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Solemn Vow: Solum's Originalism, Treaties, and Tribal Sovereignty in Castro-Huerta

Liam T. Sheridan
University of Maine School of Law, liam.t.sheridan@maine.edu

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ABSTRACT

In *Oklahoma v. Castro-Huerta*, the Supreme Court held that states have inherent authority to prosecute crimes committed by non-Indians in "Indian country." Only two years earlier, the Court in *McGirt v. Oklahoma* held that most of eastern Oklahoma was Indian country, and thus immune from any state criminal jurisdiction. *Castro-Huerta* limited this immunity and narrowed the Court's view of tribal sovereignty as a whole. The majority represented the Court's originalist faction—minus Justice Gorsuch, who had penned both the majority opinion in *McGirt* and the dissent in *Castro-Huerta*. The majority and dissent disagreed over whether federal statutes preempted Oklahoma's criminal jurisdiction. But the more fundamental issue is whether criminal jurisdiction in Indian country is constitutional in the first place. This Note asks whether Justice Kavanaugh and Justice Gorsuch faithfully employed an originalist methodology to resolve that issue. More generally, this Note serves as a study of originalism's usefulness in guiding judges towards the correct legal sources to answer constitutional questions, as well as its implications for the constitutional basis for federal criminal jurisdiction in Indian country; and it advances the argument that treaties should be the primary legal authority governing tribal relations.

INTRODUCTION

"Great nations, like great men, should keep their word."[1]

– Hugo Black

You could forgive the two men for arguing about the correct path to the top of the mountain. The labyrinth of winding paths that lead there are so ancient and complex, so poorly designed, that following them is all but impossible. Odd, then, that each man is so sure of his route. They sneer at each other's tools: misread maps, malfunctioning compasses, myopic fragments cherry-picked from the directions of guides long since gone. But as they argue, the mountain is moving. The truth is that the way to the top is unnavigable, the paths are ever shifting. And

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1. Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

while the men argue, they sink, for the mountain is made of muck—it has no foundation.

In *Oklahoma v. Castro-Huerta*, the Supreme Court ruled that crimes committed by a non-Indian against an Indian in Indian country are subject to state criminal jurisdiction.[2] This holding narrowed the wide breadth of criminal jurisdiction afforded to tribes in Oklahoma in *McGirt v. Oklahoma*.[3] The author of the majority in that opinion, Justice Gorsuch, now found himself the author of a vociferous dissent in *Castro-Huerta*.[4] What remained the same, though, was that Justice Gorsuch was in the unusual position of disagreeing with the view of Justice Kavanaugh, and was writing against the voting bloc with which he is most often aligned.[5] In the Justices' view, *Castro-Huerta* came down to a matter of statutory interpretation.[6] How is it, then, that two Justices who claim fidelity to the same school of jurisprudential thought came to opposite conclusions about what a statute provides?

Justices Kavanaugh and Gorsuch are both self-proclaimed originalists.[7] An originalist is someone who interprets the Constitution by assigning the words their meaning fixed at the time of their ratification.[8] Proponents of this judicial theory stress its ability to provide predictable outcomes because it fixes a static, and therefore certain, meaning to the constitutional provision or law in question.[9] Public interest in judicial philosophies is high: our Senate confirmation hearings often center around an attempt to discern prospective Justices' analytical approaches, which has in turn impacted our public perception of, and discourse around, the Court.[10] All this makes sense: legislators and citizens want to be able to forecast what kinds of decisions Justices will make on the bench, and judicial ideology may be a good way to do so.[11] After all, this is what the originalist approach promises us: certainty, predictability, restraint.[12]

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2. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2499 (2022).

3. Chris Casteel, *Will U.S. Supreme Court Hear Another Case Linked to McGirt Ruling?*, THE OKLAHOMAN (Sept. 26, 2022), https://www.oklahoman.com/story/news/2022/09/26/will-supreme-courts-new-term-include-an-oklahoma-case-tied-to-mcgirt/69493093007/.

4. *See* McGirt v. Oklahoma, 142 S. Ct. 2452, 2458 (2020); *Castro-Huerta*, 142 S. Ct. at 2505 (Gorsuch, J., dissenting).

5. *See* ANGIE GOU ET AL., SCOTUSBLOG, STAT PACK FOR THE SUPREME COURT'S 2021-22 TERM 15 (2022) (showing that Justice Gorsuch more regularly votes with the members of the majority in *Castro-Huerta* than with the members of the dissent).

6. *Castro-Huerta*, 142 S. Ct. *passim*.

7. *See* Eric J. Segall, *Does Originalism Matter Anymore?*, N.Y. TIMES (Sept. 10, 2018), https://www.nytimes.com/2018/09/10/opinion/kavanaugh-originalism-supreme-court.html; Neil M. Gorsuch, *Justice Neil Gorsuch: Why Originalism Is the Best Approach to the Constitution*, TIME (Sept. 6, 2019), https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution/.

8. Harry Litman, *Originalism, Divided*, THE ATL. (May 25, 2021), https://www.theatlantic.com/ideas/archive/2021/05/originalism-meaning/618953/.

9. *See* ROBERT W. BENNET & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 78 (2011).

10. Jason J. Czarnezki et al., *An Empirical Analysis of the Confirmation Hearings of the Justices of the Rehnquist Natural Court*, 24 CONST. COMMENT. 127, 127 (2007).

11. *See id.*

12. *See* Jamal Green, *Rule Originalism*, 116 COLUM. L. REV. 1639, 1644, 1692 (2016).

While the Justices take each other to task on the question of statutory interpretation, this Note asks a more fundamental question: whether originalism allows for our current body of federal Indian law in the first place. Specifically, this Note asks whether the Court relied on law that is incompatible with originalism in determining that states have an inherent authority to prosecute crimes occurring on their land, even in Indian country. First, this Note introduces the theory of originalism advanced by Lawrence Solum and its interaction with federal Indian law through an academic lens. Next, this Note provides the historical and legal background necessary to understand *Castro-Huerta*. Then, *Castro-Huerta* itself is explored, and the reasoning of the Court explained. Finally, this Note advances the idea that current federal Indian law is incompatible with an originalist view of the Constitution and demonstrates that the *Castro-Huerta* dissent's reliance on early Native American treaties is the proper analysis of the constitutional basis for a state's criminal jurisdiction in Indian country. The other legal authorities cited by both the majority and the dissent are as malleable as the mountain—they have no originalist foundation.

