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A Familiar Crossroads: McGirt v. Oklahoma and the Future of Federal Indian Law Canon

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A FAMILIAR CROSSROADS: *MCGIRT V. OKLAHOMA* AND THE FUTURE OF THE FEDERAL INDIAN LAW CANON

By Dylan R. Hedden-Nicely[*] and Stacy L. Leeds[**]

Federal Indian law forms part of the bedrock of American jurisprudence. Indeed, critical parts of the pre-civil war constitutional canon were defined in Federal Indian law cases that simultaneously provided legal justification for American westward expansion onto unceded Indian lands. As a result, Federal Indian law makes up an inextricable part of American rule of law. Despite its importance, Federal Indian law follows a long and circuitous road that requires "wander[ing] the maze of Indian statutes and case law tracing back [over] 100 years." That road has long oscillated between two poles, with the Supreme Court sometimes applying foundation principles that view tribes as sovereigns "retaining all their original natural rights," and at other times treating tribes as mere "wards subject to a [self-imposed] guardian."

The Supreme Court's respect for tribal sovereignty and self-

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determination reached its zenith in the so-called "modern era" of Federal Indian law, spanning from 1959 through the late 1970s. During this era, the Court tended to adhere to federal Indian jurisprudence and solidified a relatively coherent doctrine based upon the foundation principles developed in the 1830s. The late Dean David Getches described the modern era as a time that "encouraged a reinvigoration of tribal governments throughout the country. During this period, tribes gained political influence and economic security as [the federal government] generally promoted a policy of tribal self-determination."

The Court turned away from its foundation Indian law principles with the onset of the 1980s, and the departure intensified as Chief Justice William Rehnquist was appointed chief justice in 1986. Since then, the touchstone of the Supreme Court's federal Indian jurisprudence has been to employ a "subjectivist" approach whereby it "gauges tribal sovereignty as a function of changing conditions"—demographic, social, political, and economic—and the expectations of non-Indians that may be potentially impacted by the exercise of tribal power. These cases have invariably involved fear-based concerns that a decision in favor of the tribes will alter the settled balance of power between tribes, states, and non-Indians

As a result, the Supreme Court became a strikingly hostile place for American Indian tribes as the Court became increasingly willing to divest tribes of governmental powers, not by upholding the enactments of Congress, but through its own interpretation of what tribal inherent governmental rights ought to be.

The appointment of Justice Sonia Sotomayor and, more recently, Justice Neil Gorsuch seems to have brought change to the Court's direction in Indian law cases. Since then, cases have been consistently decided in favor of tribal litigants by reaffirming treaty rights through the application of foundation principles that focus on the plain language of treaties and the application of the Indian law canons of construction. However, to be sure, even the Rehnquist Court did "recite[] and sometimes act[] upon foundation principles," but those cases were limited to situations where "non-Indian interests [were] not seriously threatened." All of Indian Country waited for, or perhaps dreaded, a true litmus test.

That test came to the Supreme Court in the form of two Indian law cases—Sharp v. Murphy and McGirt v. Oklahoma—both of which were framed by non-Indian parties to affect the interests of an estimated 1.8 million people in the eastern half of Oklahoma. Ready or not, Indian Country found its test case, which squarely placed the Court's competing jurisprudential philosophies—its foundation principles and its "subjectivist" approach—on a collision course.

In a powerful and uncharacteristically passionate decision, Justice Gorsuch wrote for a 5-4 majority, upholding treaty-based rights to re-recognize the historic reservation boundaries of the Muscogee (Creek) Nation, the fourth largest Indigenous nation in the United States. The decision was the fourth consecutive treaty-rights victory and seemed to solidify a shift toward a consistent approach rooted in foundation principles.

The victory could be short-lived. Just weeks after the Court's decision in McGirt, Justice Ruth Bader Ginsburg passed away, once again shifting the make-up of the United States Supreme Court. As a result, Federal Indian law once again finds itself at a crossroads. The Murphy and McGirt decisions are landmark decisions that bring change to the legal landscape of much of Oklahoma. It remains to be seen whether the perceived new Supreme Court era in Indian law is here to stay.

I. INTRODUCTION

"Bad facts make bad law," and the Five Tribes[1] now situated in eastern Oklahoma—the Muscogee (Creek) Nation, Cherokee Nation, Seminole Nation, Choctaw Nation, and Chickasaw Nation—could not have asked for a worse set of facts as they set out to protect their political sovereignty and the territorial integrity of their homelands. In 1999, Patrick Dwayne Murphy, a citizen of the Muscogee (Creek) Nation, brutally murdered another Muscogee (Creek) Nation citizen.[2] Just a few years before, Jimcy McGirt, a citizen of the Seminole Nation, committed an unspeakable sex crime against a child.[3] Both crimes involved Indian defendants and took place inside Indian country, within the boundaries of the Muscogee (Creek) Nation—a permanent homeland the United States had "solemnly guaranteed" to the Creek Nation in 1832 in what was then known as Indian Territory, now present-day Oklahoma.[4] Both defendants were tried and convicted in Oklahoma state courts.[5] McGirt received a sentence that ensured life imprisonment;[6] Murphy was sentenced to death.[7]

1. Historic and legal documents refer to the "Five Civilized Tribes" when collectively referring to the Indigenous nations that were relocated to Indian Territory, now eastern Oklahoma. For purposes of this article, the authors will use the formal names of each Indigenous nation names and "Five Tribes" when making a collective reference.

2. Murphy v. Royal, 875 F.3d 896, 904–05 (10th Cir. 2017).

3. Order Affirming Denial of Application for Post-Conviction Relief at 1, McGirt v. Oklahoma (Okla. Crim. App. Feb. 25, 2019) (No. PC-2018-1057) [hereinafter *McGirt*, Order Denying Relief]. McGirt was convicted of First-Degree Rape by Instrumentation, Lewd Molestation, and Forcible Sodomy. *Id*.

4. Treaty with the Creeks art. 14, Mar. 24, 1832, 7 Stat. 366.

5. *Murphy*, 875 F.3d at 905; *McGirt*, Order Denying Relief, *supra* note 3, at 1.

6. Specifically, McGirt received two sentences of five hundred years imprisonment for the first two crimes and a sentence of life without the possibility of parole for the third. *McGirt*, Order Denying Relief, *supra* note 3, at 1. The sentences were set to be served consecutively. *Id.*

7. *Murphy*, 875 F.3d at 905.

Both appealed and later filed applications for post-conviction relief, arguing that the Oklahoma state courts lacked criminal jurisdiction over their cases.[8] The argument was a straight-forward application of the federal Major Crimes Act.[9] That Act provides for federal court jurisdiction, exclusive of the states,[10] to try Indian defendants for certain "major crimes" (including murder and rape) when such crimes occur within, among other areas, Indian Reservations.[11] According to Jimcy McGirt, the argument was simple:

> The facts in evidence show that (1) Petitioner is a federally recognized [tribal] member . . . ; (2) the alleged crimes were . . . within the federally recognized boundaries of the [Muscogee Creek] Nation of Oklahoma; (3) [the crime charged is] enumerated within the Indian Major Crimes Act, under exclusive federal jurisdiction; and (4) Oklahoma courts lack subject matter jurisdiction; therefore the state convictions are *void ab initio*.[12]

Oklahoma's position was equally simple: if Congress ever established any "reservations" in Indian territory, then Congress had subsequently disestablished those reservations, including the Muscogee (Creek) Nation where the crime occurred (and also the Cherokee, Seminole, Choctaw, and Chickasaw Nations) in a series of statutes culminating with Oklahoma statehood.[13] Indeed, Oklahoma had spent the past 113 years since statehood exercising general criminal jurisdiction over most of the lands within the state in stark contrast to other states with Indian reservations inside their borders. From this exercise of jurisdiction, Oklahoma reasoned, there are no modern-day Indian reservations within eastern Oklahoma and therefore the federal Major Crimes Act does not apply. As a result, the State argued that Oklahoma, not the federal government, had exclusive jurisdiction over Murphy's and McGirt's crimes.[14]

And just like that, the Five Tribes found themselves in a familiar yet perilous circumstance where a case of utmost importance to their past, present and future was presented to the United States Supreme Court, but no tribe initiated the litigation. Instead, the Five Tribes were drawn into these precarious cases and—to the extent their arguments rested on the continued existence of the Muscogee (Creek) Nation reservation, as well as the continued recognition of their territorial-based sovereignty—forced to join in a common cause with a convicted rapist and a convicted murderer.

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8. *Id. See also McGirt*, Order Denying Relief, *supra* note 3, at 1.

9. 18 U.S.C. § 1153 (2019).

10. Some argue that the Act grants jurisdiction to the federal government over Indian defendants that commit crimes inside Indian reservations regardless of whether the victim is an Indian or non-Indian. *See, e.g.*, United States v. John, 437 U.S. 634 (1978). The Act's enumerated crimes now include murder; manslaughter; kidnapping; maiming; incest; rape; an assault against an individual who has not attained the age of 16 years; felony child abuse or neglect; arson; burglary; and robbery. 18 U.S.C. § 1153

11. 18 U.S.C. §§ 1153, 1151.

12. Petition for Writ of Certiorari at 16, McGirt v. Oklahoma (U.S. April 17, 2019) (No. 18-9526), 2019 WL 7372927. *See also* Brief for Petitioner at 21, Carpenter v. Murphy (U.S. Sept. 19, 2018) (No. 17-1107), 2018 WL 4522427 [hereinafter *Murphy*, Brief for Petitioner].

13. *See generally Murphy*, Brief for Petitioner, *supra* note 12.

14. *See generally id.*

The stakes could not have been higher for Murphy and McGirt, whose very personal lives were at stake, or for the Five Tribes, each fighting for on-going recognition of their remaining homelands and accompanying right to territorial-based self-governance. Multiple treaties guaranteed distinct boundaries for each of the Five Tribes and the modern governing documents of all Five Tribes incorporate treaty boundaries as the territorial basis for their jurisdiction.[15] Nonetheless, federal court cases involving Indian tribes tend to take on a life of their own; a narrow set of facts specific to a single tribal government is often generalized to result in sweeping and detrimental precedent for all 574 federally recognized tribes. As a result, the Five Tribes, each possessing a distinct historic, political, cultural and legal standing, could share the same fate in a case that none initiated. Knowing this, the Five Tribes tread lightly for years, hesitant to go on the offense to litigate their boundaries for fear that a final blow to remaining treaty rights might be dealt by the United States Supreme Court which may permanently preclude future claims[16] and therefore obliterate rights that the tribes hold sacred.

These cases also have a deeper meaning for Indian Country nationwide—they serve as a bellwether for the Court's Federal Indian law jurisprudence writ large. From its inception, the "whole course of judicial decision on the nature of Indian tribal power is marked by adherence to three underlying fundamental principles."[17] Those foundation principles provide that:

> (1) [A]n Indian tribe possesses, in the first instance, all the inherent powers of any sovereign state; (2) a tribe's presence within the territorial boundaries of the United States subjects the tribe to federal legislative power and precludes the exercise of external powers of sovereignty of the tribe . . . but does not by itself affect the internal sovereignty of the tribe; and (3) inherent tribal powers are subject to qualification by treaties and by express legislation of Congress, but except as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.[18]

These foundation principles are not trivial. Instead, they are inextricably intertwined with the foundation of the American rule of law.[19] Indeed, the body of

15. The Muscogee (Creek) Nation's constitution defines its political jurisdiction as the same geographic area designated in 1900 pursuant to treaties with the United States. MUSKOGEE CONST. art. I, § 2. The Choctaw Nation's constitution defines the nation as a geographic area with direct citation to the Treaty of June 22, 1853 (11. Stat. 611). CHOCTAW NAT. CONST. art. I, § 2 (1983). The Cherokee Nation's constitution defines its territorial jurisdiction with direct citation to the fee patents of 1838 and 1846, as only diminished by the Treaty of July 19, 1866 and the sale of the Cherokee Outlet. CHEROKEE NAT. CONST. art. II. The Chickasaw Nation Constitution assigns the power of its judiciary to all cases arising under the laws of the Chickasaw Nation pursuant to treaties made with the United States. CHICKASAW NAT. CONST. amend. IV, § 2. The Seminole Nation's constitution defines territorial jurisdiction consistent with treaties. SEMINOLE NAT. OKLA. CONST. art. XV.

16. *See, e.g.*, Osage Nation v. Irby, 597 F.3d 1117 (10th Cir. 2010), *cert. denied*, 564 U.S. 1046 (holding that the Osage Nation's reservation had been disestablished).

17. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.02 (Nell Jessup Newton ed., 2012).

18. *Id*.

19. *See* Maggie Blackhawk, *Federal Indian Law as Paradigm within Public Law*, 132 HARV. L. REV. 1787, 1795, 1804 (2019).

laws necessary to justify American expansion into Indian lands was a matter of such importance to the nascent United States that it colored much of the Supreme Court's development of the pre-Civil War Constitutional canon.[20] The Supreme Court has largely remained faithful to these foundation principles for almost two-hundred years; from Chief Justice John Marshall through the retirement of Justice Thurgood Marshall.[21]

The rise of William Rehnquist as Chief Justice in 1986 resulted in an abrupt turn away from foundation principles.[22] That trend continued after Chief Justice John Roberts took the helm in 2005.[23] The touchstone of the Rehnquist and Roberts Courts' federal Indian jurisprudence has been to ignore foundation principles and instead employ a "subjectivist" approach whereby it "gauges tribal sovereignty as a function of changing conditions— demographic, social, political, and economic— and the expectations they create in the minds of affected non-Indians."[24] In 1996, the late Dean David Getches noted three "new rules of judicial subjectivism:" (1) retreat from the established canons of construction; (2) nineteenth-century allotment policy as the touchstone for Congressional intent; and (3) fabrication of a "balancing of interests" test that allows the justices to "reach outcomes consistent with their own notions of how much tribal autonomy there ought to be."[25]

The subjectivist approach has been the hallmark of the Federal Indian law jurisprudence of the Supreme Court for the past thirty-plus years. Dean Getches describes the Court's recent Indian jurisprudence as the "*new*" subjectivism of the Supreme Court in Indian law.[26] However, with the benefit of time, we can now see that the Court's more recent approach fits into a deeper pattern. Although "the whole course of judicial decision on the nature of Indian tribal power is marked by adherence" to foundation principles, the Court has nonetheless moved away from these ideals on a few occasions.[27] During those times, the Court has retreated from the principle that tribes are sovereigns "retaining all their original natural rights"[28] and instead viewed tribes as "wards subject to a guardian." [29] Despite being called "new," contemporary Supreme Court precedent fits nicely into this latter, albeit invariably temporary, mold, concluding that tribes lack any powers "inconsistent with their [dependent] status."[30]

Change has seemingly come with the appointment of Justice Sonia Sotomayor and, more recently, Justice Neil Gorsuch to the high bench. Since the appointment of Justice Gorsuch the Supreme Court has ruled in favor of tribal

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20. *See id*.

21. Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 PUB. LAND L. REV. PUB. 1, 7 (1995).

22. *See* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996); *see also* Johnson & Martinis, *supra* note 21, at 1.

23. *See infra* Part C.

24. Getches, *supra* note 22, at 1575.

25. *Id.* at 1620, 1622, 1626, 1628.

26. *See id.* at 1573.

27. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 17, at § 4.02.

28. Worcester v. Georgia, 35 U.S. 515, 555 (1832).

29. *Ex Parte* Crow Dog, 109 U.S. 556, 569 (1883).

30. Oliphant v. Suquamish Tribe, 435 U.S. 191, 208 (1978).

interests in all four cases that have come before it.[31] Just as important as the result, the Court—in *Washington State Dept. of Licensing v. Cougar Den* and *Herrera v. Wyoming*—has sent strong signals that it plans to return to foundation principles.[32] However, even the Rehnquist court occasionally would "recite[] and sometimes act[] upon foundation principles," where "non-Indian interests [were] not seriously threatened."[33] Although critically important to the parties of *Cougar Den* and *Herrera*, neither of those cases can be said to seriously threaten broad non-Indian interests. Accordingly, it is not clear whether the Court's recent decisions mark an aberration or a true return to foundation principles.

Murphy and *McGirt* placed these competing philosophies—the Court's foundation principles and its "subjectivist" approach—on a collision course. As recently as 2016 in *Nebraska v. Parker*, the Supreme Court—in an opinion authored by Justice Clarence Thomas— reaffirmed the foundational principle that a strong textual signal is necessary for the Court to find Congressional intention to disestablish an Indian reservation.[34] The Court also conspicuously undercut the value of subsequent events as a marker of Congressional intent.[35] However, unlike *Parker*, *Murphy* and *McGirt* are alleged to affect the interests of an estimated 1.8 million people in eastern Oklahoma[36] and the metropolitan Tulsa area. Application of the foundational disestablishment rubric would seem to predict a clear victory for tribes, while application of the Court's subjectivist approach would likely lead to a win for the State of Oklahoma. The outcome, in other words, would be determined by which philosophy the Court adopted.

The Court's long-awaited[37] decision on the final day of the 2019-2020 term marked an atmospheric shift in the field of Federal Indian law.[38] The decision seemed to solidify a shift back to foundation principles in cases dealing with tribal treaty rights, and a retreat from the Rehnquist Court's version of Indian law. However, less

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31. *See* Herrera v. Wyoming, 139 S.Ct. 1686 (2019); Washington v. United States, 138 S.Ct. 1832 (2018); Upper Skagit Tribe v. Lundgren, 138 S.Ct. 1649 (2018).

