

OKLAHOMA v. CASTRO-HUERTA—REBALANCING
FEDERAL–STATE–TRIBAL POWER

PANELISTS*

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on July 7, 2022.¹ It is lightly edited for brevity and clarity.

DERRICK BEETSO: Good afternoon and welcome to today's presentation *Oklahoma v. Castro-Huerta*²—Rebalancing Federal–State–Tribal Power.

Let me take a brief moment to help set the stage for today's discussion.

In 2020, the U.S. Supreme Court in an opinion authored by the relatively newly minted Justice Neil Gorsuch determined that the Muskogee (Creek) Reservation, as established by the Tribe's treaties with the United States, was never disestablished despite over a century's worth of actions by the state of Oklahoma to the contrary.³

The case was *McGirt v. Oklahoma*.⁴ Now the legal effect of the *McGirt* case is that a large portion of Eastern Oklahoma is now confirmed as "Indian country"⁵ under federal law.

Since then, the state of Oklahoma has sought additional review before the Supreme Court of the *McGirt* decision, has sought legislation to address jurisdictional issues the state has with the *McGirt* ruling, and has engaged in a very public campaign against the *McGirt* decision itself.

*Oklahoma v. Castro-Huerta*⁶ is the result of these efforts by the state of Oklahoma. The facts of the case are as follows.

In 2015, Victor Manuel Castro-Huerta, a non-Indian,⁷ was prosecuted and convicted of child neglect in Oklahoma State Court in a case involving his

1. This roundtable may be viewed at https://vimeo.com/728199379?embedded=true&source=vimeo_logo&owner=12531945.

2. 142 S. Ct. 2486 (2022).

3. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020).

4. *Id.*

5. See 18 U.S.C. § 1151(a)–(c).

6. 142 S. Ct. 2486 (2022).

7. Victor Manuel Castro-Huerta is not enrolled in a federally recognized Indian tribe, "is not a U.S. citizen," and argued for exclusive Federal jurisdiction in this matter based upon his standing as a "non-Indian" prosecuted for a crime committed against an Indian. See *id.* at 2492.

stepdaughter, an enrolled citizen of the Cherokee Nation, as the victim.⁸

After the *McGirt* decision, Castro-Huerta argued in appealing his conviction that the state of Oklahoma lacked jurisdiction to convict him since *McGirt* held that his criminal actions occurred within Indian country and the federal government instead had exclusive jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.⁹

The Oklahoma Court of Criminal Appeals agreed with Castro-Huerta¹⁰ and the state of Oklahoma swiftly sought review of that decision before the U.S. Supreme Court.¹¹

The Supreme Court granted the state's petition for review in January 2022, and oral arguments were held in late April 2022.¹²

In a blistering majority opinion drafted by Justice Brett Kavanaugh and joined by Justices Thomas, Alito, Roberts, and Coney Barrett, the Court held that State law enforcement officers share concurrent criminal jurisdiction with the federal government over crimes committed by non-Indians against Indians in Indian country.¹³

In doing so, the majority wildly departed from centuries of federal Indian law principles in case law and thus we're here today to discuss this recent opinion.

I won't ask each of you what the effect of *Castro-Huerta*¹⁴ will be on federal Indian law, because I know that's hard to see from here.

But what I do want to ask is how it felt to read the *Castro-Huerta* decision, two weeks ago, or last week,

8. *Castro-Huerta*, 142 S. Ct. at 2491.

9. *Id.* at 2492.

10. *Castro-Huerta v. State*, No. F-2017-1203, 2021 WL 8971915, at *2 (Okla. Crim. App. Apr. 29, 2021).

11. Petition for Writ of Certiorari, *Castro-Huerta*, 142 S. Ct. 2486 (2022) (No. 21-429), 2021 WL 4296002.

12. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 877, 877–78 (2022) (granting certiorari).

13. *Castro-Huerta*, 142 S. Ct. at 2504–05.

14. *Id.*

rather. For me, it felt like reading a termination bill. And it seemed like every line represented some erasure of substantive law in the field that we each have dedicated our careers to.

Maybe we can begin by each sharing some initial feelings and thoughts we had when reading the decision.

KEVIN WASHBURN: Thank you, Derrick. I will say it was not like reading *McGirt*¹⁵ for the first time. I read the *McGirt* decision, sitting in my basement back in 2020, during the pandemic, when we were all stuck in our in our homes.

I read that first line—“On the far end of the Trail of Tears was a promise”¹⁶—and I got a lump in my throat. It was moving; it was such a surprise. And that was what was refreshing about *McGirt*—the idea that the rule of law would be followed by the courts, even in Indian law cases, which can be kind of unusual.

Castro-Huerta did not give me the same good vibes. It made me feel like we are back in the old days. The majority opinion has a lot of troubling rhetoric which we will talk about. But we’ve seen it all before.

I teach a really awful course in law school called Federal Indian Law. And I will teach it again this fall. And I say it’s really awful because, it has a few good moments, but, mostly, the course is 14 weeks of how the law has failed my people. And, for someone who loves the law, the course of Indian law cases can be pretty depressing. And so, for my own sanity I have learned to read past a lot of the bad editorializing in Supreme Court opinions. And the majority opinion in *Castro-Huerta* has a lot of rhetoric that it’s best just to sort of read past.

The reasoning in *Castro-Huerta* is frustrating in much the same way that *Oliphant v. Suquamish Indian Tribe*¹⁷ is frustrating. *Oliphant*, as most of you will recall, is the 1978 decision that suddenly held for the first time in 200 years of American history that tribes lack criminal jurisdiction over non-Indians. But it didn’t

15. *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

16. *Id.* at 2459.

17. 435 U.S. 191 (1978).

explain the law, or the treaty, or the case, that made that so. It lacked any legitimate basis in law, and that's the same feeling that I had from reading the majority in *Castro-Huerta*.

Justice Kavanaugh's majority opinion says that *Worcester v. Georgia*¹⁸ has effectively been overruled, but does not say when it was overruled, and does not say how it was overruled, and does not say who overruled it.¹⁹ It points to no congressional actions. And that's frustrating in a country that claims to be governed by the rule of law. Show your work, Supreme Court. I just want to see you show your work.

And we know that *Worcester* certainly represented the understanding of the law when the Trade and Intercourse Acts and the General Crimes Act were passed by Congress.²⁰ And *Worcester* says that state law does not apply in Indian country—it says that clearly.²¹ And so that should be the end of the question, at least for an originalist, one would think. And thus these so-called originalists are not adhering to their stated method of resolving cases. Is that hypocrisy frustrating to anybody else, or is it just to me? That's the kind of thing that drives Indian law professors nuts.

To the originalist, the history is absolutely paramount, except when it doesn't align with the preferred outcome.

I once met Justice Scalia in person. A lot of people place him up on the pedestal as the “original” originalist. The professor who introduced me to Scalia said, “This is Kevin Washburn. He teaches federal Indian law.” And Scalia, he could be very charming. He looked at me, and he said, “Really? Do you understand that stuff? We just make it up as we go along.”

18. 31 U.S. 515 (1832).

19. *Castro-Huerta*, 142 S. Ct. at 2502 (“[T]his Court long ago made clear that *Worcester* rested on a mistaken understanding of the relationship between Indian country and the States.”).

20. See *Worcester*, 31 U.S. at 556–57.

21. *Id.* at 595–96.

Truer words were never spoken by a Supreme Court Justice.

So there's a lot of rhetoric in *Castro-Huerta* that is really troubling and things we can be wringing our hands about, but honestly I got past those thoughts pretty quickly because again I've learned to read past that stuff. So let me tell you the more positive side that I see from this. *Castro-Huerta* may be a net benefit.

We don't necessarily want Indian reservations to be places where non-Indians can hide from state authorities, because that can make reservations lawless in some ways. And that puts a lot of responsibility on federal officials and federal public servants who are not really up to the task for this kind of work. That's what our Indian country criminal justice system looks like. It's the feds that must prosecute the major crimes and the felonies.

And that's now what we have in eastern Oklahoma. And, if you want more on that, about the institutional incompetence of the federal government to do this kind of work, just read my *Michigan Law Review* article from about 2006.²²

I don't think that the U.S. Attorney's offices are particularly well suited to this kind of work. The U.S. Department of Justice is the gold standard as far as quality of prosecution, but they can use some help in Indian country. Someone once laughed and told me that an FBI agent "can't find his butt with both hands in Indian country unless a tribal police officer helps him." And that's true with the prosecutors to some degree, too, and I was one of those prosecutors.

Oklahoma tribes have been great partners with Oklahoma state prosecutors for many years. Moreover, not a single Native American will ever be prosecuted under the decision in *Castro-Huerta*. This case makes new law, but it does not give states authority to

22. See generally Kevin Washburn, *American Indians, Crime, and the Law*, 104 MICH L. REV. 709 (2006).

prosecute Native Americans. This is not a Public Law 280 adoption.²³

And, secondly, *Castro-Huerta* doubles the number of governments that can prosecute non-Indians for committing crimes against Indians. And tribes can make that “triple” if they adopt the VAWA-enhanced jurisdiction provisions,²⁴ and so that’s a good thing.

The last thing I thought about when I read it is, I think this opinion may relieve the pressure that we were seeing from *McGirt*. How many cert petitions did Oklahoma file to challenge *McGirt*? It was dozens.²⁵

None of them were granted. But they were continuing to come, and this case takes a lot of the pressure off the perceived need to revisit *McGirt* or overrule it.

The Wall Street Journal has written several opinion page editorials²⁶ complaining about *McGirt*, and the

23. Public Law 280 authorized certain enumerated states to have criminal and civil jurisdiction over tribal lands within the state. Pub. L. No. 83-280, 67 Stat. 588 (1953).

24. Violence Against Women Reauthorization Act of 2013, H.R. 11, 113th Cong. § 904 (2013) (authorizing tribes to assume criminal jurisdiction over crimes of domestic violence committed by non-Indians against Indian women).

25. See Chad Hunter, *High Court Rejects 30-Plus McGirt Petitions*, CHEROKEE PHOENIX (Feb. 2, 2022), https://www.cherokeephoenix.org/news/high-court-rejects-30-plus-mcgirt-petitions/article_6829b61a-8453-11ec-8af2-e37cf0303f20.html.

26. M. Todd Henderson, Opinion, *Native American Sovereignty Is No Liberal Triumph*, WALL ST. J. (July 12, 2020, 2:27 PM), <https://www.wsj.com/articles/native-american-sovereignty-is-no-liberal-triumph-11594578446>; Sadie Gurman, *The Supreme Court Upended the Legal System in Oklahoma and Could Do It Again*, WALL ST. J. (Mar. 12, 2022, 10:00 AM), <https://www.wsj.com/articles/supreme-court-upended-the-legal-system-in-oklahoma-and-could-do-it-again-11647097200>; Editorial, *Justice Gorsuch Tears Up Oklahoma*, WALL ST. J. (Sept. 8, 2021, 6:41 PM), <https://www.wsj.com/articles/justice-neil-gorsuch-tears-up-oklahoma-mcgirt-creek-supreme-court-tribal-11627221756>; Editorial, *The Supreme Court’s McGirt Dilemma*, WALL ST. J. (Apr. 28, 2022, 6:47 PM), <https://www.wsj.com/articles/the-supreme-courts-mcgirt-dilemma-oklahoma-v-castro-huerta-neil-gorsuch-samuel-alito-11651182201>; Editorial, *More McGirt Mayhem in Oklahoma*, WALL ST. J. (Feb. 21, 2022, 5:27 PM), <https://www.wsj.com/articles/mcgirt-decision-oklahoma-native-american-reservation-jurisdiction-muscogee-creek-hughes-county-crime-racial-injustice-systemic-racism-11644772881>; Editorial, *More McGirt Fallout: The Case of the White Supremacist Choctaw*, WALL ST. J. (Apr. 11, 2022, 6:56 PM), <https://www.wsj.com/articles/the-case-of-the-white-supremacist-choctaw-supreme-court>

WSJ opinion writers can now move on and get on with their lives.

So when I first read *Castro-Huerta*, I was relieved in some ways that tribes are not losing any authority, and we aren't losing *McGirt* and that case remains good law. I think that there's some good here.