I. BACKGROUND

A. What Is Originalism?

Originalism is a method of interpreting the Constitution's linguistic meaning. Although subject to many evolving definitions,[13] the basic premise of modern originalism is that the Constitution's language is best interpreted based on its "original public meaning."[14] Original public meaning depends on the "communicative content" of the language.[15] Communicative content has been defined as what the drafter of the language sought to convey,[16] their expectation as to how the language would be applied,[17] and what reasonable members of the public would interpret that language to mean.[18] No matter the method an originalist employs, the original public meaning is fixed at the time of ratification.[19] This analytical framework, known as the fixation thesis, is the anchor of the originalist methodology—its effect is that constitutional terms are static, their

13. *See* Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12, 32–37 (Grant Huscroft & Bradley W. Miller eds., 2011) (outlining the historical evolution of originalism and detailing different schools of thought that lay claim to the originalist moniker).

14. Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1965 (2021).

15. *Id*. at 1957.

16. *Id*. at 1971.

17. Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 662–63 (2009) (noting the distinction between the different definitions of public meaning, but positing that they may not be substantively different).

18. Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498, 544 (2011).

19. Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of The Great Debate*, 113 NW. U. L. REV. 1243, 1248 (2019).

meaning does not change.[20] Any effort to discern the communicative content of the text must be informed by the historical context at the time of ratification, not by modern understanding.[21]

Professor Solum, a thought leader on originalism, distinguishes between constitutional interpretation, outlined above, and constitutional construction.[22] While interpretation discerns communicative content, construction discerns legal content.[23] Legal content is meaning assigned to constitutional language by relevant legal authorities, typically case law.[24] When the terms of the Constitution are vague, we turn to construction to provide clarity.[25] But when interpretation and construction are in conflict, Solum contends that construction must be "constrained" to the original communicative content.[26] In other words, legal content cannot command something that the communicative content forbids, nor can it ignore what the original communicative content requires.[27]

It is a matter of controversy among originalists how strict Solum's constraint principle should be; specifically, whether case law that is contrary to the public meaning must be overruled or whether both original public meaning and contrary modern constitutional doctrine can be maintained.[28] This Note adopts the premise that when case law ascribes a legal meaning to the Constitution that is inconsistent with the document's original public meaning, a faithful originalist will accord those precedents no weight. Otherwise, the entire doctrine of originalism is rendered moot: cases that implicate a constitutional provision must be resolved by the Constitution's language—it is the supreme law of the land. To ignore the original public meaning of that language not only renders the entire originalist exercise moot, it also disregards the Constitution in favor of erroneous precedent. No defendable theory of constitutional interpretation can allow this result.

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20. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015). *But see* Solum, *supra* note 18 (discussing room for dynamism even within originalism and suggesting that the terms of the Constitution are not static, per se).

21. Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1956 (2013).

22. Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 483 (2013).

23. *Id.* at 479.

24. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 453 (2013). For example, an interpretation of the Commerce Clause would look to primary sources that indicate what the Framers understood "commerce" to mean and what "commerce" meant to the public in 1788. Construction is looking to *Marbury v. Madison* and determining that the power to regulate commerce should be construed broadly. In other words, originalists look to historical sources to interpret the Constitution, and legal sources are used to engage in constitutional construction. *See id.*

25. *Id.* at 469.

26. Lawrence B. Solum, The Constraint Principle: Original Meaning and Constitutional Practice 8 (Apr. 13, 2019) (on file with SSRN).

27. *See id.* at 20–21.

28. *Compare* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989), *with* Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 23 (2006).

B. Originalism and Federal Indian Law

In his work *Originalism and Indians*, scholar M. Alexander Pearl gives an originalist view of federal Indian law.[29] Pearl answers, among other things, two foundational questions: (i) whether the congressional plenary power under the Indian Commerce Clause is valid, and (ii) whether an originalist view of the Constitution leaves room for tribal sovereignty.[30] In answering the first question, Pearl says that federal common law has interpreted the term "commerce" too broadly.[31] While he explicitly rejects the narrow definition of commerce offered by Justice Thomas,[32] Pearl says that the regulation of commerce is *with* Indian tribes, not *within* Indian tribes.[33] The federal common law that endorsed congressional plenary power violates the constraint principle; it is legal content that extends beyond the communicative content of the Commerce Clause because it ignores the difference between the terms "with" and "within."[34] Thus, legislation that attempts to regulate Indian activity is an unconstitutional encroachment on the tribes' sovereignty.[35] Congress may regulate U.S. citizens and their interactions *with* tribes, but not the tribes internal governments or members of the tribes themselves.[36]

Regarding the second question, Pearl concludes that—while the Constitution does not expressly recognize tribal sovereignty—public meaning, treaties, and constitutional structure guide an originalist understanding towards recognizing tribal sovereignty. First, Pearl posits that the original public meaning should include the Native Americans' understanding of the Constitution at the time of ratification.[37] Because tribes undoubtedly saw themselves as sovereign, that should inform the public meaning as much as any other source of historical context.[38] Second, the public meaning should be informed by the way in which the pre-constitutional government interacted with the tribes.[39] Specifically, the United States engaged in treaty-making with the tribes, showing that at the time of

29. *See generally* M. Alexander Pearl, *Originalism and Indians*, 93 TUL. L. REV. 269 (2018).

30. *Id.* at 322.

31. *Id.* at 328 ("One clear conclusion, regardless of the type of originalist lens used to examine the constitution, is that the contemporary version of the congressional plenary power doctrine is not valid.").

