

REPRINT:
THE RULE OF LAW: *McGIRT v.*
OKLAHOMA AND THE RECOGNITION
OF THE MUSCOGEE (CREEK)
RESERVATION

C. Steven Hager

As this special dedication issue dives into the testimonials in honor of Professor Hager, the incoming Board has decided to include a work by Professor Hager, to share his passion with you, the reader, in his own words.

This article, written by Professor C. Steven Hager, was one of the last works Professor Hager published with Oklahoma Indian Legal Services (OILS) in 2020. This has been reproduced with special permission from OILS, as a way to say “goodbye” to Professor Hager.

Best wishes,
Samantha A. Tamura, Editor-in-Chief of AILR

REPRINT: THE RULE OF LAW: *MCGIRT v. OKLAHOMA* AND THE RECOGNITION OF THE MUSCOGEE (CREEK) RESERVATION*

C. Steven Hager**

In what can only be described as a major victory for Indians in Oklahoma, the Supreme Court ruled 5-4 that the (Muscogee) Creek Reservation has remained intact. The decision in *McGirt v. Oklahoma*, No. 18-9526, 591 U. S. ___ (2020), contains no caveats limiting the Creek Reservation. The Creek Nation has a reservation, period.

McGirt is a case that on surface addresses a narrow question: what Court should have tried Jimcy McGirt, a Creek man whose crimes were committed within the traditional Creek reservation? There is no question of guilt in this case. Jimcy McGirt is a child molester who was convicted in Oklahoma State Court of three crimes. There is a federal law called the Major Crimes Act (MCA). This law requires that certain major crimes, including child sexual abuse, committed in Indian Country by tribal members be tried in federal court. McGirt's entire argument at the Supreme Court was that his crimes occurred within the boundaries of Creek Reservation. The Federal Court in the Eastern District of Oklahoma should have tried him, not the State of Oklahoma. Oklahoma argued that the Creek Reservation no longer existed and McGirt was properly tried in state court.

* Originally published with Oklahoma Indian Legal Services (OILS) in 2020.

** C. Steven Hager has been an attorney at Oklahoma Indian Legal Services since 1990. While at OILS, he has been the author of 24 editions of *The Indian Child Welfare Act: Case, Regulation and Analysis* (Oklahoma Indian Legal Services, August, 2020).

Hager received the 2015 Hargrave Writing Prize at the Oklahoma Supreme Court's annual Sovereignty Symposium. He won second place in this competition in 2013, 2014, 2018 and 2019. He is a contributing author to *Greenwood Encyclopedia of American Indian Issues Today* (ABC-CLIO Publishing, 2013), and the *Child Fatality Review* (George Washington Publishing, 2009), a treatise for social workers, attorneys, and doctors.

He is also the Chief Judge for the Kickapoo Nation in Kansas and serves on the Supreme Court for the Kaw Nation of Oklahoma. He is an adjunct professor at the University of Oklahoma College of Law, teaching in the Masters of Law and L.L.M. programs.

Hager is a member of the Board of Directors for the National American Indian Court Judge's Association (NAICJA) and the Kansas Tribal-State Judicial Committee. He graduated from the University of Oklahoma College of Law with a Juris Doctor degree in 1987. He received a Bachelor of Arts degree from Phillips University in 1981. He has always wanted to be a lumberjack.

While the question sounds narrow, the implications of the answer are broad. If the Creek Reservation is intact, it is not just about Indians being tried in federal rather than state courts. If the Creek Reservation is intact, the Tribe has civil, regulatory and criminal authority over a 13-county swath of Oklahoma, including part of Tulsa. If the Creek Reservation is intact, then are the Cherokee, Chickasaw, Seminole, and Choctaw Reservations also intact? What about the reservations of the Comanche Nation, or the Sac and Fox, or the Citizen's Potawatomi Nation? If the Creek Reservation is intact, does each and every tribe in Oklahoma have intact reservations as well? These are the underlying issues that were in the Court's consideration.

I. The Majority Opinion

Justice Gorsuch wrote for the majority. He began by reminding readers how, exactly, this question began, and how it would finish:

“On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever... Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.”¹

Gorsuch then frames the issue before the Court in the context of being not just between Mr. McGirt and Oklahoma, but also between the state and the Creek Nation:

“At another level, then, Mr. McGirt's case winds up as a contest between State and Tribe. The scope of their dispute is limited; nothing we might say today could unsettle Oklahoma's authority to try non-Indians for crimes against non-Indians on the lands in question. See *United States v. McBratney*, 104 U. S. 621, 624 (1882). Still, the stakes are not insignificant. If Mr. McGirt and the Tribe are right, the State has no right to prosecute Indians for crimes committed in a portion of Northeastern Oklahoma that includes most of the city of Tulsa. Responsibility to try these matters would fall instead to the federal government and Tribe. Recently, the question has taken on more salience too. While Oklahoma state courts have rejected any suggestion that the lands in question remain a reservation, the Tenth Circuit has

1. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 1, 591 U. S. ____ (2020).

reached the opposite conclusion. *Murphy v. Royal*, 875 F. 3d 896, 907-909, 966 (2017). We granted certiorari to settle the question. 589 U. S. ____ (2019).”²

Justice Gorsuch starts “with what should be obvious – Congress established a reservation for the Creeks.”³ He examines the history of the Creek Trail of Tears, the resultant grant of lands in what would become Oklahoma, and finally the scope of the subsequent betrayal of those promises:

“While there can be no question that Congress established a reservation for the Creek Nation, it’s equally clear that Congress has since broken more than a few of its promises to the Tribe. Not least, the land described in the parties’ treaties, once undivided and held by the Tribe, is now fractured into pieces. While these pieces were initially distributed to Tribe members, many were sold and now belong to persons unaffiliated with the Nation. So in what sense, if any, can we say that the Creek Reservation persists today? To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress.”⁴

Justice Gorsuch then looked to the prior case law determining reservation status. The laws begin with a basic tenet: that only Congress may disestablish a reservation. The Courts or the President cannot disestablish a reservation.⁵ Disestablishment has “never required any particular form of words.... But it does require that Congress 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. *Nebraska v. Parker*, 577 U. S. 481(2016).”⁶

The majority then looked at the evidence Oklahoma presented from the allotment era in favor of disestablishment, and found it lacking:

“Missing in all this, however, is a statute evincing anything like the “present and total surrender of all tribal interests” in the affected lands. Without doubt, in 1832 the Creek “cede[d]” their original homelands east of the Mississippi for a reservation promised in what is now Oklahoma. 1832 Treaty, Art. I, 7 Stat.

2. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 3, 591 U. S. ____ (2020).

3. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 4, 591 U. S. ____ (2020).

4. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at pages 6-7, 591 U. S. ____ (2020).

5. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 7, 591 U. S. ____ (2020).

6. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 8, 591 U. S. ____ (2020).

366. And in 1866, they “cede[d] and convey[ed]” a portion of that reservation to the United States. *Treaty With the Creek, Art. III, 14 Stat. 786*. But because there exists no equivalent law terminating what remained, the Creek Reservation survived allotment. In saying this we say nothing new. For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument. Remember, Congress has defined “Indian country” to include “all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent, and, including any rights-of-way running through the reservation.” 18 U. S. C. §1151(a). So the relevant statute expressly contemplates private land ownership within reservation boundaries. Nor under the statute’s terms does it matter whether these individual parcels have passed hands to non-Indians. To the contrary, this Court has explained repeatedly that Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others.”⁷

There is only one place to look for disestablishment information, according to the majority:

“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. *Lone Wolf v. Hitchcock*, 187 U. S. 553, 566-568 (1903). 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. *Solem v. Bartlett*, 465 U. S. 463, 470 (1984).”⁸

Similarly, Justice Gorsuch does not accept Oklahoma’s view that since non-Indians own land titles in the reservation, it should not be considered Indian Country.

“Missing in all this, however, is a statute evincing anything like the “present and total surrender of all tribal interests” in the

7. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at pages 9-10, 591 U. S. ____ (2020).

8. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 7, 591 U. S. ____ (2020).

affected lands... In saying this we say nothing new. For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument. Remember, Congress has defined “Indian country” to include “all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent, and, including any rights-of-way running through the reservation.” 18 U. S. C. §1151(a). So the relevant statute expressly contemplates private land ownership within reservation boundaries. Nor under the statute’s terms does it matter whether these individual parcels have passed hands to non-Indians. To the contrary, this Court has explained repeatedly that Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others...

It isn’t so hard to see why.”⁹

Justice Gorsuch demolishes Oklahoma’s argument that Congress “believed to a man” that, after allotment, reservations would be extinguished in the early 1900’s¹⁰ by dryly noting that “. . . just as wishes are not laws, future plans aren’t either.”¹¹ The opinion points out that ignoring the failure of Congress to include the noted specific language would ignore that Congress had included that very language when, for example, allotted reservations of the Ponca and Otoe Tribes were clearly disestablished.¹² The majority notes that Congress’ intrusion into promised tribal rights after allotment did not demonstrate disestablishment, but rather

9. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 10, 591 U. S. ____ (2020).

10. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 12, 591 U. S. ____ (2020).

11. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 12, 591 U. S. ____ (2020).

12. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 12, 591 U. S. ____ (2020).

As Justice Gorsuch notes: “Ignoring this distinction would run roughshod over many other statutes as well. In some cases, Congress chose not to wait for allotment to run its course before disestablishing a reservation. When it deemed that approach appropriate, Congress included additional language expressly ending reservation status. So, for example, in 1904, Congress allotted reservations belonging to the Ponca and Otoe Tribes, reservations also lying within modern-day Oklahoma, and then provided “further, That the reservation lines of the said . . . reservations . . . are hereby abolished.” Act of Apr. 21, 1904, §8, 33 Stat. 217-218 (emphasis deleted); see also *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U. S. 425, 439440, n. 22 (1975) (collecting other examples). **Tellingly, however, nothing like that can be found in the nearly contemporary 1901 Creek Allotment Agreement or the 1908 Act.** [Emphasis added] That doesn’t make these laws special. Rather, in using the language that they did, these allotment laws tracked others of the period, parceling out individual tracts, while saving the ultimate fate of the land’s reservation status for another day.”

the opposite. The Court states “And, in its own way, the congressional incursion on tribal legislative processes only served to prove the power: Congress would have had no need to subject tribal legislation to Presidential review if the Tribe lacked any authority to legislate. Grave though they were, these congressional intrusions on pre-existing treaty rights fell short of eliminating all tribal interests in the land.”¹³ The Court goes on to note that as time passed and further laws were adopted, Congress did not disestablish the Creek Reservation, but instead continued to modify and change tribal authority, first removing rights, but then, tellingly, granting them back as they moved away from assimilationist policies.¹⁴

Justice Gorsuch’s opinion then considers Oklahoma’s argument regarding historical practices and demographics.¹⁵ Oklahoma argued that *Solem v. Bartlett*, the primogenitive case regarding disestablishment, established three steps, each of which should be considered independently.¹⁶ This is not accepted as correct:

“This is mistaken. When interpreting Congress’s work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us. *New Prime Inc. v. Oliveira*, 586 U. S. ___, ___ (2019) (slip op., at 6). That is the only “step” proper for a court of law. To be sure, if during the course of our work an ambiguous statutory term or phrase emerges, we will sometimes consult contemporaneous usages, customs, and practices to the extent they shed light on the meaning of the language in question at the time of enactment. *Ibid.* But Oklahoma does not point to any ambiguous language in any of the relevant statutes that could plausibly be read as an Act of disestablishment. Nor may a court favor contemporaneous or later practices *instead of* the laws Congress passed. As *Solem* explained, “[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.” 465 U. S.,

13. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at pages 14-17, 591 U. S. ___ (2020).

14. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 17, 591 U. S. ___ (2020).

15. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 17, 591 U. S. ___ (2020).

16. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 18, 591 U. S. ___ (2020), citing *Solem v. Bartlett*, 465 U.S. 463 (1984).

at 470 (citing *United States v. Celestine*, 215 U. S. 278, 285 (1909)).¹⁷

The Court finds that while *Solem* may have discussed the possible use of demographics, it ultimately found them of little use.¹⁸ Justice Gorsuch also notes that these factors were clarified in *Parker v. Nebraska*, when the Court found that historical treatment of the land had “limited interpretive value.”¹⁹ The majority states that the standard to be used is clear and unambiguous:

“To avoid further confusion, we restate the point. There is no need to consult extratextual sources when the meaning of a statute’s terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help “clear up . . . not create” ambiguity about a statute’s original meaning. *Milner v. Department of Navy*, 562 U. S. 562, 574 (2011). And, as we have said time and again, once a reservation is established, it retains that status “until Congress explicitly indicates otherwise.” *Solem*, 465 U. S., at 470 (citing *Celestine*, 215 U. S., at 285); see also *Yankton Sioux*, 522 U. S., at 343 (“[O]nly Congress can alter the terms of an Indian treaty by

17. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 18, 591 U. S.(2020).

18. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 19, 591 U. S.(2020).

19. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 19, 591 U. S. ____ (2020), citing *Parker v. Nebraska*, 577 U.S. ____ (2016). Justice Gorsuch does not accept the dissent’s position that *Parker’s* language was limited:

“The dissent suggests *Parker* meant to say only that evidence of subsequent treatment had limited interpretative value “*in that case.*” *Post*, at 12. But the dissent includes just a snippet of the relevant passage. Read in full, there is little room to doubt *Parker* invoked a general rule:

“This subsequent demographic history cannot overcome our conclusion that Congress did not intend to diminish the reservation in 1882. And it is not our rule to ‘rewrite’ the 1882 Act in light of this subsequent demographic history. *DeCoteau*, 420 U. S., at 447. After all, evidence of the changing demographics of disputed land is ‘the least compelling’ evidence in our diminishment analysis, for ‘[e]very surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the “Indian character” of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation.’ *Yankton Sioux*, 522 U. S., at 356... Evidence of the subsequent treatment of the disputed land by Government officials likewise has ‘limited interpretive value.’ *Id.*, at 355.” 577 U. S., at ____ (slip op., at 11).”

McGirt at page 19, Footnote 8, 591 U. S. (2020).

diminishing a reservation, and its intent to do so must be clear and plain”) (citation and internal quotation marks omitted).²⁰

While the dissent argues that there are “compelling reasons” to consider the extratextual evidence, the majority does not find it so. In an accurate but cutting description, Justice Gorsuch leaves no doubt that this would merely be an excuse to deny the Creek Nation what the tribe clearly possesses: its Reservation.

“But Oklahoma and the dissent have cited no case in which this Court has found a reservation disestablished without first concluding that a statute required that result. Perhaps they wish this case to be the first. To follow Oklahoma and the dissent down that path, though, would only serve to allow States and courts to finish work Congress has left undone, usurp the legislative function in the process, and treat Native American claims of statutory right as less valuable than others. None of that can be reconciled with our normal interpretive rules, let alone our rule that disestablishment may not be lightly inferred and treaty rights are to be construed in favor, not against, tribal rights. *Solem*, 465 U. S., at 472.

To see the perils of substituting stories for statutes, we need look no further than the stories we are offered in the case before us. Put aside that the Tribe could tell more than a few stories of its own: Take just the evidence on which Oklahoma and the dissent wish to rest their case. First, they point to Oklahoma’s long historical prosecutorial practice of asserting jurisdiction over Indians in state court, even for serious crimes on the contested lands. If the Creek lands really were part of a reservation, the argument goes, all of these cases should have been tried in federal court pursuant to the MCA. Yet, until the Tenth Circuit’s *Murphy* decision a few years ago, no court embraced that possibility. See *Murphy*, 875 F. 3d 896. Second, they offer statements from various sources to show that “everyone” in the late 19th and early 20th century thought the reservation system—and the Creek Nation—would be disbanded soon. Third, they stress that non-Indians swiftly moved on to the reservation in the early part of the last century, that Tribe members today constitute a small fraction of those now residing on the land, and that the area now includes a “vibrant city with

20. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 20, 591 U. S. ____ (2020).

expanding aerospace, healthcare, technology, manufacturing, and transportation sectors.” [Brief for Petitioner in *Carpenter v. Murphy*, O. T. 2018, No. 17-1107, p. 15.] All this history, we are told, supplies “compelling” evidence about the lands in question.

Maybe so, but even taken on its own terms none of this evidence tells the story we are promised. Start with the State’s argument about its longstanding practice of asserting jurisdiction over Native Americans. Oklahoma proceeds on the implicit premise that its historical practices are unlikely to have defied the mandates of the federal MCA. That premise, though, appears more than a little shaky. In conjunction with the MCA, §1151(a) not only sends to federal court certain major crimes committed by Indians on reservations. Two doors down, in §1151(c), the statute does the same for major crimes committed by Indians on “Indian allotments, the Indian titles of which have not been extinguished.” Despite this direction, however, Oklahoma state courts erroneously entertained prosecutions for major crimes by Indians on Indian allotments for *decades*, until state courts finally disavowed the practice in 1989. See *State v. Klindt*, 782 P. 2d 401, 404 (Okla. Crim. App. 1989) (overruling *Ex parte Nowabbi*, 60 Okla. Crim. III, 61 P. 2d 1139 (1936)); see also *United States v. Sands*, 968 F. 2d 1058, 1062-1063 (CA10 1992). And if the State’s prosecution practices disregarded §1151(c) for so long, it’s unclear why we should take those same practices as a reliable guide to the meaning and application of §1151(a).

Things only get worse from there. Why did Oklahoma historically think it could try Native Americans for any crime committed on restricted allotments or anywhere else? Part of the explanation, Oklahoma tells us, is that it thought the eastern half of the State was always categorically exempt from the terms of the federal MCA. So whether a crime was committed on a restricted allotment, a reservation, or land that wasn’t Indian country at all, to Oklahoma it just didn’t matter. In the State’s view, when Congress adopted the Oklahoma Enabling Act that paved the way for its admission to the Union, it carved out a special exception to the MCA for the eastern half of the State where the Creek lands can be found. By Oklahoma’s own admission, then, for decades its historical practices in the area in question didn’t even *try* to conform to the MCA, all of which

makes the State's past prosecutions a meaningless guide for determining what counted as Indian country. As it turns out, too, Oklahoma's claim to a special exemption was itself mistaken, yet one more error in historical practice that even the dissent does not attempt to defend."²¹

The majority opinion eviscerates Oklahoma's position arguing that everyone was aware that the reservation had simply gone away. "Whatever else might be said about the history and demographics placed before us, they hardly tell a story of unalloyed respect for 22 tribal interests."²²

The majority of the Supreme Court found Oklahoma's carefully crafted history to be, strangely enough, the strongest evidence against the state's position. Justice Gorsuch writes eloquently with what can only be described as anger, frustration and disbelief at the theories Oklahoma and the dissenters suggest should control in this case:

In the end, only one message rings true. Even the carefully selected history Oklahoma and the dissent recite is not nearly as tidy as they suggest. It supplies us with little help in discerning the law's meaning and much potential for mischief. If anything, the persistent if unspoken message here seems to be that we should be taken by the "practical advantages" of ignoring the written law. How much easier it would be, after all, to let the State proceed as it has always assumed it might. But just imagine what it would mean to indulge that path. A State exercises jurisdiction over Native Americans with such persistence that the

21. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at pages 20-23, 591 U. S. ____ (2020).

22. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at pages 27, 591 U. S. ____ (2020). Footnote 14 of the opinion further explains the limited nature of Oklahoma's position: "The dissent asks us to examine a hodge-podge of other, but no more compelling, material. For example, the dissent points to later statutes that do no more than confirm there are former reservations in the State of Oklahoma. *Post*, at 30-31. It cites legislative history to show that Congress had the Creek Nation—or, at least, its neighbors—in mind when it added these in 1988. *Post*, at 31, n. 7. The dissent cites a Senate Report from 1989 and post-1980 statements made by representatives of other tribes. *Post*, at 30, 32-33. It highlights three occasions on which this Court referred to something like a "former Creek Nation," though it neglects to add that in each the Court was referring to the loss of the Nation's communal fee title, not its sovereignty. *Grayson v. Harris*, 267 U. S. 352, 357 (1925); *Woodward v. DeGraffenreid*, 238 U. S. 284, 289-290 (1915); *Washington v. Miller*, 235 U. S. 422, 423-425 (1914). The dissent points as well to a single instance in which the Creek Nation disclaimed reservation boundaries for purposes of litigation in a lower court, *post*, at 32, but ignores that the Creek Nation has repeatedly filed briefs in this Court to the contrary. This is thin gruel to set against treaty promises enshrined in statutes." *Footnote 14 at page 27*.

practice seems normal. Indian landowners lose their titles by fraud or otherwise in sufficient volume that no one remembers whose land it once was. All this continues for long enough that a reservation that was once beyond doubt becomes questionable, and then even farfetched. Sprinkle in a few predictions here, some contestable commentary there, and the job is done, a reservation is disestablished. None of these moves would be permitted in any other area of statutory interpretation, and there is no reason why they should be permitted here. ***That would be the rule of the strong, not the rule of law.*** [emphasis added]²³

The majority of justices similarly expressed disbelief at Oklahoma's argument of a "dependent Indian community." Here, Oklahoma argues that the Creek Nation never had a reservation; rather, because their land was initially held in fee simple, they possessed a "dependent Indian community."²⁴ Justice Gorsuch's opinion finds this unpersuasive in the extreme. He notes that even if the Court accepts "this bold feat of reclassification," it would mean little in the great scheme of things, since the definition of Indian land includes reservations, allotments, AND dependent Indian communities.²⁵ However, Oklahoma argued that *Solem* only applied to reservations and that a dependent Indian community could be disestablished by history and demographics.²⁶ The argument is that the Creek Nation only held a fee title when they came to the land in Oklahoma. Since a reservation must be "reserved from sale," the state argued, the initial status of Creek land must control.²⁷ The disingenuousness of this argument, made only by Oklahoma, did not likely win the state any points among the justices.²⁸ Justice Gorsuch, in a few pithy sentences, demonstrates the obvious weaknesses of the position :

"It's hard to see, too, how any difference between these two arrangements might work to the detriment of the Tribe. Just as we have never insisted on any particular form of words when it

23. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at pages 27-28, 591 U. S. ____ (2020).

24. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 28, 591 U. S. ____ (2020).

25. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at pages 28-29, 591 U. S. ____ (2020); citing 25 U.S.C. §1911 (a), (b), and (c).

26. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 29, 591 U. S. ____ (2020).

27. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 30, 591 U. S. ____ (2020).

28. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 30, 591 U. S. ____ (2020).

comes to disestablishing a reservation, we have never done so when it comes to establishing one.”²⁹

“By now, Oklahoma’s next move will seem familiar. Seeking to sow doubt around express treaty promises, it cites some stray language from a statute that does not control here, a piece of congressional testimony there, and the scattered opinions of agency officials everywhere in between.”³⁰

“But the most authoritative evidence of the Creek’s relationship to the land lies not in these scattered references; it lies in the treaties and statutes that promised the land to the Tribe in the first place. And, if not for the Tribe’s fee title to its land, no one would question that these treaties and statutes created a reservation. So the State’s argument inescapably boils down to the untenable suggestion that, when the federal government agreed to offer more protection for tribal lands, it really provided less. All this time, fee title was nothing more than another trap for the wary.”³¹

In the same fashion, Oklahoma’s arguments regarding the Oklahoma Enabling Act fell on, unfortunately for them, a Supreme Court Justice who was fully aware of the actual history of the Indian law. When Oklahoma argued that the state had jurisdiction over Creek land because, well, if Oklahoma didn’t, absolutely no one would have it, Justice Gorsuch noted that “... what the State considers unthinkable turns out to be easily imagined. Jurisdictional gaps are hardly foreign to this area of the law.”³²

Finally, the majority addresses the “potentially transformative” effects that a finding of a Creek Reservation would have.³³ Here the state simply argued essentially that if the Creek reservation was found intact, the skies would fall, dogs and cats would live together, and non-Indians would discover that they lived in Indian country. Oklahoma argued that if the Creek Reservation was valid, then other reservations would likely be valid

29. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 30, 591 U. S. ____ (2020).

30. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 31, 591 U. S. ____ (2020).

31. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 31, 591 U. S. ____ (2020).

32. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at pages 35-36, 591 U. S. ____ (2020).

33. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at pages 36-37, 591 U. S. ____ (2020). “In the end, Oklahoma abandons any pretense of law and speaks openly about the potentially “transform[ative]” effects of a loss today.”

as well. Ultimately, the state fears, half its land base and 1.8 million Oklahomans might be living in reservation lands.³⁴

“It is hard to know what to make of this self-defeating argument,” wrote Justice Gorsuch. He went on to write a balanced, nuanced response to the fearmongering:

“Each tribe’s treaties must be considered on their own terms, and the only question before us concerns the Creek. Of course, the Creek Reservation alone is hardly insignificant, taking in most of Tulsa and certain neighboring communities in Northeastern Oklahoma. But neither is it unheard of for significant non-Indian populations to live successfully in or near reservations today. See, e.g., Brief for National Congress of American Indians Fund as *Amicus Curiae* 26-28 (describing success of Tacoma, Washington, and Mount Pleasant, Michigan); see also *Parker*, 577 U. S., at ___ - ___ (slip op., at 10-12) (holding Pender, Nebraska, to be within Indian country despite tribe’s absence from the disputed territory for more than 120 years). Oklahoma replies that its situation is different because the affected population here is large and many of its residents will be surprised to find out they have been living in Indian country this whole time. But we imagine some members of the 1832 Creek Tribe would be just as surprised to find them there. What are the consequences the State and dissent worry might follow from an adverse ruling anyway? Primarily, they argue that recognizing the continued existence of the Creek Reservation could unsettle an untold number of convictions and frustrate the State’s ability to prosecute crimes in the future. But the MCA applies only to certain crimes committed in Indian country by Indian defendants. A neighboring statute provides that federal law applies to a broader range of crimes by or against Indians in Indian country. See 18 U. S. C. §1152. States are otherwise free to apply their criminal laws in cases of non-Indian victims and defendants, including within Indian country. See *McBratney*, 104 U. S., at 624. And Oklahoma tells us that somewhere between 10% and 15% of its citizens identify as Native American. Given all this, even Oklahoma admits that the vast majority of its prosecutions will be unaffected whatever we decide today. Still, Oklahoma and the dissent fear, “[t]housands”

34. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at pages 36-37, 591 U. S. ___ (2020).

of Native Americans like Mr. McGirt “wait in the wings” to challenge the jurisdictional basis of their state-court convictions. Brief for Respondent 3. But this number is admittedly speculative, because many defendants may choose to finish their state sentences rather than risk re prosecution in federal court where sentences can be graver. Other defendants who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on post-conviction review in criminal proceedings.

In any event, the magnitude of a legal wrong is no reason to perpetuate it.”³⁵

The majority properly notes that an alternate finding would also create a diametrically opposed risk. Should Oklahoma’s argument prevail, the result would simultaneously call into effect every federal conviction under the Major Crimes Act.³⁶ Similarly, Oklahoma arguing that reservations would have dramatic civil and regulatory impacts are “far from obvious” to the majority.³⁷ The dissent also notes that the consequences “will be drastic because they depart from... more than a century of settled understanding.”³⁸ The consequence, Justice Gorsuch notes, of arguing the future results is that they are often wrong:

“The prediction is a familiar one. Thirty years ago the Solicitor General warned that “[l]aw enforcement would be rendered very difficult” and there would be “grave uncertainty regarding the application” of state law if courts departed from decades of “long-held understanding” and recognized that the federal MCA applies to restricted allotments in Oklahoma. Brief for United States as *Amicus Curiae* in *Oklahoma v. Brooks*, O.T. 1988, No. 88-1147, pp. 2, 9, 18, 19. Yet, during the intervening decades none of these predictions panned out, and that fact stands as a note of caution against too readily crediting identical warnings today.

More importantly, dire warnings are just that, and not a license for us to disregard the law. By suggesting that our interpretation of Acts of Congress adopted a century ago should

35. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at pages 37-38, 591 U. S. ____ (2020).

36. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 39, 591 U. S. ____ (2020).

37. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 40, 591 U. S. ____ (2020).

38. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 40, 591 U. S. ____ (2020).

be inflected based on the costs of enforcing them today, the dissent tips its hand.”³⁹

Finally, Justice Gorsuch and majority suggest that maybe, just perhaps, the ruling today will not result in widespread chaos:

“In reaching our conclusion about what the law demands of us today, we do not pretend to foretell the future and we proceed well aware of the potential for cost and conflict around jurisdictional boundaries, especially ones that have gone unappreciated for so long. But it is unclear why pessimism should rule the day. With the passage of time, Oklahoma and its Tribes have proven they can work successfully together as partners. Already, the State has negotiated hundreds of intergovernmental agreements with tribes, including many with the Creek. See Okla. Stat., Tit. 74, §1221 (2019 Cum. Supp.); Oklahoma Secretary of State, Tribal Compacts and Agreements, www.sos.ok.gov/tribal.aspx. These agreements relate to taxation, law enforcement, vehicle registration, hunting and fishing, and countless other fine regulatory questions. See Brief for Tom Cole et al. as *Amici Curiae* 13-19. No one before us claims that the spirit of good faith, “comity and cooperative sovereignty” behind these agreements, *id.*, at 20, will be imperiled by an adverse decision for the State today any more than it might be by a favorable one.¹⁶ And, of course, should agreement prove elusive, Congress remains free to supplement its statutory directions about the lands in question at any time. It has no shortage of tools at its disposal.

The federal government promised the Creek a reservation in perpetuity. Over time, Congress has diminished that reservation. It has sometimes restricted and other times expanded the Tribe’s authority. But Congress has never withdrawn the promised reservation. As a result, 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. We reject that thinking. 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

39. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 40, 591 U. S. ____ (2020).

the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.”⁴⁰

With that, in forty-two pages, the majority of the Supreme Court makes it clear that the Creek Reservation has always existed, and that it will continue to exist, despite the protestations of Oklahoma. In a one-line unsigned opinion, the Supreme Court also affirmed the Tenth Circuit decision in *Sharp v. Murphy*, Case No. 17-1107, the progenitor case in the Creek Reservation fight.⁴¹ Two days later, the Court remanded four other decisions for the Oklahoma Court of Criminal Appeals to reconsider.⁴² All of these four cases involve Indian defendants who committed major crimes, *but none of them were within the Creek Reservation*. One is in Ottawa County, in the Miami, Oklahoma area;⁴³ one is in Seminole County, in the Seminole Reservation;⁴⁴ one was in Cleveland County, in the Citizen Potawatomi Reservation;⁴⁵ and one within the Choctaw Nation.⁴⁶ The Oklahoma Court of Criminal Appeal will have to consider the potential Reservations of these four tribes.

