Rectifying Broken Treaties: *McGirt v. Oklahoma*, a Step Toward Natural Resource Sovereignty

*Thomas Siwula**

The treaties, statutes, and historical events leading to the formation of Native American reservations in the United States are complex, discriminatory, and often ambiguous. As a result, it is quite difficult to derive from these conflicting resources Congress's intent to disestablish a specific reservation. Prior to McGirt v. Oklahoma*, the U.S. Supreme Court gave greater deference to historical evidence of disestablishment. This severely disadvantaged tribal sovereignty given the racist policies and practices that led to these historical events. The Court's move away from a historical analysis to a textual analysis, which focuses more intensely on the contemporary treaties and statutes that created a reservation, bolsters tribal sovereignty. This Note examines* McGirt v. Oklahoma *and the legal analysis used to determine whether Congress had divested the Muscogee Creek Nation reservation of its independent status. Then, this Note discusses specific implications of affirming the Muscogee Creek Nation's reservation status and borders. Throughout this Note, I refer to the Muscogee Creek Nation as the Creek. Also, the text sometimes uses the term Indian when referring to past statutes or treaties that used the same term.*

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INTRODUCTION

Between 1777 and 1868, the United States government entered into more than 370 treaties with tribal nations, only to subsequently break these agreements.[1] Congress retains this long-established power to make and break treaties (and disestablish reservations in the process) as long as an explicit intent to do so exists.[2] The modern reservation system was created in response to these broken treaties as the United States government forcefully removed tribes from their ancestral homes.[3] The Cherokees and Creek, for example, were subjected to forced migration and removed from their lands in Alabama and Georgia to embark on a

1. Julian Brave NoiseCat, *The* McGirt *Case Is a Historic Win for Tribes*, THE ATLANTIC (July 12, 2020), https://www.theatlantic.com/ideas/archive/2020/07/mcgirt-case-historic-win-tribes/614071/ [https://perma.cc/S8SY-3CRA]; SUSAN HARJO, NATION TO NATION: TREATIES BETWEEN THE UNITED STATES & AMERICAN INDIAN NATIONS xi (2014).

2. Brief for Petitioner at 1, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526) (citing Nebraska v. Parker, 136 S. Ct. 1072, 1078–79 (2016)); *see also* McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020) ("[O]nly Congress can divest a reservation of its land and diminish its boundaries." (quoting Solem v. Bartlett, 465 U.S. 463, 470 (1984))).

3. *See McGirt*, 140 S. Ct. at 2459 ("Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever."); *see also* NICHOLAS CHRISTOS ZAFERATOS, PLANNING THE AMERICAN INDIAN RESERVATION: FROM THEORY TO EMPOWERMENT 3–4 (2015) (describing reservations' history); ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 5–6 (1972) (describing federal tactics used to force tribes west of the Mississippi).

thousand-mile journey to Oklahoma by foot in the dead of winter.[4] This diaspora became known as the Trail of Tears.[5]

During this forced emigration, unspeakable events occurred.[6] The lame, sick, and blind were left behind if they could no longer walk, frostbite set in as people marched on without shoes, and the dead were left on the side of the road only to be later devoured by wolves or vultures.[7] Despite these injustices, the State of Oklahoma hoped to further add to the land-grabbing narrative in *McGirt v. Oklahoma*.[8] Oklahoma has a strong interest in Creek reservation divestment as the state garners millions through the control of business operations[9], taxes[10], and investments[11] on

4. Karen M. McDearman, *Trail of Tears*, *in* 3 THE NEW ENCYCLOPEDIA OF SOUTHERN CULTURE 340–41 (Charles Reagan Wilson ed., 2006) (discussing Cherokees' Trail of Tears journey); *see* GRANT FOREMAN, INDIAN REMOVAL: EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS 177 (1932) ("Thousands of [Creek] are entirely destitute of shoes or cover of any kind for their feet; many of them are almost naked . . . . In this destitute condition, they are wading in cold mud, or are hurried on over the frozen ground . . . .").

5. DEBO, *supra* note 3, at 5; *see also* Russell Thornton, *Cherokee Population Losses During the Trail of Tears: A New Perspective and a New Estimate*, 31 ETHNOHISTORY 289, 289 (1984) ("It is said that as many as 100,000 American Indians were removed from eastern homelands to locations west of the Mississippi River . . . .").

6. FOREMAN, *supra* note 4, at 177–78; *see* Thornton, *supra* note 5, at 290 ("[T]urning for one last look as they crossed the ridge, they saw their homes in flames, fired by the lawless rabble that followed on the heels of the soldiers to loot and pillage . . . ." (quoting JAMES MOONEY, HISTORICAL SKETCH OF THE CHEROKEE 122 (1975))).

7. FOREMAN, *supra* note 4, at 177 (citing Letter from Little Rock, December 25, 1836, published in the New York Observer, Feb. 11, 1837); *see also* Thornton, *supra* note 5, at 291 ("There was much sickness among the emigrants and a great many little children died of whooping cough.").

8. *See McGirt*, 140 S. Ct. at 2470 (recounting Oklahoma's objective to disestablish Creek reservation); *see also* Brief for Petitioner, *supra* note 2, at 30 ("Oklahoma engaged in 'an orgy of plunder and exploitation' through 'evasion or defiance of the law.'" (citing DEBO, *supra* note 3, at 91, 117, 182)).

9. Adam Dinnell & Andrew Hicks, *Oklahoma Oil and Gas Business Brace for Change in Wake of Supreme Court Decision*, JDSUPRA (July 16, 2020), https://www.jdsupra.com/legalnews/oklahoma-oil-and-gas-business-braces-47615/ [https://perma.cc/QJ5X-7SMJ] (discussing *McGirt* decision's multifaceted impacts on industry regulation); Dino Grandoni, *Now That Half of Oklahoma Is Officially Indian Land, Oil Industry Could Face New Costs and Environmental Hurdles*, WASH. POST (July 17, 2020), https://www.washingtonpost.com/business/2020/07/17/supreme-court-oklahoma-oil-/ [https://perma.cc/5G5N-LZ93] (discussing long-term impacts of *McGirt* decision for oil and gas regulation).

10. Dinnell & Hicks, *supra* note 9 (citing Oklahoma Tax Comm'n v. Chicasaw Nation, 515 U.S. 450, 458 (1995)); *see* Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv., 425 U.S. 463, 480–81 (1976) (holding that certain state taxes do not extend to tribal members on reservations).

11. City of Albuquerque v. Browner, 97 F.3d 415, 423 (10th Cir. 1996) (holding that nations who receive treatment-as-a-state status can implement stringent environmental standards); *see* Grandoni, *supra* note 9 ("60 percent of [Oklahoma's] refinery capacity now lie[s] within the territory of five tribes . . . .").

Creek lands.[12] All it took to implicate these sensitive issues was a member of the Seminole nation, Jimcy McGirt, to appeal his state criminal convictions and argue that his crimes were committed on historic Creek lands.[13]

Under the Major Crimes Act (MCA), which gives federal courts exclusive jurisdiction over certain crimes committed on tribal lands, McGirt argued that the State of Oklahoma did not have the right to prosecute him.[14] The Supreme Court has previously held that "state courts generally have no jurisdiction to try Indians for conduct committed in 'Indian Country.'"[15] Thus, the Supreme Court was tasked with determining whether Congress utilized its disestablishment power over the Creek reservation, meaning that McGirt's crimes were not committed in Indian Country and thus properly subject to state jurisdiction.[16]

This Note asserts that *McGirt v. Oklahoma* was decided correctly but that the holding's hypothesized effect on Oklahoma's criminal justice system pales in comparison to its consequences for tribal sovereignty.[17] Specifically, *McGirt* bolsters tribal self-determination and control over the Creek reservation's natural resources and the administration of environmental regulations.[18]

I. CREEK TREATIES AND HISTORICAL TRIBAL SOVEREIGNTY

This Part examines the history of Creek treaties, allotment, Supreme Court decisions on tribal sovereignty, and recent laws that have culminated in the current Muscogee Creek reservation structure within Oklahoma the Court analyzed in *McGirt*.

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12. *See* Brief for Respondent at 44, *McGirt*, 140 S. Ct. 2452 (No. 18-9526) ("[T]urning half the State into Indian country would decimate state and local budgets."); *see also McGirt*, 140 S. Ct. at 2501 (Roberts, C.J., dissenting) ("Beyond the criminal law, the decision may destabilize the governance of vast swathes of Oklahoma.").

13. *McGirt*, 140 S. Ct. at 2459 ("Did he commit his crimes in Indian country?"); Brief for Petitioner, *supra* note 2, at 16.

14. *McGirt*, 140 S. Ct. at 2459 (citing 18 U.S.C. 1153(a)); 18 U.S.C. § 1153(a) ("Any Indian who commits against the person or property of another Indian or another person any of the following [listed] 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.").

15. *McGirt*, 140 S. Ct. at 2459 (citing Negonsott v. Samuels, 507 U.S. 99, 102–103 (1993)); *see also* Brief for Respondent, *supra* note 12, at 44–45 ("Indians are generally immune from state law.").

16. *McGirt*, 140 S. Ct. at 2459.

17. *See* Dinnell & Hicks, *supra* note 9 ("Because the eastern half of Oklahoma must be treated as a reservation under *McGirt*, tribes will have the power to regulate commercial conduct . . . ."); *see also* NoiseCat, *supra* note 1 (discussing *McGirt*'s potential ramifications for criminal law and economic development in relevant jurisdiction).

18. Brief of Amici Curiae Environmental Federation of Oklahoma, Inc., et al. in Support of Respondent at 10, *McGirt*, 140 S. Ct. 2452 (No. 18-9526) (citing United States v. Mazurie, 419 U.S. 544, 557 (1975)).

A. Treaties

Article VI of the United States Constitution gives the federal government authority over treaties with sovereign tribal nations.[19] The Creek entered into treaties with the United States federal government in 1832, 1833, 1856, and 1866, guaranteeing the Creek sovereign rights within its reservation borders.[20] As President Andrew Jackson made it his mission to forcefully relocate tribal nations to federally defined Indian territories, he signed the Indian Removal Act, which solidified the President's authority to exchange U.S. land "west of the Mississippi to Indian lands in the east."[21]

With the Indian Removal Act as a basis, the Creek reluctantly ceded all of their lands in Alabama[22] and Georgia in an 1832 Treaty with the federal government that "solemnly guarantied [sic]" the Creek all lands west of the Mississippi in return.[23] This treaty maintained that no state or territory would "ever have a right to pass laws for the government of such Indians," who would "be allowed to govern themselves" as long as this self-government were "compatible with the . . . jurisdiction" of Congress over the Creeks.[24] Further, the 1832 Treaty allowed for some Creek members to stay in their ancestral homelands,[25] but the federal government

19. U.S. CONST. art. VI; *see* Petition for Writ of Certiorari at 2, *McGirt*, 140 S. Ct. 2452 (No. 18-9526) (stating that United States Constitution Article VI provides for federal authority over treaties).

20. *McGirt*, 140 S. Ct. at 2459–62 (citing Treaty with the Creeks, Mar. 24, 1832, 7 Stat. 366; Treaty with the Creeks, Feb. 14, 1833, 7 Stat. 418; Treaty with the Creeks, Aug. 7, 1856, 11 Stat. 699; Treaty with the Creeks, June 14, 1866, 14 Stat. 785); *see* Brief for Petitioner, *supra* note 2, at 5 ("Federal treaties in 1832, 1833, and 1856 guaranteed the Nation's rights within its borders." (citing Murphy v. Royal, 875 F.3d 896, 932–33 (10th Cir. 2017), *cert. granted*, 138 S. Ct. 2026 (2018))).

21. DEBO, *supra* note 3, at 4–5; *see* Christopher Maloney, *Treaty of Cusseta (1832)*, ENCYCLOPEDIA OF ALA. (Jan. 30, 2017), https://encyclopediaofalabama.org/article/h-3083 [https://perma.cc/FY5K-NFDL] ("The treaty was one of many concluded during Jackson's presidency . . . .").

22. *See* Maloney, *supra* note 21 (describing removal from Alabama); *see also* FOREMAN, *supra* note 4, at 107–09 (detailing Creek Chief Eneah Micco's trip to Washington, D.C., to protest taking of Creek lands in Alabama).

23. Treaty with the Creeks, art. XIV, Mar. 24, 1832, 7 Stat. 366, 368; Brief for Petitioner, *supra* note 2, at 5 (citing Treaty with the Creeks, arts. I, XIV, Mar. 24, 1832, 7 Stat. 366, 368).

24. Treaty with the Creeks, art. XIV, Mar. 24, 1832, 7 Stat. 366, 368.

25. Maloney, *supra* note 21; *see also* FOREMAN, *supra* note 4, at 110–11 (providing context for March 1832 treaty that ceded Creek lands to United States).

did not enforce this provision,[26] which led to conflict.[27] This culminated in federal armed forces removing the Creek, against their will, westward on the Trail of Tears towards modern-day Oklahoma.[28]

Next, the 1833 and 1856 treaties fixed the boundaries of the lands guaranteed to the Creek in 1832, stating that the land "shall constitute and remain the boundaries of the Creek country."[29] These two treaties explicitly gave the Creek "unrestricted right of self-government"[30] and "jurisdiction over persons and property within [its] limits."[31] More specifically, the 1866 Treaty referred to the Creek lands as a "Reservation."[32] Incrementally, the land originally ceded to the Creek tribe was diminished, such that the initial boundaries no longer exist.[33] More importantly, these three treaties were unique among other contemporary examples, as they awarded the Creek fee simple title over their land, unlike most other tribes.[34] Fee simple title held significant importance as the Creeks fought for their territorial land rights throughout the allotment era.

B. Allotment Era

Congress's prohibition in 1871 on treaties between tribal nations and

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26. *See* Robert B. Kane, *Second Creek War*, ENCYCLOPEDIA OF ALA. (Feb. 17, 2017), http://www.encyclopediaofalabama.org/article/h-3866 [https://perma.cc/X3LM-WCXN] ("[The] federal government . . . refused to enforce the terms of the 1832 Treaty of Cusseta."); *see also* FOREMAN, *supra* note 4, at 141 ("[T]he heirs of dead members of their families, were not entitled to possess or convey the lands inherited by them, which the white courts insisted on . . . selling.").

27. *See* FOREMAN, *supra* note 4, at 145 ("[A] company of fifty or sixty [Creek] Indians attacked a mail stage about twenty miles west of Columbus . . . and killed some of the passengers."); *see also* Kane, *supra* note 26 ("The Second Creek War . . . was a conflict between the U.S. Army and Alabama and Georgia militias and a faction of the Creek Nation . . . .").

28. Kane, *supra* note 26; *see* Christoper Haveman, *Creek Indian Removal*, ENCYCLOPEDIA OF ALA. (Jan. 13, 2017), http://www.encyclopediaofalabama.org/article/h-2013 [https://perma.cc/LB64-NVLW] (discussing forced removal of Creek from their land).

29. Treaty with the Creeks, arts. II–III, Aug. 7, 1856, 11 Stat. 699, 700; Treaty with the Creeks, arts. II, VII, Feb. 14, 1833, 7 Stat. 417, 418–20; *see also* Brief for Petitioner, *supra* note 2, at 5 ("Given this history, the Creek demanded the strongest protections for their new reservation.").

30. Brief for Petitioner, *supra* note 2, at 6; *see also* Treaty with the Creeks, art. XIV, Mar. 24, 1832, 7 Stat. 366, 368 ("[T]he Creek Indians . . . shall be allowed to govern themselves . . . .").

31. Treaty with the Creeks, art. XIV, Mar. 24, 1832, 7 Stat. 366, 368; Treaty with the Creeks, arts. IV, XV, Aug. 7, 1856, 11 Stat. 699, 700, 703–04; Brief for Petitioner, *supra* note 2, at 35.

