Georgia State University Law Review

Volume 37
Issue 3 *Spring 2021*

Article 4

8-1-2021

Has Federal Indian Law Finally Arrived at "The Far End of the Trail of Tears"?

Ann Tweedy
University of South Dakota School of Law, ann.tweedy@usd.edu

HAS FEDERAL INDIAN LAW FINALLY ARRIVED AT "THE FAR END OF THE TRAIL OF TEARS"?[†]

Ann E. Tweedy[*]

ABSTRACT

This Article examines the United States Supreme Court's July 9, 2020 decision in McGirt v. Oklahoma, *which held that the historic boundaries of the Creek reservation remain intact, and argues that the decision may signal a sea change in the course of federal Indian law of the magnitude of* Obergefell v. Hodges *in the LGBT rights arena. The Article shows how the opinion lays a very strong foundation for a much-needed return to traditional federal Indian law principles, respectful treatment of tribal governments as a third sovereign in the American system, and an understanding of fairness from the perspective of tribes and Native individuals. The possible effects of Justice Barrett's replacement of Justice Ginsburg on the Court's future federal Indian law jurisprudence are also explored. The Article concludes with the hope that Justice Gorsuch's majority opinion will foster predictability in the wildly unstable area of diminishment and disestablishment jurisprudence, as well as in other facets of federal Indian law.*

[†] McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020).

[*] Associate Professor, University of South Dakota School of Law; M.F.A., Hamline University; J.D., University of California, Berkeley School of Law; A.B., Bryn Mawr College. Thank you to Professors Jasmine Gonzales Rose, Steven Macias, Frank Pommersheim, Eric Eberhard, and Bethany Berger for reviewing drafts of this Article and for their extremely helpful comments. Thank you also to my Research Assistants, Josey Johnson and Raegan Chavez, for their invaluable assistance, and to the editors of the *Georgia State University Law Review* for their careful attention to this Article.

CONTENTS

INTRODUCTION

The Supreme Court issued its opinion in *McGirt v. Oklahoma* on July 9, 2020,[1] ruling in a 5–4 decision authored by Justice Gorsuch that the three million-acre Creek reservation in Eastern Oklahoma had not been disestablished and thus that its historical boundaries remained intact.[2] Although the case itself resulted from an application for post-conviction relief brought by an individual who had been convicted of child sexual abuse, the reason that it was so closely watched was because Mr. McGirt's argument about Oklahoma's lack of jurisdiction over him depended on the continuing reservation status of the Creek Nation's historical reservation.[3]

The Indian law bar had nervously anticipated the long-awaited decision.[4] In a highly unusual turn of events, a predecessor case, *Sharp v. Murphy*, from which Justice Gorsuch recused himself, was argued in November 2018.[5] After additional briefing was ordered, the case was held over for reargument in the following term.[6] The order for additional briefing and the subsequent holding over of the case spurred speculation that the Justices were split 4–4 in *Sharp*.[7] The Court

1. 140 S. Ct. at 2452.

2. *See, e.g.*, WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 153–54 (7th ed. 2020). When Congress has disestablished a reservation, it is no longer legally considered a reservation, and the special jurisdictional rules that apply on reservations no longer obtain. *Id.* Similarly, when Congress has diminished a reservation, the boundaries have been shrunk; in other words, the reservation status of part of the lands has been extinguished. *Id.*

3. *McGirt*, 140 S. Ct. at 2459–60 (noting that the Creek Nation appeared as amicus curiae "because Mr. McGirt's personal interests [wound] up implicating the Tribe's"); *see also* Matthew L.M. Fletcher, *The Creek Reservation Cases and the Great Conflict of Modern Day Federal Indian Law*, A.B.A., https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/professional-development/the-creek-reservation-cases-and-great-conflict-modern-day-federal-indian-law/ [https://perma.cc/N3TP-43LG].

4. *See, e.g.*, Acee Agoyo, *Still No Sign of Supreme Court Arguments in Closely-Watched Indian Country Case*, INDIANZ.COM (Nov. 11, 2019), https://www.indianz.com/News/2019/11/11/still-no-sign-of-supreme-court-arguments.asp [https://perma.cc/VVR2-Y4RV].

5. 140 S. Ct. 2412 (2020) (per curiam); *see also* Agoyo, *supra* note 4.

6. Christopher Coble, Carpenter v. Murphy*: The Case the Justices Couldn't Decide*, FINDLAW: U.S. SUP. CT. NEWS BLOG (July 9, 2019, 3:04 PM), https://blogs.findlaw.com/supreme_court/2019/07/carpenter-v-murphy-the-case-the-justices-couldnt-decide.html [https://perma.cc/D25T-P6LD]. The case was finally decided after *McGirt*. *See generally Sharp*, 140 S. Ct. 2412.

7. *See, e.g.*, Matthew L.M. Fletcher, *Textualism's Gaze*, 25 MICH. J. RACE & L. 111, 113 (2020); Coble, *supra* note 6.

originally scheduled the argument in *McGirt* (whose issues mirrored those in *Sharp*) for April 2020 but then postponed it until May because of the coronavirus pandemic.[8] Additionally, the Justices' questions and comments during the oral arguments in both cases did not provide a clear indication of which way the Court was leaning, although some saw the argument questions in *Sharp* as being more favorable to Oklahoma.[9]

Would the Supreme Court's doctrine in the area of diminishment and disestablishment become more incoherent because of a new results-oriented decision, or would the Court hew to the bright line it had recently re-inscribed in *Nebraska v. Parker*,[10] despite the fact that that the historic Creek Reservation was much more populous—and thus home to many more non-Indians in terms of hard numbers—than the historic Omaha Reservation whose boundaries were held to be intact in *Parker*? Until well into July 2020, past June 30th (the date at which the Court normally issues its last decisions for the term and then breaks for recess),[11] it was anyone's guess.

In the popular understanding, the *McGirt* opinion is viewed as remarkable for its practical effect—over three million acres in Oklahoma are now understood to be an Indian reservation, despite the fact that many people assumed the reservation to be defunct and merely a relic of history.[12] But, from the viewpoint of a federal Indian

8. *See* Press Release, Sup. Ct. of the U.S. (Apr. 13, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-13-20 [https://perma.cc/Y4LQ-E8KV].

9. *See generally* Transcript of Oral Argument, *Sharp*, 140 S. Ct. 2412 (No. 17-1107); Ronald Mann, *Argument Analysis: For the Second Time in Two Terms, Justices Consider Reservation Status of Eastern Oklahoma*, SCOTUS BLOG (May 12, 2020, 4:24 PM), https://www.scotusblog.com/2020/05/argument-analysis-for-the-second-time-in-two-terms-justices-consider-reservation-status-of-eastern-oklahoma/ [https://perma.cc/PSR3-2RC7]; Ronald Mann, *Argument Analysis: Justices Dubious About Ramifications of Broad Indian Reservation in Oklahoma*, SCOTUS BLOG (Nov. 27, 2018, 6:24 PM), https://www.scotusblog.com/2018/11/argument-analysis-justices-dubious-about-ramifications-of-broad-indian-reservation-in-oklahoma/ [https://perma.cc/W6UT-C4ET].

10. 136 S. Ct. 1072 (2016).

11. *See, e.g.*, *FAQs: Announcements of Orders and Opinions*, SCOTUS BLOG, https://www.scotusblog.com/faqs-announcements-of-orders-and-opinions/ [https://perma.cc/SL67-LGTT].

12. *See, e.g.*, Richard Wolf & Kevin Johnson, *Supreme Court Says Eastern Oklahoma Remains Native American Territory*, USA TODAY: POLITICS, https://www.usatoday.com/story/news/politics/2020/07/09/

law scholar, the opinion is remarkable for its straightforwardness and dearth of post hoc rationales.[13] In other words, the *McGirt* decision is unusual in contemporary federal Indian law because it is a Supreme Court decision that hews closely to both traditional federal Indian law principles and general statutory interpretation principles, eschewing the approach that many Supreme Court cases have taken from the Rehnquist Court onwards of trying to shut down the exercise of tribal sovereignty wherever possible, no matter how flimsy or novel the proffered justification for doing so.[14] The *McGirt* decision is also noteworthy for its respectful tone vis-à-vis tribes and tribal sovereignty.

Although the recent addition of Justice Barrett to the Court following Justice Ginsburg's death creates a great deal of uncertainty, the opinion may signal a return to the relatively predictable and well-reasoned federal Indian law jurisprudence that we more commonly saw in Supreme Court cases from the late 1950s to the mid-1970s, as well as in some cases decided in the 1980s.[15] In terms

---

supreme-court-allows-native-american-jurisdiction-half-oklahoma/3208778001/ [https://perma.cc/7BHR-QRVT] (July 9, 2020, 1:57 PM); *see also* Robert J. Miller & Torey Dolan, *The Indian Law Bombshell:* McGirt v. Oklahoma, 101 B.U. L. REV. (forthcoming 2021) (manuscript at 31) (on file with the Georgia State University Law Review) ("Oklahoma and Oklahomans had assumed and operated for over 100 years as if there was no Creek Reservation.").

13. *Accord* Dean B. Suagee, *The Supreme Court's "Whack-a-Mole" Game Theory in Federal Indian Law, a Theory That Has No Place in the Realm of Environmental Law*, 7 GREAT PLAINS NAT. RES. J. 90, 96–97 (2002); *see also* Joy Harjo, *After a Trail of Tears, Justice for 'Indian Country,'* N.Y. TIMES (July 14, 2020), https://www.nytimes.com/2020/07/14/opinion/mcgirt-oklahoma-muscogee-creek-nation.html [https://perma.cc/2KNB-JU4N].

14. *See, e.g.*, Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and* United States v. Lara*: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651, 677–83 (2009) [hereinafter Tweedy, *Connecting the Dots*]; Ann E. Tweedy, *Indian Tribes and Gun Regulation: Should Tribes Exercise Their Sovereign Rights to Enact Gun Bans or Stand-Your-Ground Laws?*, 78 ALB. L. REV. 885, 897 (2015) [hereinafter Tweedy, *Indian Tribes*]; Leah Jurss, *Halting the "Slide down the Sovereignty Slope": Creative Remedies for Tribes Extending Civil Infraction Systems over Non-Indians*, 16 RUTGERS RACE & L. REV. 39, 49–54 (2015). Although the Supreme Court has had a decidedly mixed record in its dealings with tribes over time (with its level of openness to tribal rights having been subject to vast shifts that often correlate with the congressional policy of the day), the period beginning during Chief Justice Rehnquist's tenure and continuing in some measure into the present has been characterized by hostility to tribal rights that contravenes—and even may constitute an attempt to undo—congressional policy. *See, e.g.*, ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW: CASES & COMMENTARY 77–78, 153–54 (4th ed. 2020).

15. *See generally* Williams v. Lee, 358 U.S. 217 (1959); McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164 (1973); Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968); New Mexico v.

of tone, the decision is unusual in that it takes into account fairness concerns from the Creek Nation's perspective,[16] and it enforces as a solemn obligation Congress's historical promises to the Nation. Thus, rather than playing the all-too-common role of "court as the conqueror,"[17] the Court's decision attempts to do justice by applying the relevant legal principles in a straightforward manner, properly recognizing that Congress—and not the Court—has plenary power in the area of Indian affairs.[18] In taking this approach, the Court overtly rejects the oft-recited notion that widespread past injustices inflicted on a tribe and then relied upon by non-Natives make it impossible to rule in favor of a tribe in a contemporary case.[19] The *McGirt* majority instead proclaims, forthrightly and powerfully, that "[u]nlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law."[20]

In the context of the Supreme Court's federal Indian law jurisprudence, which had become so unstable and so frequently hostile to tribal rights in recent years that attorneys who represent tribes very

Mescalero Apache Tribe, 462 U.S. 324 (1983); Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989); Bethany R. Berger, *Hope for Indian Tribes in the U.S. Supreme Court?:* Menominee, Nebraska v. Parker, Bryant, Dollar General . . . *and Beyond*, 2017 U. ILL. L. REV. 1901, 1901 (2017) (describing Court decisions in federal Indian law authored by the previous generation of progressive Justices).

16. Tweedy, *Connecting the Dots*, *supra* note 14, at 683 (noting that the Court often "appears unwilling to give tribal interests genuine weight or to make the effort necessary to grasp the genuine import of tribal interests"); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Sovereignty over Nonmembers*, 109 YALE L.J. 1, 26 (1999) (noting the one-sidedness of the Court's perception of fairness in diminishment and disestablishment cases generally); *accord* Fletcher, *supra* note 7, at 114 ("Justice Gorsuch appears to be the rare judge who takes seriously the views of Indian tribes in interpreting Indian law.").

17. Frickey, *supra* note 16, at 73.

18. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978) ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent." (first citing Antoine v. Washington, 420 U.S. 194, 199–200 (1975); and then citing Choate v. Trapp, 244 U.S. 665, 675 (1912))).

19. *Accord* Bethany R. Berger, McGirt v. Oklahoma *and the Past, Present, and Future of Reservation Boundaries*, 169 U. PA. L. REV. ONLINE (forthcoming 2021) (manuscript at 29–32), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3694051 (describing the frequency with which states violated federal law by asserting authority over reservations during and after the allotment period and noting that "*McGirt* finally ended the practice of relying on historical exercises of state jurisdiction as evidence of reservation diminishment"); *see also* Ann E. Tweedy, *Unjustifiable Expectations: Laying to Rest the Ghosts of Allotment-Era Settlers*, 36 SEATTLE U. L. REV. 129, 155 & n.134 (2012).

20. McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020).

often would "try to avoid the Supreme Court at all costs,"[21] the decision, including both its tone and substance, feels like a sea change equal to the magnitude of *Obergefell v. Hodges* and the historic sex discrimination case *Reed v. Reed*.[22] By way of background, the *Obergefell* Court's decision in 2015 that the Equal Protection and Due Process Clauses of the Fourteenth Amendment protect an individual's right to enter into a same-sex marriage (as well as a different-sex one) emphatically affirmed that LGBT individuals were deserving of the same legal benefits and protections as others and thereby broke with over a century of precedent disparaging LGBT persons, criminalizing their sexual conduct, and denying them the rights that others enjoyed.[23] And the Supreme Court's dramatic disavowal in its 1971 decision in *Reed* of the patriarchal notion that the law could, consistent with the Equal Protection Clause, automatically prefer men over women for important roles like the administration of estates destabilized centuries of enshrinement of male privilege in the American legal tradition, including the vestiges of the long-held conception of women as property, and caused our entire legal framework to shift a bit toward equality of the sexes.[24]

Similarly, the *McGirt* decision is a powerful affirmation of rights too often ignored and disparaged in the Supreme Court and elsewhere in our culture.[25] On one level, it is about upholding and enforcing a treaty promise.[26] But, by recognizing that the promises the government made in exchange for its heart-wrenching demands were meaningful, the Court also implicitly acknowledges that the Creek Nation's sacrifices—including their brutal, forced relocation to present-day Oklahoma, an area far from their traditional territory in the

21. *See, e.g.*, Alex Tallchief Skibine, *Teaching Indian Law in an Anti-Tribal Era*, 82 N.D. L. REV. 777, 777 (2006).

