
THE INDIAN LAW BOMBSHELL: *MCGIRT V. OKLAHOMA*

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ABSTRACT

*On July 9, 2020, the United States Supreme Court held by a five-four vote that the borders of the 1866 Muscogee (Creek) Nation Reservation in Oklahoma remain intact. The decision landed like a bombshell. Overnight, the Muscogee (Creek) Reservation was reaffirmed and recognized as covering 3.25 million acres. The entire area is once again recognized as “Indian Country,” as defined by federal law. One million Oklahomans discovered that they now live on an Indian reservation, including 400,000 people in the city of Tulsa. The United States, Oklahoma, and Oklahomans will now have to deal with numerous and complex issues involving Muscogee (Creek) Nation jurisdiction over an enormously larger expanse of land and population than was previously assumed. This case has crucially important implications that will involve the Muscogee (Creek) Nation, other tribes in Oklahoma, and tribes across the country in future negotiations, lawsuits, and perhaps legislative efforts to address the issues that will arise. *McGirt v. Oklahoma* is likely the most significant Indian law case in well over 100 years. In this Article, we examine *McGirt* in-depth and we then focus our attention on its future ramifications for the Muscogee (Creek) Nation, federal Indian law, the United States, Indian nations in Oklahoma, the State of Oklahoma, and Indian nations and peoples across the country.*

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INTRODUCTION

The United States Supreme Court decides several Indian law cases almost every year. These cases are crucial, of course, for the Indian nations and parties involved. Sometimes these decisions can alter federal Indian law for all tribes and Indian peoples across the country—and sometimes an Indian law case drops like a bombshell. *McGirt v. Oklahoma*¹ is just such a case.

On July 9, 2020, in a five-four decision, the Court held that the boundaries of the Muscogee (Creek) Nation (“MCN”) Reservation, as defined in its 1866 treaty with the United States, remain intact.² Overnight, the MCN Reservation was reaffirmed and re-recognized as covering 3.25 million acres, and thus the entire area is “Indian country” as defined by federal law.³ Consequently, one million Oklahomans live on an Indian reservation, including 400,000 in the city of Tulsa.⁴ Now, Oklahoma will have to deal with the issue of MCN jurisdiction over an expanse of land and population twenty-five times larger than had been previously assumed.⁵ This case has enormous implications that will involve the MCN, the United States, Oklahoma, and other Indian tribes in Oklahoma and across the country in future negotiations, litigations, and perhaps legislative efforts to address the issues that will arise. Oklahoma state courts have already relied on *McGirt* to rule that the reservations of the Cherokee Nation, Chickasaw Nation, Choctaw Nation, and Seminole Nation also continue to exist, and litigation regarding other tribal reservations is ongoing.⁶ Surely, *McGirt* is one of the most significant and impactful Supreme Court Indian law cases in nearly 100 years. But if the state, the tribes, and the United States can adjust to this new

¹ 140 S. Ct. 2452 (2020).

² *Id.* at 2482.

³ 18 U.S.C. § 1151 (“[T]he term ‘Indian country’, as used in this chapter, means . . . all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . .”).

⁴ *See McGirt*, 140 S. Ct. at 2501 (Roberts, C.J., dissenting).

⁵ *See id.* at 2482; *infra* note 318.

⁶ *See, e.g., Oklahoma v. Hogner*, No. CF-2015-263, at 6 (Dist. Ct. Craig Cnty., Okla. Sept. 30, 2020), <https://attorneygeneral.cherokee.org/media/hm1n4b1t/hogner-order-on-remand.pdf> [<https://perma.cc/45MC-G87H>] (holding that Cherokee Nation Reservation was never disestablished and thus Indian defendant committed his crime in Indian Country); *Oklahoma v. Barker*, No. CF-2019-92, at 9-10 (Dist. Ct. Seminole Cnty., Okla. Sept. 3, 2020), <https://turtletalk.files.wordpress.com/2020/09/district-court-order.pdf> [<https://perma.cc/WX4G-MTYX>] (applying *McGirt* and dismissing state prosecution of Indian defendant who allegedly committed crime within 1866 reservation boundaries of Seminole Nation); Chris Casteel, *Judge Finds Chickasaw Nation’s Reservation Still Exists*, OKLAHOMAN (Oct. 14, 2020, 1:25 AM), <https://oklahoman.com/article/5673877/judge-finds-chickasaw-nations-reservation-still-exists> [<https://perma.cc/73Z4-NSL3>] (discussing McClain County district judge’s ruling that “death row inmate . . . was wrongly tried in state court because the crime was committed on the Chickasaw Nation’s Reservation,” marking the “first judicial recognition of the Chickasaw reservation in the wake of” *McGirt*). *See also* *Oneida Nation v. Village of Hobart*, 968 F.3d 664, 668 (7th Cir. 2020) (citing *McGirt* and holding that Oneida Nation’s Reservation boundaries in Wisconsin had not been diminished).

reality, it is possible that under settled case law and the example of other states that also have numerous Indian nations and reservations within their borders, this new situation can be managed and ultimately work well for all the governments and peoples concerned.

Even before *McGirt* was issued, several Indian nations negotiated with Oklahoma regarding the handling of the case. Surprisingly, the state and what are known as the “Five Civilized Tribes” (Five Tribes)⁷ announced an agreement-in-principle four days after the opinion, asking Congress to enact legislation to ameliorate the serious complications and uncertainties that the parties assumed *McGirt* would produce.⁸ It appears that the agreement-in-principle would have completely reversed the important tribal win that *McGirt* represents and would also have injured other Indian nations in Oklahoma.⁹ At least three of the Five Tribes ultimately repudiated that agreement-in-principle,¹⁰ and on January 22, 2021, the Oklahoma governor appointed a negotiator and once again invited the Five Tribes to the negotiating table.¹¹

In this Article, we examine *McGirt* in-depth and also highlight its ramifications on federal Indian law, Indian nations in Oklahoma, the State of Oklahoma, the United States, and Indian nations and peoples across the country. Part I describes how the MCN and other Indian tribes were forcibly and sometimes voluntarily removed westward in the 1830s to the Indian Territory,¹² which ultimately became part of Oklahoma. Part II analyzes the *McGirt* decision, its analysis of when and how Indian reservations are diminished in size or completely disestablished, and the dissent. Part III sets out the complex and

⁷ The Five Civilized Tribes consist of “Muscogee (Creek), Cherokee, Chickasaw, Choctaw and Seminole Nations.” See *Tribal Leaders Release Set of Principles on Jurisdiction Following SCOTUS Ruling*, ANADISGOI (July 16, 2020), <https://anadisgoi.com/index.php/government-stories/349-tribal-leaders-release-set-of-principles-on-jurisdiction-following-scotus-ruling> [https://perma.cc/5FLU-CAWS].

⁸ See Press Release, Five Tribes & Oklahoma Off. of the Att’y Gen., *Murphy/McGirt Agreement-in-Principle* (July 16, 2020), https://www.oag.ok.gov/sites/g/files/gmc766/f/documents/2020/doc_-_2020-07-15_-_murphy_final_-_agreement-in-principle.pdf [https://perma.cc/655T-25K6].

⁹ See *id.*

¹⁰ Chris Casteel, *Creek, Seminole Nations Disavow Agreement on Jurisdiction*, OKLAHOMAN (July 18, 2020, 1:23 AM), <https://www.oklahoman.com/article/5667046/creek-seminole-nations-disavow-agreement-on-jurisdiction> [https://perma.cc/6VZR-EU7Z]; Gary Batton, *FAQ: Gaming Compact McGirt, Agreement-in-Principle and Latimer County Property*, CHOCTAW NATION (Aug. 4, 2020), <https://www.choctawnation.com/chief-voice/080420weekly-update> [https://perma.cc/9HK3-KKRC].

¹¹ Kaylee Douglas, *Gov. Stitt Calls for Tribes to Enter Formal Negotiations with State Following McGirt Ruling*, OKLA.’S NEWS 4 (Jan. 25, 2021, 5:01 PM), <https://kfor.com/news/local/gov-stitt-calls-for-tribes-to-enter-formal-negotiations-with-state-following-mcgirt-ruling/> [https://perma.cc/3XU5-NZZE].

¹² The term “Indian Territory” was first used in the 1830s for what is now the eastern part of Oklahoma. See RONALD N. SATZ, *AMERICAN INDIAN POLICY IN THE JACKSONIAN ERA* 127 (1975).

politically fraught jurisdictional and governance issues that are arising for the MCN, the United States, and Oklahoma. Finally, the authors conclude by opining that *McGirt* is an enormously important decision for the MCN and all Indian nations, and notwithstanding the decades of negotiation, litigation, and tribal, state, and federal legislation that might follow, the MCN and all Indian nations should fight to preserve the significant and honorable victory that *McGirt* represents.

I. THE CREEK NATION AND OKLAHOMA PRE-*McGIRT*

The Indian Territory, later incorporated into Oklahoma (“[t]he state belonging to Red People”),¹³ was a presumed barren landscape that Congress used to relocate Indian nations from the East to satiate the desires of White settlers for Indian lands.¹⁴ Among the first tribes removed from their ancestral lands to Indian Territory were the Choctaw, Chickasaw, Muscogee Creek, Seminole, and Cherokee Nations, known by the United States as the “Five Civilized Tribes.”¹⁵ These Five Tribes are bonded by commonalities in culture and language, being indigenous to the southeastern United States, their forcible removal to Indian Territory, and by modern-day consequences of being subject to similar federal laws and signatories to similar treaties with similar reserved rights. However, *McGirt* only expressly addressed the MCN, its treaties, and the existence of its reservation, so its history is of primary focus here.

A. *Muscogee (Creek) Nation Pre-removal*

The Muscogee (Creek) are a mound-building people from the lands known today as Alabama, Georgia, Florida, and South Carolina.¹⁶ The MCN was a confederacy made up of tribal towns each with its own political system, lands, and diplomatic autonomy.¹⁷ The confederacy was adaptable and regularly absorbed smaller tribes, established new towns, and had various types of relationships with Euro-American colonists.¹⁸ Muscogee towns on the Coosa and Tallapoosa Rivers were known as the “Upper Creeks” and towns along the Chattahoochee and Flint Rivers were known as the “Lower Creeks.”¹⁹ By virtue

¹³ *Choctaw Place Names in “Oklahumma,”* CHAHTA ANUMPA AIKHXVNA SCH. OF CHOCTAW LANGUAGE, <https://choctawschool.com/home-side-menu/history/choctaw-place-names-in-oklahumma.aspx> [<https://perma.cc/S672-WDGC>] (last visited Dec. 5, 2021).

¹⁴ See ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES’ HISTORY OF THE UNITED STATES 95-116 (2014).

¹⁵ See Andrew K. Frank, *Trail of Tears*, OKLA. HIST. SOC’Y, <https://www.okhistory.org/publications/enc/entry.php?entry=TR003> [<https://perma.cc/5WAS-NQXA>] (last visited Dec. 5, 2021).

¹⁶ *Muscogee (Creek) Nation History*, MUSCOGEE NATION, <https://www.mcnnsn.gov/culturehistory/> [<https://perma.cc/T5JM-GCXA>] (last visited Dec. 5, 2021).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

of their proximity to colonists, the “Lower Creeks” had higher rates of intermarriage with Euro-Americans and more contact with Euro-American governments and cultures.²⁰

After the Revolutionary War, there was increased pressure from Americans to wrest desirable lands from Indian nations for the settlement and proliferation of White society.²¹ Benjamin Hawkins was appointed as an Indian agent and sent to Georgia to facilitate this process.²² Hawkins sought to hasten the rate at which the United States acquired lands from the MCN.²³ Additionally, Hawkins attempted to influence Creeks to discard traditional political and legal structures engrained in their clan system and their hunting, fishing, and farming traditions to adopt settler lifestyles.²⁴ The Upper Creeks remained committed to their traditional systems of governance and subsistence, combining farming and hunting/gathering, while the Lower Creeks began to incorporate elements of Euro-American cultures related to farming and diplomatic relations.²⁵ Hawkins’s efforts exacerbated a growing rift within the Muscogee confederacy between the Upper and Lower Creeks that was often centered around competing visions of Creek law, life, tradition, culture, and the future of the confederacy.²⁶

In 1802, the United States executed a compact with Georgia under which the former colony granted the United States eighty-six million acres of Indian land (from the Alabama border to the Mississippi River) in exchange for \$1,250,000 and an agreement “[t]hat the United States shall, at their own expense, extinguish for the use of Georgia, as early as the same can peaceably be obtained, on reasonable terms, the Indian title.”²⁷ Soon thereafter, a treaty was executed with the MCN ceding more land.²⁸ Determined to get even more land, Hawkins signed another treaty with the Muscogee Creek National Council that was ratified in 1805.²⁹ Despite reserving land unto itself, the MCN fell victim to Americans who continued to take Creek lands in defiance of the treaties while the Governor of Georgia continued to demand that the Creeks cede the remainder of their lands.³⁰

²⁰ *Id.*

²¹ See Grace M. Schwartzman & Susan K. Barnard, *A Trail of Broken Promises: Georgians and Muscogee/Creek Treaties, 1796-1826*, 75 GA. HIST. Q. 697, 698 (1991).

²² *Id.* at 698-99.

²³ *Id.* at 699.

²⁴ *Id.* at 699-700.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Articles of Agreement and Cession Regarding Georgia’s Western Lands, Ga.-U.S., art. II, Apr. 24, 1802, GA. ARCHIVES VIRTUAL VAULT, <https://vault.georgiaarchives.org/digital/collection/adhoc/id/416> [<https://perma.cc/L6R6-6WAU>] (last visited Dec. 5, 2021).

²⁸ Schwartzman & Barnard, *supra* note 21, at 700.

²⁹ *Id.*

³⁰ *Id.* (“Secretary of War Henry Dearborn directed Hawkins in 1804 to meet with the Muscogee/Creek National Council and use every reasonable method at his command to obtain further land cessions.”).

In September 1811, Shawnee leader Tecumseh visited the Muscogee town of Tuckabatchee to encourage the Creeks to align with him and other Indians to combat White encroachment on Indian lands.³¹ Hawkins wrote Secretary of War William Eustis that the Indians were uniting to wage war against Americans, but noted that the Lower Creeks refused to join the war.³² The following spring, a party of Upper Creeks known as “Red Sticks”³³ attacked American settlers near Nashville.³⁴ In retaliation, the United States invoked the Treaty of New York which permitted the United States to convict individual Creeks of capital crimes under U.S. law.³⁵ Lower Creek chiefs Big Warrior and William McIntosh, fearful of retaliation, dispatched warriors to find members of the Red Sticks and prosecute them under Creek law, which resulted in the execution of eleven Creeks and a subsequent retaliation by the Red Sticks that caused a Creek civil war.³⁶

Tecumseh encouraged Indians to align with the British in the War of 1812, and thousands did so, while the United States threatened the Creeks that they would lose their country if they supported the British.³⁷ The rift within the Creek Nation further widened. Each time the Red Sticks attacked an American settlement, Hawkins demanded Creek chiefs capture the offenders and extract retribution.³⁸ After the Lower Creeks executed an Upper Creek leader for participating in a Red Stick attack on a White settlement, the Upper Creeks attacked the Lower Creeks, and the United States deployed General Andrew Jackson to quell the Red Stick militia.³⁹

Thereafter, the Upper Creeks aligned with the British in the War of 1812, and the Lower Creeks aligned with the Americans.⁴⁰ Jackson organized a militia of Creek and Cherokee soldiers to attack the Red Sticks’ militias and towns.⁴¹ The war within the Creek Nation was ended by the United States’ force and was

³¹ Susan K. Barnard & Grace M. Schwartzman, *Tecumseh and the Creek Indian War of 1813-1814 in North Georgia*, 82 GA. HIST. Q. 489, 493 (1998).

³² *Id.* at 493-94.

³³ Creeks who engaged in military resistance against encroaching White settlers became known as “Red Sticks” because of the red painted clubs they carried. NAT’L PARK SERV., U.S. DEP’T OF INTERIOR, THE CREEK INDIAN WAR OF 1813-1814 [hereinafter CREEK INDIAN WAR], <https://www.nps.gov/ocmu/learn/historyculture/upload/Accessible-Creek-Indian-War-of-1813-1814-2.pdf> [<https://perma.cc/DPQ8-ZACB>] (last visited Dec. 5, 2021).

³⁴ Barnard & Schwartzman, *supra* note 31, at 495 (“The animosity between the Indians and settlers culminated in the spring of 1812 when a party of Upper Creek Red Sticks, led by the Little Warrior/Tuskegee Tustunnegee, murdered a group of white settlers along the Duck River near Nashville.”).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 496-97.

³⁸ *See id.* at 497.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ CREEK INDIAN WAR, *supra* note 33.

formalized in the Treaty of Fort Jackson, in which the Creek Nation was forced to cede twenty-three million acres of land—an amount Jackson had calculated to be the United States' expenses during the war.⁴²

After the War of 1812, President James Madison assured the Creek Nation that it would be furnished with the necessities of life until the next harvest and that its remaining lands “would never be taken from them without their consent and suitable payment.”⁴³ These promises, however, were short-lived. In 1817, Andrew Jackson offered the Creek Nation land west of the Mississippi in exchange for its remaining lands in Georgia, but it refused, later passing a law forbidding land sales after a number of other deals.⁴⁴ Prior to passing this law, another treaty with the Creeks in 1818 resulted in the cession of 1.5 million acres for a payment that was never delivered to the Creek Nation.⁴⁵

The millions of acres that the Creek Nation ceded via treaties were not enough to satiate American settlers. In 1820, President James Monroe informed the Senate that Georgia wanted more Creek land and payment for property stolen from Georgians by Creeks and Cherokees, while the Creek Nation protested the government's failure to pay past treaty annuities.⁴⁶ Again, another treaty was proposed as the solution.⁴⁷ At this treaty session, Georgia demanded \$350,000 for allegedly stolen property, horses, and enslaved people in addition to an acre-for-acre swap of land in the West, but the Creeks refused to remove.⁴⁸ Thirty-six Creek town chiefs left the meeting, but, afterwards, some leaders agreed to cede land to the United States if a Creek town opted to move west.⁴⁹ Chief William McIntosh, the principal Creek leader in these negotiations, convinced the National Council to suspend the moratorium on land sales so that he could sign the treaty.⁵⁰

After this latest treaty, only ten million acres were left to the MCN in Georgia, and a threat of death lingered over any Creek who attempted to sell more.⁵¹ But Georgia continued pushing to extinguish all Indian title in its state, and President Monroe took the issue to Congress.⁵² In addition, Chief McIntosh continued to talk with the United States about selling more land, but once the Creek National

⁴² Barnard & Schwartzman, *supra* note 31, at 505.

⁴³ Schwartzman & Barnard, *supra* note 21, at 704.

⁴⁴ *Id.* at 705, 708.

⁴⁵ *Id.* at 705-06.

⁴⁶ *Id.* at 707.

⁴⁷ *Id.* (observing that few important chiefs were present at meeting during which new treaty was proposed).

⁴⁸ *Id.* at 707-08.

⁴⁹ *Id.*

⁵⁰ *Id.* at 708.

⁵¹ *Id.*

⁵² *Id.* at 709.

Council got wind of it, he was banned from being Chief, although he continued to conspire with the United States to acquire more land.⁵³

The Muscogee continued to resist land sales: “We feel an affection for the land in which we were born; we wish our bones to rest by the sides of our fathers.”⁵⁴ American treaty commissioners were unable to secure more land via a treaty that would be deemed valid across the Creek Nation and instead signed a secret treaty with McIntosh (who was later executed by the Creek Nation for this act).⁵⁵ In 1827, after the Lower Creeks negotiated the Treaty of Washington, some of them relocated west of the Mississippi.⁵⁶

B. *Creek Nation 1832 and 1833 Treaties*

Despite the ties the Five Tribes had to their homelands and impassioned resistance to removal, the federal Indian Removal Act was enacted on May 28, 1830.⁵⁷ The law permitted the President to remove tribes west of the Mississippi River after land exchanges and assurances to the tribes: “[T]he United States will forever secure and guaranty to them, and their heirs or successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same”⁵⁸

The MCN remained opposed to removal. In a letter dated April 8, 1831, Principal Chief Eneah Micco and other leaders told Secretary of War John Eaton, “our aged fathers and mothers beseech us to remain upon the land that gave us birth, where the bones of their kindred are buried, so that when they die they may mingle their ashes together.”⁵⁹ Additionally, the Creeks who had removed west reported that the lands were unsuitable and many returned to their eastern homelands.⁶⁰ However, Secretary Eaton continued to encourage the Creek to migrate and told them the United States would not stop Alabama from exercising its authority over them.⁶¹ The Tribe and settler communities were in constant tension, often erupting in acts of violence, due to Alabama’s imposition of state law and the settlers’ violent efforts to take land and property from the

⁵³ *Id.* at 710-12 (“While McIntosh continued to espouse the National Council’s stand, he was dealing covertly with Commissioners Campbell and Merriwether.”).

