . . . [T]he States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes."). *But see* United States v. Kagama, 118 U.S. 375, 378–79 (1886) ("[W]e think it would be a very strained construction of this clause that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.").

Justice Thomas has recently advanced an originalist critique of the theory locating exclusive federal power over Indian affairs in the various identified constitutional provisions. *See, e.g.*, United States v. Lara, 541 U.S. 193, 215 (2004) (Thomas, J., concurring) ("I cannot agree with the Court, for instance, that the Constitution grants to Congress plenary power to calibrate the 'metes and bounds of tribal sovereignty.' . . . I cannot locate such congressional authority in the Treaty Clause, U.S. Const., art. II, § 2, cl. 2, or the Indian Commerce Clause, Art. I, § 8, cl. 3.") (quoting *Lara*, 541 U.S. at 202 (majority opinion)); Adoptive Couple v. Baby Girl, 570 U.S. 637, 664–65 (2013) (Thomas, J., concurring) ("There is little evidence that the ratifiers of the Constitution understood the Indian Commerce Clause to confer anything resembling plenary power over Indian affairs."). For a treatment of this new originalist approach, see Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1022–23 (2015).

44. THE FEDERALIST No. 42, at 236–37 (James Madison); *see* Ablavsky, *supra* note 43, at 1022–23 (noting that Madison's comment in *The Federalist* was "[t]he only sustained discussion" on the Indian Commerce Clause during the ratification debates).

B. Exclusivity of Federal Control over Criminal Jurisdiction in Indian Country from the Founding Until McBratney

After the ratification of the Constitution, President Washington and his first secretary of war Henry Knox acted swiftly to settle tensions with Indian tribes against the backdrop of exclusive federal power. The new administration promised to respect existing treaty obligations that tribes had negotiated with the Crown, which were then assumed by the United States after the Revolutionary War, and the Washington administration recommended the negotiation of additional treaties that often traded federal protection over Indian lands and financial compensation for partial land transfers to the United States.[45] Congress also tapped their constitutionally endowed power to manage Indian affairs by passing the first of six Indian Trade and Intercourse Acts in 1790.[46] While the Act was most notable for its restriction on the alienability of native land, it was also the first act of Congress to regulate criminal jurisdiction on Indian land, criminalizing conduct by non-Indians against Indians on Indian land that would have been criminal had it been committed against a non-Indian in the state or territory from which the offender was from.[47] The 1790 Act lasted only two years, but it was reenacted four times between 1793 and 1802 with the criminal jurisdiction language being strengthened to provide for coverage of specific crimes, application of specific penalties, and withholding of compensation for Indian victims whose tribes sought independent retribution against the offender.[48]

In 1817, Congress passed the first version of the Indian Country Crimes Act, which authorized federal prosecution of conduct by "any Indian, or other person" if that conduct would have been criminal "if committed in any place

45. *See* Newton, *supra* note 4, at 200.

46. Act of July 22, 1790, ch. 33, §§ 5–6, 1 Stat. 137, 138.

47. *Id.* § 5, 1 Stat. at 138 ("And be it further enacted, That if any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit any crime upon, or trespass against, the person or property of any peaceable and friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen or white inhabitant thereof, would be punishable by the laws of such state or district, such offender or offenders shall be subject to the same punishment, and shall be proceeded against in the same manner as if the offence had been committed within the jurisdiction of the state or district to which he or they may belong, against a citizen or white in habitant thereof.").

48. Act of June 30, 1834, ch. 161, §§ 16–19, 4 Stat. 729, 731; Act of Mar. 30, 1802, ch. 13, § 4, 2 Stat. 139, 143; Act of Mar. 3, 1799, ch. 46, § 4, 1 Stat. 743, 744–45; Act of May 19, 1796, ch. 30, § 4, 1 Stat. 469, 470; Act of Mar. 1, 1793, ch. 19, § 4, 1 Stat. 329, 329.

or district of country under the sole and exclusive jurisdiction of the United States."[49] The Act carved out intra-tribal offenses as well as those that conflicted with applicable treaties.[50] The 1817 Indian Country Crimes Act served as the basis for the 1834 General Crimes Act, which was part of the final, permanent Indian Trade and Intercourse Act.[51] As it exists today, the General Crimes Act extends "the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia . . . to the Indian country."[52] In addition to preserving the exceptions in the 1817 Indian Country Crimes Act, the modern incarnation of the General Crimes Act provides that federal criminal jurisdiction will not attach "to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe."[53]

The 1834 General Crimes Act was enacted against the backdrop of the Supreme Court's extraordinary 1832 decision in *Worcester*. The case arrived at the Court after Samuel Worcester, an American missionary, was arrested by the State of Georgia for preaching on Cherokee land without a license.[54] A trial court found Samuel Worcester guilty of violating Georgia law and sentenced him to four years of hard labor.[55] In truth, Samuel Worcester's challenge was to more than just his prosecution; he and his allies were protesting a concerted campaign by the State of Georgia to "seize on the whole Cherokee country, parcel it out among the [neighboring] counties of the state, extend [Georgia's] code over the whole country, abolish [the Cherokees'] institutions and its laws, and annihilate its political existence."[56]

Despite intense political support for Georgia from the expansionist Jackson administration, the Supreme Court rebuffed the State's advance and reversed the petitioners' convictions.[57] Writing for the Court, Chief Justice

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49. Act of Mar. 3, 1817, ch. 92, § 1, 3 Stat. 383, 383.

50. *Id.*

51. Robert N. Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 959–60 (1975).

52. Trade and Intercourse Act of 1834, ch. 161, § 25, 4 Stat. 729, 733 (codified as 18 U.S.C. § 1152). The provision specifying that the laws of the District of Columbia do not apply in Indian Country was added as part of an unrelated law in 1854). Clinton, *supra* note 51, at 960.

53. 18 U.S.C. § 1152.

54. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 538–39 (1832).

55. *See* Matthew L. Sundquist, Worcester v. Georgia*: A Breakdown in the Separation of Powers*, 35 AM. INDIAN L. REV. 239, 240 (2010-2011).

56. *Worcester*, 31 U.S. at 542.

57. Sundquist, *supra* note 55, at 241.

Marshall described tribes "as distinct political communities, having territorial boundaries, within which their authority is exclusive."[58] The opinion also rejected the notion that states had any role to play in the management of relations with Indian tribes, concluding that the interaction of the Indian Commerce Clause, the war power, and the treaty power "comprehend all that is required for the regulation of our intercourse with the Indians."[59] He reasoned that the "shackles imposed on this power, in the confederation, [were] discarded" in the centralized constitutional scheme.[60] Marshall's exposition of exclusive federal power over Indian affairs built on his opinion one year earlier in *Cherokee Nation v. Georgia*, in which the Court held that the Supreme Court could not exercise its original jurisdiction to adjudicate "controversies between a state and a foreign state" because Indian tribes were more accurately characterized as "domestic dependent nations" whose relationship to the federal government was like "a ward to his guardian."[61] The guardianship relationship identified by Marshall in *Cherokee Nation* served as another basis, unmoored to the text of the Constitution, in which exclusive federal control over Indian affairs could be located.[62]

The Court's decision in *Worcester* amplified the need for federal regulation of criminal jurisdiction in Indian Country. Without the possibility of state adjudication, White settlers were confronted with the frightening prospect that they would be subject to exclusive tribal jurisdiction for criminal conduct arising on tribal land.[63] The 1834 General Crimes Act—enacted only two years after the Court decided *Worcester*—remedied that by providing a federal forum and body of law to be applied in Indian Country.[64]

Georgia responded to *Worcester* less deliberatively. It initially passed a law declaring that anyone who came to Georgia to enforce the decision would be hanged.[65] The Jackson Administration expressed similar reticence to

58. *Worcester*, 31 U.S. at 557.

59. *Id.* at 559.

60. *Id.*

61. 30 U.S. (5 Pet.) 1, 2, 11 (1831).

62. *See* United States v. Kagama, 118 U.S. 375, 384 (1886) (justifying plenary federal power over Indian affairs primarily by the federal government's guardianship relationship to Indian tribes).

63. *See* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2507 (2022) (Gorsuch, J., dissenting).

64. Trade and Intercourse Act of 1834, ch. 161, § 25, 4 Stat. 729, 733 (codified as 18 U.S.C. § 1152).

65. Stephen G. Breyer, *Dwight D. Opperman Lecture: Reflections of a Junior Justice*, 54 DRAKE L. REV. 7, 9 (2005).

enforce the judgment and, in fact, posited novel legal theories to shirk any alleged responsibility.[66] Two years before *Worcester*, President Jackson had shepherded the Indian Removal Act of 1830 through Congress, authorizing the president to negotiate treaties with tribes in the American Mid-Atlantic that would relocate those tribes to protected land west of the Mississippi River in exchange for a transfer of their native lands to the federal government.[67] After briefly resisting removal, the Cherokee Nation (or some group of Cherokee purporting to speak for the tribe) succumbed to federal pressure and, in 1835, signed the Treaty of New Echota, precipitating the notorious Trail of Tears.[68] The Treaty promised the Cherokee five million dollars in exchange for moving within two years to the territory which was to become Oklahoma.[69] Among the most important provisions of the Treaty was Article V, which stipulated "that the lands ceded to the Cherokee nation . . . shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory."[70]

After Indian removal, the federal government (via the 1834 General Crimes Act) was exercising criminal jurisdiction on tribal lands west of the Mississippi concurrently with tribal courts. However, as new states were admitted to the Union with borders that encompassed these tribal lands, the federal government had to grapple with potential assertion of criminal jurisdiction by the states in violation of treaty promises that explicitly foreclosed state jurisdiction on Indian lands.[71] The first occasion for Congress to address this conundrum came in Kansas. The Shawnee were pushed to Kansas and Missouri from Pennsylvania, Missouri, and Indiana by White encroachment and, in 1831, signed a treaty with the federal government promising that they, much like the Cherokee, would never be included within the boundaries of a state nor subject to the jurisdiction of a

66. *See* Sundquist, *supra* note 55, at 246–47 (noting that Benjamin Butler, who would become Jackson's Attorney General in 1833, "argued that because the Court did not issue a remedial order mandating enforcement, Jackson had no grounds to interfere").

67. Indian Removal Act of 1830, ch. 148, 4 Stat. 411; *see* Sundquist, *supra* note 55, at 241.

68. The Treaty of New Echota, which would eventually be ratified was, to put it mildly, procedurally suspect. The Treaty was negotiated by only a small subset of Cherokee after initial treaty discussions with the federal government, negotiating pursuant to the 1830 Removal Act, broke down. Ultimately, the Treaty of New Echota "received 114 votes, at most, out of thousands of votes at the National Council." Sundquist, *supra* note 55, at 247. The Senate ratified the treaty by a one-vote margin. *Id.*

69. Treaty of New Echota, Cherokee Nation-U.S., arts. I–II, Dec. 29, 1835, 7 Stat. 478.

70. *Id.* art. V.

71. *See* Clinton, *supra* note 51, at 960.

state.[72] When Kansas was admitted to the Union in 1861, Congress sought to preserve that core treaty obligation by inserting language into Kansas's Enabling Act that required the Kansas Constitution to disclaim jurisdiction over land set aside for tribes.[73] This disclaiming language made it clear that Congress intended the Shawnee's land to remain separate and apart from state *control*, as was required by the still-valid treaty provisions, even as its land was subsumed into Kansas's borders.[74] Section 1 of the Kansas Act served as a model for the admission of a slew of new states that had substantial Indian populations within their contemplated borders, including Oklahoma.[75] Article I, section 3 of the Oklahoma Constitution still contains

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72. *See id.* at 961 n.59 (citing Treaty with the Shawnees, art. X, Aug. 8, 1831, 7 Stat. 357).

73. Act of Jan. 29, 1861, ch. 20, § 1, 12 Stat. 126, 126. ("*Provided*, That nothing contained in the said constitution respecting the boundary of said state shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with such Indian tribe, is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the state of Kansas, until said tribe shall signify their assent to the president of the United States to be included within said state, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to make if this act had never passed.").

74. *See* Clinton, *supra* note 51, at 960–61.

75. *See id.* at 960–61 (noting that this language was substantively replicated in the enabling laws of other states with meaningful Indian populations including Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, and Washington).

The 1906 Oklahoma Enabling Act contains two provisions important to jurisdiction on tribal lands. First, the preamble declares that

> [N]othing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed.

Ch. 3335, pmbl., 34 Stat. 267, 267–68 (1906). Second, the Act provides that

> the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.

Id. § 3, 34 Stat. at 270.

the required jurisdictional disclaimer.[76]

Ten years after Congress began to fold core treaty promises into laws admitting new states into the Union, it brought treaty making to an abrupt end. The Indian Appropriations Act of 1871 provided that "[n]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."[77] Nevertheless, the law declared that "no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."[78] The law also did nothing to enlarge the scope of permissible state jurisdiction in Indian Country.

C. Limited Assertion of State Control from Allotment to Termination

The continued supremacy of treaties negotiated between the federal government and tribes before March 3, 1871, was the controlling backdrop when the Supreme Court faced *McBratney* in 1881.[79] The case concerned the murder of one non-Indian by another non-Indian on the Ute Reservation within the borders of Colorado.[80] The murder was prosecuted by the federal government pursuant to its plain authority under the General Crimes Act to apply "the general laws of the United States . . . to Indian country" (and not falling within any of the General Crimes Act's exceptions).[81] Nevertheless, the Court vacated the conviction, holding that crimes committed by non-Indians against non-Indians in Indian Country are within the exclusive jurisdiction of the state.[82] The Court reasoned that the 1875 Act admitting Colorado to the Union "upon an equal footing with the original States in all respects whatever" had invalidated the application of the General Crimes Act

76. OKLA. CONST. art. I, § 3 ("The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.").

77. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71).

78. *Id.*

79. United States v. McBratney, 104 U.S. 621 (1881).

80. *Id.*

81. *Id.* at 621–22; 18 U.S.C. § 1152. The General Crimes Act, as explained, carved out from federal jurisdiction intra-Indian crimes, crimes already punished by tribal law, and crimes exclusively reserved for tribal prosecution by treaty. The crime in *McBratney* fit none of those exceptions.

82. *McBratney*, 104 U.S. at 624.

to crimes not by or against Indians in Indian Country.[83] In the Court's view, "[w]henever, upon the admission of a State into the Union, Congress has intended to except out . . . the sole and exclusive jurisdiction over [an Indian] reservation, it has done so by express words," and it had chosen not to do so in Colorado.[84] While *McBratney* was a significant victory for proponents of expansive state authority, it did not purport to establish a completely new jurisdictional paradigm. Indeed, the Court explicitly declined to opine on whether jurisdiction over "punishment of crimes committed by or against Indians" was similarly transferred from the federal government to the states.[85]

Two years later, the Court was again asked to assess the limit of the federal government's prosecutorial authority. Crow Dog, a Brulé Lakota subchief, was accused of murdering Spotted Tail, a Lakota chief, on the Great Sioux Reservation in southern South Dakota.[86] The murder was initially dealt with according to Sioux tradition, with Crow Dog compensating Spotted Tail's family for the death. Unhappy with the seemingly trivial consequences for a murder, federal prosecutors indicted Crow Dog under the General Crimes Act. After his conviction in federal court, Crow Dog petitioned the Supreme Court for a writ of habeas corpus, contending that the federal government lacked jurisdiction to prosecute intra-tribal crimes and crimes that had already been punished by tribal courts under the General Crimes Act. In *Ex parte Crow Dog*, the Supreme Court agreed.[87] It straightforwardly applied the exceptions to federal jurisdiction in the General Crimes Act and held that the 1868 Treaty of Fort Laramie between the United States and, among other tribes, the Brulé band of Lakota Indians did not abrogate those exceptions.[88]

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83. *Id.* at 623.