22. Obergefell v. Hodges, 135 S. Ct. 2584, 2584 (2015) (recognizing the constitutional right to same-sex marriage under the Due Process and Equal Protection Clauses of the Fourteenth Amendment); Reed v. Reed, 404 U.S. 71, 71 (1971) (holding that state laws may not use a party's gender as a basis to discriminate among candidates for administration of a decedent's estate).

23. *See generally* Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993).

24. *Reed*, 404 U.S. at 71.

25. *McGirt*, 140 S. Ct. at 2452.

26. *Id.* at 2459.

southeastern United States—were meaningful as well.[27] Thus, as poet laureate Joy Harjo commented, the *McGirt* decision is actually "about so much more" than the enforcement of a single treaty promise.[28] "It [is] about validity, personhood, humanity—the assertion of our human rights as Indigenous peoples and our right to exist."[29] In other words, the decision represents an all too rare instance when a tribe was heard in the Supreme Court and was treated with dignity and respect rather than being disparaged or recoiled from in fear.[30]

I. THE CONFOUNDING JURISPRUDENCE OF RESERVATION DIMINISHMENT AND DISESTABLISHMENT AS A CONTRAST TO THE MAJORITY'S SOUND AND INTERNALLY CONSISTENT REASONING IN *MCGIRT*

A. The Confounding Jurisprudence of Reservation Diminishment and Disestablishment

The Supreme Court's diminishment and disestablishment jurisprudence has been inconsistent at best, with one highly respected scholar suggesting that the Court's "judicial method" in these cases

27. *Id.*

28. Harjo, *supra* note 13.

29. *Id.*

30. *See, e.g.*, Fletcher, *supra* note 7, at 133 ("Throughout the Indian law canon, Indian people are referred to as 'incompetents,' 'wards,' unlettered, people without laws, uncivilized heathens, and so on. Regardless of the language used, the Court's Indian affairs jurisprudence depends on the presumed inferiority of Indian people." (first quoting Drummond v. United States, 324 U.S. 316, 318 (1945); then quoting Rice v. Rehner, 463 U.S. 713, 724 (1983); then citing United States v. Winans, 198 U.S. 371, 380–81 (1908); and then citing Oregon v. Hitchcock, 202 U.S. 60, 62 (1906))). The December 2015 oral argument in *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (per curiam), represents an example of the Court recoiling in fear from the prospect of tribal jurisdiction over a non-member business. *See, e.g.*, Berger, *supra* note 15, at 1937–38 (describing the oral argument and noting that the argument devolved into "a blood bath" when the Mississippi Band of Choctaw Indians' attorney stepped up to the podium). Although the "blood bath" scene that Berger describes seems to be more rooted in anger than fear, anger is actually predicated on other emotions that are connected to vulnerability—one of the most common of which is fear. *See, e.g.*, Paul Thagard, *How Fear Leads to Anger: Emotions Cause Other Emotions, As When People's Fears Cause Them to Be Angry.*, PSYCH. TODAY: HOT THOUGHT (Nov. 9, 2018), https://www.psychologytoday.com/us/blog/hot-thought/201811/how-fear-leads-anger [https://perma.cc/DA3S-T2G8]; Leon F. Seltzer, *What Your Anger May Be Hiding: Reflections on the Most Seductive—and Addictive—of Human Emotions.*, PSYCH. TODAY: EVOLUTION OF THE SELF (July 11, 2008), https://www.psychologytoday.com/us/blog/evolution-the-self/200807/what-your-anger-may-be-hiding [https://perma.cc/N6XR-KTH9].

has the appearance of being "essentially lawless."[31] This inconsistency may be due, in part, to the view of some Justices, at least historically, that adhering to precedent was less critical—or even optional—in the field of federal Indian law. For example, the late Justice Scalia once wrote approvingly in an internal memorandum:

> [O]ur opinions in th[e] field [of 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, down to the present day.[32]

For Justice Scalia, this realization served as the basis to depart from his planned course of joining Justices Brennan and Marshall in their dissent in *Duro v. Reina*,[33] in which they argued that the Court should have supported the Salt River Pima Maricopa Tribe's interest in maintaining law and order on its reservation; Justice Scalia's realization therefore justified his decision to instead join the majority opinion in that case and also appeared to influence his decisions in subsequent federal Indian law cases.[34] Justice Scalia later casually acknowledged his free-wheeling approach to federal Indian law at a book signing, where he told a young Native woman who mentioned that her family had had a federal Indian law case go up to the Supreme Court when she was in elementary school: "You know, when it comes to Indian law, most of the time we're just making it up."[35]

---

31. Frickey, *supra* note 16, at 24; *see also* Fletcher, *supra* note 7, at 121 ("[T]he outcomes of reservation boundaries disputes are unpredictable if not completely random."); Fletcher, *supra* note 3; Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 30 (1995) (describing the Court's then-current approach to diminishment and disestablishment cases as "essentially ad hoc").

32. Tweedy, *Connecting the Dots*, *supra* note 14, at 698 n.238 (citing Frickey, *supra* note 16, at 63).

33. 495 U.S. 676 (1990) (Brennan & Marshall, JJ., dissenting).

34. *See* Frickey, *supra* note 16, at 62–63; *see also* Tweedy, *Connecting the Dots*, *supra* note 14, at 686 n.168 (collecting sources that connect the Court's decisions in *Duro* and other cases that divested tribes of jurisdiction to problems of lawlessness on reservations).

35. *April Youpee-Roll: Supreme Court Makes Up Indian Law Decisions*, INDIANZ.COM (Feb. 18, 2016), https://www.indianz.com/News/2016/02/18/april-youpeeroll-supreme-court.asp [https://perma.cc/6PHJ-ERJF].

Justice Scalia's untethered approach to cases involving tribes contrasted with his much more constrained originalist and textualist approach in other areas of the law.[36] And his Indian law approach was all the more surprising because, outside of the context of federal Indian law, he frequently chastised other Justices for applying what he perceived as their own values to resolve cases rather than focusing solely on the Framers' intent as to constitutional issues or legislative intent, as discerned from statutory language, in statutory cases.[37]

Thus, we have one prominent (and purportedly anti-activist) former Justice openly espousing the view that precedent has less force in federal Indian law and that he and other Justices were free to disregard it whenever they believed doing so was warranted. Whether or not other Supreme Court Justices would have (or currently do) explicitly subscribe to this view, the body of diminishment and disestablishment cases suggests that some do so and that some previous Justices have done so, at least in practice.

To briefly summarize the background for the question at issue in *McGirt*, diminishment and disestablishment cases examine whether a reservation has been partially or fully extinguished because of a congressional decision to sell off some reservation lands to homesteaders during a period of history when the government's policy was to forcibly assimilate tribal citizens into mainstream American culture by violating tribal rights and abolishing tribal communal property ownership.[38] Diminishment and disestablishment questions normally turn on whether a statute allowing for the allotment of a

36. John F. Manning, *Justice Scalia & the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 747–50 (2017); *cf.* Craig S. Lerner, *Justice Scalia's Eighth Amendment Jurisprudence: The Failure of Sake-of-Argument Originalism*, 42 HARV. J.L. & PUB. POL'Y 91, 96–97 (2019) (noting that Justice Scalia's approach to the Eighth Amendment was not purely originalist because he did at times defer to non-originalist precedent). Even more strikingly, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), Justice Scalia embraced a non-originalist view of the Second Amendment (while maintaining that it was rooted in originalism). Reva B. Siegel, *Dead or Alive: Originalism As Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 238–40, 240 n.250 (2008).

37. *See, e.g.*, Amy L. Padden, *Overruling Decisions in the Supreme Court: The Role of a Decision's Vote, Age, and Subject Matter in the Application of Stare Decisis After* Payne v. Tennessee, 82 GEO. L.J. 1689, 1705 n.134 (1994); Fletcher, *supra* note 7, at 117. *See generally* J. Lyn Entrikin, *Disrespectful Dissent: Justice Scalia's Regrettable Legacy of Incivility*, 18 J. APP. PRAC. & PROCESS 201 (2017).

38. *See, e.g.*, Tweedy, *supra* note 19, at 130, 136.

specific reservation and the sale of "surplus lands"[39] to non-members had the effect of eliminating the reservation status of the whole body of reservation lands or of shrinking the reservation (usually in such a way that the so-called surplus lands would no longer be considered included within reservation boundaries).[40] Reservation status, in turn, generally means that, for criminal cases involving Native Americans as victims or defendants, the federal government, and in some cases, the tribe (rather than the state)[41] will have jurisdiction. Reservation status also affects civil jurisdiction to some extent, but the contours of these effects are much less predictable.[42]

For the past few decades, the Court has used the three-step analysis laid out in *Solem v. Bartlett* to determine whether a given reservation has been diminished or disestablished,[43] but it has not been consistent about how and when the latter steps apply.[44] Besides this inconsistency, another problem with the Court's jurisprudence in this area is that it seems to impose a "magic language" requirement in the first step,[45] which addresses statutory language and congressional intent, but it sometimes appears to expand the universe of qualifying magic language in an outcome-determinative manner.[46]

---

39. The lands considered "surplus" were those lands not allotted to tribal members. *See, e.g., id.* at 134.

40. *See, e.g., id.* at 134, 143–44.

41. However, a few states have been explicitly granted criminal jurisdiction over reservations within their borders under a federal law referred to as Public Law 280. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 28 U.S.C. §§ 1162, 1360, and 25 U.S.C. §§ 1321–26); *see also* Tweedy, *Connecting the Dots*, *supra* note 14, at 694.

42. *See, e.g.*, Tweedy, *Indian Tribes*, *supra* note 14, at 893–99.

43. 465 U.S. 463, 472, 476, 478 (1984).

44. *See, e.g.*, Miller & Dolan, *supra* note 12, at 17 (explaining that the Supreme Court first laid out the three-part test in *Solem*); Frickey, *supra* note 16, at 24, 26 (acknowledging that "[t]aken as a whole, the judicial method in the diminishment cases might appear to be essentially lawless" and noting that "a reading of these cases suggests . . . a casual, unreflective concession to non-Indian instincts"); Fletcher, *supra* note 7, at 120–21 (noting that, after *Solem*, "nothing [besides the fact that the three-part test would be applied in some fashion] was certain or predictable in how these cases would be decided").

45. *See* Frickey, *supra* note 16, at 18. The term "magic language" refers to the fact that the Court parses very similar statutory terms relating to tribal cession of the surplus lands differently in terms of whether they are read to effect diminishment or disestablishment. *See id.* Thus, a layperson reading the statutes that have been held to effect diminishment and those that have been held not to effect diminishment might very well conclude that they all say basically the same thing. *See id.*

46. *Id.* at 24, 26.

The three steps are: (1) the statutory language itself; (2) the legislative history and the course of negotiations with the relevant tribe or tribes (also sometimes referred to as "surrounding circumstances"); and finally, (3) post-enactment history, including the demographics of the contested area.[47] Theoretically, it is only when a statute is ambiguous that a court should move on to analyzing the less probative information adduced from steps two and three,[48] but, in practice, the Court has sometimes used the latter steps—especially the third—to support holdings of diminishment that seemed to run contrary to the statutory language.[49] However, adhering closely to Congress's intent is extremely important in the federal Indian law context because Congress is the branch of the federal government that has been held to have plenary power over tribes and because one of the foundational principles of Indian law is that tribes retain their sovereign powers (except those like treaty-making power with foreign nations that would be inconsistent with their position within the United States), unless Congress has explicitly acted to remove the power at issue.[50] Thus, diminishment and disestablishment, like the abrogation of other treaty rights, should not be lightly inferred. Instead, to hold a treaty right to be abrogated, a court needs to find "clear and plain" evidence that Congress considered the conflict between its proposed action and the treaty right and chose to resolve the conflict by abrogating the treaty right.[51] Thus, when the Court relies on steps two and three in the absence of at least ambiguous statutory language suggesting intent to abrogate tribal rights in step one, it violates its own overarching Indian law principles.

The earliest diminishment cases undertook a more holistic analysis of the statutory language to determine whether it genuinely

47. 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.04[3] (2020) [hereinafter COHEN].

48. *See id.* (noting that a statutory ambiguity is required to move on to step two); Frickey, *supra* note 16, at 18 (discussing the Court's decision in *Solem*, 465 U.S. 463); *see also* Royster, *supra* note 31, at 30–31 (discussing early diminishment and disestablishment cases, in which the Court focused primarily on the language of the surplus land acts themselves).

49. Frickey, *supra* note 16, at 18–26; *see also* Fletcher, *supra* note 3; Royster, *supra* note 31, at 34–36 (discussing *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977)).

50. *See, e.g.*, ANDERSON ET AL., *supra* note 14, at 71–72; Fletcher, *supra* note 7, at 123; *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978) (alluding to Congress's plenary power in Indian Affairs).

51. United States v. Dion, 476 U.S. 734, 738–40 (1986); *see also* Berger, *supra* note 15, at 1921.

demonstrated that Congress clearly intended to terminate reservation status for all or part of the reservation lands.[52] Starting in the mid-1970s, however, the Court began to conclude that language indicating an intent for a tribe to cede lands unconditionally to the United States for a sum certain was sufficient to support a judicial inference of an intent to diminish or disestablish a reservation.[53] The Court later expanded this universe of so-called magic language to include run-of-the-mill language that "restor[ed] land to the public domain."[54] As I have argued elsewhere, the Court's contemporary enforcement of statutes—based on the intent of the Congress that passed the statute so as to implement a repudiated and "disastrous" policy aimed at assimilating tribes, usually against their wills [55]—is artificial and unjust.[56] Nonetheless, if this is the course that the Court has determined to take, one would hope that at least it would be undertaken in a consistent manner in order to imbue highly significant questions of continued reservation status with some level of predictability. Instead, however, the Court's diminishment and disestablishment jurisprudence has often seemed confoundingly inconsistent.[57]

One recent case that seemed poised to reinscribe much-needed clarity to diminishment and disestablishment jurisprudence was a unanimous 2016 opinion called *Nebraska v. Parker*.[58] Although diminishment and disestablishment cases are invariably contentious, this case was arguably relatively uncontroversial because it involved the validity of a tribal law requiring a tribal liquor license to engage in on-reservation liquor sales, and such tribal laws are explicitly

52. *See, e.g.*, Mattz v. Arnett, 412 U.S. 481, 504 (1973); Royster, *supra* note 31, at 30–31.

