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Shinn v. Ramirez: Creating a Catch-22 to Habeas Corpus Relief

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“CHICKENIZATION,” DATA-HARVESTING, AND ANTITRUST

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The past decade has seen increased concentration among meat processors, who generally stand in between farmers upstream and retailers and consumers downstream. In the pre-Internet era, antitrust often treated concentration among intermediaries relatively benignly, reasoning that their pricing was constrained by the possibility of their upstream suppliers doing an “end run” around the intermediaries to deal directly with downstream retailers and consumers. However, vertical contracts with suppliers, combined with increased data-gathering ability, has made it possible for powerful intermediaries to shift bargaining power massively in their favor. This dynamic, termed “chickenization” for its early appearance in the poultry industry, has spread to pork and beef, and may yet spread further. This article describes and critiques these developments and argues for a more active antitrust role in addressing the harms that can result from data-turbocharged processing intermediaries who may exercise monopsony power vis-à-vis upstream producers, and monopoly power towards downstream retailers and consumers.

I. INTRODUCTION

Over the past decade, critics of the American agricultural system have warned of the danger of “chickenization”: the tight vertical integration of farmers into the supplier chains of large processors, for example, Tyson Foods.¹ Combined with increased horizontal concentration of suppliers, poultry farmers see chickenization as shifting bargaining power massively in favor of the large processors who buy their birds.² Moreover, farmers complain that chickenization results in the replacement of preexisting open markets with one-sided contractual relationships.³

Over a decade ago, United States President Barack Obama’s administration tried to take on the spread of chickenization to other areas of agriculture with a series of unprecedented Department of Justice (“DOJ”) and Department of

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1. CHRISTOPHER LEONARD, THE MEAT RACKET: THE SECRET TAKEOVER OF AMERICA’S FOOD BUSINESS 113-46, 149-58 (2014) (describing “The Great Chickenization” of the meat industry, with “chickenized” describing a phenomenon involving high market power by processors, tight vertical control of producers—who see low or negative margins making them reliant on bailout loans or government subsidies).

2. See generally *id* (describing this further); MARYN MCKENNA, PLUCKED: CHICKEN, ANTIBIOTICS, AND HOW BIG BUSINESS CHANGED THE WAY THE WORLD EATS (2019).

3. MCKENNA, *supra* note 2, at 245-61.

Agriculture (“DOA”) joint hearings;⁴ while ambitious, this initiative was seen as relatively fruitless. Indeed, the pattern seen in the chicken industry has spread to other industries.⁵ Some of the results are shocking: for example, the hardships visited upon dairy farmers has led big dairy processors to start including a list of suicide prevention hotlines in the same envelopes as the checks they send to the farmers they have under contract.⁶

Chickenization depends on both horizontal concentration and vertical integration. Horizontal concentration tends to create increased buyer market power and, at a high degree, monopsony power. A strict, short-term consumer welfare view might see this buyer market power as beneficial if the reductions in farm product prices are passed on by the processors to consumers as cheaper food. However, monopsony power can cause long-term welfare losses, as artificially low prices deter investment by farmers and others in productive capacity.

As a result, the vertical dimension of chickenization deserves renewed attention. While the Chicago School⁷ held vertical restraints to be benign or even procompetitive overall, that proposition is under current debate.⁸ Moreover, it is increasingly clear that some vertical restraints can foster competitive harm, and if they can be identified, society might be better off prohibiting them.⁹ Big Data makes the problem of chickenization more urgent. The deployment of the so-called “Internet of Things” is driving the development of “smart farming,” by which large amounts of data about farmers’ produce and livestock will be available in real time for the analysis and optimization by processors with the market power to contract for it.¹⁰ As in the world of Big Data generally, a key question is whether data interoperability should be promoted to promote competition between processors, rather than allowing the enclosure of farmers into walled gardens from which switching or information costs make it difficult to exit.

Unfortunately, these trends seem to be spreading beyond farming; we may all be chickenized soon. In particular, so-called “sharing economy” platforms are showing signs of concentration, parallel behavior, and vertical control that

4. Press Release, Dep’t of Just., Off. of Pub. Affs., Justice Department and USDA to Hold Public Workshops to Explore Competition Issues in the Agriculture Industry (Aug. 5, 2009), <https://perma.cc/R4FW-EV44>.

5. LEONARD, *supra* note 1, at 183-227 (describing the spread of chickenization to pork and beef production).

6. David Dayen, *Obama’s Agriculture Secretary, Now Working for the Dairy Industry, Urges 2020 Democrats to Be Nice to the Dairy Industry*, THE INTERCEPT (May 6, 2019), <https://perma.cc/R2D8-XK92>.

7. Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 217-27 (1985) (describing the “Chicago School” as a movement dating to the late 1970s and early 1980s in which proponents made a major impact on antitrust law by successfully arguing for a shift to a “neoclassical market efficiency model” as the basis for antitrust policy with economic efficiency as its sole goal).

8. See Lina Khan, *Amazon’s Antitrust Paradox*, 126 YALE L. J. 710, 731-36 (2017).

9. See Jonathan Baker and Fiona Scott Morton, *The Antitrust Case Against Platform MFNs*, 127 YALE L. J. 2176, 2199 n. 97 (2018).

10. See Brian Leopold, *Forecasting Change: Examining the Future of Agricultural Data Processors and Ownership Rights*, 44 J. CORP. L. 403, 405 (2018) (describing move towards “big data”-driven “smart farming” and potential concerns).

resemble what has happened in farming.¹¹ This short article, prepared for a symposium on agriculture and technology hosted by the *South Dakota Law Review*, argues that, as in the reconsideration of antitrust policy for data-rich platforms more generally,¹² chickenization and data-monopsony require steps towards preventing asymmetries in Big Data from augmenting market power.¹³ While such an approach alone will not cure the ills of chickenization, they may prevent Big Data from worsening the condition.

II. AGRICULTURE, INCREASED CONCENTRATION, AND “CHICKENIZATION”

The U.S. economy has seen increased consolidation and concentration across a variety of industries during this century.¹⁴ Agriculture has not been an exception to this trend.¹⁵ Across a variety of subsectors, agriculture has seen increased concentration in recent years.¹⁶ Between 1977 and 2011, the share of the market controlled by the four largest soybean purchasing companies increased from 54% to 79%.¹⁷ Similarly, the share held by the four largest beef processors increased from 36% to 85%.¹⁸ A series of mergers between agricultural chemical firms in 2017 and 2018 led to three firms holding 80% of the U.S. corn seed market and 70% percent of the world pesticide market.¹⁹

The trend towards increased concentration in U.S. agriculture has continued despite warnings early last decade about what has been called “chickenization”: the transformation of agriculture into a top-down, contract-based vertically integrated system in conjunction with increased concentration among intermediaries between the farmer and the end consumer.²⁰ The word derives from the fact that this process took place first in the chicken industry, driven by intermediaries with high market share such as Tyson and Perdue.²¹ In reality, chickenization involves three different, interconnected phenomena.

11. See, e.g., REBECCA GIBLIN & CORY DOCTOROW, *CHOKEPOINT CAPITALISM* (Scribe 2022) (arguing that Internet platform- and data-driven “chickenization” has already come to a range of creative industries).

12. STAFF OF H. COMM. ON the Judiciary, H. Subcomm. on Antitrust, Com. & Admin. L., 117th Cong., *Investigation of Competition in Digital Markets: MAJORITY STAFF REPORT AND RECOMMENDATIONS* (Comm. Print 2020), <https://perma.cc/P4BK-B387>.

13. See discussion *infra* Part III (analyzing how informational asymmetries increase as Big Data enters these markets).

14. See THOMAS PHILIPPON, *THE GREAT REVERSAL*, 84-85 (2019) (describing the data regarding increased concentration across a series of industries).

15. Andrew Schwartz & Ethan Gurwitz, *Big Business Rules American Agriculture—and Congress Doesn’t Seem to Care*, CTR. FOR AM. PROGRESS (May 16, 2018), <https://perma.cc/9VZJ-VBWY>.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*; James M. MacDonald, *Mergers in Seeds and Agricultural Chemicals: What Happened?*, AMBER WAVES MAG. (Feb. 15, 2019), <https://perma.cc/4NRT-VY9A>.

20. Jennifer 8. Lee, *Tyson’s ‘Chickenization’ of Meat Industry Turns Farmers into Serfs*, THE SPLENDID TABLE (Feb. 21, 2014), <https://perma.cc/8RV5-J5XW>; LEONARD, *supra* note 1, at 145.

21. See LEONARD, *supra* note 1.

Intermediaries grow in market share as producers and buyers.²² They vertically integrate with farmers by contract.²³ In conjunction, preexisting market processes—for example, a regional auction or a spot market—for meat or produce are displaced by these vertical relationships with a few powerful intermediaries.²⁴

Indeed, these changes took hold in the chicken industry starting in the middle of the last century.²⁵ In 1950, there were 1.6 million U.S. poultry farms, most of them operating independently.²⁶ Now there are approximately 25,000, virtually all operating under contracts that virtually integrate them with a handful of intermediaries such as Tyson Foods, Sanderson, Pilgrim's Prime, Koch Foods, and Perdue.²⁷ As of 2020, these five firms controlled about 60% of the U.S. chicken market.²⁸ The level of vertical integration combined with high market shares has enabled the construction of, for example, internal tournament systems among Tyson's suppliers, under which lower-ranked performers earn less compensation and are weeded out.²⁹ Having been locked into a particular intermediary's production ecosystem by contract, they cannot easily seek a better alternative if they start to slip in the tournament rankings.³⁰ This market structure has largely displaced the prior system of independent poultry farmers free to buy or sell chickens to whom they want; their birds are under long-term contracts with the large intermediaries.³¹

To be fair, these changes have had some benefits for consumers. As producers have noted, the poultry industry was transformed into one that “produc[es] meat for almost the price of bread.”³² Consumers have enjoyed the benefits of lower cost poultry, pork and beef—though recent rises in price and antitrust investigations have raised questions about whether consumer benefits will continue.³³ This kind of compensation might strengthen the intermediary—

22. *Id.* at 98-111 (describing growth of chicken processors' market share via acquisition of competitors).

23. *Id.* at 120-22 (describing imbalance of power between processors and producers leading to contract-based “tournament” among the latter to survive as suppliers).

24. *Id.* at 207-21 (describing auctions and cash markets for cattle being displaced by vertical contracting with processors).

25. See MCKENNA, *supra* note 2, at 58-73.

26. *Id.* at 66.

27. *Id.*

28. Michael Sainato, *'I Can't Get Above Water': How America's Chicken Giant Perdue Controls Farmers*, THE GUARDIAN (Mar. 14, 2020), <https://perma.cc/MD8S-MYRL>.

29. See LEONARD, *supra* note 1, at 120-22.

30. See Sainato, *supra* note 28.

31. *Id.* (reporting that fewer than 10% of U.S. poultry producers can do so due to exclusive contracts).

32. MCKENNA, *supra* note 2, at 67 (quoting the poultry company Arbor Acres's Henry Saglio); Anahad O'Connor, *Henry Salgio, 92, 'Father' of Poultry Industry*, N.Y. TIMES (Dec. 21, 2003), <https://perma.cc/CY3C-8FD2> (describing how chicken breeder's efforts transformed chicken from “probably the most expensive meat you could buy” before his efforts to “one of the least expensive meats”).

33. See Matthew Perlman, *Why DOJ's Chicken Price-Fixing Probe Fizzled Out*, LAW360 (Oct. 19, 2022) <https://perma.cc/2MTP-LF2B> (describing probe that led to guilty plea and \$107.9 million criminal fine from Pilgrim's Pride, a large chicken processor, but failed to obtain convictions against industry executives as individual criminal defendants). There is ongoing civil antitrust litigation in the pork and beef industries. Joyce Hanson, *Court Oks \$75M Smithfield Deal in Pork Price-Fixing Suit*, LAW360 (Nov.

e.g., Tyson versus Perdue—by driving down costs of supply, though perhaps at the cost of poultry farmers. Actionability under current antitrust law depends on four considerations. First, whether the changes wrought by chickenization are a problem depends on (i) whether the intermediaries have monopsony power (for example in a relevant geographic or product market) and (ii) whether their conduct can be appropriately characterized as predatory or exclusionary.³⁴ On the intermediaries’ consumer side, (iii) sufficient competition between intermediaries could force them to reduce prices to consumers, rather than pocketing the reduction in poultry acquisition costs for the intermediaries’ shareholders. Finally, and crucially, there is the question of (iv) whether gains to the consumer side of the intermediaries should be weighed against losses to the supplier side, even when the latter is harmed by the predatory or exclusionary exercise of monopsony power.

In fact, questions about chickenization go beyond the poultry industry. Increases in intermediary concentration and shifts to vertical integration in contracting have also taken place in the U.S. pork and beef industries.³⁵ Despite some significant differences in the reproductive lives of these animals and the scalability of their production, intermediary concentration and vertical integration via contact have taken similar hold as in the poultry industry.³⁶ Relatedly, this has changed market mechanics. In the pork industry, a few large intermediaries, such as Smithfield, Hormel, JBS/Cargill, and Tyson, have replaced auctions and spot markets with long-term contracts for hogs.³⁷ These four firms account for almost three-quarters of U.S. hog processing.³⁸

Similar concentration and vertical concentration have taken place in the beef industry, notably drawing an antitrust class action.³⁹ Though the suit has been recently dismissed,⁴⁰ its allegations about market mechanics in the beef industry were interesting. The cattle ranchers’ trade association alleged that the processors required a “queueing protocol” in which the ability of ranchers to solicit bids from

10, 2022), <https://perma.cc/LJ6F-MM6R> (describing preliminary judicial approval of a seventy-five million dollar settlement between Smithfield Foods, Inc. and consumer indirect purchasers, and noting that the “sprawling litigation” is “ongoing”); Chris Clayton, *Fed Cattle Lawsuit Against Big Four*, PROGRESSIVE FARMER (Nov. 21, 2022), <https://perma.cc/A8CX-B23B> (describing ongoing proceedings in “what is becoming one of the largest and most complicated antitrust cases against the country’s four largest [beef] packers”).

34. See discussion *infra* Part V (commenting on the U.S. pork and beef industries’ intermediary concentration and shifts towards vertical integration). “Predatory” and “exclusionary” are terms of art in antitrust law.

35. LEONARD, *supra* note 1, at 190-227.

36. Chickens’ egg laying and ability to cohabit in confined spaces is much greater than with swine and their broods. Even more notably, cows typically bear only a single calf, taking roughly a year to do so. *Id.*

37. *Id.* at 203-04 (describing effects on market structure and price discovery).

38. Tom Philpott, *Bacon is About to Get More Expensive*, MOTHER JONES (July 8, 2015), <https://perma.cc/5N2H-6LLF>.

39. Joe Fassler, *A New Lawsuit Accuses the “Big Four” Beef Packers of Conspiring to Fix Cattle Prices*, THE COUNTER (Apr. 23, 2019, 4:55 PM), <https://perma.cc/YXD5-856U>.

40. Todd Neeley, *Cattle Price Conspiracy Suit Dismissed*, PROGRESSIVE FARMER (Oct. 5, 2020), <https://perma.cc/CHK2-5W2G>.

buyers was limited in several ways.⁴¹ Fundamentally, this protocol shaped the relationship between ranchers and buyers by instituting a stepwise algorithm.⁴² Ranchers who received a bid from a processor, by contract, were prevented from “shopping” that bid to other processors to try to induce a higher bid.⁴³ Then, if a rancher passed on a bid, they were required to inform the next bidder of it and could only accept a bid of $X+\$1$, where the first bid was X .⁴⁴ The first bidder would then have a right of first refusal at $X+\$1$.⁴⁵ Finally, the winning bidder would then have an “option” to buy, as opposed to being obligated to do so.⁴⁶ The potential for these restrictions to reduce competition among buyers may be particularly of concern given the high value and relatively short window for economically bringing cattle to market.⁴⁷

Chickenization is not limited to meat.⁴⁸ Indeed, similar trends have been observed in the production of potatoes, as well as potentially to grains, legumes and vegetables.⁴⁹ Moreover, some argue that similar trends are spreading throughout the rest of the U.S. economy—even that Amazon is “chickenizing” its suppliers and workers.⁵⁰ The gist of such arguments is that concentration plus contract can displace prior market mechanisms, and that powerful intermediaries can become market shapers rather than market participants.⁵¹ Indeed, just as firms with market power can become “price makers” rather than “price takers,” they can also become “law makers” rather than “law takers,” effectively creating the new rules under which competition, to the extent it takes place, will happen.

III. BIG DATA COMES TO AGRICULTURE

As much concern as chickenization has already engendered, technological trends might raise even more alarm. While concentrated intermediaries have already imposed significant buyer control on their suppliers via contract, they may be able to further leverage that control via Big Data and related technologies. In general, sellers possess more information than buyers about the subject of their transaction. While buyers can try to protect themselves, this informational

41. *See id.*

42. *See id.*

43. *See id.*

44. Fassler, *supra* note 39.

45. *Id.*

46. *Id.*

47. *See* LEONARD, *supra* note 1, at 190.

48. Candace Krebs, *Chickenization: How Far Can Vertical Integration Go?*, in SOY PERSPECTIVES 8-9 (Mar. 2019), <https://perma.cc/EJ3G-JLW5> (considering spread of concentration and vertical integration via contracts to potatoes and potential for chickenization in grain and soybean industries).

49. *Id.*

50. *See* Robin Kaiser-Schatzlein, *Monopolies Make Their Own Rules*, THE NEW REPUBLIC (July 7, 2020), <https://perma.cc/A8WX-SVF8> (describing and applying arguments in *Break'em Up*, a book by Zephyr Teachout).

51. *See id.*

asymmetry is a longstanding subject of contract law.⁵² However, the increased ability to collect and process data may reduce this asymmetry. While we might normally see transparency as beneficial, it could have the potential to exacerbate the exercise of market power by concentrated intermediaries. Several nascent technologies could have such results.

A. SMART FARMING

Smart farming (also referred to as “precision farming” or “digital agriculture”) has been defined as the application of technology to agriculture to minimize waste and boost productivity.⁵³ In particular, by monitoring inputs, such as soil, irrigation, pest control, and others, and analyzing the responsiveness of outputs, such as yield, better, more cost-effective utilization strategies can be developed.⁵⁴ Measurements can be gathered via a variety of fairly longstanding technologies, including drones, video cameras, and GPS devices.⁵⁵ Additionally, the burgeoning Internet of Things promises to accelerate the growth of smart farming.

B. THE INTERNET OF THINGS (“IOT”)

IoT generally takes the form of a network of interconnected devices that can communicate with each other.⁵⁶ Depending on the device’s capabilities, it can collect various sorts of data about its operating environment, and an array of devices can gather multiple data points on various different parameters. The growth and improvement of such devices has been stunning in recent years, with significant reductions in cost, power consumption, and size.⁵⁷ Moreover, increased connectivity with the internet has created the capacity to collect and process the data such devices collect.⁵⁸

IoT architecture, like information technology architecture generally, is frequently described in terms of layers, building up from perception to transport and then to processing and application.⁵⁹ In the agricultural context, for example,

52. See, e.g., 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 491 (3d ed. 1836) (describing a Roman case involving a corn merchant from Alexandria (Egypt) arriving by ship in Rhodes (now Greece) during a time of famine and whether he was required to disclose to sellers that there was an abundance of corn in Alexandria and many more merchants’ ships coming behind him).

53. See NIKOLA M. TRENDOV ET AL., FOOD & AGRIC. ORG. OF THE U.N., DIGITAL TECHNOLOGIES IN AGRICULTURE AND RURAL AREAS 1-2, <https://perma.cc/R4DJ-4FLT>.

54. See *id.*

55. See *id.*

56. Scott R. Peppet, *Regulating the Internet of Things: First Steps Toward Managing Discrimination, Privacy, Security, and Consent*, 93 TEX. L. REV. 85, 87-89 (2014).

57. *Id.*

58. *Id.* at 113 (describing examples of sensors with such connectivity).

59. See, e.g., Phil Goldstein, *What is IoT Architecture, and How Does It Enable Smart Cities?*, STATETECH (June 16, 2021), <https://perma.cc/6FN3-AX57> (describing conventional understanding of IoT architecture as involving 4 layers: the sensor or sensing layer, the network layer, the data processing layer, and the application layer).

perception may be done by sensors that monitor growth or condition, with network protocols enabling the transport of this data to a computer that processes and analyzes that data, yielding an application step, for example, disease control or feed adjustment.⁶⁰ While this data promises to improve the efficiency of farming, it can also yield a great deal of highly granular information about the costs involved.⁶¹ Knowledge of this information by buyers, such as high-market share agricultural intermediaries, could bolster their bargaining leverage.

C. ROBO-SELLING

An additional set of technologies could exacerbate existing monopsony power. The combination of mass data collection, increased connectivity and algorithmic processing—“robo-selling”—can make price fixing more feasible and more robust.⁶² Potentially, it could even facilitate higher pricing, even in the absence of an agreement of the sort antitrust law traditionally has required, via algorithmic collusion.⁶³

In the context of an industry with a few powerful intermediaries who already integrate suppliers vertically via contract, the increased ability to monitor, process, and respond to competitors’ pricing could be good or bad. Price discovery fosters efficiency. However, increased transparency can also promote tacit collusion and parallel behavior. While this is an area that is currently under significant study,⁶⁴ the allegations of the cattle ranching trade association’s antitrust lawsuit suggest a willingness of intermediary processors to reshape market mechanisms in ways adverse to producers via algorithms, albeit lower-tech ones.⁶⁵

IV. CHICKENIZATION BEYOND FARMING

While this article focuses on chickenization in agriculture, these developments in agriculture should cause concern in other sectors. Specifically, the mix of intermediary concentration, vertical restraints, and technological development has allegedly fostered higher prices, both explicitly via price fixing and via tacit collusion.⁶⁶ In a series of ongoing antitrust cases, American poultry, pork, and beef farmers have alleged that the concentrated intermediary sector

60. See Barnaby Lewis, *How Smart Farming is Changing the Future of Food*, ISO (June 15, 2022), <https://perma.cc/7H5L-BQXG> (describing these applications).

61. *Id.*

62. See Salil K. Mehra, *Antitrust and the Robo-Seller: Competition in the Time of Algorithms*, 100 MINN. L. REV. 1323, 1363-64 (2016).

63. *Id.*

64. See Emilio Calvano et al., *Protecting Consumers from Collusive Prices due to AI*, SCIENCE (Nov. 27, 2020), <https://perma.cc/6XJN-PW2C>.

65. See *supra* Part II and accompanying text (explaining the increased concentration in the cattle ranching industry through the use of algorithms).

66. For examples, see the U.S. DOJ indictments of chicken price-fixers and its investigation of beef (2019-ongoing). There is ongoing litigation in Pork/Agri Stats (D. Minn. 2019), Cattlemen/Agri Stats (D. Minn. 2019), and Poultry/Agri Stats (D. Md. 2020).

(meat processors) use software-powered information exchange services, such as “Agri Stats,” to enhance their monopsony power, keeping prices paid to farmers low.⁶⁷ Moreover, a series of related allegations suggest that Agri Stats also serves “as a kind of digital evolution of the proverbial smoke-filled rooms where collusive schemes” lead to higher retail prices to consumers for processed meat.⁶⁸

In part, Agri Stats’s role results from affirmative government policy. In 2014, the DOJ and the Federal Trade Commission (“FTC”) jointly announced that they would permit “reasonable” information exchanges.⁶⁹ While this announcement was not sector-specific, it was quite relevant to agriculture and Agri Stats.⁷⁰ The agencies created what they termed a “safety zone” for data exchanges that fulfilled several conditions: the data exchanges were managed by a third party and not a firm providing the data, and the data contained was more than three months old, not readily traceable to each provider, and not heavily sourced from a particular provider.⁷¹ Given the focus on Agri Stats’s role in facilitating collusion, the FTC and DOJ should consider whether their safety zone is too risky for competition.

That said, reexamining the safety zone may be necessary, but not sufficient, to deal with data-driven monopsony. Moreover, looking beyond meat and Agri Stats, intermediary platforms have grown in a variety of industries.⁷² Most notably, the past decade has seen the rapid rise of so-called sharing economy platforms, some of which have seen supercharged growth due to the pandemic.⁷³ In areas such as ridesharing (Uber, Lyft), meal delivery (Grubhub, Postmates, Deliveroo), and others, a few firms have emerged, with one or two often dominating a metropolitan area.⁷⁴ Like the meat processors and their data services, these firms may have the ability to coordinate with “digital smoke-filled rooms” to chickenize their suppliers, and, on their customer side, simultaneously foster increased retail prices.

Specifically, the combination of concentration—a few platforms in any given field—plus vertical integration and control could cause the chickenization of not just farmers but gig workers. Technological advances in surveillance could shift

67. Examples of antitrust cases against meat processors that also involve allegations concerning Agri Stats include: Complaint, *United States v. Cargill Meat Solutions Corp.*, 1:22-cv-01821-ELH (D. Md. July 25, 2022); *In re Turkey Antitrust Litig.*, No. 19 C 8318, 2022 WL 797180, at *1 (N.D. Ill. Mar. 16, 2022); *Jien v. Perdue Farms, Inc.*, No. 1:19-CV-2521-SAG, 2020 WL 5544183, at *2 (D. Md. Sept. 16, 2020); *In re Pork Antitrust Litig.*, 495 F. Supp. 3d 753, 775 (D. Minn. 2020).

68. Christopher Leonard, *Is the Chicken Industry Rigged?*, BLOOMBERG BUSINESSWEEK (Feb. 15, 2017), <https://perma.cc/73AS-ENCN> (describing farmer and consumer advocate concerns about the use of Agri Stats by intermediaries and the resulting effects).

69. The announcement was made via an FTC official blog post. Michael Bloom, *Information Exchange: Be Reasonable*, FTC: COMPETITION MATTERS BLOG (Dec. 11, 2014), <https://perma.cc/QZS2-XKW2>.

70. *Id.*

71. *Id.*

72. Salil K. Mehra, *Price Discrimination-Driven Algorithmic Collusion: Platforms for Durable Cartels*, 26 STAN. J.L. BUS. & FIN. 171, 173 (2021) (describing the rapid growth of such data-driven intermediaries).

73. *Id.*

74. *Id.* at 212-13.

the returns from platform-based gig work, and possibly other fields, away from workers and towards a few oligopolists. While the tech-supercharged vertical control alone may not cause this outcome, the interaction between that control and industry concentration bear watching. As a result, renewed antitrust concern focused on the chickenization of the meat industry may have broader implications.