84. *Id.* at 623–24.

85. *Id.* at 624.

86. *Ex parte* Crow Dog, 109 U.S. 556 (1883). South Dakota was not yet a state at the time of the murder.

87. *Id.* at 572.

88. *Id.* at 567–68. The Court quoted article 1 of the 1868 Treaty of Fort Laramie, which provides,

> If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws . . . .

Treaty of Fort Laramie, art. I, Crow Tribe-U.S., May 7, 1868, *quoted in Crow Dog*, 109 U.S. at 567. The Court interpreted "Indian" within the list "white, black, or Indian" to refer only to

To hold that the Treaty did abrogate the exceptions to the General Crime Act, the Court said, would be to "reverse . . . the general policy of the government towards the Indians" which "requires a clear expression of the intention of congress . . . that [it was un]able to find."[89] And absent an abrogation of the General Crimes Act's exceptions, crimes "by Indians against each other were left to be dealt with by each tribe for itself, according to its local customs"; no inherent authority existed in any other sovereign.[90] The writ was granted, and Crow Dog was released.

The Court's decision in Crow Dog sparked outrage among those who could not accept, or even comprehend, the adequacy of the tribal court's resolution.[91] Two years after the decision, Congress sought to remedy the perceived injustice through the Major Crimes Act.[92] As originally enacted, the law gave the federal government exclusive jurisdiction to prosecute Indians accused of committing seven major crimes in Indian Country.[93] The constitutionality of the Major Crimes Act was upheld in *United States v. Kagama* in 1886, just one year after the law was passed.[94] "In an opinion not

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an Indian of a different tribe than those who were party to the Treaty. *Crow Dog*, 109 U.S. at 567.

89. *Crow Dog*, 109 U.S. at 572.

90. *Id.* at 571–72.

91. There is limited historical record of the exact details of the settlement, but most agree that it involved some form of restitution payment made by Crow Dog to the family of Spotted Tail. *See* 2 GEORGE WASHINGTON KINGSBURY, HISTORY OF DAKOTA TERRITORY 1194 (George Martin Smith ed., 1915), https://archive.org/details/historyofdakotat02king/page/1194/mode/2up?q=money+horses+blanket (noting that the payment was a small sum of money, horses, and a blanket). There is, of course, a strong normative case for such a resolution being more humane than life in prison or the death penalty. Moreover, the Court acknowledged that tribal sovereignty requires tribes to have autonomy in their choice of punishment. *See also Crow Dog*, 109 U.S. at 571 ("[The federal government] tries them not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.").

92. Major Crimes Act of 1885, 18 U.S.C. § 1153.

93. The Major Crimes Act originally covered murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. The current version of the law includes "murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under [18 U.S.C. § 661]." 18 U.S.C. § 1153.

94. United States v. Kagama, 118 U.S. 375, 385 (1886).

known for its coherence or clarity, the Court"[95] attempted to identify a source of federal power to regulate intra-tribal criminal conduct in Indian Country. The opinion first ruled out the Indian Commerce Clause as the regulation of major crimes could not plausibly be included within the definition of "commerce,"[96] but it declined to point to another constitutional provision expressly justifying congressional action. Instead, the Court reasoned that "[t]he soil and [Indian] people [in Indian Country] are under the political control of the government of the United States, or of the states of the Union," so one of those two sovereigns *must* have the authority to regulate criminal jurisdiction in Indian Country.[97] The Court then gave two reasons why that authority lay in the federal government. First, the Court reasoned that because "Indians are within the geographical limits of the United States" and the power of Congress to make laws for inhabitants within its geographical limits "arises, not so much from the clause in the constitution . . . as from the ownership of the country . . . and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else," it must be that Congress can prescribe rules for tribes.[98] Second, the Court explained that the tribal dependency on federal protection first announced in *Cherokee Nation*[99] gave rise to a "duty of protection, and with it the power" to regulate criminal jurisdiction in Indian Country.[100]

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95. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.01(4) (Nell Jessup Newton et al. eds., 2005).

96. *Kagama*, 118 U.S. at 378–79 ("But we think it would be a very strained construction of this clause that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.").

97. *Id.* at 379.

98. *Id.* at 379–80.

99. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 2 (1831).

100. *Kagama*, 118 U.S. at 384. The Court's explanation of how the wardship relationship gave rise to federal authority to enact an intra-tribal criminal code became the most famous delineation since *Worcester* of why states can have no authority in Indian Country:

> These Indian tribes are the wards of the nation. They are communities dependent on the United States,-dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. 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

In 1896, the Court was confronted with a redux of *McBratney* with a novel statutory overlay. In *Draper v. United States*, a non-Indian convicted of murdering another non-Indian in Indian Country sought to invalidate his federal conviction on the grounds that the State (Montana) possessed exclusive jurisdiction to try and punish crimes not by or against Indians.[101] The Court concluded that *McBratney* governed.[102] Most notably, the opinion expressly rejected the idea that a disclaimer in the Montana Enabling Act of 1889 acknowledging that "Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States"[103] reserved exclusive jurisdiction in the United States to try and punish crimes by non-Indians against non-Indians in Indian Country.[104] In its interpretation of the provision in the Montana Enabling Act, the Court reasoned that because "equality of statehood is the rule," an exception cannot be created "if[] by any reasonable meaning" the provision in the Enabling Act can be read as not creating the exception.[105] That Court found that reasonable meaning in the 1887 General Allotment Act, which authorized a division of native lands into allotments for Indian individuals and families on the theory that traditional property rights and ownership would quickly integrate Indians into mainstream American society.[106] The Court first noted that under the statute, land acquired by allottees was to remain inalienable for twenty-five years and could not be taxed.[107] However, the General Allotment Act provided that Indians living outside Indian Country could put in for a piece of the "unappropriated public land," which would then be subject to the same twenty-five-year inalienability and anti-taxation protections as those who received allotted land on reservations even though, under normal circumstances, Indians living outside Indian Country were fully subject to the criminal and civil laws of the states in which they lived.[108] Consequently, the Court thought it reasonable that the disclaimer in the Montana Enabling Act served only to clarify that land received by Indians not living on

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> recognized by the executive, and by congress, and by this court, whenever the question has arisen.

Id. at 383–84.

101. 164 U.S. 240, 241–42 (1896).

102. *Id.* at 242–43.

103. Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676, 677.

104. *Draper*, 164 U.S. at 245.

105. *Id.* at 244.

106. An Act to Provide for the Allotment of Lands in Severalty to Indians on the Various Reservations (General Allotment Act or Dawes Act), ch. 119, 24 Stat. 388.

107. *Draper*, 164 U.S. at 245.

108. *Id.* at 246.

reservations was free from alienation and state taxation (and thus under the "jurisdiction and control" of the United States) in the same way that allotted land was under the General Allotment Act.[109] Any reader who found those legal gymnastics confusing would not be alone; the *Draper* Court twisted itself in knots to read the command that "Indian lands shall remain under the absolute *jurisdiction* and control of the congress of the United States" to implicate *only* property rights and not sovereignty.[110] Nevertheless, the upshot of *Draper* was that *McBratney* remained undisturbed.

The General Allotment Act would be repudiated in the 1934 Indian Reorganization Act, which ended allotment and sought to reverse the policy of cultural integration by promoting tribal culture and self-government.[111] Despite that, the Court has never revisited the reasoning in *Draper*, which would seem vulnerable now that the jurisdictional reservation (which still exists) cannot be understood as reasonably speaking to the inoperative alienation and taxation provisions in the General Allotment Act. If *Draper* came before the Court in 1935, it may well have come out the other way.

In 1913, the Court was asked for the first time to decide what *McBratney* and *Draper* left open, namely whether the grant of statehood on a footing equal with all other states divested the federal government of jurisdiction to prosecute crimes by or against Indians and transferred that jurisdiction to the states.[112] *Donnelly v. United States* arose out of the murder of an Indian by a non-Indian within the Extension of the Hoopa Valley Reservation in Northern California.[113] The defendant was convicted in federal court, but he contended—relying on *McBratney*—that crimes committed by non-Indians against Indians in Indian Country were exclusively cognizable in state courts.[114] The Court emphatically rejected that assertion, instead holding that the prosecution was plainly authorized by the General Crimes Act, and that "[u]pon full consideration . . . offenses committed by or against Indians are not within the principle of the *McBratney* and *Draper* Cases."[115]

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109. *Id.* at 246–47.

110. *Id.* at 244 (emphasis added).

111. *See* Act of June 18, 1934 (Indian Reorganization Act or Wheeler-Howard Act), 25 U.S.C. § 461; S. REP. NO. 112-166, at 5 (2012) ("By the 1930s, the federal allotment policies had proven disastrous for Indian tribes. As part of the repudiation of federal allotment policies, the [Indian Reorganization Act] ended allotment and made possible the organization of tribal governments and tribal corporations.") (footnote omitted)).

112. *Draper*, 164 U.S. at 247.

113. 228 U.S. 243, 252 (1913).

114. *Id.* at 252–70.

115. *Id.* at 271.

From 1913 forward, *Donnelly*'s interpretation of state criminal jurisdiction in Indian Country was the settled understanding.[116] In *United States v. Ramsey*, the Court declared that

> authority in respect of crimes committed by or against Indians continued after the admission of the state as it was before . . . in virtue of the long-settled rule that such Indians are wards of the nation, in respect of whom there is devolved upon the federal government "the duty of protection and with the power.[117]

In *United States v. Chavez*, the Court again said that "the United States, in virtue of its guardianship, has *full* power to punish crimes committed within the limits of the pueblo lands by or against the Indians or against their property, even though, where the offense is against an Indian or his property, the offender be not an Indian" and specifically rejected the argument made in *McBratney* by concluding that "the principle of equality is not disturbed by a legitimate exertion by the United States of its constitutional power in respect of its Indian wards and their property."[118] In *Williams v. United States*, the Court said that

> [w]hile the laws and courts of the State of Arizona may have jurisdiction over offenses committed on this reservation between persons who are not Indians, the laws and courts of the United States, *rather than those of Arizona*, have jurisdiction over

116. A 1979 Office of Legal Counsel opinion is the only evidence of a live counterargument. The opinion posits that in cases involving a non-Indian defendant and an Indian victim, the states and the federal government both have an interest in prosecuting the offender, just as the tribes and the federal government both have an interest in prosecuting a tribal offender even when the victim is a non-Indian (but the states do not). "Victimless" Crimes Committed by Non-Indians on Indian Reservations, 3 Op. O.L.C. 111 (1979), https://www.justice.gov/olc/file/626801/download. Moreover, under the test in *Williams v. Lee*, 358 U.S. 217 (1959), assertion of state jurisdiction would not infringe on "Indian interests in making their own laws and being ruled by them." 3 Op. O.L.C. at 119. That is true, the opinion contends, because "[w]hile significant damage might be done to Indian interests if Indian defendants could be prosecuted under State law for conduct occurring on the reservation, no equivalent damage would be done if State as well as Federal prosecutions of non-Indian offenders against Indian victims could be sustained." *Id.*

To the extent that the OLC opinion represented the opinion of the Executive Branch in 1979, that opinion appears to have been abandoned by 1989. *See* Amicus Curiae Brief by the Solicitor General, Arizona v. Flint, 492 U.S. 911 (1989) (No. 88-603) (recommending the denial of certiorari).

117. 271 U.S. 467, 469 (1926).

118. 290 U.S. 357, 365 (1933) (emphasis added).

> offenses committed there, as in this case, by one who is not an Indian against one who is an Indian.[119]

In *Solem v. Bartlett*, the Court noted that "[w]ithin Indian country, State jurisdiction is limited to crimes by non-Indians against non-Indians."[120] And most recently in *McGirt v. Oklahoma*, the Court recognized that "[The General Crimes Act] provides that federal law applies to a broader range of crimes by or against Indians in Indian country . . . [and that] States are otherwise free to apply their criminal laws in cases of non-Indian victims *and* defendants, including within Indian country."[121]

Donnelly was also the operative understanding when Congress began to craft new jurisdictional arrangements in the 1940s. Congress was once again attempting to integrate native communities into the surrounding society, and it thought that subjecting these communities to non-Indian institutions of law enforcement was vital to assimilation. The experiment began with the Kansas Act of 1940, which conferred upon Kansas jurisdiction "over offenses committed by or against Indians on Indian reservations . . . to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State."[122] Follow-on laws were passed for the Devil's Lake Reservation in South Dakota,[123] in New York with certain carve-outs for hunting and fishing rights,[124] and on the Sac and Fox Reservations in Iowa.[125]

In the early 1950s, gradual efforts to integrate native communities morphed into an aggressive campaign to terminate reservations altogether. The policy mood was crystallized in a 1953 Joint Resolution of Congress which declared that the policy of Congress was

> as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities [and] . . . to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship.[126]

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119. 327 U.S. 711, 714 (1946) (emphasis added).
120. 465 U.S. 463, 465 n.2 (1984).
121. 140 S. Ct. 2452, 2479 (2020) (emphasis added).
122. 18 U.S.C. § 3243.
123. Act of May 31, 1946, Pub. L. No. 79-394, 60 Stat. 229 (1946).
124. 25 U.S.C. § 232.
125. Act of June 30, 1948, ch. 759, 62 Stat. 1161.
126. H.R. Cong. Res. 108, 83d Cong. (1953).

To that end, the Resolution called for the termination of federal supervision over all tribes within four states (California, New York, Florida, and Texas) and over five other specifically listed tribes.[127]

That same year, Congress passed Public Law 280,[128] the cornerstone legislative accomplishment of the Termination Era. Public Law 280 accelerated the piecemeal efforts of the 1940s to unburden the federal government of responsibilities in Indian Country, mandating a jurisdictional transfer from the federal government to the state in six jurisdictions: California, Minnesota (except on the Red Lake Reservation), Nebraska, Oregon (except on the Warm Springs Reservation), Wisconsin, and (after being admitted to the Union) Alaska.[129] For non-mandatory jurisdictions, Public Law 280 authorized state legislatures to unilaterally assume criminal jurisdiction after amending their state constitutions to get rid of any prohibitory disclaimers[130] (despite the fact that *Draper* thought the standard disclaimer language in those states' enabling laws did not reserve exclusive criminal jurisdiction in the federal government).[131] In its original form, Public Law 280 did not provide for any tribal input into the jurisdictional arrangement despite several tribes expressing concerns over the potential for inequitable treatment and other degradation of civil rights under state control.[132]

D. Return to Exclusive Federal Control in Indian Country During Self-Determination

Between 1953 and 1968, seven states unilaterally assumed jurisdiction pursuant to Public Law 280.[133] However, in 1968, Congress reversed course

127. *See id.* (The specifically listed tribes were the Flathead Tribe of Montana, the Klamath Tribe of Oregon, the Menominee Tribe of Wisconsin, the Potawatomie Tribe of Kansas and Nebraska, and those members of the Chippewa Tribe on the Turtle Mountain Reservation, North Dakota).