53. DeCoteau v. Dist. Cnty. Ct. for Tenth Jud. Dist., 420 U.S. 425, 445 (1975); Frickey, *supra* note 16, at 18–19.

54. Frickey, *supra* note 16, at 18–19, 21 (discussing earlier cases in conjunction with *Hagen v. Utah*, 510 U.S. 399 (1994)); *see also* Royster, *supra* note 31, at 30–31 (discussing early diminishment cases).

55. Frickey, *supra* note 16, at 15, 25.

56. *See, e.g.*, Ann E. Tweedy, *The Liberal Forces Driving the Supreme Court's Divestment & Debasement of Tribal Sovereignty*, 18 BUFF. PUB. INT. L.J. 147, 193–94 (2000).

57. Frickey, *supra* note 16, at 24; *see also* Fletcher, *supra* note 3; Fletcher, *supra* note 7, at 121.

58. 136 S. Ct. 1072, 1076 (2016); *see also* Fletcher, *supra* note 7, at 121 (noting that *Parker* "seemed to put an end to much of [the] nonsense" evident in prior reservation boundary cases).

sanctioned under federal law.[59] Additionally, the federal statute sanctioning application of tribal law had been upheld as a valid delegation to Indian tribes over forty years before.[60] Perhaps in part because of these relatively tame facts[61]—and despite the fact that the Supreme Court's federal Indian law decisions are very often fractured and that tribes generally lose,[62] especially when state or non-member interests are implicated[63]—*Parker* was a unanimous decision *in favor of* the Omaha Tribe. In a twelve-page-opinion, the Court determined, primarily based on the text of the statute under which the disputed parcel, now containing the Village of Pender and the establishments to which the Omaha Tribe was attempting to apply its liquor licensing requirements, that Congress had not diminished the reservation.[64]

The 1882 Act at issue in the case authorized the Secretary of the Interior to survey and sell tracts of reservation land to non-members.[65] It contained none of the magic language (or "hallmarks," as Justice Thomas's majority opinion more charitably termed the required words) indicating complete and total surrender of tribal interests; and because the parcels were to be sold off on a piecemeal basis, the Act did not provide for "sum certain" compensation to the Tribe by the federal government.[66] The second factor, relating to the legislative history of the Act and the course of negotiations with the Tribe, was

59. *Parker*, 577 U.S. at 486 (quoting 18 U.S.C. § 1161).

60. *See generally* United States v. Mazurie, 419 U.S. 544 (1975).

61. Additionally, amicus briefs submitted to the Court detailing unfairness in the allotment process with respect to these particular lands may have had some influence on the Court. *See* Berger, *supra* note 15, at 1923–24.

62. *See* Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX LAW. 897, 996 n.380 (2010); Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1190 (2001).

63. David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 268, 281 (2001); *see also* Berger, *supra* note 15, at 1906–07; Fletcher, *supra* note 7, at 130, 135 (noting that "tribal assertions of power over non-members attract the Court's attention" and that, for Indians and tribes, "the numerous biases of the judiciary make every case a presumptive loser"). The Supreme Court's June 2021 decision in *United States v. Cooley*, 141 S. Ct. 1638 (2021), like the decisions in *McGirt* and *Parker*, is an important deviation from this bleak principle and supports the idea that *McGirt* may well signal a sea change. At the very least, we now know that *McGirt* was not simply an aberration.

64. *Parker*, 577 U.S. at 481, 489–90.

65. Act of Aug. 7, 1882, ch. 434, 22 Stat. 341.

66. *Parker*, 577 U.S. at 489.

mixed.[67] Though the third factor, relating to the United States' subsequent treatment of the land and its demographic make-up, favored diminishment, the Court noted that it "ha[d] never relied solely on th[e] third consideration to find diminishment."[68]

The Village of Pender had, at the time of the case, approximately 1,300 residents,[69] and the purportedly diminished area of the reservation that includes Pender was over 99% non-Native in the year 2000.[70] Thus, *Parker* presented a demographic setting similar to those that had seemingly swayed the Court in previous cases to hold a reservation diminished despite weak showings of congressional intent in step one of the test.[71] But the Court in *Parker* resisted the temptation to determine the case based on the presumed expectations of the non-Indians living in the area and instead proclaimed that "it is not our role to 'rewrite' the 1882 Act in light of this subsequent demographic history."[72]

Parker, then, seemed to lay a foundation for a similar affirmance of reservation status in *Sharp* and later in *McGirt*.[73] At the same time, there was considerable apprehension in the federal Indian law community that the exponentially larger non-Indian population on the Creek Reservation, including most of the roughly 400,000 people who live in Tulsa alone, could be viewed to foreclose, as a practical matter, a decision that favored the Creek Nation (which appeared as amicus curiae in both *Sharp* and *McGirt*).[74] Many tribal advocates had all but

67. *Id.* at 490–92.

68. *Id.* at 492.

69. Smith v. Parker, 996 F. Supp. 2d 815, 819 (D. Neb. 2014), *aff'd*, 774 F.3d 1166 (8th Cir), *aff'd sub nom.* Nebraska v. Parker, 577 U.S. 481 (2016).

70. Brief for Petitioners at 28, *Parker*, 577 U.S. 481 (No. 14-406).

71. Frickey, *supra* note 16, at 18–26; *see also* Fletcher, *supra* note 3.

72. *Parker*, 577 U.S. at 493–94.

73. Sharp v. Murphy, 140 S. Ct. 2412, 2412 (2020) (per curiam); McGirt v. Oklahoma, 140 S. Ct. 2452, 2464, 2469 (2020).

74. *See* Wendy Weitzel, *Ruling Shifts Ground for Tribes, State*, SEQUOYAH CNTY. TIMES, https://www.sequoyahcountytimes.com/news/ruling-shifts-ground-tribes-state [https://perma.cc/Q6NR-RE9B] (discussing views of tribal advocates); Fletcher, supra note 3; *see also Supreme Court Schedules Tribal Lands Case for Reargument Next Term*, A.B.A.: DEATH PENALTY REPRESENTATION PROJECT (July 1, 2019), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2019/summer [https://perma.cc/PRY4-96ME]; Agoyo, *supra* note 4. Many news articles treat the *McGirt* decision as if it actually held that the entire eastern half of Oklahoma is Indian Country. *See, e.g.*, Wolf &

lost faith in the Court because of the apparent lawlessness of its prior diminishment and disestablishment cases and, more broadly, because of the Court's extreme discomfort with the prospect of tribal jurisdiction over non-members in the large majority of civil jurisdiction cases that had come before it in recent decades.[75] Thus, despite the strength of the language in *Parker* and the clarity of its analysis, there was trepidation that the Court would retreat from it rather than face the prospect of potentially upsetting hundreds of thousands of non-Natives to preserve a tribal right.[76]

B. The Majority's Reasoning in McGirt

The unusual measures that the Court took in *Sharp*, such as ordering further briefing on whether any federal statute granted Oklahoma criminal jurisdiction over the historic Creek Reservation and on the strawman question of whether there were circumstances under which land might qualify as a reservation but still not qualify as Indian country under 25 U.S.C. § 1151(a)[77] and its holding the case over for reargument the following term,[78] support the inference that the question of the continued reservation status of the Creek Nation's

---

Johnson, *supra* note 12. This is erroneous in a technical sense and is based on the assumption that if the Creek Nation's reservation is still intact, those of other nearby tribes must be as well. *See, e.g.*, *McGirt*, 140 S. Ct. at 2478–79 (describing and responding to Oklahoma's arguments in that vein). On the other hand, the Cherokee, Chickasaw, Seminole, and Choctaw Tribes' reservations were allotted under the same statutes as that of the Muscogee (Creek) Nation, so these other four tribes undoubtedly have a strong argument that their reservations similarly remain intact. *See, e.g.*, Berger, *supra* note 19 (manuscript at 2). Indeed, Oklahoma courts have held that other reservations allotted under the same statutes do in fact remain intact. *See generally* Bosse v. Oklahoma, 484 P.3d 286 (Okla. Crim. App. 2021); Hogner v. State, No. F-2018-138, 2021 WL 958412 (Okla. Crim. App. Mar. 11, 2021).

75. *See* Weitzel, *supra* note 74; *see also* Fletcher, *supra* note 7, at 130, 135 (noting that "tribal assertions of power over nonmembers attract the Court's attention" and that for Indians and tribes, "the numerous biases of the judiciary make every case a presumptive loser").

76. The Court frequently seems to assume that non-Indians will be hostile to tribal jurisdiction, although that may not be the case in many circumstances and certainly would not be true for all non-Indians. *See* Tweedy, *Connecting the Dots*, *supra* note 14, at 705–06, 706 n.270.

77. Order Requesting Additional Briefing, 140 S. Ct. 2412 (2020), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-1107.html [https://perma.cc/6SB3-ECCN]. The answer to this question is a simple "no," unless one wanders far afield from the facts of *McGirt* and imagines something like a state-recognized tribe that receives a reservation from the state.

78. Order Restoring Case to Calendar for Reargument, 140 S. Ct. 2412 (2020), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-1107.html [https://perma.cc/6SB3-ECCN].

Oklahoma land set aside was indeed more difficult for the Court than that of the continued viability of the western section of the Omaha Tribe's reservation in *Parker*.[79] The difficulty of the decision for the Court is also evident from the fact that the decision in *McGirt* that finally answered the question was a 5–4 decision, in sharp contrast to the unanimous decision we saw in *Parker*.[80] Indeed, even the author of *Parker*, Justice Thomas, was willing to abandon the precedent the case had set a mere four years later in *McGirt*.

Although the *McGirt* Court followed the trail blazed by *Parker*, the decision is remarkable in its own right for a number of reasons. Moreover, in the sometimes upside-down world of federal Indian law, adherence to precedent is often remarkable in itself.[81] This is particularly so in cases in the area of diminishment and disestablishment,[82] as well as in the related area of tribal jurisdiction, which are difficult from the Court's perspective because of the potential to both upset non-Indians' presumed expectations and to interfere with state interests.

1. The Canons of Construction in Federal Indian Law and the Fact that Congress, Rather than the Supreme Court, Is the Repository of Plenary Power

The Court's majority opinion in *McGirt* is noteworthy in its respect for Congress's plenary power; instead of taking it upon itself to complete what it often perceives as Congress's unfinished project of assimilation, the *McGirt* Court focuses squarely on the legislative intent discernible from the statute under which the Creek reservation was allotted.[83] There are many examples where the Court, in recent decades, has taken it upon itself to enforce the repudiated allotment policy by denying a tribe jurisdiction over non-members or holding a reservation to have been diminished or disestablished in the absence

79. *See, e.g.*, Fletcher, *supra* note 3.

80. *Compare* McGirt v. Oklahoma, 140 S. Ct. 2452, 2458 (2020), *with* Nebraska v. Parker, 577 U.S. 481, 494 (2016).

81. Berger, *supra* note 15, at 1905.

82. Royster, *supra* note 31, at 30, 37.

83. *McGirt*, 140 S. Ct. at 2462–82.

of clear congressional intent; and, in so holding, it sometimes invokes the idea that the challenged exercise of tribal sovereignty is inconsistent with the tribe's dependent status.[84] This approach is contrary to the long-established doctrine that Congress (not the Court) has plenary power over tribes,[85] and it violates one of the core principles or canons of construction in federal Indian law—namely that "tribal rights and property rights are preserved unless Congress'[s] intent to the contrary is clear and unambiguous."[86]

The majority opinion in *McGirt* is a welcome departure from this approach. Instead of trying to extrapolate from and implement Congress's long-repudiated policy in the present day, apparently to save non-members the possible inconvenience and confusion that could result from future exercises of tribal jurisdiction, the Court carefully parses the statutory language and emphasizes that Congress has the power to change the result should it desire to do so. Early in the opinion, the Court notes that, because of the legislature's "significant constitutional authority when it comes to tribal relations," Acts of Congress are the "only . . . place" the Court may look to determine if a reservation has been disestablished.[87] It further explains that "courts have no proper role in the adjustment of reservation borders."[88] At another point, the majority states: "If Congress wishes to break the promise of a reservation, it must say so."[89] Later in the Court's analysis, it elucidates the necessity of relying on the words of the statute and suggests that the fact that the laws being interpreted relate to tribes is not a license to ignore congressional intent based on

84. *See, e.g.*, Tweedy, *Connecting the Dots*, *supra* note 14, at 674–84 (discussing jurisdiction cases); Tweedy, *supra* note 56, at 189–94 (discussing reliance on the allotment policy in the Court's jurisdiction cases); Frickey, *supra* note 16, at 21–26 (discussing diminishment cases); Matthew L.M. Fletcher, *Muskrat Textualism*, 115 NW. U. L. REV. (forthcoming 2022) (manuscript at 12), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3767096 (describing how the Supreme Court sometimes intervenes without any authorization from Congress to "enforce the passivity of tribal governments").

85. *See, e.g.*, Tweedy, *supra* note 56, at 150; Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 163, 205, 213–14 (2002); *see also* Berger, *supra* note 19 (manuscript at 16).

86. ANDERSON ET AL., *supra* note 14, at 72.

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

88. *Id.*

89. *Id.*

concerns about the possible reactions of non-tribal citizens to a ruling in favor of a tribe.[90] Thus, as the Court explains, consultation of "contemporaneous usages, customs, and practices" may sometimes be appropriate if they shed light on statutory meaning, but only if the statutory terms themselves are ambiguous.[91]

It similarly emphasizes that, as the "least compelling" category of evidence relating to diminishment or disestablishment, evidence as to subsequent demographics may only be used to elucidate ambiguous statutory text.[92] Thus, "extratextual sources" may never "overcome" a statute's clear terms.[93] It then buttresses this statement by explaining that to allow extratextual sources to overcome a statute's plain meaning would be "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."[94] The reference to usurping legislative function is a clear invocation of the importance of the judiciary's deference to Congress's plenary power.[95] By setting out this straightforward framework for analysis of diminishment and disestablishment questions and by buttressing it with a principled exegesis that ties federal Indian law

90. *Id.* at 2468–69.