32. *See McGirt*, 140 S. Ct. 2461–62 ("Congress explicitly restated its commitment that the remaining land would be 'forever set apart as a home for said Creek nation,' which it now referred to as 'the reduced Creek reservation.'" (citing Treaty with the Creeks, art. III, IX, June 14, 1866, 14 Stat. 786, 788).

33. *See* Brief for Muscogee (Creek) Nation as Amicus Curiae in Support of Petitioner at 6, *McGirt*, 140 S. Ct. 2452 (No. 18-9526) (recounting gradual diminishment of reservation boundaries by successive treaties).

34. *See* Treaty with the Creeks, art. XIV, Mar. 24, 1832, 7 Stat. 366, 368 ("[A]s soon as the boundaries of the Creek country West of the Mississippi are ascertained, case a patent or grant to be executed to the Creek tribe . . . .").

the United States marked the beginning of forced assimilation.[35] Then, in 1887, Congress passed the Dawes Act, also known as the General Allotment Act.[36] The Creek were excluded from the General Allotment Act,[37] which quickly ceded over sixty million acres to the United States government, over fifteen million of which were allotted to members of the Five Tribes.[38] As the federal government tried to maximize dissolution of tribal lands, Congress passed the Curtis Act, which forced allotments on Native Americans without their consent, on June 28, 1898.[39] The Curtis Act was intended to force the Creeks into accepting general allotment on compromised grounds.[40] These coerced negotiation tactics somewhat backfired as the Five Civilized Tribes placed restrictions on alienation within their respective allotment plans, strengthening various tribal members' landholdings.[41]

Other tribes sold their land to the United States or private U.S. citizens, but the Creek allotment agreement required the Creek lands to be allotted among Creek citizens, reinforcing their reservation status.[42] Thus, the Creek received fee simple title to their lands[43] and land title reverted to the Five Tribes for reassignment once it was no longer occupied or used by a tribal member.[44] Due to the Creek's perseverance, and despite tactics the territory of Oklahoma and the federal government used to entice tribal members to sell their land,[45] the Supreme Court, in 1904, held that the allotment era did not divest the Creeks of their reservation.[46]

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35. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71) ("[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . . .").

36. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331–54).

37. *See* Tim Vollmann & M. Sharon Blackwell, *"Fatally Flawed": State Court Approval of Conveyances by Indians of the Five Civilized Tribes—Time for Legislative Reform*, 25 TULSA L.J. 1, 6 (1989) ("Despite the exclusion of the Five Tribes from the General Allotment Act . . . .").

38. *History of Allotment*, INDIAN LAND TENURE FOUND., https://iltf.org/land-issues/history/ [https://perma.cc/7K6Q-WT3E] (last visited Dec. 3, 2021).

39. Act of June 28, 1898, ch. 517, 30 Stat. 495.

40. Harjo v. Kleppe, 420 F. Supp. 1110, 1122 (D.D.C. 1976); *see also* DEBO, *supra* note 3, at 32–33 (discussing Curtis Act of June 28, 1898).

41. *See* Brief for Petitioner, *supra* note 2, at 9 ("The agreement thus tilted dramatically toward keeping Creek land in Creek hands.").

42. *Id.* at 10 ("The agreement recognized the Creek government's legislative authority over 'the lands of the tribe' . . . .").

43. *See* Vollmann & Blackwell, *supra* note 37, at 8; *see also* United States v. Creek Nation, 295 U.S. 103, 109 (1935) ("The Creek Tribe had a fee-simple title, not the usual Indian right of occupancy with the fee in the United States.").

44. *See* Vollmann & Blackwell, *supra* note 37, at 8 ("In contrast, the Five Tribes had received fee simple title to their tribal lands in Indian Territory. . . .").

45. DEBO, *supra* note 3, at 137–38 (discussing conflicts surrounding alienation restrictions).

46. Morris v. Hitchcock, 194 U.S. 384, 393 (1904) (finding that Five Tribes retained continued legislative power within their borders indicative of a defined reservation).

C. Oklahoma Achieves Statehood

In 1906, Oklahoma was admitted to the Union with the passage of the Oklahoma Enabling Act.[47] The first section of this Act prohibited Oklahoma from limiting federal authority over tribal property and stipulated that the state could not interfere with personal or property rights of Indians who now resided in the new state.[48] Furthermore, the Oklahoma Constitution stated that non-tribal state citizens disclaimed all right and title to all lands owned or held by a Native American.[49] The limiting provisions, however, did not protect the Five Civilized Tribes' lands for long, as those in state government positions quickly advocated for the removal of alienation restrictions.[50]

These efforts proved successful as Congress passed the Act of May 27, 1908, which removed alienation restrictions so Native Americans could sell their land, ultimately increasing the Oklahoma tax base.[51] As a result, 12,002,897 acres of tribal lands were lifted from restriction,[52] and Oklahoma probate courts now had to approve certain tribal land conveyances.[53] Extensive litigation stemmed from the 1908 Act, and lines quickly blurred as to what land was subject to Oklahoma probate courts.[54]

The Act of April 10, 1926, sought to remedy the confusion by stating that Oklahoma county courts had conclusive jurisdiction over full-blood heir land conveyances,[55] which made it easier for adverse possessors to take Creek land.[56] In light of this assault on Creek landholdings, the Nation still endured and fought against the fraudulent land embezzlement that was occurring in Oklahoma probate courts.[57] For example, the

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47. Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (1906).

48. *Id.* at § 1.

49. OKLA. CONST. art. I, § 3; DEBO, *supra* note 3, at 166.

50. *See* Vollmann & Blackwell, *supra* note 37, at 13 (outlining Oklahoma's call for removal of restrictions on Indian land).

51. Act of May 27, 1908, ch. 199, § 9, 35 Stat. 312, 315; *see* Vollmann & Blackwell, *supra* note 37, at 14–15 ("The 1908 Act . . . sought a balance between the manifest duty to protect unsophisticated Indians . . . and the compelling need of the new State of Oklahoma for tax revenues.").

52. DEBO, *supra* note 3, at 180.

53. Act of May 27, 1908, § 9; *see* Vollmann & Blackwell, *supra* note 37, at 15 ("As to inherited lands, the statute provided in substance that the conveyances by full-blood heirs were subject to the approval of the probate courts of Oklahoma having jurisdiction of the settlement of the deceased allottee.").

54. Vollmann & Blackwell, *supra* note 37, at 15–18 (recounting consequences of 1908 Act); DEBO, *supra* note 3, at 361.

55. Act of Apr. 10, 1926, ch. 115, 44 Stat. 239 (amending Act of May 27, 1908, § 9); DEBO, *supra* note 3, at 364 (discussing how probate attorneys were appointed to represent Native Americans before Oklahoma courts and that court intervention was required for any conveyance).

56. *See* Act of Apr. 10, 1926 § 2 (amending Act of May 27, 1908, § 9); *see* Vollmann & Blackwell, *supra* note 37, at 18–19 (describing Act of April 10, 1926 and its consequences).

57. Brief for Amicus Curiae Muscogee (Creek) Nation in Support of Petitioner, *supra* note 33,

Creeks sued the United States for taking land under these practices, in violation of the 1866 Treaty.[58]

In addition, underground governance was formed to keep the tribe organized in light of the state's discriminatory practices that hindered the Creek's assertions of its sovereignty.[59] Congress passed the Indian Reorganization Act of 1934 (IRA) because it recognized that the tribal land bases, including Creek lands, were disappearing due to state land infringement.[60] The IRA eliminated allotment and put Indian lands into federal trusts while adopting tribal constitutions.[61] During this time, the Creeks were able to assert their sovereign rights.[62]

But the Termination era soon followed, an intense period marked by the dissolution of tribes at the hands of the federal government.[63] Congress ceded jurisdiction over Native American criminal and civil affairs to the states[64] and ended federal recognition for certain tribes. The transfer of jurisdiction further perpetuated discriminatory practices against tribal members on affected reservations[65] and imposed state tax

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at 31 ("The Nation directed its National Attorneys to investigate and litigate fraudulent town lot sales and embezzlement in probate and guardianship matters.").

58. *See* United States v. Creek Nation, 295 U.S. 103, 110–111 (1935) (holding that the United States appropriated Creek lands through allotment practices and must compensate the Creek for those lands with interest).

59. *See* Brief for Amicus Curiae Muscogee (Creek) Nation in Support of Petitioner, *supra* note 33, at 32 ("To survive the Creek formed an underground government, the Creek General Convention . . . .").

60. Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as 25 U.S.C. § 461); *see* Brief for Amicus Curiae Muscogee (Creek) Nation in Support of Petitioner, *supra* note 33, at 34 (discussing 1934 IRA).

61. 25 U.S.C. § 5108; *see* Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, And Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 14–15 (2015) ("The IRA aimed to reverse the erosion of the tribal land base by eliminating allotment and authorizing the Secretary to take Indian land into trust . . . .").

62. *See* Brief for Amicus Curiae Muscogee (Creek) Nation in Support of Petitioner, *supra* note 33, at 34 ("[T]he Creek sought permission in 1934 to conduct their first tribal election since 1906, and Commissioner Collier consented." (citing Letter from John Collier to Adrian Landman (May 19, 1934))); *see generally* DEBO, *supra* note 3, at 368.

63. *See generally* Felix S. Cohen, *The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 357 (1953).

64. Act of Aug. 15, 1953, ch. 505, Pub. L. No. 83-280, 67 Stat. 588 (codified at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–26, 28 U.S.C. § 1360); Strommer & Osborne, *supra* note 61, at 15 (discussing states asserting jurisdiction over tribes during Termination era).

65. *See* Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 153 (1977) (discussing imposition of state judicial authority following Public Law 280); U.S. COMM'N ON C.R., 1961 COMMISSION ON CIVIL RIGHTS REPORT 146–48 (1961) (describing incidents of discriminatory policing and court processes following imposition of state-law jurisdiction over reservations); STAFF OF AM. INDIAN POL'Y REV. COMM'N, 94TH CONG., 2D SESS. REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION 15–24, 32 (1976) (explaining consequences of Public Law 280 for Native Americans).

obligations on tribes.[66] In 1970, Termination came to an end with President Nixon's Special Message on Indian Affairs.[67] With this policy shift, the Creek ratified a new Constitution, which established a tripartite government with eight legislative districts.[68]

D. Modern Approach to Reservation Divestment

The Muscogee Creek Constitution states that the Creek reservation "shall be as it geographically appeared in 1900 which is based upon those Treaties entered into by the [Creek] and the United States . . . ."[69] Other tribal nations with treaties asserting tribal self-governance have addressed the same reservation disestablishment issue that the Creek faced in *McGirt v. Oklahoma*.[70]

In *Solem v. Bartlett*, the Supreme Court was tasked with a similar disestablishment question: whether South Dakota had jurisdiction to try a defendant whose crimes were committed on the Cheyenne River reservation.[71] The Court centered its disestablishment analysis on congressional intent evidenced by the statutory language regarding the specific reservation,[72] followed by circumstances surrounding the passage of the statutory texts[73] and subsequent treatment of the land.[74] The Court reasoned that congressional intent to divest is not presumed when relevant evidence supporting the three-step analysis, defined below, is lacking.[75]

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66. *See* Wilkinson & Biggs, *supra* note 65, at 153 (noting that tribal tax immunity was abolished during Termination).

67. *See* Special Message to the Congress on Indian Affairs, 213 PUB. PAPERS 564 (July 8, 1970) (detailing Nixon's message and new direction of his American Indian policy); *see* Brief for Amicus Curiae Muscogee (Creek) Nation in Support of Petitioner, *supra* note 33, at 35 ("President Nixon brought an end to the Termination policy with his watershed Special Message on Indian Affairs (July 8, 1970).").

68. MCN CONST. art. IV, § 9 (establishing voter eligibility in tribal elections); MCN CONST. art. VI, §§ 1–2 (dividing Nation into eight districts and vesting legislative power in the National Council); *see* Brief for Amicus Curiae Muscogee (Creek) Nation in Support of Petitioner, *supra* note 33, at 35 ("In 1979, the Nation adopted a new Constitituion, which sought to renew its tripartite system of government, and in 1982 it requested funding to reestablish its courts" (citing Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1442 (D.C. Cir. 1988).).

69. MCN CONST. art. I, § 2.

70. *See* Nebraska v. Parker, 577 U.S. 481, 493–94 (2016) (holding that Congress did not intend to diminish Omaha Indian Reservation); *see* Solem v. Bartlett, 465 U.S. 463, 480–81 (1984) (holding that South Dakota state courts lacked jurisdiction to try crimes committed on Cheyenne River Sioux Reservation because Congress never disestablished reservation).

71. 18 U.S.C. § 1153; *Solem*, 465 U.S. at 465 ("Respondent contended that the crime for which he had been convicted occurred within the Cheyenne River Sioux Reservation, established by Congress . . . and that the State therefore lacked criminal jurisdiction over respondent.").

72. *Solem*, 465 U.S. at 470; McGirt v. Oklahoma, 140 S. Ct. 2452, 2468 (2020).

73. *Solem*, 465 U.S. at 471.

74. *Id.*

75. *Id.* at 472 (holding that diminishment does not take place when an act and its legislative history do not provide requisite evidence (citing Mattz v. Arnett, 412 U.S. 481, 505 (1973))).

In *Nebraska v. Parker*, the Supreme Court analyzed whether Congress had divested the Omaha Tribe's reservation.[76] First, the majority opinion outlined the three necessary elements that determine whether an Indian reservation has been diminished, starting with the statutory text.[77] Second, the court analyzed historical events surrounding the relevant statutory text but stated that "historical evidence . . . cannot overcome the lack of clear textual signal that Congress intended to diminish the reservation."[78] Third, the Court referenced subsequent demographic history of how the Indians and non-Indians treated the land as an additional clue that might "reinforce a finding of diminishment or nondiminishment based on the text."[79] Subsequent demographic evidence, however, remains the weakest and most unreliable evidence of reservation disestablishment, according to *Parker*.[80]

II. DISCUSSION

First, this Part summarizes Jimcy McGirt's crimes and conviction within the Oklahoma state court system[81] and various courts' interpretations of jurisdiction over the land where the crime occurred.[82] Second, it explores McGirt's failed appeals that challenged Oklahoma's criminal jurisdiction over crimes committed on historic Creek lands.[83] Third, it considers the Supreme Court's majority opinion and textual interpretation of reservation divestment[84] in comparison to the dissent's three-step interpretation.[85]

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76. Nebraska v. Parker, 577 U.S. 481, 483 (2016).

77. *See id.* at 488 ("[T]he most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands." (quoting Hagen v. Utah, 510 U.S. 399, 411 (1994))).

78. *Id.* at 490.

79. *Id.* at 492 (citing *Mattz*, 412 U.S. at 505).

80. *Id.* at 493 (describing demographics as least compelling divestment evidence (citing South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 356 (1998))).

81. McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020); *see* Petition for Writ of Certiorari, *supra* note 19, at 5.

82. Petition for Writ of Certiorari, *supra* note 19, at 7; *see* Order Affirming Denial of Application for Post-Conviction Relief at 2, McGirt v. Oklahoma, No. PC-2018-1057 (Okla. Crim. App. Feb. 25, 2019) ("Petitioner tries to claim that his crimes were committed in portions of Oklahoma located in Indian Country . . . .").

83. Petition for Writ of Certiorari, *supra* note 19 at 1; *see* Brief for Petitioner, *supra* note 2, at 17 ("The [Oklahoma Court of Criminal Appeals] noted Petitioner's argument that his crimes were committed in Indian Country, prohibiting Oklahoma courts from exercising jurisdiction." (citations omitted)).

84. *McGirt*, 140 S. Ct. at 2462 ("To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress.").

85. *McGirt*, 140 S. Ct. at 2482 (Roberts, C.J., dissenting) (citing Nebraska v. Parker, 577 U.S. 481, 488–89).