⁵⁴ *Id.* at 712 (quoting Letter from Little Prince, Chilly McIntosh, William McIntosh, Opothle Yoholo, & Hopoy Hadgo, Creek Council Members, to U.S. Comm’rs (Dec. 11, 1824), *reprinted in* H.R. REP. NO. 19-98, at 106, 107 (1827)).

⁵⁵ *Id.* at 713-14, 716 (“Aware that his signature on the paper meant he was also signing his own death warrant, [McIntosh] and his followers appealed to the president for protection.”).

⁵⁶ *Muscogee (Creek) Nation History*, *supra* note 16.

⁵⁷ Indian Removal Act, Pub. L. No. 21-148, 4 Stat. 411 (1830).

⁵⁸ *Id.* § 3, 4 Stat. at 412.

⁵⁹ GRANT FOREMAN, INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS 108 & n.5 (1932).

⁶⁰ *Id.* at 108 & n.6.

⁶¹ *Id.* at 108 (noting that Eaton indicated their “only hope for relief” was west of Mississippi River).

Creeks.⁶² The federal government failed to fulfill its treaty obligations to protect the Tribe from settlers and state jurisdiction—even arguing that it was unable to stop it.⁶³ As historian Grant Foreman describes,

The favorite argument of government officials from the president down, was the impotency of the government to function where its power was invoked to protect the Indians from oppression by the whites. . . . [T]he disgraceful and humiliating response was a disclaimer of the power and intention to keep those [treaty] promises.⁶⁴

Creek leaders traveled to Washington to protest Alabama’s unlawful exercise of jurisdiction over them and the failure of the federal government to live up to its promises, but the Secretary of War refused to talk to them about anything but the Creek Nation moving west.⁶⁵ The Creek Nation was left without relief from the violent encroachments of American settlers, and the United States, which bore treaty obligations to protect the Creek Nation, abdicated its role. Under these conditions, yet another treaty was executed. On March 24, 1832, the Creek Nation ceded all its lands east of the Mississippi.⁶⁶ The United States promised the Creek Nation a permanent home in Indian Territory and that “[no] State or Territory [shall] ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves.”⁶⁷ The Creek leaders were determined to secure their new lands in the West with the strongest title possible—fee title—and the guarantee that they would never become part of any territory or state again.⁶⁸ These provisions obviously reflected their frustrations with Georgia and Alabama, as well as their determination to guard their new land holdings from Americans.⁶⁹

The 1832 treaty promised to survey the cession and allot 2,187,000 acres to individual chiefs and heads of Creek households.⁷⁰ Individual Creek land holders then had the option to sell their allotments and remove west or remain

⁶² *Id.* at 107.

⁶³ ANGIE DEBO, *AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES* 5 (1972).

⁶⁴ FOREMAN, *supra* note 59, at 109.

⁶⁵ *Id.* at 110.

⁶⁶ *Id.* at 110-11 (excepting “individual selections which they were to occupy for five years unless sooner sold by them”).

⁶⁷ Treaty with the Creeks, Creek Nation-U.S., art. XIV, Mar. 24, 1832, 7 Stat. 366, 368 [hereinafter 1832 Treaty].

⁶⁸ See *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2461 (2020) (noting that 1833 Treaty between Creek Indians and United States provided that United States would grant, in fee simple, land to Creeks (citing Treaty with the Creeks, Creek Nation U.S., art. III, Feb. 14, 1833, 7 Stat. 417, 419 [hereinafter 1833 Treaty])).

⁶⁹ DEBO, *supra* note 63, at 5.

⁷⁰ JOHN T. ELLISOR, *THE SECOND CREEK WAR: INTERETHNIC CONFLICT AND COLLUSION ON A COLLAPSING FRONTIER* 47 (2010).

in Alabama as state citizens.⁷¹ The treaty assured that individual Creeks would not be removed by force “but they shall be free to go or stay.”⁷²

The treaty, however, also provided that trespassers on Creek Nation lands would not be removed until the land was surveyed, and White persons would not be removed if they had made improvements on the lands they had trespassed upon and if they had not been expelled by the Creeks.⁷³ This created a perverse incentive for Americans to trespass on the Creek Nation and quickly make improvements so that they could not be expelled.⁷⁴ The federal government hoped that market forces in Alabama would essentially result in Creek removal to Indian Territory.⁷⁵

The system of individual land allotments in the Creek homeland was a crushing blow to Creek society because it helped destroy both town and clan law, customs, and morale because “the Creek sense of self-worth was related to the integrity of their tribal community, not individual land ownership or the accumulation of personal wealth.”⁷⁶ In addition, White settlers continued to bring alcohol and violence into the Creek Nation in order to secure land, coerce Creeks to sell their individual holdings, and execute predatory agreements—putting Creeks in debt in hopes of acquiring funds the United States had promised in the treaty to pay Creek debts.⁷⁷

The Creek Nation once again wrote to Washington, D.C., asking that the federal government live up to its promises, and yet again the government expressly claimed it could not.⁷⁸ The U.S. Secretary of War Lewis Cass wrote to the United States Marshal for the Southern District of Alabama, Robert Crawford: “The only power vested in the President is to remove the intruders from the public lands. The State of Alabama has jurisdiction over that district of country, and her Legislature can only provide a remedy for this evil, and her courts of justice enforce it.”⁷⁹

The abdication of the federal government’s duties left the Creeks subject to the unmerciful State of Alabama. Trespassing settlers used the Alabama legal system against Creeks to coerce them to give into the settlers’ desires.⁸⁰

⁷¹ *Id.*

⁷² 1832 Treaty, *supra* note 67, art. XII, 7 Stat. at 367.

⁷³ *Id.* art. V.

⁷⁴ See FOREMAN, *supra* note 59, at 114.

⁷⁵ See DEBO, *supra* note 63, at 4-5 (explaining how Georgia encouraged robbing and plundering, with the federal government claiming it could not prevent it).

⁷⁶ ELLISOR, *supra* note 70, at 68-69 (noting that land allotment system sped up decentralization of tribal existence because tribespeople settled new tracts of land far from their community centers).

⁷⁷ See FOREMAN, *supra* note 59, at 119-21.

⁷⁸ See *id.* at 113-17.

⁷⁹ Letter from Lewis Cass, U.S. Sec’y of War, to Robert L. Crawford, U.S. Marshal of the S. Dist. of Alabama (Aug. 26, 1833), *reprinted in* S. DOC. NO. 23-512, at 759 (1st Sess. 1835).

⁸⁰ FOREMAN, *supra* note 59, at 117 (“Some of the white intruders . . . had a large number

Americans took advantage of the 1832 treaty and entered into predatory contracts with Creeks, subjecting them to debts and judgments under Alabama law, which outrageously prohibited Indians from even testifying against White men in court.⁸¹

In 1833, a delegation of Creek citizens selected the lands in the West, in the Indian Territory.⁸² Another new treaty conveyed the lands in fee simple title to be held in common by the entire Creek Nation, both those Creeks who had relocated under prior treaties and those who had remained east of the Mississippi.⁸³ The right to the land set aside in the West was to endure “so long as [the Creek Nation] shall exist as a nation, and continue to occupy the country hereby assigned to them.”⁸⁴

Parties of Creeks that had volunteered to move west left between 1833 and 1836 to escape the unrelenting hardships of starvation, debt, land loss, and societal devastation caused by encroaching American settlements and the extension of state law.⁸⁵ Lower Creeks, however, lashed out at American encroachments, and war ensued.⁸⁶ President Jackson used the war as an excuse to militarily remove the remaining Creeks, and some Creeks even committed suicide to escape removal.⁸⁷ More than 20,000 Creeks were removed by force between 1836 and 1837, thereby finalizing the removal of the Creek Nation.⁸⁸

C. *Creek Nation in Indian Territory*

There was no United States territorial government in the “Indian Territory,” despite the name.⁸⁹ Instead, the only existing governments were the tribal governments.⁹⁰ As a result of the strong rights reserved in their treaties, the Five Tribes were “constituted as the sovereign autonomy established in lieu of a prospective State,”⁹¹ were “in an entirely different relation to the United States

of claims against the Indians and threatened the latter that if they were removed they would sue every one without mercy. And . . . [the Indians] would be helpless in the state court of Alabama, where they could not be heard to defend themselves . . .”).

⁸¹ *Id.* at 120-21.

⁸² *See* 1833 Treaty, *supra* note 68, art. II, 7 Stat. at 418-19.

⁸³ *See id.* art. III, IV, 7 Stat. at 419.

⁸⁴ *Id.* art. III, 7 Stat. at 419.

⁸⁵ *See, e.g.*, CHRISTOPHER D. HAVEMAN, BENDING THEIR WAY ONWARD: CREEK INDIAN REMOVAL IN DOCUMENTS 72-74 (2018).

⁸⁶ *Id.* at 179 (identifying failure of 1832 Treaty of Washington, land frauds, and starvation as impetus for Second Creek War).

⁸⁷ *Id.* at 179-80.

⁸⁸ *Muscogee (Creek) Nation History*, *supra* note 16.

⁸⁹ Kirke Kickingbird, “Way Down Yonder in the Indian Nations, Rode My Pony Cross the Reservation!” from “Oklahoma Hills” by Woody Guthrie, 29 TULSA L.J. 303, 317 (1993).

⁹⁰ *Id.*

⁹¹ *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 638 (1970) (Douglas, J., concurring).

from other territories, and [were] for most purposes . . . to be considered as an independent country.”⁹²

During this initial time period, there was relative peace as the Five Tribes adjusted to massive cultural and lifestyle shifts.⁹³ The promise of the Indian Territory was a home “free from the pressures of white settlement; a place where their tribal governments might remain intact; a place which was to remain their’s [sic] forever ‘under the most solemn guarantees of the United States.’”⁹⁴

The MCN began rebuilding their life in the Indian Territory. Throughout the 1850s and 1860s, cattle grazing became an economic mainstay among the Five Tribes.⁹⁵ Communal ways of living and tribal towns were reestablished.⁹⁶ Creek chief Pleasant Porter stated that Creeks “always raised enough to eat, . . . and the country was prosperous.”⁹⁷ But contrary to the treaty promises, Indian Territory did not put the MCN beyond the reach of American encroachment. White settlers and corporations seeking wealth, land, and resources continued to thirst for Indian lands, and in the post-Civil War period the United States worked against the Five Tribes and facilitated renewed American encroachments on Indian Country.⁹⁸

D. *The Civil War and the Creek Nation 1866 Treaty*

After three decades of Creek rebuilding in the West, the Civil War broke out. The war split the Creek Nation just as it did the United States. Citizens that participated in, or advocated for, chattel slavery sided with the Confederacy, while some Creeks sided with the Union, and other Creeks remained neutral.⁹⁹

Like all the Five Tribes, and many other tribes in the Indian Territory, the MCN signed a treaty with the Confederacy in 1861 that assured “perpetual peace and friendship, and an alliance offensive and defensive, between the Confederate States of America, and all of their States and people, and the Creek Nation of Indians, and all its towns and individuals.”¹⁰⁰ At the end of the Civil War, the

⁹² *Atl. & Pac. R.R. Co. v. Mingus*, 165 U.S. 413, 435-36 (1897).

⁹³ See *Kickingbird*, *supra* note 89, at 314.

⁹⁴ *Id.* at 311 (quoting LAURENCE F. SCHMECKEBIER, *THE OFFICE OF INDIAN AFFAIRS: ITS HISTORY, ACTIVITIES AND ORGANIZATION* 93 (1927)).

⁹⁵ *Id.* at 315.

⁹⁶ DEBO, *supra* note 63, at 13-15 (“With a natural gift for collective enterprise the Indians were contented and prosperous under a system that seemed actually sacrilegious to the individualistic and acquisitive white man.”).

⁹⁷ *Id.* at 14.

⁹⁸ See *Kickingbird*, *supra* note 89, at 314-15 (contending that birth of railroad and discovery of mineral wealth sparked drastic population shift impacting Indian nations).

⁹⁹ Jack Healy, *For Tribe in Oklahoma, Ruling Sparks Emotion over ‘a Promise Kept,’* N.Y. TIMES, July 13, 2020, at A16.

¹⁰⁰ A Treaty of Friendship and Alliance, Confederate States of America-Creek Nation, art. I, July 10, 1861, *reprinted in* U.S. CONG., *THE STATUTES AT LARGE OF THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA* 289 (James M. Matthews ed., Richmond, R.M. Smith 1864).

United States demanded revenge and that all the tribes sign reconstruction treaties.¹⁰¹ The reconstruction treaties extracted massive land cessions from the tribes.¹⁰² Similarly, the Creek Nation ceded the western half of its territory, over two million acres.¹⁰³

The Civil War impacted the authority and sovereignty of the Five Tribes, but the Five Tribes retained large territories and maintained their political autonomy.¹⁰⁴ In the post-war period, however, the political and geographic cohesion of the Five Tribes became an obstacle to “manifest destiny” and westward expansion for Americans.¹⁰⁵ Railroad companies, and oil and gas companies, sought access to the Indian Territory, and American settlers wanted free or cheap access to valuable lands and assets.¹⁰⁶

E. *Creek Allotment Agreement of 1901*

The United States continued its relentless pursuit of the lands of the MCN during the Allotment Era of federal Indian policy. The General (Dawes) Allotment Act of 1887 (“Dawes Act”)¹⁰⁷ was enacted with three overarching goals: to destroy the communal land holdings of Indian tribes in favor of individual Indian land holdings, to open surplus Indian lands for sales to non-Indians, and to assimilate tribal citizens to Western notions of farming and private property rights.¹⁰⁸ Communal land holdings among tribal communities was seen as an impediment to American prosperity and Indian “progress” and was a target of the Dawes Act.¹⁰⁹

¹⁰¹ See Robert J. Miller, *Treaties Between the Eastern Shawnee Tribe and the United States: Contracts Between Sovereign Governments*, in *THE EASTERN SHAWNEE TRIBE OF OKLAHOMA: RESILIENCE THROUGH ADVERSITY* 107, 127-28 (Stephen Warren ed., 2017) [hereinafter Miller, *Treaties*]; William D. Pennington, *Reconstruction Treaties*, OKLA. HIST. SOC'Y, <https://www.okhistory.org/publications/enc/entry.php?entry=RE001> [https://perma.cc/HL3D-3AS2] (last visited Dec. 5, 2021).

¹⁰² See Miller, *Treaties*, *supra* note 101, at 127-29.

¹⁰³ Treaty with the Seminole Indians, Seminole Nation-U.S., art. 3, Mar. 21, 1866, 14 Stat. 755, 756.

¹⁰⁴ Kickingbird, *supra* note 89, at 309.

¹⁰⁵ See ROBERT J. MILLER, *NATIVE AMERICA, DISCOVERED AND CONQUERED* 77-80, 84-94, 120-22 (Bruce E. Johansen ed., 2006) [hereinafter MILLER, *DISCOVERED AND CONQUERED*]; accord Kickingbird, *supra* note 89, at 310.

¹⁰⁶ See Kickingbird, *supra* note 89, at 314-15.

¹⁰⁷ Dawes Act, ch. 119, 24 Stat. 388 (1887), *repealed by* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, 114 Stat. 1991 (codified at 25 U.S.C. §§ 2201-2219).

¹⁰⁸ See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 (Nell Jessup Newton ed., 2017), LexisNexis [hereinafter COHEN'S HANDBOOK]; WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 22-25 (6th ed. 2015); MILLER, *DISCOVERED AND CONQUERED*, *supra* note 105, at 164, 170-71.

¹⁰⁹ See DEBO, *supra* note 63, at 20.

At first, Congress believed that Indian nations had to consent to allotment.¹¹⁰ The general design of allotment was to grant each family head 160 acres of land, eighty acres to single persons over eighteen, eighty acres to orphans under eighteen, and forty acres to all other single people under eighteen.¹¹¹ Titles to the allotments were held in trust by the United States for the Indian individuals, usually for twenty-five years, and then were issued in unencumbered fee titles, and at that time, the individual was also granted U.S. citizenship.¹¹² Initially, the Dawes Act did not apply in Indian Territory; critically, however, the same ideas, framework, and goals were later extended to the Five Tribes and other tribes in the Indian Territory.¹¹³

Despite the assurances in the Five Tribes' removal treaties that they would never become a part of any state or territory, the large presence of non-Indians in Indian Territory and the clamor for progress began to weigh against the treaties and Indian nations' rights in the eyes of Congress.¹¹⁴ In the Oklahoma Organic Act of 1890,¹¹⁵ Congress defined the boundaries of Indian Territory as the lands of the Five Tribes and the tribes in the Quapaw Indian Agency, with the western portion established as the Oklahoma Territory.¹¹⁶ The Organic Act expressly preserved tribal authority, tribal and individual Indian property rights, and federal jurisdiction in both the Oklahoma and Indian Territories.¹¹⁷ The Indian Territory government was one of limited jurisdiction when it came to Indians. In civil matters, the territorial courts did not have jurisdiction over cases in which the tribal courts had jurisdiction.¹¹⁸ The law preserved existing tribal jurisdiction within the Five Tribes for civil and criminal matters:

[N]othing in this act shall be so construed as to deprive any of the courts of the civilized nations of exclusive jurisdiction over all cases arising wherein members of said nations . . . are the sole parties, nor so as to interfere with the right and power of said civilized nations to punish said members . . .¹¹⁹

¹¹⁰ CAROLE E. GOLDBERG, REBECCA TSOSIE, KEVIN K. WASHBURN & ELIZABETH RODKE WASHBURN, *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* 26 (6th ed. 2016).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 29.

¹¹⁴ See DEBO, *supra* note 63, at 18-19.

¹¹⁵ Oklahoma Organic Act, Pub. L. No. 51-182, 26 Stat. 81 (1890).

¹¹⁶ COHEN'S HANDBOOK, *supra* note 108, § 4.07(1)(a). Prior to this law, the Tribes of the region were completely self-governing and reliant on their own governments, law enforcement, courts, and welfare systems. Kickingbird, *supra* note 89, at 313.

¹¹⁷ Oklahoma Organic Act § 12, 26 Stat. at 88; COHEN'S HANDBOOK, *supra* note 108, § 4.07(1)(a).

¹¹⁸ Oklahoma Organic Act § 29, 26 Stat. at 93-94.

¹¹⁹ *Id.* § 31, 26 Stat. at 94-95.

However, the law did give jurisdiction to the United States over cases arising between citizens of different tribes.¹²⁰ But territorial courts could not usually levy attachments against Indian lands, and territorial judgments were not valid for the sale or conveyance of titles to Indian lands, except in limited circumstances.¹²¹

But Indian lands had been opened for non-Indian settlement in 1889, causing the land runs when unassigned parcels of land were opened to White settlement.¹²² Other Americans illegally trespassed and settled in Indian Territory in defiance of federal and tribal laws, and eventually non-Indians began to outnumber Indians.¹²³ The non-Indian population began calling for statehood, with both the Oklahoma Territory and the Indian Territory to become one state.¹²⁴

Non-Indians also argued that communal land ownership was one of the biggest obstacles to progress in the Indian Territory.¹²⁵ Eventually, the idea of allotment was seen as a solution to the Indian “problem” in Indian Territory.¹²⁶ In 1893, Congress expanded on the Dawes Act and authorized the President to appoint commissioners to negotiate with the Five Tribes for “the extinguishment of the national or tribal title to any lands within that territory now held by . . . such nations or tribes, either by cession . . . or by the allotment and division of the same in severalty among the Indians of such nations or tribes.”¹²⁷ The commission was supposed to reach an agreement “with the consent of such nations or tribes of Indians . . . to enable the ultimate creation of a [s]tate . . . which shall embrace the lands within said Indian [t]erritory.”¹²⁸ Unsurprisingly, the Indian nations were vehemently opposed to any land sales and were distrustful of the United States.¹²⁹

Unable to secure tribal consent to land sales or allotments, Congress passed the Curtis Act in 1898.¹³⁰ This statute subjected the Five Tribes to allotment

¹²⁰ *Id.* § 36, 26 Stat. at 97.