91. *Id.* at 2468.

92. *Id.* at 2469 (quoting South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 356 (1998)).

93. *McGirt*, 140 S. Ct. at 2469.

94. *Id.* at 2470 (emphasis added).

95. Although the Court has not been entirely consistent about the locus or loci of plenary power in the U.S. Constitution, plenary power has often been tied to the Indian Commerce Clause and perhaps to a somewhat lesser degree to the Treaty Clause. *See, e.g.*, CANBY, *supra* note 2, at 102. Because power over Indian affairs has been held to be the province of Congress, a usurpation occurs when the Court arrogates that power to itself, and such a usurpation is properly understood as a violation of the separation of powers. *See, e.g.*, MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE § 3.5 (2018) (explaining that "[t]he separation of powers doctrine, in essence, acknowledges that in a multi-branch system of government there are limits on each branch's ability to encroach on the others"); MICHAEL P. ALLEN ET AL., FEDERAL COURTS: CONTEXT, CASES, AND PROBLEMS 16 (3d ed. 2020) (noting that "on the federal level, separation-of-powers issues arise when the act of any one of the three federal branches (legislative, executive, or judicial) affects one or more of the remaining branches" and that "[t]he Framers remained faithful to 'the political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct'" (quoting THE FEDERALIST NO. 47 (James Madison))); *see also* Tweedy, *supra* note 56, at 150; Tweedy, *Indian Tribes*, *supra* note 14, at 904.

decisions to other areas of law,[96] the *McGirt* opinion appears to be attempting to lay a foundation for analysis in future decisions that will make it more difficult for the Court to depart from unambiguous statutory text to find diminishment or disestablishment based solely on steps two and three of the doctrinal test.

The *McGirt* decision also reflects a nuanced view of the repudiated allotment policy, which is relatively rare in Supreme Court decisions.[97] As I have previously argued, to evaluate whether non-Indian settlers developed expectations of reservation diminishment or disestablishment as a result of the allotment policy and to determine whether any such expectations were justifiable, it is crucial to acknowledge that allotment, although borne out of an assimilationist goal, was merely one step in the process.[98] Settlers were often on notice that the policy hit snags as it was being implemented and, in at least some cases, should have known that the taking of tribal lands constituted a violation of tribal property rights; so, courts should not view allotment as having constituted an enforceable promise to non-Indian settlers of either reservation disestablishment or freedom from tribal jurisdiction.[99] The majority in *McGirt* implicitly espouses this line of thought when it says that "Congress may have passed allotment laws to create the conditions for disestablishment. But to equate allotment with disestablishment would confuse the first step of the march with arrival at its destination."[100] This nuanced understanding stands in sharp contrast with the blunt view of the allotment policy as an indestructible assimilationist hammer that we

96. *McGirt*, 140 S. Ct. at 2474 ("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."); *see also* Berger, *supra* note 15, at 1923 (describing the briefing in *Parker* on this question).

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

98. Tweedy, *supra* note 19, at 171–72; *see also* Berger, *supra* note 19 (manuscript at 25) (noting that "[t]he Dawes Act reflected a 'policy of gradualism,' under which Indians would be assimilated under federal protection and control" (quoting FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880–1920, at 52 (Bison Books 2001) (1984))).

99. *See generally* Tweedy, *supra* note 19.

100. *McGirt*, 140 S. Ct. at 2465.

see in the dissent in *McGirt*, as well as in many previous Supreme Court cases.[101]

Similarly, the Court refuses to simply assume that non-Indian allotment-era purchasers had justifiable expectations of reservation disestablishment that trump any expectations that the Creeks might have had as to the durability of the United States' treaty promises.[102] Instead, the Court almost appears to respond to my earlier critique of the Court's practice of simply presuming without any historical analysis that non-Indian settlers had justifiable expectations as to the diminishment or disestablishment of a reservation or as to the absence of tribal jurisdiction.[103]

Thus, rather than assuming the existence of monolithic non-Indian justifiable expectations, the *McGirt* majority acknowledges that "some white settlers [may have] in good faith thought the Creek lands no longer constituted a reservation. But maybe, too, some didn't care and others never paused to consider the question."[104] Later in the opinion, the majority responds to Oklahoma's allegation that its non-Native citizens will be surprised to find that they live on a reservation with the observation that "we imagine some members of the 1832 Creek Tribe would be just as surprised to find them there."[105]

These acknowledgements of a probable diversity of historical views are startling in the context of the Court's unimaginative body of case law in this area, especially given that the Court takes the possible expectations of Creek citizens into account as well,[106] but the majority goes on to recognize some of the actual historical injustices to the Creeks that were attendant on their land loss, in that some federal officials in charge of implementing the law allotting the Creek reservation held "shares or board positions in the very oil companies who sought to deprive Indians of their lands."[107] The Court further

101. *Id.* at 2488–89 (Roberts, C.J., dissenting); *see also* Tweedy, *supra* note 19, at 137–38, 141, 143–44.
102. Tweedy, *supra* note 19, at 137.
103. *Id.* at 131.
104. *McGirt*, 140 S. Ct. at 2473.
105. *Id.* at 2479.
106. *Accord* Tweedy, *supra* note 19, at 137, 188; Fletcher, *supra* note 7, at 114.
107. *McGirt*, 140 S. Ct. at 2473.

acknowledges that the Oklahoma courts appear to have been complicit in this process in that they held "sham competency and guardianship proceedings that divested Tribe members of oil rich allotments."[108] This historical analysis by the Court of the injustices to the Creeks that were part and parcel of the allotment of their reservation feels like nothing less than a reckoning. Where previously the Court has often been unwilling or unable to seriously consider fairness questions from a tribe's perspective,[109] the *McGirt* majority's analysis is perceptive, empirically rooted, and careful.

2. Adherence to Precedent

Another way that the majority opinion in *McGirt* fosters predictability in diminishment and disestablishment cases is by adhering to precedent.[110] As explained above, the *McGirt* Court followed and elaborated upon the *Parker* Court's affirmation that the proper focus in a diminishment or disestablishment inquiry is on statutory language.[111] If the Court had instead hastily retreated from *Parker* in *McGirt*, as was widely feared, the Court's jurisprudence in the area would have been left in a completely incoherent state. Thankfully, we instead have two congruent decisions four years apart as the Court's most recent pronouncements in this area, and there can at least be a logically based hope that any subsequent decisions on these matters in the reasonably near future will follow the same model.

In addition to the majority's adherence to *Parker*, the Court also relied on much older persuasive precedent, namely a 1905 decision from the U.S. Court of Appeals for the Eighth Circuit affirming that, despite Congress's plan to abolish the Creek's government a mere one year later, the Nation still had legislative and governmental powers until such an abolition occurred, including the power to collect taxes

108. *Id.*

109. Tweedy, *Connecting the Dots*, *supra* note 14, at 683; Frickey, *supra* note 16, at 26, 80; Fletcher, *supra* note 7, at 114.

110. *See, e.g.*, Berger, *supra* note 15, at 1905.

111. *McGirt*, 140 S. Ct. at 2469.

from non-Indians doing business within the reservation.[112] As it turned out, of course, Congress's plans changed, and the abolition never occurred. In following *Parker* and *Buster v. Wright*,[113] rather than deciding the case irrespective of past precedent, the Court in *McGirt* seems to signal that the field of federal Indian law may be on the road to some level of predictability.[114] If this is indeed the case, the benefits will be vast; uncertainties as to how cases might ultimately be decided in the Supreme Court have, in some cases, led to years of protracted litigation with proceedings sometimes occurring simultaneously in different fora.[115] Additionally, this unpredictability has undoubtedly chilled tribes from attempting to enforce their sovereign rights in numerous instances.

3. The Respectful Tone of the Decision

McGirt is also fairly unusual among Supreme Court cases in the respectful tone it uses with respect to tribal governments, placing them on par with other sovereigns. Opinions that are on the less respectful end of the continuum are sometimes subtle and sometimes more overt in expressing a distrust of tribal sovereignty. For example, the opinion in *Parker* somewhat subtly frames the question of diminishment as whether the disputed land was "free[d] . . . of its reservation status."[116] Because the word "free" has a positive connotation, we are left with the impression that not having the land be part of a reservation may be

112. *Id.* at 2466 (citing Buster v. Wright, 135 F. 947 (8th Cir. 1905)); *see also* Tweedy, *supra* note 19, at 178–79 (discussing *Buster*, 135 F. 947).

113. *Buster*, 135 F. 947.

114. This hope is also supported to some degree by the Court's more recent decision in *United States v. Cooley*, 141 S. Ct. 1638 (2021). In *Cooley*, where the Court upheld a tribal officer's authority to detain and search a non-Native suspected of violating state or federal law, the Court adhered to its earlier statement in *Duro v. Reina*, 495 U.S. 676, 697 (1990), that a tribal officer lacking criminal jurisdiction over a suspect could nonetheless detain the suspect and transport him or her to the state or federal authorities that did have jurisdiction. *Cooley*, 114 S. Ct. at 1644. However, the *Cooley* Court's unexplained reliance on precedent relating to tribal civil jurisdiction in the context of a question pertaining to tribal criminal jurisdiction is confusing and problematic. *See infra* notes 179–189 and accompanying text.

115. *See, e.g.*, *Q&A with Snell & Wilmer's Richard Derevan*, LAW360.COM (Dec. 23, 2009), https://www.law360.com (search in search bar for "Q&A with Snell & Wilmer's Richard Derevan") (discussing *Ford Motor Co. v. Todechenee*, 488 F.3d 1215 (9th Cir. 2007)).

116. Nebraska v. Parker, 577 U.S. 481, 483 (2016) (quoting Solem v. Bartlett, 465 U.S. 463, 467 (1984)).

the more positive outcome. Similarly, in *Plains Commerce Bank v. Long Family Land and Cattle Co.*,[117] a tribal jurisdiction case, the Court casually frames the General Allotment Act itself as a positive development and,[118] later in the opinion, suggests that a bank's discrimination against a majority tribal member-owned business had no discernible effect on the tribe or its members.[119] On the more overt end, in the course of upholding tribal sovereign immunity from suit, the majority in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* seemed to impugn the doctrine,[120] suggesting that, despite the fact that sovereign immunity is considered an incident of sovereignty for other governments (such as the federal government and states), for tribes, it could only be justified if they were in a weak and defenseless state.[121]

The Supreme Court's often disparaging view of tribes has deep roots. In cases in 1823 and 1831 respectively, Chief Justice Marshall describes the "Indians inhabiting this country [as] fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest" and, in the next opinion pertaining to tribes, describes tribal citizens at the time that the Constitution was written as not customarily resorting to courts; rather, Chief Justice Marshall tells us, "[t]heir appeal was to the tomahawk, or to the government."[122]

McGirt dramatically parts company with this approach of painting tribes in a disparaging manner, whether explicitly or implicitly.[123]

117. 554 U.S. 316, 316 (2008).

118. *Id.* at 328 ("Thanks to the Indian General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 *et seq.*, there are millions of acres of non-Indian fee land located within the contiguous borders of Indian tribes." (citing General Allotment (Dawes) Act of 1887, Pub. L. No. 49-105, 24 Stat. 388 (codified at 25 U.S.C. §§ 331–34, 339, 341, 342, 348, 349, 354, 381) (§§ 331–33 repealed 2000)).

119. Tweedy, *Connecting the Dots*, *supra* note 14, at 683 & n.156 (discussing *Plains Com. Bank*, 554 U.S. 316); *see also Plains Com. Bank*, 554 U.S. at 332 (contrasting the discernible effect of non-member activities that tribes have jurisdiction to regulate with the actions at issue in that case).

120. 523 U.S. 751, 751 (1998).

121. *Id.* at 756–58; *see also* Tweedy, *Indian Tribes*, *supra* note 14, at 893; Fletcher, *supra* note 84 (manuscript at 15).

122. Ann E. Tweedy, "*Hostile Indian Tribes . . . Outlaws, Wolves, . . . Bears . . . Grizzlies and Things Like That?" How the Second Amendment and Supreme Court Precedent Target Tribal Self-Defense*, 13 U. PA. J. CONST. L. 687, 717–18 (2011) (first quoting Johnson v. M'Intosh, 21 U.S. 543 (1823); and then quoting Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831)). For other examples of Supreme Court cases relying on notions of tribal savagery, see *id.* at 719–22.

123. *See, e.g.*, *id.* at 719–22; McGirt v. Oklahoma, 140 S. Ct. 2452, 2467 (2020).

Instead of highlighting the supposedly "anomalous" character of tribal sovereignty,[124] the majority seems to conceive of tribes as being roughly on par with the state and federal governments. One prominent example is the majority's drawing of a parallel between the United States' selling its land to homesteaders and yet retaining sovereignty over the area, on the one hand, and parcels within a reservation being sold off and the tribe's retention of sovereignty over the reservation despite these land sales on the other.[125] This understanding of tribal sovereignty—as extending over lands within the boundaries of a reservation no matter who owns the individual parcels—has been codified in the Indian Country Statute,[126] as the majority acknowledges;[127] yet for decades, the Court has been retreating from the territorial conception of tribal sovereignty codified in federal law in favor of a consent-based conception of its own creation that is primarily rooted in tribal membership.[128]

Another indication of the majority opinion's positive tone with respect to the Creek Nation's rights is the sanctity with which it views the United States' treaty promises. For example, the opinion emphasizes the magnitude of what the Creeks gave up—namely, all of their traditional lands in the East—when they accepted the Creek reservation.[129] It further emphasizes that they were promised that the new reservation would be their "permanent home" and that the federal government's treaty promises to them were not "meant to be

---

124. *See, e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980). Writing for the Court, Justice Marshall stated:

> The status of the tribes has been described as "an anomalous one and of complex character," for . . . the tribes have retained "a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations . . . ."

Id. (quoting McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 173 (1973)).

125. *McGirt*, 140 S. Ct. at 2464; *see also* Katherine Florey, *Toward Tribal Regulatory Sovereignty in the Wake of the COVID-19 Pandemic*, 63 ARIZ. L. REV. 399, 432 (2021) (describing this portion of the *McGirt* opinion as "near-revolutionary").

126. 25 U.S.C. § 1151(a).

127. *McGirt*, 140 S. Ct. at 2464.