128. 18 U.S.C. § 1162.

129. *See id.*

130. *Id.*

131. Draper v. United States, 164 U.S. 240, 246–47 (1896).

132. *See* Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority over Indian Country Granted by Public Law 280*, 87 WASH. L. REV. 915, 931 n.90 (2012) (citing Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 544–46 (1975)); DAVID M. ACKERMAN, CONG. RSCH. SERV., BACKGROUND REPORT ON PUBLIC LAW 280, at 22 (1975); Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 489 n.33 (1979)).

133. Anderson, *supra* note 132, at 932. Oklahoma was not one of the seven states.

with the passage of the Indian Civil Rights Act.[134] In an effort to reinvigorate tribal self-government, the Indian Civil Rights Act of 1968, among other measures, made many of the guarantees of the Bill of Rights applicable to tribes.[135] Most notably for present purposes, the Indian Civil Rights Act of 1968 also amended Public Law 280 to require tribal consent before a state could assume jurisdiction in Indian Country.[136] The amendments further provided that the federal government could continue exercising jurisdiction, concurrent with the states, to prosecute crimes under the General Crimes Act after request by the tribe "and consent by the Attorney General."[137]

Two years after the passage of the Indian Civil Rights Act of 1968, President Nixon made self-determination the definitive policy of the federal government. In an address to Congress, Nixon declared: "The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."[138] In 1988, Congress passed another statement of policy, this time "repudiat[ing] and reject[ing] House Concurrent Resolution 108 of the 83d Congress and any policy of unilateral termination of Federal relations with any Indian nation."[139]

The most recent opportunity for the Court to assess the limitations of state jurisdiction in Indian Country came in *McGirt v. Oklahoma*.[140] Jimcy McGirt, an enrolled member of the Seminole Nation of Oklahoma, was convicted in Oklahoma state court of three sexual offenses.[141] McGirt challenged the convictions as inconsistent with the 1885 Major Crimes Act which, as previously noted, provides for exclusive federal jurisdiction over the prosecution of certain major crimes (including the offenses McGirt was convicted of) committed by Indians in Indian Country.[142] The Court granted certiorari only to address whether the McGirt's crime was committed in Indian Country.[143] McGirt argued that Congress had never disestablished the Creek reservation in Eastern Oklahoma, so cultural integration notwithstanding, that region of Oklahoma remained Indian Country as

134. 25 U.S.C. §§ 1301–1304.
135. *See id.* § 1302(a).
136. *Id.* § 1321; *id.* § 1322; *id.* § 1326.
137. *Id.* § 1321(a)(2).
138. Richard Nixon, Special Message on Indian Affairs, 1970 PUB. PAPERS 564, 565 (July 8, 1970).
139. 25 U.S.C. § 2501(f).
140. 140 S. Ct. 2452 (2020).
141. *Id.* at 2459.
142. *Id.*; 18 U.S.C. § 1153.
143. *McGirt*, 140 S. Ct. at 2460.

defined by 18 U.S.C. § 1151.[144] Justice Gorsuch, writing for the Court, agreed.

Facially, *McGirt* has very little to do with *Castro-Huerta*; all it held was that a large swath of Oklahoma was made to be Indian Country by virtue of treaties between tribes and the federal government and that Congress has never abrogated those treaties (although, of course, it could).[145] Moreover, the Court in *McGirt* was not confronted with any difficult question of federal exclusivity because the applicable statute, the 1885 Major Crimes Act, *expressly* made jurisdiction over covered major crimes exclusively federal.[146] But under the surface alarm bells began to ring, for if the jurisdictional understanding delineated in *Donnelly* was correct, then Oklahoma may unexpectedly lack prosecutorial authority over inter-racial and intra-tribal crimes in a significant portion of the state.[147] Then, in September, 2020—just over three months after joining the majority in *McGirt*—Justice Ruth Bader Ginsburg died. After her prompt succession by Justice Amy Coney Barrett, commentators began to speculate on what effect the Court's changing composition would have on its willingness to reevaluate *McGirt*.[148] All it needed was the right case.

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144. *Id.* Section 1151 provides that "the term 'Indian country,' as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151.

145. *McGirt*, 140 S. Ct. at 2460, 2474; *see* Treaty with the Creek, pmbl., Feb. 14, 1833, 7 Stat. 417 (stating the treaty's purpose as "establish[ing] boundary lines which will secure a country and permanent home to the whole Creek nation of Indians, including the Seminole nation who are anxious to join them"); *Id.* at art. II (defining the boundaries of the Creek home).

146. *McGirt,* 140 S. Ct. at 2459.

147. *See* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2492 (2022) ("The classification of eastern Oklahoma as Indian country has raised urgent questions about which government or governments have jurisdiction to prosecute crimes committed there.").

148. *See, e.g.*, Noah Feldman, Legal Consequences in the Wake of *McGirt v. Oklahoma*: An Analysis at 4 (n.d.) (on file with author) (predicting that Justice Barrett would "vote like the four other Conservatives rather than like Justice Gorsuch" if the Court was asked to reconsider *McGirt*). Professor Feldman's argument acknowledged that Justice Barrett had participated in no guiding cases in Federal Indian Law during her time on the Seventh Circuit. *Id.* at 3. Nonetheless, he concluded that Justice Barrett's focus on reliance interests in her approach to stare decisis made it "highly plausible" that she would vote to overturn *McGirt* because *McGirt* was decided only two years previously and "unsettled extensive reliance interests" (presumably because nobody thought that Eastern Oklahoma was previously Indian Country) instead of "creat[ing] reliance interests." *Id.* at 5. Professor Feldman's thoughtful, but speculative, assessment of Justice Barrett's likely jurisprudence had purchase.

II. Oklahoma v. Castro-Huerta*: Facts and Procedural History*

Enter *Oklahoma v. Castro-Huerta*. In 2015, Victor Manuel Castro-Huerta, a non-Indian living in Indian Country (Tulsa, Oklahoma) was arrested by state authorities and charged with criminal child neglect.[149] His arrest stemmed from gut-wrenching treatment of his disabled, five-year-old Indian stepdaughter.[150] The child was severely malnourished, dehydrated, and emaciated, eventually requiring emergency medical attention.[151] Castro-Huerta was convicted in Oklahoma State Court and sentenced to thirty-five years in prison with the possibility of parole.[152] While his case was winding its way through the Oklahoma appellate process, *McGirt* was decided.[153] As a result, the Oklahoma Court of Criminal Appeals vacated his conviction on the grounds that Oklahoma lacked jurisdiction to prosecute Castro-Huerta because crimes by non-Indians against Indians in Indian Country were exclusively cognizable in federal court.[154]

The State of Oklahoma petitioned the Supreme Court for a writ of certiorari to review the decision of the Oklahoma Court of Criminal Appeals.[155] The petition presented two questions: first, "[w]hether a State has authority to prosecute non-Indians who commit crimes against Indians in Indian country," and second, "[w]hether *McGirt v. Oklahoma* should be overruled."[156] Despite some prognosticating otherwise,[157] the Court declined to entertain Oklahoma's arguments that it should so quickly depart from its decision in *McGirt* and instead granted certiorari on only the first question presented.[158]

In April 2021, Okla. Governor Kevin Stitt lamented that dangerous criminals in Eastern Oklahoma originally convicted under state law were being allowed to go free in the wake of *McGirt*. He referenced Professor Feldman's article as support for his belief that there was a "legal path forward" to remedy the situation that he believed *McGirt* created. Houston Keene, *Oklahoma Gov. Stitt Says Dangerous Criminals Walking Free Thanks to "Horribly Wrong" Supreme Court Ruling*, FOX NEWS (Apr. 7, 2021, 4:15 PM) https://www.foxnews.com/politics/oklahoma-governor-supreme-court-mcgirt-criminals-released.

149. *Castro-Huerta*, 142 S. Ct. at 2491.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 2492.
155. Petition for a Writ of Certiorari, *Castro-Huerta*, 142 S. Ct. 2486 (No. 21-429).
156. *Id.* at (I) (citation omitted).
157. *See* Feldman, *supra* note 148.
158. *Castro-Huerta*, 142 S. Ct. at 2492–93.

III. Critiques of the Court's Opinion in Oklahoma v. Castro-Huerta

The Court's opinion, penned by Justice Kavanaugh, approached the case as fundamentally one of preemption. That is, "as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country," unless "federal law . . . preempt[s] that state jurisdiction."[159] The opinion went on to evaluate two federal statutes—the General Crimes Act and Public Law 280—failing to identify preemptive language in either.[160] Finally, the opinion recognized that "even when federal law does not preempt state jurisdiction under ordinary preemption analysis, preemption may still occur if the exercise of state jurisdiction would unlawfully infringe upon tribal self-government."[161] Applying what the opinion dubs the "*Bracker* balancing test" for the first time in criminal law,[162] the Court concluded that Oklahoma's assertion of jurisdiction was unproblematic because the State has a strong interest in punishing offenders and protecting tribal victims that is congruent, not orthogonal, to the tribal interest.[163]

From the very first argumentative sentence in the decision, the opinion demonstrates antipathy toward the historical context in which the relevant statutes were developed and a breathtaking misunderstanding of the most essential principles in Federal Indian Law. Those failings are fatal to its conclusion.

A. The Court's Analysis of the General Crimes Act Ignores Founding-Era Understandings of Plenary Executive Control over Indian Affairs

The Court's analysis of the General Crimes Act is limited to familiar principles of preemption that apply in non-Indian law cases. Justice Kavanaugh just reads the text of the law[164] and concludes, "The text of the

159. *Id.* at 2493. For this proposition, Justice Kavanaugh cited the Tenth Amendment and *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 228 (1845), a case that is not about Indians or Indian Country.

160. *Castro-Huerta*, 142 S. Ct. at 2494.

161. *See id.* at 2500–01 (citing White Mountain Apache Tribe v. Bracker, 448 U.S 136, 142–43 (1980)).

162. *See* Transcript of Oral Argument at 17–21, Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022) (No. 21-429) [hereinafter Transcript of Oral Argument], https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/21-429_09m1.pdf. Justice Gorsuch asked, "Does that count in -- in your balancing -- your new *Bracker* balancing test which we've never heretofore applied in criminal law?" *Id.* at 17.

163. *Castro-Huerta*, 142 S. Ct. at 2501–02.

164. 18 U.S.C. § 1152. In relevant part, the General Crimes Act says, "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of

Act simply 'extend[s]' federal law to Indian country, leaving untouched the background principle of state jurisdiction over crimes committed within the State, including in Indian country."[165] That analysis is imbued with an unstated assumption: if Congress *wanted* to preempt state jurisdiction, it would have said so. While that principle makes sense in most preemption cases, it is nonsensical here. The legal and political backdrop in the late eighteenth century and early nineteenth century when the General Crimes Act and its predecessor statutes were adopted made clear that state jurisdiction in Indian Country was illegal, and this understanding dictated the choice not to address state power expressly. Expecting Congress to preempt jurisdiction whose nonexistence was required by the prevailing constitutional understanding is preposterous adherence to the preemption doctrine untethered from the reasons the doctrine requires express preemption in the first place.

First, when Congress enacted the early versions of the General Crimes Act, it was legislating with an understanding that federal power in Indian Country was exclusive. That assumption was constitutionally grounded. Recall that the constitutional structure sought to remedy the incoherent allocation of power over Indian affairs between the federal government and the states in the Articles of Confederation.[166] Although there are some (e.g., Justice Clarence Thomas)[167] who dispute the clarity with which the Constitution vests exclusive control over Indian affairs in the federal government, Professor Gregory Ablavsky explains that any ambiguity can readily be resolved by examining early federal practice.[168] The Washington administration viewed their authority over Indian affairs as similar to contemporary notions of field preemption.[169] Indeed that understanding is

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offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country." *Id.*

165. *Castro-Huerta*, 142 S. Ct. at 2495 (alteration in original) (quoting 18 U.S.C. § 1152).

166. *See supra* Section I.A.

167. *See* Adoptive Couple v. Baby Girl, 570 U.S. 637, 659 (2013) (Thomas, J., concurring) ("Although this Court has said that the 'central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs,' neither the text nor the original understanding of the Clause supports Congress' claim to such 'plenary' power." (citation omitted) (quoting Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989)); United States v. Lara, 541 U.S. 193, 215 (2004) (Thomas, J., concurring) ("I cannot agree with the Court, for instance, that the Constitution grants to Congress plenary power to calibrate the 'metes and bounds of tribal sovereignty.'" (quoting *Lara*, 541 U.S. at 202 (majority opinion)).

168. *See* Ablavsky, *supra* note 43, at 1044.

169. *See id.*

confirmed by the first version of the Indian Trade and Intercourse Act.[170] The law, passed in 1790, regulated regular-way commerce, land sales, *and* provided that non-Indians who committed crimes against Indians in Indian Country were to be punished as if the crime had been committed in the jurisdiction or state to which the accused belonged.[171] The original public understanding was that the constitutional structure empowered the federal government to regulate more than just commerce.

As Professor Ablavsky points out, arguments in favor of retained state power (and against the view that the Constitution preempted state regulation in the field of Indian affairs) in the early days of the republic were not, as they are today, textual. Rather, the arguments were structural and drew on fundamental precepts of state sovereignty.[172] States unhappy with, for example, treaties between the federal government and tribes that nullified claimed land cessions from tribes to the state,[173] claimed that the federal government violated a grab-bag of seemingly unrelated constitutional provisions by entering into the treaties including Article IV, Section 3;[174] the Enclave Clause;[175] and the property guarantee in the Fifth Amendment's Due Process Clause.[176] Underlying these stretched arguments was a deep grievance that the federal government's management of Indian affairs was messing with the rights of the states as sovereign units with meaningful political borders.

But that grievance was never vindicated. In *Worcester*, Chief Justice John Marshall settled any lingering debate over the extent of the federal power over Indian affairs by explaining that the Constitution "confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian

170. Trade & Intercourse Act of 1790, ch. 33, 1 Stat. 137.

171. *Id.* § 5, 1 Stat. at 138.

172. Ablavsky, *supra* note 43, at 1045–50.

173. *See, e.g.*, Treaty of New York, Creek Nation-U.S., Aug. 7, 1790, 7 Stat. 35 (invalidating land cessions from the Muscogee (Creek) Nation to Georgia).

174. U.S. CONST. art. IV, § 3, cl. 2 ("[N]othing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.").

175. *Id.* art. I, § 8, cl. 17 ("[The Congress shall have Power to] exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.").

176. *See* Ablavsky, *supra* note 43, at 1046–47.

tribes."[177] "These powers comprehend all that is required for the regulation of our intercourse with the Indians."[178] From this premise, Justice Marshall concluded that the "treaties and laws of the United States [which] contemplate the Indian territory as completely separated from that of the states" were valid exercises of federal power, and "all intercourse with them shall be carried on exclusively by the government of the union."[179] States were to play no role. *Worcester* thus confirmed that if the federal government thought the fair and efficient adjudication of crimes by or against Indians was necessary for peace on the frontier, it had to provide the forum. And that is precisely what Congress did in 1834.