32. *Id.* at 323–25. Justice Thomas views Congress's plenary power as invalid because he does not think the term "commerce" includes the categories of legislation Congress has enacted under this enumerated power. United States v. Lara, 541 U.S. 193, 224 (2004) (Thomas, J., concurring) ("I cannot agree that the Indian Commerce Clause 'provide[s] Congress with plenary power to legislate in the field of Indian affairs.'").

33. Pearl, *supra* note 29, at 325.

34. See *id.* at 325–26.

35. *See id.* at 328.

36. *See id.* at 329.

37. *Id.* at 334. In advancing this argument, Pearl specifically notes the indeterminacy of communicative content and suggests that the Indian canon of construction should be applied to constitutional doctrine as well. *Id.* For an argument as to why originalism should embrace the Indian canon, see Phillip P. Frickey, *Indian Canon Originalism*, 126 HARV. L. REV. 1100 (2013).

38. Pearl, *supra* note 29, at 334.

39. *Id*. at 330.

ratification the tribes were viewed as separate sovereigns.[40] Because the United States cannot engage in treaty making with non-sovereign entities, the government at the time of ratification must have viewed the tribes as independent nations.[41]

Finally, Pearl looks to the Constitution's inherent separation of powers to show that the tribes were viewed as sovereign. This begins with the recognition that 25 U.S.C. § 71, a law disallowing the President from making treaties with Indian tribes, is unconstitutional.[42] The Constitution empowers the President, with the advice and consent of the Senate, to make treaties.[43] Congress may not usurp this power from the executive.[44] Therefore, the Indian Appropriations Act, which forbids the President from striking treaties with the tribes,[45] is unconstitutional. This interpretation is compatible with originalist doctrine, which gives great weight to the implicit separation of powers within the Constitution.[46] Chief among modern originalist concerns is the revival of the long dormant nondelegation principle.[47] So the argument goes, if Congress cannot delegate its authority to the executive branch, then the executive cannot acquiesce its powers to Congress.[48]

This charts the course for Pearl's view of federal Indian law under originalism. First, a tribe's sovereignty cannot be undone or diminished through judicial opinions. Second, statutes that regulate intra-tribal affairs are unconstitutional. Third, a sovereign nation must come to terms with another sovereign nation through means of a treaty. Finally, in addition to respecting tribal sovereignty, treaties provide clear contours to its limits.

With this backdrop in mind, this Note turns to a specific dispute involving foundational issues of federal Indian law and tests whether the reasoning of the Court in *Castro-Huerta* is originalist at all.

C. Historical Background: The Trail of Tears

In one sense, the facts of *Castro-Huerta* are straightforward and relatively unimportant—the only fact pertinent to whether Oklahoma had jurisdiction is that a non-Indian committed a crime against an Indian in Indian country.[49] But in another sense, the facts upon which *Castro-Huerta* was decided are as long and complex as the history of the nation itself. The circumstances that gave rise to the issue of jurisdiction are complicated, their origins both remote and recent.

From 1831 to 1838, the United States federal government engaged in the forced relocation of the so-called "Five Civilized Tribes" (Five Tribes) from their

40. *Id.* ("Treaties only exist as agreements between sovereign entities. Thus, these treaties indicate that the sovereignty of Indian tribes was not questioned by the Continental Congress. This undisputed historical fact cannot be ignored by any plausible originalist conception of the Constitution.").

41. *Id.*

42. *Id.* at 331.

43. U.S CONST. art. II, § 2.

44. *See id*.

45. 25 U.S.C § 71 (2012).

46. Pearl, *supra* note 29, at 332–33.

47. *See id*.

48. *See id*.

49. *See* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2491–93 (2022).

homelands in the southeastern United States to modern day Oklahoma.[50] This removal, commonly referred to as the "Trail of Tears," had two legal bases: statute and treaty. The Indian Removal Act of 1830 allowed the President to promise land west of the Mississippi River to the Five Tribes, who would in turn give up their ancestral homes.[51] The President then entered into treaties with the tribes providing for financial remuneration and lands west of the Mississippi River (called "Indian territory") in exchange for the tribes' relocation.[52] Of particular importance to *Castro-Huerta* is the Treaty of New Echota, which established the legal foundation for the removal of the Cherokee Nation.[53] Subsequently, the United States promised the Cherokee that "[no] State or Territory [shall] ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves."[54]

The promise would not be long lived. In the intervening years, non-Indian settlers migrated into Indian territory.[55] By 1900, settlers outnumbered members of the Five Tribes ten-to-one and had significantly contributed to the development of Indian territory.[56] The United States government supported Indian migration and development through a policy of assimilation by weakening tribal power.[57] Beginning in 1898, the United States government began systemically dismantling the Five Tribes' governments and their land claims to tribal territory.[58] In 1906, Congress passed the States Enabling Act, granting Oklahoma statehood.[59] By 1934, the tribal governments were all but abolished.[60] The Roosevelt administration made strides toward reestablishing tribal government with some

50. *See Indian Treaties and Removal Act of 1830*, OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1830-1860/indian-treaties (last visited Apr. 5, 2023). The "Five Civilized Tribes" was the title used to refer to the Cherokee, Chickasaw, Choctaw, Seminole, and Muscogee (or Creek) Nations. Andrew C. Frank, *The Five Civilized Tribes*, ENCYCLOPEDIA OF OKLAHOMA HISTORY & CULTURE, https://web.archive.org/web/20141228051804/http://digital.library.okstate.edu/encyclopedia/entries/F/FI011.html (last visited Apr. 14, 2023).

51. *See Indian Treaties and Removal Act of 1830*, *supra* note 50.

52. *See id.*

53. *See* Treaty with the Cherokee, Cherokee Nation-U.S., Dec. 29, 1835, 7 Stat. 478 [hereinafter Treaty of New Echota]. The legitimacy of the Treaty of New Echota is dubious. *See* Christopher Robert Rossi, *The Blind Eye: Jus Soli, and the "Pretended" Treaty of New Echota*, 9 AM. INDIAN L.J. 402, 403 (2021). It was agreed to by a minority contingent of the Cherokee Nation and deemed fraudulent by the Cherokee Chief and National Council. *See id.* at 408, 410–12. The Cherokee Nation unsuccessfully appealed to the United States Senate not to ratify the treaty because they, and a majority of Cherokee Indians, did not support it. *See id.* at 412–13.