128. *See, e.g.*, Tweedy, *Connecting the Dots*, *supra* note 14, at 675; *see also* Fletcher, *supra* note 7, at 125 (describing the Court's analysis in *Duro v. Reina*, 495 U.S. 676 (1990)).

129. *McGirt*, 140 S. Ct. at 2460–61.

delusory."[130] This framing poignantly demonstrates the justice of enforcing these treaty promises.

At another point, the majority rejects the State's argument that the federal government's offer to the Creek Nation (which the Nation accepted) to provide the Nation fee title to its lands (rather than adhering to the federal government's usual practice of holding the lands in trust) actually defeated the reservation status of the lands.[131] In rejecting this argument, the majority emphasizes the importance of the federal government's promise to the Nation and the moral imperative that it keep its word: "[T]he 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."[132] This tone and framing represents another instance of the majority's approach of illustrating the justice of enforcing the federal government's promises to the Creek Nation by evoking the Creek Nation's point of view to elucidate the true stakes of continuing to recognize the reservation.

4. Rejecting the Use of Past Legal Wrongs As Precedent

As I noted in previous work, there is a trope in federal Indian law under which the Court understands widespread, on-the-ground violations of a particular tribe's land and sovereignty rights to create a sort of legal precedent for continued violation of those rights.[133] Under this view, modern enforcement or recognition of the tribe's previously violated rights comes to be seen as practically impossible. Not only does "such reasoning syllogistically and unfairly allow[] past injustice to serve as a basis for present injustice, thus resulting in extreme and

130. *Id.* at 2460.
131. *Id.* at 2474.
132. *Id.* at 2474–76.
133. Tweedy, *supra* note 19, at 130, 155 & n.134, 170. Chief Justice Roberts's dissent in *McGirt* provides a vivid illustration of the use of this trope. *See* Miller & Dolan, *supra* note 12, at 15–16 (citing *McGirt*, 140 S. Ct. at 2484 (Roberts, C.J., dissenting)).

ever increasing under-protection of tribal sovereign rights,"[134] but it also incentivizes non-Indian individuals and even state and local governments to encroach upon tribal sovereignty by giving them the message that they may do so with impunity and that their actions will create a kind of self-fulfilling prophecy. The majority in *McGirt* roundly rejects this backwards system. In its most concise formulation, the majority states that "the magnitude of a legal wrong is no reason to perpetuate it."[135] Earlier in the opinion, the majority rejects this approach by unpacking the absurdity of allowing a state's violation of a tribe's rights to its reservation over time to amount to legal evisceration of the reservation's status:

> Under our Constitution, States have no authority to reduce federal reservations lying within their borders. Just imagine if they did. A State could encroach on the tribal boundaries or legal rights Congress provided, and, with enough time and patience, nullify the promises made in the name of the United States. That would be at odds with the Constitution, which entrusts Congress with the authority to regulate commerce with Native Americans, and directs that federal treaties and statutes are the "supreme Law of the Land." . . . . It would also leave tribal rights in the hands of the very neighbors who might be least inclined to respect them.[136]

Given that this is exactly how the system has worked in some previous diminishment and jurisdiction cases without being explicitly acknowledged as such, this is a remarkable line in the sand that the majority draws, refusing to continue to be an instrument of injustice. A bit later in the opinion, it reaffirms the same principle—this time with respect to past injustices inflicted by the federal government:

134. Tweedy, *supra* note 19, at 170; *see also* Berger, *supra* note 19 (manuscript at 9–10, 30–31) (detailing the State of Oklahoma's historical illegal assertions of jurisdiction over the Creek Nation's territory and outlining the State of Nebraska's as well with respect to the Omaha Reservation).

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

136. *Id.* at 2462 (citations omitted).

"[I]t's no matter how many other promises to a tribe the federal government has already broken. If Congress wishes to break the promise of a reservation, it must say so."[137] It is hard to resist the sense, in reading the majority opinion in *McGirt*, that a new day is dawning in federal Indian law. But it is a new day that is also an old day—one that hearkens back to Felix Cohen's classic formulations, the reign of the rule of law, and the primacy of the canons of construction.

C. The Dissent in McGirt

Chief Justice Roberts wrote a strong dissent in *McGirt*, in which he was joined by Justices Alito, Kavanaugh, and Thomas.[138] Justice Thomas also wrote a separate dissent in which he argued that the decision below was unreviewable because it was supported by an independent and adequate state law ground.[139] The primary dissent's main focus in terms of legal analysis is on the fact that it sees the majority as deviating from *Solem*'s three-part test; specifically, Chief Justice Roberts accuses the majority of ignoring the latter two prongs of the *Solem* test in favor of the first prong, which focuses on statutory language.[140] The dissent further complains that the majority views "each of the statutes enacted by Congress in a vacuum," divorced from the "highly contextual inquiry" that the pre-*Parker* precedents reflected (although the dissent neither acknowledges nor seems to notice that *Parker* took the same approach as the majority).[141]

The primary dissent is also apparently convinced by the state's litany of dramatic fears recited in briefing and at oral argument, and, accordingly, the dissent worries that "the State's ability to prosecute serious crimes will be hobbled and [that] decades of past convictions could well be thrown out."[142] Additionally, the primary dissent is convinced by the State's argument that Congress's partially executed but later abandoned plan to dismantle the Creek government somehow

137. *Id.*
138. *Id.* at 2482 (Roberts, C.J., dissenting).
139. *Id.* at 2502 (Thomas, J., dissenting).
140. *Id.* at 2485–87 (Roberts, C.J., dissenting).
141. *McGirt*, 140 S. Ct. at 2485–87.
142. *Id.* at 2482.

operated to disestablish the reservation, although that is not an approach that is reflected in other reservation boundaries cases.[143] A concern for justifiable expectations of non-Indians living in the area is also apparent in the primary dissent's analysis, even though the presence of these non-Indians is in many cases attributable to the illegal activities of their ancestors or predecessors, as well as of federal and state officials.[144] In contrast to the majority opinion, the tone of the primary dissent is cold and indifferent towards tribes, which is unfortunately to be expected in Chief Justice Roberts's opinions on Indian law.[145] Thus, we see bland statements in the primary dissent describing horrific federal actions, such as: "In 1832, the Creek were compelled to cede these lands to the United States in exchange for land in present day Oklahoma."[146] Though seemingly innocuous on its face, the statement is remarkable for its utter lack of recognition as to what the Trail of Tears meant from the Creek's perspective. It has the effect of distorting the event into one that sounds neutral, thereby implicitly justifying the idea that the promise of land in Oklahoma could be broken with impunity. A few paragraphs later, the dissent glibly states in reference to the promise of the Oklahoma reservation: "Forever, it turns out, did not last very long."[147] The statement comes off as cold and uncaring, and the most charitable interpretation of it is probably that it was written by someone who, for whatever reason, completely lacks the ability to imagine himself on the tribal side of the case. Whatever the basis or origin of the statement, it is diametrically opposed to the majority's sensitive and thoughtful analysis, which also takes a deeper and more nuanced view of the checkered history that led to the current demographic situation. The dissent does respond to the majority's powerful observation that the dissent's preferred

143. *Id.* at 2491.

144. *Id.* at 2502; Miller & Dolan, *supra* note 12, at 15–16.

145. *See, e.g.*, Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 328 (2008) ("Thanks to the Indian General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 *et seq.*, there are millions of acres of non-Indian fee land located within the contiguous borders of Indian tribes." (citing General Allotment (Dawes) Act of 1887, Pub. L. No. 49-105, 24 Stat. 388 (codified at 25 U.S.C. §§ 331–34, 339, 341, 342, 348, 349, 354, 381) (§§ 331–33 repealed 2000)).

146. *McGirt*, 140 S. Ct. at 2483 (Roberts, C.J., dissenting).

147. *Id.*

approach of ignoring clear text in favor of surrounding circumstances and subsequent history would not "be permitted in any other area of statutory interpretation, and [that] there is no reason why [these moves] should be permitted here,"[148] with the unsatisfying statement that "disestablishment cases call for a wider variety of tools than more workaday questions of statutory interpretation."[149] In other words, apparently, Indians' property rights are not as deserving of the same level of respect as others' property rights.

In many ways, the primary dissent treads familiar and expected ground. It reflects a one-sided preoccupation with non-Indians' presumed understandings and entitlements and does not try to wrestle with tribal interests, instead leaving them almost completely out of the equation. The dissent also ignores the most recent precedent, *Parker*, in favor of older precedent that allows for more flexibility and better accommodates an outcome-determinative approach.[150] The dissent additionally reflects how polarized the Justices are on these issues, and given that the decision in *McGirt* was 5–4, it stands for the precariousness of the tribal victory, especially in light of Justice Ginsburg's recent passing.[151]

II. *MCGIRT* AND THE LARGER CONTEXT OF RECENT SUPREME COURT CASES ON TRIBES AND TRIBAL RIGHTS

Although the tenor of Supreme Court cases in the last several decades has generally been very negative for tribes, *Parker* and *McGirt* are not the only recent cases to have positive outcomes. In addition to *Parker*, the Supreme Court heard *United States v. Bryant*,[152] another case that was a clear win for the tribes, in its 2015 term; and to some extent, the trend has continued in more recent cases.[153] Before the two

148. *Id.* at 2474 (majority opinion).
149. *Id.* at 2500 (Roberts, C.J., dissenting).
150. *See id.* at 2486. *See generally* Nebraska v. Parker, 577 U.S. 481 (2016).
151. *See McGirt*, 140 S. Ct. at 2458.
152. 136 S. Ct. 1954 (2016). *See generally* Berger, *supra* note 15.
153. *See, e.g.*, Herrera v. Wyoming, 139 S. Ct. 1686, 1691 (2019) (finding a treaty "right to hunt on the unoccupied lands of the United States"); Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct.

clear wins in the 2015 term, *Michigan v. Bay Mills Indian Community*,[154] a 2014 sovereign immunity case, stood as a the most recent signal that tribes may not be inevitably doomed in the modern Supreme Court.

McGirt, however, remains unique in its vision of tribes as bona fide sovereigns that are a legitimate part of the framework of governance in the United States and in the combination of its eminently respectful tone and its subject matter. Tribal jurisdiction cases are notoriously hard for tribes to win, and reservation boundary cases seem to be the next hardest category, most likely in large part because of the potential jurisdictional implications of intact reservation status.[155] In *McGirt* in particular, the Creek Nation seemed to have the cards stacked against it not only because of demographics but also because the federal government openly opposed its legal position that the reservation was still in place, a circumstance that is often fatal to a tribal claim.[156]

To briefly explore some of the other recent tribal wins, *Bay Mills* was a tribal sovereign immunity case that was on all fours with relatively recent precedent,[157] albeit precedent in which the Court had not enthusiastically endorsed the doctrine it applied (the aforementioned *Kiowa Tribe* case).[158] *Bay Mills*, a 5–4 decision,

1000, 1015–16 (2019) (plurality opinion) (finding a treaty right to travel that limits state taxing authority). *See generally* United States v. Cooley, 141 S. Ct. 1638 (2021) (upholding a tribal officer's ability to detain and search a non-Native suspect, pending the arrival of state or federal officers). A fourth case, *Upper Skagit Indian Tribe v. Lundgren*, that raised questions of tribal sovereign immunity in the context of an *in rem* quiet title action, was a wash from the tribal interest perspective in that the Court remanded the case for consideration of an argument raised by the non-Indian landowners for the first time in the Supreme Court. 138 S. Ct. 1649, 1651 (2018). A fifth case that was closely watched nationwide resulted in a 4–4 split after Justice Kennedy recused himself, causing the opinion of the U.S. Court of Appeals for the Ninth Circuit recognizing a treaty habitat right to be upheld. Washington v. United States, 138 S. Ct. 1832, 1833 (2018) (per curiam), *aff'g by an equally divided court* 864 F.3d 1017 (2017).

154. 572 U.S. 782 (2014).

155. *See, e.g.*, Berger, *supra* note 15, at 1920, 1933–34; *see also* Tweedy, *supra* note 19, at 142–43 (discussing *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), a case about local jurisdiction to tax within the boundaries of a historic Indian reservation); Royster, *supra* note 31, at 37 (noting that, as of the publication of that article, tribes had only won one case concerning diminishment or disestablishment in the past two decades); Carpenter v. Murphy, 139 S. Ct. 626 (2018) (ordering further briefing on jurisdictional issues). The Supreme Court's June 2021 decision in *Cooley* is a rare example of a tribal win in the jurisdiction context. *Cooley*, 141 S. Ct. 1638.

156. *See, e.g.*, John R. Hermann, *American Indians in Court: The Burger and Rehnquist Years*, 37 SOC. SCI. J. 245, 253–54 (2000); *see also* Berger, *supra* note 15, at 1939.

157. Berger, *supra* note 15, at 1910–11. *See generally Bay Mills*, 572 U.S. 782.

158. Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751 (1998).

represented a solid (though precarious) win for the Tribe and was certainly more neutral in tone than *Kiowa Tribe*, although it still did not approach the level of respect in its tone that we see in *McGirt*.[159] For example, rather than unequivocally highlighting tribal sovereignty as an important basis for the doctrine of tribal sovereign immunity, the *Bay Mills* opinion repeatedly refers to tribes using the somewhat depreciative "domestic dependent nations"[160] language that dates back to 1831 and the Supreme Court's decision in *Cherokee Nation v. Georgia*,[161] and it also refers to tribes more sharply as "dependents . . . subject to plenary control by Congress."[162] Moreover, beyond tone, with the opinion's analysis primarily focused on precedent and stare decisis, the opinion does not substantially add to the jurisprudence of tribal sovereignty.

Parker, to recap briefly, while well-written, did not evince the sense of respect for tribes as governments that we see in *McGirt*, nor did it examine fairness questions from the Tribe's perspective.[163] An overtly respectful tone regarding tribes is important in federal Indian law decisions because, not only does it encourage others who interact with tribes to treat them fairly,[164] but it also undoubtedly affects the level of fairness to tribes in the Court's framing of common law rules applicable to them. Just as decisions that employ a belittling attitude toward tribes and describe them in racist ways have created bad law

159. *See generally Bay Mills*, 572 U.S. 782; *Kiowa Tribe*, 523 U.S. 751.

160. *Bay Mills*, 572 U.S. at 788, 803.

161. 30 U.S. (5 Pet.) 1, 17 (1831).