And one other thing I think we can be happy about is that Justice Gorsuch is sticking to his guns as the defender of tribal sovereignty. That's a very good thing. He's not dialing it back at all. I'm told that he's not always the most charming person on the Court among his peers. On the other hand, we have seen the atmospherics for Kavanaugh and Amy Coney Barrett and they are bad. Some of these Justices are starting to stake out their positions, and that's not a good thing. So those are some of the key points that struck me as I read the opinion the first time.

STACY LEEDS: As many of you know I wear several hats across Indian country. So, I'm going to give my gut reactions from three different perspectives briefly.

First, as an academic, I read this opinion and immediately I'm outraged. It's very easy for me to go to a place of intellectual panic mode, when I read this case through, for the first time.

And, like Dean Washburn said, from an academic standpoint, I'm stunned at some of the intellectual dishonesty in the majority opinion, and some of the very broad sweeping statements, particularly the constitutional law aspects, the lack of historical context

mcgirt-oklahoma-native-americans-crime-11649260615; Editorial, *An FBI Agent's Straight Talk on McGirt and the Mess in Oklahoma*, WALL ST J. (Apr. 24, 2022, 6:32 PM), <https://www.wsj.com/articles/mcgirt-v-oklahoma-native-american-reservation-fbi-supreme-court-tulsa-pd-systemic-racial-injustice-crime-policing-11650821774>; Editorial, *The Native American Victims of McGirt*, WALL ST. J. (Jan. 9, 2022, 5:13 PM), <https://www.wsj.com/articles/the-native-american-victims-of-mcgirt-oklahoma-supreme-court-11641589074>; Editorial, *How To Get Away With Manslaughter*, WALL ST. J. (Dec. 3, 2021, 6:48 PM), <https://www.wsj.com/articles/how-to-get-away-with-manslaughter-mcgirt-oklahoma-neil-gorsuch-supreme-court-11638484034>; Letter to the Editor, *Congress Can Solve Oklahoma's McGirt Problem*, WALL ST. J. (Apr. 25, 2022, 3:13 PM), <https://www.wsj.com/articles/congress-choctaw-reservation-mcgirt-11650659358>.

and the complete disregard for settled law or the role of Congress in all of this.

When I think about settled law across Indian country, rare is a time where even the *Conference of Western Attorney General's Indian Law Deskbook*²⁷ and the state courts in Oklahoma since the 1980s forward,²⁸ have both understood the presumptions against state jurisdiction is very entrenched: If a tract of land is truly “Indian country,” states just don’t have jurisdiction over these Indian country crimes when a Native person is involved, either as the perpetrator or as the victim. My academic takeaways, of course, match the dissenting opinion and some of the critiques therein.

I think that it’s so true, that it’s hard to fathom, there could be a bigger misstatement of what the field of federal Indian law is, than *Castro-Huerta’s* majority opinion. I truly lump this in with the horrible bucket of cases. It’s *Kagama*,²⁹ *Lone Wolf*,³⁰ *Oliphant*,³¹ and now add *Castro-Huerta*.³²

But then immediately I go to the tribal judge perspective, which is a much more pragmatic and unfazed. I actually read this decision for the first time in the parking lot, just after I pulled into the Muscogee (Creek) Nation. I parked and read the case before I walked in to do my docket there that week. There is a piece of me—and I know by talking to some of the tribal judges in Oklahoma they share the same view—that responds to this case and realizes that the day-to-day work in the tribal courts is not going to change very much because of this decision, at least not in the short term.

What we do on a day-to-day basis in tribal courts is pretty much going to stay the same. It’s going to mean a

27. CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK 160–61 (Larry Long et al. eds., 4th ed. 2008).

28. *State v. Kindt*, 782 P.2d 401 (Okla. Crim. App. 1989); *Cheyenne-Arapaho Tribes v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980).

29. *United States v. Kagama*, 118 U.S. 375 (1886).

30. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

31. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

32. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022).

lot more communication and cooperation in the field between the prosecutors. But the judges and the law enforcement in the field right now inside of Indian country, they're already working well on the ground with each other as to what happens next. This case shines the light on the prosecutors and who gets to first initiate prosecutions when there's concurrent jurisdiction situations and how they deal with the allocation of resources. From a tribal judge's perspective, everyone should join me in a collective sigh of relief now, after I've had a chance to read it through maybe ten times. It's going to be okay, like Dean Washburn said.

The morning after *McGirt*, I wrote a quick "think piece" that was published in *Slate*³³ and it said, basically, that the sun was going to come up the next day in Tulsa, and those state court judges were going to go to their jobs and they were going to not see a whole lot of changes in their day-to-day lives and the number of cases in their dockets.

Maybe their dockets would be reduced 10 to 20% in size, but the core of their mission what they do every single day doesn't change much after *McGirt*.

And I think that's also now true for the tribal court judges, at least as it relates to the Five Tribes³⁴ and Quapaw and Wyandotte and a few other nations that are directly impacted by *McGirt*.

The last two years has required a Herculean "scale up" that's still very much in progress. But after those new caseloads are absorbed, the dockets aren't going to change much and business as usual in those courts is going to be about the same. And this will calm things down a little bit in Oklahoma on the ground.

The only place where I see now that there's going to be a big overlap, that is worrisome to me, is in the

33. Stacy Leeds, *What the Landmark Supreme Court Decision Means for Policing Indigenous Oklahoma*, SLATE (July 10, 2020, 3:07 PM), <https://slate.com/news-and-politics/2020/07/supreme-court-mcgirt-oklahoma-tribal-courts.html>.

34. The Cherokee, Chickasaw, Choctaw, Creek, and Seminole Nations.

domestic and family violence cases under VAWA.³⁵ And we're already slated for additional changes to take place October 1, 2022, when the new VAWA reauthorization goes into effect with additional covered crimes.³⁶

I don't see a situation, as a practical reality, where all three sovereigns end up prosecuting someone for the same conduct. It's just going to be a collaborative process to work this out.

Finally, and I'll end on this and defer to a little bit later in our conversation, but the third hat takes me right back to that academic piece. The third hat is as a Cherokee person and a Cherokee lawyer.

And this case is a Cherokee Nation case, and the Court is wrong, wrong, wrong, in its take on Cherokee legal history and Cherokee treaty guarantees and the Cherokee Nation's relationship with the United States, in terms of what the Cherokee Nation bargained for and successfully negotiated. I'll say a little bit more about that later, but it's a seesaw of a continuum with me with a pragmatic middle piece somewhat joins in with what Dean Washburn said.

ROBERT MILLER: When I first heard of the decision, well, I knew what the case was about and I, being an optimist, some of you might not think I'm an optimist—like Kevin said, we teach Indian law, it's hard to be an optimist sometimes—but I'm looking for the silver lining to this cloud and it's that it does not impact tribal criminal jurisdiction at all, in my opinion.

35. Prior to the 2013 VAWA Reauthorization, only the federal government had the jurisdiction to prosecute non-Indians for certain sexual assault violations against Indian women occurring on tribal lands due to *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). The current VAWA provisions extend such jurisdiction to tribes. Violence Against Women Reauthorization Act of 2013, H.R. 11, 113th Cong. § 904. *Castro-Huerta* extended such jurisdiction to state governments, effectively creating a trifecta of potential jurisdiction to prosecute sexual assault crimes by non-Indian offenders against Indian women.

36. Violence Against Women Reauthorization Act of 2022, S. 3623, 117th Cong. § 804 (expanding the types of crimes tribes have jurisdiction to prosecute, including assaults on tribal justice personnel, child violence, dating violence, domestic violence, obstruction of justice, sexual violence, sex trafficking, stalking, and violation of a protection order).

Tribal sovereignty, I mean does it irritate you to see state troopers or city cops driving across your land so maybe there's a little bit of an affront to the sovereignty of an Indian nation. But prosecution of non-Indians is not a power most tribes have accepted in the VAWA situation that I think both Stacy and Kevin just mentioned.

So I tried to see the positive side of it, and Kevin referred to this already, but when we rely on the feds for criminal jurisdiction, well, there's been a lack of law enforcement often. What's the declination rates that we've moaned about for years and the Indian Law and Order Commission has investigated.³⁷

And then I'm looking back to my own law practice back in the late 1990s. I was representing a tribe in a PL-280 state,³⁸ so we were reliant on the states for criminal jurisdiction, and this tribal community wanted more law and order. Because the states, as I'm sure we'll talk about later, they were handed this PL-280 jurisdiction, but not given one dollar of federal money to pay for it.

And a lot of the states were stunned to find out that they have to do this, but can't collect taxes from the reservation or from Indians living there.³⁹ And so, law enforcement by state troopers in PL-280 states, I believe the facts show, and Carol Goldberg⁴⁰ and others have written, was woeful. So this tribal client I represented, we were negotiating with the county sheriff's office to pay them to patrol our reservation more often. We can't rely on the feds to prosecute all the non-Indians who injure

37. INDIAN LAW & ORDER COMMISSION, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES (Nov. 2013), https://www.aisc.ucla.edu/iloc/report/files/a_roadmap_for_making_native_america_safer-full.pdf.

38. Public Law 280 authorized certain enumerated states to have criminal and civil jurisdiction over tribal lands within the state. Pub. L. No. 83-280, 67 Stat. 588 (1953).

39. See, e.g., *Bryan v. Itasca Cnty.*, 426 U.S. 373 (1976) (holding that state taxation of Indian reservation lands and Indian income from activities carried on within the boundaries of the reservation is not permissible absent congressional consent).

40. Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405 (1997).

Indians in now what is 43% of Oklahoma. So I'm trying to look for the positive side.

But then, after reading the case and reviewing it again, I'm appalled. Originalist? Kevin already mentioned that this is a joke, and we'll get into this. I wrote here [on the slip opinion], "are you joking me?" Textualist? I point this out in *McGirt*. I'm publishing a book on *McGirt*,⁴¹ and the only textualist in that case was Gorsuch and the liberal Justices who joined him.

Kavanaugh discusses the "the early years of the Republic,"⁴² and then he goes on to excoriate the *Worcester* decision.⁴³

So I thought the textualist and the originalist really liked the early years of the Republic and what the founding fathers said and what James Madison said about why we needed a Constitution. That the Articles of Confederation were not strong enough to keep state governments out of Indian affairs, and so we get the Constitution with the Indian Commerce Clause, we have to this very day. So I'm stunned.

And the Tenth Amendment is a savings cause for the States for the things the Constitution does not assign to the federal government.

That whole paragraph in the majority opinion has only one citation to a whole lot of pretty bold statements,⁴⁴ and then the majority cites the Tenth Amendment.⁴⁵

Wait a minute, what about the Indian Commerce Clause that expressly gives Congress the power over

41. ROBERT J. MILLER & ROBBIE ETHRIDGE, A PROMISE KEPT: THE MUSCOGEE (CREEK) NATION AND *McGIRT V. OKLAHOMA* (2022).

42. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2493 (2022).

43. *Id.* ("[T]he 'general notion drawn from Chief Justice Marshall's opinion in *Worcester v. Georgia*' has yielded to closer analysis.' 'By 1880 the Court no longer viewed reservations as distinct nations.' Since the latter half of the 1800s, the Court has consistently and explicitly held that Indian reservations are 'part of the surrounding State' and subject to the State's jurisdiction 'except as forbidden by federal law.'") (citations omitted) (quoting *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 72 (1962)).

44. *Id.*

45. *Id.* at 2493, 2503.

Indian affairs?⁴⁶ States are not mentioned in the Indian Commerce Clause. What about Article VI, the Treaty Clause of the Constitution?⁴⁷ The Constitution prevents states from enacting treaties. The Treaty Clause impliedly referred to Indian nations and the nine treaties that the United States had already entered with Indian nations before the 1789 Constitution became effective. States aren't involved in treaty relations. Only the feds are, and that's with foreign nations and with tribal governments.

And then, as we all know, the two references to Indian peoples in Article I and the Fourteenth Amendment recognize them as citizens of their own nations, not state or federal citizens.⁴⁸

I am just blown away that originalists, textualists, ignore all that and instead cite the Tenth Amendment. I'm hoping we can call that sentence dicta, where the majority alleges that the Constitution says states have jurisdiction in Indian country.⁴⁹ But it's pretty hard to call that dicta though, and hard to think the majority are not going to cite that in the future. So yes, *McGirt* is still alive now, but I fear for that.