54. Treaty with the Creeks, Creek Tribe of Indians-U.S., art. 14, Mar. 24, 1832, 7 Stat. 368.

55. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.03 (Nell Jessup Newton et al. eds., 2019) [hereinafter COHEN'S HANDBOOK].

56. *See* S. REP. NO. 377-53, at 6 (1894).

57. *See* COHEN'S HANDBOOK, *supra* note 55, at § 1.03.

58. *See* General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C.) (repealed 2000) (disestablishing the Indian governments and providing for the allotment of land).

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

60. *See* COHEN'S HANDBOOK, *supra* note 55, at § 1.05.

success.[61] However, the role of the tribal government within a state was left unclear, the contours of its power undefined.[62]

D. Legal Background: McGirt v. Oklahoma

The ambiguous relationship between tribal and state sovereignty would simmer from then on, until finally boiling over in *McGirt v. Oklahoma*.[63] In that case, which also presented a question of state criminal jurisdiction, the Court held that, under existing precedent, an Indian reservation, which constitutes Indian country, could only be disestablished by an act of Congress.[64] Congress only disestablishes a reservation when it clearly evinces its intent to do so.[65] The Court reasoned that neither allotment, nor the temporary abolishment of tribal government, nor the demographics or practices of modern Oklahoma constituted congressional intent.[66] Because Congress had never clearly expressed its intent to disestablish the reservation granted to the Creek Nation, the reservation still existed for the purposes of the Major Crimes Act and, therefore, the State lacked criminal jurisdiction.[67] The Court concluded that although Oklahoma had prosecuted crimes in Indian country for nearly one hundred years, the State had done so in error.[68]

II. *UNITED STATES V. CASTRO-HUERTA*

A. Majority Opinion

McGirt laid the groundwork for *Castro-Huerta*.[69] If the Five Civilized Tribes' treaties, including the Cherokee's, did not constitute a reservation, then there would be no question of the State's ability to prosecute Castro-Huerta. After *McGirt*, there would appear to be no question of the State's *lack* of ability to prosecute Castro-Huerta. But shifting dynamics on the Court would raise the question anew: what is the extent of Oklahoma's criminal jurisdiction in Indian country?

The Court answered this question by holding that (i) states have an inherent authority to prosecute crimes by non-Indians against Indians in Indian country;[70] (ii) this authority is not preempted by the federal government;[71] and (iii) under the balancing test set forth in *White Mountain Apache Tribe v. Bracker*, there is no infringement on tribal sovereignty.[72]

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61. *Id.*

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

63. *See id.* at 2460.

64. *Id.* at 2462 ("To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress.").

65. *Id.* at 2463.

66. *Id.* at 2464–68.

67. *See id.* at 2459.

68. *Id.* at 2470, 2485.

69. *See* Oklahoma v. Castro-Huerta, 142 S. Ct 2486, 2492 (2022).

70. *Id.* (citing United States v. McBratney, 104 U.S. 621, 623–24 (1882)).

71. *Id.* at 2494.

72. *Id.* at 2500–02. *See generally* White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (holding that whether a state tax law was preempted by federal law was a fact intensive inquiry). It is a

1. Facts

Victor Castro-Huerta was charged with child neglect in 2015.[73] His five-year-old stepdaughter, who has cerebral palsy and is legally blind, was brought to the hospital in 2015 in critical condition.[74] She was dehydrated, malnourished, and covered in lice and excrement.[75] Castro-Huerta admitted to severely malnourishing his stepdaughter.[76] The State of Oklahoma charged him with child neglect and sentenced him to thirty-five years in prison.[77] Mr. Castro-Huerta is a non-Indian.[78] His stepdaughter is an Indian and they were living in Indian country.[79]

Castro-Huerta challenged his conviction.[80] He argued that *McGirt* clarified that Oklahoma never had jurisdiction to prosecute him in the first place.[81] The Oklahoma Court of Criminal Appeals accepted this argument and vacated his conviction.[82] At the same time, a federal grand jury indicted Castro-Huerta because both the Department of Justice and Oklahoma Court of Appeals believed the federal government had exclusive jurisdiction over his case; he pled guilty in exchange for a sentence of seven years in prison followed by his deportation.[83] In other words, Castro-Huerta's sentence was reduced by 28 years as a result of the jurisdictional handoff.[84]

2. Constitutional Basis for State Criminal Jurisdiction

No one contested that the federal government had jurisdiction to prosecute Castro-Huerta.[85] The question was whether that jurisdiction was exclusive, and, if not, from where the State derived its criminal jurisdiction.[86] First, the Court held that states exercised an inherent constitutional authority to prosecute crimes committed within their borders, including within Indian country.[87] Then, the Court rejected Castro-Huerta's arguments that either the General Crimes Act or Public Law 280, two laws which potentially extend federal criminal jurisdiction into Indian country, preempted inherent state jurisdiction.[88] The Court reasoned that this inherent authority was limited by the balancing test articulated in *Bracker*.[89]

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matter of contention between the majority and dissent whether or not *Bracker* creates the balancing test that the majority relies on. *Castro-Huerta*, 142 S. Ct. at 2521.

73. *Castro-Huerta*, 142 S. Ct. at 2491.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 2492.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *See id.*
86. *Id.* at 2494.
87. *See id.* (citing United States v. McBratney, 104 U.S. 621, 623–24 (1882)).
88. *Id.*
89. *Id.* at 2500–02.

The Court explained at the outset that, as a constitutional matter, states have an inherent authority to prosecute crimes committed within their borders.[90] Thus, unless federal law specifically preempts a state's jurisdiction, the state retains its prosecutorial authority.[91] The Court acknowledged that it once considered Indian country separate and apart from the state.[92] Since then, the Court has embraced the notion that Indian country is part of a state and not separate from it.[93] In the context of criminal jurisdiction, the Court cited, *inter alia*, three cases: *United States v. McBratney*, *Draper v. United States*, and *Donnelly v. United States*.[94] Under the majority's view, these cases demonstrated that State Enabling Acts, which admit territories to the union, effectively granted states the power to prosecute non-Indians in Indian country.[95] It is a fleetingly brief analysis of the Tenth Amendment's supposed grant of a state's authority to prosecute.[96] From there, the Court mostly concerned itself with addressing whether Oklahoma's criminal jurisdiction was preempted.