V. ANTITRUST'S ROLE

Technological change could exacerbate existing buyer power in agriculture. However, to date, antitrust has played a limited role regarding chickenization and monopsony, and understandably, almost no role concerning data-powered monopsony. That said, chickenization has drawn notable antitrust concern, if relatively little concrete action. President Obama's administration convened a series of joint DOJ/DOA hearings focusing on disfunction and manipulation of agricultural markets.⁷⁵ While well-intentioned, they are largely regarded to have had little impact, in part due to well-mobilized lobbying efforts aimed at stemming the reinvigoration of antitrust in this area.⁷⁶

A. MONOPSONY AND INTERMEDIARIES

Antitrust commentators have directed renewed concern at monopsony power, as well as the role of intermediaries.⁷⁷ As a result of new empirical learning, much of this attention has focused on labor market monopsony.⁷⁸ In particular, commentators argue that employers' market power enables the purchase of workers' labor at under-competitive prices, calling for increased antitrust attention and labor market regulation.⁷⁹

In the agricultural sector, the case is analogous but more difficult. It is analogous to the labor market examples because of the potential for abuse of monopsony power by buyers. But conceptually, it may be more difficult; opponents of labor market monopsony can point to pro-unionization labor law and minimum wage regulation as legislative antipathy to buyer power. Lacking such endorsement, agriculture will have to make a more complex case about reduced

75. Alan Guebert, *Bigger and Bigger and . . .*, TRI-STATE LIVESTOCK NEWS (Apr. 16, 2012), <https://perma.cc/6WF3-YW9J>.

76. *Id.*; see LEONARD, *supra* note 1, at 279-303.

77. See, e.g., Candice Yandam Riviere, *The Legal Causes of Labor Market Power in the U.S. Agriculture Sector*, 88 U. CHI. L. REV. 1555, 1565 (2021) (describing recent focus by the U.S. DOJ and FTC on monopsony power over labor, including its exercise or augmentation via intermediaries).

78. See Ioana Elena Marinescu & Eric A. Posner, *A Proposal to Enhance Antitrust Protection Against Labor Market Monopoly*, ROOSEVELT INST. (Dec. 21, 2018), <https://perma.cc/C9FZ-9USQ>; Hiba Hafiz, *Labor Antitrust's Paradox*, 87 U. CHI. L. REV. 381 (2020).

79. See ERIC POSNER, HOW ANTITRUST FAILED WORKERS 53 (2021) (describing how reinvigorated antitrust enforcement in the past five years has led first to allegations that Perdue, Tyson, and other processors fixed the prices they paid poultry farmers and then subsequently to allegations that these poultry processors also fixed the wages that they paid their employees); Hafiz, *supra* note 78, at 388-91 (arguing that a "new labor antitrust" movement may be able to redress the harms to workers of employer monopsony that lowers wages).

incentives for investment and innovation. Antitrust law should create conceptual space for this debate. Moreover, debates about the desirability of trading off one side of a platform against another should be extended to discussions about intermediaries in agriculture.

B. VERTICAL RESTRAINTS

Recently, there have been calls to strengthen antitrust law's scrutiny of vertical agreements.⁸⁰ While the Chicago School successfully convinced the federal courts to modify antitrust's *per se* hostility to vertical restraints, since they could be pro- or anticompetitive, increasingly, the courts are unjustifiably treating verticality almost as an indicator of *per se* legality.⁸¹

This debate should be extended to data-monopsony in the agricultural sector. Because vertical agreements can be anticompetitive, special attention should be paid to their actual impact in agriculture. Moreover, as discussed, the increased availability and processing of data could enhance the power of these vertical agreements.⁸² In particular, antitrust enforcers should direct their focus at whether concentration among intermediaries means that these vertical agreements are hurting competition, either on the supplier (farmer) or buyer (consumer) side. For example, they may be enhancing monopsony power on the supplier side. Alternatively, the consumer side could be injured through reduced quality or increased prices. The latter could occur even in the event monopsony power is being enhanced if the existing level of competition among intermediaries is not sufficient to force cost savings to be passed on to consumers.

C. CONCENTRATION THRESHOLDS

Big data, the Internet of Things, and Robo-selling provide more control, and more transparency, to those firms that can take advantage of these technologies.⁸³ Large intermediaries such as Tyson, Perdue, and similar firms are more likely to be early adopters, and to make more significant use of these developments.

All things being equal, technologies that enhance monopsony or monopoly power make that power more concerning. To the extent that these changes make tacit collusion and parallel conduct more likely, enforcement agencies would do well to reconsider whether the existing level of toleration for mergers in the agricultural sector is appropriate.

80. Jonathan Baker et al., *Five Principles for Vertical Merger Enforcement Policy*, 33 ANTITRUST 12, 17 (2019); Steven Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L. J. 1962 (2018).

81. See D. Daniel Sokol, *The Transformation of Vertical Restraints: Per Se Illegality, the Rule of Reason, and Per Se Legality*, 79 ANTITRUST L.J. 1003 (2014).

82. See *supra* Part III and accompanying text (describing how technology may lead to increased market power by concentrated intermediaries).

83. See *supra* Part III and accompanying text (discussing how Big Data has arrived in agriculture, seemingly to the advantage of a few).

VI. CONCLUSION

The changes, trends, and proposals set forth in this paper are necessarily tentative. There is relatively little case law in this area, and the interaction between Big Data, markets, and antitrust is still a nascent field. That said, the ability of increased data collection and processing—and its asymmetry—to allow contracts to displace traditional market mechanisms bears scrutiny, particularly in the agricultural sector, even if “chickenization” there is just the canary in the coal mine for the rest of the economy.

A NEW ENTRY INTO THE ANTICANON OF INDIAN LAW: *OKLAHOMA V. CASTRO-HUERTA* AND THE ACTUAL STATE OF THINGS

BRYCE DRAPEAUX†

Criminal jurisdiction in Indian country is complex and has generally been controlled by the federal government and the tribes. State involvement in this realm has traditionally been limited and subject only to congressional plenary authority in Indian affairs. But the Supreme Court in Oklahoma v. Castro-Huerta ruled that states hold concurrent jurisdiction with the federal government over non-Indian crimes against Indian victims in Indian country—undermining congressional plenary power and reshaping the criminal jurisdictional framework in Indian country. In doing so, the Supreme Court erroneously altered fundamental canons that have shaped the foundation of Indian law since the country’s origin. This article analyzes the ruling in Castro-Huerta and highlights how the Supreme Court veers sharply from well-established precedent. And as the Supreme Court endorsed state sovereignty over tribal sovereignty, it left much uncertainty surrounding the deeply-rooted canons that were blatantly disregarded. Further, history proves that when a state assumes criminal jurisdiction in Indian country, it negatively effects Indian nations and their citizens. The evidence suggests that the Supreme Court’s decision in Castro-Huerta will perpetuate dangerous conditions in Indian country. Finally, this article closes with a discussion of the likely on-the-ground effects in Indian country after the Supreme Court’s decision in Castro-Huerta, including the necessary collaboration that must be undertaken between all three sovereigns in order to prioritize the public safety of tribal and other citizens.

Table of Contents

I.INTRODUCTION.....	513
II.FACTS AND PROCEDURAL HISTORY	518
III.PREVIOUS CONGRESSIONAL ENACTMENTS & SUPREME COURT JURISPRUDENCE	521
IV.ANALYSIS OF THE MAJORITY AND DISSENTING OPINIONS	531
V.ON-THE-GROUND CONSIDERATIONS MOVING FORWARD....	542
VI.CONCLUSION	544

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I. INTRODUCTION

Since the founding of this country, American Indian tribes have been condemned to an ambiguous and often perplexing position within the American constitutional system.¹ Roughly two hundred years ago, in what has been called the “Marshall trilogy,”² Chief Justice John Marshall affirmed some of the most significant hallmarks of Indian law.³ And although these hallmarks have mostly endured through the present day, the cases relying on them have been subjected to many interpretations.⁴ This has created a jurisdictional maze in Indian law that is difficult for most folks, including tribes, to navigate.⁵ Traditionally, the federal government and the tribes—not the states—have controlled criminal jurisdiction in Indian country.⁶ State involvement in matters of tribal jurisdiction has traditionally been well-delineated by federal statutes,⁷ beginning with the

1. *United States v. Kagama*, 118 U.S. 375, 381-82 (1886) (stating that “[t]he relation of the Indian tribes living within the borders of the United States . . . has always been an anomalous one, and of a complex character”).

2. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

3. See generally Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and United States v. Lara: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651, 673 (2009) [hereinafter Tweedy, *Connecting the Dots*] (explaining that “the Trilogy decisions do, in many ways, provide a view of tribal sovereignty that is functionally robust”).

4. Frank Pommersheim, *Democracy, Citizenship, and Indian Law Literacy: Some Initial Thoughts*, 14 T.M. COOLEY L. REV. 457, 458 (1997) [hereinafter Pommersheim, *Indian Law Literacy*].

5. See Philip P. Frickey, *Scholarship, Pedagogy, and Federal Indian Law*, 87 MICH. L. REV. 1199, 1201-02 (1989) [hereinafter Frickey, *Federal Indian Law*] (describing how “federal Indian law is highly complicated and often inconsistent[.]” and frequently elicits “extreme mental gymnastics” during its analysis).

6. Federal law defines “Indian country” under 18 U.S.C. § 1151:

[e]xcept as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country”, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Id. See *Alaska v. Native Vill. of Venetie Tribal Gov.*, 522 U.S. 520, 527 n.1 (1998) (“Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States.”); see also John W. Gillingham, *Pathfinder: Tribal, Federal, and State Court Subject Matter Jurisdictional Bounds: Suits Involving Native American Interests*, 18 AM. INDIAN L. REV. 73, 76 (1993) (examining the long-standing jurisdictional framework in Indian country).

7. General Crimes Act, 18 U.S.C. § 1152:

[e]xcept 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. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

principle endorsed in 1832 in *Worcester v. Georgia*:⁸ that state laws can “have no force” in Indian country due to tribes’ inherent sovereignty.⁹

So too has tribal sovereignty been entrenched within the backdrop of the Supreme Court’s Indian law preemption analysis: that tribal sovereignty should be respected and out of the state’s reach unless Congress decides otherwise.¹⁰ Against this backdrop, the proper preemption analysis is one predominated by statutory interpretation—as are most cases involving federal Indian criminal law—in order to determine “whether the exercise of state authority has been preempted by operation of federal law.”¹¹ Undeniably, the Court’s decision departs substantially from basic Indian law preemption analysis, and thus gives much freight to the remark offered by Philip Frickey, the renowned Indian law professor, that “the precedential effect of federal Indian law decisions is often weak.”¹² The 2022 decision in *Oklahoma v. Castro-Huerta*¹³ epitomizes this remark, considering how the Supreme Court employed such an innovative approach in its interpretation of such seminal cases¹⁴ and congressional statutes¹⁵ that have provided the bedrock of Indian law since the founding of the country. Since the Supreme Court’s expansive role in Indian law has been characterized by some as controversial,¹⁶ the decision here may add further skepticism to the legitimacy of the Court at a time when trust in the Court is at an all-time low.¹⁷

Justice Neil Gorsuch’s dissent in *Castro-Huerta* captures well the full picture of the true history and precedents of Indian law and their foundational underpinnings, while identifying where the majority strays from fundamental

Id.; Major Crimes Act, 18 U.S.C. § 1153 (conferring jurisdiction to the federal government with regard to certain, more serious, crimes occurring in Indian country); Assimilative Crimes Act, 18 U.S.C. § 13 (making state law applicable to Indian country if there is no relevant federal statute with regard to the offense committed in Indian country); Public Law 280, 18 U.S.C. § 1162 amended by Indian Civil Rights Act, §§ 401-06, 25 U.S.C. §§ 1321-26 (granting certain states criminal jurisdiction in Indian country, and allowing other states to opt-in with tribal consent); Violence Against Women Reauthorization Act, 42 U.S.C. § 13701 (2013), reauthorized in 2022 by 34 U.S.C. § 10101 (permitting Indian tribes to assume some criminal jurisdiction over non-Indians for certain domestic violence crimes committed against Indians in Indian country); Tribal Law and Order Act, Pub. L. No. 111-211, 124 Stat. 2258 (2010) (expanding the punitive abilities of tribal courts across the country if those courts adhere to the opting-in provisions).

8. 31 U.S. (6 Pet.) 515 (1832).

9. *Id.* at 520.

10. See *id.*; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (asserting that “traditional notions of Indian self-government are so deeply engrained in [the Court’s] jurisprudence that they have provided an important ‘backdrop,’ . . . against which vague or ambiguous federal enactments must always be measured”) (citing *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 172 (1973)).

11. *Bracker*, 448 U.S. at 143 (quoting *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 475 (1976)).

12. See Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 439 (1993) [hereinafter Frickey, *Marshalling Past and Present*].

13. 142 S. Ct. 2486 (2022).

14. See *Worcester*, 31 U.S. at 515; *Bracker*, 448 U.S. at 136; *Williams v. Lee*, 358 U.S. 217 (1959).

15. See *supra* note 7 (outlining the statutes). The two statutes directly at issue in *Castro-Huerta* are 18 U.S.C. § 1152 (2022) and 18 U.S.C. § 1162 (2022). 142 S. Ct. at 2494.

16. See Frickey, *Federal Indian Law*, *supra* note 5, at 1205.

17. See Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP (Sept. 29, 2022), <https://perma.cc/DJ6P-HKNC>.

canons that have been mostly respected by the Supreme Court for nearly two hundred years.¹⁸ This article does not merely reiterate Justice Gorsuch’s adamant dissent, but also provides a contrasting analysis of the majority and dissent’s opinions, and gives further context of the practical considerations—the actual state of things—of what concurrent state and federal criminal jurisdiction means for Indian country.¹⁹ History tells us that when states have been permitted to assume jurisdiction in Indian country, it creates a jurisdictional environment that negatively affects reservations and the Native Americans living there.²⁰

The five-four majority in *Castro-Huerta*, authored by Justice Kavanaugh, partly rested its decision as one that will help Indian tribes and reservation communities.²¹ But the paternalistic overtones are nothing new to Indian country²² and can be attributed to exacerbating the actual state of things there.²³ What makes the Court believe its decision in *Castro-Huerta* will produce any significant difference in protecting Indian victims or empowering tribes?²⁴ If America is truly in an era of tribal self-determination,²⁵ the Court’s decision here either ignored that policy, or even worse, determined for itself a new policy for federal Indian law—something more akin to legislating from the bench.²⁶ Indeed,

18. *Castro-Huerta*, 142 S. Ct. at 2505-27 (Gorsuch, J., dissenting).

19. See *infra* Part V (proposing cooperative interactions between tribes and states while recognizing tribal sovereignty).

20. See CAROLE GOLDBERG, THE HARV. PROJECT ON AM. INDIAN ECON. DEV. & THE NATIVE NATIONS CTR., THE PERILS AND POSSIBILITIES OF EMPLOYING PUBLIC LAW 280 IN OKLAHOMA 11 (2020) [hereinafter GOLDBERG, EMPLOYING PUBLIC LAW 280 IN OKLAHOMA] (explaining that tribes within states that assert criminal jurisdiction under Public Law 280 criticize it for “lack of patrolling and response from local law enforcement, lack of cultural compatibility, and discrimination in the state justice system”); see also Carole Goldberg, *Unraveling Public Law 280: Better Late than Never*, 43 A.B.A. HUM. RTS. MAG. 1 (2017) [hereinafter Goldberg, *Unraveling Public Law 280*] (asserting that “[l]ocal authorities have sometimes failed to serve tribal communities and sometimes have reacted with excessive harshness”).

21. See *Castro-Huerta*, 142 S. Ct. at 2502 (suggesting Native Americans would be “second-class citizens” without Supreme Court intervention).

22. Several court decisions in Indian law have elicited paternalism and are supported with eurocentrism. See *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164, 174 (1973) (stating that “(d)oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith”) (citing *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)); *United States v. Joseph*, 94 U.S. 614, 616 (1876) (portraying the Pueblo of Taos as “Indians only in feature, complexion, and a few of their habits” while determining whether the Pueblos were considered an “Indian tribe” under to federal law); *United States v. Kagama*, 118 U.S. 375, 384 (1886) (expressing how “[t]he power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary [sic] to their protection, as well as to the safety of those among whom they dwell”); *Ex parte Mayfield*, 141 U.S. 107, 115-16 (1891) (explaining Congress’s Indian policy as encouraging the Indians “as far as possible in raising themselves to [the American] standard of civilization”—implying that the federal government knows what is best for Indian people).

23. See GOLDBERG, EMPLOYING PUBLIC LAW 280 IN OKLAHOMA, *supra* note 20, at 11 (“When a system of justice is widely viewed as unfair and illegitimate, citizens are less inclined to obey the law and to cooperate with authorities.”).

24. See *generally id.* (explaining how state criminal justice has functioned poorly in Indian country).

25. The trajectory of Indian law has been besieged by a paradox of executive branch policies since the founding of the country “through allotments and assimilation, Indian reorganization, termination, and the current phase of self-determination.” Pommersheim, *Indian Law Literacy*, *supra* note 4, at 457.

26. See Thomas L. Jipping, *Legislating from the Bench: The Greatest Threat to Judicial Independence*, 43 S. TEX. L. REV. 141, 146 (2001) (asserting that “[l]egislating from the bench, another name for judicial activism, destroys the proper end of judging and, therefore, is the greatest threat to judicial independence”).

progress in state-tribal relationships is still possible and necessary for the prosperity of both sovereigns, but the Court's ruling in *Castro-Huerta* was a missed opportunity for tribal nations and states to more organically collaborate out of mutual respect as sovereigns under the concept of cooperative federalism.²⁷ Instead, states are now empowered to further dismiss tribal sovereignty as the Supreme Court provided the states with yet another justification to infringe upon the criminal jurisdiction of Indian tribes.²⁸

The holding in *Castro-Huerta* minimizes the foundational canon established in *Worcester*: that tribal sovereignty prevails in matters involving Indian country unless clearly modified by Congress.²⁹ And instead, replaced it with a new “anticanon”: that states have jurisdiction in Indian country unless state sovereignty is preempted by Congress.³⁰ This decision will likely result in worsening conditions in Indian country³¹ and casts a harrowing shadow over what remains of tribal sovereignty. Given the historically bumpy relationship between states and tribes, and the current makeup of the Supreme Court and potential for its longevity, the most pragmatic recourse tribal nations have is to lobby Congress and demand that it restores the constitutional principles abrogated in *Castro-Huerta* to achieve a fairer system of justice.³² Merely closing our eyes and hoping *Castro-Huerta* is a one-off may prove to be futile.³³

27. Cooperative federalism involves different governments (e.g., tribal and state) sharing responsibility and authority through cooperation and understanding for the betterment of all governments and citizens involved. See generally Philip J. Weiser, *Cooperative Federalism and its Challenges*, 2003 MICH. ST. DCL L. REV. 727, 728-29 (2003) (providing an overview of cooperative federalism while focusing on state and federal cooperative federalism).

28. See, e.g., *United States v. McBratney*, 104 U.S. 621, 624 (1881) (holding that the State of Colorado has jurisdiction over crimes committed on tribal land by non-Natives); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (holding that tribes do not have jurisdiction over criminal offenses committed by non-Natives on reservation land).

29. See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (creating a strong presumption against state jurisdiction in Indian country). This canon is considered a “clear-statement rule,” because unless Congress clearly states otherwise, tribal sovereignty should be upheld. See Frickey, *Marshalling Past and Present*, *supra* note 12, at 414-15 (expressing how clear-statement rules are used sparingly by the Court in order to “guard against the erosion of constitutional structures that are difficult to protect”). But the Court's dismissal of this foundational canon effectively dismantled the constitutional safeguard of the clear-statement rule established in *Worcester*. See *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2493 (2022).

30. *Castro-Huerta*, 142 S. Ct. at 2504. The phrase “new entry into the anticanon of Indian law” was penned by Justice Gorsuch in his dissent in *Castro-Huerta*. *Id.* at 2521 (Gorsuch, J., dissenting).

31. See Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1423 (1997) (dissecting the on-the-ground effects of state criminal jurisdiction in Indian country: “With the tribe, the state, and the federal government all hobbled, at least partly, as a result of Public Law 280, the eruption of lawlessness was predictable”); see also Brief for National Indigenous Women's Resource Center et al., as Amici Curiae Supporting Respondent at 10-18, *Castro-Huerta*, 142 S. Ct. 2486 (No. 21-429) [hereinafter Brief for National Indigenous Women's Resource Center] (describing the effects of state criminal jurisdiction in Indian country and the dysfunction it has created).

32. See Violence Against Women Reauthorization Act, 42 U.S.C. § 13701 (2013), reauthorized in 2022 by 34 U.S.C. § 10101. Congress reauthorized this Act in 2013 after an effective lobbying campaign by interested parties. See vnovak, *Violence Against Women Act Focus of Heavy Lobbying*, OPEN SECRETS (May 15, 2012), <https://perma.cc/M2LB-WG4S>.

33. See generally David Hill et al., *Tribal Chief: Castro-Huerta Ruling is an Alarming Affront to our Sovereignty, Safety*, YAHOO! NEWS (July 1, 2022), <https://perma.cc/K5M5-22K7> (“We look forward to

In analyzing the *Castro-Huerta* decision, this article begins by describing the facts and procedural history in Part II.³⁴ In Part III, this article provides an accounting of previous congressional enactments and Supreme Court jurisprudence surrounding federal Indian criminal law.³⁵ Part IV returns to the *Castro-Huerta* case to describe the majority and dissenting opinions from the Supreme Court, accompanied by an analysis dictating which opinion, the majority or the dissent, more closely resembles the controlling law.³⁶ Finally, Part V gives an overview of the likely practical considerations—the on-the-ground actual state of things—of the *Castro-Huerta* decision.³⁷

II. FACTS AND PROCEDURAL HISTORY

In 2015, Victor Manuel Castro-Huerta, a non-Indian, was living on the historic reservation lands of the Cherokee Nation in Oklahoma along with his wife and five-year-old step-daughter.³⁸ One day, his step-daughter, an enrolled member of the Eastern Band of Cherokee Indians, was rushed to the emergency room and found to be cruelly malnourished.³⁹ Eventually, the State of Oklahoma charged and convicted Castro-Huerta for criminal child neglect, handing down a thirty-five-year sentence with the possibility of parole.⁴⁰ On appeal in the Oklahoma Court of Criminal Appeals (“Oklahoma Court of Appeals”),⁴¹ Castro-Huerta argued that because he is a non-Indian, his step-daughter is an Indian, and the crime occurred in Indian country, the State lacked jurisdiction over the crime.⁴² While the appeal was pending, the United States Supreme Court decided *McGirt v. Oklahoma*,⁴³ effectively shifting the criminal jurisdictional landscape

collaborating with members of Congress and the federal government to identify all options available to empower tribal nations to ensure the safety and prosperity of all who reside, work or visit our reservation.”).

34. See *infra* Part II (detailing the facts and procedural history of *Castro-Huerta*).

35. See *infra* Part III (providing history of Congressional enactments and Supreme Court jurisprudence concerning Federal Indian law).

36. See *infra* Part IV (analyzing the majority and dissenting opinions in *Castro-Huerta*).

37. See *infra* Part V (considering the practical consequences of the *Castro-Huerta* decision and future solutions to resolve them).

38. Petition for a Writ of Certiorari at 6-8, *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (No. 21-429) [hereinafter Cert. Petition].

39. *Id.* at 6-7.

40. *Castro-Huerta*, 142 S. Ct. 2486, 2491 (2022).

41. The Oklahoma Court of Criminal Appeals is the highest criminal court in Oklahoma, serving as the last recourse for any criminal appeals in the state. *Oklahoma State Courts*, STATE COURTS, <https://perma.cc/TE9M-RKX5>.

42. See Brief for the United States as Amicus Curiae Supporting Respondent at 3, *Castro-Huerta*, 142 S. Ct. 2486 (No. 21-429) [hereinafter Brief for U.S. as Amicus Curiae].

43. 140 S. Ct. 2452 (2020). In *McGirt*, the Supreme Court held that the Creek Nation Reservation was never disestablished by Congress, meaning that the federal government, and not the state, assumes criminal jurisdiction under the Major Crimes Act for any crimes committed by a tribal member on the Creek Reservation—which included much of Tulsa. *Id.* at 2460, 2479; see also *infra* Part III (discussing criminal jurisdiction between the federal government and state government under the Major Crimes Act). A closer analysis of other reservations in Oklahoma revealed that most were not diminished either, creating a ripple effect that removed criminal jurisdiction from the state to the tribes and federal government for crimes committed in Indian country within the reestablished reservation boundaries. See Ray Carter,

in much of Oklahoma away from the State and returning to a much more principled approach.⁴⁴ Shortly thereafter, the Oklahoma Court of Appeals remanded Castro-Huerta's case to establish whether the victim was an Indian and whether the offense occurred in Indian country.⁴⁵

While on remand, the parties agreed by stipulation to two issues—that the victim was an Indian enrolled in a federally recognized tribe and that the crime took place within the boundaries historically demarcated by treaty for the Cherokee Nation.⁴⁶ But the State would not agree that the crime occurred in Indian country.⁴⁷ After accepting the parties' stipulations, the trial court concluded—in light of *McGirt*—that the Cherokee Nation was never disestablished by Congress, and, consequently, that Castro-Huerta's crime was committed within Indian country.⁴⁸ The State then argued that Castro-Huerta's state conviction was still valid because the State retains concurrent jurisdiction with the federal government over any crimes committed by non-Indians against Indians—"regardless of whether the crime occurred in Indian country."⁴⁹ The trial court, though, declined to hear any argument or reach any conclusion on that issue, instead allowing the State to preserve the argument on appeal.⁵⁰

The Oklahoma Court of Appeals, after considering the trial court's findings and the State's renewed argument, affirmed the trial court's decision because "the ruling in *McGirt* govern[ed] th[e] case."⁵¹ The Oklahoma Court of Appeals based its holding on the text of the General Crimes Act⁵² and on Public Law 280,⁵³ noting that Public Law 280 granted a few specific states broad criminal jurisdiction over crimes committed in Indian country.⁵⁴ The Oklahoma Court of Appeals reasoned that passing Public Law 280 "would have been unnecessary if the General Crimes Act did not otherwise preempt state jurisdiction."⁵⁵ Thus, the Oklahoma Court of Appeals held that "the General Crimes Act preempted state prosecutions for crimes committed by non-Indians against Indians in Indian

McGirt Leads to Another Reservation Ruling, OKLA. COUNCIL OF PUB. AFFS. (Oct. 21, 2021), <https://perma.cc/SX9L-UM6P>.

44. See Mary Kathryn Nagle, *Introduction*, 56 TULSA L. REV. 363, 364 (2021) (expressing how *McGirt* was an "Indian law case . . . guided by *the law*, and not white expectations of tribal diminishment").

