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### Oklahoma v. Castro Huerta: A Rhetorical Analysis of the Majority Opinion

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*Oklahoma v. Castro Huerta: A Rhetorical Analysis of the Majority Opinion*

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**A Note on Terminology:**

In writing about a sensitive topic such as Native American land and sovereignty, it is sometimes difficult to choose appropriate language. This thesis will primarily use “Native,” “Native American,” and “tribal/tribe(s),” but it will occasionally use the term “Indian,” “Indian reservation,” and “Indigenous” to match the sources from which the information is coming from. It is important to note that no term is universally accepted by Native Americans throughout the United States. Many Natives prefer to be identified by the tribe they are a member of. However, when discussing federal Indian law and policy, the scope is often broad, and general terms will primarily be utilized.

**Introduction:**

The law is not just a system of rules to be followed; it is a branch of rhetoric. The law is composed of specific words and phrases that work to inform reality and influence human decisions. In every sector of the criminal justice system, rhetorical strategies are employed to advance one’s goal of persuasion, regardless of their position in the court. Particularly, one area of the law in which rhetoric holds extreme value is in regard to the United States Supreme Court. As the highest tier of the legal system in the United States, the decisions the Court administers set precedent and must be obeyed by all lower court systems. When the Court decides a case, the majority opinion not only outlines the Court’s explanation and justifications of the ruling, but it also simultaneously rejects the dissenting opinion’s point of view. As such, rhetoric plays a vital role in majority opinions, as justices who pen these decisions must write strategically in order to convince their readers the legitimacy of their decision.

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This rhetorical analysis will examine the majority opinion in *Oklahoma v. Castro-Huerta*, a case concerning criminal jurisdiction on Native American land. Before examining the rhetorical strategies used in the majority opinion, it is important to first understand the context of this case in relation to federal Indian law. This decision was released on June 29th, 2022 and is related to the Court's previous ruling in *McGirt v. Oklahoma*. Decided in 2020, the Court ruled in *McGirt* that Congress never disestablished Native American tribes in Oklahoma when granting Oklahoma statehood, therefore indicating that almost half of the state is still Native American land (1). This decision greatly changed the criminal jurisdictional landscape in Oklahoma because state courts no longer had the authority to prosecute crimes committed by or against Native Americans on tribal land. The state of Oklahoma did not agree with this decision as they believed the tribal and federal governments did not have the capacity to prosecute the abundance of new cases that would be transferred to them from the state as a result of *McGirt*. The state finally had found a case to present to the Supreme Court that would challenge *McGirt*, but the Supreme Court only agreed to consider the scope of *McGirt* rather than the entire decision itself. *Castro-Huerta* concerns the case of Victor Castro-Huerta, a non-Native who was convicted in the Oklahoma State Court for child neglect (1). The victim, his stepdaughter, is Native American, and the crime itself was committed on Native land (1). Castro-Huerta challenged the conviction, stating that the state cannot prosecute crimes on Indigenous land in Oklahoma without federal approval, whereas Oklahoma argued that since Castro-Huerta is non-Native, *McGirt* does not prevent him from being prosecuted by the state (2-3). The Court has previously concluded that the state maintains jurisdiction regarding crimes committed by non-Natives against non-Natives. However, in this case, the Court was tasked with deciding if the State has the authority to prosecute non-Natives who commit crimes against Natives on

Indigenous land. In their decision, the Court ruled 5-4 in Oklahoma's favor, confirming that the state possesses concurrent jurisdiction regarding this matter (1).