162. *Bay Mills*, 572 U.S. at 788. Professor Matthew Fletcher has described how the notion of dependency, although previously often evoking more of a protectorate relationship, has come to be a loaded term that is most often used by the Court to eviscerate aspects of tribal sovereign rights. Fletcher, *supra* note 84 (manuscript at 12, 20–25). Although Justice Kagan may not have intended to invoke that view in *Bay Mills*, references to tribes as "dependents" now unavoidably carry a great deal of baggage. *See Bay Mills*, 572 U.S. at 788.

163. *See* discussion *supra* Section I.A.

164. *Cf.* Plains Com. Bank v. Long Fam. Land & Cattle Co., Nos. 03-002-A & R-120-99, slip op. at 18–19 (Cheyenne River Sioux Ct. App. Nov. 22, 2004) (discussing a non-member Bank's disrespect for the Cheyenne River Sioux judicial system, which it boldly articulated to the tribal appellate court during argument), *rev'd*, 554 U.S. 316 (2008); Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311, 331 (2000) (discussing the mixed message implicit in the tribal exhaustion doctrine and explaining how the "extreme scrutiny" it provides for tribal court jurisdictional determinations "encourages . . . disrespect" of tribal court judgments).

that continues to plague tribes to this day,[165] we can expect the reverse to be true (although there have been fewer opportunities to examine the reverse in action): that the decisions that contribute the most to the jurisprudence of tribal sovereignty and that are among the fairest to tribes are likely to be those that adopt a respectful tone.

The other case from that term that was a clear win for tribal interests, *Bryant*, involved the question of whether uncounseled tribal court convictions could constitute predicate offenses in a federal domestic violence habitual offender statute.[166] The Court's decision to allow the use of uncounseled tribal court convictions as predicate offenses was beneficial to tribes because reservations tend to be plagued by domestic violence (among other types of violence against Native women and other Native individuals), which is often committed by outsiders.[167] As Professor Bethany Berger has noted, the result of the case was very beneficial for tribes in facilitating the removal of some of the most egregious repeat offenders from reservations, but the opinion unfortunately did not focus on tribal sovereignty and comity as the bases for recognition of the tribal court convictions; thus it created some potentially bad law in the criminal arena as a result.[168] *Bryant*, like *Parker*, was therefore helpful to tribes but did not add to the jurisprudence of tribal sovereignty, and *Bryant* also did not shed as much light as it could have on the reasons that tribal court convictions are deserving of respect in the federal system.

Finally, there was a tribal loss in the 2015 Supreme Court term on an issue concerning equitable tolling of a statute of limitations,[169] and there was also an extremely important tribal jurisdiction case that split 4–4 after Justice Scalia passed away, resulting in the affirmance of the U.S. Court of Appeals for the Fifth Circuit's decision upholding tribal jurisdiction.[170] Although this jurisdiction case, *Dollar General Corp.*

165. Tweedy, *supra* note 122, at 738–39.

166. United States v. Bryant, 136 S. Ct. 1954, 1961 (2016).

167. *Id.* at 1959; Berger, *supra* note 15, at 1926; *see also* Tweedy, *Connecting the Dots*, *supra* note 14, at 689–91.

168. Berger, *supra* note 15, at 1931–33.

169. *See generally* Menominee Indian Tribe of Wis. v. United States, 577 U.S. 250 (2016).

170. *See generally* Dollar General Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159 (2016) (per

v. Mississippi Band of Choctaw Indians,[171] was vitally important to tribes, as a Supreme Court decision, it lacks all precedential value.[172] Therefore, from a theoretical standpoint, it does not qualify as a true Supreme Court win.

Since the 2015 term, there have been some additional wins, two of which were in the area of treaty usufructuary rights and related treaty rights.[173] A plurality opinion striking down a fuel importation tax as unlawfully burdening the Yakama Tribe's treaty right to travel represents one of these treaty-rights wins.[174] The other is a 5–4 decision upholding the continued viability of the Crow Tribe's treaty hunting right within the Bighorn National Forest.[175] The importance of these two cases should not be underestimated, and the plurality opinion in *Washington State Department of Licensing v. Cougar Den, Inc.* (the right-to-travel case) and Justice Sotomayor's majority opinion in *Herrera v. Wyoming* (the hunting case) are strongly written affirmances of tribal rights and both emphasize the necessity of treating the tribal parties fairly in light of the vast amounts of land they gave up based on promises that they could retain other rights.[176] The wins in these cases, although precarious in terms of the dividedness of

curiam), *aff'g by an equally divided court* Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167 (5th Cir. 2014); Berger, *supra* note 15, at 1938. Another important case for Alaska Native Villages, although not a federal Indian law case per se, was *Sturgeon v. Frost*, which rejected the federal government's regulatory authority over a stretch of river in Alaska under the Alaska National Interest Lands Conservation Act. *See generally* 136 S. Ct. 1061 (2016) (citing 16 U.S.C. § 3102(4)).

171. 136 S. Ct. 2159.

172. *See, e.g.*, Ryan Black & Lee Epstein, *Recusals and the "Problem" of an Equally Divided Supreme Court*, 7 J. APP. PRAC. & PROCESS 75, 81 (2005).

173. *See generally* Herrera v. Wyoming, 139 S. Ct. 1686 (2019); Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000 (2019) (plurality opinion) (finding a treaty right to travel that limits state taxing authority). An additional case in which tribal interests prevailed was *Patchak v. Zinke*, which upheld a statute stripping the federal courts of jurisdiction to continue to hear a landowner's challenge to the federal government's decision to take land into trust on behalf of a tribe. 138 S. Ct. 897 (2018). A fourth case, involving whether the treaty right to fish includes a right to protection of habitat, split 4–4, resulting in affirmance of the U.S. Court of Appeals for the Ninth Circuit's decision in the Tribes' favor. Washington v. United States, 138 S. Ct. 1832 (2018) (per curiam), *aff'g by an equally divided court* 864 F.3d 1017 (9th Cir. 2017). A fifth recent case, *Lewis v. Clarke*, constituted a loss for tribes. 137 S. Ct. 1285 (2017). In *Lewis*, a tribal employee committed an off-reservation tort while on duty, and the Supreme Court held that he could be sued in his individual capacity in state court notwithstanding the tribe's sovereign immunity. *Id.* at 1293.

174. *See generally Cougar Den*, 139 S. Ct. 1000 (plurality opinion).

175. *See generally Herrera*, 139 S. Ct. 1686.

176. *See generally Cougar Den*, 139 S. Ct. 1000 (plurality opinion); *Herrera*, 139 S. Ct. 1686.

the Court, are less unusual than the win in *McGirt* because tribes seem to be generally more likely to win in pure treaty rights cases than in other types of cases. For example, historically, tribes have won treaty usufructuary rights cases during periods when they were losing most other types of cases.[177] And some Justices seem more amenable to pure tribal treaty rights claims than to tribal jurisdiction or reservation boundary claims.[178] It is possible that this is because the exercise of treaty rights somehow meshes with non-Indians' stereotypes of Native peoples or perhaps, more pragmatically, because the exercise of treaty rights does not involve any direct tribal authority over non-tribal citizens. At any rate, these recent treaty rights wins, although crucial to the maintenance of tribal cultures, are not as striking in terms of Supreme Court jurisprudence as the win in *McGirt*.

There is a post-*McGirt* case that yielded a remarkable result in the tribal criminal jurisdiction context, although the reasoning is curious and the language, although not disrespectful, does not exude the level of respect for tribal sovereignty that we see in *McGirt*.[179] In *United States v. Cooley*,[180] the Court unanimously upheld a tribal officer's authority to detain and search a non-Native driver who appeared to be impaired, had a loaded semi-automatic weapon as well as drug paraphernalia with him, and had his young child in the car.[181] The detention was allowed pending transfer to state or federal officers that had jurisdiction.[182] The nine-page opinion rests primarily on the Court's civil jurisdiction precedent without explaining why this precedent should be extended to the criminal context in the

177. *See, e.g.*, United States v. Winans, 198 U.S. 371 (1905); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

178. The late Justice Ginsburg is one example of such a Justice. Her relatively dismal early record in federal Indian cases did not begin to turn around until 2005. *See* Carole Goldberg, *Finding the Way to Indian Country: Justice Ruth Bader Ginsburg's Decisions in Indian Law Cases*, 70 OHIO ST. L.J. 1003, 1014–15, 1032 (2009). She nonetheless joined the five-Justice majority in a seminal treaty rights case in 1999. *See generally Mille Lacs*, 526 U.S. 172.

179. *See generally* United States v. Cooley, 141 S. Ct. 1638 (2021).

180. *Id.*

181. *Id.* at 1641; *see also* United States v. Cooley, 919 F.3d 1135, 1139–40 (9th Cir. 2019) (reciting the facts of the case), *rev'd*, 141 S. Ct. 1638 (2021).

182. *Cooley*, 141 S. Ct. at 1641, 1643.

circumstances at hand.[183] The discussion of precedent relating to tribal civil jurisdiction appears to be loosely based on an argument the United States made in its brief; specifically, the United States asserted that one of the exceptions to the general divestment of tribal civil jurisdiction over non-members on fee lands delineated in *Montana v. United States*,[184] *viz* the exception that allows for tribal civil jurisdiction where there is a threat or direct effect on tribal health or welfare, "reflects a general principle that supports the more modest ability to protect the public from imminent danger and to aid federal and state law enforcement."[185] Rather than spelling out that it was extracting a wider, general principle from the *Montana* case, as the United States advocated, the Court in *Cooley* appears to simply apply *Montana* in the criminal context, raising questions about whether the Court's civil jurisdiction test has somehow now crept into the criminal context as well.[186] Despite the curiousness of the Court's analysis, the result in *Cooley* is a clear win for tribes on a jurisdictional question—an area of law where such wins have been few and far between.[187] Although the mismatch between the legal question posed in *Cooley* and the precedent applied means that the opinion does not strongly further predictability in the Court's Indian law jurisprudence,[188] the win does suggest that *McGirt* may well have paved the way for Supreme Court decisions that are more amenable to recognizing tribal rights.[189]

183. *Id.* at 1641 (citing *Montana* v. United States, 450 U.S. 544, 566 (1981), and stating without explanation that "[w]e believe this statement of law governs here").

184. 450 U.S. 544.

185. Brief of Petitioner at 25–26, *Cooley*, 141 S. Ct. 1638 (No. 19-1414), 2021 WL 103640, at *25–26.

186. *Cooley*, 141 S. Ct. at 1641.

187. Other tribal wins in the jurisdiction context include *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), and *United States v. Lara*, 541 U.S. 193 (2004).

188. One sense in which the *Cooley* decision does further predictability is in its reliance on a statement in past precedent to the effect that such detentions by tribal officers were allowed. *See supra* note 114 (discussing *Duro v. Reina*, 495 U.S. 676, 697 (1990)).

189. The Court decided another case dealing with tribal and Native rights in 2021: *Yellen v. Confederation Tribes of the Chehalis Reservation*, Nos. 20-543, 20-544, 2021 WL 2599432 (June 25, 2021). At issue was a technical question as to whether Alaska Native Corporations (ANCs) qualify as "Tribal government[s]" under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, 15 U.S.C. §§ 9001–12, 9021–34, 9041–63, 9071–80, scattered sections of title 21 and 22 of the U.S. code, 42 U.S.C. § 801, 33 U.S.C. § 2238b-1, 2 U.S.C. § 5548, and 17 U.S.C.A. § 710 (West 2021). *Yellen*, 2021

III. UNCERTAINTY IN THE WAKE OF JUSTICE GINSBURG'S DEATH

Justice Ginsburg, who passed away from cancer in September 2020, was part of the slim 5–4 Majority in *McGirt*.[190] While her early record as a Supreme Court Justice in ruling on federal Indian law cases left a great deal to be desired, her decisions as to tribal rights appeared to improve over time, particularly after apparently having reached a turning point in 2005.[191] Though her record after 2005 remained mixed—for example, she disliked both tribal and state sovereign immunity and therefore voted against the tribe in *Bay Mills*[192]—she cast favorable votes for tribes in other recent cases and wrote the majority opinion in *Bryant*.[193] Another indication of her apparent change of heart regarding tribal interests is her statement that the decision she most regretted was *City of Sherrill v. Oneida Indian Nation*,[194] in which she employed colorful language to reject a tribe's immunity from local taxes, insisting that the "embers" of its sovereignty over the area in question had "long" grown "cold."[195] Additionally, to reach this result, she invoked the equitable defense of laches, which was neither briefed by the parties nor supported by the factual record and the application of which to federally protected tribal

WL 2599432, at *2. Because there was tension between the interests of urban Alaska Natives and those of federally recognized tribes in the case, Brief for Cook Inlet Region, Inc. as Amicus Curiae Supporting Petitioners at 1–2, *Yellen*, 2021 WL 2599432 (Nos. 20-543, 20-544), 2021 WL 915949, at *1–2, and because the case solely involved a technical, statutory interpretation issue, *Yellen*, 2021 WL 2599432, at *2, it is difficult to characterize the opinion in terms whether it supports or derogates tribal and Native rights.

190. *See generally* McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

191. Goldberg, *supra* note 178, at 1014–15.

192. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 831–32 (Ginsburg, J., dissenting) ("Neither brand [i.e., tribal or state] of immoderate, judicially confirmed immunity, I anticipate, will have staying power.").

193. *See generally* United States v. Bryant, 136 S. Ct. 1954 (2016); *see also* Patchak v. Zinke, 138 S. Ct. 897, 912–13 (2018) (Ginsburg, J., concurring); Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1016–21 (2019) (Gorsuch, J., concurring); Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 342–52 (2008) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

194. 544 U.S. 197 (2005); Oliver O'Connell, *Ruth Bader Ginsburg's Greatest Regret Revealed*, INDEPENDENT (Sept. 22, 2020, 6:13 PM), https://www.independent.co.uk/news/world/americas/ruth-bader-ginsburg-supreme-court-regret-oneida-nation-sherill-native-americans-b534565.html.

195. *City of Sherrill*, 544 U.S. at 214.

rights had been previously rejected.[196] Although the decision itself remains a bitter pill for anyone who cares about tribal rights, her ultimate recognition of its injustice was a heartening development and exemplifies the fact that Supreme Court Justices sometimes do evolve considerably in their thinking on specific issues. Thus, despite having written and joined her share of poor decisions relating to tribes, Justice Ginsburg's jurisprudence on tribal sovereignty had some bright spots and seemed to be arcing toward justice in the later stages of her career.