45. See Brief for U.S. as Amicus Curiae, *supra* note 42, at 3.

46. See *id.*; Cert. Petition, *supra* note 38, at 7.

47. See Cert. Petition, *supra* note 38, at 7.

48. See *id.* at 7-8.; Brief for U.S. as Amicus Curiae, *supra* note 42, at 3.

49. See Cert. Petition, *supra* note 38, at 8.

50. See *id.*

51. See *id.*

52. *Supra* note 7 (stating the text of the statute).

53. *Supra* note 7 (explaining the statute).

54. Cert. Petition, *supra* note 38, at 8. Although the Oklahoma Court of Appeals focused primarily on Public Law 280, it also alluded to other later-enacted statutes passed by Congress and conferred on other individual states. See GOLDBERG, EMPLOYING PUBLIC LAW 280 IN OKLAHOMA, *supra* note 20, at 4 (beginning in the 1940s, Congress also passed statutes conferring state criminal jurisdiction over Indian country on a limited number of individual states (e.g., Kansas and New York)).

55. Cert. Petition, *supra* note 38, at 8.

country,”⁵⁶ which, in effect, meant that only tribal and federal authorities possessed the jurisdiction to prosecute crimes by or against Indians in Indian country.⁵⁷

As the state court proceedings were ongoing, Castro-Huerta was indicted by a federal grand jury in Oklahoma for the same conduct.⁵⁸ He later agreed to a plea bargain, whereafter a federal district court sentenced him to seven years in prison followed by removal from the United States.⁵⁹ Meanwhile, Oklahoma’s executive branch, certain cities, and interested parties proceeded to wage a hasty public relations campaign,⁶⁰ stressing that the Court’s ruling in *McGirt* created a “criminal-justice crisis”⁶¹ that has caused a “significant prosecution gap”⁶² on Oklahoma reservations because Oklahoma understood it lacked the authority to prosecute crimes involving Native Americans on the reservation.⁶³ After the state proceedings, Oklahoma filed a writ of certiorari to the Supreme Court, advancing two issues: “[w]hether a State has authority to prosecute non-Indians who commit crimes against Indians in Indian country”; and whether *McGirt* should be overruled.⁶⁴ The Court declined to consider overruling *McGirt* but granted certiorari on the narrower issue concerning concurrent federal and state jurisdiction in Indian country over non-Indian against Indian crime.⁶⁵

In *Castro-Huerta*, Justice Kavanaugh wrote for the majority, holding that the federal government and the states share concurrent jurisdiction to prosecute crimes

56. *Id.* Similar to here, the Oklahoma Court of Appeals affirmed in another case that states do not have concurrent criminal jurisdiction with the federal government in crimes involving non-Indian perpetrators and Indian victims. *See Roth v. Oklahoma*, 499 P.3d 23, 27 (2021) (asserting that “federal law applied in Oklahoma ‘according to its usual terms’ because the State had never complied with the requirements to assume jurisdiction over the Creek Reservation and Congress had never expressly conferred jurisdiction on Oklahoma”).

57. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2510 (2022) (Gorsuch, J., dissenting); *see* 18 U.S.C. § 1152.

58. Brief for U.S. as Amicus Curiae, *supra* note 42, at 4.

59. *Castro-Huerta* had been unlawfully residing in the United States. *Castro-Huerta*, 142 S. Ct. at 2492.

60. *See, e.g.*, Jonathan Small, *McGirt Mess Continues to Grow*, OKLA. COUNCIL OF PUB. AFFS. (May 23, 2022), <https://perma.cc/7V8B-W4DQ> (calling on Congress to disestablish the “*McGirt* reservations” due to “real harm” associated with the *McGirt* decision). This notion of a criminal justice crisis in the wake of *McGirt*, however, has arguably been overstated and instead promulgated for more pernicious reasons. *See, e.g.*, Brandon Tensley, *What Oklahoma’s Governor and Others Get Wrong About Tribal Sovereignty*, CNN (Apr. 21, 2022), <https://perma.cc/JKL7-262T> (explaining that Oklahoma’s governor utilized “race-baiting” and “scare” tactics after *McGirt* in order to mislead his constituents and polarize Oklahomans). Instead, it has been argued that “external narratives and scare tactics of ‘lawlessness’ inside tribal jurisdictions have been invented and recycled to justify incursions on tribal sovereignty and limit Indigenous autonomy.” Stacy Leeds, *What the Landmark Supreme Court Decision Means for Policing Indigenous Oklahoma*, SLATE (July 10, 2020), <https://perma.cc/NCD7-V9Y4>.

61. Brief for the States of Texas, Kansas, Louisiana, Nebraska, and Virginia as Amici Curiae in Support of Petitioner at 2, *Castro-Huerta*, 142 S. Ct. 2486 (No. 21-429).

62. Brief of the City of Tulsa as Amicus Curiae in Support of Petitioner at 6, *Castro-Huerta*, 142 S. Ct. 2486 (No. 21-429).

63. *See infra* Part III (illustrating the criminal jurisdictional landscape in Indian country). Oklahoma never opted into Public Law 280 when it unilaterally had the chance and has still refused to opt-in with tribal consent. *See* GOLDBERG, EMPLOYING PUBLIC LAW 280 IN OKLAHOMA, *supra* note 20, at 4.

64. Cert. Petition, *supra* note 38, at i.

65. *See* Wayne L. Ducheneaux, II, *Oklahoma v. Castro-Huerta: Bad Facts Make Bad Law*, NATIVE GOVERNANCE CTR. (July 14, 2022), <https://perma.cc/3FBZ-GF89>.

committed by non-Indians against Indians in Indian country.⁶⁶ The Court reasoned that neither the General Crimes Act nor Public Law 280 preempt state jurisdiction over crimes committed by non-Indians against Indians in Indian country because “Indian country is part of a State, not separate from a State,” and “[t]herefore, a State has jurisdiction to prosecute crimes committed in Indian country unless state jurisdiction is preempted.”⁶⁷ Justice Gorsuch, who wrote for the majority in *McGirt*, penned the dissent, stressing that the majority’s decision “comes as if by oracle, without any sense of [Indian law] history . . . and unattached to any colorable legal authority. Truly, a more ahistorical and mistaken statement of Indian law would be hard to fathom.”⁶⁸

III. PREVIOUS CONGRESSIONAL ENACTMENTS & SUPREME COURT JURISPRUDENCE

The framework for criminal jurisdiction in Indian country is complicated.⁶⁹ This is primarily because Congress has passed multiple statutes controlling jurisdiction.⁷⁰ Specifically, the General Crimes Act,⁷¹ the Assimilative Crimes Act,⁷² the Major Crimes Act,⁷³ and Public Law 280⁷⁴ all govern Indian country under different jurisdictional schemes. Congress, in passing these statutes, attempted to integrate its vision of the Anglo-American criminal justice system against the backdrop of tribal sovereignty.⁷⁵ This has created significant tension between the sovereigns, however, because tribal sovereignty is based upon the premise that tribes have control over their citizens and their territory.⁷⁶

In 1790, in order to protect Native Americans “from the violence[] of the lawless part of [the American] frontier inhabitants,” the first Congress conferred some federal criminal jurisdiction over crimes committed by non-Indians against

66. *Castro-Huerta*, 142 S. Ct. at 2491.

67. *Id.* at 2504.

68. *Id.* at 2511 (Gorsuch, J., dissenting).

69. See Gillingham, *supra* note 6, at 76-77 (alluding to the “inconsistent and perplexing case law” due to the “interplay of individual treaties, general federal legislation, and tribe specific federal statutes”).

70. Significantly, it is Congress that has the paramount authority over Indian affairs, not the Supreme Court or the states. See Frank Pommersheim, *Is There a (Little or not so Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay*, 5 U. PA. J. CONST. L. 271, 271 n.4 (2003) [hereinafter Pommersheim, *Constitutional Crisis*]. This principle of plenary power was established in *Lone Wolf v. Hitchcock*, 187 U.S. 533, 565 (1903) (asserting that “[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government”).

71. 18 U.S.C. § 1152 (2022).

72. 18 U.S.C. § 12 (2022).

73. 18 U.S.C. § 1153 (2022).

74. 18 U.S.C. § 1162 (2022).

75. See generally William V. Vetter, *A New Corridor for the Maze: Tribal Criminal Jurisdiction and Nonmember Indians*, 17 AM. INDIAN L. REV. 349, 350 (1992) (explaining the criminal “jurisdictional maze” in Indian country and how the “legal and ideological foundations of that maze . . . [started] in Europe long before the United States began its political existence—even before Europeans ‘discovered’ the American continents”).

76. See *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (stating that tribes are “unique aggregations possessing attributes of sovereignty over both their members and their territory”).

Indians when it passed the first Indian Trade and Intercourse Act.⁷⁷ In 1817 Congress authorized the first General Crimes Act (also called the “Indian Country Crimes Act” and the “Federal Enclaves Act”),⁷⁸ further permitting limited⁷⁹ federal criminal jurisdiction over Indian perpetrators against non-Indian victims in Indian country by extending “the general laws of the United States” to Indian country.⁸⁰ Consequently, these laws provide the federal government with the authority to prosecute offenses committed by non-Indians against Indians, and, conversely, crimes committed by Indians against non-Indians.⁸¹ Congress, in passing these statutes, was acutely aware of Indian tribes’ sovereignty, its power to allocate legislation over Indian tribes, and the jurisdictional limitations states had over Indian affairs.⁸² This understanding was echoed by Congress after the Supreme Court’s decision in *Worcester*, described below, after which Congress reenacted the General Crimes Act in 1834⁸³ to preserve a federal forum for crimes by and against non-Indians in Indian country.⁸⁴ Because *Worcester* concluded that states have no authority to apply their criminal laws over Indian country, Congress was mindful that absent this federal forum, non-Indians would have been liable under tribal law alone.⁸⁵

77. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 201 (1978); 1 Stat. 137 (1790).

78. The General Crimes Act is considered a “federal enclave law” because, for jurisdictional purposes, it treats Indian country as a “federal enclave.” See *United States v. Markiewicz*, 978 F.2d 786, 797 (2d Cir. 1992) (describing that “federal enclave laws are a group of statutes that permits the federal courts to serve as a forum for the prosecution of certain crimes when they occur within the ‘[s]pecial maritime and territorial jurisdiction of the United States[.]’ 18 U.S.C. § 7”). Thus, the General Crimes Act fills some prosecutorial gaps by applying the federal enclave laws to Indian country. 18 U.S.C. § 1152.

79. Congress limited federal jurisdiction under the second paragraph of 18 U.S.C. § 1152, which explains that the jurisdiction at issue does not extend to offenses committed by one Indian against another in Indian country.

80. *United States v. Wheeler*, 435 U.S. 313, 324 (1978).

81. See *id.* at 324-25; 18 U.S.C. § 1152. The General Crimes Act effectively covers crimes that do not rise to the level of those enumerated in the Major Crimes Act and the offender has not already been punished by the tribe for the crime. 18 U.S.C. § 1152. The Act, however, does not extend to any case where tribes have secured exclusive criminal jurisdiction by treaty. *Id.*

82. See David H. Getches, *Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 269 (2001). Getches clarifies that the Indian Commerce Clause was adopted to “vest all power over Indian affairs in Congress,” and to “curtail arguments that state legislation could deal with Indians who were within a state[.]” *Id.* at 270; see also Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1014-15 (2015) (contending that those who founded the United States understood that “[t]he laws of the State can have no effect upon a tribe of Indians or their lands within the limits of the state so long as that tribe is independent” (quoting 33 JOURNAL OF THE CONTINENTAL CONGRESS, 1774-1789, 458 (Roscoe R. Hill ed., 1936))).

83. Congress reenacted the General Crimes Act most recently in 1948 with few minor amendments, but the Act generally remains as originally ratified. See 18 U.S.C. § 1152.

84. See H.R. REP. NO. 23-474, at 13 (1834) (“[I]t is rather of courtesy than of right that we undertake to punish crimes committed in [Indian] territory by and against our own citizens.”).

85. See *id.* at 18 (“Officers, and persons in the service of the United States, and persons [residing] in [] Indian country by treaty stipulations, must necessarily be placed under the protection, and subject to the laws of the United States. To persons merely travelling in the Indian country the same protection is extended.”); see also Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal, Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609, 625-26 (1979) (explaining how, in 1834, it was understood that non-Indians who voluntarily traversed or resided in Indian country “must be considered as voluntarily submitting to the laws of the tribes”) (quoting H.R. REP. NO. 23-474, at 18 (1834)) (emphasis in original).

The Assimilative Crimes Act⁸⁶ makes state law applicable where there is no applicable federal statute to charge for crimes committed in a federal enclave, such as a national park, inside the surrounding state.⁸⁷ Accordingly, if federal law failed to criminalize an action, but the surrounding state's law made that action a crime, this Act essentially converts the crime into a federal offense.⁸⁸ The Supreme Court, in 1946, expressly applied the Assimilative Crimes Act to Indian country.⁸⁹

The first significant case involving state criminal jurisdiction in Indian country was *Worcester v. Georgia*, decided in 1832.⁹⁰ *Worcester* was one of three major cases decided in the early nineteenth century, together called the "Marshall trilogy," (named after Chief Justice John Marshall,⁹¹ who wrote the most influential opinions in each case) which established the underpinnings of Indian law norms and precedent.⁹² In *Worcester*, the State of Georgia attempted to extend its criminal laws over Cherokee lands by requiring non-Indians to seek the State's permission before entering the reservation and to swear an oath of loyalty to the State.⁹³ The issue in *Worcester* was whether Georgia could rightfully assert its laws over the Cherokee reservation.⁹⁴ The Supreme Court declared that because of the exclusive sovereign-to-sovereign relationship between the federal government and Indian tribes, state law was preempted by federal law.⁹⁵ The Court acknowledged that the federal government validly possessed this authority due to the importance of tribal self-governance, the treaty power, and earlier federal legislation effectively preempting states from imposing their laws in Indian country.⁹⁶ The decision established a foundational canon in Indian law: that

86. 18 U.S.C. § 13. The Assimilative Crimes Act is a federal enclave law similarly to the General Crimes Act. See *United States v. Markiewicz*, 978 F.2d 786, 797 (2d Cir. 1991). Among the crimes covered under the Assimilative Crimes Act are murder, 18 U.S.C. § 1111; theft, 18 U.S.C. § 661; arson, 18 U.S.C. § 81; assault, 18 U.S.C. § 113; receiving stolen property, 18 U.S.C. § 662; and sexual offenses, 18 U.S.C. § 2241.

87. See *Markiewicz*, 978 F.2d at 797-98.

88. *Id.* at 797.

89. See *Williams v. United States*, 327 U.S. 711, 713 (1946) (asserting that "[i]t is not disputed that [] Indian reservation[s] [are] 'reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof,'" which "means that many sections of the Federal Criminal Code apply to the reservation, including . . . the Assimilative Crimes Act[.]").

90. 31 U.S. (6 Pet.) 515 (1832).

91. Marshall was uniquely positioned in history because he "lived through and was personally aware of the debates of the Framers." Getches, *supra* note 82, at 270 n.13. This understanding arguably gives Chief Justice Marshall "great weight" in his decision in *Worcester*, considering it was "written during James Madison's lifetime when mistaking, let alone distorting, the intent or meaning of the Constitution would be highly unlikely." *Id.*

92. See *id.* at 269 ("the 'Marshall Trilogy[]' form[s] the foundation of Indian law").

93. *Worcester*, 31 U.S. at 521-23.

94. *Id.* at 534-35.

95. See *id.* at 519-20 (declaring that "[t]he treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union").

96. Pommersheim, *Constitutional Crisis*, *supra* note 70, at 275.

unless Congress expressly commands otherwise, states lack the power to regulate Native American tribes due to their sovereign status.⁹⁷

After the declaration in *Worcester*, the first serious affront to tribal sovereignty by the Supreme Court came in *United States v. McBratney*.⁹⁸ There, the Supreme Court crafted an exception to exclusive tribal/federal jurisdiction in Indian country by ruling that the federal government has no jurisdiction in Indian country over crimes between non-Indians.⁹⁹ Instead, jurisdiction over non-Indian on non-Indian crimes is within the sole purview of the surrounding state.¹⁰⁰ The Supreme Court concluded that the General Crimes Act and the treaty at issue contained no stipulation covering non-Indian against non-Indian crimes.¹⁰¹ To buttress this conclusion, the Court reasoned that state courts are vested with jurisdiction in this context unless a treaty or a state enabling act, both affirmed by Congress, exclude state jurisdiction over crimes committed in Indian country involving non-Indian parties.¹⁰² Since neither condition was present, the Court ruled that non-Indian on non-Indian crimes are exclusively under the state's jurisdiction.¹⁰³ Although highly criticized,¹⁰⁴ the holding has been consistently reaffirmed as controlling law.¹⁰⁵

The *McBratney* principle was later extended in 1978, when the Supreme Court, in *Oliphant v. Suquamish Indian Tribe*,¹⁰⁶ determined that tribes lack jurisdiction over all offenses committed by non-Indians, absent explicit congressional action.¹⁰⁷ Notably, the Court “judicially crafted” its decision under its federal common lawmaking power and not through statutory interpretation, like

97. *Worcester*, 31 U.S. at 559, 581-82 (reasoning that by placing themselves under the protection of the federal government, Native Americans did “not divest them[selves] of the right of self government” and still “retain[] their original natural rights, as the undisputed possessors of the soil, from time immemorial”). Chief Justice Marshall proclaimed that the constitutional powers of the federal government “remain in full force,” including the treaties, which guarantees “to [the Indians] their rights of occupancy, of self-government, and the full enjoyment of those blessings[.]” *Id.* at 595. This canon is ignored by the majority in *Castro-Huerta* and, ultimately, displaced for a new “anticanon.” 142 S. Ct. 2486, 2521 (2022) (Gorsuch, J., dissenting).

98. 104 U.S. 621 (1881). In *McBratney*, a non-Indian was convicted in federal court for the murder of another non-Indian on the Ute Reservation in Colorado. *Id.* at 621.

99. *Id.* at 624.

100. *Id.*

101. *Id.*

102. *Id.* at 623-24.

103. *Id.* at 624.

104. See Joseph D. Matal, *A Revisionist History of Indian Country*, 14 ALASKA L. REV. 283, 325-26 (1997) (revealing that *McBratney* was supposedly grounded on “statutory interpretation, but it is difficult to arrive at the Court’s result by any ordinary approach to statutory construction. One possibility is that the Court simply misread the laws. . . . Whatever the basis, it is unlikely that the same result would be reached today in a case of first impression”) (citing FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 246-66 (Rennard Strickland et al., 1982 ed.)).

105. *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946); *Draper v. United States*, 164 U.S. 240 (1896).

106. 435 U.S. 191 (1978). In *Oliphant*, a non-Indian resident of the reservation, was charged in tribal court for assaulting a non-Indian tribal police officer and resisting arrest on reservation lands. *Id.* at 194.

107. *Id.* at 212.

in *McBratney*.¹⁰⁸ The Court in *Oliphant* explained that Indian tribes lacked “inherent criminal jurisdiction to try and punish non-Indians” in Indian country.¹⁰⁹ Still, as serious as the Supreme Court’s cabining of tribal sovereignty was in *McBratney* and *Oliphant*, it has departed from the *Oliphant* limitations after recognizing some tribal power over nonmembers in the civil realm.¹¹⁰ Additionally, Congress acted by restoring some tribal jurisdiction over non-Indian crimes in Indian country when it reauthorized the Violence Against Women Act (“VAWA”) in 2013—partially overturning *Oliphant* for certain domestic crimes committed against Indian women and children.¹¹¹

In 1883, the Supreme Court held in *Ex parte Crow Dog* that not even federal courts, let alone state courts, contained any jurisdiction over Indian-on-Indian crimes committed in Indian country.¹¹² There, Crow Dog shot and killed Spotted Tail, who were both Indians belonging to the same tribe living on the Rosebud Agency.¹¹³ Crow Dog was punished according to the traditional custom among the Sioux by providing restitution to the victim’s family and relatives.¹¹⁴ But the traditional punishment of the Sioux was not sufficient according to the officials in Washington overseeing Dakota Territory, where the Sioux reservations were located.¹¹⁵ So the officials charged Crow Dog with murder in federal district court, where he was found guilty and sentenced to death.¹¹⁶ The Supreme Court decided to take the case upon a writ of habeas corpus filed by Crow Dog.¹¹⁷ The Court held that since tribes had exclusive criminal jurisdiction over a prosecution involving Indians in Indian country, Crow Dog must be freed.¹¹⁸

In 1885, after *Ex parte Crow Dog*, pressure from Indian agents and the Indian Service led Congress to pass the Major Crimes Act.¹¹⁹ The Act extends federal criminal jurisdiction into Indian country for certain, more serious, crimes.¹²⁰ Effectively, for crimes committed in Indian country where the perpetrator is Indian, federal courts have jurisdiction exclusive of the states with regard to the

108. See generally Judith V. Royster, *Oliphant and Its Discontents: An Essay Introducing the Case for Reargument Before the American Indian Nations Supreme Court*, 13 KAN. J.L. & PUB. POL’Y 59, 61, 63 (2003) (utilizing the term “judicially crafted” to explain how the Supreme Court, on more than one occasion, created a bright-line rule in Indian law under its federal common lawmaking authority).

109. *Oliphant*, 435 U.S. at 212.

110. See, e.g., *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 344 (1983) (holding that tribes retain the power to regulate non-Indian hunting and fishing in Indian country).

111. See *supra* note 7 (noting VAWA). Congress reauthorized VAWA again in 2022. *Id.*

112. 109 U.S. 556, 572 (1883).

113. SIDNEY L. HARRING, *CROW DOG’S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* 1 (1994).

114. *Id.* at 110.

115. *Id.*

116. *Crow Dog*, 109 U.S. at 557.

117. *Id.*

118. *Id.* at 572.

119. 18 U.S.C. § 1153; Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 169 (2002).

120. See 18 U.S.C. § 1153.

enumerated offenses in the section.¹²¹ The Major Crimes Act was the first major statute extending federal jurisdiction over crimes committed by Indians in Indian country since the passage of the General Crimes Act in 1817.¹²² Thus, the cumulative effect of the General Crimes Act, Assimilative Crimes Act, and the Major Crimes Act provided the federal government and the tribes near-complete criminal jurisdiction in Indian country, only lacking authority over non-Indian on non-Indian crimes under *McBratney* and *Oliphant*.¹²³ The Supreme Court affirmed the constitutionality of the Major Crimes Act the year after its passage in *United States v. Kagama*,¹²⁴ holding that Indian tribes were no longer “possessed of the full attributes of sovereignty” due to their “dependent” status.¹²⁵ The Court, though, reiterated that tribes were still “not brought under the laws of . . . the state within whose limits they resided.”¹²⁶

Just six years after the passage of the Major Crimes Act, in *In re Mayfield*,¹²⁷ the Supreme Court explained that the congressional history and policy towards Indian tribes was to, in part, “reserve to the courts of the United States jurisdiction of all actions [in Indian country] to which its own citizens are parties *on either side*.”¹²⁸ That principle was further illustrated in *Donnelly v. United States*,¹²⁹ decided in 1913, where the Supreme Court confined *McBratney* solely to non-Indian on non-Indian crimes in Indian country, declaring the *McBratney* principle did not apply to “offenses committed by or against Indians[,]” which were specifically subject to federal and tribal jurisdiction.¹³⁰ *In re Mayfield* and *Donnelly* both illustrate a foundational canon in Indian law established in

121. *Id.* Some enumerated offenses include murder, kidnapping, assault, and certain sexual offenses. *Id.* It remains an open question whether federal jurisdiction is exclusive of tribal jurisdiction. *See Duro v. Reina*, 495 U.S. 676, 680 n.1 (1990). *But see Wetsit v. Stafne*, 44 F.3d 823, 825 (9th Cir. 1995) (claiming that “[a] tribal court, which is in compliance with the Indian Civil Rights Act is competent to try a tribal member for a crime also prosecutable under the Major Crimes Act”).

122. *See Matal*, *supra* note 104, at 303 (stating that in Indian country, the “reach of the federal criminal laws had not increased much since 1817”).

123. *Supra* notes 98, 106 (citing these cases).

124. 118 U.S. 375 (1886). In *Kagama*, the issue was whether the federal government had jurisdiction over a murder committed by two Indians against another Indian, all three being from the same tribe. *Id.* The Court held that the federal government has jurisdiction over this offense under the Major Crimes Act which was passed just one year earlier. *Id.* at 385.

125. *Id.* at 381, 384.

126. *Id.* at 382.

127. 141 U.S. 107 (1891).

128. *Id.* at 116 (emphasis added). *In re Mayfield* consisted of a habeas corpus petition by a Cherokee Indian charged for adultery with a non-Indian woman that took place at his residence on the Cherokee Nation homelands. *Id.* at 108. The defendant averred that the federal district court had no jurisdiction to charge him for his crime because he was an Indian and the crime was committed in Indian country. *Id.* Instead, the defendant maintained that he was under the sole jurisdiction of the Cherokee Nation by way of treaty stipulation. *Id.* at 112.

129. 228 U.S. 243 (1913).

130. *Id.* at 271-72. In *Donnelly*, a non-Indian defendant murdered an Indian within the limits of the Hoopa Valley reservation in California. *Id.* at 252-53. The Court concluded that “offenses committed by Indians against white persons, and by white persons against Indians, were specifically enumerated and defined[,]” and that “[t]he policy of the government in that respect has been uniform.” *Id.* at 270; *see also Williams v. Lee*, 358 U.S. 217, 220 (1959) (asserting that “if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained *exclusive*”) (emphasis added).

Worcester: that since Congress has passed statutes with regard to crimes committed by or against Indians in Indian country, coupled with a strong presumption of tribal sovereignty, federal jurisdiction preempts state jurisdiction.¹³¹ Confirming this principle, the Supreme Court held in *United States v. John*¹³² that where the federal government has jurisdiction under the Major Crimes Act, it preempts state jurisdiction.¹³³

Under its plenary authority and due to concerns of “lawlessness” and “inadequate tribal institutions” on Indian reservations throughout the country, Congress passed Public Law 280 in 1953.¹³⁴ This law fundamentally altered bedrock assumptions of Indian law by allowing certain states to assume criminal jurisdiction in Indian country.¹³⁵ In the impacted states, Public Law 280 shifted almost all criminal jurisdiction from the federal government and granted it to those states for crimes involving Indians in Indian country.¹³⁶ In effect, a Public Law 280 state can generally impose criminal jurisdiction over non-Indians and Indians in Indian country that exists within that state’s borders.¹³⁷ Public Law 280 also created an opt-in mechanism for all other states interested in this jurisdictional arrangement.¹³⁸ States could either join in part or in full; importantly, Oklahoma never asserted such jurisdiction under Public Law 280’s opt-in mechanism.¹³⁹ A Tenth Circuit Court of Appeals case in 1990 confirmed Oklahoma’s lack of jurisdiction in Indian country due to Oklahoma’s failure to opt into Public Law 280.¹⁴⁰

131. See *Donnelly*, 228 U.S. at 272 (explaining that since the Major Crimes Act was held valid in *United States v. Kagama*, 118 U.S. 375, 383 (1886), the Act’s passage preempted states from asserting jurisdiction over the enumerated crimes in the Act. The Court further explained that “[t]his same reason applies—perhaps *a fortiori*—with respect to crimes committed by white men against the persons or property of the Indian tribes while occupying reservations”).