3. Federal Statutes Do Not Preempt State Jurisdiction

The General Crimes Act of 1885 (GCA) grants the United States government jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.[97] The GCA extended the laws for the "punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States" into Indian country.[98] This language is a cross-reference to the criminal law of federal enclaves.[99] Castro-Huerta advanced three alternative arguments that the GCA preempted state prosecution: (i) the law of exclusive jurisdiction extended into Indian country necessarily preempts state jurisdiction,[100] (ii) Congress implicitly intended for the GCA to preclude state jurisdiction,[101] and (iii) Congress ratified a

90. *Id.* at 2493.

91. *Id.*

92. *Id.* (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832)).

93. *Id.* ("[R]eservations are part of the state within which they lie, and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards." (quoting Surplus Trading Co. v. Cook, 281 U.S. 647, 651 (1930))); *see also* New York *ex rel*. Ray v. Martin, 326 U.S. 496, 499 (1946) ("[I]n the absence of a limiting treaty obligation or Congressional enactment, each state ha[s] a right to exercise jurisdiction over Indian reservations within its boundaries."); Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Nation, 502 U.S. 251, 257–58 (1992) ("This Court's more recent cases have recognized the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands."); Nevada v. Hicks, 533 U.S. 353, 361 (2001) ("State sovereignty does not end at a reservation's border.").

94. *Castro-Huerta*, 142 S. Ct. at 2491, 2496.

95. *See id*. at 2494.

96. *See id*. at 2493

97. 18 U.S.C. § 1152 ("Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.").

98. *Id.*

99. *Castro-Huerta*, 142 S. Ct. at 2491, 2495.

100. *Id*. at 2486, 2495.

101. *Id.* at 2496.

Supreme Court decision that recognized states could not prosecute in Indian country.[102] The Court rejected each of these arguments in turn.[103]

First, Castro-Huerta argued that because the law of federal enclaves is exclusive to state law, and that is the law that was extended into Indian country, the GCA necessarily excludes state law.[104] The Court held that this argument misunderstood the GCA.[105] The GCA does not create a federal enclave out of Indian country, nor does it state that federal jurisdiction is exclusive.[106] Rather, it merely indicates that the body of criminal law that applies in federal enclaves applies in Indian country.[107] Next, the Court rejected the closely related argument that the GCA is exclusive to state jurisdiction because its language mirrors that of the Major Crimes Act, which clearly preempts state prosecution because the Court found the language to be substantially dissimilar.[108]

Second, the Court rejected outright Castro-Huerta's argument that the history of the GCA demonstrates Congress's intent to preempt state jurisdiction.[109] The Court noted that "Congress expresses its intentions through statutory text," and nothing about the GCA states Congress's desire to make Indian country the exclusive province of federal jurisdiction.[110] Even if its history could overcome the plain language of the GCA, Castro-Huerta's historical analysis is erroneous because the first versions of the Act were from a time when Indian territory was separate from the states.[111] Therefore, Congress would not have considered state preemption because no state existed to preempt—nothing about the Act's history would imply an intent to preempt a state that does not exist.[112]

Finally, the Court rejected Castro-Huerta's argument that Congress reenacted the Court's decision in *Williams v. United States* by recodifying the GCA two years after the decision.[113] Reenactment is a canon of statutory construction stating that if Congress reenacts a law after a recent Supreme Court decision and does not change the language upon which the decision is based, then Congress may have accepted that interpretation.[114] In *Williams*, the Court stated that state jurisdiction only applied to crimes committed by non-Indians against Indians.[115] The *Castro-*

102. *Id.* at 2498.
103. *See id.* at 2495–99.
104. *See id.* at 2495.
105. *See id.*
106. *Id.* at 2496.
107. *Id.*
108. *Id.*
109. *Id.* at 2497.
110. *Id.* at 2496.
111. *Id.*
112. *Id.*
113. *Id*. at 2489–90.
114. LARRY M. EIG, CONG. RSCH. SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 50–51 (2014).
115. Williams v. United States, 327 U.S. 711, 714 (1946) ("While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on this reservation between persons who are not Indians, the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian.").

Huerta majority dismissed that argument, claiming that the reenactment canon cannot overcome the plain text of the statute.[116] The Court also reasoned that, in any event, the pertinent portion of *Williams* was dicta, and so Congress could not have endorsed that reading of the statute when it was not material to the disposition in *Williams*.[117]

Public Law 280 granted certain states criminal jurisdiction over non-Indians committing crimes in Indian country.[118] Oklahoma is not one of these states.[119] Castro-Huerta argued that it would be unnecessary surplusage to pass a law which would allow a state to gain criminal jurisdiction from the federal government if Oklahoma already had jurisdiction under the Constitution.[120] Surplusage is a canon of construction holding that if one reading of a law produces a redundancy, and another reading of the law does not, the reading without the redundancy is preferred.[121] The Court rejected this argument on the simple ground that the language of Public Law 280 does not displace any inherent state authority to prosecute crimes within its borders.[122] It made sense for Congress to restate this preexisting authority, the Court said, because the Court had not yet ruled on this issue, and Congress sought to avoid "uncertainty," which was not unnecessary surplusage.[123]

4. Bracker Balancing Test

Finally, the Court applied the balancing test articulated in *Bracker* to determine whether the exercise of jurisdiction infringed on tribal self-government.[124] The *Bracker* test balances state, federal, and tribal interests.[125] It does so in order to determine whether tribal interests have been infringed upon.[126] First, the Court noted that prosecution of Castro-Huerta would not encroach any tribal interest because tribes lack authority to prosecute non-Indians, even when they commit crimes in Indian Country.[127] In addition, prosecuting a non-Indian did not infringe on tribal self-government.[128] Federal interests would be well served because states would be able to prosecute cases that would otherwise overwhelm the Department of Justice.[129] Finally, Oklahoma had an interest in ensuring the safety of its citizens and ensuring its laws are enforced.[130]