We wondered how Amy Coney Barrett's Indian law jurisprudence would play out, in contrast to Ruth Bader Ginsburg, whom she replaced. After her opinion in

46. U.S. CONST. art. I, § 8, cl. 3. ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes . . .").

47. U.S. CONST. art. VI. cl. 2. ("This Constitution . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .").

48. U.S. CONST. art I, § 2, cl. 3 ("Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free persons . . . and excluding Indians not taxed, three fifths of all other Persons."); *Id.* § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ."); *Id.* amend. XIV, § 2 ("Representatives shall be apportioned . . . according to their respective numbers . . . excluding Indians not taxed.").

49. *Castro-Huerta*, 142 S. Ct. at 2493 ("[T]he Constitution allows a State to exercise jurisdiction in Indian country. Indian country is part of the State, not separate from the State.").

*Denezpi*⁵⁰ and the fact that she joined *Ysleta del Sur Pueblo*⁵¹ her positions looked kind of favorable for Indian law, but now she has raised questions after *Castro-Huerta*.

DERRICK BEETSO: Thank you, I appreciate you sharing your perspectives, and I think as many of you tuning in right now already know, the most egregious departure in *Castro-Huerta* from prior precedent is the concept of the Tenth Amendment being used to support territorial jurisdiction by states over Indian territory. Professor Miller, can I ask you to discuss a bit more your thoughts on this departure from the prior precedent, what makes it such a big deal.

ROBERT MILLER: Well, I started digging into that already, didn't I? So it's what you just mentioned, citing the Tenth Amendment, the savings clause for the States, and ignoring what the founding fathers intended, and what they actually said in the Constitution in Article I, section eight, clause three⁵²; in the Treaty Clause, Article VI⁵³; and in their definitions of Indian peoples as citizens of their own governments. So to me that's very disturbing.

Also I forgot to mention that the first time I heard how the case had been decided it made me think of *Nevada v. Hicks*,⁵⁴ and so I just want to remind people of the language from *Hicks*. Scalia writes this in 2001—this is a quote—"[s]tate sovereignty does not end at a reservation's border."⁵⁵ He goes on a little farther and he cites the 1958 Department of the Interior version of the Cohen's *Handbook*, "Ordinarily, it is now clear, 'an Indian reservation is considered part of the territory of

50. *Denezpi v. United States*, 142 S. Ct. 1838 (2022) (holding that the Double Jeopardy Clause does not bar successive prosecutions of offenses arising from a single act if those offenses are defined by separate sovereigns, even if a single sovereign prosecutes them).

51. *Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929 (2022).

52. U.S. CONST. art I, § 8, cl. 3.

53. U.S. CONST. art VI, cl. 2.

54. 533 U.S. 353 (2001).

55. *Id.* at 361.

the State.”⁵⁶ He’s actually citing the Department of the Interior’s version of the Cohen *Handbook*. So, we’ve lived with language like this before.

I think you asked how we will teach this. I’ll talk a little more about how I teach *Hicks*. I hope this case will be one that we can ignore. In the panel discussion that UCLA put on,⁵⁷ one of the participants said that very thing—this may be one of the cases that you hardly talk about. The *Kake*⁵⁸ decision cited in *Castro-Huerta*,⁵⁹ when’s the last time you had your class read the *Kake* decision? I never have.

But this is such a departure from the basics of Indian law that came from the original times, the original days, that I don’t understand how these five Justices can ignore that and just say that *Worcester* has been put to rest. And you claim you’re an originalist and a textualist? What about the rest of the Constitution?

DERRICK BEETSO: Thank you, Professor Miller. Professor Leeds, I want to return to you.

Your tribe, the Cherokee Nation, has been working very diligently with the state of Oklahoma, and others, on these issues. Do you see that we’re continuing as needed, or does the *Castro-Huerta* decision present the challenge of state officials potentially backing away from ongoing partnerships or collaborations?

STACY LEEDS: Well, we were just talking about the UCLA panel yesterday, and I think that Cherokee Attorney General Sarah Hill, did a phenomenal job talking about specifically what has gone on in the Cherokee Nation and just sorting out what this case means to the tribes. But, if I speak more broadly for the tribes in eastern Oklahoma as a whole, it seems that the practical effect of this is going to be more boots on the

56. *Id.* at 361–62 (quoting U.S. DEPT. OF INTERIOR, FEDERAL INDIAN LAW 510 & n.1 (1958)).

57. UCLA School of Law, *Castro-Huerta v. Oklahoma and the Attack on Tribal Sovereignty: Where Do We Go from Here?*, YOUTUBE (July 6, 2022), <https://www.youtube.com/watch?v=ZmU8d4l6B0M>.

58. *Organized Vill. Of Kake v. Egan*, 369 U.S. 60, 72 (1962).

59. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2493 (2022).

ground, in terms of prosecution. And we probably need to remind ourselves, and everyone else, what huge strides the tribes have made since the 1980s.

If you dial back to the 1970s and '80s, it wasn't that very long ago that Oklahoma continued to take the position that the state could prosecute everyone, everywhere in the state of Oklahoma, including on restricted and trust property, and even as to Native defendants. And so, in the 1980s, in response to what I now call, "McGirt 1.0," that first round of cases that said "no (Oklahoma) this is Indian country" under 1151(c) and (b),⁶⁰ and states don't have jurisdiction over the Natives who commit crimes in Indian country.⁶¹

But what happened during that time in the 1980s is that we start to see a lot of cross-deputization agreements on the ground in Oklahoma. So many, that by the time *McGirt* was decided, there were 50 or 60 or 70 cross-deputization agreements that individual tribes had with Oklahoma over a range of law enforcement issues and jurisdictions.⁶²

And in the 1990s, the Oklahoma Supreme Court led the charge to develop the Oklahoma full faith and credit statutes.⁶³ And so, if you're a tribal judge in Oklahoma or a state court judge in Oklahoma, you routinely see cases that come out of the other jurisdiction that then find their way into your court. And I think that that's just always going to continue to be the case now, even as it relates to criminal jurisdiction.

Now, in those 1980s cross-deputization agreements and then into the 1990s, the elephant in the room was

60. 18 U.S.C. § 1151(b)–(c).

61. *State v. Kindt*, 782 P.2d 401 (Okla. Crim. App. 1989); *Cheyenne-Arapaho v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980).

62. OKLAHOMA SECRETARY OF STATE, TRIBAL COMPACTS & AGREEMENTS, <https://www.sos.ok.gov/gov/tribal.aspx> (last visited Feb. 17, 2023).

63. See Shelly Grunsted, *Full Faith and Credit: Are Oklahoma Tribal Courts Finally Getting the Respect They Deserve?*, 36 TULSA L.J. 381, 389–90 (2000) ("In 1992, Oklahoma's legislature enacted a statute that allowed the Oklahoma Supreme Court to establish standards to recognize judgments and decrees of tribal courts. . . . [The standards were] adopted by the Oklahoma Supreme Court in 1994.").

this 1151(a) argument⁶⁴ that finally caught traction in the Tenth Circuit in *Murphy v. Royal*,⁶⁵ but it has always been hanging in the background.

But I think that people who are not in Oklahoma working in this area would be shocked at how few cross-deputization agreements happened after *McGirt*. There were already many agreements in place prior to *McGirt*, and we've seen a few more since then. That's the first piece of it.

The second piece is that additional counties and agencies are included over time. A lot of these arrangements have been in place for a very long time, and so law enforcement officials on the ground have acted in good faith and in partnership with each other at these local levels over time. When it comes to first responders from the state or the tribe, and then more rarely from the federal government, when an arrest is made, the suspect gets handed off to the proper prosecutorial authority.

After *McGirt*, an arrest would take place and it would get assigned to either the tribe or the federal government. And now, after *Castro-Huerta*—and here's the title of our presentation—the real rebalance that's happening in all of this is that *Castro-Huerta* rebalances that state-to-federal assignment and vice versa but leaves intact a lot of that balance that was already there and so that's where the big rebalancing now takes place.

But I think that it's also really important to think about Justice Barrett, and you mentioned the first few Indian law cases where Justice Barrett participated. The most important one to me in this conversation is the very recent unanimous decision in *Cooley*.⁶⁶ When there's a public safety call, a tribal officer can detain and hold a

64. Although the governing documents of many tribes in Oklahoma have defined their modern-day boundaries consistent with original treaty terms, Oklahoma has long presumed reservation status had ended at statehood. Tribes were hesitant to advance their reservation status in federal or state court for fear of a negative ruling that could foreclose those legal arguments in the future for one or all tribes.

65. 875 F.3d 896 (10th Cir. 2017).

66. *United States v. Cooley*, 141 S. Ct. 1638 (2021).

suspect and then pass off that person to the appropriate jurisdiction, which will also happen in reverse.

Now what changes though, on the ground, is that handoff piece. And so, now, for the first time ever, there is this bifurcated criminal law chart, and I've thought about how I would teach this the next time around, and it basically draws a line between Native defendants on one side and everybody else on the other. It will continue to be the case that if the alleged offender is Native, then it's a federal and/or tribal question. And if the person is not Native, now there's that federal-to-state handoff. And then the VAWA-covered cases might involve the tribe, too, in those situations.

But I think on the ground, most of the law enforcement officials are really good at this and they get this, and they have cooperated on the ground for so long. And, I don't see on the local level the same sort of posturing that you see in offices where people are running for election, such as some of the DA-level positions and at the executive level in the state of Oklahoma.

It is not unusual at all for me as a tribal judge to see a state officer in tribal court and vice versa—you see that routinely. But where there will be a need to have more conversation about this is, who gets to decide first in any given case and, most importantly, who is going to pay for it? My guess is that the state will often take the first pass because they can act a lot faster than the federal government, at least in those early charging decision questions. And we already see this on the ground in the tribal context. The tribes will often hear about a case from the federal government, but they will make the initial charge and the initial detention to create a tribal hold before the U.S. Attorney's Office can determine how to proceed. There's often a big time-gap involved in that.

And so one of the challenges is that the tribes, right now, in Oklahoma are bearing huge financial cost of pretrial detention on cases that the federal government should prosecute. And you're going to see that same dynamic now play out between the federal government

and the state. So, in sum, the biggest problem that I see on the ground is the financial resource question. There's only so much money to go around, and now what do you do if there's no extra money? And when you have the possibility of three cooks in the kitchen, something has to give. And I think that now, this is where compacts and agreements might actually be very important.

When we had our first *McGirt* webinar in 2020, I think there was uniform agreement among the panelists that it would be a very bad thing for tribes to go out and compact to give all of that authority back to Oklahoma, especially giving back jurisdiction over Native people.

Now no one could have predicted that the Supreme Court would do that, but now that we are here, the agreement and compact phase might be about who prosecutes certain types of crimes and who gets first dibs on other types of crimes that could provide some clarity in the field. But that is not the tribe agreeing to give up jurisdiction that it has just won. It's saying as a practical matter of prosecutorial discretion, here's how we're going to proceed, on the ground.

And so, I think that that will be part of the next phase of conversations now. And, I also think that, on that compacting piece, we're going to talk about what you go to Congress and ask Congress to fix about this case, but the big plug that I have is this: I think it's unrealistic that you're going to go to Congress and get a complete *Castro-Huerta* fix or a complete *Oliphant* fix. I don't think that's realistic. I don't think all tribes would necessarily support that.

But what if *Castro-Huerta* created a situation that has more play and interaction between the states and the tribes? Right now, under federal law the United States Attorney owes a trust responsibility to the tribes to prosecute cases and there are statutorily mandated reporting requirements and conversations that must take place, as well as the role of the Special Assistant United States Attorneys.

What if that question about maybe codifying some of the results, but putting a consent dynamic in there and

adding to the communication piece? If the state is going to prosecute a crime inside Indian country where there is a Native victim, can there be some accountability like the one that is already statutorily mandated as to the U.S. Attorneys? That kind of conversation, I think, will be taking place over the next six months or so or in the coming years.

DERRICK BEETSO: Thank you, Professor Leeds. Dean Washburn, I want to turn to you now here and given your prior role as Assistant Secretary of Indian Affairs and in your service at the National Indian Gaming Commission and in the Department of Justice, what do you think this decision could mean for the federal trust responsibility? And I'm asking that question broadly on purpose, so you can feel free to answer it as broadly or specific as you like.

KEVIN WASHBURN: Thank you. This case in no way diminishes the principle of the federal trust responsibility that Dean Leeds just referred us to. The U.S. still has the responsibility to prosecute non-Indians who harm Indians in Indian country.

