RE-WRITING PRECEDENT: AN EXPLORATION OF THE NEGATIVE IMPACT ON NATIVE RIGHTS IN THE WAKE OF *OKLAHOMA V. CASTRO-HUERTA*

ABSTRACT

The word "sovereignty" implies "freedom from external control" and is synonymous with the terms autonomy, self-determination, and independence. That is, at least, how Merriam-Webster defines the term and how the Supreme Court treated Native Americans through the careful development of over 200 years of case law. The current bench of the Supreme Court, however, had a different perception of how the relationship between federal, state, and tribal governments should function. In its decision in *Oklahoma v. Castro-Huerta*, the majority decided the state now has authority to prosecute crimes traditionally reserved for the federal government. This decision incorrectly frames the jurisdictional dispute as one of preemption, whereas the correct analysis would follow well established precedent that promised tribes would remain sovereign and free from state interference.

This Comment analyzes the majority opinion's flawed legal reasoning by evaluating the clear line of case law that was impliedly overruled without proper justification. This Comment maintains that this ruling fundamentally ignores the principle of tribal sovereignty, explores the negative impact it will have on Native rights, and proposes that states should invest resources into tribal communities rather than encroaching on their sovereignty. As support for this proposal, this Comment explores how tribal communities will face an increase in safety concerns and suffer potentially deadly consequences due to jurisdictional disputes. This Comment also supports its proposition to keep prosecutorial power in the hands of federal and tribal governments who prioritize unique concerns to Native peoples by analyzing the treatment of murdered and missing Indigenous women and girls.

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INTRODUCTION

It is no national secret that the relationship between Native American tribes[1] and the United States federal government has been bloody, dark, and disgraceful since the "discovery" of America in 1492.[2] Though land was taken, treaties were broken, and lives were stolen, tribal governments now hold tight to their autonomy by putting faith in the constitutional right[3] to tribal sovereignty.[4] This idea refers to the tribes' right "to govern themselves" by recognizing them "as distinct governments" with "the same powers as federal and state governments to regulate their internal affairs."[5] Thus, determining the jurisdictional lines of whether a matter falls within this right to self-governance is detrimental not only to the outcome of the case, but also to the legitimacy of a fragile relationship between the United States and the 574 federally recognized tribes.[6]

Historically, the right of tribes to govern themselves was seldomly infringed upon.[7] However, the Supreme Court recently ignored this long history in *Oklahoma v. Castro-Huerta*[8] and determined that states now

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1. The terms "Native" and "Native American" are used when generally referencing Indigenous peoples and communities. *See Native American and Indigenous Peoples FAQs*, UCLA EQUITY, DIVERSITY & INCLUSION, https://equity.ucla.edu/know/resources-on-native-american-and-indigenous-affairs/native-american-and-indigenous-peoples-faqs/#term (last visited Dec. 23, 2023).

2. *Oct 12, 1492 CE: Columbus Makes Landfall in the Caribbean*, NAT'L GEOGRAPHIC, https://education.nationalgeographic.org/resource/columbus-makes-landfall-caribbean/ (last visited Dec. 23, 2023).

3. *See* Williams v. Lee, 358 U.S. 217, 220, 222 (1959) (establishing that tribal members living on Indian reservations have the right "to make their own laws and be ruled by them").

4. *An Issue of Sovereignty*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 13, 2013), https://www.ncsl.org/quad-caucus/an-issue-of-sovereignty#:~:text=Tribal%20sovereignty%20refers%20to%20the,to%20regulate%20their%20internal%20affairs.

5. *Id.*

6. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 86 Fed. Reg. 7554 (Jan. 29, 2021) (listing the 574 federally recognized tribes).

7. Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, AM. BAR ASS'N HUM. RTS. MAG. (Oct. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol--40--no--1--tribal-sovereignty/short_history_of_indian_law/.

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

have the power "to prosecute crimes committed by non-Indians[9] against Indians," a power which was previously exclusive to tribes and the federal government.[10] This opinion incorrectly frames the issue as one of preemption, which is detrimental to principles of tribal sovereignty.[11]

This Comment will first review the important areas of law that explain how federal, state, and tribal police power coexist. It will discuss the critical history and case law that sets the backdrop for jurisdictional disputes. This Comment will then provide a description of the Court's opinion in *Castro-Huerta*, in addition to noting Justice Gorsuch's strong dissent. This Comment will next discuss the immediate negative impacts of the Court's decision and argue that states should provide Native communities with the tools and resources necessary to prosecute rather than encroach on tribal sovereignty. Finally, this Comment will consider the potential for broader implications the *Castro-Huerta* decision will have in the wake of the Land Back movement.

I. BACKGROUND

Since laws governing Indians are both intertwined with and independent from the traditional American legal system,[12] exploring key statutes and cases will help one fully grasp the central issue in *Castro-Huerta*. Section A will lay the statutory ground by discussing the legal doctrine of preemption, the General Crimes Act,[13] the Major Crimes Act,[14] and Public Law 280.[15] Section B will then discuss the following three cases which laid precedent for *Castro-Huerta*: *Worcester v. Georgia*,[16] *White Mountain Apache Tribe v. Bracker*,[17] and *McGirt v. Oklahoma*.[18]

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9. 18 U.S.C. § 1151 (defining the term "Indian country"). The term Indian country is used by the Supreme Court in its analysis of cases. *See, e.g.*, *Castro-Huerta*, 142 S. Ct. at 2493. The terms "Indian," "non-Indian," and "Indian Country" are used in reference to legal interpretation. *See* UCLA EQUITY, DIVERSITY & INCLUSION, *supra* note 1.

10. *Castro-Huerta*, 142 S. Ct. at 2491; *id.* at 2505 (Gorsuch, J., dissenting).

11. *See id.* at 2511–12 (Gorsuch, J., dissenting).

12. Felicity Barringer, *How the U.S. Legal System Ignores Tribal Law*, HIGH COUNTRY NEWS (Oct. 7, 2021), https://www.hcn.org/articles/law-how-the-us-legal-system-ignores-tribal-law. There is no law school in the United States that requires its students to take coursework focused on Indian law. Even in the law schools that offer coursework focused on Indian law, it is not taught unless actively sought out by the students. This is true despite the fact that Indian law coexists with the American legal structure, and the two systems must work together for each to be successful due to the sovereign status of tribes in the United States. *See* NAT'L NATIVE AM. BAR ASS'N, THE STATE OF INDIAN LAW AT ABA-ACCREDITED LAW SCHOOLS 1 (2021), https://www.nativeamericanbar.org/wp-content/uploads/2021/04/2021-State-of-Indian-Law-at-ABA-Accredited-Schools_Final.pdf (cataloging, by state, the available Indian Law curriculum, clinics, certificates, or journals, as well as the existence of Native American faculty members and Native American Law Student Association (NALSA) chapters in all American Bar Association (ABA) accredited law schools).

13. 18 U.S.C. § 1152.

14. 18 U.S.C. § 1153.

15. 28 U.S.C. § 1360 (civil jurisdiction); 18 U.S.C. § 1162 (criminal jurisdiction).

16. 31 U.S. 515 (1832).

17. 448 U.S. 136 (1980).

18. 140 S. Ct. 2452 (2020).