Second, the legal understanding that the federal government's authority over Indian affairs was plenary motivated the provision of a federal forum for the prosecution of offenses committed on the frontier. The 1790 Trade and Intercourse Act, the first of five temporary acts governing the basic relationship between the federal government and tribes, made a crime against an Indian punishable as if it were a crime committed against a non-Indian inhabitant of a state or federal territory.[180] That provision was intended "to control 'lawless whites on the frontier' in order to fulfill treaty obligations and prevent retaliation between whites and Indians."[181] But that skinny initial law proved inadequate, and in 1792, President Washington explained that a "more adequate provision for giving energy to the laws throughout our interior, and for restraining the commission of outrages upon the Indians" was required.[182] Three years later, President Washington again told Congress that their legislative scheme was too weak, complaining:

> The provisions heretofore made with a view to the protection of the Indians from the violence of the lawless part of frontier inhabitants are insufficient. It is demonstrated that these violences can now be perpetrated with impunity, and it can need no argument to prove that unless the murdering of Indians can be restrained by bringing the murderers to condign punishment, all

177. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

178. *Id.*

179. *Id.* at 557.

180. Trade & Intercourse Act of 1790, § 5, ch. 33, 1 Stat. 137, 138.

181. *See* ROBERT ANDERSON ET. AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 318 (4th ed. 2020) (quoting FRANCIS PAUL PRUCHA, THE GREAT FATHER 92 (1984)).

182. George Washington, *Fourth Annual Address to Congress [Nov. 6, 1792]*, THE AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/fourth-annual-address-congress-0 (last visited Feb. 4, 2024), *quoted in* FRANCIS PAUL PRUCHA, THE GREAT FATHER 103 (1984).

> the exertions of the Government to prevent destructive retaliations by the Indians will prove fruitless and all our present agreeable prospects illusory.[183]

President Washington's message was crystal clear: do something to provide a more robust forum for the adjudication of crimes (specifically murder) by whites against Indians or the frontier will descend into constant warfare. Congress heeded President Washington's directive; the 1796 and 1802 versions of the Indian Trade and Intercourse Acts enhanced the procedures for punishing whites committing crimes against Indians by stipulating the duration of prison sentences and providing for specific monetary fines for certain crimes (as well as by providing that the federal government would pay the fines if the perpetrator was unable to). In 1817, Congress once more expanded the scope of the federal forum by enacting the first version of the Indian Country Crimes Act, which ensured that Indians committing crimes against Whites could be similarly subject to federal prosecution.[184] During consideration of these laws, the argument was pressed that state law already provided a forum for the adjudication of these cases, but that theory was rejected in the floor debates.[185] Congress knew that it alone possessed the power to set the rules for criminal prosecutions in Indian Country, and it acted upon the exclusive authority six times between 1790 and 1834.

This history makes Justice Kavanaugh's insistence that the General Crimes Act does not expressly preempt state jurisdiction all the more puzzling. The constitutional structure told the 1834 Congress that it didn't need to expressly preempt state jurisdiction. The Supreme Court confirmed that understanding of that constitutional structure in 1834 and once more told Congress that it did not need to expressly preempt state jurisdiction. Undisturbed executive practice told the 1834 Congress that it didn't need to expressly preempt state jurisdiction. And Congress acted on that understanding six times between 1790 and 1834. But now, nearly two centuries later, Justice Kavanaugh says that Congress was wrong all along.

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183. George Washington, *Seventh Annual Address to Congress [Dec. 8, 1795]*, THE AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/seventh-annual-address-congress (last visited Feb. 4, 2024), *quoted in* PRUCHA, *supra* note 182, at 103–04.

184. *See id.*

185. *See* 2 ANNALS OF CONG. 751–52 (1792). One member of Congress responded to the contention that cases involving crimes by non-Indians against Indians in Indian Country were "fully provided for by treaties, or by the laws of the respective states," by noting that "if the [Federal] Government cannot make laws to restrain persons from going out of the limits of any of the States, and commit murders and depredations, it would be in vain to expect any peace with the Indian tribes." *Id.*

Justice Kavanaugh comes close to grappling with this uncomfortable reality when he acknowledges that "[b]ecause Congress operated under a different territorial paradigm in 1817 and 1834, it had no reason at that time to consider whether to preempt preexisting or lawfully assumed state criminal authority in Indian country."[186] But that framing is simply wrong as a matter of history. It is not that Congress had no occasion to consider whether it *should* preempt state law, it was that Congress *knew* as a matter of constitutional design and original public understanding that state law *was* preempted. And in *Worcester*, the Court told Congress that state law was inoperable unless or until Congress said otherwise because by ratifying treaties and passing laws which contemplated an undisturbed home for tribes, Congress precluded the states from asserting any valid jurisdictional claim. Thus, by staying silent on the applicability of state law in the General Crimes Act, Congress was doing all that it needed to do to clarify that states had no power in Indian Country.

Moreover, Congress's schematic choice confirms that it contemplated the complete absence of state jurisdiction in Indian Country. As Justice Kavanaugh notes, the General Crimes Act extends a body of substantive law—federal enclave law—to Indian Country.[187] This, he says, "does not [make] Indian country . . . equivalent to a federal enclave," where federal jurisdiction is exclusive.[188] But it does reveal something significant about the congressional *intent*, the "ultimate touchstone" of preemption analysis.[189] Federal enclave law is a substantive body of law that covers the same topics as state criminal law. If the 1834 Congress truly *intended* to "leav[e] untouched the background principle of state jurisdiction over crimes committed within the State, including in Indian country," why would it extend a topically duplicative body of general law? Is a non-Indian operating in Indian Country supposed to adhere to the federal standards governing, say, mens rea of conspiracy or available justifications for manslaughter, or potentially conflicting state law standards? The Court, of course, never

186. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2497 (2022). The Court's implication here that *Worcester* is merely premised on a different "territorial paradigm" is incorrect, as explained in *infra* Section III.B.3.

187. *Id.* at 2495 (citing *Ex parte* Wilson, 140 U.S. 575 (1891)).

188. *Id.*

189. Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

explains why Congress would have *intended* to introduce so much confusion.[190]

Ultimately, this analysis turns on which way the presumption operates. Justice Kavanaugh contends that the presumption favors the applicability of state law out of deference to federalism and state experimentation in matters, like criminal enforcement, that fall within their general police powers.[191] But if there was ever a situation in which the presumption should flip, it would seem to be a case in which Congress is told by the Supreme Court that state law does not apply and that, therefore, it ought to go out and craft the jurisdictional rules. By framing this as a familiar preemption inquiry and searching in vain for preemptive language in the General Crimes Act, the Court is failing at a farcical endeavor of its own creation. And by ignoring the legal framework that Congress was operating under in 1834 and declining to engage with the implications of their policy choice, the Court betrays its own professed adherence to original intent.

B. The Court Improperly Relies on McBratney *to Establish That States Possess Jurisdiction to Try and Punish Crimes Within Their Borders Unless Preempted*

1. McBratney *Was Wrongly Decided*

Before critiquing the Court's interpretation and application of *McBratney*, it is helpful to catalog the glaring failings of that opinion. On its face, *McBratney* held that states possess jurisdiction to prosecute crimes committed by non-Indians against non-Indians in Indian Country.[192] *McBratney*'s innovation was not its holding, but rather its novel application of the Equal Footing Doctrine. The Court assumed that "[w]henever, upon the admission of a State into the Union, Congress has intended to except out of [the state] an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words."[193] No explicit jurisdictional reservation was written into Colorado's Enabling Act, so the

190. Transcript of Oral Argument, *supra* note 162, at 42–46. Justice Kagan pressed Kannon Shanmugam, advocate for Petitioner Oklahoma, about this very conundrum in oral argument. Mr. Shanmugam could not offer a justification for the extension of two overlapping bodies of substantive law. He could only argue, as the majority opinion did, that the General Crimes Act does not say anything about state jurisdiction and that Congress had no occasion to consider preemption. *Id.*

191. *See* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 533 (1992) (Blackmun, J., concurring in part, concurring in the judgment, and dissenting in part).

192. United States v. McBratney, 104 U.S. 621, 624 (1881).

193. *Id.* at 623–24.

Court determined that Colorado's "admission to the Union "on an equal footing with the original states in all respects whatever" had conferred onto it "criminal jurisdiction over its own citizens and other White persons throughout the whole of the territory within its limits" by repealing the provision of the General Crimes Act that had granted jurisdiction over those crimes to the federal government.[194]

Although the Court in *McBratney* is not explicit on this point, reliance on the Equal Footing Doctrine necessarily implies that Colorado acquired jurisdiction over crimes between non-Indians in Indian Country because the original thirteen states already had it. The Supreme Court has repeatedly confirmed that this is how the doctrine operates. In *Coyle v. Smith*, the Court held that a provision in the Oklahoma Enabling Act preventing Oklahoma from moving its capital until 1913 was unenforceable because "[t]he power to locate its own seat of government, and to determine when and how it shall be changed . . . are essentially and peculiarly state powers" and "[t]hat one of the original thirteen states could now be shorn of such powers by an act of Congress would not be for a moment entertained."[195] In *Utah Division of State Lands v. United States*, the Court explained that "[b]ecause all subsequently admitted States enter the Union on an 'equal footing' *with the original 13 States*, they *too* hold title to the land under navigable waters within their boundaries upon entry into the Union."[196] The Equal Footing Doctrine can only equalize the authority of new states to that of existing states, it does not have the force to confer *novel authority* onto new states. And yet that is precisely what *McBratney* does.

First, the *McBratney* Court never tells us why, how, or when the original thirteen states acquired jurisdiction to try and punish crimes committed by non-Indians against non-Indians in Indian Country. That is because there was no Supreme Court precedent recognizing that the original states possessed such jurisdiction until 1946, sixty-five years *after McBratney* was decided.[197] In *New York ex. rel. Ray v. Martin*, the Court held that "[t]he fact that Colorado was put on an equal footing with the original states obviously did not give it any greater power than New York," and thus because Colorado has jurisdiction to try and punish crimes committed by non-Indians against non-Indians (by virtue of *McBratney*), so too must New York.[198] Consider how dizzyingly circular that logic is. *McBratney* extended criminal

194. *Id.*
195. Coyle v. Smith, 221 U.S. 559, 565 (1911).
196. 482 U.S. 193, 196 (1987) (emphasis added).
197. New York *ex. rel.* Ray v. Martin, 362 U.S. 496 (1946).
198. *Id.* at 499. New York was one of the original thirteen states.

jurisdiction over these crimes to states on the unstated assumption that the original states had that jurisdiction, and then *Martin* says that because *McBratney* held that Colorado had such jurisdiction, it must have meant that New York, as one of the original thirteen states, had it all along. Somehow the Court reasons to this conclusion without ever identifying an original, independent source of the authority to prosecute non-Indian on non-Indian crimes in Indian Country.

And both textualism and originalism suggest that the original thirteen states had no jurisdiction to try and punish crimes committed by non-Indians against non-Indians in Indian Country before *McBratney* was decided. Start with the text. The General Crimes Act extends "the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States . . . to the Indian country."[199] The General Crimes Act contains three exceptions. Federal jurisdiction does not extend to 1) crimes committed by Indians against Indians, 2) crimes committed by Indians that have already been punished by tribal law, and 3) crimes that, by treaty stipulation, can be punished only by the tribe.[200] Congress actively considered which types of cases it wanted to exempt from the General Crimes Act, and chose not to exempt crimes by non-Indians against non-Indians. And yet *McBratney* does not contain even a shred of textual analysis of the General Crimes Act. That perplexing tension was recognized by the Court in *Martin*, which noted that despite the General Crimes Act being in effect at the time of *McBratney*, "the Court did not even find it necessary to mention it."[201] Justice Kavanaugh himself gestured at this reality during oral argument when he asked Edwin Kneedler—representing the United States as amicus curiae—why, just according to the statutory text, if states would have jurisdiction over crimes by non-Indians against non-Indians in Indian Country.[202] Mr. Kneedler dutifully recounted the Court's reasoning in *McBratney*, but was unable to offer an independent statutory basis for a state's assumption of such jurisdiction.

Second, the implication in *McBratney* that the original thirteen states had jurisdiction over these crimes is irreconcilable with the Court's elucidation of the original constitutional design in *Worcester*, which was the controlling precedent when *McBratney* was decided.[203] Chief Justice Marshall said clearly in *Worcester* that "[t]he whole intercourse between the United States

199. 18 U.S.C. § 1152.
200. *Id.*
201. *Martin*, 326 U.S. at 500 n.6.
202. Transcript of Oral Argument, *supra* note 162, at 126.
203. As it was when *Castro-Huerta* was decided.

and [the Cherokee Nation], is by our constitution and laws, vested in the government of the United States", that "[t]he Cherokee nation . . . is a distinct community, occupying its own territory," and that consequently, "the laws of Georgia can have no force" on Cherokee land.[204] There was no carve-out in *Worcester* for crimes committed by non-Indians against non-Indians, and, in fact, the contested prosecution in *Worcester* was of a non-Indian minister accused of breaking a law without a victim (residing within the Cherokee Nation without a license).[205] The Court did not even make a cursory attempt to distinguish the facts in *McBratney* from those in *Worcester* nor did it claim to be abrogating *Worcester* in the slightest. It actually didn't claim to be doing anything; the Court's opinion in *McBratney* does not contain even a single citation to *Worcester*.[206]

Simply put, the Court in *McBratney* concocted a legal rule unmoored from the will of Congress and the Court's established precedents. It deserves a place in the halls of federal Indian law anti-canon, not repeated reference in the United States Reports.

2. Even Taking McBratney *at Face Value, the Court in* Castro-Huerta *Misunderstands and Misapplies* McBratney *and* Donnelly

It is one thing to accept that "[t]he *McBratney* principle remains good law" despite its legally dubious foundations.[207] It is quite another to misapply *McBratney* and the subsequent case law that refined its holding. The Court in *Castro-Huerta* relies on *McBratney* as "the leading case in the criminal context" to establish the "overarching jurisdictional principle dating back to the 1800s . . . that States have jurisdiction to prosecute crimes committed in Indian country unless preempted."[208] This is a woefully overbroad reading of *McBratney*. The Court in *McBratney* claims that Colorado's admission to the Union on an equal footing with all other states does two things: first, it gives Colorado "criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including [in Indian Country]" and, second, it "necessarily repeals the provisions of any prior statute . . . which are clearly inconsistent" with that jurisdictional grant.[209] By doing both of those things at the same time, admission to the Union affected

204. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 520 (1832).
205. *Id.* at 516.
206. *See* United States v. McBratney, 104 U.S. 621 (1881).
207. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2494 (2022).
208. *Id.*
209. *McBratney*, 104 U.S. at 621, 623.

a *jurisdictional transfer* over crimes by non-Indians against non-Indians in Indian Country from the federal government to the state.[210]

This understanding was confirmed in subsequent cases interpreting *McBratney*. In describing the holding of *McBratney*, the Court in *Donnelly* explained "that the organization and admission of states qualified the former Federal jurisdiction over Indian country included therein by *withdrawing from the United States and conferring upon the states* the control of offenses committed by white people against whites, in the absence of some law or treaty to the contrary."[211] *Draper*, which reaffirmed *McBratney* in 1896, described *McBratney* as holding that "where a state was admitted into the Union, and the enabling act contained no exclusion of jurisdiction as to crimes committed on an Indian reservation by others than Indians, or against Indians, the state courts were *vested* with jurisdiction to try and punish such crimes" and the federal government was necessarily stripped of such jurisdiction.[212] The simultaneous vesting in the states and stripping from the federal government is a transfer; that is the *McBratney* principle.

