Surviving Castro-Huerta: The Historical Perseverance of the Basic Policy of Worcester v. Georgia Protecting Tribal Autonomy, Notwithstanding One Supreme Court Opinion's Errant Narrative to the Contrary

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I. Introduction
III. Castro-Huerta’s Power Play: Forging a False Historical Narrative to Uproot Worcester and Expand State Authority in Indian Country
   A. Key Precedents Misrepresented and Misapplied
      1. Worcester v. Georgia (1832)

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B. Other Distortions and Omissions in Castro-Huerta’s Efforts to Erase Tribal Autonomy from the History of Indian Law

1. Earliest Post-Worcester State and Territorial Authority Cases Through 1880
   - United States v. McBratney (1881)
   - Utah & Northern Railway Co. v. Fisher (1885)
   - United States v. Kagama (1886)
   - Ward v. Race Horse (1896)
   - Draper v. United States (1896)
   - Thomas v. Gay (1898), Wagoner v. Evans (1898), and Montanta Catholic Missions v. Missoula County (1906)
   - Donnelly v. United States (1913)
   - United States v. Sandoval (1913)
2. Additional Early-Twentieth-Century State Authority Cases
   - Williams v. Lee (1959) and the Continuing Policy of Worcester in Modern Indian Law


V. Conclusion

APPENDIX: Selected Exhibits from the Papers of Supreme Court Justices

I. INTRODUCTION

Oklahoma v. Castro-Huerta is an unprecedented attack on the autonomy of Native American nations in the United States. The Supreme Court held that Oklahoma had jurisdiction over a crime committed by a non-Indian perpetrator against an Indian victim within the Cherokee Reservation’s boundaries. The decision posits that states presumptively have jurisdiction, concurrent with the federal government, over crimes by non-Indians against Indians in Indian

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1. 142 S. Ct. 2486 (2022).
country. But this proposition is at war with a bedrock principle of Indian law, namely, that reservations are essentially “free from state jurisdiction and control,” a policy that “is deeply rooted in the Nation’s history.” That principle has stood the test of time, with the high court itself guarding tribes’ autonomy and sovereignty in celebrated Indian law cases dating to the nation’s founding.

Castro-Huerta drastically extends the reach of state authority into Indian country, and it does so by imposing a dubious, revisionist retelling of the history of U.S.-tribal relations. The false narrative forged by the majority reflects an extremist “states’-rights” ideology aggressively projected onto the field of Indian law, threatening to “wipe away centuries of tradition and practice” by uprooting a core historical principle protective of Indigenous rights. The decision provoked an immediate U.S. governmental response, with a House subcommittee holding hearings and the Justice and Interior Departments conducting listening sessions in September 2022 to begin assessing the case’s dire implications. Scholarly criticism already is underway as well and likely

4. Id. (“We conclude that the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.”).

5. McGirt v. Oklahoma, 140 S. Ct. 2452, 2476 (2020) (quoting Rice v. Olson, 324 U.S. 786, 789 (1945)); see also COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 6.01[2], at 492 (Nell Jessup Newton et al. eds., 2012) (footnote omitted) [hereinafter COHEN’S HANDBOOK] (“[S]tate law generally is not applicable to Indian affairs within the territory of an Indian tribe, absent the consent of Congress.”).

6. E.g., Worcester v. Georgia, 31 U.S. 515 (1832); see also Talton v. Mayes, 163 U.S. 376, 379–80 (1896) (“By treaties and statutes of the United States the right of the Cherokee Nation to exist as an autonomous body . . . has been recognized.”).

7. Cf. John P. LaVelle, Sanctioning a Tyranny: The Diminishment of Ex parte Young, Expansion of Hans Immunity, and Denial of Indian Rights in Coeur d’Alene Tribe, 31 ARIZ. ST. L.J. 787, 789–90 (1999) (footnotes omitted) (“Since 1986, and inversely proportional to the rise of ‘States’ rights’ activism on the high court, the percentage of Supreme Court decisions favorable to Tribes’ interests in Indian law cases has fallen steadily, year after year.”).

8. Matthew L.M. Fletcher, In 5–4 ruling, court dramatically expands the power of states to prosecute crimes on reservations, SCOTUSBLOG (June 29, 2022), https://in-5-4-ruling-court-dramatically-expands-the-power-of-states; see also Gregory Ablavsky & Elizabeth Hidalgo Reese, The Supreme Court strikes again—this time at tribal sovereignty, WASH. POST, July 1, 2022, https://the-supreme-court-strikes-again (“To put it bluntly, this decision is an act of conquest. And it could signal a sea change in federal Indian law, ushering in a new era governed by selective ignorance of history and deference to state power. . . . It is . . . a radical remaking of current law that casts aside foundational precedent—and could have profound consequences for Native nations and their authority.”).

will proliferate and intensify. With so much at stake for the preservation of tribal sovereignty and the future of federal Indian law, unmasking and deconstructing the decision will remain a pressing project for years to come.

This Article contributes to the project by examining the long line of historical Supreme Court precedents addressing state authority in Indian country to discern and explain their true significance. In addition, the Article casts light on a few important issues in *Castro-Huerta* from a unique source: the papers of individual Justices archived at the Library of Congress and various universities across the country. A point of departure is Justice Neil Gorsuch’s dissenting opinion in the case, a searing critique that delves incisively into many of the relevant precedents, exposing numerous flaws and fallacies in the majority’s analysis and laying the groundwork for additional commentary and criticism. Anchored in that foundation of principled critical assessment, this Article endeavors to help fill in some of the serious gaps and omissions in the majority’s treatment of state authority in Indian country while periodically referencing the “Indian Law Justice Files” to further illuminate the case’s alarming distortions of history and precedent.


11. See infra note 502 and accompanying text; infra note 596 and accompanying text.


II. OKLAHOMA V. CASTRO-HUERTA: FACTS, PROCEEDINGS, AND DIVERGENT MAJORITY AND DISSENTING OPINIONS

The basic facts of Castro-Huerta are both tragic and easily stated. A non-Indian defendant was convicted in Oklahoma’s courts of seriously abusing his stepdaughter, a Cherokee citizen.\(^{14}\) The defendant, Victor Manuel Castro-Huerta, appealed the conviction to the Oklahoma Court of Criminal Appeals after the U.S. Supreme Court in McGirt v. Oklahoma made clear that the Cherokee Reservation continues to exist, placing the location of the crime within the reservation’s boundaries.\(^{15}\) Accordingly, the state appellate court ruled that Oklahoma lacked criminal jurisdiction pursuant to basic principles of Indian law that prescribe exclusive federal jurisdiction for crimes committed by non-Indians against Indians within Indian country.\(^{16}\)

By a 5 to 4 vote the U.S. Supreme Court reversed, holding that federal law did not preclude Oklahoma’s criminal jurisdiction and that the state’s conviction of Castro-Huerta therefore was valid.\(^{17}\) Justice Brett Kavanaugh’s majority opinion dismissed as mere dicta statements from numerous previous Supreme Court decisions reiterating that states lack jurisdiction over crimes against Indians in Indian country absent a

\(^{14}\) See Castro-Huerta, 142 S. Ct. at 2491.

\(^{15}\) Id. at 2491–92 (citing and discussing McGirt v. Oklahoma, 140 S. Ct. 2452 (2020)).

\(^{16}\) See id. at 2492 (citations omitted) (“[T]he [Oklahoma appellate] court ruled that the State did not have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.”); see also Bosse v. State, 484 P.3d 286, 295 (Okla. Crim. App. 2021) (“Absent any law, compact, or treaty allowing for jurisdiction in state, federal or tribal courts, federal and tribal governments have jurisdiction over crimes committed by or against Indians in Indian Country, and state jurisdiction over those crimes is preempted by federal law.”), cited in Castro-Huerta v. Oklahoma, No. F-2017-1203 (Okla. Crim. App. 2021). The unreported decision of the Oklahoma Court of Criminal Appeals is reprinted as Appendix A in Oklahoma’s petition for certiorari, filed on September 17, 2021, and available at the U.S. Supreme Court’s website. See SUP. CT. OF THE UNITED STATES (citation omitted), https://castro-huerta-cert-petition-appendix (stating, at page 4a, that “[w]e rejected the State’s argument regarding concurrent jurisdiction in Bosse v. State” and that “[w]e do so again in the present case”); see also Kirsten Matoy Carlson, The Democratic Difficulties of Oklahoma v. Castro-Huerta 12, NEW POL. SCI. (May 9, 2023), https://doi.org/10.1080/07393148.2023.2203056 (noting that upon his release from state prison “a federal grand jury indicted [Castro-Huerta] for child neglect” and that he then “entered into a plea agreement with federal prosecutors, agreeing to a federal prison sentence followed by deportation”).

\(^{17}\) See Castro-Huerta, 142 S. Ct. at 2491 (“We conclude that the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.”); see also id. at 2502–03 (“[N]o federal law preempts the State’s exercise of jurisdiction over crimes committed by non-Indians against Indians in Indian country. And principles of tribal self-government likewise do not preempt state jurisdiction here.”).
congressional statute conferring such authority. Instead, Kavanaugh opined, neither the General Crimes Act nor Public Law 280 preempted the state's jurisdiction. Moreover, Kavanaugh continued, state jurisdiction over all crimes committed by non-Indians within reservations had become the default rule during the nineteenth century, supplanting the baseline preclusion of state law and jurisdiction established by the 1832 foundational Indian law case *Worcester v. Georgia*. Finally, purporting to apply the Indian law preemption precedent *White Mountain Apache Tribe v. Bracker*, the Court concluded: 

"... *Bracker* does not bar the State from prosecuting crimes committed by non-Indians against Indians in Indian country. ... [T]he exercise of state jurisdiction here would not infringe on tribal self-government." 

In dissent Justice Neil Gorsuch denounced the *Castro-Huerta* majority decision as an "ahistorical and mistaken statement of Indian law" that "allows Oklahoma to intrude on a feature of tribal sovereignty recognized since the founding" and that "surely marks an embarrassing new entry into the anticanon of Indian law." Gorsuch observed that the majority's analysis defied "a foundational rule" dating back two centuries and firmly established by *Worcester*, namely, that "Native American Tribes retain their sovereignty unless and until Congress ordains otherwise."

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18. See, e.g., id. at 2499 ("[T]here is a good explanation for why the Court's previous comments on this issue came only in the form of tangential dicta. The question of whether States have concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian country did not previously matter all that much and did not warrant this Court's review.").

19. 18 U.S.C. § 1152. Regarding nomenclature, see COHEN'S HANDBOOK § 9.02[1][a], supra note 5, at 738 n.1 (citations omitted) ("For most of its history, the statute has had no descriptive title, although over the last few decades it has more commonly been labeled the General Crimes Act, apparently in reference to the statutory phrase 'general laws of the United States.' The statute has also been called the Indian Country Crimes Act, the Interracial Crime Provisions, and the Federal Enclaves Act. Most commonly the statute is referred to either as the Indian Country Crimes Act or the General Crimes Act.").


21. See *Castro-Huerta*, 142 S. Ct. at 2499 ("[W]e have concluded that the General Crimes Act does not preempt state jurisdiction over crimes committed by non-Indians against Indians in Indian country."); id. at 2500 ("In sum, Public Law 280 does not preempt state authority to prosecute crimes committed by non-Indians against Indians in Indian country.").

22. 31 U.S. 515 (1832).


25. Id. at 2511, 2521, 2527 (Gorsuch, J., dissenting).

The dissent faulted the preemption analysis the majority used to evaluate the significance of the General Crimes Act and Public Law 280, noting that by virtue of the Worcester-derived foundational principle “the preemption rule applicable to [tribes] is exactly the opposite of the normal rule” and, accordingly, “[t]ribal sovereignty means that the criminal laws of the States ‘can have no force’ on tribal members” absent federal statutory authorization.\(^\text{27}\) Finally, Justice Gorsuch decried as “mistaken root and branch” the Castro-Huerta majority’s presuming to use the Bracker state-taxation precedent “to ‘balance’ away tribal sovereignty in favor of state criminal jurisdiction over crimes by or against tribal members.”\(^\text{28}\) “[T]he Court’s balancing-test game is not one we should be playing in this case,” Gorsuch wrote, adding: “This Court has no business usurping congressional decisions about the appropriate balance between federal, tribal, and state interests.”\(^\text{29}\)

### III. CASTRO-HUERTA’S POWER PLAY: FORGING A FALSE HISTORICAL NARRATIVE TO UPROOT WORCESTER AND EXPAND STATE AUTHORITY IN INDIAN COUNTRY

#### A. Key Precedents Misrepresented and Misapplied

1. **Worcester v. Georgia (1832)**

   Central to Castro-Huerta’s allowing state jurisdiction over crimes committed by non-Indians against Indians is the majority’s denial that Worcester v. Georgia\(^\text{30}\) is a foundational precedent whose “basic policy” restricting state authority in Indian country “has remained.”\(^\text{31}\) In the 1832 Worcester case, the Supreme Court nullified Georgia’s imprisonment of two non-Indian missionaries convicted of entering and remaining in the Cherokees’ territory with the Indians’ permission but without a license from the state.\(^\text{32}\) The high court’s decision prohibited

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27. Id. at 2511 (quoting Worcester, 31 U.S. at 561).
28. Id. at 2521.
29. Id. at 2522, 2525.
30. 31 U.S. 515 (1832).
32. See Worcester, 31 U.S. at 537–38; see also Wenona T. Singel, The First Federalists, 62 Drake L. Rev. 775, 794–95 (2014) (footnotes omitted) (“[Georgia’s] legislation purported to annex Cherokee lands to state counties, extend state civil and criminal laws over the Cherokee territory, nullify Cherokee laws, prohibit Cherokee citizens from appearing as witnesses in state courts, and provide for the surveying and eventual lottery of Cherokee lands. Georgia’s actions may have been among the most egregious, but they formed part of a broad pattern of attempts in every state to nullify the rights of Indians and Indian tribes under federal law. In an effort to deter sympathizers from living within the Cherokee
Georgia from imposing its laws or jurisdiction anywhere within the territorial boundaries of the Cherokee Nation. The legal basis for the decision was multilayered and complex. The Court declared Georgia's assertions of authority "void" because they were in "hostility with" and "repugnant to the constitution, laws, and treaties of the United States," essentially holding that the state's jurisdiction and laws were preempted by paramount federal law. But the Court condemned Georgia's territory, the state also required that all white males living within the Cherokee Nation take an oath of loyalty to the sovereignty of Georgia and obtain a license.


34. Worcester, 31 U.S. at 561; infra note 39 and accompanying text.

35. See COHEN'S HANDBOOK § 6.03[2][a], supra note 5, at 518 (footnote omitted) (identifying "federal preemption" as one of the "dual barriers" to state authority in Indian country that have persisted in modern Indian law cases and that were applied in Worcester v. Georgia); MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW § 2.2, at 35 (2016) (footnote omitted) ("The [Worcester] decision is a Supremacy Clause decision, holding that state laws interfering or conflicting with federal laws are void."); David H. Gethes, Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law, 84 CALIF. L. REV. 1573, 1582 (1996) (footnote omitted) ("Marshall's opinion found Georgia's law void as 'repugnant to the Constitution, treaties, and laws of the United States,' using contemporary terms for federal preemption."). In his concurring opinion in Worcester, Justice John McLean emphasized the preemption aspect of the Court's decision:

No one can deny, that the constitution of the United States is the supreme law of the land; and consequently, no act of any state legislature . . . which is repugnant to it, can be of any validity.

. . . .

It has been shown, that the treaties and laws referred to come within the due exercise of the constitutional powers of the federal government; that they remain in full force, and consequently must be considered as the supreme laws of the land. These laws throw a shield over the Cherokee Indians. They guarantied to them their rights of occupancy, of self-government, and the full enjoyment of those blessings which might be attained in their humble condition. But, by the enactments of the state of Georgia, this shield is broken in pieces—the infant institutions of the Cherokees are abolished, and their laws annulled. Infamous punishment is denounced against them, for the exercise of those rights which have been most solemnly guarantied to them by the national faith.

. . . .

[Being repugnant to the constitution of the United States, and to the laws made under it, [the laws of Georgia] can have no force to divest the plaintiff in error of his property or liberty.
legislative acts for the further reason that “[t]hey interfere[d] 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, [is] committed exclusively to the government of the union.”\(^{36}\) Thus, Worcester recognized and applied a second barrier—*in addition to* the preemption barrier—to the imposition and intrusion of state law, namely, the federally protected right of tribal self-government.\(^{37}\) The effect of the Court’s recognition and application of these barriers was to establish the foundational principle that “state law generally is not applicable to Indian affairs within the territory of an Indian tribe, absent the consent of Congress.”\(^{38}\) As famously stated by Chief Justice John Marshall:

> The Cherokee nation . . . 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.\(^{39}\)

In sum, Worcester “explained that the State’s ‘assertion of jurisdiction over the Cherokee nation’ was ‘void,’ because under our Constitution only the federal government possessed the power to manage relations with the Tribe.”\(^{40}\)

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\(^{37}\)\textit{Worcester}, 31 U.S. at 561; \textit{see also} Oneida Indian Nation v. Cnty. of Oneida, 414 U.S. 661, 671 (1974) (quoting \textit{Worcester}, 31 U.S. at 561) (“The Georgia law was declared unconstitutional [*in Worcester*] because it interfered with the relations *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.”).

\(^{38}\)\textit{Cohen’s Handbook} § 6.01[2], supra note 5, at 492 (footnote omitted) (identifying “infringement on tribal self-government” as the second of Indian law’s “dual barriers” that were invoked and applied in \textit{Worcester}).

\(^{39}\)\textit{Worcester}, 31 U.S. at 561.

In its campaign to impugn and diminish *Worcester*, *Castro-Huerta* portrays that foundational precedent as derivative of an obsolete “territorial separation” concept, opining that this “*Worcester*-era understanding . . . was abandoned later in the 1800s.” But in *Worcester* the “territorial separation” between Georgia and the Cherokee Nation did not itself comprise a stand-alone doctrinal grounding; rather, it was a product of the Court’s applying its constitutionally-based federal preemption and infringement analyses. Thus, the *Worcester* Court pointed to the “treaties . . . which mark out the boundary that separates the Cherokee country from Georgia,” as well as “the acts of congress . . . giving effect to the treaties” to conclude that federal law precluded any enforcement of Georgia’s laws within the Cherokee Nation’s own territory. In fact, Chief Justice Marshall himself observed that if the Court’s “objection” had been “confined” to merely denouncing the “extra-territorial operation” of the state’s laws “in relation to the Cherokee nation,” this “objection . . . would give [the] court no power over the subject.” Hence, the Court’s ruling on whether Georgia’s laws were “repugnant to” federal law was indispensable to the Court’s being able to announce an enforceable judgment in the case. *Worcester’s* principle of preclusion was further recognized, moreover, as comprising a baseline for analysis in any instance where a state purports to assert authority within the territory of an Indian tribe. The principle reflected and flowed from the universal conviction . . . that [Indian nations’] territory was separated from that of any state within whose chartered limits they might reside, by a boundary line, established by treaties; that, within their boundary, they possessed rights with which no state could

42. Thus, the *Castro-Huerta* majority erred when it opined, on the basis of no cited authority, that “territorial separation[,] not jurisdictional preemption[,]” was “the reason that state authority did not extend to Indian country,” during the period when *Worcester* was decided. *Id.*; see infra notes 43–44 and accompanying text; infra note 92 and accompanying text.
43. See COHEN’S HANDBOOK § 6.03[2][a], *supra* note 5, at 518 (observing that the “dual barriers to state authority” recognized in modern Indian law cases, i.e., “federal preemption and infringement on tribal self-government,” are “essentially the same ones the Supreme Court invoked” in *Worcester*); cf. Baker v. Carr, 369 U.S. 186, 215 n.43 (1962) (noting that in *Worcester* “the right asserted was one of protection under federal treaties and laws from conflicting state law” and “the fact that the tribe was a separate polity served as a datum contributing to the result”).
45. *Id.* at 561.
46. *Id.*
interfere; and that the whole power of regulating the intercourse with them, was vested in the United States.47

Just as important, in addition to declaring Georgia’s laws completely forbidden by federal law, the Worcester Court took the further step of holding that this total preclusion of state law was perfectly consistent with states’ sovereignty within the plan of the Constitution.48 Framing the constitutional law question as asking “Is this the rightful exercise of [federal] power, or is it usurpation?”49 the Court concluded that such total preclusion did not violate the sovereignty of the states.50 At the core of Worcester’s analysis of the states’-rights issue was Chief Justice Marshall’s emphasizing the contrast between (1) the problematic allocation of authority over Indian affairs under the Articles of Confederation and (2) the superseding U.S. Constitution’s delegation of exclusive federal power.51 As Professor Gregory Ablavsky succinctly explains,

... Marshall delved into the history of Indian affairs under Article IX of the Articles [of Confederation], noting that its “ambiguous phrases ... were so construed by the states of North Carolina and Georgia as to annul the power itself.” But, Marshall continued, the correct construction of Article IX was not before the Court because of the “adoption of our existing constitution.” “That instrument,” he wrote,

confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and

47. Id. at 560 (emphases added); see also Reid Peyton Chambers, Reflections on the Changes in Indian Law, Federal Indian Policies and Conditions on Indian Reservations Since the Late 1960s, 46 Ariz. St. L.J. 729, 754 (2014) (citing Worcester, 31 U.S. at 558) (“[T]he Cherokee decisions written by Chief Justice Marshall in the 1830s held that states’ authority over reservations had been preempted by exclusive federal control over relations with Indians, even where non-Indian activities were involved.”).
49. Worcester, 31 U.S. at 558; see also Cohen’s Handbook § 6.01[4], supra note 5, at 501 n.84 (citation omitted) (noting that Worcester held “that federal preclusion of state power and authority on an Indian reservation does not effect a ‘usurpation’ of states’ rights under the U.S. Constitution”).
50. See Worcester, 31 U.S. at 559; see also Nell Jessup Newton, Federal Power Over Indians: Its Sources, Scope and Limitations, 132 U. Pa. L. Rev. 195, 201–02 (1984) (footnote omitted) (noting that in Worcester the Supreme Court “upheld the supremacy of federal over state power regarding Indian tribes” and that the “decision was ... a defense of federal over state power”).
among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. . . . The shackles imposed on this power, in the confederation, are discarded.

Marshall thus adopted [James] Madison’s reading that the shift in language from the Articles [of Confederation] was intended to grant exclusive power over Indian affairs.52

It is crucial to observe that when the Worcester Court announced this holding in 1832, the Tenth Amendment was part of the Constitution, having been ratified with the rest of the Bill of Rights in 1791.53 Chief Justice Marshall in fact had provided an explication of the Tenth Amendment thirteen years before Worcester, having written the opinion for a unanimous Court in the famous constitutional law case McCulloch v. Maryland.54 Thus, Marshall delivered Worcester’s holding that complete federal preclusion of state law within the Cherokees’ own territory was not a “usurpation” of Georgia’s sovereignty in full knowledge of the Constitution’s inclusion of the Tenth Amendment.55 This timeline contradicts the insinuation, posited by the Castro-Huerta majority, that the Tenth Amendment somehow trumped or constrained Worcester.56

52. Gregory Ablavsky, The Savage Constitution, 63 DUKE L.J. 999, 1075 n.455 (2014) (quoting Worcester, 31 U.S. at 558–60) (citations omitted); see also FLETCHER § 2.3, supra note 35, at 44 (footnote omitted) (“What was a certainty . . . at the time of the ratification of the Constitution . . . was that federal authority in Indian affairs . . . was sole and exclusive of state authority.”). See generally Gregory Ablavsky, Beyond the Indian Commerce Clause, 124 YALE L.J. 1012 (2015).

53. See, e.g., The Bill of Rights: A Brief History, AM. CIV. LIB. UNION, https://bill-of-rights-brief-history (“The American Bill of Rights . . . was adopted, and in 1791 the Constitution’s first ten amendments became the law of the land.”).


56. See Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2493 (2022) (citing U.S. CONST. amend. X) (“Under this Court’s precedents, federal law may preempt . . . state jurisdiction in certain circumstances. But otherwise, as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country.”). But see Brief for 87 Members of Congress as Amici Curiae in Support of Federal and Tribal Defendants at 7, Haaland et al. v. Brackeen et al. (Nos. 21-376, 21-377, 21-378, 21-380) (citations omitted), available at https://brief-for-87-members-of-congress (“The Tenth Amendment reflects ‘but a truism’ that the States retain all powers that have not been delegated to Congress. . . . The applicable test [for whether assertions of federal power violate the Tenth Amendment] is . . . whether the Constitution divested the States of those authorities and transferred them to the federal government, which the Indian Commerce Clause expressly did with respect to Indian affairs.”); Kirsten Matoy Carlson, Bringing Congress and Indians Back into Federal Indian Law: The Restatement of the Law of American Indians, 97 WASH. L. REV. 725, 765 n.238 (2022) (citations omitted) (noting that in Castro-Huerta the majority

Mocking the dissent for “lift[ing] up the 1832 decision in Worcester v. Georgia as a proper exposition of Indian law,” the Castro-Huerta majority opined that “this Court long ago made clear that Worcester rested on a mistaken understanding of the relationship between Indian country and the States.”57 As alleged support for this jarring proposition the majority pointed to a passage of dicta from the 1962 case Organized Village of Kake v. Egan which asserted that the “general notion drawn from [Worcester] . . . has yielded to closer analysis,” that “[b]y 1880 the Court no longer viewed reservations as distinct nations,” and that “[o]n the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law.”58 But, as Justice Gorsuch pointed out, Kake—which the majority “seem[ed] to think [was] some magic bullet”59—was a case that “addressed the prosaic question whether Alaska could apply its fishing laws on lands owned by a native Alaska tribal corporation.”60 Indeed, the

“provides no support or rationale for the idea that the Tenth Amendment reserved Indian affairs powers to the states” and that “[s]cholars have extensively reviewed the historical documents to show that the Founders intended for the U.S. Constitution to give exclusive authority over Indian affairs to Congress”); cf. Jeremy Rabkin, Commerce with the Indian Tribes: Original Meanings, Current Implications, 56 IND. L. REV. 279, 280, 285 (2023) (“. . . Castro-Huerta seems to demonstrate that the Court is not very interested in recovering the Constitution’s original meaning as it applies to America’s original peoples. . . Whatever else one might say about the original understanding, it most certainly was not that Indian reservations are simply part of the surrounding state, as the decision in Castro-Huerta claims.”).

58. Kake, 369 U.S. 60, 72 (1962) (dicta) (citations omitted), quoted in Castro-Huerta, 142 S. Ct. at 2502. Kake’s pointing to 1880 as a year by which “it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law,” id., appears to refer to Langford v. Monteith, 102 U.S. 145 (1880). See infra notes 103–111 and accompanying text (discussing Langford). Kake’s dictum averring that “[b]y 1880 the Court no longer viewed reservations as distinct nations,” Kake, 369 U.S. at 72, may reflect a distorting influence stemming from the well-known nineteenth-century Indian law case United States v. Kagama, 118 U.S. 375 (1886), which posited similar dicta. See infra notes 139–184 and accompanying text (discussing Kagama).
60. Id. (citing Kake, 369 U.S. at 61–63).
61. Kake, 369 U.S. at 62, 75 (noting that neither of the two Alaska Native tribes whose fishing activities were at issue in the case “ha[d] been provided with a reservation” and characterizing those fishing activities as “activities . . . not on any reservation”); see also CANBY, supra note 38, at 484 (citation omitted) (observing that in Kake the Court “held that the Secretary was not authorized to issue any [fish trap] permits” for supporting the fishing activity of “Village fishermen in waters not part of any reserve”). Kake’s reliance on Ward
Castro-Huerta majority ignored clarification provided by the Court a decade after Kake wherein the Court observed that Kake was “cabined . . . to circumstances ‘dealing with Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government.’”62 Thus, the leading precedent Castro-Huerta deployed to launch its attack on Worcester in reality armed the majority with nothing but a scrap of irrelevant “tangential dicta.”63

The Supreme Court in the 1962 Kake case implicitly conceded, moreover, that with respect to on-reservation activities the Worcester principle restricting state authority remained alive and well. “[S]tate regulation of off-reservation fishing,” the Kake Court wrote, “certainly does not impinge on treaty-protected reservation self-government, the factor found decisive in Williams v. Lee.”64 That decisive factor, as the

62. Castro-Huerta, 142 S. Ct. at 2520 (Gorsuch, J., dissenting) (quoting McClanahan v. Ariz. St. Tax Comm’n, 411 U.S. 164, 167–68 (1973)); see also Kiowa Tribe v. Mfg. Techs., 523 U.S. 751, 755 (1998) (emphasis added) (citing, inter alia, Kake, 369 U.S. 60) (observing that the Supreme Court has “recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country”); McClanahan, 411 U.S. at 176 n.15 (emphasis in original) (noting that Kake’s “holding came in the context of a decision concerning the fishing rights of nonreservation Indians” and that Kake “did not purport to provide guidelines for the exercise of state authority in areas set aside by treaty for the exclusive use and control of Indians”); Chambers, supra note 47, at 757 (footnotes omitted) (noting that in Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973), the Supreme Court "also observed that Kake arose outside an Indian reservation, and confined Kake’s analysis of state jurisdiction to matters occurring outside reservations, where the Court sustained broad state authority"); cf. Dean B. Suagee, The Supreme Court’s “Whack-A-Mole” Game Theory in Federal Indian Law: A Theory That Has No Place in the Realm of Environmental Law, 7 Great Plains Nat. Resources J. 90, 122 (2002) (footnote omitted) (“Kake did not involve a reservation—in fact, the result of that case turns on a finding that the conduct the state sought to regulate did not take place within a reservation.”); COHEN’S HANDBOOK § 5.03[2], supra note 5, at 399 n.25 (emphasis added) (citation omitted) (noting that Kake held that the Secretary of the Interior was not authorized by Congress “to grant rights to tribes outside reservations contrary to state law”).

63. Castro-Huerta, 142 S. Ct. at 2499 (using the label “tangential dicta” to characterize “the Court’s previous comments” on a particular issue in controversy).

64. Kake, 369 U.S. at 75–76.
Court explained in *Williams* in 1959, was among the “broad principles” from *Worcester* that persisted into the modern era, giving rise to the *Williams* Court’s core insight that “the basic policy of *Worcester* has remained.” Indeed, the *Kake* Court expressed approval of *Williams’s* formulation of this crucial way in which *Worcester’s* “basic policy . . . has remained,” with Justice Felix Frankfurter’s explaining that “in *Williams v. Lee*, we declared that the test of whether a state law could be applied on Indian reservations . . . was whether the application of that law would interfere with reservation self-government.”

All nine Justices who signed on to Justice Frankfurter’s opinion for the Court in *Kake* also had joined in the unanimous *Williams v. Lee* ruling just three years earlier. Accordingly, in response to the question posed by Chief Justice John Roberts during oral argument in *Castro-Huerta* about “what weight we should give to *Worcester*” in light of Justice Frankfurter’s dicta in *Kake* the correct answer is this: the Court should give *Worcester* the same considerable weight Frankfurter and all of the other Justices gave that foundational precedent in *Williams v. Lee*

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66. *Id.*


CHIEF JUSTICE ROBERTS: . . . [W]hat is your answer to the language, Frankfurter’s language I read from *Kake* concerning what weight we should give to *Worcester* against Georgia?

. . . .

CHIEF JUSTICE ROBERTS: . . . I think what Frankfurter was addressing is the overall theory of what Marshall’s approach was, that the—[the] boundary theory, that this is the state and this is the Indian country and—and, you know, they don’t—don’t overlap at all.

And Frankfurter’s point is, well, it turns out that they have to overlap quite a bit if you’re going to deal with all these different factual situations that come up.

So the notion, which certainly has a lot to play in the arguments that—that you have chosen to support, I think, is undermined quite a bit.

*Id.* at 109–11.
where—like in *Castro-Huerta* but unlike in *Kake*—on-reservation activities involving Indians were at issue.


In addition to relying on dicta from an inapposite 1962 case that addressed a dispute over exclusively off-reservation activities, the *Castro-Huerta* majority purported to ground its assault on *Worcester* in what Justice Gorsuch called “a string of carefully curated snippets—a clause here, a sentence there—from [five other] decisions out of the galaxy of this Court’s Indian law jurisprudence.” The earliest of the cases listed by the majority, *New York ex rel. Cutler v. Dibble*, “allowed New York to use civil proceedings to eject non-Indian trespassers on Indian lands.” As the leading treatise in the field of Indian law observes, *Dibble* merely shows that “the Supreme Court held long ago that the federal relationship with tribes does not preclude protective state laws that do not infringe on federally protected rights.” *Dibble* does not mention *Worcester*, let alone purport to overthrow that foundational precedent. Even the *Kake* Court acknowledged, implicitly, that in 1859, when *Dibble* was decided, the “general notion drawn from [*Worcester*]” was still in full force since *Worcester*’s baseline preclusion principle concededly informed the Supreme Court’s decisions in *The Kansas Indians* and *The New York Indians*, both decided eight years after *Dibble*. And, in 1974, the Supreme Court expressly limited *Dibble* to its facts, pointing out that “by the later decision in *The New York Indians* the Court did not consider the potential implications of the dictum expressed in *Dibble* applicable” other than in the ejectment-of-intruders context. *Dibble*’s misplaced dictum, which the high court later

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70. *See supra* notes 59–61 and accompanying text.
72. *Id.* (citing *New York ex rel. Cutler v. Dibble*, 62 U.S. 366, 369–71 (1859)).
73. COHEN’S HANDBOOK § 14.03[2][b][iii], *supra* note 5, at 960 (footnote omitted).
75. *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 72 (1962) (citing *The Kansas Indians*, 72 U.S. 737, 755–57 (1867); *The New York Indians*, 72 U.S. 761 (1867)); *see also* COHEN’S HANDBOOK § 6.01[2], *supra* note 5, at 494–95 (footnotes omitted) (“In 1867, the Supreme Court in *The Kansas Indians* and *The New York Indians* invalidated efforts by two states to tax Indian lands. In each instance the Court relied on one of the principles announced in *Worcester v. Georgia*, that state law had no force within the Indian country.”).
disavowed and limited, about “the power of a sovereign” being “necessary to preserve the peace of the Commonwealth”77 thus does not evince a sea change away from Worcester, as Castro-Huerta speciously implies.78

B. Other Distortions and Omissions in Castro-Huerta’s Efforts to Erase Tribal Autonomy from the History of Indian Law

1. Earliest Post-Worcester State and Territorial Authority Cases Through 1880

The Dibble dictum is, chronologically, the earliest of the “snippets”79 Castro-Huerta enlists to advance its warped historical narrative for promoting expansive state authority in Indian country. But Castro-Huerta exhibits numerous additional errors of commission and omission as well. The majority opinion neglects to disclose, for example, that a Supreme Court precedent decided two years before Dibble, the 1857 case Fellows v. Blacksmith, likewise had validated relief afforded by New York against intrusion onto Indian land, through the Supreme Court’s upholding, in Blacksmith, a state-court lawsuit filed by an Indian against agents of a land company who had trespassed onto the plaintiff’s property and violently ejected him.80 Like Dibble, Blacksmith does not mention Worcester. And, crucially, Blacksmith later was judicially recognized as an early case that was consistent with the Supreme Court’s
modern-era observation and pronouncement that “the basic policy of Worcester has remained.”

As previously indicated, eight years after Dibble the Supreme Court in 1867 issued two celebrated decisions—The Kansas Indians and The New York Indians—both of which are applications of Worcester and neither of which Castro-Huerta mentions. In The Kansas Indians, the high court overturned a decision of the supreme court of Kansas which had denied claims brought by Shawnee plaintiffs who argued that the state could not lawfully tax the Indians’ allotted lands. The denial was

81. Williams v. Lee, 358 U.S. 217, 219 (1959). Blacksmith’s consistency with the high court’s later recognition of Worcester’s continuing vitality is discernible through (1) the Court’s acknowledging in 1959, in Williams v. Lee, that “suits by Indians against outsiders in state courts have been sanctioned,” id., and (2) the Court’s subsequent reliance on Blacksmith, in 1984, when reiterating that “[t]his Court . . . repeatedly has approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian country,” United States v. Wold Eng’g, 467 U.S. 138, 148 (1984) (citing, inter alia, Blacksmith, 60 U.S. 366). Significant, too, was the Court’s referencing, in 1886, both Worcester and Blacksmith when stating (1) that Worcester held that “the tribe was under [the United States’] protection, and could not be subjected to the laws of the State and the process of its courts” and (2) that “[t]he same thing was decided in” Blacksmith, i.e., “that the State could not enforce [the Seneca Indians’] removal, but the duty and the power to do so was in the United States.” United States v. Kagama, 118 U.S. 375, 384 (1886) (emphasis added) (citations omitted).

82. See supra note 75 and accompanying text.


84. See McClanahan v. Ariz. St. Tax Comm’n, 411 U.S. 164, 169 (1973) (quoting Worcester v. Georgia, 31 U.S. 515, 561 (1832), and citing The Kansas Indians, 72 U.S. 737 (1867)) (observing that Worcester’s “rationale” that “[t]he whole intercourse between the United States and [Indian nations], is, by our Constitution and laws, vested in the government of the United States’ plainly extended to state taxation within the reservation as well”); see also COHEN’S HANDBOOK § 6.01[2], supra note 5, at 495 (footnote omitted) (noting that in both The Kansas Indian and The New York Indians “the Court relied on one of the principles announced in Worcester v. Georgia, that state law had no force within the Indian country”); Taylor, supra note 83, at 935 (stating that an “important point of these two tax cases is that the United States Supreme Court continued to apply Worcester v. Georgia and did so in the context of taxation”).

85. See The Kansas Indians, 72 U.S. at 757 (“[T]he Supreme Court of Kansas erred in not perpetuating the injunction and granting the relief prayed for.”); Blue-Jacket v. Comm’rs of Johnson Cnty., 3 Kan. 299, 364 (1865) (decision below) (“Our conclusion then, upon the whole case is, that the Shawnees who hold their lands in severalty under patents from the government, have the abstract title thereto; that the lands are subject to taxation, unless exempted specifically by the constitution of this State, or by some paramount law, and that they are not so exempt.”).
based in part on the state court’s view that *Worcester* was not “applicable to the case at bar” since in *Worcester* the Indians “held their lands in common” and “occupied a district of country, the boundaries of which were accurately and distinctly defined,” whereas “[t]he Shawnees do not hold their lands in common, nor are they contiguously located.”86 Reversing the state court and “announcing principles that continue to have vitality,”87 the U.S. Supreme Court held that the Indians’ tax immunity claims were valid. The Court wrote:

> If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a “people distinct from others,” capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. If under the control of Congress, from necessity there can be no divided authority. . . . This people have their own customs and laws by which they are governed. . . . [S]ome of those customs having been abandoned, owing to the proximity of their white neighbors, . . . does not tend to prove that their tribal organization is not preserved. . . . Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization. . . . [T]heir property is withdrawn from the operation of State laws.88

Notably, *The Kansas Indians*, like *Fellows v. Blacksmith*,89 was a case where the Indian plaintiffs had sued *in state court* seeking relief against unlawful activity by non-Indians;90 yet, notwithstanding the fact of Kansas’s exercise of judicial jurisdiction over the dispute the Supreme Court again issued a ruling *consistent with*, and indeed *compelled by*, *Worcester’s* baseline preclusion of state authority in Indian country.91

87. *Cohen’s Handbook* § 6.01[2], *supra* note 5, at 495.
89. *See supra* notes 80–81 and accompanying text; *supra* note 86 and accompanying text.
90. *See Blue-Jacket*, 3 Kan. at 301 (stating that the “action in the court below was instituted for the purpose of obtaining an order restraining the defendants from selling certain lands of the plaintiff’s for taxes, and to recover judgment for taxes already paid” and that the “petition . . . was filed in behalf of Charles Blue-Jacket and all other Shawnee Indians owning lands in Johnson county”).
91. *See supra* notes 86–88 and accompanying text. In *Williams v. Lee*, the Supreme Court in 1959 indirectly referenced *The Kansas Indians*, via nested citations to authority, as a case exemplifying “suits by Indians against outsiders in state courts” which the Supreme Court historically had “sanctioned” and which therefore were harmonious with
Perhaps even more significantly, the Court in *The Kansas Indians* applied the *Worcester* principle in circumstances where allotment policy had produced a pattern of scattered land ownership among the Indians that was unlike the “territorial separation” scenario evinced by the “contiguously located” tribal land in *Worcester* itself. And, in the case known as *The New York Indians*, decided together with *The Kansas Indians* in 1867, the Court similarly held, consistent with *Worcester*, that Indian reservations in New York were “wholly exempt from State taxation” and that “the exercise of [state] authority over [the reservations] is an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations.”

the observation that “the basic policy of *Worcester* has remained.” See Williams v. Lee, 358 U.S. 217, 219 (1959) (citing, inter alia, Felix v. Patrick, 145 U.S. 317, 332 (1892) (emphasis added) (citing, inter alia, Blue-Jacket, 3 Kan. 299, rev’d, The Kansas Indians, 72 U.S. 737 (1867)) (avowing that “the courts of Nebraska were open to [the Indian plaintiffs whose suit was held barred by laches] irrespective of race or color”)); see also Scott A. Taylor, *State Property Taxation of Tribal Fee Lands Located within Reservation Boundaries: Reconsidering County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation and Leech Lake Band of Chippewa Indians v. Cass County*, 23 AM. INDIAN L. REV. 55, 63 (1998/1999) (footnote omitted) (observing that in *The Kansas Indians* “[t]he Court reiterated the basic principle in *Worcester* that Indian tribes are separate and politically distinct entities that are beyond the powers of a state, including its power to tax”).