As this decision is a major blow to the notion of tribal sovereignty, because it undercuts a tribe's power to enforce its own laws within its own borders, it calls for a careful analysis of the rhetorical strategies Justice Brett Kavanaugh uses as the author of the majority opinion. In writing this opinion, Justice Kavanaugh's goal is to justify the federal and state governments having concurrent jurisdiction to prosecute crimes committed by non-Natives against Natives on Native American land. However, what is most important when considering the rhetorical strategies employed by Justice Kavanaugh is the audience: that is, the general public. Native American law is complicated and virtually unknown to many Americans in the United States. Thus, Justice Kavanaugh uses the ignorance of the general public to his advantage. This analysis will examine, as Justice Neil Gorsuch refers to in his dissent in *Castro-Huerta*, the majority opinion's "ahistorical and mistaken statement of Indian law" (12). Throughout the opinion, Justice Kavanaugh ignores the historical context of Native American law, jurisprudence, and tribal sovereignty in order to rationalize the majority's ruling of how the states have concurrent jurisdiction.

### **Arguments from the Constitution:**

Throughout the majority opinion, Justice Kavanaugh attempts to use the Constitution to showcase to the reader that states have jurisdiction over crimes committed in Indian country. For instance, at the beginning of the second section of the opinion, Justice Kavanaugh writes, "[t]o begin with, the Constitution allows a State to exercise jurisdiction in Indian country. Indian country is part of the State, not separate from the State" (4). A few lines following, Justice Kavanaugh includes "See U.S. Const., Amdt. 10" but does not explain the Tenth Amendment's

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connection to the definitive statements he had just made (5). The only other time Justice Kavanaugh explicitly references the Constitution is in the fourth section of the opinion, in which he writes, “[u]nder the Constitution, States have jurisdiction to prosecute crimes within their territory except when preempted (in a manner consistent with the Constitution) by federal law or by principles of tribal self-government” (22). In both references to the Constitution, Justice Kavanaugh fails to elaborate on what ways the Constitution supports state jurisdiction in Indian country. His mere mentioning of the supreme law of the land by name is, in reality, an attempt to render the majority's viewpoints trustworthy. Recognizing that the audience, the general public, is vastly unfamiliar with the nuances of the Constitution, Justice Kavanaugh knows that the audience is unlikely to question the majority's reference to the Constitution in the opinion. Thus, by doing so, Justice Kavanaugh convinces his audience that the majority's stance on state jurisdiction is credible. However, he disregards the history of the Constitution relating to Native American relations and the Framers' intent for jurisdiction within Indian country.

In his dissenting opinion, Justice Gorsuch explains in detail the ratification of the Constitution and how the Framers intended to resolve the unclear standards set by the Articles of Confederation. Therefore, Justice Gorsuch's account of the creation of the Constitution showcases how Justice Kavanaugh deflects what the Constitution actually calls for in the majority opinion. When explaining the motives of the Framers when they convened to draft a new Constitution, Justice Gorsuch highlights how they sought to settle confusion over whether the national or state governments could oversee relations with various tribes (3). He details that “[t]o that end, they gave the federal government ‘broad general powers’ over Indian affairs” (*United States v. Lara* qtd in *Castro-Huerta* 3). He further explains how the Framers granted Congress the authority “to make war and negotiate treaties with the Tribes,” as well as to

regulate commerce with the tribes (3). However, Gorsuch explicitly states that “Nor did the Constitution replicate the Articles' carveout for state power over Tribes within their borders” (3). Therefore, as Gorsuch’s opinion demonstrates, Justice Kavanaugh ignores the intent behind the Constitution concerning relations with Native American tribes; namely, Justice Kavanaugh fails to mention that the federal government was designated with exclusive authority over Indian affairs. By refusing to acknowledge the clear intent of the Framers and only mentioning the Constitution by name, Justice Kavanaugh effectively coerces his readers to believe that the Constitution permits the state of Oklahoma to exercise jurisdiction in Indian country over all affairs.