A. Defining Jurisdiction by Statute: Preemption, the General Crimes Act, the Major Crimes Act, and Public Law 280

1. Preemption: Conflict, Express, and Field

To understand how the statutes discussed below interact with one other, it is important to consider how the constitutional limitation of preemption operates. Preemption refers to the principle that "[w]hen state law and federal law conflict, federal law displaces, or preempts, state law, due to the Supremacy Clause of the Constitution. Preemption applies regardless of whether the conflicting laws come from legislatures, courts, administrative agencies, or constitutions."[19] Generally, there are three categories of preemption.[20] First, conflict preemption, a type of implied preemption, exists when it is impossible to comply with both federal and local law or local law creates an obstacle to achieving a federal purpose.[21] Second, express preemption exists when federal law directly opposes a local law using preemptive language.[22] Third, field preemption, another type of implied preemption, exists when there is clear legislative intent that a "field," such as immigration law, is preempted by federal law.[23]

2. The General Crimes Act

In 1817, Congress passed the General Crimes Act which states 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 . . . shall extend to Indian [Territory]."[24] In effect, this Act extends federal criminal jurisdiction to crimes committed in "Indian Territory" and "applies [in] cases where the offender is non-Indian but the victim is Indian."[25] Additionally, "[t]he General Crimes Act can also apply where the offender is Indian and the victim is non-Indian, [if] the crime falls outside of the Major Crimes Act, and the offender has not already been punished by the tribe for the offense."[26] Laws that are extended are "popularly known as 'federal enclave laws.'"[27]

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19. *Preemption*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/preemption (last visited Dec. 23, 2023) (internal citations omitted); U.S. CONST. art. VI, cl. 2.

20. *See* JAY B. SYKES & NICOLE VANATKO, CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER 2 (2019) (identifying express and implied preemption as the two general classes of preemption, and identifying two sub-categories of implied preemption).

21. *Id.* at 23–28 (citing Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

22. *Id.* at 2.

23. *Id.* at 17–20 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

24. 18 U.S.C. § 1152.

25. *SANE Program Development and Operation Guide: Tribal Law*, OFF. FOR VICTIMS OF CRIME, https://www.ovcttac.gov/saneguide/legal-and-ethical-foundations-for-sane-practice/tribal-law/ (last visited Dec. 23, 2023) [hereinafter *SANE Guide*].

26. *Id.*

27. *Criminal Resource Manual: 678. The General Crimes Act—18 U.S.C. § 1152*, U.S. DEP'T OF JUST. (Jan. 22, 2020), https://www.justice.gov/archives/jm/criminal-resource-manual-678-general-crimes-act-18-usc-1152 [hereinafter *The General Crimes Act Criminal Resource Manual*].

Under the General Crimes Act, there are four exceptions to federal jurisdictional coverage related to Native American tribes. Under the first exception, tribes retain jurisdiction of "offenses committed by one Indian against the person or property of another Indian."[28] Under the second exception, tribes also retain jurisdiction over "any Indian committing any offense in the Indian [Territory] who has been punished by the local law of the tribe."[29] The third exception applies "to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."[30] The fourth exception was created in *United States v. McBratney*,[31] which significantly narrowed the reach of the General Crimes Act.[32] Under *McBratney*, "absent treaty provisions to the contrary, the state has exclusive jurisdiction over a crime committed in the Indian [Territory] by a non-Indian against another non-Indian."[33]

3. The Major Crimes Act

Following the enactment of the General Crimes Act, Congress passed the Major Crimes Act in 1885.[34] The Major Crimes Act further extends "federal criminal jurisdiction over certain enumerated crimes if the defendant is Indian."[35] These enumerated crimes include murder, assault resulting in serious bodily injury, and most sexual offenses.[36] Under the Major Crimes Act, the federal government has broad jurisdiction over "crimes in which both the offender and the victim are Indians and the crime occurred in Indian [Territory]."[37] Because the "victim may be Indian or non-Indian," only the defendant's race is considered in determining whether the federal government has jurisdiction."[38] It is important to note that tribes still "retain jurisdiction to prosecute Indians for the same" enumerated crimes.[39] Due to tribal retention of jurisdiction, "an Indian defendant may be prosecuted concurrently in two jurisdictions for the same offense."[40] Moreover, "[t]he constitutional prohibition against double jeopardy does

28. *Id.* (quoting 18 U.S.C. § 1152).
29. *Id.* (quoting 18 U.S.C. § 1152).
30. *Id.* (quoting 18 U.S.C. § 1152) (the term "treaty stipulations" refers to specific terms that were originally agreed upon between the Indian tribes and the United States government in a formal commitment).
31. 104 U.S. 621 (1881).
32. *Id.* at 623–24 (1881) (holding that the Ute reservation was not excluded from Colorado's jurisdiction because, in the past, when "Congress has intended to except out of [a State] an Indian reservation . . . it has done so by express words").
33. *The General Crimes Act Criminal Resource Manual*, *supra* note 27.
34. *SANE Guide*, *supra* note 25.
35. *Id.*
36. 18 U.S.C. § 1153 (providing a complete list of crimes which 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 section 661 of this title" (citations omitted)).
37. *SANE Guide*, *supra* note 25 (the broad scope of the Major Crimes Act makes it the primary source of federal jurisdiction—if the defendant had to be either Indian or non-Indian, the scope of federal jurisdiction would narrow).
38. *Id.*
39. *Id.*
40. *Id.*

not apply because the United States and Indian tribes are separate sovereigns."[41]

4. Public Law 280

More recently, Congress enacted Public Law 280 in 1953.[42] This statute created a transfer of jurisdiction "from the federal government to state governments which significantly changed the division of legal authority among tribal, federal, and state governments."[43] It transferred criminal jurisdiction and limited civil jurisdiction over Indian Territory from the federal government to six states, commonly referred to as "mandatory states": Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin.[44] The law also permitted those states not explicitly mentioned in Public Law 280, "nonmandatory states," to opt in, thus allowing those states to "assume jurisdiction at their own option at any time in the future."[45] Tribal nations, alternatively, were not afforded the same respect and "had no choice in the matter."[46] The tribes affected by Public Law 280 were forced to deal with heightened state authority and "control over a broad range of reservation activities without . . . tribal consent."[47] Congress's primary concern when passing Public Law 280 was the "alleged lawlessness on the reservations and the accompanying threat to *Anglos* living nearby."[48] As a solution, "Congress chose to radically shift the balance of jurisdictional power towards the states and away from the federal government" and Native tribes.[49]

Later amendments to Public Law 280 "allowed states to retrocede jurisdiction back to the Federal Government, and section 221 of the Tribal Law and Order Act of 2010 provide[d] that tribes [could] ask the Attorney General to reassume concurrent jurisdiction if certain conditions [were] met."[50] Thus, if a state failed to prosecute a crime due to lack of interest or resources, this amendment allowed the tribe to seek federal prosecution of

