



**Attacks on Tribal
Sovereignty:
An Analysis of
Recent Decisions
of the United
States Supreme
Court**

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Introduction

Recent Supreme Court decisions are concerning Tribal Nations and those who work in Indian Law. Most notably, [Oklahoma v. Castro-Huerta](#)¹ has major implications on the legal relationship between Tribes, states, and the federal government. The potential negative impact from these decisions can change Tribal sovereignty as it is commonly understood. One solution is to increase efforts to provide more education and data on Indian Country to ensure that there are accurate representations of Tribal communities and Tribal sovereignty. This article will provide a historical background of Tribal sovereignty through the lens of the United States legal system and follow with an overview and analysis of the recent pivotal Supreme Court decisions and their use of data.

Historic Background

Indigenous Peoples have thrived in the part of the world known as North America since time immemorial. When European colonizers made first contact, they recognized Indigenous Peoples as Native Nations.² This recognition was documented by European powers through treaties and other agreements. Native Nations have always exercised their inherent powers of self government, but it took time for European powers to decide how they would acknowledge Tribal sovereignty.³ These early documents formed the legal relationships between Tribal Nations and European powers.

With the establishment of the U.S., came the inevitable acceptance of the prior legal relationships previously negotiated between other European powers and Tribes. Expanding on these negotiated recognitions, the U.S. also entered in their own treaties with Native Nations. However, these treaties were exclusive actions conducted by the newly formed Federal Government. Individual States within the U.S. had their own views on the concept Tribal sovereignty and the legal effects of that concept. As such, they were often in conflict with each other as well as Federal decisions.

These State and Federal conflicts found their way to the Supreme Court, seeking resolution to the growing problems Tribes experienced in relation to Tribal sovereignty. The U.S. Supreme Court first addressed Tribal sovereignty and its relationship to the federal government in the following cases known collectively as the Marshall trilogy.⁴

¹ *Oklahoma v. Castro-Huerta*, 597 U.S. ___, 2 (2022).

² William C. Canby Jr., *American Indian Law in a Nutshell*, 6th Edition (St. Paul: West Academic, 2015, pp.13-14.

³ *Ibid.*, 14-15.

⁴ *Ibid.*, 15.

- [*Johnson v. McIntosh*](#)⁵. In this case the Court held that the Doctrine of Discovery diminished Tribal ownership of their lands and only gave them a right to occupy. This case also held that only the discovering sovereign had the right to sell or convey the lands occupied by Tribes.
- [*Cherokee Nation v. Georgia*](#)⁶. In this case the Court disagreed with the argument that the Cherokee Nation was a “foreign state” as that term was intended in the U.S. Constitution. Justice Marshall instead defined the Cherokee Nation as a “domestic dependent nation.”
- [*Worcester v. Georgia*](#)⁷. In this case the Court held that the Cherokee Nation constituted a nation holding distinct sovereign powers. Resultantly, state laws had “no force” in Indian country, barred under the Supremacy Clause by federal statutes and the Cherokee Nation’s treaties with the United States.

Ever since 1823, the Supreme Court has settled Tribal sovereignty issues according to the principles stated in the early Marshall Trilogy cases. These foundational cases and other subsequent cases developed core principles regarding Tribal sovereignty including, but not exclusive to the following:⁸

- Tribal Nations are sovereign entities with the power of self government.
- Congress is the only power able to regulate and modify the status of Tribal nations.
- States cannot deal or regulate with Tribal Nations unless Congress chooses to delegate that power to a state.
- The Federal government has a responsibility to protect Tribal treaty rights, lands, assets, and resources. This is also commonly referred to as the Federal Trust Responsibility.

The early Marshall principles have been scrutinized and diminished over the years. The Supreme court has made several rulings that limit a Tribe’s authority over non-Indians,⁹ and the Court also made several rulings that have allowed States to encroach on Tribal Sovereignty.¹⁰ However, in spite of these decisions, the court maintained a reasoning based on the core principles that were first expressed by Justice Marshall.

The Supreme Court undermines Tribal sovereignty

More recently, the Supreme Court made a decision that partially restored some of the early core Marshall principles. In 2020, the court ruled in the case of [*McGirt v. Oklahoma*](#)¹¹, that once a reservation is established, it will retain that status until Congress explicitly indicates otherwise.

⁵21 U.S. 8 Wheat. 543 (1823).

⁶30 U.S. 5 Pet. 1 (1831).

⁷31 U.S. 6 Pet. 515 (1832).

⁸William C. Canby Jr., *American Indian Law in a Nutshell, 6th Edition* (St. Paul: West Academic, 2015, pp. 1-2.