132. 437 U.S. 634 (1978).

133. *Id.* at 651. In *John*, an Indian committed an assault on the Choctaw Indian reservation in Mississippi and was charged in a U.S. district court under the Major Crimes Act. *Id.* at 635-36. The Supreme Court determined this was a valid exercise of jurisdiction under the Major Crimes Act, and accordingly, the states were preempted from prosecuting for the same offense. *Id.* at 654.

134. *Bryan v. Itasca Cnty.*, 426 U.S. 373, 379 (1976).

135. 18 U.S.C. § 1162. There are six states required to assert jurisdiction under the law: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. *Id.* Some tribes in these states were excepted from the statute. *Id.* Relatedly, but passed under other “sister” statutes before 1953, Congress has conferred criminal jurisdiction similar to that of Public Law 280 to a few individual states (e.g., Kansas and New York). See 18 U.S.C. § 3243 and 25 U.S.C. § 232, respectively.

136. See 18 U.S.C. § 1162.

137. See GOLDBERG, EMPLOYING PUBLIC LAW 280 IN OKLAHOMA, *supra* note 20, at 4 (explaining the effects of Public Law 280).

138. See *id.* (describing the “opt-in” mechanism).

139. See *id.*

140. *Ross v. Neff*, 905 F.2d 1349 (10th Cir. 1990). In *Neff*, an Indian defendant was arrested on tribal trust land by an Oklahoma deputy who, the defendant asserted, lacked jurisdiction to make an arrest on Indian land. *Id.* at 1351. The Tenth Circuit concluded that Oklahoma state police had no criminal jurisdiction over tribal lands within the state, reasoning that “Indian country is subject to exclusive federal or tribal criminal jurisdiction [e]xcept as otherwise expressly provided by [federal] law.” *Id.* at 1352 (quoting 18 U.S.C. § 1152). The court specified that Congress has created a framework for states to claim criminal jurisdiction over Indian country under Public Law 280, but Oklahoma never asserted such jurisdiction. *Id.*

In 1968, Congress amended Public Law 280 by requiring tribes to consent to any future extension of state jurisdiction over its territory under the law.¹⁴¹ Consequently, not one tribe has consented to the expansion of Public Law 280.¹⁴² Since its inception in 1953, Public Law 280 has been highly criticized.¹⁴³ Despite its criticism, Congress's decision to authorize Public Law 280 fits squarely into the foundational Indian law preemption framework, which embraces the tribal sovereignty canon from *Worcester*: that state law is preempted unless Congress explicitly permits the relevant authority to the states.¹⁴⁴ And here, Congress acted by passing Public Law 280—conferring authority to a limited number of states to assert criminal jurisdiction in Indian country and allowing other states to opt in upon tribal consent.¹⁴⁵

In 1978 in *United States v. Wheeler*, the Supreme Court held that a tribe's power to enforce tribal law derives from its inherent sovereign power.¹⁴⁶ The Supreme Court reasoned that a tribe's power to punish its members for crimes committed under tribal law is a feature of its inherent sovereignty because Congress never declared the tribe's power as a delegation of federal authority.¹⁴⁷ In *Wheeler*, this meant that the criminal defendant who had previously been convicted in tribal court may also be charged in federal court without violating the Fifth Amendment's Double Jeopardy Clause.¹⁴⁸ With its decision, the Court aptly reaffirmed a *Worcester* foundational Indian law canon: that tribes retain all inherent sovereign authority unless and until Congress specifically acts to remove

141. See GOLDBERG, EMPLOYING PUBLIC LAW 280 IN OKLAHOMA, *supra* note 20, at 5. Additionally, the 1968 amendment allowed states to return, or “retrocede,” state jurisdiction back to the federal government. *Id.* This amendment, however, did not give tribes any influence over the retrocession of state jurisdiction in Indian country. *Id.*

142. *Id.*

143. See, e.g., Jerry Gardner and Ada Pecos Melton, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, TRIBAL L. & POL'Y INST. (2022), <https://perma.cc/U3SZ-572R> (“From the beginning, Public Law 280 was unsatisfactory to both states and Indian Nations. Public Law 280 inspired widespread criticism and concern from Indians and non-Indians alike. Disagreements arose immediately concerning the scope of powers given to the states and the methods of assuming that power.”).

144. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561-62 (1832) (explaining that Georgia's attempt to assert jurisdiction over the Cherokee lands “interfere[s] forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union”).

145. 18 U.S.C. § 1162; see GOLDBERG, EMPLOYING PUBLIC LAW 280 IN OKLAHOMA, *supra* note 20, at 5.

146. 435 U.S. 313, 323-24 (1978). In *Wheeler*, an Indian defendant (*Wheeler*) was charged for the same crime twice—once by the Navajo Nation and once by the federal government. *Id.* at 314-15. *Wheeler* argued that this violated the Double Jeopardy Clause of the Fifth Amendment, which precludes a defendant from being charged twice for the same offense by the same sovereign. *Id.* at 315-16. Thus, the controlling issue in *Wheeler* was whether the source of a tribe's power to punish tribal offenders originated from its own inherent sovereignty, or instead, was a power delegated to the tribes by the federal government. *Id.* at 322. If the source of tribal power to punish tribal offenders stemmed not from its own sovereignty, but from the federal government, *Wheeler*'s charges would violate the Double Jeopardy Clause. See *id.* at 314-16.

147. *Id.* at 327 (“If Navajo self-government were merely the exercise of delegated federal sovereignty, such a delegation should logically appear somewhere. But no provision in the relevant treaties or statutes confers the right of self-government in general, or the power to punish crimes in particular, upon the Tribe.”).

148. *Id.* at 330.

those powers.¹⁴⁹ Further, the Court reiterated the premise that tribes possess “sovereignty over both their members and their territory.”¹⁵⁰

The statutory scheme imposed upon Indian country since the founding of the country can be particularly confusing when authorities attempt to apply the statutes.¹⁵¹ In practice, determining which sovereign assumes jurisdiction usually takes on a complex analysis that includes determining whether the perpetrator or victim is Indian, whether the crime is a felony or misdemeanor, and whether the surrounding state in question is a Public Law 280 state.¹⁵² Absent further congressional action, these are the rules that apply to criminal jurisdiction in Indian country.¹⁵³ The only grant of authority that Congress conferred to the states under these statutes was the special jurisdiction permitted under Public Law 280 and its sister statutes.¹⁵⁴ If a state desires to assert criminal jurisdiction in Indian country, it must follow the mechanism created by Congress in Public Law 280 or the perpetrator and victim must both be non-Indians under *McBratney*.¹⁵⁵

Congress’s actions, augmented by the foundational teachings first illuminated by Chief Justice Marshall in *Worcester* and more broadly in the “Marshall trilogy,” have provided the framework delineating the criminal jurisdictional authority amongst the three sovereigns in Indian country.¹⁵⁶ Indeed, the Supreme Court has chipped away at some of the foundational underpinnings of Indian law established in *Worcester*—such as the holding in *McBratney*.¹⁵⁷ Moreover, the Court has diluted *Worcester* by shifting away “from the idea of inherent Indian sovereignty as a bar to State jurisdiction . . .”¹⁵⁸ But the foundational backdrop rules recognized in *Worcester* are largely intact, with *Worcester* still regarded as “the single most important case in federal Indian law.”¹⁵⁹ Most notably, Congress’s actions, along with *Worcester*’s foundational teachings, have established the Supreme Court’s time-honored rule “of upholding tribal self-governance unless Congress ha[s] spoken to the contrary.”¹⁶⁰

Many times, Congress has not spoken to the contrary and is silent on an issue; and when that happens, the Supreme Court has fashioned two distinct tests to a state’s assumption of authority over non-Indian activity in Indian country:

149. *Id.* at 323 (explaining that tribal sovereignty “exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers”).

150. *Id.* (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)).

151. See Gillingham, *supra* note 6, at 76-77 (describing the “inconsistent” “judicial clarity” regarding “general federal legislation” concerning Indian country, which introduces difficulty in applying the statutes in practice).

152. See *id.* at 79.

153. GOLDBERG, EMPLOYING PUBLIC LAW 280 IN OKLAHOMA, *supra* note 20, at 4.

154. See *supra* note 135 (describing how Congress has conferred criminal jurisdiction similar to that of Public Law 280 to a select few states).

155. GOLDBERG, EMPLOYING PUBLIC LAW 280 IN OKLAHOMA, *supra* note 20, at 4.

156. See *supra* Part I (expounding upon the jurisdictional framework in Indian country).

157. 104 U.S. 621 (1881).

158. *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 172 (1973).

159. STEPHAN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 109 (4th ed. 2012).

160. Getches, *supra* note 82, at 273.

infringement and preemption.¹⁶¹ Each test, independently, may be sufficient to conclude a state law is inapplicable in Indian country, but it is important to consider both together because “they are related.”¹⁶² Infringement precludes a state’s assertion of jurisdiction over non-Indians in Indian country if the exercise of state authority would violate “the right of reservation Indians to make their own laws and be ruled by them.”¹⁶³

Relatedly, when determining whether federal law preempts state law in this context, there are some important canons the Court customarily takes into consideration.¹⁶⁴ Due to the significance of tribes as sovereigns, the Supreme Court recognizes that “[t]ribal reservations are not States,” and consequently engaging in an ordinary preemption analysis¹⁶⁵ would be “unhelpful” and even “treacherous.”¹⁶⁶ As such, courts are to engage their analysis against the backdrop of tribal sovereignty, which includes an “assumption that States have no power to regulate the affairs of Indians on a reservation.”¹⁶⁷ Importantly, the Supreme Court has specified that there need not be an express congressional act in order to find that a state’s law has been preempted by federal law and that any ambiguities in federal law are generously construed in favor of the tribes (the ambiguity canon).¹⁶⁸ With these principles in mind, the Court then begins “a particularized inquiry into the nature of the state, federal, and tribal interests at stake” to determine whether a state’s assertion of jurisdiction is preempted by federal law.¹⁶⁹ This preemption analysis is otherwise called the *Bracker* balancing test and was applied by the majority in *Castro-Huerta* in deciding its ruling.¹⁷⁰ Historically, the *Bracker* balancing test had only been utilized in the civil context, and not the criminal, until it was applied by the Court in *Castro-Huerta*.¹⁷¹

161. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980).

162. *Id.* at 143.

163. *Williams v. Lee*, 358 U.S. 217, 220 (1959). In *Williams*, a non-Indian general store owner operating on the Navajo reservation in Arizona filed suit in state court against an Indian defendant over nonpayment of goods sold on credit. *Id.* at 217. The Tribe argued that the proper forum for the suit was tribal court. *Id.* at 218. The Supreme Court held that tribal court was the correct forum for cases brought by non-Indians against Indians for actions occurring on reservation land, because states have no jurisdiction in Indian country if it would infringe on a tribe’s ability to govern itself. *Id.* at 220.

164. *Bracker*, 448 U.S. at 141.

165. “In other areas of the law, the courts are more hesitant to find that state law has been preempted: ‘It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.’” Laurie Reynolds, *Indian Hunting and Fishing Rights: The Role of Tribal Sovereignty and Preemption*, 62 N.C. L. REV. 743, 776 n.199 (1984) (internal citations omitted).

166. *Bracker*, 448 U.S. at 143.

167. *Williams*, 358 U.S. at 220.

168. *Bracker*, 448 U.S. at 143.

169. *Id.* at 145.

170. In *Bracker*, the Supreme Court struck down Arizona’s attempt to impose taxes over on-reservation logging operations owned by a non-Indian corporation under contract with the tribe. *Id.* at 137-38.

171. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2500 (2022).

IV. ANALYSIS OF THE MAJORITY AND DISSENTING OPINIONS

Oklahoma v. Castro-Huerta was a 5-4 decision authored by Justice Brett Kavanaugh, and joined by Chief Justice John Roberts and Justices Samuel Alito, Clarence Thomas, and Amy Coney Barret.¹⁷² Writing for the dissent was Justice Gorsuch, joined by Justices Sonia Sotomayor, Elena Kagan, and Stephen Breyer.¹⁷³ This case, like most others concerning federal Indian criminal law, is about statutory interpretation.¹⁷⁴ Specifically, the *Castro-Huerta* decision employed a federal preemption inquiry that predominately analyzed the General Crimes Act and Public Law 280.¹⁷⁵ Once the majority concluded that neither act preempts a state's assumption of concurrent jurisdiction in Indian country over non-Indian crimes, it moved further into its preemption analysis and determined, under a *Bracker* balancing test, that the tribe and the federal government's interests were superseded by the state's.¹⁷⁶

In *Castro-Huerta*, the majority fumbles not only the basic premises of the controlling law but also the application of foundational canons that have been engrained in Indian law for over forty years.¹⁷⁷ The analysis below encompasses a structure that separates the majority and the dissent's preemption inquiries by their foundational approaches—that is, how each opinion supports its reasoning—and how each statute was examined.¹⁷⁸ What follows is an analysis that provides which opinion, the majority or dissent, more closely resembles the controlling law.¹⁷⁹ Importantly, the sections below are intended to demonstrate a side-by-side breakdown of the majority and dissenting opinions, illustrating just how dissimilar they are from one another.¹⁸⁰

A. FOUNDATIONAL CANONS

In *Castro-Huerta*, the Supreme Court ruled that states have concurrent jurisdiction with the federal government to prosecute crimes committed in Indian

172. *Id.* at 2486.

173. *Id.* at 2505 (Gorsuch, J., dissenting). Justice Coney Barret was considered the swing vote in *Castro-Huerta* due to her prior vote during the same session to uphold tribal sovereignty in *Denezpi v. United States*, 142 S. Ct. 1838 (2022)—but she distinctly sided with the majority in *Castro-Huerta*. See Nat'l Cong. of Am. Indians, *The Castro-Huerta Decision: Understanding the Case and Discussing Next Steps*, YOUTUBE, at 47:30 (July 7, 2022), <https://perma.cc/HQC4-JRZS>.

174. This is generally true in matters of criminal jurisdiction in Indian country where federal statutes occupy the field. See *supra* note 7 (outlining those statutes). In contrast, issues of tribal civil jurisdiction (particularly over non-Indians) are governed primarily by federal common law (or “in the vernacular, the Court just makes it up”). Interview with Frank Pommersheim, Professor Emeritus, Univ. of S.D. Knudson Sch. of L., in Vermillion, S.D. (Nov. 2, 2022).

175. *Castro-Huerta*, 142 S. Ct. at 2494.

176. *Id.* at 2501.

177. *Id.*

178. See *infra* Part IV.A-B (examining the majority and dissenting opinions).

179. See *supra* Part III (explaining the controlling law relevant here).

180. See *infra* Part IV.A-B (contrasting the majority and dissenting opinions).

country by non-Indian perpetrators against Indian victims.¹⁸¹ From the outset, the majority grounded its reasoning against a backdrop presumption of state sovereignty.¹⁸² The Court began its analysis by explaining that the Constitution permits a state's assertion of jurisdiction in Indian country because "Indian country is part of the State, not separate from the State."¹⁸³ And because Indian country is part of a state, according to the Court, a state is "entitled to the sovereignty and jurisdiction over all the territory within her limits[,]" which includes Indian country.¹⁸⁴ The majority maintained that the foundational canons established in *Worcester* relied on an incorrect understanding of the relationship between the states and Indian country.¹⁸⁵ The Court supported this idea by explaining that the "general notion drawn" from *Worcester* "has yielded to closer analysis."¹⁸⁶ Particularly, Justice Kavanaugh asserted that since the late nineteenth century, a state has needed no "permission slip from Congress to exercise their sovereign authority[,]" and thus, "Indian reservations are 'part of the surrounding State' and subject to the State's jurisdiction 'except as forbidden by federal law.'"¹⁸⁷ The majority then explained that a "State's jurisdiction in Indian country may be preempted (i) by federal law under *ordinary principles of federal preemption*, or (ii) when the exercise of state jurisdiction would unlawfully infringe on tribal self-government" under a "*Bracker*" balancing analysis.¹⁸⁸ It is in this statement where the majority noiselessly fashioned its new anticanon of Indian law, bypassing the congressional plenary doctrine and substituting in its place the Court's vision of state sovereignty superseding tribal sovereignty.¹⁸⁹

Conversely, Justice Gorsuch began his dissent by attacking the majority's analysis as a foundational and categorical error.¹⁹⁰ He explained that the majority's attempt to examine the case under "normal" preemption rules is precisely the opposite of the preemption analysis the Supreme Court has always relied upon in cases involving Indian tribes.¹⁹¹ Because tribes are sovereigns, Justice Gorsuch wrote, the proper analysis should begin with the "traditional" rule that unless Congress expressly authorizes, state criminal laws are inapplicable in Indian country.¹⁹² The dissent ridiculed how the majority could so indifferently negate the canons set forth in *Worcester*, while those same canons have been

181. *Castro-Huerta*, 142 S. Ct. at 2502-03.

182. *Id.* at 2493.

183. *Id.*

184. *Id.* (quoting *Lessee of Pollard v. Hagan*, 44 U.S. 12, 17 (1845)).

185. *Id.* at 2502.

186. *Id.* at 2493.

187. *Id.* at 2503, 2493 (quoting *Org. Vill. of Kake v. Egan*, 369 U.S. 60, 72 (1962)).

188. *Id.* at 2494 (emphasis added). The majority here casually transforms important strictures of the *Bracker* test by conducting its balancing analysis under ordinary rules of preemption. See Reynolds, *supra* note 165 (describing ordinary rules of preemption).

189. See *supra* note 30 (stating how "the phrase 'new entry into the anticanon of Indian law' was penned by Justice Gorsuch in his dissent in *Castro-Huerta*").

190. *Castro-Huerta*, 142 S. Ct. at 2511 (Gorsuch, J., dissenting).

191. *Id.*

192. *Id.* at 2527.

consistently upheld by the Court since America’s founding.¹⁹³ In ending his rebuke of the majority’s interpretation of well-established Indian law canons, Justice Gorsuch emphasized how tribal sovereignty is not some “discarded artifact of a bygone era.”¹⁹⁴ To be sure, Justice Gorsuch asserted, the Supreme Court has upheld the foundational underpinnings from *Worcester*—that tribes are separate sovereigns that can exercise their own retained sovereignty, which includes the assertion of tribal sovereign immunity—most recently in 2014 and 2022.¹⁹⁵

The majority and dissent both have starkly contrasting views on the relationship between tribal and state sovereignty.¹⁹⁶ Those differences can be, at least partly, attributed to their distinctive interpretation and respect for foundational Indian law canons and Indian tribes in general.¹⁹⁷ The majority constructs a new anti-canon in its reasoning, asserting that state sovereignty, at least in modern times, trumps tribal sovereignty.¹⁹⁸ To support this revelation, the Court provides some fragmented case law.¹⁹⁹ This, certainly, is not what the controlling law is and has been in Indian law.²⁰⁰ Perhaps the most serious affront to tribal sovereignty that the Court reinforces with fragmented case law is this notion that Indian country is part of a state, and not separate from a state, and therefore states have jurisdiction over all territory within its boundaries unless Congress has preempted that jurisdiction.²⁰¹ That statement by the Court effectively strengthened state sovereignty at the expense of tribal sovereignty.²⁰² And that rhetoric by the Court—whether dicta or part of the holding—may be unlawfully misconstrued by the lower courts, potentially creating a ripple effect that narrows tribal sovereignty even further as we move into the future.²⁰³

To be fair, Indian law precedent is highly fact-specific, creating a seemingly disjointed and inconsistent application of *stare decisis*.²⁰⁴ It is true that tribal

193. *Id.* at 2511.

194. *Id.*

195. *Id.*; see *Denezpi v. United States*, 142 S. Ct. 1838 (2022) (reaffirming *Wheeler*: that tribal nations are separate sovereigns for purposes of the Double Jeopardy Clause); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014) (upholding tribal sovereign immunity).

196. Compare *Castro-Huerta*, 142 S. Ct. at 2493-94, with *id.* at 2511-12 (Gorsuch, J., dissenting) (expressing differing views).

197. See *supra* note 30. The other canons pertinent here are: (1) the ambiguity canon: that any ambiguities in federal law are to be construed in favor of the tribes “to comport with [] traditional notions of sovereignty and with the federal policy of encouraging tribal independence”; and (2) there need not be an explicit statement from Congress in order to find a state’s law preempted by tribal and federal interests. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980).

198. See *supra* note 30 (describing the new “anti-canon” of Indian law).

199. *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962); *New York ex rel. Cutler v. Dibble*, 62 U.S. 366 (1858); *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930); *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946); *Yakima v. Confederated Tribes & Bands of Yakima Nation*, 502 U.S. 251 (1992); *Nevada v. Hicks*, 533 U.S. 353 (2001).

200. See *supra* Part III (explaining the true history of Indian law precedent and statutes relevant here).

201. *Castro-Huerta*, 142 S. Ct. At 2493.

202. See *supra* Part III (revealing other ways the Supreme Court has chipped away at tribal sovereignty throughout the years).

203. See generally Nat’l Cong. of Am. Indians, *supra* note 173 (commenting on how lower courts may unlawfully broaden the ruling in *Castro-Huerta*).

204. See, e.g., Frickey, *Marshalling Past and Present*, *supra* note 12, at 439 (explaining that “the precedential effect of federal Indian law decisions is often weak”).

sovereignty has been chiseled away since *Worcester*.²⁰⁵ But this *Worcester*-era canon to uphold tribal sovereignty unless Congress acts has been vital to the preservation of what is left of tribal sovereignty.²⁰⁶ With this decision, the Court not only chiseled away a large chunk of what remains of tribal sovereignty, but it now gives the Court endorsement to further weaken that sovereignty.²⁰⁷ For example, it is not unreasonable to foresee the Court applying its reasoning from *Castro-Huerta* to create a presumption that states have civil jurisdiction over non-Indian conduct on reservation land, posing a substantial threat to tribal sovereignty.²⁰⁸ The decision in *Castro-Huerta* effectively abrogates *Worcester*, and if not a mere “one-off,” the ruling will likely have serious implications for the future of tribal sovereignty.²⁰⁹

The dissent’s view, however, is principled and one that upholds tribal sovereignty.²¹⁰ Particularly, the dissent explains that the ordinary preemption rule—where “courts start with the assumption that Congress has not displaced state authority”—does not apply in Indian law.²¹¹ Instead, in the Indian law context, “when a State tries to regulate tribal affairs, the same backdrop does not apply because Tribes have a claim to sovereignty [that] long predates that of our own Government.”²¹² Thus, under its responsibility to the rule of law and Congress’s plenary authority in Indian affairs, the Court is to uphold tribal sovereignty unless and until Congress acts.²¹³

Indian law seems elusive to many Justices of the Supreme Court, which could be a prime reason why the force of Indian law precedent is often weak.²¹⁴ Equally troublesome is the thought that those same Justices *do* have a strong grasp of Indian law but are instead making up their preferred result in place of what the Court interprets as insufficient congressional action.²¹⁵ Disrespect towards tribal

205. See *supra* Part III (outlining *McBratney* and *Oliphant* and their impact on Indian country).

206. E.g., *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (reiterating that “unless and until Congress acts, the tribes retain their historic sovereign authority”) (internal citations omitted).

207. The Court now has now created precedent further eroding tribal sovereignty. *But see* Frickey, *Marshalling Past and Present*, *supra* note 12, at 439 (stating how “the precedential effect of federal Indian law decisions is often weak”).

208. Interview with Frank Pommersheim, *supra* note 174 (discussing the potential issues with the *Castro-Huerta* decision).

209. See generally Nat’l Cong. of Am. Indians, *supra* note 173 (mentioning how lower courts may unlawfully broaden the ruling in *Castro-Huerta*).

210. See *supra* Part III (illustrating a principled overview of the Indian law precedent relevant here).

211. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2512 (2022) (Gorsuch, J., dissenting) (internal quotations omitted).

212. *Id.* (internal quotations omitted).

213. *Id.*

214. See generally Robert Laurence, *Don’t Think of a Hippopotamus: An Essay on First-Year Contracts, Earthquake Prediction, Gun Control in Baghdad, the Indian Civil Rights Act, the Clean Water Act, and Justice Thomas’s Separate Opinion in United States v. Lara*, 40 TULSA L. REV. 137, 148 (2004) (noting that the Supreme Court is “confused about Indian law”); see also Nat’l Cong. of Am. Indians, *supra* note 173, at 59:05 (expressing how the Supreme Court does not know Indian law very well).

215. See generally John A. Ferejohn and Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT’L REV. L. & ECON. 263, 278 (1992) (explaining how statutory interpretation commands the Supreme Court to act on the preferences of the enacting legislature as an “honest agent,” and not on the preferences of individual Justices).

nations and sovereignty can be found in either approach.²¹⁶ The Court's neglect of precedent and its seemingly fervent disposition to legislate from the bench creates a troubling outlook for the country.²¹⁷ This trouble can be underscored in how Justice Kavanaugh so cavalierly asserts his understanding of Indian law as the correct interpretation that reading his opinion makes it seem like he is gaslighting anyone who disagrees with him.²¹⁸

B. FEDERAL STATUTORY SCHEME

1. *The General Crimes Act*

Under its preemption analysis, the Court examined whether the General Crimes Act preempts state criminal authority in Indian country.²¹⁹ Studying the text of the General Crimes Act, the majority stated that the Act is without any language purporting exclusive federal jurisdiction in Indian country, and that the Act is silent with regard to state jurisdiction being preempted in Indian country.²²⁰ Justice Kavanaugh also explained that the General Crimes Act does not equate Indian country with a federal enclave for jurisdictional purposes, but instead, the Act merely “borrows the body of federal criminal law that applies in federal enclaves and extends it to Indian country.”²²¹ Since the Act is not explicit with respect to exclusive federal authority or state preemption, the Court construed this in favor of the states.²²² Thus, the majority held, the General Crimes Act does not bar states from concurrently prosecuting crimes with the federal government committed by non-Indians against Indians in Indian country.²²³

The dissent first described how the passage of the General Crimes Act, as adopted in 1834 in response to *Worcester*, did not confer any state jurisdiction in Indian country—even though Congress was obviously aware of the implications of the holding there.²²⁴ The dissent explained that Congress passed the General Crimes Act because it understood that only federal law, and not state law, may oversee Indian country—and even still, federal jurisdiction under the Act was limited.²²⁵ By analyzing the text, the dissent stated that the Act “makes plain” that Indian country is equivalent to federal enclaves due to both being “within the

216. Interview with Frank Pommersheim, *supra* note 174 (discussing the *Castro-Huerta* decision).

217. See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (overturning nearly fifty years of precedent affirming a woman's right to choose to have an abortion); see also Jipping, *supra* note 26, at 159 (describing how “a judiciary that impartially and fairly applies the facts of a case to the applicable law” is imperative in preserving the separation of powers and American liberty).