32. *Herrera*, 139 S.Ct. at 1686; Washington St. Dept. of Licensing v. Cougar Den, Inc., 139 S.Ct. 1000 (2018).

33. Getches, *supra* note 22, at 1576.

34. Nebraska v. Parker, 136 S.Ct. 1072, 1078–79 (2016).

35. *Id.* at 1082.

36. Petition for Writ of Certiorari, Royal v. Murphy (U.S. Feb. 6, 2018) (No. 17-1107), 2018 WL 776368, [hereinafter *Royal*, Petition for Certiorari].

37. On appeal from the Tenth Circuit, the *Murphy* case was argued before the United States Supreme Court on Nov. 27, 2018. Justice Gorsuch did not participate in the consideration or the decision of the case. The Court did not issue a decision and the case was bound over for the following term. The Tenth Circuit case was published on November 9, 2017. The resolution was tied to the *McGirt* decision with a full court on July 9, 2020.

38. *See* Jonodev Chaudhuri, *Reflection on* McGirt v. Oklahoma, HARV. L. REV. FORUM (Nov. 20, 2020) https://harvardlawreview.org/2020/11/reflection-on-mcgirt-v-oklahoma/ [https://perma.cc/L59A-P3LB]; Bregory Ablavsky, *McGirt: Gorsuch Affirms "Rule of Law," Not "Rule of the Strong" in Key Federal Indian Law Decision*, STAN. L. SCH. BLOGS (July 10, 2020) https://law.stanford.edu/2020/07/10/mcgirt-gorsuch-affirms-rule-of-law-not-rule-of-the-strong-in-key-federal-indian-law-decision/ [https://perma.cc/52L6-9J2B]; Dylan R. Hedden-Nicely and Monte Mills, *The Civil Jurisdiction Landscape in Eastern Oklahoma Post McGirt v. Oklahoma*, ROCKY MOUNT. MINERAL LAW FOUND. (August 2020) https://www.rmmlf.org/natural-resources-law-network/august-2020 [https://perma.cc/H779-WFWT].

than eighty days later, with the death of Justice Ruth Bader Ginsburg, a cloak of uncertainty returned. The Court's competing jurisprudential philosophies for Indian law cases that seemed settled after *McGirt*, may continue to jockey for the supremacy within the Court.

This article examines the recent history of Supreme Court jurisprudence in the field of Federal Indian law, demonstrating the affect the Court's subjectivist approach has had on the canon. It then analyzes the *McGirt* and *Murphy* decisions, contextualizing the shifting predictability for Federal Indian law cases before the United States Supreme Court. This article concludes by recounting how these decisions have recently played out in tribal, federal, and state courts in eastern Oklahoma.

II. A PRIMER ON THE LEGAL HISTORY OF THE FIVE TRIBES

Although every Indigenous nation has a unique culture, the Five Tribes share similar political and legal histories. They have simultaneously weathered external pressures and responded to changes in their relationships with the United States over the last three centuries, often in a solidarity of resistance. The Five Tribes have collectively experienced cyclical highs and lows that have required them to repeatedly rebuild their government institutions after near catastrophic events ranging from settler invasion and disease to removal and relocation, forced allotment of tribally controlled and regulated territories, and near political extinction.

Over much of the last 100 years, the United States interfered with the internal governance of the Five Tribes to such a degree that Congress authorized the President of the United States to install unelected Principal Chiefs of the Five Tribes to execute deeds and other documents. Federal policy did not shift until 1970, when Congress re-recognized the Five Tribes' authority to elect their own leaders.[39] From that point forward, the Five Tribes' modern history begins on the legal foundation for federal law that was set forth in many treaties with the United States.

A. Removal, Relocation and Post-Civil War Treaties

The Five Tribes had distinct, large territories in what would become the southeastern United States, but after the United States revolution, non-Indian settlers moved into these original territories and ancestral homelands.Pressures for more land resulted in the Five Tribes' territories being repeatedly redrawn to increasingly smaller boundaries. By the early 1800s, each had agreed to several land cessions at the threat of more violence, but the Five Tribes persevered by exercising autonomy over the land and the people within their reduced territories.[40]

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39. An Act to Authorize Each of the Five Civilized Tribes of Oklahoma to Select Their Principal Officer, S. 3116, 91st Cong. (1970).

40. *See generally* J. MATTHEW MARTIN, THE CHEROKEE SUPREME COURT 1823–1835 (2020) (discussing the exercise of jurisdiction by Cherokee judicial and law enforcement officers over Indians and non-Indians alike within the reduced boundaries of the Cherokee Nation). *See also* STEVE INSKEEP, JACKSONLAND: PRESIDENT ANDREW JACKSON, CHEROKEE CHIEF JOHN ROSS, AND THE GREAT AMERICAN LAND GRAB, 210–216 (2015) (telling the story of Cherokee efforts to evict white families living on Cherokee land).

As tensions continued to escalate, non-Indian state and local powers supported and emboldened settler encroachment. A frequent cycle played out: tribal resistance led to state and federal retaliation, resulting in new agreements and the slow but steady erosion of tribal land ownership, territorial dominion, and political sovereignty, which, of course, led to more tribal resistance.[41]

The election of President Andrew Jackson proved a flashpoint for intensified tensions and anti-Indian sentiment.[42] Jackson had long played significant roles in the dispossession of the Five Tribes. From 1814 to 1824, Jackson was instrumental in negotiating several treaties that led to the divestiture of the Five Tribes' territory in Alabama, Florida, parts of Georgia, Tennessee, Mississippi, Kentucky, and North Carolina.[43] As President, Jackson signed the Indian Removal Act of 1830[44] into law, enshrining the policy that would be directly responsible for catastrophic loss to the Five Tribes, not just in terms of land ownership and control, but also thousands of lives.

But the Indian Removal Act was not self-executing and instead, required new treaties to be negotiated with tribes in order to effectuate tribal land cessions to the United States in the east in exchange for new tribal territories owned by the Tribes in the west. Most importantly, these land cessions and relocation efforts required tribal consent. The Act set aside lands "west of the river Mississippi . . . for the reception of such tribes or nations of Indians as *may choose* to exchange lands where they now reside [east of the Mississippi], and remove from there."[45] If a tribe agreed to remove from their original territory and homelands, the Act provided, "the United States will forever secure and guaranty to them, and their heirs or successors, the country so exchanged with them."[46] Should the Tribes decline to enter into treaty negotiations for removal and relocation, the Tribes remained in their homelands to deal with ever increasing hostility from the states and local settlers, potentially needing to rely on the federal government to intervene on the Tribes' behalf.

By the time the Indian Removal Act was passed, the Five Tribes no longer possessed the requisite military strength to respond to non-Indian encroachment of their lands, particularly if the United States military were to become involved. Instead, the Tribes began asserting their rights to land and territory in the federal courts, culminating in the United States Supreme Court decisions *Cherokee Nation v. Georgia*[47] and *Worcester v. Georgia.*[48] These cases provided the following foundation principles of Federal Indian law that continue to guide the modern balance of power within the federal union: (1) inherent tribal powers are retained absent a voluntarily cession of those powers by the Tribal Nation or unless expressly extinguished by a specific Act of Congress; and (2) state laws have no force and

41. *See* INSKEEP, *supra* note 40 at 210–216.

42. *See id.* at 25.

43. *See* J. Stanford Hays, *Twisting the Law: Legal Inconsistencies in Andrew Jackson's Treatment of Native-American Sovereignty and State Sovereignty*, 21 J. SO. LEGAL HIST. 157, 159–60 (2013).

44. Indian Removal Act, 4 Stat. 411 (1830).

45. *Id*. (emphasis added).

46. *Id*.

47. *See generally* Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

48. Worcester v. Georgia, 31 U.S. 515, 519 (1832).

effect inside Indian country, absent a delegation of federal authority by Congress inviting state power to operate inside of Indian country.

These foundation principles further establish that as sovereigns, "[t]he Indian nations had always been considered as distinct, independent political communities, retaining all their original natural rights . . . from time immemorial."[49] As to the enforceability of inter-governmental agreements and the relationship of the tribes to the United States, "the treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provided that all intercourse with them shall be carried on exclusively by the government of the union."[50] The Court situated Indigenous nations as retaining territorial integrity to the exclusion of state governments as "distinct communit[ies], occupying [their] own territory, with boundaries accurately described, in which the laws of [the states] can have no force."[51]

Although the Cherokee Nation's legal victory was short lived as a practical matter, with relocation to Indian Territory being complete by mid-1839, the Cherokee cases continue to provide the legal framework for treaty-interpretation, including the *McGirt* decision and other modern treaty-interpretation cases.[52] To legally effectuate removal and relocation, each of the Five Tribes entered into a removal treaty[53] outlining, as a matter of tribal and federal law, the conditions with which the tribe "agreed" to be relocated to their current territories.[54] At present, the Five Tribes continue to incorporate these treaty guarantees as a matter of tribal law in their primary governing documents, particularly as it relates to their territorial boundaries.[55]

B. Allotment and the Weaponization of Tribal Government Termination

The Five Tribes rebounded in their new home and rebuilt their governmental institutions following relocation. In many ways, this time represents a golden era for the Five Tribes, with governmental capacity expanding well-beyond what existed in the pre-removal era. New national capitals were declared, townsites were created, and each of the Five Tribes engaged in nation-building with emphasis on legal, regulatory, and educational infrastructure. New constitutions were adopted, legislative bodies passed laws, and each of the Five Tribes reconstituted its government institutions.

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49. *Id.*

50. *Id*.

51. *Id*. at 520.

52. *See, e.g.*, Washington St. Dept. of Licensing v. Cougar Den, Inc., 139 S.Ct. 1000 (2018); Herrera v. Wyoming, 139 S.Ct. 1686 (2019).

53. *But see* Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478. This treaty, concluded at New Echota, was not executed by duly elected Cherokee citizens. Instead, United States officials sought treaty signatories that lacked official agency to sign on behalf of the Cherokee Nation.

54. *See generally* Treaty of Dancing Rabbit Creek, Feb 24, 1831, 7 Stat. 333 (Choctaw); Treaty with the Seminole, May 9, 1832, 7 Stat. 368 (Seminole); Treaty of Cusseta, Mar. 24, 1832, 7 Stat. 366 (Creek); Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478 (Cherokee); Treaty of Pontotoc, Oct. 20, 1832, 7 Stat. L., 381 (Chickasaw).

55. *See supra* note 15.

The Muscogee (Creek) Nation reestablished a constitutional form of government providing for executive, legislative, and judicial branches.[56] The Constitution called for a bicameral legislative body that would make up the National Council: House of King and House of Warriors.[57] The executive branch was made up of Principal Chief and Second Chief[58] with executive veto powers[59] and the power to seat treaty delegates subject to National Council ratification.[60]

Muscogee (Creek) Nation and the other Five Tribes' governments were well-known at the time for sophisticated and mature judiciaries exercising the full array of civil and criminal jurisdiction.[61] The Muscogee (Creek) Nation established a police force called the Lighthorse, exercising territorial jurisdiction to enforce its criminal code. A judicial branch was comprised of a High Court composed of five judges[62] exercising general jurisdiction, including criminal cases with a constitutional right to legal counsel.[63]

Within Indian Territory, the Five Tribes maintained strong inter-governmental relationships, forming the Inter-Tribal Council in 1842, the United Nations of Indian Territory in 1861, and the Inter-Tribal Council of the Five Civilized Tribes (ITC) in 1949.[64] These organizations addressed, among other things, intertribal matters such as dual citizenship[65] and shared criminal jurisdiction.[66] In the modern era, the Five Tribes continue to hold regular inter-tribal meetings of the elected leaders.[67]

Following the U.S. Civil War, the United States and non-Indian settlers renewed their previous push to acquire even more Indian lands.[68] To facilitate access to more land and create easier alienability for Indian lands, Congress ushered in a

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56. *See generally* MUSKOGEE CONST. *See also* Woodward v. De Graffenried, 238 U.S. 284, 293–94 (1915).

57. MUSKOGEE CONST. art. I, § 1.

58. *Id*.

59. MUSKOGEE CONST. art. II, § 4.

60. MUSKOGEE CONST. art. X.

61. *See* Gavin Clarkson, *Reclaiming Judicial Sovereignty: A Tribal Judiciary Analysis*, 50 KAN. L. REV. 473, 474–80 (2002).

62. MUSKOGEE CONST. art. III, §§ 1–2.

63. MUSKOGEE CONST. art. IX, § 2.

64. INTER-TRIBAL COUNCIL OF THE FIVE CIVILIZED TRIBES, *Inter-Tribal Council Formation* (2021) http://www.fivecivilizedtribes.org/Chapter-One.html [https://perma.cc/S6JC-8JL5].

65. *See generally* SHARON F. MOUSS, THE INTER-TRIBAL COUNCIL OF THE FIVE CIVILIZED TRIBES (Suzanne Heard, ed., 1975).

66. *Id.*

67. The Inter-Tribal Council of the Five Civilized Tribes meets regularly to take up issues of joint concern. *See* INTER-TRIBAL COUNCIL OF THE FIVE CIVILIZED TRIBES, *Meetings* (2021) http://www.fivecivilizedtribes.org [https://perma.cc/5GT2-PTGW].

68. The Five Tribes within Indian Territory were in an all too familiar situation. In the pre-removal era, just decades before, the thirst for more land lead to devastating consequences for the Five Tribes' property ownership and political power. Although prior treaty provisions promised federal intervention to remove non-Indian settlers, the federal government was either unwilling or unable to stop the non-Indian population flow into Indian Territory. Settlers disregarded proclamations by successive presidents warning against non-Indian entry and occupation. *See, e.g*, Marlin v. Lewallen, 276 U.S. 58, 58, 61–62 (1928). *See generally* JEFFREY BURTON, INDIAN TERRITORY AND THE UNITED STATES 1866–1906: COURTS, GOVERNMENT, AND THE MOVEMENT FOR OKLAHOMA STATEHOOD (1995).

new federal Indian policy with the passage of the General Allotment Act of 1887.[69] Because their lands were held in fee simple, the Five Tribes were initially exempt from the General Allotment Act. Notwithstanding, similar laws were soon passed to coerce the Five Tribes into agreeing to allotment of their lands in a process similar to, but distinct from, other tribes across the United States.[70]

Like the 1830 Indian Removal Act before it, the various enactments of allotment legislation were not self-executing and were not contemplated—or enforceable at the time—as unilateral actions by the federal government. In response, federal agents began seeking negotiations with each tribe, placing incalculable pressure on tribal leadership to consent to allotment[71] and make way for statehood.

Nationally, allotment accelerated significantly after the Supreme Court decided *Lone Wolf v. Hitchcock.*[72] That decision marked the cession of the Supreme Court's role in Indian affairs for over half a century and solidified Congressional "plenary" power over Indians, holding that:

> We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts.[73]

As a result, the Court concluded that the federal government has limitless power to allot tribal lands over the objection of tribal governments, even if it meant unilateral federal abrogation of prior treaty guarantees. *Lone Wolf* marks the low water mark for Supreme Court Indian jurisprudence that had previously guarded tribes from encroachment into internal tribal affairs. After *Lone Wolf*, Indian land tenure and tribal land use laws would become subject to federal control, with or without tribal consent.

Although the allotment policy dealt primarily with the transfer of lands, federal policy at the time also intended wholesale assimilation of Indian people into the American mainstream, including eventual United States citizenship. In fact, some allotment agreements included the agreement that the tribal citizens would become United States citizens once the land was allotted to the individual.

These allotment and assimilation policies were applied nationwide, including on reservations located in federal territories as well as those located within the boundaries of already-existing states. Proponents of this policy had several reasons to support implementation. Foremost, critics of tribal self-governance

69. General Allotment Act, 25 U.S.C. § 331 (1887).

70. Lands of many tribes were allotted under this law, but it expressly excluded the Five Tribes and a few other Indian Territory tribes. *Id*. at § 8.

71. *See generally* WILLIAM T. HAGEN, TAKING INDIAN LANDS: THE CHEROKEE (JEROME) COMMISSION 1889–93 (2003).

72. 187 U.S. 553 (1903).

73. *Id.* at 568.

characterized Indian reservations (regardless of whether owned by the United States in trust for the benefit of a tribe, or, in the case of the Five Tribes, ownedby the tribe in fee with tribal laws to benefit surface ownership and use by tribal citizens) as "communist" in nature.[74] This criticism of tribal "communal" ownership was a major factor in the federal push to allot lands in Indian Territory.[75]

Non-Indians likewise coveted tribal lands for their natural resources. During the allotment era there were "frequent allusions to the [notion] that the Indians were of course making no use of natural resources which should be developed in the interests of civilization."[76] Whether an adequate description or not, oil was to the allotment era what gold had been to Indian removal in the east. At the time of allotment, tribal lands featured timber, lands suitable for grazing and game preserves, oil reserves, and gas resources.[77] Access to these resources, accelerated non-Indian calls for removing tribal title through the allotment policy.