¹²¹ *Id.* § 31.

¹²² Linda D. Wilson, *Statehood Movement*, OKLA. HIST. SOC’Y, <https://www.okhistory.org/publications/enc/entry.php?entry=ST025> [<https://perma.cc/E4QB-QUNA>] (last visited Dec. 5, 2021).

¹²³ DEBO, *supra* note 63, at 12-13 (describing deluge of White immigrants into Indian Territory in defiance of tribal law, where Indians were ultimately outnumbered—comprising only 28.11% of total racial composition of the area by 1890).

¹²⁴ Wilson, *supra* note 122.

¹²⁵ See DEBO, *supra* note 63, at 19-20.

¹²⁶ *Id.* at 20-23.

¹²⁷ *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 301 (1902) (quoting *Stephens v. Cherokee Nation*, 174 U.S. 445, 446 (1899)).

¹²⁸ *Id.* (second and fourth alterations in original) (quoting *Stephens*, 174 U.S. at 446-47).

¹²⁹ *Id.* at 301-02 (citing S. REP. NO. 53-377, at 12 (1894)).

¹³⁰ Curtis Act of 1898, Pub. L. No. 55-517, 30 Stat. 495; see also Act of Mar. 1, 1901, Pub. L. No. 56-676, § 46, 31 Stat. 861, 872 (ratifying planned date of Creek Nation government dissolution on March 4, 1906).

through coerced agreements, the abolition of tribal courts, and the dissolution of tribal governments as of March 4, 1906.¹³¹ The law gave the Dawes Commission authority over tribal membership rolls and “prohibited the enforcement of tribal laws in the courts of the United States in Indian Territory.”¹³² In this environment, the insatiable American desire for more Indian land won out, and the MCN executed an allotment agreement with the federal government in 1901 to allot its tribal communally owned lands.¹³³

The Allotment Era was a devastating disruption to the MCN’s tribal relations and existence, was spiritually and culturally shocking, and resulted in enormous financial losses to Indians.¹³⁴ Many Indians were not interested in being on the Dawes membership rolls, the process by which a person received an allotment, because of their political disagreements with the imposition of the allotment system.¹³⁵ As Creek Chief Pleasant Porter described it: “If we had our own way we would be living with lands in common But we came up against it; this civilization came up against us and we had no place to go.”¹³⁶ However, Americans living inside and outside of Indian Territory saw the allotment process as exceedingly fair to individual Indians because it gave them land to own privately.¹³⁷ In contrast, individual Indians saw allotments as a violation of the treaties.¹³⁸

The allotments and attempted breakup of the reservations were a signal of encroaching statehood. The Tribes lobbied hard against statehood and created the Five Tribes Executive Committee.¹³⁹ This Committee passed resolutions adopting and reciting the guarantees in their removal treaties: that the Tribes would not become a part of any territory or state without their consent.¹⁴⁰ The Tribes wrote President Theodore Roosevelt and reminded him of the promises enshrined in their treaties: “As a people we have kept our faith with the United States . . . for the consummation of the sacred pledge made to us [Y]ou know our hopes and our ambitions; and we appeal again to your sense of justice and fair dealing.”¹⁴¹ In addition, many tribal citizens organized a constitutional

¹³¹ Abi Fain & Mary Kathryn Nagle, *Close to Zero: The Reliance on Minimum Blood Quantum Requirements to Eliminate Tribal Citizenship in the Allotment Acts and the Post-Adoptive Couple Challenges to the Constitutionality of ICWA*, 43 MITCHELL HAMLINE L. REV. 801, 833 (2017).

¹³² *Id.* at 833-34.

¹³³ Agreement of Dawes Commission with Muscogee or Creek Tribe of Indians, Creek Nation-U.S., art. 3, Mar. 1, 1901, 31 Stat. 861.

¹³⁴ DEBO, *supra* note 63, at 127.

¹³⁵ *See id.*

¹³⁶ *Id.* at 132.

¹³⁷ *Id.* at 127.

¹³⁸ *Id.* at 152.

¹³⁹ *Id.* at 160-61 (describing Tribes’ opposition to lobbying efforts made by White residents of Indian Territory for statehood and formation of intertribal conference).

¹⁴⁰ *Id.* at 161.

¹⁴¹ *Id.* at 162.

convention and unsuccessfully worked for the creation of a separate Indian state, the State of Sequoyah.¹⁴²

In 1906, Congress passed the Oklahoma Enabling Act to admit Oklahoma as a state, including the Indian Territory.¹⁴³ In the same year, Congress passed the Five Tribes Act to serve as the final disposition of the affairs of the Five Tribes—closing their membership rolls and liquidating tribal properties but also stating that the Five Tribes “are hereby continued in full force and effect.”¹⁴⁴ The Oklahoma Enabling Act required that the new state disclaim jurisdiction over Indians and Indian nations and disclaim any right to Indian or tribal lands.¹⁴⁵ Oklahoma became a state in 1907.¹⁴⁶ Despite the state’s eagerness to absorb Indian lands and assets, the Enabling Act preserved federal jurisdiction over Indians and Indian lands, and this division of power was enshrined in the Oklahoma Constitution.¹⁴⁷ Moty Tiger, the Chief of the Creeks, summed up what statehood foretold: “As a part of the new state into which we shall merge, there lies a path new and full of uncertainties upon which, however, we enter with a hope that the burden which we shall share with our white brother shall not be too heavy for our untrained shoulders.”¹⁴⁸

F. *Oklahoma’s Exercise of Jurisdiction Post-statehood*

The Oklahoma Constitution disclaims any right to Indian lands,¹⁴⁹ yet after statehood the state began to assume the very jurisdiction its constitution expressly disclaimed. Oklahoma exercised jurisdiction over the Indian nations with escalating encroachments on tribal governments, rights, and lands.¹⁵⁰ The

¹⁴² Richard Mize, *Sequoyah Convention*, OKLA. HIST. SOC’Y, <https://www.okhistory.org/publications/enc/entry.php?entry=SE021> [perma.cc/M8FK-7W75] (last visited Dec. 5, 2021); Stacy L. Leeds, *Defeat or Mixed Blessing? Tribal Sovereignty and the State of Sequoyah*, 43 TULSA L. REV. 5, 5-7 (2007).

¹⁴³ Oklahoma Enabling Act, Pub. L. No. 59-234, 34 Stat. 267 (1906); COHEN’S HANDBOOK, *supra* note 108, § 4.07.

¹⁴⁴ Five Tribes Act, Pub. L. No. 59-129, § 28, 34 Stat. 137, 148 (1906); *accord* COHEN’S HANDBOOK, *supra* note 108, § 4.07.

¹⁴⁵ Robert J. Miller, *Tribal, Federal, and State Laws Impacting the Eastern Shawnee Tribe, 1812 to 1945*, in THE EASTERN SHAWNEE TRIBE OF OKLAHOMA: RESILIENCE THROUGH ADVERSITY 149, 164 (Stephen Warren ed., 2017) [hereinafter Miller, *Laws Impacting the Eastern Shawnee Tribe*].

¹⁴⁶ See Kickingbird, *supra* note 89, at 320-21 (explaining how establishment of Oklahoma’s statehood in 1907 referred to reservations and allotments as “Indian Country”).

¹⁴⁷ Kickingbird, *supra* note 89, at 320-21 (“It should be noted that the Act expressly provides that federal jurisdiction over Indian affairs should continue and that Indian property rights should not be impaired . . .”).

¹⁴⁸ DEBO, *supra* note 63, at 172.

¹⁴⁹ OKLA. CONST. art. I, § 3.

¹⁵⁰ Miller, *Laws Impacting the Eastern Shawnee Tribe*, *supra* note 145, at 164-65.

federal government, the Bureau of Indian Affairs, non-Indians, and others all accepted this eventuality as one of fact despite its illegality.¹⁵¹

The Five Tribes and their citizens found themselves in a precarious limbo. The Curtis Act severely limited the Five Tribes governments, and in their absence, Oklahoma assumed the very jurisdiction that its Enabling Act and constitution expressly disclaimed.¹⁵² The illegal jurisdiction that Oklahoma exercised over Indian Country raised questions about land, taxes, civil and criminal jurisdiction, and other rights of Indians that had to be litigated in Oklahoma courts for over a century.¹⁵³

The State was so confident of its authority over Indian nations and lands that Governor Johnston Murray wrote the Assistant Secretary of the Interior in 1953, claiming that Oklahoma had no use for the jurisdictional provisions proposed in a bill that became Public Law 280 (by which select states were given criminal and some civil jurisdiction over Indian lands).¹⁵⁴ The governor claimed that Oklahoma already had that jurisdiction as a result of statehood: “When Oklahoma became a State, all tribal governments within its boundaries became merged in the State and the tribal codes under which the tribes were governed prior to Statehood were abandoned and all Indian tribes, with respect to criminal offenses and civil causes, came under State jurisdiction.”¹⁵⁵ If Governor Murray were still alive in 2020, the *McGirt* decision would have rendered him speechless.

G. *Murphy v. Royal*

The question of whether the MCN Reservation still exists was first brought to the Supreme Court in the case of *Murphy v. Royal*.¹⁵⁶ In that case, Patrick Murphy, an enrolled citizen of the MCN, was convicted in Oklahoma state court of murdering a fellow tribal member.¹⁵⁷ Murphy challenged his conviction on the basis that he, an Indian, was charged with murder of another Indian on the MCN Reservation, and therefore Oklahoma did not have criminal jurisdiction.¹⁵⁸ The Tenth Circuit agreed with Murphy that the MCN Reservation had never

¹⁵¹ *See id.* at 165.

¹⁵² *See id.*; Kickingbird, *supra* note 89, at 319 (explaining devastating effect of Curtis Act on Five Civilized Tribes’ governments).

¹⁵³ Kickingbird, *supra* note 89, at 331-32.

¹⁵⁴ *Id.* at 330.

¹⁵⁵ Letter from Johnston Murray, Governor of Oklahoma, to Orme Lewis, Assistant Sec’y of the Interior (Nov. 18, 1953), *reprinted in* 10 OKLA. ATT’Y GEN., OKLAHOMA ATTORNEY GENERAL REPORTS AND OPINIONS, No. 78-176, at 469 (1978).

¹⁵⁶ 875 F.3d 896 (10th Cir. 2017), *aff’d sub nom.* Sharp v. Murphy, 140 S. Ct. 2412 (2020) (per curiam).

¹⁵⁷ *Id.* at 904-05.

¹⁵⁸ *Id.* at 905.

been disestablished and that Oklahoma lacked jurisdiction to prosecute him for committing a crime in Indian Country.¹⁵⁹

The Supreme Court granted certiorari and Oklahoma, in essence, argued that Congress had been so hostile towards the Five Tribes over 100 years ago that it had absorbed Indian Territory into the State of Oklahoma and that the MCN Reservation had been disestablished.¹⁶⁰ Oklahoma asserted, “It is inconceivable that Congress would have bothered to create a State comprising both Oklahoma Territory and Indian Territory if the entire Indian Territory was to become reservation land over which the State had limited authority.”¹⁶¹

The state also foretold a parade of horrors, such as rampant crime and chaos, and the unsettling of expectations, as the legal basis to reverse the Tenth Circuit decision.¹⁶² Justice Gorsuch had recused himself from the *Murphy* case.¹⁶³ The Court asked for a supplemental briefing after the initial oral argument and eventually listed the case for reargument.¹⁶⁴ Many assume the case was relisted because there was a four-four tie vote that could not be broken without Justice Gorsuch’s involvement, and that the issue was too important to let the Tenth Circuit decision be affirmed by a four-four Supreme Court vote.¹⁶⁵ This impasse apparently led the Court to grant certiorari in *McGirt*, which allowed Justice Gorsuch to participate in resolving the issue of the continued existence of the MCN Reservation.

II. THE MUSCOGEE (CREEK) NATION RESERVATION STILL EXISTS

*On the far end of the Trail of Tears was a promise.*¹⁶⁶

As set out in Part I, the MCN signed numerous treaties with the United States in the nineteenth century that clearly defined its reservation.¹⁶⁷ Under those treaties and federal Indian law, only the MCN and the United States could exercise sovereignty and jurisdiction within those borders.¹⁶⁸ State governments

¹⁵⁹ *Id.* at 911.

¹⁶⁰ Brief for Petitioner at 19-20, *Murphy*, 140 S. Ct. 2412 (2020) (No. 17-1107), 2018 WL 3572365, at *19-20.

¹⁶¹ *Id.* at 4.

¹⁶² *Id.* at 44, 56.

¹⁶³ Ronald Mann, *Justices Call for Reargument in Dispute About Oklahoma Prosecutions of Native Americans*, SCOTUSBLOG (July 2, 2019, 12:08 PM), <https://www.scotusblog.com/2019/07/justices-call-for-reargument-in-dispute-about-oklahoma-prosecutions-of-native-americans/> [<https://perma.cc/A9TT-D3V5>].

¹⁶⁴ *Id.*

¹⁶⁵ *See id.*

¹⁶⁶ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020).

¹⁶⁷ *Id.* at 2459-60.

¹⁶⁸ *See, e.g.*, *Talton v. Mayes*, 163 U.S. 376, 384-85 (1896) (holding Fifth Amendment did not apply to appellant where Cherokee Nation law was violated); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 520 (1832) (finding Georgia law inapplicable to appellants who resided within Cherokee Nation). Oklahoma expressly disclaimed any jurisdiction over Indians and

had, and still have today, very limited jurisdiction within Indian Country, which includes reservations.¹⁶⁹ For over 100 years, however, Oklahoma illegally exceeded its authority and applied its jurisdiction and laws inside the MCN Reservation and in other reservations and Indian Country within the state.¹⁷⁰

In 1997, Jimcy McGirt was convicted in Oklahoma state court of raping a child and was sentenced to 1,000 years plus life.¹⁷¹ In post-conviction proceedings, he alleged that Oklahoma did not have criminal jurisdiction over him because he is an Indian, a citizen of the Seminole Nation, and because the crime was committed in Indian Country, on the MCN Reservation.¹⁷² The Oklahoma courts rejected his argument that the reservation continued to exist and held that the state possessed criminal jurisdiction over McGirt's crime.¹⁷³

The Supreme Court granted certiorari to address "whether the land these [Creek] treaties promised remains an Indian reservation for purposes of federal criminal law."¹⁷⁴ Oklahoma argued that Indian reservations within the state had been disestablished, erased, by the time of statehood in 1907.¹⁷⁵ Oklahoma, Oklahomans, and apparently most of the Indian nations and peoples in Oklahoma themselves, assumed Indian reservations had disappeared in the state.¹⁷⁶ But the Court held to the contrary: "Because Congress has not said otherwise, we hold the government to its word."¹⁷⁷ Consequently, since the

Indian Country as part of its agreement with Congress to enter the union and agreed to include that disclaimer in its constitution, which it did. OKLA. CONST., art. 1, § 3; Oklahoma Enabling Act, Pub. L. No. 59-234, § 1, 34 Stat. 267, 267 (1906).

¹⁶⁹ See, e.g., Okla. Tax Comm'n. v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 515-16 (1991) (finding state sales tax does not apply where Potawatomi Indian sells to tribal members); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 344 (1983) (finding New Mexico's hunting and fishing laws preempted by federal law); *Worcester*, 31 U.S. at 561.

¹⁷⁰ See *supra* notes 150-51 and accompanying text; Miller, *Laws Impacting the Eastern Shawnee Tribe*, *supra* note 145, at 164-65.

¹⁷¹ *McGirt*, 140 S. Ct. at 2482 (Roberts, C.J., dissenting); Lawrence Hurley, *U.S. Supreme Court Weighs Oklahoma Tribal Authority Dispute*, REUTERS (May 11, 2020, 1:01 PM), <https://www.reuters.com/article/us-usa-court-oklahoma/u-s-supreme-court-weighs-oklahoma-tribal-authority-dispute-idUSKBN22N2DP> [https://perma.cc/9KDU-XV6U] (describing factual background of *McGirt*).

¹⁷² *McGirt*, 140 S. Ct. at 2459.

¹⁷³ *Id.*; Order Affirming Denial of Application for Post-conviction Relief at 2-3, *McGirt v. Oklahoma*, No. PC-2018-1057 (Okla. Crim. App. Feb. 25, 2019), <https://casetext.com/api/search-api/doc/mcgirt-v-oklahoma-1/data> [https://perma.cc/FC6X-6KPC]; Hurley, *supra* note 171.

¹⁷⁴ *McGirt*, 140 S. Ct. at 2459.

¹⁷⁵ See *id.* at 2463-66.

¹⁷⁶ See Miller, *Laws Impacting the Eastern Shawnee Tribe*, *supra* note 145, at 164-65.

¹⁷⁷ *McGirt*, 140 S. Ct. at 2459.

MCN Reservation, spanning 3.25 million acres, had never been disestablished, it continues to exist today.¹⁷⁸

A. *Diminishing or Disestablishing Indian Country*

The Supreme Court has long held that Congress possesses the authority to abrogate Indian treaties, and thus Congress may unilaterally diminish (decrease in size) or disestablish (completely erase) Indian reservations that were recognized or created by those treaties.¹⁷⁹ The Court has heard nine diminishment and disestablishment cases over the past six decades.¹⁸⁰ In the fifth in this series of cases, *Solem v. Bartlett*,¹⁸¹ the Court claimed that it had “established a fairly clean analytical structure” for addressing these issues.¹⁸² Most courts and commentators assumed the *Solem* Court had set out a three-step test.¹⁸³

In *Solem*, the Court laid out the principles that guide this inquiry: only Congress can diminish or disestablish a reservation and such actions “will not be lightly inferred.”¹⁸⁴ The Court then set out its “analytical structure” to apply to these questions in what appeared to be a three-step test.¹⁸⁵

¹⁷⁸ *Id.* at 2459, 2482. See Leading Case, *McGirt v. Oklahoma*, 134 HARV. L. REV. 600, 603 (2020); Ann E. Tweedy, *Has Federal Indian Law Finally Arrived at “The Far End of the Trail of Tears”?*, 37 GA. ST. U. L. REV. 739, 741 (2021); Bethany R. Berger, *McGirt v. Oklahoma and the Past, Present, and Future of Reservation Boundaries*, 169 U. PA. L. REV. ONLINE 250, 253 (2021).

¹⁷⁹ *Solem v. Bartlett*, 465 U.S. 463, 470 (1984); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566-68 (1903). The United States is required, however, by the Fifth Amendment to pay “just compensation” for taking treaty rights. See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 423-24 (1980); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968) (stating that if Congress breached treaty promises to a tribe, that “would subject the United States to a claim for compensation by destroying property rights conferred by treaty” (footnote omitted)); *United States v. Creek Nation*, 295 U.S. 103, 110 (1935); Robert J. Miller, Comment, *Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act*, 70 OR. L. REV. 543, 573-74, 573 nn.231-32, 576 & n.247 (1991).

¹⁸⁰ *McGirt*, 140 S. Ct. at 2460; *Nebraska v. Parker*, 136 S. Ct. 1072, 1076 (2016); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 333 (1998); *Hagen v. Utah*, 510 U.S. 399, 401 (1994); *Solem*, 465 U.S. at 464; *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587 (1977); *DeCoteau v. Dist. Cnty. Ct. for the Tenth Jud. Dist.*, 420 U.S. 425, 426-427 (1975); *Mattz v. Arnett*, 412 U.S. 481, 483 (1973); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 354 (1962).

¹⁸¹ *Solem*, 465 U.S. 463.

¹⁸² *Id.* at 470.

¹⁸³ See *Yankton Sioux*, 522 U.S. at 330; *Hagen*, 510 U.S. at 411-12; DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR., MATTHEW L.M. FLETCHER & KRISTEN A. CARPENTER, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 521-24 (7th ed. 2017); COHEN’S HANDBOOK, *supra* note 108, § 3.04 (noting a “three-step inquiry”).