218. The American Psychological Association defines “gaslight” as the manipulation of “another person into doubting his or her perceptions, experiences, or understanding of events.” *Gaslight*, APA DICTIONARY OF PSYCH., <https://perma.cc/6FM8-KK5Q> (last visited Dec. 10, 2022).

219. *Castro-Huerta*, 142 S. Ct. at 2494.

220. *Id.* at 2495.

221. *Id.*

222. See *id.*

223. *Id.*

224. *Id.* at 2513 (Gorsuch, J., dissenting).

225. *Id.*

sole and exclusive jurisdiction of the United States.”²²⁶ Further, Justice Gorsuch explained that the exceptions within the General Crimes Act were implemented by Congress against the backdrop of tribal sovereignty.²²⁷ And that Congress, in crafting these exceptions, would have never “taken such care to limit federal authority” in Indian country, but “somewhere, somehow” permitted the states to “enjoy free rein.”²²⁸

The majority explains that the General Crimes Act is silent on state jurisdiction being preempted, and so that supports the notion that state jurisdiction is *not* preempted.²²⁹ But this is exactly the opposite of the foundational principle the Court has employed under its preemption analysis.²³⁰ Justice Kavanaugh fails to mention his abrogation of this principle—he carries on as if his approach has had precedential value all along.²³¹ The majority also failed to give deference to the ambiguity canon, like it is an invisible tool only to be applied when the Court desires.²³² The uncertainty surrounding what remains of these principles is glaring.²³³ Further complicating things is the Court’s notably absent explanation on how it veered from precedent.²³⁴ Although it is not unusual for the Court to subtly overrule its precedent, its silence here is problematic in determining the impact of the Court’s reasoning.²³⁵

The dissent took a much more principled approach, encapsulating against a backdrop of tribal sovereignty, what the law and precedent have demonstrated over the years.²³⁶ Indian law experts agree with the dissent’s characterization of the law due to its accuracy.²³⁷ A major portion of precedent that is vital to the interpretation of the federal statutory scheme in Indian law was ignored, and a new “pathmarking” case on how state sovereignty supersedes tribal sovereignty was established.²³⁸ The General Crimes Act has been understood to preempt state

226. *Id.*

227. *Id.* at 2514.

228. *Id.*

229. *Id.* at 2500-02.

230. A “basic principle[.]” of Indian law preemption analysis is encapsulated in the “reject[ion of] the proposition that in order to find a particular state law to have been preempted by operation of federal law, an express congressional statement to that effect is required.” *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141-44 (1980).

231. *See Castro-Huerta*, 142 S. Ct. at 2495.

232. *See Bracker*, 448 U.S. at 143-44.

233. *See generally Castro-Huerta*, 142 S. Ct. at 2504 (stating that the Court’s holding is based on precedent).

234. *See id.* at 2494-2500.

235. *See* Michael H. Leroy, *Overruling Precedent: “A Derelict in the Stream of the Law”*, 66 SMU L. REV. 711, 719 (2013) (“The Supreme Court invalidates its precedents in many ways—often by nuance or deflection, as when it narrows the application of a precedent . . .”).

236. *Castro-Huerta*, 142 S. Ct. at 2511-12 (Gorsuch, J., dissenting).

237. *Cf.* Nat’l Cong. of Am. Indians, *supra* note 173, at 23:45 (explaining that Justice Gorsuch’s dissent in *Castro-Huerta* illustrated well the problems of the majority’s ruling and reasoning).

238. *See Castro-Huerta*, 142 S. Ct. at 2504; *see also* *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997) (“*Montana v. United States* . . . is the pathmarking case concerning tribal civil authority over nonmembers.”).

assumption of criminal jurisdiction since its passage.²³⁹ But the Court was able to erroneously side-step the plain text of the Act, the context surrounding its passage, the precedent established under the Act, and the status quo—which all amply support the understanding that state criminal jurisdiction is preempted in Indian country unless Congress acts (which it did, for example, when it passed Public Law 280).²⁴⁰

2. Public Law 280

In analyzing whether Public Law 280 preempts state jurisdiction in Indian country, the majority first based its decision on the absence of any language in Public Law 280 preempting state jurisdiction.²⁴¹ The majority then relied upon *stare decisis*, asserting that it has previously concluded that Public Law 280 does not preempt any preexisting or lawfully assumed jurisdiction that states already possess in Indian country by explaining that “[n]othing in the language or legislative history of Pub[lic Law] 280 indicates that it was meant to divest States of pre-existing and otherwise lawfully assumed jurisdiction.”²⁴²

Castro-Huerta argued that Congress assumed that the states lacked concurrent criminal jurisdiction in Indian country unless Congress granted them that power.²⁴³ And that because Congress passed Public Law 280 in 1953, which conferred jurisdiction in Indian country to certain states, the law at present would be but “pointless surplusage” if states naturally possessed this authority.²⁴⁴ Justice Kavanaugh dismissed this argument, first by stressing that assumptions are not laws, and since there is no explicit language in Public Law 280 that preempts state jurisdiction, the Court will not construe it as such.²⁴⁵ Additionally, the Court specified that Public Law 280 covers “far more than just non-Indian on Indian crimes”—it also authorizes states to assume criminal jurisdiction over offenses committed *by* Indians.²⁴⁶ So, the Court explained, absent Public Law 280, a state attempting to assume jurisdiction over “Indian-defendant” offenses would infringe upon principles of tribal self-government—principles which have been

239. See, e.g., GOLDBERG, EMPLOYING PUBLIC LAW 280 IN OKLAHOMA, *supra* note 20, at 4 (expressing that “[a] fundamental tenet of federal Indian law is that states may not assert civil or criminal jurisdiction over Indians within Indian country unless Congress authorizes that jurisdiction. Absent Congressional authorization, state jurisdiction of this kind is federally preempted”).

240. *Id.* (describing how Congress created a mechanism for states to obtain criminal jurisdiction in Indian country).

241. *Castro-Huerta*, 142 S. Ct. at 2499-2500.

242. *Id.* (quoting *Three Affiliated Tribes of Fort Berthold Rsv. v. Wold Eng’g*, 467 U.S. 138, 150 (1984)). This notion that states, as a backdrop, have always had “pre-existing” and “lawfully assumed jurisdiction” in Indian country is a breakaway from well-established precedent. See, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980) (asserting that Indian tribes have retained “a semi-independent position . . . as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided”) (quoting *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 173 (1973)).

243. *Castro-Huerta*, 142 S. Ct. at 2500.

244. *Id.*

245. *Id.*

246. *Id.*

generally upheld by the Supreme Court.²⁴⁷ The majority utilized the latter illustration to vindicate Public Law 280 as still an integral component within the criminal jurisdictional framework in Indian country, even though its decision here holds that Public Law 280 does not preempt states from assuming criminal jurisdiction in Indian country over crimes committed by non-Indians against Indians.²⁴⁸

Justice Gorsuch briefly reviewed Public Law 280 and the context surrounding its approval in 1953, declaring that the law's passage is confirmation that Congress authorized state jurisdiction over Indian country "only in very limited circumstances."²⁴⁹ He opined that Congress created a mechanism for states to assume jurisdiction in Indian country under Public Law 280, but Oklahoma never satisfied the preconditions necessary under the law to assume that authority.²⁵⁰ Justice Gorsuch proclaimed that in its decision, the majority is flouting Congress's framework under Public Law 280.²⁵¹ And until Oklahoma fulfills the requirements under that framework, Oklahoma "does 'not hav[e] jurisdiction'" to try crimes committed by non-Indians against Indians in Indian country.²⁵²

The passage and promulgation of Public Law 280 is a strong argument to prove that state jurisdiction is preempted in Indian country.²⁵³ Congress authorized this law in 1953 conferring state criminal jurisdiction over Indian country in certain states.²⁵⁴ Presumably, this was because Congress knew that states contained no inherent criminal jurisdiction over Indian country.²⁵⁵ Thus, fitting squarely within the *Worcester*-era canon, Congress acted, under its plenary authority, and conferred state jurisdiction over Indian country in some states.²⁵⁶ If states already lawfully assumed criminal jurisdiction in Indian country, why would Congress explicitly confer to some states that criminal jurisdiction in 1953—and create an entire mechanism for other states to opt into that framework?²⁵⁷ In that vein, the Court here is acting most like a legislative authority, explaining what it wishes the law would be, rather than interpreting the law for what it is.²⁵⁸

247. *Id.*; see, e.g., *Bracker*, 448 U.S. at 143 (describing that "traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop,' *McClanahan v. Arizona State Tax Comm'n*, [411 U.S. 164, 172 (1973)], against which vague or ambiguous federal enactments must always be measured").

248. *Castro-Huerta*, 142 S. Ct. at 2500.

249. *Id.* at 2517 (Gorsuch, J., dissenting).

250. *Id.* at 2518.

251. *Id.*

252. *Id.* at 2517 (quoting 25 U.S.C. §§ 1321(a), 1323(b)).

253. See GOLDBERG, EMPLOYING PUBLIC LAW 280 IN OKLAHOMA, *supra* note 20, at 4.

254. *Id.*

255. See generally *Castro-Huerta*, 142 S. Ct. at 2517 (Gorsuch, J., dissenting) (articulating how a state has no jurisdiction in Indian country unless "the State . . . seek[s] and obtain[s] tribal consent to any extension of state jurisdiction").

256. See GOLDBERG, EMPLOYING PUBLIC LAW 280 IN OKLAHOMA, *supra* note 20, at 4.

257. *Id.*

258. But see *Castro-Huerta*, 142 S. Ct. at 2504 ("But this Court's proper role under Article III of the Constitution is to declare what the law is, not what we think the law should be.").

3. Bracker *Balancing Test*

Significantly, the majority here employed the *Bracker* balancing test—only previously applied in civil preemption cases in Indian law—for the first time in evaluating criminal preemption.²⁵⁹ Under its *Bracker* analysis, the majority determined that, after balancing tribal and federal interests against the State of Oklahoma’s, the scale weighed in favor of the state’s interest.²⁶⁰ The Court reasoned that tribal interests involving self-government are not infringed upon when a state asserts criminal jurisdiction over non-Indian defendants in its territory—even against Indian victims—because tribes generally lack criminal jurisdiction over non-Indian crimes occurring in Indian country.²⁶¹ Further, a state’s exercise of criminal jurisdiction over non-Indian perpetrators in Indian country does not include an assertion of jurisdiction “over any Indian or over any tribe.”²⁶² In concluding its federal, tribal, and state balancing inquiry, the Court articulated that “any tribal self-government ‘justification for preemption of state jurisdiction’ would be ‘problematic.’”²⁶³ Additionally, Justice Kavanaugh explained that because the state and federal government would share concurrent authority in Indian country over non-Indian crimes, federal interests in protecting Indian victims would not be harmed.²⁶⁴

Finally, the majority declared that Oklahoma’s interest included its ability to safeguard the public, promote criminal justice, protect all victims of crime, and appropriately punish criminal offenders.²⁶⁵ Castro-Huerta conceded that the state would have the authority to prosecute him if his victim was non-Indian,²⁶⁶ but because the victim was Indian, Castro-Huerta argued that he should be prosecuted by the federal government and not the state.²⁶⁷ The majority declared that if Castro-Huerta was out of the state’s reach merely because his victim was Indian, it “would require [the] Court to treat Indian victims as second-class citizens”—which it declined to do.²⁶⁸

The dissent lambasted the majority for misapplying the *Bracker* balancing test.²⁶⁹ Specifically, Justice Gorsuch described how *Bracker* involved a “relatively minor civil dispute” where the Court balanced the competing tribal, federal, and state interests when Arizona attempted to assume jurisdiction over

259. *Id.* at 2500.

260. *Id.* at 2501.

261. *Id.* The Court did note, rather ambiguously, that there are some “exceptions not invoked here” with regard to tribal criminal jurisdiction over non-Indian crimes in Indian country. *Id.*

262. *Id.*

263. *Id.* (quoting CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK 260 (2021 ed.)).

264. *Id.*

265. *Id.* at 2501-02.

266. *Id.* at 2502.

267. *Id.*

268. *Id.*

269. *Id.* at 2521 (Gorsuch, J., dissenting).

non-Indians in Indian country.²⁷⁰ He clarified that the *Bracker* Court, in its analysis, prefaced its decision by reiterating the usual “backdrop” rules of Indian law—that instead of applying the “normal” preemption rules, Indian jurisprudence operates upon the premise that “States lack jurisdiction in Indian country[,]” and that any ambiguities about the law are to be “‘construed generously’ in favor of the Tribes as sovereigns.”²⁷¹ The dissent disagreed sharply with the majority, not only for applying *Bracker* in the criminal context, but more significantly, for abandoning the backdrop rules and instead employing the balancing test under a “traditional” preemption analysis.²⁷² Justice Gorsuch declared that the comprehensive scheme of statutes passed by Congress outlining criminal jurisdiction in Indian country is evidence of Congress “already” balancing competing federal, tribal, and state interests.²⁷³ The majority’s decision to flout these actions, the dissent argued, likens its work to “a legislative committee [] touting the benefits of some newly proposed bill”—a function completely outside the scope of the Supreme Court’s authority.²⁷⁴ For argument’s sake, Justice Gorsuch provided his own *Bracker* balancing analysis—even utilizing the majority’s skewed perception of *Bracker*—and concluded that tribal and federal interests supersede state interests here.²⁷⁵

A major distinction between the majority and dissent is not just *how* to employ the *Bracker* analysis, but also *when* to apply it.²⁷⁶ The majority’s decision to engage in a *Bracker* inquiry in the criminal jurisdictional context was a novel one.²⁷⁷ However, to the Court’s credit, this would not be the first time, at least in Indian law, when it utilized a civil jurisdiction test in the criminal jurisdictional context.²⁷⁸ Nevertheless, the problem is not necessarily the adoption of the *Bracker* test into the criminal realm.²⁷⁹ The real issue is how the majority haphazardly applied the test.²⁸⁰ By disregarding the basic principles underlying

270. *Id.*

271. *Id.* (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980)).

272. *Id.* at 2522 (Gorsuch, J., dissenting).

273. *Id.*

274. *Id.* at 2525.

275. *Id.* at 2522-26.

276. A true *Bracker* test is a preemption analysis utilized to determine whether a state may exert its civil regulatory authority over tribal reservations and its members. *Bracker*, 448 U.S. at 142.

277. *Castro-Huerta*, 142 S. Ct. at 2500-01.

278. See *United States v. Cooley*, 141 S. Ct. 1638 (2021) (applying the “*Montana* test”—a civil jurisdictional test to determine whether a tribe may regulate nonmember activity on non-Indian fee lands within reservation boundaries—in a criminal law context). The ruling in *Cooley* dictates that tribal police have jurisdiction to detain and search non-Indians traveling on public rights-of-way cutting through a reservation. *Id.*

279. But see *Castro-Huerta*, 142 S. Ct. at 2522 (Gorsuch, J., dissenting) (“The simple truth is *Bracker* supplies zero authority for this Court’s course today. If Congress has not always ‘been specific about the allocation of civil jurisdiction in Indian country,’ the same can hardly be said about the allocation of criminal authority.”).

280. See generally Gregory Ablavsky and Elizabeth Hidalgo Reese, *The Supreme Court Strikes Again—This Time at Tribal Sovereignty*, WASH. POST (July 1, 2022), <https://perma.cc/8XFF-ZXQW> (expressing how the Court’s ruling in *Castro-Huerta* is “an act of conquest” decided by “selective ignorance of history and deference to state power”).

the balancing analysis, the scale was skewed against the Tribe from the start.²⁸¹ Indeed, respect for the canons established from precedent would have likely produced a different result under a true *Bracker* analysis,²⁸² so it is plausible that this newly crafted anticanon is evidence that the Court tailored its analysis toward its preferred outcome. Equally puzzling is when the Court asserts that tribal self-government principles are not infringed upon merely because tribes are not deprived of their prosecutorial authority when a state assumes criminal jurisdiction over non-Indian on Indian crimes in Indian country.²⁸³

To start, tribal self-governance is implicated when tribal people are the victims of crimes on Indian lands—regardless of whether the perpetrator is Indian or non-Indian.²⁸⁴ A major facet of tribal self-governance is the ability to govern, and inherently protect, tribal people on tribal land.²⁸⁵ “Indian women experience the highest rates of domestic violence compared to all other groups in the United States”²⁸⁶—perhaps because the Court removed Indian tribes’ power to protect their people against non-Indian perpetrators when it decided *Oliphant* in 1978.²⁸⁷ The Court, on its own and in plain disregard of Congress’s intent, transferred that power to the states under the guise of concurrent criminal jurisdiction.²⁸⁸ Congress’s intent was illustrated when it restored tribal authority to prosecute certain domestic criminal conduct committed by non-Indians against Indians on tribal lands in 2013 and reauthorized that power in 2022 under VAWA.²⁸⁹ The Court’s decision in *Castro-Huerta* took no notice of Congress’s intent, and yet, the Court highlighted the lack of congressional action that clearly states Congress’s commitment to exclusive federal jurisdiction or the preemption of state criminal jurisdiction in Indian country.²⁹⁰ It is Congress, not the Court, with plenary authority over Indian affairs.²⁹¹ But here the Court is unlawfully wandering outside of its Article III jurisdiction and invading upon Congress’s domain by ignoring Congress.²⁹²

281. See *Bracker*, 448 U.S. at 143.

282. See *Castro-Huerta*, 142 S. Ct. at 2522-25 (Gorsuch, J., dissenting) (conducting its own balancing analysis—even under the altered test the majority crafted).

283. *Id.* at 2501.

284. See generally 165 Cong. Rec. S2,679-02 (daily ed. May 7, 2019) (statement of Sen. Dianne Feinstein) (“[T]he very core of [tribal] sovereignty mean[s] the right of Tribes to exercise dominion and jurisdiction over appalling crimes that occur on Tribal land.”).

285. See generally Bill Smallwood, *Castro-Huerta Supreme Court Decision by Mary Kathryn Nagle*, YOUTUBE, at 1:20 (Sept. 23, 2022), <https://perma.cc/W6B8-L94Z> (asserting that “no sovereign has a greater interest in protecting Native children than their own tribal nations”).

286. 151 Cong. Rec. S4,871-01 (daily ed. May 10, 2005) (statement of Sen. McCain); see also Tweedy, *Connecting the Dots*, *supra* note 3, at 692 (noting how there is a “continuing epidemic of violence against Indian women” in America).

287. See *supra* Part III (describing *Oliphant* and its impact on tribal sovereignty).

288. See Bill Smallwood, *supra* note 285, at 0:40.

289. See *supra* note 7; see also *supra* Part III (explaining how Congress restored some jurisdiction removed from tribes by the Court in *Oliphant* by reauthorizing VAWA in 2013).

290. 142 S. Ct. 2486, 2496-98 (2022).

291. See *Lone Wolf v. Hitchcock*, 187 U.S. 533 (1903) (reiterating Congressional plenary authority in Indian affairs).

292. But see *Castro-Huerta*, 142 S. Ct. at 2504 (conveying how the “Court’s proper role under Article III of the Constitution is to declare what the law is, not what we think the law should be”).

The vast plenary authority held by Congress in tribal affairs is well-established,²⁹³ but the Court conveniently ignores that principle when the effect would likely be adverse to state sovereignty. Equally concerning is that the Court's decision here further hampers a tribe's ability to govern and to protect its own tribal people under a justice system created by the conqueror in furtherance of assimilation.²⁹⁴ Worse yet is that states have been regarded as the tribes' "deadliest enemies,"²⁹⁵ and now tribal nations are forced to trust the states to protect their citizens from non-Indian criminals.

V. ON-THE-GROUND CONSIDERATIONS MOVING FORWARD

Despite the holding in *Castro-Huerta*, tribes and states should always strive to foster as healthy a relationship as possible.²⁹⁶ But the Court's decision here was a missed opportunity for tribes and states to work together in the spirit of cooperative federalism if the Court had upheld tribal sovereignty.²⁹⁷ If tribal sovereignty was upheld, it may have given tribes more leverage over the states to cooperate and enter into agreements²⁹⁸—especially considering that, within the last one-hundred years, tribes have been mostly without bargaining power, at least when negotiating with the federal government.²⁹⁹ Instead, the ruling may perpetuate crime and dangerous conditions for Indian people living on tribal

293. See, e.g., *United States v. Lara*, 541 U.S. 193, 200 (2004) ("First, the Constitution, through the Indian Commerce and Treaty Clauses, grants Congress plenary and exclusive powers to legislate in respect to Indian tribes.") (internal quotations omitted).

294. The system of tribal self-government in place today stems from the Indian Reorganization Act (IRA), passed by Congress in 1934 in "an attempt to rectify the mistakes of the [General] Allotment Act." Karin Mika, *Private Dollars on the Reservation: Will Recent Native American Economic Development Amount to Cultural Assimilation?*, 25 N.M. L. REV. 23, 29 (1995). Still, tribes that opted into the IRA framework of governance effectively adopted an assimilated version of government—a system much like that of the conqueror. See VINE DELORIA JR. AND CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 15 (1st ed. 1983) ("[I]n general the new tribal constitutions and bylaws were standardized and largely followed the Anglo-American system of organizing people. Traditional Indians of almost every tribe strongly objected to this method of organizing and criticized the IRA as simply another means of imposing white institutions on the tribes.").

295. *United States v. Kagama*, 118 U.S. 375, 384 (1886).

296. Especially because, historically, tribal-state relations consist of "friction and continuing uncertainty." Frank R. Pommersheim, *Tribal-State Relations: Hope for the Future?*, 36 S.D. L. REV. 239, 240 (1991) [hereinafter Pommersheim, *Tribal-State Relations*].

297. See *supra* note 27 (describing cooperative federalism).

298. If states did not have concurrent jurisdiction over non-Indian crimes against Indian victims in Indian country, it would effectually force states to collaborate with tribes if a state desired to assume criminal jurisdiction over Indian lands. See GOLDBERG, *EMPLOYING PUBLIC LAW 280 IN OKLAHOMA*, *supra* note 20, at 6 (maintaining that "for Oklahoma to acquire any jurisdiction under Public Law 280, either civil or criminal, as to some subject matters or parts of Indian country or others, there would have to be a vote of the tribal citizens within affected parts of Indian country").

299. See, e.g., MICHAEL L. LAWSON, *DAMMED INDIANS REVISITED: THE CONTINUING HISTORY OF THE PICK-SLOAN PLAN AND THE MISSOURI RIVER SIOUX* 41 (2009) (explaining how, in the 1940's, the federal government implemented the dam system—under the Pick-Sloan plan—on the Missouri River "without the approval of tribal councils or the secretary of the interior, [while failing] to cooperate with tribal representatives even in those cases when Congress mandated it to do so").

lands.³⁰⁰ History shows us that states do not prioritize Indian country within the state's limits.³⁰¹ For example, when Nebraska assumed jurisdiction over Indian country under Public Law 280, the U.S. Commission on Civil Rights reported that Nebraska told certain tribal nations within its boundaries that the state “did not have enough funds to maintain stationed deputy sheriffs on their reservations.”³⁰² Issues such as these are all too pervasive when a state assumes criminal jurisdiction in Indian country.³⁰³

Also, after the Court's decision in *United States v. Cooley*³⁰⁴ in 2021—which provides tribal police officers with the authority to conduct investigatory stops and searches of non-Indians traveling on public rights-of-way within Indian reservations—and Congress's reauthorization of VAWA in 2022, all three sovereigns have jurisdiction over non-Indians in Indian country in some capacity. Thus, all three sovereigns must collaborate under mutual tribal-federal-state problem-solving to better ensure public safety throughout Indian country.³⁰⁵ It may prove difficult in practice.³⁰⁶ On the other hand, instead of a lack of state presence on Indian reservations, state authority may increase on reservations in order to arrest non-Indians.³⁰⁷ This creates the potential for more state encounters with Native Americans on reservation lands—a novel concept that could prove harmful.³⁰⁸ Likely, though, is that many states with rural reservations will decide

300. See M. Brent Leonhard, *Returning Washington P.L. 280 Jurisdiction to its Original Consent-Based Grounds*, 47 GONZ. L. REV. 663, 699 (2011) (asserting that “Indian Country crime in some P.L. 280 states became worse than it was under exclusive federal jurisdiction”); see also GOLDBERG, EMPLOYING PUBLIC LAW 280 IN OKLAHOMA, *supra* note 20, at 15 (asserting state criminal jurisdiction can be “dangerous” for tribes).

301. See GOLDBERG, EMPLOYING PUBLIC LAW 280 IN OKLAHOMA, *supra* note 20 (describing the perils presented by Public Law 280).

302. 5 U.S. COMMISSION ON CIVIL RIGHTS, JUSTICE: 1961 COMMISSION ON CIVIL RIGHTS REPORT 148 (1961).

303. See *id.* (describing how “similar problems appear to exist for reservations in California, Minnesota, Oregon, Wisconsin, and Alaska [due to] withdrawal of Federal law and order and inadequate expansion of State jurisdiction”); see also U.S. Department of Justice Office on Violence Against Women, *2022 Tribal Consultation Rep. 28* (2022), <https://perma.cc/JM6D-6NCT> (testimony of Vivian Korthuis, Chief Executive Officer of the Association of Village Council Presidents) (“Alaska is also a PL-280 state, meaning the federal government pulled out of law enforcement across rural Alaska, and transferred that authority to the State. However, State law enforcement is largely absent in our villages.”).

304. 141 S. Ct. 1638 (2021).

305. See generally Pommersheim, *Tribal-State Relations*, *supra* note 296, at 275 (explaining the positive effects of “mutual tribal-state problem solving”).

