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Lessons Learned, Lessons Forgotten: A Tribal Practitioner's Reading of McGirt and Thoughts on the Road Ahead

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LESSONS LEARNED, LESSONS FORGOTTEN: A TRIBAL PRACTITIONER'S READING OF *MCGIRT* AND THOUGHTS ON THE ROAD AHEAD

Stephen H. Greetham*

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"We are told we should worry[.]"
– Neil Gorsuch, Justice of the United States Supreme Court[1]

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* Senior Counsel, Chickasaw Nation; Northeastern University School of Law, J.D., 1998; Boston University, B.A. (Political Science), 1991. A few programming notes: First, this Article offers an analysis of work I have been personally engaged in, both on behalf of my client and in close collaboration with counsel for other Tribal

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> *"What we have is an intergovernmental environment in which, if we could just quit thinking of Indian Tribes and Nations as problems and start thinking of them as peoples, communities, and governmental units, we can get on with business and make it happen."*
>
> – Bruce Babbitt, former Secretary of the U.S. Department of the Interior and Governor of Arizona[2]

> *"Where do you go to start compacting with that group? We need to take a case back and have the courts tell us that we're going back to the way we've operated the state for 114 years."*
>
> – J. Kevin Stitt (Cherokee), Governor of Oklahoma[3]

I. INTRODUCTION

On July 9, 2020, the United States Supreme Court decided *McGirt v. Oklahoma*[4] and affirmed the reservation status of the Muscogee Creek Nation's treaty territory. In the months that followed, the Oklahoma Court of Criminal Appeals went on to hold that the treaty territories of five other Tribal nations in Oklahoma also constituted Indian reservations under federal law.[5] Oklahoma has staunchly resisted the validity of this ruling, but on January 24, 2022, the United States Supreme Court denied thirty-two separate petitions Oklahoma had filed seeking *McGirt*'s overturning.[6] Three days later,

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sovereigns, and I have chosen to use "we" and "our" somewhat liberally. However, I am not a member or citizen of any Indigenous people and have attempted to avoid personal pronouns in contexts that could be construed as suggesting otherwise. If my wording in any instance is unclear, I ask the reader's forgiveness for my error. Second, particularly as this Article stems from my personal engagement in this work, I must make clear that the views expressed are my own and should not be attributed to anyone else, including my client, the Chickasaw Nation. Third and from my heart, thank you to Dr. Amanda Cobb-Greetham (Chickasaw), my best friend, wife, and partner from whom I learn every day and with whom I share every joy. Thanks also to Meredith Turpin (Chickasaw) and Kelsie Sweat (Chickasaw), my compatriots who help get our office's work done every day and who helped specifically in getting this Article out the door. Next, a tip of the hat and expression of respect and affection for my colleagues in the law with their shoulders on the wheel of all this work—both those with whom I agree but even also those with whom I disagree but who nonetheless engage with integrity and respect while arguing coherently from principle; it will be from our consistent and clear argumentation that we push the law forward, something it desperately needs. Finally, a warm thank you to Governor Bill Anoatubby (Chickasaw), whose vision, leadership, and personal commitment to service inspire all of us working on behalf of the Chickasaw people—and many more in Indian country.

1. Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1020 (2019) (Gorsuch, J., concurring).

2. BONNIE G. COLBY ET AL., NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST 33 (2005) (quoting Bruce Babbitt).

3. Joe Tomlinson & Tres Savage, *Forum Ends Early, Stitt Aims to Overturn* McGirt *Ruling*, NONDOC (July 14, 2021), https://nondoc.com/2021/07/14/mcgirt-v-oklahoma-community-impact-forum/.

4. 140 S. Ct. 2452 (2020).

5. Hogner v. State, 500 P.3d 629 (Okla. Crim. App. 2021) (Cherokee); Bosse v. State, 484 P.3d 286 (Okla. Crim. App. 2021), *withdrawn on other grounds*, 495 P.3d 669, *aff'd*, 499 P.3d 771 (Chickasaw); Sizemore v. State, 485 P.3d 867 (Okla. Crim. App. 2021) (Choctaw); Grayson v. State, 485 P.3d 250 (Okla. Crim. App. 2021) (Seminole); State v. Lawhorn, 499 P.3d 777 (Okla. Crim. App. 2021) (Quapaw).