¹⁸⁴ *Solem*, 465 U.S. at 470 & n.11.

¹⁸⁵ See *id.* at 470-71.

First, the Court said judges should examine whether “Congress clearly evince[d] an ‘intent . . . to change . . . [reservation] boundaries.’”¹⁸⁶ If Congress used “statutory language . . . [making] [e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests,” then it “strongly suggests that Congress meant to” diminish or disestablish a reservation.¹⁸⁷ In fact, if such language was also coupled with “an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe’s reservation to be diminished.”¹⁸⁸ Consequently, a court is to commence its analysis with a search for the clear and explicit intent of Congress.¹⁸⁹

Next, the *Solem* Court stated that “explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment.”¹⁹⁰ Courts can then examine

events surrounding the passage of a surplus land Act . . . [and if they] unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged.¹⁹¹

Finally, courts may, “to a lesser extent,” consider subsequent history and events to determine if Congress had the specific intent to diminish a reservation at the time it enacted the statute in question.¹⁹² This evidence could include how Congress and the Bureau of Indian Affairs treated the lands thereafter, “who actually moved onto opened reservation lands,” and the “subsequent demographic history of opened lands.”¹⁹³

¹⁸⁶ *Id.* at 470 (second and third alterations in original) (quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 (1977)); see also *Yankton Sioux*, 522 U.S. at 343 (“[O]nly Congress can alter the terms of an Indian treaty by diminishing a reservation, and its intent to do so must be ‘clear and plain’” (citation omitted) (quoting *United States v. Dion*, 476 U.S. 734, 738-39 (1986))).

¹⁸⁷ *Solem*, 465 U.S. at 470; see also *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 355 (1962) (“The case turns upon the current status of the Colville Indian Reservation.”).

¹⁸⁸ *Solem*, 465 U.S. at 470-71.

¹⁸⁹ See *id.*

¹⁹⁰ *Id.* at 471; see also *id.* at 470 (“The most probative evidence of congressional intent is the statutory language . . .”).

¹⁹¹ *Id.* at 471.

¹⁹² *Id.* (placing evidentiary value on historical actions of Congress, the Bureau of Indian Affairs, and local judicial authorities).

¹⁹³ *Id.* at 471-72; see also *DeCoteau v. Dist. Cnty. Ct. for the Tenth Jud. Dist.*, 420 U.S. 425, 428 (1975) (finding Congress’ actions towards land in question can explain Congressional statutory intent).

Legal scholars, the lower federal courts, and the Supreme Court itself have considered the *Solem* test to be a three-step test and have applied it consistently since 1984. The *McGirt* Court, however, appears to have modified that test or, at the very least, has made it abundantly clear that *Solem* did not create a three-step test.¹⁹⁴

B. *The McGirt Majority Opinion*

McGirt argued that the Major Crimes Act¹⁹⁵ allows only the federal government to prosecute an Indian for conduct in violation of the Act that occurs in Indian Country.¹⁹⁶ “State courts generally have no jurisdiction to try Indians for conduct committed in ‘Indian country.’”¹⁹⁷ Thus, the Court noted that the “key question” was: “Did [McGirt] commit his crimes in Indian country?”¹⁹⁸ Oklahoma argued that a Creek Reservation was never created and was not Indian Country, but if the Court disagreed, Oklahoma also asked the Court to declare that “the land once given to the Creeks is no longer a reservation.”¹⁹⁹

The Court commenced its analysis by stating that the United States and the Creek Nation had initially established a Creek Reservation.²⁰⁰ The Court reviewed the treaties and the promises, set out above in Part I, in which the United States guaranteed a permanent homeland for the Creek Nation to entice it to remove west of the Mississippi.²⁰¹ The Court concluded that in these treaties “Congress established a reservation for the Creeks,” and “guarantied” them their homelands west of the Mississippi, and “establish[ed] boundary lines [to] secure a country and permanent home to the whole Creek Nation of Indians.”²⁰² The United States did not give these lands to the Creek Nation out of generosity; instead, the federal government provided the lands as payment for the Creek

¹⁹⁴ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2468 (2020); see also *infra* Section II.C.

¹⁹⁵ 18 U.S.C. § 1153(a) (“Any Indian who commits against the person or property of another Indian or other person any of the following offenses . . . shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.”).

¹⁹⁶ *McGirt*, 140 S. Ct. at 2459. Indian nations have concurrent criminal jurisdiction to prosecute Indians who commit crimes. *United States v. Wheeler*, 435 U.S. 313, 324 (1978).

¹⁹⁷ *McGirt*, 140 S. Ct. at 2459 (quoting *Negonsott v. Samuels*, 507 U.S. 99, 102-03 (1993)).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 2460, 2474 (“Unable to show that Congress disestablished the Creek Reservation, Oklahoma next tries to turn the tables in a completely different way. Now, it contends, Congress never established a reservation in the first place.”). The U.S. Solicitor General, an *amicus* for Oklahoma, did not join Oklahoma’s argument that the MCN Nation had never had a reservation and that its lands had never been Indian Country under 18 U.S.C. § 1151(a). *Id.* at 2474 (elaborating that dissent did not defend this argument, either).

²⁰⁰ *Id.* at 2462 (“While there can be no question that Congress established a reservation for the Creek Nation, it’s equally clear that Congress has since broken more than a few of its promises to the Tribe.”).

²⁰¹ *Id.* at 2461-62.

²⁰² *Id.* at 2460 (first alteration in original) (first quoting 1832 Treaty, *supra* note 67, art. XIV, 7 Stat. at 368; and then quoting 1833 Treaty, *supra* note 68, pmb., 7 Stat. at 18).

Nation's agreement to sell its lands in Alabama to the United States and to move west.²⁰³ The 1833 Treaty defined the Nation's land borders in the Indian Territory, which was to be the "permanent home" of the Nation.²⁰⁴

The early Creek treaties did not use the word "reservation" perhaps, as the Court recognized, because the word was not then the term of art that it has since become.²⁰⁵ However, the Creek Nation Treaty of 1866 expressly used the word "reservation" in regards the Creek homeland and removed any doubts that the lands were a reservation.²⁰⁶ Thereafter, other federal laws and treaties expressly referred to the Creek Reservation.²⁰⁷ In light of this evidence, the Court held there was "no question that Congress established a reservation for the Creek Nation."²⁰⁸

The Court then had to decide whether this reservation continues to exist today. The Court stated there was only one place to look, "the Acts of Congress,"²⁰⁹ because "only Congress can divest a reservation of its land and diminish its boundaries."²¹⁰ Even so, the Court has never required Congress to use some special verbiage or specific words before holding that a reservation was diminished or disestablished.²¹¹ A variety of statutory language has been held to be sufficient.²¹² Ultimately, the Court "require[s] that Congress clearly express its intent to" disestablish a reservation.²¹³

The *McGirt* Court then reviewed numerous statutes looking for evidence of congressional intent to disestablish the MCN Reservation.²¹⁴ Oklahoma pointed the Court to the 1901 Act that allotted the Creek Reservation.²¹⁵ In the Allotment

²⁰³ *Id.*

²⁰⁴ *Id.* at 2461 (quoting 1833 Treaty, *supra* note 82, pmbl.).

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 2461 (quoting Treaty Between the United States and the Creek Nation of Indians, Creek Nation-U.S., arts. III, IX, June 14, 1866, 14 Stat. 786, 786, 788 (mentioning "reduced Creek reservation")).

²⁰⁷ *Id.* at 2461 (quoting Treaty Between United States and Cherokee Nation, Cherokee Nation-U.S, art. IV, July 19, 1866, 14 Stat. 799, 800 ("Creek reservation"); Act of Mar. 3, 1873, Pub. L. No. 42-322, pmbl., 17 Stat. 626, 626 ("Creek reservation"); 11 Cong. Rec. 2351 (1881) ("dividing line between the Creek reservation and their ceded lands"); Act of Feb. 13, 1891, Pub. L. No. 51-165, art. I, 26 Stat. 749, 750 ("the Creek Reservation").

²⁰⁸ *Id.* at 2462.

²⁰⁹ *Id.*

²¹⁰ *Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

²¹¹ *Hagen v. Utah*, 510 U.S. 399, 411 (1994).

²¹² *See, e.g., id.* at 412 (explaining that under treaty unallotted lands shall be "restored to the public domain" (quoting Act of May 27, 1902, Pub. L. No. 57-888, miscellaneous section, 32 Stat. 245, 263)); *Solem*, 465 U.S. at 470 (addressing an "[e]xplicit reference to cession" or an "unconditional commitment . . . to compensate the Indian tribe for its opened land"); *Mattz v. Arnett*, 412 U.S. 481, 504 n.22 (1973) (providing examples of express termination of a reservation including "discontinued," "abolished," or "vacated").

²¹³ *McGirt*, 140 S. Ct. at 2463.

²¹⁴ *Id.* at 2463-64.

²¹⁵ *Id.* at 2465-66.

Era of federal Indian policy, the United States broke up over 100 reservations into small parcels of land that were then allotted to individual Indian citizens of those tribal nations to ultimately be held in fee simple private ownership.²¹⁶ Oklahoma was incorrect in arguing that the 1901 Act was relevant to the issue in *McGirt* because, as a general principle, the Supreme Court has often stated that merely allotting a reservation does not diminish or disestablish it.²¹⁷ In fact, the very process of allotting the Creek Reservation demonstrated the exact opposite; it clearly showed that Congress did not intend to disestablish the Reservation by enacting the 1901 Creek allotment agreement.²¹⁸

In contrast, in 1893, Congress had attempted to get the Creek Nation to sell land and to make changes to its Reservation borders, but the Nation adamantly refused.²¹⁹ Congress was aware that this might happen because it tasked “the Dawes Commission with negotiating changes to the Creek Reservation . . . [and] identified two goals: Either persuade the Creek to cede territory to the United States, as it had before, or agree to allot its lands to Tribe members.”²²⁰ The Commission failed to get the Creek Nation to agree to sell any land, and reported to Congress that the Nation “would not, under any circumstances, agree to cede any portion of their lands.”²²¹ Thereafter, it is obvious that Congress “turned [its] attention to allotment rather than cession”²²² and the congressional commission then concluded an allotment agreement with the Nation which Congress enacted into law in 1901.²²³ The *McGirt* Court held, as precedent required, that this allotment agreement, and the other acts the Court reviewed, had no impact on the boundaries of the Creek Reservation: “Missing in all this, however, is a

²¹⁶ See *id.* at 2464-65; COHEN’S HANDBOOK, *supra* note 108, § 16.03; Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 9 & n.33 (1995); Dawes Act, ch. 119, 24 Stat. 388 (1887), *repealed by* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, 114 Stat. 1991 (codified at 25 U.S.C. §§ 2201-2219) (authorizing President to allot reservation lands).

²¹⁷ *Mattz*, 412 U.S. at 497 (“[A]llotment . . . is completely consistent with continued reservation status.”); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356-57 (1962) (explaining that allotment “did no more than open the way for non-Indian settlers to own land on the reservation”); *cf.* *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016) (discussing “another category of surplus land Acts: those that ‘merely opened reservation land to settlement’” (quoting *DeCoteau v. Dist. Cnty. Ct. for the Tenth Jud. Dist.*, 420 U.S. 425, 448 (1975))).

²¹⁸ *McGirt*, 140 S. Ct. at 2465 (“Congress may have passed allotment laws to create the conditions for disestablishment. But to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination.”).

²¹⁹ *Id.* at 2463.

²²⁰ *Id.* (citing Act of Mar. 3, 1893, Pub. L. No. 52-209, § 16, 27 Stat. 612, 645-56).

²²¹ *Id.* (quoting S. MISC. DOC. NO. 53-24, at 7 (3d Sess. 1894)); see also *id.* at 2463 n.2 (“[T]he dissent fails to mention the Commission’s various reports acknowledging that those efforts were unsuccessful precisely because the Creek refused to cede their lands.”).

²²² *Id.*

²²³ Agreement of Dawes Commission with Muscogee or Creek Tribe of Indians, Creek Nation-U.S., Mar. 1, 1901, 31 Stat. 861.

statute evincing anything like the ‘present and total surrender of all tribal interests’ in the affected lands. . . . [And] because there exists no equivalent law terminating what remained, the Creek Reservation survived allotment.”²²⁴ The dissent even agreed with this statement.²²⁵

The Court looked at numerous other statutes cited by Oklahoma and the dissent in which Congress attacked tribal sovereignty and governance in the Indian Territory—and in Oklahoma after it became a state—and several acts that were directed specifically at the Creek Nation.²²⁶ “Despite these additional incursions on tribal authority, however, Congress expressly recognized the Creek’s ‘tribal existence and present tribal governmen[t]’ and ‘continued [them] in full force and effect for all purposes authorized by law.’”²²⁷ In addition, starting in the 1920s, Congress once again began supporting tribal nations and governance in Oklahoma, and across the country, and authorized the Creek Nation in 1936 to draft and adopt a constitution and bylaws.²²⁸ After reviewing this history and these acts of Congress, the Court concluded that “in all this history there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation.”²²⁹

In light of the fact that Congress never intended to disestablish the Creek Nation Reservation, the Court held, not surprisingly, that the Reservation was never disestablished and that it still exists today.²³⁰ The Court’s analysis was straightforward and perhaps even simple. The Court found no explicit or potentially ambiguous statement that demonstrated any congressional intent to disestablish the Reservation.²³¹ Consequently, under the relevant Supreme Court precedent, the MCN Reservation continues to exist.

²²⁴ *McGirt*, 140 S. Ct. at 2464 (citation omitted) (quoting *Nebraska v. Parker*, 577 U.S. 481, 488 (2016)).

²²⁵ *Id.* at 2487 (Roberts, C.J., dissenting) (“No one here contends that any individual congressional action or piece of evidence, standing alone, disestablished the Creek reservation.”).

²²⁶ *Id.* at 2465-67 (majority opinion).

²²⁷ *Id.* at 2466 (alternations in original) (quoting Five Tribes Act, Pub. L. No. 59-129, § 28, 34 Stat. 137, 148 (1906)).

²²⁸ *Id.* at 2467; *see also* *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1442-47 (D.C. Cir. 1988) (“[T]he Oklahoma Indian Welfare Act . . . provided for constitutional governments and corporate charters.”).

²²⁹ *McGirt*, 140 S. Ct. at 2468. It is worth mentioning again that the dissent agreed with the majority. *Id.* at 2487 (Roberts, C.J., dissenting).

²³⁰ *Id.* at 2459, 2482 (majority opinion).

²³¹ The Court also considered and rejected out of hand two other arguments Oklahoma raised, which the dissent and the U.S. Solicitor General as *amicus* did not join. *Id.* at 2474 (addressing Oklahoma’s argument that Creek Nation never had a reservation and its lands were not Indian Country under 18 U.S.C. § 1151(a) but were Indian Country under 18 U.S.C. § 1151(b) as a “dependent Indian community”); *id.* at 2476-77 (noting that Oklahoma argued that Major Crimes Act never applied in eastern Oklahoma).

The majority began and ended its analysis with the relevant congressional language, what most commentators would have called step one of *Solem*.²³² However, the Court discussed at length and dismissed the necessity and the value of considering other evidence that Oklahoma and the dissent claimed, under the alleged steps two and three of *Solem*, required a finding that the MCN Reservation had been disestablished.²³³ In response, the majority noted that Supreme Court case law shows that the “value” of steps two and three “evidence . . . can only be *interpretative*—evidence that, at best, might be used to the extent it sheds light on what the terms found in a statute meant at the time of the law’s adoption, *not as an alternative means of proving disestablishment or diminishment*.”²³⁴ Thus, such evidence cannot be used to convert clear and explicit statutory language into ambiguous language that then requires a court to use interpretive tools.²³⁵

The majority also addressed what we have called the “chaos” theory, the “sky-is-falling” argument that Oklahoma and the dissent relied upon. The Court dismissed that point: “In the end, Oklahoma abandons any pretense of law and speaks openly about the potentially ‘transform[ative]’ effects of a loss today.”²³⁶ The Court noted Oklahoma’s argument that “[i]f we dared to recognize that the Creek Reservation was never disestablished, Oklahoma and dissent warn, our holding might be used by other tribes.”²³⁷ Furthermore, Oklahoma and the dissent argued that the Court’s decision “could unsettle an untold number of convictions and frustrate the State’s ability to prosecute crimes in the future.”²³⁸ The majority noted this argument was “admittedly speculative” and “even Oklahoma admits that the vast majority of its prosecutions will be unaffected whatever we decide today.”²³⁹ The Court discounted these potential issues.²⁴⁰

²³² *Id.* at 2462, 2468.

²³³ *Id.* at 2468-81; *see also infra* Section III.C.

²³⁴ *Id.* at 2469 (second emphasis added). The Court cited *Nebraska v. Parker*, 577 U.S. 481, 493 (2016), and *South Dakota v. Yankton Sioux*, 522 U.S. 329, 355 (1998), in support of this position. *See McGirt*, 140 S. Ct. at 2469 n.8 (“*Parker* invoked a general rule: ‘This subsequent demographic history cannot overcome our conclusion that Congress did not intend to diminish the reservation in 1882. And it is not our rule to “rewrite” the 1882 Act in light of this subsequent demographic history.’” (quoting *Parker*, 577 U.S. at 493)).

²³⁵ *See McGirt*, 140 S. Ct. at 2469 (“The only role such materials can properly play is to help ‘clear up . . . not create’ ambiguity about a statute’s original meaning.” (alteration in original) (quoting *Milner v. Dep’t of Navy*, 562 U.S. 562, 574 (2011))); *id.* at 2470 n.9 (stating that *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588 n.4 (1977), and *Yankton Sioux*, 522 U.S. at 343, “merely acknowledge that extratextual sources may help resolve ambiguity about Congress’s directions”); *see also id.* at 2468 (“Oklahoma does not point to any ambiguous language in any of the relevant statutes . . .”).

²³⁶ *Id.* at 2478 (alteration in original).

²³⁷ *Id.* at 2478-79.

²³⁸ *Id.* at 2479.

²³⁹ *Id.*

²⁴⁰ *Id.*

In addition, Oklahoma and the dissent went beyond just the criminal jurisdiction issue before the Court and argued civil law and civil jurisdiction matters. The majority briefly addressed and refuted those points.²⁴¹ The Court stated that “dire warnings are just that, and not a license for us to disregard the law.”²⁴² In addition, the Court made an excellent point in response to Oklahoma’s and the dissent’s arguments about the changes that the majority decision would allow if the state was prevented from benefitting from the illegal conditions it had created over the past century. The Court stated simply that “the magnitude of a legal wrong is no reason to perpetuate it.”²⁴³ Consequently, the Court did not allow Oklahoma to benefit from its illegal actions in applying its jurisdiction in Indian Country for the past 100 years.²⁴⁴

The Court was also more hopeful about future events than the dissent and Oklahoma foretold. The majority noted that Oklahoma and many Indian nations over a long period of time have negotiated hundreds of cooperative compacts that cover myriad topics such as “taxation, law enforcement, vehicle registration, hunting and fishing, and countless other fine regulatory questions,” and that these successful endeavors portended well for Oklahoma and the tribes to also handle the criminal and civil issues that might arise after *McGirt*.²⁴⁵

The Court more sharply addressed the chaos argument and the “costs” of its decision. “By suggesting that our interpretation of Acts of Congress adopted a century ago should be inflected based on the costs of enforcing them today, the dissent tips its hand.”²⁴⁶ The Court expressly criticized step three of *Solem*: “Yet again, the point of looking at subsequent developments seems not to be determining the meaning of the laws Congress wrote in 1901 or 1906, but emphasizing the costs of taking them at their word.”²⁴⁷ And if “chaos” really does ensue, if the “costs” of *McGirt* become too burdensome, the majority noted that “Congress remains free to supplement its statutory directions about the lands in question at any time.”²⁴⁸

The majority emphasized that in “reaching our conclusion about what the law demands of us today, we do not pretend to foretell the future and we proceed well aware of the potential for cost and conflict around jurisdictional boundaries, especially ones that have gone unappreciated for so long.”²⁴⁹ But the Court also noted:

²⁴¹ *Id.* at 2480-81.

²⁴² *Id.* at 2481.