But that responsibility has never been very enforceable. So, there are some other ways it's enforceable, such as they have to report, they have to consult with tribes about those cases and such, but it's never really amounted to much. It sometimes feels as though the trust responsibility and five bucks will get you a cup of coffee at Starbucks, but it doesn't do you a whole lot more than that in Indian country in these kinds of cases.

The state now has the power, but it does not necessarily have the same sense of responsibility to tribes and Indian people. Remember that states don't have a trust responsibility to tribes or Indian people, and that's for certain. But state prosecutors, they will be held accountable through political processes, and there are a lot of Native voters in Oklahoma. And my tribe, and Dean Leeds's and Professor Miller's tribes, they know how to exert pressure on local officials and make themselves heard in local elections.

They haven't cracked Governor [Kevin] Stitt yet, but down-ballot they've had a lot of influence, and I think the district attorneys and prosecutors care what tribes think, because, well, I've said it before so I'll say it here too: remember the American political process is corrupted by money, and even more so since *Citizens United*.⁶⁷ And, unlike when I was growing up in Oklahoma, some tribes now have money. So tribes can now engage in the corrupt political process, just like corporations under *Citizens United*, and everyone else. So tribes have a lot more influence over state prosecutors these days, and that's a good thing. And so they may be more responsive to tribes in some places because of that dynamic.

Brent Leonhard from Umatilla raised an interesting question in the Q&A that came right to my mind when I read *Castro-Huerta* too, which is how the Petite Policy at DOJ will affect this?⁶⁸ We now have dual sovereignty here, so the state and federal governments could prosecute the very same crime in Indian country, and we've seen that come up over and over, and that does not violate double jeopardy.⁶⁹ But the Petite Policy provides that, generally, the United States will not prosecute a person if the state has already prosecuted because we don't need to prosecute people twice for the same crime in the United States, generally.⁷⁰

We do this routinely in Indian country cases, though, because tribal penalties are so small. So sometimes we need a follow-on federal prosecution. But the trust responsibility may very well affect how we apply the Petite Policy in Indian country, even if the state has

67. *Citizens United v. FEC*, 558 U.S. 310 (2010).

68. See generally J. S. Allerman, Note, *Petite Policy—An Example of Enlightened Prosecutorial Discretion*, 66 GEO. L.J. 1137, 1137 (1978) (“Under the first prong of the policy . . . defendants who are prosecuted by a state will not be prosecuted for federal crimes arising from the same act except when there is a compelling federal interest and the approval of an Assistant Attorney General is obtained. The second prong of the policy . . . prohibits separate prosecutions for different federal offenses committed during the course of a single transaction unless an Assistant Attorney General approves.”).

69. *Denezpi v. United States*, 142 S. Ct. 1838 (2022).

70. U.S. DEP'T OF JUST., JUST. MANUAL § 9-2.031 (2020).

already prosecuted. If the state didn't do an adequate job, the trust responsibility would suggest that the U.S. should come in and prosecute. Even in Public Law 280 states, the feds have come in behind states and prosecuted under the provision in the Tribal Law and Order Act that that authorized this action.⁷¹ So Oklahoma at least, may be in a similar position as in Public Law 280 states, at least in that respect.

But remember the feds can prosecute if the state refuses and that's valuable, here too. And remember, a state can never prosecute an Indian on the reservation.

Let me tell you what the trust responsibility has really looked like in the *McGirt* era where the rubber meets the road: that is, in budgets and funding. And do you know that DOJ asked for \$33 million in annual increase in its budget to address *McGirt* in eastern Oklahoma?⁷² It was apparently saying at one point that it needed several hundred new AUSAs in Oklahoma to address the huge new caseload that they would see from *McGirt*.

The Department of Justice went into a full-scale panic almost as bad as Governor Kevin Stitt, or maybe they were working to "let no perceived crisis go to waste," but they asked for hundreds of prosecutors and millions of dollars in the U.S. Attorney's Offices in Oklahoma. Since this is an ASU-sponsored program, let me put this in perspective for people. The reservations in eastern Oklahoma after *McGirt* are not that different in size from the reservations in Arizona in sheer square miles. So there's not a significantly different amount of Indian country in Arizona and Oklahoma.

Moreover, the actual native populations in Oklahoma and Arizona are not that dissimilar, although some of the Native population in Oklahoma is outside of Indian country. So they're kind of similar there, too. So,

71. Tribal Law and Order Act of 2010, H.R. 725, 111th Cong. § 221 (allowing Indian tribes to request the federal government to exercise concurrent jurisdiction to prosecute certain criminal violations within Indian country).

72. U.S. DEP'T OF JUST., FY 2022 BUDGET REQUEST, <https://www.justice.gov/jmd/page/file/1398851/download>.

the bottom line is that they have similar sized reservation lands, similar sized native populations, but Arizona has nearly 8 million people and Oklahoma has only about 4 million people.

And I'm not sure that Arizonians are all that much more law abiding than Okies—I haven't looked into that statistic—but things would seem to be pretty comparable between Arizona and Oklahoma, but Arizona has a lot more people.

And the U.S. Attorney's Office in Arizona does all of its work in Indian country with fewer than 25 AUSAs. And Indian country, by the way, is a lot further away, generally, in Arizona from the U.S. Attorney's Offices, because way out on the Navajo reservation you can drive five or six hours to reach a crime scene if you're an AUSA living in Phoenix. Going way out in Tohono O'Odham from Tucson can also be a great distance. It's a long way away. So it's harder to do this work in Arizona, in many respects, and there are fewer than 25 Indian country AUSAs in Arizona handling all that work.

So, I don't think Oklahoma really needs 400 new Assistant U.S. Attorneys. I don't think they need 200 new Assistant U.S. Attorney to do that work. But that's what DOJ sought.

The irony is that the people who really have to work after *McGirt* is the tribes. The tribes are the ones whose workload is increasing most. *Castro-Huerta's* not going to solve that at all, and Interior asked for little more for BIA and tribes,⁷³ compared to the \$33 million requested by DOJ. So tribes have the greatest need for support here. And, today, tribal self-governance is a more relevant principle than the trust responsibility. And *Castro-Huerta* is sort of neutral on tribal self-governance, as I said.

Following *McGirt*, my own tribe, the Chickasaw Nation, went from handling 75 criminal cases a year to

73. Press Release, Dep't of the Interior, President Biden's Fiscal Year 2023 Budget Makes \$18.1 Billion Investment in Interior Department Initiatives (Mar. 28, 2022), <https://www.doi.gov/pressreleases/president-bidens-fiscal-year-2023-budget-makes-181-billion-investment-interior>.

50 cases per week. And you know what? *Castro-Huerta* makes no difference to those cases. All of those are going to continue, because they're not prosecuting non-Indians, so they're going to continue doing all that work. Fortunately, I think my tribe is pleased to be doing them.

And following *Castro-Huerta*, we're still going to need to be doing most of those cases and we're going to need more funding to do it. All the tribes are going to need more funding. I will say that DOJ has also asked for more money for victim services. They put a heavy request in for victim services, and it is true, someone mentioned this, I think, in the Q & A, but the feds handle victim services better than states do because they've got more resources. So that's one reason why you would want the feds prosecuting your cases instead of the state sometimes.

So I think that's kind of the where we are in the trust responsibility. It doesn't have a whole lot of application, except for funding and we need to push for more trust responsibility funding for criminal justice and public safety in Indian country.

DERRICK BEETSO: Appreciate that, Dean Washburn. Professor Leeds, this decision takes me back to the Rehnquist era. You mentioned *Oliphant*⁷⁴ earlier, we talked a little bit about *Nevada v. Hicks*,⁷⁵ and there was *Cotton Petroleum*.⁷⁶

At that time, tribes were losing on many critical issues that involved tribal sovereignty, and it actually spurred the tribes' call for establishment of the Tribal Supreme Court project, which is now co-directed by NARF (Native American Rights Fund) and the National Congress of American Indians (NCAI). Tribes have had a relatively good run from 2019 up until last week, but are we in a similar time now where tribes should be cautioned from going to the Court to have their issues reviewed?

74. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

75. 533 U.S. 353 (2001).

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

STACY LEEDS: People will have to make sure that they craft their cases as well as possible. In terms of taking risk, I think that's always the case.

I think that the most profound off-the-record development of the NCAI and NARF relationship has been the coordinated efforts on all of these amicus briefs.

No matter whether United States Supreme Court trends are favorable or unfavorable to tribal interest, having that whole body of Indian law practitioners and scholars joined in a common purpose on this work is probably here to stay and it will always need to be. We need to be careful, knowing where the Supreme Court appears to be now, but it'll be very interesting to watch over the next few years to see where these lower federal courts bite and where they don't bite with the broad language in this case.

Picking up on something that Professor Miller said earlier, I certainly hope that it's a "one-off," and the two cases that come to mind where people assumed that there would be this parade of horrors, and then there wasn't. First, after *Nevada v. Hicks*,⁷⁷ people thought that this would lead to an expansion of state patrols and investigations inside of Indian country all over the United States. That didn't happen.

Another case on the civil side was the *Dry Creek Lodge* case out of the Tenth Circuit,⁷⁸ where there was this fear that people would be able to run to federal court and argue about the nature of whether they had access in the political process and otherwise with tribes, and that really didn't get a whole lot of mileage either.

I do live in Oklahoma, and I am not naïve enough to think that this won't empower people to make attempts to further encroach on tribal sovereignty. The first place that I see this coming up, that everyone will just have to be really smart about, is in all of the pending and forthcoming tax cases before the Oklahoma Tax Commission. That immediately comes to mind.

77. 533 U.S. 353 (2001).

78. *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980).

And it raises this cyclical set of arguments that's been going on in Oklahoma and now we will see the flipside of that. And so, if you'll walk with me for a moment, you know when *McGirt* was decided Oklahoma officials would say, "Oh, this is absolutely only about criminal jurisdiction and nothing else. Right?"

Then the tribal advocates would retort: "No. Indian country is Indian country and if there's a reservation for criminal purposes there's a reservation for every other purpose that Congress hasn't stepped in and said something one way or the other about."

And so immediately people started making these arguments based on the *McClanahan*⁷⁹ and *Sac and Fox* tax decisions⁸⁰ regarding income tax of individual Natives inside Indian country. And there's a whole body of case law on taxation that shouldn't be impacted by this, but that will be one of the first places where that battleground plays out.

I can certainly put *Castro-Huerta* as the third case in the line of *McBratney*,⁸¹ *Draper*,⁸² *Castro-Huerta*. And I would call that some sort of an inherent state jurisdiction Indian country trilogy that relates to criminal cases where non-Indians are the defendants and those all go in this contained place and that really is where Indian advocates put this, in that box. Those three cases, formed together, say a whole lot about states' inherent sovereignty but absolutely nothing about Native defendants or anything to do with civil, regulatory, or adjudicatory jurisdiction. Only criminal law and the power of the state over non-Indians.

I think that there's a big conversation out there still about what happens in concurrent jurisdiction in situations where Congress has spoken. In addition to Public Law 280, I know that there are always ongoing

79. *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164 (1973).

80. *Okl. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993).

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

82. *Draper v. United States*, 164 U.S. 240 (1896).

conversations about the Kansas Act,⁸³ which similarly creates concurrent jurisdiction of all three sovereigns. So there's places around the country where we can all look to for how this might play out, but that would be something to look at.

I guess that's where I would stop with that part of the conversation before we pick up the other, but I think that it's just a question of containment and limitation to what was actually before the court.

DERRICK BEETSO: Appreciate that, Professor Leeds. Professor Miller, how should law professors and law students be discussing this case? The holding itself, as Professor Leeds just described, could be described as a narrow extension of concurrent jurisdiction in line with the *McBratney* exception,⁸⁴ and maybe that's the federal Indian law takeaway at the end of the day, but how would we hypothetically discuss this case in your federal Indian law classroom in 2023?

ROBERT MILLER: Well, I suppose I would teach it the same way I teach *Hicks*. I think Stacy mentioned earlier *Lone Wolf* and *Kagama*, and *Oliphant* I think Kevin mentioned, I mean there are some notable losses in Indian law.

Obviously, we teach those cases to our students just straight up. Here's the law, how do you find a path for a tribal government to do what it wants to protect its people, to protect its territory, to exercise its sovereignty?

