THE REPORTS OF MY DEATH ARE GREATLY EXAGGERATED: THE CONTINUED VITALITY OF *WORCESTER V. GEORGIA*

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I. INTRODUCTION

Sovereign governments, like the people that form them, are imperfect. All have some level of corruption, privileging, and bias. Some, unfortunately, are despotic or rapidly moving in that direction. Most, however, strive to form a "more perfect union," whereby they maintain their political integrity and economic security so as to improve the hea

Indeed, *Bracker* serves as the basis for the Court's ill-conceived balancing test that ultimately carried the day for Oklahoma.[22] Thus, the Court did not need to erode *Worcester* any further than it already had to achieve its end. Nonetheless, the Court chose to elevate its *dicta* in *Kake*, twice announcing that the "'general notion drawn from Chief Justice Marshall's opinion in *Worcester* v. *Georgia*' 'has yielded to closer analysis.'"[23]

Unlike Justice Marshall's conclusion in *Bracker*, the majority's reasoning in *Castro-Huerta* seems to contain no limiting principle, leading many to speculate as to its scope.[24] Indeed, taken out of context, which anti-sovereignty activists will undoubtedly do, it could be read as a total abrogation of *Worcester*. However, before diving into the cases underlying the Court's cryptic remark, it is important to identify *precisely* what the Court was actually saying in *Castro-Huerta*.

Recall that, as articulated in *Worcester*, the ban on state jurisdiction within Indian country was *categorical*, yielding to no exceptions.[25] Furthermore, *Worcester* stated that Indian lands were "distinct communit[ies] occupying [their] own territory."[26] Although *Castro-Huerta* did not argue it, the majority seemed unusually concerned that this language seemed to indicate that "the Federal Government sometimes treated Indian country as [physically] separate from state territory."[27] Thus, the Court reached back to *dicta* from *Kake* to conclude that "the Court has consistently and explicitly held that Indian reservations are 'part of the surrounding State.'"[28] Importantly, *Castro-Huerta* does *not* claim to abrogate *Worcester* beyond this. The Court did *not* move to overrule or even erode the mountain of precedent establishing that Congress has plenary authority over Indian relations and that federal law may preempt state law.[29] Furthermore, the Court said nothing about the general metes and bounds of tribal sovereignty, nor did the Court limit the power of a treaty to preempt state law within Indian country.

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22. *Bracker*, 448 U.S. at 144-46.

23. *Castro-Huerta*, 142 S. Ct. at 2493, 2502 (quoting Organized Vill. of Kake v. Egan, 369 U.S. 60, 72 (1962)).

24. Matthew L.M. Fletcher, *In 5-4 Ruling, Court Dramatically Expands the Power of States to Prosecute Crimes on Reservations*, SCOTUSBLOG (Jun. 29, 2022, 12:35 PM), https://www.scotusblog.com/2022/06/in-5-4-ruling-court-dramatically-expands-the-power-of-states-to-prosecute-crimes-on-reservations/ [https://perma.cc/TBB7-EZ6T].

Ultimately, *Kake* was the single reed upon which the majority could grasp for its bare conclusion that "as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country."[30] However, as Justice Neil Gorsuch points out in his dissent, the Court's holding actually rests on a balancing of state, tribal, and federal interests, which "makes anything it does say about the 'inherent' rights of states to try cases within Indian country dicta through and through."[31] Further, and more to the point here, *Kake* simply does not support *any* abrogation of *Worcester* beyond its simple proposition that "the *Worcester*-era understanding of Indian country as separate from the State was abandoned later in the 1800s."[32]

III. EXPLORING *CASTRO-HUERTA*'S HALF-BAKED APPLICATION OF *KAKE*

As Justice Gorsuch remarked in his dissent in *Castro-Huerta*, the majority seemed to view *Kake* as "some magic bullet" that impliedly unwound nearly 200 years of precedent, largely affirming *Worcester*.[33] However, upon "closer analysis," it is clear that *Kake* is not nearly so broad. Instead, that case was born out of the incredibly unique circumstances that existed in Alaska at the time of its statehood.[34] Because it was so remote, there had not been the same level of significant non-Indian pressure to acquire Native lands in Alaska when compared to the continental United States. As a result, the federal government had never entered into any agreements for land cessions with Alaska Natives and had established just nine reservations within the territory that later became Alaska.[35] That meant that the United States had never extinguished the aboriginal title that the Alaska Natives held over the entirety of the State, which called into question

jurisdiction and control" over Indian fishing rights did not necessarily require that jurisdiction be exclusive of the State.[47]

