



Written by [Carlton Rogers](#) on June 30, 2022

Supreme Court Ruling Modifies *McGirt* Decision to Protect State Sovereignty

Two years ago, the *McGirt v. Oklahoma* ruling by the U.S. Supreme Court struck a serious blow to the sovereignty of the states, but Wednesday's ruling modified that decision so as to restore an understanding of Oklahoma's sovereignty that had been near-universally understood and accepted since Oklahoma entered the Union as the 46th state in 1907.

The significance of the *McGirt* decision has been largely missed by even many conservatives and constitutionalists. Fortunately, Amy Coney Barrett's replacement of Ruth Bader Ginsburg since that ruling has led to a modification.



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In 2020, the Supreme Court, with Justice Neil Gorsuch writing the majority opinion joined by the four "liberal" justices, held that much of eastern Oklahoma was composed of Indian reservations and the state had limited criminal jurisdiction there. The new ruling, by a 5-4 vote in *Oklahoma v. Castro-Huerta*, did not completely reverse the 2020 decision — as the Court generally adheres to "precedent" — but did modify that holding significantly. Under *McGirt*, which was also settled on a 5-4 vote, only tribal courts or federal courts could try cases involving major crimes in most of eastern Oklahoma, if a member of one of six tribes — the Cherokee, Choctaw, Chickasaw, Seminole, Creek, or Quapaw — was either the alleged perpetrator of a major crime, or the victim of a major crime. In contrast, the *Castro-Huerta* decision returned prosecution to the state if the accused perpetrator is a non-tribal member, and the victim is either a non-tribal member or a tribal member.

The *McGirt* ruling had led to near-chaos in Oklahoma. For example, in Tulsa (which is part of the Creek Indian reservation), city police officers "have referred thousands of cases to federal prosecutors and tribal authorities — but only a tiny fraction of these cases have been meaningfully prosecuted. Federal authorities decline to prosecute all but the most serious crimes, and tribal authorities do not have the resources to prosecute many of the cases referred to them."

For the majority opinion in *Castro-Huerta*, written by Justice Brett Kavanaugh, this problem is cited as the reason that the Supreme Court took up the case so quickly. Victor Manuel Castro-Huerta, an illegal alien, was charged with child neglect of his five-year-old stepdaughter, and convicted in state court and sentenced to 35 years in prison. After *McGirt*, *Castro-Huerta's* case had to be dismissed by the state, and the federal court system, deluged with cases, cut a deal with him for a seven-year sentence, followed by removal from the United States. "Castro-Huerta, in effect, received a 28-year reduction of his sentence as a result of *McGirt*," Kavanaugh explained.

Kavanaugh added, "Castro-Huerta's case exemplifies a now-familiar pattern in Oklahoma in the wake of *McGirt*. The Oklahoma courts have reversed numerous state convictions on that same jurisdictional



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ground. After having their state convictions reversed, some non-Indian criminals have received lighter sentences in plea deals negotiated with the Federal Government. Others have simply gone free.” Kavanaugh noted that “going forward, the State estimates that it will have to transfer prosecutorial responsibility for more than 18,000 case per year to the Federal and Tribal Governments.”

Of course, Oklahoma and its local governments have been prosecuting crimes, both major and minor, since Oklahoma became a state on November 16, 1907, and no one apparently realized that anything was odd about this until Gorsuch and four liberal judges of the Supreme Court made that decision in 2020. Gorsuch largely ignored that history, instead substituting a recitation of the history of the mistreatment of the tribes prior to statehood.

Anyone who knows American history realizes that relations between the U.S. government or state governments on one side and the Native Americans on the other was not always something to be proud of. But, as Kavanaugh said, responding to Gorsuch, “The dissent emphasizes the history of mistreatment of American Indians. But that history does not resolve the legal questions presented in this case. Those questions are: (i) whether Indian country is part of a state or instead is separate and independent from a state; (ii) if Indian country is part of a State, whether the State has concurrent jurisdiction with the Federal Government to prosecute crimes committed by non-Indians against Indians in Indian country.”

Kavanaugh said the answers are “straightforward.” He explained, “This court has repeatedly ruled that Indian country is part of a State, not separate from a State.” He added, “In any event, it is not evident why the pre-Civil War history of tribal discord with States — unconnected from any statutory text — should disable States from exercising jurisdiction in 2022 to ensure that crime victims in state territory are protected under the State’s laws.”

“The default is that States may exercise criminal jurisdiction within their territories. See Amdt. 10. States do not need a permission slip from Congress to exercise their sovereign authority.... The dissent’s view is inconsistent with the Constitution’s structure, the State’s inherent sovereignty, and the Court’s precedents,” Kavanaugh wrote.

Finally, Kavanaugh said, “Admission of a State into the Union ... necessarily repeals the provisions of any prior statute, or of any existing treaty that is inconsistent with the State’s criminal jurisdiction throughout the whole of the territory within its limits.... Since at least Oklahoma’s statehood in the early 1900s, Indian country has been part of the territory of Oklahoma.”

Perhaps the single greatest misunderstanding of these cases is what they are really all about. They are not about whether Indians were mistreated in U.S. history, and they are not about tribal sovereignty vs. state sovereignty. They are about the transfer of sovereignty of a state to the federal government, and establishing that the federal government can do just about anything it wishes to a sovereign state.

In 1910, Oklahoma moved its state capital from Guthrie to Oklahoma City, despite the requirement in the Enabling Act (which allowed Oklahoma to become a state) that the capital remain in Guthrie until at least 1913. The city of Guthrie was understandably upset, and a case made its way to the U.S. Supreme Court, which ruled that Congress could put that stipulation into the Oklahoma State Constitution, but once Oklahoma became a state, it could amend its Constitution as a sovereign state.

To tell a state that it cannot prosecute major crimes within its borders without, as Justice Kavanaugh so aptly put it, “a permission slip from Congress,” is a direct attack on the sovereignty of that state.

And that is an issue that should concern all Americans who value our federal system of government, whatever state they live in, and whether they are Indian or non-Indian.



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