I think you suggested in an email, to me, Derrick, should we teach this case for two days? No, I do not want to devote two days to this case. As for *Hicks*, I tell my class, and I have since 2001, we'll see if the Supreme Court advances that language any further. Stacy just said that we haven't seen too much of that—state troopers patrolling the reservation looking for off

83. 18 U.S.C. § 3243 (granting Kansas jurisdiction over state offenses committed by or against Indians on Indian reservations located within the State of Kansas).

84. *McBratney*, 104 U.S. at 624 (holding that state courts, rather than federal courts, had jurisdiction over a crime by a white man against another white man on the Ute Reservation in Colorado).

reservation violations, etc. So I try to cabin *Hicks* to its facts and what it said, an unusual situation in which Scalia and, I forget the vote, but anyway a majority of the Court says, in this case the tribal court does not have authority over these state troopers to decide its adjudicatory jurisdiction.

Can we cabin this case to the *McBratney*, to the *Draper*, and I think a lot of people forget the 1946 *Martin* case.⁸⁵ The Supreme Court decided in 1946 that New York had this same kind of *McBratney* jurisdiction.

So is this just in that line? I mean, it's a loss that we have to talk about and we have to deal with, but I want to say something I just said yesterday to one of my recent grads who's now my colleague: since Gorsuch has been on the Court, all these young Indian lawyers think that we win every case Supreme Court. What is it, folks? I think eight for eight or nine for nine since Gorsuch joined the Court until this *Castro-Huerta* loss. I want the audience to realize for the vast majority of my career, 31 years since I graduated law school, we have lost almost 80% of our cases in the Rehnquist Court and the first 12 years of the Roberts Court. For a while, we were one of ten in front of the Roberts Court.

So this is why tribal attorneys and NCAI started the Supreme Court project because of question over how we could address this losing record, how can we stay out of the Supreme Court, if at all possible?

Now all of a sudden, we went eight for eight or nine for nine and we are doing cartwheels, but you don't always win every case. So, again, I want to tone this loss down. But I started out saying I'm an optimist and see the silver lining. Well, now I'll tell you my paranoid part.

I'm afraid, as I already said, of that sentence that Kavanaugh wrote, that the Constitution grants states jurisdiction in Indian country.⁸⁶ I don't think you can say it's dicta; it sure looks relevant to the holding. And, my

85. New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946).

86. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2493 (2022) (“[T]he Constitution allows a State to exercise jurisdiction in Indian country. Indian country is part of the State, not separate from the State.”).

gosh, I'm not much of a bettor and I'm not much of a forecaster, but you're going to see that sentence quoted back to us.

And with these five Justices on the Supreme Court, who are going to be there quite a while, I am worried about future cases. And I'm paranoid enough that even though, yes, the Supreme Court rejected hearing the question about *McGirt* in this case, and as Kevin said in dozens and dozens and dozens of other cert petitions, I was worried that the Supremes would take up *McGirt* again.

I just wonder what the other two panelists think. But I guess I'll talk right now about this, because I'm outraged by it. The majority relies on the Oklahoma Enabling Act, and they purposefully or, I guess you can't say this about Supreme Court Justices, ignorantly overlooked the very words used in that act.⁸⁷ I've written about what Kavanaugh wrote when he discussed the tribal treaties, including the Cherokee treaties: "[T]hose treaties have been supplanted: Specific to Oklahoma, those treaties, in relevant part, were formally supplanted no later than the 1906 Act enabling Oklahoma's statehood."⁸⁸

Now this is extremely troubling to me because the Court in *McGirt* found just the opposite of that.⁸⁹ And I also still wonder why the *McGirt* majority didn't emphasize more the 1906 Oklahoma Enabling Act, and so I want to tell you some facts.

"Supplant"? Why didn't he use the word "abrogate"? Is there some reason he didn't use the word "abrogate"? Did he slip that in? Because we know that for Congress to abrogate an Indian treaty, it must do so explicitly. And so now, I want to tell you what Congress knew about the Indian territory and what it stated would happen to reservations in the Oklahoma Enabling Act. That 1906 Act, that authorized the Oklahoma and Indian Territories to become the state of Oklahoma, expressly

87. *See id.* at 2503–04.

88. *Id.* at 2503.

89. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020).

refers to Indian treaties, and 18 different tribes, 21 different times.⁹⁰

I want to repeat and emphasize that. The Osage Indian reservation is “specifically,” referenced by Congress in the 1906 Enabling Act.⁹¹ So what was it telling the Oklahoma Territory and the Indian Territory that wanted to merge and become Oklahoma the state? Congress is telling them, “You have to remember those reservations and you have to disclaim all jurisdiction and rights in those lands.” And Oklahoma did that very thing in its 1907 constitution⁹² and, as Justice Gorsuch emphasizes in the dissent multiple times, that provision has never been amended.⁹³

Now I didn’t finish quite my point about how Congress was referring to reservations in those two territories, but Congress knew there were reservations. Congress knew they still existed, and Congress insisted that these two territories, if they wanted to become a state, had to forgo any claim of jurisdiction over the reservations. So the Five Tribes are mentioned, their lands, the word “reservation” is not attached to those tribes, but I would say it’s analogous. My tribe, and the other eight tribes that are northeast of the Cherokee reservation are specifically referred to in the Act by Congress—the nine Indian reservations northeast of Cherokee.⁹⁴ And three other tribes, including Kaw, are expressly mentioned in the Act.⁹⁵

Now, for those who believe in plain meaning, believe in originalism, what did the 1906 Congress say was in Indian Territory and the Oklahoma Territory? Twenty-

90. Oklahoma Enabling Act of 1906, Pub L. No. 59-234, 34 Stat. 267 (1906).

91. *Id.*

92. OKLA. CONST. art. I, § 3 (The . . . State [] agree[s] and declare[s] that [it] forever disclaim[s] all right and title . . . to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.”).

93. *See, e.g., Castro-Huerta*, 142 S. Ct. at 2509 (Gorsuch, J., dissenting).

94. Oklahoma Enabling Act of 1906, Pub L. No. 59-234, 34 Stat. 267 (1906).

95. *Id.*

one different reservations. And for Oklahoma to become a state, Congress ordered that it had to give up any claim of jurisdiction over all Indian nations and their lands.

The majority in *Castro-Huerta* purposely misreads this Act, but again I wonder why it wasn't emphasized more by the majority in *McGirt*? I believe the Enabling Act is strong evidence that the laws Oklahoma claims disestablished Indian country do not mean that at all. Congress showed its knowledge about the Indian Territory and that it recognized and expressly intended that Indian nations and reservations would continue to exist inside the new state of Oklahoma when it explicitly named all these tribes and reservations in the 1906 Enabling Act.

So where is the supplanting *Castro-Huerta* mentioned? Where is the abrogation of the Cherokee treaty rights here, my tribe's treaty rights, Chickasaw treaty rights, etc.?

So what was the majority saying and doing, what game are they playing? I am a little paranoid about the future and I'm not joking that I thought the Court might, even though they said we won't hear that question about whether to reverse *McGirt*, we know they're called the Supremes for a reason, and I have fears about Amy Coney Barrett being on the Court now, instead of Ginsburg. You asked me how I'll be teaching it. Cabin it, it's a loss, move ahead, learn how to deal with it, it's what Kevin and Stacy have been saying to us. The tribes are going to move ahead, we're going to deal with this, just as we have some of these other losses in the 240 years. Thanks.

DERRICK BEETSO: Appreciate it, Professor Miller, thank you. Dean Washburn, there are many young practitioners working on behalf of tribes right now. There will likely be many citations to this opinion and briefs submitted by opposing counsel in areas outside of criminal law, and this case, will arise in other contexts as well. What should tribal in-house counsel be thinking about with respect to this decision? Obviously in the

criminal justice aspects or realm, but also perhaps another regulatory areas where this might come up.

KEVIN WASHBURN: Well, we have said, for a long time that we have a serious public safety problem in Indian country. We have a problem with missing and murdered Indian people. We've got a problem of sexual violence in some Indian communities. We have a problem with domestic violence. We've got a problem with drug abuse. And we say that non-Indians are, at least, a part of the root of this problem.

And I think non-Indians are probably not solely responsible, because we know that Native people commit crimes, too. But it's not necessarily a bad thing to double the number of governments that can prosecute those non-Indians that are committing those crimes.

So, I think that we need to think about that. Jon Sands raised an interesting question in the chat about public safety that could come up for tribal counsel, with the fact that it used to be the tribes had to consent to have the federal death penalty applied on the reservation, but, and Jon Sands is the federal public defender in Arizona, and he notes that now the state death penalty could potentially apply in Indian country under this decision.⁹⁶

But, first, that's only for non-Indians. *Castro-Huerta* only applies to non-Indians, so the death penalty potentially could apply to non-Indians, but we also know that this basic principle, that the tribes have to consent to the federal death penalty, that doesn't really happen either. The Ninth Circuit put that idea to rest in *United States v. Mitchell*.⁹⁷ Jon and I both thought that was a pretty troubling case, but the fact is, the death penalty can be applied in Indian country, one way or another, already.

Rural justice has a lot of challenges in this country and that's where tribal prosecutors, and state prosecutors, and tribal counsel must worry. I mean, this

96. Comment by Jon Sands, Federal Public Defender of the District of Arizona.

97. 971 F.3d 993 (9th Cir. 2020).

is difficult work. We don't have enough resources, but here's the reality on the ground: if a police officer on the ground is in trouble and another police officer rolls up, they are glad to see that other police officer. They don't care what the patch is on the person's sleeve, if it's a tribal patch, and this is a state police officer in trouble, or vice versa, they're just glad to have some help. Law enforcement is a dangerous job, and police officers look out for one another.

I think probably the same idea is at work with state and tribal prosecutors, at least at some level, and they tend to work well together. The answer here is a lot of cooperation, and I think that's where we need a lot of good cooperation and that tends to work. And it tends to work at that prosecutor-to-prosecutor, or a policeman-to-policeman, level. It doesn't work at the political level. That's where people fight. It's sheriffs, it's governors, it's people at those levels that seem to be offended by the continued existence of tribes.

So I think those are some of the things that we need to think about. I will tell you, indeed, that some tribal prosecutors and tribal public defenders in Oklahoma, I think that they kind of breathed a sigh of relief when this happened because they know that the state prosecutors know how to do this work, and they can do it. State prosecutors are easier to work with, in some ways, than the feds. Tribal prosecutors may be slightly relieved that they've got the old, state prosecutors doing this work again.

I think the takeaway for all of us, though, needs to be that reservations are still sanctuaries for Indian people from state authority. *Castro-Huerta* does not affect state authority over tribes. Now, sometimes we see erosion, and that's the thing when you see this bad language that you worry about, that maybe another important principle is ignored in future cases, but this case does not do that. This case does not extend state authority over any Native American and, in fact, again, I think that there may be some slight upsides to, you know, having the state prosecuting non-Indians within

Indian country. So I think that's the way I would look at it, if I were legal counsel for a tribe. And recognize these upsides and work on cooperation and trying to enhance cooperation with state authorities.

DERRICK BEETSO: Appreciate that answer. Professor Miller, I want to go back to you with a question in your area of expertise, tribal economic development. We know that tribes often partner with non-Indians to conduct business projects within the reservation. Do you see *Castro-Huerta* potentially having an effect on economic development? Perhaps now tribes might need to be aware of "presumptions of jurisdiction," where there were none before? Can you speak a little bit about that?

ROBERT MILLER: Well, you asked me that question the other day and I've been pondering it. For the most part, the state still has civil jurisdiction over non-Indians, doesn't it? The state can tax them, and even if they live in Indian country, the state can regulate them. Does the tribal court have jurisdiction? We know the *Montana* test is the answer.⁹⁸

So I think the state had a far larger role until, you know, four days ago in the civil arena in Indian country than it did over criminal prosecution of non-Indians who injure Indians, because of the 200-year assumption and federal laws, etc.

You know, we'll see if this shakes out again as Kevin said. Will there be future cases where I feared this language will be cited? We'll see if that impacts economics in Indian country. I agree with what Stacy said, the state's desperate for taxation dollars, but they can tax those non-Indians already, so—I don't know if the other two commentators, do you see an economic impact here, you know, not because of people being non-

98. *Montana v. United States*, 450 U.S. 544, 565–66 (1981) (holding a tribe may only assert jurisdiction over a non-tribal citizen if the citizen: (1) "enter[s] consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements"; or (2) acts in a way that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe").