6. SUPREME COURT OF THE UNITED STATES: ORDER LIST 3, 7–8 (Jan. 24, 2022), https://www.supremecourt.gov/orders/courtorders/012422zor_m6io.pdf (denying certiorari in Oklahoma v. Davis, No. 21-258, Oklahoma v. Brown, No. 21-251; Oklahoma v. Kepler, No. 21-252; Oklahoma v. Hathcoat, No. 21-253; Oklahoma v. Mitchell, No. 21-254; Oklahoma v. Jackson, No. 21-255; Oklahoma v. Starr, No. 21-257; Oklahoma v. Howell, No. 21-259; Oklahoma v. Bain, No. 21-319; Oklahoma v. Perry, No. 21-320; Oklahoma v. Johnson, No. 21-321; Oklahoma v. Harjo, No. 21-322; Oklahoma v. Spears, No. 21-323; Oklahoma v. Grayson, No. 21-324; Oklahoma

the Court granted review on a single post-*McGirt* petition that presented two questions but, in doing so, again rejected the State's effort to overturn *McGirt* and confined its writ to a single question that can *only* arise *within Indian country*.[7] In doing so, the Court "establishe[d] a new level of certainty and finality" in this area of the law and in Oklahoma; it made plain that "our treaties and reservation[s] continue in accord with the constitution and other federal law."[8]

As a body, these rulings and orders have revised the criminal justice paradigm that governs throughout much of Eastern Oklahoma, ousting the State from the prosecution of crimes involving Natives and placing such jurisdiction, instead, in the hands of federal and Tribal governments. Taking a step back, the rulings also left Oklahoma and those six Tribal nations with something of a choice: Take the difficult path of working together to implement the law based on some identifiable and mutually acceptable sense of common cause or, alternatively, take the perhaps *equally* difficult but *more* unpredictable path of litigating our way forward. Posing things that way suggests it is a simple either-or proposition—one path or the other. It is, of course, far more complicated.

On a good day, Tribal-State relations can be fraught. Intergovernmental dealings between Indigenous and non-Indigenous peoples involve tangled matters of law, policy, and politics as well as deep histories of exploitation, inequity, and distrust, all of which often lies just below the surface and, consciously or not, shapes parties' attitudes and expectations. This might be particularly true in Oklahoma, which today is home to dozens of Indigenous nations which the government forcibly uprooted from aboriginal homelands to a promised Indian Territory—new treaty homelands in which they fell siege almost immediately to boomers and boosters clamoring for the non-enforcement of the law and federal promises so they could set the nations aside and form a new state.[9] Oklahoma's chaotic origin and contested identities continue to shape its politics and sense of itself.[10]

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v. Janson, No. 21-325; Oklahoma v. Sizemore, No. 21-326; Oklahoma v. Ball, No. 21-327; Oklahoma v. Epperson, No. 21-369; Oklahoma v. Stewart, No. 21-370; Oklahoma v. Jones, No. 21-371; Oklahoma v. Cooper, No. 21-372; Oklahoma v. Beck, No. 21-373; Oklahoma v. McCombs, No. 21-484; Oklahoma v. Shriver, No. 21-486; Oklahoma v. Martin, No. 21-487; Oklahoma v. Fox, No. 21-488; Oklahoma v. Cottingham, No. 21-502; Oklahoma v. Martin, No. 21-608; Oklahoma v. Ball, No. 21-644; Oklahoma v. Ned, No. 21-645; Oklahoma v. Leathers, No. 21-646; and Oklahoma v. Perales, No. 21-704).

7. SUPREME COURT OF THE UNITED STATES: ORDER LIST 1 (Jan. 21, 2022), https://www.supremecourt.gov/orders/courtorders/012122zr_3f14.pdf (granting review in Oklahoma v. Castro-Huerta, No. 21-429, exclusively on question of whether Oklahoma possesses a criminal jurisdiction over non-Indian offenders in Indian country concurrent with the United States, notwithstanding the General Crimes Act, 18 U.S.C. § 1152 and declining review on question of whether *McGirt* should be overturned).

8. Chris Casteel, *Anoatubby Cites 'Finality' as US Supreme Court Rejects 32* McGirt *Petitions*, OKLAHOMAN (Jan. 25, 2022), https://www.oklahoman.com/story/news/2022/01/25/mcgirt-ruling-supreme-court-rejects-32-petitions/9202339002/ (quoting Chickasaw Nation Governor Bill Anoatubby); *see also* The Chickasaw Nation (@Chickasawnation), TWITTER (Jan. 24, 2022, 7:58 PM), https://twitter.com/Chickasaw Nation/status/1485794146761818116.