A. Significance of Location

Jimcy McGirt, an enrolled member of the Seminole Tribe, was charged and convicted of first-degree rape, lewd molestation, and forcible sodomy of a four-year-old[86] on what was regarded as historic Creek reservation lands.[87] The crime occurred in rural Broken Arrow, Wagoner County, Oklahoma, in August of 1996.[88] At the time, Mr. McGirt was married to and living with the alleged victim's grandmother, Norma Blackburn.[89] In September of 1996, a report was made to the Wagoner County Sheriff's department after the alleged victim made statements to a child-abuse counselor.[90] Based on the report, Jimcy McGirt was charged with two 500-year sentences and life without the possibility of parole.[91]

The Broken Arrow Creek tribe of Alabama settled the city of Broken Arrow when they were forcibly removed to Oklahoma on the Trail of Tears.[92] Since 1828 the Creek inhabited this area and formally incorporated Broken Arrow from allotted lands in 1902.[93] Early maps detailing the Five Tribes reservation boundaries show Broken Arrow within the Creek reservation.[94] Thus, the crux of the argument in *McGirt* centers on whether the historic Creek reservation that encompassed Broken Arrow had been divested of reservation status, subjecting Jimcy McGirt to state rather than federal jurisdiction, under the Major Crimes Act.[95]

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86. *See* Brief for Petitioner, *supra* note 2, at 16 (describing convicted charges); Order Affirming Denial of Application for Post-Conviction Relief, *supra* note 82, at 1.

87. *McGirt*, 140 S. Ct. at 2459; Petition for Writ of Certiorari, *supra* note 19, at 6.

88. Petition for Writ of Certiorari, *supra* note 19, at 4.

89. *Id.*

90. *Id.*

91. Brief for Petitioner, *supra* note 2, at 16.

92. Betty Gerber, *History of the Name of Broken Arrow*, CITY OF BROKEN ARROW, https://www.brokenarrowok.gov/our-city/visit/visitor-info/history-of-the-name-of-broken-arrow [https://perma.cc/5DZS-WEQT] (last visited Nov. 20, 2021) (citing STEVEN STAPLETON, BROKEN ARROW: THE FIRST HUNDRED YEARS (2002)); *see also* Donald Wise, *Broken Arrow*, OKLA. HIST. SOC'Y, https://www.okhistory.org/publications/enc/entry.php?entry=BR019 [https://perma.cc/9XU6-UP39] (last visited Nov. 20, 2021) ("In 1836 the Muscogee (Creek) Indians became the first permanent settlers in this part of Indian Territory . . . .").

93. *See* Gerber, *supra* note 92 ("Broken Arrow Muscogee people were the first permanent residents in the area. Some arrived as early as 1828 . . . ."); *see also* DONALD WISE, BROKEN ARROW: CITY OF ROSES AND PURE WATER 13 (2002) ("When the townsite of Broken Arrow was surveyed and platted in 1902, warranty deeds could not be issued to the property since it was restricted land allotted by the Creek Nation.").

94. *See* WISE, *supra* note 93, at 27 (providing a 1795 map showing Broken Arrow within the Creek reservation); *see generally* H. CECIL RHOADES, ESTABLISHMENT AND DEVELOPMENT OF BROKEN ARROW, OKLAHOMA (1976).

95. McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020); *see also* Negonsott v. Samuels, 507 U.S. 99, 102–03 (1993) (holding that state courts do not have jurisdiction over Indians for certain crimes committed on reservations).

B. State Jurisdictional Challenges

In 1997, the Wagoner County District Court of Oklahoma convicted Jimcy McGirt and he appealed without raising the issue that the state courts lacked jurisdiction.[96] Not until June 18, 2018 did McGirt first argue that the State of Oklahoma lacked criminal jurisdiction over him because his crimes were committed on the Creek reservation.[97] The Oklahoma Court of Criminal Appeals affirmed the Wagoner County conviction,[98] holding that the district court had jurisdiction over the matter since Congress previously disestablished the Creek reservation and transferred criminal jurisdiction to the state.[99]

On writ of certiorari to the U.S. Supreme Court, McGirt argued that the state of Oklahoma lacked jurisdiction under the Major Crimes Act.[100] The Major Crimes Act states that "any Indian who commits certain enumerated offenses against the person or property of another Indian or any other person while on federally defined Indian Country shall be subject to . . . exclusive jurisdiction of United States."[101] "Indian Country" is defined as "all lands within the limits of any Indian reservation under the jurisdiction of the United States Government . . . including right of way running through the reservation."[102] Oklahoma argued that the Major Crimes Act did not strip the state of jurisdiction because the Creek reservation was previously divested of its federal status.[103] Thus, the "case winds up as a contest between State and Tribe."[104]

C. Opinion of the Court in McGirt v. Oklahoma

Justice Gorsuch in authoring the majority opinion took a textual

96. Brief for Respondent, *supra* note 12, at 4 (describing Oklahoma's jurisdiction to prosecute); Brief for Petitioner, *supra* note 2, at 16 (detailing appeal without mention of jurisdictional issues).

97. Brief for Respondent, *supra* note 12, at 4 (describing the crimes); Petition for Writ of Certiorari, *supra* note 19, at 8–10 (advancing arguments about jurisdictional issues).

98. Brief for Respondent, *supra* note 12, at 4 (recounting procedural history); Brief for Petitioner, *supra* note 2, at 17 (arguing to overturn conviction).

99. Order Affirming Denial of Application for Post-Conviction Relief, *supra* note 82, at 2–3 (describing why no jurisdictional issues existed); Petition for Writ of Certiorari, *supra* note 19, at 9–10 (detailing petitioner's argument about Oklahoma's lack of jurisdiction).

100. Petition for Writ of Certiorari, *supra* note 19, at 6 (describing how Major Crimes Act impacts jurisdiction); *see* 18 U.S.C. § 1153(a) (giving federal courts jurisdiction over specific crimes committed by Indians on Indian reservations).

101. 18 U.S.C. § 1153(a).

102. *Id.*; *see also* U.S. DEP'T OF JUST., CRIM. RESOURCE MANUAL § 677 (2001) ("'Indian Country' is defined . . . as including (1) federal reservations . . . (2) dependent Indian communities . . . and (3) Indian allotments to which title has not been extinguished . . . ." (citations omitted)).

103. Brief for Respondent, *supra* note 12, at 6.

104. McGirt v. Oklahoma, 140 S. Ct. 2452, 2460 (2020).

approach[105] and sifted through all of Congress's previous treaties and agreements involving the Creek[106] to show that no language within those respective documents explicitly divested the reservation.[107] Because only Congress has the power to divest a reservation of its land,[108] Justice Gorsuch contended that the Court need only look to acts of Congress to determine the status of the Creek reservation.[109] Therefore, Congress must have demonstrated an explicit intent to abolish the reservation. Justice Gorsuch used *Nebraska v. Parker* as the standard determinative of congressional intent.[110]

First, the majority described how the Creek reservation was created:[111] the Creek were granted a fee simple title in their land to endure "so long as they shall exist as a nation, and continue to occupy the country hereby assigned to them."[112] Given the extensive and detailed history of the Creek reservation, the majority layed out the State of Oklahoma's argument[113] for divestment to show that each referenced legislative act or historical event failed to demonstrate the requisite congressional intent for disestablishment compared to the textual evidence.[114] Part of this history included explicit references to Creek land as a reservation in each treaty brought before the court.

Second, the majority denoted that allotment did not disestablish the Creek reservation as the dissent contended.[115] For allotment to

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105. *Id.* at 2462; *see* David K TeSelle, *Review of McGirt v. Oklahoma*, NAT'L L. REV. (Aug. 5, 2020), https://www.natlawreview.com/article/review-mcgirt-v-oklahoma-how-supreme-court-and-justice-gorsuch-s-revolutionary [https://perma.cc/Z4N8-4J46] ("Through this 'textualist' lens, Justice Gorsuch . . . focused squarely on the words used by Congress . . . .").

106. *McGirt*, 140 S. Ct. at 2460–62 (discussing treaties entered into with the Creek); *see also* Brief for Petitioner, *supra* note 2, at 5–6 (outlining the effects of the 1832, 1833, 1856, and 1866 treaties).

107. *McGirt*, 140 S. Ct. at 2482 ("Congress has never withdrawn the promised [Creek] reservation."); *see generally* Brief for Petitioner, *supra* note 2, at 17.

108. *McGirt*, 140 S. Ct. at 2462 (citing Solem v. Bartlett, 465 U.S. 463, 470 (1984)); Nebraska v. Parker, 577 U.S. 481, 488–89 (2016) (citing *Solem*, 465 U.S. at 470).

109. *McGirt*, 140 S. Ct. at 2462–63 ("If Congress wishes to break the promise of a reservation, it must say so. . . . Congress might speak of a reservation as being 'discontinued,' 'abolished,' or 'vacated.'"(citing Mattz v. Arnett, 412 U.S. 481, 504 n.22 (1973))).

110. *Id.* at 2463 (citing *Parker*, 577 U.S. at 481).

111. *Id.* at 2460 ("Congress . . . 'established boundary lines which will secure a country and permanent home to the whole Creek nation of Indians.'" (citing Treaty with the Creeks, Mar. 24, 1832, art. XIV, 7 Stat. 366, 368)).

112. *Id.* at 2459 (citing Treaty with the Creeks, Feb. 14, 1833, art. III, 7 Stat. 418, 418).

113. *Id.* at 2463 ("Oklahoma points to events during the so-called 'allotment era.'"); *see* Brief for Petitioner, *supra* note 2, at 18 ("Oklahoma relies on allotment of Creek lands. But allotment is 'completely consistent with continued reservation status.'" (citing *Mattz*, 412 U.S. at 497)).

114. *McGirt*, 140 S. Ct. at 2462 ("If Congress wishes to break the promise of a reservation, it must say so.").

115. *Id.* at 2464; *see Mattz*, 412 U.S. at 497 ("[A]llotment . . . is completely consistent with continued reservation status.").

disestablish the Creek reservation "would require an act of cession, the transfer of a sovereign claim from one nation to another."[116] Without additional cession language, allotment alone is not enough to end a reservation.[117]

Next, the majority poked holes in Oklahoma's argument that historical events surrounding allotment divested the Creek reservation.[118] For example, each of Oklahoma's cited events, like a 1901 allotment agreement,[119] is rebutted with evidence of independence, like the Five Civilized Tribes Act of 1906 that further asserted each tribe's sovereignty.[120] Due to this evidence, the Creek tribal government was constantly recognized throughout the allotment era, solidifying its reservation status.[121]

During this period of tribal recognition, the Creek Nation became more defined.[122] The majority concluded that Congress's authorization of a Creek constitution and tribal self-government,[123] which the Creek fully utilized,[124] showed that "Congress moved in the opposite direction" of divestment.[125] In addition, the Creek exercised criminal territorial

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116. *McGirt*, 140 S. Ct. at 2464 (citing 3 EMORY WASHBURN, AMERICAN LAW OF REAL PROPERTY *521–24 (1860)).

117. *McGirt*, 140 S. Ct. at 2465 (quoting Act of Apr. 21, 1904, § 8, 33 Stat. 189, 217–18); *see* Brief for Petitioner, *supra* note 2, at 17 (arguing that no congressional act or statute used hallmark language necessary for Creek reservation disestablishment).

118. *McGirt*, 140 S. Ct. at 2466 (listing significant Creek sovereign functions); *see* Brief for Petitioner, *supra* note 2, at 15 ("The [Creek] Nation today is thriving . . . it employs 5,000 people and commands an annual budget of $300 million . . . .").

119. Creek Allotment Agreement of 1901, ch. 676, § 46, 31 Stat. 861, 872; *see* Brief for Respondent, *supra* note 12, at 30 (citation omitted) ("The Creek Allotment Agreement broke up the Tribe's fee patent and required conveyance to allottees of 'all right, title, and interest of the Creek Nation.' All interest in the land thereafter rested in the allottee alone." (citing Creek Allotment Agreement of 1901, § 23)).

120. *McGirt*, 140 S. Ct. at 2466 (citing Five Civilized Tribes Act of 1906, § 6, 34 Stat. 137, 139–40).

121. *Id.* at 2466–67 (noting examples of government recognizing Creek Nation's exercise of self-government.

122. *Id.* at 2467; *see* Brief for Petitioner, *supra* note 2, at 15 ("[The Creek Nation's] new, federally ratified constitution confirmed that Creek 'political jurisdiction' is coextensive with its 1866 reservation boundaries.").

123. *McGirt*, 140 S. Ct. at 2467 (citing Act of June 26, 1936, § 3, 49 Stat. 1967); *see* Brief for Amicus Curiae Muscogee (Creek) Nation in Support of Petitioner, *supra* note 33, at 36 ("The Constitution, which was approved by the Interior Department in 1979, provides that '[t]he political jurisdiction of the [Nation] shall be as it geographically appeared in 1900 . . . .'").

124. *See McGirt*, 140 S. Ct. at 2467 (discussing Creek democratic leaders and police force (citing Brief for Amicus Curiae Muscogee (Creek) Nation in Support of Petitioner, *supra* note 33, at 36–39)).

125. *See id* at 2468 ("[There was] no moment when any Act of Congress dissolved the Creek Tribe . . . . In the end, Congress moved in the opposite direction."); *see* Brief for Amicus Curiae Muscogee (Creek) Nation in Support of Petitioner, *supra* note 33, at 18 ("[E]very original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by act of Congress." (citing Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905))).

jurisdiction over tribal members and nonmembers.[126] The Creek thus retained their reservation, maintaining their continuous sovereign authority through earlier periods of hostility and questionable allotment-era tactics until reaching a new period of "support for federally defined tribalism."[127]

Turning to precedent, Justice Gorsuch made it abundantly clear that Oklahoma and the dissent cannot turn to historical acts and demographics within the *Solem-Parker* analysis to prove disestablishment when clear statutory analysis will suffice.[128] Justice Gorsuch turneds to the same cases that Oklahoma and Chief Justice Roberts in dissent relied on to illustrate that extratextual sources should only be utilized when the intent behind the relevant statutes is ambiguous.[129] Standing staunchly by his interpretation of *Solem* and *Parker* holding that "once a reservation is established it retains that status 'until Congress explicitly states otherwise,'"[130] Justice Gorsuch noted that steps two and three of the *Solem-Parker* analysis become inapplicable.[131]

Despite painting the *Solem-Parker* approach as unnecessary, the majority delved into Oklahoma's proposed disestablishment analysis to prove it deficient.[132] Oklahoma first argued that a reservation never existed, but that if one did exist, it was disestablished by historical events.[133] These events included allotment-era practices,[134] the influx of white

126. *See McGirt*, 140 S. Ct. at 2467 ("Pursuant to this new national policy, in 1936, Congress authorized the Creek to adopt a constitution and bylaws . . . enabling the Creek government to resume many of its previously suspended functions."); *see generally* Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439 (D.C. Cir. 1988).

127. *McGirt*, 140 S. Ct. at 2467; *see* Brief for Petitioner, *supra* note 2, at 22 (revealing that relevant statutes contained no cessation language).

128. *See* Nebraska v. Parker, 577 U.S. 481, 490 (2016) ("The mixed historical evidence . . . cannot overcome the lack of clear textual signal . . . .").

129. *See McGirt*, 140 S. Ct. at 2468–69 (discussing four cases suggesting extratextual evidence as least compelling form of evidence with limited interpretive value that cannot override congressional intent); *see* Brief for Petitioner, *supra* note 2, at 16 ("Oklahoma's 'mixed' and 'conflicting' evidence . . . 'falls short' of the unequivocal evidence *Parker* demands.") (citing Murphy v. Royal, 875 F.3d 896, 938-39 (10th Cir. 2017))).

130. *McGirt*, 140 S. Ct. at 2469 (citing Solem v. Bartlett, 465 U.S. 463, 470 (1984)).

131. *See id.* at 2470 ("[There is n]o case in which this Court has found a rnseservation disestablished without first concluding that a statute required that result.").