Indian or because of the *Castro-Huerta* case? I hope not, Derrick, and I think not, at this moment.

DERRICK BEETSO: Appreciate that. Thank you. Kevin I'd like to go back to you and ask more of a global question. Stacy alluded to it earlier, she mentioned the *Cooley* decision, we've seen the *Denezpi* decision, and now the *Castro-Huerta* decision. Can you discuss generally your thoughts on public safety in Indian country post all of these recent court decisions?

KEVIN WASHBURN: Well, one thing that's good here is we've normalized tribal criminal justice work in recent cases. *Denezpi* was great in that way that, and so was *Cooley*, right? The Court realizes now that tribes do criminal justice work. Now they know it.

You have to realize that, for a lot of the Supreme Court justices, the first thing they learned about Indian tribes is when they see a petition for cert, and then the briefs. They know nothing until then; that's how they learn about tribes.

Once in a decade, we can get a couple of Justices out to a reservation or something like that. But they know nothing, and most of them grew up far away from Indian country—and that's why Justice Gorsuch has been a breath of fresh air, because he's a westerner. Now, not all westerners are good on tribal issues. O'Connor was pretty good on our issues. Rehnquist was not so good, and they were both from Arizona.

But that's the problem with the educational process for Justices. It is hard, and so the good news is that we've really normalized criminal justice and, through their cases, they've seen it happening. They know that Indian tribes are pursuing criminal justice. That gives us a much better baseline than we have ever had. If we'd had that baseline before *Oliphant* went up, *Oliphant* might have come down differently. So those are really good things, and that's important for tribes and the Court from a public safety standpoint.

DERRICK BEETSO: Appreciate it, thank you for that perspective. Professor Leeds, I want to ask you to

offer your thoughts how *Worcester v. Georgia*,⁹⁹ *Cherokee Nation v. Georgia*,¹⁰⁰ and now *Oklahoma v. Castro-Huerta*¹⁰¹ and just the immense weight of federal Indian law precedent that rests on Cherokee Nation history. Are you able to offer some of your thoughts here?

STACY LEEDS: Before I jump into that, let me say one more thing before I forget it, and it relates to Professor Miller's quandary with what does "supplant" mean in this decision. What does "supplant" mean, as opposed to "abrogate"? And I think that if you reread this decision and, in almost every sentence where you want to scratch your head, if you would insert the words at the end of the sentence, "as it relates to non-Indians," it will almost make sense. Right?

When the Court decides these cases, they're just not connected to the realities on the ground, thinking about the 15 things that tribes might do in this jurisdictional space. They have that one case, with a non-Indian defendant. And to this Court, it was ludicrous that somebody who gets picked up in Tulsa—it gets mentioned several times, Tulsa—can't be prosecuted by the state, particularly someone who is a non-Indian person. That's part of this containment thing. A lot of what they said, if you're truly talking about non-Indians, is true. Where the rub is? When the question extends to Native people who have treaty rights relative to the tribes at issue.

So it brings me to this *Worcester* question. And I still think that the single most important case in all the federal Indian law is *Worcester* and I think that it still is, as it relates to tribal sovereignty and the role of the federal government.

Now, to be fair, when they suggest that it's overturned, it is in this way: *Worcester* happened because Georgia was trying to extend their laws inside the Cherokee Nation for the purpose of prosecuting a non-Indian who lived among the Cherokee people. And that

99. 31 U.S. 515 (1832).

100. 30 U.S. 1 (1831).

101. 142 S. Ct. 2486 (2022).

gave us this chicken-and-egg question in federal Indian law.

Did the Cherokees win that case because of tribal sovereignty and the treaty guarantees with the United States, the Cherokee secured to themselves? Or was that really primarily a case about federalism and the federal power over states with tribal sovereignty as a secondary matter?

And I always conclude, and I still do, that the answer to that question is yes and yes, it was that tag team, treaty sovereignty and federalism, argument.

And so I fast-forward the experiences of the Cherokee Nation from *Worcester* to today. All of these cases stand intertwined with treaties, where the tribe actually came back and negotiated to overturn some of the statements of the United States Supreme Court, which I'll get to in a minute, and also the times that we've been able to go back to Congress and reclaim something that has been taken away.

One of the things that was mentioned in the Cherokee Nation's amicus briefs in both *Murphy*¹⁰² and *McGirt*¹⁰³ was this notion that you can't think in Indian law that, once a tribe loses something, it's lost forever. It has always been this "one step forward, two steps back" dynamic. Where sometimes you have this jurisdiction, and then it shrinks for a while, and then it grows for a while, and then it shrinks for a while, and it's this very fluid dynamic that happens over time.¹⁰⁴

I want to really quickly talk about a timeline and how sometimes the Court is the focus and sometimes what they do or say doesn't really matter on the ground at all. So, if you think about *Worcester*, it was decided by United States Supreme Court in 1832. Right? Yay! The

102. Brief of Amici Curiae Historians, Legal Scholars, and Cherokee Nation in Support of Respondent, *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (No. 17-1107), 2018 WL 4773101.

103. Brief of Amici Curiae Historians, Legal Scholars, and Cherokee Nation in Support of Petitioner, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526), 2020 WL 774429.

104. *Id.*

rule of law! You win that case, a great win for Indian country, and then you all know what happens, right? The rule of law doesn't mean anything and removal and relocation is going to take place.

But the Cherokee Nation's Treaty of New Echota—which could be its own four-hour webinar—that treaty was ratified in 1835,¹⁰⁵ so it is just a little over three years after *Worcester*. And the Cherokees who signed that treaty said, “The Court can't save us, we can't just have a boundary. We have to have something more powerful than a boundary.” And so, part of that negotiation was the fee patent piece. We need some other guarantee more secure than what the Supreme Court is to us. And so the promise of no future state, exclusive sovereignty, etc, and part of this federal responsibility today in criminal jurisdiction comes out of that.

In the post-removal era, the Cherokee Nation, and all of the Five Tribes, scaled up quickly to reach the zenith of exercising general jurisdiction. And in the 1866 Treaty,¹⁰⁶ the Cherokee Nation secured a perpetual guarantee of exclusive jurisdiction over all criminal and civil court cases involving Cherokee citizens as a precondition to any federal court being seated inside Indian Territory.

What that creates is a little bit of Cherokee exceptionalism in the late 1800s, where the rest of Indian country is subjected to the Major Crimes Act.¹⁰⁷ But because of treaty provisions, you have cases like *Talton v. Mayes*¹⁰⁸ going all the way up until the late 1890s. So for two full decades after the Major Crimes Act that law was not implemented on the ground. The tribes are still fully exercising their jurisdiction and there's this negotiation around that.

105. Treaty with the Cherokee, 1835, Cherokee–U.S., Dec. 29, 1835, 7 Stat. 478.

106. See, e.g., Treaty with the Cherokee, 1866, Cherokee–U.S., July 19, 1866, 14 Stat. 799.

107. 18 U.S.C. § 1153.

108. 163 U.S. 376 (1896).

And I think that that is so important because the treaty days are our power with Congress now. A court case issues that we like, and we can't count on it. A court case happens that we don't like, and we can get around it by treaty, or we can go to Congress to get around it, but it's always this sort of back and forth exception.

To the point that Professor Miller raised, there are a lot of the cases that deal with this interpretation of what happens when the state of Oklahoma and allotment occurred. So we've got a lot of cases, besides just this one to go on. What the Court does in *Castro-Huerta*, without calling it that, is they reinvigorate the Equal Footing Doctrine. And the Equal Footing Doctrine, relative to the Five Tribes, we've got all the Arkansas Riverbed cases¹⁰⁹ that say it doesn't quite work that way here in Oklahoma and it doesn't quite work that way because of plain language in treaties.

So I think that, in this case, where it says the state of Oklahoma is founded and then automatically Oklahoma has this power, "comma, as it relates to non-Indians." And we just have to keep reiterating that over and over when it comes to this piece. So, in conclusion on the Cherokee and the Five Tribes point, we have to continue speaking our truth every time in these cases, and don't repeat these untruths that are inherent in this case.

For more than 100 years, Oklahoma exercised expansive jurisdiction over Native people in the Five Tribes, and even during those darkest times we didn't change who we were to bend to that. If you look at all the Five Tribes constitutions and laws, they're always going back to that treaty language or the conveyances that happened right after that treaty that carried it into motion.

And so I think it's just time to again, add: "comma, as it relates to non-Indians," but distinguish it as it relates to the nation building and rebuilding process inside of our tribes. We have seen so much worse than

109. See, e.g., *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970).

this case and we have always had to do this dance of “Okay, this moment didn’t work now. What do we do? What can we live with? What are we always going to push back on?” And I think that’s where we still are and how we move forward with this.

ROBERT MILLER: Derrick, I want to add a little levity to the moment. Stacy, when you said what you do at the end of each of the sentences of the majority opinion, I thought you were going to say, “not!”

STACY LEEDS: As it relates to non-Indians.

DERRICK BEETSO: Appreciate those remarks, Professor Leeds and Professor Miller. So now, I want to ask each of you one more question. What can we do in Indian country to better educate the judiciary on federal Indian law? Go ahead, Professor Miller.

ROBERT MILLER: I’d just like to make two more points before we leave. Stacy brought up the Equal Footing Doctrine, alluded to in the majority opinion¹¹⁰ and the dissent.¹¹¹

I sense the Equal Footing Doctrine coming back without the Court saying it, without using those express words. And that offends me because a new state comes into the Union subject to what the Feds have done while the area was a federal territory. National parks, Army bases, federal lands, we know the property cause of the Constitution, and what the feds have done in federal territories continue into the future. It’s not a violation of Equal Footing Doctrine for a new state to come into the Union, subject to the things the federal government has done in the area while it was a territory, and that’s exactly what the 1906 Oklahoma Enabling Act said and required: “You, Oklahoma, have to recognize these tribal nations, these reservations, and, oh by the way, you can’t become a state until you adopt a constitutional

110. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2503 (2022) (quoting *Draper v. United States*, 164 U.S. 240, 242–43 (1896)) (“This Court long ago explained that interpreting a statehood act to divest a State of jurisdiction over Indian country ‘wholly situated within [its] geographical boundaries’ would undermine ‘the very nature of the equality conferred on the State by virtue of its admission into the Union.’”).

111. *Id.* at 2515 n.4 (Gorsuch, J., dissenting).

provision,” which is in Article I of the Oklahoma constitution today, “that you will not claim or exercise jurisdiction over the tribal nations and their lands.”

My second point is that the majority clearly accepted the PR campaign of Oklahoma. “The sky is falling.” Kevin mentioned *The Wall Street Journal*. I have written a little something about that, but I don’t know who got to *The Wall Street Journal* editorial board, but Oklahoma set aside \$10 million for litigation and PR to fight *McGirt*. Kavanaugh plainly emphasized and repeated Oklahoma’s language of chaos.¹¹² Those two provisions bother me, and I wanted to emphasize them.

DERRICK BEETSO: No problem. I appreciate it. So, I was asking if you wanted to share some thoughts on how practitioners in Indian country can better educate the federal judiciary.

Yesterday, on a UCLA panel—which was excellent by the way, and which has been referenced a couple times on this program¹¹³—Riyaz Kanji had mentioned this idea that, you know, 10 great articles masterfully written, for Supreme Court practitioners to cite might be something that practitioners could use right now.

You all could build on Riyaz’s comments or offer your own wholly different comments, but can we go ahead and go down the line and see if we can get responses to that question?

STACY LEEDS: Okay, what I think won’t be helpful is if 12 Indian law practitioners or scholars write an article saying how bad this one case was. We need to do this as therapy on these webinars and then move on about our business.

What we need to be helpful to people writing briefs is we need empirical data of what’s actually happening on the ground. People have been talking about this forever, but one of the things that clearly shifted the Court’s thought in this case, was Oklahoma’s “sky is

112. See, e.g., *id.* at 2492–93, 2496.

113. UCLA School of Law, Castro-Huerta v. Oklahoma and the Attack on Tribal Sovereignty: Where Do We Go from Here?, YOUTUBE (July 6, 2022), <https://www.youtube.com/watch?v=ZmU8d4l6B0M>.

falling” argument about the number of cases, but you just get into this test of wills, where you have two parties saying, “yes it is, no it’s not, yes it is, no it’s not.” And this is where some legal scholarship with a true empiricist as a co-author. What is really happening in tribal court, state courts, federal courts, not just in Oklahoma, but all over Indian country? That is one piece.