9. *See generally, e.g.*, ANGIE DEBO, AND STILL THE WATERS RUN (1940); *cf.* Harjo v. Kleppe, 420 F. Supp. 1110, 1120–33 (D.D.C. 1976) (summarizing complex legal history of the Five Tribes, focusing on Muscogee Creek Nation, spanning the period of 1890 through 1909), *aff'd sub nom.* Harjo v. Andrus, 582 F.2d 949 (D.C. Cir. 1978).

10. Dr. Cobb-Greetham recently spoke to how this dynamic can feel less like history and more as a visceral tension among the threads of cultures, memories, stories, and identities that weave the fabric we know as Oklahoma. *See* Amanda Cobb-Greetham, *Viewpoint: Embracing Complexity Is Key to Understanding Oklahoman Identity*, OKLAHOMAN (Nov. 14, 2021), https://www.oklahoman.com/story/opinion/2021/11/14/embracing-complexity-key-understanding-oklahoman-identity/6379268001/. As Sara Hill (Cherokee) writes

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It is within this sometimes heavy atmosphere that Tribal and state governments have forged a hard-fought but generally successful relationship, more often than not navigating through seemingly intractable zero-sum game positions to craft mechanisms of intergovernmental collaboration. On a good day, we leave aside our differences and act with common cause. Unfortunately, the Court did not hand down its ruling on a good day.

The Court took up and decided *McGirt* during a period in which the turmoil was much closer to the surface. One year earlier, almost to the day, the Oklahoma Governor launched a campaign to disrupt existing Indian Gaming Regulatory Act compacts so he could attempt to impose a tripling, or even a quadrupling, of the State's take of Tribal revenues.[11] His efforts succeeded primarily in establishing a remarkable level of unity and Tribal cooperation in opposing the gambit, but it did damage to the Tribal-State relationship.[12] Separately, while the Five Tribes[13] and the now-former Oklahoma Attorney General[14] had for years engaged *outside* the courtroom on jurisdictional matters implicated in the *McGirt* dispute, the arguments *inside* the courtroom and the weight of the issues themselves further polarized constituencies and caused talks to collapse when diplomacy was perhaps most needed.[15] This is where we were, more or less, the day the Court decided the case, and those circumstances seemed to choose our path for us—at least for the time being.

Meanwhile, it would not surprise me if, since that day, entire forests have been felled to print the post-*McGirt* commentary so far produced. Oklahoma has, of course, filed its

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in a separate article in this Journal, Cobb-Greetham is not alone in her sense of tension and disappointment here lately in Oklahoma. Sara E. Hill, *Restoring Oklahoma: Justice and the Rule of Law Post-*McGirt, 57 TULSA L. REV. 553 (2022).

11. Kevin Stitt, *New Gaming Compacts Must Protect the Interests of Tribes and the State*, TULSA WORLD (July 8, 2019), https://tulsaworld.com/opinion/columnists/gov-kevin-stitt-new-gaming-compacts-must-protect-the-interests-of-the-tribes-and-the/article_ae5596f7-e9e5-5613-9bbb-c6341af9259f.html; *see also* Sean Murphy, *Oklahoma Governor, Tribes Clash over Casino Gaming Revenue*, APNEWS (July 10, 2019), https://apnews.com/article/4cdc21f7e721487e84d86b11898f3e56.

12. *E.g.*, Simon Romero & Graham Lee Brewer, *Oklahoma's Tribes Unite Against a Common Foe: Their Cherokee Governor*, N.Y. TIMES (May 15, 2021), https://www.nytimes.com/2020/02/20/us/kevin-stitt-tribal-nations-oklahoma-casinos.html. Notwithstanding the headline, few Native Nation's would likely consider the Oklahoma Governor to be "their . . . Governor," particularly as each Tribal government is its own sovereign polity with its own constitutive system of laws and leadership officials.

13. The Five Tribes, sometimes referred to with the archaic title "Five Civilized Tribes," are the Cherokee Nation, the Chickasaw Nation, the Choctaw Nation of Oklahoma, the Muscogee (Creek) Nation, and the Seminole Nation of Oklahoma. *E.g.*, *Five Civilized Tribes*, INTER-TRIBAL COUNCIL OF THE FIVE CIVILIZED TRIBES, http://www.fivecivilizedtribes.org/ (last visited Feb. 20, 2022).