II. The Dissents

The dissent by Justice Roberts goes to full-on doom. The dissent expects that the other Five Civilized Tribes will no doubt soon recognize their reservations.⁴⁷ Terrible things will no doubt happen:

“Across this vast area, the State’s ability to prosecute serious crimes will be hobbled and decades of past convictions could well be thrown out. On top of that, the Court has profoundly destabilized the governance of eastern Oklahoma.”⁴⁸

40. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 40-42, 591 U. S. ____ (2020).

41. *Sharp v. Murphy*, Slip Opinion No. 17-1107 at page 1, 591 U.S. ____ (2020).

42. *Terry v. Oklahoma*, Slip Opinion No. 18-8801 at page 1, 591 U.S. ____ (2020); *Johnson v. Oklahoma*, Slip Opinion No. 18-6098 at page 1, 591 U.S. ____ (2020); *Bentley v. Oklahoma*, Slip Opinion No. 19-5417 at page 1, 591 U.S. ____ (2020); and *Davis v. Oklahoma*, Slip Opinion No. 19-6428 at page 1, 591 U.S. ____ (2020).

43. *Terry v. Oklahoma*, Slip Opinion No. 18-8801 at page 1, 591 U.S. ____ (2020).

44. *Johnson v. Oklahoma*, Slip Opinion No. 18-6098 at page 1, 591 U.S. ____ (2020).

45. *Bentley v. Oklahoma*, Slip Opinion No. 19-5417 at page 1, 591 U.S. ____ (2020).

46. *Davis v. Oklahoma*, Slip Opinion No. 19-6428 at page 1, 591 U.S. ____ (2020).

47. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at Dissent page 1, 591 U.S. ____ (2020).

48. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at Dissent page 1, 591 U.S. ____ (2020).

Justice Roberts believes that the Creek Nation was disestablished through a series of “well settled” statutes, none of which actually used phrases of disestablishment.⁴⁹ He believes that most tribal members were horribly mistreated by the tribes, and as a result, the benevolent Federal government had to take away tribal lands and distribute the property to each citizen.⁵⁰ In a footnote, he makes it clear that he believes there was, at one time, a Creek Reservation despite the opposite theories of Oklahoma.⁵¹ Finally, he believes that *Solem v. Bartlett* has the steps ignored by the majority, any one of which would prove that the Creek Reservation was disestablished.⁵²

The majority of the dissent is taken up with a recognition that no specific disestablishment language has ever been provided by Congress regarding the Five Civilized Tribes, but that crucial language is unnecessary.⁵³ Justice Roberts’ argument uses, literally, individual words plucked from statutes to demonstrate that NOT using words proved that they had been used.⁵⁴ The Dissent substitutes phraseology from a plethora of statutes either reducing Creek authority or adding to it to “prove” disestablishment.⁵⁵ To the dissenters, the lack of clear language is simply not important.

“These statutes evince a clear intent to leave the Creek Nation with no communally held land and no meaningful governing authority to exercise over the newly distributed parcels. Contrary to the Court’s portrayal, this is not a scenario in which Congress allowed a tribe to “continue to exercise governmental functions over land” that it “no longer own[ed] communally.”⁵⁶

49. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at Dissent page 2, 591 U.S. ____ (2020).

50. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at Dissent page 5, 591 U.S. ____ (2020).

51. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at Dissent page 4, Footnote 1, 591 U.S. ____ (2020).

52. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at Dissent page 7, 591 U.S. ____ (2020).

53. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at Dissent page 9-10, 591 U.S. ____ (2020). “This is a school of red herrings. No one here contends that any individual congressional action or piece of evidence, standing alone, disestablished the Creek reservation.”

54. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at Dissent page 15, 591 U.S. ____ (2020).

55. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at Dissent page 17, 591 U.S. ____ (2020).

56. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at Dissent page 20, 591 U.S. ____ (2020).

The fact that the Creek Nation did and continues to exercise “government functions” is not a factor in the dissent; indeed, the only factors the dissent considers are those brought by non-Indians. Justice Roberts argues that in the past century, the Tribes and their attorneys never raised the argument that a reservation existed, even citing *Sharp v. Murphy* to demonstrate this.⁵⁷ It is an interesting choice, since the Tenth Circuit in that case published a 110-page order finding that very thing, and the Court issued a one-page decision on this day upholding that Tenth Circuit decision.⁵⁸

The dissenters then rely upon the actions of Oklahoma to prove the reservation no longer existed.⁵⁹ The dissent consistently uses the language of non-Creeks to define the Creek reservation, by taking excerpts and phrases from persons and equating them as proof of disestablishment.⁶⁰ Finally, the dissent argues that the majority are causing problems for the state prosecutions of Oklahoma, which will no longer be valid. As the majority notes, it is concerning that the dissent would rather leave prosecutions alone even if the state had no authority to prosecute.⁶¹ Indeed, for several pages, the dissent makes a policy statement, rather than a legal argument. The dissent is concerned with “undermining state authority” and “conferring on tribal government power over numerous areas of life—including powers over non-Indian citizens and businesses.”⁶² With this, the dissenting justices admit that their primary concern was crafting a decision that maintained the status quo, rather than truly determining the proper legal response:

“The Court responds to these and other concerns with the truism that significant consequences are no “license for us to disregard the law.” *Ibid.* Of course not. But when those consequences are drastic precisely because they depart from how the law has been applied for more than a century—a settled understanding that our

57. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at Dissent page 29, 591 U. S. ____ (2020).

58. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at Dissent page 29, 591 U. S. (2020), citing *Sharp v. Murphy*, Case No. 17-1107 at page 1, 591 U.S. ____ (2020).

59. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at Dissent page 29-32, 591 U. S. ____ (2020). “Tulsa, for example, has exercised jurisdiction over both Indians and non-Indians for more than a century on the understanding that it is not a reservation.”

60. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at Dissent page 34, 591 U. S. ____ (2020).

61. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at page 40, 591 U. S. ____ (2020).

62. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at Dissent page 36, 591 U. S. ____ (2020).

precedents demand we consider—they are reason to think the Court may have taken a wrong turn in its analysis.”⁶³

Justice Thomas also wrote a dissent, for the express purpose to argue that the Supreme Court did not have jurisdiction over an Oklahoma Court of Criminal Appeals decision. No one joined his dissent.⁶⁴

III. The Impact in the Future: Issues to Be Determined

This a time of great confusion in Indian Country. Within one week of the decision, the Five Tribes and the Oklahoma Attorney General announced an agreement that would largely return the status quo to pre-*McGirt*. The proposal will need to pass through Congress, and no one can be certain what any agreement would look like after that is established. However, regardless of the final law, the window between issuance of the *McGirt* mandate and the agreement will create a period of uncertainty. Any law may also fall as an ex post facto law, which would mean that the law would only apply to future events, not prior. Those cases would have to work within the context of a tribal reservation as the law would currently consider it today.