²⁴³ *Id.* at 2480. One might ask, for example, if the Supreme Court should have refused to decide *Brown v. Board of Education*, 347 U.S. 483 (1954), due to nearly seventy years of turmoil, disputes, litigation, violence, and murders that followed that ruling.

²⁴⁴ *Id.* at 2482.

²⁴⁵ *Id.* at 2481.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 2481-82.

²⁴⁹ *Id.* at 2481.

[M]any of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. . . . Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.²⁵⁰

In sum, the Court applied the intent of Congress as expressed in the relevant statutes and enforced the rule of law.²⁵¹ The *McGirt* Court did not find express or even ambiguous language that demonstrated that Congress ever had an intent to disestablish the MCN Reservation.²⁵² It addressed but ultimately ignored the *Solem* step two and three evidence highlighted by Oklahoma and the dissent.²⁵³ The Court said that to use this uncertain evidence to try to obscure or disprove the clear intent of Congress would allow Oklahoma to benefit from its unauthorized and illegal actions, and in fact “would be the rule of the strong, not the rule of law.”²⁵⁴

C. *Modifying the Solem Test?*

As already mentioned, the *Solem* test was presumed by courts and commentators to allow, or even to require, a court to move beyond just what Congress expressly said or did not say about diminishing or disestablishing a particular Indian reservation.²⁵⁵ The commonly called “step two” of *Solem*’s “analytical structure” allowed a court to examine the contemporaneous history and events surrounding a statute that arguably diminished or disestablished a reservation to determine whether there had been a common and widely held

²⁵⁰ *Id.* at 2482. Justice Gorsuch stated a similar idea in his concurrence in 2019 in a case that also enforced a tribal treaty:

[T]his case just tells an old and familiar story. The State of Washington includes millions of acres that the Yakamas ceded to the United States under significant pressure. In return, the government supplied a handful of modest promises. The State is now dissatisfied with the consequences of one of those promises. It is a new day, and now it wants more. But today and to its credit, the Court holds the parties to the terms of their deal. It is the least we can do.

Wash. State Dep’t of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1021 (2019) (Gorsuch, J., concurring).

²⁵¹ *McGirt*, 140 S. Ct. at 2482. (“If Congress wishes to withdraw its promises, it must say so.”).

²⁵² *Id.* at 2468. (“Oklahoma does not point to any ambiguous language in any of the relevant statutes that could plausibly be read as an Act of disestablishment. Nor may a court favor contemporaneous or later practices *instead of* [sic] the laws Congress passed.”).

²⁵³ *Id.* at 2468-69.

²⁵⁴ *Id.* at 2474.

²⁵⁵ *Solem v. Barlett*, 465 U.S. 463, 471 (1984) (“[E]xplicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment.”).

understanding that the “reservation would shrink.”²⁵⁶ In step three, a court could examine the subsequent history and events following the opening of a reservation to non-Indian settlement to determine if Congress had intended the reservation’s borders to change.²⁵⁷

Arguably, the majority in *McGirt* did modify the long-accepted *Solem* three-step test. The dissent alleged it did, stating that the majority “announces a new approach” and does “not even discuss the governing approach reiterated throughout [Court] precedents.”²⁵⁸ The majority did not affirmatively state anything of the sort but it did expressly disparage the idea that *Solem* created putative steps and that those steps have to be applied in every diminishment case.²⁵⁹ It is possible, then, that *McGirt* can be read as disapproving the *Solem* analysis to some extent.

It is worthwhile to quote a passage from *McGirt* after the majority finished analyzing the relevant congressional statutes and turned to Oklahoma’s arguments about steps two and three:

Oklahoma even classifies and categorizes how we should approach the question of disestablishment into three “steps.” It reads *Solem* as requiring us to examine the laws passed by Congress at the first step, contemporary events at the second, and even later events and demographics at the third. On the State’s account, we have so far finished only the first step; two more await.

This is mistaken. When interpreting Congress’s work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us. That is the only “step” proper for a court of law. To be sure, if during the course of our work an ambiguous statutory term or phrase emerges, we will sometimes consult contemporaneous usages, customs, and practices to the extent they shed light on the meaning of the language in question at the time of enactment.²⁶⁰

It is perhaps not surprising that Justice Gorsuch, the author of *McGirt*, and an avowed originalist or textualist,²⁶¹ would disapprove of the view that *Solem* requires a court to use all three steps all the time. If Congress’s language and

²⁵⁶ *Id.* at 471.

²⁵⁷ *Id.* at 471-72.

²⁵⁸ *McGirt*, 140 S. Ct. at 2486-87 (Roberts, C.J., dissenting).

²⁵⁹ *See id.* at 2468-70 (majority opinion).

²⁶⁰ *Id.* at 2468 (citation omitted).

²⁶¹ NEIL GORSUCH WITH JANE NITZE & DAVID FEDER, A REPUBLIC, IF YOU CAN KEEP IT 127-42 (2019); *see also* Matthew L.M. Fletcher, *Textualism’s Gaze*, 25 MICH. J. RACE & L. 111, 113 (2020) (“Gorsuch’s *McGirt* opinion is pure textualism writ large.”). *But see generally* DAVID H. GANS, CONST. ACCOUNTABILITY CTR., THE SELECTIVE ORIGINALISM OF JUDGE NEIL GORSUCH (2017), <https://www.theconstitution.org/wp-content/uploads/2017/12/CAC-Selective-Originalism-of-Gorsuch.pdf> [https://perma.cc/BC64-BY86] (criticizing then-Judge Gorsuch as being “a selective originalist, committed to following only *some* of the Constitution’s text and history”).

intent is clear and explicit, would not an originalist, and the theory of originalism, argue that the analysis and interpretation of the statute or a constitutional provision ends there? Considering that the four dissenters can also be fairly defined as originalists and textualists, adherents of that constitutional and statutory interpretive method, one wonders why they did not join the majority opinion.²⁶²

The majority emphasized and “restate[d] the point” that “[t]here is no need to consult extratextual sources when the meaning of a statute’s terms is clear. Nor may extratextual sources overcome those terms.”²⁶³ The “only role such materials can properly play is to help ‘clear up . . . not create’ ambiguity about a statute’s original meaning.”²⁶⁴

The dissent charged that the majority’s “new approach sharply restrict[ed] consideration of contemporaneous and subsequent evidence of congressional intent.”²⁶⁵ And it further charged that the majority ignored precedent and “[o]ur traditional approach . . . [which] *requires* us’ to determine Congress’s intent by ‘examin[ing] *all* the circumstances surrounding the opening of a reservation.’ Yet the Court refuses to confront the cumulative import of all of Congress’s actions here.”²⁶⁶

The dissent surely overstated its case. But perhaps we are too, because in one sense, the majority did not alter *Solem*; perhaps the majority just applied the flip side of another interpretive principle stated in that case. In *Solem*, the Court stated that if a statute clearly diminished or disestablished a reservation, and Congress coupled that with “an unconditional commitment . . . to compensate the Indian tribe for its opened land,” then that creates an “almost insurmountable presumption” that the reservation did shrink.²⁶⁷ Thus, it would be nearly impossible for step two or three evidence to overcome that presumption. That is somewhat analogous to what the majority did in *McGirt* but in reverse. The statutes regarding the Creek Nation and Creek Reservation clearly did not intend to disestablish the Reservation nor did they make “an unconditional commitment” to pay the Nation to sell its lands, so evidence from step two and

²⁶² See, e.g., John O. McGinnis, *Which Justices Are Originalists?*, LAW & LIBERTY (Nov. 9, 2018), <https://lawliberty.org/which-justices-are-originalists/> [<https://perma.cc/A2ED-DJPF>]; Allen Porter Mendenhall, *Brett Kavanaugh and Originalism*, IMAGINATIVE CONSERVATIVE (Oct. 9, 2018), <https://theimaginativeconservative.org/2018/10/brett-kavanaugh-originalism-allen-porter-mendenhall.html> [<https://perma.cc/V7B9-4PWB>].

²⁶³ *McGirt*, 140 S. Ct. at 2469.

²⁶⁴ *Id.* (alteration in original) (quoting *Milner v. Dep’t of Navy*, 562 U.S. 562, 574 (2011)).

²⁶⁵ *Id.* at 2487 (Roberts, C.J., dissenting).

²⁶⁶ *Id.* (second and fourth alterations in original) (citation omitted) (quoting *Hagen v. Utah*, 510 U.S. 399, 412 (1994)).

²⁶⁷ *Solem v. Bartlett*, 465 U.S. 463, 470-71 (1984).

three could not, and should not, be used to try to overcome the presumption that Congress did not intend to disestablish the Reservation.²⁶⁸

In conclusion, it appears that *McGirt* will impact the future application of the *Solem* test. The majority did not reverse *Solem sub silentio* but it did expressly disapprove of a mandatory three-step approach to analyzing disestablishment questions, and it expressly denigrated the value of evidence in step two and three. It will no doubt be a long time before an advocate expressly raises the *Solem* “three step” test to the Supreme Court again.

D. *The Dissent*

The dissent has been briefly addressed several times already. As mentioned, it claimed the majority altered the application of *Solem*, ignored steps two and three of its analytical structure, and disregarded decades of Supreme Court precedent on how to apply the *Solem* test.²⁶⁹

In a lengthy dissent, Chief Justice Roberts discussed what he alleged were the required three steps of *Solem*. First, the dissent recounted a “relentless series of statutes” Congress enacted regarding the Creek Nation and other tribes in the Indian Territory and argued that this series of acts demonstrated Congress’s intent to disestablish the Creek Reservation.²⁷⁰

Using step two, the dissent argued that it was the contemporary understanding of Congress, Oklahoma, Oklahomans, the Creek Nation, and the other tribes in the Indian Territory that Indian reservations were disestablished by the time of

²⁶⁸ See *McGirt*, 140 S. Ct. at 2468 (“[T]here simply arrived no moment when any Act of Congress dissolved the Creek Tribe disestablished its reservation.”). Tribal advocates should be happy to see steps two and three decreased in importance. Indian nations should win most of the diminishment and disestablishment cases if courts focus only on the language of the relevant statute because Congress rarely used what some have called the “magic language” that presumptively demonstrates a clear and explicit intent to diminish a reservation. See *id.* at 2489 (Roberts, C.J., dissenting) (“[T]here is no ‘magic words’ requirement for disestablishment, and each individual statute may not be considered in isolation.”). Congress did not know in the 1880s-1920s what the “magic language” was because it was not then a term of art. See *Solem*, 465 U.S. at 475 n.17. And the Supreme Court has even rejected diminishment arguments when it looked like Congress accidentally did use the “magic language.” In *Solem*, there was “some language” in the relevant act that supported diminishment because the act referred to “the respective reservation[] thus diminished.” *Id.* at 474. The Act also referred to Indians having rights on the opened parts of the reservation “as long as the lands remain part of the public domain.” *Id.* at 475 (quoting Cheyenne River Act, Pub. L. No. 60-158, § 9, 35 Stat. 460, 464 (1908)). Those phrases look like words that might signify diminishment today. But the *Solem* Court downplayed them as “isolated phrases” that were “hardly dispositive” and “cannot carry the burden of establishing an express congressional purpose to diminish.” *Id.* at 475.

²⁶⁹ *McGirt*, 140 S. Ct. at 2489 (Roberts, C.J., dissenting); see also *id.* at 2488 (“Unless the Court is prepared to overrule these precedents, it should follow them.”).

²⁷⁰ *Id.* at 2489-93.

Oklahoma statehood in 1907.²⁷¹ The dissent believed the “available evidence overwhelmingly confirms that Congress eliminated any Creek reservation.”²⁷²

The dissent then turned to step three and examined the subsequent history of the relevant acts, the allotment of the Creek Reservation, and Oklahoma statehood up to the present day. The dissent cited numerous statements by tribal, federal, and state leaders and officials, congressional language in later statutes, and Congress’s treatment of the allegedly disestablished area.²⁷³ The dissent interpreted this evidence as inferring that Congress had intended to disestablish the MCN Reservation.²⁷⁴ It also relied on modern-day “demographic data” and “a century of settled understanding” that the Reservation had been disestablished by the early 1900s.²⁷⁵

The dissent also relied on the chaos theory advocated by Oklahoma and argued that a MCN Reservation covering over three million acres, one million Oklahomans, and part of the city of Tulsa would harm “the State’s ability to prosecute serious crimes” and that “decades of past convictions could well be thrown out.”²⁷⁶ In addition, the dissent alleged that “the Court has profoundly destabilized the governance of eastern Oklahoma.”²⁷⁷

The dissent went far beyond the specific criminal issue facing the *McGirt* Court to address potential chaos in the civil law arena as well and worried that “[b]eyond the criminal law, the decision may destabilize the governance of vast swathes of Oklahoma.”²⁷⁸ The dissent worried about the “significant uncertainty” the decision could create regarding “the State’s continuing authority over any area that touches Indian affairs, ranging from zoning and taxation to family and environmental law.”²⁷⁹ Similarly, it lamented that questions of tribal civil jurisdiction, adjudicatory jurisdiction, regulatory authority, and the accompanying, complicated federal analysis will have to be performed for all these issues to determine whether the state, the MCN, or the United States would be involved.²⁸⁰

²⁷¹ *Id.* at 2494-98.

²⁷² *Id.* at 2494-95.

²⁷³ *Id.* at 2498-500.

²⁷⁴ *Id.* at 2502.

²⁷⁵ *Id.* at 2500.

²⁷⁶ *Id.* at 2482.

²⁷⁷ *Id.* The dissent seems to have made the same mistake as news reports about *McGirt*. This appeal was only about the MCN Reservation of three million acres, not “eastern Oklahoma.” See, e.g., Cecily Hilleary, *Could Half of Oklahoma End Up Under Native American Control?*, VOICE OF AM. (Dec. 26, 2018), <https://learningenglish.voanews.com/a/could-half-the-state-of-oklahoma-end-up-under-native-american-control-/4696407.html> [<https://perma.cc/VPP2-4RUT>].

²⁷⁸ See *McGirt*, 140 S. Ct. at 2501 (Roberts, C.J., dissenting).

²⁷⁹ *Id.* at 2482.

²⁸⁰ *Id.* at 2501-02, 2501 n.10 (“This test mires state efforts to regulate on reservation lands in significant uncertainty, guaranteeing that many efforts will be deemed permissible only after extensive litigation, if at all.”).

Under its chaos theory, the dissent and Oklahoma foretold looming disasters on the horizon.²⁸¹ As already mentioned, the majority discounted these “dire warnings” and emphasized that if the warnings come true, Congress has the power to legislate on these topics.²⁸²

Finally, we would be remiss if we ignored a disturbing subtext emphasized by the dissent.²⁸³ We wonder why it relied on the intent and effects of certain historical facts, and seemed to laud, as part of the subsequent history of Oklahoma, events that were often illegal and that highlight the sordid history of ethnocentrism, manifest destiny, settler-colonial greed, and the confiscation/theft of Indians’ lands and assets.²⁸⁴ The dissent used these facts apparently to justify its argument that the Creek Reservation had been disestablished by Congress in the early 1900s, but in doing, so it utilized manifest destiny imagery and the Jeffersonian “yeoman farmer” trope about who were destined to occupy and “civilize” the continent and the “savages.”²⁸⁵ Thus, the dissent noted that American settlers began a “renewed ‘determination to thrust the nation westward’” into the Indian Territory, which “rapidly

²⁸¹ See *id.* at 2500-01 (discussing majority opinion’s drastic implications on prior convictions, authority, and procedural stability).

²⁸² *Id.* at 2481-82 (majority opinion) (“[S]hould agreement prove elusive, Congress remains free to supplement its statutory directions about the lands in question at any time. It has no shortage of tools at its disposal.”).

²⁸³ The dissent also makes a bizarre suggestion that because some Creeks were successful, and came to control much of the land on the Reservation, that this should somehow be evidence that the Reservation was disestablished. See *id.* at 2484 (Roberts, C.J., dissenting). This seems ironic considering that just three Americans are richer than the bottom 50% combined, and that one political party states that American politics favors the top 1%. Noah Kirsch, *The 3 Richest Americans Hold More Wealth than Bottom 50% of The Country, Study Finds*, FORBES (Nov. 9, 2017, 12:08 PM), <https://www.forbes.com/sites/noahkirsch/2017/11/09/the-3-richest-americans-hold-more-wealth-than-bottom-50-of-country-study-finds/#378b47bb3cf8> [https://perma.cc/U2AM-BDSX]; John Sides, *The Politics of the Top 1 Percent*, FIVETHIRTYEIGHT (Dec. 14, 2011, 11:51 AM), <https://fivethirtyeight.com/features/the-politics-of-the-top-1-percent/> [https://perma.cc/3B9S-3GUW] (discussing that inequality between political voice of the 1% and others “may then give rise to policies that perpetuate unequal outcomes”).

²⁸⁴ See *McGirt*, 140 S. Ct. at 2484-91 (Roberts, C.J., dissenting) (discussing settler movement to the region and Congress’s intentional destruction of the Creek government and land titles).

²⁸⁵ See *id.* at 2484; see also GETCHES ET AL., *supra* note 183, at 167-71 (describing laws and policies implemented with intent of “civilizing” Indians); Robert J. Miller, *American Indians, the Doctrine of Discovery, and Manifest Destiny*, 11 WYO. L. REV. 329, 348-49 (2011) (quoting U.S. Senator in 1846 foretelling Indian extinction if they “resisted civilization” and extolling the “moral and intellectual superiority of the White race”); *id.* (quoting 1870 Wyoming newspaper claiming Wyoming was “destined for the occupancy and sustenance of the Anglo-Saxon race” and that “the doom of extinction is upon the red men”); *id.* at 349 (quoting Secretary of State Henry Clay stating in 1825 that it was “impossible to civilize Indians . . . [and t]hey were destined to extinction” (first alteration in original)); MILLER, DISCOVERED AND CONQUERED, *supra* note 105, at 77-80, 84-94, 120-22.

transformed vast stretches of territorial *wilderness* into farmland and ranches” as well as “founded ‘[f]lourishing towns.’”²⁸⁶

Most of this American expansion into the Indian Territory and the alleged “progress” was in reality illegal trespass, invasion, and theft of treaty-protected, tribally owned lands and assets.²⁸⁷ The dissent, however, inexplicably bemoaned that these trespassers, who invested “millions” in towns and farms, “had no durable claims to their improvements” and did not have “meaningful access to private property ownership, as the unique communal titles of the Five Tribes precluded ownership by Indians and non-Indians alike.”²⁸⁸ We are compelled to ask: how could these trespassers have any legitimate claim to tribal and Indian owned lands and assets? In contrast, research by many historians and lawyers, and reports to Congress in the early 1900s, demonstrate that Americans’ take-over of Indian lands and assets in the Indian Territory, and afterwards in Oklahoma, included rampant fraud, coercion, and even murders.²⁸⁹ The evidence shows that some federal and state officials and attorneys fraudulently dispossessed Indian individuals of their lands and assets in many ways, including courts appointing unnecessary and fraudulent guardians, both of which earned unconscionable court costs and fees, to control and even steal the properties of allegedly incompetent Indian adults and minors.²⁹⁰ In fact, Francis Prucha,

²⁸⁶ *McGirt*, 140 S. Ct. at 2484 (Roberts, C.J., dissenting) (emphasis added) (citations omitted) (first quoting COHEN’S HANDBOOK, *supra* note 108, § 1.04; and then quoting S. REP. NO. 53-377, at 6 (1894)).

²⁸⁷ See, e.g., Brief of Amici Curiae Historians, Legal Scholars, and Cherokee Nation in Support of Petitioner at 26-31, *McGirt*, 140 S. Ct. 2452 (2020) (No. 18-9526) (discussing unlawful federal acts to establish control of Indian territory and Creek resistance to federal control); FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE INDIANS 411, 736-38, 744 (1984) (discussing how “throng[s] of whites” invaded Indian Territory, contributing to “civilization” for Indians while Americans were stealing their lands and assets through “illegal invasions of the Indian Territory”); RENNARD STRICKLAND, THE INDIANS IN OKLAHOMA 32-38, 40-46, 52-53, 72-73, 82, 113 (1980); DEBO, *supra* note 63, at viii, 48-51, 86-87, 94-98, 104-06, 117-18, 233-34, 313 (1940) (discussing historical strategies used to encroach on Indian Territory).

²⁸⁸ *McGirt*, 140 S. Ct. at 2484 (Roberts, C.J., dissenting).