⁹*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), *Montana v. United States*, 450 U.S. 544 (1981).

¹⁰*Williams v. Lee*, 358 U.S. 217 (1959), *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164 (1973).

¹¹ 591 U.S. __ (2020).

This ruling was heralded as a victory for Tribal sovereignty because it not only settled long standing jurisdictional questions affecting the Tribes involved, but it also signaled a new and more substantial recognition of Tribal sovereignty by the Supreme Court.

The optimistic outlook after *McGirt* did not last long. Two years later, the Supreme Court reconsidered its endorsement of Tribal sovereignty from *McGirt* in [Oklahoma v. Castro-Huerta](#)¹². In *Castro-Huerta*, the Supreme Court ruled that States hold concurrent criminal jurisdiction in crimes that take place on Tribal lands. The Court also goes further to say that this is true even in cases where an indigenous individual is a victim of an offense. This holding changes the common understanding of the core Tribal sovereignty principles stated in the *Marshall* cases. The holding allowed a state to encroach into Tribal sovereignty in a case taking place on Tribal land involving a Tribal victim of an offense. This case involved a set of facts that would have normally been believed to fall under Tribal jurisdiction before *Castro-Huerta*.

On its face, the court is making a ruling on a very specific set of facts. However, the assumptions about the facts are detrimental to Tribal sovereignty. In one example, the Court states, “About two million people live there [eastern Oklahoma] and the vast majority are not Indians.”¹³ The holding in *McGirt* did not hinge on who was living on the land, but on the core principle that only Congress has the power to disestablish a reservation.¹⁴ This statement by the court undermines the inherent sovereignty of Tribal justice systems and is contrary to what was actually happening on the ground.¹⁵

Shift to States Rights

Arguments supporting state’s rights and state sovereignty are often used to outweigh the interest of Tribes and Tribal sovereignty. In two other recent cases, this Supreme Court has signaled its support for those arguments. In the case of [Dobbs v. Jackson Women’s Health Organization](#)¹⁶, the Court held, in conflict with previous precedent, that the United States Constitution does not address a right to abortion and resulted in the overturning of the prominent cases of [Roe v. Wade](#)¹⁷, and *Planned Parenthood of Southeastern Pa. v. Casey* (1992). The Court then reasoned that the right to abortion is still subject to state legislatures.¹⁸

In the case of [West Virginia v. EPA](#), the court held that the Environmental Protection Agency in Section 111(d) of the Clean Air Act does not have the authority to devise emissions caps based on the generation shifting approach the Agency took in the Clean Power Plan. The court

¹² 597 U.S. __ (2022).

¹³ *Oklahoma v. Castro-Huerta*, 597 U.S. __, 2 (2022).

¹⁴ *McGirt v. Oklahoma*, 591 U.S. __, 3-6 (2020).

¹⁵ Rebecca Nagle and Allison Herrera, “Where Is Oklahoma Getting Its Numbers From in Its Supreme Court Case?,” *The Atlantic*, April 26, 2022, [link](#) (July 29, 2022).

¹⁶ 597 U.S. __ (2022).

¹⁷ 410 U.S. 113 (1973).

¹⁸ 597 U.S. __, 78-79 (2022).

reached its decision by also holding that states are harmed by regulations like section 111(d) because it requires the states to do more work.¹⁹

***Oklahoma v. Castro-Huerta*: Recent Misinterpretations of Federal Indian Law & Tribal Sovereignty**

When looking further into the supporting facts and rationale in the ruling made by the Supreme Court in *Castro-Huerta*, contradictions are abundant through inconsistency in case law analysis, making unsubstantiated claims, and making broad sweeping statements, among others.

A trend seen throughout the recent Supreme Court decisions is a complete separation from established understandings of case law and previously established case precedents. The *Castro-Huerta* decision, in particular, contradicts long-accepted legal principles on Tribal jurisdiction. As seen in the cases discussed above, it has been confirmed that states do not have jurisdiction over non-Indian criminals who commit crimes against Indians in Indian Country for nearly 200 years.