132. *Id.*; *see* Brief for Petitioner, *supra* note 2, at 39 ("With neither text nor tale to support their disestablishment claims, Oklahoma and the Solicitor General each offered an argument to avoid the result's implication . . . .").

133. *See McGirt*, 140 S. Ct. at 2468 (responding to Oklahoma's argument that historical practices and demographic change over time amounted to disestablishment).

134. *See* Brief for Respondent, *supra* note 12, at 14 ("Creek country lost its communal status as Indian country via allotment . . . .").

settlers,[135] Oklahoma's historical criminal and civil jurisdiction,[136] and the achievement of statehood.[137]

Justice Gorsuch conversely contended that Oklahoma's self-asserted and erroneous jurisdiction conflicts with the Major Crimes Act[138] and case precedent.[139] In addition, the reliance on historical events surrounding allotment cannot make up for the lack of textual evidence that never resulted in disestablishment.[140] Finally, Oklahoma's Major Crimes Act exemption claim was meaningless; state noncompliance with a federal act fails to indicate the requisite congressional intent.[141]

The majority quickly sifted through Oklahoma's alternative argument—that Congress never established a Creek reservation to begin with[142]—by once again pointing to treaties and statutes.[143] First, Justice Gorsuch noted that the MCA explicitly includes "dependent Indian communities" as under federal jurisdiction to combat Oklahoma's contention that the Creek were never given a reservation, but existed as a "dependent Indian community."[144] Second, he pointed to the numerous treaties that "solemnly guarantied [sic] to the Creek Indians . . . a permanent home," which sufficed to establish a federal reservation.[145] Lastly, even though

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135. *McGirt*, 140 S. Ct. at 2473; *see* Brief for Respondent, *supra* note 12, at 23–24 (reasoning that legislation that equally affected Indians and non-Indians within the territory pointed to disestablishment).

136. *See* Brief for Respondent, *supra* note 12, at 40 (pointing to Oklahoma's longstanding jurisdiction in practice over asserted as reservation lands).

137. *See id.* at 5 ("That the land was not a reservation became manifest at statehood."); *see* Brief for Petitioner, *supra* note 2, at 38 ("[D]isestablishing the Creek borders was a necessary step for Oklahoma statehood.").

138. *McGirt*, 140 S. Ct. at 2470; *see* 18 U.S.C. § 1151 ("[T]he term 'Indian country', as used in this chapter, means . . . all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.").

139. *See McGirt*, 140 S. Ct. at 2470–71 (noting that practice of trying major crimes committed by Indians on allotments in Oklahoma state court was previously disavowed (citing State v. Klindt, 782 P. 2d 401, 404 (Okla. Crim. App. 1989))).

140. *See id.* at 2468–69 (reasoning that historical and demographic evidence was not offered in manner required by *Parker* and *Solem*).

141. *Id.* at 2471; *see* Brief for Petitioner, *supra* note 2, at 30–31 ("[S]ubstantial post-statehood evidence shows a widely shared understanding that the Creek reservation remained intact.").

142. *McGirt*, 140 S. Ct. at 2474.

143. *See id.* ("Holding that the Creek never had a reservation would require us to stand willfully blind before a host of federal statutes."); *see* Brief for Petitioner, *supra* note 2, at 35 ("Regardless, the statutes refute Oklahoma's claim . . . .").

144. *McGirt*, 140 S. Ct. at 2474; *see* 18 U.S.C. § 1151 ("[T]he term 'Indian country', as used in this chapter, means . . . all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state.").

145. *McGirt*, 140 S. Ct. at 2474; *see also* Brief for Petitioner, *supra* note 2, at 5 (citing Treaty with the Creeks, art. I, Mar. 24, 1832, 7 Stat. 366).

the Creek held fee simple title to their land,[146] the land was still reserved from sale as evidenced by the Indian Removal Act.[147] Thus, if the government sold the land without permission, it would be "an act of confiscation."[148] Since no "particular form of words" are necessary to establish a reservation, the treaties that set aside fee simple title that reverted to the Creek once land was no longer occupied or used denote a continued Creek reservation.[149]

Propounding further on the inadequacies of Oklahoma's statehood argument, the majority asserted that the statutes Oklahoma referred to fail so significantly that even the dissent declined to join in the disagreement.[150] These statutes removed distinctions between Indians and non-Indians for state citizenship and court jurisdiction purposes.[151] Still, Justice Gorsuch reverted to applicable federal statutes to highlight long-established federal jurisdiction over Native Americans in Oklahoma.[152] For instance, the MCA, which "applied immediately" in 1907 when Oklahoma achieved statehood "provided exclusive federal jurisdiction over qualifying crimes," contradicting Oklahoma's position.[153] Similarly, Oklahoma's focus on the Enabling Act[154] fell short because the federal MCA still covers crimes committed on reservations, which belong in federal court even if the state has wrongly asserted jurisdiction.[155] Thus,

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146. *See McGirt*, 140 S. Ct. at 2475 (noting that the Creek held fee title); *see* Brief for Respondent, *supra* note 12, at 6 (similarly noting Creek's fee simple title).

147. *McGirt*, 140 S. Ct. at 2475 (citing Indian Removal Act of 1830, ch. 148, § 3, 4 Stat. 411, 412; United States v. Creek Nation, 295 U.S. 103, 109 (1935)); *see* Brief for Amicus Curiae Muscogee (Creek) Nation in Support of Petitioner, *supra* note 33, at 5 ("The term 'reservation' has long been 'used in land law to describe any body of land reserved . . . from sale for any purpose.'" (citing United States v. Celestine, 215 U.S. 278, 285 (1909))).

148. *McGirt*, 140 S. Ct. at 2475 (citing *Creek Nation*, 295 U.S. at 110).

149. *Id.* at 2475 (citing *Creek Nation*, 295 U.S. at 110); Minnesota v. Hitchcock, 185 U.S. 373, 390 (1902).

150. *See McGirt*, 140 S. Ct. at 2476 ("[T]he dissent again declines to join Oklahoma in its latest twist. And it turns out, for good reason.").

151. *See id.* ("The State tells us . . . eastern Oklahoma is and has always been exempt [from the Major Crimes Act]."); *see* Brief for Respondent, *supra* note 12, at 35 ("Congress deliberately transformed the governance of the territory by ending legal distinctions between Indians and non-Indians to create a new state government for all . . . .").

152. *See McGirt*, 140 S. Ct. at 2476 ("[I]n 1897, Congress abolished that scheme, granting the U.S. Courts of the Indian Territory 'exclusive jurisdiction' to try 'all criminal causes . . . .' . . . A year later, Congress abolished tribal courts and transferred all pending criminal cases to U.S. courts of the Indian Territory." (first citing Act of June 7, 1897, 30 Stat. 83, then citing Curtis Act of 1898, § 28, 30 Stat. 504–05)).

153. *McGirt*, 140 S. Ct. at 2477; *see* Brief for Petitioner, *supra* note 2, at 45 ("At statehood and today, the Major Crimes Act has conferred federal jurisdiction pre-emptive of state jurisdiction . . . ." (internal citations omitted)).

154. *McGirt*, 140 S. Ct. at 2477.

155. *Id.*; *see* Brief for Petitioner, *supra* note 2, at 45 ("The Solicitor General thus must show that Congress nullified the Major Crimes Act in Oklahoma.").

Oklahoma described "assignment of cases" within "Indian Country," instead of the requisite "division of responsibilities between federal and state authorities."[156] The former confirms congressional intent.[157]

Finally, the majority cut down Oklahoma's last remaining argument that the hypothetical effects of a decision in favor of *McGirt* would wreak havoc on the state.[158] It minimized one effect—the reversal of state convictions and Oklahoma's criminal jurisdiction—by pointing out that Oklahoma retains the power to try criminal cases involving "non-Indian victims and defendants . . . within Indian country."[159] As a result, the small percentage of Native Americans within Oklahoma ensures that most "prosecutions will be unaffected."[160]

Furthermore, fears that "thousands of Native Americans" will challenge their state convictions are unfounded as "reprosecution in federal court . . . can be graver," in addition to state and federal limitations on post-conviction review.[161] Simply put, many tribal members will not risk appealing their state conviction, even if they are within the statute of limitations for appeal, due to harsh potential consequences.[162] Conversely, holding that the MCA never applied to Oklahoma could overturn every federal conviction on reservations within the state, resulting in the same outcome Oklahoma fears.[163] Thus, adverse risks were at stake for either party in *McGirt* and not a strong indication of congressional intent.[164]

The effects on regulatory and civil law Oklahoma warned of are limited as they are outside the scope of *McGirt*'s question of federal criminal jurisdiction.[165] The state alluded to new federal obligations that would be

156. *McGirt*, 140 S. Ct. at 2477.

157. *Id.*

158. *Id.* at 2478–79; *see* Brief for Petitioner, *supra* note 2, at 40 ("Oklahoma's claims of turmoil are in any event mostly rhetoric." (citation omitted)).

159. *McGirt*, 140 S. Ct. at 2479 (citing United States v. McBratney, 104 U.S. 621, 624 (1882)); *see* Brief for Petitioner, *supra* note 2, at 40 ("States retain jurisdiction over non-Indians absent specific preemption . . . .").

160. *McGirt*, 140 S. Ct. at 2479 ("Oklahoma admits that the vast majority of its prosecutions will be unaffected whatever we decide today."); *see* Brief for Petitioner, *supra* note 2, at 42 ("There is no credible claim that the federal government cannot handle the additional prosecutions.").

161. *McGirt*, 140 S. Ct. at 2479.

162. *Id.* at 2479; *see* Brief for Petitioner, *supra* note 2, at 43 ("Even state prisoners who *could* bring claims will think twice: Success will subject them to federal prosecutions—which often yield harsher sentences.").

163. *McGirt*, 140 S. Ct. at 2480; *see* Brief of Amici Curiae Seventeen Oklahoma District Attorneys and the Oklahoma District Attorneys Association in Support of Respondent at 1, *McGirt*, 140 S. Ct. 2452 (No. 18-9526) ("McGirt's argument now threatens . . . to overturn decades of convictions that they have obtained.").

164. *McGirt*, 140 S. Ct. at 2480 ("[A] decision for either party today risks upsetting some convictions."); *see* Brief for Respondent, *supra* note 12, at 43 ("Reversal also risks reopening thousands of state convictions . . . .").

165. *McGirt*, 140 S. Ct. at 2480.

imposed, such as homeland security, drug enforcement, tobacco regulation, timber protection, school resources, housing assistance, and waste management among others.[166] Also, Oklahoma hypothesized that *McGirt*'s civil effects will "decimate state and local budgets" due to new tax and regulatory obligations, like the invalidation of state-issued environmental permits.[167]

The majority assuaged the worries of Oklahoma and the dissent by reminding both that the same concerns were raised when the Court previously held that the MCA applied to restricted allotments in Oklahoma.[168] Since that decision, none of the dire warnings came to fruition, discrediting Oklahoma's concerns.[169] Also, the majority noted that Oklahoma has proven its ability to work out the complex criminal, regulatory, and civil jurisdictional issues that could arise after *McGirt*.[170] For example, Oklahoma has entered into "hundreds of intergovernmental agreements with tribes" that "relate to taxation, law enforcement . . . and countless other fine regulatory questions."[171] Thus, the state will not be so "imperiled by an adverse decision,"[172] revealing the unfounded[173] nature of these remediable, speculative consequences.[174]

Ultimately, the majority strictly adhered to the text of Congress's enactments as determinative of the Creek reservation's current status.[175] Justice Gorsuch delved into each of Oklahoma's arguments to clearly reveal that the first step of the reservation divestment test of *Parker* and

166. *Id.*; *see also* Brief for Respondent, *supra* note 12, at 43–44 (listing various other subjects of federal legislation that may pertain to relevant land if reservation not disestablished).

167. Brief for Respondent, *supra* note 12, at 44; s*ee* Brief of Amici Curiae Environmental Federation of Oklahoma, Inc., et al., in Support of Respondent, *supra* note 18, at 13 ("[T]he extension of reservation status . . . could divest the State, its counties, or municipalities of taxing authority over Creek members . . . .").

168. *McGirt*, 140 S. Ct. at 2481.

169. *Id.*; *see* Brief for Amicus Curiae Muscogee (Creek) Nation in Support of Petitioner, *supra* note 33, at 43 (noting that many cities exist within reservation boundaries without disruption).

170. *McGirt*, 140 S. Ct. at 2481 ("Oklahoma and its Tribes have proven they can work successfully together as partners."); *see* Brief for Petitioner, *supra* note 2, at 40 ("Here, disruption is particularly unlikely because Creek government is so embedded in the community.").

171. *McGirt*, 140 S. Ct. at 2481; *see* Brief for Amicus Curiae Muscogee (Creek) Nation in Support of Petitioner, *supra* note 33, at 44 (noting Oklahoma's continued authority to levy property taxes and enforce environmental regulation on tribal land).

172. *McGirt*, 140 S. Ct. at 2481; *see* Brief for Petitioner, *supra* note 2, at 41 ("If the jurisdictional divisions . . . prove disruptive, the solution is another statute.").

173. *McGirt*, 140 S. Ct. at 2481 ("[I]t is unclear why pessimism should rule the day.").

174. *Id.*; *see* Brief for Petitioner, *supra* note 2, at 41 ("Oklahoma and tribes already collaborate closely: Around five hundred tribal compacts govern cooperation on taxes, fire services, environmental protection, and more.").

175. *McGirt*, 140 S. Ct. at 2463 (citing Nebraska v. Parker, 577 U.S. 481, 487–88 (2016)).

Solem takes precedence over the subsequent factors.[176] The majority created a clear blueprint for what truly dictates reservation disestablishment,[177] which begins and ends with Congress.[178]

D. Dissent of Chief Justice Roberts

Chief Justice Roberts utilized the full three-step approach from *Parker* and *Solem* and emphasized the latter steps more than the majority.[179] Highlighting historical activities surrounding the Creek reservation to interpret congressional acts,[180] Chief Justice Roberts emphasized the broad regulatory impacts that *McGirt* may have.[181] Chief Justice Roberts briefly referred to congressional statutes in his analysis and noted that the United States Code denotes tribal lands in Oklahoma as former reservations.[182] Statutory texts and their interpretive value were clearly a point of contention for the dissent.[183] Thus, the bulk of the dissent's analysis focused on Congress's historical activities surrounding those statutes[184] as indicative of Congress's intent to divest the Creek reservation.[185]

For example, the dissent combatted the majority's focus on terms indicative of disestablishment, such as "cession," with federal allotment

176. *Id.* at 2468 ("On [Oklahoma]'s account, we have so far finished only the first step; two more await. This is mistaken."); *see* Brief for Petitioner, *supra* note 2, at 19 ("[S]tatutory text is the most probative evidence of [congressional] intent." (citation omitted)).

177. Stacy Leeds, *What the Landmark Supreme Court Decision Means for Policing Indigenous Oklahoma*, SLATE: JURISPRUDENCE (July 10, 2020, 3:07 PM), https://slate.com/news-and-politics/2020/07/supreme-court-mcgirt-oklahoma-tribal-courts.html [https://perma.cc/38H8-LKEQ] ("[The] United States Supreme Court . . . pulled no punches in recognizing and reaffirming the political and territorial boundaries of the Muscogee (Creek) Nation."); *see also* Brief for Petitioner, *supra* note 2, at 19 (arguing Congress can disestablish a reservation) (citing *Parker*, 577 U.S. at 488).

178. *McGirt*, 140 S. Ct. at 2462.

179. *Compare McGirt*, 140 S. Ct. at 2469–70 (majority opinion) ("The dissent charges that we have failed to take account of the compelling reasons . . . .") *with id.* at 2482 (Roberts, C.J., dissenting).

180. *Id.* at 2486 (Roberts, C.J., dissenting) (citing *Parker*, 577 U.S. at 488); *see* Brief for Respondent, *supra* note 12, at 40 (relying on historical activities to assert state-court jurisdiction).