The *Castro-Huerta* Court's erroneous understanding of *McBratney* leads to a striking underemphasis of *Donnelly*, which should have been the most important precedent in deciding the case. *Donnelly* answered a question that was specifically reserved in *McBratney* and *Draper*: are crimes committed by non-Indians against Indians properly cognizable in federal courts? Or, in a framing more faithful to the holding in *McBratney*: was jurisdiction over crimes committed by non-Indians against Indians *transferred* from the federal government to the states by virtue of their admission to the Union on a footing equal with all other states? The *Donnelly* Court held that "offenses committed by or against Indians are not within the principle of the *McBratney*

210. Although it was not pressed by any litigant, the Court's holding in *McBratney* provides more evidence of the preemptive effect of the General Crimes Act. As described, *McBratney* first says that the Equal Footing Doctrine confers jurisdiction over crimes by non-Indians against non-Indians onto the states, and then says that *any laws inconsistent* with that conferral are necessarily repealed. In that case, the General Crimes Act as it applied to crimes by non-Indians against non-Indians was determined to be an inconsistent law. But why, if the General Crimes Act (as the *Castro-Huerta* majority concludes) is permissive of concurrent jurisdiction, is it inconsistent with the transfer of jurisdiction onto the states? The only answer is that the Court in *McBratney* understood the General Crimes Act to provide for exclusive federal jurisdiction over these crimes. If the General Crimes Act was, as the *Castro-Huerta* majority concludes, tolerant of concurrent jurisdiction, then there would have been absolutely no need to invalidate a portion of it in *McBratney*.

211. Donnelly v. United States, 228 U.S. 243, 271 (1913) (emphasis added).

212. Draper v. United States, 164 U.S. 240, 242–43 (1896) (emphasis added).

and *Draper* Cases."[213] And because that "principle" was jurisdictional transfer, jurisdiction remained exclusively within the federal government.[214]

The reasoning in *Donnelly* drew on *Kagama*,[215] in which the Court sustained the 1885 Major Crimes Act "upon the ground that the Indian tribes are wards of the nation" and thus require federal protection from hostile state encroachment.[216] According to the *Donnelly* Court, the same reasoning applied "perhaps *a fortiori* . . . to crimes committed by white men against the persons or property of the Indian tribes while occupying reservations set apart for the very purpose of segregating them from the whites and others not of Indian blood."[217] The Court thus recognized that Congress wrote the General Crimes Act in part to protect tribes from bloodthirsty states and that purpose is what gave the General Crimes Act (as well as the Major Crimes Act) its constitutional legitimacy. But of course, the General Crimes Act could only protect tribes if federal jurisdiction over crimes by or against Indians was exclusive of state jurisdiction, which is why the equal footing doctrine did not transfer jurisdiction over crimes by non-Indians against Indians to the states. After *McBratney*, *Kagama*, and *Donnelly* the doctrinal rule had thus crystallized: when federal jurisdiction purports to cover criminal conduct only between non-Indians in Indian Country, the equal footing doctrine repeals that jurisdiction and conveys it to the states because the law has no protective function; but when federal law implicates the federal government's trust responsibility by covering crimes by or against Indians, jurisdiction is presumptively exclusive in the federal government and the equal footing doctrine does no work.

The Court's response to this argument, if it can be called that, is confined to a single footnote. It says that "[i]n *Donnelly*, the Court simply concluded . . . States do not have . . . '*undivided* authority' over crimes committed by or against Indians in Indian country."[218] Simplistically, the Court is correct—the holding of *Donnelly* is that the federal government does have jurisdiction over crimes by non-Indians against Indians committed in Indian Country; it does not explicitly say that the states do not have such jurisdiction. But that understanding is superficial. The reasoning of *Donnelly* was premised on the well-accepted understanding that the federal government could claim jurisdiction in Indian Country specifically because

213. *Donnelly*, 228 U.S. at 271.
214. *Id.* at 271–72.
215. United States v. Kagama, 118 U.S. 375 (1886).
216. *Donnelly*, 228 U.S. at 272.
217. *Id.*
218. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2498 n.3 (2022).

it had a responsibility to protect tribes from the states, which the Court had regarded as "their deadliest enemies."[219] When no Indians were involved, the federal government's guardianship relationship is not implicated (which is why *McBratney* and *Draper* come out as they do). But when Indians are involved as defendants or (in the case of *Donnelly*) victims, the guardianship relationship is at its apex and the jurisdiction created by Congress in the General Crimes Act remains exclusively federal unless it says otherwise. The Court in *Castro-Huerta* engages with none of that nuance.

3. Even If Donnelly *Is Not Dispositive, the Rule in* McBratney *Does Not Compel the Result in* Castro-Huerta

Even if one were to reject all the foregoing analysis demonstrating the proper understanding of *McBratney* and *Donnelly*, there is still no basis for the Court's conclusion that the "overarching jurisdictional principle dating back to the 1800s [is that] States have jurisdiction to prosecute crimes committed in Indian country unless preempted."[220] At most, *McBratney* says that, unless a state's enabling law clearly stipulates otherwise, the admission of that state to the Union on a footing equal with all other states grants the newly admitted state the same jurisdictional authority as original states enjoyed, and all federal laws to the contrary are implicitly repealed.[221]

The equal footing doctrine, as explained, is *relative*, not absolute. That is, authority must only be conferred onto newly admitted states if the original states possessed the same authority.[222] But just as the Court in *McBratney* never identified a positive source of authority to try crimes committed by non-Indians against non-Indians in Indian Country within the original thirteen states, the Court in *Castro-Huerta* never identifies a positive source of authority to try crimes committed by non-Indians against Indians in Indian Country within those states. Indeed, such authority did not exist; that is what *Worcester* is all about.[223]

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219. *Kagama*, 118 U.S. at 384.

220. *Castro-Huerta*, 142 S. Ct. at 2494.

221. *See* United States v. McBratney, 104 U.S. 621, 623–24 (1881).

222. *See supra* Section III.B.1 (describing in greater detail how the Equal Footing Doctrine confers onto new states authority that was possessed by the original thirteen states).

223. Worcester v. Georgia, 31 U.S. (6 Pet.) 520 (1832) ("The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is by our constitution and laws, vested in the government of the United States").

The Court in *Castro-Huerta* simply ignores this, asserting instead that states have jurisdiction in Indian Country because "Indian country is part of the State, not separate from the State," and "as a matter of state sovereignty, a State has jurisdiction over all of its territory."[224] To reconcile this position with *Worcester*, the Court says that it "long ago made clear that *Worcester* rested on a mistaken understanding of the relationship between Indian country and the States."[225] In particular, the Court argues that "territorial separation . . . was the reason that state authority did not extend to Indian country [in the *Worcester*-era]."[226] But, according to the Court, "The idea of territorial separation has long since been abandoned . . . ."[227] Therefore, even if the original states did not have a recognized right to prosecute crimes by non-Indians against Indians in the first century of the republic's existence, they acquired that right at some later, unspecified date and thus the admission of Oklahoma into the Union on a footing equal with all other states conferred that jurisdiction onto Oklahoma as well.[228]

There are two responses to this argument. First, the idea that territorial separateness was the conceptual underpinning of *Worcester* is fallacious. Start with the most obvious fact that the territory of the Cherokee Nation was *within* the territorial boundaries of several states at the time *Worcester* was decided, not separate from them. The below map is illustrative.[229]

224. *Castro-Huerta*, 142 S. Ct. at 2493 (citing U.S. CONST. amend. X).

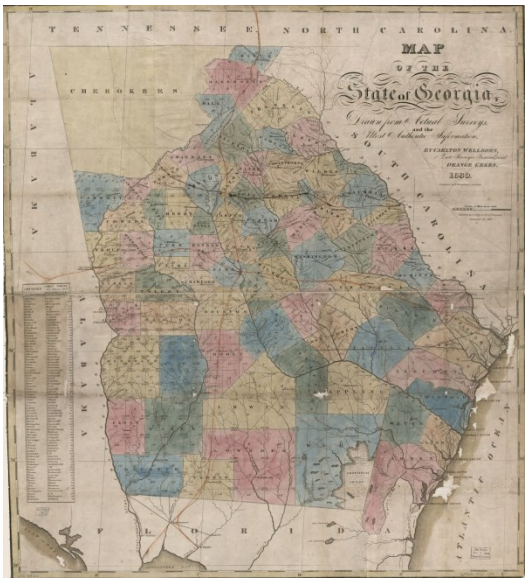
225. *Id.* at 2502.

226. *Id.* at 2497.

227. *Id.* at 2490.

228. The Court in *Castro-Huerta* never makes this final logical conclusion because they fail to recognize that the Equal Footing Doctrine as applied in *McBratney* requires identifying the existence of the claimed authority in the original thirteen states. Nonetheless, this framing of the Court's response is faithful to their stance that *Worcester* is of limited use because it relied on a notion of territorial separateness.

229. *Map of the State of Georgia, Drawn from Actual Surveys and the Most Authentic Information [1830]*, LIBR. OF CONG. https://www.loc.gov/resource/g3920.tr000287/?r=-0.77,-0.101,2.54,1.254,0 (last visited Feb. 7, 2024).



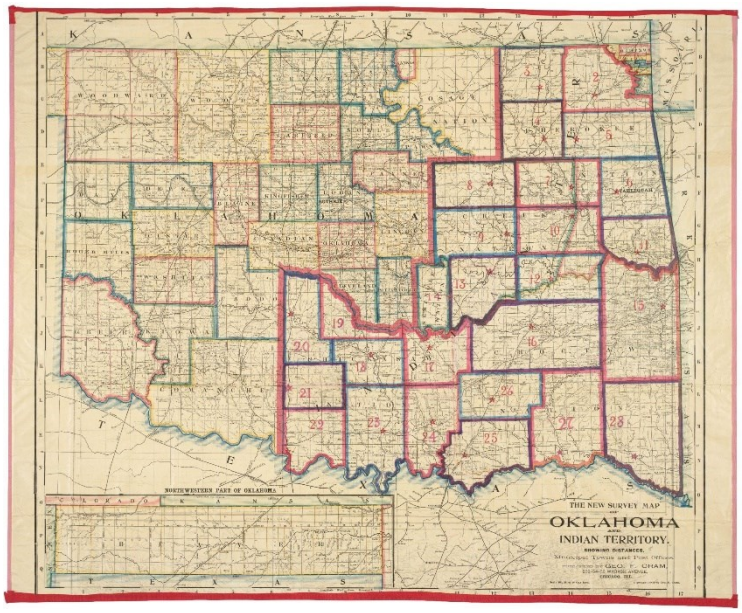
The northwest portion of Georgia was set aside and occupied by the Cherokee Nation, but it was still within the borders of Georgia. The same was true for the small portions of the Cherokee Nation that fell within the borders of North Carolina, Tennessee, and Alabama. Indeed, the 1791 Treaty of Holston, which set out the boundaries of the Cherokee Nation until the Treaty of New Echota in 1835 (with some intervening alterations),[230] described the boundaries of the Cherokee Nation as, in part, extending "to the North-Carolina boundary [and from there] north to a point from which a line is to be extended to the river Clinch."[231] The Treaty thus contemplates Cherokee territory extending *into* what was already established as North Carolina, not establishing territory completely separate from the existing states. And this arrangement is identical to how states were admitted into the Union well after the Court claims that "the idea of territorial separation ha[d] long since been abandoned."[232] When Oklahoma was admitted to the Union, the Oklahoma Enabling Act required that the new state set aside areas for

230. *See, e.g.*, Treaty of Chickasaw Council House, Cherokee-U.S., Sept. 14, 1816, 7 Stat. 148 (ceding territory); Treaty of Fort Jackson, Creek-U.S., Aug. 9, 1814, 7 Stat. 120 (demanding land from Creek and Cherokee after the end of the Creek War); Second Treaty of Tellico, Cherokee-U.S., Oct. 24, 1804, 7 Stat. 228 (ceding territory).

231. Treaty of Holston (Treaty with the Cherokee) art. IV., July 7, 1791, 7 Stat. 39.

232. *Castro-Huerta*, 142 S. Ct. at 2490.

tribes.[233] These areas were within the boundaries of the state in precisely the same way as the Cherokee Nation was within the boundaries of Georgia, North Carolina, Tennessee, and Alabama. Compare the below contemplated map of Oklahoma upon admission to the Union to the above map of Georgia.[234] The difference between the Cherokee Nation in 1832 Georgia and the Osage Nation in 1907 Oklahoma (outlined in yellow in the Central-North portion of the map) is only in size, it is not in degree of separation.



That tribal land was thought to be physically within state boundaries is also confirmed by the Articles of Confederation, the first document to opine on the relationship between the tribes, the states, and the federal government during the Founding. Recall that the Articles provided that "the legislative right of any state *within its own limits* be not infringed or violated."[235] Several states, most notably including Georgia and North Carolina, leaned on this provision as authority to ratify treaties between the state and the tribe because the tribal territory at issue was *within* the borders of the negotiating state. The

233. Oklahoma Enabling Act of 1906, § 21, ch. 3335, 34 Stat. 267, 277–78 (1906).

234. George Cram, *Survey Map of the Oklahoma and Indian Territory showing Distances, Municipal Towns and Post Offices [March 16, 1905]*, NAT'L ARCHIVES, https://catalog.archives.gov/id/7260790 (last visited Feb. 7, 2024).

235. ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 4 (emphasis added).

move to the Constitution centralized political authority in the central government, but it did not disturb this core understanding of territorial location.

The Supreme Court has also confirmed the idea that, at the time of the Founding, Indian tribes were considered to be geographically *within* states but *politically* sovereign. As far back as *Johnson v. M'Intosh*, Chief Justice Marshall described the lands over which title was contested in the case as "lay[ing] *within* the chartered limits of Virginia."[236] In the *Oneida Nation* line of cases, the Court evaluated the Oneida Nation's ability to sue over the validity of a 1795 treaty between the Oneidas and the State of New York that transferred large swaths of the Oneida's land to the state.[237] The Court affirmed the uncontested holding of the lower courts that the transfer violated the 1793 Trade and Intercourse Act only because it did not involve a commissioner of the United States, not because the Oneida Nation was geographically separate from the State of New York.[238] After all, why would the State of New York be negotiating with the tribe unless the tribe was located *within* the boundaries of the state?[239]

Even stipulating that tribes were once outside states and are now within states, the *Castro-Huerta* Court's characterization of *Worcester* as depending on that notion of "territorial separation" is simply unfaithful to *Worcester*'s reasoning.[240] It is true that *Worcester* acknowledged, "The treaties and laws of the United States contemplate[d] the Indian territory as completely separated from that of the states,"[241] but that was just a function of the tribes' inherent *political* sovereignty stemming from tribes' status as "distinct, independent *political* communities, [that] retain[ed] their original natural rights."[242] Indeed, if territorial separation were the basis for the Court's holding in *Worcester*, the Court would have long ago abandoned the idea that tribes still retain any inherent sovereignty, but an extensive body of Supreme Court case law demonstrates just the opposite.[243]

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236. 21 U.S. (8 Wheat.) 543, 586 (1823) (emphasis added).