Instead, for the Court, it was the 1891 Act that set aside the Annette Islands as an Indian reservation that was dispositive.[48] That Act provided that:

> [T]he body of lands known as Annette Islands .

state jurisdiction applied to the fish traps at Kake and then examined both the White Act and the Alaska Statehood Act to determine whether those laws preempted the State's authority to regulate off-reservation tribal fishing.[57] Of course, it had already found those laws did *not* preempt state authority, which led the Court to ultimately conclude that the state anti-fish-

within what is now the United States," it took for granted that tribal lands sometimes were located within states.[73] And over time, the Court had allowed for state jurisdiction within Indian country "where essential tribal relations were not involved and where the rights of Indians would not be jeopardized."[74] However, beyond this *narrow* exception, the Court was crystal clear that "the basic policy of *Worcester* has remained."[75]

Importantly, the *Williams* Court pointed to precisely the same case—*Utah & Northern Railway v. Fisher*—it cited in *Kake* when it said that "Chief Justice Marshall's opinion in *Worcester v. Georgia* . . . has yielded to closer analysis."[76] That case, which dates to 1885, originated when the Utah & N. Railway sought to avoid payment of a tax levied on property it held within the Fort Hall Reservation, which was reserved for the "absolute and undisturbed use and occupation" of the Shoshone-Bannock Tribes in the 1868 Fort Bridger Treaty.[77] Pursuant to that promise, the railway claimed that "the Indian reservation is excluded from the limits of Idaho . . . or that it is necessarily excepted from [Idaho's] jurisdiction . . . by [the Treaty of Fort Bridger]."[78]

The Court rejected both arguments.[79] However, interestingly, contrary to *Castro-Huerta*, the Court in *Utah & N. Railway* did *not* "consistently [or] explicitly" conclude that Indian reservations are *categorically* "'part of the surrounding State' and subject to the State's jurisdiction 'except as forbidden by federal law.'"[80] Instead, the Court found that the Fort Hall Reservation was within the geographical boundaries of the territory of Idaho based upon the specific facts present in that case, namely that the Idaho territory was created *before* the Reservation and the 1868 Treaty gave no indication that the parties intended to physically remove Fort Hall from the boundaries of the territory.[81] Thus, the Supreme Court's statement in *Kake* that "it was said that a reservation was *in many cases* a part of the surrounding State or Territory," seems to more accurately describe its precedent than the categorical statement made by the majority in *Castro-Huerta*.[82]

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73. *Id.* at 218.

74. *Id.* at 219.

75. *Id.*

76. *Compare id.* at 220, *with* Organized Vill. of Kake v. Egan, 369 U.S. 60, 72 (1962).

77. Utah & N. Ry. Co. v. Fisher, 116 U.S. 28, 29 (1885) (citing Treaty with the Eastern Band Shoshonees and the Bannock tribe, Shoshonee-U.S., art. 2, July 3, 1868, 15 Stat. 673 [hereinafter Treaty of Fort Bridger]).

78. *Utah & N. Ry. Co.*, 116 U.S. at 29.

79. *Id.*

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

81. *Utah & N. Ry. Co.*, 116 U.S. at 29-30.

82. Organized Vill. of Kake v. Egan, 369 U.S. 60, 72 (1962) (emphasis added).

Similarly, the territory's jurisdiction to impose a tax on the railway was a function of the unique facts in the case. Specifically, the Shoshone-Bannock Tribes had entered into an agreement with the United States to allow the railway to be run through the Reservation.[83] That agreement, according to the Court, caused "the land upon which the railroad and other property of the [Railway] are situated [to be] . . . withdrawn from the reservation."[84] At the very least, the Court drew from the consent given by

invalid because it "would infringe on the right of the Indians to govern themselves."[92]

The Court's "closer analysis" of *Worcester* becomes yet even clearer in another foundational case that originated on the Navajo Nation: *Warren Trading Post*.[93] Decided just three years after

That includes *Worcester*'s holding that the federal government has plenary authority over the management of the government-to-government relationship with Indian tribes pursuant to "the controlling power of the