181. *McGirt*, 140 S. Ct. at 2482 (Roberts, C.J., dissenting).

182. *McGirt*, 140 S. Ct. at 2498 (Roberts, C.J., dissenting) (citing 25 U.S.C. § 2719(a)(2)(A)(i)); *see* Brief for the United States as Amicus Curiae Supporting Respondent at 22–23, *McGirt*, 140 S. Ct. 2452 (No. 18-9526) (listing federal statutes referring to Indian lands in Oklahoma as reservations).

183. *McGirt*, 140 S. Ct. at 2485–86, 2489 (Roberts, C.J., dissenting) (noting that no magic words trigger disestablishment); *see* Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 182, at 6 ("Those statutes, properly read in their historical context and in light of contemporary understandings and subsequent developments . . . .").

184. *McGirt*, 140 S. Ct. at 2482 (Roberts, C.J., dissenting).

185. *Id.* at 2487 ("Every single . . . disestablishment case[] has considered extratextual sources . . . .").

practices and Oklahoma's statehood.[186] Specifically, "Congress subjected the Indian Territory to specified state criminal jurisdiction, not covered by federal laws,"[187] abolished all tribal courts,[188] established municipalities to govern Indians,[189] and "systematically dismantled the governmental authority of the Creek."[190] Thus, in the dissent's view, Congress, through its actions, meant to divest the lands of reservation status.[191]

In addition, the dissent pointed to Oklahoma's Enabling Act and the majority's definition of the Creek reservation as historical evidence of divestment.[192] The Enabling Act, a rare piece of legislation, made both tribal members and non-members citizens of Oklahoma,[193] gave tribal members the right to vote,[194] and subjected all new citizens to state laws and courts.[195] This served as another historical event revealing intent to disestablish.

Next, the dissent found the statutes were ambiguous.[196] Resolving this ambiguity required the consideration of "the contemporaneous understanding of the statutes . . . and the subsequent treatment of the lands at issue."[197] Chief Justice Roberts argued that this understanding lent itself to divestment as Creek members realized the inability of self-government in light of Congress's actions.[198] For example, in 1901, the Creek Chief,

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186. *Id.* at 2489–90; Brief for Respondent, *supra* note 12, at 18–19 (discussing applicability of federal liquor law prohibiting importation or sale of alcohol within Indian country on newly founded states (citing Swafford v. United States, 25 F.2d 581, 583 (8th Cir. 1928))).

187. *McGirt*, 140 S. Ct. at 2490 (Roberts, C.J., dissenting).

188. *Id.* at 2490; *see* Brief for Respondent, *supra* note 12, at 14 ("Congress passed the Curtis Act, which instructed the Commission to allot the Five Tribes' land . . . .").

189. *McGirt*, 140 S. Ct. at 2490 (Roberts, C.J., dissenting) ("In addition the Curtis Act established municipalities to govern both Indians and non-Indians.").

190. *Id.* at 2491 ("Congress systematically dismantled the governmental authority of the Creek Nation, targeting all three branches."); *see* Brief for Respondent, *supra* note 12, at 28 ("But here Congress specifically abolished existing tribal courts . . . .").

191. *McGirt*, 140 S. Ct. at 2492 (Roberts, C.J., dissenting) (citing Solem v. Bartlett, 465 U.S. 463, 470 (1984)); *see* Brief for Respondent, *supra* note 12, at 32 (arguing that Congress divested all tribal interest in Creek Nation's land when it conveyed land to the state).

192. *McGirt*, 140 S. Ct. at 2493 (Roberts, C.J., dissenting); *see* Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 182, at 32 ("[T]he 1904 Act reconfirmed the equal treatment of all individuals under a uniform body of assimilated state law . . . .").

193. *McGirt*, 140 S. Ct. at 2492 (Roberts, C.J., dissenting) (citing Act of Mar. 3, 1901, ch. 868, 31 Stat. 1447).

194. *Id.* at 2492–93; Brief for Respondent, *supra* note 12, at 24.

195. *McGirt*, 140 S. Ct. at 2493 (Roberts, C.J., dissenting) ("The Enabling Act also ensured that Indians and non-Indians would be subject to uniform laws and courts.").

196. *Id.* at 2494. Justice Breyer, however, pointed out at oral argument that ambiguity existed between the 1906 and 1907 Enabling Acts. *See* Transcript of Oral Argument at 34–35, *McGirt*, 140 S. Ct. 2452.

197. *McGirt*, 140 S. Ct. at 2494 (Roberts, C.J., dissenting).

198. *Id.* at 2495 (discussing how Creek Nation was disestablished).

Pleasant Porter, stated that "all powers over the governing . . . of our landed property will cease,"[199] and, in 1907 a Choctaw governor stated that he only retained the authority to sign deeds after allotment.[200] Thus, the Creek's own contemporaneous understanding also provided historical evidence of the requisite intent.[201]

Under the last step of the *Parker* and *Solem* disestablishment test, Chief Justice Roberts argued that subsequent treatment of the Creek reservation demonstrated Congress's intent to divest.[202] This included state criminal jurisdiction over Indians on tribal lands[203] along with demographic history of the Creek reservation, that was mostly made up of non-native settlers instead of Creek members.[204]

Finally, the dissent, echoing Oklahoma, warned that the decision in *McGirt* could lead to adverse consequences.[205] Unlike the majority, the dissent did not sweep aside the hypothetical regulatory consequences as outside the scope of the decision.[206] The dissent alluded to the broad implications that "tribes may regulate non-Indian conduct on reservation land,"[207] which carries a "significant 'potential for cost and conflict.'"[208]

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199. *Id.* at 2496; *see also* S. REP. NO. 5013, at 885 (1907) (presenting to Congress curtailments of tribal rights in response to Oklahoma's Enabling Act).

200. *McGirt*, 140 S. Ct. at 2496 (Roberts, C.J., dissenting); Brief for Respondent, *supra* note 12, at 39.

201. *McGirt*, 140 S. Ct. at 2496 (Roberts, C.J., dissenting) ("[T]he new principal Chief confirmed that it was 'utterly impossible' to resume 'our old tribal government.'").

202. *Id.* at 2498.

203. *Id.* at 2500; *see* Brief for Amicus Curiae Muscogee (Creek) Nation in Support of Petitioner, *supra* note 33, at 33 (recalling that the Department of Indian Affairs had "governing authority" on the reservation).

204. *See McGirt*, 140 S. Ct. at 2500 (Roberts, C.J., dissenting) ("Continuing from statehood to the present, the population of the lands has remained approximately 85%–90% non-Indian."); Brief of the City of Tulsa as Amicus Curiae in Support of Respondent at 28, *McGirt*, 140 S. Ct. 2452 (No. 18-9526) (emphasizing large percentage of Tulsa's non-Native population that would find themselves living on Creek lands if reservation not disestablished).

205. *See McGirt*, 140 S. Ct. at 2500 (Roberts, C.J., dissenting) ("Most immediately, the Court's decision draws into question thousands of convictions obtained by the State . . . ."); Brief for Respondent, *supra* note 12, at 43 ("Reversal also risks reopening thousands of state convicions . . . that the federal government may be unable to retry . . . .")

206. *See McGirt*, 140 S. Ct. at 2501 (Roberts, C.J., dissenting) (discussing difficulties federal government will have reprosecuting state convictions overturned as a result of *McGirt* decision); *see also generally* Brief of Amici Curiae Environmental Federation of Oklahoma, Inc., et al. in Support of Respondent, *supra* note 18, at 13.

207. *McGirt*, 140 S. Ct. at 2502 (Roberts, C.J., dissenting) (citing Montana v. United States, 450 U.S. 544, 565–66 (1981)).

208. *Id.*; *see* Brief for Respondent, *supra* note 12, at 44 ("On the civil side, effects will extend from taxation to family law.").

III. ANALYSIS

A. Justice Gorsuch Created a New Test for Reservation Disestablishment

At first glance, Justice Gorsuch side-stepped the three-step reservation disestablishment test laid out in *Nebraska v. Parker* and *Solem v. Bartlett* to apply his own piecemeal textualist approach focused solely on previous congressional acts, treaties, and statutes.[209] The specific evidence in *McGirt* required such an approach, given the lack of statutory evidence in *Parker* and *Solem*.[210] Thus, the nature of *McGirt* and the Creeks' long-documented history with the state of Oklahoma and United States government requires the exact detailed approach that Justice Gorsuch implements when compared to *Solem* and *Parker*.[211]

Despite Justice Gorsuch's assertion that the statutes in *McGirt* served as the only necessary evidence, the majority's disapproval of Oklahoma's disestablishment analysis effectively fulfilled the two remaining steps in the *Nebraska v. Parker* framework, which the dissent contended was ignored.[212] In addition, Justice Gorsuch remarked, "leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history."[213] For example, history surrounding early treaties indicated that tribal nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive."[214] Thus, where strong and abundant statutory evidence contains no explicit reference to reservation divestment, abolishment, or disestablishment, steps two and three from *Parker* and *Solem* become obsolete.[215]

Rendering these additional steps obsolete mirrors *Chevron*

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209. *See* TeSelle, *supra* note 105 (discussing Justice Gorsuch's textualist approach); *see also McGirt,* 140 S. Ct. at 2482 (Roberts, C.J., dissenting) ("The Court reaches [its] conclusion only by disregarding the 'well settled' approach required by our precendents." (citing Nebraska v. Parker, 577 U.S. 481, 487 (2016))).

210. *See* Transcript of Oral Argument, *supra* note 196, at 8–9 (noting that statutory evidence, regardless of how much exists, must reveal Congress's intent to divest); *see also id.* at 8–10, (statement of Justice Thomas) (discussing *Solem* and *Parker*).

211. *McGirt,* 140 S. Ct. at 2468; *see* Transcript of Oral Argument, *supra* note 196, at 8–9 (contending that no matter the amount of statutory evidence, "plain text is required to abrogate sovereign rights").

212. *McGirt,* 140 S. Ct. at 2469–70, 2482; *see* Transcript of Oral Argument, *supra* note 196, at 23 ("[W]hen you look at the plain text . . . this case is even stronger than Your Honor's opinion in Parker . . . .").

213. *McGirt,* 140 S. Ct. at 2476 (citing Rice v. Olson, 324 U.S. 786, 789 (1945)); *see generally* Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831); Worcester v. Georgia, 31 U.S. 515, 561–62 (1832).

214. *McGirt,* 140 S. Ct. at 2476–77 (citing *Worcester*, 31 U.S. at 557); *see also* McClanahan v. Ariz. Tax Comm'n, 411 U.S. 164, 168–69 (1973) (holding that tribes are distinct political communities separate from United States).

215. *McGirt*, 140 S. Ct. at 2468.

deference.[216] It seems that the majority, where it found no ambiguity or evidence of disestablishment in the early treaties with Native Americans or in subsequent acts of Congress, would hold that disestablishment did not occur.[217] In line with *Chevron*, and finding no ambiguity, the Court then skipped any analysis of subsequent acts and reasonable interpretation of those treaties.[218] Oklahoma found the treaties ambiguous and took the three-step approach,[219] but the Court declined to follow.[220] Where statutory and treaty evidence is abundant and clear, as it was in the Creek's case, tribes may hold the advantage in disestablishment debates.[221] This may hold true for large tribes, like the Creek, who have an extensive history of treaties and agreements with the United States.[222] Smaller tribes and those unknown to federal statute, whose lands were taken with little to no government oversight, have no treaties or other documents that evidence a stake to their tribal lands, which may serve as a detriment.[223] In those cases, the Court would have to look to the surrounding circumstances and partake in the three-step *Solem-Parker* analysis, which American history clearly shows is not in favor of upholding tribal land rights.[224] If the Creek had been one of these tribes, and the abundance of treaty evidence at issue did not exist, the Court would have to adopt the dissent's methodology, which would have significantly curtailed Creek sovereignty.[225] Luckily for the Creek, this was not the case.

Aside from the effect on smaller, statutorily undefined tribes, the majority opinion still set a new precedent that may benefit tribes in future

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216. Chevron, Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (holding that where no statutory ambiguity exists, court will adopt Congress's intent).

217. *McGirt*, 140 S. Ct. at 2462–63 ("History shows that Congress knows how to withdraw a reservation when it can muster the will. . . . Congress might speak of a reservation as being 'discontinued,' 'abolished,' or 'vacated.'" (citing Mattz v. Arnett, 412 U.S. 481, 504 n.22 (1973))); *see also* Brief for Petitioner, *supra* note 2, at 17 ("As in Parker, statutory text decides this case.").

218. *McGirt*, 140 S. Ct. at 2468–69; *see* Brief for Petitioner, *supra* note 2, at 21 ("Here, as in *Parker*, the simple, dispositive, and undisputed fact is that none of the relevant statutes . . . contain clear language of disestablishment.").

219. *See* Brief for Respondent, *supra* note 12, at 40–42 (relying heavily in Respondent's brief on subsequent historical activities).

220. *McGirt*, 140 S. Ct. at 2465 ("Oklahoma seeks to prove disestablishment by pointing to other ways Congress intruded on the Creek's promised right to self-government . . . .").

221. *See* Transcript of Oral Argument, *supra* note 196, at 8–10 (statement by Justice Thomas) (discussing abundant statutory evidence regarding Creek lands).

222. *Id.*

223. *See* Hansi Lo Wang, *Broken Promises on Display at Native American Treaties Exhibit*, NPR (Jan. 18, 2015, 4:57 PM), https://www.npr.org/sections/codeswitch/2015/01/18/368559990/broken-promises-on-display-at-native-american-treaties-exhibit [https://perma.cc/UJF5-5DEZ] (discussing tribes without treaty protections).

224. *See generally* NoiseCat, *supra* note 1; HARJO, *supra* note 1, at xi.

225. *McGirt*, 140 S. Ct. at 2486 (Roberts, C.J., dissenting) (citing Nebraska v. Parker, 577 U.S. 481, 487 (2016)).

cases where reservation disestablishment is at issue.[226] Given the Court's intense focus on statutes and the early treaty language between tribes and the United States that guaranteed sovereign control over tribal land, *McGirt* created a new test upholding previously defined reservation boundaries.[227]

B. The Majority's Selective Interpretation Protects Sovereign Tribal Nations

With nearly every one of the 370 treaties made between the United States and Native Americans now broken,[228] the majority rightfully upheld the 1866 treaty with the Creeks by valuing the words within the treaty more than the events that followed its passage.[229] The new test Justice Gorsuch implemented, requiring explicit congressional intent to divest in an act, text, or statute before the law can declare that status, gives tribal nations and their land the protection they deserve.[230] It is easy to infer from the events and demographics surrounding the history between the United States and tribal nations that at one point in time, Congress obviously evidenced a clear intent to divest all reservations.[231] One can simply point to the Termination era, a broken treaty, shady allotment tactics, or even how white settlers forceably took over federally defined reservation lands.[232] Instead, the majority correctly focused on the original treaties and statutes as the strongest evidence of whether a reservation was divested of its status.[233]

For example, a few justices during oral arguments wrestled with the treaty language that guaranteed Creek sovereignty in light of Oklahoma's

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226. *See* NoiseCat, *supra* note 1 ("For now, what's really changed is that, for the first time in decades, tribes might just get a fair day in court.").

227. *See* Troy A. Eid, McGirt v. Oklahoma*: Understanding What the Supreme Court's Native American Treaty Rights Decision Is and Is Not*, NAT'L L. REV. (Aug. 12, 2020), https://www.natlawreview.com/article/mcgirt-v-oklahoma-understanding-what-supreme-court-s-native-american-treaty-rights [https://perma.cc/L695-Y38L] ("Yet the textualist approach of the McGirt majority . . . invites scrutiny . . . .").

228. *See generally* NoiseCat, *supra* note 1; HARJO, *supra* note 1.

229. *McGirt,* 140 S. Ct. at 2462 (citing Lone Wolf v. Hitchcock, 187 U.S. 553, 566–68 (1903)); *Parker*, 577 U.S. at 487–88 (finding statutes most probative evidence).