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41. *Id.*
42. *Id.*
43. Jerry Gardner & Ada Pecos Melton, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, TRIBAL CT. CLEARINGHOUSE, http://www.tribal-institute.org/articles/gardner1.htm (last visited Dec. 23, 2023).
44. *Id.*
45. *Id.* ("Most previous grants of jurisdiction to the states had been limited to some or all the reservations in a single state. They also had generally followed consultation with the individual state and the affected Indian Nations." Thus, such a broad jurisdictional transfer was unprecedented, and hotly opposed by tribal nations.)
46. *Id.*
47. *Id.* (Some of the effects of Public Law 280's enactment are as follows: "an increased role for state criminal justice systems" on tribal reservations; "a virtual elimination of the special federal criminal justice role (and a consequent diminishment of the special relationship between Indian Nations and the federal government);" "numerous obstacles to individual Nations in their development of tribal criminal justice systems;" and "an increased and confusing state role in civil related matters.")
48. *Id.* (emphasis added).
49. *Id.*
50. *SANE Guide*, *supra* note 25.

the crime.[51] Section 221 of the Tribal Law and Order Act of 2010 reflects a recent trend of certain states and tribes working together to return some or all of this authority back to the tribes as an "expand[ed] recognition of tribal sovereignty."[52]

Between these three statutes, it is clear that determining who has jurisdiction over Indians or non-Indians in Indian Territory remains an important topic for Congress. Though the landscape may seem somewhat convoluted, one principle remains consistent: jurisdiction has traditionally been balanced between federal and tribal governments, with the state intervening only by the enactment of Public Law 280.

B. Defining Jurisdiction by Case Law: From Worcester to McGirt

In 1832, *Worcester*, a case involving the application of Georgia state law within the Cherokee Nation's territory, established that tribal nations have a protected constitutional right to tribal sovereignty.[53] Samuel Worcester, the plaintiff, argued that because the Cherokee Nation was its own state, Georgia had no right to exert authority over individuals within the Cherokee Nation and doing so would deprive the Cherokee Nation of its autonomy.[54] The Court agreed, holding that tribes do not lose their sovereign powers by becoming subject to the power of the United States.[55] The Court also maintained that only Congress has power over Indian affairs and that state laws do not apply in Indian Territory.[56] This case set the foundation for evaluating jurisdiction between states and tribes.

More recently, in *Bracker*, the Court articulated a balancing test, that is still in place today, to determine if preemption applies when dealing with federal, state, and tribal interests.[57] In *Bracker*, a company employed by the tribe protested its obligation to pay state taxes for harvesting timber on a reservation.[58] The company claimed that the state tax was preempted by federal law and interfered with tribal self-governance.[59] The Court held 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-governance, as was the case here.[60] The Court required a careful balancing of federal,

51. Michael J. Bulzomi, *Indian Country and the Tribal Law and Order Act of 2010*, FBI L. ENF'T BULL. (May 1, 2012), https://leb.fbi.gov/articles/legal-digest/legal-digest-indian-country-and-the-tribal-law-and-order-act-of-2010 (citing 18 U.S.C. § 1162(d)).

52. *Id.*

53. Worcester v. Georgia, 31 U.S. 515, 537, 561–62 (1832).

54. *Id.* at 537–38.

55. *Id.* at 561–62.

56. *Id.* at 561.

57. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144–45 (1980).

58. *Id.* at 137–39.

59. *Id.* at 138.

60. *Id.* at 152 (citing Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685, 688–91 (1965)).

state, and tribal interests to determine if there was a sufficiently strong state interest for disrupting a federal scheme or tribal sovereignty.[61]

In 2020, the Supreme Court's decision in *McGirt* appeared to reaffirm its commitments to tribal sovereignty in the eyes of many Native peoples.[62] In this case, an Oklahoma court convicted Seminole Native tribal member, Jimcy McGirt, for committing sexual offenses on land within the Creek Nation reservation.[63] McGirt argued the Major Crimes Act required that a federal court try him for crimes on an Indian reservation, not a state court.[64] Oklahoma argued the Creek Nation reservation lands no longer qualified as Indian Territory under the Major Crimes Act, so the state court had jurisdiction.[65] The heart of this dispute was whether the Creek Nation reservation was Indian Territory as defined by the Major Crimes Act.[66] After doing a thorough historical analysis, focusing on past treaties, the Court firmly concluded the Creek Nation reservation was Indian Territory under the Major Crimes Act.[67] The Court's analysis acknowledges the long history that preserves tribal sovereignty by evaluating past treaties. The Court even noted that Oklahoma mistakenly prosecuted Native peoples for crimes committed on reservation land for decades, despite the Major Crimes Act.[68] Thus, the Court confirmed that the Major Crimes Act gives federal courts exclusive jurisdiction to try Native Americans for serious crimes committed in Indian country, and that states generally cannot try those crimes.[69]

In its analysis, the Court acknowledged that only Congress can establish a reservation, and that Congress had established the Creek Nation reservation in the 1830s and guaranteed it would remain Indian Territory.[70] Beginning in the 1880s, Congress divided communally owned reservations into individually owned parcels.[71] In 1901, the Creek Nation agreed to allotment in hopes of better protecting their property rights. Tribal members were then permitted by the federal government to hold, in trust, individual parcels of their reservation land, which, after twenty-five years, they could hold complete, fee simple ownership of.[72] However, Congress never passed an enactment disestablishing the entire reservation.[73]

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61. *Id.* at 151–52 (citing *Warren Trading Post*, 380 U.S. at 688–91).

62. Julian Brave NoiseCat, *The* McGirt *Case Is a Historic Win for Tribes*, THE ATLANTIC (July 12, 2020), https://www.theatlantic.com/ideas/archive/2020/07/mcgirt-case-historic-win-tribes/614071/; *see* McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020).

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

64. *Id.*

65. *Id.* at 2459–60.

66. *Id.* at 2459.

67. *Id.* at 2460–78.

68. *Id.* at 2470.

69. *Id.* at 2478, 2482.

70. *Id.* at 2460–61, 2474.

71. *McGirt*, 140 S. Ct. at 2463.

72. *Id.* This time period is generally referred to as the allotment era. *See generally Land Tenure History*, INDIAN LAND TENURE FOUND., https://iltf.org/land-issues/history/ (last visited Dec. 23, 2023).

73. *McGirt*, 140 S. Ct. at 2464–65.

Supreme Court precedent confirms that once Congress establishes a reservation, it remains a reservation until Congress explicitly disestablishes it.[74] Thus, though the Creek Nation ceded their original homeland east of the Mississippi when accepting the Oklahoma reservation, and rights to a portion of that reservation in 1866, the Creek Nation never gave up tribal rights to the remainder of the unceded land which it therefore had jurisdiction over.[75]

Here, because McGirt committed major crimes as an Indian, on Indian Territory, a federal trial was required.[76] The Court, accordingly, reversed the judgment denying McGirt relief.[77] *McGirt* signified an immense victory for Native communities: the Supreme Court was willing to do the work to recognize tribal sovereignty where the state had repeatedly ignored it. This gave power back to the tribes and allowed the federal government to prosecute crimes committed by Indians and non-Indians in Indian Territory.