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116. *Castro-Huerta,* 142 S. Ct. at 2489–90.
117. *Id.* at 2490.
118. 18 U.S.C. § 1162(a).
119. *Id.* The law does allow Oklahoma (or any state with Indian country within its borders) to petition Congress to become one of these states, *id.* § 1162(d), but Oklahoma has not done so, *Castro-Huerta*, 142 S. Ct. at 2518.
120. *Castro-Huerta*, 142 S. Ct. at 2490.
121. *See* John M. Golden, *Redundancy: When Law Repeats Itself*, 94 TEX. L. REV. 629, 655 (2015).
122. *Castro-Huerta*, 142 S. Ct. at 2499.
123. *Id.* at 2500.
124. *Id.* at 2501.
125. *Id.*
126. *See id.*
127. *Id.*
128. *See id.*
129. *See id.*
130. *Id.* at 2501–02.

B. Dissent

Justice Gorsuch began his dissent attacking the idea that states have an inherent authority to prosecute.[131] First, he outlined the historical context in which the Constitution was ratified and how that supports a view of exclusive federal power.[132] Second, he used a textual argument to demonstrate that states cannot have power over another sovereign.[133]

Centralizing the power to regulate affairs with Indian tribes was one of the shortcomings of the Articles of Confederation that the Constitution sought to ameliorate.[134] The Articles allowed for states to undermine the federal government's authority to deal with tribes by allowing states to regulate tribes within their borders.[135] By contrast, the Constitution vested this power solely with the federal government and did not grant states the same power to regulate tribes within their borders.[136] This was a clear centralization of power at the expense of the states, and historical commentary from the Founders reinforces the view that this power was to be exclusive.[137] Second, the dissent notes that the attempt to extend state jurisdiction over Indian country misunderstands the notion of state police power.[138] Justice Gorsuch posits that it is a "category error" to claim sovereign tribes are subject to the powers that are reserved to the states by the Tenth Amendment.[139] Tribes are independent from states and are subject to their own control.[140] Necessarily then, states cannot exercise their constitutionally delegated powers over tribes, including criminal jurisdiction.[141]

Indeed, the dissent recognized that the existence of the federal statutory provisions at issue demonstrated that Oklahoma lacks authority to prosecute crimes committed in Indian country.[142] The GCA was passed after the Supreme Court's decision in *Worcester v. Georgia*.[143] In *Worcester*, the Supreme Court held that Congress needed to expressly allow for federal jurisdiction in Indian country because it did not otherwise exist in the Constitution.[144] The Major Crimes Act granted similar jurisdiction to another set of crimes.[145] Both of these laws were passed on the assumption that, absent federal jurisdiction, tribal law would control.[146] Otherwise, Congress would not have had to extend their criminal

131. *Id*. at 2511 (Gorsuch, J., dissenting).
132. *Id.* at 2506–08.
133. *Id.* at 2513–18.
134. *Id.* at 2506.
135. *See id*.
136. *Id.*
137. *See id.* (noting that Founding Fathers Jefferson and Yates, as well as the Washington administration, viewed the Constitution as vesting the power to deal with the tribes exclusively with the federal government).
138. *See id.* at 2511.
139. *Id.*
140. *Id.*
141. *Id.*
142. *See id.* at 2517.
143. *See id.* at 2507.
144. *See id.*
145. *See id.* at 2508.
146. *See id.* at 2517 (contending this assumption was mistaken).

jurisdiction to areas already covered by state jurisdiction.[147] More to the point, Public Law 280 laid out a clear procedural framework by which Oklahoma could exercise criminal jurisdiction in Indian country.[148] It simply required Oklahoma to change its constitution and, perhaps most tellingly, obtain tribal consent.[149] Why would Congress outline this method if Oklahoma already had jurisdiction?

The dissent proceeded with the view the Court expressed in *McGirt*: tribal sovereignty can only be abrogated by an express act of Congress.[150] The dissent argued that the majority improperly relied on the notion that the legal understanding of American Indian tribes changed in the 1800s and that tribes were not separate from states, but instead part of them.[151] However, the majority provided no historical evidence of this shift, and the case law it cited did not support the Court's propositions.[152] *McBratney* and *Draper* expressly held that states *lacked* the authority to prosecute crimes by or against Indians.[153] *Donnelley* held that crimes committed in Indian country were the province of federal, not state, jurisdiction.[154] The dissent characterized the body of law directing the Court to the conclusion that Oklahoma lacked jurisdiction as a "mountain."[155]

III. ANALYSIS

This Note examines whether that mountain of case law sits firmly on an originalist foundation. Both Justices Kavanaugh and Gorsuch say they are originalists.[156] If originalism does what it purports to do, it will resolve the tension in this case by pointing towards the correct legal sources to answer the legal questions posed—namely, what is the scope of tribal sovereignty and is it exclusive to state criminal jurisdiction? In *Castro-Huerta*, both the majority and dissent's analyses rely on sources that are contrary to originalism. First, the majority abdicates the originalist methodology when it fails to recognize that tribes are sovereign as a constitutional matter.[157] Then, the majority erred when it relied upon the Tenth Amendment in holding that states have inherent authority to prosecute within their boundaries, augmented only by the federal government.[158] For its part, the dissent disavows these sources, but improperly relies on several federal statutes to reach its conclusion.[159] Furthermore, although the dissent correctly identifies the Treaty of New Echota as the primary legal authority governing tribal-state jurisdiction, Justice Gorsuch incorrectly concludes that this

147. *See id.*
148. *See id.*
149. *See id. See generally* 18 U.S.C. § 1162; 28 U.S.C. § 1360; 25 U.S.C. §§ 1321–1326 (outlining the process for a state to obtain jurisdiction in Indian country).
150. *See Castro-Huerta*, 142 S. Ct. at 2510–11 (Gorsuch, J., dissenting).
151. *See id.* at 2511.
152. *See id.* at 2519–20.
153. *Id.* at 2520.
154. *Id.*
155. *Id.* at 2521.
156. Segall, *supra* note 7.
157. *See infra* Section III.A.
158. *See infra* Section III.B.
159. *See id.*

treaty could be abrogated by Congress.[160] The Court spends most of its time explaining why certain federal statutes do not preempt state power and very little time addressing exactly what the federal statutes preempt. With an understanding of the tribes as constitutionally sovereign, the question of federal preemption becomes moot—there is no state jurisdiction to preempt.