92. See supra notes 41–43 and accompanying text; cf. Taylor, supra note 83, at 934 (observing that “*The Kansas Indians* case validates the political separation paradigm and affirms that this separation preempts the state power to tax lands even when held individually (not in common) in the form of allotments”); cf. Foster v. Pryor, 189 U.S. 325, 331 (1903) (describing an Indian reservation in the Territory of Oklahoma as “a totally distinct and separate domain, set apart for a home for Indians under the care and custody of the general government”); COHEN’S HANDBOOK § 3.04[2][a], supra note 5, at 185 (footnotes omitted) (“The policy of separating Indians from non-Indians reached its peak with the removal schemes of 1816 to 1846. . . . Although the policy of complete separation for the Indian Territory ended [by the time Oklahoma became a state], the separation policy continued to apply to tribal lands within organized territories and states, and the federal policy of separate territory and status for Indian tribes continues today.”).


94. *The New York Indians*, 72 U.S. at 771; see also Taylor, supra note 91, at 64 (footnote omitted) (“New York argued that the Indian lands were within the political boundaries of New York and should be subject to the state’s taxing power absent an express federal prohibition.”); COHEN’S HANDBOOK § 6.01[2], supra note 5, at 495 (footnotes omitted) (observing that in *The Kansas Indians* “[o]ne of the grounds for the Court’s decision . . . was
Another ringing endorsement of Worcester followed nine years later, in the unanimous 1876 Supreme Court decision with the memorable name United States v. 43 Gallons of Whiskey. Although the main issue was the validity of criminal penalties on the sale of liquor to Indians on land no longer located within reservation boundaries, the case also is important for showing Worcester's continuing efficacy vis-à-vis the high court's rejecting "states'-rights" challenges to exclusive federal power in Indian affairs. The Court wrote:

Few of the recorded decisions of this court are of greater interest and importance than those pronounced in The Cherokee Nation v. The State of Georgia and Worcester v. The State of Georgia. Chief Justice Marshall, in these cases, with a force of reasoning and an extent of learning rarely equaled, stated and explained the condition of the Indians in their relation to the United States and to the States within whose boundaries they lived . . . .

. . . . It is not easy to see how [the federal prohibition against liquor transactions, including off-reservation sales,] infringes upon the position of equality which Minnesota holds with the other States. The principle that Federal jurisdiction must be everywhere the same, under the same circumstances, has not been departed from. The prohibition rests on grounds which, so far from making a distinction between the States, apply to them all alike. The fact that the ceded territory is within the limits of Minnesota is a mere incident; for the act of Congress imported into the treaty applies alike to all Indian tribes occupying a particular country, whether within or without State lines. Based as it is exclusively on the Federal authority over the subject-matter, there is no disturbance of the principle of State equality.97

95. 43 Gallons of Whiskey, 93 U.S. at 188 (1876).
96. See id. at 193 (“In this case, the United States, in its endeavors to enforce [the intercourse laws], is met with the objection, that they do not apply to the country in which the liquor was seized.”); COHEN’S HANDBOOK § 5.01[2], supra note 5, at 387 n.23 (noting the federal statutory prohibition in 43 Gallons of Whiskey was “held to be within congressional commerce power to give effect to [a land-cession] treaty and thus supersedes state laws to the contrary”); cf. id. § 13.01, at 917 (footnote omitted) (“The basic provision [regulating liquor trafficking] in effect today was first adopted in 1834 and makes it a crime to sell, give away, introduce, or attempt to introduce intoxicating beverages within Indian country.”).
97. 43 Gallons of Whiskey, 93 U.S. at 193, 197 (citations omitted); see also Perrin v. United States, 232 U.S. 478, 484 (1914) (describing 43 Gallons of Whiskey as having
The *43 Gallons of Whiskey* precedent thus shows that as of 1876 *Worcester* remained potent and vital, exerting decisive impact in Supreme Court decisions resolving disputes pitting federal authority against state-law intrusions in matters involving Indians.

Again, in 1878, the Supreme Court issued a decision that loudly resounded *Worcester*'s baseline preclusion of state authority in Indian affairs. *Harkness v. Hyde* held that a court of the Territory of Idaho lacked jurisdiction to serve judicial process in a suit involving events on the Shoshone Reservation.\(^98\) The argument for validity was that two sources of federal law—the Idaho Territory Act and a treaty with the Shoshone-Bannock Indians—combined to authorize Idaho's jurisdiction.\(^99\) But the Supreme Court rejected this argument, reasoning that (1) the Act required the Indians' “assent” before their reservation could be included within Idaho's boundaries and (2) “[n]o assent was given by [the] treaty.”\(^100\) Accordingly, the reservation “was as much beyond the jurisdiction, legislative or judicial, of the government of Idaho, as if it had been set apart within the limits of another country, or of a foreign State. Its lines marked the bounds of that government.”\(^101\) Although *Harkness* does not cite *Worcester*, the Court clearly presumed *Worcester*'s baseline preclusion of any power a state or territorial government might attempt to exercise on an Indian reservation absent express federal authorization.\(^102\)

Just two years after *Harkness*, however, the high court effectively voided that decision. The 1880 case *Langford v. Monteith* involved facts that were virtually identical to those of *Harkness*.\(^103\) But in *Langford* the Supreme Court reached an opposite conclusion and affirmed Idaho’s service of process on the Nez Perce Reservation in a suit involving only

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\(^{98}\) See *Harkness v. Hyde*, 98 U.S. 476, 477 (1878); cf. COHEN'S HANDBOOK § 6.01[3], supra note 5, at 497 (“The earliest Supreme Court cases [addressing application of state civil laws to non-Indians in Indian country in matters not affecting Indians or their property] arose in territories rather than states and involved service of judicial process on whites within Indian reservations at a time when service was considered restricted to the boundaries of a court's jurisdiction.”).


\(^{100}\) *Id.*

\(^{101}\) *Id.* at 478.

\(^{102}\) See also COHEN'S HANDBOOK § 6.01[3], supra note 5, at 497 (footnotes omitted) (observing that in *Harkness* “the Supreme Court rendered a decision consonant with the geographically-based exclusion of state authority announced in *Worcester v. Georgia*”).

\(^{103}\) See *Langford v. Monteith*, 102 U.S. 145 (1880).
non-Indian litigants. The Court conceded that its analysis in *Harkness* had been “mistaken,” opining that the Court had “inadvertently inferred that the treaty with the Shoshones . . . contain[ed] a clause excluding the lands of the tribe from territorial or State jurisdiction.” In truth, however, the Court in *Harkness* had properly noted the lack of treaty-based “assent” by the Shoshones to having their reservation included within Idaho’s boundaries. Rather, the “mistake” in *Harkness* was the Court’s errant representation of the content of the Idaho Territory Act, which actually specified that an Indian reservation would be excluded from Idaho’s boundaries *only if a treaty with the tribe so provided*. Since there was no such treaty provision with respect to U.S.-Nez Perce relations, the Court in *Langford* concluded that the tribe’s reservation was within Idaho’s boundaries and that process could be served there since “this is a suit between white men,” so long as “the subject-matter was one of which [the court] could take cognizance.”

104. See infra note 108 and accompanying text.


106. See supra text accompanying note 100.

107. Compare *Harkness*, 98 U.S. at 477 (quoting Act of Mar. 3, 1863, 12 Stat. 808, 809) (“The act of Congress . . . organizing the Territory of Idaho, provides that it shall not embrace within its limits or jurisdiction any territory of an Indian tribe without the latter’s assent, but that ‘all such territory shall be excepted out of the boundaries, and constitute no part of the Territory of Idaho,’ until the tribe shall signify its assent to the President to be included within the Territory.”), with Act of Mar. 3, 1863, 12 Stat. 808, 809 (emphasis added) (providing “[t]hat nothing in this act contained shall be construed . . . to include any territory which, by treaty with any Indian tribes, is not, without the consent of said 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 Territory of Idaho, until said tribe shall signify their assent to the President of the United States to be included within said Territory”); cf. COHEN’S HANDBOOK § 6.01[3], supra note 5, at 498 n.65 (citation omitted) (“The Idaho Territory Organic Act uses several confusing negatives to express that tribal territory will be excluded from ‘the territorial limits or jurisdiction of any state or territory’ if there is a treaty with the tribe providing for tribal consent before inclusion, and the tribe has not consented.”).

108. *Langford*, 102 U.S. at 147; see also Organized Vill. of Kake v. Egan, 369 U.S. 60, 72 (1962) (emphasis added) (citation omitted) (“In *Langford v. Monteith* the Court held that process might be served within a reservation for a suit in territorial court *between two non-Indians*.”). The Supreme Court’s intimation in 1880 that the territorial court’s jurisdiction did not extend to “subject-matter” over which the court could not “take cognizance,” *Langford*, 102 U.S. at 147, recalls the same Court’s emphasis four years earlier on Congress’s exclusive jurisdiction, vis-à-vis the states, in *United States v. 43 Gallons of Whiskey*, 93 U.S. 188 (1876). See id. at 194 (stating that “[b]ased as it is exclusively on the Federal authority over the subject-matter, there is no disturbance of the principle of State equality” in the enforcement of federal law prohibiting liquor sales to Indians within a state, including off-reservation); supra note 97 and accompanying text; cf. *Justices 1789 to Present*, SUP. CT. OF THE UNITED STATES, https://justices-1789-to-present (listing Justices’
While the Harkness/Langford imbroglio might, at first blush, appear to show discontinuity with Worcester, the real lesson of this pair of cases is that, consistent with Worcester, Indian reservations can be brought within the boundaries of territories or states if treaties and/or congressional statutes so provide. Thus Worcester, in establishing its foundational principle generally precluding state authority in Indian affairs, impliedly acknowledged the possibility of express federal exceptions, proclaiming that state law could not be extended into Cherokee Indian country “but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.”109 In Harkness and Langford the Supreme Court fumbled its way to rulings in 1878 and 1880, respectively, that seemed mutually contradictory110 but that both reflected applications of Worcester. Subsequent Indian law decisions of the late nineteenth century, as well as decisions issued during the long course of the twentieth century, exhibit the same basic consistency.111

2. United States v. McBratney (1881)

Thus, it was in the immediate aftermath of Harkness and Langford that the Supreme Court rendered its 1881 criminal-jurisdiction decision in United States v. McBratney,112 the case on which Castro-Huerta most heavily relies.113 The Court held that a federal district court lacked jurisdiction over a crime committed by one non-Indian against another on the Ute Reservation in the state of Colorado and that the defendant should be “deliver[ed] up . . . to the authorities of the State of Colorado to be dealt with according to [state] law.”114 As in Langford, the Supreme Court looked to provisions of an Indian treaty and acts of Congress to terms of office and indicating eight Justices were on the Court in both 1876 and 1880 when 43 Gallons of Whiskey and Langford, respectively, were unanimously decided—Chief Justice Morrison Remick Waite and Associate Justices Nathan Clifford, Noah Haynes Swayne, Samuel Freeman Miller, Stephen Johnson Field, William Strong, Joseph P. Bradley, and Ward Hunt.


110. See, e.g., Langford, 102 U.S. at 147 (avowing that in Harkness the Court, “relying upon an imperfect extract found in the brief of counsel, inadvertently inferred that the treaty with the Shoshones . . . contains a clause excluding the lands of the tribe from territorial or State jurisdiction” and that “[i]n this it seems we were laboring under a mistake”). But see supra notes 105–107 and accompanying text.

111. See infra notes 112–524 and accompanying text.

112. 104 U.S. 621 (1881).


114. McBratney, 104 U.S. at 624 (citations omitted).
determine whether federal law had produced an exception to the baseline preclusion of state authority in Indian country. The Court, in effect, concluded that an exception existed, reasoning that a federal statute, i.e., the Colorado Enabling Act, had abrogated antecedent treaty and statutory provisions that had operated to confirm that the reservation would not be included within Colorado’s boundaries. Although the Colorado Enabling Act did not expressly abrogate the treaty, the Court apparently interpreted the Act’s provision that Colorado “shall be admitted into the Union upon an equal footing with the original States” as effecting an implied repeal of the earlier treaty guarantee, an abrogation the Court viewed as necessary to ensure Colorado would have general police powers equivalent to those of the other states.

115. See id. at 622–24 (citations omitted) (determining whether the federal court had jurisdiction by interpreting (1) “the treaty between the United States and the Ute Indians of March 2, 1868,” (2) “the act of Congress of Feb. 28, 1861 to provide a temporary government for the Territory of Colorado,” and (3) “the act of Congress of March 3, 1875 for the admission of Colorado into the Union”).


117. See McBratney, 104 U.S. at 622–24 (citation omitted) (reasoning that the Colorado Enabling Act “necessarily repeals the provisions of any prior statute, or of any existing inconsistent treaty, which are clearly inconsistent therewith” and that the Ute Reservation therefore “is no longer within the sole and exclusive jurisdiction of the United States”); see also id. at 623 (citing Act of Feb. 28, 1861, ch. 59, § 1, 12 Stat. 172) (observing that under the Colorado Territory Act “all territory which, by treaty with any Indian tribe, was not, without its consent, to be included within the territorial limits or jurisdiction of any State of Territory, was excepted out of the boundaries and constituted no part of the Territory of Colorado”). The McBratney Court appeared to concede that prior to statehood certain provisions of the 1868 Ute Treaty and the 1861 Colorado Territory Act operated in tandem to ensure the Ute Reservation’s exclusion from Colorado’s boundaries. See id. (citations omitted) (stating that if a section of the Colorado Territory Act that, in light of the Ute Treaty, had excepted the Ute Reservation from the Territory’s boundaries “had remained in force after Colorado became a State, this indictment might doubtless have been maintained in federal court”).


119. See McBratney, 104 U.S. at 623 (citation omitted) (opining that the Colorado Enabling Act “necessarily repeals the provisions of any prior statute, or of any existing treaty, which are clearly inconsistent therewith”); cf. United States v. Ward, 28 F. Cas. 397, 398–99, No. 16,639 (D. Kan. 1863) (citing, inter alia, Worcester v. Georgia, 31 U.S. 515 (1832)) (inquiring whether statutes and treaties had “withdrawn [the sole and exclusive jurisdiction of the United States to legislate over Indian lands] from the federal and conferred it upon the state government” so as to “operate as a repeal” of the previous exclusive federal jurisdiction), cited in McBratney, 104 U.S. at 623–24; see also infra note 216.

120. See McBratney, 104 U.S. at 624 (“The State of Colorado, by its admission into the Union by Congress, upon an equal footing with the original States in all respects whatever, without any such exception as had been made in the treaty with the Ute Indians and in the act establishing a territorial government, has acquired criminal jurisdiction over its own
But, importantly, the Supreme Court in *McBratney* limited the scope of its ruling to the question of jurisdiction over an on-reservation crime “committed by a white man upon a white man” within Colorado.\(^{121}\) As Justice Gorsuch pointed out in his *Castro-Huerta* dissent, *McBratney*’s “aggressive” interpretation of the Colorado Enabling Act yielded the decree that “States admitted to the Union may gain the right to prosecute cases involving only non-Indians on tribal lands, but they do not gain any inherent right to punish ‘crimes committed by or against Indians’ on tribal lands.”\(^{122}\) Because no federal statute or treaty provision, on *McBratney*’s facts, granted the state any authority over crimes involving Indians, jurisdiction over those crimes remained within the purview of *Worcester*’s principle of preclusion and subject to Congress’s exclusive control.\(^{123}\)

\(^{121}\) *McBratney*, 104 U.S. at 624 (emphasis added); see also *Canby*, supra note 38, at 155 (emphasis added) (noting that in *McBratney* the Court held that Colorado’s laws “extend[ed] throughout the state, including the Ute reservation, insofar as they relate[d] to crimes by non-Indians against non-Indians”).

\(^{122}\) *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2517, 2520 (2022) (Gorsuch, J., dissenting) (quoting *McBratney*, 104 U.S. at 624); accord *Truscott v. Hurlbut Land & Cattle Co.*, 73 F. 60, 65 (9th Cir. 1896) (emphasis added) (citation omitted) (observing that in *McBratney* the Supreme Court held “that the criminal jurisdiction of the state courts extends to crimes [on reservations] in which the Indians have no part”).

\(^{123}\) Even from the vantage point of viewing *Worcester* as effecting a “territorial separation” model, see supra notes 41–42 and accompanying text, the narrow exception produced by *McBratney* does not amount to an overthrow of *Worcester* as the foundational precedent establishing a baseline rule of preclusion vis-à-vis assertions of state authority in Indian country. See *Getches*, supra note 35, at 1586, 1588 (citation omitted) (describing *McBratney* as the “most notable exception” to “*Worcester*’s announcement of reservation boundaries as barriers to state jurisdiction” but observing that “[i]n the end . . . *Worcester*’s barrier to state jurisdiction over reservation activities remained unbreached, save for this handful of cases,” including *McBratney*, “that purportedly did not implicate Indian interests”); see also *Chambers*, supra note 47, at 754–55 (citing Mont. Cath. Missions v. Missoula Cnty., 200 U.S. 118, 129 (1906); *Thomas v. Gay*, 169 U.S. 264, 273 (1898)) (“In the late nineteenth century, the Court modified the principles of the Cherokee cases concerning
The post-1881 Supreme Court precedents of the late-nineteenth-century and early-twentieth-century period addressing limited state authority over non-Indians in Indian country can be divided into two lines of cases: (1) a line of civil jurisdiction cases stemming from *Langford v. Monteith*124 and (2) a line of criminal jurisdiction cases with *United States v. McBratney* as their root.125 A frequently cited case from the *Langford* line is *Utah & Northern Railway Co. v. Fisher*, which validated a territorial tax on a railway company that had a track running through a portion of the Fort Hill Indian Reservation in the Territory of Idaho.126 The company argued that the tax as applied to the on-reservation stretch of track was illegal and void because (1) “the . . . reservation [had been] excluded from the limits of Idaho” by the 1863 Idaho Territory Act and (2) the reservation was “necessarily excepted from the jurisdiction of [Idaho] by the [1868] treaty” with the Shoshone and Bannock tribes, for whose benefit the reservation had been established.127 The Court made quick work of its rejection of the company’s first argument, pointing out that in 1863 “[t]here was . . . no treaty with the Indians that the lands, which might be reserved to them should be . . . excluded from the limits and jurisdiction of any state or territory” and that the Idaho Territory Act’s exclusion “proviso” therefore “ha[d] . . . no application” in the controversy before the Court.128


127. Id. at 29.

128. Id. at 30 (citation omitted); see also *United States v. Unzueta*, 281 U.S. 138, 145 (1930) (citation omitted) (“It appeared [in *Fisher*] that no treaty with the Indians was in existence at the time Congress created the Territory.”).
Fisher’s reasoning rejecting the railway company’s other argument—a.e., that the 1868 Shoshone-Bannock Treaty barred Idaho from subjecting the company to taxation within the reservation—was more involved. The essence of the company’s argument was that by imposing its jurisdiction Idaho would be interfering with the rights of the Indians as guaranteed by the treaty. The Court’s response was, first, that Idaho “undoubtedly” was precluded from exercising its jurisdiction “to the fullest extent” because that “might . . . defeat [treaty] provisions designed for the security of the Indians.” But the Court reasoned further that Idaho’s authority could “rightfully extend to all matters not interfering with [the stipulations for the Indians’] protection.” To illustrate such non-interference the Court alluded to Langford v. Monteith—a case whose holding covered only civil suits between non-Indian parties—stating: “It has, therefore, been held that process of [Idaho’s] courts may run into an Indian reservation of this kind, where the subject-matter or controversy is otherwise within their cognizance.” Applying this non-interference mandate to the dispute at hand, the Fisher Court concluded that the “railroad through the reservation” was properly subject to taxation, explaining: “[I]t is not perceived that any just rights of the Indians under the treaty can be impaired by taxing the road and property used in operating it.”

129. See supra text accompanying note 127.
131. Id.
132. Id.; see also Unzueta, 281 U.S. at 145 (citation omitted) (summarizing Fisher as having reasoned that the 1868 treaty “did not require that the reservation should be excluded from the jurisdiction of the Territory when the exercise of that jurisdiction would not defeat the stipulations of the treaty for the protection of the Indians”).
133. 102 U.S. 145 (1880); see supra notes 103–111 and accompanying text (discussing Langford).
134. See supra note 108 and accompanying text.
135. Fisher, 116 U.S. at 31; see also supra note 108 and accompanying text.
136. Fisher, 116 U.S. at 31–32; see also Richard Pomp, The Unfulfilled Promise of the Indian Commerce Clause and State Taxation, 63 TAX LAW. 897, 981 (2010) (“Under the facts of [Fisher], this conclusion was hardly surprising because the Indians sold the land to the Federal Government with the understanding that a right of way would be granted to the railroad. No rights of the Indians would be impaired in this voluntary transaction.”); accord Truscott v. Hurlbut Land & Cattle Co., 73 F. 60, 65 (9th Cir. 1896) (emphasis added) (citation omitted) (observing that in Fisher the Supreme Court approved Idaho’s “authority . . . to tax that portion of a railroad extending, with the consent of the Indians, through a . . . reservation”). The Fisher Court posited an alternative rationale for holding the company responsible for paying the tax, opining that the act of Congress that granted the company a right-of-way for the railroad’s construction had “withdrawn” the corridor of land “from the reservation” so that the “road and property thereupon became subject to the laws of the territory relating to railroads, as if the reservation had never existed.” Fisher,
Although the case did not cite or discuss Worcester, the 1885 Fisher decision has been recognized as another late-nineteenth-century application of an aspect of Worcester’s principle of preclusion, namely, the historical proscription against any authority exerted by a state or territory that would interfere with, impair, or “infringe on” the rights of Indians or Indian tribes.

4. United States v. Kagama (1886)

The year after deciding Fisher, the Supreme Court issued its unanimous opinion in United States v. Kagama, the watershed 1886 case

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116 U.S. at 32. A similar statutory rationale was used a decade later, in a case that validated a territorial tax as applied to a railway company’s short segment of track through the Gila River Reservation in Arizona. See Maricopa & Phoenix Ry. Co. v. Territory of Arizona, 156 U.S. 347 (1895). The Court reasoned that “the rights vested in the corporation by the act of Congress” that had permitted the company to construct the railway line “were taken out of the reservation by virtue of the [statutory] grant, and came, to the extent of their withdrawal, under the jurisdiction of the territorial authority.” Id. at 352. As a formal matter this alternative rationale, common to the Fisher and Maricopa & Phoenix Railway Co. cases, also is consistent with the Worcester principle, which presumptively precludes state (or analogous territorial) authority on reservations while acknowledging the possibility of federal grants of such authority “in conformity with treaties, and with the acts of Congress.” Worcester v. Georgia, 31 U.S. 515, 561 (1832); see also supra text accompanying note 39. For compelling criticism of the Supreme Court’s “withdrawn from the reservation” rationale in both Fisher and Maricopa & Phoenix Railway Co., see Scott A. Taylor, A Judicial Framework for Applying Supreme Court Jurisprudence to the State Income Taxation of Indian Traders, 2007 Mich. St. L. Rev. 841, 855–56 (2007) (observing, inter alia, (1) that the statute discussed in Fisher incorporated a U.S.-tribal agreement which in turn “restated that the existing treaty between the United States and the Tribe remained in full force”; (2) that the statute at issue in Maricopa & Phoenix Railway Co. “explicitly stated that, upon discontinuance of use of the right of way by the railway, the property would revert back to the Tribe”; and (3) that “[a]ny sensible reading of the law and the facts [in Maricopa & Phoenix Railway Co.] demonstrates that Congress intended the granting of the right of way to affect the territorial rights of the Tribe as little as possible”).

137. See supra note 98.

138. See Williams v. Lee, 358 U.S. 217, 219–20 (1959) (citing Fisher, 116 U.S. 28) ("[T]he basic policy of Worcester has remained.... Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."); United States v. Unzueta, 281 U.S. 138, 145 (1930) (citing infra note 504 and accompanying text; cf. Cohen’s Handbook § 6.01[3], supra note 5, at 498 discussing Fisher as one of the late-nineteenth-and early-twentieth-century cases in which “the Supreme Court continued to allow the civil authority of territorial or state governments to reach non-Indians on Indian reservations, but only to the extent the Indians themselves, and the Indians’ interests, remained essentially unaffected").
that declared constitutional the 1885 Major Crimes Act,\textsuperscript{139} a statute in which Congress, for the first time, subjected Indians to federal jurisdiction for certain serious crimes committed within reservations.\textsuperscript{140} The Court divided its analysis into sequential inquiries that tracked the Act’s “two distinct definitions of the conditions under which Indians may be punished.”\textsuperscript{141} First, the Court addressed whether the statute’s constitutionality could be sustained if the crime had occurred in a \textit{territory} rather than within a state.\textsuperscript{142} The Court then turned to the other inquiry,\textsuperscript{143} having reserved to the concluding paragraphs the opinion’s coverage of whether any “objection to the law” based on states’ rights might be “fatal” to the Act’s constitutionality.\textsuperscript{144}

In the longer, hypothetically-oriented analysis in the first part of the opinion the Court began by noting that “[a]lthough the offense charged in this indictment was committed \textit{within a state}, and not \textit{within} a territory, the considerations which are necessary to a solution of the problem in regard to the one must in a large degree affect the other.”\textsuperscript{145} It is in this part of \textit{Kagama} that the Supreme Court began developing

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\item\textsuperscript{139} Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385.
\item\textsuperscript{140} See \textit{United States v. Kagama}, 118 U.S. 375, 377–78 (1886); cf. \textit{Newton}, supra note 49, at 212 (footnote omitted) (noting that the Major Crimes Act “made federal offenses of seven major crimes if committed by Indians against Indians in Indian country, whether or not within the boundaries of any state”). For a thorough discussion of the case, including its factual, historical, and cultural context, see Sidney L. Harring, \textit{The Distorted History that Gave Rise to the “So Called” Plenary Power Doctrine: The Story of United States v. Kagama, in INDIAN LAW STORIES} 149 (Carole Goldberg, Kevin K. Washburn & Philip P. Frickey eds., 2011). Among the fascinating details is that after the Supreme Court’s decision the ensuing murder trial resulted in “a directed acquittal of ‘not guilty’ on jurisdictional grounds: the federal courts lacked jurisdiction because the killing had not actually occurred within the boundaries of the Hoopa Valley Reservation, and was therefore not under the Major Crimes Act.” \textit{Id.} at 170 (footnote omitted).
\item\textsuperscript{141} \textit{Kagama}, 118 U.S. at 377. The Court observed that in one of its clauses the Major Crimes Act “subjects all Indians, guilty of these crimes committed within the limits of a \textit{territory}, to the laws of that \textit{territory}, and to its courts for trial,” and that a second clause—the one relevant to the putative facts of \textit{Kagama} itself—“applies solely to offenses by Indians which are committed within the limits of a \textit{state} and the limits of a reservation” and “subjects the offenders to the laws of the United States passed for the government of places under the exclusive jurisdiction of those laws, and to trial by the courts of the United States.” \textit{Id.} (emphases added).
\item\textsuperscript{142} \textit{See id.} at 377–83.
\item\textsuperscript{143} \textit{See id.} at 383–85.
\item\textsuperscript{144} \textit{Id.} at 383. The opinion inserts a reminder of the yet-to-be-addressed states’-rights issue midway through the Court’s preliminary, hypothetical focus on federal power to enforce the Major Crimes Act in the territories, stating: “What authority the \textit{State} governments may have to enact criminal laws for the Indians will be presently considered.” \textit{Id.} at 380 (emphasis added); \textit{see also infra} note 172.
\item\textsuperscript{145} \textit{Id.} at 378 (emphasis added).
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one of the most far-reaching and controversial principles of Indian law, namely, what has since been called the “plenary power” of Congress in Indian affairs.\textsuperscript{146} The analysis focused on the Indian Commerce Clause.\textsuperscript{147} The Court wrote:

The mention of Indians in the Constitution which has received most attention is that found in the clause which gives Congress “power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”

This clause is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. 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.\textsuperscript{148}

The\textit{ Kagama} Court confessed that it was “not able to see in” the Indian Commerce Clause “any delegation of power” authorizing Congress “to enact a code of\textit{ criminal law}” for Indians.\textsuperscript{149} Yet the Court proceeded with its admittedly “very strained construction,”\textsuperscript{150} opining that “there is a

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\textsuperscript{146} \textit{See}, \textit{e.g., Walter R. Echo-Hawk, In The Courts Of The Conqueror: The 10 Worst Indian Law Cases Ever Decided} 199 (2010) (“[O]n the dark side, beginning with \textit{Kagama} the guardianship principle was twisted into a sword by the courts to justify excessive government intrusion into the internal affairs of Indian tribes and to exercise unwarranted control over the lives and property of American Indians in a slide toward despotism.”); \textit{Fletcher § 2.3, supra} note 35, at 44 (footnotes omitted) (“[F]or decades, Indian activists and scholars decried federal plenary power in Indian affairs because it was the source of deeply destructive federal Indian law and policy. Beginning especially in the mid-1980s, Indian law specialists and scholars became divided over the scope and legitimacy of federal plenary power in Indian affairs. While plenary power once created untold hardships for Indian people, Congress had lately begun using its plenary power, in most instances, to enact statutes for the benefit of Indian tribes and Indian people.”); \textit{Carlson, supra} note 16, at 8 (footnotes omitted) (“A relatively cohesive policymaking alliance on Indian affairs policy has existed since the mid-1970s when the Executive Branch and Congress adopted the Tribal Self-Determination Policy. . . . Under the Tribal Self-Determination Policy, the majoritarian branches of the United States government have committed to supporting Indian Nations as governments with inherent sovereign powers . . . and separate from the states.”).
\textsuperscript{147} \textit{See} \textit{U.S. Const.}, art. I, § 8, cl. 3.
\textsuperscript{148} \textit{Kagama}, 118 U.S. at 378–79.
\textsuperscript{149} \textit{Id}. at 379 (emphasis added).
\textsuperscript{150} \textit{Id}. at 378.
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suggestion in the manner in which the Indian tribes are introduced into that clause which may have a bearing on the subject before us." The Court properly observed that, as with the Constitution’s "commerce . . . with the Indian tribes" language, "commerce with foreign nations" also "is distinctly stated [in the text of the Constitution] as submitted to the control of Congress." But the Court then opined—gratuitously—that "in the minds of the framers of the Constitution" Indian tribes themselves must not have been thought of as "nations." The Court then purported to summon precedent for this conjecture-based rhetorical downgrading of Indigenous peoples’ status under U.S. law. The Court first invoked *Cherokee Nation v. Georgia*, averring that in that foundational Marshall trilogy precedent "it was . . . held that the Cherokees were not a state or nation, within the meaning of the constitution, so as to be able to maintain [their] suit" against Georgia. A few pages later the Court opined that *Worcester v. Georgia* likewise was a relevant precedent for *Kagama*'s denial of Indian tribes' national character and status. Thus, referring to both *Cherokee Nation* and *Worcester*, the Court wrote:

These opinions are exhaustive . . . .

In [*Cherokee Nation*] it was held that these tribes were neither states nor nations . . . .

In the opinions in these cases they are spoken of as "wards of the nation," "pupils," as local dependent communities. In this spirit the

151. *Id.* at 379.
152. U.S. CONST. art. I, § 8, cl. 3.
154. *See id.* ("Were [the Indian tribes] nations? If so, the natural phrase would have been ‘foreign nations and Indian nations,’ or, in the terseness of language uniformly used by the framers of the instrument, it would naturally have been ‘foreign and Indian nations.’").
155. *See id.* at 379, 381–82 (purporting to paraphrase *Cherokee Nation* v. Georgia, 30 U.S. 1 (1831); *Worcester* v. Georgia, 31 U.S. 515 (1832)).
156. 30 U.S. 1.
157. Professor Richard Pomp borrows levity from Professor Charles Wilkinson in pointing out that "John Marshall was Chief Justice [when *Cherokee Nation* was decided], and this case would be one of his three seminal and foundational decisions on Indian law: the so-called Marshall trilogy (although 'trinity' might be an equally appropriate term)." Pomp, *supra* note 136, at 948 (footnote omitted) (quoting CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 24 (1987)); *see also id.* at 948 n.199 ("Professor Wilkinson apparently coined the term 'Marshall Trinity' . . . .").
United States has conducted its relations to them from its organization to this time.\textsuperscript{159}

Judicial mistakes are to be expected, but when a court repeatedly misstates precedent to lend illusory credibility to a harmful proposition or oppressive result, unethical choices are the most likely explanation. \textit{Kagama} thus appears to intentionally misrepresent both \textit{Cherokee Nation} and \textit{Worcester}. In \textit{Cherokee Nation}, for instance, Chief Justice Marshall had pointedly concluded that, like all Indian tribes, the Cherokee Nation undoubtedly qualified as a “state” and a “nation” (albeit not a “foreign” one):

So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.\textsuperscript{160}

And, in \textit{Worcester}, the Supreme Court was adamant in repeatedly referring to tribes as “nations,” a characterization integral to \textit{Worcester’s} holding that federal power over relations between the United States and Indian nations was completely exclusive of the states:

The sixth and seventh articles [of the 1785 Treaty of Hopewell] stipulate for the punishment of the citizens of either country who may commit offenses on or against the citizens of the other. The only inference to be drawn from them is, that the United States considered the Cherokees as a nation.

\textsuperscript{159} Id. at 382 (emphasis added).

\textsuperscript{160} \textit{Cherokee Nation}, 30 U.S. at 16; see also Newton, supra note 49, at 238 & n.236 (quoting \textit{Cherokee Nation}, 30 U.S. at 17, 19) (observing that in \textit{Cherokee Nation} “Chief Justice Marshall found that the Constitution recognized Indians as sovereign nations, albeit ‘domestic dependent nations,’” and that “[i]n explaining the [Court’s] conclusion that Indian tribes could not sue as foreign nations, Chief Justice Marshall noted that the framers did not regard Indian tribes as foreign nations ‘not, we presume because a tribe may not be a nation, but because it is not foreign to the United States’”).
[The Cherokees] assumed the relation with the United States, which had before subsisted with Great Britain.

This relation was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master.

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

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 . . . . The very term “nation,” so generally applied to them, means “a people distinct from others.” The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties. The words “treaty” and “nation” are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.¹⁶¹

¹⁶¹ Worcester v. Georgia, 31 U.S. 515, 553, 555, 556–57, 559–60 (1832); see also Holden v. Joy, 84 U.S. 211, 242 (1872) (footnote omitted) (“Laws have been enacted by Congress in the spirit of [Indian] treaties, and the acts of our government, both in the executive and legislative departments, plainly recognize such tribes or nations as States, and the courts of the United States are bound by those acts.”); cf. Pomp, supra note 136, at 965 (“[I]n Worcester, Marshall could let his true views control. The tribes might not be ‘foreign’ nations but Marshall had no doubts whatsoever that they were nations. Georgia could no more legislate for the Indians than it could for South Carolina or Canada.”).
Even *Kagama*’s calling tribes “local dependent communities”\(^{162}\)—a term that does not appear in *Cherokee Nation* or *Worcester*—instead of using Marshall’s own term, “domestic dependent nations,”\(^{163}\) when paraphrasing those earlier opinions betrays studious avoidance of basic integrity and honesty in the Court’s deliberate disparagement of Indigenous nations.\(^{164}\)

*Kagama*’s distortion of precedent to demean tribes and denigrate Native rights\(^{165}\) established a nefarious model that, sadly, the Supreme Court all too often has emulated in Indian law cases\(^{166}\)—a stratagem

\(^{162}\) *See supra* text accompanying note 159.

\(^{163}\) *Cherokee Nation*, 30 U.S. at 17 (emphasis added).

\(^{164}\) *See also infra* note 179. *Kagama*’s disparaging dicta set an example for further judicial commentary denigrating and vilifying Indian nations during the turn-of-the-century period. *See*, e.g., *Cherokee Nation* v. S. Kan. Ry. Co., 135 U.S. 641, 653 (1890) (“The proposition that the *Cherokee Nation* is a sovereign in the sense that the United States is sovereign, or in the sense that the several states are sovereign . . . finds no support.”); *United States v. Choctaw Nation*, 179 U.S. 494, 532 (1900) (citing *Choctaw Nation* v. *United States*, 119 U.S. 1, 28 (1886)) (“[T]he relation between the United States and the Indian tribes [is] that of superior and inferior . . . .”); *Montoya* v. *United States*, 180 U.S. 261, 265 (1901) (“[T]he word ‘nation’ as applied to the uncivilized Indians is so much of a misnomer as to be little more than a compliment.”); *In re Heff*, 197 U.S. 488, 498 (1905) (“[T]he recognized relation between the Government and the Indians is that of a superior and an inferior, whereby the latter is placed under the care and control of the former.”), overruled by *United States v. Nice*, 241 U.S. 591, 601 (1916); *United States v. Sandoval*, 231 U.S. 28, 39 (1913) (describing the Pueblo Indians of New Mexico as “a simple, uninformed and inferior people”); *see also*, e.g., *Jaeger* v. *United States*, 27 Ct. Cl. 278, 282 (1892) (citing, inter alia, *United States v. Kagama*, 118 U.S. 375 (1886)) (“The Indian question has been among the great problems of the age, and, consistent with the manifest destiny of civilization to assume the place of barbarism, the treatment of the American Indian has been perhaps as humane as it could have been, under all the circumstances of the situation. . . . The decisions of the Supreme Court define the relation of the Indians to the United States.”).

\(^{165}\) *Cf.* COHEN’S HANDBOOK § 1.04, supra note 5, at 76 (footnote omitted) (observing that by upholding the Major Crimes Act *Kagama* “opened the way for a new level of interference in the internal affairs of Indian tribes”); *Canby*, supra note 38, at 151 (“[T]he Major Crimes Act was the first systematic intrusion by the federal government into the internal affairs of the tribes.”).

\(^{166}\) *See*, e.g., FRANK POMMERSHEIM, BROKEN LANDSCAPES: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 139 (2009) (footnote omitted) (citing *Kagama*, 118 U.S. at 383–84; *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 567 (1903)) (“. . . *Kagama* is quoted approvingly in *Lone Wolf*, but it is then used without qualm or analysis to permit the transformation of the trust responsibility from a protective shield to a destructive sword with which to carve up and dispose of the tribal land estate. All of this is cloaked in arid formalism that is a toxic mix of deceit and evasion.”); *cf.* Ann E. Tweedy, Has Federal Indian Law Finally Arrived at “The Far End of the Trail of Tears”? 37 GA. ST. U. L. REV. 739, 755 (2021) (footnote omitted) (“[I]n the sometimes upside-down world of federal Indian law, adherence to precedent is often remarkable in itself.”). *Kagama*’s misrepresentations and distortions denying the nation status of Indian tribes have even infected modern Indian law cases that
reflected, in fact, in the way Castro-Huerta systematically “disregards” precedents recognizing that “power to try ‘crimes committed by or against Indians’ on tribal lands” is “reserved . . . to the federal government and the Tribes alone.”167 In Kagama, the Court’s misrepresentations obscured and partially derailed that case’s constitutional law analysis, leaving uncertain whether Congress’s power to enact the Major Crimes Act was or was not rooted in the Indian Commerce Clause. Regardless, the Court went on to definitively proclaim the Act’s constitutionality, holding, as summarized by Judge William Canby, “that this exercise of congressional power was justified by the dependent status of the tribes as wards of the federal government.”168

To complete its analysis, however, the Kagama Court had to move beyond the hypothetical part of its inquiry and determine whether, in view of the fact that the murder at issue had occurred on a reservation located within California, any state sovereignty concerns might require striking down the statute as unconstitutional.169 The Court held that such objections were without merit, reasoning that the Major Crimes Act (1) “[did] not interfere with the process of the state courts within the reservation, nor with the operation of state laws upon white people found there”; (2) was compatible with Congress’s “duty of protection” toward

otherwise largely adhere to foundational principles protective of tribal sovereignty and autonomy. See, e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980) (emphasis added) (quoting McClanahan v. Ariz. St. Tax Comm’n, 411 U.S. 164, 173 (1973) (quoting Kagama, 118 U.S. at 381–82)) (“[T]he tribes have retained ‘a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations . . . .’”).

167. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2518 (2022) (Gorsuch, J., dissenting) (citations omitted); cf. Angela R. Riley & Sarah Glenn Thompson, Mapping Dual Sovereignty and Double Jeopardy in Indian Country Crimes, 122 COLUM. L. REV. 1899, 1909–10 (2022) (“For about two hundred years, Indian tribes and the federal government have been responsible for coadministering the criminal justice system in Indian country, largely to the exclusion of the states. A long history—as manifested in treaties, the U.S. Constitution, congressional acts, and an entire body of Supreme Court jurisprudence—confirmed this arrangement. During this time, for the most part, if an Indian country crime involved an Indian, either as perpetrator or as victim, states lacked criminal jurisdiction altogether. The Supreme Court [in Castro-Huerta] . . . changed this rule . . . .”).

168. CANBY, supra note 38, at 151 (citation omitted); cf. Newton, supra note 50, at 205 (footnotes omitted) (“After the Civil War and the pacification of the last tribes of the plains, a movement began to assimilate Indians into American culture, by force if necessary. A policy of treating Indian tribes as separate nations with power over their own people on their own land was seen as antithetical to this new policy.”).