To better understand the landscape of *Castro-Huerta*, which diminishes the victory of *McGirt* just two years later, it is important to note *McGirt*'s critical impact. Functionally, *McGirt* transferred the jurisdiction of matters that were traditionally, albeit incorrectly, handled by states back to federal and tribal governments; this created a backlog in the courts.[78] Since resources were held by the state, tribal governments were not adequately prepared to handle both the influx of cases that were currently sitting in state courts waiting to be tried *and* cases that had been heard in state court and were seeking a retrial.[79] Therefore, Oklahoma grew concerned about the cases left unprosecuted due to this backlog. Additionally, Oklahoma was hesitant to act where jurisdiction was unclear, thus creating a delay in response time for police.[80] This delay created a concern for safety and led to the Oklahoma Attorney General filing numerous petitions with the Supreme Court to reverse the *McGirt* decision.[81] The state argued *McGirt* "led to the reversal of convictions of crimes committed by non-Indians against" Indians, and the state "ha[d] legitimate interests both in protecting its Indian citizens and in enforcing its criminal laws against non-Indian citizens."[82] The state further claimed that since it had previously been

74. *Id.*

75. *Id.* at 2464 (citing Treaty with the Creeks, Creek Tribe-U.S., art. I, Mar. 24, 1832, 7 Stat. 366; Treaty with the Creeks, Creek Tribe-U.S., art. III, June 14, 1866, 14 Stats. 785).

76. *Id.* at 2480.

77. *Id.* at 2482.

78. Curtis Killman, *Feds Decline More than 5,800 Criminal Cases Since* McGirt *Ruling*, TULSA WORLD (July 10, 2023), https://tulsaworld.com/news/state-and-regional/crime-and-courts/feds-decline-more-than-5-800-criminal-cases-since-mcgirt-ruling/article_0cf8aa3e-dd0a-11ec-ab20-737a4fd2f591.html#tncms-source=login.

79. *See id.*

80. *See id.*; Brief of the City of Tulsa as Amicus Curiae in Support of Petitioner at 3–4, Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022) (No. 21-429).

81. Chris Casteel, *O'Connor Files New Petitions Asking High Court to Reverse* McGirt, THE OKLAHOMAN (Sept. 20, 2021, 9:40 AM), https://www.oklahoman.com/story/news/local/oklahoma-city/2021/09/20/ok-john-oconnor-supreme-court-petitions-reverse-mcgirt-decision/8383044002/.

82. *Id.*

responsible for prosecuting such crimes, the federal government and tribal communities "demonstrably lack[ed] the capacity and resources to take over that responsibility."[83] By the time *Castro-Huerta* was on the Supreme Court's docket, this was the general anxiety the Supreme Court was forced to address.

Until the Supreme Court delivered its opinion in *Castro-Huerta*, the decisions in *Worcester*, *Bracker*, and *McGirt* were still good law and not impliedly overruled. Just two years later, however, the Court derailed its well-settled precedent by claiming Indian Country is jurisdictionally a part of the state because Congress has not preempted states' inherent authority over Indian Territory.[84] This decision not only contradicts the precedent discussed above, but also undermines assertions made by many leading commenters who concede the Marshall Trilogy[85] and that the principle of tribal self-governance remain intact.[86]

II. *OKLAHOMA V. CASTRO-HUERTA*

A. Facts and Procedural History

In 2015, the State of Oklahoma charged Victor Manuel Castro-Huerta with child neglect.[87] Castro-Huerta, a non-Indian, allegedly neglected his stepdaughter, a Cherokee Native, in Tulsa, Oklahoma, which was not considered Indian Territory at the time.[88] His stepdaughter was five years old, had cerebral palsy, and was legally blind.[89] She was rushed to the hospital after a 911 call from Castro-Huerta's sister-in-law who feared for the girl's life.[90] The girl was dehydrated, emaciated (weighing only nineteen pounds), "and covered in lice and excrement" and investigators later discovered the girl's "bed [was] filled with bedbugs and cockroaches."[91] The state court convicted Castro-Huerta and sentenced him to thirty-five years of imprisonment.[92] While Castro-Huerta's state-court appeal was pending, the Supreme Court decided *McGirt*, which resulted in Tulsa being recognized as Indian Territory.[93] Because of this, Castro-Huerta argued that the federal government should have jurisdiction

83. *Id.*
84. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2503 (2022).
85. Fletcher, *supra* note 7 ("The history of Indian law in the Supreme Court opens with the Marshall Trilogy—*Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); and *Worcester v. Georgia*, 31 U.S. 515 (1832). The Trilogy, primarily authored by Chief Justice John Marshall, established federal primacy in Indian affairs, excluded state law from Indian country, and recognized tribal governance authority. Moreover, these cases established the place of Indian nations in the American dual sovereign structure that still governs today.").
86. *See* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.01 (Nell Jessup Newton ed., 2023).
87. *Castro-Huerta*, 142 S. Ct. at 2491.
88. *Id.* at 2491–92.
89. *Id.* at 2491.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 2491–92 (citing McGirt v. Oklahoma, 140 S. Ct. 2452 (2020)).

over his appeal rather than the state.[94] The Oklahoma Court of Criminal Appeals agreed and vacated his conviction.[95] On January 21, 2022, the Supreme Court granted certiorari to determine the extent of a state's jurisdiction "to prosecute crimes committed by non-Indians against Indians in Indian" Territory.[96]

B. Opinion of the Court

Justice Kavanaugh authored the majority opinion, while Chief Justice Roberts and Justices Alito, Barrett, and Thomas joined.[97] The Court framed *Castro-Huerta* as a preemption issue and held that the State and federal government have concurrent jurisdiction in this scenario rather than the federal government having exclusive jurisdiction.[98] Consequently, Castro-Huerta was not entitled to a federal trial.[99]

Castro-Huerta argued that the federal government had exclusive jurisdiction to prosecute him and therefore, the State lacked jurisdiction to prosecute him.[100] Castro-Huerta pointed to two federal laws—the General Crimes Act and Public Law 280—"that, in his view, preempt Oklahoma's authority to prosecute crimes committed by non-Indians against Indians in Indian" Territory.[101] First, Castro-Huerta claimed "the General Crimes Act makes Indian [Territory] the jurisdictional equivalent of a federal enclave."[102] Second, he argued Public Law 280's enactment "in 1953 would have been [a] pointless surplusage if States already had concurrent jurisdiction."[103]

The majority disagreed.[104] In addressing Castro-Huerta's first argument, the Court held the General Crimes Act does not preempt state authority to prosecute.[105] By its terms, "the Act simply 'extend[s]'" the federal laws that apply on federal enclaves to Indian Territory.[106] The Act "does not say that Indian [Territory] is equivalent to a federal enclave for jurisdictional purposes, . . . that federal jurisdiction is exclusive in Indian [Territory], or that state jurisdiction is preempted in Indian [Territory]."[107] Therefore, as a matter of text and precedent, Castro-Huerta's first

94. *Id.* at 2492.
95. *Id.*
96. *Id.* at 2492–93.
97. *Id.* at 2490.
98. *Id.* at 2493, 2504–05.
99. *See id.* at 2504–05.
100. *Id.* at 2495. Though not explicit, Castro-Huerta's motivation for seeking federal jurisdiction over state jurisdiction could be for a number of reasons, including but not limited to: different jury selection; different governing code; different penalties; delay litigation; or personal desire for the recognition of *McGirt's* holding.
101. *Id.* at 2494.
102. *Id.* at 2495.
103. *Id.* at 2500.
104. *Id.* at 2495–96, 2500.
105. *Id.* at 2495.
106. *Id.* (quoting 18 U.S.C. § 1152).
107. *Id.*

argument failed.[108] The majority also addressed his second argument and determined that it, too, was insufficient.[109] The Court held that "Public Law 280 affirmatively grants certain States," and allows other states to acquire, "broad jurisdiction to prosecute state-law offenses committed by or against Indians in Indian" Territory.[110] Public Law 280 does not contain language preempting state jurisdiction, and it "encompasses far more than just non-Indian on Indian crimes."[111] Thus, "resolution of the narrow jurisdictional issue in this case does not negate the significance of Public Law 280."[112]