237. *See* Oneida County v. Oneida Indian Nation of N.Y., 470 U.S. 226 (1985).

238. *Id.* at 232–33.

239. *Id.* at 230.

240. Oklahoma. v. Castro-Huerta, 142 S. Ct. 2486, 2497 (2022).

241. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832).

242. *Id.* at 557, 559 (emphasis added).

243. *See, e.g.*, United States v. Lara, 541 U.S. 193, 204–05 (2004) (recognizing that tribes' inherent authority to control their own land stems from their status as distinct political societies); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 425–26 (1989) (recognizing that inherent tribal authority over affairs on tribal land stems from their status as political sovereigns and is limited only to the extent that it conflicts with

The authorities cited by the Court for the proposition that "*Worcester* rested on a mistaken understanding of the relationship between Indian country and the States" do not disturb this reasoning.[244] In *Organized Village of Kake v. Egan*, the Court recounts the history of increasing state power from 1871 (the end of treaty making) through the Termination-Era (ending with the Indian Reorganization Act of 1934), but even there the Court recognizes that the increase in state power has been a result of Congress altering the boundaries of permissible state incursion, not some novel recognition of a state's *inherent* authority.[245] Recognizing the authority of Congress to alter the jurisdictional arrangement in Indian Country is not a departure from *Worcester*, for that recognition was at the core of Chief Justice Marshall's opinion.[246] Moreover, *Organized Village of Kake* was a case about whether a provision in the Alaska Statehood Act disallowed Alaska from subjecting Indians to fishing regulations *outside* of Indian Country.[247] *Worcester*, in contrast, was all about what is permissible *within* Indian Country.

The other cases cited by the Court fare no better. *Surplus Trading Co. v. Cook* was not even a case about Indians or Indian Country, and simply noted in dicta that "the usual Indian reservation [is] set apart within a state as a

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their status as domestic, dependent nations); United States v. Mazurie, 419 U.S. 544, 557 (1975) ("Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . .").

244. *Castro-Huerta*, 142 S. Ct. at 2502. Among the cases cited by the Court is *New York ex rel. Cutler v. Dibble*, 62 U.S. 366 (1858). *Dibble* is a strange citation for two reasons. First, it was decided in 1858, thirteen years before the end of treaty making and at least twenty-two years before the Court in *Castro-Huerta* says that the overarching jurisdictional framework started to change. Second, *Dibble* upheld the constitutionality of a New York law permitting a state court to oust a non-Indian living on Indian land. The law in many ways looks like the law struck down twenty-six years earlier in *Worcester* (non-Indian cannot enter Cherokee Nation without permit), but *Dibble* does not contain a single citation to *Worcester*. The only distinguishing feature seems to be that the law in *Dibble* was deemed a "dictate of a prudent and just policy" designed to "protect these feeble and helpless bands from imposition and intrusion," *Dibble*, 62 U.S. at 370, while in *Worcester*, Georgia was more obviously attempting to assert its police power across Indian Country. This distinction between good, protective policy and bad, intrusive policy has not been dispositive in any challenges to assertions of state jurisdiction in Indian Country since.

245. Organized Village of Kake v. Egan, 369 U.S. 60, 74 (1962) ("Decisions of this Court are few as to the power of the States when not granted Congressional authority to regulate matters affecting Indians.").

246. *Worcester*, 31 U.S. at 561 ("[The Georgia laws] interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union.").

247. *Organized Village of Kake*, 369 U.S. at 61.

place where the United States may care for its Indian wards and lead them into habits and ways of civilized life" and that as "[s]uch reservations are part of the state within which they lie, and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards."[248] Noting that sometimes state law applies in Indian Country and sometimes it does not tells us nothing about the circumstances in which it applies or who decides when it applies; it certainly does nothing to establish a presumption of state law application. *New York ex. rel. Ray v. Martin* simply reaffirms and applies *McBratney*, which, as has been well documented already, was a case interpreting congressional authorization for a state to exercise jurisdiction through its Enabling Act.[249] *County of Yakima v. Confederated Bands & Tribes of the Yakima Indian Nation* then simply restates (again in dicta) the statement in *Martin* (which itself just reiterates *McBratney*) and simultaneously notes that there are some spheres of power, most notably taxation, in which the Court "declin[es] to find that Congress has authorized state [power] unless it has 'made its intention to do so unmistakably clear.'"[250]

In claiming a presumption in favor of state law application, the Court actively misrepresents its own cases and ignores the legal context that gave rise to the federal government's guardianship responsibility.[251] The *Castro-Huerta* Court's specific reliance on *McBratney*—a legally regrettable decision—is unsound as a matter of both interpretation and application. This case should have been fully resolved by *Donnelly*.

C. The Court Deploys the Wrong Preemption Framework and Ignores the Indian Civil Rights Act of 1968 When Determining the Preemptive Effect of Public Law 280

Having concluded that states may exercise jurisdiction over crimes committed by non-Indians against Indians in Indian Country unless preempted, the Court in *Castro-Huerta* proceeds to apply "ordinary principles of ... preemption [law]" to resolve the case.[252] Under those

248. Surplus Trading Co. v. Cook, 281 U.S. 647, 651 (1930).

249. New York *ex. rel.* Ray v. Martin, 326 U.S. 469, 499 (1946).

250. County of Yakima v. Confederated Bands & Tribes of the Yakima Indian Nation, 502 U.S. 251, 257 (1992) (quoting Montana v. Blackfeet Tribe, 471 U.S. 759, 765 (1985)).

251. To the extent any of the cases cited in the *Castro-Huerta* majority—namely *Martin*, 326 U.S. 496, and *County of Yakima*, 502 U.S. 251—interpret *McBratney* as establishing such a presumption, those cases are mistaken. *See supra* Section III.B.2.

252. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2494 (2022). The Court also notes that state law may be preempted "when the exercise of state jurisdiction would unlawfully infringe on tribal self-government." *Id.* This Article addresses those arguments at *supra* Section II.C.4.

principles, the Court says, neither the General Crimes Act nor Public Law 280 preempts state jurisdiction.[253] However, applying familiar tenets of preemption in *Castro-Huerta* is unfaithful to the Court's determination that "tribal sovereignty may not be ignored" and that it "do[es] not necessarily apply 'those standards of preemption that have emerged in other areas of the law.'"[254]

Instead of applying the traditional preemption standard, in Indian Country "State jurisdiction is preempted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority."[255] "The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government . . . ."[256] Consequently, "where a detailed federal regulatory scheme exists and where its general thrust will be impaired by incompatible state action, that state action, *without more*, may be ruled pre-empted by federal law."[257]

The Court's analysis of Public Law 280's preemptive effect is irreconcilable with these Indian Country-specific sensitivities. The Court makes three individual contentions in concluding that "Public Law 280 does not preempt state authority to prosecute crimes committed by non-Indians against Indians in Indian country."[258] First, the Court says that Public Law 280 is an affirmative grant of jurisdiction to the states, and nothing in the text can be read to "preempt any preexisting or otherwise lawfully assumed jurisdiction that States possess to prosecute crimes in Indian country."[259] The

253. *Id.*

254. Rice v. Rehner, 463 U.S. 713, 718 (1983) (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980)).

255. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983).

256. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987) (quoting *Mescalero Apache Tribe*, 462 U.S. at 333–34).

257. Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g, 476 U.S. 877 (1986) (emphasis added); *see also Bracker*, 448 U.S. at 143–44 ("The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law. As we have repeatedly recognized, this tradition is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development. Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence. We have thus rejected the proposition that in order to find a particular state law to have been preempted by operation of federal law, an express congressional statement to that effect is required." (citations omitted)).

258. *Castro-Huerta*, 142 S. Ct. at 2500.

259. *Id.* at 2499.

second and third arguments are both responses to the respondent's contention that, had states already had jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian Country, Public Law 280 would have been "pointless surplusage."[260] The first response the Court offers is that Public Law 280 should not be understood as surplusage because it permits states to assume jurisdiction over crimes by *and* against Indians, and states had no preexisting jurisdiction over crimes by Indians because "state jurisdiction over those Indian-defendant crimes could implicate principles of tribal self-government."[261] Therefore, Public Law 280 still does *something* even assuming states already had jurisdiction over crimes by non-Indians against Indians in Indian Country.[262] The second response is, basically, that surplusage is fine because the "scope of the States' authority [over crimes committed by non-Indians against Indians in Indian Country] had not previously been resolved by this Court, except in cases such as *McBratney* and *Draper* with respect to non-Indian on non-Indian crimes," so "it made good sense for Congress in 1953 to explicitly grant such authority in Public Law 280."[263]

Specific critiques of those arguments can[264] and should be made, but the bigger problem is that the Court's incorrect choice of preemption standard causes it to fix its gaze on the wrong law.[265] The Indian Civil Rights Act of

260. *Id.* at 2500.

261. *Id.*

262. *Id.* This argument is, to say the least, intuitively implausible. At best, it says the whole of Public Law 280 is not surplusage; but an entire law need not be surplusage for a provision within it to be surplusage. There is no escaping the conclusion that if Congress meant states to have jurisdiction over crimes by non-Indians against Indians before Public Law 280 (via the grant of statehood), it would not have expressly listed additional requirements to assume that jurisdiction within Public Law 280.

Justice Kavanaugh makes a related point that, even if Congress *assumed* states did not have jurisdiction over crimes by non-Indians against Indians prior to the passage of Public Law 280, that is not relevant because "assumptions are not laws." *Id.* But *congressional* assumptions are not ordinary assumptions. The rule from the beginning of the republic is that *only* Congress can change the jurisdictional arrangement, and the Court's reading of *McBratney* is that Congress did just that in Colorado's Enabling Act with respect to crimes by non-Indians against non-Indians. Congress's "assumptions" are central because they reveal congressional *intent*, which is all that matters in determining which sovereign has jurisdiction over which class of crimes.

263. *Id.* However, as explained, the "'scope of the States' authority" over this class of crimes was resolved in *Donnelly*. *Id.*

264. *See id.*

265. Somewhat incredibly, the majority opinion in *Castro-Huerta* contains zero citations to the Indian Civil Rights Act of 1968.

1968, not Public Law 280, should have been the centerpiece of the Court's preemption analysis. Recall that the Indian Civil Rights Act of 1968 amended Public Law 280 by requiring states to obtain tribal consent before assuming jurisdiction over crimes by or against Indians in Indian Country.[266] Application of the Indian Country preemption standard to the Indian Civil Rights Act of 1968 then resolves this case.

1. The Indian Civil Rights Act of 1968 Was Intended, in Relevant Part, to Remedy the Law Enforcement Failures of Public Law 280 and to Restore Consent of the Governed in Indian Country

The legislative history of Public Law 280 as well as Supreme Court case law has made clear that Public Law 280 was meant to address the "lawlessness on certain Indian reservations."[267] The House report during the drafting of Public Law 280, reproduced in *Bryan v. Itasca County*,[268] reads:

> These States lack jurisdiction to prosecute Indians for most offenses committed on Indian reservations or other Indian country, with limited exceptions. The applicability of Federal criminal laws in States having Indian reservations is also limited. The United States district courts have a measure of jurisdiction over offenses committed on Indian reservations or other Indian country by or against Indians, but in cases of offenses committed by Indians against Indians that jurisdiction is limited to the so-called 10 major crimes: murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny.
>
> As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian

266. 25 U.S.C. § 1321; *id.* § 1326. Section 1326 provides,

> State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

Id.

267. Bryan v. Itasca County, 426 U.S. 373, 379 (1976); *see* Goldberg, *supra* note 132, at 541–42.

268. *Bryan*, 426 U.S. at 379.

> groups themselves. In many States, tribes are not adequately organized to perform that function; consequently, there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.[269]

But it didn't take very long for Congress to realize that its solution to lawlessness in Indian Country was woefully inadequate. In 1961, less than ten years after the original passage of Public Law 280, Congress began to hold hearings and conduct fact-finding that revealed disparate treatment of Indian and non-Indian defendants in the state system, both before and during formal criminal proceedings.[270] Take just a few examples. The Cheyenne River Sioux complained that that state law enforcement officials would frequently arrest Indians for crimes that white citizens would have never been arrested for.[271] The South Dakota Indian Commission explained that Indian inmates were routinely required to perform labor not demanded of non-Indian inmates.[272] Reports of Indian prisoners dying at the hands of state authorities abounded.[273] Sometimes state authorities ignored Indian inmates' obvious need for medical care (as happened to a Shoshone-Bannock Indian jailed in Pocatello); in other instances authorities dropped helpless arrestees at the city limits in sub-zero temperatures to fend for themselves (as happened to Crow Indians in Montana).[274] The Shoshone-Bannock reported that Indians being tried in off-reservation state courts encountered a presumption of guilt, and the Hualapai charged state courts with working with law enforcement officers who made illegal arrests to convict and sentence Indian defendants anyways.[275] Attorneys called before Congress to

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269. *Id.* at 379–80 (citing H.R. REP. NO. 83-848, at 5–6 (1953)); *see id.* at 380 n.5 (noting that the House & Senate reports were substantially identical).

270. *See* Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557, 584–88 (1972).

271. *Id.* at 584 (citing *Hearings on S. 961-968 and S.J. Res. 40 Before Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong., 1st Sess. 243, 331 (1965)).

272. *Id.* (citing *Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 87th Cong., 2d Sess., pt. 3, at 588 (1962) [hereinafter *1962 Hearings*]).

273. *See id.* at 584–85 (detailing the experiences of the Shoshone-Bannock, the Hualapai, and the Navajo, among others).

274. *See id.* (citing *Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 88th Cong., 1st Sess., pt. 4, 820–21, 882–83 (1963) [hereinafter *1963 Hearings*]).

275. *Id.* at 585 (citing *1963 Hearings*, *supra* note 274, at 823, 828).

testify lamented that Indians' "right to counsel" was routinely violated,[276] and some judges disallowed nonguilty pleas.[277]

Congress was also made aware of states' general unwillingness to enforce their criminal codes in Indian Country with the same vigor as outside Indian Country. The Quechan (Yuma) in California reported that they were "left stranded" after the state assumed jurisdiction following the passage of Public Law 280 but then refused to devote adequate resources and manpower to law enforcement on the reservation.[278] "[T]he Rincon, Pala," Puma, and "Soboba Band of Mission Indians" echoed that frustration.[279] Crucially, this vexation related not just to state authorities refusing to enforce criminal laws against Indian defendants, but also (of particular relevance to this case) to their refusal to enforce criminal laws against non-Indian defendants who were committing crimes against Indian victims.[280] In the Navajo Nation, the situation deteriorated to the point where the tribe complained that when tribal police would arrest a non-Indian for a serious crime committed on the reservation, including murder and rape, "New Mexico authorities" would simply disclaim jurisdiction and let the perpetrator go.[281]

In response to the glaring inadequacy of Public Law 280, Senator Sam Ervin of North Carolina took it upon himself to fashion a legislative solution.[282] Among Senator Ervin's proposals was Senate Bill 966, which proposed to repeal the provisions "of Public Law 280" that allowed states to unilaterally assume jurisdiction in Indian Country.[283] Senator Erwin argued during the bill's consideration that unilateral assumption of jurisdiction in Indian Country violated the core principle of consent of the governed and lamented that Public Law 280's haphazard execution resulted in "a breakdown in the administration of justice to such a degree that Indians are

276. *Id.* at 586 (citing *1962 Hearings*, *supra* note 272, at 598).