169. See Kagama, 118 U.S. at 375 (noting that the case involved “an indictment against two Indians for murder committed on the Indian reservation of Hoopa Valley, in the State of California, the person murdered being also an Indian of said reservation”); see also supra note 144 and accompanying text.
the Indians; and (3) was an exercise of sovereign power that “must exist in [the federal] government because it never has existed anywhere else.”

The Supreme Court thus recognized “that Congress had always been the political entity that had asserted authority over Indian affairs, and that states were not so authorized.”

Kagama’s holding was consistent, in

171. Fletcher § 3.7, supra note 35, at 83 (footnote omitted); cf. Newton, supra note 50, at 214, 215 (observing that “the Kagama Court relied on the history of federal supremacy over the states in Indian affairs and the historic, protective role the government played toward Indians” and that “the federal government had insisted on the exclusive right to deal with the tribes since the founding of the republic”); William Wood, It Wasn’t an Accident: The Tribal Sovereign Immunity Story, 62 Am. U. L. Rev. 1587, 1659 n.425 (2013) (citation omitted) (citing Kagama for the proposition that “[p]rotecting the tribes against state encroachment was the federal government’s obligation, assumed explicitly through treaties and as part of the federal government’s fiduciary duties toward Indian tribes generally”). The Court reinforced its analysis ruling out the states as not being constitutionally authorized to manage Indian affairs by stating: “Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.” Kagama, 118 U.S. at 384. Since the exact focus of Kagama was the imposition of external governmental power over Yurok Indians on the Hoopa Valley Reservation in California, see Harring, supra note 140, at 151–61 (discussing Kagama’s historical background), the Justices may have been especially sensitive to the then-recent history of widespread violence against California Indians earlier in the nineteenth century perpetrated by mining prospectors and settlers, and condoned and even authorized by state officials. Cf. LaVelle, supra note 13, at 156–58 n.75 (sampling historical accounts addressing “the scope of the population decimation suffered by California Indians at the time of the California Gold Rush” and “the contemporaneous policy positions and practices of . . . government leaders advocating or countenancing the extermination of Indigenous peoples”); Nick Estes, The rightwing supreme court has another target: Native American rights, Guardian (July 21, 2022), https://the-rightwing-supreme-court-has-another-target (“. . . [Kagama] recognized the role states, and their citizens, played in fueling Native conflict and dispossession. It was a rare occasion in which the court acknowledged it was making Indian law in the context of great violence and suffering.”). See generally Benjamin Madley, An American Genocide: The United States and the California Indian Catastrophe, 1846–1873 (2016). As an example of this historical violence historian Benjamin Madley writes: “By invoking the inevitable extinction myth, on one hand, while supporting Indian killing, on the other, [Peter] Burnett leveraged his authority as California’s first civilian US governor to endorse further ranger militia operations against California Indians. In this way, he pushed his successor, lieutenant governor and fellow Democrat John McDougal, as well as state legislators, to institutionalize the state-sponsored hunting and killing of California Indians.” Id. at 186 (endnote omitted).

Kagama’s traumatic historical context renders especially disturbing the Castro-Huerta majority’s misrepresenting a point made by the respondent. The majority wrote: “Castro-Huerta notes that many tribes were enemies of States in the 1700s and 1800s.” Castro-Huerta, 142 S. Ct. at 2502 n.7. But the respondent’s brief actually makes the converse point: “. . . 19th-century Congresses understood States as often Indians’ ‘deadliest enemies’ and recognized that Indians would ‘receive [from States] no protection.’” Brief for Respondent at 37, Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022) (No. 21-429) (quoting Kagama, 118 U.S. at 384), available at https://casto-huerta-brief-for-respondent; see also
other words, with the Worcester principle: state authority over on-
reservation crimes involving Indians remained precluded\textsuperscript{172} even as national policy had abruptly shifted by force of a newly enacted statute subjecting Indians to federal criminal jurisdiction, a statute that was a valid exercise of Congress's paramount and exclusive authority in Indian affairs.\textsuperscript{173} Kagama's affirming, in light of Worcester, the Major Crimes Act's constitutionality\textsuperscript{174} aligned, moreover—as the Court itself

\begin{quote}
Transcript of Oral Argument, \textit{supra} note 69, at 81 (No. 21-429) (remark of Mr. Schauf) ("[A]s this Court said in the Kagama case, . . . states at this point were Indians' deadlest enemies, and I don't think you put, you know, the fox in charge of the hen house even if the fox only has concurrent jurisdiction."). The Court's misrepresentation evokes a similar one made by Chief Justice John Roberts—who was part of the Castro-Huerta majority—prior to his appointment to the Supreme Court. See Richard A. Guest, "Motherhood and Apple Pie": Judicial Termination and the Roberts Court, \textit{Fed. Law.} 52, 54-55 (Mar./Apr. 2009) (noting introductory statement in a petitioner's brief, submitted to the Supreme Court, in which Roberts, purporting to quote from Kagama, argued "reservation Indians . . . were often 'dead[ly] enemies' of the States," and criticizing Roberts's statement for having "re-characterized Indians as the 'deadly enemies' of the states (alluding to the stereotype of the savage Indian)").
\end{quote}

172. \textit{Kagama}'s analysis rejecting any state sovereignty concerns thus implicitly responds "None" to the Court's self-posed query about "[w]hat authority the State governments . . . have to enact criminal laws for the Indians . . . . have to enact criminal laws for the Indians," \textit{Kagama}, 118 U.S. at 380 (emphasis added). \textit{See supra} notes 143–144 and accompanying text; \textit{see also}, e.g., New York ex rel. Cusick v. Daly, 105 N.E. 1048, 1049, 1052, (N.Y. 1914) (emphases added) (citing \textit{Kagama}, 118 U.S. 375) (". . . [According to the Kagama Court] the power of the Federal authorities was asserted primarily because the Indian tribes in this country were, and always had been since the formation of the government, the wards of the nation and not of the states. . . . In that case it was held, not only that Congress was acting within its proper sphere in enacting the statute of 1885, but that the extension of the Federal jurisdiction to Indians upon state reservations was not an invasion of state rights. . . . [T]he jurisdiction of our state courts must give way before the higher authority which [the Major Crimes Act] vests in the Federal courts."). \textit{cited in} Oneida Indian Nation v. Cnty. of Oneida, 414 U.S. 661, 672 n.8 (1974), and \textit{in Rice v. Olson}, 324 U.S. 786, 790 n.4 (1946); \textit{Ex parte Cross}, 30 N.W. 428, 428 (Neb. 1886) (emphasis added) (citing \textit{Kagama}, 118 U.S. 375) ("In [Kagama] it is held that the state courts have no jurisdiction over the Indians within the state, and on their reservations, for crime committed by and against each other, so long as they maintain their tribal relations."). \textit{cited in} Rice, 324 U.S. at 790 n.4; \textit{infra} note 418 and accompanying text; \textit{cf. Estes, supra note 171} ("[T]he court affirmed in Kagama . . . that Indian country sat apart from states and was instead subject to congressional and federal authority. Put simply, states had no business in tribal affairs.").

173. \textit{Cf. Michigan v. Bay Mills Indian Cnty.}, 572 U.S. 782, 803 (2014) (quoting \textit{COHEN'S HANDBOOK} § 2.01[1], \textit{supra} note 5, at 110) ("Judicial deference to the paramount authority of Congress in matters concerning Indian policy remains a central and indispensable principle of the field of Indian law.").

recognized—with the limited reach of state and territorial authority on reservations to matters involving non-Indians only, as shown in the pre-Kagama cases addressing assertions of (1) civil adjudicative and legislative jurisdiction (i.e., Longford and Fisher, respectively) and (2) criminal jurisdiction (i.e., McBratney). Having thus completed the second prong of its constitutional law analysis by rejecting state sovereignty objections the Court held that the Major Crimes Act was “a valid law in both its branches.”

Notwithstanding Kagama’s contrived and patronizing labeling of tribes as “wards of the nation” and its disingenuous dicta maligning United States and [Indian nations], is, by our Constitution and laws, vested in the government of the United States”.

175. See Kagama, 118 U.S. at 383 (stating that exclusive federal jurisdiction under the Major Crimes Act “does not interfere with the process of the state courts within the reservation, nor with the operation of state laws upon white people found there”); supra text accompanying note 170.


177. See supra notes 112–123 and accompanying text (discussing United States v. McBratney, 104 U.S. 621 (1881)); see also Truscott v. Hurlbut Land & Cattle Co., 73 F. 60, 65 (9th Cir. 1896) (emphasis added) (citations omitted) (“[T]hat the criminal jurisdiction of the state courts extends to crimes [on reservations] in which the Indians have no part . . . was held by the supreme court in U.S. v. McBratney and in U.S. v. Kagama.”).

178. Kagama, 118 U.S. at 385.

179. Id. at 382 (purporting to quote from Cherokee Nation and Worcester when stating that “[i]n the opinions in these cases” Indian tribes “are spoken of as ‘wards of the nation,’ ‘pupils,’ as local dependent communities”); see supra text accompanying note 159. But see Fletcher § 3.7, supra note 35, at 78 n.215 (noting that the Kagama Court’s statement that the phrase “wards of the nation” appears in the Cherokee cases “was mistaken” since “‘wards of the nation’ appears nowhere in either opinion”). The word “pupils,” which Kagama likewise places in quotation marks, see supra text accompanying note 159, also does not appear in either Cherokee Nation or Worcester; rather, as Professor Matthew Fletcher points out, in Cherokee Nation “Chief Justice Marshall’s lead opinion . . . asserts that Indian people ‘are in a state of pupilage.’” Fletcher § 3.7, supra note 35, at 78 n.215 (quoting Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831)). The term “local dependent communities,” which Kagama purports to be one of the labels used by the Marshall Court to describe tribes, see supra text accompanying note 159, likewise is not found in the Cherokee cases; instead, that term appears to have been invented by the Kagama Court itself. Finally, in contrast with Kagama’s stating that it was “[i]n this spirit” (adverting to Kagama’s wardship terms) that “the United States has conducted its relations to [tribes] from its organization to this time,” see supra text accompanying note 159, Chief Justice Marshall actually had used the phrase “in the spirit of” in the following way: “[Federal laws] have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.” Cherokee Nation, 30 U.S. at 16; see supra text accompanying note 160.
tribes’ political status, the case remains paradoxically important for modern Indian law. Its implicit incorporation of Worcester’s baseline preclusion of state authority on reservations over matters involving Indians or Indian tribes can be, and has been, put to beneficial use in bolstering tribal autonomy. Indeed, as discussed below, twentieth-century Supreme Court cases relying on Kagama clearly contradict Castro-Huerta’s holding, i.e., that states generally “have . . . jurisdiction [concurrent with the federal government] over crimes committed by non-Indians against Indians in Indian country.”

5. Ward v. Race Horse (1896)

Ten years after Kagama the Supreme Court decided two cases that further reflected judicial adherence to the enduring Worcester principle. The first of these, Ward v. Race Horse, might seem like an odd one to be discussing in this regard since that case has the ignoble distinction of being twice repudiated by the Supreme Court. Repudiation was

180. See supra notes 154–165 and accompanying text.


185. 163 U.S. 504 (1896).

186. See Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 205 (1999) ("Race Horse rested on the premise that treaty rights are irreconcilable with state sovereignty. It is this conclusion—the conclusion undergirding the Race Horse Court’s equal footing holding—that we have consistently rejected over the years."); Herrera v. Wyoming, 139 S. Ct. 1686, 1697 (2019) ("[W]e make clear today that Race Horse is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood.").
necessary, the Justices have explained in recent years, because *Race Horse* “rested on a false premise,” namely, the belief “that treaty rights can be impliedly extinguished at statehood.” In *Race Horse* the Court gave notorious effect to that now-discredited assumption by overturning a Shoshone-Bannock Indian’s habeas corpus-based discharge from custody after he had been convicted and imprisoned for violating state law by hunting elk off-reservation. But, despite its erroneous and unjust denial of the continuation of the tribe’s off-reservation treaty rights after Wyoming became a state, the *Race Horse* Court got at least one thing right: It distinguished situations implicating the question whether on-reservation Indian rights and tribal autonomy remained intact post-statehood. Thus, in response to the Shoshone-Bannock Indian’s unavailing efforts to use *The Kansas Indians* and *The New York Indians* to persuade the Justices to affirm the lower court’s order releasing him from confinement, the Supreme Court stated that those precedents

involved the authority of the state to exert its taxing power on lands embraced within an Indian reservation,—that is to say, the authority of the state to extend its powers to lands not within the scope of its jurisdiction,—while this case involves a question of whether, where no reservation exists, a state can be stripped, by implication and deduction, of an essential attribute of its governmental existence.

The *Race Horse* Court thus clearly recognized that the *Worcester* principle—which had controlled the outcomes in *The Kansas Indians* and *The New York Indians*—retained its efficacy, even in view of “equal footing” provisions of enabling acts like Wyoming’s, to presumptively

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188. See *Race Horse*, 163 U.S. at 507, 516.

189. See *Herrera*, 139 S. Ct. at 1694–95 (citations omitted) (summarizing facts, treaty issue, and conclusion in *Race Horse*).


191. See supra notes 82–94 and accompanying text.

192. Cf. *Race Horse*, 163 U.S. at 519 (Brown, J., dissenting) (“I am not impressed with the [majority’s] theory that the act admitting Wyoming into the Union upon an equal footing with the original states authorized them to impair or abrogate [off-reservation] rights previously granted by the sovereign power by treaty, or to discharge itself of burdens which the United States had assumed before her admission into the Union. . . . [T]he proviso in the [Wyoming] territorial act exhibited a clear intention on the part of congress to continue in force the stipulation of the treaty, and there is nothing in the act admitting the territory as a state which manifests an intention to repudiate them.”); accord *Herrera*, 139 S. Ct. at 1695 (observing that the Court has “methodically repudiated [*Race Horse’s]*
bar any attempted extension of state jurisdiction onto an Indian reservation absent Congress’s authorization.


The other case implicitly validating *Worcester* that the Supreme Court decided in 1896 was *Draper v. United States*.193 As with *United States v. McBratney*,194 *Draper* held that it was the courts of the state—Montana, in this instance—and not the federal courts, that had valid jurisdiction over a crime committed by a non-Indian against another non-Indian within the boundaries of an Indian reservation.195 Once again the Supreme Court pointed to the language of federal statutes, i.e., the 1864 Montana Territory Act196 and the 1889 Montana Enabling Act,197 as amounting to congressional direction that on-reservation crimes committed by non-Indians against other non-Indians were within the state’s jurisdiction once Montana entered the Union.198 The Court rejected the U.S. government’s argument that *McBratney* did not control this dispute because a provision of the Montana Enabling Act disclaimed “all right and title” to lands “owned or held by an Indian or Indian tribes” and specified that such lands would “remain under the absolute jurisdiction and control of the congress of the United States.”199 Since “equality of statehood is the rule,” the Court reasoned, the disclaimer language must be read narrowly200—and read in light of the federal government’s then-prevailing Indian allotment policy—as applying only logic,” including through the Court’s having “entirely rejected the ‘equal footing’ reasoning applied in *Race Horse*”).

193. 164 U.S. 240 (1896).
194. 104 U.S. 621 (1881).
195. See infra text accompanying note 202.
198. See *Draper*, 164 U.S. at 242–43 (citations omitted) (describing 1864 Montana Territory Act and 1889 Montana Enabling Act, and stating that “*McBratney* is . . . decisive of the question now before us, unless the enabling act of the state of Montana contained provisions taking that state out of [*McBratney’s*] general rule”).
199. See id. at 243–44 (quoting provisions of Montana Enabling Act, including state’s disclaimer of “all right and title” to all Indian lands and explaining that “[t]he words upon which the [United States’] argument is based are the following: ‘And said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States’”).
200. See id. at 244–45 (“As equality of statehood is the rule, the words relied on here to create an exception to [*McBratney*] cannot be construed as doing so if, by any reasonable meaning, they can be otherwise treated. The mere reservation of jurisdiction and control by the United States of ‘Indian lands’ does not of necessity signify a retention of jurisdiction in the United States to punish all offenses committed on such lands by others than Indians or against Indians.”).
to “the reservation of jurisdiction and control over the Indian lands” and not to questions of criminal jurisdiction within reservations.\(^\text{201}\) The Court wrote: “[I]n reserving to the United States jurisdiction and control over Indian lands, [the statutory provision] was not intended to deprive [Montana] of power to punish for crimes committed on a reservation or Indian lands by other than Indians or against Indians . . . .”\(^\text{202}\) Accordingly, the Supreme Court reversed the lower federal court’s determination that it had jurisdiction and ordered that court to “deliver up the prisoner to the authorities of the state . . . to be dealt with according to [Montana] law.”\(^\text{203}\)

Like McBratney, Draper reflects adherence to, not a departure from, the Worcester preclusion principle. In each of these cases the state’s authority to exercise jurisdiction over a crime committed by a non-Indian against a non-Indian depended on authorization found in a federal statute, i.e., each state’s enabling act.\(^\text{204}\) As Justice Gorsuch observed in his Castro-Huerta dissent, “this Court in McBratney and Draper held that federal statutes admitting certain States to the Union effectively meant those States could now prosecute crimes on tribal lands involving only non-Indians.”\(^\text{205}\) Or, to use the language of Worcester’s formulation

\(^{201}\) Id. at 245–46 (emphasis added) (citations omitted) (discussing Montana Enabling Act provisions in light of the 1882 Crow Allotment Act and the 1887 General Allotment Act). The Draper Court’s acknowledgment of the federal government’s “reservation of jurisdiction and control over the Indian lands,” id. at 246, during the allotment period, as confirmed by Congress in the Montana Enabling Act, contextualizes Draper’s dictum opining that allotment policy aspired to achieve “the gradual extinction of Indian reservations and Indian titles by the allotment of such lands to the Indians in severalty,” id. See Susan D. Campbell, Reservations: The Surplus Lands Acts and the Question of Reservation Disestablishment, 12 AM. INDIAN L. REV. 57, 90 (1984) (footnote omitted) (“Allotment, paradoxically, did not weaken the reservation system, but necessitated its expansion.”); see also infra note 430 (discussing the misleading use of similar dictum in County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992)).

\(^{202}\) Draper, 164 U.S. at 247 (emphasis added).

\(^{203}\) Id. (citation and internal quotation marks omitted).

\(^{204}\) See supra notes 112–123 and accompanying text (discussing McBratney); supra notes 193–203 and accompanying text (discussing Draper). Draper’s reliance on federal statutory law, i.e., the Montana Enabling Act, as authorizing exclusive state jurisdiction over crimes by non-Indians against non-Indians on reservations provides context and contrast for the Supreme Court’s misrepresenting and distorting Draper in Nevada v. Hicks, 533 U.S. 353 (2001), where the Court averred in dicta that “States’ inherent jurisdiction on reservations can of course be stripped by Congress.” Id. at 365 (citing Draper, 164 U.S. at 242–43). For further discussion of Hicks, see infra notes 571–587 and accompanying text.

\(^{205}\) Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2517 (2022) (Gorsuch, J., dissenting) (emphasis added); see also id. at 2508 (emphasis added) (citing United States v. McBratney, 104 U.S. 621, 623 (1881); Draper, 164 U.S. at 243, 247) (“Relying on language in certain
as it relates to McBratney and Draper, state jurisdiction over crimes involving only non-Indians could “have [had] no force” within reservation boundaries had that authority not been shown to be “in conformity . . . with . . . acts of congress.” Indeed, in McBratney and Draper the Colorado and Montana enabling acts had to be carefully scrutinized for the very purpose of justifying the Court’s conclusion that the U.S. government was wrong in arguing, in both cases, that exclusive federal jurisdiction over crimes on reservations, including crimes involving only non-Indians, persisted in the two newly admitted states.

Castro-Huerta, however, distorts McBratney and Draper, wielding those cases as though they controlled the question whether a state (Oklahoma) had jurisdiction in Indian country (i.e., on the Cherokee Reservation) over a crime committed by a non-Indian against an Indian.

To make those precedents seem applicable, the majority had to skip over and deflect away from crucial limiting language in both cases and make a move of judicial activism to replace the McBratney rule with a contrary, misleading precept of the Court’s own devising. Thus, McBratney itself states that the Colorado Enabling Act gave the state “criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation.” Castro-Huerta, however, misrepresents this rule, asserting that McBratney had concluded that Colorado’s admission into the Union validated, as a general matter, “the State’s exercise of criminal jurisdiction ‘throughout the whole of the territory within its limits,’ including Indian country.” Castro-Huerta, by leaving out language that had confined the McBratney rule to instances where a state asserts criminal jurisdiction “over its own citizens and other white persons” on a

laws admitting specific States to the Union, the Court held that States were now entitled to prosecute crimes by non-Indians against non-Indians on tribal lands.

206. See supra text accompanying note 39.

207. See supra notes 115–120 and accompanying text (discussing McBratney’s reliance on the Colorado Enabling Act); supra notes 198–203 and accompanying text (discussing Draper’s reliance on the Montana Enabling Act); cf. John Hayden Dossett, Indian Country and the Territory Clause: Washington’s Promise at the Framing, 68 AM. U. L. REV. 205, 274 (2018) (footnotes omitted) (observing that in McBratney and Draper “the Supreme Court found that a federal reservation of land for Indian tribes did not remove the power of states to punish crimes committed between two non-Indians, because state jurisdiction in that limited instance did not interfere with the purpose of the reservation”).

208. See supra notes 3–4 and accompanying text.

209. McBratney, 104 U.S. at 624 (emphasis added); cf. Suagee, supra note 62, at 109 n.94 (citations omitted) (observing that through its doubtful construction of state enabling act language the Supreme Court in McBratney and Draper “found state rather than federal [criminal] jurisdiction when it found no Indian interests involved”).

reservation, promotes the erroneous belief that Worcester’s principle of preclusion had been “abandoned” and that a presumption favoring state criminal jurisdiction generally in Indian country had come to take Worcester’s place. But, in truth, Castro-Huerta’s aggressive “states’-rights” power play protrudes from a series of illusory premises, the main one being the false notion that McBratney and Draper show that Worcester had been obliterated by the end of the nineteenth century and therefore no longer represented “a proper exposition of Indian law.”

A final, related concern must be raised about additional language from McBratney and Draper that Castro-Huerta takes out of context when opining that, upon entering the Union, a state enjoys criminal jurisdiction state-wide “including [within] Indian country unless the enabling act says otherwise ‘by express words.’” The quoted phrase “by express words” first appeared in McBratney, where the Court used it to distinguish Colorado’s jurisdiction over a crime by a non-Indian against a non-Indian on the Ute Reservation, from Kansas’s lack of jurisdiction anywhere within the Shawnee Reservation, as reflected in two precedents McBratney cited, i.e., The Kansas Indians, decided by the Supreme Court in 1867, and an 1863 decision of a lower federal court, United States v. Ward. But in both The Kansas Indians and Ward the allusion to an “express words” requirement was made in the context of explaining that the Treaty with the Shawnee Indians contained “a guarantee that their lands should never be within the bounds of any State or Territory.” As the high court later explained in Langford v.

211. See supra text accompanying note 209.
212. Cf. Castro-Huerta, 142 S. Ct. at 2497 (“[T]he Worcester-era understanding of Indian country as separate from the State was abandoned later in the 1800s.”).
213. Id. at 2502; see supra text accompanying note 57.
215. See McBratney, 104 U.S. at 623–24 (citing United States v. Ward, 28 F. Cas. 397, No. 16,639 (D. Kan. 1863); The Kansas Indians, 72 U.S. 737 (1867)).
216. The Kansas Indians, 72 U.S. at 752, 755 (emphasis in original) (discussing 1831 Treaty with the Shawnees, with “guarantees” implicitly “import[ed] . . . into” provisions of subsequent 1854 Treaty); see also Ward, 28 F. Cas. at 399 (observing that the Shawnees “had . . . a treaty with the United States . . . in which it was guaranteed to them . . . that their reservation should not be brought within any state, nor subjected to its laws”). Notably, both The Kansas Indians and Ward relied in their respective analyses on Worcester’s baseline principle barring state authority in Indian country. See supra notes 82–92 and accompanying text (discussing The Kansas Indians); see also Ward, 28 F. Cas. at 398 (citing, inter alia, Worcester v. Georgia, 31 U.S. 515 (1832)) (stating that the court “must recur to the provisions of law as written in the statute books and the treaties, for an answer to the question before us,” that is, whether statutes and treaties had “withdrawn [the sole and exclusive jurisdiction of the United States to legislate over these lands] from the federal and conferred it upon the state government”). The Ward case is
Monteith, this treaty provision operated in conjunction with the “act for the admission of Kansas” to ensure that the Shawnee Reservation was “excepted out of the boundaries and constitute[d] no part of the State . . . until said tribe shall signify their assent to the President . . . to be included within [the] State.”217 For the Shawnees, in other words, “express words” conveying the Indians’ “assent” were necessary for the Tribe’s reservation “to be included within” Kansas.218 In contrast, for Colorado’s Ute Tribe in McBratney and Idaho’s Nez Perce Tribe in Langford, the absence of such “express [treaty] words” excluding the reservations meant those lands were formally included within the boundaries of the respective state and territory.219 This difference did not, however, enlarge the scope of the state or territorial government’s authority so as to encompass civil or criminal jurisdiction on reservations in matters involving Indians. Rather, that scope remained narrowly confined to civil suits between non-Indians only in Langford,220 and criminal cases involving only non-Indians in McBratney.221

It is important to note further that McBratney’s specific factual profile—i.e., the case’s entailing prosecution of an on-reservation murder where “both [the perpetrator and victim] were white men”222—contextualizes the Court’s assertion that state jurisdiction would be barred only if, “by express words,” “Congress ha[d] intended to except out of [the state] [the] Indian reservation.”223 Had the crime involved an Indian as perpetrator or victim, “express words” in a treaty or statute excluding the reservation from the state would not have been necessary to preclude the state’s jurisdiction, as the Supreme Court precedent on which McBratney relied (and which Castro-Huerta does not mention224)

thoroughly discussed in John W. Ragsdale, Jr., Treaty-Based Exclusions from the Boundaries and Jurisdiction of the States, 71 UMKC L. REV. 763, 785–90 (2003).


218. See supra notes 216–217 and accompanying text.

219. See supra notes 103–108 and accompanying text (discussing Langford); supra notes 112–123 and accompanying text (discussing McBratney).

220. See Langford, 102 U.S. at 147 (emphasis added) (permitting territorial court’s service of process on the Nez Perce Reservation since “this is a suit between white men” provided that “the subject-matter was one of which [the court] could take cognizance”); see also supra notes 103–108 and accompanying text (discussing Langford).

221. See United States v. McBratney, 104 U.S. 621, 624 (1881) (emphasis added) (limiting the scope of the Court’s ruling to the question of jurisdiction over an on-reservation crime in Colorado “committed by a white man upon a white man”); see also supra notes 121–123 and accompanying text (discussing McBratney).

222. McBratney, 104 U.S. at 621 (emphasis added).

223. Id. at 623–24 (citation omitted).

224. See supra text accompanying notes 81–84.
made clear.\textsuperscript{225} Thus, in\textit{The Kansas Indians}, the Court explained it was “\textit{not necessary to import the [express] guarantees} of the treaty of 1831” which excluded the Shawnees’ lands from Kansas “in order to save the property of the entire tribe” from state authority since the Shawnees’ status “as a distinct people, with a perfect tribal organization” recognized by the U.S. government ensured “their property [was] withdrawn from the operation of State laws.”\textsuperscript{226} Accordingly, Castro-Huerta’s decontextualized misappropriation of the phrase “\textit{by express words}” from\textit{McBratney} and\textit{Draper} provides no support for concluding that the Supreme Court “abandoned” the\textit{Worcester} presumption barring state authority in Indian country around the time\textit{McBratney} was decided\textsuperscript{227} and instead began presuming state authority applied broadly on reservations, adopting a requirement that there be “express words” that “say[] otherwise” in a state’s enabling act\textsuperscript{228} before tribes could be deemed “free from state jurisdiction and control.”\textsuperscript{229}

\textbf{7. Thomas v. Gay (1898), Wagoner v. Evans (1898), and Montana Catholic Missions v. Missoula County (1906)}

In three turn-of-the-century taxation cases decided after\textit{Race Horse} and\textit{Draper} the high court rendered additional decisions reflective of the\textit{Worcester} principle. First, in the 1898 case\textit{Thomas v. Gay},\textsuperscript{230} the Court allowed the Territory of Oklahoma to impose a personal property tax on cattle owned by non-Indians who had obtained leases from the Osage Tribe for grazing livestock on the Osage Reservation.\textsuperscript{231} As in\textit{Langford v. Monteith} and\textit{Utah & Northern Railway Co. v. Fisher}, the Supreme Court cited federal statutory law—in this case, the Oklahoma Territory Act\textsuperscript{232}—as manifesting Congress’s intent to include the reservation

\begin{itemize}
\item \textsuperscript{225} See\textit{The Kansas Indians}, 72 U.S. 737 (1867), cited in\textit{McBratney}, 104 U.S. at 624; see also supra notes 82–92 and accompanying text (discussing\textit{The Kansas Indians}).
\item \textsuperscript{226}\textit{The Kansas Indians}, 72 U.S. at 755–57 (emphasis added); see supra text accompanying note 88; accord\textit{Draper v. United States}, 164 U.S. 240, 242–43 (1896) (emphasis added) (citation omitted) (“\textit{In United States v. McBratney}, this court held 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 \textit{by others than Indians, or against Indians}, the state courts were vested with jurisdiction to try and punish such crimes.”).
\item \textsuperscript{227} See supra notes 208–214 and accompanying text.
\item \textsuperscript{228} See supra note 214 and accompanying text.
\item \textsuperscript{229} Cf.\textit{Rice v. Olson}, 324 U.S. 786, 789 (1945) (“The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history.”).
\item \textsuperscript{230} 169 U.S. 264 (1898).
\item \textsuperscript{231} See id. at 268.
\item \textsuperscript{232} Act of May 2, 1890, 26 Stat. 81.
\end{itemize}
within the Territory’s boundaries. Accordingly, using an approach resembling the one applied in those earlier cases, the Court addressed the question of the tax’s validity in terms of whether it interfered with the rights or interests of the Indians. The Court held there was no interference, stating that “a tax put upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians.”

The Court rejected the cattle owners’ argument “that the Indians [were] directly and vitally interested in the property sought to be taxed, and that their rights of property and person [were] seriously affected by the legislation complained of.”

In essence, the Court thought it inconceivable that damage to the Indians’ interests could be proved where any alleged economic loss did not result directly from the territorial government’s taxing the property of non-Indians on the reservation. This conceptual failure might be explained by the Court’s appearing to have injected into its analysis a flawed dichotomy between “direct” and “remote” causes and consequences, a deficiency common in pre-modern judicial opinions dealing with nascent concepts of “proximate” causation.

In any event,

233. See Thomas, 169 U.S. at 270–72 (“[I]t is conceded that the United States have, by the act of May 2, 1890, 26 Stat. 81, creating the Territory of Oklahoma, included these Osage and Kansas Indian lands within the geographical limits of said Territory.”). But see Taylor, supra note 136, at 857–58 (“The treaties [at issues in Thomas] . . . made it clear that the tribes were not to be included within a territory or a state, and the federal statute creating the territory stated that the treaty rights of the tribes were not to be abrogated. Given this legal framework, one wonders how Justice Shiras could conclude that the cattle were subject to taxation. Nonetheless, he essentially concluded that the federal statute creating the territory abrogated the earlier treaties.”).

234. See Thomas, 169 U.S. at 273 (reasoning “it is sufficient to cite” Fisher, inter alia, to reject “the argument which claims that even if the Indians were not interested in any way in the property taxed, the territorial authorities would have no right to tax the property of others than Indians located upon these reservations”).

235. Id.; see also COHEN’S HANDBOOK § 6.01[3], supra note 5, at 498 (footnote omitted) (“The [Thomas] Court upheld the tax because a treaty provision excluding the reservation from the limits of any territory or state without the Indians’ consent had been repealed by the Oklahoma [Territory] Act, and because the tax was ‘too remote and indirect to be deemed a tax upon the lands or privileges of the Indians.’”).

236. Thomas, 169 U.S. at 273.

237. In Thomas there were no developed facts regarding the tax’s potential economic impact on the Indians. Cf. Pomp, supra note 136, at 990 (“Today, the taxpayers would have had a gaggle of economists with computer printouts and sophisticated models, but no empirical evidence was offered in 1898.”).

238. See supra note 235 and accompanying text.

the Court did not purport to be breaking any new ground in analyzing whether Oklahoma Territory could extend its tax laws onto the Osage Reservation. The Court’s multiple citations to Fisher\(^2\) evince application of that case’s approach, where the Fisher Court stated: “It is not perceived that any just rights of the Indians . . . can be impaired by taxing” the property of non-Indians.\(^2\) Thus, in both Fisher and Thomas the Worcester principle implicitly controlled: taxation was permitted only because (1) congressional acts had brought Indian reservations within the respective territories’ boundaries\(^2\) and (2) the Indians’ rights and property interests would not be affected in any legally cognizable way.\(^2\)

A factually similar companion case, decided three months after Thomas, “[brought] up the same questions” and “brought [the Court] to the same conclusion.”\(^2\) In Wagoner v. Evans cattle owners who had obtained federally approved grazing leases from tribes argued that because these non-Indian lessees provided additional benefits to the Indians by hiring them as cattle herders, Oklahoma Territory had no authority to impose its personal property tax on the lessees’ livestock.\(^2\) The Court, in essence, replicated its two-step analysis in Thomas, stating that (1) “there was nothing in the treaties” with the tribes “which disabled the United States from bringing the reservations within the limits of the Territory of Oklahoma” and (2) “taxing personal property of persons other than Indians” on the reservations “did not impair the
rights of person or property pertaining to the Indians.” Similar to Thomas’s rejection of the cattle owners’ arguments about causation and consequences in that case, the Court in Wagoner dismissed as “too indirect and far-fetched” the contention that “to permit the Territory to tax the cattle would tend to discourage the making of such leases, and thus deprive the Indians of the advantages coming to them.”

Finally, in 1906 the Court rejected similar immunity claims raised by a missionary organization which contended its interests in cattle being grazed on the organization’s own fee land on the Flathead Reservation were so intertwined with the Indians’ interests that Montana could not tax the cattle. In Montana Catholic Missions v. Missoula County the organization argued it conferred benefits on the Indians through its slaughtering of cattle “consumed as food by the [Indians’] children” and its providing the Indians with significant educational and religious benefits. The Court held (1) that the complaint failed to “draw[] in question” any allegation the tax violated federal law and, accordingly, (2) that dismissal of the suit for lack of federal question jurisdiction must be affirmed. The Court reasoned that the missionaries’ case for tax immunity was an even weaker one than the immunity claims in Thomas and Wagoner because “[i]n this case the Indians have not even given a lease, and the [non-Indian landowners] are not obliged to pay [the Indians] anything for the privilege of grazing.” Under these circumstances, concluded the Court, the “claim of a Federal question” lacked any “foundation in plausibility . . . to give jurisdiction” to the federal courts.

246. Id.
247. Id. at 591; see also Taylor, supra note 136, at 858 (“The obvious point [of the non-Indian lessees’ argument in Wagoner] is that taxation increased the costs of the cattle operation, which then affected the wages that the lessees could afford to pay. With the expectation of future taxation, lessees are likely to pay lower rentals on future leases or lease renewals.”).
249. Id. at 126–27, 130. The Court opined that the missionaries’ complaint seemed to involve only questions of whether Montana statutory law conferred immunity on the organization as “an institution of purely public charity” and that “[t]he case is, therefore, not one which, from the subject-matter of the controversy, is apparently and in its essence of a Federal nature, or one that involved any . . . questions of Federal right.” Id. at 126–27 (citation omitted).
250. Id. at 128–29. Regarding the missionary organization’s on-reservation fee land, where the cattle were being grazed, the Court stated that “the property is owned unconditionally and absolutely by” the organization and that “the Indians have neither any legal nor equitable title to the property, neither have they any legal or equitable right to its beneficial use.” Id. at 128.
251. Id. at 130.
Significantly, the Court in *Montana Catholic Missions* described the *Thomas* and *Wagoner* precedents as having “determined that the Indians’ interest in this kind of [personal] property, situated on their reservation, was not sufficient to exempt such property, when owned by private individuals, from taxation.” The description appears to reflect a pivoting away from the categorical and formalistic reasoning of *Thomas* and *Wagoner*, where the Court was fixated on abstract notions of remoteness and directness when pondering whether a causal connection existed between (1) a tax on non-Indians and (2) the tax’s effects, if any, on the Indians. By 1906 the doctrinal analysis seemed to have shifted to determining whether a state’s levying a tax on non-Indians within reservations would actually cause “sufficient” or substantial harm to the Indians’ interests, with gradations of tribal property ownership and Indian land tenure comprising important factors in this emerging quantum-of-impact calculus.

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252. *Id.* at 128–29 (emphases added) (citing *Thomas v. Gay*, 169 U.S. 264 (1898); *Wagoner*, 170 U.S. 588); cf. *Foster v. Pryor*, 189 U.S. 325, 331 (1903) (describing a reservation on which grazing cattle owned by non-Indian lessees were subjected to a territorial property tax as a reservation that “is no part of the county, but is a totally distinct and separate domain, set apart for a home for Indians under the care and custody of the general government,” and stating further “that taxation therein is permitted only to a limited extent and upon certain kinds of property, not including Indians or their property”).

253. See supra notes 235–247 and accompanying text; cf. *Getches*, *supra* note 35, at 1588 (referring to this “flurry of turn-of-the-century cases allowing states [and territorial governments] to tax non-Indian property on the reservation” as “incursions on tribal sovereignty [that] can be tied to the assumption that imposition of the taxes had no direct effect on Indians or federal regulation of Indian affairs”); Scott A. Taylor, *The Native American Law Opinions of Judge Noonan: Do We Hear the Faint Voice of Bartolome de las Casas?*, 1 U. ST. THOMAS L.J. 148, 178 (2003) (“The [*Thomas v. Gay*] Court found that the tax did not fall on the tribe or its members and, therefore, did not adversely affect the tribe’s sovereignty.”).

254. See supra text accompanying note 252. Replacing the binary analysis identifying so-called “direct” versus “remote” causes and effects with an approach that assesses the magnitude of the economic injury suffered by tribes as a result of state taxation of non-Indians on reservations obviates the “ipse dixit logic,” Pomp, supra note 136, at 991, reflected in *Thomas v. Gay*, See id. at 991–92 (quoting *Thomas*, 169 U.S. at 273) (“In classic *ipse dixit* logic, the [*Thomas*] Court simply stated ‘it is obvious that a tax put upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians,’ thus dispensing with an otherwise empirical question.”); cf. COHEN’S HANDBOOK § 6.03[2][a], *supra* note 5, at 525–26 (footnotes omitted) (noting the presence in modern Indian law cases of “conflicting signals concerning the significance of indirect economic burdens on tribal interests emanating from state taxation of non-Indians or nonmembers in Indian country” but observing that cases decided since 1980 “appear to provide relatively clear support for judicial consideration of indirect economic impacts on tribes”).
It’s also important to observe further that Montana Catholic Missions—the culminating case dealing with state and territorial taxation of non-Indians on reservations during this late-nineteenth-century and early-twentieth-century period implicitly invoked the Worcester principle by revalidating The Kansas Indians; thus, the Court wrote: “It is true that the property of Indians living in the tribal state, and so recognized by the government, is withdrawn from the operation of state laws, and is exempt from taxation thereunder.” Indeed, it is clear that previous to this transition period “the basic policy of Worcester” had persevered through all of the Supreme Court’s cases dealing with the

255. Reflecting on the Supreme Court’s readiness and inclination to construe federal statutes as permitting taxation of non-Indians on reservations in Thomas, Wagoner, Utah & Northern Railway Co. v. Fisher, and Maricopa & Phoenix Railway Co. v. Territory of Arizona, Professor Scott Taylor writes:

The United States Supreme Court decided these four territorial cases during the early part of the allotment process when federal Indian policy sought to eliminate tribes as political entities and to hasten the assimilation of Native Americans. Given this context, it is not surprising that the Supreme Court paid little or no attention to the possible ill effects of its decisions on the tribes. Instead, the members of the Court probably viewed territorial taxation as an important part of a broad federal policy of closing the frontier, establishing new states, and finishing the process of manifest destiny. Given the flawed reasoning and obvious lack of impartiality, these four cases should be viewed as unworthy of any precedential value.


256. Mont. Cath. Missions, 200 U.S. at 127 (citing, inter alia, The Kansas Indians, 72 U.S. 737, 757 (1867)).

limited extent of state authority in Indian country.258 Fluctuations in the broader national Indian policy did not countermand *Worcester* or nullify its relevance because, from the start, the baseline preclusion of state authority was just that, a *baseline* preclusion, one that contemplated future exceptions and accommodations by way of congressional enactments.259 When the formative era of Indian policy gave way to consecutive eras of removal and allotment,260 the Supreme Court continued validating and applying *Worcester*, proving it to be just as relevant and indispensable in the latter eras as it was during the former. Thus, the Supreme Court applied *Worcester* in 1867 in *The Kansas Indians*,261 where state authority was held to be barred as to the noncontiguous, allotted lands of tribal Indians who had been repeatedly subjected to removal.262 And, in 1896, when the U.S. government was implementing its allotment policy at a fevered pitch of intensity,263 the high court in separate decisions (1) validated congressionally authorized state jurisdiction over on-reservation crimes not involving Indians264 and (2) acknowledged that reservations generally were “not within the scope of [the states’] jurisdiction.”265 In addition, the Court in 1886 reconfirmed that constitutionally allocated power in Indian affairs belonged


259. See *supra* note 109 and accompanying text.


261. 72 U.S. 737.