Although allotment was the federal policy goal, the path to allotment of the Five Tribes' lands was not clear because they owned their reservations in fee title. Members of Congress doubted whether Congress "had any authority to interfere with the rights of those Indians" in Indian Territory.[78] Although the Supreme Court later ruled that the federal government could achieve allotment with or without tribal consent in *Cherokee Nation v. Hitchcock*[79] and *Lone Wolf v. Hitchcock*,[80] federal officials remained concerned about the interrelationship between allotment and the United States' conveyances of the Five Tribes' fee title to their lands. Federal officials took the safer route by seeking allotment agreements that required tribal officials to execute the deeds as an intra-tribal property transfer.[81]

To effectuate negotiations, Congress established the Commission to the Five Civilized Tribes (Dawes Commission).[82] Negotiations went on for more than a decade and were only successful after the enactment of draconian laws that threatened the continued governmental authority of the Five Tribes. The first such law, "designed to coerce the tribes to negotiate with the Commission,"[83] was passed in 1897 and provided that after January 1, 1898, the federal courts in Indian Territory "shall have original and exclusive jurisdiction and authority to try and determine all . . . criminal causes for the punishment of any offense committed" after that date.[84] The 1897 Act included, however, the qualification that any agreement with a tribe, when ratified, would "operate to suspend any provisions of this Act if in

74. D. S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 11, 54–55 (1973).

75. Heckman v. United States, 224 U.S. 413, 434, 438 (1912). *See also* Woodward v. De Graffenried, 238 U.S. 284, 297, 305, 309 (1915).

76. OTIS, *supra* note 74, 17–18.

77. *Id.* at 22, 25.

78. 18 Cong. Rec. 191 (1886) (statement of Mr. Perkins).

79. 187 U.S. 294, 305 (1902).

80. 187 U.S. 553 (1903).

81. Woodward v. De Graffenried, 238 U.S. 284, 294 (1915).

82. Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 612, 643–45.

83. Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1441 (D.C. Cir. 1988). *See also* Act of June 7, 1897, ch. 3, 30 Stat. 62, 83.

84. 30 Stat. 62, 83.

conflict therewith as to said nation."[85] Congress understood that the threat to abolish exclusive tribal court jurisdiction over tribal citizens, together with this savings clause, was "intended to drive them into an agreement with the Dawes Commission, and if they do not agree to it, they shall get this terrible blow."[86]

The Curtis Act,[87] passed in 1898, contained similar threats to tribal judicial authority and to the individual judges who could exercise tribal adjudicatory authority. Section 28 threatened the abolishment of "all tribal courts in Indian Territory" and the transfer of tribal court cases to the federal court. But the Act also provided an escape clause for the Choctaws, Chickasaws, and Muscogee (Creek) Nations if they agreed to allotment.[88] Allotment agreements were completed, subject to ratification by tribal citizens by December 1, 1898. The Creek Agreement included a provision that would have expressly protected Creek courts, but the Muscogee (Creek) Nation citizens did not ratify the agreement by the deadline. Further, the final allotment agreement provided that it was not to be construed to revive or reestablish the Creek courts.[89] The Muscogee (Creek) Nation judiciary was not revived, legally or as a practical matter, until the completion of two federal lawsuits in which the Muscogee (Creek) Nation won re-affirmation of their right to self-govern after years of federal interference.[90]

The allotment and assimilation era also marks the period when Congress began to significantly expand its criminal jurisdiction into Indian Country. The United States' policy concerning "the Indian country" criminal prosecutions began

85. *Id.*

86. 29 Cong. Rec. 2310 (1897) (statement of Sen. Bate). Although lacking in clarity, the 1897 Act threatened an implied repeal of provisions protecting tribal courts in the 1890 law that established and authorized a non-Indian territorial government for Oklahoma Territory, while leaving the Five Tribes in a reduced Indian Territory with no territorial government. Act of May 2, 1890, ch. 182, 26 Stat. 81. Sections 30 and 31 of the 1890 Act expressly preserved exclusive jurisdiction in the Five Tribes over all cases involving tribal members as the sole parties. *Id*.; *see also* Talton v. Mayes, 163 U.S. 376, 381 (1896) (finding that the Cherokee Nation had exclusive jurisdiction over an 1892 Cherokee murder in the Cherokee Nation under its treaties and the 1890 Act).

87. Act of June 28, 1898, ch. 517, 30 Stat. 495 (1898).

88. *Id*. The Choctaws and Chickasaws approved their agreement on August 24, 1898, before the deadline established in the Curtis Act. *See* DEPT. INT., 56TH CONG., REP. OF THE COMM. TO THE FIVE CIV. TRIBES 9 (1899) [hereinafter 1899 FCT REP.] Their agreement did not abolish tribal courts, instead authorizing only a limited grant of federal court jurisdiction over certain land matters, homicide, embezzlement, bribery, disturbance of the peace, and carrying weapons. *See* Act of June 28, 1898, ch. 517, § 29, 30 Stat. 495. *See also* Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1441–42 (D.C. Cir. 1988. However, a later appropriation act purportedly abolished Choctaw and Chickasaw Nation courts. *See* Act of Mar. 1, 1907, ch. 2285, 34 Stat. 1015, 1027. The Seminole Agreement contained a similar limited grant of federal jurisdiction, but expressly protected Seminole courts. *See* Act of July 1, 1898, ch. 542, 30 Stat. 567. The final Cherokee agreement, unlike earlier versions, did not abolish Cherokee courts and expressly preserved only two Curtis Act sections unrelated to tribal judicial functions. Act of July 1, 1902, ch. 1375, § 73, 32 Stat. 716. *Compare* Act of Mar. 1, 1901, ch. 675, pmbl. *and* § 72, 31 Stat. 848 (agreement not effective because not ratified by Cherokees), *with* DEPT. INT., 57TH CONG., REP. OF THE COMM. TO THE FIVE CIV. TRIBES 13, 37, 45, 1 app. § 80, *and* 1899 FCT REP. 49, 57, 2 app. § 71. Notwithstanding these details, federal officials found it expedient in subsequent years to erroneously proclaim that the Curtis Act abolished the tribal courts of all of the Five Tribes.

89. Act of Mar. 1, 1901, ch. 676, 31 Stat. 861.

90. *See* Harjo v. Kleppe, 420 F.Supp. 1110 (D.C. Dist. 1976); *Hodel*, 670 F. Supp. 434 (D.C. Dist.1987).

with federal enactments as early as 1796.[91] As of 1883, this federal policy was embodied in the General Crimes Act ("GCA").[92] Under that law, federal courts retained jurisdiction to try offenses enumerated and defined under the general laws of the United States which were committed in "the Indian country" by Indians against "white persons," and by "white persons" against Indians. However, the Supreme Court in *Ex parte Crow Dog*, interpreted the scope of the GCA narrowly; those crimes committed by Indians against each other in "the Indian country" were left to each tribe to resolve according to its local laws and customs.[93] In direct response to *Crow Dog*, Congress enacted the Major Crimes Act ("MCA").[94] The MCA conferred federal jurisdiction over certain enumerated major crimes by an Indian offender against an Indian or non-Indian victim, including murder and rape, when committed on an "Indian reservation" within a state or federal territory.[95]

In its 1866 treaty, the Muscogee (Creek) Nation agreed to federal legislation as Congress deemed "necessary for the better administration of justice and the protection of the rights of persons and property within the Indian Territory," provided that such federal legislation would not interfere with Creek organization, rights, laws, privileges, and customs,[96] which would have included the right to exercise jurisdiction over the Muscogee (Creek) Nation's geographic area.

The federal government did not recognize full tribal law enforcement authority over all U.S. citizens, and as a result, non-Indian offenders flooded into Indian Territory.[97] In response, Congress began implementing federal criminal jurisdiction in Indian Territory in 1877 and the "Indian police," under federal agency supervision, assisted United States marshals and tribal police with law enforcement.[98] At this time, the United States was not seeking to exercise jurisdiction over Indian-on-Indian crimes, and the Muscogee (Creek) Nation and the other of the Five Tribes were exercising full jurisdiction, including imposing the death penalty for first-degree murder.[99]

When federal courts were eventually established in Indian Territory, federal courts had authority to enforce general federal laws, such as the GCA and MCA, consistent with the 1890 Act's requirement that "all general laws of the United States which prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States . . . shall have the same force and effect in the Indian Territory as elsewhere in the United States."[100] In cases where the laws of the United

91. *Ex parte* Crow Dog, 109 U.S. 556, 571 (1883).

92. Rev. Stat. §§ 2145, 2146 (1878) (codified at 18 U.S.C. § 1152). *See also Crow Dog*, 109 U.S. at 558.

93. *Crow Dog*, 109 U.S at 568, 571–72 (Indian-on-Indian murder on the Sioux reservation warranted tribal jurisdiction, rather than federal jurisdiction, under Rev. Stat. § 2146).

94. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified at 18 U.S.C. § 1153). *See also* United States v. Kagama, 118 U.S. 375, 382–83 (1886); United States v. John, 437 U.S. 634, 649, n.18 (1978).

95. § 9, 23 Stat. 362, 385.

96. Treaty with the Creek Indians art. 10, June 14, 1866, 14 Stat. 785.

97. COMM. OF INDIAN AFFAIRS, 49TH CONG., ANN. REP. COMM'R INDIAN AFF. 91 (1886).

98. ANGIE DEBO, THE RISE AND FALL OF THE CHOCTAW REPUBLIC 185–89 (1934).

99. L. SUSAN WORK, THE SEMINOLE NATION OF OKLAHOMA: A LEGAL HISTORY 42 (2010)

100. Act of May 2, 1890, ch. 182, 26 Stat. 81, § 31.

States and Arkansas laws concerned the same offense, "the laws of the United States shall govern as tosuch offense."[101] "The [Five] tribes, however, retained exclusive jurisdiction over all civil and criminal disputes involving only tribal members, and the incorporated laws of Arkansas did not apply to such cases."[102]

As the allotment processes continued, and it became clear to the Five Tribes that statehood would eventually prevail, the tribes attempted one last effort to retain some control by holding an inter-tribal constitutional convention in 1905 and proposing their own state for congressional consideration: the State of Sequoyah.[103] That effort failed and Oklahoma gained statehood in 1907, despite several treaty guarantees to the Five Tribes that their territories would never be encompassed in a future state.

Section 13 of the Oklahoma Enabling Act replaced the application of Arkansas laws after statehood with "the laws in force in the Territory of Oklahoma, *as far as applicable* . . . until changed by the legislature thereof."[104] The "laws in force" in Oklahoma Territory at the time included federal laws, such as the GCA and the MCA. Oklahoma courts were thus enabled, until such time as Oklahoma adopted its own criminal laws, to apply Oklahoma Territory criminal laws to crimes subject to state jurisdiction, such as crimes by non-Indians against non-Indians on Indian country, and crimes by anyone outside Indian country.[105] However, the Enabling Act required the transfer to new federal courts prosecutions of "all crimes and offenses" committed within Indian Territory, "which, had they been committed within a State, would have been cognizable in the Federal courts,"[106] including crimes under the GCA and the MCA.[107]

The Oklahoma Enabling Act also preserved federal jurisdiction over Indians and their lands, and required the state, as a condition of statehood, to disclaim all rights and title to Indian lands.[108] Oklahoma's constitution contains the required disclaimer, that acknowledges:

> The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to . . . all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.[109]

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101. *Id*. at § 33.

102. *See* § 30 Stat. 693; Indian Country, U.S.A., Inc. v. Oklahoma *ex rel.* Oklahoma Tax Comm'n, 829 F.2d 967, 977–78 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988). *See also* § 31, 26 Stat. 81.

103. Stacy L. Leeds, *Defeat or a Mixed Blessing–Tribal Sovereignty and the State of Sequoyah*, 43 TULSA L. REV. 5 (2007)

104. Act of June 16, 1906, ch. 3335, 34 Stat. 267 (emphasis added).

105. *See* United States v. McBratney, 104 U.S. 621, 624 (1881).

106. Act of Mar. 4, 1907, ch. 2911, § 1, 34 Stat. 1286.

107. *See* United States v. Ramsey, 271 U.S. 467, 469 (1926).

108. §§ 1, 3, 34 Stat. 267.

109. OKLA. CONST. art. 1, § 3 (amended 1907). As a result, DOI accordingly continued to fund the Indian police in the former Indian Territory after statehood. *See* COMM. OF INDIAN AFFAIRS, 62ND CONG., ANN. REP. COMM'R INDIAN AFF. 437 (1911). *See also* COMM. OF INDIAN AFFAIRS, 61ST CONG., ANN. REP. COMM'R INDIAN AFF. 106, 108–09 (1909).

Despite these protections, the State of Oklahoma unilaterally and illegally assumed criminal jurisdiction over all people throughout the entire state as soon as it entered the Union.

In the darkest hour for the Five Tribes since forced removal, the allotment agreements set dates certain when the governments of the Five Tribes would cease. But shortly before Oklahoma statehood in 1907, Congress repealed those provisions in individual allotment agreements with a sweeping Five Tribes Act that preserved the legal existence of the Five Tribes by stating that their governments would continue in full force and effect.[110]

It was common throughout the United States for allottees to hold lands in a restricted status that continued to protect the land against alienation and state *ad valorum* taxation for a period of twenty-five years. Muscogee (Creek) Nation allottees, under the 1901 and 1902 allotment agreements, owned their allotments in fee, subject to federal statutory restrictions against alienation ("restricted allotments") for only a five-year period, with a period up to twenty-one years for forty-acre homesteads.[111] The Five Tribes Act that continued the existence of the tribal governments also strengthened land protections for the citizens of the Five Tribes, extending restrictions on alienation to twenty-five years, but only if the allottee was a full-blood Indian.[112] These federal rules, tying land protections to percentage of Indian blood, was unique to the Five Tribes and was not consistent with tribal distinctions in their own communities. These federal rules, treating tribal citizens differently based on percentage of Indian blood, continued until 2017.[113]

Congressional protections for the allotments of the Five Tribes' members were short-lived. By 1908, Congress removed restrictions against alienation for Indians of less than one-half Indian blood, freedmen citizens, and intermarried white citizens of the Five Tribes.[114] Congress likewise delegated to Oklahoma courts jurisdiction over the person and property of minor Five Tribes allottees. Oklahoma courts were also given the authority to approve conveyances ofrestricted lands of Indian heirs of deceased allottees, again, acting as federal instrumentalities and not in the exercise of any inherent state power.[115] Eventually, Congress removed the Dawes Act's protection entirely by authorizing the Secretary of Interior to issue fee patents to "competent" allottees.[116] In 1910, competency commissions started visiting reservations nationwide. The result was the wholesale theft of many allotments, with well-noted exploitation and fraudulent land transactions sanctioned

110. Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137.

111. Act of Mar. 1, 1901, ch. 676, 31 Stat. 861; Act of June 30, 1902, ch. 1323, § 16, 32 Stat. 500.

112. § 19, 34 Stat. 137, 144.

113. *See* Stigler Act Amendments of 2018, H.R. 2606, 115th Cong. (2d Sess. 2018).

114. Act of Apr. 21, 1904, ch. 1402, 33 Stat. 180; Act of May 27, 1908, ch. 199, §§ 1, 4, 35 Stat. 312.

115. §§ 2, 6, 9, 35 Stat. 312. *See also* Springer v. Townsend, 336 F.2d 397, 400 (10th Cir. 1964); United States v. Gypsy Oil Co., 10 F.2d 487 (8th Cir. 1925). The United States still maintains a significant role in state court proceedings involving restricted lands, including, the right to remove certain state proceedings to federal court. *See* Act of Dec. 31, 2018, Pub. L. No. 115-399, 132 Stat. 5333; Act of Aug. 4, 1947, ch. 458, §§ 1, 3,4 61 Stat. 731.

116. Act of May 8, 1906, ch. 2348, 34 Stat. 182 (codified at 25 U.S.C. § 349).

by Oklahoma courts, all of which was intensified by the discovery of oil.[117] Nationally, by 1912, over 200,000 acres of trust land was shifted to local tax rolls.[118] Sales of trust allotments also increased, with 775,000 acres of inherited land being sold between 1902 and 1910, which represented "only a fraction of the total territory lost during those years."[119]

C. Phoenix Rising: The Modern Muscogee (Creek) Nation

As a result of whipsaw federal policies, as well as the steadfast refusal of the executive branch to follow Congressional policy recognizing the existence of the Five Tribes, there existed but a flickering "pilot light of tribal existence" within the Creek Nation by the early twentieth century.[120] Nonetheless, the Creek Nation "refused to abandon their tribal government and political life." By 1909 it held the first of many annual "Creek Conventions."[121] Regularly scheduled Conventions continued for decades, often without the Bureau of Indian Affairs ("BIA") recognizing their legitimacy.[122] Between 1934 and 1951, the Chief, who was elected by the Creek people and then appointed by the Department of the Interior, participated in the Convention, which functioned much as the Council and Chief had earlier.[123] The BIA briefly refused to recognize Creek government under a constitution and bylaws approved by the Convention in 1944, but recognized in 1946 that the Convention had been acting as the official governing body of the Creeks since 1924.[124] In the early 1950s, the BIA again shifted direction, and dealt with a Council appointed by the Chief, instead of the elected Convention.[125]

In the mid-1950s the BIA returned to the unlawful practice of treating federally appointed Chiefs as the sole embodiment of Creek governmental authority.[126] Congress finally addressed the problem by recognizing the right of Five Tribes citizens to elect their chiefs "by popular selection."[127] The BIA, in a "determined use of its raw power," nevertheless persisted in claiming that the Creek Nation was a "government by Principal Chief alone."[128]

As recognized by the D.C. Circuit Court of Appeals, the BIA's "bureaucratic imperialism"— through its "deliberate attempts to frustrate, debilitate, and generally prevent from functioning" the Creek tribal government—was contrary to Congress's express preservation of tribal governments in Section 28 of the Five

117. ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBE 86–87, 91, 117 (4th ed. 1991).

118. *See generally* FREDERICK E. HOXIE, THE CAMPAIGN TO ASSIMILATE THE INDIANS 1880-1920 (2001).

119. *Id*. at 160.

120. *See Murphy*, Brief for Petitioner, *supra* note 12, at 36.

121. Harjo v. Kleppe, 420 F. Supp. 1110, 1133 (D.D.C. 1976).

122. *Id*. at 1133–38.