²⁸⁹ STRICKLAND, *supra* note 287, at 32-38, 40-46, 52-53, 72-73, 82, 113; DEBO, *supra* note 63, at viii, 48-51, 86-87, 94-98, 104-06, 117-18, 233-34, 313; see generally DAVID GRANN, KILLERS OF THE FLOWER MOON: THE OSAGE MURDERS AND THE BIRTH OF THE FBI (2017) (detailing series of tragic, profit-motivated murders of Osage people in early Oklahoma).

²⁹⁰ ANGIE DEBO, FIVE CIVILIZED TRIBES OF OKLAHOMA: REPORT ON SOCIAL AND ECONOMIC CONDITIONS 1 (1951) (“[T]he whole legal system of Eastern Oklahoma was warped to strip [Indians] of their property.”); PRUCHA, *supra* note 287, at 901-06 (remarking that “investigators did indeed turn up questionable dealings” and that “[i]n 1926 the Board of Indian Commissioners . . . repeated the established litany of evils in the work of the probate courts and called again for return to the federal government of the protective authority over Indian estates that had been taken away by the act of 1908”); GERTRUDE BONNIN, CHARLES H. FABENS & MATTHEW K. SNIFFEN, INDIAN RIGHTS ASS’N, OKLAHOMA’S POOR RICH INDIANS: AN ORGY OF GRAFT AND EXPLOITATION OF THE FIVE CIVILIZED TRIBES—LEGALIZED ROBBERY

probably the leading historian on American Indian affairs, stated that in Oklahoma “when oil was found on an Indian’s property, ‘it [was] usually considered prima facie evidence that he is incompetent.’”²⁹¹

Furthermore, in contrast to the dissent’s argument, the actual evidence suggests that the Five Tribes and their citizens “showed tremendous resilience in reestablishing an orderly and productive existence,”²⁹² in the Indian Territory, were operating settled governments, and were engaged in beneficial governance and economic efforts.²⁹³ But their valuable lands, minerals, and oil assets were just too attractive for Americans to ignore.

It is unfortunate that the dissent highlighted these specific facts and events as part of its *Solem* step two and three arguments that “Congress” had intended to disestablish the Creek Reservation as of the early 1900s.²⁹⁴ In sharp contrast, these illegal and contemptible events strongly support the majority in its decision to criticize and downplay this type of evidence because, as the majority said: “None of these moves would be permitted in any other area of statutory interpretation, and there is no reason why they should be permitted here. That would be the rule of the strong, not the rule of law.”²⁹⁵

In sum, the dissent vigorously attacked the majority opinion and its analysis at length. In fact, this dissent, the five-four vote, and the current composition of the Court leads one to wonder how it will utilize and synthesize *Solem* and *McGirt* to decide similar cases in the future.

5 (1924). *See generally* H. M. HOYT, ACTING ATT’Y GEN., CHARGES AGAINST UNITED STATES COURT OFFICIALS IN INDIAN TERRITORY, H.R. DOC. NO. 58-528 (1904) (discussing array of investigative findings regarding Indian Rights Association’s charges against United States). The majority in *McGirt* also noted that evidence suggests

that the loss of Creek land ownership was accelerated by the discovery of oil A number of the federal officials charged with implementing the laws of Congress were apparently openly conflicted, holding shares or board positions in the very oil companies who sought to deprive Indians of their lands. And for a time Oklahoma’s courts appear to have entertained sham competency and guardianship proceedings that divested Tribe members of oil rich allotments. Whatever else might be said about the history and demographics placed before us, they hardly tell a story of unalloyed respect for tribal interests.

McGirt, 140 S. Ct. at 2473 (citations omitted). *See also* Miller, *Laws Impacting the Eastern Shawnee Tribe*, *supra* note 145, at 165 (“After finding their governments, jurisdictions, lands, and cultures under attack from the United States, the Bureau of Indian Affairs, ‘boomers,’ churches, American settlers, and corporations—and all too often by fraudulent means—the tribal nations in Oklahoma were decimated and nearly inactive for many decades after statehood.”).

²⁹¹ PRUCHA, *supra* note 287, at 905 (quoting BONNIN ET AL., *supra* note 290, at 7).

²⁹² *Id.* at 272.

²⁹³ *See, e.g., id.* at 272-79; Royster, *supra* note 216, at 8; DEBO, *supra* note 290, at 1.

²⁹⁴ *See McGirt*, 140 S. Ct. at 2484-87 (Roberts, C.J., dissenting) (applying *Solem* to relevant history to suggest disestablishment was intended).

²⁹⁵ *Id.* at 2474 (majority opinion). The majority also stated, “To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.” *Id.* at 2482.

E. *Justice Ruth Bader Ginsburg*

The outcome in *McGirt* surprised many people. One reason is that the Supreme Court was very unfavorable to tribal and Indian litigants in the thirty-one years from 1987 to 2017.²⁹⁶ In fact, during the Rehnquist Court and the first twelve years of the Roberts Court, Indian nations and Indian litigants lost over 70% of their cases.²⁹⁷ But since Justice Gorsuch joined the Court in April 2017, there has been a notable turnaround and he has provided the crucial fifth vote in three tribal wins before the Court.²⁹⁸

In light of those statistics, and the magnitude of *McGirt*, the MCN and Indian advocates had valid reasons to be uncertain about the outcome of this appeal. But they had an additional reason to be wary because of uncertainty over the position of Justice Ruth Bader Ginsburg. This concern seemed reasonable because in 2005 Justice Ginsburg authored the eight-one opinion in *City of Sherrill v. Oneida Indian Nation*.²⁹⁹ In that case, the Oneida Indian Nation attempted to restore its sovereignty over land parcels it had repurchased on the open market that were within the boundaries of its 1788 reservation.³⁰⁰ The Nation then rejected state, county, and city regulatory and taxation authority over these parcels.³⁰¹ But Justice Ginsburg and seven other members of the Court invoked the “settled expectations” and the “justifiable expectations” of the non-Indian governments and the predominantly non-Indian population in the

²⁹⁶ Alexander Tallchief Skibine, *The Supreme Court's Last 30 Years of Federal Indian Law: Looking for Equilibrium or Supremacy?*, 8 COLUM. J. RACE & L. 277, 285-86 (2018).

²⁹⁷ *Id.* (surveying sixty-six Supreme Court cases with tribal litigants from 1986 to 2017 and finding tribal win rate of 28%); see Bethany R. Berger, *Hope for Indian Tribes in the U.S. Supreme Court?: Menominee, Nebraska v. Parker, Bryant, Dollar General . . . and Beyond*, 2017 U. ILL. L. REV. 1901, 1945 (calculating percentage of Supreme Court tribal wins from 1990 to 2015 as 23.5%); Alex Tallchief Skibine, *Teaching Indian Law in an Anti-tribal Era*, 82 N.D. L. REV. 777, 780-81 (2006) (calculating Indian nations and tribal litigants won 56% of seventy-five Supreme Court cases from 1968 to 1987 but only 23% of forty-eight cases from 1988 to 2006); 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, 280, 285 (2001) (calculating tribal interests won 23% of cases in Rehnquist Court's first fifteen years (1986 to 2000) despite winning 58% of cases in Burger Court (1969 to 1985)); Matthew L.M. Fletcher, *Supreme Court Outcomes: Federal Indian Law from 1959*, TURTLE TALK (Nov. 21, 2007), <https://turtletalk.blog/2007/11/21/supreme-court-outcomes-federal-indian-law-from-1959/> [<https://perma.cc/3WTY-VZEJ>] (calculating percentage of Supreme Court tribal wins from 1987 to 2007 as 25%).

²⁹⁸ *McGirt*, 140 S. Ct. at 2453 (Gorsuch writing opinion for five-four majority); *Herrera v. Wyoming*, 139 S. Ct. 1686, 1691 (2019) (Gorsuch joining five to four majority); *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1016-1021 (2019) (Gorsuch joining five-four plurality and writing concurrence).

²⁹⁹ 544 U.S. 197, 201 (2005).

³⁰⁰ *Id.* at 203-07, 211.

³⁰¹ *Id.* at 202 (“[Oneida Indian Nation] resists the payment of property taxes to Sherrill on the ground that [its] acquisition of fee title to discrete parcels of historic reservation land revived the Oneidas’ ancient sovereignty piecemeal over each parcel.”).

area and prevented the Nation from reasserting its sovereignty over these repurchased lands.³⁰² The majority stated that the Nation was precluded by equitable defenses of laches, acquiescence, and impossibility “from rekindling embers of sovereignty that long ago grew cold.”³⁰³ The majority emphasized that New York and the relevant counties and cities had governed, organized, and increased the value of the area in the absence of any tribal presence for nearly 200 years.³⁰⁴

Obviously, the *Sherrill* opinion raised concerns about how Justice Ginsburg would vote in *McGirt* since Oklahoma and Oklahomans had assumed and operated for over 100 years as if there was no MCN Reservation. Settled expectations, although in violation of federal and state law, the Creek Nation-U.S. treaties, and the borders of the MCN Reservation, had surely arisen in that time. The majority in *McGirt* recognized that “reliance interests” had arisen and that these interests might need to be litigated in the future.³⁰⁵ These “reliance interests” look quite similar to the “settled expectations” that were protected in *Sherrill*. Possibly, the paragraph in the majority opinion that discussed reliance interests was insisted upon by Justice Ginsburg, or at the very least was included to attract her support. The dissent likewise raised this topic, and that might also have been an attempt to attract her vote.³⁰⁶ In the end, however, Justice Ginsburg voted with the majority.

F. *Open Issues*

As is discussed in Part III below, significant and numerous repercussions have already occurred, and more are certain to follow *McGirt*, which will lead tribal, state, and federal governments into extensive negotiations and perhaps litigation over the decades to come. The *McGirt* opinion itself leaves open at least three issues that invite more litigation.

First, as the Supreme Court always carefully tries to do, it answered just the narrow question before it—whether Oklahoma had criminal jurisdiction over

³⁰² *Id.* at 215-16, 218. The Court has mentioned that “justifiable expectations” of non-Indians may arise in disestablishment cases. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-05 (1977) (“The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian both in population and in land . . . has created justifiable expectations . . .”); *Hagen v. Utah*, 510 U.S. 399, 421 (1994) (finding that refusal to acknowledge Reservation’s diminishment would disrupt justifiable expectations).

³⁰³ *Sherrill*, 544 U.S. at 214, 216-21.

³⁰⁴ *Id.* at 202, 215-16, 219-20 (finding that centuries of governance by New York State and ownership by private landowners make it impractical for Court to recognize Oneida Indian Nation’s sovereignty over repurchased lands).

³⁰⁵ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2481 (2020) (“[W]e do not disregard the dissent’s concern for reliance interests.”).

³⁰⁶ *Id.* at 2500 (Roberts, C.J., dissenting) (asserting that likely burdens caused by Court’s opinion are “the product of a century of settled understanding”).

Jimcy McGirt.³⁰⁷ The holding in *McGirt* forecloses the state from exercising criminal jurisdiction over Indian defendants within the boundaries of the MCN Reservation. But that does leave open serious questions about the MCN's and Oklahoma's exercise of civil jurisdiction over non-Indians and Indians of other tribes within the Reservation borders.³⁰⁸ These issues could easily lead to more litigation.

Second, the Court expressly anticipated future litigation on the issue of the reliance interests as noted in Section II.E.³⁰⁹

Third, the Court also recognized that Congress has the power to address any outcomes that might ensue. As the Court often does in Indian law cases, it expressly invited congressional legislation on the issue if Congress thinks that it is necessary.³¹⁰

Other potential issues that will arise due to *McGirt* are addressed in Part III.

III. THE IMPACT OF *McGIRT* AND THE MUSCOGEE (CREEK) NATION RESERVATION IN OKLAHOMA

In this Part, we briefly address what we see as the primary issues that will arise from *McGirt*. It must be remembered, however, that Congress could short circuit these impacts at any time by exercising its power to diminish or disestablish Indian reservations.³¹¹ Moreover, the majority in *McGirt* stated that less drastic congressional actions are also an option if insurmountable problems arise from the recognition of the continued existence of the MCN Reservation.³¹² But as already mentioned, if Congress were to take the most extreme act of diminishing or disestablishing the Reservation it would surely provoke the MCN

³⁰⁷ *Id.* at 2480 (“The only question before us, however, concerns the statutory definition of ‘Indian country’ as it applies in federal criminal law under the MCA . . .”).

³⁰⁸ *See id.* (finding that civil statutes need not rely on criminal law definitions and that “[i]t isn’t even clear what the real upshot of this borrowing into civil law may be”).

³⁰⁹ *Id.* at 2481 (“[W]e are ‘fre[e] to say what we know to be true . . . today, while leaving questions about . . . reliance interest[s] for later proceedings crafted to account for them.’” (alterations in original) (quoting *Ramos v. Louisiana*, 140 S. Ct. 1390, 1407 (2020))).

³¹⁰ *Id.* at 2481-82 (“Congress remains free to supplement its statutory directions about the lands in question at any time.”); *see also* *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 803 (2014) (“[I]t is for Congress . . . to say whether to create an exception to tribal immunity for off-reservation commercial activity.”); *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998) (“Although the Court has taken the lead in drawing the bounds of tribal immunity, Congress, subject to constitutional limitations, can alter its limits through explicit legislation.”).

³¹¹ *McGirt*, 140 S. Ct. at 2462 (finding that Congress, but not states or Court, has full authority to diminish or disestablish a reservation).

³¹² *Id.* at 2481-82.

to make a Fifth Amendment takings claim for its treaty-promised and constitutionally protected property and sovereign rights.³¹³

In our opinion, *McGirt* is one of the most significant and impactful Indian law cases the Supreme Court has decided in nearly a century. The decision portends substantial legal, political, and societal adjustments for the MCN, Oklahoma, and the United States that could take decades to resolve. Many changes have already occurred. In fact, within days of the opinion, S&P Global's issued a preliminary opinion on what *McGirt* meant for Oklahoma's credit rating.³¹⁴ That is not a common occurrence after Indian law cases. In addition, four other large reservations in eastern Oklahoma have now been recognized by state courts since *McGirt*, and the continued existence of other reservations is currently being litigated.³¹⁵

³¹³ See *supra* note 179 and accompanying text. Article VI of the Constitution states that federal treaties are the "Supreme law of the land." U.S. CONST. art. VI, cl. 2.

The MCN categorically rejected Governor Stitt's demands and the call for a federal law to disestablish the MCN Reservation. Press Release, Muscogee (Creek) Nation, Principal Chief David Hill Responds to Governor Stitt Press Conference (Oct. 22, 2020), <https://www.mcn-nsn.gov/principal-chief-david-hill-responds-to-governor-stitt-press-conference/> [<https://perma.cc/YJ39-BRLT>] ("[The Governor's] claim that enacting statehood in 1906 eliminated separate tribal reservations is blatantly false and unsupported by decades of laws."). Instead, the MCN began taking steps to protect its win in *McGirt* and begin governing its re-recognized Reservation. Press Release, Muscogee (Creek) Nation, Muscogee (Creek) Nation Announces Mvskoke Reservation Protection Commission (July 29, 2020), at <https://www.mcn-nsn.gov/muscogee-creek-nation-announces-mvskoke-reservation-protection-commission/> [<https://perma.cc/M9QR-T4KM>] (announcing creation of commission made up of Muscogee (Creek) citizens that will analyze post-*McGirt* issues in law enforcement, child welfare, government-to-government relations, judicial affairs, regulatory matters, business and commerce, and violence against Native women); Press Release, Muscogee (Creek) Nation, Muscogee (Creek) Nation Announces Appointments to Mvskoke Reservation Protection Commission (Aug. 10, 2020), <https://www.mcn-nsn.gov/muscogee-creek-nation-announces-appointments-to-mvskoke-reservation-protection-commission/> [<https://perma.cc/KN5Q-VRA3>] (listing several appointments for eight sections of Mvskoke Reservation Protection Commission).

³¹⁴ *Bulletin: Oklahoma's State, Local Credit Ratings Unlikely to Be Affected in the Near Term by the SCOTUS Decision on Reservations*, S&P GLOBAL (July 13, 2020, 7:16 PM), <https://www.spglobal.com/ratings/en/research/articles/200713-bulletin-oklahoma-s-state-local-credit-ratings-unlikely-to-be-affected-in-the-near-term-by-the-scotus-decis-11572905> (noting that *McGirt* will not have immediate impacts on Oklahoma's credit rating because "[w]e expect the effects of the decision to unfold relatively slowly, potentially over multiple years"); see also Carmen Forman, *Tax Commission: McGirt Decision Will Have 'Significant, Immediate' Financial Impact*, OKLAHOMAN (Oct. 5, 2020, 1:24 AM), <https://oklahoman.com/article/5673163/tax-commission-mcgirt-decision-will-have-significant-immediate-financial-impact> [<https://perma.cc/498E-DT55>] ("The ruling could result in hundreds of millions less in state tax collections because the state is unable to tax income earned by tribal citizens while they reside on their tribe's land.").

³¹⁵ See *supra* note 6; *Deerleader v. Crow*, No. 20-cv-00172, 2021 WL 150014, at *5 (N.D. Okla. Jan. 15, 2021) (approving Deerleader's pro se federal writ for habeas corpus for release

The existence of the MCN Reservation significantly impacts Oklahoma's authority and jurisdiction because state laws and state governments have very limited roles inside Indian Country and over the conduct of Indian peoples inside Indian Country. In 1832, for example, the Court said that the "laws of Georgia can have no force" within Cherokee Nation territory.³¹⁶ That was black-letter law for 130 years, at least in the civil law arena, until the later decades of the twentieth century when the Court retreated somewhat and allowed state law, in some limited situations, to apply in Indian Country.³¹⁷ Notwithstanding that fact, there is no question that *McGirt* has initiated significant changes in the exercise of sovereignty and jurisdiction on the Reservation for the state, the MCN, and the United States.

A. *Criminal Jurisdiction*

The MCN's jurisdiction over criminal issues is now vastly expanded and encompasses its 3.25 million-acre Reservation instead of just the approximately 135,000 acres of "Indian Country" that was formerly presumed to comprise the MCN's territory.³¹⁸ Indian nations exercise criminal jurisdiction over all Indians

from state prison because, under *McGirt*, state lacked jurisdiction to prosecute him, a Muscogee (Creek), for a crime committed in Indian Country). The current existence of the Miami Tribe and Ottawa Tribe Reservations were being litigated in *Oklahoma v. Leopard*, No. CF-2019-00194 (Dist. Ct. Ottawa Cnty. Okla. dismissed Nov. 12, 2020), <https://www1.odcr.com/detail?court=058-&casekey=058-CF++1900194> (dismissing for want of jurisdiction), and *Oklahoma v. Terry*, No. CF-2012-00242 (Dist. Ct. Ottawa Cnty. Okla. dismissed Feb. 25, 2021), <https://www1.odcr.com/detail?court=058-&casekey=058-CF++1200242> (same).

³¹⁶ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

³¹⁷ *See, e.g., Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186 (1989); *Washington v. Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. 134, 154 (1980) (holding that tribal government must assist in collecting state cigarette taxes on on-reservation sales to non-Indians); CANBY, *supra* note 108, at 155 (noting that exclusion of state law stated in *Worcester* was only fifty years for criminal laws).

³¹⁸ We estimate that before *McGirt*, the MCN and its tribal citizens held about 135,000 acres in trust status with the United States. That was no doubt the extent of "Indian Country" that the MCN was governing. *Compare* Letter from John Tahsuda, Principal Deputy Assistant Sec'y, Indian Affs., Dep't of the Interior, to Hon. James Floyd, Principal Chief, Muscogee (Creek) Nation (Apr. 30, 2018) (on file with author) ("Today, approximately 6,856 acres are held in trust for the Nation."), *with* Memorandum from Realty Tr. Servs., Muscogee (Creek) Nation (Nov. 19, 2020) (on file with author) ("There are approximately 128,000 acres of restricted property owned by individual Tribal members in need of assistance managing and protecting their property rights.").