262. See *supra* notes 82–92 and accompanying text.

263. See *supra* note 260.

264. Draper v. United States, 164 U.S. 240 (1896); see *supra* notes 193–207 and accompanying text.

265. Ward v. Race Horse, 163 U.S. 504, 516 (1896) (emphasis added), repudiated on other grounds by Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 205 (1999), and Herrera v. Wyoming, 139 S. Ct. 1686 (2019); see *supra* notes 185–192 and accompanying text; cf. Foster v. Pryor, 189 U.S. 325, 329 (1903) (citing Thomas v. Gay, 169 U.S. 264, 275 (1898)) (upholding, against a challenge based on a federal statutory requirement of uniformity, a variable rate of personal property taxation of cattle grazed on-reservation versus off-reservation since “the reservation was never any part of [the county], for the legislature had no power to make it such,” and explaining further that the reservation “was, as its name implies, a reservation set apart by the general government as a home for the Indians, and as such it formed no part of any organized county”).
exclusively to the federal government because “it never has existed anywhere else,” that is, in the states. These and other rulings all reflected conformity with Worcester’s presumptive preclusion of state authority in Indian affairs, a core principle of the field that would continue to inform, guide, and direct judicial decisions and congressional enactments during the full span of the twentieth century.

8. Donnelly v. United States (1913)

An early-twentieth-century case involving an issue of jurisdiction closely related to the one in Castro-Huerta is the 1913 case Donnelly v. United States. In Donnelly the Supreme Court addressed whether a federal court had jurisdiction to convict a non-Indian for murdering an Indian on the Hoopa Valley Reservation in California. The Court sustained the conviction, holding that “the offense . . . was punishable in the Federal courts” pursuant to the General Crimes Act. A major argument in opposition was (1) that California’s entry into the Union “conferred upon the State undivided [i.e., exclusive] authority to punish crimes committed upon those lands, even when set apart for an Indian reservation, excepting crimes committed by the Indians,” and (2) that the reasoning of United States v. McBratney and Draper v. United States compelled this conclusion. But the Supreme Court rejected this argument, reasoning that in McBratney and Draper Congress, in admitting Colorado and Montana into the Union, had permitted state criminal jurisdiction to extend onto reservations only in the narrow

266. United States v. Kagama, 118 U.S. 375, 384 (1886); see supra notes 169–177 and accompanying text.
267. See Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2508 (2022) (Gorsuch, J., dissenting) (observing that “[t]hrough all these [nineteenth-century Indian law and policy] developments, . . . at least one promise remained: States could play no role in the prosecution of crimes by or against Native Americans on tribal lands”).
268. See supra notes 30–56, 70–266 and accompanying text (discussing nineteenth-century Indian law cases reflecting the Worcester principle); supra notes 57–69 and accompanying text (discussing such cases decided during the twentieth century); infra notes 269–524 and accompanying text (same).
269. 228 U.S. 243 (1913).
270. See id. at 252–55.
271. Id. at 272 (concluding that “the offense with which the plaintiff in error was charged was punishable in the Federal courts under §§ 2145 and 5339, Rev. Stat.,” i.e., the General Crimes Act); cf. CANBY, supra note 38, at 174 (observing that the General Crimes Act’s “primary present function is to provide for prosecution of crimes by non-Indians against Indians and of non-major crimes by Indians against non-Indians”).
272. Donnelly, 228 U.S. at 271–72 (citing United States v. McBratney, 104 U.S. 621 (1881); Draper v. United States, 164 U.S. 240 (1896)).
situation where both the perpetrator and the victim were non-Indians.\textsuperscript{273}

The Court pointed out that in both \textit{McBratney} and \textit{Draper} the state enabling acts “qualified the former Federal jurisdiction over Indian country . . . 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.”\textsuperscript{274} The Court further noted that in both cases “the question was reserved as to the effect of the admission of the State into the Union upon the Federal jurisdiction over crimes committed by or against the Indians themselves.”\textsuperscript{275} The Court then proceeded to definitively answer this formerly “reserved” question:

Upon full consideration we are satisfied that offenses committed by or against Indians are not within the principle of the \textit{McBratney} and \textit{Draper} Cases. This was in effect held, as to crimes committed by the Indians, in the \textit{Kagama} Case, where the constitutionality of the second branch of [the Major Crimes Act] was sustained upon the ground that the Indian tribes are the wards of the nation. This same reason applies—perhaps \textit{a fortiori}—with respect 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.\textsuperscript{276}

Donnelly thus expressly held that the federal court had jurisdiction by reason of the \textit{McBratney} rule’s non-applicability in any case where an Indian either committed or was a victim of an on-reservation crime.\textsuperscript{277} Yet, despite this holding, the \textit{Castro-Huerta} majority proceeded as if Donnelly had never addressed and resolved this question, i.e., the very

\textsuperscript{273} See id. at 271 (citations omitted) (“In both [\textit{McBratney} and \textit{Draper}] . . . the question was reserved as to the effect of the admission of the State into the Union upon the Federal jurisdiction over crimes committed by or against the Indians themselves.”).

\textsuperscript{274} Id. at 272 (emphasis added).

\textsuperscript{275} Id. (emphasis added) (citations omitted); see \textit{McBratney}, 104 U.S. at 624 (“The record before us presents no question . . . as to the punishment of crimes committed by or against Indians . . . .”); \textit{Draper}, 164 U.S. at 247 (“[T]he construction of the enabling act here given is confined exclusively to the issue before us, and therefore involves in no way any of the questions fully reserved in \textit{United States v. McBratney}, and which are also intended to be fully reserved here.”).


\textsuperscript{277} Accord \textit{Truscott v. Hurlbut Land \\& Cattle Co.}, 73 F. 60, 65 (9th Cir. 1896) (emphasis added) (citations omitted) (noting that both \textit{McBratney} and \textit{Kagama} held “that the criminal jurisdiction of the state courts extends to crimes” on reservations “\textit{in which the Indians have no part}”); see also supra notes 272–276 and accompanying text.
“question . . . reserved” in McBratney and Draper. Like much of the majority opinion, Castro-Huerta’s disregard of Donnelly’s holding and reasoning is marked by evasion, revisionism, and a familiar form of judicial sleight of hand. For instance, Castro-Huerta opines that the General Crimes Act’s language “extend[ing] to the Indian country” 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” refers only to the body of substantive federal law applicable within federal enclaves but “not ‘to the jurisdiction extended over the Indian country.’” For this unremarkable observation Castro-Huerta cites the 1891 case In re Wilson, in which the Supreme Court, when discussing the General Crimes Act’s significance, stressed this same distinction between federal substantive law, on the one hand, and federal jurisdiction, on the other. Castro-Huerta posits further that in Donnelly the Court “repeated that analysis . . . concluding that the phrase ‘sole and exclusive jurisdiction’ is ‘used in order to describe the laws of the United States which by that section are extended to the Indian country.’” Castro-Huerta then avers: “But the extension of those [substantive] federal laws to Indian country does not silently erase preexisting or otherwise lawfully assumed state jurisdiction to prosecute crimes committed by non-Indians in Indian country.”

To this circumlocutory blending of the unremarkable with the unsubstantiated, Castro-Huerta adds a footnote that purports to sum up Donnelly’s reasoning for holding that the federal court had jurisdiction over a crime committed by a non-Indian against an Indian on the Hoopa Valley Reservation in California. The majority wrote:

In Donnelly, the Court simply concluded that although States have exclusive jurisdiction over crimes committed by non-Indians against non-Indians in Indian country, States do not have similarly “undivided authority” over crimes committed by or against Indians in Indian country. In other words, the Federal Government also maintains

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278. See supra note 275 and accompanying text.
279. See supra notes 165–167 and accompanying text.
281. See supra text accompanying note 280; see also Wilson, 140 U.S. at 578 (“The words ‘sole and exclusive,’ in section 2145 [i.e., the General Crimes Act], do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it.”).
282. Castro-Huerta, 142 S. Ct. at 2495–96 (quoting Donnelly v. United States, 228 U.S. 243, 268 (1913)).
283. Id. at 2496.
284. See supra text accompanying notes 270–271.
jurisdiction under the General Crimes Act over crimes by or against Indians in Indian country because of the Federal Government’s interest in protecting and defending tribes. Donnelly did not address the distinct question we confront here: whether States have concurrent jurisdiction with the Federal Government over non-Indians who commit crimes against Indians in Indian country. If anything, Donnelly’s rejection of the argument that the State had “undivided” authority, without the Court’s saying more, suggests that the Court thought that the State had concurrent authority with the Federal Government in Indian country, unless otherwise preempted.285

Castro-Huerta’s paraphrasing of Donnelly’s reasoning, however, hits far from the mark. As exhibited above,286 Donnelly’s stated reasons for upholding the federal court’s jurisdiction over a crime committed by a non-Indian against an Indian did not consist of merely rebuking the “undivided authority” argument, that is, the brazen contention that McBratney and Draper required a finding that federal legislation admitting California into the Union gave the state exclusive authority over all crimes committed on reservations “excepting crimes committed by the Indians.”287 Instead, Donnelly held that the federal court’s authority existed pursuant to the reasoning of United States v. Kagama, where the high court sustained the Major Crimes Act as a constitutionally valid exercise of Congress’s paramount authority in Indian affairs, a power exclusive of the states.288 In particular, Donnelly credited Kagama for the Court’s proclaiming it was “satisfied that offenses committed by or against Indians” remained within the federal courts’ exclusive jurisdiction notwithstanding the narrowly drawn “principle of . . . McBratney and Draper.”289 Castro-Huerta, however, evades Donnelly’s reasoning by skipping past that case’s pointed reliance on Kagama’s core rationale for validating the Major Crimes Act290 and

285. Castro-Huerta, 142 S. Ct. at 2498 n.3 (citations omitted).
286. See supra text accompanying note 276.
287. See supra text accompanying note 272.
288. See supra note 276 and accompanying text; see also supra notes 169–178 and accompanying text (discussing Kagama’s constitutional law analysis with regard to the Major Crimes Act’s applicability within California and other states).
289. See supra text accompanying note 276.
290. The Donnelly Court pointed specifically to the part of Kagama addressing “the constitutionality of the second branch of” the Major Crimes Act. Donnelly v. United States, 228 U.S. 243, 271–72 (1913) (citation omitted). This was the part in which the Supreme Court rejected state sovereignty objections to the federal courts’ exclusive jurisdiction over crimes by Indians on reservations within the states. As discussed previously, in that part of Kagama the Court explained that exclusive federal power over on-reservation matters involving Indians “must exist in [the federal] government because it never has existed
by strangely assigning the label “analysis” to Donnelly’s passing observation that “the phrase ‘sole and exclusive jurisdiction’” in the General Crimes Act was “used . . . to describe the laws of the United States which” the Act “extended to the Indian country.” 291 A finer specimen from the school of red herrings that swarm the high court’s worst Indian law decisions would be hard to find. 292

Castro-Huerta thus disregards Donnelly’s having explained that the Court’s reliance on Kagama for Donnelly’s validation of federal jurisdiction over crimes committed by non-Indians against Indians followed “perhaps a fortiori” from the “same” reasoning used in Kagama, 293 The term “a fortiori” means “with greater reason or more convincing force”; 294 hence, Donnelly held that exclusive federal jurisdiction over “crimes committed [in Indian country] by white men against the persons or property of the Indian tribes” was mandated even more forcefully by Kagama’s core reasoning than was the Kagama decision itself. 295 Donnelly’s holding is especially convincing, moreover, in view of (1) the notorious history of genocidal violence countenanced and sometimes ordered and mobilized by state officials to exterminate California Indians 296 and (2) Kagama’s concomitant recognition (similar to Donnelly’s 297) that “the people of the States where [the Indians] are


292. For another example, see LaVelle, supra note 13, at 241–42 (quoting H.R. Rep. No. 1356, 51st Cong., 1st Sess., at 2 (1890)) (footnotes omitted) (describing the Court’s use of its invented term “loyal scout claim” in DeCoteau v. District County Court, 420 U.S. 425 (1975), as a “red herring” deployed for the purpose of “diverting from acknowledging the crucial condition that the [Sisseton-Wahpeton Dakota] Indians did impose—adamantly and repeatedly—during [land-sale] negotiations [with U.S. commissioners in 1889], namely, that the United States at long last pay restitution for having wrongfully confiscated and cut off treaty annuities after the [1862] U.S.-Dakota War, a ‘monstrous injustice to the Sisseton and Wahpeton bands’”).

My husband Monte Deer Carden and I are fans of RuPaul’s Drag Race and we agree Castro-Huerta’s use of this red herring technique is like a Jaida Essence Hall moment: “Look over there!” See Michael Cook, Look Over There!—Jaida Essence Hall Wins RuPaul’s Drag Race Season 12!, S. Fla. Gay News (June 3, 2020), https://look-over-there.

293. Donnelly, 228 U.S. at 272 (emphasis added); see supra text accompanying note 276.


295. Donnelly, 228 U.S. at 272; see supra text accompanying note 276.

296. See supra note 171.

297. Donnelly, 228 U.S. at 272 (emphasis added) (asserting that Kagama’s reasoning “applies—perhaps a fortiori—with respect to crimes committed by white men against the persons or property of the Indian tribes while occupying reservations set apart for the very
found are often their deadliest enemies.” Thus, far from “suggesting,” by purportedly not “saying more,” that California “had concurrent authority with the Federal Government in Indian country, unless otherwise preempted,” the Donnelly Court emphatically did “say[ ] more.” It said (1) that the federal court’s jurisdiction was valid by force of Congress’s exclusive power in Indian affairs, a paramount power that precluded state jurisdiction over crimes involving Indians absent Congress’s consent, and (2) that the McBratney and Draper cases implied no such consent.

Moreover, Castro-Huerta’s mention of In re Wilson—an 1891 precedent Donnelly itself cited—is notably ironic in view of Castro-Huerta’s efforts to suppress and distort Donnelly’s reasoning.

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298. United States v. Kagama, 118 U.S. 376, 384 (1886); see also supra note 171.

299. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2498 n.3 (2022); see supra text accompanying note 285.

300. Donnelly’s precisely targeted reliance on that part of Kagama “where the constitutionality of the second branch of [the Major Crimes Act] was sustained,” Donnelly, 228 U.S. at 243, 271–72 (emphasis added) (citations omitted); see supra text accompanying note 276, is further proof of the case’s basing its holding on the continuing preclusion of state authority, pursuant to the Worcester principle, over matters involving Indians and Indian tribes in Indian country. See supra notes 169–178 and accompanying text (discussing Kagama and showing how the case’s constitutionality analysis proceeds sequentially from (1) considering whether the Major Crimes Act would be enforceable in the territories, to (2) declaring the Act “a valid law in both its branches” after rejecting state sovereignty objections stemming from the Act’s subjecting Indians to exclusive federal criminal jurisdiction).

301. See supra notes 286–297 and accompanying text; see also Castro-Huerta, 142 S. Ct. at 2520 (Gorsuch, J., dissenting) (citations omitted) (“[T]he Court’s invocation of Donnelly is more baffling still. There, the Court once more reaffirmed the rule that ‘offenses committed by or against Indians’ on tribal lands remain subject to federal, not state, jurisdiction.”).

302. See Donnelly, 228 U.S. at 268. With the context added, the Donnelly Court stated: “The existence of the state school district [on the Hoopa Valley Reservation] is without present significance. For, as was pointed out in the Wilson Case, the words ‘sole and exclusive jurisdiction,’ as employed in § 2145, Rev. Stat. [i.e. the General Crimes Act], do not mean that the United States must have sole and exclusive jurisdiction over the Indian country in order that that section may apply to it; the words are used in order to describe the laws of the United States which by that section are extended to the Indian country.” Id. (citation omitted). The Court made this point about the “sole and exclusive jurisdiction” language of the General Crimes Act in rejecting the argument that Congress’s having permitted a state school district to exist on the reservation voided the Act’s operating to “extend to the Indian country” the general criminal laws of the United States in the particular instance of the Hoopa Valley Reservation. See id. at 253–54, 268 (quoting U.S. Rev. Stat. § 2145, codified at 18 U.S.C. § 1152).

303. See supra notes 286–301 and accompanying text.
The majority cited that 1891 case for its description of the General Crimes Act as a statute that extended federal \textit{substantive law} into Indian country but did not say anything about federal \textit{jurisdiction}.\footnote{See supra notes 280–281 and accompanying text.} But \textit{Castro-Huerta}'s insinuation that \textit{Wilson} therefore countenances or supports \textit{concurrent state} jurisdiction over crimes involving Indians is contradicted by \textit{Wilson}'s own reasoning, including \textit{Wilson}'s citations to authority.\footnote{See infra notes 306–378 and accompanying text.} For starters, \textit{Wilson} did not deal directly with a question of \textit{state} authority at all. Instead, the issue was whether a habeas corpus petition should be granted to a non-Indian who argued that a \textit{territorial} court's conviction of him for murdering another non-Indian on an Indian reservation in the Territory of Arizona was illegal and void, requiring his release from custody.\footnote{See \textit{In re Wilson}, 140 U.S. 575, 575–76 (1891) (noting that an Arizona territorial court had sentenced the petitioner “to be hung,” that he had “sued out this habeas corpus to test the validity of such sentence,” that the “petition alleges that the petitioner is a citizen of the United States, of African descent,” and “that . . . the person killed, was also a negro”).} (The \textit{McBratney} rule relating to “equal footing” language in state enabling acts\footnote{See supra notes 112–120 and accompanying text (discussing \textit{McBratney}).} was not cited in \textit{Wilson} and had no bearing on the case since Arizona was still a federal territory and would not be admitted into the Union as a state for another two decades.\footnote{See \textit{H.A. Hubbard, The Arizona Enabling Act and President Taft's Veto}, 3 PAC. HIST. REV. 307, 322 (1934) (footnote omitted) (noting that on August 21, 1911, a joint congressional resolution proposing Arizona statehood “was signed . . . by President Taft and Arizona was a state”).})

The Supreme Court in \textit{Wilson} upheld the territorial court’s murder conviction and denied the non-Indian’s habeas petition.\footnote{See \textit{Wilson}, 140 U.S. at 585 (denying the habeas petition and remanding the non-Indian petitioner Wilson “to the custody of the marshal”).} In doing so the Court rejected the petitioner’s argument that the territorial court was prohibited from “sitting as a United States Court”\footnote{Id. at 576.} and applying the general federal law of murder (which included a mandatory death penalty)\footnote{See \textit{Ex parte Gon-Shay-Ee}, 130 U.S. 343, 349 (1889) (observing that the applicable penalty for murder “under the law of the United States” was “the penalty of death”).} on the reservation because the Major Crimes Act had transferred \textit{all} of the federal courts’ previous on-reservation criminal jurisdiction to the \textit{territorial} courts.\footnote{See infra text accompanying notes 339–340.} If the Supreme Court had accepted this argument the petitioner, on retrial, might have escaped execution since under Arizona territorial law the sentence for murder was death or
life imprisonment.\textsuperscript{313} The precedent Wilson, the non-Indian convict, invoked in making his argument was \textit{Ex parte Gon-Shay-Ee}, a case decided by the Supreme Court two years earlier.\textsuperscript{314} Thus, understanding \textit{Gon-Shay-Ee} is crucial for appreciating (1) the significance of \textit{Wilson}'s distinguishing between federal substantive law and federal jurisdiction\textsuperscript{315} and (2) the irony of \textit{Castro-Huerta}'s purporting to use a “snippet[ ]”\textsuperscript{316} from \textit{Wilson} to support a judicial conclusion allowing \textit{concurrent state} jurisdiction under the General Crimes Act,\textsuperscript{317} a conclusion contradicted by both \textit{Wilson} and \textit{Gon-Shay-Ee}.

\textit{Gon-Shay-Ee} and \textit{Wilson} open a fascinating window into the past, showing how criminal justice and U.S. Indian policy were being administered in the late nineteenth century, particularly in the federal territories. Each case dealt with whether a habeas corpus petition should be granted after the petitioner had been convicted of murder in the Territory of Arizona.\textsuperscript{318} The key factual difference between the two cases was that the petitioner in \textit{Gon-Shay-Ee} was an Indian, while the petitioner in \textit{Wilson} was a non-Indian.\textsuperscript{319} In the earlier of the two cases (decided in 1889), the Supreme Court granted \textit{Gon-Shay-Ee}'s habeas petition, agreeing with the Apache Indian’s argument that the territorial court had wrongly applied \textit{general federal law} when convicting him and sentencing him to death.\textsuperscript{320} The Court observed that the language of the 1885 Major Crimes Act plainly commanded territorial courts to apply \textit{local territorial law} when exercising jurisdiction in criminal proceedings involving Indians, regardless of whether the crime occurred on- or off-

\begin{itemize}
\item \textsuperscript{313} See \textit{Gon-Shay-Ee}, 130 U.S. at 349 (emphasis added) (citation omitted) (observing that “under the local law” of the Territory of Arizona “the punishment [for murder] shall be death or imprisonment for life”).
\item \textsuperscript{314} 130 U.S. 343; see infra notes 318–336 and accompanying text (discussing \textit{Gon-Shay-Ee}).
\item \textsuperscript{315} See infra notes 351–363 and accompanying text.
\item \textsuperscript{316} See supra note 71 and accompanying text.
\item \textsuperscript{317} See supra notes 300–305 and accompanying text.
\item \textsuperscript{318} See \textit{Gon-Shay-Ee}, 130 U.S. at 343. The historical background, legal proceedings and decision, and aftermath of the \textit{Gon-Shay-Ee} case are recounted in Clare V. McKanna, Jr., \textit{Murderers All: The Treatment of Indian Defendants in Arizona Territory, 1880–1912}, 17 AM. INDIAN Q. 359, 364–67 (1993).
\item \textsuperscript{319} See \textit{Gon-Shay-Ee}, 130 U.S. at 343 (“This crime is alleged in the indictment to have been committed by the defendant, an Apache Indian . . . .”); see also supra note 306 and accompanying text.
\item \textsuperscript{320} See \textit{Gon-Shay-Ee}, 130 U.S. at 349, 353 (“The question in this case is whether the offence charged against \textit{Gon-Shay-Ee} was one committed against the laws of the United States . . . or whether it was an offence against the laws of the Territory, to be punished by a court proceeding under its laws. . . . We are of opinion that the writ of habeas corpus should issue as prayed for in this case . . . .”).
\end{itemize}
Referring specifically to the part of the statute that subjected Indians to the criminal laws of existing territorial governments, the Court wrote:

We . . . have little hesitation in holding that under the act of 1885 the case of Gon-Shay-Ee should have been considered as an offence against the laws of the Territory . . . [T]he [statute's] declaration is clear that they "shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of said crimes respectively."

These Indians, then, are subjected by this statute not to the criminal laws of the United States but to the laws of the Territory . . .

. . . .

. . . . It will be observed also that this part of the statute makes no distinction in regard to whether the crime was committed by the Indian on or off an Indian reservation.

We do not entertain any doubt that this part of the statute was enacted to transfer to the territorial courts established by the general government, as all courts of general jurisdiction are in the Territories, the jurisdiction to try the crimes described in [the Major Crimes Act] under the territorial laws, when sitting as and exercising the functions of such territorial court . . .

Realizing that by granting the habeas petition the Indian convict might receive a sentence of life in prison, rather than be sentenced to death, once he was retried under the applicable laws of the territory, the Court ended its opinion on what for the Court, writing in the depths of the allotment and assimilation era of federal Indian policy, must have seemed like something of a high note:

It is of consequence that in this new departure which Congress has made, of subjecting the Indians, in this limited class of [major crime] cases, to the same laws which govern the whites within the Territories where they both reside, the Indian shall at least have all the advantages which may accrue from that change, which transfers him,

321. See infra text accompanying note 322.
322. Gon-Shay-Ee, 130 U.S. at 351–52 (emphases added).
323. See supra note 313 and accompanying text.
324. See supra note 263 and accompanying text.
as to the punishment for these crimes, from the jurisdiction of his own tribe to the jurisdiction of the government of the territory in which he lives.\footnote{325}

As discussed further below, \textit{Gon-Shay-Ee} provides the crucial backdrop for ascertaining the significance of the Supreme Court’s subsequent distinguishing between substantive law and jurisdiction in \textit{In re Wilson}.\footnote{326} But of equal importance, in the context of critically evaluating \textit{Oklahoma v. Castro-Huerta}, is what the \textit{Gon-Shay-Ee} Court wrote regarding Congress’s intent when subjecting Indians \textit{in the states} to federal jurisdiction under the Major Crimes Act. First, the Court pointed out that the Act declared that Indians who committed any of the listed major crimes “within the boundaries of a state, and within the boundaries of any Indian reservation, . . . ‘shall be subject to the same laws, tried in the same courts, and in the same manner, and subject to the same penalties, as are all other persons committing any of [those major] crimes within the exclusive jurisdiction of the United States.’”\footnote{327} The Court elaborated that the “phrase ‘within the exclusive jurisdiction of the United States,’ is well understood as applying to the crimes which are committed within the premises, grounds, forts, arsenals, navy-yards, and other places within the boundaries of a State, or even within a Territory, over which the Federal government has . . . exclusive jurisdiction.”\footnote{328} Cases within such federal enclaves, the Supreme Court observed, are tried by federal courts “administering the laws of the United States, and not by the courts of the State or those of the Territory.”\footnote{329} Then the Court stated:

The framers of this act were very careful, in this part of the statute, where the offence was committed within the territorial limits of a \textit{State}, to declare that a violation of the laws of the United States in regard to these crimes of murder, etc., \textit{should be tried in the courts}

\footnote{325. \textit{Gon-Shay-Ee}, 130 U.S. at 353; see also Barbara Creel, \textit{Tribal Court Convictions and the Federal Sentencing Guidelines: Respect for Tribal Courts and Tribal People in Federal Sentencing}, 46 U.S.F. L. REV. 37, 62 (2011) (quoting \textit{Gon-Shay-Ee}, 130 U.S. at 350) (noting the \textit{Gon-Shay-Ee} Court’s describing “the hasty nature of the Major Crimes Act and its obvious purpose” as legislation that “‘is very clearly a continuation of the policy upon which Congress entered several years previously, of attempting, so far as possible and consistent with justice and existing obligations, to reduce the Indians to individual subjection to the laws of the country and dispense with their tribal relations’”).


329. \textit{Id.} (emphasis added).}
exercising the jurisdiction of the United States to punish offences against the United States.\textsuperscript{330}

The Supreme Court’s point in Gon-Shay-Ee is forceful and clear. Congress, in passing the 1885 Major Crimes Act, intended to allocate to the federal courts exclusive jurisdiction over crimes involving Indians on reservations, having been “very careful” to ensure state authority over such crimes remained—as it had been before 1885, pursuant to the baseline Worcester principle\textsuperscript{331}—entirely precluded.\textsuperscript{332} Gon-Shay-Ee’s emphasis on the Act’s conferring exclusive federal jurisdiction over major offenses involving Indians belies Castro-Huerta’s ominous insinuation that whether states have “prosecutorial authority over crimes committed by Indians in Indian country” is an unanswered question (or “a question not before us”),\textsuperscript{333} the answer to which “would be the result of” a discretionary judicial balancing of interests (of the sort chaotically deployed in Castro-Huerta\textsuperscript{334}) to decide whether that authority amounts to an impermissible “interference with tribal self-government.”\textsuperscript{335} As the Supreme Court in Gon-Shay-Ee made clear, exclusive federal jurisdiction over such offenses is exactly what Congress enacted into statutory law by passing the Major Crimes Act.\textsuperscript{336}

\textsuperscript{330.} Id. (emphasis added).

\textsuperscript{331.} See supra notes 30–138 and accompanying text.

\textsuperscript{332.} See supra text accompanying notes 327–330; see also United States v. John, 437 U.S. 634, 651 n.22 (1978) (citing and quoting 16 Cong. Rec. 934, 2385 (1885)) (discussing the Major Crimes Act’s legislative history and noting that a concern raised in a congressional debate about language in an early version of the bill was resolved by changing the wording to ensure the Act would not “take away from State courts’ jurisdiction over off-reservation crimes but instead ensured exclusive federal jurisdiction over the specified serious offenses only when such crimes occurred on reservations).

\textsuperscript{333.} Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2495 n.2 (2022); cf. id. at 2510 (Gorsuch, J., dissenting) (“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.”).

\textsuperscript{334.} See id. at 2500 (majority opinion) (opining that in the absence of state authority over Indians conferred by Public Law 280 “state jurisdiction over . . . Indian-defendant crimes could implicate principles of tribal self-government”); see also infra notes 539–601 and accompanying text (discussing Castro-Huerta’s deployment of a “paternalist” balancing test).

\textsuperscript{335.} Castro-Huerta, 142 S. Ct. at 2495 n.2.

\textsuperscript{336.} See supra notes 327–332 and accompanying text. Castro-Huerta purports to find support for its insinuation that states may have concurrent jurisdiction over major crimes committed by Indians on reservations by citing John, 437 U.S. at 651 & n.22, and Negonsott v. Samuels, 507 U.S. 99, 103 (1993), intimating that each of those cases left open just such a possibility. See Castro-Huerta, 142 S. Ct. at 2496. But in John, which addressed whether federal jurisdiction, rather than state jurisdiction, applied to a crime committed by an Indian “within the area designated as a reservation for the Choctaw Indians residing in
central Mississippi," the Supreme Court stated its unanimous conclusion as follows: "We therefore hold that [the Major Crimes Act] provides a proper basis for federal prosecution of the offense involved here, and that Mississippi has no power similarly to prosecute [the Choctaw Indian defendant] Smith John for that same offense." John, 437 U.S. at 654 (emphases added) (citing 18 U.S.C. § 1153); see also supra note 332. Further, the Court agreed with Mississippi's "concession," based on the state's "correct" assumption during the course of the litigation, that if the Major Crimes Act "provides a basis for the prosecution of Smith John for the offense charged, the State has no similar jurisdiction." Id. at 651 (citation omitted). The John Court also pointed out that exclusive federal jurisdiction under the Major Crimes Act "was a necessary premise" of the holding in Seymour v. Superintendent, 368 U.S. 351 (1962), where the Court granted an Indian criminal defendant's habeas corpus petition, ordering his release from the custody of the state's prison system, based on the fact that the alleged crime occurred on an Indian reservation whose continuing existence the Court validated. See Seymour, 368 U.S. at 359 ("Since the burglary with which the petitioner was charged occurred on property plainly located within the limits of [the Colville] reservation, the courts of Washington had no jurisdiction to try him for that offense."); see also LaVelle, supra note 13, at 144–48 (discussing Seymour); accord Solem v. Bartlett, 465 U.S. 463, 465 & n.2 (1984) (citations omitted) (proceeding with reservation diminishment analysis on the premise that if the Indian defendant's crime of attempted rape occurred in Indian country federal jurisdiction under the Major Crimes Act would be exclusive of the state, and explaining that "within Indian country, state jurisdiction is limited to crimes by non-Indians against non-Indians and victimless crimes by non-Indians"). The John Court also cited Williams v. Lee (1959) and Rice v. Olson (1945)—which both reflected background operation of the Worcester v. Georgia principle precluding state authority in Indian country absent congressional authorization—as precedents supporting John's acknowledging that the Major Crimes Act guaranteed federal criminal jurisdiction that is exclusive of the states. See John, 437 U.S. at 651 (citing, inter alia, Williams v. Lee, 358 U.S. 217, 220 & n.5 (1959); Rice v. Olson, 324 U.S. 786 (1945)); see also infra notes 478–516 and accompanying text (discussing Williams v. Lee); infra notes 410–420 and accompanying text (discussing Rice). In addition, the John Court cited with approval, see John, 437 U.S. at 651, a 1959 decision of the Ninth Circuit Court of Appeals, Dickson v. Carmen, which affirmed a district court's granting an Indian petitioner's habeas corpus petition and ordering his discharge from a state penitentiary based on (1) the alleged murder of which he had been convicted having occurred on an Indian allotment and (2) the district court's determination that the Major Crimes Act "place[d] [the Act's listed offenses] within the exclusive jurisdiction of the federal courts when committed by an Indian in Indian country," In re Petition of Carmen, 165 F. Supp. 942, 951 (N.D. Cal. 1958) (emphasis added), aff'd per curiam sub nom. Dickson v. Carmen, 270 F.2d 809, 809 (9th Cir. 1959) (stating that the "exhaustive opinion of [District Court] Judge Goodman leaves nothing to be added, and his judgment is affirmed"), cert. denied, 361 U.S. 934 (1960). See also Carole E. Goldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians, 22 UCLA L. REV. 535, 541 & n.27 (1975) (citing Carmen, 165 F. Supp. 942) ("The absence of state jurisdiction over [Major Crimes Act] crimes has been affirmed.").

Castro-Huerta's tendering Negonsott v. Samuels as alleged support for the majority's insinuating that the Major Crimes Act's provision of "federal jurisdiction over crimes committed by Indians in Indian country" may not be "exclusive" of the states, see Castro-Huerta, 142 S. Ct. at 2496 (citation omitted), is even more bizarre. In Negonsott the Supreme Court unequivocally and unanimously asserted a position that is the opposite of Castro-Huerta's insinuation, stating that "the text of [18 U.S.C.] § 1153 and our prior cases
In light of the Supreme Court’s granting Gon-Shay-Ee’s habeas petition and thereby giving the Apache Indian a chance to avoid the death penalty on retrial, it’s no wonder the non-Indian petitioner in

make clear, federal jurisdiction over the offenses covered by the Indian Major Crimes Act is ‘exclusive’ of state jurisdiction.” Negonsott, 507 U.S. at 103 (emphasis added) (citing John, 437 U.S. at 651; Seymour, 368 U.S. at 359; United States v. Kagama, 118 U.S. 375, 384 (1886); see also supra note 172 and accompanying text. The Negonsott Court held that Indians were subject to state criminal law and jurisdiction on reservations in Kansas only because Congress had “explicitly conferred” that peculiarly broad authority on the state, an outcome consistent with the Worcester principle’s barring state authority in Indian affairs in the absence of congressional consent. See Negonsott, 507 U.S. at 103 (emphasis added) (citations omitted) (observing that “Congress has plenary authority to alter . . . jurisdictional guideposts” and that “[t]his case concerns the first major grant of jurisdiction to a State over offenses involving Indians committed in Indian country”); see also id. at 106 (reasoning that Congress had “altered the jurisdictional landscape” by passing the Kansas Act, Act of June 8, 1940, 54 Stat. 249, a piece of federal legislation that “explicitly conferred jurisdiction on Kansas over all offenses involving Indians on Indian reservations” within the state). Negonsott’s particular conclusion that Kansas had “concurrent ‘legislative’ jurisdiction . . . to define and prosecute . . . offenses” that were “similar” to the federal offenses listed in the Major Crimes Act was based on the “reasonably plain terms” of the Kansas Act, id. at 104–05 (citations and internal quotation marks omitted), a “construction” supported by the Act’s unique legislative history, see id. at 106–09. Negonsott’s conclusion did not arise from any assumption that the Major Crimes Act itself contemplated or permitted concurrent state authority over the federal offenses listed in that Act, offenses for which “federal courts retain their exclusive jurisdiction to try individuals.” Id. at 105 (emphasis added); see also COHEN’S HANDBOOK § 6.04[4][b], supra note 5, at 581 (footnote omitted) (“Although federal Indian country criminal jurisdiction is ordinarily exclusive of state jurisdiction, the [Negonsott] Court found the language and legislative history of the Kansas Act perfectly clear in providing for state legislative power to define offenses that overlap with those under the [Major Crimes Act].”). For critical appraisals of Negonsott and calls for congressional repeal or modification of the Kansas Act, see John J. Francis, Stacy L. Leeds, Aliza Organick & Jelani Jefferson Exum, Reassessing Concurrent Tribal-State-Federal Criminal Jurisdiction in Kansas, 59 KAN. L. REV. 949 (2011); Michael C. Duma, Kansas’ Criminal Jurisdiction in Indian Country: Why the Kansas Act [18 U.S.C. § 3243] Is Unnecessary, Outdated, and Unfair, 50 WASHBURN L.J. 685 (2011).

337. See supra notes 311–313 and accompanying text. On retrial the territorial court again sentenced Gonshayee to be hanged. Historian Clare V. McKanna, Jr. describes the tragic fate of Gonshayee after the San Carlos Apache chief received his second death sentence:

White expressions of hatred for Apaches who killed white citizens, and the strong desire to destroy these Apaches, could be quite shocking. Pinal County officials tried, convicted, and ordered the executions of Gonshayee, Kahdoslah, Askisaylala, Nahconquisay, and Pahslagosia. The circumstances surrounding the final demise of Gonshayee and his fellow Apaches require further comment. On the eve of their execution, Gonshayee, Askisaylala, and Pahslagosia all committed suicide in the Pinal County Jail in Florence [in Arizona Territory]. They tore strips from their breach cloths

and passed them around their necks. They then tied a secure knot by giving an extra twist, whereby, when once drawn tight, it could not be loosened, even if the victim felt so disposed. The ends of the strings were then taken
Wilson two years later had hoped to achieve the same outcome by invoking Ex parte Gon-Shay-Ee as binding and controlling precedent. But the Wilson Court denied the petition, clarifying that, contrary to the petitioner’s argument, the Gon-Shay-Ee decision did not stand for the proposition that Congress, when enacting the Major Crimes Act, had transferred to the territorial courts all of the federal courts’ jurisdiction on reservations that had been conferred, prior to 1885, by the General

by the hands of the suicidal aborigines and drawn tightly with a sudden jerk; strangulation followed.

The next day, a gray, rainy morning, when authorities executed Nahconquisay and Kahdeslah, both exhibited visible signs of being badly shaken by the news that their fellow [San Carlos Apache] band members had committed suicide. One day after the executions, the Arizona Weekly Enterprise ran the following banner headline announcing the Apache deaths: “Good Indians, Five Apache Murderers Gone to Glory!” However, some of the white population in Florence, robbed of retribution by the suicides of Gonshayee and two of his companions, became enraged. The night after the hangings, some of the more sadistic Indian haters visited Gonshayee’s grave site, dug up the body, chopped off Gonshayee’s head, and kept it as a souvenir. The editor of the Arizona Weekly Enterprise gloated:

Gon-sha [sic], the ex-chief, now lies in his grave a headless piece of clay. He cheated the gallows by committing suicide and in turn he has been cheated out of his cabeza . . . and to this hour it is believed that even Gon-sha has not missed the head he so mysteriously lost.

In a strong statement that was probably shared by many white Arizonans, the editor of the Flagstaff Arizona Champion suggested, “If there are any good Indians outside of graveyards, they do not live in Arizona.” This outpouring of venom against Gonshayee typifies white anger and hatred for Apaches throughout Arizona Territory. Although the Apache wars had ended, a period of intense racial animosity toward Apaches permeated white society and continued for decades.

. . . . In the historical literature of Native American culture compiled by contemporary white authors, Apaches were characterized as the most vicious and fiendish of all. Anglo Americans viewed Native Americans as impediments to civilization who needed to be removed at all costs and destroyed if necessary. Arizona residents perceived Apaches as vicious, ruthless, and ready to kill any unsuspecting whites. Many whites determined that extermination was the preferred method to deal with Apaches. Under such circumstances, it should not be surprising that these Apache defendants suffered under Arizona’s criminal justice system.

Clare V. McKanna, Jr., White Justice in Arizona: Apache Murder Trials in the Nineteenth Century 178–79, 183 (2005) (endnotes omitted); see also LaVelle, supra note 13, at 157–58 n.75 (citation and internal quotation marks omitted) (quoting Brig. Gen. E.O.C. Ord, Commander of the Department of Texas, U.S. Sec’y of War Ann. Rep. 121–22 (1869)) (recounting the avowed efforts of U.S. military personnel in the nineteenth century to “hunt [the Apaches] down as they would wild animals” with the “general idea” of “kill[ing] them wherever found” for the purpose of “extermination”).

338. See infra note 340 and accompanying text.
The Wilson Court relayed the petitioner’s argument as follows:

His proposition is, that “Congress by [the Major Crimes Act] conferred upon the Territory and her courts full jurisdiction of the offence of murder when committed on an Indian reservation by an Indian. This offence had heretofore, when committed in... [Indian country] by... [non-Indians], been cognizable by the courts of the United States under [the General Crimes Act]. The petitioner believes that the United States, by yielding up a part of [its] jurisdiction [to the territorial courts] over the offence of murder when committed on an Indian reservation, lost all; that is, that [the United States’] jurisdiction of the offence... [within reservations] must be ‘sole and exclusive,’ or will not exist at all; that it cannot be that there shall be one law and one mode of trial for a murder... [on a reservation] if committed by an Indian and another law and mode of trial for the identical offence... [on a reservation] committed by a white man or a negro.”