123. *Id.* at 1136.

124. *Id*. at 1137–38.

125. *Id*. at 1138–39.

126. *Id.* at 1139.

127. Act of Oct. 22, 1970, Pub. L. No. 91-495, 84 Stat. 1091 (1970).

128. *Harjo*, 420 F. Supp at1143.

Tribes Act, including the right to elect chiefs and exercise legislative functions.[129] In 1979, the Creeks reorganized under the Oklahoma Indian Welfare Act and adopted a new constitution.[130] During this same period, Congress ushered in the self-determination era of federal Indian policy by enacting the 1975 Indian Self-Determination Act, the first of many federal laws promoting development of the Creek Nation and other tribes.[131] From then on, the flickering "pilot light of tribal existence" came roaring back to life.

The Creek Nation's capacity to enforce the law has changed significantly since the end of the nineteenth century. Now, "The Nation's Lighthorse Police Department plays a pivotal role in coordinated law enforcement efforts on the Reservation."[132] The Creek Nation currently has "cross-deputization agreements with the United States, the State [of Oklahoma], and 32 county and municipal jurisdictions."[133] The caseload is significant; it "responds to approximately 5,000 criminal and emergency situations throughout the Reservation annually," often serving as first responder, regardless of the race of the parties involved.[134] State officials have recognized the investigatory capabilities of the Lighthorse Police Department, commenting that certain investigations "would not have been possible without the close cooperation and outstanding effort of all of the agencies involved [including the] Creek Nation Lighthorse."[135]

Like the Nation's law enforcement, "the Nation has a robust criminal jurisdiction, has robust courts, [and] is already prosecuting many Indians. The Nation also supplies a special U.S. attorney to the United States to prosecute major crimes . . . pursuant to congressional authorization."[136] The Creek Nation has gone to considerable lengths to protect the constitutional rights of the accused.[137] The Court's prosecutions are conducted consistent with the Indian Civil Rights Act, the Tribal Law and Order Act, and the Violence Against Women Reauthorization Act of 2013.[138] As a result, the Nation "affords defendants protections mirroring those of the federal Bill of Rights, including due process and equal protection, assistance of

129. *Id*. at 1118, 1141-43.

130. Act of June 26, 1936, ch. 831, 49 Stat. 1967 (codified at 25 U.S.C. §§ 5201-5210). *See also* Indian Country, U.S.A., Inc. v. Oklahoma *ex rel.* Oklahoma Tax Comm'n, 829 F.2d 967, 970–71 (10th Cir. 1987). The OIWA was enacted two years after the Indian Reorganization Act ("IRA"), which officially ended the allotment era for all tribes. *See* Act of June 18, 1934, ch. 576, Pub. L. No. 96-363, 48 Stat. 985. Section 13 of the IRA provided that five IRA sections were inapplicable to Oklahoma tribes. *See* 25 U.S.C. § 5118 (1990) (listing sections codified at 25 U.S.C. §§ 5107, 5110, 5123, 5124, and 5125, concerning some matters later addressed in the OIWA). All other IRA provisions applied in Oklahoma.

131. Act of January 4, 1975, Pub. L. No. 96-638, 88 Stat. 2203 (codified at 25 U.S.C. §§ 5301, *et seq*.).

132. Brief of *Amici Curiae* Muscogee (Creek) Nation in Support of Respondent at 28–31, Carpenter v. Murphy, 591 U.S. __ (2020) (No. 1107), [hereinafter *Murphy*, Brief for Muscogee (Creek) Nation].

133. *Id.*

134. *Id.*

135. *Id.* at 27–28.

136. Transcript of Oral Argument at 65–66, Carpenter v. Murphy, 591 U.S. __ (2020) (No. 1107), [hereinafter *Murphy*, Transcript of Oral Argument].

137. *See Murphy*, Brief for Muscogee (Creek) Nation, *supra* note 132, at 28.

138. *Id.* at 28.

counsel, and in the case of non-Indian defendants, the right to a jury pool including non-Indian community members."[139]

In addition to law enforcement, tribal governments throughout Oklahoma are providing important governmental functions, including "healthcare, infrastructure, education"—often in order to fill a gap left by the State of Oklahoma.[140] For example, the Nation's healthcare system "serves more than 30,000 Indian *and non-Indian* patients each quarter [or a total of approximately 120,000 patients per year] at its two rural hospitals, rehabilitation center, and six medical clinics."[141] One of its hospitals "was on the verge of closing before the Nation purchased and rehabilitated it."[142] Today, the Creek Nation provides "emergency room, laboratory, surgical, and inpatient and outpatient specialty care."[143]

In the realm of education, the Creek Nation has contributed over $40 million to the State's public education fund in the years between 2013 and 2017.[144] It likewise provides a Head Start program for 286 children and it supports women, infants, and children through its special supplemental nutrition program.[145] It does all of this "without regard to tribal citizenship."[146] It also works to prevent violence in the home with its Family Violence Prevention Program.[147] Since 2016, that program has served 475 Indian and 306 non-Indian clients, providing "24-hour emergency assistance and crisis intervention [as well as] providing treatment and evidence collection, legal advocacy and multi-jurisdictional program coordination."[148] Importantly, the Creek Nation often provides these in the place of the responsible *state* governmental agency. For example, Okmulgee County, "being rural in nature, is lacking in resources . . . to ensure safety, justice, support and healing for adults impacted by sexual or domestic violence. Fortunately, [the County] is able to consistently direct people to the Muscogee (Creek) Nation program for their invaluable services."[149]

Today, tribal Nations and the State of Oklahoma have "654 tribal compacts [that] govern cooperation on taxes, fire services, environmental protection, and more."[150] As a result of these efforts:

> [I]f you were in a car accident [on] fee land within the historic boundaries [of the Creek Reservation], . . . you might be driving on roads owned and paved by the tribe, the first responder might

139. *Id.*

140. *Murphy*, Transcript of Oral Argument, *supra* note 136, at 73. *See also Murphy*, Brief for Muscogee (Creek) Nation, *supra* note 132, at 28–31.

141. *Murphy*, Brief for Muscogee (Creek) Nation, *supra* note 132, at 29 (emphasis added).

142. *Id.* at 30.

143. *Id.*

144. *Id.*

145. *Id*.

146. *Id.*

147. *Id.* at 28.

148. *Id.*

149. *Id.* at 29.

150. *Murphy*, Brief for Respondent, *supra* note 11, at 57.

> be a tribal police officer, and you might be taken to a community hospital built and run by the tribe.[151]

Although unique in its particulars, the history of the Creek Nation is a story all too familiar in Indian Country; a story that has been intimately intertwined with federal law and policy since the formation of the United States. Although Congress and the executive branches of the United States have espoused a policy of self-determination for over fifty years, the jurisprudence of the United States Supreme Court has largely taken a hiatus from its foundational jurisprudence during that same time, instead invoking a new brand of subjectivist jurisprudence in Federal Indian law.

III. THE COMPETING JURISPRUDENTIAL POLICIES OF THE SUPREME COURT: THE FOUNDATION PRINCIPLES OF FEDERAL INDIAN LAW VERSUS THE SUPREME COURT'S SUBJECTIVIST APPROACH

Early Federal Indian law is part of the bedrock of American jurisprudence.[152] Indeed, Chief Justice John Marshall's trilogy of cases from the early nineteenth-century not only provided the legal justification for American expansion west but also defined much of the Court's jurisprudence regarding federalism before the Civil War.[153] As a result, Federal Indian law makes up an inextricable part of the American rule of law.[154] Unfortunately—as a direct result of whipsaw federal law and policies—the practice of Indian law long required "wander[ing] the maze of Indian statutes and case law tracing back [over] 100 years."[155] The confusion continued until Justice Thurgood Marshall took up the mantle, working to distill the field back into a coherent body.[156] That effort centered on the "foundation principles" that the Court has invariably returned to over the centuries, asserting that:

> (1) [A]n Indian tribe possesses, in the first instance, all the inherent powers of any sovereign state; (2) a tribe's presence within the territorial boundaries of the United States subjects the tribe to federal legislative power and precludes the exercise of external powers of sovereignty of the tribe . . . but does not by itself affect the internal sovereignty of the tribe; and (3) inherent tribal powers are subject to qualification by treaties and by express legislation of Congress, but except as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.[157]

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151. *Murphy*, Brief for Petitioner, *supra* note 12, at 36.

152. *See* Blackhawk, *supra* note 19, at 1795, 1804.

153. *See id*.

154. *See id.*

155. Johnson & Martinis, *supra* note 21, at 7.

156. Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992) (Blackmun, J., concurring in part and dissenting in part).

157. Getches, *supra* note 22, at 1653.

Rooted in these foundation principles are the Indian canons of construction:

> The basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians and that all ambiguities are to be resolved in their favor. In addition, treaties and agreements are to be construed as the Indians would have understood them, and tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous.[158]

Although these principles are as old as the Republic, their application reached its zenith in the so-called "modern era" of Federal Indian law. The late Dean David Getches described the modern era, which spanned from 1959 through the 1980s, as a time that "encouraged a reinvigoration of tribal governments throughout the country. During this period, tribes gained political influence and economic security as Congress and the executive generally promoted a policy of tribal self-determination."[159]

This was also a time of unprecedented support for tribal sovereignty from the Supreme Court.[160] Overall, between 1959 and Justice Thurgood Marshall's retirement in 1991, the Supreme Court heard approximately eighty cases involving Indian law, and tribes were successful approximately 48% of the time.[161] More important were the impact of individual cases to tribal sovereignty. The Court reaffirmed the special government-to-government relationship between tribes and the United States.[162] It recognized that tribes have the sovereign right to assess

158. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 17, at § 4.02.

159. *Id.* at § 2.02.

160. Getches, *supra* note 22, at 1574.

161. *See generally* Lawrence R. Baca, *40 Years of U.S. Supreme Court Indian Law Cases: The Justices and How they Voted*, THE FED. LAWYER, April 2015, at 18.

162. Lawrence R. Baca calculated that sixty-eight cases were heard between 1976 and 1991, twenty-nine of which were favorable to Indian interests. *Id.* at 19. Additionally, between *Williams v. Lee* and 1976 the Court heard another twelve cases. *See* Antoine v. Washington, 420 U.S. 194 (1975) (invalidating Washington state laws seeking to regulate off-reservation treaty hunting); United States v. Mazurie, 419 U.S. 544 (1975) (upholding a federal law that regulated the distribution of alcohol on non-Indian fee land within Indian reservations and could validly delegate regulatory authority to tribes over the same); Morton v. Mancari, 417 U.S. 535 (1974) (upholding a hiring preference for members of federally recognized Indian tribes at the Bureau of Indian Affairs on the basis that the preference was based on a political rather than racial classification); Morton v. Ruiz, 415 U.S. 199 (1974) (holding that Congress did not intend to exclude full-blooded, unassimilated Indians living in an Indian community near their native reservation, who maintained close economic and social ties with that reservation from receiving federal general assistance from the Bureau of Indian Affairs); Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973) (holding that a Washington state regulation that prohibited net fishing but allowed hook and line fishing was discriminatory against tribal members); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) (invalidating an Arizona income tax as applied to tribal members that derived their income entirely from reservation sources); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) (holding that the State of Arizona could not tax tribal lands within the reservation but could tax certain off-reservation business activities); United States v. Southern Ute Tribe or Band of Indians, 402 U.S. 159 (1971) (reversing a decision by the Indian Claims Commission finding the United States liable for compensation and accounting by the United States); Menominee Tribe v. United States, 391 U.S. 404 (1968) (regarding hunting rights were not implicitly abrogated by the Menominee Termination Act); Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968) (invalidating state regulation of tribal treaty fishing except

taxes,[163] and for reservation Indians and on-reservation tribal goods and services to be free from state taxation.[164] The Court also decided a number of landmark treaty rights cases in favor of tribes throughout the United States,[165] and significantly limited state civil and criminal jurisdiction within Indian Country.[166]

A. The Rise of Subjectivism

The modern era came to an end with the ascension of William Rehnquist as Chief Justice of the Supreme Court. The Rehnquist Court's treatment of Federal Indian law has been well documented.[167] The Court backed away from foundation principles, indicating—as put by the late Justice Antonin Scalia—a belief that:

> [O]pinions in [Federal Indian law] have not posited an original state of affairs that can subsequently be altered only by explicit legislation, but have rather sought to discern what the current state of affairs ought to be by taking into account all legislation, and the congressional "expectations" that it reflects, to the present day.[168]

Analysis by Lawrence Baca shows that "[d]uring Rehnquist's tenure (1987–2005) . . . 52 Indian law cases were decided with 15 favorable to Indian interests and 37 against. Indian interests were now failing [7]1 percent of the time."[169]

Tribes fared no better under the Roberts Court. Between Chief Justice Roberts' appointment to the Court and Justice Antonin Scalia's sudden death in 2016, the Court decided a total of thirteen cases involving Native interests.[170]

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regulation necessary for species conservation and that does not discriminate against tribal fishing); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965) (holding invalid a state gross proceeds tax on a federally-licensed Indian trader for sales occurring on the Navajo Reservation); Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351 (1962) (holding that the state was without jurisdiction to try a member of the Confederated Colville Tribes for a crime that occurred within the Reservation but on land owned by a non-Indian). Although it is often difficult to identify winners and losers in these complex cases, we estimate that during this time period, nine cases favored tribal interests, one did not, and two were a draw. Resultantly, between *Williams v. Lee* and Justice Marshall's retirement in 1991, the Supreme Court heard eighty cases involving Indian tribes and Indian interests were successful in approximately thirty-eight of those cases.

163. *Mancari*, 417 U.S. 535.

164. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

165. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); *McClanahan*, 411 U.S. 164; *Mescalero Apache Tribe*, 411 U.S. 145.

166. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); *Antoine*, 420 U.S. 194; *Menominee Tribe*, 391 U.S. 404. *But see* Puyallup Tribe, Inc. v. Department of Game of Wash., 433 U.S. 165 (1977); Puyallup Tribe v. Department of Game, 429 U.S. 976 (1976); *Puyallup Tribe*, 391 U.S. 392.

167. Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351 (1962); Bryan v. Itasca County, 426 U.S. 373 (1976). However, at the same time the Court significantly curtailed tribal criminal and civil regulatory authority over non-Indians. *See* Montana v. United States, 450 U.S. 544 (1981); Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978).

168. *See generally* Getches, *supra* note 22, at 1573; Johnson & Martinis, *supra* note 21, at 1; Baca, *supra* note 161, at 18.

169. Getches, *supra* note 22, at 1575.

170. Baca, *supra* note 161, at 19.

According to Lawrence Baca, an astounding 77% of those cases were decided against the tribes.[171]

The Indian law jurisprudence of the Rehnquist-Roberts Courts has been marked by three "new rules of judicial subjectivism."[172] First, the Court has "[r]etreat[ed] from the established canons of construction," by simply "dismiss[ing] the canons by declaring that no true ambiguity exists."[173] Second, despite its wholesale repudiation by Congress, the Court has applied "[n]ineteenth-century allotment policy as the touchstone for Congressional intent."[174] Finally, the Court has abandoned "[t]he established role of Indian law preemption analysis," in favor of the "[f]abrication of a 'balancing of interests' test," whereby "it . . . gauges tribal sovereignty as a function of changing conditions—demographic, social, political, and economic—and the expectations they create in the minds of affected non-Indians."[175]

After thirty years, the Court has largely directed Indian law practitioners—particularly those aligned against tribal interests—away from arguments based on foundation principles and toward its subjectivist approach.[176] This has created a self-fulfilling prophecy, reducing the instances when the Court is hearing foundation-based arguments, thereby increasing the probability of a subjectivist outcome. The underpinning of the subjectivist approach is the fabricated "balancing of interests" test, whereby the court "collect[s] ingredients for *ad hoc* judicial balancing" of tribal rights and balances them against the "demographic, social, political, and economic . . . expectations . . . in the minds of affected non-Indians."[177]

Although the strategy is often case-specific, invariably the tactic involves *fear*-based arguments that a decision in favor of the tribes will alter the settled balance of power between tribes, states, and non-Indians. Oklahoma took this approach to new heights during oral argument in *Murphy*, arguing that:

> There are 2,000 prisoners in state court who committed a crime in the former Indian territory who self-identify as Native American . . . . That's 155 murderers, 113 rapists, and over 200

171. *See id.* at 29–30.

172. *Id.*

173. *See generally* Getches, *supra* note 22, at 1620–30.

174. *Id.* at 1620–22. *See also* Johnson & Martinis, *supra* note 21, at 18 (noting that under Rehnquist the Court often "interpreted what seems an ambiguous statute against Indian interests").

175. Getches, *supra* note 22, at 1622–26.

176. *Id.* at 1575, 1626–30. *See also* Johnson & Martinis, *supra* note 21, at 1 ("As Chief Justice, [Rehnquist] . . . has upheld Indian self-government only to the extent that non-Indians are not affected.").

177. Although beyond the scope of this work, we stress that this subjectivist approach has infiltrated tribal advocacy as well. For example, Creek Nation advocate Riyaz Kanji repeatedly stressed the benefits tribal governance brings to non-Indians, arguing the Creek nation provides important governmental functions, including "healthcare, infrastructure, education"—often in order to fill a gap left by Oklahoma. *Murphy*, Transcript of Oral Argument, *supra* note 136, at 73. *See also Murphy*, Brief for Muscogee (Creek) Nation, *supra* note 132, at 28. Advocates for Jimcy McGirt dedicated an entire section in its petitioner's brief entitled "The Sky is Not Falling." Brief for Petitioner at 39, McGirt v. Oklahoma (U.S. Feb. 4, 2020) (No. 18-9526). Although the majority of tribal arguments continue to focus on foundation principles, the space dedicated toward refuting these subjectivist arguments represents lost opportunities to dedicate more effort toward recentering the precedent of the Supreme Court.