A. An Originalist View of the Constitution Necessitates Tribal Sovereignty

To begin with, an originalist reading of the Constitution holds that tribes are sovereign.[161] The extent of this sovereignty is unclear.[162] However, so long as tribes are independent sovereigns as a constitutional matter, their independence cannot be undone through case law or legislation; to do so is to give legal content to the Constitution that expands beyond the document's communicative content.[163] An originalist view of the Constitution shows the tribes are sovereign through its mandate that the executive shall make treaties with the tribes.[164] The historical context which informs an originalist understanding of the Constitution indicates that the public understood the tribes to be separate nations at the time of ratification.[165]

The majority itself admits that at the nation's founding, the tribes were understood to be separate nations, but that understanding changed.[166] The Court in *Castro-Huerta* relies heavily on *McBratney*, *Draper*, and *Donnelly* to support its proposition that the country's legal view of the tribes has changed.[167] But because the tribes' sovereignty is tied to the Constitution itself, the development of case law is irrelevant. The fixation thesis, which holds that the communicative content of the Constitution's language is fixed at the time of ratification,[168] necessitates that the version of tribal sovereignty implicit in our Constitution cannot be enlarged or diminished by case law.

The majority and dissent disagree over whether *McBratney, Draper,* and *Donnelly* demonstrate a departure from the original view of tribes as independent.[169] But whether the case law demonstrates a departure from the understanding of the tribes at the time of ratification is wholly irrelevant from an originalist perspective. The original view of tribes as separate sovereigns at the time of ratification is fixed; the evolution of public or legal conception from thereon is only originalist if it comports with that view.[170] As such, the case law should not be persuasive to an originalist precisely *because* it departs from the

160. *See id.*

161. *See supra* Section I.B.

162. *See* Pearl, *supra* note 29, at 272.

163. *See supra* Section I.B.

164. Pearl, *supra* note 29, at 330; *see also* Charles D. Bernholz, *Early Recognized Treaties with American Indian Nations,* AM. INDIAN TREATIES PORTAL, http://treatiesportal.unl.edu/earlytreaties/ (last visited Apr. 14, 2023).

165. *See supra* Section I.B.

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

167. *Id.* at 2494, 2496.

168. Solum, *supra* note 19, at 1248.

169. *See supra* Sections II.A.2, II.B.

170. *See supra* Section I.B.

original understanding of the tribes. Justice Kavanaugh is attempting to use legal content, these cases, to support his claim that the Tenth Amendment give states an inherent authority to prosecute. But that legal content contradicts the Constitution's communicative content—namely, that the Drafters and reasonable native and non-native members of the public alike viewed the tribes as separate entities and subject to their own laws at the time of ratification. This is a faulty analysis under Solum's brand of originalism. A line of erroneous case law, however long, cannot overcome the original communicative content of the Constitution.

B. States Have No Inherent Authority to Prosecute in Indian Country

Once the originalist basis for tribal sovereignty under the Constitution is established, it becomes clear that Oklahoma has no inherent authority to prosecute crimes occurring on tribal land. The Court invokes the Tenth Amendment to support its claim that states have jurisdiction.[171] No genuine analysis of the Tenth Amendment would entail that one of the powers reserved to the states is the power to prosecute in Indian country. The Court discusses no historical context to buttress this view, likely because there is no such historical context.[172] Since Oklahoma's entry into the union, the understanding has been that if the federal government does not preempt the tribes, then the state had no jurisdiction.[173]

More importantly, this view reflects the public meaning of the Constitution at the time of its ratification. James Madison, Robert Yates, and the Washington administration all viewed the Constitution as vesting the power to regulate tribes solely in the federal government.[174] By this view, the Tenth Amendment could not reserve such power to the states because it was already delegated to the federal government by the Constitution.

Additionally, Oklahoma's police power cannot extend into Indian country precisely because the Constitution requires tribal sovereignty. If sovereignty is to mean anything at all, it must mean that a nation has independent authority to effectuate its own laws and is un-commanded by the laws of another.[175] Oklahoma's police power is, in a sense, its own sovereign authority.[176] But this authority ends where another sovereign's authority begins. For example, the Tenth Amendment does not allow the State of Oklahoma to subject Kansas to its laws because Kansas has its own police powers. In the same way, the tribes' sovereignty excludes Oklahoma's criminal jurisdiction.

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171. *Castro-Huerta*, 142 S. Ct. at 2493.

172. *See id.* at 2520 (Gorsuch, J., dissenting).

173. *See id.* at 2512.

174. *See* Oklahoma v. Castro-Huerta, 142 S. Ct 2486, 2506 (2022). Robert Yates was a Founding Father and leader of the Anti-Federalists. *A Biography of Robert Yates 1738–1801*, AM. HISTORY: FROM REVOLUTIONARY TO RECONSTRUCTION AND BEYOND, http://www.let.rug.nl/usa/biographies/robert-yates/ [https://perma.cc/543W-3CGK].

175. *See generally* Kevin Jon Heller, *In Defense of Pure Sovereignty in Cyberspace*, 97 NAVAL WAR COLL. INT'L L. STUD. 1432, 1438 (2021); Island of Palmas (Neth. v. U.S.), 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928).