The majority also pointed to the test articulated in *Bracker* to support its conclusion.[113] The Court determined that after balancing federal, state, and tribal interests, Oklahoma was not barred "from prosecuting crimes committed by non-Indians against Indians in Indian" Territory.[114] In its analysis, the Court noted that "the exercise of state jurisdiction . . . would not infringe on tribal" self-governance.[115] Additionally, since state and federal jurisdictions would be concurrent in this context, state prosecutions do not preclude federal prosecution.[116] Finally, the Court explained that Oklahoma had "a strong sovereign interest in ensuring public safety and criminal justice within its" borders.[117] Due to the strong state interest and lack of infringement on tribal self-governance, Oklahoma was not preempted by federal or tribal law from prosecuting Castro-Huerta and therefore had legitimate authority to hear his case rather than turning it over to a federal court.[118]

C. Justice Gorsuch's Dissenting Opinion

Justice Gorsuch's dissent—joined by Justices Breyer, Sotomayor, and Kagan—framed the issue not as one of preemption, but rather of ignored precedent.[119] The dissent first analyzed historical constitutional formation, case history, treaties, and statutes to emphasize the long line of precedent that acknowledges tribal sovereignty in Oklahoma.[120] Alternatively, the dissent asserted that the authority the majority relied on is no more than "a string of carefully curated snippets—a clause here, a sentence there—from six decisions out of the galaxy of this Court's Indian law

108. *Id.*
109. *Id.* at 2499.
110. *Id.* (citing 18 U.S.C. § 1162; 25 U.S.C. § 1321).
111. *Id.* at 2500.
112. *Id.*
113. *Id.* at 2500–01; *see also* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142–43, 145 (1980) (determining that there should be a careful balancing of federal, state, and tribal interests to determine if there is a sufficiently strong enough state interest to disrupt a federal scheme or tribal sovereignty).
114. *Castro-Huerta*, 142 S. Ct. at 2501.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 2501–02.
119. *Id.* at 2505, 2510 (Gorsuch, J., dissenting).
120. *Id.* at 2505–11.

jurisprudence."[121] The dissent critiqued the majority for trying to justify its ruling under states' broad police powers, absent federal preemptive law, within their borders.[122] This justification positions the issue in the wrong category.[123] The dissent highlighted that the interested party is not just Castro-Huerta, as the Cherokee Nation, which ironically was not even a party to this case, had more at stake yet could only voice concerns through an amicus curiae brief.[124]

The dissent then pivoted to the heart of its argument, opining that "[t]ribes are not private organizations within state boundaries"—they are sovereign.[125] Therefore, ordinary preemption analysis for this scenario as articulated in *Bracker* is simply not applicable:

> Tribal sovereignty means that the criminal laws of the States "can have no force" on tribal members within tribal bounds unless and until Congress clearly ordains otherwise. After all, the power to punish crimes by or against one's own citizens within one's own territory to the exclusion of other authorities is and has always been among the most essential attributes of sovereignty.[126]

The dissent then noted how "Congress's work and this Court's precedent yield three clear principles that firmly resolve this case."[127] First, tribal sovereign authority inherently excludes the functions "of other sovereigns' criminal laws unless and until Congress" commands otherwise.[128] Second, though Congress has extended a large portion of federal criminal law to Indian Territory, in Oklahoma specifically, the state can only prosecute crimes by or against Indians within Indian Territory if it has met certain requirements.[129] Specifically, Public Law 280 requires that Oklahoma "remove state-law barriers to jurisdiction and obtain tribal consent" to prosecute these crimes.[130] Third, since Oklahoma has not met either of these requirements, it lacks jurisdictional authority.[131] In the words of Justice Gorsuch, "[u]ntil today, all this settled law was well appreciated by this Court, the Executive Branch, and even Oklahoma."[132]

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121. *Id.* at 2520.
122. *Id.* at 2511.
123. *Id.*
124. *Id.* at 2510–11. ("Really, though, this case has less to do with where Mr. Castro-Huerta serves his time and much more to do with Oklahoma's effort to gain a legal foothold for its wish to exercise jurisdiction over crimes involving tribal members on tribal lands. . . . The real party in interest here isn't Mr. Castro-Huerta but the Cherokee, a Tribe of 400,000 members with its own government. Yet the Cherokee have no voice as parties in these proceedings; they and other Tribes are relegated to the filing of amicus briefs.").
125. *Id.* at 2511.
126. *Id.* (quoting Worcester v. Georgia, 31 U.S. 515, 561 (1832).
127. *Id.* at 2518.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*

III. ANALYSIS

The majority's opinion in *Castro-Huerta* signaled a grave departure from precedent that previously recognized and respected the existence of tribal sovereignty.[133] This has a multitude of negative consequences for tribal communities,[134] which this Comment will explore. Sections A and B will explore negative impacts on Native safety and governmental relationships. Section C will explain the importance of investing in Native communities instead of rashly transferring tribal jurisdiction to the states. Section D will then explore broader impacts the majority decision may have in light of the Land Back movement.

A. Immediate Impact on Native Safety Explored

In the abstract, it is not difficult to imagine the negative impact of *Castro-Huerta* on tribal sovereignty. In the words of Tara Widner, who is Red Lake Band of Chippewa, "[W]hen you start thinking about it a little deeper . . . the implications of this case [in conjunction with the Indian Child Welfare (ICWA) case coming up][135] and the chipping away of sovereignty, it's horrifying."[136] Moreover, the consequences that jurisdictional disputes will have on effective policing are also immediately detrimental to tribes and states.[137]

The varying different sources of law and cases interpreting jurisdiction have already caused confusion.[138] Widner spoke of her lived experience in Minnesota, which is already a Public Law 280 state:

> There is a lot of confusion as it stands right now with jurisdiction: if the police are going to come onto [the Red Lake Reservation], they have to ask for permission. Whereas, in one of the other counties where the White Earth reservation is, [the police] can come right through there with sirens blaring and pull over whoever they want . . . it really does bring up some interesting jurisdictional [questions].[139]

Considering that "[p]ublic safety in Indian [Territory] is already incredibly complex due to overlapping jurisdiction[,] [e]xpanding jurisdiction to states adds additional law enforcement actors (and more confusion)

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133. *See generally* Fletcher, *supra* note 7.

134. *See Castro-Huerta*, 142 S. Ct. at 2505 (Gorsuch, J., dissenting).

135. *See generally* Haaland v. Brackeen, 143 S. Ct. 1609, 1622–23 (2023) (rejecting "all of petitioners' challenges to" the Indian Child Welfare Act that protects Indian children and families from unjust separations). The Supreme Court's decision on whether ICWA, which protects Indian children and families from unjust separations, goes beyond the power of Congress had not been passed down at the time this interview was conducted. The Supreme Court ultimately decided ICWA is consistent with congressional powers and upheld its legitimacy).

136. Telephone Interview with Tara Widner, Indigenous Educator & Indigenous Def. Supporter (Oct. 19, 2022) [hereinafter Tara Widner Interview] (on file with author).