In addition to the criminal cases that will have to be redistributed to proper forums, many other jurisdictional issues may have to be considered, ranging from taxes to marijuana laws. There have already been social media disinformation, ranging from mortgages are now invalid to no longer being required to pay taxes.

None of these things are true, of course. For most people in Oklahoma Reservations, change will come slowly if at all. There are many issues to be considered, but most will have to addressed over time. And that, of course, is the factor: time. It is likely that many issues will come about not through a thoughtful, organized approach, but by individual tribal members filing their own actions. Here are just a few of the potential issues that will have to be determined:

1. Taxes

Generally speaking, state and local taxes are not paid if a tribal member person has earned their money on a reservation; for example, if a tribal member works for their tribe and lives on the reservation, they do not have

63. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at Dissent page 37, 591 U. S. ____ (2020).

64. *McGirt v. Oklahoma*, Slip Opinion No. 18-9526 at Dissent page 1, 591 U. S. ____ (2020).

to pay state taxes (They may, however, have to pay taxes to the tribe).⁶⁵ Similarly, a tribal member does not have to pay state sales tax or local property taxes if the transaction is on their reservation. However, other Indians who live on a reservation other than their own do have to pay those taxes.⁶⁶

Since Oklahoma has functioned as if no reservations existed, taxes both state and local will have to be addressed. Some people may argue that the state must refund any previous taxes paid. These issues will have to be discussed in a rational, realistic manner to minimize the impact to the state's finances. Failing that, litigation may be necessary.

Generally, Tribes cannot tax non-Indians living on fee simple lands on a reservation.⁶⁷ Non-Indian and non-tribal people living on the Creek Reservation will continue paying taxes to Oklahoma. Tribes with businesses may also be required to collect sales taxes for services rendered to non-Indians or non-tribal Indians.⁶⁸ Taxes such as sales taxes are sometimes called "pass through" taxes, in that they go toward the ultimate consumer, not the vendor. Oklahoma will not be able to tax the Tribe but can demand the tribe collect taxes on nontribal members.⁶⁹ Oklahoma cannot collect sales taxes on tribal members living on their reservation.

2. *Environmental Requirements*

Tribal reservations may pass laws to establish rules and procedures for their lands, in conjunction with federal laws like the National Environmental Policy Act (NEPA) of 1969.⁷⁰ Federal agencies may recognize Oklahoma tribes as states' equal to authorize regulations such as clean water or pollution standards. Oklahoma Reservations will have the ability to work within the federal system and protect its lands – if allowed to do so.

In 2005, Sen. Jim Inhofe added a last-minute rider to a 286 billion transportation bill that blocked the Environmental Protection Agency from recognizing the sovereignty of Oklahoma tribes without first gaining the

65. *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973); *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993); *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995).

66. *Washington v. Confederated Tribe of Colville Indian Reservation*, 447 U.S. 134 (1980).

67. *Atkinson Trading Company v. Shirley*, 532 U.S. 645 (2001).

68. *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995).

69. *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995).

70. National Environmental Policy Act, 42 U.S., Chap. 55 §§ 4321 et al.

approval of the state.⁷¹ This prohibited the tribes from creating clean air or water regulations that would be stronger than the state.⁷² Neither the EPA, Oklahoma, the tribes or other lawmakers were informed before the rider was added. The reason given by the Senator's office was simply that "Oklahoma is unique."⁷³

With the return of recognized Reservations, the posture of Oklahoma tribes is perhaps a little less "unique." With a potential shift in government, Reservations may well begin regulatory authority.

3. Casinos

The Governor is currently battling a majority of tribes, the Oklahoma Legislature, and the Oklahoma Attorney General about his authority to replace prior gaming compacts with new ones of his negotiation. Casinos on Reservations are clearly permitted, likely on the same requirements as previously defined. However, the Oklahoma Governor has entered into at least one compact that would permit one tribe to place a casino onto land on

71. "Inhofe defends tribal environmental rider," indianz.com, August 18, 2005; https://www.indianz.com/News/2005/08/18/inhofe_defends.asp.

72. SEC. 10211. ENVIRONMENTAL PROGRAMS.

(a) OKLAHOMA. Notwithstanding any other provision of law, if the Administrator of the Environmental Protection Agency (referred to in this section as the "Administrator") determines that a regulatory program submitted by the State of Oklahoma for approval by the Administrator under a law administered by the Administrator meets applicable requirements of the law, and the Administrator approves the State to administer the State program under the law with respect to areas in the State that are not Indian country, on request of the State, the Administrator shall approve the State to administer the State program in the areas of the State that are in Indian country, without any further demonstration of authority by the State.

(b) TREATMENT AS STATE. Notwithstanding any other provision of law, the Administrator may treat an Indian tribe in the State of Oklahoma as a State under a law administered by the Administrator only if:

(1) the Indian tribe meets requirements under the law to be treated as a State; and

(2) the Indian tribe and the agency of the State of Oklahoma with federally delegated program authority enter into a cooperative agreement, subject to review and approval of the Administrator after notice and opportunity for public hearing, under which the Indian tribe and that State agency agree to treatment of the Indian tribe as a State and to jointly plan administer program requirements."

73. *Inhofe defends tribal environmental rider*, indianz.com, August 18, 2005; https://www.indianz.com/News/2005/08/18/inhofe_defends.asp.

another tribe's reservation.⁷⁴ With *McGirt*, this compact provision will be obviously void. The Governor would have no authority to put anything on Reservation Lands.