339. See infra notes 351–364 and accompanying text.

340. In re Wilson, 140 U.S. 575, 577 (1891) (emphases added) (citing, inter alia, Ex parte Gon-Shay-Ee, 130 U.S. 343 (1889)).
In making this intricate argument Wilson cited, understandably, the factually similar case *Ex parte Gon-Shay-Ee*, where the Apache Indian petitioner had prevailed with his virtually identical argument, i.e., that an Arizona territorial court had wrongly applied *general federal law*, instead of territorial law, when convicting the petitioner of murder and sentencing him to death.\(^{341}\) Beyond the factual similarities between the two cases Wilson’s argument seemed supported, moreover, by the Supreme Court’s statement in *Gon-Shay-Ee* that, by passing the Major Crimes Act, Congress had “*transfer[ed] to the territorial courts . . . the jurisdiction* to try the crimes described in” the Major Crimes Act, including the crime of murder, and to try those crimes “under the *territorial laws*, when sitting as and exercising the functions of such territorial court.”\(^{342}\) If Congress (1) had “*transfer[ed] to the territorial courts* all of the federal courts’ previous on-reservation General Crimes Act jurisdiction and (2) had required the territorial courts to *apply the territorial laws*,”\(^{343}\) should it not have followed, logically, that there would have been no residue of federal jurisdiction left for a territorial court to “*sit[] as a court of the United States*”\(^{344}\) and *use the general federal laws* to convict and sentence to death a non-Indian like Wilson when the murder had occurred on an Indian reservation?

As facially compelling as this argument might have seemed, the Supreme Court rejected it. “The question is one of statutory construction,” the Court wrote, turning to address the purpose and meaning of the Major Crimes Act in the wake of the Court’s having validated the Act’s constitutionality in *United States v. Kagama*, the seminal Indian law case decided five years before *Wilson*.\(^{345}\) Citing *Kagama*, the Wilson Court stated that “[t]he jurisdiction of the United States over these reservations and the power of Congress to provide for the punishment of all offences committed therein, by whomsoever committed, are not open questions.”\(^{346}\) Further, the Court affirmed Congress’s authority to “provide for the punishment of one class of offences in one court, and another class in a different court,” reasoning that “[t]here is no necessity for, and no constitutional provision

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341. See *supra* notes 318–320 and accompanying text.
342. *Gon-Shay-Ee*, 130 U.S. at 352 (emphases added); *supra* text accompanying note 322.
343. See *supra* text accompanying note 342.
344. See *Wilson*, 140 U.S. at 575 (noting the petitioner’s habeas corpus “attack [was] rested on two propositions,” one of which was that the “territorial court, sitting as a court of the United States,” “did not have jurisdiction of the offence charged”).
345. See *id.* at 577–78 (citing, inter alia, *United States v. Kagama*, 118 U.S. 375 (1886)).
346. *Id.* at 577 (emphases added) (citing *Kagama*, 118 U.S. 375).
compelling, full and exclusive jurisdiction in one tribunal . . . .”347 Thus, the Court rebuked, in effect, the petitioner’s argument that “it cannot be that there shall be one law and one mode of trial” for an Indian who commits murder on a reservation “and another law and mode of trial” for a non-Indian who commits the same on-reservation crime.348 Congress’s broad power in Indian affairs enabled it to establish a separate and unique process for the prosecution of crimes in Indian country involving Indians, and Congress indeed had done just that by enacting the Major Crimes Act.349

The Wilson Court also rejected the logic of the non-Indian petitioner’s argument to the extent it maintained that the Major Crimes Act had transferred all of the federal courts’ preexisting criminal jurisdiction on reservations to the territorial courts, leaving no residual jurisdiction available to be exercised by those courts “sitting as courts of the United States”350 and applying general federal law rather than local territorial law.351 In a densely stated rejection of that argument the Court wrote: “The effect of the act of 1885 was not to transfer to territorial courts a part of the sole and exclusive jurisdiction of United States courts, but only a part of the limited jurisdiction then exercised by such [United States] courts, together with jurisdiction over offences not theretofore vested therein.”352 Unpacking this statement, the Court explained that the core premise of the petitioner’s argument was false since the Major Crimes Act did not bring about a “transfer to [the] territorial courts a part of” the federal courts’ “sole and exclusive” jurisdiction.353 The petitioner was wrong, explained the high court, in reading the “sole and exclusive jurisdiction” phrase in section 2145 of the General Crimes Act as “apply[ing] to the [federal-court] jurisdiction extended over the Indian country” by that act and thus as “carrying by implication, even in the absence of express language, a transfer of all jurisdiction.”354 Instead, reasoned the Wilson Court, the jurisdiction the

347. Id. at 577–78; cf. United States v. Pridgeon, 153 U.S. 48, 58 (1894) (citing Ex parte Crow Dog, 109 U.S. 556, 559 (1883); Gon-Shay-Ee, 130 U.S. at 349) (observing that courts of a Territory “sit as territorial courts to administer the laws of the Territory and as courts of the United States to administer the laws of the United States”).
348. See supra text accompanying note 340.
349. See supra note 346 and accompanying text; see also supra notes 140–178 and accompanying text (discussing the Supreme Court’s upholding the constitutionality of the Major Crimes Act in Kagama, 118 U.S. 375).
350. Wilson, 140 U.S. at 579.
351. See supra notes 339–350 and accompanying text.
352. Wilson, 140 U.S. at 579 (emphasis added).
353. Id. (emphasis added); see supra text accompanying note 352.
354. Wilson, 140 U.S. at 578.
General Crimes Act conferred was “only a part of the limited jurisdiction . . . exercised by such [federal] courts,” a scope of jurisdiction that was limited by the exceptions listed in section 2146 of the Act. Further, “[t]he words ‘sole and exclusive’” in the text of the General Crimes Act signified that the substantive law Congress authorized the federal courts to apply when exercising their limited jurisdiction under the General Crimes Act was the exclusively federal law that the federal courts applied within federal enclaves, i.e., those discrete geographical areas such as “the premises, grounds, forts, arsenals, navy-yards, and other places within the boundaries of a State, or even within a Territory, over which the Federal government has . . . exclusive jurisdiction.” Accordingly, what Congress had “transferred” to the territorial courts by passing the Major Crimes Act was (1) the same limited federal-court jurisdiction established by the General Crimes Act, a jurisdiction to be exercised by territorial courts in applying local territorial law only, and only in cases that involved Indians and that implicated the specific offenses listed in the Major Crimes Act, and (2) the additional “jurisdiction over offences not theretofore vested” in federal courts under section 2145 of the General Crimes Act, i.e., jurisdiction over “crimes

355. Id. (emphases added); see 28 U.S. Rev. Stat. § 2146; see also Pickett v. United States, 216 U.S. 456, 458 (1910) (observing that the general law defining the federal crime of murder “was, by § 2145, Rev. Stat., extended ‘to the Indian Country,’ when not within . . . the exceptions of § 2146”).

356. See Wilson, 140 U.S. at 578 (“The words ‘sole and exclusive,’ in section 2145 [of the General Crimes Act], do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it.”).

357. See Ex parte Gon-Shay-Ee, 130 U.S. 343, 353 (1889) (emphasis added) (noting, in discussing the text of the Major Crimes Act, that the “phrase, ‘within the exclusive jurisdiction of the United States,’ is well understood as applying to the crimes which are committed within the premises, grounds, forts, arsenals, navy-yards, and other places within the boundaries of a State, or even within a Territory, over which the Federal government has by cession, by agreement, or by reservation exclusive jurisdiction”). The text of the General Crimes Act itself makes clear that its reference to “any place within the sole and exclusive jurisdiction of the United States” is a reference to federal enclaves by exempting only one such federal enclave, namely, the District of Columbia. See id. at 349 (emphasis added) (“Sec. 2145 of the Revised Statutes [i.e., the General Crimes Act] extends the general laws of the United States as to the punishment of crimes committed in any place within their sole and exclusive jurisdiction, except the District of Columbia, to the Indian country . . . .”); cf. Wilson, 140 U.S. at 579 (emphasis added) (“It follows that as the Circuit Courts of the United States have jurisdiction over the crime of murder committed within any fort, arsenal or other place within the exclusive jurisdiction of the United States, so, prior to 1885, the District Courts of a Territory had jurisdiction over the crime of murder committed by any person other than an Indian, upon an Indian reservation within its territorial limits . . . .”).

358. See supra text accompanying note 352.

359. See supra text accompanying note 352.
committed by one Indian against the person or property of another Indian," a category previously exempted from the federal courts' Indian-country jurisdiction by section 2146 of the General Crimes Act.\textsuperscript{360}

The Major Crimes Act had not, the Wilson Court continued, "taken away" any of the federal courts' pre-1885 jurisdiction, as conferred by the General Crimes Act, over on-reservation crimes not involving Indians.\textsuperscript{361} Moreover, the federal legislation that had established the Territory of Arizona had "given [the territorial courts] the same jurisdiction in all cases arising under the Constitution and laws of the United States as [was] vested in" the United States courts.\textsuperscript{362} This already-vested jurisdiction of the territorial courts to apply the substantive laws of the United States when prosecuting on-reservation crimes that did not involve Indians remained intact after 1885; it had not been altered or transferred "by language [or] implication" in the Major Crimes Act so as to require the territorial courts to apply only local territorial law in this category of on-reservation crimes.\textsuperscript{363} The habeas corpus petition in the Wilson case, the Court concluded, could not be granted, therefore, on the ground that the territorial court lacked jurisdiction to convict the non-Indian petitioner and sentence him to death.\textsuperscript{364}

Wilson thus clarified that the General Crimes Act conferred—on the federal courts only—an expressly limited jurisdiction for applying exclusively federal law in Indian country.\textsuperscript{365} Nowhere in the Supreme Court's meticulous and elaborate reasoning in Wilson and Gon-Shay-Ee is there even a hint that once a state entered the Union it could exercise jurisdiction over a crime on a reservation that involved an Indian as either perpetrator or victim. Castro-Huerta makes a contextually

\begin{footnotesize}
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\item 360. See Wilson, 140 U.S. at 578 (quoting section 2146 of the General Crimes Act) (observing that the General Crimes Act’s “extension of the criminal laws of the United States over the Indian country is limited by the section immediately succeeding, 2146, as follows: ‘The preceding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian . . .’”).
\item 361. See id. at 579 (“Prior to 1885, the [territorial courts] had jurisdiction over the crime of murder committed by any person other than an Indian, upon an Indian reservation within its territorial limits, and . . . such jurisdiction has not been taken away by the legislation of that year.”).
\item 362. Id.
\item 363. See id. at 578 (“There has been no transfer of part of a sole and exclusive jurisdiction, carrying by implication, even in the absence of express language, a transfer of all jurisdiction, but only a transfer of part of an already limited jurisdiction, and neither by language nor implication transferring that theretofore vested and not in terms transferred.”).
\item 364. See id. at 575, 579 (“The first claim is, that the court did not have jurisdiction of the offence charged. . . . The first contention of petitioner . . . cannot be sustained.”).
\item 365. See supra notes 350–364 and accompanying text.
\end{itemize}
\end{footnotesize}
misleading statement when it asserts that “[a]s far back as 1891, the [Wilson] Court stated that the phrase ‘sole and exclusive jurisdiction’ in the General Crimes Act is ‘only used in the description of the laws which are extended’ to Indian country” and does not apply “to the jurisdiction extended over the Indian country.” 366 That 1891 case did not involve a question of state jurisdiction; the Wilson Court discussed the distinction between federal substantive law and limited federal-court jurisdiction, as implicated in the text of the General Crimes Act, in affirming that Congress had retained its discretion to vary the mode of criminal jurisdiction the courts of the Territory of Arizona would be allowed to exercise, making it depend on whether the crime involved Indians. 367 If Indians were not involved, the territorial courts remained authorized—as they had been ever since Congress established the Territory 368—to “sit[] as . . . court[s] of the United States” and apply general federal law in criminal cases regardless of whether the crime occurred on- or off-reservation. 369 But if Indians were involved, the Major Crimes Act’s first “branch” 370 operated to restrict the territorial courts’ jurisdiction by authorizing them to “sit[] as courts of the Territory” and apply only the local laws of the Territory—not the general laws of the United States—and to do so only if the crime was one of the offenses specifically named in that 1885 Act. 371 In none of this was there any implication that states—

367. See Wilson, 140 U.S. at 577–78 (internal quotation marks omitted) (rejecting petitioner’s argument that “it cannot be that there shall be one law and one mode of trial for a murder . . . [on a reservation] if committed by an Indian and another law and mode of trial for the identical offence in the same place committed by a [non-Indian]” in holding that “Congress may provide for the punishment of one class of offences in one court, and another class in a different court”).
368. See supra notes 362–363 and accompanying text.
369. Wilson, 140 U.S. at 575, 579; see supra note 344 and accompanying text.
370. See Donnelly v. United States, 228 U.S. 243, 269–71 (1913) (emphases added) (referring to the two “branches” of the Major Crimes Act that were “sustained as valid and constitutional” in United States v. Kagama, 118 U.S. 375, 383 (1886), and identifying the “branches” as “[1] that which provides for the punishment of the crimes enumerated when committed by Indians within the Territories, and [2] that which provides for the punishment of the same crimes when committed by an Indian on an Indian reservation within a State of the Union”); id. at 271–72 (citations omitted) (noting that Kagama addressed “the constitutionality of the second branch of” the Major Crimes Act to produce that case’s holding); see also supra notes 169–178 and accompanying text (discussing the second “branch” of Kagama’s analysis of the constitutionality of the Major Crimes Act).
371. See Wilson, 140 U.S. at 579 (stating that “the distinction between District Courts when sitting as courts of the Territory, and when sitting as courts of the United States, was fully developed and explained in the case of” Ex parte Gon-Shay-Ee, 130 U.S. 343 (1889)); see also Gon-Shay-Ee, 130 U.S. at 351–52 (emphases added) (“The [Major Crimes Act]
whose entry into the Union the Major Crimes Act’s second “branch” contemplated372—would ever be permitted to exercise authority over matters involving Indians.

Indeed, the Court in Gon-Shay-Ee—a Court composed of a core of the same Justices who decided both In re Wilson and United States v.

evidently intended to provide for the punishment of all cases of ‘murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny,’ committed by Indians within any Territory of the United States, whether within or without an Indian reservation, and the declaration is clear that they ‘shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of said crimes respectively.’

It may be useful to summarize in the form of syllogisms (1) the non-Indian petitioner’s (losing) argument and (2) the Court’s reasoning and conclusion in the 1891 Wilson case. Following is that summary.

Incorrect Argument of the (Losing) Non-Indian Petitioner in In re Wilson

1. False Major Premise: The General Crimes Act (GCA) gave federal courts a one-mode-only jurisdiction in Indian country, permitting them to sit solely and exclusively as U.S. courts applying U.S. law.

2. False Minor Premise: The first “branch” of the Major Crimes (MCA) transferred that one-mode-only jurisdiction to the territorial courts for applying only territorial law.

3. False Conclusion 1: Since the MCA’s enactment the federal courts therefore could exercise their Indian country jurisdiction solely and exclusively in the mode of sitting as territorial courts applying only territorial law, and not as U.S. courts applying U.S. law.

4. False Conclusion 2: Therefore, the Arizona territorial court lacked jurisdiction to sit as a U.S. court and apply U.S. law to sentence to death the non-Indian convict Wilson for murdering another non-Indian on an Indian reservation.

Correct Reasoning and Conclusion of the Supreme Court in In re Wilson

1. True Major Premise: The GCA gave federal courts a limited jurisdiction in Indian country (limited to exclude cases that involved Indians) which allowed them to sit as U.S. courts and apply solely and exclusively U.S. law, i.e., federal enclave law, to crimes on Indian reservations.

2. True Minor Premise 1: The MCA’s first “branch” restricted the jurisdiction of territorial courts to applying only territorial law in cases that involved Indians and implicated the specific major offenses listed in the MCA.

3. True Minor Premise 2: The congressional legislation that established the Arizona Territory authorized territorial courts to sit as U.S. courts and apply U.S. law.

4. True Conclusion 1: Since the MCA’s enactment Arizona territorial courts therefore could continue sitting as U.S. courts applying U.S. law in all criminal cases except cases implicating crimes committed by or against Indians in Indian country.

5. True Conclusion 2: Therefore, the Arizona territorial court had jurisdiction to sit as a U.S. court applying U.S. law to sentence to death the non-Indian convict Wilson for murdering another non-Indian on an Indian reservation.

372. See supra note 370.
Kagama\textsuperscript{373}—was explicit in emphasizing that in passing the Major Crimes Act, Congress’s purpose was to keep firmly in place the historical bar against state authority over Indians in Indian country.\textsuperscript{374} “The framers of [the Major Crimes Act],” the Court wrote, “were very careful,” when providing for exclusive federal jurisdiction in that part of the Act addressing crimes committed on reservations and within states, “to declare that a violation of the laws of the United States in regard to these crimes of murder, etc., should be tried in the courts exercising the jurisdiction of the United States to punish offences against the United States.”\textsuperscript{375} This congressional declaration had confirmed, in part, the existing law\textsuperscript{376} for the historical preclusion of state authority in Indian country, as articulated in Worcester v. Georgia,\textsuperscript{377} had continued to operate as a baseline principle in all the Supreme Court’s decisions, and through all the changes in federal Indian policy, during the nineteenth century and into the twentieth,\textsuperscript{378} including in the cases Gon-Shay-Ee,\textsuperscript{379} Wilson,\textsuperscript{380} and Donnelly.\textsuperscript{381}

\textbf{9. United States v. Sandoval (1913)}

The same year it decided Donnelly, the Supreme Court issued another unanimous decision, United States v. Sandoval,\textsuperscript{382} that likewise

\textsuperscript{373} See Justices 1789 to Present, supra note 108 (listing Justices’ terms of office and indicating six Justices were on the Court in 1886, 1889, and 1891 when Kagama, Gon-Shay-Ee, and Wilson, respectively, were unanimously decided—Justices Samuel Freeman Miller, Stephen Johnson Field, Joseph P. Bradley, John Marshall Harlan, Horace Gray, and Samuel Blatchford).

\textsuperscript{374} See supra text accompanying notes 327–336.

\textsuperscript{375} Gon-Shay-Ee, 130 U.S. at 352 (emphasis added); supra text accompanying note 330; see also Negonsott v. Samuels, 507 U.S. 99, 102–03 (1993) (citations omitted) (“As the text of [18 U.S.C.] § 1153 and our prior cases make clear, federal jurisdiction over the offenses covered by the Indian Major Crimes Act is ‘exclusive’ of state jurisdiction.”); supra note 336; cf. McKanna, supra note 318, at 366–67 (“The intensity for Indian-hating in Arizona at the outset of Indian-white relations set the stage for future race relations. Patterns of direct and indirect as well as overt and covert prejudice by attorneys, judges, juries, and newspaper editors against Arizona Indian people legitimized their social, cultural, and legal oppression. . . . The region’s educated elite—judges, attorneys, and newspaper editors—set the tone for racial intolerance and sanctioned (countenanced, endorsed, approved, and upheld) the perversion of a system designed to safeguard the rights of Americans, Native Americans as well.”).

\textsuperscript{376} See supra text accompanying notes 330–336.

\textsuperscript{377} 31 U.S. 515 (1832).

\textsuperscript{378} See supra notes 331–332 and accompanying text.

\textsuperscript{379} 130 U.S. 343 (1889).

\textsuperscript{380} 140 U.S. 575 (1891).

\textsuperscript{381} 228 U.S. 243 (1913).

\textsuperscript{382} 231 U.S. 28 (1913).
implicated the federal government’s paramount authority, vis-à-vis the states, in Indian affairs. The Court validated enforceability of a provision of a federal statute, namely, the New Mexico Enabling Act, which “prohibit[ed] the introduction of liquor into the Indian country” and specified that “the terms ‘Indian’ and ‘Indian country’ shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them.” The Court held that the prohibition was valid as applied to a non-Indian’s sale of liquor to an Indian within the territory of Santa Clara Pueblo. “Being a legitimate exercise of [Congress’s constitutional] power [in Indian affairs],” the Court wrote, “the [provision] in question does not encroach upon the police power of the State or disturb the principle of equality among the States.”

Most significant in light of the Castro-Huerta decision is Sandoval’s express reliance on Pollard v. Hagan, a case from which the Castro-Huerta majority isolated a quote positing that “a State is generally ‘entitled to the sovereignty and jurisdiction over all the territory within her limits.’” In Sandoval, however, the Supreme Court reasoned that, with regard to Congress’s sovereign and paramount power in Indian affairs within the states, the controlling language from Pollard was the following passage:

[All constitutional laws are binding on the people, in the new states and the old ones, whether they consent to be bound by them or not. Every constitutional act of Congress is passed by the will of the people of the United States, expressed through their representatives, on the

384. Sandoval, 231 U.S. at 37 n.1 (quoting New Mexico Enabling Act, Act of June 20, 1910, 36 Stat. 557); see also COHEN’S HANDBOOK § 4.07[2][b], supra note 5, at 315 (footnote omitted) (noting that in Sandoval “the Supreme Court upheld Congress’s decision in the Enabling Act to include the Pueblos as Indians under federal control”).
385. See Sandoval, 231 U.S. at 36, 49.
386. Id. at 49 citing, inter alia, United States v. 43 Gallons of Whiskey, 93 U.S. 188 (1876); United States v. Kagama, 118 U.S. 375 (1886); see also COHEN’S HANDBOOK § 4.07[2][b], supra note 5, at 315 (footnote omitted) (quoting Sandoval, 231 U.S. at 38) (observing that the Sandoval Court “[r]eject[ed] arguments that the Enabling Act usurped the police power of the state and violated the equal footing doctrine,” concluding instead “that Congress’s treatment of the Pueblos as Indians was ‘within the sphere of the plain power of Congress’”); cf. Dossett, supra note 207, at 253 (footnote omitted) (observing that “Justice [Willis] Van Devanter gained a deep understanding of both federal land law and Indian law long before he became a Justice” and “authored United States v. Sandoval, widely recognized as a landmark decision affirming the federally-protected status of tribal lands”).
387. 44 U.S. 212 (1845).
subject-matter of the enactment; and when so passed it becomes the supreme law of the land, and operates by its own force on the subject-matter, in whatever state or territory it may happen to be. The proposition, therefore, that such a law cannot operate upon the subject-matter of its enactment, without the express consent of the people of the new state where it may happen to be, contains its own refutation, and requires no farther examination.\textsuperscript{389}

Indeed, the Sandoval Court quoted directly and extensively from a more recent precedent, \textit{Coyle v. Smith},\textsuperscript{390} one among many decisions in the long line of cases stemming from the seminal states’-rights precedent \textit{Pollard}:

> It may well happen that Congress should embrace in an enactment introducing a new State into the Union legislation intended as a regulation of commerce . . . with Indian tribes situated within the limits of such new State . . . which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force . . . solely because the power of Congress extended to the subject, and, therefore, would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress.\textsuperscript{391}

Accordingly, Castro-Huerta’s insinuation that the majority’s dubious narrative about Worcester’s “abandon[ment]”\textsuperscript{392} finds support, somehow, in \textit{Pollard} is a contention which, in the 1845 case’s apt phrasing, “contains its own refutation.”\textsuperscript{393}

\textsuperscript{389} \textit{Pollard}, 44 U.S. at 224–25, cited in Sandoval, 231 U.S. at 38.

\textsuperscript{390} 221 U.S. 559, 574 (1911), cited in Sandoval, 231 U.S. at 38.

\textsuperscript{391} Id. (citing, inter alia, \textit{Pollard}, 44 U.S. 212), cited in Sandoval, 231 U.S. at 38.

\textsuperscript{392} \textit{Cf. Castro-Huerta}, 142 S. Ct. at 2497 (positing that “the Worcester-era understanding of Indian country as separate from the State was abandoned later in the 1800s”); see also supra note 227 and accompanying text.

\textsuperscript{393} \textit{Pollard}, 44 U.S. at 225; \textit{cf. LaVelle, supra note 7, at 815 n.106 (citations omitted)} (“That the holding of [\textit{Pollard}] never was presumed to apply to disputes concerning submerged lands within the boundaries of federally protected Indian reservations may be inferred from the Court’s underlying concern in [\textit{Pollard}] about federal interference with the States’ ‘right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes.’ But where States have no jurisdiction to impose general police powers—i.e., within the boundaries of federally protected Indian reservations, as commanded by [\textit{Worcester v. Georgia})—a rationale declaring state ownership of submerged lands as essential to the States’ ‘eminent domain’ in exercising general police powers compels the conclusion that this ‘States’ rights’ principle does not apply to the construction of federal instruments specially affirming and safeguarding tribal property interest in lands within the boundaries of Indian reservations.”).
10. Additional Early-Twentieth-Century State Authority Cases

In 1926, the Supreme Court expressly confirmed its continuing understanding that “authority in respect of crimes [in Indian country] committed by or against Indians continued after the admission of [a] state as it was before,” that is, as authority that remained within the scope of exclusive federal jurisdiction. The particular issue in United States v. Ramsey was whether an Indian-owned allotment with a federal restriction on alienation, located within a reservation in Oklahoma, was Indian country for purposes of federal jurisdiction under the General Crimes Act. The Court held that the restricted-fee allotment was Indian country, justifying a federal court’s exercise of jurisdiction to prosecute and punish two non-Indians who murdered an Osage Indian on that allotment. In validating federal jurisdiction over crimes committed by non-Indians against Indians in Indian country notwithstanding a state’s entry into the Union, the Ramsey Court relied on Donnelly v. United States and United States v. Kagama, thereby incorporating by reference those precedents’ use of a shared rationale.


395. See id. at 470 (“The sole question for our determination, therefore, is whether the place of the crime is Indian country within the meaning of § 2145 [i.e., the General Crimes Act]. The place is a tract of land constituting an Indian allotment, carved out of the Osage Indian reservation and conveyed in fee to the allottee named in the indictment, subject to a restriction against alienation . . . .”).

396. See id. at 468. The two murderers were John Ramsey and William K. Hale, convicted of killing the Osage Indian Henry Roan in the infamous serial murders that occurred over several years in early-twentieth-century Oklahoma known as the “Osage Reign of Terror,” depicted in the national best-selling book and forthcoming movie Killers of the Flower Moon. See Brief of Amici Curiae Historians, Legal Scholars, and Cherokee Nation in Support of Petitioner at 30, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526) (quoting DAVID GRANN, KILLERS OF THE FLOWER MOON: THE OSAGE MURDERS AND THE BIRTH OF THE FBI 116, 120, 214 (2017), and citing Ramsey, 271 U.S. at 471–72) (“It was ‘not only useless but positively dangerous’ to prosecute related crimes in the state legal system, as recognized by federal attorneys prosecuting the murder of an Osage on a restricted Osage allotment in northern Oklahoma in the mid-1920s—one of the many Osage murders motivated by greed for the great wealth of Osage mineral headright owners. Their decision to file the prosecution in federal court occurred after an investigation ordered by J. Edgar Hoover, who wanted to avoid scandal and protect his 1924 appointment as the director of the ‘Bureau of Investigation.’ The prosecution resulted in [the Supreme] Court’s 1926 decision recognizing federal court jurisdiction over the prosecution of non-Indians for the murder of an Osage on a restricted Osage allotment . . . .”). See generally DONALD L. FIXICO, THE INVASION OF INDIAN COUNTRY IN THE TWENTIETH CENTURY: AMERICAN CAPITALISM AND TRIBAL NATURAL RESOURCES 27–53 (2d ed. 1998) (chapter titled “The Osage Murders and Oil”).

397. See Ramsey, 271 U.S. at 469 (citing, inter alia, Donnelly, 228 U.S. at 271; United States v. Kagama, 118 U.S. 375, 384 (1886)).
excluding states from any authority over crimes in Indian country involving Indians.\textsuperscript{398} Thus, as Justice Gorsuch recognized in his dissenting opinion in \textit{Castro-Huerta}, the \textit{Ramsey} Court “explained that the ‘grant of statehood’ may have endowed Oklahoma with authority to try crimes ‘not committed by or against Indians,’ but with statehood did not come any authority to try ‘crimes by or against Indians’ on tribal lands.”\textsuperscript{399} The \textit{Castro-Huerta} majority conceded that \textit{Ramsey} held the federal courts’ General Crimes Act jurisdiction over crimes committed by non-Indians against Indians was not “‘ended by the grant of statehood.’”\textsuperscript{400} But the majority added that “the [\textit{Ramsey}] Court did not say that States lacked \textit{concurrent} jurisdiction,” revealing once again the majority’s constant evasion of the core reasoning of cases confirming the continuing, unextinguished autonomy of Indians and Indian tribes in Indian country, vis-à-vis state governments, in the absence of congressional authorization.\textsuperscript{401}

Seven years after deciding \textit{Ramsey}, the Supreme Court issued another unanimous decision in a case that likewise implemented this historical principle of autonomy. In \textit{United States v. Chavez}, decided in 1933, the high court addressed whether the Pueblo of Isleta in New Mexico was within the reach of protective federal statutory law—i.e., the General Crimes Act—by virtue of the Pueblo’s lands’ having Indian country status.\textsuperscript{402} The Court clarified how recent cases had settled the Indian country question with regard to the pueblos,\textsuperscript{403} and ultimately held that

\begin{quote}
\textsuperscript{398} See supra notes 169–178 and accompanying text (discussing Kagama); supra notes 269–301 and accompanying text (discussing Donnelly); cf. McClanahan v. Ariz. St. Tax Comm’n, 411 U.S. 164, 169 & n.4 (1973) (quoting Worcester v. Georgia, 31 U.S. 515, 561 (1832), and citing, inter alia, Ramsey, 271 U.S. 467) (referring to Ramsey as a case dealing with “a State’s efforts to extend criminal jurisdiction” into Indian country that exemplified Worcester’s “rationale” that “[t]he whole intercourse between the United States and [Indian nations], is, by our Constitution and laws, vested in the government of the United States”).

\textsuperscript{399} Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2516 (2022) (Gorsuch, J., dissenting) (emphasis added).

\textsuperscript{400} Ramsey, 271 U.S. at 469 n.3, quoted in Castro-Huerta, 142 S. Ct. at 2499.

\textsuperscript{401} Castro-Huerta, 142 S. Ct. at 2499 (emphasis added).

\textsuperscript{402} See Chavez, 290 U.S. 357, 358–60 (1933); see also Dossett, supra note 207, at 254 n.350 (quoting Chavez, 290 U.S. at 363) (observing that in Chavez “the Court again found that the Pueblo of Isleta’s ‘communal ownership of the full title in fee simple’ is not an obstacle to federal protection of Indian lands”).

\textsuperscript{403} See Chavez, 290 U.S. at 361 & n.8 (citing United States v. Sandoval, 231 U.S. 28 (1913); United States v. Candelaria, 271 U.S. 432 (1926)) (“By a uniform course of action, beginning as early as 1854 and continued up to the present time, the legislative and executive branches of the Government have regarded and treated [the people of these pueblos] as dependent Indian communities requiring and entitled to its aid and protection, like other Indian tribes.”).
\end{quote}
the General Crimes Act did, in fact, apply in *Chavez*, conferring valid federal jurisdiction over a crime committed by two non-Indians against Indian property within the Pueblo.\textsuperscript{404} The Court rejected the argument that legislation making larceny a federal crime did not apply when the offense was committed by non-Indians in Pueblo Indian country because those statutes had to be “construed in the light of” the New Mexico Enabling Act which, in turn, the argument went, left such crimes “to be dealt with exclusively by and under the laws of the State.”\textsuperscript{405} Citing *United States v. Sandoval*, the Court wrote that the pueblos were “under the guardianship of the United States” and “by reason of this status they and their lands [were] subject to the legislation of Congress enacted for the protection of tribal Indians and their property.”\textsuperscript{406} As in *Sandoval*, the Court rejected the non-Indian criminal defendants’ states’-rights argument, reiterating 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.”\textsuperscript{407} *Chavez*’s reliance on *Sandoval* thus manifests a through-line from *Sandoval*’s validation of federal prohibitions on the sale of liquor in Pueblo Indian country,\textsuperscript{408} a validation grounded in Congress’s paramount and exclusive authority in Indian affairs with respect to all matters involving Indians.\textsuperscript{409}

The continuation of the historical principle of tribal autonomy is further reflected in three near-mid-twentieth-century Supreme Court decisions, all issued within the span of a single year. First, in the 1945 case *Rice v. Olson*, the Court reversed dismissal of a habeas corpus

\begin{itemize}
  \item \textsuperscript{404} See id. at 358–59, 364–65.
  \item \textsuperscript{405} Id. at 358–59.
  \item \textsuperscript{406} Id. at 362 (citing *Sandoval*, 231 U.S. 28).
  \item \textsuperscript{407} Id. at 365 & n.15 (citing *Sandoval*, 231 U.S. at 49); cf. Gabriel J. Chin, *The Voting Rights Act of 1867: The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C.L. REV. 1581, 1598 (2004) (footnote omitted) (adverting to *Coyle v. Smith*, 221 U.S. 559 (1911)) (citing *Chavez* as one of “several cases decided after” *Coyle v. Smith* in which “the Court upheld special provisions of enabling acts on the ground that . . . the provision was within federal power”); supra notes 386–392 and accompanying text (discussing the *Sandoval* Court’s reliance on *Coyle v. Smith* and *Pollard v. Hagan*, 44 U.S. 212 (1845), in rejecting state sovereignty arguments against an exercise of Congress’s paramount and exclusive power in Indian affairs).
  \item \textsuperscript{408} See *Sandoval*, 231 U.S. at 37 n.1; supra note 382 and accompanying text.
  \item \textsuperscript{409} See supra notes 381–385 and accompanying text; cf. McClanahan v. Ariz. St. Tax Comm’n, 411 U.S. 164, 169 & n.4 (1973) (quoting *Worcester v. Georgia*, 31 U.S. 515, 561 (1832), and citing, inter alia, *Chavez*, 290 U.S. 357) (referring to *Chavez* as another case dealing with “a State’s efforts to extend criminal jurisdiction” into Indian country that exemplified the *Worcester* Court’s “rationale” that “[t]he whole intercourse between the United States and [Indian nations], is, by our Constitution and laws, vested in the government of the United States”).
\end{itemize}
petition which alleged that the Winnebago Indian petitioner had been deprived of his constitutional right to counsel when convicted of burglary in state court and sentenced to a term of one to seven years in prison.\footnote{410}{See Rice v. Olson, 324 U.S. 786, 786–87, 792 (1945).}

The Court stated that the petitioner’s “need for legal counsel . . . is strikingly emphasized by the allegation . . . that the offense for which the state court convicted him was committed on a government Indian Reservation ‘without and beyond the jurisdiction of the Court.’”\footnote{411}{Id. at 789.}

The high court opined further that the petitioner’s allegation “raises an involved question of federal jurisdiction, posing a problem that is obviously beyond the capacity of even an intelligent and educated layman, and which clearly demands the counsel of experience and skill.”\footnote{412}{Id.}

The Court then made an astute observation about the field of Indian law generally: “The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history.”\footnote{413}{Id.}

The case the Court cited for this insight was \textit{Worcester v. Georgia}, intimating the Justices’ acknowledgment of that foundational precedent’s enduring impact and continuing influence, stretching back in time for more than a century.\footnote{414}{See id. (citing \textit{Worcester}, 31 U.S. 515).}

The \textit{Rice} Court also used the \textit{Worcester} principle as the reference frame, in effect, for highlighting the Nebraska Supreme Court’s obvious error in the prior, lower-court proceedings, namely, the state court’s ruling that the 1885 Major Crimes Act “gave Nebraska authority to try the petitioner” for a major offense (burglary) that was alleged to have occurred on the Winnebago Reservation.\footnote{415}{Rice, 324 U.S. at 789–90 (emphasis added).}

The U.S. Supreme Court pointed out that among Congress’s stated purposes when passing the Major Crimes Act was “to fulfill ‘treaty stipulations with various Indian Tribes,’ specifically including the Winnebagoes [sic], of which tribe the petitioner alleges he is a member.”\footnote{416}{Id. at 789.}

The Court emphasized that the Act “subject[ed] Indians who commit certain crimes, including burglary, to trial and punishment,” but that

\begin{quote}
\textit{[t]he language . . . used to accomplish this purpose is that “all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts.} \end{quote}
and in the same manner, and subject to the same penalties as are all
other persons committing any of the above crimes within the exclusive
jurisdiction of the United States.”

The Supreme Court noted that the state court’s view that the Major
Crimes Act conferred jurisdiction on the state courts “was not in accord
with [the construction] given [the Act] by the Courts of Nebraska and
other courts,” including by the U.S. Supreme Court itself in United States
v. Kagama. Although Nebraska argued it did “not rely on” the state
supreme court’s interpretation of the Major Crimes Act, the U.S. Supreme Court found that the state court’s doubtful reading was
plainly implicated in “[a]ll of these questions concerning the power of the
state courts to try this Indian petitioner for burglary.” Such questions
entailed “complexities,” explained the high court, that led it to “conclude
that the petitioner [was] entitled to a hearing on his allegations that he
did not . . . waive his constitutional right to have the benefit of counsel.”

Just nine months after the Rice ruling, the Supreme Court issued
another opinion that implicitly embraced the background Worcester
principle while confirming the limited reach of state criminal jurisdiction
in Indian country. In New York ex rel. Ray v. Martin, the Court held that
a crime committed by a non-Indian against another non-Indian on a
reservation in New York was within the exclusive jurisdiction of
New York’s courts. The Court opined that United States v. McBratney

417. Id. at 789–90 (emphasis added) (quoting Act of Mar. 3, 1885, 23 Stat. 385); see also
United States v. John, 437 U.S. 634, 651 (1978) (citing, inter alia, Rice, 324 U.S. 786)
(adverting to Rice as supporting “the assumption that § 1153 ordinarily is pre-emptive of
state jurisdiction when it applies”); supra note 336 (discussing John).

418. Rice, 324 U.S. at 790 & n.4 (citing, inter alia, United States v. Kagama,
118 U.S. 375 (1886); see also supra note 172 and accompanying text. Among the
lower-court cases the Supreme Court cited as being “not in accord with” the state court’s
interpretation in Rice is Ex parte Cross, 30 N.W. 428 (Neb. 1886), a decision issued in the
same year Kagama was decided. In Cross, the Nebraska Supreme Court stated its
contemporaneous understanding of Kagama’s meaning:

In [Kagama] it is held that the state courts have no jurisdiction over the
Indians within the state, and on their reservations, for crime committed by and
against each other, so long as they maintain their tribal relations . . . [As it
declares the law as it is and has been since the taking effect of the [Major Crimes
Act], to wit, March 3, 1885, and is now by the terms of the act and the
construction given it by the highest court of the nation, the law of the land, we
acknowledge its authority. We also fully approve of the reasoning of the learned
judge who wrote the opinion.

Id. at 428 (emphasis added) (citing Kagama, 118 U.S. 375; Act of Mar. 3, 1885, 23 Stat. 385),
cited in Rice, 324 U.S. at 790 n.4; see also supra note 172 and accompanying text.

419. Rice, 324 U.S. at 790–91.

420. Id. at 791.

and *Draper v. United States* controlled the outcome despite the fact that there was no state enabling act to construe since New York was one of the original states. The Court adverted to the relevant text of the enabling act that had been construed in *McBratney*—i.e., the “equal footing” language—and reasoned, pragmatically, 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.” The Court then asserted that when interpreting congressional acts and treaties it generally had placed “no emphasis . . . on whether state or United States courts should try white offenders for conduct which happened to take place upon an Indian reservation, but which did not directly affect the Indians.”

The upshot is that the Court’s reasoning in *Martin* can be seen as consistent with the inherently flexible *Worcester* principle. The advent of “equal footing” provisions of state enabling acts, as judicially construed in the late nineteenth century, manifested an accommodating shift in Congress’s Indian policy, collateral relaxing *Worcester*’s baseline preclusion to allow state criminal jurisdiction on reservations in the narrow instance of non-Indian on non-Indian crime where neither the defendant nor the victim was an Indian and where—theoretically, at least—the state’s assertion of authority would “not directly affect the Indians.”

*Martin* is the case to which *Castro-Huerta*’s “carefully curated snippet[.]” of dicta from the Supreme Court’s 1992 case *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation* refers when opining that the Court’s “more recent cases have recognized the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on

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422. See id. at 497–99 (discussing *United States v. McBratney*, 104 U.S. 621 (1881), and *Draper v. United States*, 164 U.S. 240 (1896), and stating that “the rule announced in the *McBratney* case [is] controlling and . . . the New York Court therefore properly exercised its jurisdiction”).

423. Id. at 499.

424. Id. at 501.


426. *Martin*, 326 U.S. at 491; supra text accompanying note 424; *see also* CANBY, supra note 38, at 200 (citing *Martin*, 326 U.S. 496) (“While [*McBratney* and *Draper*] emphasized the inherent right of states to jurisdiction within their boundaries, the Supreme Court has subsequently adhered to the results but justified them on the ground that the Indians were not directly affected.”).

reservation lands.” That 1992 dictum, together with the majority’s extraction of an isolated assertion from Martin itself—i.e., that “in the absence of a limiting treaty obligation or Congressional enactment each state ha[s] a right to exercise jurisdiction over Indian reservations within its boundaries”—comprise misleading, out-of-context misrepresentations of language from Martin’s discussion of limited state criminal jurisdiction on reservations as exhibited by “the McBratney line of decisions,” cases involving only “crimes between whites and whites which do not affect Indians.”

The same Justices who decided Martin, .