Oklahoma does not have criminal jurisdiction over Indians committing crimes on individual Indian-owned trust allotments because they are "Indian Country." *Magnan v. Trammell*, 719 F.3d 1159, 1176 (10th Cir. 2013); accord *United States v. Pelican*, 232 U.S. 442, 447-49 (1914).

who commit crimes within Indian Country,³¹⁹ and can even opt into a federal program to exercise limited criminal jurisdiction over non-Indians who commit specifically defined acts of domestic violence.³²⁰ In addition, the federal government has assumed jurisdiction to prosecute some crimes committed by Indians and non-Indians within Indian Country.³²¹ In contrast, state governments cannot criminally prosecute Indians for conduct occurring within Indian Country except in a few states where Congress expressly created that jurisdiction.³²² Obviously, then, *McGirt* has created major changes and presents challenges for all three governments in regard to criminal jurisdiction now that the MCN Reservation is twenty-five times larger than the MCN's territory was formerly presumed to be. In addition, the reservations of other Indian nations in Oklahoma have also now been recognized as still in existence, which further increases the criminal jurisdiction on the part of the Indian nations and the United States and decreases jurisdiction for Oklahoma.³²³

The Supreme Court expressly recognized this eventuality from its decision in *McGirt* and stated that there would no doubt be a period of adjustment, and perhaps intergovernmental diplomacy and cooperation would be necessary to accommodate this new reality.³²⁴ The Court noted that perhaps Oklahoma would now have too many prosecutors and the United States and the MCN too few.³²⁵ In recognition of this increase in criminal jurisdiction over its re-recognized Reservation, the MCN has hired four more prosecutors and one more district court judge, and the U.S. Attorney's Office for the Northern District of Oklahoma significantly increased its prosecutors and staff.³²⁶

³¹⁹ 25 U.S.C. § 1301(2); *United States v. Lara*, 541 U.S. 193, 199 (2004); *United States v. Wheeler*, 435 U.S. 313, 327-28 (1978); *Talton v. Mayes*, 163 U.S. 376, 381 (1896); *Ex Parte Kan-gi-Shun-ca (Ex Parte Crow Dog)*, 109 U.S. 556, 570 (1883).

³²⁰ Violence Against Women Act, 25 U.S.C. § 1304 (providing tribal jurisdiction for instances of domestic violence perpetrated by non-Indians against Indian partners).

³²¹ *See, e.g.*, Major Crimes Act, 18 U.S.C. § 1153; Indian Country Crimes Act, 18 U.S.C. § 1152; Assimilative Crimes Act, 18 U.S.C. § 13; CANBY, *supra* note 108, at 170-76, 182-85.

³²² *Magnan*, 719 F.3d at 1176 (finding that, because defendant was in Indian Country during commission of crime, state has no criminal jurisdiction). Congress granted a few states criminal jurisdiction over some Indian reservations. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified at 18 U.S.C. § 1162; 25 U.S.C. §§ 1321-1326; 28 U.S.C. § 1360) (providing California, Minnesota, Nebraska, Oregon, and Wisconsin with criminal jurisdiction over Indian reservations within their borders); COHEN'S HANDBOOK, *supra* note 108, § 6.04 (discussing Public Law 280 states and statutes for New York, Kansas, North Dakota, and Iowa). Oklahoma does, however, possess criminal jurisdiction over crimes committed by non-Indians in Indian Country against non-Indians. *See Draper v. United States*, 164 U.S. 240, 243-44, 247 (1896); *United States v. McBratney*, 104 U.S. 621, 624 (1881).

³²³ *See supra* notes 6, 315 and accompanying text.

³²⁴ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2481-82 (2020).

³²⁵ *Id.* at 2480.

³²⁶ Kristen Weaver, *Muscogee (Creek) Nation Receives Grant to Aid Influx of New Criminal Cases*, NEWS ON 6 (Sept. 17, 2020, 9:45 PM), <https://www.newson6.com>

In the seven months since *McGirt* was decided, we are encouraged to see the steps that have been taken to address criminal issues. The United States and the MCN acted quickly to ensure McGirt was kept in custody and successfully prosecuted after the Supreme Court voided his state conviction.³²⁷ While some Oklahoma officials and state citizens complained bitterly about the changes *McGirt* will cause,³²⁸ the state appears to have begun working towards real world solutions, and on January 22, 2021, Oklahoma Governor Kevin Stitt named a negotiator and invited the Five Tribes to negotiate the issues raised by *McGirt*.³²⁹

B. *Civil Jurisdiction*

Civil jurisdiction encompasses a wide array of sovereign authority that governments exercise over daily life and activities. We will mention here just some of the civil powers that tribal governments exercise in Indian Country and potential issues that will arise for the MCN and Oklahoma.³³⁰ We will also highlight the jurisdiction that the MCN will now exercise over its 3.25 million-acre Reservation, the expanded role of the federal government on the Reservation, and the jurisdictional limitations reservation status imposes on Oklahoma, all to demonstrate just some of the impacts of *McGirt*.

/story/5f641f670811e473c77fa812/muscogee-creek-nation-receives-grant-to-aid-influx-of-new-criminal-cases- [https://perma.cc/K389-8Y7C] (reporting that MCN received a \$547,000 Bureau of Indian Affairs grant to hire four new prosecutors); Curtis Killman, *McGirt Decision Results in Record Number of Criminal Federal Filings in 2020*, WAGONER CNTY. AM.-TRIB. (Feb. 12, 2021), https://tulsaworld.com/community/wagoner/mcgirt-decision-results-in-record-number-of-criminal-federal-filings-in-2020/article_2a653f86-4ebf-11eb-a788-7f4c2bb9c11e.html [https://perma.cc/YTU5-ALC9] (reporting that twelve prosecutors from other jurisdictions worked in the Northern District to assist with the increased cases; staff and office space have been added; and fourteen more assistant and special assistant U.S. attorneys will be hired); Joseph Holloway, *Muscogee Creek Nation Investing Millions in Lighthorse Police Department*, NEWS ON 6 (Sept. 30, 2020, 6:35 AM), <https://www.newson6.com/story/5f746d9210991b0c17a80d5a/-muscogee-creek-nation-investing-millions-in-lighthorse-police-department> [https://perma.cc/V9M5-4WS3] (reporting that the MCN is investing \$2 million to hire up to forty people, including officers, investigators, and dispatchers).

³²⁷ Press Release, U.S. DOJ, *Jimcy McGirt Found Guilty of Aggravated Sexual Abuse, Abusive Sexual Contact in Indian Country* (Nov. 6, 2020), <https://www.justice.gov/usao-edok/pr/jimcy-mcgirt-found-guilty-aggravated-sexual-abuse-abusive-sexual-contact-indian-country> [https://perma.cc/P3QX-4TM5].

³²⁸ See Chris Casteel, *Seminole Nation's Attempt to Tax Oil Companies Prompts Swift Response from Hunter, Stitt*, OKLAHOMAN (Dec. 16, 2020, 1:21 AM), <https://oklahoman.com/article/5678354/seminole-nations-attempt-to-tax-oil-companies-prompts-swift-response-from-hunter-stitt> [https://perma.cc/VB69-8YBY]; Barbara Hoberock & Randy Krehbiel, *Oklahoma Conservative Group Wants Tribal Reservation Boundaries Gone*, TULSA WORLD (Nov. 16, 2020), <https://tulsaworld.com/news/state-and-regional/govt-and-politics/oklahoma-conservative-group-wants-tribal-reservation-boundaries-gone/article5ff72b0e-0a5f-11eb-9ee3-afcf85c16b89.html>.

³²⁹ See *supra* note 11 and accompanying text.

³³⁰ For extensive coverage of civil jurisdiction in Indian Country, see COHEN'S HANDBOOK, *supra* note 108, chs. 7-8, 10-11.

First, from its inception, the United States has recognized Indian nations as sovereign governments that are the governing entities over their territories.³³¹ The Supreme Court has always acknowledged that Indian governments possess inherent powers that exist totally separate from, and predate, the United States and the Constitution.³³² In 1832, the Court stated that the entire course of the United States' conduct and history with Indian nations shows that it "manifestly consider[s] the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries."³³³ More recently, in 1959, the Court reiterated this position and precluded state court civil jurisdiction from reaching into Indian Country.³³⁴ The Court held that Indian nations and their citizens have the power and the right "to make their own laws and be ruled by them"³³⁵ and "to enforce that law in their own forums."³³⁶ In 1975, the Court reiterated that tribes possess "attributes of sovereignty over both their members and their territory."³³⁷

Second, in light of those long-standing principles, the civil jurisdiction of tribal governments in Indian Country is extensive. The Supreme Court and lower federal courts have reaffirmed this point many times. Tribal governments possess the power to enact laws regarding taxation of Indians and non-Indians, land use, zoning, administrative and regulatory matters, economic issues, and numerous other subjects in Indian Country.³³⁸ In addition, federal environmental laws allow tribes to work through the Environment Protection Agency ("EPA") to establish many of the environmental standards on reservations, and then the EPA applies those standards to everyone within that reservation including non-Indians.³³⁹ In contrast, Oklahoma's civil jurisdiction over the newly re-recognized MCN Reservation will be significantly limited, and no doubt will often be preempted from applying to MCN citizens and perhaps other Indians within the MCN Reservation. For example, the state will surely be precluded from taxing MCN citizens who live and work on the re-recognized MCN

³³¹ U.S. CONST. art. I, § 8, cl. 3.

³³² *Talton v. Mayes*, 163 U.S. 376, 384 (1896).

³³³ *United States v. Worcester*, 31 U.S. (6 Pet.) 515, 556-57 (1832).

³³⁴ *Williams v. Lee*, 358 U.S. 217, 223 (1959).

³³⁵ *Id.* at 220.

³³⁶ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978).

³³⁷ *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

³³⁸ *See, e.g., Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 444 (1989); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 (1982); *Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 152-54 (1980); *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892, 895 (9th Cir. 2019) (holding that tribe had regulatory authority over nonmember's conduct); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 818-19 (9th Cir. 2011).

³³⁹ *But see infra* notes 356-58 and accompanying text.

Reservation.³⁴⁰ Consequently, the *McGirt* decision has clearly expanded the reach of the MCN's civil authority, jurisdiction, and power over its re-recognized Reservation and even over non-Indians in some circumstances, and this expansion tends to limit Oklahoma's jurisdiction.

Third, *McGirt*'s impacts are well exemplified by the initial fears of some non-Indian Oklahomans that the decision put their homes and properties at risk.³⁴¹ The case did not, of course, concern those issues. But non-Indian Oklahomans, who live and/or work on the re-recognized MCN Reservation, and on the reservations of other tribes in Oklahoma that have been re-recognized, do now live and work within Indian Country. There is an additional government that will exercise some level of authority over these non-Indians and their lands and assets, and that will have to be dealt with. Complex issues of Indian law and tribal versus state sovereignty will have to be addressed, and the uncertainty of this new situation can cause confusion and create complex new issues.

But the potential impact of *McGirt* and the MCN Reservation's status on non-Indians and their fee simple owned lands is less than was feared. The Supreme Court has established a fairly well understood rule limiting tribal civil jurisdiction over the conduct of non-Indians on non-Indian owned fee lands within Indian Country. In 1981, in *Montana v. United States*,³⁴² the Court set out a general rule, and two famous exceptions, to decide when tribal governments have civil jurisdiction over non-Indian activities that occur on non-Indian owned fee lands within Indian Country.³⁴³ The Supreme Court stated that as a general rule, Indian nations do not have governmental authority to regulate non-Indian activities in those situations.³⁴⁴ The Court carved out, however, two exceptions defining when Indian nations can exercise jurisdiction and control non-Indians. The first allows a tribal government to regulate non-Indian activities through taxation, licensing, or other means when the non-Indian has entered into a consensual relationship with the tribal nation or its citizens through contracts, leases, or other commercial and noncommercial arrangements.³⁴⁵ The second

³⁴⁰ Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 452-53 (1995) (holding state could not impose fuel tax on Chickasaw Nation retail stores residing on tribal trust land); Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 126-28 (1993) (holding state could not impose tax in Indian Country due to presumption against state's ability to tax within Indian Country); *Bryan v. Itasca County*, 426 U.S. 373, 393 (1976) (holding state could not impose tax on personal property of Indian living in Indian Country); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 169-70 (1973) (holding that state could not tax Indians in Indian Country even where no federal interest was implicated).

³⁴¹ See, e.g., *How U.S. Supreme Court Tribal Ruling in Oklahoma Impacts Title Industry, Property Rights*, AM. LAND TITLE ASSOC. (Sept. 1, 2020), <https://www.alta.org/news/news.cfm?20200901-How-US-Supreme-Court-Tribal-Ruling-in-Oklahoma-Impacts-Title-Industry-Property-Rights> [<https://perma.cc/4WUD-N99Z>].

³⁴² 450 U.S. 544 (1981).

³⁴³ *Id.* at 545.

³⁴⁴ *Id.* at 565.

³⁴⁵ *Id.*

exception allows a tribal government to exercise sovereignty and jurisdiction over non-Indians, and their activities on non-Indian-owned fee lands, when the conduct “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”³⁴⁶ Consequently, under *Montana*, the MCN will often lack jurisdiction over the conduct of non-Indians and their actions on their fee owned lands within the re-recognized MCN Reservation.³⁴⁷ Oklahoma should still be able to exercise civil jurisdiction over most of these non-Indians within the Reservation in many circumstances. But under the two exceptions, the MCN will sometimes have civil jurisdiction over non-Indian conduct on non-Indian owed fee lands within its Reservation. The *Montana* test, however, is not always easy to apply or predict. Thus, questions will arise as to the extent of Oklahoma’s and the MCN’s civil jurisdiction on the Reservation.

Fourth, various federal laws and federal civil jurisdiction will now have a much larger impact inside Oklahoma due to the re-recognized MCN Reservation. The existence of Indian Country implicates and increases federal involvement and power over the MCN Reservation and possibly all the peoples and entities operating therein. These laws will impact tribal, federal, and state jurisdiction. For example, several federal cultural resource laws will now apply to the entire 3.25 million acres of the Reservation that probably did not apply when the area was assumed to be under state jurisdiction. The Native American Graves Protection and Repatriation Act,³⁴⁸ provides heightened protections for Indian human remains, funerary objects, and sacred objects found on federal and tribal lands. The Act defines the term “tribal lands” broadly, and very relevant to this Article, it means “all lands within the exterior boundaries of any Indian reservation.”³⁴⁹ Hence, the extensive protections provided by the Act to Indian nations and peoples will now apply over all the lands and peoples on the MCN Reservation. Furthermore, under the Archaeological Resources Protection

³⁴⁶ *Id.* at 566. The Court has severely limited the reach of the second exception, but it is occasionally applied to grant tribal governments and courts jurisdiction over non-Indians. *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892, 895 (9th Cir. 2019) (holding that tribe had regulatory authority over nonmember employee’s conduct under both *Montana* exceptions); *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 592-95 (9th Cir. 1983) (enforcing Navajo Nation ordinance and court judgment against off-reservation business because its repossessions of vehicles on Reservation threatened health and welfare of the Nation); *Skokomish Indian Tribe v. Mosbarger*, 7 NICS App. 90, 90 (Skokomish Ct. App. 2006) (holding that tribal court had jurisdiction to issue speeding ticket to non-Indian under second exception).

³⁴⁷ *See, e.g., Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653-54 (2001) (holding that Navajo Nation did not possess jurisdiction to tax non-Indian hotel occupants when the hotel was located on non-Indian owned fee lands within the Reservation).

³⁴⁸ 25 U.S.C. §§ 3001-3013; 18 U.S.C. § 1170; *see also* COHEN’S HANDBOOK, *supra* note 108, § 20.02 (expanding on contents of Native American Graves Protection and Repatriation Act).

³⁴⁹ 25 U.S.C. § 3001(15)(A).

Act,³⁵⁰ the MCN will now have the right to be consulted and to consent to any permit for archaeological excavations or activities conducted on “Indian lands,” which is more narrowly defined as lands the Nation and its tribal citizens own in trust within the Reservation.³⁵¹ Finally, the National Historic Preservation Act³⁵² sets out the federal policy to assist Indian nations to develop their historical preservation programs and goals.³⁵³ Tribal nations can apply to assume some or all of the functions and duties of State Historic Preservation Officers within tribal lands, which the Act defines as “all land within the exterior boundaries of any Indian reservation.”³⁵⁴ Consequently, the MCN can assume and exercise these powers over all lands and all peoples within the MCN Reservation.³⁵⁵

As already referred to above, Indian nations can also take advantage of federal environmental statutes to increase their authority in Indian Country and to indirectly control non-Indians’ conduct on non-Indian owned fee lands within, and even outside, a reservation.³⁵⁶ But Indian nations in Oklahoma have had these rights severely limited because current Oklahoma Senator James Inhofe attached a “midnight rider” to a massive transportation bill in 2005 that gave the state the right to request authority over Indian nations and limit tribal rights under these environmental laws.³⁵⁷ Governor Stitt acted quickly after *McGirt*

³⁵⁰ 16 U.S.C. §§ 470aa-470mm; see also COHEN’S HANDBOOK, *supra* note 108, § 20.02 (providing implications of Archaeological Resources Protection Act effect for Indian land).

³⁵¹ 16 U.S.C. § 470bb(4) (“‘Indian lands’ means lands of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States . . .”).

³⁵² 54 U.S.C. §§ 302701-302706; see also COHEN’S HANDBOOK, *supra* note 108, § 20.02.

³⁵³ 54 U.S.C. § 302701.

³⁵⁴ *Id.* §§ 300319(1), 302702.

³⁵⁵ See, e.g., Robert J. Miller, *Consultation or Consent: The United States’ Duty to Confer with American Indian Governments*, 91 N.D. L. REV. 37, 60-61 (2015); *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 788 (9th Cir. 2006) (holding federal agencies violated National Historic Preservation Act consultation requirements by not consulting with tribe over historic sites before extending geothermal leases).

³⁵⁶ *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1289-90 (D.C. Cir. 2000) (holding Congress expressly delegated authority to Indian nations in Clean Air Act to regulate air quality over all lands within reservations); *Montana v. EPA*, 137 F.3d 1135, 1140-41 (9th Cir. 1998) (holding Clean Water Act allows tribes to set reservation environmental standards and grants EPA authority to apply tribal standards over non-Indians on non-Indian owned fee lands); *City of Albuquerque v. Browner*, 97 F.3d 415, 423-24 (10th Cir. 1996) (holding that EPA properly used Clean Water Act to approve tribal water quality standards more stringent than federal standards and that affected off-reservation non-Indians).

³⁵⁷ Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005, Pub. L. No. 109-59, § 10211(a)-(b), 119 Stat. 1144, 1937 (“[O]n request of [Oklahoma], the [EPA] Administrator shall approve the State to administer the State program in the areas of the State that are in Indian country . . . [T]he Administrator may treat an Indian tribe in the State of Oklahoma as a State under a law administered by the Administrator only if . . . the Indian tribe and the agency of the State of Oklahoma . . . enter into a cooperative agreement . . .”);

was issued and requested and was granted this authority over the re-recognized MCN Reservation and all Indian Country in the state.³⁵⁸

Perhaps the prime example of the importance of the existence of Indian Country, the re-recognition of the MCN Reservation, and its impact on tribal and state jurisdiction, is the Indian Child Welfare Act.³⁵⁹ Under this Act, when questions of foster care placement, adoption, or termination of parental rights arise regarding an “Indian child” who is domiciled or resides on a reservation, tribal court jurisdiction is exclusive, and even such suits that were first commenced in state court are required to be transferred to tribal court, unless there is “good cause” not to do so.³⁶⁰ Thus, the sovereign, jurisdictional, and human dimensions of *McGirt* are well demonstrated. Now that the MCN Reservation is re-recognized, all Indian children of any tribal nation, who are undergoing the above-named proceedings, and reside or are domiciled within the MCN Reservation, or are already wards of the tribal court, are subject to the exclusive jurisdiction of the MCN.³⁶¹ Consequently, that Act will now apply far more broadly for the MCN and all Indian children on the 3.25 million acres of the MCN Reservation.