14. Oklahoma Attorney General Mike Hunter resigned his position May 26, 2021. *Oklahoma Attorney General Mike Hunter Announces He Will Resign*, KOCO, https://www.koco.com/article/oklahoma-attorney-general-mike-hunter-announces-he-will-resign/36544629 (last updated May 26, 2021, 5:42 PM). The Oklahoma Governor named his successor two months later. Dillon Richards, *New Oklahoma Attorney General Assumes Offices as Big Legal Battles Loom*, KOCO, https://www.koco.com/article/new-oklahoma-attorney-general-assumes-office-as-big-legal-battles-loom/37117524 (last updated July 23, 2021, 6:38 PM).

15. *Compare* Curtis Killman, *AG, Tribes Reach Agreement on Jurisdictional Issues*, TULSA WORLD (July 17, 2020), https://tulsaworld.com/news/local/ag-tribes-reach-agreement-on-jurisdictional-issues/article_eb55c534-dcc1-5c10-a6c3-f3c44bad2cba.html, *with* Sean Murphy, *2 Oklahoma Tribal Leaders Say They Don't Support Agreement*, APNEWS (July 17, 2020), https://apnews.com/article/10c369108f464dd0461444924e1c7899, *and* Mary Annette Pember, *Oklahoma Attorney General Dismisses Legislation Critics as 'Sovereignty Hobbyists'*, INDIAN COUNTRY TODAY (July 29, 2020), https://indiancountrytoday.com/news/oklahoma-attorney-general-dismisses-legislation-critics-as-sovereignty-hobbyists.

petitions with the Supreme Court to attack the decision,[16] and its governor consistently applies his own polemical take on it all, pledging to "not stop fighting to ensure we have one set of rules to guarantee justice and equal protection under the law for all citizens,"[17] his coded and benign-sounding rhetoric of termination that he reiterated at the top of his 2022 State of the State address.[18] Meanwhile a local political organization has made the ruling its cartoonish posterchild in a retrograde campaign against Tribes and Tribal sovereignty.[19] Offering high-profile support for those efforts and unencumbered by any reportage from its own news division,[20] the *Wall Street Journal* editorial board so far has published no fewer than *eight* opinion pieces to malign the ruling (and its judicial author, Justice Neil Gorsuch) while telling tabloid tales of some new, wild, and fantastical place—an Oklahoma of dusty streets and crime that seems more like a frontier Deadwood.[21] From

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16. *See, e.g.*, *supra* notes 6–7 and accompanying text.

17. Chris Casteel, *Supreme Court Lets* McGirt *Stand, Will Address Related Question*, OKLAHOMAN (Jan. 21, 2022), https://www.oklahoman.com/story/news/2022/01/21/supreme-court-mcgirt-ruling-related-question-reservations-oklahoma/6526529001/.

18. Governor Kevin Stitt, 2022 State of the State (Feb. 7, 2022), https://oklahoma.gov/content/dam/ok/en/governor/documents/2022StateoftheStatefulltextversion.pdf.

19. *E.g.*, *OCPA Urges Congress to Provide Post-*McGirt *Fairness, Certainty and Unity*, OCPA (Oct. 8, 2020), https://www.ocpathink.org/post/ocpa-urges-congress-to-provide-post-mcgirt-fairness-certainty-and-unity.

20. Between July 9, 2020, the date on which the Court handed down its *McGirt* ruling, and the *Wall Street Journal*'s publication of its eighth editorial on the subject, its news division had produced only three news reports concerning the ruling. The first two of which were published within the first few weeks following the decision. Veronica Dagher, *Three Questions with Scholar Sarah Deer on Empowering Tribal Nations to Protect Native American Women*, WALL ST. J. (July 31, 2020, 10:09 AM), https://www.wsj.com/articles/three-questions-with-scholar-sarah-deer-on-empowering-tribal-nations-to-protect-native-american-women-11596204577?mod=Searchresults_pos7&page=1; Christopher Weaver, *Oklahoma Ruling Shakes up How Police, Courts Handle Crimes Against Native Americans*, WALL ST. J. (July 14, 2020, 9:37 AM), https://www.wsj.com/articles/oklahoma-ruling-shakes-up-how-police-courts-handle-crimes-against-native-americans-11594733835?mod=Searchresults_pos9&page=1. And with the third published only after seven of the editorials had already run. Sadie Gurman, *Supreme Court Upended the Legal System in Oklahoma and Could Do It Again*, WALL ST. J. (Mar. 12, 2022), https://www.wsj.com/articles/supreme-court-upended-the-legal-system-in-oklahoma-and-could-do-it-again-11647097200?mod=Searchresults_pos1&page=1.