230. *McGirt*, 140 S. Ct. at 2463; *see* TeSelle, *supra* note 105 ("To Justice Gorsuch, the rule of law and the word of the law are paramount to all other interests.").

231. *See* Transcript of Oral Argument, *supra* note 196, at 61–62 (considering demographic evidence); *Parker*, 577 U.S. at 490–93 (discussing historical circumstances following passage of 1882 Act and consequences for Omaha Indian Reservation).

232. *McGirt*, 140 S. Ct. at 2462 ("History shows that Congress knows how to withdraw a reservation when it can muster the will."); Mattz v. Arnett, 412 U.S. 481, 497 (1973) ("[A]llotment . . . is completely consistent with continued reservation status.").

233. *McGirt*, 140 S. Ct. at 2462 (citing U.S. CONST. art. I, § 8; art. VI, cl. 2); *see* NoiseCat, *supra* note 1 ("[F]or the first time in decades, tribes might just get a fair day in court.").

"dependent Indian community" argument.[234] Justice Kagan further rebutted that argument through a reference to Felix Cohen's treatise which stated, "All Indian reservations are also dependent Indian communities, unless they are uninhabited."[235]

The majority's reference to Cohen fulfilled steps two and three of the *Solem-Parker* framework, even if those steps were unnecessary, as Justice Gorsuch contended. Cohen's treatise has been described as the bible of federal Native American law and delves through the history of reservation status.[236] In oral arguments, Justice Breyer, referencing Cohen, noted that states often tried major crimes that involved Native Americans on reservations, to refute Oklahoma's stance that their historical jurisdiction over the Creek evidenced disestablishment.[237] Furthermore, Justice Gorsuch cited the retention of sovereign functions, including "the power to collect taxes, operate schools, and legislate through tribal ordinances," within the treaties to rebut Oklahoma's allotment-based argument.[238]

Hence, both the dissent and majority could cherry-pick past historical events or activities that favored either disestablishment or a continued reservation. The tumultuous history between sovereign tribal nations and the United States reveals the necessity of using statutory language as the most probative evidence of reservation disestablishment. Through this approach that overtly focuses on statutory language, courts can no longer rely on discriminatory historical evidence that continues to disadvantage tribal nations today. Instead, courts must hold themselves accountable to the original, long disregarded, treaties with tribal nations, which will help fulfill the original promises between the United States and Native Americans.[239]

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234. *See* Transcript of Oral Argument, *supra* note 196, at 56–57 (discussing Oklahoma's "dependant Indian community" argument).

235. Transcript of Oral Argument, *supra* note 196, at 59 (citing FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 38 (1982); *see also* Paul W. Shagen, *Indian Country: The Dependent Indian Community Concept and Tribal/Tribal Member Immunity from State Taxation*, 27 N.M. L. REV. 421, 431 (1997) (highlighting dependent Indian communities) (citing FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 38 (1982)).

236. Russel Lawrence Barsh, *Felix S. Cohen's Handbook of Federal Indian Law, 1982 ed.*, 57 WASH. L. REV. 799, 799 (1982) ("Cohen's work . . . quickly assumed the role of an undisputed authority in litigation."); *see* Shagen *supra* note 235, at 444 ("The modern definition of a 'reservation' refers to 'land set aside under federal protection for the residence of tribal Indians, regardless of origin.'" (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 34 (1982))).

237. Transcript of Oral Argument, *supra* note 196, at 34–35; *see* Brief for Petitioner, *supra* note 2, at 41–42 (citing FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 4.07(1)(c) (Nell Jessup Newton ed., 2012)).

238. *McGirt*, 140 S. Ct. at 2466.

239. *See* NoiseCat, *supra* note 1 (discussing treaties United States broke); *see also* Terry L. Anderson & Adam Crepelle, *Broken Treaties with Native Americans Not Fixed by Supreme Court Ruling*, THE HILL (July 16, 2020, 4:30 PM), https://thehill.com/opinion/civil-rights/507688-

C. Deference to Magic Words

The new test outlined above, which gives great deference to tribes that have treaties to back their land claims, turned on the existence of a few specific words.[240] Those words include "abolished," "vacated," "cession," "restored to public domain," and "discontinued."[241] From Justice Gorsuch's view, if these words are present, then Congress intended to disestablish the reservation; if they do not exist, neither does the requisite congressional intent.[242] For such words to exist, however, they must be written down somewhere. Tribes lucky enough to have evidence of their history written down will benefit from this, but those whose histories are largely oral or had their lands taken without a paper record of such events will not have the requisite words.[243] As a result, the majority's textualist approach benefits tribes that have text and disadvantages tribes that do not.[244]

Consequently, similar cases challenging divestment may not go as smoothly, from a tribal standpoint, as *McGirt* went for the Creek. Here, there were four lengthy treaties the Creek could rely upon for the magic words.[245] The Creek, part of the Five Civlized Tribes, is one of the most salient, established, and well-known tribes in America.[246] Despite the injustices the tribe has faced, they have more resources, from a quantitative standpoint, to draw from due to their rich treaty history that can help in

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broken-treaties-with-native-americans-not-fixed-by-supreme-court-ruling [https://perma.cc/N5BK-QGUF] (hypothesizing monumental nature of *McGirt* decision).

240. *McGirt*, 140 S. Ct. at 2463 (citing Parker v. Nebraska, 577 U.S. 481, 487 (2016)).

241. *Id.* at 2462–63 (noting statutory terms that evidence disestablishment); Mattz v. Arnett, 412 U.S. 481, 504 (1973) (finding terms "discontinued," "abolished," or "vacated" have resulted in disestablishment).

242. *McGirt*, 140 S. Ct. at 2464 ("[B]ecause there exists no . . . law terminating what remained, the Creek Reservation survived allotment.").

243. *Cf.* Larisa K. Miller, *The Secret Treaties with California's Indians*, PROLOGUE, Fall/Winter 2013, at 38, 39–42 (discussing how unratified treaties led to unresolved land-use issues that allowed land prospectors and settlers to take advantage of northern California tribes). For Creek treaty history, see generally Grace M. Schwartzman & Susan K. Barnard, *A Trail of Broken Promises: Georgians and Muscogee Creek Treaties*, 1796–1826, 75 GA. HIST. Q. 697, 710–18 (1991).

244. Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* 42 (Harvard Univ. John F. Kennedy Sch. of Gov't , Faculty Research Working Paper Series, Paper No. 04-016, 2004), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID529084_code349533.pdf?abstractid=529084&mirid=1&type=2 [https://perma.cc/BV6P-W6T6] ("[T]ribes' sovereignty is founded de jure on an admirable pattern of basing relationships between the U.S. and the tribes on treaties . . . .").

245. *See* Brief for Petitioner, *supra* note 2, at 5 ("Federal treaties in 1832, 1833, and 1856 guaranteed the Nation's rights within its borders."); *see also McGirt*, 140 S. Ct. at 2460–62 (discussing various Creek treaties).

246. *Five Civilized Tribes*, BRITANNICA (Jan. 4, 2019), https://www.britannica.com/topic/Five-Civilized-Tribes [https://perma.cc/PMY6-DZLX] (noting tribes had developed extensive economic ties with whites, written language, and strong central government by early 1800s).

this complex litigation.[247] Moving farther west, where the United States government took lands, mostly due to mineral interests, the treaty paper trail may grow stale.[248]

The Court's reliance on previous disestablishment cases serves as an ironic demonstration of this issue.[249] In *Nebraska v. Parker*, the Court relied on two treaties, one from 1854 and another from 1865, to analyze whether the Omaha Tribe's historical lands were divested.[250] In *Solem v. Bartlett*, the Court could not rely on treaties, but luckily had one text, the Cheyenne River Act of 1908, to analyze in its disestablishment determination.[251] Comparing these text-rich cases with *Rosebud Sioux Tribe v. Kneip*, where the Sioux tribe had less clear treaties, the Court relied on subsequent events, which included congressional acts that three-fourths of the Rosebud Sioux men did not consent to.[252] These acts did not contain the exact words Justice Gorsuch based his opinion on, yet in *Rosebud Sioux*, the Court still found disestablishment.[253]

In *Rosebud Sioux*, the Court based much of its decision on historical evidence that clearly disadvantages tribal nations.[254] The *McGirt* majority recognized the nature of this discriminatory evidence in the tribal texts at issue, revealing that the test formulated in *McGirt*, which narrowly focused on a few specific terms, becomes necessary.[255] Without this new test, the Court would still look to subsequent historical actions, even when treaties or other tribal texts exist, which would continue to foster the land-grabbing narrative, as seen in *Rosebud Sioux*.[256] In the wake of

247. Treaty with the Creeks, Mar. 24, 1832, 7 Stat. 417; Treaty with the Creeks, Feb 14, 1833, 7 Stat. 417; Treaty with the Creeks, Aug. 7, 1856, 11 Stat. 699; Treaty with the Creek, June 14, 1866, 14 Stat. 785; *see* THE MUSCOGEE (CREEK) NATION, https://www.mcn-nsn.gov [https://perma.cc/2C8L-EH9V] (last visited Dec. 4, 2021) ("MCN . . . is the fourth largest tribe in the U.S. with 86,100 citizens.").

248. *See generally* Wang, *supra* note 223.

249. *McGirt*, 140 S. Ct. at 2463 .

250. Nebraska v. Parker, 577 U.S. 481, 489 (2016) ("Our conclusion that Congress did not intend to diminish the reservation . . . is confirmed by the text of earlier treaties . . . .").

251. *See* Solem v. Bartlett, 465 U.S. 463, 472–76 (1984) (analyzing text of Cheyenne River Act).

252. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 587 (1977) ("Applying these principles . . . we conclude that the Acts . . . did clearly evidence congressional intent to diminish the boundaries of the Rosebud Sioux Reservation.").

253. *See id.* at 589–605 (discussing language of acts in question); *cf. McGirt*, 140 S. Ct. at 2470 ("Oklahoma state courts erroneously entertained prosecutions for major crimes by Indians on Indian allotments for *decades* . . . .").

254. *Rosebud Sioux Tribe*, 430 U.S. at 603–08 (giving great weight to state's jurisdiction over tribe to find cession).

255. *McGirt*, 140 S. Ct. at 2482 ("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.").

256. *Rosebud Sioux Tribe*, 430 U.S. at 614–15 (holding that congressional intent to diminish was clear when Court considered additional evidence, not just statutes).

McGirt, this issue is hopefully curbed for certain tribes who have at least some textual record of their relationship with the United States.

D. The Dissent's Focus on Past Historical Activities Disadvantages Tribal Nations

Chief Justice Roberts and the dissent would rather have inferred congressional intent from historical events involving the federal government, the State of Oklahoma, and the Creek instead of admitting that no explicit intent existed, which rejects the test in *Nebraska v. Parker*.[257] According to *Parker*, "historical evidence . . . cannot overcome the lack of clear textual signal that Congress intended to diminish the reservation,"[258] and subsequent demographic history is the weakest part of the disestablishment analysis.[259] For example, Chief Justice Roberts in dissent and Justice Kavanaugh in oral argument focused on the demographic history of the land, arguing that it would be unusual to have a reservation like the Creek's where non-Indians constituted a majority of the population.[260] In line with that perspective, they found that the implications of Oklahoma's longstanding criminal jurisdiction further evidenced clear disestablishment.[261] But this approach only substitutes "stories for statutes" and requires an inferential leap that *Parker* and *Solem* forbid when treaty and statutory text, as is true in *McGirt*, fails to evidence disestablishment.[262]

Lastly, alluding to *McGirt*'s hypothetical effects does not help the dissent any more than it helped Oklahoma answer the narrow question of disestablishment.[263] However, the dissent was right about one thing:

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257. *McGirt*, 140 S. Ct. at 2498 (Roberts, C.J., dissenting); Nebraska v. Parker, 577 U.S. 481, 488 (2016) (citing Hagen v. Utah, 510 U.S. 399, 411 (1994)).

258. *Parker*, 577 U.S. at 490; Brief for Petitioner, *supra* note 2, at 1.

259. *Parker*, 577 U.S. at 493 (citing South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 356 (1998)); *supra* note 2, at 32 ("The Court summarily rejected such arguments in Parker, and it should do so again.") (citation omitted).

260. *McGirt*, 140 S. Ct. at 2500 (Roberts, C.J., dissenting) (citing *Yankton Sioux Tribe*, 522 U.S. at 357; Solem v. Bartlett, 465 U.S. 463, 471–72 n.12 (1984)); *see also* Transcript of Oral Argument, *supra* note 196, at 65 (statement of Justice Kavanaugh) ("My understanding is that, as of 1890, this was a very unusual situation because it was already predominantly non-Indian in Indian territory . . . .").

261. *McGirt*, 140 S. Ct. at 2496 (Roberts, C.J., dissenting) ("Yet, at statehood, Oklahoma immediately began prosecuting serious crimes committed by Indians in the new state courts . . . ."); Major Crimes Act of 1885, ch. 341, § 9, 23 Stat. 362, 385.

262. *McGirt*, 140 S. Ct. at 2469–70 (detailing what constitutes interpretive evidence); *Parker*, 577 U.S. at 493 (noting that steps two and three have less probative value).

263. *McGirt*, 140 S. Ct. at 2480 (indicating that ruling for either party could have negative future consequences for Oklahoma); *see* Elizabeth Reese, *Welcome to the Maze: Race, Justice, and Jurisdiction in* McGirt v. Oklahoma, UNIV. CHI. L. REV. ONLINE (Aug. 13, 2020), https://lawreviewblog.uchicago.edu/2020/08/13/mcgirt-reese/ [https://perma.cc/PB66-UDUJ] ("[T]he state of Oklahoma vastly overstated the implications of the case . . . [b]ut the reality is that very little would change.").

McGirt's hypothesized effects on Oklahoma's criminal justice system pale in comparison to the new regulatory powers the decision imparted to the sovereign Muscogee Creek Nation.[264]

IV. IMPACT

The holding in *McGirt v. Oklahoma* impacts more than criminal jurisdiction on reservations. As the Court's ruling designates nineteen million acres of land as a reservation that was previously believed to be under state control, massive regulatory implications regarding natural resource sovereignty will ensue.[265] Specifically, *McGirt v. Oklahoma* now enables the Creek to control and regulate water resources, oil and gas reserves, farming practices, game infringement, and taxes on their land.[266] Ultimately, this newfound regulatory power, due to *McGirt*, enhances tribal sovereignty and overall economic outcomes for the Creek.

A. Water Resources

When Congress creates a reservation, it reserves the water resource rights to the Native American tribe on that reservation.[267] The reservation waters are exempt from appropriation under state law.[268] Furthermore, the federally reserved water rights for the reservation "are not dependent upon state law or state procedures . . . ."[269] Conflicts concerning the reserved waters can be tried in state court, but the court must apply federal law.[270] These rights include "all water sources—groundwater, streams,

264. *McGirt*, 140 S. Ct. at 2482 (Roberts, C.J., dissenting) ("The decision today creates significant uncertainty . . . ."); *see* Dinnell & Hicks, *supra* note 9 (hypothesizing *McGirt* will affect oil, gas, energy, environmental, and taxation regulation).

265. *McGirt*, 140 S. Ct. at 2501–02 (Roberts, C.J., dissenting); *see also* Brief of Amici Curiae Environmental Federation of Oklahoma, Inc., et al. in Support of Respondent, *supra* note 18, at 30–31 ("The consequences for the vast majority of the population residing within the former Creek . . . territory are far too significant . . . .").

266. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 333 (1998) (holding federal government has regulatory jurisdiction).

267. Winters v. United States, 207 U.S. 564, 576–77 (1908) (discussing water rights on Fort Belknap Reservation); *see also Federal Reserved Water Rights and State Law Claims*, U.S. DEP'T JUST. (May 12, 2015), https://www.justice.gov/enrd/federal-reserved-water-rights-and-state-law-claims [https://perma.cc/4YUV-25BF] ("[When] the United States sets aside an Indian reservation, it impliedly reserves sufficient water to fulfill the purposes of the reservation . . . .").