Justice Ginsburg has now been replaced by Justice Barrett, a self-proclaimed protégé of the late Justice Scalia and a Justice whose views on some issues, such as gender equality, may well turn out to be the inverse of those of Justice Ginsburg.[197] Given Justice Barrett's short tenure as a judge (she was appointed to the U.S. Court of Appeals for the Seventh Circuit in 2017 and previously served as a law professor at the conservative University of Notre Dame Law School), it is difficult to read the tea leaves as to how she might rule on Indian law cases. In light of her self-professed adherence to Justice Scalia's judicial philosophy and his textualist approach,[198] one clue might be

196. Fletcher, *supra* note 7, at 132; Tweedy, *Connecting the Dots*, *supra* note 14, at 683 n.157.

197. *Compare* Emma Brown et al., *Amy Coney Barrett Served As a 'Handmaid' in Christian Group People of Praise*, WASH. POST (Oct. 6, 2020, 8:09 PM), https://www.washingtonpost.com/investigations/amy-coney-barrett-people-of-praise/2020/10/06/5f497d8c-0781-11eb-859b-f9c27abe638d_story.html [https://perma.cc/PP9E-NMM5] (describing Justice Barrett's former role as "handmaid" or women's leader in a far-right Catholic group called "People of Praise" in which women are required to submit to their husbands and acknowledge them as their "heads"), *with* Melissa Block, *Pathmarking the Way: Ruth Bader Ginsburg's Lifelong Fight for Gender Equality*, NPR (Sept. 24, 2020, 3:00 PM), https://www.npr.org/2020/09/24/916377135/pathmarking-the-way-ruth-bader-ginsburgs-lifelong-fight-for-gender-equality [https://perma.cc/X8UM-XT4K] (describing Justice Ginsburg's considerable legacy of furthering gender equality); *see also Amy Coney Barrett Senate Confirmation Hearing Day 2 Transcript*, REV: TRANSCRIPTS (Oct. 13, 2020), https://www.rev.com/blog/transcripts/amy-coney-barrett-senate-confirmation-hearing-day-2-transcript [https://perma.cc/288A-39BR] [hereinafter *Barrett Confirmation Hearing*] ("I would say that Justice Scalia was obviously a mentor, and as I said when I accepted the President's nomination, that his philosophy is mine too."); Mary Annette Pember, *Amy Coney Barrett and the Fate of Native Adoption Law*, INDIAN COUNTRY TODAY (Oct. 12, 2020), https://indiancountrytoday.com/news/amy-coney-barrett-and-the-fate-of-native-adoption-law-4oKdAmOCKUq-HDbZ2fj5sQ [https://perma.cc/G6HL-9UC5] (explaining that People of Praise has been accused by past members of subjugating women).

198. *Barrett Confirmation Hearing*, *supra* note 197; *Amy Coney Barrett: USSC Nomination Acceptance Address*, AM. RHETORIC: ONLINE SPEECH BANK (Sept. 26, 2020), https://www.americanrhetoric.com/speeches/amyconeybarrettusscnominationacceptance.htm [https://perma.cc/X8PB-JGJS].

Justice Scalia's jurisprudence on federal Indian law, which, as discussed briefly above,[199] is extremely problematic for tribes. On the other hand, however, Justice Barrett did express openness to the Indian law canons in one of her law review articles,[200] so there is some cause for hope that she may demonstrate more fidelity to precedent and core Indian law principles than did Justice Scalia. Her joinder of the unanimous opinion in *Cooley* is also a promising sign.[201] Furthermore, Supreme Court Justices' rulings on Indian law appear to be less tied to their conservative or liberal ideologies than their rulings in other areas, as well as being more likely to evolve after their appointment to the Supreme Court.[202]

A. Justice Scalia's Indian Law Jurisprudence As a Possible Model for Justice Barrett

If Justice Barrett were to decide to follow Justice Scalia's lead on cases that raise federal Indian law issues, this would undoubtedly foster continued unpredictability in the Court's Indian law jurisprudence and would inculcate a sense of hopelessness among tribes and tribal advocates. As described above, Justice Scalia did not believe adherence to precedent was required in the field of federal Indian law,[203] and as demonstrated by Professor Matthew Fletcher, despite the late Justice's attachment to textualism, he usually failed to engage with the relevant texts in Indian law, instead elevating the interests of non-Indian opponents of tribal jurisdiction and other

199. *See* discussion *supra* Section I.A.

200. Amy Coney Barrett, *Substance Canons & Faithful Agency*, 90 B.U. L. REV. 109, 151–52 (2010); *see also* Memorandum from Joel West Williams, Senior Staff Att'y, Native Am. Rights Fund, on Nomination of Amy Coney Barrett to the Supreme Court 3–4 (Oct. 6, 2020) [hereinafter NARF Memorandum], https://sct.narf.org/articles/indian_law_jurispurdence/amy_coney_barrett_indian_law.pdf [https://perma.cc/8H2E-XRGC].

201. United States v. Cooley, 141 S. Ct. 1638 (2021); *see also supra notes* 179–189 and accompanying text.

202. Grant Christensen, *Judging Indian Law: What Factors Influence Individual Justice's Votes on Indian Law in the Modern Era*, 43 U. TOL. L. REV. 267, 269–72, 293 (2012).

203. *See* discussion *supra* Section I.A.

sovereign rights, apparently because of a personal proclivity for, or identification with, such interests.[204]

Justice Scalia's record on tribal rights was poor although not absolutely bleak. In a study of individual Justices' rulings in the area of Indian law from 1959 through 2010, Professor Grant Christensen found that Justice Scalia had voted for tribal interests 17.5% of the time.[205] This was roughly the same percentage as Justice Kennedy, a modicum higher than Justice Thomas's 12.2%, and a substantial improvement on Chief Justice Roberts's and Justice Alito's abysmal 0%, though the latter two were quite new to the Court at that time.[206] Among Justice Scalia's most notable votes in favor of tribal interests are two Indian Child Welfare Act (ICWA)[207] cases, *Mississippi Band of Choctaw Indians v. Holyfield*,[208] in which he voted with the majority to enforce the statute and transfer jurisdiction to the tribal court, and *Adoptive Couple v. Baby Girl*,[209] in which he partially joined Justice Sotomayor's dissent and penned his own dissent, with both dissents arguing that the majority should have applied the statute to protect the biological father's parental rights.[210] As to the *Holyfield* case, he did comment decades later that he found it "very hard" to follow the ICWA in that case, suggesting that he felt constrained to do so by the clear statutory language.[211] Thus, even when he voted for tribal rights

204. *See generally* Fletcher, *supra* note 7; *see also id.* at 126 (discussing Justice Scalia's majority opinion in *Nevada v. Hicks*, 533 U.S. 353 (2001)).

205. Christensen, *supra* note 202, at 292. The Native American Rights Fund reports that Justice Scalia's full voting record shows that he voted in favor of tribal interests only 14% of the time. NARF Memorandum, *supra* note 200, at 5.

206. Christensen, *supra* note 202, at 292. For more on Chief Justice Roberts's disappointing record in the field of federal Indian law, see Peter Scott Vicaire, *Two Roads Diverged: A Comparative Analysis of Indigenous Rights in a North American Constitutional Context*, 58 MCGILL L.J. 607, 644 & n.185 (2013).

207. 25 U.S.C. §§ 1901–03, 1911–23, 1931–34, 1951, 1952, 1961, 1963.

208. 490 U.S. 30 (1989).

209. 570 U.S. 637 (2013).

210. *Id.* at 667–92 (Scalia, J., dissenting, and joining dissent in part).

211. Adam Liptak, *Case Pits Adoptive Parents Against Tribal Rights*, N.Y. TIMES (Dec. 24, 2012), https://nyti.ms/WBopZV [https://perma.cc/Z4SB-PMVE]. Some have also voiced concern about how Justice Barrett might approach ICWA cases because she herself has adopted two children from Haiti who are thus of a different race and national origin from her. Pember, *supra* note 197. It is impossible to know if Barrett's status as a white adoptive parent of Haitian children will influence her approach to ICWA, and unfortunately, she was not asked about the ICWA during her confirmation hearings. *See Barrett Confirmation Hearing*, *supra* note 197. One aspect of her adoption experience that may suggest that it is

based on statutory text, he, at least in some cases, felt ambivalent about it. And although his dissent in *Adoptive Couple* could arguably be chalked up to a penchant for father's rights,[212] he did vote to uphold tribal rights in a smattering of other cases, including his vote with the majority in *Salazar v. Ramah Navajo Chapter*,[213] which held the federal government to its statutory obligation to pay contract support costs under the Indian Self-Determination and Education Assistance Act,[214] despite Congress's failure to appropriate sufficient funds.

Nonetheless, his slim record of cases in favor of tribal rights is dwarfed by his strident and unnuanced rejection of such rights in many others.[215] One particularly troubling example is his majority opinion in *Nevada v. Hicks*,[216] an opinion denying a tribal court's jurisdiction over civil rights claims against state officers relating to an on-reservation search. Although the bare result may not be entirely surprising in the abstract, the opinion wreaked a good deal of collateral damage. The opinion is problematic in (1) seeming to extend the

---

less likely to negatively dispose her towards the ICWA is that she and her husband did not adopt because of an inability to have children themselves and in fact have five biological children. Dora Nuss-Warren, *Who Are Amy Coney Barrett's Children?*, MOMS.COM (Sept. 26, 2020), https://www.moms.com/amy-coney-barretts-children/ [https://perma.cc/2JF5-Z8TF]. Thus, she is perhaps less likely than some adoptive parents to be concerned that the ICWA in effect shrinks the pool of children available for adoption by childless couples. *See, e.g.*, Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in* Adoptive Couple v. Baby Girl, 67 FLA. L. REV. 295, 299, 353–54 (2015) (describing the commodification of adoption and the increasing demand for adoptable babies by privileged, upper-middle class couples). In light of the Fifth Circuit's very recent fractured en banc decision on the ICWA, it is possible that we will know Justice Barrett's views on ICWA quite soon. *See generally* Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (en banc).

212. Fletcher, *supra* note 7, at 136.

213. 567 U.S. 182 (2012).

214. 25 U.S.C. §§ 13a, 5301–02, 5304–08, 5321–25, 5328–32, 5345–47, 5351–56, 5361–77, 5381–99, 5411–13, 5421–23; 42 U.S.C. § 2004b.

215. *See, e.g.*, Fletcher, *supra* note 7, at 118; *see also* United States v. Navajo Nation, 556 U.S. 287 (2009) (Scalia, J., authoring the majority opinion rejecting a breach of trust claim against the federal government based on its covert dealings with a coal company regarding on-reservation mineral leases while an administrative appeal involving the Navajo Nation and the coal company was pending); Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316 (2008) (Scalia, J., joining the majority opinion rejecting tribal court's jurisdiction to adjudicate discrimination claims relating to an off-reservation bank's treatment of an on-reservation business, the majority of which was owned by tribal members); Lyng v. Nw. Indian Cemetery Prot. Ass'n, 485 U.S. 439 (1988) (Scalia, J., joining Justice O'Connor's majority opinion rejecting tribes' free exercise claim relating to National Forest lands); Hagen v. Utah, 510 U.S. 399 (1994) (Scalia, J., joining the majority opinion finding a reservation to have been diminished based on "public domain" language that had not previously been recognized as a basis for diminishment).

216. 533 U.S. 353 (2001).

application of the extremely demanding test that must be met for a tribe to exercise civil jurisdiction over non-member activities on fee lands to tribally owned lands,[217] (2) adding a grossly subjective exception to the requirement that litigants exhaust tribal court remedies before seeking relief in federal courts, (3) seeming to minimize the likelihood of the Court's upholding tribal jurisdiction over non-member defendants, and (4) suggesting that states have considerable authority within the bounds of Indian country.[218] It is safe to say that, if Justice Barrett were to follow in Justice Scalia's shoes in the context of Indian law cases, it would be a disaster for Indian country.

B. Justice Barrett's Participation in Indian Law Cases on the Seventh Circuit and on the Supreme Court

The only Indian law case Justice Barrett appears to have participated in as a judge on the Seventh Circuit was a per curiam case involving a prisoner's statutory claim that his right to practice his Native religion was being infringed upon by the prison.[219] It is difficult to glean a sense of Justice Barrett's view of the statutory claims to free exercise of religion because of the procedural posture of the case. The trial court had at first rejected the prisoner's claims on summary judgment, and the Seventh Circuit had, before Justice Barrett was appointed, reversed and remanded for trial.[220] At trial, the prisoner had prevailed on most claims but, proceeding pro se, appealed on claims and issues he had lost—the most important of which was his contention that he was entitled to fresh (rather than dried) game meat for religious ceremonies.[221] The Seventh Circuit panel, in which Justice Barrett participated, affirmed.[222] However, given that it was the earlier

217. *Id.* at 374. *But see* Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391, 406 (2008) (advocating for a narrow reading of *Hicks* that is linked to its specific factual context); COHEN, *supra* note 47, § 4.02 (same).

218. Tweedy, *Connecting the Dots*, *supra* note 14, at 678–79, 684 n.159 (citing Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 407 (2003)).

219. *See generally* Schlemm v. Carr, 760 F. App'x 431 (7th Cir. 2019) (per curiam); NARF Memorandum, *supra* note 200, at 3.

220. Schlemm v. Wall, 784 F.3d 362, 363 (7th Cir. 2015).

221. Schlemm v. Wall, No. 11-CV-272, 2015 WL 2371944, at *1 (W.D. Wis. Apr. 21, 2015).

222. *Carr*, 760 F. App'x at 432–33.

appellate panel that reversed the summary judgment ruling, that the prisoner was proceeding pro se, that he had won most of his claims at trial, and that tribes and Native individuals tend to have an uphill battle in succeeding on religious exercise claims generally,[223] his loss before a panel in which Justice Barrett participated does not seem remarkable. Accordingly, Justice Barrett's brief judicial service on the United States Court of Appeals for the Seventh Circuit does not shed much, if any, light on how she might rule on Indian law issues.