Finally, in contrast to the expansions of tribal and federal civil jurisdiction highlighted above, Oklahoma will be limited in exercising civil jurisdiction over Creek Indians, and perhaps other Indians, within the MCN Reservation. Federal Indian law, the Indian Child Welfare Act, and the sovereign powers that Indian nations exercise in Indian Country, all work to exclude and preempt many forms of state jurisdiction and authority. “State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation”³⁶² In addition, “State jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at

see also Raymond Nolan, *The Midnight Rider: The EPA and Tribal Self-Determination*, 42 AM. INDIAN Q. 329, 334-35 (2018) (detailing how Senator James Inhofe of Oklahoma added rider making it illegal for tribes in Oklahoma to operate environmental programs without first negotiating with state). This was not the first time Oklahoma federal representatives limited the powers of Indian nations *sub silentio*. In 1934, Oklahoma Senator Elmer Thomas excluded tribes in Oklahoma from the Indian Reorganization Act without consulting them. PRUCHA, *supra* note 287, at 971 (“Senator Thomas, without consulting the Indians of his state, managed to exclude them from the basic sections of the final act.”).

³⁵⁸ Sean Murphy, *EPA Grants Stitt Request for State Oversight on Tribal Lands*, AP NEWS (Oct. 5, 2020), <https://apnews.com/article/us-supreme-court-environment-oklahoma-archive-754444e8b4887f4045c4604248142665>.

³⁵⁹ 25 U.S.C. §§ 1901-1963.

³⁶⁰ *Id.* § 1911(a)-(b).

³⁶¹ *Id.* § 1911(a); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 53-54 (1989).

³⁶² *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164, 170-71 (1973); *see also* *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (holding Georgia’s laws could “have no force” in Indian territory).

stake are sufficient to justify the assertion of State authority.”³⁶³ The Court has also “consistently guarded the authority of Indian governments over their reservations.”³⁶⁴ These principles absolutely limit Oklahoma’s sovereignty and jurisdiction over the lands and peoples that are now within the MCN Reservation and on the other re-recognized reservations in the state. There are numerous concrete examples of these limitations on state power. The Supreme Court, for example, has barred a state from imposing its motor carrier and fuel taxes on non-Indian logging companies that were harvesting timber on a reservation.³⁶⁵ A state was precluded from taxing the gross receipts of a non-Indian trading post operating on a reservation,³⁶⁶ and another case prevented a state from regulating hunting and fishing by non-Indians on a reservation.³⁶⁷ In yet another decision—one featuring dueling plurality opinions and dissents—the Court’s judgments allowed a county to zone some properties on the Yakama Indian Nation Reservation while the Yakama Nation was allowed to zone other properties to the exclusion of the county.³⁶⁸ States have also been prevented from applying their tax and gambling laws on reservations, and one court has held that a state’s speed limit laws were not enforceable on a reservation.³⁶⁹

In addition, it must be pointed out that in 1993 and 1995, Oklahoma lost significant tax cases before the Supreme Court when it attempted to tax Indians in Indian Country.³⁷⁰ These cases will surely preclude Oklahoma from taxing Creek Indians who work and live on the MCN Reservation. In contrast, though, there is still room for Oklahoma to exercise jurisdiction over non-Indians on non-Indian owned fee lands on the MCN Reservation since the general rule of *Montana* will often prevent the MCN from exercising jurisdiction in those situations.³⁷¹

In sum, the *McGirt* decision has dramatically expanded the reach of the civil powers and jurisdiction of the MCN because it is once again able to exercise its authority over its entire 3.25 million-acre Reservation. In some circumstances,

³⁶³ *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983).

³⁶⁴ *Williams v. Lee*, 358 U.S. 217, 223 (1959).

³⁶⁵ *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 148-51 (1980).

³⁶⁶ *Warren Trading Post Co. v. Ariz. Tax Comm’n*, 380 U.S. 685, 690-92 (1965).

³⁶⁷ *Mescalero Apache Tribe*, 462 U.S. at 325.

³⁶⁸ *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 447-48 (1989).

³⁶⁹ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987); *Bryan v. Itasca County*, 426 U.S. 373, 385, 388-90 (1976) (invalidating state tax and regulatory laws on Reservation); *Confederated Tribes of Colville Rsr. v. Washington*, 938 F.2d 146, 149 (9th Cir. 1991).

³⁷⁰ *Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 453 (1995); *Okla. Tax Comm’n v. Sac & Fox Nation*, 508 U.S. 114, 126-28 (1993) (finding Oklahoma could not impose income tax on Indian, nor excise or sales tax on Indian-owned vehicles, when person worked and lived in Indian Country).

³⁷¹ *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653-54 (2001).

these governmental powers will even apply to non-Indian Oklahomans within the Reservation.

C. *Adjudicatory Jurisdiction*

Adjudicatory jurisdiction is the power of a government's court system to hear specific cases, over specific persons, arising in certain geographical locations.³⁷² It encompasses the principles of subject matter jurisdiction and personal jurisdiction.³⁷³ It is also related to the civil jurisdictional power of governments.³⁷⁴

Many Indian nations exercise their powers of civil and adjudicatory jurisdiction by operating court systems to handle disputes that arise in Indian Country. In fact, the Supreme Court has stated that tribal courts are often the exclusive forum to adjudicate issues affecting personal and property interests on reservations for both Indians and non-Indians.³⁷⁵ In 1987, the Court stated that “[t]ribal authority over activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities *presumptively lies in the tribal courts.*”³⁷⁶ It is no surprise, then, to state that another of the important results of *McGirt* is that it has exponentially expanded the adjudicatory jurisdiction of the MCN to now cover the 3.25 million acres of its Reservation.³⁷⁷ Furthermore, federal court jurisdiction will also be greatly

³⁷² See, e.g., *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 818-19 (9th Cir. 2011); A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 617 n.2, 618 n.3, 638-40 (2006); COHEN'S HANDBOOK, *supra* note 108, § 7.01.

³⁷³ *Water Wheel*, 642 F.3d at 809; Spencer, *supra* note 372, at 617 & n.2, 618 & n.3.

³⁷⁴ *Water Wheel*, 642 F.3d at 809; Spencer, *supra* note 372, at 617 & n.2, 618 & n.3, 638-40.

³⁷⁵ *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n.8, 18-19 (1987) (holding party can file in federal court to contest tribal court jurisdiction but only after exhausting tribal remedies); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855-56 (1985) (“[O]rderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.”); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56, 65 (1978) (“Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.”); *Fisher v. Dist. Ct. of the Sixteenth Jud. Dist. of Mont.*, 424 U.S. 382, 386-89 (1976); *Williams v. Lee*, 358 U.S. 217, 220 (1959) (stating that actions concerning reservations and reservation Indians must be heard in tribal court); *Stock W. Corp. v. Taylor*, 964 F.2d 912, 917-20 (9th Cir. 1992) (discussing lower court's decision to abstain and allow Colville tribal court to hear case regarding non-Indians that arguably arose off-reservation).

³⁷⁶ *Iowa Mut. Ins. Co.*, 480 U.S. at 18 (emphasis added) (citations omitted).

³⁷⁷ One question that arises about tribal courts and non-Indians is the fear of discrimination by some non-Indians. But several studies have shown that in the vast majority of cases, non-Indians are treated at least as fairly as Indians in tribal courts. Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047,

expanded in this area due to the presence of MCN court jurisdiction because the extent of tribal “civil adjudicative or regulatory jurisdiction over nonmembers is a matter of federal common law.”³⁷⁸ We anticipate issues of MCN jurisdiction on its Reservation over non-Indians to arise quite often, as the adjudicatory jurisdiction of its court system has expanded. In contrast, Oklahoma’s adjudicatory jurisdiction over many events and people on the Reservation will be restricted.³⁷⁹

An important consideration, however, is that in recent decades the Supreme Court has limited tribal adjudicatory jurisdiction over non-Indians, especially when the activities at issue occur on non-Indian owned fee lands on a reservation.³⁸⁰ The Court has applied *Montana* to answer questions about the extent of tribal adjudicatory jurisdiction. Under the general rule and two exceptions of *Montana*, the Court has limited tribal court adjudicatory jurisdiction in three noteworthy cases.³⁸¹

First, in *Strate v. A-1 Contractors*,³⁸² the Supreme Court stated that the adjudicatory jurisdiction of tribal courts does not exceed a tribe’s civil regulatory and legislative jurisdiction and thus the Court applied the *Montana* test.³⁸³ *Strate* was a tort lawsuit regarding a car accident between non-Indians on a state highway that ran through the Three Affiliated Tribes Reservation.³⁸⁴ The Court held that the location of the accident was analogous to non-Indian owned fee lands on a reservation and applied *Montana*.³⁸⁵ Under that general rule, tribal governments lack regulatory, administrative, and legislative jurisdiction over such parties on land in Indian Country, and consequently also lack adjudicatory jurisdiction to hear the lawsuit.³⁸⁶ The *Strate* Court then examined *Montana*’s two exceptions and held that there was no reason to avoid the general rule of

1079 (2005) (demonstrating fairness was afforded nonmembers by Navajo courts); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 285-87, 351-52 (1998) (analyzing eighty-five cases in tribal courts and concluding they demonstrated fairness to non-Indian litigants). Federal law prevents tribal governments and courts from denying equal protection and due process to “any person.” 25 U.S.C. § 1302(8).

³⁷⁸ COHEN’S HANDBOOK, *supra* note 108, § 7.01.

³⁷⁹ See, e.g., *Fisher*, 424 U.S. at 386-89; *Williams*, 358 U.S. at 220.

³⁸⁰ *Montana v. EPA*, 137 F.3d 1135, 1136 (9th Cir. 1998) (“[R]egulation which allowed Tribes to exercise authority over non-Indians owning fee interests in land located within Reservation reflected appropriate delineation and application of inherent Tribal regulatory authority . . .”).

³⁸¹ *Id.* at 1140 (“In general, absent express authorization by federal statute or treaty, Indian tribes lack civil authority over conduct of non-members on non-Indian land within a reservation.”).

³⁸² 520 U.S. 438 (1997).

³⁸³ *Id.* at 453.

³⁸⁴ *Id.* at 443.

³⁸⁵ *Id.* at 454.

³⁸⁶ *Id.* at 439.

Montana.³⁸⁷ Thus, the tribal court lacked adjudicatory jurisdiction over the non-Indian parties in this tort litigation even though the accident occurred in Indian Country.³⁸⁸

The Supreme Court went even further in 2001 in *Nevada v. Hicks*.³⁸⁹ The *Hicks* Court stated that “[t]ribal courts, it should be clear, cannot be courts of general jurisdiction . . . for a tribe’s inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction.”³⁹⁰ The Court then held that the tribal court did not have adjudicatory jurisdiction over the actions of state officers, even though the suit was for conduct they engaged in while on reservation land owned by the tribe in trust with the United States.³⁹¹ Additionally, in a 2008 decision in *Plains Commerce Bank v. Long Family Land & Cattle Co.*,³⁹² the Court used *Montana*, *Strate*, and *Hicks* to hold that a tribal court did not have adjudicatory jurisdiction over a tort action by a tribal citizen against an off-reservation, non-Indian-owned bank regarding its alleged discriminatory sale of non-Indian owned fee land on a reservation to non-Indian buyers.³⁹³

Notwithstanding those three cases and those specific situations, the MCN’s adjudicatory jurisdiction will increase considerably over its now re-recognized Reservation, and Oklahoma’s judicial role will decrease. This will require adjustments to the court systems of both the MCN and the state, and will also impact the federal court system, similar to the readjustments the Supreme Court mentioned in *McGirt* in regards to criminal jurisdiction.³⁹⁴

In conclusion, it is clear that our brief examination of just a few of the aspects of these three subjects demonstrates some of the far-reaching changes *McGirt* foretells in regards to criminal, civil, and adjudicatory jurisdiction for Oklahoma, the MCN, and the United States over the re-recognized MCN Reservation.

CONCLUSION

The *McGirt* decision is both a bombshell and a shock for Oklahoma, and, we suspect, even for the MCN. The impacts of the case are just beginning to be felt by the state, the MCN, the United States, other Indian nations in Oklahoma, and tribes and states across the nation. We can also imagine the uncertainty that one million Oklahomans must be experiencing who now find themselves living and

³⁸⁷ *Id.* at 457-59.

³⁸⁸ *Id.* at 459.

³⁸⁹ 533 U.S. 353, 358 (2001).

³⁹⁰ *Id.* at 367.

³⁹¹ *Id.* at 364 (“We conclude today . . . that tribal authority to regulate state officers in executing process related to the violation . . . of state laws is not essential to tribal self-government . . .”).

³⁹² 554 U.S. 316 (2008).

³⁹³ *Id.* at 330-32, 336-41.

³⁹⁴ See *supra* text accompanying notes 324-29.

working within the MCN Reservation. Moreover, *McGirt* has led to four other large Indian reservations being re-recognized in Oklahoma, and there is ongoing litigation about several smaller reservations, and thus even more Oklahomans are finding out they live on Indian reservations.³⁹⁵ No matter how one considers the case, *McGirt* portends a new reality and significant changes and adjustments for Oklahoma and the state's governance and society, the MCN, and the United States.

But we do not want to overstate the changes nor add to the fears that the case might have unleashed. In one sense, *McGirt* has placed Oklahoma in the same situation as several other states in the union that have large numbers of Indian nations and reservations within their borders. In Arizona, for example, Indian nations own 27% of the landmass of the state.³⁹⁶ There have been many conflicts that led to disputes and lawsuits between Arizona and tribal nations, but it seems today as though a more cooperative relationship involving mutual respect, consultations, and governmental compacting has become the norm in Arizona and in other states.³⁹⁷ This same kind of relationship is not new to Oklahoma. The state has also pursued the cooperative path and has long engaged in negotiations and compacting with Indian nations over governance, taxation, gaming, and other mutual concerns.³⁹⁸

We are compelled to point out, though, that any "shock" arising from *McGirt* was not caused by the Supreme Court decision but by Oklahoma's illegal actions and incorrect assumptions over the past century and the United States' acquiescence and failure to support Indian nations.³⁹⁹ As *McGirt* holds, the MCN Reservation and MCN sovereignty and jurisdiction did not magically disappear within Oklahoma. The error that *McGirt* had to correct, if there is any reason to lay blame, is not on the Court, or on the MCN.

So how could or should Oklahoma, Oklahomans, the Indian nations, and Indian peoples proceed? For the MCN, *McGirt* has expanded by twenty-five times the territory over which the Nation now exercises sovereignty, jurisdiction, and governmental duties. These enormously expanded responsibilities present a conundrum for the Nation in terms of costs and capacity. How will the Nation fund an expanded court system, law enforcement,

³⁹⁵ See sources cited *supra* notes 6, 315.

³⁹⁶ Julia Shumway, *Fact Check: Gosar Correct on Private Land in Ariz.*, AZCENTRAL (Apr. 13, 2015, 4:34 PM), <https://www.azcentral.com/story/news/politics/fact-check/2015/04/13/fact-checker-gosar-correct-private-land-arizona/25740527/> [<https://perma.cc/4VLN-L63V>].

³⁹⁷ See, e.g., *Legislative Commission on Indian Services*, OR. STATE LEGISLATURE, <https://www.oregonlegislature.gov/cis> [<https://perma.cc/N8GP-MVYE>] (last visited Dec. 5, 2021) ("The Legislative Commission on Indian Services (LCIS) was created by statute in 1975 to improve services to Indians in Oregon.")

³⁹⁸ Miller, *Laws Impacting the Eastern Shawnee Tribe*, *supra* note 145, at 164-65.

³⁹⁹ See, e.g., *supra* notes 147-51 and accompanying text (highlighting instances where Oklahoma illegally exercised jurisdiction over Indian Country); Miller, *Laws Impacting the Eastern Shawnee Tribe*, *supra* note 145, at 164-65.

social services, and the new duties placed upon it? Commensurately, Oklahoma's jurisdiction and responsibilities are lessened and there might even be a tax savings to the state, but at the same time, the state's tax base will be diminished. Political, societal, and governmental decisions will have to be made by all governments involved. One million Oklahomans, who are primarily non-Indians, now find themselves living on the MCN Reservation, including 400,000 in the city of Tulsa. Obviously, this fact will create legal and societal changes. These changes are already occurring and they require action by governments.

We see three possible ways forward for the MCN and Oklahoma. First, the state can take the antagonistic strategy of asking Congress to diminish or disestablish the MCN Reservation. This was the first impulse of Governor Stitt, who announced that he would pursue that option.⁴⁰⁰ This tactic produced a negative response from the MCN and would certainly poison the state/tribal relationship and inhibit future progress. The state, of course, has two senators and members of the House of Representatives, but the MCN and the other Indian nations in Oklahoma who have had their reservations re-recognized are not without allies in Congress and in the public. There are 574 federally recognized Indian nations across the United States and they have resources and friends and would no doubt vigorously fight a bill to diminish or disestablish the MCN Reservation. Some legal commentators have pointed out that Congress has not passed Indian legislation over Indian opposition since the 1960s.⁴⁰¹ In addition, the Biden Administration might well side with the MCN. Our recommendation is that Oklahoma not pursue this path.

Oklahoma, the United States, and the MCN could decide to address the issues that will arise piecemeal through case-by-case litigation. This would no doubt entail decades upon decades of lawsuits and millions of dollars in legal fees. That course would not seem to best serve the interests of the three governments, nor would it help them to settle issues and provide certainty for daily life, economic activities, jurisdiction, and governance within the state. The issues addressed above, and many more, will create conflicts, raise questions, and lead to extensive and expensive litigation if Oklahoma, the MCN, and the United States cannot address and settle them short of litigation.

In our opinion, the preferable method for addressing the issues that are arising after *McGirt* is for the MCN, Oklahoma, and the United States to take cooperative and proactive steps to anticipate issues and to consult and negotiate agreements.⁴⁰² As already mentioned, and as *McGirt* recognized, Indian nations

⁴⁰⁰ See Ti-Hua Chang, *Oklahoma Governor Pushing to Undo Tribal Sovereignty Ruling*, TYT (Sept. 3, 2020), <https://tyt.com/stories/4vZLCHuQrYE4uKagy0oyMA/48MFWZV1NIvr5yGCZW07Ao> [<https://perma.cc/9NV5-UTN9>]; Hoberock & Krehbiel, *supra* note 328.

⁴⁰¹ CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 83 (1987).

⁴⁰² In fact, Oklahoma has already negotiated with the Five Tribes about *McGirt*. Within days of the opinion being issued, the Attorney General of Oklahoma announced that the Five Tribes had been in negotiations and had reached an agreement-in-principle. *Murphy/McGirt Agreement-in-Principle*, *supra* note 8.

and Oklahoma have been negotiating and entering compacts on a multitude of legal and jurisdictional issues over the past thirty-plus years.⁴⁰³ This same process should be relatively easy to continue. In fact, we are very encouraged by the fact that on January 22, 2021, Governor Stitt appointed a state negotiator and invited the Five Tribes to start negotiating about *McGirt*.⁴⁰⁴

It is our hope and expectation that the MCN, Oklahoma, and the United States will cooperatively work together to create concrete and equitable solutions to address the myriad implications that will arise after *McGirt*, and that will need to be clarified and settled for all governments and all individuals involved. Then, the Creek-U.S. treaty promises, the “supreme Law of the Land,”⁴⁰⁵ that the MCN negotiated with the United States from 1831 to 1866, will be honorably upheld, and the *McGirt* Court’s poetic statement will be fully realized: “On the far end of the Trail of Tears was a promise.”⁴⁰⁶

⁴⁰³ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2481, 2481 n.16 (2020). The Court stated in relevant part, “[W]e proceed well aware of the potential for cost and conflict around jurisdictional boundaries, especially ones that have gone unappreciated for so long. . . . Oklahoma and its Tribes have proven they can work successfully together as partners. Already, the State has negotiated hundreds of intergovernmental agreements with tribes, including many with the Creek.” *Id.* at 2481.

⁴⁰⁴ Douglas, *supra* note 11. One potential problem, however, is that the Five Tribes do not appear to agree on how to proceed. See Allison Herrera, *Tribes Favor Legislation for Optional State Compacts in McGirt*, KOSU—NPR (Jan. 17, 2021, 9:46 AM), <https://www.kosu.org/news/2021-01-17/tribes-favor-legislation-for-optional-state-compacts-in-mcgirt> [<https://perma.cc/B3L4-SVXW>] (describing how the Chickasaw and Cherokee Nations support a “compact agreement . . . done through legislation” while “the Muscogee (Creek) Nation disagrees”).

⁴⁰⁵ U.S. CONST. art. VI (“This Constitution . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

⁴⁰⁶ *McGirt*, 140 S. Ct. at 2459.