21. *More* McGirt *Fallout: The Case of the White Supremacist Choctaw*, WALL ST. J. (Apr. 11, 2022, 6:56 PM), https://www.wsj.com/articles/the-case-of-the-white-supremacist-choctaw-supreme-court-mcgirt-oklahoma-native-americans-crime-11649260615?mod=Searchresults_pos1&page=1; *More* McGirt *Mayhem in Oklahoma*, WALL ST. J. (Feb. 21, 2022, 5:27 PM), https://www.wsj.com/articles/mcgirt-decision-oklahoma-native-american-reservation-jurisdiction-muscogee-creek-hughes-county-crime-racial-injustice-systemic-racism-11644772881?mod=Searchresults_pos1&page=1; *The Supreme Court's* McGirt *Cleanup*, WALL ST. J. (Dec. 26, 2021), https://www.wsj.com/articles/the-supreme-courts-mcgirt-cleanup-oklahoma-v-victor-manuel-castro-huerta-11642806980; *The Native American Victims of* McGirt, WALL ST. J. (Jan. 21, 2022, 6:39 PM), https://www.wsj.com/articles/the-native-american-victims-of-mcgirt-oklahoma-supreme-court-11641589074?mod=Searchresults_pos1&page=1; *The* McGirt *Ruling Breaches Its Levee*, WALL ST. J. (Dec. 26, 2021), https://www.wsj.com/articles/the-mcgirt-ruling-breaches-its-levee-oklahoma-stephen-friot-supreme-court-11640384399?mod=Searchresults_pos2&page=1; *How to Get Away with Manslaughter*, WALL ST. J. (Dec. 3, 2021, 6:48 PM), https://www.wsj.com/articles/how-to-get-away-with-manslaughter-mcgirt-oklahoma-neil-gorsuch-supreme-court-11638484034?mod=Searchresults_pos3&page=1; *Justice Gorsuch Tears up Oklahoma*, WALL ST. J. (Sep. 8, 2021, 6:41 PM), https://www.wsj.com/articles/justice-neil-gorsuch-tears-up-oklahoma-mcgirt-creek-supreme-court-tribal-11627221756?mod=Searchresults_pos4&page=1; *The Tempting of Neil Gorsuch*, WALL ST. J. (July 10, 2020, 7:04 PM), https://www.wsj.com/articles/the-tempting-of-neil-gorsuch-11594422279.

The editorial board's take neither cites to nor is consistent with its earlier reporting, *see supra* note 20, and its take differs markedly from what is reported from the ground, at least as suggested by local media and analysis. *E.g.*, Curtis Killman, *Most Released Due to* McGirt *Have Been Charged Either Federally or Tribally,*

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the other side of the apparent divide, Tribes have opposed the State's petitions[22] and engaged in local public affairs work,[23] and as implementation of the ruling has proceeded, Oklahoma media have closely tracked developments, suggesting a story very different from the one told by the *Wall Street Journal*.[24] Finally, the activist-academic industrial complex has also been busy, declaiming in various ways and to various ends that Federal Indian law *in fact* exists and applies in Oklahoma.

In the meantime, laboring on the ground with cooperating intergovernmental partners, the Indigenous nations of Oklahoma Indian country have been at work.[25] The Tribes affected by the ruling have assessed, invested in, and expanded internal Tribal

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Tulsa World Analysis Finds, TULSA WORLD, https://tulsaworld.com/news/local/crime-and-courts/most-released-due-to-mcgirt-have-been-charged-either-federally-or-tribally-tulsa-world-analysis/article_96e94b7e-6f30-11ec-992c-9f9ace817196.html (last updated Feb. 20, 2022); McGirt *Not Causing Sky to Fall as State Leaders, Law Enforcement Claim*, TULSA WORLD (Jan. 16, 2022), https://tulsaworld.com/opinion/editorial/editorial-mcgirt-not-causing-sky-to-fall-as-state-leaders-law-enforcement-claim/article_b64a2e4e-725e-11ec-9cf4-0bf95f0b454 5.html; *accord* Stephen Greetham, *Chickasaw Nation Replies on Oklahoma Law*, WALL ST. J. (Dec. 10, 2021, 2:03 PM), https://www.wsj.com/articles/chickasaw-nation-tribal-oklahoma-law-supreme-court-justice-gorsuch-11639078495.