> felons who committed crimes against children [and could be released if the Court sides with Murphy].[178]

However, the strategy is often more subtle. Sometimes the argument is based on economics—the recognition of a treaty right would plunge a non-Indian community into economic chaos. Although from a different era, non-Indian arguments in the groundbreaking reserved water rights case *Winters v. United States* amply demonstrates the approach.[179] There, non-Indian water users went to great lengths to highlight the following:

> [I]n establishing a civilized community in said country and in building and maintaining churches, schools, villages, and other elements and accompaniments of civilization; that said communities consist of thousands of people, and, if the claim of the United States and the Indians be maintained, the lands of the defendants and the other settlers will be rendered valueless, the said communities will be broken up, and the purpose and object of the government in opening said lands for settlement will be wholly defeated.[180]

As a result, according to the non-Indian water users, a decision in favor of the tribes would cause "'their lands [to] be ruined, it will be necessary to abandon their homes, and they will be greatly and irreparably damaged, the extent and amount of which damage cannot now be estimated.'"[181]

This argument consistently shows up in cases related to natural resources as well. For example, in *United States v. Washington* the United States and tribes of Western Washington sued the State of Washington to force it to replace salmon migration blocking culverts throughout the western portion of the state.[182] The State, in an attempt to sway the economic balance in its favor, "implied the cost of complying with the court's order will oblige the State to cut other important state programs," arguing:

> [T]he injunction will require the State to devote roughly $100 million per year more than it otherwise would have to culvert repair. This at a time when the State faces recurring budget shortfalls in the billions of dollars and has already made deep and painful cuts to subsidized health insurance for low-income workers, K-12 schools, higher education, and basic aid for persons unable to work.[183]

State parties often argue that tribes will take unfair advantage of their treaty rights or use them in a way that will harm the broader community. Most recently,

178. Getches, *supra* note 22, at 1575, 1626–30. *See also* Johnson & Martinis, *supra* note 21, at 1 ("As Chief Justice, [Rehnquist] . . . has upheld Indian self-government only to the extent that non-Indians are not affected.").

179. *Murphy*, Transcript of Oral Argument, *supra* note 136, at 76–77.

180. Winters v. United States, 207 U.S. 564 (1908).

181. *Id.* at 570.

182. *Id.*

183. United States v. Washington, 853 F.3d 946 (9th Cir. 2018).

this played out in *Washington Dept. of Licensing v. Cougar Den* where the State of Washington argued that the Yakama Nation's treaty right to "travel on all public highways," did not include the right to transport fuel from Oregon to its reservation free from state taxation.[184] Part of their argument was that if the Nation had such a right:

> [I]t places a cloud over the state's ability to regulate Yakama use of highways in other ways as well. Rules like licensing requirements, truck weight limits or other safety rules, and even speed limits arguably would be preempted . . . If carrying goods over the highways immunizes the Yakama from any state oversight, they would be free to ignore such regulations.[185]

At oral argument, counsel for the State went even further, arguing that a right to travel free from state regulation would allow "a Yakama member [to] possess illegal firearms or illegal drugs or diseased apples in their car . . . and bring them into the state and [allow tribal members to] say your laws against these things violate my right to travel by public highway."[186]

Washington State likewise argued that the Yakama Nation would take advantage of its rights to take "an unfair advantage over both non-Indian businesses and businesses owned by members of the twenty-eight other tribes in Washington and other tribes nationwide. The Yakama should not be allowed to use an untenable treaty interpretation to market a tax exemption throughout the country."[187]

Washington's argument is derived from a long line of subjectivist cases that preclude tribes from "marketing an exemption" from state taxation to non-Indians because "the Tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing custom from surrounding areas."[188] And these arguments have seen success. In the arena of state taxation of non-Indians on the reservation, the Court has abandoned foundation principles "whether stated in terms of pre-emption, tribal self-government, or otherwise," and instead measures the validity of the exemption against its perception of whether it would give the tribes an "unfair" advantage over non-Indians.[189]

Similarly, non-Indian litigants attack tribal sovereign immunity as providing an unfair advantage to tribal nations to the detriment of their non-Indian neighbors. Although the Court in this arena has largely remained true to its foundation principle that Congress has plenary authority to limit tribal sovereignty, it has done so with extreme reluctance, noting that "immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity,

184. *Id.* at 978.

185. Washington St. Dept. of Licensing v. Cougar Den, Inc., 139 S.Ct. 1000 (2018).

186. Brief for Petitioner at 44, Washington State Dept. of Licensing v. Cougar Den (U.S. Aug. 9, 2018) (No. 16-1498), [hereinafter *Cougar Den*, Brief for Petitioner].

187. Transcript of Oral Argument at 10, Washington State Dept. of Licensing v. Cougar Den, (U.S. Oct. 30, 2018) (No. 16-1498).

188. *Cougar Den*, Brief for Petitioner, *supra* note 186, at 44.

189. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155 (1980).

or who have no choice in the matter, as in the case of tort victims."[190] Taking their cue from the Court, non-Indian litigants have focused their arguments on the negative effects of tribal sovereign immunity on non-Indian communities in an effort to convince the Court that it is necessary to "'level[ ] the playing field'" for the benefit of non-Indians.[191]

As a result of these efforts, support for tribal sovereign immunity is hanging by a thread within the Supreme Court. In *Michigan v. Bay Mills Indian Community*, the last major sovereign immunity case at the Supreme Court, at least four justices voiced their concern that "the conflict and inequities brought on by blanket tribal immunity have also increased. Tribal immunity significantly limits, and often extinguishes, the States' ability to protect their citizens and enforce the law against tribal businesses."[192] Although he joined with the majority in *Upper Skagit Tribe v. Lundgren* in remanding the case to the lower court to address the scope of tribal sovereign immunity in *in rem* proceedings, Chief Justice Roberts wrote separately to ask:

> What precisely is someone in the [non-Indian person's] position supposed to do? There should be a means of resolving a mundane dispute . . . even when one of the parties to the dispute . . . is an Indian tribe. The correct answer cannot be that the tribe always wins no matter what; otherwise a tribe could wield sovereign immunity as a sword and seize property with impunity, even without a colorable claim of right.[193]

States have long argued that tribes cannot be trusted to manage their own hunting and fishing rights—they will harvest to extinction unless states are able to control them. This argument occurred recently in *Herrera v. Wyoming*, a case involving whether the Crow Tribe's treaty right to hunt on all "unoccupied lands of the United States" included national forest lands within the State of Wyoming. As part of their argument against that right, the State of Wyoming argued:

> [The Court should not] remake history and grant the Indians . . . a treaty right to a state resource . . . now to be harvested with jeeps, trucks, four wheelers and snowmobiles instead of on foot or horseback; and this time using semiautomatic weapons, scopes, lasers, rangefinders, rather than bow and arrow, the spear, and black powder firearms.[194]

Wyoming openly argued that only the state could be trusted to manage elk within the state and that the absence of that regulatory authority "would surely lead

190. *Id.*

191. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 758 (1998).

192. Michigan v. Bay Mills Indian Community, 572 U.S. 782, 798 (2014) (quoting Brief for Petitioner at 38, Michigan v. Bay Mills Indian Community (U.S. Aug. 30, 2013) (No. 12-515)).

193. *Bay Mills*, 572 U.S. at 823 (Thomas, J., dissenting).

194. Second Supplemental Response to Motion to Dismiss at 13, Wyoming v. Herrera, CT 2014-2687, 2688 (Wyo. Cir. Oct. 8, 2015).

to [the] 'progressive depletion,'" of the elk population within the region.[195] It argued that without state regulation tribal members would take "the easy kills, in the dead of the winter, on the Wyoming side of the state line, regardless of the consequences."[196] The argument was successful, at least at the state circuit court level, which concluded that "[w]ithout regulation . . . a [tribal] hunter or hunters [could] decimat[e] a herd of elk within a few minutes."[197]

This argument has been made repeatedly in the arena of fishing rights, starting with *Puyallup Tribe v. Dept. of Game of the State of Washington*.[198] There, Washington State argued for a regulatory scheme that allowed it to prevent the Puyallup Tribe from "tak[ing] all but the last fish."[199] The State took for granted that the tribe was incapable of regulating itself; the tribal right, without state control "would effectively destroy the economic and recreational value of the resource . . . it leaves an Indian commercial fishery . . . subject to no meaningful management or control."[200]

Most troubling, anti-tribal advocates often use Indian children as a sword in their effort to tip the scales in their favor, arguing that tribes will invade the sanctity of non-Indian homes and rob them of their authority to parent their children. For example, Lisa Blatt—the same lawyer that represented Oklahoma in *Murphy*—argued in *Adoptive Couple v. Baby Girl* that affirming the Indian Child Welfare Act would:

> [A]pply to the next case and to a[n] apartment in New York City where a tribal member impregnates someone who's African-American or Jewish or Asian Indian, and in that view, even though the father is a completely absentee father, you are rendering these women second-class citizens with inferior rights to direct their reproductive rights [regarding] who raises their child.
> You are relegating adoptive parents to go to the back of the bus and wait in line if they can adopt. And you're basically relegating the child, the child to a piece of property with a sign that says, "Indian, keep off. Do not disturb."[201]

She reprised this tactic in *Murphy*, arguing that "[u]nder the Indian Child Welfare Act . . . [a]ffirmance raises the specter of tearing [apart] families all across

195. Supplemental Response to Motion to Dismiss at 16, Wyoming v. Herrera, CT 2014-2687 2688 (Wyo. Cir. Aug. 24, 2015).

196. *Id.*

197. Order Denying Motion to Dismiss, Striking Evidentiary Hearing and Granting the State's Motion in Limine at 6, Wyoming v. Herrera, CT 2014-2687, 2688, (Wyo. Cir. Oct. 16, 2015). The Supreme Court did not pass judgment on this argument, noting that "[t]he appellate court did not reach this issue." Herrera v. Wyoming, 139 S.Ct. 1686, 1703 (2019). However, the Court left the door open for the State to remake its arguments, concluding that "[O]n remand, the state may press its arguments as to why the application of state conservation regulations . . . is necessary." *Id.*

198. Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968).

199. Brief for Respondent at 20, Puyallup Tribe v. Dept. of Game of the State of Washington (U.S. March 3, 1968) (No. 247).

200. *Id.*

201. Transcript of Oral Argument at 62–63, Adoptive Couple v. Baby Girl (U.S. April 16, 2013) (No. 12-399).

eastern Oklahoma, and probably beyond, for years and years and years and years after the fact."[202]

Subjectivist arguments reach their zenith where a decision could alter the jurisdictional landscape. Oklahoma's arguments in *Murphy* are a prime example of this, beginning and ending its arguments with a discussion of the "settled expectations across half of Oklahoma,"[203] hyperbolizing that a decision in favor of the Creek Nation would "reincarnate Indian Territory in the form of 'Indian country' under 18 U.S.C. § 1151(a), *cleaving* the State in half.… That revolutionary result would shock the 1.8 million residents of eastern Oklahoma [and] would plunge eastern Oklahoma into civil, criminal, and regulatory turmoil."[204]

In a not so subtle comparison to what the Court could expect if the Creek Reservation is preserved, Oklahoma harkens back to conditions in Indian Territory before Congress temporarily abolished tribal governance of the region: "Rampant disorder and lawlessness reigned . . . . Violent crime went largely unpunished and business agreements were effectively unenforceable."[205] Where jurisdiction is at play, the true concern about the "settled expectations" of non-Indians becomes about *control*; whether tribal governments could or should be able to have a say in the conduct of non-Indians within the reservation. *Amici* from non-Indian agricultural and oil and gas interests in *Murphy* lay this bare, arguing the Tenth Circuit's decision "threatens to substantially enlarge tribal civil [and regulatory] jurisdiction over nonmembers in Eastern Oklahoma;" "threatens Oklahoma citizens and businesses with tribal taxation;" "threatens Oklahoma citizens and businesses with dispute resolution in tribal courts;" and that "[f]ederal authority delegated to tribes may oust state regulation."[206]

The argument presumes that tribes are unfit to govern non-Indians, imputing incompetence and bias upon tribal governments, particularly tribal courts. A textbook example of this treatment comes from *Dollar General v. Mississippi Choctaw*, the last Supreme Court case to address the scope of tribal court civil jurisdiction.[207] There, Dollar General spent considerable time attempting to convince the Court that "Nonmembers' status as outsiders . . . can give rise to a substantial risk of unfair treatment [in tribal courts]."[208] Dollar General summed up the "features of tribal courts that risk unfair treatment of outsiders" to include "the lack of judicial training and independence, the risk of local bias and the limited protections against it, etc."[209] Earlier, it had explained:

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202. *Murphy*, Transcript of Oral Argument, *supra* note 136, at 76–77.

203. *Murphy*, Brief for Petitioner, *supra* note 12, at 56.

204. *Id.* at 3 (emphasis added).

205. *Id.*

206. Brief of *Amici Curiae* Environmental Federation of Oklahoma, Inc., Oklahoma Cattlemen's Association, Oklahoma Farm Bureau Legal Foundation, Mayes County Farm Bureau, Muskogee County Garm Bureau, Oklahoma Oil & Gas Association, and State Chamber of Oklahoma in Support of Petitioner, at i, Carpenter v. Murphy (U.S. July 30, 2018) (No. 17-1107).

207. Dollar General Corp. v. Mississippi Band of Choctaw Indians, 136 S.Ct. 2159 (2016).

208. Brief for Petitioner at 9, Dollar General Corp. v. Mississippi Band of Choctaw Indians (U.S. Aug. 31, 2015) (No. 13-1496).

209. *Id.* at 54.

> [T]ribal courts can vary considerably from the norms that govern the judicial systems contemplated by the Constitution. In both civil and criminal cases, tribal courts "are influenced by the unique customs, languages, and usages of the tribes they serve." The Bill of Rights applies to neither criminal nor civil trials in tribal court. The potential "subordinat[ion] to the political branches of tribal governments" that characterizes some tribal courts is also a feature that applies to both civil and criminal cases.[210]

Indeed, Dollar General dedicated so much of its argument to casting uncertainty and mistrust upon tribal courts that Justice Kagan summed its argument as follows:

> All of these arguments, your arguments—let me figure out whether this is right. Your arguments about [tribal courts]—it's a nonneutral forum, it's an unfair forum, we don't know whether they have the same procedures that—that are commonly—that commonly exist in Federal and State courts.[211]

Advocates have likewise harnessed the Court's tendency to use "[n]ineteenth-century allotment policy as the touchstone for Congressional intent."[212] The State of Oklahoma's arguments in *Murphy* once again demonstrate the approach. There, the State entirely ignores federal policy from the reorganization and self-determination eras, focusing instead on the argument centered on allotment era Congressional acts: "[A]ll understood that Congress—through a series of statutes—was abrogating the treaties, destroying tribal sovereignty, ending Indian interests in the land, and creating a new State through undifferentiated union with Oklahoma Territory."[213] Through these acts, Oklahoma concludes, "Congress expressly repudiated every promise that could have made the area a reservation."[214] At oral argument, Lisa Blatt, the lawyer for Oklahoma, laid out those portions of the statutory record that supported the State's position:

> Now just remember, in Sections 26 and 28 of the Curtis Act, all tribal courts are abolished. All tribal taxes are abolished in Section 16 of the Five Tribes Act. A tribal law is unenforceable. In Section 15, tribal—all tribal buildings and furniture, the tribal schools, property, money, books, papers, and records were all ordered to be turned over or face imprisonment of five years in jail . . . . I mean, I could keep going on.[215]

And she did keep going on:

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210. *Id.* at 39 (internal citations omitted).

211. Transcript of Oral Argument at 21, Dollar General Corp. v. Mississippi Band of Choctaw Indians (U.S. Dec. 7, 2015) (No. 13-1496).

212. Getches, *supra* note 22, at 1622–26.

213. *Murphy*, Brief for Petitioner, *supra* note 12, at 51 (emphasis added).

214. *Id.* at 21. *See also id.* at 10, 19, 20, 22, 25, 27, 29, 38, 47, 49.

215. *Murphy*, Transcript of Oral Argument, *supra* note 136, at 11–12.

> [E]very piece of paper, record, book, dollar bill or coin or property, their buildings, their furniture, their desks, everything was taken away from the tribes . . . Their taxes were abolished. Their tribal law was unenforceable. Every single federal court, tribal chief, tribal lawyer, members of Congress, Oklahoma historians, and the popular press recognized that the only authority [the Nation] had was to equalize allotments with the money and sign deeds.[216]

To Oklahoma, broken promises beget broken promises; the fact that "[w]ithin a decade [of the Creek Allotment Act], 'the bulk of the landed wealth of the Indians passed into individual hands,'" is potent evidence of disestablishment.[217] Or that these lands were taken from tribal members in "'an orgy of plunder and exploitation unparalleled in American history,' as Creek citizens were swindled out of allotments … There was 'legalized robbery' through courts, and entire land companies formed for the 'systematic and wholesale exploitation of the Indian through evasion or defiance of the law.'"[218]

And so, the logic goes: since Congress had broken other promises it had made to the Creek Nation, it necessarily follows that it also intended to break the promises made in the Treaties of 1832 and 1833. The promises made in those treaties need not be strictly construed; close enough is good enough:

> [T]his Court has never required a complete extinction of tribal government to find reservation disestablishment . . . Congress need not extinguish the pilot light of tribal existence to disestablish reservation borders.[219]

But, of course, that's *exactly* what a decision grounded in foundation principles and the canons of construction require: a "clear textual signal" that "unequivocally reveal[s] a widely held, contemporaneous understanding" that Congress actually *intended* to disestablish the Creek Reservation.[220] Indeed, that flickering "pilot light of tribal existence," came roaring back to life with passage of the 1936 Oklahoma Indian Welfare Act, which provided the Creek Nation with the "right to organize for its common welfare and adopt a constitution and bylaws."[221]

This is the hallmark of the subjectivist approach. Ignore the innumerable laws and policies developed by Congress that support tribal rights and sovereignty and instead laser in on its short-lived but destructive policies from the Allotment Era by "filling gaps in legislation and construing tribal sovereign powers in accordance with allotment-era goals merely because some or all of a reservation has been

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216. *Id.* at 19–20.