277. *Id.* (citing *Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 87th Cong., 1st Sess., pt. 2, 366, 375 (1961)).

278. *Id.*

279. *Id.*

280. *See id.* at 586–87 ("The Navaho reported a similar difficulty, claiming that when tribal police apprehended whites for crimes such as rape, murder, and assault committed on the reservation and delivered them to New Mexico authorities for trial, the state disclaimed jurisdiction and released the prisoners.").

281. *Id.* at 586–87 (citing *1963 Hearings*, *supra* note 274, at 856–87).

282. *See id.* at 588.

283. *Id.* at 597 (citing *Hearings on S. 961-968 and S.J. Res. 40 Before Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong., 1st Sess. 243 (1965)).

being denied due process and equal protection of the law."[284] The reaction of Indian leaders to the proposal was positive, with Vine Deloria, Jr., then-Executive Director of the National Congress of American Indians, remarking, "Not only will we have consent of the governed if we get S. 966 passed, but we can have the opportunity then to be released from this psychological fear on the reservation of having the whole culture run over."[285] Senator Ervin's proposal was passed into law in 1968 as part of the Indian Civil Rights Act, three years after its initial introduction in the Senate.[286] Two years after the passage of the Indian Civil Rights Act of 1968, President Nixon delivered a message to Congress on Indian Affairs that plainly evinced a desire to break with the Termination-Era policy of encouraging full state control of Indian Country.[287] In announcing a new policy of Indian "self-determination," Nixon made clear that his government's policy was one of encouraging tribal control over on-reservation policy and increased federal support instead of reliance on the states.[288] The Indian Civil Rights Act of 1968 was in perfect harmony with that objective.

2. After the Indian Civil Rights Act of 1968, Unilateral Assumption of Criminal Jurisdiction by States in Indian Country Was Preempted by Federal Law Under the Indian Country Preemption Standard

Having sketched the legislative basis for the tribal consent provisions of the Indian Civil Rights Act of 1968, it should be clear that the "general thrust"[289] of the "federal regulatory scheme"[290] was to return control over who could exercise jurisdiction over crimes by or against Indians in Indian Country to the tribes themselves. Unilateral assertions of state jurisdiction over these crimes not only fails to comport with this scheme, but actively undermine it. Indeed, it is difficult to imagine a state policy more antithetical to the principles embodied in the Indian Civil Rights Act of 1968 and the concurrent policy shift to self-determination.

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284. *Id.*

285. *Id.* at 598.

286. *See id.* at 602–14 (describing the process of passing the Indian Civil Rights Act of 1968).

287. *See* Nixon, *supra* note 138.

288. *See id.*

289. Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g (*Three Affiliated Tribes II*), 476 U.S. 877, 885 (1986).

290. *Id.*

The Court in *Castro-Huerta* can find no support for its preemption analysis in the Court's modern Indian Country preemption cases. In *New Mexico v. Mescalero Apache Tribe*, for example, the Court held that New Mexico could not "superimpose its own hunting and fishing regulations" on the Mescalero Apache Tribe's regulations because "concurrent jurisdiction would effectively nullify the Tribe's authority to control hunting and fishing on the reservation."[291] The Court further stressed that "the exercise of concurrent State jurisdiction in this case would completely 'disturb and disarrange' the comprehensive scheme of federal and tribal management established pursuant to federal law" which entailed extensive federal involvement in crafting on-reservation hunting and fishing policies.[292] Oklahoma's assertion of concurrent jurisdiction is at least as disruptive to the federal scheme as was New Mexico's. The Indian Civil Rights Act of 1968 laid out a detailed scheme in which states could assume jurisdiction only after consent "by a majority vote of the adult Indians voting at a special election," which could be called by the Secretary of the Interior, "when requested . . . by the tribal council or other governing body, or by 20 per centum of such enrolled adults."[293] Unilateral assertions of criminal jurisdiction "disturb and disarrange"[294] the federal scheme by bypassing the involvement of tribal authorities in determining jurisdictional rules in Indian Country.

The cases in which the Court has found a state assertion of jurisdiction not preempted by federal law are those in which no detailed federal scheme existed. In *Rice v. Rehner*, for example, the Court held that California could require a federally-licensed liquor trader operating in Indian Country to obtain a state permit to sell liquor for off-reservation consumption because "[i]n the area of liquor regulation, [the Court could] find no congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development."[295] But when, as here, "the current federal policy is to promote precisely what [the state] seeks to prevent," state assertions of jurisdiction are preempted.[296] In *California v. Cabazon Band of Mission Indians*, the Court looked to the President's 1983 Statement on Indian Policy, interdepartmental funding of tribal gaming enterprises, and

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291. 462 U.S. 324, 336, 338 (1983).

292. *Id.* at 338 (quoting Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 691 (1965)).

293. 25 U.S.C. § 1326.

294. *Mescalero Apache Tribe*, 462 U.S. at 338.

295. 463 U.S. 713, 724 (1983) (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980)).

296. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 220 (1987).

federal approval of tribal bingo management contracts, all of which "demonstrate[d] the Government's approval and active promotion of tribal bingo enterprises."[297] Although it is completely ignored by Justice Kavanaugh's opinion, similar evidence of an existing, coherent federal policy exists with respect to assertion of state jurisdiction over crimes by or against Indians in Indian Country. It is a policy of self-determination grounded in the centrality of tribal consent in determining effective jurisdictional and law enforcement arrangements as well as in fidelity to the bedrock principle of consent of the governed. It is a policy elucidated in federal law (The Indian Civil Rights Act of 1968), Presidential proclamation (Nixon's Special Message on Indian Affairs), and in the Court's precedents. As *Bracker* makes clear, when the federal policy is unambiguous, no "express congressional statement" preempting state law is required.[298]

3. The Castro-Huerta *Majority's Invocation of* Three Affiliated Tribes I *to Resolve the Public Law 280 Preemption Question Is Unpersuasive*

Justice Kavanaugh's response in *Castro-Huerta* amounts to one, cherry-picked line from *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P. C.* (*Three Affiliated Tribes I*) claiming that "[n]othing in the language or legislative history of Pub.L. 280 indicates that it was meant to divest States of pre-existing and otherwise lawfully assumed jurisdiction."[299] This, Justice Kavanaugh contends, is a "definitive statement" resolving the preemption question. To start, that proposition misunderstands Public Law 280. Public Law 280 was intended to affect a jurisdictional transfer after specific action (state legislation or constitutional amendment), so it *assumes* that the jurisdiction being transferred didn't already belong to the state. Public Law 280 was not a law about keeping state jurisdiction while ending federal jurisdiction.

But even accepting the statement from *Three Affiliated Tribes I* that lawfully assumed jurisdiction isn't preempted by Public Law 280, *Three Affiliated Tribes I* doesn't resolve the specific preemption question in this case, for that case was wildly different than *Castro-Huerta*. In *Three Affiliated Tribes I*, a tribal petitioner sought civil relief "in a North Dakota state court" in a "breach of contract" claim against a non-Indian defendant.[300] In 1957, after the passage of Public Law 280 but before North Dakota had

297. *Id.* at 218.

298. *Bracker*, 448 U.S. at 144.

299. Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g, P.C. (*Three Affiliated Tribes I*), 467 U.S. 138, 150 (1984).

300. *Id.* at 141.

assumed civil jurisdiction pursuant to Public Law 280, the North Dakota Supreme Court took the "expansive view of . . . state court jurisdiction . . . in Indian Country," holding that the relevant state law jurisdictional disclaimers prevented the state from hearing a civil case only if the case involved Indian land.[301] The next year, North Dakota amended its state constitution and passed legislation assuming civil jurisdiction over all cases arising in Indian Country with Indian consent.[302] The Court then held, in relevant part, that Public Law 280 did not require North Dakota to disclaim jurisdiction that the North Dakota Supreme Court had previously recognized because "Pub.L. 280 was intended to facilitate rather than to impede the transfer of jurisdictional authority to the states."[303]

Several distinctions make *Three Affiliated Tribes I* inapposite. Perhaps most fundamentally, *Three Affiliated Tribes I* was the rare case of a tribe *seeking* relief in the state system, not the state attempting to impose its authority over tribal affairs. As the Court explained, "exercise of state jurisdiction is particularly compatible with tribal autonomy when, as [in *Three Affiliated Tribes I*], the suit is brought by the tribe itself and the tribal court lacked jurisdiction over the claim at the time the suit was instituted."[304] But that is hardly the case in *Castro-Huerta*, where the tribal victim is *resisting* state jurisdiction and the interested tribes have expressed hostility to the state asserting criminal jurisdiction in cases with an Indian defendant arising from conduct in Indian Country.[305]

Second, while the Court in *Three Affiliated Tribes I* agrees that assumption of state jurisdiction is preempted if it is antithetical to prevailing federal policy, it simply says that in 1958 when North Dakota assumed jurisdiction, prevailing federal policy was embodied in Public Law 280, which sought to expand rather than constrict state assumption of jurisdiction.[306] For that reason, the Indian Civil Rights Act of 1968 is largely irrelevant in the *Three*

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301. *Id.* at 143–44; *see also* Vermillion v. Spotted Elk, 85 N.W.2d 432, 436 (N.D. 1957).

302. *Three Affiliated Tribes I*, 467 U.S. at 144.

303. *Id.* at 150.

304. *Id.* at 149.

305. *See* Brief for Cherokee Nation as Amici Curiae Supporting Respondent at 15–16, Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022) (No. 21-429); Brief for Muscogee (Creek) Nation as Amici Curiae Supporting Respondent at 28, Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022) (No. 21-429); Brief for Chickasaw Nation & Choctaw Nation of Oklahoma as Amici Curiae Supporting Respondent, Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022) (No. 21-429).

306. *Three Affiliated Tribes I*, 467 U.S. at 151 ("[N]o federal law *or policy* required the North Dakota courts to forgo the jurisdiction recognized in *Vermillion* in this case.") (emphasis added)).

Affiliated Tribes I analysis because the "tribal consent requirements . . . were not made retroactive" and thus "the 1968 amendments therefore did not displace jurisdiction previously assumed under Pub.L. 280, much less jurisdiction assumed prior to and apart from Pub.L. 280."[307] Therefore, *Three Affiliated Tribes I* should be understood to say, at most, that if a state appropriately recognized some state jurisdiction in Indian Country, Public Law 280 does not require the state to forego that jurisdiction. Unfortunately for the *Castro-Huerta* majority, Oklahoma never recognized jurisdiction over crimes by non-Indians against Indians in Indian Country. In fact, the entire reason that *Castro-Huerta* found itself in the Supreme Court is that the Oklahoma Court of Criminal Appeals agreed that Oklahoma did not have jurisdiction over these crimes.[308] Nowhere in *Three Affiliated Tribes I* is there a claim that if a state had not assumed jurisdiction, either by law pursuant to the pre-1968 version of Public Law 280 or by state judicial proclamation, they nevertheless can ignore the tribal consent requirements in the Indian Civil Rights Act of 1968.

Three Affiliated Tribes I simply does not have the dispositive effect that the *Castro-Huerta* majority claims, and its choice of that case as a silver bullet reflects the same fatal neglect of the Indian Civil Rights Act of 1968 that dooms the majority's preemption inquiry in the first place.

4. The Court Incorrectly Concludes That Concurrent State Jurisdiction over Crimes by Non-Indians Against Indians Serves Tribal Interests

Finally, the Court in *Castro-Huerta* acknowledges that, even if none of the relevant statutes preempt state jurisdiction, "preemption may still occur if the exercise of state jurisdiction would unlawfully infringe upon tribal self-government."[309] The Court then offers three reasons why state jurisdiction is not barred in this case. First,

> a state prosecution of a crime committed by a non-Indian against an Indian would not deprive the tribe of any of its prosecutorial authority . . . because . . . Indian tribes lack criminal jurisdiction to prosecute crimes committed by non-Indians such as Castro-

307. *Id.* at 150–51.

308. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2492 (2022); *see* Bosse v. State, 484 P.3d 286, *withdrawn* (Okla. Crim. App. 2021); Roth v. State, 499 P.3d 23, 25 (Okla. Crim. App. 2021).

309. *Castro-Huerta*, 142 S. Ct. at 2501 (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142–43 (1980)).

> Huerta, even when non-Indians commit crimes against Indians in Indian country.[310]

Second, because "State prosecution would supplement federal authority, not supplant federal authority," the introduction of another sovereign would simply fortify existing law enforcement and add an additional layer of security for tribal victims.[311] Third, "the State has a strong sovereign interest in ensuring public safety and criminal justice within its territory" that extends to Indian victims.[312] Therefore, denying the state the ability to prosecute offenders simply because their victim is an Indian "would require this Court to treat Indian victims as second-class citizens."[313]

As an initial matter, the Court's use of *Bracker* as requiring a simple "balancing test" to determine the legitimacy of state jurisdiction absent express preemption is wrong. *Bracker* itself emphasized that in the "[m]ore difficult questions" involving the conduct of non-Indians in Indian Country "the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence" must remain central.[314] What *Bracker* does not permit is free-form policy balancing in which courts substitute their own judgment over what tribes do or should want for the judgment of the tribes themselves.

And yet that is exactly what the Court in *Castro-Huerta* does. Seven tribes[315] as well as the National Congress of American Indians, filed seven separate amicus briefs in this case, all in opposition to concurrent state jurisdiction. In the fifty-four years since the passage of the Indian Civil Rights Act, the Cherokee Nation (the location of Castro-Huerta's crime) has never consented to the exercise of state jurisdiction. No matter, says the Court, this is what is good for you.

The Court's paternalism would be striking even if its arguments were substantively correct. They are not. Start with the Court's argument that

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310. *Id.*
311. *Id.*
312. *Id.* at 2501–02.
313. *Id.* at 2502.
314. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144–45 (1980).
315. Cherokee Nation, Muscogee (Creek) Nation, Choctaw Nation, Chickasaw Nation, Seminole Nation of Oklahoma, United Keetoowah Band of Cherokee Indians, and the Navajo Nation.

because, thanks to *Oliphant v. Suquamish Indian Tribe*,[316] state jurisdiction in this case would not cover crimes that the tribe would otherwise be able to prosecute, tribal self-government is not infringed. That myopic view of tribal self-government ignores the broader sovereign interest being infringed: the ability *to decide* who can exercise criminal jurisdiction on your land. In 1968, Congress decided that tribal self-determination required tribes to be able to turn away states who wanted to exercise jurisdiction in Indian Country. Congress did not say that tribal consent was only required when states were attempting to exercise jurisdiction only over crimes that the tribes were otherwise able to prosecute; it said that it was required when states were attempting to prosecute crimes by *and* against Indians.