On a practical level, tribes must partner together in a national and state and regional way, and win the next PR war, Oklahoma won in this context, the tribes won when it came to the renewal of the gaming compact in Oklahoma.

But just as we once had the ability to treat around cases that didn’t come in our favor and if that’s gone it’s supplanted with going to Congress, and if you don’t have the political capital at that moment, the media and what we now can voice at a national and international level is so incredibly important. So that will be huge, and we just have to step up to the place. We’ve got the talent, but we’ve all got to work together to make that happen.

KEVIN WASHBURN: So let me say, I think that one of the things that I try to do, now and then, is write a judge a note. We all do amicus briefs, and we join amicus briefs.

But I frequently will write a circuit court judge a note if they’ve written a really good decision for Indian tribes. I’ve sent the same to a state Supreme Court justice sometimes, and sometimes if there’s a good dissent. They may have lost the case, but if they dissented and in a good way, I will write them a note.

Judges mostly get their correspondence through briefs. And the parties don’t write a thank-you note afterward. You know the parties may try to take them up on appeal, but the judges don’t get a lot of constructive feedback.

They get a lot of crazy letters from nutjobs. I will tell you that. A lot of those from prison, by the way. So don’t write negative notes because they won’t have any effect, but a little bit of positive reinforcement after a judge writes a good opinion, is good. I think it helps.

I wrote Gorsuch a note once when he was a Tenth Circuit judge and he had a really strong opinion in these Utah cases, where the state of Utah keeps fighting the Ute tribes. In the opinion, he said I've had enough of Utah relitigating the same issue over and over.¹¹⁴ And I wrote him a note, and he wrote me back. His response was not substantive. His letter said, "Thank you. I am glad to know that someone other than my wife reads these opinions." But I hope that he felt affirmed by it, and I think we can all try to encourage good instincts. So that's a small thing—it'll take you five minutes in your day. I don't do it as often as I should, but I encourage everybody to do.

Yes, we need more scholarship. We have a bunch of great new young scholars coming along. There is a lot of good new material across the academic field in Indian country, because we've got such a great crop of young scholars writing. So, some important journal articles will happen.

And I agree with Stacy. This case is done and gone. It's got some horrible language in it, but we're not going to change it. What we must do is keep it from going any further.

And so we need to be looking at the next cases coming along and worrying about those, rather than criticizing the last one. We just don't get very far with criticism. One last concern, though. The majority opinion cited the Conference of Western Attorneys General Deskbook on Indian law and failed to cite the modern Felix Cohen *Handbook* at all.¹¹⁵ The opinion reminded me of the bad old days of the Court's focus on states' rights. There's a part of the Court that may be starting to take that states' rights kind of view of things, and that

114. *Ute Indian Tribe of the Uintah & Ouray Reservation v. Myton*, 835 F.3d 1255, 1257 (2016) ("We're beginning to think we have an inkling of Sisyphus's fate. Courts of law exist to resolve disputes so that both sides might move on with their lives. Yet here we are, forty years in, issuing our seventh opinion in the Ute line and still addressing the same arguments we have addressed so many times before.")

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

may be what we will get with *Brackeen*¹¹⁶ and the anti-commandeering type of argument in that case.

ROBERT MILLER: We are definitely in a PR war, so I want to repeat, I think Stacy said it the most, but what Kevin's talking about—in all the newspaper articles I've been reading about this case—and yes, *The Wall Street Journal's* writing all these inflammatory editorials. But when they sent their news reporter to Oklahoma, they came back with nothing to report. So, we have got to get the good news out and we have to fight fire with fire.

And I agree exactly with what Riyaz was talking about—and now I'm gonna make a joke—he said, we need masterfully written articles to counteract Oklahoma's PR and the *Castro-Huerta* case and the thinking behind it. So, I guess we need Stacy and Kevin to write those articles and I better stay on the sidelines. Because I will write the diatribe or the polemic.

I want everyone to know that there is already good news, empirical research, that is very new, that no one is considering—I want the newspaper to write about so that we can counteract the negative PR.

There's a new article by a professor at Michigan Law School and his co-author, who even represented Oklahoma in the *Murphy* case that preceded *McGirt*. These are neutral empiricists. They put their article online in mid-April of this year. They looked at three economic factors in the counties affected by *McGirt* versus the Oklahoma counties not affected and found no economic changes whatsoever.¹¹⁷

116. *Haaland v. Brackeen*, 142 S. Ct. 1205 (2022) (mem.) (granting certiorari).

117. Michael K. Velchik & Jeffery Y. Zhang, *Restoring Indian Reservation Status: An Empirical Analysis*, 40 YALE J. REG. (forthcoming 2023) (manuscript at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4057695 (“[W]e leverage monthly employment data at the county level, annual output data at the county level, and daily financial data for public companies incorporated in Oklahoma. Contrary to the “falling sky” hypothesis that recognition of Indian jurisdiction would negatively impact the local economy, we observe no statistically significant effect of the Tenth Circuit or Supreme Court opinions on economic output in the affected counties.”).

Another brand-new study by two University of Wisconsin economists was put online in May. In that article, Professors Dominic Parker and Sarah Johnston analyzed Zillow home sales and prices, and oil well starts, and they compared Eastern Oklahoma, that's now mostly Indian country after *McGirt*, against Western Oklahoma. Their study also shows there have been no economic changes due to *McGirt*.¹¹⁸

Has *The Wall Street Journal* written an editorial about these factual and empirical studies? I joke, right? But where have *we* published editorials and articles about these facts? Where have *we* gotten reporters to report this news?

I agree and support what Stacy said—we need articles with empirical studies showing that law and order is still the same or maybe even better in the newly re-recognized Indian country inside Oklahoma. And we need to highlight these economics studies to refute what the state of Oklahoma will be arguing in the future.

So, empiricists, which is what Riyaz called for—I would like to ask the other three of you—but, obviously, if it comes from an Indian law person, we're gonna be advocating for something. So what kind of an article do you think he really means that will influence the Court but isn't at the same time critiquing and criticizing *Castro-Huerta*?

We have got to trumpet the good news. And so these two recent studies are something we should be getting out to other tribes, etc. We got to get that news out.

DERRICK BEETSO: Appreciate it. I appreciate your responses here today. Now, let's get into questions from the audience.

We have our first question from Bob. Bob asked: what does *Castro-Huerta* mean for *Brackeen*?

118. Sarah Johnston & Dominic Parker, *Causes and Consequences of Policy Uncertainty: Evidence from McGirt vs. Oklahoma 1* (May 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4124658

("[W]e econometrically estimate its effects on Zillow home sales and prices, and on oil, gas, and renewable energy investments. We find no evidence that the ruling reduced home sale prices. There is, however, some evidence that it induced a race to extract oil in eastern Oklahoma.").

And, Professor Leeds, I know that, because of some of the work that you're doing right now, you're actually recused from answering that question. So I'll go ahead and see if Dean Washburn wants to go ahead and take that question.

KEVIN WASHBURN: Yeah, I'm worried about this a little bit, I have to say. *Brackeen*, interestingly, is concerning. *Castro-Huerta*, love it or hate it, in the grand scheme of things, it's a fairly narrow decision.

But *Brackeen* presents an existential threat, honestly, to Indian law. And not just to the Indian Child Welfare Act, but all of Indian law. And, *Brackeen* is a very different case than this one, because it addresses a statute that Congress took with the intention of regulating states in many respects in the child welfare area. So it's clear—it's absolutely clear—what Congress intended to do here.

And this state's rights rhetoric that we see echoed a bit in Kavanaugh's opinion here, again, makes me worry. That's problematic for *Brackeen*.

Brackeen raises the issue of whether Indian status is a political status or a racial status. And that's the challenge for us.

You know, in different contexts it clearly is both. I mean, look at me—racially, I look like a bald white guy, but I'm a citizen of the Chickasaw Nation of Oklahoma, just as I'm a citizen with the state of Iowa and the United States of America. So, Indian status is clearly a political question. At least in part. And a racial question, in part.

But the question really is whether Congress can recognize the political status of Native Americans and legislate in that way.

And there are five volumes of the U.S. Code that depend on Congress having the power to do this. So, *Brackeen* presents a really existential question for all of federal Indian law and including the Major Crimes Act, which is close to the issues in *Castro-Huerta*, to some degree.

So *Brackeen* is something we need to worry about, honestly more than the case that's before us today. I

think that the Court—I think they take each case one by one. I mean, Amy Coney Barrett is an example. She has made us happy in a couple of cases, but she disappointed us with her vote in this one.

But remember that we're looking at these cases as federal Indian law cases. That includes most of us on this call and probably most of the people attending. But, you know, Amy Coney Barrett may be looking at this case—*Castro-Huerta*—as a criminal law case and the *Brackeen* case as a case about child welfare. Two separate cases having to do with Indians. The Justices may not be thinking of the broad panoply of Indian law. We're bringing that bias, that lens, to this. And the Justices may not be doing that.

So, I don't know that we know. I don't want to predict too much how much this case and the tea leaves say for *Brackeen*. But I am a little bit nervous.

ROBERT MILLER: Well, it's a shame that Stacy can't comment because of her current work.

I'm not an ICWA [Indian Child Welfare Act] expert and I do not teach Con Law. So, anti-commandeering: what does that mean? The feds can't force state officials to do certain things.

And so, in the Fifth Circuit, it's my understanding, they struck down—what, about three provisions of ICWA as unconstitutional for anti-commandeering.¹¹⁹

But the biggest threat is what Kevin just said. If all of a sudden, being a tribal citizen is a racial decision—talk about changing, you know, 400 years of history and 1,000 years of Native history. I said I'm an optimist, didn't I? But my teeth are chattering here.

DERRICK BEETSO: Appreciate that, Dean Washburn and Professor Miller.

Our next question is actually for Dean Washburn. Our guest says: In New Mexico, the Indian Pueblo Lands Act Amendments of 2005 explicitly defined authority of the pueblo, federal, and state governments to exercise criminal jurisdiction within the boundaries of the

119. See *Brackeen v. Haaland*, 994 F.3d 249, 268 (5th Cir. 2021).

pueblos. As drafter of PLAA of 2005, I would like to know if Dean Washburn believes that PLAA of 2005 is an example of the federal government preempting the state's authority to prosecute crimes committed by Indians against non-Indians within the pueblos.

KEVIN WASHBURN: It's a great question, and let me just say I love the Q&A here, all the questions coming up, because a lot of them I haven't even thought of yet.

We're in a place of transitional justice because the rules are changing. *McGirt* started that, and now it's happening with *Castro-Huerta*.

And this question of how is it going to apply elsewhere is really fascinating.

And, especially in light of that statute, for example, which is a much more recent statute that has very specific terms. I haven't looked at that question closely. My sense is that, in other states where the U.S. Attorneys are prosecuting Indian Country offenses, they will continue doing so.

It's expensive to prosecute. And I'm not sure that states are going to suddenly say, "We now have this power, let's start exercising it," because they don't have any additional tax revenues to do that work.

I don't see them running into the breach and trying to start doing that. Not to say that it might not happen now and then, though. Because the power is now recognized. And so in some places, we may see state prosecutors trying to prosecute.

You know, since the *McBratney* case in 1881, states have been exercising criminal justice authority within Indian reservations, at least if there was no Indian involved. So, states know the highways, they know the pathways, in theory. I don't think they've been doing a whole lot of that. But this broader question—what does this mean for other states besides Oklahoma?—is a really interesting one, and I can't wait to see what happens.

It presents an interesting question about the Nebraska tribes, too. They were all Public Law 280 tribes. And I think over the course of about four decades,

I think all of the tribes in Nebraska have retroceded Public Law 280 jurisdiction. What happens there? We don't yet know the answer to these questions. And the case doesn't tell us. So we're going to get answers. We're going to get them the hard way, probably through litigation. And it'll probably take years before we know all the full impacts and perhaps unintended consequences of *Castro-Huerta*.

DERRICK BEETSO: Thank you, Dean Washburn. Professor Leeds, I'll go ahead and direct this next question to you. Dusty asked: Does the state jurisdiction over non-Indian defendants open the door for states to start collecting a tax to cover their costs?