217. *Murphy*, Brief for Petitioner, *supra* note 12, at 12.

218. *Murphy*, Brief for Respondent, *supra* note 11, at 14.

219. *Murphy*, Brief for Petitioner, *supra* note 12, at 36.

220. Solem v. Bartlett, 465 U.S. 463, 471 (1984). *See also* United States v. Dion, 476 U.S. 734, 740 (1986) ("[There must be] clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.").

221. Act of June 26, 1936, ch. 831, 49 Stat. 1967 (1936).

allotted."[222] In so doing, the necessary inference is that the allotment policies were correct and Congress' policy of self-determination is wrong.

Accordingly, Oklahoma invites the Court to usurp Congress' power over Indian affairs and chart its own path—not according to what the law is, but instead according to what it believes the law should be. The goal, in other words, is to perpetuate the Allotment Era as the preferred approach.

B. A Return to Form [Foundation Principles?]

Despite the increasing prevalence of subjectivist arguments and decisions, "the Court often recites and sometimes acts upon foundation principles . . . [p]articularly when non-Indian interests are not seriously threatened."[223] As a result, despite the Court's relatively short departure from bedrock principles of Federal Indian law "[i]t is not too late in the day to revisit two centuries of consistently and firmly reiterated precedent or to expect a basic reformation of the historical legal relationship of the United States to Indian tribes."[224] However, to do so, "[o]ne or more of the new Justices—or future appointees—[must] steer doctrine back on track using foundation principles by taking responsibility as Justice Thurgood Marshall did, for writing a large number of opinions based on consistent principles."[225] For almost thirty years, Indian Country has been waiting for this intellectual leader to join the Court.

That leader finally arrived in 2009 with the appointment of Sonia Sotomayor to the United States Supreme Court. Of Puerto Rican descent and born and raised in a housing project in the Bronx borough of New York City, Justice Sotomayor is unique on the Court in her ability to empathize with economically disadvantaged minority communities throughout the United States.[226] That empathy has resulted in a voting record that is almost perfectly aligned with tribal interests.[227]

Unfortunately, the appointment of Justice Sotomayor could not alone alter the Court's misguided approach to Federal Indian law. Although she brought the intellectual leadership necessary to "steer doctrine back on track," the subjectivist wing of the Court still held a slight edge in votes. As a result, Justice Sotomayor

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222. Getches, *supra* note 22, at 1626.

223. *Id.* at 1576, 1617.

224. *Id.* at 1581.

225. *Id.* at 1631.

226. SONIA SOTOMAYOR, MY BELOVED WORLD 14 (2013).

227. *See* Baca, *supra* note 161, at 30. Since 2015, Justice Sotomayor has also joined the majority in *Upper Skagit Tribe v. Lundgren* (remanding the case to adjudicate the question of whether tribes have sovereign immunity in *in rem* lawsuits because the legal theory advanced by the respondents underpinnings of federal Indian law that has led her to become the intellectual leader that Indian Country has so sorely needed. was not raised until late in the case); the plurality in *Washington State Dept. of Licensing v. Cougar Den, Inc.*, (holding that the Yakama Nation's treaty right to travel pre-empted the State of Washington's fuel tax as applied to Cougar Den's importation of fuel to the reservation); and wrote the majority opinion in *Herrera v. Wyoming* (the Crow Tribe's off-reservation hunting rights were not implicitly abrogated by the State of Wyoming's admission into the Union). Although the decisions were *per curium*, she also participated in 4-4 affirmances—both of which were favorable to tribal interests—in *Dollar General Corp. v. Mississippi Band of Choctaw Indians* and *Washington v. United States*.

often found herself dissenting in Indian law cases for her first years on the bench.[228] That has seemingly changed since Neil Gorsuch has replaced Antonin Scalia as a Justice on the Supreme Court. The Court has heard four Indian law cases since Justice Gorsuch's appointment.[229] Although one case—*Washington v. United States*—ended in a 4-4 affirmance without an opinion and another—*Upper Skagit Tribes v. Lundgren*—turned on issues not directly related to fundamental Federal Indian law,[230] all four decisions have been favorable to tribal interests. More importantly, the remaining cases— *Washington State Department of Licensing v. Cougar Den, Inc.* and *Herrera v. Wyoming*—are both based on foundation principles of Federal Indian law.[231] The question is whether the Court's recent decisions represent an aberration from its subjectivist approach, or whether it has finally returned to its foundation principles.

With a sample pool of just four cases—only two of which were based upon the merits of Federal Indian law—it was impossible to know whether the appointment of justices Sotomayor and Gorsuch mark a turning point for Supreme Court Indian jurisprudence. Indeed, Dean Getches and the late Professor Ralph Johnson both have commented that the Court's true weakness is that it "became susceptible to arguments that the impacts on non-Indians were too severe."[232] Although both *Cougar Den* and *Herrera* are hugely important to the parties involved, neither severely affect non-Indian interests. *Murphy*, on the other hand, was alleged to affect upwards of 1.8 million non-Indian people.[233] Unlike *Cougar Den* and *Herrera*, therefore, the facts in *Murphy* forced the Court to confront its competing philosophies—foundation versus subjectivist principles—that have been jockeying for supremacy for the past half-century.

IV. THE LAW OF DISESTABLISHMENT

At its core, *McGirt* is a reservation disestablishment case. If the Muscogee (Creek) Nation was lawfully established and no further treaty or act of Congress

228. *See, e.g.*, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013); Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209 (2012); United States v. Jicarilla Apache Nation, 564 U.S. 162 (2011).

229. Upper Skagit Indian Tribe v. Lundgren, 138 S.Ct. 1649 (2018); Washington v. United States, 138 S.Ct 1832 (2018); *Baby Girl*, 570 U.S. 637; *Pottawatomi Indians*, 567 U.S. 209; *Jicarilla*, 564 U.S. 162.

230. At issue in *Upper Skagit Tribes* was whether a tribe enjoys sovereign immunity in *in rem* cases. *See Upper Skagit Tribe*, 138 S.Ct. at 1655. The non-Indian respondents initially claimed that the Supreme Court had authorized such suits in *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*. *Id.* However, half-way through the briefing before the United States Supreme Court, the respondents changed course and abandoned their legal theory in favor of a common law theory that "sovereigns enjoyed no immunity from actions involving immoveable property located in the territory of another sovereign." *Id.* at 1653. The Court held that *Yakima* did not hold that tribe lack sovereign immunity in *in rem* suits and remanded the case to the Washington State courts to hear the Lundgren's common law arguments. *Id.* The Court entered into little-to-no analysis of how traditional principles of Federal Indian law might affect the case.

231. Getches, *supra* note 22, at 1617, 1576.

232. *Id.* at 1576. *See also* Johnson & Martinis, *supra* note 21, at 1 (arguing that the Rehnquist Court "upheld Indian self-government only to the extent that non-Indians are not affected").

233. *Royal*, Petition for Writ of Certiorari, *supra* note 36, at 2.

expressly disestablished the reservation, then the reservation remains intact. *McGirt* is just one of nine disestablishment cases since 1950.

The Court's disestablishment or diminishment analysis has largely remained faithful to foundation principles, repeatedly reaffirming that "[d]iminishment . . . will not be lightly inferred. Our analysis . . . requires that Congress clearly evince an 'intent . . . to change . . . boundaries' before diminishment will be found."[234] The Supreme Court has "a fairly clean analytical structure for distinguishing those surplus land acts that diminished reservations from those that simply offered non-Indians the opportunity to purchase land within established reservation boundaries."[235] To assess Congressional intent, the Court looks to the text and circumstances surrounding the passage of each individual surplus lands act and, to a lesser extent, the subsequent history of the area, which "serves as 'one additional clue as to what Congress expected.'"[236]

The "most probative evidence" of Congressional intent to diminish a reservation lies "of course [with] the statutory text used to open the Indian lands."[237] The Supreme Court has consistently adhered to foundation principles in the diminishment context, requiring clear and unambiguous language that "provid[es] for the total surrender of tribal claims in exchange for a fixed payment" by Congress.[238] For example, the Court found the Yankton Reservation had been diminished where the Tribe agreed to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation."[239] The Court there found that this language, coupled with a fixed payment of $600,000 was "precisely suited to terminating reservation status."[240] Similarly, the Court found a statute restoring a portion of the Uintah Reservation to "the public domain" signified that Congress intended to diminish the reservation.[241]

In contrast, the Court has refused to find diminishment where the Congressional language "simply authorizes the Secretary to 'sell and dispose of certain lands.'"[242] The Court in *Solem v. Bartlett* found that such language, "coupled with the creation of Indian accounts for proceeds . . . 'did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial.'"[243] The Court so found despite noting the "presence of some language in the . . . Act that indirectly supports petitioner's view that the reservation was

234. Solem v. Bartlett, 465 U.S. 463, 470 (1984). *See also* Nebraska v. Parker, 136 S.Ct. 1072, 1078–79 (2016) (citing *Solem* to reaffirm "'only Congress can divest a reservation of its land and diminish its boundaries,' and its intent to do so must be clear").

235. *Solem*, 465 U.S. at 470.

236. *Parker*, 136 S.Ct. at 1081 (quoting *Solem*, 465 U.S. at 472).

237. *Parker*, 136 S.Ct. at 1079 (quoting Hagen v. Utah, 510 U.S. 399, 411 (1994)).

238. *See Parker*, 136 S.Ct. at 1079; *Solem*, 465 U.S. at 470.

239. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 344 (1998).

240. *Id*.

241. Hagen v. Utah, 510 U.S. 399, 412–13 (1994).

242. *Solem*, 465 U.S. at 473.

243. *Id.* (quoting Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351, 356 (1962)).

diminished," including reference to the "reservations thus diminished," and the allowance of tribal members to harvest timber "only as long as the lands remain part of the public domain."[244] Nonetheless, the Court ultimately concluded that "[t]hese isolated phrases are hardly dispositive. And, *when balanced against the . . . Act's stated and limited goal . . .* these two phrases cannot carry the burden of establishing an express congressional purpose to diminish."[245] More recently, the Court considered a statute that "empowered the Secretary to survey and appraise the disputed land, which then could be purchased in 160-acre tracts by non-members."[246] In comparing this statute to those in *Yankton* and *Hagen*, the court found:

> From this text, it is clear that the 1882 Act falls into another category of surplus lands Act: those that "merely opened reservation land to settlement and provided that the uncertain future proceeds of settler purchases should be applied to the Indians benefit." Such schemes allow "non-Indian settlers to own land on the reservation." But in doing so, they do not diminish the reservation's boundaries.[247]

The Court has also historically considered the circumstances surrounding the passage of a surplus lands act, including authorizing acts, negotiation history, congressional reports, and congressional floor debates. To "determine whether . . . [Congressional] language abrogates . . . [t]reaty rights," the Court has long "look[ed] beyond the written words to the larger context that frames the Treaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties."[248] Importantly, circumstantial historical evidence can cut both ways; buttressing a textual conclusion that Congress either did or did not intend to abrogate tribal treaty rights.[249] However, the Court has once again adhered to foundation principles, requiring—in the absence of a "clear textual signal"—that the surrounding circumstances "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation."[250] Thus, "mixed historical evidence" is not sufficient: the Court has repeatedly eschewed reliance on "cherry-picked" and "isolated" phrases in the legislative history, even where "there are a few phrases scattered through the legislative history . . . that support [disestablishment]."[251]

Far "[m]ore illuminating," according to the Court, is "the manner in which the transaction was negotiated with the tribes involved."[252] Once again, the Court has

244. *Solem*, 465 U.S. at 474–75.

245. *Id.* at 475 (emphasis added).

246. Nebraska v. Parker, 136 S.Ct. 1072, 1079 (2016).

247. *Id.* at 1079–80.

248. *See*, *e.g.*, *Parker*, 136 S.Ct. at 1080–81 (considering floor debates and the Act's negotiation history); *Solem*, 465 U.S. at 476-78 (considering negotiation history, the report from the federal negotiator, floor debates, and legislative reports).

249. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999).

250. *Compare id. with* Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586 (1977).

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

252. *Parker*, 136 S.Ct. at 1080–81; *Solem*, 465 U.S. at 476. The circumstances surrounding allotment of the Creek reservation perfectly demonstrate the shortcomings of reliance on isolated legislative history,

consistently relied on the canon that such negotiations should be "construed as the Indians would have understood them."[253]

Accordingly, the Court has demanded evidence that "unambiguously 'signaled [*the Tribe's*] *understanding* that the cession of the surplus lands dissolved tribal governance of the . . . reservation.'"[254] Indeed, despite "scattered" legislative history indicating a "reduced" and "diminished" Cheyenne River Sioux Reservation, the dispositive thrust of the Court's analysis in *Solem* was the lack of "a clear statement that Congress [understood there was] an agreement *on the part of the Cheyenne River Indians* to cede the opened areas."[255]

The singular place where the Court has diverged from foundation principles in its disestablishment analysis lies in its use of "subsequent demographic history of the opened lands . . . as well as the United States' [subsequent] 'treatment of the affected areas.'"[256] Thus the Court looks to subsequent legislation regarding the area, subsequent treatment of the land by federal officials, whether one "sovereign dominated the jurisdictional history of the open lands," and subsequent demographic history of the area.[257]

Reliance on subsequent history is exceedingly contrary to foundation principles, not least because it provides nearly no evidence regarding contemporary *Congressional* intent from the time the relevant statute was actually passed.[258] Accordingly, the Court has been careful to make clear that subsequent history provides but "one additional clue as to what Congress expected;"[259] it serves as "'the least compelling' evidence in [the Court's] diminishment analysis."[260] Indeed, the "Court has never relied solely on [subsequent history] to find diminishment."[261] Instead, its use is limited to "'reinforc[ing]' a finding of diminishment or nondiminishment based on the text."[262]

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particularly from Congressional floor debates. Murphy was able to bring to bear statements from a variety of legislators which indicated the legislators did not believe their actions disestablished the Creek Reservation. *See e.g.*, *Murphy*, Brief for Respondent, *supra* note 11, at 42 (quoting 29 Cong. Rec. 2341 (1897) (statement of Sen. Platt) ("Men of great legal ability who have gone into it . . . do not believe . . . there is any violation of any treaty."). *See also id.* at 40 (quoting 24 Cong. Rec. 268 (1892) (statement of Sen. Perkins) ("I do not know why the rights which have been given to them under the treaties . . . might not be respected and protected, and yet they have them brought into the Union as a State."). For its part, Oklahoma was able to "cite members holding different perspectives." *Id.* at 42, n. 7. As *Murphy* correctly points out, however, "that is why this Court discounts "cherry-picked statements by individual legislators." *Id.* (quoting *Parker*, 136 S.Ct. at 1081).

253. *Parker*, 136 S.Ct. at 1081; *Solem*, 465 U.S. at 471.

254. COHEN'S HANDBOOK TO FEDERAL INDIAN LAW, *supra* note 17, at § 2.02.

255. *Parker*, 136 S.Ct. at 1081 (quoting South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 353 (1998)) (emphasis added) (blocks in original).

256. *Solem*, 465 U.S. at 478 (emphasis added).

257. *Parker*, 136 S.Ct. at 1081 (quoting *Solem*, 465 U.S. at 472).

258. *Parker*, 136 S.Ct. at 1082; *Solem*, 465 U.S. at 479.

259. *Parker*, 136 S.Ct. at 1082 (quoting *Yankton Sioux*, 522 U.S. at 356) ("Every surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation, yet we have repeated state that not every surplus land Act diminished the affected reservation").

260. *Parker*, 136 S.Ct. at 1081 (quoting *Solem*, 465 U.S. at 471).

261. *Parker*, 136 S.Ct. at 1082 (quoting *Yankton Sioux*, 522 U.S. at 356).

262. *Parker*, 136 S.Ct. at 1082.