268. *Winters*, 207 U.S. at 577–78 ("[Montana's] argument upon the incidental repeal of the agreement by the admission of Montana into the Union and the power over the waters . . . make it unnecessary to answer the argument . . . ."); *see also* United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703 (1899) ("[A] State cannot . . . destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters . . . .").

269. Cappaert v. United States, 426 U.S. 128, 145 (1976); *Rio Grande Dam & Irrigation Co.*, 174 U.S. at 703.

270. Arizona v. San Carlos Apache Tribe of Ariz., 463 U.S. 545, 571 (1983); *see also* CHARLES V. STERN, CONG. RSCH. SERV., R44148, INDIAN WATER RIGHTS SETTLEMENTS 1 (2020),

lakes, and springs—that arise on, border, traverse, underlie, or are encompassed within Indian Reservations."[271]

Thus, *McGirt* gives the Creek the power to regulate the necessary waters to fulfill reservation purposes and prohibit Oklahoma's appropriation of their waters. For example, the 2016 Water Settlement between Oklahoma, the Chickasaw, and Choctaw Nations mandated that Oklahoma consult with tribes who have "preferential rights to water and water management protections" on their land.[272] Given the water rights *McGirt* recognizes for the Creek, a similar agreement could be entered into, ensuring that Oklahoma respects Creek reservation waters.[273] The city of Tulsa's main water sources include Lakes Spavinaw and Eucha, which the city contends "are owned and operated by the City."[274] After *McGirt*, however, these water resources flow into the Arkansas River that cuts clear across the Creek reservation, which may require Tulsa to gain Creek approval for further water appropriation in those respective areas.[275] In addition, Oklahoma City relies on the Canton and Hefner Reservoirs to provide drinking water to more than 1.4 million people.[276] These reservoirs

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https://crsreports.congress.gov/product/pdf/R/R44148 [https://perma.cc/L6CJ-U5MM] (answering why federal government is involved in Indian water rights settlements).

271. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW §19.03(2)(a) (Nell Jessup Newton ed., 2012); *see also* Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262, 1271 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 468 (2017) ("We hold that the *Winters* doctrine encompasses both surface water and groundwater appurtenant to reserved land.").

272. William Crum, *OKC Civic Life for Monday, July 13, 2020*, THE OKLAHOMAN (July 13, 2020, 1:15 AM) https://oklahoman.com/article/5666644/okc-civic-life-for-monday-july-13-2020 [https://perma.cc/924C-7DVV]; *see also* Water Infrastructure Improvements for the Nation Act, Pub. L No. 114-322, § 1120(b), 130 Stat. 1628, 1643 (2016).

273. *See* SHANNON L. FERRELL ET AL., THE OKLAHOMA WATER LAW HANDBOOK 7 (2012) (discussing the type of water appropriation permits one may obtain from the Oklahoma Water Resources Board); *see also* Joe Wertz & Logan Layden, *Inside the Landmark State and Tribal Agreement That Ends Standoff Over Water in Southeast Oklahoma*, STATE IMPACT (Aug. 12, 2016, 12:11 PM), https://stateimpact.npr.org/oklahoma/2016/08/12/inside-the-landmark-state-and-tribal-agreement-that-ends-standoff-over-water-in-southeast-oklahoma/ [https://perma.cc/D7F7-HGFU] (noting that the Chickasaw and Choctaw were able to assert sovereignty over water resources in their 2016 water pact with Oklahoma).

274. *Water and Sewer*, CITY OF TULSA, https://www.cityoftulsa.org/government/departments/water-and-sewer/ [https://perma.cc/C9TX-BWMY] (last visited Jan. 16, 2022); *Water Quality Evaluation of the Eucha/Spavinaw Lake System*, OKLA. WATER RES. BD. (Feb. 2002), https://www.owrb.ok.gov/studies/reports/eucha-spav/eucha-spav.php [https://perma.cc/G9YC-HN2Q].

275. Indian Territory, with Part of the Adjoining State of Kansas, 1866 (map image), *in Indian Territory*, LIBR. OF CONG., https://www.loc.gov/item/2011590003/ [https://perma.cc/32AV-5G5D] (last visited Jan. 16, 2022) (showing rivers within Creek Country).

276. OKLA. CITY WATER UTILS. TR., OKLA. CITY UTILITIES DEP'T, 2019 DRINKING WATER QUALITY REPORT 2 (2019), https://www.okc.gov/Home/ShowDocument?id=17471 [https://perma.cc/LY5F-H796] ("More than 1.4 million Oklahomans in 18 different communities receive drinking water through our . . . water programs."); *see Reservoir Storage: Oklahoma*

are on the Canadian River that eventually flows through the Creek reservation.[277]

Moreover, the Atoka pipeline, southwest of Oklahoma City, carries water over one hundred miles to Oklahoma City residents.[278] Currently, Oklahoma is planning a large extension of the pipeline that will draw from water that flows through the Creek reservation.[279] The current pipeline proposal does not include the Creek as a "consulted" entity, despite the fact that the pipe would draw water from and affect watersheds on Creek lands.[280] Lastly, under 42 U.S.C. § 7601(d), the tribe could apply for treatment-as-a-state (TAS) status, which would apply federal environmental regulations such as the Clean Water, Clean Air, and Safe Drinking Water Act to activities on the reservation.[281] TAS status enables tribal entities to impose stricter environmental standards and could regulate activities, like oil drilling, that draw from or contaminate reservation water resources.[282] Ultimately, the decision in *McGirt* may force the State of Oklahoma to enter into consultations or water settlement agreements with the Creek to ensure that it can continue providing drinking water to more

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Surface Water Resources, OKLA. WATER RES. BD., https://www.owrb.ok.gov/supply/drought/reservoirstorage.php [https://perma.cc/H3TL-KURH] (last visited Jan. 16, 2022) (providing an interactive map of Oklahoma reservoir levels and storage).

277. OKLA. CITY WATER UTILS. TR., *supra* note 276, at 2; C.C. Royce, Cherokee Nation of Indians West of the Mississippi, 1884 (map image), *in Oklahoma Maps*, OKLA. STATE UNIV. LIBR. DIGIT. COLLECTIONS, https://dc.library.okstate.edu/digital/collection/OKMaps/id/4447/ [https://perma.cc/R352-CRHH] (last visited Jan. 16, 2022).

278. OKLA. CITY WATER UTILS. TR., SOUTHEAST OKLAHOMA RAW WATER SUPPLY SYSTEM: FINAL REPORT CONCEPTUAL PLAN 5–6 (2014), https://agenda.okc.gov/sirepub/cache/2/b1v50445i4mdfi45sk2wjh55/368311012182021125643272.PDF [https://perma.cc/S3BT-G2YX] (detailing maps of layout of Atoka pipeline); William Crum, *City's Water Pipeline from Southeast Oklahoma Could Cross Beneath South Canada River*, THE OKLAHOMAN (June 5, 2017, 10:52 AM), https://oklahoman.com/article/5551583/citys-water-pipeline-from-southeast-oklahoma-could-cross-beneath-south-canadian-river [https://perma.cc/9XQ9-RWYG].

279. *See* U.S. FISH & WILDLIFE SERV., DRAFT ENVIRONMENTAL ASSESSMENT FOR THE PROPOSED SECOND ATOKA PIPELINE PROJECT HABITAT CONSERVATION PLAN § 3.3 (2020), https://www.fws.gov/southwest/es/33klahoma/Documents/ABB/Atoka_Pipeline_EA_2020_0820_508.pdf [https://perma.cc/V2HF-JHML] [hereinafter DRAFT ENVIRONMENTAL ASSESSMENT] ("The Plan Area lies within four watersheds: Muddy Boggy, Clear Boggy, Lower Canadian-Walnut, and Little.").

280. *See* Crum, *supra* note 272 (noting Chickasaw and Choctaw nations have rights to consultations about water management, but not Creek Nation); *see* DRAFT ENVIRONMENTAL ASSESSMENT, *supra* note 279, at § 1.4, Public Involvement 3–4 (listing entities consulted on pipeline, which do not include Muscogee Creek Tribe).

281. 42 U.S.C. § 7601(d); *see* City of Albuquerque v. Browner, 97 F.3d 415, 423 (10th Cir. 1996) (holding that tribal nations who receive treatment-as-a-state status can implement stringent environmental standards to business entities operating on reservation lands).

282. *Browner*, 97 F.3d at 423; *see also* Dinnell & Hicks, *supra* note 9 ("[The Safe Drinking and Water Act] specifically authorizes the EPA to grant a tribe primary enforcement responsibility over the water in its tribal territory." (citing 42 U.S.C. § 300h-1(e))).

than 1.8 million people[283] without infringing on the Creek's newly reserved water rights.[284]

B. Oil and Gas

Oklahoma has a dark history when it comes to oil on reservation lands.[285] Men and women would marry Five Nations tribal members only to secretly poison them and inherit their deceased spouses' land and the oil it contained.[286] A guardianship system was even created for white settlers to serve as custodians over tribal members' oil fortunes.[287] Some of these guardians played a role in the murders of their own wards.[288] The height of these oil-driven murders was known as the "Reign of Terror" and included the murder of more than fifty Osage Indians (many of which went unsolved)[289] just north of the Creek reservation during the 1920s.[290] The Federal Bureau of Investigation was initially called in to solve these heinous crimes.[291] The federal jurisdiction that extended over those

283. Brief for Respondent, *supra* note 12, at 3; *see Oklahoma Counties by Population*, OKLAHOMA DEMOGRAPHICS (last accessed Jan. 28, 2022), https://www.census.gov/quickfacts/fact/table/tulsacountyoklahoma/BZA210218 (indicating each county's population within the affirmed Creek reservation, which includes Creek, Okfuskee, Okmulgee, Muscogee, Tulsa, McIntosh, Rogers and Wagoner Counties).

284. *See* Winters v. United States, 207 U.S. 564, 576–77 (1908) (holding federal government reserved waters for tribal use and exempted water rights from appropriation under state law); *see* Cappaert v. United States, 426 U.S. 128, 143 (1976) (extending *Winters* doctrine to any groundwater found on federally reserved land).

285. *See* ROBERT GREGORY, OIL IN OKLAHOMA 55 (1976) ("There was a quicker way to get the [oil] money. That was simply to kill the Indians."); *see* DAVID GRANN, KILLERS OF THE FLOWER MOON: THE OSAGE MURDERS AND THE BIRTH OF THE FBI 269 (2017) ("There were a lot more murders during the Reign of Terror than people know about. A *lot* more.").

286. Steve Inskeep*, In the 1920s, A Community Conspired to Kill Native Americans for Their Oil Money*, NPR (Apr. 17, 2014, 4:44 AM), https://www.npr.org/2017/04/17/523964584/in-the-1920s-a-community-conspired-to-kill-native-americans-for-their-oil-money [https://perma.cc/QB4L-BLN3] ("[P]eople would marry into the families and then begin to kill each member of the family . . . .").

287. *See* Vollmann & Blackwell, *supra* note 37, at 10–11 (describing mechanics and effects of guardianship system); *cf.* DEBO, *supra* note 3, at 95 ("No better plan could have been devised to strip the Indians of their most valuable possessions.").

288. *See* GRANN, *supra* note 285, at 280–81 (explaining that number of wards who died in care of their guardian clearly exceeded natural death rate).

289. *See* GREGORY, *supra* note 285, at 57 ("[M]ore than 50 counts of murder . . . nearly 20 other murders that were never solved because most of them were never investigated."); *see* GRANN, *supra* note 285, at 282 ("Though the bureau estimated that there were twenty-four Osage murders, the real number was undoubtedly higher.").

290. *See* GREGORY, *supra* note 285, at 55 ("[F]or a while, Fairfax [Oklahoma] had an epidemic of murder."); *see also* Map of the Indian and Oklahoma Territories, 1892 (map image), *in Map of the Indian and Oklahoma Territories*, LIBR. OF CONG., https://www.loc.gov/resource/g4021e.ct000224/ [https://perma.cc/G4TD-G85Z] (last visited Jan. 16, 2022) (showing location of Creek reservation during "Reign of Terror").

291. Inskeep, *supra* note 286; *cf.* GRANN, *supra* note 285, at 113–21 (describing formation of team that investigated Osage murders).

crimes now reaches oil and gas regulation on the Creek reservation in light of *McGirt*.[292]

Oklahoma is the fourth largest oil-producing state in America.[293] Prior to *McGirt v. Oklahoma*, the Oklahoma Corporate Commission (OCC) had exclusive jurisdiction, power, and authority over all oil and gas development on the Creek reservation lands.[294] Now, because federal jurisdiction applies over mineral leases on Creek lands, tribal members may invalidate the leases that the state, rather than the Secretary of the Interior, had previously approved.[295] Three major oil fields, two oil refineries, and two gas-processing plants lie within the Creek reservation boundaries.[296] These include the Cushing oil field, which serves as a crucial oil terminal for the Keystone XL pipeline that now travels through the Creek borders.[297] Future pipeline extensions to and from the Cushing oil field could result in similar litigation if the Creek deems those extensions a hazard to tribal welfare.[298]

Furthermore, *McGirt v. Oklahoma*, in conjunction with the Energy Policy Act of 2005, now enables the Creek to assert regulatory control over the oil and gas development that stems from these lucrative oil fields.[299] The Act grants that "an Indian tribe may, at the discretion of the Indian tribe, enter into a lease or business agreement for the purpose of energy resource development on tribal land" which "shall not require

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292. *See* Dinnell & Hicks, *supra* note 9 (explaining Supreme Court's reasoning that federal jurisdiction never ceased on Creek Nation land); *see also* Grandoni, *supra* note 9 (noting that *McGirt* decision was rooted in nineteenth century criminal law, yet implicates future taxation and environmental issues).

293. *See* Grandoni, *supra* note 9 ("[O]il and gas drillers in the nation's fourth largest oil-producing state suddenly find themselves operating within the Muscogee (Creek) Nation . . . .").

294. Dinnell & Hicks, *supra* note 9; *see* Act of Aug. 4, 1947, ch. 458, § 11, 61 Stat. 731, 734 (1947) ("All restricted lands . . . are hereby made subject to all oil and gas conservation laws of Oklahoma: *Provided*, That no order of the Corporation Commission affecting restricted Indian land shall be valid . . . until . . . approved by the Secretary of the Interior . . . .").

295. 25 U.S.C. § 396; *see* Dinnell & Hicks, *supra* note 9 (describing Indian Mineral Leasing Act).

296. Oklahoma Oil and Gas Production Infrastructure (map image), *in* RICK CANTU, DRAFT ENVIRONMENTAL ASSESSMENT FOR BOWFISHING ON TISHOMINGO NATIONAL WILDLIFE REFUGE 35 (2020), https://www.fws.gov/uploadedFiles/TishomingoNWR-Draft-EA_Fishing_2020.pdf [https://perma.cc/7YTU-G4FL] (showing locations of Oklahoma energy infrastructure); *see* GEORGE O. CARNEY, CUSHING OIL FIELD: HISTORIC PRESERVATION SURVEY 1 (1981) ("The Cushing pool is located in the extreme western part of Creek County . . . .").

297. *See* Grandoni, *supra* note 9 (noting that pipeline crosses reservation boundaries).

298. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2502 (2020) (Roberts, C.J., dissenting) ("[T]ribes may regulate non-Indian conduct on reservation land, so long as the conduct . . . directly affects 'the political integrity, the economic security, or the health or welfare of the tribe.'" (citing Montana v. United States, 450 U.S. 544, 565–66 (1981))); *see generally* Dinnell & Hicks, *supra* note 9.