#### **Arguments from the Court’s precedent:**

In addition to using the Constitution in an attempt to convince the audience that states maintain jurisdictional authority over all crimes within Native American reservations, Justice Kavanaugh also relies on the Court’s precedents to explain that reservations are part of the state, not separate. Justice Kavanaugh briefly mentions *Worcester v. Georgia*—an 1832 case in which the Court held that the “Cherokee Nation ‘is a distinct community occupying its own territory’”—but classifies the decision as void as of the late 1800s (*Worcester v. Georgia* qtd in *Castro-Huerta* 5). Rather, instead of citing a specific case that outright reversed *Worcester*, Justice Kavanaugh broadly describes how the Court has consistently held that Native American reservations are part of a state except when federal law declares otherwise. To reinforce the majority’s account of case law, he references eight cases and cites a few sentences from each case. In particular, he references *United States v. McBratney*, “the leading case in the criminal context,” and explains how in this case, “this Court has held that States have jurisdiction to prosecute crimes committed by non-Indians against non-Indians in Indian Country” (6). By

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selecting numerous cases to support the notion that the precedents outlined in *Worcester* were reversed in the late 19th century, Justice Kavanaugh makes the majority's stance appear to be legitimate and well-supported in case law, even though he does not explicitly state when the change occurred. In addition, by specifying how the main case in the criminal context supports the majority's view, Justice Kavanaugh attempts to showcase that cases that may allude to the opposing view are unimportant. This prompts his audience, who is likely unfamiliar with Indian law jurisprudence, to accept the Court's argument. As he assumes the public is uninformed about any of the numerous cases mentioned, Justice Kavanaugh effectively exploits their ignorance and convinces them that the state of Oklahoma indeed has concurrent jurisdiction over Indian affairs.

Justice Gorsuch spends considerable time in his dissenting opinion describing the roots and aftermath of *Worcester* as well as the true meaning of *McBratney*; his detailed accounts prove that Justice Kavanaugh misinforms his audience regarding the case law he references. Justice Gorsuch begins the dissenting opinion by reciting the facts and decision of *Worcester*. He writes that “[t]he decision established a foundational rule that would persist for over 200 years: Native American Tribes retain their sovereignty unless and until Congress ordains otherwise” (1). To this extent, Justice Gorsuch explains how one of the purposes of the General Crimes Act of 1834 was because “Congress sought to ensure a federal forum for crimes committed by and against non-Indians” since “*Worcester* held that States lack criminal jurisdiction on tribal lands” (6). Justice Gorsuch, contrary to Justice Kavanaugh's account, explains how since the General Crimes Act remains “in force today,” *Worcester* remains intact (6). Additionally, Justice Gorsuch references *McBratney*. While he acknowledges the Court's ruling that states could prosecute crimes committed on tribal lands only involving non-Indians, he instead notes how the decision “took care to safeguard the rule that a State's admission to the Union does not convey

with it the power to punish crimes ‘committed by or against Indians’” (*United States v. McBratney and Draper v. United States* qtd in *Castro -Huerta* 23). Thus, Justice Gorsuch’s explanations of *Worcester* and *McBratney* demonstrate what Justice Kavanaugh’s opinion lacks: the aftermath and accuracy of the case law he mentions. By failing to explain how *Worcester* inspired the General Crimes Act, Justice Kavanaugh deflects the notion that *Worcester* remains intact and communicates to his audience that Indian territories fall within a state’s territory. Moreover, Justice Gorsuch’s inclusion of the Court’s assurance in *McBratney* that a state would not be allowed to exercise jurisdiction over Native Americans shows that Justice Kavanaugh only selectively chose to highlight a certain aspect of the case to support the majority’s conclusion. The absence of these crucial case details in Justice Kavanaugh’s opinion ultimately misinforms the reader while achieving his overall goal to justify the majority’s decision.