Thus, subsequent history that is "rife with contradictions and inconsistencies" will not support a finding of diminishment. To the contrary, even evidence that "the Tribe was almost entirely absent from the disputed territory for more than 120 years" is not sufficient if not coupled with a "clear textual signal [of diminishment]."[263] For example, the Court in *Nebraska v. Parker* noted the following:

> The Omaha Tribe does not enforce any of its regulations—including those governing business, fire protection, animal control, fireworks, and wildlife and parks—in [the disputed area]. Nor does it maintain an office, provide social services, or host tribal celebrations or ceremonies [in that area].[264]

The lower court in *Parker* likewise found that "State and local officials . . . have exercised exclusive jurisdiction over the land."[265] Nonetheless, the Supreme Court found that "it is not our role to 'rewrite' the . . . Act in light of this subsequent demographic history."[266] The Court found this particularly true given its longstanding conclusion that "evidence of changing demographics . . . is 'the least compelling' evidence in [its] diminishment analysis."[267] Similarly, the Court found that Nebraska's arguments that "for more than a century . . . Government officials treated the disputed lands as Nebraska's" was offset by evidence elsewhere in the subsequent history.[268] The Court concluded that such a "'mixed record' of subsequent treatment of the disputed land [by government officials] cannot overcome the statutory text, which is devoid of any language indicative of Congress' intent to diminish."[269] Ultimately, Nebraska's argument boiled down to "concerns about upsetting the 'justifiable expectations' of the almost exclusively non-Indian settlers who live on the land."[270] Although the Court found this argument "compelling," it ultimately concluded that "these expectations alone … cannot diminish reservation boundaries. Only Congress has the power to diminish a reservation. And though petitioners wish that Congress would have 'spoken differently' . . . we cannot remake history."[271]

V. THE *MCGIRT* DECISION: A RETURN TO FOUNDATION PRINCIPLES

Penned by Justice Neil Gorsuch, *McGirt* has been characterized as the most important reservation boundary case in the history of the United States Supreme

263. *Id.* at 1081 (quoting *Solem*, 465 U.S. at 471).
264. *Parker*, 136 S.Ct. at 1082
265. *Id.*
266. Smith v. Parker, 996 F.Supp.2d 815, 841 (D. Nebraska 2014).
267. *Parker*, 136 S.Ct. at 1082.
268. *Id.* (quoting DeCoteau v. District Court, 420 U.S. 425, 447 (1975)).
269. *Parker*, 136 S.Ct. at 1082.
270. *Id*.
271. *Id*.

Court and the most significant Federal Indian law case of the century.[272] Without doubt, the case is the most important decision for the Five Tribes since *Worcester v. Georgia*. However, because of the reasoning used by the Court, its import ripples well beyond Eastern Oklahoma.

Justice Gorsuch's decision, adopted by five of the nine justices, represents a return to foundational Indian law principles. Foremost, the Court reaffirmed the core principle that it is *Congress*, not the Court, that retains the legal power to limit tribal sovereignty, observing:

> To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress. This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties. But that power, this Court has cautioned, belongs to Congress alone. Nor will this Court lightly infer such a breach once Congress has established a reservation.[273]

Justice Gorsuch's reasoning called upon his broader judicial philosophy that Congress is charged under our Constitution to make the policy of the United States, while the Court's role is to give effect to that policy.[274] The Court acknowledged that "[m]ustering the broad social consensus required to pass new legislation is a deliberately hard business under our Constitution." Although Justice Gorsuch recognized that "Congress sometimes might wish an inconvenient reservation would simply disappear," he reaffirmed that "wishes don't make for laws, and saving the political branches the embarrassment of disestablishing a reservation is not one of our constitutionally assigned prerogatives."[275]

With that refrain in mind, the Court began its analysis by acknowledging that tribal rights are "subject to qualification by treaties and by express legislation of Congress," conceding that "the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties."[276] However, the underpinning of the Court's opinion was the foundational principle that "[i]f Congress wishes to break the promise of a reservation, it must say so."[277] More particularly, he noted that Supreme Court precedent requires that, should Congress desire to abrogate tribal rights, it "clearly express its intent to do so, '[c]ommon[ly with an] "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests."'"[278]

The Court's demand that Congressional diminishment be "explicit" meant that it needed not to resort to the canons. To the majority, the *absence* of

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272. *See* Bethany R. Berger, McGirt v. Oklahoma *and the Past, Present, and Future of Reservation Boundaries*, PENN. L. REV. ONLINE (forthcoming 2021) (manuscript at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3694051 [https://perma.cc/9D54-JA27].

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

274. *Id.* at 2462.

275. *Id.* at 2463.

276. *Id.* at 2462.

277. *Id.*

278. *Id.* (quoting Nebraska v. Parker, 136 S.Ct. 1072, 1079 (2016)) (alterations in original).

disestablishment language left no room for ambiguity and therefore there is no need to apply the canons of interpretation. The fact that Oklahoma could "not point to any ambiguous language in any of the relevant statutes that could plausibly be read as an Act of disestablishment," was sufficient to *unambiguously* discern Congressional intent to *not* disestablish the Creek Reservation."[279]

At the same time, the Court clarified that there is no need to apply the three-step analysis derived from *Solem* where no language to suggest disestablishment exists. Oklahoma "read *Solem* as requiring [the Court] to examine the laws passed by Congress at the first step, contemporary events at the second, and even later events and demographics at the third."[280] However, The Court found the only role that extratextual materials can properly play where treaty rights are allegedly abrogated is to help "clear up . . . not create" ambiguity about a statute's original meaning.[281] Upon finding no language to support Oklahoma's argument that the Creek Reservation had been disestablished, the majority eschewed as unnecessary reliance on "extratextual sources when the meaning of a statute's terms is clear."[282] However, Justice Gorsuch once again tapped into his broader judicial philosophy requiring a strong textual signal, concluding that "[w]hen interpreting Congress's work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us. That is the only 'step' proper for a court of law."[283]

In *McGirt*, the Court reaffirmed *federal* power over Indian affairs.[284] The Court expressly excluded states from "encroach[ing] on the tribal boundaries or legal rights" retained by tribes and recognized by Congress.[285] Justice Gorsuch's reasoning was exceedingly simple: states cannot be trusted to respect tribal rights, because "with enough time and patience, [they will] nullify the promises made in the name of the United States."[286] That was why, as recognized by Justice Gorsuch, the original import of the Constitution was to "entrust[] Congress with the authority to regulate commerce with Native Americans, and directs that federal treaties and statutes are the 'supreme Law of the Land.'"[287]

Although *McGirt* represents a resounding reaffirmation of tribal rights and foundational Federal Indian law principles, the majority was razor thin. Four justices—led by Chief Justice John Roberts—penned a dissent that is equally remarkable for its application of subjectivist principles.

Like the majority, the dissent omitted any reference to the established canons of construction. However, unlike the majority—which concluded it needed not to rely on them given the clarity of the Congressional text—the dissent ignored these canons despite arguing vigorously that they "find it hard to see how anyone can come away from the statutory texts detailed above with *certainty* that Congress

279. *McGirt*, 140 S.Ct. at 2468.
280. *Id.*
281. *Id.* at 2469.
282. *Id.*
283. *Id.* at 2468.
284. *Id.* at 2462.
285. *Id.*
286. *Id.*
287. *Id.*

had no intent to disestablish the territorial reservation."[288] Nonetheless, despite arguing that "[a]t the very least, the statutes leave some ambiguity," the dissent was not prepared to resolve that ambiguity in favor of the Tribe. Instead, the dissent used that ambiguity as a means by which it could proceed with its analysis of extratextual sources, particularly its analysis of "'subsequent demographic history' of the lands at issue, which provides an 'additional clue' as to the meaning of Congress's actions."[289]

For the dissent, the touchstone for Congressional intent in this case rested on Congress's nineteenth-century allotment policy. It chastised the majority for "attacking each [statute] in isolation" and failing to "give effect to the cumulative significance of Congress's actions . . . ."[290] But of course, Congressional action regarding the Muscogee (Creek) Nation Reservation did not begin with the Dawes Commission, nor did it end with Oklahoma statehood.[291] And so, even while the dissent attacked the majority's analysis, it engaged in its own "isolated" analysis that failed to recognize that—as a direct result of Congressional policy throughout the majority of the twentieth century—the flickering "pilot light of tribal existence," came roaring back to life. However, those latter Congressional actions failed to fit the dissent's preferred narrative and so, like many subjectivist opinions that came before it, the dissent simply ignored the full Congressional record.

The dissent's approach is likewise noteworthy for its perpetuation of the fabricated "balancing of interests" test that is the hallmark of subjectivist opinions in Federal Indian law. Admittedly, the dissent met the text of the statutes head on, lending its own "examin[ation] [of] the relevant Acts of Congress" in an effort to draw the remarkably different conclusion that the Creek Reservation had in fact been disestablished.[292] However, the primary complaint of Chief Justice Roberts' dissent was the majority's "new approach" that refused to move beyond the text of those Acts while simultaneously "sharply restricting consideration of contemporaneous and subsequent evidence of congressional intent."[293] Instead, according to the dissent, Congressional Acts should not have to stand or fall on their own, but must be viewed through the lens of "'the [surrounding] circumstances,' including the 'contemporaneous and subsequent understanding of the status of the reservation."[294]

The dissent's strategy propelled its subjectivist approach, allowing it to position itself into a balancing posture that allowed it to "reach outcomes consistent with their own notions of how much tribal autonomy there ought to be."[295] It began by ignoring the sorrowful history—the "orgy of plunder and exploitation unparalleled in American history"[296]—that led to current demographics in Eastern

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288. *Id.* at 2494 (Roberts, C.J., dissenting) (emphasis in original).

289. *Id.* at 2500.

290. *Id.* at 2494.

291. *See* Sections I(B); I(C), *supra*.

292. *McGirt*, 140 S.Ct. at 2482 (Roberts, C.J., dissenting) (quoting Nebraska v. Parker, 136 S.Ct. 1072, 1078 (2016)).

293. *McGirt*, 140 S.Ct. at 2482.

294. *Id.* (quoting *Parker*, 136 S.Ct. at 1078).

295. David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1623 (1996).

296. *Murphy*, Brief for Respondent, *supra* note 11, at 14.

Oklahoma, instead highlighting that, "[c]ontinuing from statehood to the present, the population of the lands has remained approximately 85%–90% non-Indian." [297] Those demographics, paired with the "State's 'exercis[e] [of] unquestioned jurisdiction over the disputed area since the passage of 'the Enabling Act,'"[298] caused the dissent to argue that the majority's decision would disrupt the demographic, social, political, and economic "expectations . . . create[d] in the minds of affected non-Indians," throughout the "entire eastern half of the State [of Oklahoma]—19 million acres that are home to 1.8 million people, only 10%–15% of whom are Indians."[299]

Those expectations centered on control—how the majority's decision might upset the jurisdictional balance between the State, tribes, and the United States in Eastern Oklahoma.[300] Its central concern seemed to be that the existence of the Creek Reservation would "mire[] state efforts to regulate on reservation lands in significant uncertainty, guaranteeing that many efforts will be deemed permissible only after extensive litigation, if at all."[301] The dissent was unwilling to subject non-Indians to the "'many' federal laws, triggering a variety of rules, [that will] spring into effect when land is declared a reservation."[302] Worse still, "[i]n addition to undermining state authority, reservation status . . . confer[s] on tribal government power over numerous areas of life—including powers over non-Indian citizens and businesses."[303]

To the dissent, concerns about non-Indian expectations—the idea that non-Indian life in eastern Oklahoma might be disrupted—outweighed everything else. The dissent was not interested in finally correcting the history of "'systematic and wholesale exploitation of the Indian through evasion or defiance of the law.'"[304] Nor was the dissent concerned about usurping Congress's plenary authority in the field or maintaining the federal supremacy over Indian affairs. Certainly, the dissent gave no mind to tribal expectations, as memorialized in treaties promising "not only a 'permanent home' that would be 'forever set apart'; [but] also . . . a right to self-government on lands that would lie outside both the legal jurisdiction and geographic

297. *McGirt*, 140 S.Ct. at 2500 (Roberts, C.J., dissenting).

298. *Id.* at 2499.

299. *Id.* at 2482.

300. The Chief Justice began that discussion by adopting Oklahoma's fear-based argument, writing:

> [T]he Court's decision draws into question thousands of convictions obtained by the State for crimes involving Indian defendants or Indian victims across several decades. This includes convictions for serious crimes such as murder, rape, kidnapping, and maiming. Such convictions are now subject to jurisdictional challenges, leading to the potential release of numerous individuals found guilty under state law of the most grievous offenses.

Id. at 2500–01. The Court did not clarify why these allegations—which were not supported by evidence in the record—had any bearing on the Court's disestablishment analysis. *See McGirt*, 140 S.Ct. at 2479–80 ("[E]ven Oklahoma admits that the vast majority of its prosecutions will be unaffected whatever we decide today . . . . In any event, the magnitude of a legal wrong is no reason to perpetuate it.").

301. *Id.* at 2501 (Roberts, C.J., dissenting)

302. *Id.*

303. *Id.* at 2502.

304. *Murphy*, Brief for Respondent, *supra* note 11, at 14.

boundaries of any State."[305] Instead, for the dissent, the proper measuring stick was its own idea of what "the current state of affairs ought to be. . . ." [306]

The majority directly confronted the dissent's subjectivist approach, shining light on the fact that the dissent was desperate to examine extratextual sources "not to . . . determine[e] the meaning of the laws Congress wrote in 1901 or 1906, but emphasizing the costs of taking them at their word."[307] Justice Gorsuch castigated the dissent for "suggesting that our interpretation of Acts of Congress adopted a century ago should be inflected based on the costs of enforcing them today . . . ."[308] The Court reiterated that Oklahoma's assertions lacked any evidentiary support in the record but, "more importantly, dire warnings are just that, and not a license for us to disregard the law."[309] Justice Gorsuch ended the majority's opinion by recognizing "many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye." [310] The Court summarily "reject[ed] that thinking," and in so doing marked its return to foundation principles:

> If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right."[311]

VI. A FAMILIAR CROSSROADS: *MCGIRT* AND THE FUTURE OF THE FEDERAL INDIAN LAW CANON

McGirt is a landmark case in several ways. Most importantly, it invalidated a commonly held false narrative that there were no Indian reservations within Eastern Oklahoma. As a result, Oklahoma had asserted authority on the disputed lands for over a century, with or without the legal authority to do so. *McGirt* finally put that narrative to rest, concluding that "the magnitude of a legal wrong is no reason to perpetuate it."[312]

From a Federal Indian law standpoint, *McGirt* marks one of the few times in the past fifty years where the majority of the Court applied foundation principles in a case alleged to "seriously threaten[]" non-Indian interests.[313] In particular, the Court has signaled a willingness to side with tribes in cases related to treaty rights as well as cases involving issues such as disestablishment and sovereign immunity

305. *McGirt*, 140 S.Ct. at 2461–62.

306. *See generally* Getches, *supra* note 22, at 1573; Johnson & Martinis, *supra* note 21, at 1; Baca, *supra* note 161, at 18.

307. *McGirt*, S.Ct. at 2482. *McGirt*, 140 S.Ct. at 2482.

308. *Id.* at 2481.

309. *Id.*

310. *Id.* at 2482.

311. *Id.*

312. *Id.* at 2480.

313. Getches, *supra* note 22, at 1576.

where the Court has long deferred to Congress's authority over Indian affairs.[314] Equally important, the decision solidifies Justices Sotomayor and Gorsuch as the first intellectual leaders in Federal Indian law since the retirement of Justice Thurgood Marshall. Their leadership by "writing a large number of opinions based on consistent principles" seems to have begun "steer[ing] doctrine back on track . . . ."[315]

Justice Gorsuch's leadership will be particularly valuable. As a devout and outspoken textualist and originalist, Justice Gorsuch is uniquely suited to call out the subjectivist wing of the Court, most of whom claim this same judicial philosophy.[316] The pressure that Justice Gorsuch can bring to bear will be crucial to bringing some of the more conservative justices over to foundation principles who will hopefully find it increasingly difficult to match their Indian law jurisprudence to their broader judicial philosophy.

Nonetheless, as of today four justices, including the Chief Justice, remain committed to the subjectivist approach. That schism placed Justices Ruth Bader Ginsburg and Stephen Breyer as the swing votes in Federal Indian law cases. However, the ground has once again shifted under Indian Country with the unfortunate death of Justice Ginsburg and the appointment of Justice Amy Coney Barrett to replace her. As a result, the long-term efficacy of *McGirt* and, indeed, the course of the Court's future path in Federal Indian law lies in her hands.

It is far from clear what Justice Coney Barrett's Indian law philosophy will be. Aside from a few sentences in a law review article[317] and a single case that tangentially addressed issues of Federal Indian law,[318] Justice Coney Barrett has no record to indicate how she views tribal rights or sovereignty. However, Justice Coney Barrett's broader judicial philosophy is rooted in textualism, which she has defined to mean that "the judge approaches the text as it was written, with the meaning it had at the time and doesn't infuse her own meaning into it."[319] She likewise professes to be an originalist, "understand[ing] [law] to have the meaning that it had at the time people ratified it [which] doesn't change over time and it's not up to me to update it or infuse my own policy views into it."[320]

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314. Herrera v. Wyoming, 139 S.Ct. 1686, (2019);Washington State Dept. of Licensing v. Cougar Den, Inc., 139 S.Ct. 1000, (2018). Less clear is the Court's willingness to loosen its jurisprudence related to tribal governance, particularly over non-Indians. The majority in McGirt purposefully side-stepped this fraught issue, concluding "The only question before us, however, concerns the statutory definition of "Indian country" as it applies in federal criminal law under the MCA. . . ." *McGirt*, 140 S.Ct. at 2480. Nonetheless, the Court signaled it may view those case differently, flagging that "Many other legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few—are designed to protect those who have reasonably labored under a mistaken understanding of the law." *Id*.

315. Getches, *supra* note 22, at 1631.

316. *See generally*, Matthew L. M. Fletcher, *Textualism's Gaze*, 25 MICH. J. RACE & L. 111 (2020); M. Alexander Pearl, *Originalism and Indians*, 93 TULANE L. REV. 269 (2018); Matthew L. M. Fletcher, *Muskrat Textualism*, 115 N.W. L. Rev. (forthcoming 2022).