306. See generally *id.* at 269 (expressing that within tribal-state relations, “[t]he playing field is never level”).

307. Interview with Frank Pommersheim, *supra* note 174.

308. See GOLDBERG, EMPLOYING PUBLIC LAW 280 IN OKLAHOMA, *supra* note 20, at 11 (asserting that state assumption of criminal jurisdiction in Indian country, at least in Public Law 280 states, has produced tribal complaints that include “lack of patrolling and response from local law enforcement, lack of cultural compatibility, and discrimination in the state justice system”). State and local law enforcement may be driving through Indian country more often, sometimes even on tribal roads to remote tribal communities which could be dangerous for tribal people. See *id.* at 15 (stating that state jurisdiction in Indian country can be dangerous). Apparently, states have held the power to do this for much longer than most people realized. See *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2493-94 (2022).

to minimize their presence on tribal lands, similar to Nebraska, which proves harmful to Native American crime victims.³⁰⁹

Looking ahead, for state and federal concurrent criminal jurisdiction to be effective, the on-the-ground considerations must include solid communication and cooperation between the federal government, states, and tribes.³¹⁰ There should be discussions and agreements in place among the U.S. Attorney's Office, the State Attorney General's Office, and Tribal Attorney General's Office.³¹¹ Additionally, issues of whether state or tribal police will or should respond, and determining which sovereign will prosecute, becomes a significant discussion point.³¹² Only five states supported Oklahoma in *Castro-Huerta*,³¹³ so other states may choose not to assume jurisdiction over non-Indians in Indian country—just because states wield this power does not mean they must or will exercise it. It seems, though, that some U.S. attorney's offices around the country are already deferring the prosecution of crimes committed against Native Americans in Indian country to state and local law enforcement based on the Court's decision in *Castro-Huerta*.³¹⁴

Importantly, there are two silver linings to consider from the ruling here: (1) the federal government, states, and tribes now have an opportunity to build stronger relationships as sovereigns; and (2) tribal nations and the federal government, not the states, still have jurisdiction over Indian perpetrators on reservation lands.³¹⁵ Perhaps the precedential effect in Indian country will be so weak that the decision in *Castro-Huerta* becomes an anomaly.³¹⁶

VI. CONCLUSION

The Supreme Court in *Castro-Huerta* claimed its ruling was consistent with past Indian law cases, reiterating that it rested its decision on the Court's precedents and laws enacted by Congress.³¹⁷ But if the majority had truly observed the Court's prior rulings and congressional enactments, the outcome would have been utterly different.³¹⁸ The elephant in the room is that the Court likely fell victim to the fear-mongering campaign of Oklahoma's executive

309. See generally GOLDBERG, EMPLOYING PUBLIC LAW 280 IN OKLAHOMA, *supra* note 20, at 15 (“surrendering jurisdiction to the state can be dangerous”).

310. Interview with Frank Pommersheim, *supra* note 174.

311. These agreements can consist of cooperative agreements and memoranda of understanding (MOUs)—which can make for better state response time, accountability, and culturally appropriate services. See GOLDBERG, EMPLOYING PUBLIC LAW 280 IN OKLAHOMA, *supra* note 20, at 13 (illustrating how at least one tribe, the Shingle Springs Band of Miwok in California, entered into an MOU with the state, ultimately benefitting the safety of tribal members).

312. See Nat'l Cong. of Am. Indians, *supra* note 173, at 56:15.

313. See *supra* note 61 (citing the states in support of Oklahoma).

314. See Bill Smallwood, *supra* note 285, at 2:10.

315. See *supra* Part III (explaining the criminal jurisdictional framework in Indian country).

316. See generally Frickey, *Marshalling Past and Present*, *supra* note 12, at 439 (asserting that “the precedential effect of federal Indian law decisions is often weak”).

317. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2504 (2022).

318. *Supra* Part III (detailing Indian law precedent).

branch, perhaps coupled with its preferred result, effectively altering the criminal jurisdictional framework in Indian country.³¹⁹ The Court makes its ruling, in part, in order to “help” Indian tribes and their citizens—but evidence shows that state criminal justice has functioned poorly in Indian country.³²⁰ In its holding, the majority uses the General Crimes Act and Public Law 280 as its scapegoat.³²¹ If tribal nations desire to change the Court’s decision here, there must be an effective lobby of Congress—and a long game should be expected.³²² The dark side is that this narrow holding might be expanded beyond the General Crimes Act to other federal criminal statutes and perhaps even into the civil jurisdictional realm—further threatening tribal sovereignty.³²³ The Court’s ivory-towered analysis of the real world is personified in its decision in *Castro-Huerta*, and only time will tell of the serious implications this holding will have on Indian country, and ultimately, on tribal sovereignty.³²⁴

319. See *id.* (describing the criminal jurisdictional framework in Indian country).

320. See Goldberg, *Unraveling Public Law 280*, *supra* note 20 (asserting that state criminal justice has functioned poorly in Indian country).

321. See *supra* Part IV.B (noting how the majority veers heavily from how these statutes have been interpreted since their inception).

322. See generally Nat’l Cong. of Am. Indians, *supra* note 173, at 47:00 (describing the importance of the legislative process in limiting the ruling in *Castro-Huerta*).

323. Interview with Frank Pommersheim, *supra* note 174.

324. See *supra* Part IV (illustrating the majority’s erroneous analysis of Congressional statutes and precedent).

SHINN V. RAMIREZ: CREATING A CATCH-22 TO HABEAS CORPUS RELIEF

MADISON GOSCH†

In the United States Supreme Court’s 2022 Shinn v. Ramirez opinion, the Court reversed two Ninth Circuit decisions granting two death row prisoners habeas relief based upon evidence that each received constitutionally ineffective trial counsel. The Court relied upon the Antiterrorism and Effective Death Penalty Act to bar the federal courts from considering each petitioner’s evidence of ineffective assistance of their trial counsel since that evidence was not first presented in state court. In emphasizing the need for finality and federalism, Shinn effectively overruled the Supreme Court’s decision in Martinez v. Ryan, which allowed habeas petitioners to raise, for the first time, ineffective assistance of trial counsel claims in federal court if the failure to raise the claim in state court was caused by the ineffective assistance of postconviction counsel. The Court’s holding in Shinn underscores the need for congressional action and additional reform in habeas proceedings to ensure every defendant is afforded a remedy that protects their right to effective trial counsel guaranteed under the Sixth Amendment.

Contents

I. INTRODUCTION	546
II. BACKGROUND	548
A. LIMITING ACCESS TO FEDERAL HABEAS CORPUS: AEDPA	549
B. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN POSTCONVICTION PROCEEDINGS	552
C. MARTINEZ V. RYAN AND EVIDENTIARY HEARINGS	555
III. FACTS AND PROCEDURE OF <i>SHINN V. RAMIREZ</i>	557
A. FACTS AND PROCEDURAL HISTORY OF <i>RAMIREZ V. RYAN</i>	557
B. FACTS AND PROCEDURAL HISTORY OF <i>JONES V. SHINN</i>	558
C. MAJORITY OPINION	560
D. DISSENTING OPINION	562
IV. ANALYSIS	564
A. MOVEMENT BACK TOWARD FINALITY: PURPOSE OF AEDPA	564

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B. THE FUTURE OF MARTINEZ HEARINGS 566
 C. THE NEED FOR REFORM IN HABEAS PROCEEDINGS 567
 V. CONCLUSION 570

I. INTRODUCTION

Often referred to as the “Great Writ,” the writ of habeas corpus allows a state prisoner to file a habeas petition in federal court on the grounds that their imprisonment violates the United States Constitution or federal law.¹ A state habeas petitioner is required to raise all federal claims in state court before seeking federal relief² and is generally limited to litigating any claim based upon evidence developed in the state record.³ A petitioner’s failure to raise such claims in state postconviction proceedings will result in “procedural default” of the claims.⁴ Unless the petitioner can show “cause” and “prejudice” to excuse the failure to raise the claims in state court, the procedurally defaulted claim will be precluded from federal habeas review.⁵

Frequently, a state habeas petitioner’s failure to raise a constitutional or federal claim is the result of ineffective assistance of trial or appellate counsel.⁶ In 2012, the United States Supreme Court recognized the need to provide meaningful access to federal review for a habeas petitioner’s ineffective assistance of counsel claims in *Martinez v. Ryan*.⁷ There, the Court held that postconviction counsel’s ineffective assistance may constitute cause to excuse a habeas petitioner’s procedural default of an ineffective assistance of trial counsel claim in limited circumstances.⁸ Ten years later in *Shinn v. Ramirez*,⁹ the Supreme Court held that despite *Martinez*’s narrow exception, a federal district court could not consider evidence supporting a habeas petitioner’s ineffective assistance of trial

1. See 28 U.S.C. § 2254(a) (stating that a district court may review a habeas petition on the ground that the state prisoner is “in custody in violation of the Constitution or laws or treaties of the United States”).
 2. See 28 U.S.C. § 2254(b)(1) (providing that an application for a writ of habeas will not be granted unless “the applicant has exhausted the remedies available in the courts of the State”).
 3. *Williams v. Taylor*, 529 U.S. 420, 437 (2000) (holding that when a prisoner has failed to develop and present the factual basis of a claim in the state record, a federal court is prohibited under section 2254(e)(2) from holding an evidentiary hearing unless either of section 2254(e)(2)’s two exceptions are met).
 4. ELIZABETH M. BOSEK ET AL., 15 CYCLOPEDIA OF FEDERAL PROCEDURE § 86:60 (3d ed. Supp. 2023).
 5. *Id.*
 6. See Stephen B. Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679, 680-83 (1990) (discussing the relationship between poor lawyering and “less than full federal habeas corpus review”).
 7. *Martinez v. Ryan*, 566 U.S. 1, 10 (2012) (noting that when an attorney fails to raise a claim in the first postconviction proceeding, it is likely that no “court at any level will hear the prisoner’s claim”).
 8. *Id.* at 9.
 9. 142 S. Ct. 1718 (2022).

counsel claim if the evidence was not first developed and presented in state court.¹⁰

This casenote argues that the Court's refusal to extend the logic of *Martinez* to allow development of the evidentiary record for claims of ineffective assistance of trial counsel in cases where postconviction counsel was also ineffective violates a defendant's right to effective counsel under the Sixth Amendment to the United States Constitution.¹¹ Part II of this casenote examines Supreme Court precedent governing a habeas petitioner's ability to litigate ineffective assistance of counsel claims.¹² Part III summarizes the factual background and procedural history of the two criminal cases that were consolidated before the Supreme Court, and Part III also outlines the majority and dissenting opinions in *Shinn*.¹³ Part IV discusses the policy interests and legal reasoning behind the *Shinn* decision and analyzes the likely implications of the holding on future cases.¹⁴ Part IV also examines the need for congressional action to clarify the apparent inconsistency between the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the right to effective trial counsel protected by the Sixth Amendment.¹⁵

II. BACKGROUND

Habeas corpus is a notoriously complicated area of law,¹⁶ and this Part provides the context necessary to understand the Supreme Court's decision in *Shinn*.¹⁷ This Part first examines the limitations imposed by Congress's enactment and subsequent Supreme Court interpretations of AEDPA.¹⁸ Second, it explores varying types of state postconviction proceedings and the significance of ineffective assistance of counsel claims.¹⁹ Third, this Part outlines the Supreme Court's holding in *Martinez*, which created a narrow exception to the rule that

10. *Id.* at 1737-38, 1740.

11. *See infra* discussion Parts II-IV (discussing how limitations on a habeas petitioner's ability to vindicate their rights effectively makes their 6th Amendment right to effective counsel a right with no remedy).

12. *See infra* discussion Part II (analyzing the Supreme Court's historical trend in limiting a petitioner's opportunity to access federal habeas review).

13. *See infra* discussion Part III (explaining the factual and procedural background in *Shinn* as well as analyzing the Supreme Court's decision).

14. *See infra* discussion Part IV (discussing the role of finality, federalism, and comity in Supreme Court habeas decisions).

15. *See infra* discussion Part IV (considering potential reform options for habeas corpus proceedings).

16. *See* Diane P. Wood, *The Enduring Challenges for Habeas Corpus*, 95 *NORTE DAME L. REV.* 1809, 1810 (2020) (discussing the "endless hurdles, loops, and traps" generated by historical reforms in habeas proceedings).

17. *See infra* Part II (providing AEDPA's legislative history and the reasoning in Supreme Court precedent relevant to understanding the Court's decision in *Shinn*).

18. *See infra* Part II.A (discussing the historical background and Supreme Court interpretations of AEDPA); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

19. *See infra* Part II.B (explaining the role of ineffective assistance of counsel claims within the structure of state postconviction proceedings).

postconviction counsel's ineffective assistance could not constitute cause to excuse procedural default.²⁰

A. Limiting Access to Federal Habeas Corpus: AEDPA

AEDPA was enacted following the 1995 Oklahoma City bombings.²¹ Debates surrounding the purpose and effectiveness of AEDPA have existed since it was first enacted.²² Proponents of AEDPA sought to reform and speed up the pace of death penalty cases,²³ but AEDPA restrictions on federal habeas relief equally apply to non-capital cases.²⁴ Additionally, AEDPA's proponents sought to limit the strain placed upon judicial resources following massive increases in time-consuming state prisoner habeas petitions.²⁵ Proponents argued that AEDPA would improve habeas proceedings as the increase in habeas petitions buried meritorious petitions within "a flood of worthless ones."²⁶

However, opponents of AEDPA argue that the statute has failed to serve as a sufficient solution to these perceived problems.²⁷ AEDPA failed to reduce the strain placed upon judicial resources as the number of federal habeas petitions have remained relatively consistent since AEDPA's passage.²⁸ For capital and non-capital cases, the average disposition time for AEDPA filings increased while the rate of granted relief decreased.²⁹ The results on AEDPA's effects emphasize

20. See *infra* Part II.C (analyzing the Supreme Court's holding in *Martinez*).

21. 142 CONG. REC. H3652 (daily ed. Apr. 19, 1996) (statement of Rep. Gephardt) (detailing the movement toward passage of antiterrorism legislation in response to Oklahoma bombings).

22. Compare 142 CONG. REC. S3454-58 (daily ed. Apr. 17, 1996) (statement of Sen. Kennedy) (asserting that AEDPA operates under the "phony label of antiterrorism" and instead will effectively eviscerate the ancient Writ of Habeas Corpus by denying death row inmates a meaningful opportunity to obtain federal review of constitutional claims), with 142 CONG. REC. S3454-59 (daily ed. Apr. 17, 1996) (statement of Sen. Hatch) (arguing that death penalty reform has been necessary for years since frivolous appeals have drawn out capital cases and has resulted in few capital sentences actually carried out).

23. See President William J. Clinton, *Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996* (Apr. 24, 1996), <https://perma.cc/DL8R-WEZ5> (wishing to "streamline Federal appeals for convicted criminals sentenced to the death penalty. For too long, and in too many cases, endless death row appeals have stood in the way of justice being served").

24. See Nicholas Beekhuizen, *Post-AEDPA Compromise: Increased Habeas Corpus Relief for Capital Cases and Tighter Restrictions for Noncapital Cases*, 10 IND. J.L. & SOC. EQUAL. 321, 330 (2022).

25. *Id.* at 330-31.

26. *Id.* at 331 (quoting *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring)).

27. See *id.* (explaining that AEDPA would be considered successful in achieving its goals if there was a lower total number of federal habeas filings, higher rates of granted relief because the judiciary could focus on meritorious claims, and quicker final resolutions in capital cases); David R. Dow & Eric M. Freedman, *The Effects of AEDPA on Justice* 261, 266 (2009), <https://perma.cc/8APF-ETKR> (arguing that if AEDPA was intended to speed up federal habeas proceedings without making it more difficult to obtain habeas relief, then "the legislation has most certainly failed"); see also Robert M. Black, *Proving AEDPA Unlawful: The Several Constitutional Defects of § 2254(D)(1)*, 54 WILLAMETTE L. REV. 1, 35-38 (2017) (detailing possible constitutional issues arising from AEDPA).

28. See Beekhuizen, *supra* note 24, at 331 (providing that although federal habeas petitions increased from 8,059 filings in 1982 to over 18,000 each year after AEDPA was enacted, when compared with the increase in the U.S. prison population, habeas filings per prisoner have remained relatively consistent).

29. See *id.* at 332.

that the goals of AEDPA have not been achieved nor has it made habeas review more effective in ferreting out constitutional violations.³⁰

While the goals of AEDPA may not have been realized, the statute remains the controlling authority for federal habeas proceedings.³¹ Under AEDPA's habeas provisions, state prisoners may file a writ of habeas for federal review under 28 United States Code section 2254.³² Among its series of procedural obstacles, AEDPA codifies restrictions on a state prisoner's ability to challenge the state court record at a federal evidentiary hearing.³³ Section 2254(e)(2) provides that:

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.³⁴

The Supreme Court has increasingly found that Congress's intent behind the passage of AEDPA was meant to promote "principles of comity, finality, and federalism."³⁵ These three principles attempt to strike a balance over how much deference a federal court should pay to a state court's ruling on a habeas petitioner's federal claims.³⁶ Comity refers to the idea that federal courts should have respect for state court decisions.³⁷ The respect paid to state court decisions

30. *Id.* (emphasizing that conservation of judicial resources has not been achieved); Joseph L. Hoffman & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 806 (2009) (criticizing federal habeas review of state criminal convictions as an expensive remedy and an ineffective deterrent against constitutional violations in state criminal proceedings); Samuel R. Wiseman, *What is Federal Habeas Worth?*, 67 FLA. L. REV. 1157, 1160 (2015) ("AEDPA has failed at reducing the volume, pace, or complexity of federal review.").

31. Brandon L. Garrett & Kaitlin Phillips, *AEDPA Repeal*, 107 CORNELL L. REV. 1739, 1739-44 (2022).

32. 28 U.S.C. § 2254.

33. 28 U.S.C. § 2254(e)(2).

34. *Id.*

35. *Williams v. Taylor*, 529 U.S. 420, 436 (2000).

36. See *Coleman v. Thompson*, 501 U.S. 722, 726 (1991) (noting that this case is "about federalism" and "concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus").

37. See *Williams*, 529 U.S. at 437 ("Comity . . . dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the

also enshrines the importance of protecting finality.³⁸ Promoting finality conserves judicial resources and avoids second-guessing the decisions of state judges.³⁹ This further promotes a conclusive sense of justice for victims.⁴⁰ In promoting comity, finality, and federalism above other concerns, the Supreme Court has created multiple procedural bars that have narrowed a habeas petitioner's access to federal review.⁴¹

The emphasis placed upon deference to state court review under AEDPA has led some to question the statute's constitutionality.⁴² Promoting finality in state convictions over access to federal review appears in large part to be justified by the Supreme Court's confidence in the ability of state courts to assess federal constitutional claims.⁴³ However, in a criminal justice system where states "routinely violate defendants' constitutional rights,"⁴⁴ the restrictions imposed by AEDPA on federal courts leads to dire consequences.⁴⁵ Compounded by the role

first opportunity to review this claim and provide necessary relief." (alteration in original) (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999)); see also *Coleman*, 501 U.S. at 731 ("[I]n a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights.").

38. See, e.g., *Coleman*, 501 U.S. at 750 (recognizing "the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them").

39. See *Edwards v. Vannoy*, 141 S. Ct. 1547, 1554-55 (2021) (emphasizing the essential role finality plays in reducing extra costs on state judicial systems); *Strickland v. Washington*, 466 U.S. 668, 697 (1984) ("[T]he presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment.").

40. See, e.g., *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (highlighting that finality allows victims of crime to move on knowing that justice will be carried out).

41. See John H. Blume, *AEDPA: The "Hype" and the "Bite"*, 91 CORNELL L. REV. 259, 265-70 (2006) (providing an overview of Supreme Court precedent that placed limitations on a prisoner's access to federal habeas relief in the interests of "comity, federalism, and finality"); Lynn Adelman, *Who Killed Habeas Corpus?*, DISSENT MAG. (Winter 2018), <https://perma.cc/NG96-DJGD> (describing an array of Supreme Court cases gradually limiting a habeas petitioner's ability to obtain a remedy); EVE BRENSIKE PRIMUS, AM. CONST. SOC'Y, LITIGATING FEDERAL HABEAS CORPUS CASES: ONE EQUITABLE GATEWAY AT A TIME I (2018), <https://perma.cc/K5GV-X6SJ>.

42. See Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1224 (2015) (explaining that the Supreme Court's interpretation of AEDPA has "troubling constitutional implications"); Nathan Nasrallah, *The Wall that AEDPA Built: Revisiting The Suspension Clause Challenge to Antiterrorism and Effective Death Penalty Act*, 66 CASE W. RESV. L. REV. 1147, 1164 (2016) (noting the Congress may run into Suspension Clause problems if it prohibits federal courts from reviewing habeas petitions); see also Clinton, *supra* note 23 ("Federal courts will interpret these [AEDPA] provisions to preserve independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary . . . to avoid constitutional problems.").

43. Reinhardt, *supra* note 42, at 1231.

44. Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 17-23 (2010) [hereinafter Primus I] (discussing systematic errors in state criminal justice systems including lack of access to counsel, due process violations, and prosecutorial misconduct).

45. See Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xlii (2015) ("Not even the Supreme Court may act on what it believes is a constitutional violation if the issue is raised in a habeas petition as opposed to on direct appeal. . . . AEDPA is a cruel, unjust, and unnecessary law that effectively removes federal judges as safeguards against miscarriages of justice. It has resulted and continues to result in much human suffering. It should be repealed."); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 95 (2008) (observing that the Supreme Court has denied thirty

inadequate legal defense can play in wrongful convictions,⁴⁶ the danger that innocent prisoners will remain incarcerated or will face execution increases as a petitioner's ability to access federal review narrows.⁴⁷ The focus on federalism and finality moves away from the proper question of "whether the detainee has a constitutional right to be free" and ultimately deprives habeas petitioners from obtaining an effective remedy when their constitutional rights have been violated.⁴⁸

B. Ineffective Assistance of Counsel Claims in Postconviction Proceedings

The Sixth Amendment guarantee that a criminal defendant "have the Assistance of Counsel for his defense" includes the right to effective assistance of counsel.⁴⁹ The right to effective and appointed counsel is meant to "protect the fundamental right to a fair trial."⁵⁰ While the right to counsel applies during trial,⁵¹ direct appeals,⁵² and other "critical stage" proceedings,⁵³ there is no constitutional right to the assistance of counsel in state or federal habeas corpus proceedings.⁵⁴ Compounded by the fact that ineffective assistance of counsel

petitions for certiorari filed by "actually innocent exonerees" and even denying one petitioner's innocence claim that was later vindicated by DNA evidence).

46. SEE SAMUEL R. GROSS & MICHAEL SHAFFER, EXONERATIONS IN THE UNITED STATES, 1989–2012, NAT'L REGISTRY OF EXONERATIONS 42 (2012), <https://perma.cc/LJ9D-LS4J> (indicating that many exonerated defendants "would not have been convicted in the first instance if their lawyers had done good work").

47. See, e.g., Hassan Kanu, *Supreme Court Prioritizes Expedience, Not Justice, in Wrongful Convictions*, REUTERS (May 25, 2022, 5:07 PM), <https://perma.cc/7EA8-K8WM> (arguing that removing safeguards against prosecutorial and judicial error "increases the likelihood that some innocent prisoners will be executed"); Clare Gilbert, *Beneath the Statistics: The Structural and Systematic Causes of Our Wrongful Conviction Problem*, GA. INNOCENCE PROJECT (Feb. 1, 2022), <https://perma.cc/R8TK-Z3UM> (estimating that between four to six percent of all individuals in U.S. prisons are actually innocent).

48. See Reinhardt, *supra* note 42, at 1239-40 (noting that "[a]lthough Congress explicitly chose not to bar such [evidentiary] hearings when it passed AEDPA, the Court may be on the verge of doing so, with the result that numerous individuals who have been deprived of their constitutional rights will have no means or opportunity to establish their right to relief"); Nasrallah, *supra* note 42, at 1152-53 ("AEDPA's valuation—finality over fairness—is short sighted.").

49. See U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668, 686 (1984) ("[T]he right to counsel is the right to the effective assistance of counsel.") (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)).

50. Strickland, 466 U.S. at 684.

51. See Gideon v. Wainwright, 372 U.S. 335, 342-44 (1963) (concluding that indigent defendants have the right to appointed counsel at trial).

52. See Douglas v. California, 372 U.S. 353, 358 (1963) (holding that the Fourteenth Amendment guarantees a criminal defendant the right to counsel on their first appeal); see also Evitts v. Lucey, 469 U.S. 387, 395-97 (1985) (finding that criminal defendants have a right to effective assistance of counsel on direct appeal).

53. See, e.g., Coleman v. Alabama, 399 U.S. 1, 9-10 (1970) (holding that there is a right to counsel at preliminary hearings); Hamilton v. Alabama, 368 U.S. 52, 53-54 (1961) (finding a right to counsel during arraignments); White v. Maryland, 373 U.S. 59, 60 (1963) (holding that an arraignment constitutes a "critical stage" requiring the right to counsel).

54. See Brent E. Newton, *Incentivizing Ineffective-Assistance-of-Counsel Claims Raised on Direct Appeal: Why Appellate Courts Should Remand "Colorable" Claims for Evidentiary Hearings*, 22 J. APP. PRAC. & PROCESS 107, 108 (2022) (noting that individuals who are indigent and imprisoned based on ineffective assistance of counsel typically develop their ineffective assistance claim without attorney

claims cannot be raised on direct appeal in a majority of U.S. jurisdictions,⁵⁵ habeas petitioners are often forced to develop and litigate ineffectiveness claims without an attorney.⁵⁶

Relegation of ineffective assistance of counsel claims to proceedings outside of direct review forces habeas petitioners to collaterally attack their convictions by alleging that their trial counsel was constitutionally deficient.⁵⁷ The Supreme Court has indicated that ineffective assistance of trial counsel claims should be raised in collateral proceedings because the trial record is insufficiently developed to litigate such a claim at the direct review stage.⁵⁸ The incomplete and inadequate trial record has led many federal and state courts to require that petitioners raise claims of ineffective assistance of trial counsel in collateral review proceedings rather than on direct appeal.⁵⁹ The timing of when an ineffective assistance claim can be raised is highly relevant to habeas petitioners as it is one of the most frequently raised claims in state and federal habeas petitions.⁶⁰ While frequent, the dispositions for these claims are generally unfavorable for petitioners as a large majority of federal habeas petitions are dismissed based upon procedural barriers to federal review.⁶¹

Because ineffective assistance of counsel claims are typically relegated to collateral proceedings, these claims are often raised in a forum where the Supreme Court has held that a defendant does not have a constitutional right to counsel.⁶² This is particularly problematic in that counsel can be considered constitutionally ineffective—meaning a defendant could raise an ineffectiveness of counsel claim not fully adjudicated in state court in federal habeas proceedings—only if the Constitution requires that a defendant have the right to counsel in the proceeding.⁶³ While the Supreme Court has recognized that there may be a

assistance); *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991) (finding that there is no constitutional right to counsel in habeas corpus collateral proceedings); *Ross v. Moffitt*, 417 U.S. 600, 617-18 (1974) (finding that there is no constitutional right to counsel after a prisoner's first appeal).

55. *Commonwealth v. Grant*, 813 A.2d 726, 734-36 (2002) (noting that a vast majority of federal circuits and state courts recognize that ineffectiveness claims are not appropriate for direct review but should be brought in a collateral action).

56. See ROGER A. HANSON & HENRY W.K. DALEY, U.S. DEP'T OF JUST., *FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS* 14 (1995), <https://perma.cc/5QJC-JNDJ> (stating that in ninety-three percent of sampled federal habeas corpus cases, the prisoner was without legal counsel).

57. Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 691 (2007) [hereinafter Primus II].

58. *Massaro v. United States*, 538 U.S. 500, 504 (2003).

59. Primus II, *supra* note 57, at 692.

60. Nancy J. King et al., *Executive Summary: Habeas Litigation in U.S. District Courts*, NAT'L CTR. FOR STATE CTS. 5 (Aug. 2007), <https://perma.cc/TKU5-E82W> (providing that ineffective assistance of counsel claims were filed in 81% of capital cases and in 50.4% of non-capital cases).

61. HANSON & DALEY, *supra* note 56, at 17 (noting that of the 63% of petitions dismissed by the court or the petitioner, 57% were dismissed for failure to exhaust state remedies, and 12% were dismissed for procedural default). Only 1% of habeas petitions were granted on the merits for the issues raised, and another 1% of petitions were remanded to state courts for further proceedings. *Id.*

62. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Murray v. Giarratano*, 492 U.S. 1, 10 (1989).

63. Daniel Givelber, *The Right to Counsel in Collateral, Post-Conviction Proceedings*, 58 MD. L. REV. 1393, 1398 (1999).

limited right to counsel if a particular constitutional claim can be raised for the first time only in postconviction proceedings,⁶⁴ lacking the constitutional right to counsel in collateral review has effectively narrowed a defendant's ability to raise and litigate an ineffective assistance of counsel claim.⁶⁵

Providing effective counsel at the postconviction stage is “essential to realizing the fundamental tenet of our criminal law—that an accused be tried, convicted, and sentenced according to due process of law.”⁶⁶ While federal law provides for the appointment of habeas counsel in federal court,⁶⁷ there is no uniform system for appointing counsel in state habeas proceedings.⁶⁸ The variability in state court systems for habeas counsel appointments affects the quality of representation each habeas petitioner may or may not receive based upon location.⁶⁹ This variability often results in scenarios where defendants, while typically sitting within a jail cell, have to reinvestigate their cases and develop the trial record without the assistance of counsel.⁷⁰ Since many criminal defendants did not complete high school,⁷¹ and many struggle with learning disabilities or mental illness,⁷² the denial of a right to effective, or any, counsel in habeas proceedings has created a situation where defendants have the right to effective trial counsel with no real remedy to enforce that right.⁷³

64. *Coleman v. Thompson*, 501 U.S. 722, 755 (1991) (noting a possible exception to the rules in *Finley* and *Giarrantano* in “cases where state collateral review is the first place a prisoner can present a challenge to his conviction”); *see also* Emily Garcia Uhrig, *A Case for a Constitutional Right to Counsel in Habeas Corpus*, 60 HASTINGS L.J. 541, 544 (2009) (discussing the question left open by *Coleman* that there is a possibility of a constitutional right to counsel whenever a habeas petitioner seeks review of claims for which habeas corpus provides the first opportunity for judicial review).

65. *Halbert v. Michigan*, 545 U.S. 605, 621 (2005) (discussing that navigation of “the appellate process without a lawyer’s assistance is a perilous endeavor for a layperson, and well beyond the competence of individuals . . . who have little education, learning disabilities, and mental impairments”).

66. Givelber, *supra* note 63, at 1399.

67. Emily Olson-Gault, *Supreme Court “Guts” Case Law Protecting the Right to Counsel*, A.B.A. (May 22, 2022), <https://perma.cc/UA6W-58QF>.

68. Diana Cummiskey, Comment, *The Appointment of Counsel in Collateral Review*, 24 U. PA. J. CONST. L. 939, 945 (2022).

69. *See id.* at 946, 958-60.

70. Primus II, *supra* note 57, at 693.

71. *Halbert v. Michigan*, 545 U.S. 605, 621 (2005) (“[Sixty-eight percent] of the state prison populatio[n] did not complete high school, and many lack the most basic literacy skills. [S]even out of ten inmates fall in the lowest two out of five levels of literacy . . .” (alterations in original) (citations omitted)).

72. JENNIFER BRONSON & MARCUS BERZOFSKY, U.S. DEP’T OF JUST., INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011-12 1 (2017) <https://perma.cc/539G-9M8S> (providing that 14% of federal prisoners and 26% of state prisoners reported experiences that met the threshold for serious psychological distress, while 37% of prisoners and 44% of jail inmates reported being told in the past by a mental health professional that they had a mental disorder).

73. Primus II, *supra* note 57, at 693.

C. Martinez v. Ryan and Evidentiary Hearings

In *Martinez*, the Supreme Court qualified its holding in *Coleman v. Thompson*⁷⁴ to recognize that inadequate assistance of counsel in state collateral proceedings can constitute cause to excuse a prisoner's procedural default of a claim of ineffective assistance of trial counsel.⁷⁵ The Court asserted that this "narrow exception" to *Coleman* would apply in state "collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial."⁷⁶ The Court reasoned that when a state requires ineffective assistance claims to be raised in collateral proceedings instead of on direct appeal, "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective."⁷⁷ The Supreme Court later expanded this rule in *Trevino v. Thaler*,⁷⁸ holding that *Martinez* applied to excuse procedural default of an ineffective assistance of trial counsel claim when a state procedural framework fails to provide a criminal defendant with a meaningful opportunity to raise such a claim on direct appeal.⁷⁹

The *Martinez* Court noted the special nature of state collateral proceedings where an attorney's error would mean "that no state court at any level will hear the prisoner's claim."⁸⁰ The *Martinez* and *Trevino* Courts asserted that when such collateral proceedings were "the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim," it would be a denial of due process to prevent federal courts from adjudicating the merits of a petitioner's claim.⁸¹ In both cases, the Supreme Court emphasized the importance of having at least one court hear and adjudicate a habeas petitioner's ineffective assistance of trial counsel claim.⁸²

In the wake of *Martinez* and *Trevino*, federal district courts have conducted so-called "*Martinez* hearings" to determine whether a petitioner's failure to bring

74. See *Coleman v. Thompson*, 501 U.S. 722, 757 (1991) (holding that because a habeas petitioner has no right to counsel in state habeas proceedings, any attorney error in state court could not constitute cause to excuse the default in federal court).

75. *Martinez v. Ryan*, 566 U.S. 1, 9 (2012).

76. *Id.* at 8-9.

77. *Id.* at 17.

78. 569 U.S. 413 (2013).

79. *Id.* at 429.

80. *Martinez*, 566 U.S. at 10; see also Cary Sandman, *Supreme Court Turns a Blind Eye to Wrongful Convictions, Guts 6th Amendment Rights to Effective Counsel*, 94 N.Y. ST. B.J. 17, 18 (2022) (explaining that *Martinez* prevented the scenario where a prisoner would be "forever barred from bringing the claim in a later state court proceeding").

81. *Martinez*, 566 U.S. at 11; see also *Trevino*, 569 U.S. at 429 (rationalizing that the rule from *Martinez* should apply because the procedural frameworks set up in the different states at issue in *Martinez* and *Trevino* are a "distinction without a difference").

82. See *Martinez*, 566 U.S. at 10-11 (addressing the issues that can arise when no court has reviewed a petitioner's ineffective assistance of counsel claim); *Trevino*, 569 U.S. at 428 (discussing that denying habeas petitioners the right to bring an ineffectiveness of trial counsel claim in collateral proceedings would deprive petitioners of any opportunity for review of their claim).

an ineffectiveness of trial counsel claim can be excused from procedural default.⁸³ During these hearings, federal courts are generally barred from considering new evidence when reviewing a state court's adjudication of a claim on its merits.⁸⁴ To hear new evidence, a federal district court can hold an evidentiary hearing under section 2254(e)(2) when a prisoner has made a diligent effort to produce and develop the new evidence the petitioner seeks to rely upon in state court.⁸⁵ In multiple circuits, courts have reasoned that if a habeas petitioner overcame procedural default in a *Martinez* hearing, it necessarily followed that the petitioner had not failed to develop the factual basis of a claim that would trigger section 2254(e)(2).⁸⁶ This view accorded with Supreme Court precedent that a petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."⁸⁷ In the *Martinez* context, a state's deliberate choice to move ineffective assistance of trial counsel claims outside direct review "significantly diminishe[d] prisoners' ability to file such claims" and constituted an external factor causing the failure to develop the factual basis of a claim.⁸⁸ While *Martinez* hearings have not led to a vast increase in the number of petitioners receiving habeas relief,⁸⁹ providing the opportunity of an evidentiary hearing in such cases has been vital to vindicating the right of effective counsel.⁹⁰

83. See, e.g., *Stokes v. Stirling*, 10 F.4th 236, 239, 244 (4th Cir. 2021) (noting that a criminal defendant's lack of effective trial and postconviction counsel at their evidentiary hearing rendered enough cause to excuse procedural default); *Guerrero v. Donahue*, No. 1:14-cv-00151, 2020 WL 553728, at *2 (M.D. Tenn. Feb. 4, 2020) (discussing the district court's use of *Martinez* evidentiary hearing to determine if petitioner's ineffectiveness of trial counsel claim could constitute cause to excuse a habeas petitioner's procedural default).

84. *Cullen v. Pinholster*, 563 U.S. 170, 180-81 (2011) (interpreting section 2254(d)(1) to limit federal review to evidence developed in the state record).

85. *Williams v. Taylor*, 529 U.S. 420, 432-34 (2000) ("Under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel.").

86. See, e.g., *Sasser v. Hobbs*, 735 F.3d 833, 853-54 (8th Cir. 2013) (explaining that section 2254(e)(2) does not bar a federal court from holding an evidentiary hearing when the petitioner made a diligent effort to develop his claim in state court); *Barrientes v. Johnson*, 221 F.3d 741, 770-71 (5th Cir. 2000) (holding that section 2254(e)(2) does not apply to bar an evidentiary hearing where the petitioner overcame procedural default because the petitioner "has not failed to develop the factual basis of" his claim).

87. *Murray v. Carrier*, 477 U.S. 478, 488 (1986); see also Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 WASH. & LEE L. REV. 85, 158 (2012) (discussing that inadequate or unfair state court procedures can constitute an external factor that impedes defense counsel's efforts).

88. *Martinez v. Ryan*, 566 U.S. 1, 13 (2012).

89. See Brief of the States of Arizona et al. as Amici Curiae Supporting Respondent at 2, *Ayestas v. Davis*, 138 S. Ct. 1080 (2017) (No. 16-6795), 2017 WL 3575763, at *2 (noting that there have only been seventeen *Martinez* remands made by the Ninth Circuit for the lower federal district court in Arizona to reconsider).

90. Brief for the American Bar Association as Amicus Curiae Supporting Respondents at 7-9, *Shinn v. Ramirez*, 142 S. Ct. 1718 (2021) (No. 20-1009) [hereinafter ABA's Brief] ("*Martinez* provides a narrow but meaningful pathway to relief for this subset of prisoners whose ineffective assistance of trial counsel claims are never considered in state court due to ineffective assistance of counsel in their state collateral proceeding.").

III. FACTS AND PROCEDURE OF *SHINN V. RAMIREZ*

The Supreme Court's decision in *Shinn* is a consolidation of two petitions from the State of Arizona.⁹¹ As such, the facts and procedural history of *Shinn* are broken down between the two Ninth Circuit decisions: *Ramirez v. Ryan*⁹² and *Jones v. Shinn*.⁹³

A. Facts and Procedural History of *Ramirez v. Ryan*

David Ramirez was convicted in Arizona state court on two counts of premeditated first-degree murder and sentenced to death in 1989.⁹⁴ Ramirez was represented by a Maricopa County public defender, who “had no capital experience and had not even observed a capital trial or sentencing.”⁹⁵ The public defender later admitted to being “unprepared to represent someone ‘as mentally disturbed’ as Ramirez.”⁹⁶ Despite having evidence that Ramirez may have been intellectually disabled, Ramirez’s trial counsel failed to present a claim of mental impairment at Ramirez’s sentencing and mitigation phase.⁹⁷ Absent this mitigating evidence, a trial judge ultimately sentenced Mr. Ramirez to death.⁹⁸

The Arizona Supreme Court affirmed Ramirez’s death sentence on direct review.⁹⁹

Ramirez’s postconviction attorney filed for state postconviction relief but did not raise or develop a claim that “trial counsel provided ineffective assistance for ‘failing to conduct a complete mitigation investigation’ or ‘obtain[ing] and present[ing] available mitigation evidence at sentencing.’”¹⁰⁰ Arizona’s postconviction court denied Mr. Ramirez’s petition and the Arizona Supreme Court later denied review.¹⁰¹ Ramirez then filed a federal habeas petition under 28 United States Code section 2254.¹⁰² Following appointment of the Federal Public Defender to Ramirez’s case “‘due to concerns regarding the quality of representation,’ . . . [t]he Federal Public Defender raised [an] ineffective assistance of trial counsel claim” in Ramirez’s federal habeas petition.¹⁰³ However, the district court dismissed Ramirez’s petition stating Ramirez had

91. *Shinn v. Ramirez*, 142 S. Ct. 1718, 1728 (2022).

92. 937 F.3d 1230 (9th Cir. 2019).

93. 943 F.3d 1211 (9th Cir. 2019).

94. *Shinn*, 142 S. Ct. at 1728; Brief in Opposition at 3, *Shinn v. Ramirez*, 142 S. Ct. 1718 (2021) (No. 20-1009) [hereinafter Respondents’ Brief in Opposition].

95. Brief for Respondents at 17, *Shinn v. Ramirez*, 142 S. Ct. 1718 (2021) (No. 20-1009) [hereinafter Respondents’ Brief] (citation omitted); *Ramirez*, 937 F.3d at 1244.

96. Respondents’ Brief in Opposition, *supra* note 94, at 3 (citation omitted).

97. Respondents’ Brief, *supra* note 95, at 17-18.

98. *Id.* at 18.

99. *Shinn*, 142 S. Ct. at 1728.

100. *Id.* (citation omitted).

101. Respondents’ Brief, *supra* note 95, at 18.

102. *Shinn*, 142 S. Ct. at 1729.

103. Respondents’ Brief, *supra* note 95, at 18-19 (citation omitted).

“procedurally defaulted his ineffective-assistance claim by failing to raise it before the Arizona courts in a timely fashion.”¹⁰⁴

While Ramirez’s appeal for the federal district court’s ruling was pending, the Supreme Court decided *Martinez*, upon which the court of appeals remanded Ramirez’s appeal for reconsideration on the issue of whether to excuse his procedural default.¹⁰⁵ On remand, the federal district court allowed Ramirez to submit evidence that was not presented to the state court, including statements from family members—who were never contacted by trial counsel—“reveal[ing] the extent of abuse, poverty, and neglect that Ramirez suffered as a child.”¹⁰⁶ Considering the new evidence, “the District Court excused the procedural default but rejected Ramirez’s ineffective assistance of counsel claim on the merits.”¹⁰⁷ The United States Court of Appeals for the Ninth Circuit reversed, holding that “Ramirez’s state postconviction counsel’s failure to raise and develop the trial-ineffective-assistance claim was cause to forgive the procedural default.”¹⁰⁸ The Ninth Circuit also held that Ramirez’s underlying trial ineffective assistance claim was substantial and that the case should be remanded for further factfinding on the merits of the claim.¹⁰⁹ The Ninth Circuit further denied the State’s petition for a rehearing en banc on the State’s argument that the remand for additional evidentiary development violated 28 United States Code section 2254(e)(2).¹¹⁰ As a result, the State of Arizona petitioned the Supreme Court for a writ of certiorari.¹¹¹

B. Facts and Procedural History of *Jones v. Shinn*

In 1994, Barry Lee Jones was accused of and later convicted of sexual assault, three counts of child abuse, and the felony murder of his girlfriend’s four-year-old daughter.¹¹² The State’s case centered upon the argument that the daughter died because of an injury sustained while she was in Jones’s care the previous day.¹¹³ A “trial judge sentenced Jones to death, and the Arizona Supreme Court affirmed on direct review.”¹¹⁴ Jones was then appointed state postconviction counsel who “lacked the experience to satisfy Arizona’s requirements for the appointment of

104. *Shinn*, 142 S. Ct. at 1729.

105. Respondents’ Brief, *supra* note 95, at 19.

106. *See id.* (citation omitted) (detailing evidence “that Mr. Ramirez’s mother severely physically abused him” and that Ramirez exhibited significant developmental delays as a child).

107. *Shinn*, 142 S. Ct. at 1729.

108. *Id.*

109. *Id.*; *Ramirez v. Ryan*, 937 F.3d 1230, 1248 (9th Cir. 2019) (“[Ramirez] is entitled to evidentiary development to litigate the merits of his ineffective assistance of trial counsel claim, as he was precluded from such development because of his post-conviction counsel’s ineffective representation.”).

110. *Shinn*, 142 S. Ct. at 1729.

111. *Id.* at 1730.

112. *Id.* at 1729.

113. Respondents’ Brief, *supra* note 95, at 9.

114. *Shinn*, 142 S. Ct. at 1729.

capital post-conviction counsel.”¹¹⁵ Jones’s state postconviction counsel petitioned for state postconviction relief but did not raise an ineffective assistance claim that Jones’s trial counsel “fail[ed] to conduct sufficient trial investigation”¹¹⁶ and failed to “adequately investigate[] and present[] medical and other expert testimony to rebut the State’s theory.”¹¹⁷ “The State postconviction court denied Mr. Jones’ petition; [and] the Arizona Supreme Court denied review.”¹¹⁸

Jones, represented by new counsel, then filed a federal habeas petition with the claim that his state trial counsel was ineffective “for failing to conduct sufficient trial investigation; adequately investigate the police work, medical evidence, and timeline of death versus injury; and conduct sufficient mitigation investigation for sentencing.”¹¹⁹ The district court held that Jones’s trial-ineffective-assistance claim was procedurally defaulted, but similar to Ramirez’s case, upon the Supreme Court’s ruling in *Martinez*, Jones invoked his postconviction counsel’s ineffective assistance as grounds to forgive the default.¹²⁰ “The Ninth Circuit remanded [the case] for the district court to apply *Martinez*.”¹²¹ The federal district court, after holding a seven-day hearing where Jones presented evidence not in the state court record, held that cause existed to excuse the procedural default of Jones’s ineffective assistance of trial counsel claim.¹²² Evidence presented at the *Martinez* hearing indicated that upon examination of the victim’s tissues, her fatal injury “could not possibly have been inflicted on the day prior to her death” when she was in Jones’s care as the State alleged.¹²³

In considering the merits of Jones’s ineffective assistance claim, the district court consulted the same evidence presented at the *Martinez* hearing to hold that Jones’s trial counsel had provided ineffective assistance.¹²⁴ Upon finding that “[h]ad [Jones’s] counsel adequately investigated and presented medical and other expert testimony to rebut the State’s theory . . . there is a reasonable probability that the jury would not have unanimously convicted [Jones] of any of the counts.”¹²⁵ The federal district court ordered Jones released from state custody, unless Arizona promptly retried him.¹²⁶

115. See Respondents’ Brief, *supra* note 95, at 10 (providing that Jones’s postconviction counsel “conducted almost no investigation of ‘any potential claim that relied on the establishment of facts outside the record’”) (citations omitted).

116. *Shinn*, 142 S. Ct. at 1729 (citation omitted).

117. Respondents’ Brief, *supra* note 95, at 11 (citation omitted).

118. Respondents’ Brief, *supra* note 95, at 11.

119. *Id.* (citation omitted).

120. *Id.* at 11-12.

121. *Id.*

122. *Id.* at 13-14; *Shinn v. Ramirez*, 142 S. Ct. 1718, 1729-30 (2022).

123. Respondents’ Brief, *supra* note 95, at 12 (citation omitted).

124. See *id.* at 14 (providing that the district court found that Jones’s trial counsel’s constitutionally deficient investigation “pervaded the entire evidentiary picture” thus rendering the outcome of Jones’s trial “unreliable”) (citation omitted).

125. *Id.* at 14-15 (citation omitted).

126. *Id.* at 15.

The State of Arizona appealed the district court's decision on that grounds that section 2254(e)(2) barred consideration of evidence presented during a *Martinez* hearing to determine the merits of an ineffective assistance of trial counsel claim.¹²⁷ The Ninth Circuit affirmed the district court's grant of habeas relief to Jones, holding that section 2254(e)(2) did not prevent a district court from considering evidence developed to overcome a procedural default under *Martinez* to determine the merits of a trial ineffective assistance claim.¹²⁸ The Ninth Circuit denied rehearing en banc.¹²⁹ The State of Arizona petitioned the Supreme Court for a writ of certiorari.¹³⁰

C. Majority Opinion

In a six-to-three opinion authored by Justice Clarence Thomas, the Supreme Court held that under 28 United States Code section 2254(e)(2)'s statutory framework, because Jones and Ramirez were "at fault" for their state postconviction counsels' negligent failure to develop the state court record, neither were entitled to an evidentiary hearing in federal court.¹³¹ This decision foreclosed any federal court from determining the merits of either Jones's or Ramirez's ineffective assistance of trial counsel claims.¹³² The Court went on to broadly state that under section 2254(e)(2), a federal habeas court "may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on the ineffective assistance of state postconviction counsel."¹³³

The *Shinn* Court framed the holding as conforming with statutory authority and prior precedent.¹³⁴ Under AEDPA, the Court reasoned that a state postconviction counsel's failure to develop the state court record is attributable to the prisoner.¹³⁵ The Court stated that under section 2254(e)(2), "if a prisoner 'has failed to develop the factual basis of a claim in State court proceedings,' a federal court may hold 'an evidentiary hearing on the claim' in only two limited scenarios."¹³⁶ However, the Court noted that neither Jones nor Ramirez qualified for these two exceptions.¹³⁷

127. *Id.*

128. *Id.* at 15-16.

129. *Id.* at 16.

130. *Shinn v. Ramirez*, 142 S. Ct. 1718, 1728 (2022).

131. *See id.* at 1739-40.

132. *See* Respondents' Brief, *supra* note 95, at 41-42 (discussing that the Court's interpretation of section 2254(e)(2) would "put habeas claimants and courts in a bizarre Catch-22, the result of which is that there would be no forum—state or federal—in which such a habeas claimant has a functional opportunity to present, develop, and obtain merits adjudication of an ineffective assistance of trial counsel claim.").

133. *Shinn*, 142 S. Ct. at 1734.

134. *Id.* at 1735.

135. *Id.*

136. *Id.* at 1734 (quoting 28 U.S.C. § 2254(e)(2)).

137. *Shinn*, 142 S. Ct. at 1734.

In accordance with prior precedent, the Court interpreted “fail” as consistent with *Keeney v. Tamayo-Reyes*,¹³⁸ to mean that a prisoner must be “at fault” for the underdeveloped state record.¹³⁹ Under the Court’s prior holdings in *Williams v. Taylor*¹⁴⁰ and *Holland v. Jackson*,¹⁴¹ a prisoner was “at fault” even when state postconviction counsel was negligent for failing to develop the state court record.¹⁴² Based on these precedents, the Court reasoned that because Jones and Ramirez were “at fault” for their postconviction counsels’ failure to develop the factual basis of their claims and could not satisfy either of section 2254(e)(2)’s stringent requirements, neither were entitled to an evidentiary hearing in federal court.¹⁴³

The Court went on to reject Ramirez and Jones’s argument that because a petitioner is not held “responsible for state postconviction counsel’s failure to raise a claim” of ineffective assistance under *Martinez*, it made “little sense to hold the prisoner responsible for the failure to develop that claim.”¹⁴⁴ The Court reasoned that while *Martinez* provided a “narrow exception” to *Coleman*’s rule that attorney error cannot establish cause to excuse a procedural default unless it violates the Constitution, AEDPA foreclosed an application of *Martinez*’s exception in instances to excuse a petitioner’s failure to develop the state court record.¹⁴⁵

The Court also declined to adopt Ramirez and Jones’s reading of section 2254(e)(2) that would allow evidence submitted during a *Martinez* hearing to later be used to determine the merits of a petitioner’s underlying ineffective assistance of trial counsel claim since the federal court would not be holding a new “hearing” under section 2554(e)(2).¹⁴⁶ The Court reasoned such a reading would serve as a work-around on section 2254(e)(2)’s bar to evidentiary hearings.¹⁴⁷ The Court further asserted that under its holding, because a “*Martinez* hearing would serve no purpose,” it made more sense “to dispense with *Martinez* hearings altogether, not to set § 2254(e)(2) aside.”¹⁴⁸ Thus, the Court held that in cases where section 2554(e)(2) applied and where the petitioner could not satisfy section 2254(e)(2)’s stringent exceptions, a federal court “may not hold an evidentiary hearing—or otherwise consider new evidence—to assess cause and prejudice under *Martinez*.”¹⁴⁹

138. 504 U.S. 1 (1992).

139. *Shinn*, 142 S. Ct. at 1734 (citation omitted).

140. 529 U.S. 420 (2000).

141. 542 U.S. 649 (2004).

142. *Shinn*, 142 S. Ct. at 1734-35 (citation omitted).

143. *Id.* at 1740.

144. *Id.* at 1736 (emphases added).

145. *Id.* at 1733, 1736 (citation omitted).

146. *Id.* at 1738 (citation omitted).

147. *Id.*

148. *Id.* at 1738-39.

149. *Id.* at 1739.

The Court also addressed the need to promote finality and comity concerns over that of “needlessly prolong[ing]” a habeas case.¹⁵⁰ The Court stressed the importance of limiting federal intervention as it could impose “significant costs on state criminal justice systems.”¹⁵¹ The Court reasoned that the cases at issue demonstrated the “improper burden imposed on States” caused by an expansion of *Martinez*’s holding.¹⁵² The majority viewed the seven-day evidentiary hearing in *Jones*, which included the testimony of more than ten witnesses, as constituting a “wholesale relitigation of Jones’ guilt.”¹⁵³ The majority emphasized that this outcome was not what the *Martinez* Court had envisioned.¹⁵⁴ Instead, according to Justice Thomas, the majority’s holding best respected the special balance Congress struck in enacting AEDPA to limit the availability of habeas relief.¹⁵⁵

D. Dissenting Opinion

In her dissent joined by Justices Stephen Breyer and Elena Kagan, Justice Sonia Sotomayor accused the majority of gutting the reasoning of two key precedents—*Martinez* and *Trevino*—that ultimately leaves incarcerated habeas petitioners without a meaningful opportunity to vindicate their right to counsel.¹⁵⁶ Justice Sotomayor also maintained that the majority “arrogate[d] power from Congress” by “improperly reconfigure[ing] the balance Congress struck [in AEDPA] between state interests and individual constitutional rights.”¹⁵⁷ She affirmed that neither AEDPA nor the Court’s precedents required the majority’s holding.¹⁵⁸

The dissent faulted the majority decision as “perverse” and “illogical.”¹⁵⁹ Justice Sotomayor asserted that it made no sense to find a petitioner “at fault” for their postconviction counsel’s failure to develop the evidence of a trial ineffectiveness claim in light of *Martinez* and *Trevino*’s excusal of a petitioner’s counsel’s failure to raise that same claim.¹⁶⁰ Justice Sotomayor noted that there was no dispute that Jones and Ramirez had cause to excuse the procedural default of failing to raise their trial ineffectiveness claims under *Martinez* and *Trevino*.¹⁶¹ Instead, Justice Sotomayor framed the issue as whether Jones and Ramirez, who were “faultless for a procedural default under *Martinez*,” would be barred by section 2254(e)(2) from seeking an evidentiary hearing in federal court because

150. *Id.* (citing *Cullen v. Pinholster*, 563 U.S. 170, 208-09 (Sotomayor, J., dissenting)).