176. MICHIE'S JURISPRUDENCE OF VIRGINIA AND WEST VIRGINIA § 65 (2022).

The dissent seizes on this notion when it distinguishes tribes from private organizations within a state's borders.[177] In so doing, Justice Gorsuch cites case law illustrating our legal understanding of tribes as sovereign.[178] But the dissent's mistake is as foundational as the majority's. Justice Gorsuch assumes that tribes are sovereign but fails to ground that assumption in the Constitution. Assuming that *McBratney*, *Donnelly*, and *Draper* represent the departure from an originalist understanding of the tribes that Justice Gorsuch says they do, how does one weigh the case law the majority cites against the case law the dissent cites? The answer is grounded in the understanding that the Constitution requires tribal sovereignty. From there, an originalist following Solum's school of thought would classify the *McBratney*/*Donnelly*/*Draper* trilogy as improper legal content. Because these cases stray from the communicative content of the Constitution, which held that tribes are independent nations, they should be disregarded under an originalist methodology. By contrast, it is precisely because *Worcester* and its more recent progeny recognize the tribes as sovereign that they are correct originalist interpretations of the Constitution.

Once the constitutional issue is resolved on originalist grounds, the statutory discussion about whether the MCA provides for exclusive federal jurisdiction or concurrent jurisdiction with the states is moot. The question of preemption only arises when both the state and the federal government have authority to prosecute. Here, there is no constitutionally inherent state jurisdiction to preempt. The dissent is correct in its assertion that instead of looking for an authority that displaces state jurisdiction, the Court must look for an authority conferring jurisdiction. The dissent begins to run afoul of the originalist methodology, however, when it claims that the authority to prosecute, though not inherent, can be conferred on Oklahoma from Congress.

C. Statutes Conferring Criminal Jurisdiction on States Are Unconstitutional: The Extent of State Authority Must Be Determined Solely by Treaty

Under Pearl's view of originalism, treaties are the proper legal authority for determining the contours of state jurisdiction. As discussed above, a sovereign cannot have their sovereignty abrogated by other nations' laws.[179] Because the Constitution grants tribes that sovereignty, and because it does not grant Congress the power to abrogate it, Public Law 280 cannot confer criminal jurisdiction in Indian country to the states.

In cases of state criminal jurisdiction in Indian country, the Treaty of New Echota is controlling. The treaty holds that the lands granted to the Cherokee Nation would not be included in "the territorial limits or jurisdiction of any State or Territory" and that the Cherokee would enjoy the right to make their own laws.[180]

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177. *Castro-Huerta*, 142 S. Ct. at 2511 (Gorsuch, J., dissenting) ("The source of the Court's error is foundational.").

178. *Id.* (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980)). The dissent also notes that the Court itself has recently relied on the notion of tribal sovereignty in the context of double jeopardy. *Id.* (citing Denezpi v. United States, 142 S. Ct. 395 (2022)).

179. *See supra* Section III.B.

180. Treaty of New Echota, *supra* note 53, at 442.

The dissent correctly identifies that the Treaty of New Echota should govern the existence of state jurisdiction. The dissent errs, however, in its reason why the treaty should govern. In the dissent's view, there is no fundamental barrier to Oklahoma gaining jurisdiction in Indian country. The State would simply have to follow the procedure set out in Public Law 280.

But under an originalist view, Public Law 280 is unconstitutional. First, to allow a state to gain jurisdiction by an act of Congress undermines the very sovereignty that the dissent maintains is exclusive to state police power. If tribal sovereignty exists to the exclusion of state authority, it must also exist to the exclusion of federal authority—definitionally, a nation is only sovereign if its inherent authority excludes all other governments. Second, Public Law 280 was passed pursuant to Congress's plenary power over Indian tribes. As discussed above, originalism says there is no such plenary power; the Indian Commerce Clause has been construed too broadly. In Pearl's view, the Indian Commerce Clause only grants authority to regulate commerce with tribes[181]—and yet Public Law 280 regulated activity within tribes, not with them. Under Justice Thomas's view, legislation over Indian affairs is not commerce,[182] and so it would stand to reason that criminal jurisdiction cannot be properly categorized as commerce. Because the original public meaning of the term "commerce" is narrower than the plenary power afforded Congress, the case law interpreting commerce so broadly is improper legal content. Whichever view one takes, the Indian Commerce Clause does not vest Congress with such broad powers. Thus, the Treaty of New Echota should not control because Oklahoma has not availed itself of Public Law 280. Rather, the Treaty of New Echota should control because it is the only source of law that originalism would allow to regulate relations with the tribes.

The treaty power is vested in the President, to be exercised with the advice and consent of the Senate. Treaties are the proper tool for defining rights and obligations between sovereign nations. They are limited only as far as both parties can come to an agreement. Treaties, when executed by Congress, have the force of law.[183] Unless and until the treaty is terminated, no act of Congress can diminish the supreme law of the land. Under originalism, congressional acts purporting to have done so are unconstitutional.

CONCLUSION

In *Castro-Huerta*, Justices Kavanaugh and Gorsuch reach different conclusions because they follow a well-worn legal path that strays from the Constitution's original public meaning. There is no statute extending state criminal jurisdiction into Indian country. Any such statute would be an unconstitutional exercise of Congress's plenary power. It is only through the treaty power that the U.S. government can regulate the activity of the tribes. There is such a treaty, the Treaty of New Echota, and it expressly disallows criminal jurisdiction in Indian country. The 1871 Act divesting the President of that power is unconstitutional,

181. *See supra* Section I.B.

182. United States v. Lara, 541 U.S. 193, 224 (2004) (Thomas, J., concurring).

183. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).

and therefore, the resolution of *Castro-Huerta* did not depend on the preemption of federal jurisdiction at all. There can be no constitutional jurisdiction over Indian country recognized through originalist reasoning because the understanding of the tribes as separate sovereigns was fixed at the time of the Constitution's drafting. No subsequent history or legal development can overcome the meaning fixed at the time of ratification. Originalism is only doing its job if it identifies the correct sources to interpret the Constitution and fosters reliable outcomes. Perhaps *Castro-Huerta* stands as an example of originalism's shortcomings—in an area of law with no shortage of historical content to guide the Justices, they are still lost.