137. *See id.*

138. *Id.*

139. *Id.*

into the mix."[140] There are real negative implications regardless of whether an individual is on or off Indian Territory due to "[u]ncertainty over who to call, which police will respond, and who will prosecute a case."[141] *Castro-Huerta* erodes sovereignty for Native nations to govern their people and will ultimately diminish the effectiveness of policing on Native lands due to this jurisdictional confusion.

Additionally, the relationship between state and tribe "can impact service delivery quality."[142] "Many states, counties, and local governments actively ignore treaties" and instead expend resources to dispute the jurisdictional bounds of Indian Territories.[143] When resources are used to dispute jurisdictional bounds, they are not, in turn, used to actually deliver police services. For example, Mille Lacs County in Minnesota suddenly "terminated its 25-year-long cooperative policing agreement with the Mille Lacs Band of Ojibwe in 2016."[144] This agreement was initially formed because "Mille Lacs County and the Mille Lacs Band of Ojibwe [were] involved in an ongoing dispute over the borders of the Mille Lacs Reservation."[145] The cooperative agreement allowed tribal police "to provide law enforcement on the reservation."[146] Without the agreement, tribal officers lacked the authority "to act as peace officers and pursue their own investigations."[147] Instead, tribal officers would have only had the authority to arrest suspects and "turn them over to the sheriff's office."[148] Mille Lacs County terminated the agreement because the relationship between the parties was no longer cooperative and the land dispute intensified when the Mille Lacs Band of Ojibwe "applied to the U.S. Department of Justice to allow federal prosecutors to charge crimes committed on the reservation."[149] Mille Lacs County viewed this as a strategic move to advance the tribe's political goals of having 57,000 acres of disputed land recognized as reservation lands.[150] The termination resulted in a sudden loss of public safety resources on the Mille Lacs Reservation and it is estimated that within two years, "100 Tribal citizens lost their lives" because police calls went unanswered.[151] This example illustrates what future policing, after

140. Wayne L. Ducheneaux, II, Oklahoma v. Castro-Huerta*: Bad Facts Make Bad Law*, NATIVE GOVERNANCE CTR. (July 14, 2022), https://nativegov.org/news/castro-huerta/.

141. *Id.*

142. *Id.* Services delivered by police officers include, but are not limited to, responding to calls, enforcing the law, preventing criminal activity, investigating crimes, mediating disputes, and protecting victims.

143. *Id.*

144. *Id.*

145. *Id.*

146. Kirsti Marohn, *Lack of Agreement Between Mille Lacs Band, County Leaves Tribal Officers Without Policing Power*, MINN. PUB. RADIO NEWS (Oct. 10, 2017, 4:00 AM), https://www.mprnews.org/story/2017/10/10/lack-of-agreement-between-mille-lacs-band-county-leaves-tribal-officers-without-policing-.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *See* Ducheneaux, *supra* note 140.

Castro-Huerta, will look like as cooperation between states and tribes diminishes, and most police power returns to the state.

Moreover, "[p]ublic safety is expensive."[152] "States who participate in Public Law 280 do not receive" supplemental funds from the federal government, even though they are forced to adopt increased law enforcement duties.[153] "*Castro-Huerta* will likely result in further pressure on state budgets and law enforcement capacity," which will impact all Oklahomans.[154] The scramble to find and shift resources to maximize police sufficiency could be better focused in a way that preserves tribal sovereignty, as discussed below.

B. Castro-Huerta's Impact on Tribal, State, and Federal Relationships Explored

Not only must one consider the immediate negative impacts on Native safety following the *Castro-Huerta* decision, but one must also contemplate the broader message Justice Kavanaugh puts forth. Native communities feel misunderstood and neglected, just as they were when America was first conquered.[155] This opinion derails 200 years of fighting for sovereignty, cooperation, respect, and peace. Speaking with a few representatives from the Water Protector Legal Collective (WPLC) solidified this observation. Nizhoni Begay, Diné and Quechua, explained that the majority opinion's discussion of tribal law as insignificant in the real world is synonymous to the United States' arguments about international law.[156] Begay said, "[I]t's almost this idea that anything that is not the federal government is insignificant, which I find not only baffling but super disrespectful."[157]

Sandra Freeman, a staff attorney focused primarily in criminal defense for the WPLC, also highlighted a point in the majority opinion that stated, "[M]ost everyone in Oklahoma previously understood that the state included almost no Indian country."[158] Freeman further explained this is "the perspective of the conqueror taken for granted as the basis for all law."[159] When asked what the majority opinion intended to communicate, Freeman responded:

> It comes down to . . . the Supreme Court Justices[] creating these reasonable person standards that really depend on just who they are and

152. *Id.*
153. *Id.*
154. *Id.*
155. *See* NAT'L GEOGRAPHIC, *supra* note 2.
156. Telephone Interview with Nizhoni Begay, Commc'ns & Dev. Coordinator, Water Protector Legal Collective (Oct. 19, 2022) [hereinafter Nizhoni Begay Interview] (citing Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2499 (2022)) (on file with author).
157. *Id.*
158. Telephone Interview with Sandra Freeman, Staff Att'y, Water Protector Legal Collective (Oct. 19, 2022) [hereinafter Sandra Freeman Interview] (quoting Castro-Huerta, 142 S. Ct. at 2499) (on file with author).
159. *Id.*

> their [point of view] in the world, and affirm[s] that [the Court's] understanding of treaties, and native people, and their rights, as being almost antiquities.[160]

When asked the same question, Widner responded with a genuine contemplation: "I don't know if . . . [Justice Kavanaugh] just never read the Constitution . . . did [he] just disregard 200 years of Native law?"[161]

McGirt recognized what Native communities already believed to be true: Oklahoma is Native land.[162] Freeman pointed out how even under an originalist interpretation, "Oklahoma wasn't a place until 1907 and [Oklahoma] is . . . Choctaw words to mean . . . 'red people' because it was [Native Territory]."[163] In deciding *McGirt*, the Court was cautious and intentional in its reasoning, and implied that even though its decision would create backlog, jurisdiction would depend on an analysis of each independent "nation's history with the United States."[164] *Castro-Huerta* does the exact opposite; it sweeps Public Law 280's jurisdiction across all states and tribal nations alike.[165] After discussing the distinct differences within her family's communities, Begay explained how "[grouping all nations together as Indians] proves to me how little Justices like Kavanaugh and people that sit on the Supreme Court know about how diverse our communities are."[166]

After this decision, Native communities find themselves lacking autonomy in the face of sweeping state jurisdictional authority.[167] *Castro-Huerta* unravels the fragile relationship between tribal, state, and federal government that took over 200 years to establish.[168] What was once firm precedent is now uncharted terrain that creates a future of fear and uncertainty for Native peoples. In Begay's own words, "[T]he protections that *McGirt* afforded us weren't even perfect, but they were in place and undermining what they call 'the supreme law of the land' is contradictory to years of history and years of pain that Indigenous peoples in this country have suffered."[169]

C. Proposal: Invest Resources Back into Native Communities

Rather than encroaching on federal and tribal authority to prosecute non-Indians in Indian Territory, this Comment proposes that states should invest in Native communities and give them the tools and resources to clear the backlog that occurred after *McGirt* was decided. Investing in

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160. *Id.*
161. Tara Widner Interview, *supra* note 136.
162. *Id.*
163. Sandra Freeman Interview, *supra* note 158.
164. *Id.*
165. *Id.*
166. Nizhoni Begay Interview, *supra* note 156.
167. *See* Sandra Freeman Interview, *supra* note 158.
168. *See generally* Fletcher, *supra* note 7.
169. Nizhoni Begay Interview, *supra* note 156.