299. Energy Policy Act of 2005, Pub. L. No. 109-58, sec. 503(a), § 2604(b), 119 Stat. 594, 769–70 (codified at 25 U.S.C. § 3504).

review by or the approval of the Secretary [of the Interior]."[300] Therefore, the Creek may, at their discretion, end or enable mineral leases on their land while reaping the benefits of taxation and royalties.[301] Given case precedent, the tribal taxing authority would trump Oklahoma's.[302] In 2012, oil and gas development "generated over $701 million in royalty revenue paid to Indian mineral owners" on reservations.[303] *McGirt* now enables the Creek to regulate oil and gas development and reap the economic benefit historically associated with what previously was a detriment to the tribe.[304]

C. Farming

Due to *McGirt*, farming practices that were previously exempt from state sales taxes, may now be subject to Creek tribal taxes when such practices occur on the Creek reservation.[305] For example, taxes on livestock feed and farm machinery are usually exempt from state taxes, but tribes are free to tax these items if the farm is on reservation land.[306] Additionally, Native American farmers on trust lands can now exclude income "derived directly from the land" in addition to the "proceeds of sales of crops grown on the land" from their gross income.[307]

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300. Energy Policy Act of 2005, § 2604(a).

301. *See* 25 U.S.C. § 398(b) ("The proceeds. . . shall be deposited in the Treasury of the United States to the credit of the tribe of Indians . . . ."); *see also* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 157–58 (1982) (describing a Tribe's right to tax mineral extraction).

302. *Merrion*, 455 U.S. at 157–58; Standard Oil Co. v. Peck, 342 U.S. 382, 384–85 (1952).

303. BUREAU OF INDIAN AFFS., OIL AND GAS OUTLOOK IN INDIAN COUNTRY 1 (2013), https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/ieed/pdf/DEMD_OG_Oil_Gas_Outlook_508.pdf [https://perma.cc/MB45-HPVE]; *see generally Native American Tribes Received More Than $1 Billion in Federal Energy Royalties in 2014*, STANDING ROCK FACT CHECKER (Oct. 1, 2016), https://standingrockfactchecker.org/native-american-tribes-received-1-billion-federal-energy-royalties-2014/ [https://perma.cc/B5UP-H43R].

304. *See generally* BUREAU OF INDIAN AFFS., *supra* note 303; GREGORY, *supra* note 285; GRANN, *supra* note 285.

305. *See* Brief of Amici Curiae Environmental Federation of Oklahoma, Inc., et al. in Support of Respondent, *supra* note 18, at 13 (contemplating a possible dual tax on Oklahoma farmers (citing OKLA. STAT. ANN. tit. 68, § 1358)); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980) (holding that federal preemption applies to certain state taxes); *accord* Central Machinery Co. v. Ariz. State Tax Comm'n, 448 U.S. 160, 165 (1980) (holding that federal taxation preempted state taxation on reservation sales of farm machinery).

306. *See* Brief of Amici Curiae Environmental Federation of Oklahoma, Inc., et al. in Support of Respondent, *supra* note 18, at 13–14 (detailing taxation obligations on farmers); *see also* Ray Carter, *Officials Call on Congress to Address* McGirt *Challenges*, OKLA. COUNCIL OF PUB. AFFS. (Oct. 21, 2020), https://www.ocpathink.org/post/officials-call-on-congress-to-address-mcgirt-challenges [https://perma.cc/YH9F-Q9V5] ("Oklahoma's agriculture producers are concerned . . . .").

307. U.S. DEP'T OF AGRIC., FARM SERV. AGENCY & INTERTRIBAL AGRIC. COUNCIL, INCOME RECEIVED FROM USDA AGRICULTURE/CONSERVATION PROGRAM FOR INDIAN OPERATORS ON INDIAN TRUST LAND 2–3 (2005), https://www.fsa.usda.gov/Internet/FSA_File/tax_fact_sheet.pdf

Looking to statutes, the American Indian Agriculture Resource Management Act (AIARMA) requires that agricultural leases on reservations comply with any agricultural resource management plan developed by the tribe who has jurisdiction over the land.[308] Thus, the Creek can now establish preferences for how farmers on the Creek reservation dispose of waste, use water, apply fertilizer, or utilize pesticides or other chemicals on their crops.[309] Individuals who wish to use tribal trust land for grazing purposes must obtain permits to do so through the Bureau of Indian Affairs.[310] Farmers who were previously free to graze their livestock on the Creek reservation before *McGirt v. Oklahoma* may now have to obtain these permits, with a portion of the proceeds going to the Creek tribe.[311]

Native American economies increasingly rely on agriculture; in 2017 alone tribal production exceeded $1.4 billion in raw agriculture products.[312] With this increased reliance, grazing permits, revenues from trust land leases, and tax exemptions for Creek farmers, the Creek are now in a superior position to reap the agricultural benefits associated with a federally defined reservation.

D. Game

As Creek reservation boundaries are now federally solidified, the tribe may prohibit non-tribal members from hunting, fishing, trapping, or gathering on the reservation.[313] Before *McGirt v. Oklahoma*, the Oklahoma

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[https://perma.cc/5YES-FFT3] (citing Revenue Rulings 67-284, 69-289); *see* Carter, *supra* note 306 ("Farmers and ranchers are also concerned . . . .").

308. 25 U.S.C § 3715; 25 C.F.R. § 162.201 (2020); *see* Darla J. Mondou, *The American Indian Agricultural Resources Management Act: Does the* Winters *Water Bucket Have a Hole in It?*, 3 DRAKE J. AGRIC. L. 381, 387 (1998) ("[T]he AIARMA supports the presumption that Native American Indians must have water in order for their reservation land to provide benefits.").

309. 25 U.S.C. § 3712(a)–(c); *see* Carter, *supra* note 306 (explaining that non-Creek Nation farmers' water rights may be limited after *McGirt*); *see* Mondou, *supra* note 308, at 392 ("AIARMA allows concurrent jurisdiction in tribal and federal courts to assess fines . . . for trespassing . . . .").

310. 25 C.F.R. § 166.2 (2020); *see* Mondou, *supra* note 308, at 387–88 (examining reason for AIARMA's enactment).

311. 25 C.F.R. § 166.2 (2020); *see* Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 1, 85 (2008) ("[T]ribes can tax persons doing business in Indian country . . . .").

312. U.S. DEP'T OF AGRIC., 2017 CENSUS OF AGRICULTURE: AMERICAN INDIAN/ALASKA NATIVE PRODUCERS 2 (2019), https://www.nass.usda.gov/Publications/Highlights/2019/2017Census_AmericanIndianAlaskaNative_Producers.pdf [https://perma.cc/H6YU-597F].

313. *Fish, Wildlife and Recreation Authority and Responsibilities*, *in* BUREAU OF INDIAN AFFS., INDIAN AFFAIRS MANUAL, Pt. 56, Ch. 1, 1.2(A)(1) (2017); *see* Carter, *supra* note 306 (noting that after *McGirt* Creek Nation could restrict hunting and fishing rights on private property within a reservation); *see also* Laurie Reynolds, *Indian Hunting and Fishing Rights: The Role of Tribal Sovereignty and Preemption*, 62 N.C. L. REV. 743, 748 (1984) ("On-reservation hunting and fishing

Department of Wildlife Conservation (ODWC) managed and regulated hunting and fishing on the Creek reservation lands.[314] This includes Lakes Eufala, Okmulgee, Heyburn, parts of the Fort Gibson reservoir, Dripping Springs and Heyburn state parks, and other vast swathes of wetlands, rivers, and lakes, in addition to ODWC field offices and headquarters that are now within Creek reservation borders.[315]

In 2016, ODWC had over fifty million dollars in revenue, nineteen million and eighteen million of which came from annual license sales and federal sport fish restoration grants, respectively.[316] The federal assistance that once flowed to the ODWC for game activities on Creek lands will now funnel towards the tribe.[317] In addition, the tribe can regulate hunting and fishing licenses for nonmembers on tribal lands; this could serve as a strong source of income.[318] *McGirt* may even lead the Creek and Oklahoma to enter into similar compacts as those created with the Choctaw and Cherokee nations, which stipulate coordinated regulation of game management, benefitting both tribal and state entities.[319]

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rights generally are exclusive to the Indian tribal members for whom the reservation was created, even if the exclusivity was not expressly stipulated in the treaty creating the reservation.").

314. OKLA. DEP'T OF WILDLIFE CONSERVATION, OKLAHOMA HUNTING AND FISHING: 2020–2021 OFFICIAL REGULATIONS GUIDE 2 (2020–2021), https://www.wildlifedepartment.com/sites/default/files/2020_2021_Regulations.pdf [https://perma.cc/K4M5-AN85] (listing districts regulated by ODWC, including District Four containing Creek reservation); *see generally Oklahoma Management Area Map*, OKLA. DEP'T OF WILDLIFE CONSERVATION (2020), https://odwc.maps.arcgis.com/apps/webappviewer/index.html [https://perma.cc/WV9N-CXZW] (hereinafter ODWC Map).

315. ODWC Map, *supra* note 314; *see also Google Maps Recognizes Boundaries of Oklahoma Reservations Following* McGirt *Ruling*, NATIVE NEWS ONLINE (Sept. 23, 2020), https://nativenewsonline.net/currents/google-maps-recognizes-boundaries-of-oklahoma-reservations-following-mcgirt-ruling [https://perma.cc/S5ML-ZFUG] (showing bodies of water now within Creek reservation lands).

316. OKLA. DEP'T OF WILDLIFE CONSERVATION, 2016 ANNUAL REPORT 3 (2016), https://www.wildlifedepartment.com/sites/default/files/Annual%20Report%20FY%2016.pdf [https://perma.cc/Y5WZ-Q9Q5].

317. *See* Menominee Tribe of Indians v. United States, 391 U.S. 404, 410–12 (1968) (holding that federally recognized tribes enjoy more federally protected hunting and fishing freedoms); *cf.* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 343–44 (1983) (holding that Native American tribes have sole power to regulate nonmembers who hunt and fish there).

318. *See Fish, Wildlife and Recreation Authority and Responsibilities*, *supra* note 313, at 1.2(A)(2) ("Non-Tribal members must comply with Tribal rules, regulations, and ordinances governing on-reservation hunting, fishing, trapping, and gathering."); *see also* Reynolds, *supra* note 313, at 748 (explaining that tribes' power to govern local hunting and fishing flows from tribal sovereignty and power to "exclude nonmembers").

319. *See Fish and Wildlife*, CHEROKEE NATION, https://www.cherokee.org/our-government/secretary-of-natural-resources-office/fish-and-wildlife/ [https://perma.cc/U735-8NLE] (last updated June 10, 2021) ("In 2016 the Cherokee Nation became a frontrunner in establishing a tribal-state hunting and fishing compact."); *see also State of Oklahoma, Choctaw Nation Agree on Hunting, Fishing Compact*, OKLA. DEP'T OF WILDLIFE CONSERVATION (Aug. 31, 2016), https://www.wildlifedepartment.com/outdoor-news/state-oklahoma-choctaw-nation-agree-

E. Taxes

Once a land has been designated as a reservation, the tribal authority can implement multiple taxes and regulatory requirements on most businesses. For example, the National Historic Preservation Act requires that tribes must be consulted, and federal approval granted, for any business conducted in areas that could affect historic properties on tribal land.[320] Also, certain businesses will need to apply for and receive a vendor's sales license if they wish "to engage in the business of selling goods or items of value within the Creek territory."[321] Reservation status also enables the Creek to require a tribal sales tax in addition to other taxes on cigarettes, tobacco,[322] and alcohol, which the State of Oklahoma had previously governed since 1926.[323]

Moreover, Creek members living on the reservation could now be free of state property and income taxes, cigarette sales taxes, and vendor license fees.[324] Courts in Oklahoma already have taken *McGirt* into account.[325] One federal judge has cited *McGirt* in his opinion upholding the Chickasaw Tribe's bid for a casino despite an injunction by the Comanche Nation to prohibit the casino, based on the argument that the land

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hunting-fishing-compact [https://perma.cc/A5JY-3HA4] ("This is another example of the state of Oklahoma and tribal nations working together . . . the large sale of these hunting and fishing licenses will generate revenue for conservation efforts as well as ensure that more Oklahomans are following the standard rules and regulations associated with these licenses.").

320. National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915 (codified as 16 U.S.C. § 470); *see also* Brief of Amici Curiae Environmental Federation of Oklahoma, Inc., et al. in Support of Respondent, *supra* note 18, at 17 ("National Historic Preservation Act § 106 consultation with tribes is required for any federal approval potentially affecting historic properties on 'tribal land . . . .'").

321. *See* Brief of Amici Curiae Environmental Federation of Oklahoma, Inc., et al. in Support of Respondent, *supra* note 18, at 16 (citing 36 M(C)N Code, § 4-107(A)); *see* Plains Com. Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 332–33 (2008) (holding that tribal nations retain power to tax nonmembers who conduct business within boundaries of federally defined reservation*t* (citing Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905))).

322. *See* Brief of Amici Curiae Environmental Federation of Oklahoma, Inc., et al. in Support of Respondent, *supra* note 18, at 16 (citing 36 M(C)N Code §§ 4-103, 5-107, 5-112); *see generally* Hillary DeLong et al., *Common State Mechanisms Regulating Tribal Tobacco Taxation and Sales, the USA, 2015*, 25 TOBACCO CONTROL 32, 32 (2016).

323. *See* Brief of Amici Curiae Environmental Federation of Oklahoma, Inc., et al. in Support of Respondent, *supra* note 18, at 17 ("At least since 1926, Oklahoma has regulated liquor sales on fee lands within the former Creek territory, without challenge by the Creek Nation."); 18 U.S.C. § 1161 (denoting federal liquor laws' inapplicability in Indian country).

324. *See* Moe v. Confederated Salish & Kootenai Tribes of the Flathead Rsrv., 425 U.S. 463, 480–81 (1976) (holding that certain state taxes do not extend to tribal members); *see generally* Clay Masters, *Tribes Clash with Counties over Property Taxes*, NPR (Apr. 21, 2010, 12:40 PM), https://www.npr.org/templates/story/story.php?storyId=125172276 [https://perma.cc/L6SK-W7BC].

325. *See* Comanche Nation of Okla. v. Bernhardt, No. CIV-17-0887, 2020 WL 12787817, at *2 (W.D. Okla. July 7, 2020) ("McGirt has now been decided, and it does not support plaintiff's speculation.").

in question was not a reservation.[326] Overall, *McGirt*'s hypothetical effects are broad, but will serve as an economic benefit to the Creek as they can now assert new jurisdictional and regulatory powers over tribal members and nonmembers within reservation boundaries.

CONCLUSION

The majority's new approach to reservation disestablishment that focused on original treaty texts upholds the promises and land grants the federal government intended to confer upon the Creek. Overt focus on steps two and three of the *Solem-Parker* framework only serves to further disadvantage tribal nations because it infers congressional intent from a dark and discriminatory history.

The Indian Land Tenure Foundation surveyed numerous Native American tribes to determine what issues were most important to them.[327] More than seventy percent of respondents perceived tribal control and management of land as the most important factor in promoting tribal sovereignty and a better life for future tribal generations.[328] *McGirt v. Oklahoma* brings this need to fruition and gives land control and management back to the Creek through the simple recognition that a reservation and its people were too strong for statutes, demographics, and history to diminish.

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326. *Id.* at *1–2; *see generally* Adrian Cruz, *Citing* McGirt*, Judge Upholds Okla. Tribe's Gaming Permit*, LAW 360 (July 30, 2020, 11:14 PM), https://www.law360.com/articles/1296896/citing-mcgirt-judge-upholds-okla-tribe-s-gaming-permit [https://perma.cc/8XYL-QPTY].

327. INDIAN LAND TENURE FOUND., COMMUNITY SURVEY: IMPORTANCE OF LAND AND VALUE OF PROPERTY RIGHTS 3 (2003), https://iltf.org/wp-content/uploads/2016/11/community_survey_2003.pdf [https://perma.cc/C55k-MTN4].

328. *Id.* at 3.