151. *Id.* at 1731.

152. *Id.* at 1738.

153. *Id.*

154. *Id.*

155. *Id.* at 1731-32.

156. *Id.* at 1740 (Sotomayor, J., dissenting).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 1745.

they “failed to develop the factual basis of a claim in State court proceedings.”¹⁶² Under this framing, Justice Sotomayor argued that the majority opinion rested upon two errors: (1) the majority mischaracterized precedent by emptying *Martinez* and *Trevino* of any practical significance, and (2) the majority relied upon its own mistaken understanding of AEDPA’s policies and subsequently ignored the careful balance struck by Congress between state interests and habeas protections.¹⁶³

In looking at the Supreme Court’s precedents, Justice Sotomayor asserted that in *Williams*, the Court reasoned that section 2254(e)(2)’s “failure to develop” language raised the bar in *Keeney* only on “prisoners who were *not* diligent” in state court proceedings.¹⁶⁴ Thus, whether a petitioner who satisfies *Martinez* is subject to section 2254(e)(2) depends on “whether they were at fault for not developing evidence in support of their trial-ineffectiveness claims in state postconviction proceedings.”¹⁶⁵ Justice Sotomayor reasoned that following the logic of *Martinez*, a postconviction counsel’s ineffectiveness “cannot fairly be attributed to the defendant, and he therefore has not ‘failed to develop the factual basis of [his] claim.’”¹⁶⁶ Thus, under *Martinez*’s rationale, section 2554(e)(2)’s bar to evidentiary hearings would not apply in instances where petitioners received ineffective trial and ineffective postconviction counsel.¹⁶⁷

In examining the Court’s interpretation of AEDPA, Justice Sotomayor argued that the majority erred in thinking that AEDPA maximizes deference to state court convictions over constitutional protections.¹⁶⁸ Justice Sotomayor asserted that “AEDPA does not render state judgments unassailable, but strikes a balance between respecting state-court judgments and preserving the necessary and vital role federal courts play in ‘guard[ing] against extreme malfunctions in the state criminal justice systems.’”¹⁶⁹ Stressing the importance of habeas corpus in death penalty cases, Justice Sotomayor insinuated that the majority’s holding undermines the role of the “Great Writ” in the name of finality of state court judgments.¹⁷⁰

Justice Sotomayor also emphasized the special nature of trial ineffective assistance claims.¹⁷¹ Such claims “frequently turn on errors of omission,” which by definition, “requires evidence beyond the trial record.”¹⁷² Justice Sotomayor argued that the majority’s decision foreclosed access to federal courts for

162. *Id.*; 28 U.S.C. § 2254(e)(2).

163. *Shinn*, 142 S. Ct. at 1747 (Sotomayor, J., dissenting).

164. *Id.* at 1745 (emphasis added).

165. *Id.* at 1746.

166. *Id.* (quoting 28 U.S.C. § 2254(e)(2)).

167. *See id.* at 1747 (“Jones and Ramirez have not ‘failed to develop’ the factual basis of their claims, and AEDPA’s § 2254(e)(2), properly interpreted, poses no bar to evidentiary development in federal court.”).

168. *Id.* at 1748.

169. *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011)).

170. *Id.* at 1749 (citation omitted).

171. *Id.* at 1746.

172. *Id.*

potentially meritorious trial ineffectiveness claims.¹⁷³ The dissent further asserted that the majority's holding will negatively impact future cases dealing with ineffective assistance of trial counsel claims.¹⁷⁴ Justice Sotomayor viewed the Court's decision as reducing "to rubble many habeas petitioners' Sixth Amendment rights to the effective assistance of counsel."¹⁷⁵

IV. ANALYSIS

Shinn falls within a long line of Supreme Court precedent that has narrowly tailored a criminal defendant's access to federal habeas relief.¹⁷⁶ The *Shinn* holding forecloses a petitioner's access to the federal courts under the exception created in *Martinez* and essentially curtails a petitioner's ability to vindicate their right to effective trial counsel.¹⁷⁷ In the unfortunate cases where a defendant receives ineffective trial and ineffective postconviction counsel, under *Shinn*, a criminal defendant has effectively been given a right without a remedy.¹⁷⁸

This section considers *Shinn*'s mistaken emphasis on finality, the future of *Martinez* hearings, and possible reforms needed in habeas proceedings to fix the problems created by *Shinn* and an extensive line of Supreme Court precedent limiting a habeas petitioner's ability to access federal court review.¹⁷⁹

A. Movement Back Toward Finality: Purpose of AEDPA

The Supreme Court has created a habeas corpus regime more concerned with respecting the finality of state court judgements than with protecting federal constitutional rights.¹⁸⁰ In rationalizing its holding in *Shinn*, the Court relied upon a generalized congressional purpose behind AEDPA to limit habeas relief.¹⁸¹ The

173. See *id.* (stating, "To hold a petitioner at fault for not developing a factual basis because of postconviction counsel's ineffectiveness in the *Martinez* context, however, would be to eliminate altogether such evidentiary development and doom many meritorious trial-ineffectiveness claims that satisfy *Martinez*. Such a rule is not only inconsistent with the reasoning of *Martinez* and *Trevino* but renders those decision meaningless in many, if not most, cases.").

174. *Id.* at 1749.

175. *Id.* at 1750.

176. See PRIMUS, *supra* note 41, at 1 ("Congress and the Supreme Court have erected a complicated maze of procedural obstacles that state prisoners must navigate, often without the assistance of counsel, to have their constitutional claims considered in federal court.").

177. See Sandman, *supra* note 80, at 18 (discussing that *Shinn* hollows out the promise of *Gideon* and *Strickland* by essentially gutting *Martinez*'s exception).

178. See *id.* (arguing that *Shinn* "'hamstrings [a] federal court's [ability] to safeguard' the right of effective assistance of trial counsel. . . . [*Shinn*] 'will leave many people convicted in violation of the Sixth Amendment to face incarceration or even execution without any meaningful opportunity to vindicate their right to counsel'").

179. See *infra* Part IV.A-C (considering the implications of *Shinn* on *Martinez* hearings and the need for reform to address the Supreme Court's emphasis on finality in habeas proceedings).

180. *Coleman v. Thompson*, 501 U.S. 722, 761-62 (1991) (Blackmun, J., dissenting) (noting that protecting the finality of state judgments can weaken the federal courts' role in enforcing the Constitution to secure individual rights).

181. See *Shinn v. Ramirez*, 142 S. Ct. 1718, 1748 (2022) (Sotomayor, J., dissenting) (asserting that the majority's opinion does not focus on the text of section 2254(e)(2), but rather, centers on what it views

majority's identified costs imposed by federal habeas—the weakening of a state's ability to enforce social norms through criminal law and the disturbance of a state's criminal justice system—served as sufficient justifications for the continued narrowing of access to federal habeas relief.¹⁸² The Court's reliance upon these perceived costs and its overly broad interpretation of AEDPA's limitations imposed upon federal habeas review fails to comport with protections offered by the Sixth Amendment.¹⁸³ In emphasizing AEDPA's valuation of finality over fairness, the majority's interpretation of AEDPA attributes far more than AEDPA purported to, or would constitutionally be permitted to, accomplish.¹⁸⁴

Justice Sotomayor's dissent captures the majority's finality-centered focus in interpreting section 2254(e)(2), which ultimately fails to “guard against extreme malfunctions in the state criminal justice systems.”¹⁸⁵ The extreme malfunction ignored in the *Shinn* opinion subjects Ramirez and Jones to face execution without the opportunity to vindicate their constitutional right to effective counsel and subjects similarly situated petitioners to a similar fate.¹⁸⁶ While the Supreme Court's broad interpretation of AEDPA has typically disfavored habeas relief, the legislative intent and purpose behind AEDPA does not demand emphasizing the values of comity, finality, and federalism over all other concerns.¹⁸⁷ Failing to protect other concerns, particularly in cases where ineffective assistance of counsel claims are raised, creates a criminal justice system lacking safeguards for a petitioner to vindicate their constitutional right to effective counsel.¹⁸⁸

The “perverse” and “illogical” decision rendered by the majority implicates the utility of AEDPA.¹⁸⁹ The Supreme Court's continual narrowing of the scope of federal habeas review in reliance upon its interpretation of AEDPA is inconsistent with what Congress had intended with AEDPA's passage.¹⁹⁰ In signing AEDPA into law, President Bill Clinton rationalized doing so “on the understanding that the courts can and will interpret these provisions” with the ideal of an independent federal court that has the power “to say what the law is” and

as “AEDPA's unyielding purpose: ensuring that federal courts ‘afford unwavering respect’ to state court criminal proceedings”).

182. *Id.* at 1731.

183. *See* Sandman, *supra* note 80, at 18 (discussing the *Shinn* Court's “unwavering” deference to the finality of state court decisions in the face of potential constitutional violations).

184. *See* Reinhardt, *supra* note 42, at 1224-25, 1229 (citing the Supreme Court's interpretations of AEDPA as having “troubling constitutional implications”).

185. *Shinn*, 142 S. Ct. at 1748 (Sotomayor, J., dissenting) (quoting *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011)).

186. *See id.* at 1749-50 (stressing that the damage wrought by the *Shinn* decision will extend to other cases).

187. *See* Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 507 (2007) (“‘Comity, finality, and federalism’ is now the favored idiom for erroneously invoking a legislative mood; it has become the means by which courts express an illegitimate hostility towards exacting standards of criminal procedure.”).

188. *See Shinn*, 142 S. Ct. at 1750 (Sotomayor, J., dissenting) (discussing that the majority's holding makes Sixth Amendment protections “illusory”).

189. *See id.* at 1740.

190. Reinhardt, *supra* note 42, at 1224-25.

apply such law to the cases before it.¹⁹¹ Making federal review relatively non-existent through deference to state court convictions ignores the reality that federal judges are “far better positioned than state court judges to protect the constitutional rights of criminal defendants.”¹⁹² Yet, in increasingly ruling that AEDPA forecloses federal review of state convictions in the name of comity, finality, and federalism, the Supreme Court abdicates the important role it is meant to serve as a final arbitrator in securing individual rights.¹⁹³ Instead, limiting the ability of federal courts to review state court decisions serves as a weak deterrent to reduce systematic state violations of a defendant’s constitutional rights.¹⁹⁴

B. The Future of Martinez Hearings

As discussed in Justice Sotomayor’s dissent, the Supreme Court’s extensive line of precedent narrowly interpreting AEDPA to limit access to federal habeas relief does not command the result in *Shinn*.¹⁹⁵ Instead of embracing the logic in *Martinez* and *Trevino*, the majority’s holding in *Shinn* effectively overrules both cases by making the promise of federal review offered to habeas petitioners who receive ineffective trial and postconviction counsel “dead letters.”¹⁹⁶ The *Shinn* majority’s basis for dispensing with *Martinez* hearings altogether “because there is no point in developing a record for cause and prejudice if a federal court cannot later consider that evidence on the merits,”¹⁹⁷ serves to deny habeas petitioners a meaningful opportunity of federal review for any of their substantial ineffective trial counsel claims.¹⁹⁸

The majority’s holding has already impacted *Martinez* hearings, as several federal courts have reasoned that since a federal district court is not allowed to consider the evidence produced at a *Martinez* hearing to determine the merits of an ineffective assistance of trial counsel claim, the courts should not hold a *Martinez* hearing at all.¹⁹⁹ This has led federal courts to set new and developing

191. See Clinton, *supra* note 23 (“If [Section 2254(e)] were read to deny litigants a meaningful opportunity to prove the facts necessary to vindicate Federal rights, it would raise serious constitutional questions. . . . The provision applies to situations in which ‘the applicant has failed to develop the factual basis’ of his or her claim. Therefore, [this provision] is not triggered when some factor that is not fairly attributable to the applicant prevented evidence from being developed in State court.”).

192. See Adelman, *supra* note 41; see also Reinhardt, *supra* note 42, at 1232 (citing heavy caseloads on resource-constrained state courts as a reason that meritorious claims are more likely to be missed in state courts rather than federal courts).

193. Reinhardt, *supra* note 42, at 1252-53.

194. See Primus I, *supra* note 44, at 53.

195. *Shinn v. Ramirez*, 142 S. Ct. 1718, 1740 (2022) (Sotomayor, J., dissenting).

196. *Id.* at 1747.

197. *Id.* at 1738-39.

198. Respondents’ Brief, *supra* note 95, at 49-50.

199. See, e.g., *Marcyniuk v. Payne*, 39 F.4th 988, 998-99 (8th Cir. 2022) (discussing that a federal district court can only hold an evidentiary hearing if the habeas petitioner satisfies the requirements of section 2254(e)(2) and failure to meet either of section 2554(e)(2)’s requirements would make holding a *Martinez* hearing improper if the state court record would not afford a habeas petitioner relief); *Williams v. Superintendent Mahanoy SCI*, 45 F.4th 713, 723 (3d Cir. 2022) (“While *Martinez* may give [a habeas petitioner] a second chance, AEDPA does not. . . . [T]he District Court may not use the expanded record

standards considering the merits of a habeas petitioner's trial ineffectiveness claim based solely on the state court record.²⁰⁰ This new standard is particularly problematic for trial counsel ineffectiveness claims because the evidence used to support such claims are typically found *outside* of the state court record.²⁰¹ Only relying upon the state record in evaluating an ineffective assistance of counsel claim will routinely leave petitioners with evidence of their meritorious ineffective assistance of trial counsel claims without an opportunity to present such evidence in court.²⁰²

For *pro se* habeas petitioners, it stretches believability that these petitioners will be able to effectively navigate the habeas process and adequately investigate their own cases while incarcerated in instances where trial counsel has proven ineffective.²⁰³ Even under circumstances where a habeas petitioner is represented by postconviction counsel, that counsel's ineffectiveness should not be the determinative factor in settling the merits of a habeas petitioner's ineffective assistance of trial counsel claim.²⁰⁴ Continuing to allow and justify such a result defeats the purpose of the Sixth Amendment guarantee providing effective trial representation and allows injustice within the state judicial system to go undiscovered and ignored.²⁰⁵

C. The Need for Reform in Habeas Proceedings

The current habeas corpus framework limits meaningful opportunities for petitioners who are in custody in violation of the Constitution or federal law to obtain habeas relief.²⁰⁶ While federal statute provides for the appointment of habeas counsel in federal court, AEDPA and the Supreme Court's subsequent interpretations of the statute limit the arguments and evidence introduced in federal court to what was presented in state court.²⁰⁷ In cases where state prisoners receive ineffective postconviction counsel—or no counsel at all—AEDPA's limitations upon federal habeas proceedings restrict a federal court's ability to hear meritorious claims.²⁰⁸ AEDPA's constitutional issues, relative ineffectiveness,

to decide the merits of [petitioner's] ineffective-assistance claim, so a *Martinez* hearing would be a waste of time unless [petitioner] can prevail on the state record."); *Creech v. Richardson*, 40 F.4th 1013, 1028 (9th Cir. 2022) (explaining that *Shinn* "greatly restrict[ed] the circumstances in which a federal habeas court deciding *Martinez* claims may consider evidence beyond that already contained in the state court record").

200. *Williams*, 45 F.4th at 723-24.

201. *Shinn*, 142 S. Ct. at 1746 (Sotomayor, J., dissenting); see also *Martinez v. Ryan*, 566 U.S. 1, 13 (2012) ("Direct appeals, without evidentiary hearings, may not be as effective as other proceedings for developing the factual basis for the claim.").

202. See *Sandman*, *supra* note 80, at 18.

203. *Marceau*, *supra* note 87, at 156.

204. See *Bright*, *supra* note 6, at 680-82 (discussing the implications of poor lawyering on limiting the opportunity for full federal habeas review).

205. *Sandman*, *supra* note 80, at 18.

206. *Olson-Gault*, *supra* note 67.

207. *Id.*

208. *Id.*

and constriction of access to federal habeas review warrant the reform or reversal of the statute.²⁰⁹ Reforms to habeas corpus proceedings and to AEDPA could better protect individual constitutional rights and ensure that injustice within the state and federal criminal justice systems does not go undiscovered.²¹⁰

The constitutional concerns surrounding AEDPA warrant a look at the statute's rules and procedures.²¹¹ Some have argued that AEDPA violates the Suspension Clause of the Constitution.²¹² Others have argued that AEDPA fails to abide with the Due Process Clause of the Fourteenth Amendment.²¹³ Particularly in the realm of factfinding, "serious constitutional problems" are raised by the Supreme Court's interpretation in *Shinn* since it denies "litigants a meaningful opportunity to prove the facts necessary to vindicate Federal rights."²¹⁴ The majority's reading of section 2254(e)(2) to attribute fault to habeas petitioners who have received ineffective trial and appellate counsel forecloses evidentiary development and any meaningful opportunity for petitioners to have the merits of their ineffective assistance of trial counsel claims adjudicated in federal court.²¹⁵ The limitations imposed by section 2254(e)(2) on the development of facts in federal court undermines a petitioner's opportunity to receive a full and fair review.²¹⁶ Without a full federal review of a petitioner's case, deference to unfair state proceedings is not in accordance with the requirements of due process and the protection of the right to counsel under the Sixth Amendment.²¹⁷ While the constitutional issues surrounding AEDPA could justify a legal challenge to the statute's viability, any constitutional challenge to reform AEDPA is likely to fail in the face of the Supreme Court's relatively uniform protection of AEDPA.²¹⁸

209. See Nasrallah, *supra* note 42, at 1164 (noting that Congress may run into Suspension Clause problems if it prohibits federal courts from reviewing habeas petitions); Sandman, *supra* note 80, at 19 (asserting that the Court's interpretation of AEDPA shields "constitutionally tainted death sentences from federal review").

210. Marceau, *supra* note 87, at 146 (expanding federal habeas review could provide an opportunity to challenge inadequate state criminal proceedings); Primus II, *supra* note 57, at 696 (arguing that changing when ineffectiveness claims are brought in habeas proceedings would benefit a petitioner's ability to vindicate their Sixth Amendment rights and benefit a State's interest in finality).

211. See Nasrallah, *supra* note 42, at 1152 ("AEDPA flirts with the line between the politically foolish and the unconstitutional.").

212. See, e.g., Black, *supra* note 27, at 30 (asserting that Congress cannot constitutionally modify habeas, but rather, Congress can only strip federal courts of habeas jurisdiction through suspension of the writ).

213. See, e.g., *id.* at 37-38, 43-44 (discussing the various due process issues created by AEDPA); Marceau, *supra* note 87, at 6 (analyzing due process concerns if a criminal defendant is prevented from obtaining a full and fair process or opportunity to litigate their claims).

214. See Clinton, *supra* note 23.

215. *Shinn v. Ramirez*, 142 S. Ct. 1718, 1746 (2022) (Sotomayor, J., dissenting).

216. Marceau, *supra* note 87, at 144.

217. *Id.* at 145.

218. Kimberly Woolley, Note, *Constitutional Interpretations of the Antiterrorism Act's Habeas Corpus Provisions*, 66 GEO. WASH. L. REV. 414, 416 (1998) (arguing that while AEDPA may be unconstitutional, the current composition of the Supreme Court will likely result in failure for any constitutional challenge).

The fact that AEDPA's goals have not been met serves as another justification for the reform or repeal of the statute.²¹⁹ AEDPA's goals of increasing the speed of capital cases has not been realized nor has the statute decreased the number of habeas petitions filed.²²⁰ Rates of granted relief have decreased under AEDPA, which indicates that courts have not been able to more easily distinguish meritorious claims from frivolous ones.²²¹ AEDPA demonstrates that diminishing access to federal review has proven to be an insufficient solution in resolving the underlying issues within state criminal justice systems generating constitutional violations and wrongful convictions.²²²

Further, AEDPA's reliance upon state courts and prosecutors to rectify procedural and constitutional errors is misplaced.²²³ Investigative and prosecutorial misconduct, inadequate legal defense, and judicial error remain pervasive issues throughout state criminal justice systems that are left unchecked by federal review under AEDPA's regime.²²⁴ In particular, Jones's case raises concerns that without federal review acting as a safeguard against constitutional violations, there is an increased likelihood that innocent prisoners will be executed.²²⁵ Further, as long as inadequate legal defense remains a prevalent reason innocent individuals are incarcerated, cases like *Shinn* will prevent wrongfully incarcerated individuals from vindicating their constitutional rights.²²⁶ Unless state criminal proceedings can be more fairly adjudicated, the solution imposed by AEDPA to narrow federal habeas review will continually fail to deter constitutional violations within state criminal justice systems.²²⁷

In response to these issues, habeas proceedings and AEDPA itself should be reformed to better ensure that petitioners have at least one meaningful opportunity to bring claims of ineffective assistance of trial counsel before a court.²²⁸ While unlikely, a complete overhaul of the habeas corpus framework or the complete

219. See Beekhuizen, *supra* note 24, at 333.

220. *Id.* at 331.

221. See *id.* at 332; Row, *supra* note 27, at 267 (providing that the rate of granted relief to death row inmates has markedly decreased since the passage of AEDPA).

222. See James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2136-37 (2000) (explaining that solutions seeking to target the length and cost of habeas proceedings by simply foreclosing access to habeas review does not make the process more efficient if the underlying process is severely deficient).

223. See, e.g., Emily Hoerner, *Missouri Attorney General's Office Pushes to Keep Innocent People in Prison*, INJUSTICE WATCH (Sept. 11, 2020), <https://perma.cc/AE2M-QZWH> (discussing the Missouri Attorney General's office stating that death row exoneree Joseph Amrine should be executed even if the court determined he was actually innocent due to procedural barriers in his case); Gross, *supra* note 46, at 20-21 (discussing the vast number of exonerations in the American criminal justice system).

224. See Samuel R. Gross et al., *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement*, NAT'L REGISTRY OF EXONERATIONS 11 (2020), <https://perma.cc/PV9R-B8CD>.

225. Kanu, *supra* note 47; see also *Jones v. Shinn*, 943 F.3d 1211, 1231 (9th Cir. 2019) (upholding the district court's determination that Jones's attorney failed to present medical evidence that would go to prove his innocence by undermining the confidence in the trial court's verdict).

226. Primus II, *supra* note 57, at 686-88.

227. Kanu, *supra* note 47.

228. See Garrett, *supra* note 31, at 1746 (emphasizing that reform to habeas proceedings can increase access to the judicial system by allowing federal courts to review and reach the merits of habeas claims).

repeal of AEDPA may be in order to effectively adjudicate a prisoner's constitutional claims.²²⁹ Because a complete overhaul of habeas proceedings would prove difficult,²³⁰ more moderate reform, such as extending the right of counsel to collateral proceedings, would better reform and respond to issues within habeas corpus proceedings.²³¹ *Shinn's* essential overruling of *Martinez's* equitable exception would make it unlikely that federal habeas review could be expanded through the creation of judicial equitable exceptions.²³² Particularly in response to *Shinn*, a potential remedy would be to read section 2254(e)(2) as affording a federal judge broader authority to reexamine state fact finding by holding evidentiary hearings to hear new evidence.²³³ Another remedy would be to completely repeal section 2554(e)(2) to afford a federal judge broader discretion in deciding whether to hold an evidentiary hearing in order to effectively adjudicate a habeas petitioner's claim.²³⁴

V. CONCLUSION

AEDPA, and the Supreme Court's interpretations of it, should not be used as a device to ensure that the finality of state court convictions stand above all else.²³⁵ Habeas relief and AEDPA should ensure that prisoners are justly and legally in custody in conformity with the Constitution and laws of the United States.²³⁶ The decision in *Shinn* highlights the logical inconsistencies generated by strict readings of AEDPA and places undue deference on state court decisions that prevent habeas petitioners from vindicating their constitutional rights through federal review.²³⁷ The extreme malfunction ignored by the *Shinn* majority in the name of finality deprived Ramirez and Jones of their right to effective counsel, which constitutes the "foundation for our adversary system."²³⁸ As Justice Sotomayor asserted in her dissent,

229. See *id.*; see also Radley Balko, *Opinion: It's Time to Repeal the Worst Criminal Justice Law of the Past 30 Years*, WASH. POST (Mar. 3, 2021, 4:09 PM), <https://perma.cc/VT7L-6WLB> (discussing the need for AEDPA's repeal or reform).

230. See Garrett, *supra* note 31, at 1765 (noting the complex issues that would arise from a complete repeal of AEDPA).

231. See Beekhuizen, *supra* note 24, at 335-38 (arguing for an expanded gateway for innocence claims, removal of AEDPA's "clearly established Federal law" language, and removal of court of appeals authorization for successive petitions); Donald A. Dripps, *Ineffective Litigation of Ineffective Assistance Claims: Some Uncomfortable Reflections on Massaro v. United States*, 42 BRANDEIS L.J. 793, 799-800 (2004) (proposing an extension of the right to counsel in collateral, habeas proceedings).

232. PRIMUS, *supra* note 41, at 3.

233. Garrett, *supra* note 31, at 1775.

234. *Id.*

235. Sandman, *supra* note 80, at 18-19.

236. See *Shinn v. Ramirez*, 142 S. Ct. 1718, 1749 (2022) (Sotomayor, J., dissenting) (discussing the majority's failure to understand the "gravity of the state systems' failure in these two cases" that strikes at the breakdown in fundamental fairness in such prosecutions).

237. Sandman, *supra* note 80, at 18-19.

238. *Shinn*, 142 S. Ct. at 1749-50 (Sotomayor, J., dissenting) (quoting *Martinez v. Ryan*, 566 U.S. 1, 12 (2012)).

[T]he Court understates, or ignores altogether, the gravity of the state systems' failures in these two cases. To put it bluntly: Two men whose trial attorneys did not provide even the bare minimum level of representation required by the Constitution may be executed because forces outside of their control prevented them from vindicating their constitutional right to counsel.²³⁹

While the Supreme Court's decision is not particularly shocking provided its long history of interpreting AEDPA to limit federal habeas review, the implications from this decision highlight the growing, general acceptance that a federal court overturning a flawed state court conviction is more harmful than a state improperly imprisoning or sentencing a prisoner to death in violation of the Constitution.²⁴⁰

239. *Id.* at 1749.

240. Adelman, *supra* note 41.