. 430. Id. at 500 (footnotes omitted). The majority opinion in County of Yakima was authored by Justice Antonin Scalia, whose Indian law opinions frequently included statements that contradicted precedent, defied historical principles protective of Indian rights and tribal sovereignty, and facilitated preferred outcomes favoring the interests of states. See infra note 587 and accompanying text; see also Getches, supra note 35, at 1594, 1643–44 (footnote omitted) (including County of Yakima in list of decisions that show how “the Supreme Court has marked out the boundaries of Indian self-government, arguably pursuing its own notion of what is desirable instead of being disciplined by established tests and rules,” and observing that “[n]otwithstanding his proclaimed distaste for judicial policy making, Scalia appears content to join the subjectivist camp when it comes to issues of Indian law”). For instance, in addition to the dictum misrepresenting the significance of the 1946 Martin case, see supra text accompanying note 428, Scalia’s County of Yakima opinion posited that one of the “objectives of allotment” was “to . . . erase reservation boundaries,” Cnty. of Yakima, 502 U.S. at 254 (emphasis added). In truth, however, the General Allotment Act’s “policy was to continue the reservation system and the trust status of Indian lands . . . .” Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 478 (1976) (quoting Mattz v. Arnett, 412 U.S. 481, 496 (1973)); see also COHEN’S HANDBOOK § 1.04, supra note 5, at 75 (footnote omitted) (noting that under the federal allotment and assimilation policy “Indians had to be permanently settled on fixed reservations, since only then could tribal lands be assigned to individuals”); LaVelle, supra note 13, at 324–25 n.647 (citations omitted) (discussing the position of Senator Henry L. Dawes, the main sponsor of the 1887 General Allotment Act, that the legislation, if passed, “would not bring about the extinguishment of a reservation by the mere sale of surplus lands as authorized by” the Act and that “land-sale agreements with Indian tribes pursuant to . . . [the] Act would leave reservation boundaries intact”). Scalia’s erroneous and misleading “erase reservation boundaries” dictum purported to rely solely on In re Heff, 197 U.S. 488, 499 (1905); but the cited page from Heff does not support that dictum, stating instead that the then-operant federal policy of allotment and assimilation “looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States,” id. Moreover, Heff—which held that Indians became subject to state law immediately upon receiving trust allotments under the General Allotment Act, see id. at 502–03—was quickly repudiated and overridden by Congress’s passage of the 1906 Burke Act, 34 Stat. 182, and then was expressly overruled by the Supreme Court itself
moreover, also unanimously agreed—just three months later, in *Williams v. United States* (1946)—that states do not “have jurisdiction

in 1916, see *United States v. Nice*, 241 U.S. 591, 601 (1916) (citing *Heff*, 197 U.S. 488) (“[W]e are constrained to hold that the decision in *Heff* is not well grounded, and it is accordingly overruled.”). See also COHEN’S HANDBOOK § 14.01[3], supra note 5, at 928–29 & n.45 (footnotes omitted) (noting that the outcome of *Heff* was changed by the Burke Act and that the case itself “was expressly overruled by *United States v. Nice*, which held that the General Allotment Act had not intended either to sever the tribal ties of allottees or to remove federal protection from them during the allotment trust period”).

Scalia’s dictum in *County of Yakima* falsely attributing to the General Allotment Act an “objective[ ] . . . to . . . erase reservation boundaries,” *Cnty. of Yakima*, 502 U.S. at 254 (emphasis added), was planted to prepare the way for later decisions—such as, most conspicuously now, *Castro-Huerta*—designed to displace application of historical Indian law principles through judicial imposition of antithetical premises favoring instead states’ “exercise [of] criminal (and . . . civil) jurisdiction . . . on reservation lands,” *id.* at 257–58, *quoted in Castro-Huerta*, 142 S. Ct. at 2493–94. This subtle and cunning power move also was in keeping with the aggressive trend, noted by many scholars, of the Supreme Court’s using nineteenth-century allotment policy as a touchstone for modern Indian law decisions destructive of Indian rights. See, e.g., Getches, *supra* note 35, at 1622 (footnote omitted) (noting that “the Court has used the short-lived allotment policy as the touchstone for deciding how much governmental authority the tribes should exercise”), Ann Tweedy, *The Liberal Forces Driving the Supreme Court’s Divestment and Debasement of Tribal Sovereignty*, 18 BUFF. PUB. INTEREST L.J. 147, 189 & n.164 (1999) (citation omitted) (identifying *County of Yakima* as a “case in which [the] device [of ignoring subsequent legislative history and policy changes in construing statutes] is used to continue to enforce allotment policies”); Dylan R. Hedden-Nicely & Stacy L. Leeds, *A Familiar Crossroads: McGirt v. Oklahoma and the Future of the Federal Indian Law Canon*, 51 N.M. L. REV. 300, 330 (2021) (footnote omitted) (noting the tendency of some modern Indian law decisions to “[i]gnore the innumerable laws and policies developed by Congress that support tribal rights and sovereignty and instead laser in on its short-lived but destructive policies from the Allotment Era”). See generally Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 6, 20–29 (1995) (footnote omitted) (thoroughly discussing, under the heading “The Dawes Act Rides Again,” *County of Yakima* as representative of “the legacy of allotment in the Court’s recent opinions” which “give[e] effect to the allotment policy” and “are contrary to interpretive rules, precedent, and federal policy”).

Another corrosive and misleading dictum implanted in *County of Yakima* is the assertion that Indian law principles protective of tribal sovereignty and self-government, as derived from *Worcester*, 31 U.S. 515, “have, over time, lost their independent sway.” See *Cnty. of Yakima*, 502 U.S. at 257 (footnotes omitted). But see White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142–43 (1980) (emphasis added) (citations omitted) (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)) (observing that in modern Indian law there are “two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members,” namely, (1) the principle that “the exercise of such authority may be pre-empted by federal law,” and (2) the principle that “[such authority] may unlawfully infringe ‘on the right of reservation Indians to make their own laws and be ruled by them.’”). For discussion of *Castro-Huerta’s* own manipulations and distortions of the “two independent but related barriers” to state authority in Indian country that were reaffirmed by the Supreme Court in *Bracker*, see infra notes 525–601 and accompanying text.
over offenses committed” on a reservation “by one who is not an Indian against one who is an Indian.”

An additional problem with Castro-Huerta’s purported reliance on *Martin* is the majority’s neglecting to disclose *Martin*’s own acknowledgment, through citations to authority, that federal courts have exclusive jurisdiction over crimes on reservations involving Indians. Thus, in referring to “general principles governing [the] subject” of limited state jurisdiction in Indian country, the *Martin* Court cited three guiding precedents. The earliest of them, *Hallowell v. United States* (1911), rejected a states’-rights-based challenge to the application of federal law prohibiting the introduction of liquor into Indian country, in a case where the Indian defendant bought whiskey off-reservation and brought it to his home on an allotment within the boundaries of the Omaha Indian Reservation. A major contention against the federal law’s enforceability was “that the territory in question had become subject to the jurisdiction of the State of Nebraska, to whose police regulations upon the subject of the liquor traffic he was alone amenable.” The *Hallowell* Court rejected that argument; and three years later, in *United States v. Pelican*, the Court revalidated *Hallowell*’s


434. Id. at 323.

435. *See id.* at 323–24 (citing, inter alia, United States v. Sutton, 215 U.S. 291 (1909)) (noting the Court previously had held “that where jurisdiction and control over Indian lands remained in the United States, Congress had the right to forbid the introduction of liquor into such territory, and to provide for the punishment of those found guilty thereof,” and concluding that “[w]hile for many purposes the jurisdiction of the State of Nebraska had attached, and the Indian as a citizen was entitled to the rights, privileges, and immunities of citizenship, still the United States within its own territory and in the interest of the Indians, had jurisdiction to pass laws protecting such Indians from the evil results of intoxicating liquors as was done [by legislation] which made it an offense to introduce intoxicating liquors into . . . Indian country, including an Indian allotment”).
reasoning in the context of affirming federal jurisdiction under the General Crimes Act in a case where non-Indians murdered “Ed Louie, a full-blood Indian,” on an allotment within the Colville Reservation in Washington. In Pelican the Supreme Court wrote:

The authority of Congress to deal with crimes committed by or against Indians upon the lands within the reservation was not affected by the admission of the State of Washington into the Union . . . .

. . .

[I]n Hallowell v. United States, the Federal jurisdiction under the [liquor prohibition] statute was sustained with respect to an allotment to an Omaha Indian in Nebraska, the title being held in trust . . . . It cannot be doubted that the power of Congress was quite as complete to punish [in Pelican] crimes committed by or against Indians upon allotted lands . . . as to prohibit [in Hallowell] the introduction of liquor . . .

. . . The lands, which prior to the allotment undoubtedly formed part of the Indian country, still retain during the trust period a distinctively Indian character, being devoted to Indian occupancy under the limitations imposed by Federal legislation. . . .

. . . We deem it to be clear that Congress had the power thus to continue the guardianship of the Government.  

The Supreme Court in Martin, incorporating by reference the reasoning of Hallowell and Pelican, thus intimated approval of those precedents’ invocation of authorities that upheld exclusive federal jurisdiction over “crimes committed by or against Indians.” More than that, the Martin Court itself directly invoked those same authorities, citing United States v. Kagama, Donnelly v. United States, and United States v. Ramsey as the contextualizing reference frame for Martin’s summary of McBratney as having held that because of “the Act of Congress admitting Colorado into the Union” the “United States no longer had ‘sole and exclusive jurisdiction’ over the Reservation, except to the extent necessary to carry

437. Id. at 445, 448–49 (emphases added) (citing, inter alia, Draper v. United States, 164 U.S. 240, 242, 247 (1896); Donnelly v. United States, 228 U.S. 243, 271, 272 (1913); Hallowell, 221 U.S. at 324; United States v. Kagama, 118 U.S. 375, 383, 384 (1886)).
438. Id. at 448 (emphasis added) (citing Hallowell, 221 U.S. at 324); supra text accompanying note 437; see also New York ex rel. Ray v. Martin, 326 U.S. 496, 499 n.4 (1946) (citing, inter alia, Hallowell, 221 U.S. at 320).
out such treaty provisions which remained in force."\textsuperscript{439} The clear implication was that the Martin Court understood the McBratney rule applied only in cases like Martin itself, that is, cases that did not involve on-reservation "crimes committed by or against Indians."\textsuperscript{440}

The Martin decision provides additional illumination by citing Surplus Trading Co. v. Cook (1930) and United States v. McGowan (1938) to illustrate how "the rule announced in the McBratney case" was "in harmony with general principles governing [the] subject" of state criminal jurisdiction in Indian country.\textsuperscript{441} The cited language from Surplus Trading Co. is the following dictum—one of those "snippets" clipped by the Castro-Huerta majority,\textsuperscript{442} in fact: 

\textit{[Indian] 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."}\textsuperscript{443}

\textit{Martin}'s reference to this dictum shows that it signifies simply that state laws "have . . . force" on reservations\textsuperscript{444} only in matters that neither involve nor directly affect Indians.\textsuperscript{445} Similarly, \textit{Martin}'s advertising to a key sentence from McGowan—i.e., that "[e]nactments of the Federal Government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the federal enactments"\textsuperscript{446}—constraints that dictum so as to countenance only a limited reach of state law within reservations and dependent Indian communities,\textsuperscript{447} a narrow scope cabined and controlled by paramount

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\textsuperscript{439} Martin, 326 U.S. at 497–98 & n.1 (quoting United States v. McBratney, 104 U.S. 621, 624 (1881), and citing Draper, 164 U.S. 240; United States v. Ramsey, 271 U.S. 467, 469 (1926); Donnelly, 228 U.S. 243; Kagama, 118 U.S. at 383).
\textsuperscript{440} See supra note 438 and accompanying text.
\textsuperscript{441} Martin, 326 U.S. at 499 & n.4 (citing, inter alia, Surplus Trading Co. v. Cook, 281 U.S. 647, 651 (1930); United States v. McGowan, 302 U.S. 535, 539 (1938)).
\textsuperscript{442} Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2520 (2022) (Gorsuch, J., dissenting); see supra text accompanying note 71; see also Castro-Huerta, 142 S. Ct. at 2493 (quoting Surplus Trading Co., 282 U.S. at 651 (dictum)).
\textsuperscript{443} Surplus Trading Co., 282 U.S. at 651 (dictum), quoted in Castro-Huerta, 142 S. Ct. at 2493.
\textsuperscript{444} Id. (dictum); see supra text accompanying note 442.
\textsuperscript{446} McGowan, 302 U.S. at 539 (footnote omitted).
\textsuperscript{447} See id. at 538 & n.7 (footnote omitted) (emphasis added by the McGowan Court) (quoting United States v. Sandoval, 231 U.S. 28, 46 (1913)) (affirming the "protection" of federal law prohibiting the introduction of liquor into Indian country "is extended by the United States 'over all dependent Indian communities within its borders, whether within its
federal law and policy,\textsuperscript{448} including the continuing background policy of preclusion first announced in \textit{Worcester v. Georgia}.\textsuperscript{449} Thus, \textit{New York ex rel. Ray v. Martin}, in a number of important ways, reinforced what the Court had pronounced just nine months before that decision: that “[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history.”\textsuperscript{450}

The third state authority-related case decided in a one-year span between 1945 and 1946 was \textit{Williams v. United States}, in which the Supreme Court held that the federal, not state, definition of rape applied in a federal court’s prosecution of an accused non-Indian offender against an Indian victim for an alleged rape that occurred on an Indian reservation.\textsuperscript{451} Explaining that federal law—namely, the Assimilative Crimes Act (ACA)\textsuperscript{452}—controlled judicial analysis,\textsuperscript{453} the high court reasoned that, although the ACA directed federal courts to ordinarily use state law to fill gaps in the general law applicable within federal enclaves\textsuperscript{454} even when those courts exercised their jurisdiction in Indian country pursuant to the General Crimes Act,\textsuperscript{455} state law should not be used when, as in \textit{Williams}, doing so would conflict with definitions or elements relating to existing federal offenses enforceable within such enclaves.\textsuperscript{456} Complementary to the Court’s reasoning and conclusion—
and of heightened importance in the wake of the Castro-Huerta decision—is what the Court wrote in Williams when showing its reliance on Donnelly v. United States, the 1913 decision in which the Court affirmed exclusive federal jurisdiction over a crime committed by a non-Indian against an Indian on the Hoopa Valley Reservation in California:

> While 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 offenses committed there, as in this case, by one who is not an Indian against one who is an Indian.\(^557\)

This restatement, by the Williams Court, of a core feature of the then-existing law governing criminal jurisdiction in Indian country, under the auspices of the General Crimes Act,\(^558\) squarely contradicts the majority’s conclusion in Castro-Huerta, i.e., that Oklahoma had jurisdiction over a crime by a non-Indian against an Indian on the Cherokee Reservation.\(^559\) Indeed, the majority opinion basically concedes Castro-Huerta’s irreconcilability with Williams. Unable to distinguish or otherwise deny the force of the Williams statement, the Castro-Huerta majority resorted to the familiar tactic\(^560\) of purporting to dismiss the statement as “pure dict[um].”\(^561\) But the statement was not an instance of mere “dicta in the classic sense, that is, sheer speculation about what

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457. Williams, 327 U.S. at 714 (emphases added) (footnotes omitted) (citing, inter alia, Donnelly v. United States, 228 U.S. 243 (1913)).

458. See supra notes 269–301 and accompanying text (discussing Donnelly’s construction of the General Crimes Act).


460. See supra note 18 and accompanying text.

461. See Castro-Huerta, 142 S. Ct. at 2498 (citing Williams, 327 U.S. at 714) (asserting that the “Court’s statements in Williams were pure dicta”).
would happen in cases not before the court.\textsuperscript{462} Rather, the Supreme Court in \textit{Williams} restated Donnelly’s holding regarding the federal government’s exclusive jurisdiction over crimes by non-Indians against Indians as a crucial reinforcement of the Court’s reasoning as to why the General Crimes Act’s incorporation of the ACA\textsuperscript{463} did \textit{not} mandate using otherwise foreclosed state-law definitions and elements when prosecuting a non-Indian for allegedly committing rape against an Indian on a reservation in Arizona.\textsuperscript{464} The \textit{Williams} case’s perpetrator-victim-location factual profile—i.e., a profile entailing an on-reservation crime by a non-Indian against an Indian—was identical to Donnelly’s,\textsuperscript{465} and in view of that similarity the Williams Court’s observation that Donnelly held that state jurisdiction remained precluded with respect to such crimes was offered to bolster the conclusion that the ACA did not condone applying otherwise nonapplicable state substantive law on the facts of Williams.\textsuperscript{466} In short, Donnelly’s holding, as critically clarified by Williams, supported and reinforced the Court’s reasoning and conclusion in Williams itself.\textsuperscript{467} Rather than comprising mere “dict\[um\] in the classic sense,”\textsuperscript{468} the clarification was part of the Court’s “attend[ing]” “to the


\textsuperscript{464} See Williams, 327 U.S. at 713–15 & n.10 (discussing, inter alia, the Assimilative Crimes Act, 18 U.S.C. § 13; the General Crimes Act, 18 U.S.C. § 1152; Donnelly v. United States, 228 U.S. 243 (1913)).

\textsuperscript{465} See Williams, 327 U.S. at 713 (noting that the “petitioner, a married white man, was convicted . . . of having had [unlawful] sexual intercourse . . . within the Colorado River Indian Reservation in Arizona, with an unmarried Indian girl”); Donnelly, 228 U.S. at 252 (noting that the criminal defendant “was a white man” who was “charged . . . with the murder of . . . an Indian, within the limits of . . . the Hoopa Valley Reservation” in California).

\textsuperscript{466} See supra note 464 and accompanying text.

\textsuperscript{467} See Williams, 327 U.S. at 714 & n.10 (emphasis added) (quoting Donnelly, 228 U.S. at 272) (citations omitted) (observing that the Arizona Enabling Act “contains provisions similar to those applicable to” other states’ enabling acts, addressed in previous Supreme Court rulings, and that Donnelly’s observation that “offenses committed by or against Indians are not within the principle of the McBratney and Draper Cases” applies, accordingly, in Williams as well, compelling the conclusion, absent any “material special legislation on this subject,” that “the laws and courts of the United States, rather than those of Arizona, have jurisdiction over [such] offenses”).

\textsuperscript{468} See supra text accompanying note 462.
holding[469] of Williams,470 thereby establishing essential guidance for future cases addressing the General Crimes Act, the Assimilative Crimes Act, and the interplay between the two statutes.471

Moreover, it is crucial to note that Williams’s clarification of Donnelly’s holding reiterated how Donnelly was rooted in the reasoning of United States v. Kagama,472 a case which—like Worcester v. Georgia—centered on exclusive federal power and control in Indian affairs absent a congressional grant of authority to the states.473 In fact, the Williams Court clarified Donnelly’s holding for the very purpose of demonstrating that holding’s relevance to the analysis and decision in Williams as well.474 Castro-Huerta’s dismissing as “pure dict[um]”475 Williams’s clarification of Donnelly is symptomatic of the majority’s strategic disregard of the shared rationale of both Kagama and Donnelly, as reemphasized and endorsed in Williams.476 By the same token, the majority’s belittlement also shows Castro-Huerta’s willful blindness in refusing to acknowledge Williams and Donnelly for what they are, i.e., exemplars of Worcester’s enduring baseline principle of tribal autonomy.

469. Cf. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 379 (1994) (“It is to the holdings of our cases, rather than their dicta, that we must attend . . . .”).

470. See supra note 464 and accompanying text.

471. Cf. Michael Abramowicz & Maxwell Stearns, Defining Dicta, 57 Stan. L. Rev. 953, 1022–23, 1040 (2005) (footnote omitted) (“The holding-dicta distinction, properly conceived, helps to enforce an appropriate level of consideration, one that delves into reconciling the immediate case with the larger body of precedent, but that does not necessarily look for, or attempt to resolve, fissures within larger bodies of case law . . . . The holding-dicta distinction should not force [courts] to resolve cases in the narrowest possible manner that is consistent with the case judgment. . . . There may be . . . cases . . . in which it is appropriate for a court to clarify the law by offering a broader holding.”).

472. See Williams, 327 U.S. at 714 n.10 (quoting Donnelly, 228 U.S. at 271–72 (citing United States v. Kagama, 118 U.S. 375, 383 (1886))) (observing (1) that Donnelly noted Kagama’s having, “in effect, held, as to crimes committed by the Indians” on reservations, that such crimes were “not within the principle of the McBratney and Draper Cases,” and (2) that Donnelly went on to conclude that the “same reason applies . . . with respect to crimes committed by white men against the persons or property of the Indian tribes”); see also supra notes 269–301 and accompanying text (discussing Donnelly’s reliance on Kagama in affirming exclusive and paramount federal jurisdiction over a crime committed by a non-Indian against an Indian on a reservation in California).

473. See supra notes 139–184 and accompanying text (discussing Kagama); supra notes 30–56 and accompanying text (discussing Worcester).

474. See supra note 467 and accompanying text.

475. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2498 (2022); see supra note 461 and accompanying text.

476. See supra note 472 and accompanying text.
operating in the background of Supreme Court Indian law decisions in the twentieth century. 477

11. Williams v. Lee (1959) and the Continuing Policy of Worcester in Modern Indian Law

Of all the omissions in Castro-Huerta’s unsubstantiated and ultimately preposterous narrative about Indian law’s having “abandoned” its historical principle of tribal autonomy in Indian country, 478 the most glaring—and yet, ironically, the most predictable—is the majority’s mentioning the 1959 case Williams v. Lee 479 a grand total of zero times. For over a half-century, Williams v. Lee has been widely credited as having ushered into the modern era the “basic policy of Worcester,” 480 including, first and foremost, that policy’s protection of tribal autonomy in Indian country against encroachment and intrusion by state governments. 481 Williams v. Lee’s ringing affirmation of Worcester’s continuing relevance and importance is crystal clear:

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477. See supra notes 269–381 and accompanying text (discussing Donnelly); supra notes 451–476 and accompanying text (discussing Williams); cf. McClanahan v. Ariz. St. Tax Comm’n, 411 U.S. 164, 169 & n.4 (1973) (quoting Worcester v. Georgia, 31 U.S. 515, 561 (1832), and citing, inter alia, Williams, 327 U.S. 711) (referring to Williams as another case dealing with “a State’s efforts to extend criminal jurisdiction” into Indian country that exemplified Worcester’s “rationale” that “[t]he whole intercourse between the United States and [Indian nations], is, by our Constitution and laws, vested in the government of the United States”).

478. See Castro-Huerta, 142 S. Ct. at 2497 (“[T]he Worcester-era understanding of Indian country as separate from the State was abandoned later in the 1800s.”); see also supra notes 211–213 and accompanying text; supra notes 392–393 and accompanying text.


480. Id. at 219 (observing that “the basic policy of Worcester has remained”).

481. See, e.g., Bethany R. Berger, Sheep, Sovereignty, and the Supreme Court: The Story of Williams v. Lee, in INDIAN LAW STORIES, supra note 140, at 360 (footnote omitted) (“The [Williams v. Lee] decision affirmed the continuing force of the exclusion of state law from tribal territories first established in Worcester v. Georgia in 1832, . . . [I]t provided a legal foundation for the growth of tribal self-determination in decades to come.”); David H. Getches, Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color-Blind Justice and Mainstream Values, 86 Minn. L. Rev. 267, 273 & n.27 (2001) (quoting Williams v. Lee, 358 U.S. at 219) (“At the dawn of the modern era, as it began to consider dozens of jurisdictional contests between tribes and states, the Court forcefully recognized that ‘the basic policy of Worcester has remained.’”); cf. Pommersheim, supra note 166, at 213 (endnote omitted) (“The 1959 case of Williams v. Lee has been described as the cornerstone of the modern era of Indian law.”); Wilkinson, supra note 157, at 1 (“On January 12, 1959, the Supreme Court decided Williams v. Lee and, in so doing, opened the modern era of federal Indian Law . . . . The rendering of the Williams decision can fairly be set as a watershed . . . .”)
Despite... the defiance of Georgia which refused to obey this Court’s mandate in Worcester the broad principles of that decision came to be accepted as law. Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained. Thus, suits by Indians against outsiders in state courts have been sanctioned. And state courts have been allowed to try non-Indians who committed crimes against each other on a reservation. But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive.\footnote{482}

The Castro-Huerta majority ignored this commanding language from Williams v. Lee and issued a decision directly contradicting it, granting Oklahoma concurrent criminal jurisdiction over an on-reservation crime by a non-Indian against an Indian,\footnote{483} a category Williams proclaimed to be off-limits and precluded in the absence of express congressional authorization.\footnote{484} As a result, a state’s “defiance” of Worcester’s “mandate”\footnote{485} is now not only a shameful episode in the early history of U.S.-tribal relations but is an injurious and menacing present-day reality as well, reconjured and condoned by a five-Justice majority of the Supreme Court itself.

It is important to observe that in Williams v. Lee the Court took fully into account the particular ways in which Worcester’s preclusion of state authority had been “modified... in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized.”\footnote{486} The Court specifically pointed to the Worcester doctrine’s accommodation of state jurisdiction over crimes on reservations involving only non-Indians by citing New York ex rel. Ray v. Martin,\footnote{487} the then-
recent 1946 decision which in turn relied on and reaffirmed the nineteenth-century precedents United States v. McBratney and Draper v. United States.\textsuperscript{488} The Williams v. Lee Court also expressly noted Worcester’s compatibility with precedents that “sanctioned” “suits by Indians against outsiders [i.e., non-Indians] in state courts,”\textsuperscript{489} citing an example that in turn referenced an even earlier decision of that description, namely, The Kansas Indians, the celebrated 1867 Supreme Court opinion that notably relied on the Worcester principle.\textsuperscript{490} In this way the high court adeptly folded all of Indian law’s historical cases addressing state authority in Indian country into a coherent modern framework whose principal manifestation was the Court’s proclamation that “the basic policy of Worcester has remained.”\textsuperscript{491}

Even more important, in view of Castro-Huerta, is the observation that Williams v. Lee's acknowledgment of how the Worcester rule has been “modified”\textsuperscript{492} is essentially the same point made three years later by the same nine Justices\textsuperscript{493} in Organized Village of Kake v. Egan (1962), where the Court commented that the “general notion drawn from [Worcester] that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations.”\textsuperscript{494} As this Article’s extensive examination shows, those historical modifications illustrate the Worcester principle’s intrinsic flexibility,\textsuperscript{495} that is, they demonstrate how the principle “has yielded . . . in diverse concrete situations”\textsuperscript{496} to allow state authority in Indian

\begin{footnotes}
  \footnotetext[488]{See Martin, 326 U.S. at 497 & n.1 (discussing United States v. McBratney, 104 U.S. 621 (1881), and citing Draper v. United States, 164 U.S. 240 (1896)).}
  \footnotetext[489]{Williams v. Lee, 358 U.S. at 220 (citations omitted).}
  \footnotetext[490]{See id. (citing, inter alia, Felix v. Patrick, 145 U.S. 317, 332 (1892)); see also supra note 91 and accompanying text (describing Williams’s indirect reliance on The Kansas Indians, 72 U.S. 737 (1867)); supra notes 82–92 and accompanying text (discussing The Kansas Indians).}
  \footnotetext[491]{Williams v. Lee, 358 U.S. at 219; supra text accompanying note 482.}
  \footnotetext[492]{Williams v. Lee, 358 U.S. at 219; supra text accompanying note 482.}
  \footnotetext[493]{See supra note 68 and accompanying text.}
  \footnotetext[494]{Kake, 369 U.S. 60, 72 (1962) (dictum) (citations omitted), quoted in Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2502 (2022); see also supra note 58 and accompanying text; cf. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 & n.9 (1980) (citations omitted) (noting that both Williams v. Lee and Kake discuss the same “shift in approach” relative to Worcester’s “view that ‘the laws of [a State] can have no force’ within reservation boundaries’).}
  \footnotetext[495]{See supra note 425 and accompanying text.}
  \footnotetext[496]{Kake, 369 U.S. at 72 (dictum); supra text accompanying note 494.}
\end{footnotes}
country when “Congress [so] ordains.” Congressional enactment, periodically, of modifications—in the past as well as in modern times—thus provides no evidence whatsoever that Worcester has been “abandoned,” as Castro-Huerta wrongly opines.

Indeed, the particular rule the Supreme Court articulated and applied in Williams v. Lee was, and is, an embodiment of the “the basic policy of Worcester” as carried forward into the latter half of the twentieth century. This is clear from Williams’s having held that Arizona’s


499. See, e.g., infra notes 507–512 and accompanying text (discussing Public Law 280).


502. A revealing document found among the archived papers of Justice Hugo Black, the author of Williams v. Lee, exhibits the strong support of Justice Felix Frankfurter, who three years after Williams would write the Court’s opinion in Organized Village of Kake v. Egan, 369 U.S. 60 (1962). See supra notes 66–68 and accompanying text. In the right margin of the first page of a draft of the Williams opinion Justice Frankfurter wrote: “Dear Hugo, I’m sorry that this opinion reached me only today. I not only join it but am very glad to do so. It is excellent. And I duly note your carom against ‘interposition’ SR in recalling the Worcester v. Georgia affair.” See Hugo Lafayette Black Papers, Manuscript/Mixed Material, Box 339 (Williams v. Lee), retrieved from the Library of Congress; App. Exhibit 1, infra p. 977. The initials “SR” appear to refer to then-retired Justice Stanley Reed, with whom Justice Frankfurter, by 1959, had been locking horns, periodically, during the preceding fifteen years in sometimes acerbic exchanges over Indian law cases. Analogizing
to the sport of billiards, Frankfurter’s remark appears to applaud Black’s opinion for having achieved a “carom”—i.e., a successful “strike and rebound,” as when a “cue ball hits two balls in succession, see Random House Dictionary of the English Language 225 (unabridged ed., 1966) (defining “carom”), to get around the “interposition” of an obstacle, namely, Justice Reed. The reference to “interposition” SR also could signify Reed’s possibly having condoned southern state legislatures’ passing, in the wake of Brown v. Board of Education, 347 U.S. 483 (1954), “interposition’ resolutions asserting that a given issue—typically, public education—was within the exclusive control of the state.” Michelle Adams et al., Presidential Commission on the Supreme Court of the United States Final Report 57 (Dec. 2021) (endnotes omitted). https://presidential-commission-report; see Michael J. Klareman, Brown at 50, 90 Va. L. Rev. 1613, 1613 & n.3 (2004) (footnote and internal quotation marks omitted) (quoting from a 1954 memorandum found in the archived papers of Justice William O. Douglas in which Douglas observed that “in the original conference” of the Justices held on the day Brown was argued before the Supreme Court Justice Reed “followed the view” that “segregation was constitutional”); see also Christian G. Fritz, The History of State Interposition Shows Federalism is a Deliberative Process, Not a Set of Rules, HIST. NEWS NETWORK (Mar. 26, 2023), https://hist-news-185319 (“The explicit invocation of the term ‘interposition’ resurfaced in the 1950s, once again by those who sought a constitutional basis for white supremacy and racial inequality, especially in opposition to school integration.”). But see Cooper v. Aaron, 358 U.S. 1, 19 (1958) (“It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action. . . . The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law.”). Cf. Bush v. Orleans Parish Sch. Bd., 364 U.S. 500, 501 (1960) (citations and internal quotation marks omitted) (affirming lower-court’s ruling that “[i]nterposition is not a constitutional doctrine” but instead, “if taken seriously, . . . is illegal defiance of constitutional authority,” and declaring “without substance, as . . . held . . . in Cooper v. Aaron,” the argument that “the State of Louisiana has interposed itself in the field of public education over which it has exclusive control”); Read Martin Luther King Jr.’s “I Have a Dream” speech in its entirety, NPR (updated Jan. 16, 2023), https://MLK-speech (“I have a dream that one day down in Alabama with its vicious racism, with its governor having his lips dripping with the words of interposition and nullification, one day right down in Alabama little Black boys and Black girls will be able to join hands with little white boys and white girls as sisters and brothers.”); William O. Douglas, Interposition and the Peters Case, 1779–1809, 9 Stan. L. Rev. 3, 12 (1956) (“The problem of each generation has been to protect rights created by the Constitution and by valid federal laws against impairment by the states and yet to preserve to the states as great a measure of sovereignty as is consistent with the body of federal rights. . . . [That problem] is a never ending one where the reserved powers are in the states.”). See generally Christian G. Fritz, Monitoring American Federalism: The History of State Legislative Resistance 291–300 (2023) (section titled “Resurrection of ‘Interposition’ in the Aftermath of Brown”).

In this playful, punning way did Justice Frankfurter register his approval of Williams v. Lee and the way Justice Black anchored that decision in the insight that “the basic policy of Worcester has remained,” Williams v. Lee, 358 U.S. at 219.

Justice Reed’s collected papers at the University of Kentucky Libraries preserve the sometimes barbed repartees between Reed and Frankfurter, as well as additional critical remarks by Reed in prior Indian law cases, providing an informative context for appreciating Frankfurter’s laudatory note to Justice Black praising the Williams v. Lee
In the earliest instance, Frankfurter excoriated Reed’s own draft opinion in *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335 (1945), a 5 to 4 decision denying the Northwestern Shoshone Bands’ claim for damages against the United States for having taken the Bands’ treaty-protected lands, see id. at 355 (“Since the rights, if any the Shoshones have, did not arise under or grow out of the Box Elder treaty, no recovery may be had under the jurisdictional act.”). On a page of the draft summarizing the Shoshones’ encounters with gold prospectors and white settlers during the mid-nineteenth century, Frankfurter circled the word “renegades” (which Reed used in describing some of the non-Indians who “began to traverse . . . the Shoshone domain”), as well as a phrase asserting that the Indians’ “mores were contaminated by evil whites,” and inserted the following comment across the bottom and right margins: “Simply because you deprive Indians of their legal rights is no reason for blackguarding the whites. Nor will the Indians regard it as compensation for your injustice to them.” See Stanley Forman Reed Papers, Manuscript/Mixed Material [hereinafter Reed Papers], Box 96, No. 63 (Northwestern Bands of Shoshone Indians vs. US), retrieved from the Special Collections Research Center, University of Kentucky Libraries; App. Exhibit 2, *infra* p. 978. In addition, there appears among the Reed Papers a copy of a sarcastic mock judicial opinion by Frankfurter in the *Northwestern Bands* case, a scornful critique which begins: “Mr. Justice FRANKFURTER did NOT deliver the opinion of the Court.” The mock opinion concludes as follows:

I cannot understand why judicial self-restraint, born of consciousness of incompetence, requires us to decline to adjudicate questions that have arisen concerning the meaning of an Indian treaty even though—or perhaps because—Congress has directed us to do so, while at the same time we feel free to pronounce with Papal infallibility on psychological and sociological phases of Indian life.

See Reed Papers, *supra*, Box 96, No. 63 (Northwestern Bands of Shoshone Indians vs. U.S.); App. Exhibit 3, *infra* p. 979.

Also found among Justice Reed’s papers are Reed’s own caustic remarks on the draft of a majority opinion he intensely disliked and formally dissented from, *United States v. Alcea Band of Tillamooks*, 329 U.S. 40 (1946), in which the majority found in favor of a tribe’s “claim of original Indian title and an involuntary taking thereof” by the U.S. government, id. at 54. On one page of Chief Justice Frederick Moore Vinson’s majority opinion Reed marked with pencil a line of text referring to “judicial dispositions of claims arising from original Indian title” and inserted the following comment in the left margin: “If this means Indians have claim like a citizens [sic] from taking, answer is that depends on an aboriginal title which is a title entirely different from our concept.” Reed also drew an arrow to the underlined sentence from Vinson’s draft opinion that asserted that the “manner of terminating the right of occupancy is not unlimited,” labeling the assertion “fundamental error” and stating further: “Yes it is unlimited. May be by sword.” See Reed Papers, *supra*, Box 112, No. 26 (US v. Alcea Band of Tillamooks, dissent); App. Exhibit 4, *infra* p. 980. On another page of the draft, Reed marked out a sentence that stated: “Admitting the undoubted power of Congress to extinguish original Indian title compels no conclusion that compensation need not be paid.” In reaction Reed scrawled in the right margin: “Does the same ‘moral’ requirement apply to ‘Okinawa.’ Our frontiersmen did not consider the Indian superior to the Jap. Bloodthirsty treacherous cruel were normal descriptive adjectives[.]” See Reed Papers, *supra*, Box 112, No. 26 (US v. Alcea Band of Tillamooks, dissent); App. Exhibit 5, *infra* p. 981. And on the backside of the draft’s final page Reed wrote:

Congress carefully and in accordance with well recognized principles of fair dealing with the Indians offered them compensation for legal & equitable claims
which this Court now interprets with expanded extravagant generosity with public money into a requirement to pay for lands over which the ancestors of these tribes roamed hunted with the freedom of birds in flight of prey.

See Reed Papers, supra, Box 112, No. 26 (US v. Alcea Band of Tillamooks, dissent); App. Exhibit 6, infra p. 982; see also Nw. Bands of Shoshone Indians, 324 U.S. at 339 (majority opinion of Reed, J.) (citations and footnote omitted) ("Since Johnson v. McIntosh, decided in 1823, gave rationalization to the appropriation of Indian lands by the white man's government, the extinguishment of Indian title by that sovereignty has proceeded, as a political matter, without any admitted legal responsibility in the sovereign to compensate the Indian for his loss. Exclusive title to the lands passed to the white discoverers, subject to the Indian title with power in the white sovereign alone to extinguish that right by 'purchase or by conquest.' The whites enforced their claims by the sword and occupied the lands as the Indians abandoned them."); cf. Kathleen A. Bergin, Authenticating American Democracy, 26 Pace L. Rev. 397, 413 (2006) (footnotes omitted) ("Accustomed to the confined company of Whites, the prospect of desegregation conflicted with Reed's 'personal prejudices and deeply held beliefs about proper social relations.' . . . As a Justice, he refused to temper his racial convictions despite the tension and embarrassment this sometimes caused the Court. He declined to address Black workers by their last name, a courtesy he apparently extended to Whites, and when the Court proposed to open its annual holiday party to Black employees, Reed refused to attend. Incidents like these earned Reed a reputation for being 'thick headed,' 'ruthless,' and 'anti-black.'"); Stephen F. Rohde, By the Book, 45 Los Angeles Law. 30, 33 (Jan. 2023) (reviewing BRAD SNYDER, DEMOCRATIC JUSTICE: FELIX FRANKFURTER, THE SUPREME COURT, AND THE MAKING OF THE LIBERAL ESTABLISHMENT (2022)) ("A law clerk to Justice Stanley Reed reported that after a conference among the justices regarding equal service in restaurants and public accommodations in the District of Columbia, Reed, who grew up in a small town in Kentucky, remarked, 'Why—why, this means that a nigra can walk right into the restaurant of the Mayflower Hotel and sit down to eat right next to Mrs. Reed!'")

Interview with Stanley Forman Reed, Sr., FRED M. VINVON ORAL HIST. PROJECT, LOUIE B. NUNN CTR. FOR ORAL HIST., UNIV. OF KY. LIBRS. (Nov. 12, 1975), https://justice-reed-interview (transcript of interview at 00:19:00) ("Reed: . . . Yes, I think [Brown v. Board of Education] was on its way, that there were too many black people to think of classifying them as a lower order of beings.").

In the end, Justice Reed got the final say in the judicial war of words over the question of compensation for tribes in land-claim disputes based on assertions of original Indian title, writing the majority opinion for the Court in the infamous case Tee-Hit-Ton Band of Indians v. United States, 348 U.S. 272 (1955), holding that "the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment" of the U.S. Constitution, id. at 285. See Nell Jessup Newton, Indian Claims in the Courts of the Conqueror, 41 Am. U. L. Rev. 753, 821 (1992) (footnotes omitted) ("In effect, the Court held that if the tribes did not have a deed for their ancestral land they did not own it, at least not in the constitutional sense. Thus, the Federal Government could take it away without incurring any liability. . . . The Tee-Hit-Ton decision enabled the American people to acquire Alaska without any enforceable duty to pay for it."). Among the numerous handwritten comments by Justice Frankfurter in the margins of a draft of Tee-Hit-Ton, kept by Justice Reed, there are a few notably biting standouts. Adverting to Reed's own sarcastic statement in the majority opinion that "[e]very American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force," Tee-Hit-Ton, 348 U.S. at 289–90, Frankfurter underlined the phrase "the generous and humane policy of the Congress" in Reed’s draft and retorted: "How about what 'Every American schoolboy
judicial jurisdiction over an on-reservation lawsuit against Indians was \textit{precluded} notwithstanding the Court’s concession that no act of Congress
preempted the state’s authority. “Essentially,” the Court famously wrote, “absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.” The historical premise animating this “infringement” rule clearly was Worcester’s background principle of preclusion, i.e., the baseline presumption that states have no authority over Indian affairs unless federal law renders such assertions of governing power to be “in conformity with treaties, and with the acts of congress.” Accordingly, the very existence of the holding in Williams v. Lee is proof of the Castro-Huerta majority’s “category error” in judicially permitting Oklahoma to have jurisdiction over a crime by a non-Indian against an Indian on the Cherokee Reservation in Oklahoma.

It’s no wonder, then, that the majority declined to mention, let alone reconcile or account for, the landmark modern Indian law precedent Williams v. Lee.

A related explanation for Castro-Huerta’s ignoring the case is the fact that Williams v. Lee pointed to the then-recently enacted means by which states could acquire otherwise precluded authority on reservations, namely, by complying with the congressionally specified procedural requirements of Public Law 280. As the Williams Court explained, Public Law 280 demonstrates that “when Congress has wished the States to exercise this power [over Indians] it has expressly granted them the jurisdiction which Worcester v. Georgia had denied.”