Native communities would allow for prosecution of those crimes against Native peoples that the state has not seemed to prioritize in the past—namely, for murdered and missing Indigenous women and girls.[170]

The holding in *Castro-Huerta* further diminishes Native rights and systematically takes away tribes' capacity to manage their own communities. It is important to emphasize that "[f]ollowing the *McGirt* decision, Native nations in Oklahoma have worked hard to collaborate with non-tribal governments to create clearly-defined systems for criminal apprehension, prosecution, and detention."[171] Native nations have "invested significant resources in these processes to ensure that all Oklahomans, both Native and non-Native, receive fair and responsive treatment."[172] However, in the wake of *Castro-Huerta*, "Oklahoma's actions to exert jurisdiction could undo the cooperative progress made between non-tribal governments and Native nations," almost identical to what occurred on the Mille Lacs Reservation.[173] What occurred on the Mille Lacs Reservation offers us grave insight into what Oklahoma's future might be without continued cooperation between non-tribal governments and Native nations. Instead, the state should continue this cooperative framework,[174] or it should invest its resources into Tribal police and court systems so they can better handle the influx of cases post-*McGirt*.

The unique threat of violence Native women face demonstrates why investing in Native communities is better than handing over jurisdiction to the state. Native "women are murdered at a rate [ten] times higher than the national average, and homicide is one of the leading causes of death for young" Native women.[175] Additionally, "Native American women suffer sexual assault at a much higher rate and with more serious consequences than any other racial or ethnic group in the United States."[176] Such sexual assaults are consistently committed by individuals who are not within Native American community.[177] Thus, these crimes typically fall under those committed by Non-Natives against Natives that the states now have jurisdiction over.[178] In 2019, Alaskan Senator, Lisa Murkowski, stated: "[M]any women disappear from remote reservations—some that lack even a single police officer. Other times, cases get lost in a confusing web of

170. *#MMIW: Missing and Murdered Indigenous Women*, SICANGU CMTY. DEV. CORP. (Nov. 12, 2020), https://web.archive.org/web/20210922032050/https://sicangucdc.org/blog/f/mmiw-missing-and-murdered-indigenous-women.

171. Ducheneaux, *supra* note 140.

172. *Id.*

173. *Id.*; *see generally* Marohn, *supra* note 146.

174. Ducheneaux, *supra* note 140.

175. SICANGU CMTY. DEV. CORP., *supra* note 170 (citation omitted).

176. *Id.* (quoting Marie Quasius, *Note: Native American Rape Victims: Desperately Seeking an Oliphant-Fix*, MINN. L. REV. (Jan. 24, 2012), https://minnesotalawreview.org/article/note-native-american-rape-victimes-desperately-seeking-oliphant-fix/).

177. *Id.* (quoting Quasius, *supra* note 176).

178. *See* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2491 (2022).

jurisdictional conflicts between tribal, local, and state police."[179] There is also speculation "that some victims are simply discounted because of their race or involvement in prostitution."[180] These specific issues are unique to Native communities and state governments have not given them adequate attention.[181]

Specifically, Oklahoma currently has no effective law or initiative in place to address this crisis. The Ida Law is frequently critiqued as inadequate because it is slow and lacks funding.[182] Rather than assigning an agent to track and investigate missing and murdered Native peoples, which is the current strategy under the Ida Law, Oklahoma should apply a system similar to the one used by the State of Washington. Washington utilizes an alert system that creates a rapid response to find and assist Native people in danger—similar to an America's Missing: Broadcast Emergency Response (AMBER Alert).[183] When states have discretion on how to prioritize this crisis, though, fatal differences will persist.[184]

Given that these issues are unique to Native communities, it makes sense that tribes should have the authority to prosecute these crimes rather than the state. Elizabeth Hidalgo Reese, an Assistant Professor at Stanford Law,[185] has stated: "[T]hese messy jurisdictional rules . . . have a death toll—particularly for Native Women. Being under-prioritized by outside sovereigns does not create more safety, it creates dangerous chaos."[186] Professor Reese goes on to explain that "[t]he [Violence Against Women Act]

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179. SICANGU CMTY. DEV. CORP., *supra* note 170 (quoting Scott McLean & Sara Weisfeldt, *Why Do So Many Native American Women Go Missing? Congress Aiming to Find Out*, CNN (Apr. 9, 2019, 6:14 PM), https://www.cnn.com/2019/04/09/us/native-american-murdered-missing-women/index.html).

180. *Id.* (quoting McLean & Weisfeldt, *supra* note 179).

181. *See id.*

182. Rebecca Najera & Whitney Bryen, *Ida's Law: The Promise, Limitations of Oklahoma's Pursuit of Justice for Indigenous People*, THE NORMAN TRANSCRIPT (Nov. 5, 2021), https://www.normantranscript.com/news/ida-s-law-the-promise-limitations-of-oklahoma-s-pursuit-of-justice-for-indigenous-people/article_98e033da-3e4c-11ec-a75c-8b8f43ec8599.html.

183. *Id.*; Kimberly Cauvel, *State's Missing Indigenous Person Alert Now Active*, NOOKSACK INDIAN TRIBE (July 25, 2022), https://web.archive.org/web/20221207040120/https://nooksack-tribe.org/uncategorized/2022/states-missing-indigenous-person-alert-now-active/.

184. The federal government, unlike all states, has at a minimum definitively recognized the importance of these issues. Thus, the federal government and tribal nations are more demonstrably representing tribal interests. For example, President Joe Biden proclaimed May 5th to be National Missing or Murdered Indigenous Persons Awareness Day. *A Proclamation on Missing Or Murdered Indigenous Persons Awareness Day, 2022*, THE WHITE HOUSE (May 4, 2022), https://www.whitehouse.gov/briefing-room/presidential-actions/2022/05/04/a-proclamation-on-missing-or-murdered-indigenous-persons-awareness-day-2022/#:~:text=BIDEN%20JR.%2C%20President%20of%20the,Murdered%20Indigenous%20Persons%20Awareness%20Day. Additionally, Interior Secretary Deb Haaland created a Bureau of Indian Affairs unit last year which is devoted to closing these unsolved cases. *Secretary Haaland Creates New Missing & Murdered Unit to Pursue Justice for Missing or Murdered American Indians and Alaska Natives*, U.S. DEP'T OF THE INTERIOR (Apr. 1, 2021), https://www.doi.gov/news/secretary-haaland-creates-new-missing-murdered-unit-pursue-justice-missing-or-murdered-american.

185. *Elizabeth Hidalgo Reese*, STAN. L. SCH., https://law.stanford.edu/directory/elizabeth-reese/ (last visited Dec. 23, 2023).

186. Elizabeth Hidalgo Reese (@yunpovi), X (June 29, 2022, 5:18 PM), https://twitter.com/yunpovi/status/1542286479015026688.