Additionally, the Supreme Court made several unsubstantiated claims in *Castro-Huerta* surrounding Indian Country. One specific example can be seen in the majority opinion, in which Justice Kavanaugh expresses a need for states to be involved in criminal jurisdiction on Tribal lands because of “a now-familiar pattern in Oklahoma in the wake of *McGirt*.”²⁰ Kavanaugh writes: “the State estimates that it will have to transfer prosecutorial responsibility for more than 18,000 cases per year to the Federal and Tribal Governments” and now “many people may not be held accountable for their criminal conduct due to resource constraints.”²¹ However, when looking closer at this assertion, it is difficult to verify the purported data. Justice Kavanaugh gleans this statement directly from the State of Oklahoma’s brief in the case of *Castro-Huerta*. There is no specific source given for the State’s figures and the correlation it has to the ruling in *McGirt*.²² A lack of accurate and substantiated data when dealing with Indigenous issues is an occurrence that has long-afflicted Indian Country. Impactful decisions such as the one in *Castro-Huerta* must have factual and conclusive information to support any claims.

Finally, in its recent consideration of *Castro-Huerta*, this newest iteration of the Supreme Court had its first significant Indian law case. The new Court’s first Indian law case analysis contained many broad, sweeping statements with considerable negative implications. The decision in *Castro-Huerta* ruled that states have jurisdiction over Tribal lands by broadly concluding that states have concurrent criminal jurisdiction on Tribal lands in cases involving a Tribal member, instead of the previously understood status of that jurisdiction being separate from the state. This decision is not rooted in history in which Native Nations have been separated from the states since the United States’ founding and consequently, contradicts treaties and the federal trust relationship between the United States and Tribes. Lower courts are bound by the

¹⁹597 U.S. ___, 14 (2022).

²⁰*Oklahoma v. Castro-Huerta*, 597 U.S. ___, 3 (2022).

²¹*Ibid.*, 4.

²²Brief for Petitioner, 7, *Oklahoma v. Castro-Huerta*, 597 U.S. __ (2022).

Supreme Court's reasoning. This will result in incorrectly and unlawfully applying the decision broadly in future cases, causing further legal confusion regarding Tribal sovereignty.

Protecting Tribal Sovereignty

Misinformation about Indigenous peoples, Tribal governments, and Tribal sovereignty are detrimental to the lives of Indigenous people. Even where these misconceptions seem arbitrary, they can be echoed and used in consequential actions like these Supreme Court decisions. Therefore, it is essential to provide continuous educational resources and materials while also identifying and debunking misinformation. For those who work in Tribal policy and advocacy, the effort to educate others about Native Nations is a constant responsibility. However, it is essential to mitigate detrimental attacks on Tribal sovereignty.

“With accurate data, many of the arguments attacking Tribal sovereignty can be shown to be inaccurate.”

Data is needed for education and advocacy. It is essential to show accurate representations of Indigenous Peoples and Tribal communities. With accurate data, many of the arguments attacking Tribal sovereignty can be shown to be inaccurate. Data from Tribal courts can show the success of Tribal justice systems, public health data can show the success of Tribal healthcare systems, and education data can show the success of Tribal school systems. Data and information is

needed to show others that Tribes are fully capable of self-governance, but it can also be used to strengthen a Tribe's position when disputes end up in court.

Native Nations exercise their sovereignty daily through the operation of Tribal entities and services. Many tribes operate their own schools and healthcare systems, operate significant commercial enterprises, and advocate to state and federal entities on behalf of their Tribal members. Support for these daily activities is vital. Support can come in different forms like assisting with data and information, or training for Tribal professionals. Support for the daily exercise of Tribal sovereignty is needed and can help prevent and mitigate attacks on sovereignty like the decision in *Castro-Huerta*.

More data does not necessarily mean that future courts will automatically have more knowledge and respect for Tribal sovereignty, but it will make it harder for opponents of Tribal sovereignty to create their own narratives. More data and general knowledge about Tribal issues would help to ensure that courts take Tribal sovereignty into full consideration. It would help those who are not familiar with Tribal issues have a better understanding as to why Tribal and state sovereignty are separate and distinct. Education on the history and development of Tribal sovereignty, and good contemporary Tribal Nations data would greatly benefit all those who work in this field. It could ensure that conflicts in cases like *McGirt & Castro-Huerta* are avoided altogether.

AIPI Moving Forward

The American Indian Policy Institute is committed to leading the discourse on Tribally driven research and public policy-making and will continue to take action in the face of these recent blatant attacks on Tribal sovereignty and improper expansion of state power. AIPI will persist in providing accurate information on Tribal sovereignty. We will provide accessible and essential resources for the daily praxis of Tribal sovereignty, building Tribally led data and research needed to support Tribal sovereignty. Our commitment to connect Tribes to other Arizona State University resources will continue. As established throughout history, Indian Country will not relinquish its inherent sovereignty willingly. AIPI stands with Indian Country in its resistance to these antithetical intrusions upon Tribal sovereignty and Tribal treaty rights.



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