Thus did the Williams Court recognize the Worcester principle’s operating as a baseline rule of preclusion not only throughout the history of the Supreme Court’s Indian law jurisprudence, but also with respect to contemporaneous federal enactments, most notably Public Law 280, by

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504. Id. at 220 (emphasis added) (citing Utah & N. Ry. Co. v. Fisher, 116 U.S. 28 (1885)); supra text accompanying note 482; see also supra note 138 and accompanying text.


506. See Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2511 (2022) (Gorsuch, J., dissenting) (internal cross-reference omitted) (observing that the majority’s analysis “proceeds on the premise that Oklahoma possesses ‘inherent’ sovereign power to prosecute crimes on tribal reservations until and unless Congress ‘preempt[s]’ that authority,” and referring to the majority’s “effort to wedge Tribes into that paradigm” as “a category error”).


508. Id. at 221 (footnote omitted).

509. See supra note 268 and accompanying text.
which Congress selectively conferred on state governments otherwise forbidden on-reservation authority. Since Arizona “[t]o date . . . ha[d] not accepted [the] jurisdiction” Congress had offered to states under

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510. See supra text accompanying note 508; see also Williams v. Lee, 358 U.S. at 220 (“Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation.”); cf. Rabkin, supra note 56, at 311 n.173 (citation omitted) (“The fact that Congress thought to authorize [through Public Law 280] . . . selective state jurisdiction might seem to cut against the conclusion in Castro-Huerta that such jurisdiction has been available to all states since the late nineteenth century.”).
Public Law 280,\textsuperscript{511} Arizona’s judicial authority over the on-reservation lawsuit at issue in \textit{Williams v. Lee} remained precluded by \textit{Worcester}.\textsuperscript{512}

Finally, an obvious reason for the \textit{Castro-Huerta} majority’s ignoring \textit{Williams v. Lee} is the stark contradiction between \textit{Castro-Huerta’s} holding and \textit{Williams’s} recognition that for an on-reservation “crime . . .
by or against an Indian, tribal jurisdiction, or that expressly conferred on other courts by Congress, has remained exclusive.”

The Supreme Court’s directly citing Donnelly v. United States (1913) and Williams v. United States (1946) to support this observation shows the Court’s affirming, moreover, that those precedents had already held such authority to be within the exclusive purview of Congress and the federal courts and not within the limited scope of state jurisdiction in Indian country.

The majority’s avoidance of Williams v. Lee thus is of a piece with Castro-Huerta’s deflective analyses when discussing those earlier cases as well, as discussed previously.

IV. SOWING CONFUSION, REAPING CHAOS: CASTRO-HUERTA’S DERANGEMENT OF THE INDIAN LAW PREEMPTION DOCTRINE

In the decades since Williams v. Lee was decided, there have been numerous additional Supreme Court decisions that likewise reflect and manifest Worcester’s resilience and vitality. This section focuses on decisions that comprise the Court’s modern Indian law preemption doctrine, a subarea of Indian law that is now in danger of being eviscerated because of the Castro-Huerta decision. The leading Indian law preemption case is White Mountain Apache Tribe v. Bracker (1980), where the Supreme Court struck down a state’s motor carrier license and use fuel taxes as applied to a non-Indian logging company that hauled timber on a reservation under federal and tribal contracts. Applying a unique preemption analysis, the Court incorporated elements of the

513. Williams v. Lee, 358 U.S. at 220 (emphases added) (footnote and citations omitted); see supra text accompanying note 482.

514. See Williams v. Lee, 358 U.S. at 220 (citing Donnelly v. United States, 228 U.S. 243, 269–272 (1913); Williams v. United States, 327 U.S. 711 (1946)).

515. See supra notes 270–277 and accompanying text (discussing Donnelly’s holding); supra notes 457–477 and accompanying text (discussing the clarification of Donnelly’s holding in Williams v. United States).

516. See supra notes 269–381 and accompanying text (discussing Donnelly); supra notes 453–477 and accompanying text (discussing Williams v. United States).

517. See supra note 500; cf. FLETCHER § 5.2, supra note 35, at 184–86 (footnotes omitted) (“The duty to preserve tribal autonomy is an ancient one. . . . Supreme Court cases have relied upon federal policy favoring tribal autonomy in the varied contexts of tribal zoning authority, tribal economic development activities, tribal court authority, tribal sovereign immunity, the tribal power to tax, the tribal power to regulate non-Indian hunting and fishing on trust land, tribal immunity from state taxation, and the tribal power to prosecute lawbreakers.”).

518. For summaries of the Indian law preemption doctrine, see COHEN’S HANDBOOK § 6.01[1]–[4], supra note 5, at 489–503; FLETCHER § 8.6, supra note 35, at 411–16; CANBY, supra note 38, at 89–96, 159–63.

1959 Williams v. Lee precedent as well as two intervening decisions, Warren Trading Post Co. v. Arizona Tax Commission (1965) and McClanahan v. Arizona State Tax Commission (1973), thereby implementing an approach that examined “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.” The Court made clear that this unique preemption methodology was to be applied whenever courts were called upon to interpret Indian law statutes and treaty provisions, and that ordinary preemption rules—i.e., the preemption framework that applied outside the Indian country context—should not be used. The Court wrote:

The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law. Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other. 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.

Despite this clear guidance, including Bracker’s warning against “standards of pre-emption that have emerged in other areas of the law” being applied in the Indian law context, the Castro-Huerta majority not only applied the “treacherous” approach condemned by Bracker.

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521. 380 U.S. 685 (1965); see id. at 691–92 (citation omitted) (holding preempted by congressional statutes and regulations state laws imposing a gross receipts tax “[i]nsofar as they are applied to . . . federally licensed Indian trader[s] with respect to sales made to reservation Indians on the reservation”); cf. Anderson, Krakoff & Berger, supra note 463, at 417 (observing that “the historical exclusion of state authority from reservations and the special federal-tribal relationship” contributed significantly to the preemption holding in Warren Trading Post).
522. 411 U.S. 164 (1973) (holding preempted by federal statutory and treaty law a state’s income tax as levied on an Indian whose earnings derived from on-reservation employment).
523. Bracker, 448 U.S. at 144–45; see also id. at 142 (describing federal barriers to state authority on reservations and citing Warren Trading Post, 380 U.S. 685, and McClanahan, 411 U.S. 164).
524. Id. at 143 (citation omitted).
525. See supra text accompanying note 524.
but in dicta appeared to prescribe the use of “ordinary preemption analysis” in Indian law litigation going forward. That “ordinary” approach, of course, does not take into account the “tradition of sovereignty” that “must inform” the preemption analysis in Indian cases. Thus did the Castro-Huerta majority use its false narrative about Worcester’s having been “abandoned” to give the Court license to turn the Indian law preemption doctrine on its head, threatening to virtually ensure state law in Indian country generally will be held not preempted in future cases.

But Castro-Huerta’s manipulations and distortions of Indian law doctrine go even deeper. The majority applied the “treacherous” rules of “ordinary preemption” in answering the majority’s own misguided questions about whether the General Crimes Act and Public Law 280 preempted state jurisdiction over crimes by non-Indians against Indians on reservations, displacing the approach used throughout the history of U.S.-tribal relations, i.e., the inquiry into whether federal statutes granted states authority in Indian country that otherwise remained precluded by the baseline Worcester principle. But when it invoked the

Law 280 preempts state jurisdiction over crimes by non-Indians against Indians on reservations.

527. See id. at 2500–01 (emphasis added) (citing Bracker, 448 U.S. at 142–43; New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333–35 (1983)) (“This Court has 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.”). But see Bracker, 448 U.S. at 142–43 (identifying as one of the “two independent but related barriers to the assertion of state regulatory authority” on reservations the principle that “the exercise of such authority may be pre-empted by federal law,” directing that “standards of pre-emption that have emerged in other areas of the law” not be used in this Indian law preemption analysis, and mandating that “[t]he 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”); Mescalero Apache Tribe, 462 U.S. at 334 (emphasis added) (quoting Bracker, 448 U.S. at 143) (“The unique historical origins of tribal sovereignty and the federal commitment to tribal self-sufficiency and self-determination make it ‘treacherous to import . . . notions of pre-emption that are properly applied to . . . other [contexts].’”).

528. Bracker, 448 U.S. at 143 (emphasis added); see supra text accompanying note 494.

529. See Castro-Huerta, 142 S. Ct. at 2497 (“The Worcester-era understanding of Indian country as separate from the State was abandoned later in the 1800s.”); see also supra notes 211–213 and accompanying text; supra notes 392–393 and accompanying text; supra note 478 and accompanying text.

530. See supra note 526.

531. See supra note 268 and accompanying text; see also Berger, supra note 120, at 4–5 & n.27 (footnotes omitted) (quoting Warren Trading Post v. Ariz. Tax Comm’n, 380 U.S. 685, 687 n.3 (1965)) (“The Castro-Huerta decision is particularly outrageous given the test for preemption in Indian affairs. Given Congress’s plenary authority and the
Bracker precedent, the Castro-Huerta majority did something even more insidious and antithetical to Indian law doctrine. It purported to use Bracker as a framework for justifying discretionary judicial interest-balancing to determine whether state law was precluded, with no regard for the intent of Congress as reflected in federal statutes and treaties. But in truth, Bracker itself prescribed an approach that centered on congressional intent, as all valid forms of preemption analysis must. Thus, the Bracker Court explained that the Indian law preemption analysis entailed “a particularized inquiry into the nature of the state, federal, and tribal interests at stake,” but only because this inquiry was useful in helping the Court ultimately “determine whether, in the specific context, the exercise of state authority would violate federal law.” The preemption analysis actually undertaken in Bracker and Central Machinery Co. v. Arizona State Tax Commission, a case decided the same day as Bracker, made clear that in both cases the Court ultimately determined that the respective state taxes at issue were precluded because Congress impliedly had so intended, not because such preclusion resulted from judicial deployment of a discretionary balancing approach. Subsequent Indian law preemption cases manifested the historic exclusion of state law from reservations, express preemption is not required, and state law may only apply where “those laws are specifically authorized by acts of Congress, or where they clearly do not interfere with federal policies concerning the reservations.” Although the test is complicated as to civil matters, given the long and comprehensive history of federal laws and treaties regarding non-Indian against Indian crime, the results in the criminal context were clear.

532. See Castro-Huerta, 142 S. Ct. at 2500–02 (citations omitted) (purporting to apply, without referencing any federal statute or treaty, “the Bracker balancing test,” under which, according to the Castro-Huerta majority, “the Court considers tribal interests, federal interests, and state interests”). But see id. at 2521–22 (Gorsuch, J., dissenting) (“The Court invokes what it calls the ‘Bracker balancing’ test with no more appreciation of that decision’s history and context than it displays in its initial suggestion that the usual rules of preemption apply to Tribes. The Court tells us nothing about Bracker itself, its reasoning, or its limits. Perhaps understandably so, for Bracker never purported to claim for this Court the raw power to ‘balance’ away tribal sovereignty in favor of state criminal jurisdiction over crimes by or against tribal members—let alone ordain a wholly different set of jurisdictional rules than Congress already has. . . . The simple truth is Bracker supplies zero authority for this Court’s course today.”).

533. See infra notes 535–538 and accompanying text.

534. See, e.g., Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (citations and internal quotation marks omitted) (stating that with respect to a court’s conducting a preemption analysis “[t]he purpose of Congress is the ultimate touchstone”).


537. See Bracker, 448 U.S. at 152–53 (quoting Warren Trading Post Co. v. Ariz. Tax Comm’n, 380 U.S. 685, 891 (1965)) (concluding that “[t]he present case . . . is in all relevant
same core focus on congressional intent while adverting to tribal, federal, and state interests that bolstered the respective analyses, including in preemption cases outside the taxation arena.538

respects indistinguishable from Warren Trading Post,” a case in which the Court posited its belief that Congress had not “intended to leave to the State the privilege of levying [the disputed] tax”); Cent. Mach. Co., 448 U.S. at 165 (“Since the transaction in the present case is governed by the Indian trader statutes, federal law pre-empts the asserted state tax.”); cf. id. at 169–70 (Stewart, J., dissenting) (noting that the majority in Central Machinery did not consider any asserted state interests in holding that federal statutes preempted the disputed state tax). See generally Getches, supra note 35, at 1626–30 (discussing “Fabrication of a ‘Balancing of Interests’ Test”); William C. Canby, Jr., The Status of Indian Tribes in American Law Today, 62 WASH. L. REV. 1, 11–15 (1987) (discussing and critiquing the role of interest-balancing in the Supreme Court’s Indian law preemption cases).

538. See, e.g., Ramah Navajo Sch. Bd. v. Bur. of Revenue of N.M., 458 U.S. 832 (1982) (finding preempted by federal statutory law and congressional policy New Mexico’s taxation of a non-Indian company’s gross receipts for the construction of an on-reservation tribal school pursuant to a tribal contract); Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng’g [hereinafter Three Affiliated Tribes I], 467 U.S. 138, 141–143, 149 (1984) (adverting to Enabling Act of Feb. 22, 1889, § 4, cl. 2, 25 Stat. 677; Act of Aug. 15, 1953, 67 Stat. 588, as amended, 28 U.S.C. § 1360) (holding federal law did not preempt a state court’s jurisdiction over a tribe’s negligence and breach-of-contract claims against a non-Indian company for on-reservation transactions, and observing that such jurisdiction was “particularly compatible with tribal autonomy” and was not “inconsistent with the federal and tribal interests reflected in North Dakota’s Enabling Act or in Public Law 280”); Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng’g [hereinafter Three Affiliated Tribes II], 476 U.S. 877, 883 (1986) (holding Public Law 280 preempted a North Dakota statute that purported to disclaim state-court jurisdiction over suits by tribal plaintiffs against non-Indians “absent the Tribe’s waiver of its sovereign immunity and consent to the application of state civil law in all cases to which it is a party”).

In each of the Three Affiliated Tribes decisions, the Supreme Court rooted its preemption analysis in the intent of Congress, discernible through careful examination of the applicable federal statutes. See id. at 884–87 (examining applicable federal statutes and concluding that state law disclaiming jurisdiction over tribal claims “cannot be reconciled with the congressional plan embodied in Public Law 280 and thus [is] pre-empted by it”); Three Affiliated Tribes I, 467 U.S. at 149–51 (examining applicable federal statutes in light of Indian law canons of construction and concluding that these statutes do not require the state to “forfei[g] its preexisting judicial jurisdiction” over tribal claims). In Three Affiliated Tribes II the Court supplemented its congressional intent-based determination with supporting dicta emphasizing that consideration of the state’s asserted interests “reinforce[d]” the Court’s preemption holding. Three Affiliated Tribes II, 476 U.S. at 887–93. In contrast, Three Affiliated Tribes I contains no comparable dicta considering state interests as support for the Court’s holding regarding statutory preemption, presumably because the state supreme court had affirmed dismissal of the tribe’s lawsuit for lack of jurisdiction and had not been presented with any putative state interest that would be served by the exercise of such jurisdiction. See Three Affiliated Tribes I, 467 U.S. at 145–47, 149–51; see also Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 177–87 (1989) (considering state interests as reinforcing conclusion that federal statutes did not imply Congress’s intent to preempt state taxation of on-reservation oil production by non-Indian lessees).
The discussion Castro-Huerta mislabels as its Bracker analysis is thus a far cry from application of the Bracker Indian law preemption framework’s core inquiry into congressional intent. Rather, in New Mexico v. Mescalero Apache Tribe the Court unanimously held that state laws putatively regulating hunting and fishing by nonmembers on tribal land within the Mescalero Apache Reservation were “pre-empted by the operation of federal law.” 462 U.S. 324, 325 (1983). Although the case properly is read as exhibiting deference to Congress’s implied intent to prohibit state regulation on the reservation in light of the tribe’s own comprehensive and federally supported regulatory regime, see id. at 343–44 (“The exercise of concurrent jurisdiction by the State would effectively nullify the Tribe’s unquestioned authority to regulate the use of its resources by members and nonmembers, interfere with the comprehensive tribal regulatory scheme, and threaten Congress’s firm commitment to the encouragement of tribal self-sufficiency and economic development.”), and hence as consistent with the congressional intent-based Bracker approach, a passage of dicta in Mescalero Apache Tribe appears to go considerably farther than previous preemption cases in inviting judicial consideration of state interests within the context of a preemption inquiry. The Court wrote:

By resting pre-emption analysis principally on a consideration of the nature of the competing interests at stake, our cases have rejected a narrow focus on congressional intent to pre-empt state law as the sole touchstone. They have also rejected the proposition that pre-emption requires “an express congressional statement to that effect.” State jurisdiction is pre-empted by the operation of federal law 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.

Id. at 334 (footnote and citations omitted) (quoting Bracker, 448 U.S. at 144). Facially this passage of dicta might be read to suggest that congressional statutes impliedly prohibiting the application of state law in Indian country could be countermanded through recognition of state interests that are judicially assessed to be weighty. However, such a reading would be difficult to reconcile with basic preemption theory and doctrine, see supra note 534 and accompanying text, as well as fundamental principles of Indian law generally precluding state authority in Indian country and requiring judicial deference to congressional policymaking in the area of Indian affairs. See COHEN’S HANDBOOK § 2.01[1]–[2], supra note 5, at 109–12. In light of these difficulties as well as the Court’s (1) ultimate adherence to congressional intent, see supra, and (2) primary reliance on Bracker in recounting Indian law preemption principles, see Mescalero Apache Tribe, 462 U.S. at 333–36, the Mescalero Apache Tribe passage is properly viewed as reiterating that preemption of state law in Indian country via congressional statutes or treaties may be either express or implied, see id. at 334, and that states’ asserted interests may be considered in the Indian law preemption inquiry to the extent such consideration comports with congressional intent. Cf. Cotton Petroleum, 490 U.S. at 176 (noting that determining whether federal law preempts state taxation of non-Indian lessees of tribal land “is primarily an exercise in examining congressional intent”). Under this reading, a state’s asserted interests in extending its jurisdiction to the conduct or property of nonmembers in Indian country might be deemed “sufficient to justify the assertion of state authority,” Mescalero Apache Tribe, 462 U.S. at 334, only where an applicable statute or treaty, properly interpreted according to Indian law canons of construction, see COHEN’S HANDBOOK § 2.02[1]–[2], supra note 5, at 113–19, clearly contemplates judicial consideration of those interests.

539. Bracker, 448 U.S. at 145 (emphasis added) (applying Indian law preemption analysis by addressing state officials’ “claim that they may, consistent with federal law,
Castro-Huerta’s pseudo-Bracker discussion is the majority’s rendition of infringement analysis, that is, the inquiry into whether the application of state law would “unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them.” §40 Through this bait-and-switch technique, the Castro-Huerta majority papered over the fact that Bracker did not apply “ordinary preemption analysis,” as the majority opinion wrongly posits. §41 To the contrary, Bracker is the key modern precedent for ensuring that a unique and different preemption methodology obtains in Indian law cases instead, an approach which proceeds against a “backdrop” that respects and affirms the “unique historical origins of tribal sovereignty” §42—an analysis premised, in other words, on “the basic policy of Worcester,” §43 i.e., the principle that state authority in Indian country remains precluded in the absence of legislation showing “Congress [has] ordain[ed] otherwise.” §44

Further corruption of Indian law principles and damage to tribes’ historically protected autonomy are manifest in Castro-Huerta’s heavy-handed favoring of state authority when balancing interests pursuant to the infringement test. As Justice Gorsuch observed in dissent, the Court should not have “play[ed]” its “balancing-test game . . . in this case” since by enacting and amending Public Law 280 “Congress has already ‘balanced’ competing tribal, state, and federal interests—and its balance demands tribal consent” before Oklahoma can exercise jurisdiction over crimes by non-Indians against Indians on the Cherokee Reservation. §45

impose the contested motor vehicle license and use fuel taxes”); cf. Rice v. Rehner, 463 U.S. 713, 719 (1983) (emphasis added) (internal quotation marks omitted) (citing, inter alia, Bracker, 448 U.S. at 143 (asserting that the “goal of any pre-emption analysis is to determine the congressional plan” and that in the Indian law context the Court has “employed a pre-emption analysis that is informed by historical notions of tribal sovereignty”). §40. Bracker, 448 U.S. at 142 (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)); see Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2500–01 (2022) (emphasis added) (citing, inter alia, Bracker, 448 U.S. at 142–43) (misrepresenting Bracker by positing that in Bracker “this Court . . . 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); see also supra notes 519–528 and accompanying text (discussing the Bracker Court’s admonishment against applying “standards of pre-emption that have emerged in other areas of the law”). §41. See supra note 540.

§42. Bracker, 448 U.S. at 143 (internal quotation marks omitted) (quoting McCalhahan v. Ariz. St. Tax Comm’n, 411 U.S. 164, 172 (1973)).

§43. Williams v. Lee, 358 U.S. at 219; see supra notes 480–481 and accompanying text.

§44. Cf. Castro-Huerta, 142 S. Ct. at 2505 (Gorsuch, J., dissenting) (emphasis added) (“. . . Native American Tribes retain their sovereignty unless and until Congress ordains otherwise.”).

§45. Id. at 2522.
But even if applying the infringement test were appropriate, Justice Gorsuch continued, “it is far from obvious” a court fairly applying that test would “arrive[ ] at [the majority’s] preferred result.”

Gorsuch elaborated:

Start with the assertion that allowing state prosecutions in cases like [this one] will “help” Indians. The old paternalist overtones are hard to ignore. Yes, under the laws Congress has ordained Oklahoma may acquire jurisdiction over crimes by or against tribal members only with tribal consent. But to date, the Cherokee have misguided shown no interest in state jurisdiction. Thanks to their misjudgment, they have rendered themselves “second-class citizens.” So, the argument goes, five unelected judges in Washington must now make the “right” choice for the Tribe. To state the Court’s staggering argument should be enough to refute it.

Justice Gorsuch pointed out further that the majority’s “paternalist” balancing of interests failed “to consider some of the reasons why the Cherokee might not be so eager to invite state prosecutions” on their reservation, including the obvious reason that “state governments have . . . proven less than reliable sources of justice for Indian victims.”

Many other defects were obvious, Gorsuch noted, in the “cost-benefit analysis” used by the majority to foist concurrent state criminal jurisdiction onto reservations. “Federal authorities may reduce their involvement when state authorities are present” he pointed out, and “some States may not wish to devote the resources required,” viewing the unwelcome assignment of jurisdiction “as an unfunded federal mandate.”

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546. Id.
547. Id; cf. Carlson, supra note 16, at 19 (footnote omitted) (“Based on tribal and state experiences with [Public Law] 280, there is no reason to believe as the [Castro-Huerta] majority asserted that tribal citizens will be treated as second class citizens if the state cannot exercise criminal jurisdiction over non-Indians committing crimes against them. Rather, the legacy of [Public Law] 280 has been that states treat tribal citizens as second class citizens when they exercise criminal jurisdiction in Indian Country.”).
548. Castro-Huerta, 142 S. Ct. at 2522–23 (Gorsuch, J., dissenting); cf. Carlson, supra note 16, at 19–21 (footnote omitted) (“[I]n Castro-Huerta, the majority assumes that tribal sovereignty can and should be displaced by asserting that the states have absorbed tribal governments and can better serve their peoples. This assumption is built on the fiction that empowering the states empowers the people even though empirical studies have shown that this has not been the case in Indian Country. . . . [The majority] overlooks the well-documented reality that state law enforcement officers frequently discriminate against tribal citizens.”).
549. Castro-Huerta, 142 S. Ct. at 2523 (Gorsuch, J., dissenting).
550. Id.
that “more prosecuting authorities [on reservations] can only ‘help,’” noting that “[f]ew sovereigns . . . would see” encroachment of another sovereign’s laws “as an improvement” and expressing disbelief at the majority’s failure to “grasp why the [sovereign] Tribe may not.”

Gorsuch rejected the majority’s “dystopian tale” about rampant, unchecked criminality surging in Oklahoma due to the Court’s recognizing, in McGirt v. Oklahoma, the continuing existence of Indian reservations in Oklahoma, a pretended and unsubstantiated emergency that supposedly required the Court to step in and “forc[e] state criminal jurisdiction onto Tribes.” He noted that the testimony of federal and tribal authorities proved they were working diligently and cooperatively to manage their “new workload,” and that the tribes “have . . . shown a willingness to work with Oklahoma, having signed hundreds of cross-deputization agreements allowing local law enforcement to collaborate with tribal police.”

The evidence was clear, Gorsuch attested further, in showing that “partnerships between tribal law enforcement and state law enforcement [were] strong,” that violent crimes were “being pursued [by federal law enforcement] as heavily as they were in the past,” and that “federal prosecutors [were] now pursuing lower level offenses vigorously too.” Gorsuch lambasted as “the pastiche of a legislative process’ the Court’s ‘resort[ing] to a . . . balancing test,” chiding this unwarranted intervention as nothing but the majority’s thinly disguised promotion of “a policy argument through and through.”

Justice Gorsuch declared, “has no business usurping congressional decisions about the appropriate balance between federal, tribal, and state interests.”

551. Id.
552. Id. at 2524.
553. Id.
554. Id. at 2524–25 (citations and internal quotation marks omitted).
555. Id.; cf. Carlson, supra note 16, at 15 (footnote omitted) (“The [Castro-Huerta] Court claimed that it was interpreting the [General Crimes Act] but appears to be using interpretation as a cover for policymaking.”).
556. Castro-Huerta, 142 S. Ct. at 2525 (Gorsuch, J., dissenting); see also Carlson, supra note 16, at 17 (“The [Castro-Huerta] majority allowed the state of Oklahoma to flout the requirements . . . for states to obtain jurisdiction in Indian Country. It ignored the fact that . . . [Congress] has sound reasons for requiring tribal consent before granting states jurisdiction in Indian Country.”); cf. Justice Kagan cautions Supreme Court can forfeit legitimacy, AP NEWS (Sept. 12, 2022), https://supreme-court-can-forfeit-legitimacy (“. . . [Justice Elena] Kagan said the public’s view of the court can be damaged especially when changes in its membership lead to big changes in the law . . . . Judges create legitimacy problems for themselves . . . when they . . . stray into places where it looks like they’re an extension of the political process or when they’re imposing their own personal preferences,” Kagan said . . . .”); Mistretta v. United States, 488 U.S. 361, 407 (1989) (“The legitimacy of
Additional fallacies and biases are evident in the way Castro-Huerta “play[s]” its “balancing-test game.”\textsuperscript{557} For instance, the majority opined that tribal interests are not implicated when a state prosecutes a non-Indian for an on-reservation crime because such a prosecution “does not involve the exercise of state power over any Indian or over any tribe” since “[t]he only parties to the criminal case are the State and the non-Indian defendant.”\textsuperscript{558} This rationalization for permitting the extension of state criminal jurisdiction into Indian country without tribal consent ignores the many reasons cited by Justice Gorsuch, discussed previously, for why tribes “might not be so eager to invite state prosecutions” on their reservations.\textsuperscript{559} The statement also purports to rest on precedents that do not support the majority’s rationalization.\textsuperscript{560} United States v. McBratney and Draper v. United States, which the majority cited,\textsuperscript{561} both permitted state criminal jurisdiction on reservations only in cases where both the victim and the perpetrator were non-Indians.\textsuperscript{562} And the 1984 case Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, also cited by the majority,\textsuperscript{563} simply acknowledged that tribal interests were consistent with the historical tradition of state courts’ being open and available for Indian plaintiffs to sue non-Indians for transgressions occurring in Indian country,\textsuperscript{564} the kind of scenario, in other words, that clearly manifests \textit{tribal consent} to the exercise of state judicial jurisdiction.\textsuperscript{565} This
historically “sanctioned.”

tribal sovereignty-compatible exercise of state-court jurisdiction on reservations is what the Three Affiliated Tribes Court was referring to when it reasoned that Public Law 280 was not “meant to divest States of pre-existing and otherwise lawfully assumed jurisdiction,” a validation of limited state authority specific to the context of Indians’ traditionally being free to seek relief against non-Indians in state court without being shut out and discriminated against at the whim of state governments. The Court’s emphasis on the compatibility with tribal autonomy of this limited, longstanding state-court authority, reaffirmed in Three Affiliated Tribes, gives the lie to Castro-Huerta’s misuse of that case’s reference to “pre-existing and otherwise lawfully assumed jurisdiction,” a combative wielding that is apparent in the majority’s turning that language against tribes, using it to hand states previously forbidden police powers on reservations without tribal consent.

is not impeded when a State allows an Indian to enter its courts on equal terms with other persons to seek relief against a non-Indian concerning a claim arising in Indian country. The exercise of state jurisdiction is particularly compatible with tribal autonomy when, as here, the suit is brought by the tribe itself and the tribal court lacked jurisdiction over the claim at the time the suit was instituted.”; see also Allison M. Dussias, Heeding the Demands of Justice: Justice Blackmun’s Indian Law Opinions, 71 N.D. L. REV. 41, 96 (1995) (footnote omitted) (noting that in Three Affiliated Tribes I “the tribe itself was turning to the state court for redress” and that the decision “provided the tribe with a forum in which to seek relief, while maintaining respect for tribal self-government and the tribal court system”).

566. See Williams v. Lee, 358 U.S. 217, 220 (1959) (citations omitted) (noting that historically “suits by Indians against outsiders in state courts have been sanctioned”); supra text accompanying notes 489–490; see also supra note 81.

567. Three Affiliated Tribes I, 467 U.S. at 150 (footnote omitted); see also supra note 565.

568. See supra notes 565–567 and accompanying text; cf. Three Affiliated Tribes I, 467 U.S. at 147 (citation omitted) (noting that according to the North Dakota Supreme Court’s analysis, rejected and discredited in Three Affiliated Tribes I, “any discrimination against Indian litigants did not violate the State or Federal Constitutions”).

569. See supra note 565 and accompanying text.

570. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2499–2500 (2022) (citing Three Affiliated Tribes I, 467 U.S. at 150); see also id. at 2496 (emphasis added) (misusing the same phrasing from Three Affiliated Tribes I via the Castro-Huerta majority’s assertion that “the extension of . . . federal laws to Indian country does not silently erase preexisting or otherwise lawfully assumed state jurisdiction to prosecute crimes committed by non-Indians in Indian country”); id. at 2497 (emphasis added) (misusing the same phrasing via the majority’s assertion 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”).

Castro-Huerta’s misleading aggrandizement of the phrase “preexisting or otherwise lawfully assumed state jurisdiction” from Three Affiliated Tribe I—i.e., the majority’s proffering that phrase as “the Court’s definitive statement about Public Law 280,”
The other case invoked by the majority—Nevada v. Hicks (2001)—to rationalize the majority's permitting a "power grab" in the guise of interest-balancing, however, is undoubtedly one that contains dicta consistent with Castro-Huerta's forcing an extension of state criminal authority into Indian country. In Hicks the Court refused to acknowledge that a tribe's federally protected interest in self-government included freedom from the extension of a state court's jurisdiction into Indian country to facilitate a state law enforcement investigation of an alleged off-reservation crime that an Indian who resided on property he owned within a reservation was (mistakenly) accused of having committed.

_id. at 2505—is a deflection from the follow-on case Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g [hereinafter Three Affiliated Tribes II], 476 U.S. 877, 883 (1986), where the Court held that Public Law 280 preempted the discriminatory North Dakota statute at the center of the controversy, a hostile and offensive state law that purported to disclaim state-court jurisdiction over lawsuits brought by Indians "absent the Tribe's waiver of its sovereign immunity and consent to the application of state civil law in all cases to which it is a party." See also id. at 887 (emphasis added) ("Because Pub. L. 280 was designed to extend the jurisdiction of the States over Indian country and to encourage state assumption of such jurisdiction, and because Congress specifically considered the issue of retrocession but did not provide for disclaimers of jurisdiction lawfully acquired other than under Pub. L. 280 prior to 1968, we must conclude that such disclaimers cannot be reconciled with the congressional plan embodied in Pub. L. 280 and thus are pre-empted by it."); cf. Three Affiliated Tribes I, 467 U.S. at 156 n.14 (emphasis added) (expressing approval of the North Dakota Supreme Court's having "made . . . clear in other cases its view that Pub. L. 280, as amended by the 1968 [Indian] Civil Rights Act, is an affirmative constraint on state jurisdiction"). In thus construing Public Law 280 as having powerful and controlling preemptive force, the Court in Three Affiliated Tribes II reiterated that, in general, "considerations of tribal sovereignty . . . form an important backdrop against which the applicable treaties and federal statutes must be read." Three Affiliated Tribes II, 476 U.S. at 884 (emphasis added); see also id. at 892 ("We have never . . . found Pub. L. 280 to represent an abandonment of the federal interest in guarding Indian self-governance."). See generally COHEN'S HANDBOOK § 6.04[3][e], supra note 5, at 569–72 (discussing the "Preemptive Effect of Public Law 280"). This de facto acknowledgment of the Worcester principle's continuing background operation in the interpretive work of courts and in policymaking by Congress in modern times directly contradicts Castro-Huerta's tribal-autonomy-denying analysis of Public Law 280, see Castro-Huerta, 142 S. Ct. at 2499–2500, and renders most telling the majority's disregard of the crucial Public Law 280 case Three Affiliated Tribes II. See also supra note 511.


572. See Castro-Huerta, 142 S. Ct. at 2505 (Gorsuch, J., dissenting) (adverting to Worcester v. Georgia, 31 U.S. 515, (1832)) ("Where our predecessors refused to participate in [Georgia's] unlawful power grab at the expense of the Cherokee, today's Court accedes to [Oklahoma's].").

573. See Hicks, 533 U.S. at 364 ("The State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government."); see also COHEN'S HANDBOOK § 4.02[3][c][ii], supra note 5, at 239 (footnotes omitted).
The *Hicks* Court’s analysis, however, misrepresented and misapplied precedent. The Court wrote: “It is noteworthy that [*United States v.*]

("Scholars and commentators have . . . questioned . . . [Hicks’s] expansive view of state sovereignty in Indian country as a justification for denying tribal adjudicative power based on [the case’s] balance of state and tribal interests” as well as *Hicks*’s “failure to give serious attention to tribal interests in carrying out that balancing test.”); Bryan H. Wildenthal, *Fighting the Lone Wolf Mentality: Twenty-First Century Reflections on the Paradoxical State of American Indian Law*, 38 Tulsa L. Rev. 113, 141–42 (2013) (footnote omitted) (observing that the *Hicks* Court “completely failed to address the undermining of tribal governmental authority inherent in the unilateral assertion of state power within tribal territory, against tribal members, on tribally owned land” and that *Hicks*’s assertion “that state enforcement of state law within Indian tribal boundaries ‘no more impairs the tribe’s self-government than federal enforcement of federal law impairs state government’” is “willfully hostile to the entire history, structure, and logic of American Indian law” since “Indian nations . . . are most emphatically not mere components of the states, nor are they legally subordinate to the states”).

574. See, e.g., Robert Laurence, *Tremors: Justice Scalia and Professor Clinton Re-Shape the Debate over the Cross-Boundary Enforcement of Tribal and State Judgments*, 34 N.M. L. Rev. 239, 247–50, 260 (2004) (criticizing *Hicks*’s misrepresentations of Utah & Northern Railway Co. v. Fisher, 116 U.S. 28 (1885), condemning *Hicks*’s “aggressively destructive” dicta devised “to destroy tribal sovereignty,” and stating: “*Nevada v. Hicks* is wrong, and its dicta are ten-times wrong. It is not just wrong, it is monumentally wrong, and the smirking character of Justice Scalia’s opinion does not make it right; it makes it even more wrong. It makes it offensive, that not being too strong a word.”); see also id. at 244 n.38 (collecting articles denouncing *Hicks*); Stacy L. Leeds, *The More Things Stay the Same: Waiting on Indian Law’s Brown v. Board of Education*, 38 Tulsa L. Rev. 73, 82 (2002) (footnote omitted) (noting that *Hicks* “is heavily criticized and questioned by scholars and commentators as an intellectually dishonest application of federal Indian law principles”); Matthew L.M. Fletcher, *The Supreme Court’s Indian Problem*, 59 Hastings L.J. 579, 619 (2008) (footnote omitted) (“Justice Scalia’s majority opinion [in *Hicks*] begins with an analysis of federal Indian law principles—and, in dramatic fashion, reworks those principles in broad strokes against tribal interests.”); Joseph William Singer, *Canons of Conquest: The Supreme Court’s Attack on Tribal Sovereignty*, 37 New Eng. L. Rev. 641, 645 (2003) (“[T]he Court has slowly chipped away at the retained sovereignty of Indian nations. . . . However, [*Hicks*] is not merely an incremental step in the process. *Hicks* has the potential to destroy tribal sovereignty as we have known it.”).

*Hicks*’s misrepresentation of *Worcester*, 31 U.S. 515, in the context of the Court’s effort to distinguish and thereby diminish that foundational precedent, is especially egregious. The *Hicks* Court wrote: “Our holding in *Worcester* must be considered in light of the fact that [*t*]he 1828 treaty with the Cherokee Nation. . . . guaranteed the Indians their lands would never be subjected to the jurisdiction of any State or Territory.” *Hicks*, 533 U.S. at 361 n.4 (quoting Organized Vill. of Kake v. Egan, 369 U.S. 60, 71 (1962)). But the “1828 treaty with the Cherokee,” which was mentioned in the 1962 *Kake* case, did not involve the Cherokee Nation in Georgia, east of the Mississippi River; rather the 1828 treaty was titled “Treaty with the Western Cherokee,” i.e., the Cherokee faction located “within the limits of the Territory of Arkansas,” west of the Mississippi River. See Treaty with the Western Cherokee, May 6, 1828, 7 Stat. 311 (emphasis added), reprinted in 2 KAPPLER’S INDIAN AFFAIRS: LAWS AND TREATIES 288 (1904), and cited in *Kake*, 369 U.S. at 71. Professor Robert Clinton elaborates:
Kagama recognized the right of state laws to ‘operate[e] . . . upon [non-Indians] found’ within a reservation, but did not similarly limit to non-Indians or the property of non-Indians the scope of the process of state courts.”575 But in truth, as discussed previously, the Supreme Court in Kagama upheld the constitutionality of the Major Crimes Act’s conferral of exclusive federal jurisdiction over specified major offenses committed by Indians within reservations by virtue of the Court’s recognition that the Constitution allocated to Congress exclusive power in Indian affairs.576 Kagama’s observation that the Major Crimes Act “[d]id not interfere with the process of the state courts within the reservation, nor with the operation of state laws upon white people found there,”577 was not a confirmation, as Hicks fallaciously opined, of state courts’ being able to extend their laws or jurisdiction to on-reservation matters involving Indians or Indian property.578 Rather, Kagama’s reference to the limited reach of “the process of the state courts within

[In footnote four of his [Hicks majority] opinion, Justice Scalia seeks to limit Chief Justice Marshall’s Worcester opinion to its facts, suggesting that it was based on, or at least must be read as based on, [the fact that] a[n] “1828 treaty with the Cherokee nation . . . guaranteed the Indians their lands would never be subjected to the jurisdiction of any State or Territory.” This statement is simply historically false! There is no reference whatsoever to any 1828 Treaty with the Cherokee Nation in the Worcester opinion because the Cherokee Nation had never signed the 1828 treaty with the United States that contained the referenced language. Rather, as its express text demonstrates, the 1828 treaty was signed by the so-called Old Settlers Faction of Cherokees who had separated from the Cherokee Nation and voluntarily removed to new lands west of the Mississippi River. The Cherokees who signed the 1828 treaty therefore were not part of the remaining eastern Cherokee Nation involved in the Worcester case that resisted removal, in part, through that case. Apparently for Justice Scalia if you have seen one Cherokee, you have seen them all!]

Robert N. Clinton, There Is No Federal Supremacy Clause for Indian Tribes, 34 ARIZ. ST. L.J. 113, 232–33 (2002) (footnotes omitted) (citing Treaty at Washington with Old Settlers Faction of Cherokees, West of the Mississippi, May 6, 1828, pmbl., 7 Stat. 311); see also Suagee, supra note 62, at 122 (emphasis and alterations added) (footnote omitted) (“In Worcester, the Court did not construe the treaty of 1828, but rather certain earlier treaties. The 1828 treaty was a removal treaty, and the land that would ‘never be subjected to the jurisdiction of any State or Territory’ was the land that the United States set aside for the [Western] Cherokee . . . [l]and which was located even farther west of the Mississippi [River than the land those Western Cherokee Indians had inhabited in Arkansas before their 1828 removal]. I find Scalia’s dishonesty on this point (relying on clearly inapplicable language in Kake to distinguish Worcester, one of the leading cases in all of federal Indian law) very disturbing, and the fact that none of the other Justices called him on it is truly disheartening.”).

575. Hicks, 533 U.S. at 364 (quoting United States v. Kagama, 118 U.S. 375, 383 (1886)).
576. See supra notes 169–178 and accompanying text.
577. Kagama, 118 U.S. at 383; see also supra text accompanying note 170.
578. See supra text accompanying note 575.
... reservation[s]" was an allusion to *Langford v. Monteith*, where the high court, six years before *Kagama*, had held a territorial court had jurisdiction to serve process on a reservation in Idaho since "this is a suit between white men," so long as "the subject-matter was one of which [the court] could take cognizance." In *Kagama* the Supreme Court thus did not contend or hint that state courts had inherent authority over matters involving Indians or Indian property on reservations. Instead, the scope of valid state authority on reservations remained confined to matters that did not involve or directly affect Indians, as the Supreme Court previously had held in *Langford* (1880), *McBratney* (1881), and *Utah & Northern Railway Co. v. Fisher* (1885). Castro-Huerta's citing *Hicks* for the proposition that tribes' interest in self-government does not include freedom from having the Court extend into Indian country state authority over crimes by non-Indians against Indians thus recycles *Hicks*’s own scandalous errors of analysis and false representations of precedent.