As this Article goes to press, Justice Barrett has participated in two cases during her six-month tenure on the Supreme Court that raise federal Indian law issues. The more illuminating of the two is her joinder of the unanimous opinion in *United States v. Cooley*,[224] in which the Court upheld a tribal officer's power to detain and search a non-Native criminal suspect encountered on the reservation over whom the tribe lacked criminal jurisdiction. Although the Court's reasoning in the case is somewhat mystifying, it is a hopeful sign that Justice Barrett joined a decision that will have the effect of protecting reservation communities and tribal law enforcement from potentially violent criminal suspects.[225] Justice Barrett's questions during oral argument in *Cooley* were also thoughtful and searching, although she appeared to be assuming—at least for the purposes of her questions—the correctness of problematic statements in prior case law to the effect that subjecting non-members to tribal civil jurisdiction would be unfair due to their lack of participation in tribal law-making.[226]

The other case raising federal Indian law issues in which Justice Barrett participated, *Yellen v. Confederated Tribes of the Chehalis Reservation*,[227] a statutory interpretation case, was complex in that the

223. *See, e.g.*, Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 876–79 (1990); Lyng v. Nw. Indian Cemetery Prot. Ass'n, 485 U.S. 439, 452–53 (1988); Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1071 n.14 (9th Cir. 2008).

224. 141 S. Ct. 1638 (2021).

225. *See supra* notes 179–189 and accompanying text; *Cooley*, 141 S. Ct. at 1643; *see also* Brief of Petitioner, *supra* note 185, at 6 (discussing the threat of violence posed by the suspect in *Cooley*).

226. Transcript of Oral Argument at 27–30, 59–62, *Cooley*, 141 S. Ct. 1638 (No. 19-1414); Tweedy, *supra* note 56, at 153, 156–60 (discussing problems with the Court's notion that non-members generally should not be subject to tribal jurisdiction because, as non-members who cannot participate in tribal law-making, they have not "consented" to such jurisdiction).

227. Nos. 20-543, 20-544, 2021 WL 2599432 (June 25, 2021).

interests of urban Alaska Natives were in tension with the interests of federally recognized tribes.[228] Accordingly, her joinder in the majority opinion, which concluded that Alaska Native Corporations qualified as tribes for purposes of the Coronavirus Aid, Relief, and Economic Security (CARES) Act,[229] does not provide a clear indication of Justice Barrett's level of respect for tribal sovereignty.

To sum up Justice Barrett's Supreme Court jurisprudence to date, her participation in the unanimous *Cooley* decision is a positive sign. However, the unanimity of the decision means that her joinder does not elucidate where she is likely to fall in the Court's more common, fractured Indian law decisions.

C. Justice Barrett As a Judicial Clerk

Justice Barrett undoubtedly was exposed to federal Indian law cases as a judicial clerk, first for Judge Silberman of the U.S. Court of Appeals for the D.C. Circuit and then for Justice Scalia.[230] Because of confidentiality rules for law clerks, however, it is impossible to know the extent of her role on any given case or even which cases she worked on that came before the D.C. Circuit or the Supreme Court while she was clerking.[231] We do know that, as a clerk for Justice Scalia, she participated in the writing of memoranda on whether cases for which writs of certiorari had been filed should be taken up by the Supreme Court based on factors such as whether the decision was in conflict with cases from other federal circuits or state supreme courts.[232] Thus, as a Supreme Court clerk, she may well have had experience

228. *See supra* note 189.

229. *See supra* note 189.

230. Amy Howe, *Potential Nominee Profile: Amy Coney Barrett*, SCOTUS BLOG (July 4, 2018, 2:40 PM), https://www.scotusblog.com/2018/07/potential-nominee-profile-amy-coney-barrett/ [https://perma.cc/59QL-HHZE].

231. FED. JUD. CTR., MAINTAINING THE PUBLIC TRUST: ETHICS FOR FEDERAL JUDICIAL LAW CLERKS 5–7 (2d ed. 2011).

232. Elizabeth Slattery, *Amy Coney Barrett, in Her Own Words*, PAC. LEGAL FOUND. (Nov. 11, 2020), https://pacificlegal.org/amy-coney-barrett-in-her-own-words/ [https://perma.cc/5PV2-H7FG] (reporting on an interview with Justice Barrett in which she describes drafting memorandums for the "cert pool"); NARF Memorandum, *supra* note 200, at 4; Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process As Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933, 940–42 (2009) (describing the cert pool process and the standards by which the Supreme Court evaluates cases for possible review).

evaluating Indian law cases for possible grants of certiorari in addition to experience analyzing accepted cases and potentially making recommendations to Justice Scalia as to how to rule on them.

Among the small handful of Indian law cases that came before the Court in some fashion during Justice Barrett's clerkship, two stand out as particularly notable. Justice Scalia joined Chief Justice Rehnquist's dissent in *Minnesota v. Mille Lacs Band of Chippewa Indians*,[233] rejecting the Majority's holding that the treaty hunting and fishing rights of the Mille Lacs Band of Chippewa Indians remained intact. Additionally, the petition for a writ of certiorari in *Rice v. Cayetano* appears to have been filed during Justice Barrett's clerkship.[234] Thus, it is possible that Justice Barrett played a role in the Court's decision to accept certiorari in that case. After Justice Barrett's clerkship with Justice Scalia had ended, the Court reversed the U.S. Court of Appeals for the Ninth Circuit's decision in that case and held that, under the Fifteenth Amendment, voting in Hawaii's special elections for trustees to manage trust property for the benefit of Native Hawaiians had to be open to all citizens of Hawaii, rather than just to Native Hawaiians.[235]

As discussed below, Chief Justice Rehnquist's dissent in *Mille Lacs*, which Justice Scalia joined, is extremely problematic for tribes, particularly because it would perversely erase the tribal perspective from the Indian law canons.[236] In *Rice*, the Supreme Court ultimately sidestepped the issue of whether Native Hawaiians should be considered to have a special relationship to the United States that is similar or identical to that of tribes on the mainland.[237] The Court decided the case, instead, based on the Fifteenth Amendment.[238] However, in so holding, the Court reversed a strong Ninth Circuit decision rooted in trust principles that mirror those applied in the

233. 526 U.S. 172 (1999).

234. Petition for Writ of Certiorari, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818). Though *Rice* is not an Indian law case per se, cases raising issues with respect to the status of Native Hawaiians are analogous to those in the field of federal Indian law.

235. 528 U.S. 495 (2000).

236. *See infra* note 251 (discussing Chief Justice Rehnquist's dissent in *Mille Lacs*, 526 U.S. 172).

237. ANDERSON ET AL., *supra* note 14, at 201.

238. *Rice*, 528 U.S.at 498–99.

federal Indian law context.[239] Thus, the dissent in *Mille Lacs* and the majority in *Rice* are both troubling from a federal Indian law perspective, but the *Mille Lacs* dissent is unquestionably the worse of the two. Again, however, we do not know whether Justice Barrett played any role in Justice Scalia's decision to join the *Mille Lacs* dissent or in the Court's decision to grant certiorari in *Rice*.

D. Justice Barrett's Scholarship

Another possible window into Justice Barrett's approach to Indian law cases is any scholarship from her time as a law professor that bears on Indian law issues. The most likely contender in this area is the aforementioned law review article in which she examines canons of statutory interpretation and assesses whether it is proper for a textualist like herself to apply them (because the use of canons could potentially lead to an interpretation of a statute that is not closely aligned with the text).[240] The title and theme of the article have religious (specifically Christian) connotations—*Substantive Canons and Faithful Agency*[241]—with the reference to faithfulness seeming to lend a religious air to the exercise of interpreting statutes as well as a conservative flavor to the article.

Justice Barrett's short section on the Indian law canons acknowledges that these particular canons are not a core part of her project because the Indian law canons originated in treaty interpretation rather than statutory interpretation (and her main concern in the article is with statutory interpretation), but nonetheless, her analysis seems to reflect an openness to the validity of these canons and a willingness to apply them or see them applied, although she stops short of a wholesale endorsement.[242]

Justice Barrett first traces the Indian law canons back to their origins in the Marshall Court's decision in *Patterson v. Jenks*.[243] She then notes that, after the Court's decision a few years later in *Worcester v.*

239. *See* Rice v. Cayetano, 146 F.3d 1075, 1076, 1082 (9th Cir. 1998), *rev'd*, 528 U.S. 495 (2000).
240. *See generally* Barrett, *supra* note 200.
241. *Id.* at 109.
242. *Id.* at 151–52.
243. 27 U.S. (2 Pet.) 216, 229 (1829); Barrett, *supra* note 200, at 151.

Georgia,[244] which also applied the canons, the Indian law canons lay dormant for thirty-four years and were only applied in two additional cases in the nineteenth century.[245] Her assertion here is that because of their sparse application in their early years, the canons may not have been as "well-settled" as the twentieth century Court understood them to be.[246] However, besides the fact that, in privileging nineteenth century case law, she is also privileging the outmoded and inegalitarian perspectives of the white men who created it,[247] in making this statement, Barrett importantly does not acknowledge the procedural obstacles that prevented tribes from suing in most cases until the latter part of the twentieth century.[248] The fact that, for the most part, tribes could not get into court during the period in which she finds the use of the canons to be lacking is ample explanation for the apparent infrequency of their use during that period. However, to be fair, Justice Barrett makes a point of explaining that she is *not* saying that it is "wrong to apply the Indian canon to statutes," and, importantly, she favorably cites the late Phil Frickey's analysis supporting application of the Indian canons to statutes in a footnote.[249] Given Frickey's prominence as an Indian law scholar, Justice Barrett's evident respect for his work is a good sign for Indian country.

Justice Barrett's brief discussion of the Indian law canons leaves one with the impression that, although she is not well-versed in Indian law, she may be favorably disposed towards the Indian law canons. At the same time, her discussion of their origin suggests that she is not without some level of skepticism. Although the Indian law canons do not figure prominently in her analysis, with respect to canons that apply in the context of statutory interpretation generally, she ultimately

244. 31 U.S. (6 Pet.) 515, 541 (1832).
245. Barrett, *supra* note 200, at 151.
246. *Id.* at 151–52.
247. *See generally*, Fletcher, *supra* note 7.
248. JOSEPH WILLIAM SINGER ET AL., PROPERTY LAW: RULES, POLICIES, AND PRACTICES 101 (7th ed. 2020).
249. Barrett, *supra* note 200, at 152 & n.206 (citing Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. Rev. 381, 421–22 (1993)).

concludes that the use of such canons is permissible if they "promote[] constitutional values" in their application in a given instance.[250]

As to the application of the Indian law canons, then, Justice Barrett is likely an improvement over Justice Scalia, who, based on his votes in Indian law cases, cannot be said to have been a proponent of the Indian law canons,[251] and who failed to even mention them once in the book he co-authored on canons.[252]

E. Concluding Thoughts on Justice Barrett

It is hard to predict, based on the limited information we have, how Justice Barrett might vote in Indian law cases. Given her lack of experience in the area, it is also quite possible that her views as to Indian law and tribal rights, whatever they might be now, will evolve while she is on the Court. Although there is room for cautious optimism that she will be more respectful of and open to tribal rights than was Justice Scalia, how much more respectful and open she may be is impossible to know. She did appear humble in her answers to

250. Barrett, *supra* note 200, at 181.

251. *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 218 (1999) (Rehnquist, C.J., dissenting). Justice Scalia joined Chief Justice Rehnquist's dissent in *Mille Lacs*, which rejected the majority's robust use of the canons to uphold the Tribe's usufructuary rights against a claim that they had been extinguished. *Id.* The dissent instead suggested that the Indian law canons, which are supposed to privilege the *Indian treaty signatory's understanding*, should only come into play if "'learned lawyers' of the day would probably have offered differing interpretations of the [treaty language]." *Id.* (alteration in original) (quoting Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 677 (1979)). One modest counterpoint to Justice Scalia's decision to join the *Mille Lacs* dissent was his opinion for the Court in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*. 502 U.S. 251 (1992). That case concerned the statutory interpretation of the General Allotment Act, specifically whether it permitted Washington to impose ad valorem and excise taxes on allotted lands that the Yakama Indian Nation or its members held in fee. *Id.* at 254 (citing General Allotment (Dawes) Act of 1887, Pub. L. No. 49-105, 24 Stat. 388 (codified at 25 U.S.C. §§ 331–34, 339, 341, 342, 348, 349, 354, 381) (§§ 331–33 repealed 2000)). The Court, in an opinion authored by Justice Scalia, held that the ad valorem tax was permissible based on the Act but that the excise tax was not. *Id.* at 270. The opinion has been rightly criticized for its failure to take the Indian law canons into account with respect to the ad valorem tax. Royster, *supra* note 31, at 24. In fact, the Court could not find explicit authorization for the tax in the General Allotment Act, so it instead relied on a related federal statute that was not directly applicable to uphold the tax. *Id.* at 22. At the same time, however, the Court did use the canons in a conservative way to resolve statutory ambiguity in favor of the Yakama Indian Nation when it struck down the excise tax, and, in doing so, it went so far as to refer to the canons as "deeply rooted." *Cnty. of Yakima*, 502 U.S. at 268–69. Thus, Justice Scalia cannot be said to have completely discounted the Indian law canons of construction, although *County of Yakima* appears to be an isolated example and, even so, is a mixed bag in terms of the canons. *See generally id.*

252. Fletcher, *supra* note 7, at 136.

questions during her confirmation hearings,[253] which is probably a good sign, because humility is a necessity for any outsider to begin to understand tribal perspectives and the effects of colonial policies and laws on tribes and Native individuals.

CONCLUSION

The majority opinion in *McGirt*, when read in conjunction with the decision in *Parker*, brings much-needed coherence to the twin doctrines of diminishment and disestablishment. Moreover, the majority in *McGirt* was able to summon respect for tribal sovereignty and an understanding of the need for fairness to tribes that is seldom seen in Supreme Court decisions, particularly those in areas of law like diminishment and disestablishment that implicate tribal jurisdiction. It is not yet clear whether a new day is dawning for tribes in the Supreme Court, especially because *McGirt* is a 5–4 decision and one of the members of the majority has passed away. However, there is cause for at least modest hope that change is afoot. Moreover, if *McGirt* is any indication, there is a substantial possibility that the Court may realign itself with the canons of construction in federal Indian law, as fleshed out by Cohen, and return to a principled approach rooted in core doctrine, rather than the pell-mell methodologies we have too often seen in recent decades.

253. For example, Justice Barrett framed her answers in a way that recognized that she had not yet been confirmed and may not be, *Barrett Confirmation Hearing*, *supra* note 197, a contrast to Justice Kavanaugh's politicized and vitriolic approach at his own confirmation hearings. *See, e.g.*, Brian Naylor, *Brett Kavanaugh Offers Fiery Defense in Hearing That Was a National Cultural Moment*, NPR (Sept. 28, 2018, 12:13 AM), https://www.npr.org/2018/09/28/652239571/brett-kavanaugh-offers-fiery-defense-in-hearing-that-was-a-national-cultural-mom [https://perma.cc/7R46-BAK4].