317. Amy Coney Barrett, *Substantive Canons and Faithful* Agency, 90 B.U. L. REV. 109 (2010).

318. Schlemm v. Carr, 760 Fed. Appx. 431 (7th Cir. 2019).

319. *Confirmation Hearing of Amy Coney Barrett*, 116th Cong., 2d Sess. (Oct. 13, 2020) (statement of Judge Amy Coney Barrett).

320. *Id*.

Ideologically, those on the Supreme Court that describe themselves as textualists or originalists invariably are situated within the conservative wing of the Court. However, stereotypes and labels such as "conservative" or "liberal" break down quickly in Indian Country. *McGirt* itself is a prime example, where self-professed textualists formed the backbone of the dissent to a majority opinion penned by Neil Gorsuch, a jurist that applies textualism as well as originalism with nearly unmatched vigor. And so, the question is less whether Justice Amy Coney Barrett is a "conservative" jurist but, instead, what type of Indian law textualist or originalist will she be?

Justice Coney Barret has acknowledged that Justice Antonin Scalia—for whom she clerked—was her mentor and primary shaper of her judicial philosophy.[321] She has said that it was his "reasoning that shaped me. His judicial philosophy was straightforward: A judge must apply the law as written, not as the judge wishes it were. . . ."[322] Of course Indian people did not often see this Justice Scalia but instead the one that argued that courts should "discern what the current state of affairs ought to be by taking into account all legislation, and the congressional 'expectations' that it reflects, to the present day."[323] If Justice Coney Barrett adopts Justice Scalia's brand of Indian law textualism, then the field can brace for more subjectivist opinions in the coming years.

Without question, there is cause for concern. Justice Coney Barrett has said that "[g]iven the paucity of nineteenth century cases applying the canon, twentieth century courts perhaps overstated the case when they described the canon as 'well-settled law. . . . '"[324] However, "it is unclear why pessimism should rule the day."[325] Indeed, there is much to be hopeful for if Justice Gorsuch can guide Justice Coney Barrett to his form of Indian law textualism. That approach would simply require her to remain faithful to the doctrine she professes to espouse. Like Justice Gorsuch—who reaffirmed Congressional plenary authority in Indian affairs in *McGirt*—Justice Coney Barret has argued that:

> [C]ourts are not designed to solve every problem or right every wrong in our public life. The policy decisions and value judgments of government must be made by the political branches elected by and accountable to the People. The public should not expect courts to do so, and courts should not try.[326]

She has also acknowledged that, despite her reticence, the canons can be justified "as an outgrowth of the 'sovereign-to-sovereign, structural relationship' between Indian nations and the United States."[327] That relationship predates the

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321. *Confirmation Hearing of Amy Coney Barrett*, 116th Cong., 2d Sess. (Oct. 12, 2020) (opening statement of Judge Amy Coney Barrett).

322. *Id*.

323. *See generally* Getches, *supra* note 22, at 1573; Johnson & Martinis, *supra* note 21, at 1; Baca, *supra* note 161, at 18.

324. Coney Barrett, *supra* note 317, at 151.

325. *McGirt v. Oklahoma*, 140 S.Ct. 2452, 2481 (2020).

326. *Confirmation Hearing of Amy Coney Barrett*, 116th Cong., 2d Sess. (Oct. 12, 2020) (opening statement of Judge Amy Coney Barrett).

327. Coney Barrett, *supra* note 317 at 152 n. 206.

Constitution and forms the bedrock of the original understanding of Federal Indian law developed by the framers of our nation.[328] Ultimately, however, the short-term future of Federal Indian law stands to be impacted by whether she remains faithful to the doctrine or to the mentor who taught it to her.

EPILOGUE: OKLAHOMA POST-*MCGIRT*

Six months after *McGirt*, change has come to eastern Oklahoma, but the day-to-day consequence of the U.S. Supreme Court's decision are felt by few Oklahoma citizens. Oklahoma continues to prosecute all crimes involving non-Indian defendants who commit crimes against non-Indians, who constitute 91% of the state's population.[329] Nine months after *McGirt*, the ruling has now been extended to find that the Cherokee Nation and the Chickasaw Nation reservation boundaries also remain intact.[330]

Crimes that involve Indians are prosecuted by either the United States attorneys or the tribes, depending on the nature of the crime. This has meant a ramp up in the offices of the federal and tribal prosecutors, but the task at hand is not an insurmountable one.

Less than sixty days after the *McGirt* mandate and judgment was issued,[331] Jimcy McGirt was convicted in federal court and will spend his life in prison, albeit under a new federal sentence rather than the original Oklahoma sentence.[332] The U.S. Attorneys offices in the eastern and northern federal district in Oklahoma have increased staff to handle the increase in case load as their Indian country crimes filings grow. The former Trump administration promised more personnel and federal financial aid, and former Attorney General Bill Bar announced that the U.S. Department of Justice plans to fund two federal prosecutor positions in each federal district to handle the increased caseloads.[333] To date, the federal districts in

328. *See* Blackhawk, *supra* note 19, at 1795, 1804.

329. Oklahoma's total population is 3.9 million, with 9.4% of its citizens self-identifying as Native American. U.S. CENSUS BUREAU, *QuickFacts: Oklahoma* (2021), https://www.census.gov/quickfacts/OK [https://perma.cc/3JNA-RXFH]. Federal and tribal prosecution would be a smaller subset of individuals than those self-reporting as Native American, with enrollment and citizenship/membership in a federally recognized Indian tribe being the threshold to deprive Oklahoma of jurisdiction after *McGirt*. Individuals who self-identify as Native American but lack tribal citizenship continue to be prosecuted as non-Indians in Oklahoma courts.

330. *See generally* Hogner v. Oklahoma (Okla. Ct. of Crim. App., 2021 OK CR 4, March 11, 2021) (Cherokee Nation Reservation); Bosse v. Oklahoma (Okla. Ct. of Crim. App. No. PDC-2019-124, March 11, 2021) (Chickasaw Nation Reservation).

331. The Mandate and Judgment of United States Supreme Court was issued on August 10, 2020 following the July 9, 2020 published decision.

332. U.S. ATT'YS OFF., E. DIST. OKLA., *Jimcy McGirt Found Guilty f Aggravated Sexual Abuse, Abusive Sexual Contact In Indian Country*, U.S. D.O.J. (November 6, 2020) https://www.justice.gov/usao-edok/pr/jimcy-mcgirt-found-guilty-aggravated-sexual-abuse-abusive-sexual-contact-indian-country [https://perma.cc/KB5U-97SV].

333. *AG Barr Promises More Federal Aid, Manpower to Help Oklahoma,* PUBLIC RADIO TULSA (Sept. 30, 2020),
https://www.publicradiotulsa.org/post/ag-barr-promises-more-federal-aid-manpower-help-oklahoma#stream/0 [https://perma.cc/GL5C-94Y9].

Oklahoma filed roughly 200 Indian country cases in 2020.[334] *McGirt* certainly increased federal activity, but the increase was not insurmountable. By comparison, the federal district for New Mexico encountered 512 Indian country criminal filings in 2018 alone.[335]

In the first few months following the *McGirt* decision, the criminal dockets of the Muscogee (Creek) Nation District Court also grew. From January 1, 2020, until the *McGirt* decision, 16 felony cases were filed. From July 9 through the end of November, 2020, over 300 new felony cases had been initiated. The growth in the misdemeanor docket was similar. In 2019, a total of 44 misdemeanor case were filed. By November 1, 288 cases had been filed in 2020.[336] The Muscogee (Creek) Nation's first governmental response to *McGirt* was a legislative budget modification to make more funds available for the Lighthorse so that law enforcement could scale up. Although the expansion has been challenging, the Muscogee (Creek) Nation District Court has absorbed the expanded caseload with pre-exiting staff and definitive plans to expand court personnel and court space in the near future, once feasible in light of COVID-19.[337]

The question of whether the *McGirt* decision extends to other tribes, beyond the Muscogee (Creek) Nation, was also addressed in the short-term. The Oklahoma Court of Criminal Appeals[338] issued a mass-remand order on August 12, 2020, instructing the local trial courts to entertain two questions in light of *McGirt* for cases that may be impacted by the decision.

First, trial courts must consider whether the case involved "Indians" for the purposes of federal Indian country prosecutions.[339] In most of these cases, the Indian

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334. *See* ABA, *Questions Remain About State Jurisdiction Over Crimes in Post*-McGirt *Oklahoma* (Jan. 6, 2021) ("The Oklahoma Attorney General's office estimates about 200 criminal cases could be affected by *McGirt*, 58 of which have already been remanded to state courts for evidentiary hearings."), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/year-end-2020/jurisdictional-issues-in-post-mcgirt-oklahoma/ [https://perma.cc/D7F8-QS57].

335. U.S. D.O.J., *Indian Country Investigations and Prosecutions* 36 (2018).

336. MUSCOGEE (CREEK) NATION DISTRICT COURT RECORDS (Nov. 30, 2020).

337. It should also be noted that the challenges of expanding dockets hit the Muscogee (Creek) Nation and Oklahoma during the COVID-19 pandemic, making transfer of defendants from state arrest to tribal court initial appearances more challenging than under typical cross-deputization scenarios.

338. The Oklahoma Court of Criminal Appeals is the highest court in the state of Oklahoma for criminal cases and serves as the court of last resort on such matters. OKLA. CT. CRIM. APP., *Who We Serve* (2021), http://www.okcca.net [https://perma.cc/EW6H-FJBV].

339. The OCCA relies on a two-part test used by federal courts to determine the Indian status of either defendants or victims in Indian country cases. *See* United States v. Diaz, 679 F. 3d 1183 (10th Cir. 2012) As in *Diaz*, the pivotal question is whether the victim are non-Indian for federal General Crimes Act prosecution under 18 U.S.C. § 1152. When applied to defendants, the *Diaz* test is typically used to prosecute Indians that are not citizens or members of a tribe and thereby expand the universe of individuals that may be charged in federal prosecutions. Individuals that are members or citizens of a federally recognized tribe will generally meet the test, however, there are unique circumstances that will arise in post-*McGirt* cases such as the Cherokee Nation citizens that make up the category of "Cherokee freedmen" citizens. These modern Cherokee Nation citizens are descendants of enslaved people who lived inside the Cherokee Nation and were enslaved pursuant to Cherokee Nation law and are entitled to Cherokee Nation citizenship under current tribal and federal laws. They may or may not also possess Indian blood, but that fact is irrelevant to their Cherokee Nation citizenship, which is based on lineal descent from an individual on the Cherokee Nation rolls (or citizen census) at the time of the Cherokee Nation's allotment process.

status of the defendant is at issue for purposes of federal Major Crimes Act jurisdiction. In at least one case, the Indian status of the victim is at issue, which could result in federal prosecution under the General Crimes Act.

Second, trial courts must consider whether the crime occurred inside Indian country. The inquiry into Indian country status implicates the reservation boundaries of the remaining Five Tribes. At the date of this publication, Oklahoma district courts have reaffirmed the existence of the Cherokee Nation,[340] Chickasaw Nation,[341] Seminole Nation[342] and Choctaw Nation[343] reservation boundaries.

On the ground, state prosecutors in most eastern Oklahoma counties are not filing new cases that fall squarely in the *McGirt* framework, and if cases have been filed, most county judges are routinely granting motions to dismiss on *McGirt* jurisdictional grounds. Beyond financial resources to expand law enforcement and courts, the biggest challenge is in the details of how to transport alleged offenders to tribal custody after they are arrested by state officials pursuant to the many state and tribal cross-deputization agreements[344] that provide joint arrest powers until the jurisdictional questions can be resolved for charges to be filed by the appropriate entities. Transfer of custody from state to federal officials has proven to be much less challenging.

Although the *McGirt* decision will necessarily impact the contours of civil adjudicatory and regulatory jurisdiction, the affect is likely minimal[345] and federal and state officials have been initially focused on the practical issues around criminal jurisdiction. Oklahoma remains concerned about the financial impact to the state if significant state tax revenue is lost, [346] but tax issues and other civil matters remain for future resolution. The first six months have revealed significant inter-governmental cooperation to ensure public safety and a shift of criminal prosecutions

340. Order on Remand after Evidentiary Hearing on Remand from OCCA August 2020 Order, Oklahoma v. Hogner (Craig County, CF 2015-263) (finding the Cherokee Nation boundaries have never been disestablished).

341. Order for Remand after Evidentiary Hearing on Remand from OCCA August 2020 Order, Oklahoma v. Bosse (McClain County, CF 2010-213) (finding the Chickasaw Nation boundaries have never been disestablished). The case involved Chickasaw citizen victims of crime. The Defendant was non-Indian.

342. Oklahoma v. Barker (Seminole County, CF-2019-92) (finding the Seminole Nation boundaries have never been disestablished). This case was not on remand from the OCCA like the Chicksaw, Cherokee and Choctaw boundary cases cited in this section. This was a new case involving a state first-degree murder charge. The jurisdictional issues were raised in Defendant's Motion to Dismiss in the pre-trial phase.

343. Evidentiary Hearing on Remand from OCCA August 2020 Order, Oklahoma v. Sizemore (Pittsburg County, OCCA F-2018-1140) (Oct 28, 2020) (finding the Choctaw Nation boundaries have never been disestablished).

344. For a comprehensive list of intergovernmental agreements, *see* OKLA. SEC. OF STATE, *Tribal Compacts and Agreements* (2021), https://www.sos.ok.gov/gov/tribal.aspx [https://perma.cc/8PH7-CW4M]. Although hundreds of such agreements were in place at the time McGirt was decided, many new agreements have been reached between state, county and city officials and each of the Five Tribes. He is currently awaiting trial.

345. *See* Dylan R. Hedden-Nicely & Monte Mills, *The Civil Jurisdictional Landscape in Eastern Oklahoma Post McGirt v. Oklahoma*, NAT. RES. LAW INSIGHTS (Aug. 2020).

346. *See* OKLA. TAX COMM., *Report of Potential Impact of McGirt v. Oklahoma* (October 2020) (setting forth proposed annual tax loss of $72.7 million in revenue to the state).

to federal and tribal officials with the assistance of state officials. Rather than a doomsday scenario, in most instances officials from all three sovereigns are to be commended for what has transpired. There have been no media reports of unprosecuted crimes or lawlessness. There have been countless instances of custody transfers between jurisdictions and timely subsequent prosecutions in cases with much lower profiles than *McGirt* and *Murphy*.[347]

The concerns of lawlessness raised by Oklahoma in *McGirt* pleadings have not come to pass in the short-term, particularly any concerns that the average Oklahoman would be negatively impacted by a decision upholding reservation boundaries in eastern Oklahoma. For non-Indians in Oklahoma, state and tribal jurisdiction remains largely the same as before *McGirt* without the profound consequences Oklahoma urged would result.[348]

The individuals primarily impacted by *McGirt* are the approximately 42,000 Muscogee (Creek) Nation citizens that reside inside the Muscogee (Creek) Nation who are no longer subject to state police powers. There are 87,344 Muscogee (Creek) citizens,[349] including approximately 65,000 who live in various locations throughout the state of Oklahoma.[350] Many of those individuals do not live inside Indian country and therefore remain subject to Oklahoma prosecutions before and after *McGirt*. While there are individuals, like Jimcy McGirt,[351] who are citizens of other Indigenous nations who are subject to federal and Muscogee (Creek) prosecutions because they are members of federally recognized tribes, this is the majority of the cases that will now come to be resolved by the Muscogee (Creek) Nation.

McGirt was a win for the Muscogee (Creek) Nation because the decision re-recognized the local rule and exercise of governmental powers the Muscogee (Creek) Nation bargained for at the time of removal. The self-governance powers—including police powers—of the Muscogee (Creek) were denied for over 100 years due to the unlawful overreach of Oklahoma officials and the acquiescence of federal officials. In addition, the treaty-based rights of individual Muscogee (Creek) citizens to never to be governed by a state, nor tried in the courts of a state, cannot be lost in the post-*McGirt* aftermath. The expectations of Muscogee (Creek) citizens to primarily be governed by their Nation are as important, or more so, than the expectations of other entities that seek to govern them.

CONCLUSION

When federal courts deviate from the plain language of treaties and statutes, and take subjectivist approaches to jurisdictional inquiries by giving weight to the *possibility* that a judicial decision will lead to negative outcomes for non-Indian

347. Patrick Wayne Murphy was quickly indicted on federal charges after the McGirt decision and charge with murder and kidnapping under the Major Crimes Act.

348. *See generally* Bethany R. Berger, McGirt v. Oklahoma *and the Past, Present, and Future of Reservation Boundaries*, PENN. L. REV. ONLINE (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3694051 [https://perma.cc/9D54-JA27].

349. MUSCOGEE NATION, *Facts and Statistics* (2021), https://www.mcn-nsn.gov/services/citizenship/citizenship-facts-and-stats/ [https://perma.cc/USX5-Q76S].

350. *Id.*

351. McGirt is a citizen of the Seminole Nation.

communities, the legal rights of the tribes *and their citizens*, who constitute small minorities in the states that surround them, will almost always suffer. First and foremost, Indian law canons of construction require federal courts to limit their inquiry to the plain language of the documents at issue. If an ambiguity exists in the plain language of a treaty or statute, that ambiguity is to be resolved in favor of the tribe. Indian law canons were established, in part, to address the balance of power already significantly skewed toward non-Indian rule of small Indian populations that never consented to be governed by a colonial power. For the Indigenous Nations of Eastern Oklahoma and its citizens, *McGirt* and its progeny marks one step toward decolonization, as those Nations continue to rebuild their governmental capacity in an era of self-determination. From a legal standpoint, that small step forward occurred when, by a one-vote majority, the United States Supreme Court applied federal law as it was written.