579. *Kagama*, 118 U.S. at 383; see supra note 577 and accompanying text.
580. *Langford*, 102 U.S. 145, 147 (1880); see supra text accompanying note 108.
581. Indeed, in *Kagama* the Supreme Court supported its point about the limited reach of state law and state-court process on reservations to matters not involving Indians by reiterating that *Worcester v. Georgia* similarly had held that "the tribe was under [the United States'] protection, and could not be subjected to the laws of the State and the process of its courts." *Kagama*, 118 U.S. at 384 (emphasis added) (discussing *Worcester*, 31 U.S. 515 (1832)); see also supra note 81.
582. See supra notes 174–177 and accompanying text (discussing *Kagama*).
584. See supra notes 121–123 and accompanying text (discussing United States v. McBratney, 104 U.S. 621 (1881)).
586. See Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2501 (2022) (citations and internal quotation marks omitted) (citing, inter alia, Nevada v. Hicks, 533 U.S. 353, 364 (2001)) (intimating it would be “problematic,” when balancing interests pursuant to infringement analysis, to consider tribes as having an interest in being free from state jurisdiction over on-reservation crimes by non-Indians against Indians).
587. See supra notes 573, 574 & 585; see also LaVelle, supra note 585, at 767 (footnotes omitted) (“In *Fisher* the Supreme Court permitted the territorial government of Idaho to serve process on a railroad company within the exterior boundaries of the Fort Hill Indian Reservation for tax enforcement purposes, but only because (1) the company’s right-of-way had effectively been ‘withdrawn from the reservation’ by an act of Congress and (2) the
One final observation is in order about Castro-Huerta’s exercise of “raw power” in ‘balanc[ing]’ away tribal sovereignty in favor of state criminal jurisdiction over crimes . . . against tribal members,” thereby “sow[ing] needless confusion across the country.”

Discussing its interest-balancing, the Court wrote:

The exercise of state jurisdiction here would not infringe on tribal self-government. In particular, a state prosecution of a crime Indians’ rights would not thereby be impaired. The Fisher Court relied on Langford v. Monteith, a case which likewise recognized a narrow exception to the prevailing rule of complete exclusion of state and territorial law within reservation boundaries, positing that ‘territorial’ process may run there, however the Indians themselves may be exempt from that jurisdiction.’ Hicks’s suggestion that Fisher implies a ‘corollary right’ of states to serve process on a tribal member on Indian-owned land within reservation boundaries thus contradicts the rationale and holding of both Fisher and Langford, the only case cited in Fisher as a controlling precedent.”

In various informal settings Justice Antonin Scalia, the author of Hicks, was surprisingly candid about his, and the Court’s, taking little heed of precedent or historical principles when deciding Indian law cases, giving latitude instead to the Justices’ subjective desires for preferred outcomes, and generally making things up on a case-by-case basis. See, e.g., Gregory Ablavsky, History, Power, and Federal Indian Law, PROCESS: A BLOG FOR AM. HIST. (Jan. 4, 2018), https://ablavsky-history-power-and-federal-indian-law (observing the “remarkably wide rein to craft the law as [the Justices] see fit” that is apparent in Indian law cases and noting that “the late Justice Scalia once quipped, ‘most of the time we’re just making it up’”); Steven Newcomb, What Justice Scalia Said He Didn’t Know About U.S. Indian Law., ICT [INDIAN COUNTRY TODAY] (Sept. 12, 2018), https://scalia-indian-law (referring to Johnson v. McIntosh, 21 U.S. 543 (1823)) (recounting a conversation with Justice Scalia at a reception at the University of San Diego on August 30, 2006 in which Scalia “told me in response to my initial question that he had never heard of the doctrine of discovery or the Johnson v. McIntosh ruling, which law schools in the United States typically regard as the starting point of U.S. property law, as well as U.S. federal Indian law,” and commenting that “what I took away from my one brief conversation with Scalia is that he was woefully uninformed about the foundational conceptions of U.S. federal Indian law”); (fetches, supra note 35, at 1642–43 (footnotes omitted)) (“Justice Scalia has candidly summarized his view of the Supreme Court’s approach to Indian law as a search for ‘what the current state of affairs ought to be.’ . . . Some scholars have speculated that for Scalia, holding true to a particular method is not as important as his substantive agenda. . . . In Indian law . . . Scalia . . . seems content to allow cases to be decided on what ought to be today’s policy.”); cf. Fletcher, supra note 574, at 589 & n.52 (referring to Judge Roger L. Wollman’s comment during oral argument in Prescott v. Little Six, Inc., 387 F.3d 753 (8th Cir. 2004), that “the Supreme Court sort of makes it up as they go along” in stating that “[m]ost observers of federal Indian law cases reach the conclusion that—in the words of an Eighth Circuit judge who was reversed by the Court in a major Indian law case—the Supreme Court makes up Indian law as it goes”). For discussion of another example of Justice Scalia’s penchant for misrepresenting precedent and disregarding historical principles to advance preferred outcomes in Indian law cases, see supra note 430 (discussing Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251 (1992)).
committed by a non-Indian against an Indian would not deprive the
tribe of any of its prosecutorial authority. That is because, with
exceptions not invoked here, Indian tribes lack criminal jurisdiction to
prosecute crimes committed by non-Indians . . . , even when
non-Indians commit crimes against Indians in Indian country.589

People unfamiliar with Indian law might be shocked to read that Indian
tribes are said to have no balanceable “interest” in the “prosecution of . . .
crime[s] committed by . . . non-Indian[s] against . . . Indian[s]” on
reservations.590 That is because tribes do, of course, have such an
“interest.” In fact, regaining tribal authority to punish and deter
non-Indian criminal wrongdoers in Indian country is one of the most
pressing concerns dominating the Indian policymaking landscape in
America today.591 The reason Castro-Huerta disregards this compelling
tribal “interest” is because of one of the most unprincipled, hostile, and
intellectually dishonest Indian law decisions ever issued by the Supreme
Court—the 1978 decision Oliphant v. Suquamish Indian Tribe.592

Scholars of the field have generated numerous publications sharply

589. Id. at 2501 (majority opinion) (citation omitted).
590. See supra text accompanying note 589.
591. See ANDERSON, KRACKOFF & BERGER, supra note 463, at 316–29 (section titled
“Federal Allocation of Criminal Jurisdiction in Indian Country”) (citations omitted)
(discussing the “Crisis of Criminal Justice in Indian Country” caused, in part, by the
Supreme Court’s divesting tribes of authority over crimes committed by non-Indians on
reservations in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), and describing
tribal and congressional efforts at “Fixing the System” through, inter alia, Congress’s
enactment of a partial override of Oliphant in the context of passing the 2010 Tribal Law
and Order Act and the 2013 reauthorization of the Violence Against Women Act, which
represented “the first significant changes to the [Indian country] criminal jurisdiction
system in decades”); see also Grant Christensen, Getting Cooley Right: The Inherent
Criminal Powers of Tribal Law Enforcement, 56 U.C. DAVIS L. REV. 467, 523 (2022)
(footnotes omitted) (“Indian law is in the middle of a quiet revolution on the understanding
and articulation of the inherent powers of Indian tribes. . . . A tribal powers renaissance
began in about 2010. . . . Congress recognized the power of Indian tribes to assume felony
level criminal jurisdiction and recognized the inherent power of Indian tribes to criminally
prosecute non-Indians for offenses related to domestic violence.”); Carlson, supra note 16,
at 11 (footnote omitted) (noting that “just weeks before” the Castro-Huerta decision
Congress reauthorized previous policy by enacting the Violence Against Women Act of 2022
which “expanded federal recognition of the inherent authority of tribal governments to
exercise criminal jurisdiction over specific crimes committed by non-Indians in Indian
Country”). See generally Samuel E. Ennis, Reaffirming Indian Tribal Court Criminal
Jurisdiction Over Non-Indians: An Argument for a Statutory Abrogation of Oliphant,
592. 435 U.S. 191; cf. Ann E. Tweedy, Off-Reservation Treaty Hunting Rights, the
Restatement, and the Stevens Treaties, 97 WASH. L. REV. 835, 851 n.69 (2022) (“[I]t
cannot be denied that the [Castro-Huerta] majority opinion is part of the class of Supreme Court
decisions that fails to take adequate account of tribal interests.”).
criticizing Oliphant, including the case’s misrepresentations of precedent and reliance on racist nineteenth-century policies and attitudes toward Indian tribes and Native people to judicially bar tribes from prosecuting and punishing non-Indians who commit crimes on reservations. In the intervening decades tribes have mobilized battles...
in the courts and waged campaigns in Congress to reclaim portions of their ability to protect their people and their homelands from criminal violence perpetrated by non-Indians, an inherent sovereign right of

concerning the rights of Indian tribes today and identifying Oliphant as a “leading modern example of judicial racism directed against Indian tribes”; POMMERSHEIM, supra note 166, at 142 (endnotes omitted) (“In a series of cases beginning with Oliphant . . . the Supreme Court has . . . taken it upon itself to unilaterally abrogate tribal authority . . . . It has done so without reference to any constitutional justification—indeed, without reference to any apposite congressional enactments, and ultimately without reference to any coherent doctrinal underpinning. The Court accomplished this though a quite brazen manipulation of precedent and an incessant repetition of the mantra that it has always been thus. . . . [T]he Court in its current jurisprudence has arrogated . . . [unconstrained] power to itself rather than deferring to Congress.”). Richard B. Collins, Santa Clara Pueblo v. Martinez in the Evolution of Federal Law, 20 TRIBAL L.J. 1, 7–8 (2020) (footnote omitted) (observing that in Oliphant “the Court . . . invented a sweeping new theory of implied repeal of tribal authority over non-Indians or nonmembers within tribal territory” and that “[b]ecause the Court invented the new theory without any source in legal text, the theory is an open-ended ball of clay to be molded by its majority of the day”). See generally FLETCHER § 7.6, supra note 35, at 345–58 (analyzing and discussing Oliphant); Philip P. Frickey, A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers, 109 YALE L.J. 1, 34–39 (1999); Sarah Krakoff, Mark the Plumber v. Tribal Empire, or Non-Indian Anxiety v. Tribal Sovereignty?: The Story of Oliphant v. Suquamish Indian Tribe, in INDIAN LAW STORIES, supra note 140, at 261–96; Robert Laurence, Thurgood Marshall’s Indian Law Opinions, 27 HOWARD L.J. 3, 34–40 (1984); Peter C. Maxfield, Oliphant v. Suquamish Tribe: The Whole is Greater than the Sum of the Parts, 19 J. CONTEMP. L. 391 (1993).

595. See supra note 591; see also Jonodev Chaudhuri, Testimony of Jonodev Chaudhuri, Ambassador of the Muscogee (Creek) Nation, Before the United States House Committee on Natural Resources, Subcommittee for Indigenous Peoples of the United States 2 (Sept. 20, 2022), https://castro-huerta-hearing-chaudhuri-testimony (“Congress is working steadily to restore the inherent sovereign authority of our tribal nations because Congress understands that the best and only real solution to addressing the public safety crisis in Indian country is empowering tribal nations to ensure they are able to protect everyone within their borders, regardless of an individual’s tribal citizenship status. . . . The solution is restoration of tribal jurisdiction and authority, full stop.”); Ezekiel J.N. Fletcher, Trapped in the Spring of 1978: The Continuing Impact of the Supreme Court’s Decisions in Oliphant, Wheeler, and Martinez, FED. L. 36, 39 (Mar./Apr. 2008) (endnote omitted) (“The Oliphant decision has allowed non-Indians to engage in criminal activities on tribal lands with a certain amount of impunity while the tribal governments and tribal citizens can only stand by and watch, hoping the state or the federal government will prosecute the accused.”); Michalyn Steele, Comparative Institutional Competency and Sovereignty in Indian Affairs, 85 U. COLO. L. REV. 759, 761–62 (2014) (footnotes omitted) (“Tribes have been hamstrung [by Oliphant] in their efforts to curb [the] tide of violence in Indian country . . . . As a result . . . , many crimes—especially crimes of violence against Native American women—go unpunished.”); COHEN’S HANDBOOK §§ 4.02[2][b] & 4.03[1], supra note 5, at 229–30, 242 (footnotes omitted) (“. . . Oliphant has had significant policy consequences for Indian country, leaving tribes unable to respond when non-Indians commit crimes such as sale of illegal drugs and domestic violence that endanger the tribal community. . . . Federal enactments authorizing tribal powers have become increasingly
Indigenous peoples that *Oliphant* annihilated. See *Castro-Huerta*’s invoking *Oliphant* to justify the majority’s refusal to consider tribes’
more than for his votes. . . . Stewart knew that Rehnquist was a clever tactician. . . . Stewart’s clerks were not entirely happy about the way that their boss seemed to have fallen under Rehnquist’s spell.”)

David J. Garrow, The Supreme Court and The Brethren, 18 CONST. COMMENT. 303, 304–05, 314 (2001) (footnotes and internal quotation marks omitted) (noting that investigative journalist Bob Woodward, coauthor of The Brethren, “identified . . . Justice Potter Stewart” as the book’s “secret instigator and primary early source,” that one of Justice Rehnquist’s law clerks reportedly “had given [Woodward] a 5-hour interview” at Rehnquist’s “behest,” and that documents from Justice Lewis Powell’s papers “very strongly suggest that . . . Rehnquist” was one of “the Justices who spoke with” the book’s authors); Scott Armstrong, Supreme Court Clerks as Judicial Actors and as Sources, 98 MARQ. L. REV. 387, 395 (2014) (footnotes omitted) (“[N]one of the Justices, other than Chief Justice Warren Burger, discouraged their clerks from cooperating with us. . . . [S]everal Justices . . . tacitly or explicitly encouraged their clerks to talk.”).

Among Rehnquist’s own papers, available at Stanford University’s Hoover Institution, there’s an intriguing inquiry posed within a memorandum from Justice Harry Blackmun regarding Rehnquist’s first draft of the majority opinion in Oliphant. Referring to the penultimate sentence in the first draft, which stated that “Indians do not have inherent jurisdiction to try and punish nonmembers of their tribe,” Blackmun wrote, as the second of his two enumerated inquiries:

On the next to the last line of the opinion, page 21, the words “nonmembers of their tribe” puzzled me a little. Would they be better replaced by “non-Indians,” a phrase you use at the end of the second paragraph on page 3.

If either of the offenses charged in this case had involved a Rosebud Sioux who was vacationing in Washington, I am not sure what the answer would be.

These, of course, are trivia, and I may be out of line suggesting that you consider them.

Sincerely, Harry

See William H. Rehnquist Papers, Manuscript/Mixed Material, Box/Docket No. 406: 76-5729 (Oliphant v. Suquamish Indian Tribe), retrieved from the Hoover Institution, Stanford University; App. Exhibit 12, infra p. 988; see also Potter Stewart Papers, supra, Box No. 332, Folder No. 409 (Oliphant v. Suquamish Indian Tribe, No. 76-5729) (showing last page of Rehnquist’s first printed draft of Oliphant); App. Exhibit 13, infra p. 989. The wording was changed, of course, to “non-Indians” in the published Oliphant opinion. See Oliphant, 435 U.S. at 212 (concluding that “Indian tribes do not have inherent jurisdiction to try and to punish non-Indians”). The first draft’s use of “nonmembers of their tribe” instead of “non-Indians” appears to be an instance of how Rehnquist constantly was “thinking ahead” when developing the Court’s “intricate web of judicially made Indian law,” id. at 206; judicial divestiture of tribes’ inherent criminal jurisdiction over nonmember Indians would not be attempted until twelve years after Oliphant. See Duro v. Reina, 495 U.S. 676, 684–85 (1990) (applying the “analytic framework” of Oliphant and Wheeler to conclude “that Indian tribes lack jurisdiction over persons who are not tribe members”), superseded by statute as stated in United States v. Lara, 541 U.S. 193, 198–99 (2004); cf. Collins, supra note 594, at 8 & n.63 (footnotes omitted) (citing Wheeler, 435 U.S. at 322–29; United States v. Mazurie, 419 U.S. 544, 557 (1975)) (“[T]he [Wheeler] Court’s otherwise robust reaffirmation of tribal sovereignty inserted the seed of later restrictions on it. The opinion described tribal sovereignty as applicable to ‘tribe members’ rather than, as in most prior decisions, including Oliphant v. Suquamish Tribe, to all Indians. The Court’s sole prior reference to tribal authority over ‘members,’ cited in Wheeler, was in a context not directly reviewing tribal sovereignty. That opinion
interest in remaining “free from state jurisdiction and control.” It underscores the case’s cruel heaping of one injustice upon another.
enforce any purported regulation of non-Indian hunters and fishermen’ so that “the regulatory power was not essential and could be removed,” and noting further the “vicious circle[]” in reasoning that “because the Court has taken some powers away from the tribes, the Court may take others as well,” making the “Court’s conquest of the tribes . . . grounds for further conquest”); Russel Lawrence Barsh & James Youngblood Henderson, The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark, 63 MINN. L. REV. 609, 637 (1979) (“The ultimate danger of Oliphant is . . . to the entire judicial system. A judicial system cannot long maintain its authority when its written opinions appear insincere, or the product of distortion, unreason, or sloppiness.”).
also magnifies the need for congressional action\textsuperscript{599} to counter the Court’s anti-tribal activism,\textsuperscript{600} a surge of judicial aggression that threatens the

\textsuperscript{599} See supra note 9 and accompanying text; see also Berger, \textit{supra} note 120, at 5–7 (explaining how Castro-Huerta’s expansion of state authority “runs counter to . . . evidence-based congressional policy, . . . making Native victims less safe,” and threatens to “undermine public safety and congressional policy on reservations throughout the United States”); Bryan Newland, \textit{Statement of Bryan Newland, Assistant Secretary for Indian Affairs, United States Department of the Interior, Before the House Committee on Natural Resources, Subcommittee for Indigenous Peoples of the United States 2–3 (Sept. 20, 2022), https://castro-huerta-hearing-newland-testimony (“The \textit{Castro-Huerta} decision drastically altered the status quo, overturning nearly 200 years of law enforcement practice nationwide where federal jurisdiction over crimes committed by non-Indians against Indians in Indian country has always been exclusive of state jurisdiction. . . . If state prosecutorial activity conflicts with the exercise of Tribal and federal jurisdiction and public safety goals, that conflict will come at the expense of communities on Indian reservations. State actions at odds with Tribal and federal public safety needs and priorities will confuse the public, add conflict to the already fragile relationships between Indian Tribes and states, and abet increased crime in Indian country.”)); Chaudhuri, \textit{supra} note 595, at 2–3 (“\textit{The Court’s decision in \textit{Castro-Huerta} dangerously infringes on Congress’s ability to exercise its constitutional authority and effectuate its treaty trust duties and responsibilities to tribal nations. . . . \textit{The \textit{Castro-Huerta} Court’s misreading of the General Crimes Act and disregard for clear congressional intent only fans the flames of an already existing public safety crisis throughout all of Indian country.”}); Kevin Killer, \textit{Written Testimony of Oglala Sioux Tribe President Kevin Killer to the U.S. House of Representatives Subcommittee for Indigenous Peoples of the United States 1, 2, 4, 9 (Sept. 20, 2022), https://castro-huerta-hearing-killer-testimony (“The extension of state criminal jurisdiction in Indian Country without tribal consent . . . is an egregious affront to tribal sovereignty and violation of our treaty rights, which Congress can and should rectify by legislation. . . . This \textit{Castro-Huerta} decision is an alarming and unsupported expansion of state power in Indian country by judicial fiat. . . . Congress must . . . respond swiftly and conclusively—as it has the authority to safeguard against the severe injustices and negative ramifications created by this decision and the mountains of hardship and litigation that it will cause. . . . We urge Congress to enact an \textit{Oliphant} and \textit{Castro-Huerta} fix that would restore jurisdictional authority to Tribes and jurisdictional boundaries on states. Tribal sovereignty must include, at a minimum, the ability to protect our own people from non-Indian predators, and it must be shielded from an extension of state power onto our Pine Ridge Indian Reservation.”)); Mary Kathryn Nagle, \textit{Testimony of Mary Kathryn Nagle, Counsel, National Indigenous Women’s Resource Center, Before the United States House Committee on Natural Resources Subcommittee for Indigenous Peoples of the United States 2–3 (Sept. 20, 2022) (citing McGirt v. Oklahoma, 140 S. Ct. 2452 (2020), https://castro-huerta-hearing-nagle-testimony (“In 1978, the United States Supreme Court [in \textit{Oliphant}] took away the inherent jurisdiction of our Tribal Nations to prosecute crimes committed by non-Indians against Indian victims on tribal lands. And then two months ago [in \textit{Castro-Huerta}], the Court gave that jurisdiction to States. . . . The decision in \textit{Castro-Huerta} truly has nothing to do with what’s best for Native victims. It is an outcome determinative decision fueled by one Governor’s multi-million-dollar PR campaign to overturn the Court’s prior decision in McGirt. But when the dust has settled and the rhetoric has calmed down, it will be Native women and children who pay the price. We are asking Congress to take action and address the crisis created by \textit{Castro-Huerta}.”)). For
continuing existence of sovereign and autonomous Indian nations in the United States.\textsuperscript{601}

V. CONCLUSION

Over the course of two centuries of Supreme Court decision-making—from \textit{Worcester v. Georgia} (1832)\textsuperscript{602} to \textit{McGirt v. Oklahoma} (2020)\textsuperscript{603}—a core principle of Indian law has safeguarded the autonomy of Indigenous nations in the United States. That principle is this: By virtue of the Constitution’s allocation of exclusive federal power over the subject matter of Indian affairs, state authority in matters involving Indians or Indian tribes is presumptively precluded. Courts, accordingly, have an indispensable and historical role in protecting tribal sovereignty and autonomy by deciding cases in harmony with this baseline principle of preclusion, a principle that, as Chief Justice John Marshall courageously proclaimed in \textit{Worcester}, allows states to exercise authority in Indian country only “with the assent of the [Indians] themselves, or in conformity with treaties, and with the acts of congress.”\textsuperscript{604} On the facts of \textit{Oklahoma v. Castro-Huerta}, therefore, state authority to prosecute a crime committed by a non-Indian against an Indian on the Cherokee

\begin{footnotesize}
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\item[601.] Cf. Sarah Deer & Mary Kathryn Nagle, \textit{Return to Worcester}: Dollar General and the Restoration of Tribal Jurisdiction to Protect Native Women and Children, 41 HARV. J. L. & GENDER 179, 182, 189 (2018) (footnote omitted) (“Nearly one hundred and fifty years later, however, the Court [in \textit{Oliphant}] effectively re-wrote—or perhaps attempted to erase—the foundational tenets announced in \textit{Worcester}. . . . Because the Court’s decision in \textit{Oliphant} restricted the right of Tribal Nations to prosecute non-Indians who commit acts of violence against Native women and children on tribal lands, \textit{Oliphant} threatens nothing less than the continued existence of Tribal Nations.”); Carlson, supra note 16, at 15 (noting that the \textit{Castro-Huerta} “majority opinion did not mention tribal sovereignty once, or consider the impacts of its holding on tribal sovereignty”).
\item[602.] 31 U.S. 515 (1832).
\item[603.] 140 S. Ct. 2452 (2020).
\end{itemize}
\end{footnotesize}
Reservation remained precluded since no treaty or act of Congress authorized such jurisdiction. The “whole course of judicial decision” in Indian law stands witness to the illegitimacy of Castro-Huerta’s flouting this foundational principle by granting Oklahoma federally prohibited jurisdiction in spite of Worcester.

In the 1830s, astute commentators could righteously praise Worcester for letting the Supreme Court “wash [its] hands clean of the iniquity of oppressing the Indians and disregarding their rights.” Today, on the other hand, discerning observers are justified in condemning Castro-Huerta for threatening to bring about a revival of that same iniquity. The majority might bristle at the dissent’s “extraordinary rhetoric” denouncing the decision, but Justice Gorsuch’s stern condemnation is eminently warranted. In Castro-Huerta the Court indeed “defie[d] Congress’s statutes requiring tribal consent, offer[ed] its own consent in place of the Tribe’s, and allow[ed] Oklahoma to intrude

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605. See Castro-Huerta, 142 S. Ct. 2486, 2505 (2022) (Gorsuch, J., dissenting) (“...Native American Tribes retain their sovereignty unless and until Congress ordains otherwise.”); see also supra note 26 and accompanying text.

606. COHEN’S HANDBOOK § 4.02[1], supra note 5, at 222 (referring to “the whole course of judicial decision on the nature of Indian tribal power”).

607. See Castro-Huerta, 142 S. Ct. at 2527 (Gorsuch, J., dissenting) (internal quotation marks omitted) (quoting Justice Joseph Story’s celebration of the Worcester ruling in 1832 as recounted in Stephen Breyer, The Cherokee Indians and the Supreme Court, 87 GA. HIST. Q. 408, 420 (2003)); see also ECHO-HAWK, supra note 596, at 119 (“It is important to remember that in 1832 the rest of the nation was lined-up to commit a gross miscarriage of justice: the forcible removal of the entire Indian race from the South. In that dark period, it was only the Supreme Court that declared the state framework for removal illegal. That single ray of light illustrates the defining role of the courts to act as a bulwark of justice when vulnerable groups are faced with oppression by the tyranny of the majority.”).

608. See Gregory Ablavsky & W. Tanner Allread, We the (Native) People?: How Indigenous Peoples Debated the U.S. Constitution, 123 COLUM. L. REV. 243, 312 (2023) (footnotes omitted) (referring to Castro-Huerta as a “high-profile” case in which “the Supreme Court has ignored the principles supported by Worcester [v. Georgia] and Native peoples,” thereby “eroding both federal supremacy in Indian affairs and tribal sovereignty” and wrongly “privileg[ing] a nebulous and ahistorical concept of state sovereignty”); Katherine Florey, Tribal Land, Tribal Territory, 56 GA. L. REV. 967, 976 n.43 (2022) (“Castro-Huerta’s sweeping language, if taken literally and applied broadly, would be devastating to tribal territorial sovereignty.”); cf. Leeds, supra note 574, at 84–85 (“The Supreme Court, and our society as a whole, has become increasingly well-versed in the art of subtlety to mask racism. ... Why is it that a few Indian law scholars and a handful of Indian people are the only people seemingly outraged by the Supreme Court’s continued use of racist rationales to divest tribes of authority, even when these subtleties are revealed to others? The ongoing colonization process has desensitized the American public, including many tribal leaders.”).

on a feature of tribal sovereignty recognized since the founding.\textsuperscript{610} Because it’s unlikely the decision will be overruled anytime soon, Congress must counteract the menace and stem the damage by codifying Worcester’s tribal autonomy principle, a principle the Court in Castro-Huerta subverted and refused to apply.\textsuperscript{611} To reiterate Justice Gorsuch’s urgent advice, “the political branches” must now “do their duty to honor this Nation’s promises even as [the Supreme Court has] failed . . . to do [its] own.”\textsuperscript{612}

For the survival of sovereign Indigenous peoples in the United States, ignoring the threat of Castro-Huerta is not an option. Whether the Court deracinates a principle vital to tribes’ autonomous existence—a principle

\begin{itemize}
\item \textsuperscript{610} Id. at 2527 (Gorsuch, J., dissenting); see also Elizabeth Hidalgo Reese, Conquest in the Courts, NATION (July 6, 2022), https://conquest-in-the-courts (“With a few sentences, the Supreme Court casually dismissed the hard-won legal promise of a domestic dependent nationhood free from state power. Without having to sign a treaty or fight a war, the Supreme Court handed the states presumptive power over Indian lands. . . . Letting another sovereign’s laws into your territory is letting that sovereign rule over your lands and people. It is allowing that other sovereign to take over.”).
\item \textsuperscript{611} See supra note 599 and accompanying text; see also, e.g., Oklahoma v. Castro-Huerta Listening Sessions Summary Report, supra note 9, at 11–12, app. A (footnote omitted) (reprinting Coalition of Large Tribes (COLT) resolution of Aug. 16, 2022 addressing non-Indian crime in Indian country) (“Congress must reaffirm that Tribal Nations have criminal jurisdiction to punish wrongdoers who commit crimes on tribal lands . . . . [T]wo wrongs don’t make a right. The Court was wrong to erase tribal criminal jurisdiction in Oliphant—on grounds that such jurisdiction was ‘inconsistent with [tribes’] status’ as conquered peoples. Tribes are not mere conquered peoples. They are domestic nations that retain all the inherent powers they had as nation-states at the time of the founding of the United States unless and until Congress acts to limit that sovereignty in some way. . . . The Castro-Huerta Court has wrongly encroached on tribal sovereignty by rewriting a revisionist history and satiating colonizers’ aspirations—that States have always had jurisdiction in Indian Country—when in fact the opposite has been true from the earliest days of the republic.”). But see Carlson, supra note 16, at 13–15, 23 (footnotes omitted) (“[T]he [Castro-Huerta] Court declared a new rule: that the Constitution allows a state to exercise jurisdiction in Indian Country unless and until Congress preempts the state from doing so. . . . [The new rule] places the burden on tribal governments to seek congressional legislation precluding states from exercising jurisdiction in Indian Country. Interest group studies have shown that it is easier to defeat legislation than enact it. Their findings suggest that changing the default rule as the Court did in Castro-Huerta will likely diminish the political power of a group already disadvantaged in the political process. Moreover, this change in the power dynamic will most likely make it harder for tribal governments to use the political process to alter the Supreme Court’s new rule. . . . The low salience of most Indian law cases may further empower the Court to create national policy in Indian law cases because it believes that the public will not notice and question the legitimacy of its decisions and that Congress will not act to counter them through a legislative override.”).
\item \textsuperscript{612} Castro-Huerta, 142 S. Ct. at 2527 (Gorsuch, J., dissenting).
\end{itemize}
“deeply rooted in the Nation’s history”\textsuperscript{613}—is what hangs precariously in the balance.

\textsuperscript{613} McGirt v. Oklahoma, 140 S. Ct. 2452, 2476 (2020) (quoting Rice v. Olson, 324 U.S. 786, 789 (1945)).
APPENDIX:
SELECTED EXHIBITS FROM THE
PAPERS OF SUPREME COURT JUSTICES
Exhibit 1: From the Hugo Lafayette Black Papers, Manuscript/Mixed Material, Box 339 (Williams v. Lee), retrieved from the Library of Congress.
Exhibit 2: From the Stanley Forman Reed Papers, Manuscript/Mixed Material, Box 96, No. 63 (Northwestern Bands of Shoshone Indians vs. US), retrieved from the Special Collections Research Center, University of Kentucky Libraries.
Exhibit 3: From the Stanley Forman Reed Papers, Manuscript/Mixed Material, Box 96, No. 63 (Northwestern Bands of Shoshone Indians vs. US), retrieved from the Special Collections Research Center, University of Kentucky Libraries.
Exhibit 4: From the Stanley Forman Reed Papers, Manuscript/Mixed Material, Box 112, No. 26 (US v. Alcea Band of Tillamooks, dissent), retrieved from the Special Collections Research Center, University of Kentucky Libraries.
We cannot but affirm the decision of the Court of Claims. Taking original Indian title without compensation and without consent does not satisfy the "high standards of fair dealing" required of the United States in controlling Indian affairs. United States v. Santa Fe E. Co., 314 U.S. 339, 356 (1941). Marshall's language still rings in our ears: "The King purchased . . . but never coerced a surrender . . . of Indian lands. Worcester v. Georgia, 9 Pet. 515, 547 (1832). Admitting the undoubted power of Congress to extinguish original Indian title compels no conclusion that compensation need not be paid. A contrary decision would ignore the plain import of traditional methods of extinguishing original Indian title. The early acquisition of Indian lands in the main progressed by a process of negotiation and treaty. The first treaties reveal the striking deference paid to Indian claims, as the analysis in Worcester v. Georgia, supra, clearly details. It was usual policy not to coerce the surrender of lands without consent and without compensation." The great drive to open Western lands in the 19th Century, however productive of sharp dealing, did not wholly subvert the settled practice of negotiated extinguishment of original Indian title. In 1890, this Court noted that " . . . nearly every tribe and band of Indians within the territorial limits of the United States was under some treaty relations with the government." United States v. Alcea Band of Tillamooks, 161 U.S. 267, 292 (1896). (Something more than sovereign grace prompted the obvious regard given to original Indian title.)

Exhibit 5: From the Stanley Forman Reed Papers, Manuscript/Mixed Material, Box 112, No. 26 (US v. Alcea Band of Tillamooks, dissent), retrieved from the Special Collections Research Center, University of Kentucky Libraries.
Exhibit 6: From the Stanley Forman Reed Papers, Manuscript/Mixed Material, Box 112, No. 26 (US v. Alcea Band of Tillamooks, dissent), retrieved from the Special Collections Research Center, University of Kentucky Libraries.
Exhibit 7: From the Stanley Forman Reed Papers, Manuscript/Mixed Material, Box 186, No. 43 (Tee-Hit-Ton Indians vs. US), retrieved from the Special Collections Research Center, University of Kentucky Libraries.
II. Indian Title.—(a) The nature of aboriginal Indian interest in land and the various rights as between the Indians and the United States dependent on such interest are far from novel as concerns the Indian inhabitants. It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands under which is termed original Indian title. That description means ownership that has not been specifically recognized by Congress. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be extinguished and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

This position of the Indian has long been rationalized by the legal theory that discovery and conquest by Christian nations gave these conquerors sovereignty over and title to the lands thus obtained. 1 Wheaton’s International Law, c. V. The great case of Johnson v. McIntosh, 8 Wheat. 543, denied the power of an Indian tribe to pass their right of occupancy to another. It confirmed the practice of two hundred years of American history “that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or conquest.” P. 587.

“We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.” P. 588.

“Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued.”

Exhibit 8: From the Stanley Forman Reed Papers, Manuscript/Mixed Material, Box 186, No. 43 (Tee-Hit-Ton Indians vs. US), retrieved from the Special Collections Research Center, University of Kentucky Libraries.
February 7, 1935

TO THE CONFERENCE

RE: No. 43, Tee-Hit-Ton Indians v. U.S.

If there is no objection from the members of the Conference
I shall change in the final print the first sentence of the last para-
graph on p. 7 to read as follows:

"This position of the Indian has long been rationalized
by the legal theory that discovery and conquest gave the
conquerors sovereignty over and ownership of the lands
thus obtained."

It formerly read:

"This position of the Indian has long been rationalized
by the legal theory that discovery and conquest by Christian
nations gave these conquerors sovereignty over and owner-
ship of the lands thus obtained."

STANLEY REED

Exhibit 9: From the Papers of William O. Douglas, Manuscript/Mixed
Material, Box 1159, No. 43 (Tee-Hit-Ton Indians v. United States),
retrieved from the Library of Congress.
their territory . . . [They] are a good deal more than 'private, voluntary organizations.' United States v.

Mazurie, 419 U.S. 544, 557; see also Powers of Indian

tribes, 55 Intern. Doc. 16, 22 (1941). The sovereignty that
the Indian tribes retain is of a unique and limited
character, since it exists only at the sufferance of
Congress and is subject to complete defeasance. But until
Congress acts, the tribes retain their existing sovereign
powers. In general, they still possess those aspects of
sovereignty not withdrawn expressly by treaty or statute,
or by implication as a necessary result of their dependent
status. See Oliphant v. S quoamish Indian Tribe, ante,
at ___.

It is evident that the sovereign power to punish
tribal offenders has never been given up by the Navajo

Exhibit 10: From the Potter Stewart Papers, Manuscript/Mixed Material, MS 1367, Box No. 134, Folder No. 1144 (U.S. v. Wheeler, No. 76-1629), retrieved from Yale University Library.
United States v. Wheeler

PS court opn

Cong., 1st Sess. 13 (1834). And in 1854 Congress further

recognized the jurisdiction of tribal courts when it added another

except for crimes (general Crime Act) provided that federal courts would not try an Indian "who

has been punished by the local law of the Tribe." Act of

March 24, 1854, 10 Stat. __ modified in 18 U.S.C. 5

Thus, far from depriving Indian tribes of their

sovereign power to punish offenses against tribal law by

members of a tribe, Congress has repeatedly recognized

that power and declined to disturb it. McC

The sovereign power to try members, clearly

does not fall within that part of sovereignty which the

Navajo implicitly lost by virtue of their dependent

status. The areas in which such implicit divestiture of

sovereignty has prevailed are those involving the relations

between an Indian tribe and non-members of the tribe.

Thus, Indian tribes can no longer freely alienate to

Exhibit 11: From the Potter Stewart Papers, Manuscript/Mixed Material, MS 1367, Box No. 134, Folder No. 1144 (U.S. v. Wheeler, No. 76-1629), retrieved from Yale University Library.
Supreme Court of the United States  
Washington, D.C., 20543

February 27, 1978

Re: No. 76-5729 - Oliphant v. Suquamish Indian Tribe

Dear Bill:

By separate letter I am glad to join your proposed opinion in this case. I have two very minor and picky suggestions for your consideration; they do not affect my joinder:

1. Would it not be better to indicate that we granted Belgarde's petition for certiorari before judgment. Without such a statement, I found the second full paragraph on page 3 mildly confusing as to how Belgarde arrived here. I confess that if one reads what is said at 431 U.S. 944, it may become apparent.

2. On the next to the last line of the opinion, page 21, the words "nonmembers of their tribe" puzzled me a little. Would they be better replaced by "non-Indians," a phrase you use at the end of the second paragraph on page 3. If either of the offenses charged in this case had involved a Rosebud Sioux who was vacationing in Washington, I am not sure what the answer would be.

These, of course, are trivia, and I may be out of line suggesting that you consider them.

Sincerely,

[Signature]

Mr. Justice Rehnquist

that Indian tribes do not have inherent jurisdiction to try and punish nonmembers of their tribe. The judgments below are therefore reversed.

Reversed.

Mr. Justice Brennan took no part in the consideration or decision of this case.
commit certain specified major offenses. 25 Stat. 385, as amended, 18 U. S. C. § 1153. If tribal courts may try non-Indians, however, as respondents contend, those tribal courts are free to try non-Indians even for such major offenses as Congress may well have given the federal courts exclusive jurisdiction to try members of their own tribe committing the exact same offenses. 99

In 1891, this Court recognized that Congress’ various actions and inactions in regulating criminal jurisdiction on Indian reservations demonstrated an intent to reserve jurisdiction over non-Indians for the federal courts. In In re Mayfield, 141 U. S. 107, 115-116 (1891), the Court noted that the policy of Congress had been to allow the inhabitants of the Indian country “such power of self-government as was thought to be

The Major Crimes Act provides that Indians committing any of the enumerated offenses “shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.” While the question has never been directly addressed by this Court, courts of appeals have read this language to exclude tribal jurisdiction over the Indian offender. See, e.g., Sun v. United States, 385 F. 2d 215, 214 (CA10 1967); Felicia v. United States, 495 F. 2d 353, 354 (CA10 1974).

The legislative history of the original version of the Major Crimes Act, which was introduced as a House amendment to the Indian Appropriation Bill of 1854, creates some confusion on the question of exclusive jurisdiction. As originally worded, the amendment would have provided for trial in the United States courts “and not otherwise.” Apparently at the suggestion of Congressman Budd, who believed that concurrent jurisdiction in the courts of the United States was sufficient, the words “and not otherwise” were deleted when the amendment was later reintroduced. See 16 Cong. Rec. 934-935 (Jan. 22, 1885). However, as finally accepted by the Senate and passed by both Houses, the amendment did provide that the Indian offender would be punished as any other offender, “within the exclusive jurisdiction of the United States.” The issue of exclusive jurisdiction over major crimes was mooted for all practical purposes by the passage of the Indian Civil Rights Act of 1968 which limits the punishment that can be imposed by Indian tribal courts to a term of 6 months or a fine of $500.

Exhibit 14: From the Potter Stewart Papers, Manuscript/Mixed Material, MS 1367, Box No. 332, Folder No. 4059 (Oliphant v. Suquamish Indian Tribe, No. 76-5729), retrieved from Yale University Library.
consistent with the safety of the White population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization.” The “general object” of the congressional statutes was to allow Indian nations criminal “jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side.” *Ibid.* While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions.

In a 1960 Senate Report, that body expressly confirmed its assumption that Indian tribal courts are without inherent jurisdiction to try non-Indians, and must depend on the Federal Government for protection from intruders.13 In considering a statute that would prohibit unauthorized entry upon Indian land for the purpose of hunting or fishing, the Senate Report noted that

“The problem confronting Indian tribes with sizable reservations is that the United States provides no prote-

13 In 1977, a Congressional Policy Review Commission, citing the lower court decisions in *Oliphant and Belgrade*, concluded that “[t]here is an established legal basis for tribes to exercise jurisdiction over non-Indians.” 1 Final Report of the American Indian Policy Review Commission 114, 117, and 152-154 (1977). However, the Commission’s Report does not deny that for almost two hundred years before the lower courts decided *Oliphant and Belgrade*, the three branch of the Federal Government were in apparent agreement that Indian tribes do not have jurisdiction over non-Indians. As the Vice-Chairman of the Commission noted in dissent, “such general jurisdiction has generally not been asserted and ... the lack of legislation on this point reflects a congressional assumption that there was no such tribal jurisdiction.” *Id.* at 887 (dissenting views of Cong. Lloyd Mccue).