2013[187] prosecutions have shown that tribes are the local governments who are best equipped to prioritize, prosecute, and handle these [non-Native on Native] cases with care and compassion."[188] Begay also spoke to the immediate impacts that the *Castro-Huerta* decision will have for Native communities. Begay expressed concern over "handing power right back to states and the federal government to decide those cases" where "most [Native] women experience domestic violence at the hands of a [non-Native] person."[189] Women, whose cases already often go unreported, "may be even more deterred" from speaking out because they do not want to travel to state court to fight against their abuser in a place outside the comfort of their own community.[190] Begay emphasized, "From a survivor standpoint, that is another painful part of this whole conversation."[191]

Mille Lacs Reservation's example of the negative impact on safety for Native peoples and a close examination of violence against Native women proves that lack of tribal jurisdiction will have a severe negative impact on Native communities. In the wake of the Supreme Court's decision in *Castro-Huerta*, this is the path Oklahoma is left to follow. To avoid these negative implications, states should invest their resources in tribal communities to govern their own matters, which is a key part of being a sovereign nation, or they should work to continue the cooperative framework that progressed after *McGirt* between state and tribe.

D. Policy Implications: LANDBACK Movement

The negative implications that *Castro-Huerta* has for Native peoples are amplified when viewed in light of the LANDBACK movement.[192] The LANDBACK movement "has existed for generations with a long legacy of organizing and sacrifice to get Indigenous Lands back into Indigenous hands."[193] The LANDBACK movement is fighting battles all across North America.[194] Currently, a large battle involves returning the public lands in the Black Hills of South Dakota back to tribes, namely the Lakota Sioux.[195] "Not only does Mount Rushmore sit in the heart of the sacred Black Hills, but it is an international symbol of white supremacy and colonization."[196] Though the Supreme Court recognized the Black Hills were unconstitutionally taken and awarded a $120.5 million settlement to the Sioux, the Sioux have never accepted the payment and instead maintain "that 'the

187. Violence Against Women Act, 34 U.S.C. §§ 12291–12514.
188. Hidalgo Reese, *supra* note 186.
189. Nizhoni Begay Interview, *supra* note 156.
190. *Id.*
191. *Id.*
192. LANDBACK, https://landback.org/ (last visited Dec. 23, 2023).
193. *Id.*
194. *Id.*
195. *Native Americans and Mount Rushmore*, PUB. BROAD. SERV., https://www.pbs.org/wgbh/americanexperience/features/rushmore-sioux/ (last visited Dec. 23, 2023).
196. LANDBACK, *supra* note 192.

Black Hills are not for sale.'"[197] In the words of Lakota matriarch, Madonna Thunder Hawk: "The only reparation for land is land."[198] The LANDBACK movement also represents a "political, organiz[ational,] and narrative framework from which" tribes work towards true collective liberation "[t]o truly dismantle white supremacy and systems of oppression."[199]

In the wake of *Castro-Huerta*, the effects of the LANDBACK movement means that more lands could be transferred back to Native ownership, emphasizing the importance of an understanding as to where jurisdictional boundaries lie. This movement is not one of pure theory, rather of imminent reality. As recently as July 2022, the Onondaga Nation "recovered more than 1,000 acres of forest lands."[200] The Interior Department described this as one of "the largest returns of land to" a Native nation by a state in history.[201] Not only are states pivotal actors, but private parties are too. In December 2021, "[a] Washington state lumber company . . . returned more than 1,000 acres of ancestral land . . . to the Squaxin Island Tribe at no cost."[202] When asked what inspired the return, the company's president said, "The obvious thing to do was simply give it back . . . it's about time."[203] This emphasizes that even if courts and states may fail to acknowledge or participate in the LANDBACK movement, public interest and private actors can act quickly and continue the momentum initiated by Native peoples. Therefore, as physical boundary lines of tribal lands expand, understanding jurisdiction and placing it in the right hands is of the utmost importance to the continued safety, wellbeing, and sovereignty of tribal nations.

CONCLUSION

Legislative precedent including the General Crimes Act, Major Crimes Act, and Public Law 280, established that tribes and the federal government retained jurisdiction over Indian or non-Indians in Indian Territory with limited interference from the states.[204] Past case law, especially the *McGirt* decision, further cemented this principle and confirmed the Court's commitment to honor past treaties and the dark history from which

197. *Return Mount Rushmore and the Black Hills to the Lakota!*, LAKOTA PEOPLE'S L. PROJECT ACTION CTR., https://action.lakotalaw.org/action/land-back (last visited Dec. 23, 2023).

198. *#LandBack Is Climate Justice*, LAKOTA PEOPLE'S L. PROJECT (Aug. 14, 2020), https://lakotalaw.org/news/2020-08-14/land-back-climate-justice.

199. LANDBACK, *supra* note 192.

200. *Onondaga Land Back Victory*, ICT (July 5, 2022), https://indiancountrytoday.com/news-casts/joe-heath-07-05-2022.

201. *Id.*

202. Brooke Migdon, *Lumber Company Returns Waterfront Property to Native American Tribe in Washington State at No Cost*, THE HILL: CHANGING AM. (Dec. 25, 2021), https://thehill.com/changing-america/sustainability/environment/587152-lumber-company-returns-waterfront-property-to/#:~:text=A%20Washington%20state%20lumber%20company,Companies%20for%20an%20undisclosed%20amount.

203. *Id.*

204. General Crimes Act, 18 U.S.C. § 1152; Major Crimes Act, 18 U.S.C. § 1153; 28 U.S.C. § 1360; 18 U.S.C. § 1162.

they were established.[205] However, Justice Kavanaugh's majority opinion framed the issue in *Castro-Huerta* as one of preemption, and ignored not only the Court's recent precedent in *McGirt*, but also 200 years of history.[206] In doing so, Justice Kavanaugh melded Oklahoma and tribal nations into one and ignored the constitutional principle of tribal sovereignty. The dissent correctly recognized this mistake and grounded its opinion in precedent overlooked by firmly opposing Oklahoma's expanded jurisdiction into sovereign nations, acknowledging "[w]here this Court once stood firm, today it wilts."[207]

The Court's decision in *Castro-Huerta* has had immediate negative impacts on the efficacy of policing and will substantially erode tribal sovereignty. Native peoples view this as blatant disrespect and disregard for autonomy, further driving a wedge between the fragile relationship they have with their conquerors, murderers, and oppressors.

Ultimately, it seems that the burden may fall back onto Indigenous communities to continue fighting to protect their sovereignty. In concluding, Widner noted, "[J]ust thinking generally about it, about Native land and resources, and a lot of these extractive fights that have been happening recently—the mines, the pipelines, all of these things—it's been the Native voices that have really been rising up and pushing back."[208] Justice Gorsuch ended his dissent in solidarity, stating, "One can only hope the political branches and future courts will do their duty to honor this Nation's promises even as we have failed today to do our own."[209]

Brooke Hare[*]

205. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020); Fletcher, *supra* note 7; White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 152 (1980) (citing Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685, 688–91 (1965)).

206. *Id.* at 2505, 2511, 2519–20.

207. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2505 (Gorsuch, J., dissenting).

208. Tara Widner Interview, *supra* note 136.

209. *Castro-Huerta*, 142 S. Ct. at 2527 (Gorsuch, J., dissenting).

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