4. Tribal authority over non-Indian people living on the Reservation

Most people living on the Creek Reservation will not notice a difference in their lives. They will pay taxes to Oklahoma and go to the same stores and entertainment venues as before. At this time, there are few legal interactions that a non-Indian living on fee land in the Creek Reservation will likely have with the tribe.⁷⁵

This status may someday change. Congress could pass new laws granting broader civil or criminal authority to tribes over non-Indians. There are also situations in which a non-Indian may fall within the two exceptions located in *Montana v. United States*.⁷⁶ These exceptions are (1) when non-Indians have entered into a consensual relationship with the tribe or its members, through commercial dealings, contracts, leases or other arrangements, and (2) when the activity of a non-Indian "threatens or has some direct effect on the political integrity, economic security or the health and welfare of the tribe."⁷⁷ While current legal authority does not favor these exceptions, they remain in the law. Certain actions that are now legal in Oklahoma, such as medicinal marijuana or concealed carry, could fall within a "direct effect on the political integrity, economic security or the health and welfare of the tribe."⁷⁸ It is also safe to say that based upon *McGirt/Murphy*, the current Supreme Court might be more inclined to consider *Montana's* reasoning. Non-Indians on an Oklahoma reservation could find themselves in violation of these exceptions.

74. "According to the Comanche Nation's compact, existing facilities in Lawton, Devol, Walters and Richards Spur will pay exclusivity fees to the state of 4.5 percent until the Approval Trigger kicks up the amount to 6 percent upon the BIA's approval for proposed gaming facilities in Love, Cleveland and Grady counties." *Comanche Nation, Gov. Stitt sign new gaming compact*, Lawton Constitution, April 22, 2020. <https://www.swoknews.com/news/comanche-nation-gov-stitt-sign-new-gaming-compact/article4388dfec-5a77-59e0-85fc-859f22d46d8a.html>.

75. *Plains Commerce Bank v. Long Family Land and Cattle Company*, 554 U.S. 356 (2008); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Atkinson Trading Company v. Shirley*, 532 U.S. 645 (2001); *Nevada v. Hicks*, 533 U.S. 353 (2001).

76. *Montana v. United States*, 450 U.S. 544 (1981).

77. *Montana v. United States*, 450 U.S. 544 at 565 (1981).

78. *Montana v. United States*, 450 U.S. 544 at 565 (1981).

5. *Government to Government Relationships*

Oklahoma has generally had a good relationship with its tribes, but that relationship was based on a superior position. As tribes and Oklahoma began to explore this new paradigm, government to government agreements or compacts will need to address their shared concerns. Cities located within reservations will need to consider – or reconsider – their tribal relationships, especially for tribal businesses. For example, the Citizen Potawatomi have several restaurants, a gun range, a grocery store, and entertainment venues within their reservation boundaries in Shawnee. The Tribe and the city will need to consider their relationships regarding city and state taxes, local ordinances, and similar shared concerns.

6. *Indian Child Welfare Act*

ICWA cases will absolutely have to be reconsidered. Under section 1911 (a), the state has no authority over *any* Indian child living on the reservation:

(a) *Exclusive Jurisdiction*

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

25 CFR § 23.2:

Domicile means:

(1) For a parent or Indian custodian, the place at which a person has been physically present, and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere.

(2) For an Indian child, the domicile of the Indian child's parents or Indian custodian or guardian. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's custodial parent.

parents or custodians, *domicile* is the place a person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere. The child's *domicile* is the domicile of the parents or Indian custodian or guardian. If the parents are unmarried, the child's domicile is the domicile of his or her custodial parent.⁸²

This impact cannot be understated. Indian children constitute large segments of Oklahoma deprived actions. If only half of docketed ICWA cases fall under Five Civilized Tribes reservation land, the resources now required for the tribes is now enormous and ongoing. Tribal Courts will have to be available to address the dockets that swamp state courts. Tribal ICW departments will need to be available for large swaths of population that they have never addressed before. The financial burden to tribes could well be devastating. When one considers the current lack of resources tribes place in courts and children, the sudden influx of cases no longer in state systems will be enormous.

Once a child is a ward of a tribal court, the Court retains jurisdiction even if the child is placed off-reservation.⁸³ The Creek Nation could place a child in Oklahoma City but would still keep jurisdiction.

There is another minor issues in 1911 (a). Tribal jurisdiction is not exclusive in juvenile cases in states that fall under PL-280. While Oklahoma is not such a state, a provision of the Act of August 4, 1947 gives Oklahoma district courts exclusive jurisdiction in guardianship cases on reservation lands.⁸⁴ That law requires guardianships to be in the "State Courts:"

SEC. 3. (a) The State courts of Oklahoma shall have exclusive jurisdiction of all guardianship matters affecting Indians of the Five Civilized Tribes, of all proceedings to administer estates or to probate the wills of deceased Indians of Five Civilized Tribes, and of all actions to determine heirs arising under section 1 of the Act of June 14, 1918 (40 Stat. 606).

Under this requirement, states would maintain jurisdiction over guardianships of Indian children of the Five Civilized Tribes. This would

N.W.2d 88 (S.D. 2001), The Court found that the mother's domicile had been established off reservation, so that her return to the reservation could not grant the tribe exclusive jurisdiction under 25 U.S.C. § 1911 (a).

81. 25 CFR § 23.2.

82. 25 CFR § 23.2.

83. 25 U.S.C. §1911 (a).

84. See P.L. 53-280.

appear to be the only 1911 (a) limitation in the reservation lands in Eastern Oklahoma. Even this may not be as clear as it appears. In 1947, Oklahoma's judiciary was divided into State and County Courts. State Courts became District Courts. County Courts were eliminated. County courts were elected offices requiring no particular legal knowledge; they were also notorious for improper and frankly criminal actions stealing land from members of the Five Civilized Tribes. The Act of August 4, 1947 was meant to eliminate county court jurisdiction over tribal members and their land and thus create a more trustworthy court system. Since 1911 (a) had always been limited to trust and restricted land in Oklahoma jurisprudence, there have been no opportunities to test whether the 1947 provision is meant to control ICWA and tribal court jurisdiction until now.

The Five Civilized Tribes may choose to object to the language in the Act of August 4, 1947 and seek be retrocession to the tribe under 25 U.S.C. § 1918:

25 U.S.C. § 1918: Reassumption of Jurisdiction over Child Custody Proceedings

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) *the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and*

(iv) *the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.*

(2) *In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.*

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

While this paper has discussed the Creek reservation, 34 other tribes in Oklahoma may find themselves in Federal Court arguing that their reservations similarly remain intact. The tribes may not be able to control when and how this happens as individual parties in ICWA cases seek to review 1911 (a) jurisdiction, as permitted under 25 U.S.C. § 1914. In addition to the criminal cases that will have to be redistributed to proper forums, ICWA cases may be the *schwerpunkt* of the next phase of tribal sovereignty's battles.