Second, the Court's argument that the supplemental nature of state jurisdiction ensures that tribal victims will be no worse off than when federal jurisdiction was exclusive is incompatible with historical experience. Recall that in the fifteen years between the passage of Public Law 280 in 1953 and the passage of the Indian Civil Rights Act of 1968, tribes routinely complained to Congress that state authorities were inequitably enforcing state laws in Indian Country and abusing tribal members involved in crimes.[317] Those realities were what gave way to the tribal consent requirements in the Indian Civil Rights Act, so it is understandable that the Cherokee (or any tribe) may not so willingly trust the benevolence of a sovereign with such a tarnished track-record. Second, as Justice Gorsuch in dissent points out, concurrent jurisdiction can create "a pass-the-buck dynamic" wherein state authorities assume that federal authorities will step in and vice-versa, leading to chronic underenforcement of criminal conduct in Indian Country.[318] Moreover, when state authorities point at federal authorities and federal authorities point at state authorities, aggrieved tribal members may not know who to blame, inhibiting political accountability over local law enforcement failures. Tribes, like many communities in America, may also be concerned with over-policing. When three sovereigns are all enforcing overlapping criminal codes, tribes may rightly be worried about a constant, oppressive presence of police in tribal areas. The Court grapples with none of this.

316. 435 U.S. 191 (1978) (holding Indian tribes have no inherent authority to prosecute non-Indians even if the underlying crime takes place in Indian Country and has an Indian victim).

317. *See supra* Section III.C.1.

318. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2523 (2022) (Gorsuch, J., dissenting) (quoting Brief of Amici Curiae Former United States Attorneys et al. at 13, *Castro-Huerta* (No. 21-429)).

The Court's third argument—that a state has a sovereign interest in protecting all victims within its borders, including Indian victims—is hard to dispute, but proves nothing. The inquiry required by *Bracker* (if that is the test) does not allow states to simply assert interests without proving that those interests are best served by the jurisdiction they are claiming. Justice Kavanaugh assumes his conclusion, but as the foregoing demonstrates, it isn't so simple. If a state enforces its laws in a biased or abusive fashion (as they have in the past), that state interest is best served by staying away.

The Court's policy balancing was error from the beginning. *Bracker* requires courts to conduct preemption analysis with tribal sovereignty and congressional policy goals front of mind. The Court in *Castro-Huerta* ignores that command. Instead, it engages in a superficial analysis of tribal interests and shows deference only to unproven and historically implausible state interests.

IV. Limitations on the Court's Decision in Castro-Huerta *as a Matter of Oklahoma State Law*

In dissent, Justice Gorsuch noted, "The unamended Oklahoma Constitution and other state statutes and judicial decisions may stand as independent barriers to the assumption of state jurisdiction as a matter of state law."[319] The dissent offered no further explanation, perhaps understandably, as a proper analysis would require an exploration of state law untethered from any live federal issue and thus outside the scope of the Supreme Court's jurisdiction.[320] But if Justice Gorsuch's musing bears fruit, it could relegate the Court's decision in *Castro-Huerta* to an erroneous, but unimpactful legal anomaly, at least in Oklahoma.

The analysis begins in a familiar place, with the Oklahoma Enabling Act. The Enabling Act, like those of many states, contained "language reserving jurisdiction and control" over Indian lands in the United States and the Act required Oklahoma to incorporate that reservation in its state constitution.[321] Oklahoma complied, and article I, section 3 of the Oklahoma Constitution, in relevant part, now reads:

> The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands

319. *Id.* at 2526.

320. Likely for the same reason, the majority makes no mention of state law as a barrier to its decision taking effect in Oklahoma.

321. *Castro-Huerta*, 142 S. Ct. at 2504 (majority opinion).

> lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.[322]
>
> Even though this disclaimer was required by federal law, the extent to which this provision now bars state action is a matter of state law. Indeed, several states have interpreted substantially similar disclaiming language to allow or bar different assertions of state authority. Recall that in *Three Affiliated Tribes I*, the Court noted that the North Dakota Supreme Court had taken an expansive view of the scope of state-court jurisdiction over Indians in Indian country . . . [holding] that the existing jurisdictional disclaimers in the Enabling Act and the State's Constitution foreclosed civil jurisdiction over Indian country only in cases involving interests in Indian lands themselves.[323]

Oklahoma's understanding of article I, section 3 of their constitution was explained in *Goforth v. State*, in which a non-Indian was convicted of the murder of another non-Indian in Indian Country.[324] The Oklahoma Court of Criminal Appeals concluded that article I, section 3 of the Oklahoma Constitution did not bar the state prosecution because section 3 "was meant to disclaim jurisdiction over Indian lands *only to the extent that the federal government claimed jurisdiction*."[325] "Thus, where federal law does not purport to confer jurisdiction on the United States courts, the Oklahoma Constitution does not deprive Oklahoma courts from exercising jurisdiction over the matter."[326] This construction, the court explained, was necessary to ensure that there did not exist a class of cases over which the federal government had no jurisdiction (namely, non-Indian on non-Indian crimes by virtue of *McBratney*) and over which the state had no jurisdiction to prosecute cases on account of the constitutional disclaimer. But when the federal government did have jurisdiction, the constitutional disclaimer barred state jurisdiction.

322. OKLA. CONST. art. I, § 3.
323. *Three Affiliated Tribes I*, 467 U.S. 138, 143–44 (1984) (emphasis added).
324. Goforth v. State, 644 P.2d 114, 115 (Okla. Crim. App. 1982).
325. *Id.* at 116 (emphasis added).
326. *Id.*

Gofoth's construction of article I, section 3 was repeated in the dissent of *Roth v. State* in 2022, just before *Castro-Huerta* was decided.[327] The facts in *Roth* were much like those in *Castro-Huerta*: a non-Indian was prosecuted for a crime committed against an Indian in Indian Country, and the Court of Criminal Appeals of Oklahoma vacated the judgment because exclusive jurisdiction was reserved in the federal government over the charged crime, manslaughter, in the Major Crimes Act (18 U.S.C. § 1153).[328] *Roth* presented a paradigmatic problem for Oklahoma in the wake of *McGirt*. The federal government did not prosecute the defendant in the immediate wake of the conduct because Eastern Oklahoma was thought not to be Indian Country, and by the time *McGirt* was decided and the federal government realized that they had exclusive jurisdiction to try the case, the federal statute of limitations had lapsed.[329] Dissenting in *Roth*, Judge Rowland argued that the Major Crimes Act should be read to preempt state jurisdiction only when it is operable. That is, only when the statute of limitations on the relevant crimes has not yet expired.[330] In developing that theory, Judge Rowland found *Goforth*'s approach to article I, section 3 "instructive," and contended that because the "arguably broader language in [the Oklahoma] Constitution" is read to preclude state jurisdiction *only when federal law is operative*, the Major Crimes Act should be read to preempt state jurisdiction only when it

327. Roth v. State, 499 P.3d 23, 31 (Okla. Crim. App. 2021) (Rowland, J., dissenting); *see also* United States v. Langford, 641 F.3d 1195, 1199–1200 (10th Cir. 2011) ("Notwithstanding the plain text [of article I, section 3 of the Oklahoma Constitution], the Oklahoma courts have construed this provision 'to disclaim jurisdiction over Indian lands only to the extent that the federal government claimed jurisdiction.'" Goforth v. State, 644 P.2d 114, 116 (Okla. Crim. App. 1982) (quoting Currey v. Corp. Comm'n, 617 P.2d 177 (Okla. 1979)). As the Oklahoma Court of Criminal Appeals observed in *Goforth*, to construe this provision otherwise would result in a jurisdictional vacuum in which neither the federal government (due to *McBratney*) nor Oklahoma could punish crimes committed by non-Indians against non-Indians in Indian country. Consequently, the Oklahoma courts have asserted jurisdiction over crimes by non-Indians in Indian country.").

328. *Roth*, 499 P.3d at 26. Certain statements in the majority opinion, namely that "[f]ederal law broadly preempts state criminal jurisdiction over crimes committed by, or against, Indians in Indian Country," may have been partially abrogated by *Castro-Huerta*. (I say partially because *Castro-Huerta* of courses involves only a crime against an Indian, not by an Indian.) But the Court's judgment should not be disturbed because federal exclusivity was premised on the Major Crimes Act, which *expressly* preempts concurrent state jurisdiction.

329. *See id.* at 24–25.

330. *Id.* at 28 (Rowland, J., dissenting).

too is operative (and it is not, when the statute of limitations prevents a federal prosecution).[331]

This construction of article I, section 3 of the Oklahoma Constitution may gut the impact of the *Castro-Huerta* decision in Oklahoma, for all the Court said in *Castro-Huerta* is there is no federal law which bars the assertion of concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian Country. But Oklahoma state law does not require a preemptive federal law to bar trigger the Oklahoma Constitution's jurisdictional disclaimer, it requires only an *operative* federal law. The General Crimes Act, which the *Castro-Huerta* majority readily admits still extends federal jurisdiction to Indian Country in cases involving crimes by or against Indians, is such an operative federal law.

Moreover, despite the new rule announced in *Castro-Huerta*, the Supreme Court has no subject matter jurisdiction to review Oklahoma courts' interpretation of their own constitutional provision. In *Arizona v. San Carlos Apache Tribe*, the Court held that "to the extent that a claimed bar to state jurisdiction . . . is premised on the respective State Constitutions, that is a question of state law over which the state courts have binding authority."[332]

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331. *Id.* at 32.

332. 463 U.S. 545, 561 (1983). Federal judicial review has been invoked only when a litigant has argued that the assertion of state jurisdiction conflicts with some federal law, typically a state enabling law, not with an interpreted state constitutional provision. *See Three Affiliated Tribes I*, 467 U.S. 138, 149 (1984) (entertaining an argument that North Dakota's exercise of civil jurisdiction over cases brought by Indians against non-Indians arising out of conduct in Indian Country conflicted with North Dakota's Enabling Act, a federal law); Organized Village of Kake v. Egan, 369 U.S. 60 (1962) (holding that section 4 of the Alaska Statehood Act, a federal law, did not prevent Alaska from regulating certain Indian fishing practices in Alaska waters); Draper v. United States, 164 U.S. 240 (1896) (evaluating if provision in Montana Enabling Act, a federal law, similar to that in the Oklahoma Enabling Act, divested Montana state courts of jurisdiction over non-Indian on non-Indian crimes in Indian Country).

There is an argument that if Oklahoma courts' interpretation of their own constitutional provision was premised on an erroneous understanding of federal law that federal judicial review might be warranted to correct the error. In *Organized Village of Kake v. Egan*, the Court said that "absolute federal jurisdiction is not invariably exclusive jurisdiction," 369 U.S. at 68, so one may imagine that if a state interpreted their constitutional disclaimer to *prevent any* state jurisdiction in Indian Country, a Court may be able to vacate a state court judgment on the theory that such an understanding misunderstands what Congress intended when it insisted on the state constitutional disclaimer. But that is not what has happened in Oklahoma. Instead, Oklahoma courts have acknowledged that their constitution permits state jurisdiction in Indian Country in some cases and have simply defined—as is their prerogative to do—those cases as ones in which the federal government has not asserted jurisdiction.

If *Castro-Huerta* is to have the effect that the majority seems to hope, the Court of Criminal Appeals of Oklahoma will have to abandon *Goforth* itself.

V. Conclusion

In the wake of *McGirt*, Oklahoma was forced to reckon with the unanticipated reality that much of Eastern Oklahoma remains Indian Country. There were myriad remedies that could have been employed to deal with the law enforcement consequences of *McGirt*. Oklahoma could have asked Congress to amend the relevant federal statutes and grant Oklahoma concurrent (or exclusive) jurisdiction over crimes by or against Indians in Indian Country; it could have asked Congress for additional funding for assistant U.S. attorneys, FBI agents, district judges, and probation officers in the Eastern and Northern Districts of Oklahoma; it could have even taken the extreme step of asking Congress to reverse *McGirt* and formally disestablish the Creek and similarly situated reservations. Oklahoma could have also sought jurisdiction pursuant to Public Law 280 by amending the Oklahoma Constitution, adopting authorizing legislation, and obtaining the required tribal consent. Instead, it asked the Supreme Court to turn its back on its precedent and hold that states have jurisdiction, concurrent with the federal government, to prosecute crimes by non-Indians against Indians in Indian Country.

Unfortunately, the Supreme Court obliged. The dissent points out many of the Court's legal errors and this Article attempts to elaborate on others, but the real travesty of the opinion is not the misstatement of doctrine—that can always be corrected by more enlightened jurists—it is the nonchalance with which the Court concludes that history and context have no place in the analysis.

However profound that failing, the good news is that the Court's decision keeps open avenues for other organs of government to halt the erosion of tribal sovereignty. The Court in *Castro-Huerta* did not hold that states *must* have concurrent jurisdiction over crimes by non-Indians against Indians in Indian Country as a virtue of their sovereignty, it only held that no federal law says that states do not have this jurisdiction. So, Congress can write one; inserting preemptive language into the General Crimes Act, the Indian Civil Rights Act of 1968, or Public Law 280 is easy as a matter of drafting (if not as a matter of coalition politics). Congress could couple a new provision with continued law-enforcement and prosecutorial reinforcements to the affected jurisdictions. Congress can also grant tribal courts jurisdiction over crimes committed by non-Indians against Indians in Indian Country, to be exercised

concurrently with the federal government and the states, to ensure that Indian interests are preserved in these prosecutions.[333] Whatever the chosen approach, *Castro-Huerta* should at least make clear that defense of tribal sovereignty is not a project that can be exclusively, or even primarily, pursued in the federal courts. Relying on a swift congressional remedy is typically a recipe for disappointment, but the striking nature of the Court's decision in this case has at least inspired some preliminary action.[334] If advocates of tribal sovereignty are to strike back against a Court intent on gutting centuries of Indian law precedent, that action must soon be more than just preliminary.

333. Congress did just that in the Violence Against Women Reauthorization Act of 2013, which partially abrogated the Court's holding in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), that tribes have no inherent jurisdiction to prosecute non-Indians for crimes committed in Indian Country even if the victim is an Indian. *See* 25 U.S.C. § 1304(c) ("A participating tribe may exercise special Tribal criminal jurisdiction over a defendant for a covered crime that occurs in the Indian country of the participating tribe."); *id.* § 1304(a)(14) (defining "special Tribal criminal jurisdiction" as "the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise").

334. *See Examining* Oklahoma v. Castro-Huerta*: The Implications of the Supreme Court's Ruling on Tribal Sovereignty: Oversight Hearing Before the Subcomm. for Indigenous Peoples of the U.S., H. Comm. on Nat. Res.*, 117th Cong. 8-10 (Sept. 20, 2022) (statement of Bryan Newland, Ass't Sec. for Indian Affs.), https://www.govinfo.gov/content/pkg/CHRG-117hhrg48655/pdf/CHRG-117hhrg48655.pdf. In the hearing, the Subcomm. Chairwoman, Rep. Teresa Leger Fernandez (D.-N.M.) and the Vice Ranking Member, Rep. Jay Obernolte (R.-Cal.), both expressed concerns over the impact of *Castro-Huerta* on tribal sovereignty and called on Congress to fashion a fix to the legal confusion and inconsistency in the wake of *McGirt* and *Castro-Huerta*.