### **Arguments from tribal sovereignty:**

Perhaps most important to examine is how Justice Kavanaugh attempts to portray the majority opinion as if it is in support of tribal sovereignty; he does so in an attempt to convince his reader that the majority’s opinion will help Indian victims. Toward the end of the opinion, Justice Kavanaugh refers to the balancing test under *White Mountain Apache Tribe v. Bracker* (1980) and notes how under the test, the Court considers tribal interests in addition to state and federal interests (18). To that extent, Justice Kavanaugh notes how the exercise of state jurisdiction within Indian country “would not infringe on tribal self-government” (19). He elaborates on how it could “facilitate effective law enforcement on the Reservation, and thereby further the federal and tribal interests in protecting Indians and their property against the actions of non-Indians” (Brief for United States in *Arizona v. Flint* qtd in *Castro-Huerta* 20). Additionally, he writes that “because his victim is an Indian, *Castro-Huerta* says that he is free



from state prosecution. Castro-Huerta's argument would require this Court to treat Indian victims as second-class citizens. We decline to do so" (20). Thus, by framing the majority's opinion to seem that it is in favor of tribal sovereignty, Justice Kavanaugh convinces his audience that the majority is both justified and moral. As the general public is likely to be unfamiliar with tribal sovereignty and the complex history of Native American reservation status, they are expected to accept Justice Kavanaugh's account as being true. Justice Kavanaugh's rhetoric intends to sway the public's perception of the Court as honorable in its treatment of Native Americans. Thus, his reflection works towards the overall goal of justifying state concurrent jurisdiction within Indian reservations.

Justice Gorsuch's account of the history of the Cherokee Nation demonstrates how Justice Kavanaugh's narrative distorts the history and true meaning of tribal sovereignty. Justice Kavanaugh's omission represents his deliberate attempt to convince his reader that the majority's opinion is in the best interest of all of the governments involved. In referencing how the majority blindly asserts that it has the best interest of tribal sovereignty in mind, Justice Gorsuch writes that the majority has ignored why the Cherokee would not welcome state jurisdiction. He suggests that "Maybe the Cherokee have so far withheld their consent because, throughout the Nation's history, state governments have sometimes proven less than reliable sources of justice for Indian victims" (33). Justice Gorsuch, in referencing the Brief for the Former United States Attorneys et al., further explains how in other states that have concurrent jurisdiction due to Public Law 280, crime has actually increased due to the "pass-the-buck dynamic" (Former United States Attorneys qtd in *Castro-Huerta* 34). Ultimately, as Justice Gorsuch's dissent indicates, Justice Kavanaugh's opinion offers the Court's own consent in exchange for that of the tribes. Justice Kavanaugh recognizes that the general public is unfamiliar with the history behind

tribes in the United States and their struggle for tribal sovereignty. He misconstrues the notion of tribal sovereignty in an attempt to reflect how the majority's view would actually benefit not only the state government but also the tribal government.

### **Conclusion:**

Justice Kavanaugh effectively portrays to the general public that the majority's decision of states maintaining concurrent jurisdiction in Indian country is justified and well-informed by oversimplifying Native American law, jurisprudence, and tribal sovereignty. Justice Kavanaugh's strategy of exploiting the general public's vague familiarity with Native American history aids him in his overall goal of legitimizing the majority's misconstrued opinions. Justice Kavanaugh convinces the general public that the Constitution and case law support the decision and that the decision thus supports tribal sovereignty. In doing so, he intentionally hides the Court's ulterior motivation to allocate more power and jurisdiction to the state, not caring about truly protecting tribal sovereignty. As Justice Gorsuch's dissent exemplifies, the majority opinion fails to include vital details concerning Indian law and history; the mere difference in page lengths of the opinions—25 and 42, respectively— further demonstrates this. Ultimately, following *McGirt's* victory for a tribe's right to self-determination, *Castro-Huerta* signals an end to that notion. As Justice Gorsuch put it: “[t]he Court may choose to ignore Congress's statutes and the Nation's treaties, but it has no power to negate them. The Court may choose to disregard our precedents, but it does not purport to overrule a single one. As a result, today's decision surely marks an embarrassing new entry into the anticanon of Indian law” (29-30). The Court will likely continue to use this rhetoric to rule in opposition to tribal sovereignty in future decisions such as *Haaland v. Brackeen*. To reverse this misrepresentation of Native American

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law and tribal sovereignty, change will have to be enacted elsewhere, perhaps through tangible legislation.

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