STACY LEEDS: Yeah, I worried about that immediately because of the conversation about the *Bracker* balancing test¹²⁰ and some of the back and forth in a lot of tax cases about how you get revenues to support it. And so, when I was talking about a finite amount of resources and then now there are three sovereigns potentially exercising that jurisdiction, that gives me a lot of pause. And I think that we are entering into an area where we have to prepare for some pretty dark times, if this gets traction.

I also think, though, that it also begs the question: What are the tribal taxes that are going to support tribal sovereign exercises of authority in addition to federal support? Where are the revenues going to start happening at that level? Because I don't think that where tribes have chosen not to pursue a certain type of taxation, and they have foreclosed, that may be a problem. We are heading into a timeframe, where the lack of exercising some jurisdiction, while the state is exercising that jurisdiction, might come back to bite when you get into those balancing tests. So you know, I think that's a piece of it.

120. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144–45 (1980) (holding when a state tries to assert authority over a non-Indian's activities on a reservation, a court must balance the nature of the state, federal and tribal interests that are at stake).

The other issue is a resource question. When we talk about the potential for either Congressional action or potential for compacts and agreements, we tend to think about that as an allocation of law enforcement resources, and I just want to put a plug in for the one thing that concerns me the most, and that is domestic and family violence realm.

If there's one thing that people across all political spectrums agree on is that some services are absolutely best at a local level. And so, in these cases where there's a Native woman who has been a victim of domestic violence, and now this case might be in the state system, I hope that there is a lot of collaboration, and agreements, and partnership, so that the people who are working so hard at our tribes and victim services have the ability to transfer that service across all jurisdictional lines.

And I just don't want us to lose sight of that because I think that that's a big piece that's not a legal one, but incredibly important on the ground.

DERRICK BEETSO: Appreciate that. Thank you, Professor Leeds. Our next question is from Mike. Mike wants to know how we see this playing out in regards to state law enforcement officers and defense attorneys, making arrests and detentions. Is there a need for more training, and what does that training look like?

ROBERT MILLER: I have just an initial thought. I mean, they've been exercising this criminal jurisdiction until two years ago, right? I just wonder what training the question is directed to. For Oklahoma, this is just a return to the status quo, what they had on the vast majority of this 43% of the state.

DERRICK BEETSO: I understood the question to refer to outside of Oklahoma, and whether there is a need to change the training that law enforcement officers are receiving on the ground with respect to this decision.

KEVIN WASHBURN: One of the things we need is more cooperation. We need more cross-deputization agreements.¹²¹

Because what those do is they double the power of neighboring law enforcement agencies. They let tribal officers make an arrest if it's a non-Indian, and they allow state officers to make an arrest if it's an Indian.

And it's not inconsistent with the sovereignty of the state or the tribe. Those are good things. And it sort of resolves the question, at least for purposes of an immediate response, and puts off the question about whether they are a citizen of a tribe or not.

And you know *McGirt* was a wonderful case in this way. It made it really clear where the Indian reservation land was. Suddenly, you didn't have to have GPS to see if you're on an allotment or other form of Indian country, and so it actually simplified law enforcement.

But *Castro-Huerta* actually kind of simplifies things, too, except for the citizenship. Because you can't tell by looking at me whether I'm a member or a tribe or not. And so it's not obvious. You have to ask me a question or look in my wallet and see my tribal voter card or something like that to make that determination.

But those are the kinds of things that cross-deputization agreements can address. And I think that cooperation is really what's important in Indian country. It's good for everybody.

ROBERT MILLER: If the question was directed to the other 49 states, yes, this is a pretty big change for state troopers—and city cops and county cops—to think they're going to go on reservation and have jurisdiction. So yes, there will need to be a lot of work there.

DERRICK BEETSO: Appreciate it, thank you. Our next question comes from Ryan. Ryan says: Given Kavanagh's disregard for Article I shown here, is there

121. Dean Washburn has been encouraging such cooperation for years. See Kevin K. Washburn, *Testimony on Law Enforcement in Indian Country Before the United States Senate Committee on Indian Affairs, 110th Congress, 1st Session (June 21, 2007)* (Harv. Pub. L. Working Paper, Paper No. 07-22, 2007), <https://ssrn.com/abstract=1055621>.

any concern that Justice Thomas's dim view, rather, of the Indian Commerce Clause is gaining traction with others on the Court, and could that affect *Brackeen*?

KEVIN WASHBURN: It's a great question that we're all nervous about, I'll say that.

ROBERT MILLER: The sky *is* now falling.

KEVIN WASHBURN: Thomas is interesting because some of the things he says are right about all this. Sometimes. He's just wrong about what it means.

He sort of recognized—he's written before that there is no legitimate basis for federal power over Indian tribes. And he's absolutely right about that, but he sort of thinks that reflects on Indian tribes, but it doesn't, it reflects on the United States. And whether the United States has power over tribes.

So it's interesting because a lot of the things that he says strike me as correct in the first couple of sentences, but then he draws the wrong conclusion from those premises.

ROBERT MILLER: But Kevin, every time a student or someone makes that comment, I go, "Would you like to have Justice Thomas rewrite all of Indian law? What do you think it would look like?"

KEVIN WASHBURN: No!

DERRICK BEETSO: Somebody asked: Can someone discuss how the *Bracker* balancing tests will work? Moving forward, I assume. And she says: Professor Leeds or Professor Miller, what do you think the relationship will be with the newly elected AG?

STACY LEEDS: Well, I'll jump in on this, and then Professor Miller maybe can back me up. On the ground, I think that there has been a lot of positive conversation around the new Attorney General in Oklahoma. He seems much more willing to be a partner, instead of a perpetual enemy, of the tribes. And so I think that there's positive conversation about that political movement.

I think with the *Bracker*¹²² test, I wonder if the conversation about *Bracker* was more of a one-off. I think

122. *Bracker*, 448 U.S. at 144–45.

they knew the direction that they were going and a conclusion they wanted to reach in *Castro-Huerta*, and then there was a whole lot of swimming upstream about how they were going to get there, so that was a bit perplexing.

Particularly given how much federal presence there is in Indian country crimes, now and historically. I don't know that we're going to necessarily see that again in these kind of cases.

But if we do, it requires making a good record about all the types of partnerships, relationships, and funding. That presence of the federal government in this space has always been really important. And the perceived lack of that was what led the Court to reach its conclusion in *Venetie*,¹²³ in Alaska.

And so, for a long time, where there's this conflict between the states and the tribes, one easy place to go is: well, how much presence? (Which is subjective.) How does it feel on the ground? Does this feel like the federal government's there enough? But I think that that'll be part of any dialogue moving forward. Just like after *Montana v. United States*,¹²⁴ no matter what, you always talk about a consensual relationship and the public health aspects to the tribe in the case because you can see that test crop up in really odd places.

You know, remember in this recent case of *Cooley*¹²⁵ within the Crow reservation and out of the blue, this application around a police officer's activity of the second prong of that Montana test.

And so this balancing test is one more way for them to reach that conclusion with the state. But it didn't seem to me, through how it was applied in all of the tax cases, to have any real longevity as far as some sort of doctrine. I think it was also a one-off, but others may disagree. Professor Miller, what do you think?

ROBERT MILLER: Well, once the Court started where it did—with the Tenth Amendment and the

123. *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 534 (1998).

124. 450 U.S. 544 (1981).

125. *United States v. Cooley*, 141 S. Ct. 1638, 1646 (2021).

Constitution says tribes, you're inside states' territory and, I guess, state jurisdiction.

I was not too surprised at their *Bracker* analysis. They spend about three-quarters of a page on it.¹²⁶

In my classes I say this: "Okay, the *Bracker* test is all about balancing, on one hand you have the tribal and federal interests, and on the other, you have the state interests, and then you ask which is heavier, more important?"

Since the feds were hardly exercising any criminal jurisdiction in eastern Oklahoma and the tribes had just small areas of trust land, they did not have a long history of a lot of criminal work in this area, or lands and peoples to protect, maybe. And so I was not too surprised by what the Court said when it looked at *Bracker* and weighed the competing interests.

The Supreme Court use of the *Bracker* test started from that historical starting point and said there is state jurisdiction unless we find federal preemption, and that again is the scary part of this case.

DERRICK BEETSO: Thank you so much to our audience for these questions. We're just about out of time, but I did want to reserve a little bit of space for our panelists to offer some final comments and thoughts.

KEVIN WASHBURN: In some ways, *Castro-Huerta* is not a bad case, but the *Bracker* language is troubling.

This notion of this reaffirmation of state's rights is bad for tribes. We've always known that tribes are located within states. Indeed, if you look up the names of the tribes, many of the of the 38 or 39 tribes in Oklahoma have "Oklahoma" in their name. They're the such-and-such tribe "of Oklahoma."

And this is not the controversy that it appears to be in the *Castro-Huerta* opinions. It is a good thing because it means that tribes know where to find the state with which they can compact for tribal gaming. We've known forever that tribes are located within the boundaries of states. That's not the problem, again, because that

126. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2500–02 (2022).

doesn't mean that state law applies to tribes. And so that disagreement between the majority and the dissent seemed to be a red herring.

But the majority's application of the *Bracker* test and the things said about it—that's problematic. The elevation of the nearly forgotten *Village of Kake* case is also a troubling signal from the case.¹²⁷ But the actual holding, again, is one we can live with.

We have dealt with challenges in Indian country before. We've dealt with bad cases and yet we keep persisting. And we will survive this case and we will persist. And I think we're going to see a whole bunch of new cases come up now because this case will have some ramifications.

I'm even more certain of that after this conversation because I am seeing other issues that will need to be resolved, and in both state courts and federal district courts.

But the sky is not falling. This case has limited applicability. And we will survive it, and we're going to learn a lot of new things about criminal justice in Indian country because of the fallout cases from this.

And there are a bunch of open questions. Another good one in the comment was by Rhonda Hardjo about subpoena power. The state's going to need to try to subpoena Native Americans sometimes as witnesses in some cases. And it is usually in the victim's interest to testify, but the state may feel the need to exercise authority, sometimes, to get witnesses to appear.

One worrisome ramification could be some erosion—some *Nevada v. Hicks*-type of erosion—in our immunity from state authority when a state decides to serve a subpoena on a Native witness or victim to prove a case against a non-Indian. There are some potential problems ahead.

I'm relatively optimistic generally about the Supreme Court, these days, because of the recent victories. And so, this too shall pass.

127. *Id.* at 2493, 2502–04.

ROBERT MILLER: I think you called on me next. I'm sorry, everyone, I have to leave the moment I get done. I agree with the points Kevin made, the only thing I had written down is, yes, we were eight for eight or else nine for nine in our last Supreme Court cases and that's a miracle.

And now we've lost one. It does have an impact nationwide, and so every tribe, every state, is going to have to deal with it. But every Supreme Court case has an impact that has to be dealt with.

McGirt is something that the state, the feds, and all the tribal nations had to deal with.

I don't want any of us to get too worried that this was Armageddon or the end of the world. We're going to push ahead, we're going to keep fighting for tribal sovereignty. Thank you all for being here.

STACY LEEDS: And I'll just end on that same positive note. I think that, especially for those of us in Oklahoma, when you think about where tribal sovereignty was three or five or 25 years ago, we are far ahead of the curve than where we have been even very recently.

And so, I think we just need to keep focusing on Indigenous excellence and doing our work, the best that we can do. Be creative. Think about compacts in places that you never thought about them before.

You know, why not have one judge that's cross-deputized between the tribe, and the city, or the county that sits and hears initial appearances all together in one place.

I mentioned my concern over victims' services and the hard work that they do. Let's support them. And then I think, rather than viewing this as "run to Congress and get a such-and-such insert-the-name fix," we just need to think holistically about Indian country. And we go to Congress with a package of a lot of things that we all need, and we support each other in that.

And a lot of it is resourced-based, but a lot of it has to do with all types of jurisdiction and everything under the sun, from economic development to our court systems

to our healthcare systems. So, I think supporting each other in a big package to Congress, rather than this piecemeal responsiveness, will serve us all well, nationally. And we'll just continue to unpack what this all means together.

DERRICK BEETSO: Thank you so much, and thank you to our audience. Thank you to those of you who stuck with us to the end.

We really appreciate these opportunities to share education with you all, as part of our mission and what we do. Thank you.