22. Tribal briefs organized by Tribal nation: (1) Brief for Cherokee Nation as Amicus Curiae Supporting Respondents, Oklahoma v. Bragg, No. 21-1009 (Jan. 12, 2022), Oklahoma v. Castro-Huerta, No. 21-429 (Oct. 29, 2021), Oklahoma v. Cottingham, No. 21-502 (Oct. 29, 2021), Oklahoma v. Foster, No. 21-868 (Jan. 23, 2022), Oklahoma v. Leathers, No. 21-646 (Nov. 24, 2021), Oklahoma v. McCombs, No. 21-484 (Oct. 28, 2021), Oklahoma v. McDaniel, No. 21-485 (Oct. 28. 2021), Oklahoma v. Perales, No. 21-704 (Dec. 10. 2021), Oklahoma v. Shriver, Dakota, No. 21-486 (Oct. 28, 2021), Oklahoma v. Shriver, Gage, No. 21-985 (Jan. 20, 2022), Oklahoma v. Spears, No. 21-323 (Oct. 28, 2021); (2) Brief for Chickasaw Nation as Amicus Curiae Supporting Respondents, Oklahoma v. Ball, No. 21-644 (Nov. 23, 2021), Oklahoma v. Beck, No. 21-373 (Oct. 15, 2021), Oklahoma v. Cooper, No. 21-372 (Oct. 15, 2021), Oklahoma v. Jones, Shawn, No. 21-451 (Oct. 25, 2021), Oklahoma v. Martin, Laurie, No. 21-608 (Nov. 23, 2021), Oklahoma v. Ned, No. 21-645 (Nov. 23, 2021), Oklahoma v. Vineyard, No. 21-798 (Dec. 17, 2021); (3) Brief for Chickasaw Nation and Choctaw Nation of Oklahoma as Amici Curiae Supporting Respondent, Oklahoma v. Castro-Huerta, No. 21-429 (Nov. 18, 2021); (4) Brief for Choctaw Nation as Amicus Curiae, Oklahoma v. Bailey, No. 21-960 (Jan. 5, 2022), Oklahoma v. Coffman, No. 21-772 (Dec. 22, 2021), Oklahoma v. Fox, No. 21-488 (Oct. 28, 2021), Oklahoma v. McCurtain, No. 21-773 (Dec. 22, 2021), Oklahoma v. Miller, No. 21-643 (Nov. 22, 2021), Oklahoma v. Sizemore, No. 21-326 (Oct. 28, 2021); (5) Brief for Muscogee (Creek) Nation as Amicus Curiae, Oklahoma v. Ball, No. 21-327 (Oct. 15, 2021), Oklahoma v. Brown, No. 21-251 (Oct. 22, 2021), Oklahoma v. Castro-Huerta, No. 21-429 (Nov. 16, 2021), Oklahoma v. Davis, No. 21-258 (Oct. 21, 2021), Oklahoma v. Harjo, No. 21-322 (Oct. 22, 2021), Oklahoma v. Hathcoat, No. 21-253 (Oct. 8, 2021), Oklahoma v. Howell, No. 21-259 (Oct. 15, 2021), Oklahoma v. Jackson, No. 21-255 (Oct. 15, 2021), Oklahoma v. Janson, No. 21-325 (Oct. 22, 2021), Oklahoma v. Johnson, No. 21-321 (Oct. 22, 2021); Oklahoma v. Jones, Jeffery, No. 21-371 (Nov. 5, 2021), Oklahoma v. Kepler, No. 21-252 (Oct. 8, 2021), Oklahoma v. Little, No. 21-734 (Dec. 15, 2021), Oklahoma v. Martin, David, No. 21-487 (Nov. 24, 2021), Oklahoma v. Mitchell, No. 21-254 (Oct. 8, 2021), Oklahoma v. Mize, No. 21-274 (Oct. 5, 2021); Oklahoma v. Perry, No. 21-320 (Oct. 29, 2021), Oklahoma v. Starr, No. 21-257 (Oct. 15, 2021), Oklahoma v. Stewart, No. 21-370 (Oct. 29, 2021), Oklahoma v. Williams, No. 21-265 (Nov. 5, 2021), Oklahoma v. Yargee, No. 21-705 (Dec. 15, 2021).

23. Molly Young, *Oklahoma Tribes Seek to Shape Their Own Narrative with TV Ads Amid Battles with Gov. Stitt*, OKLAHOMAN (Jan. 16, 2022), https://www.oklahoman.com/story/news/2022/01/16/amid-battles-over-mcgirt-with-stitt-oklahoma-tribes-shape-own-story-tv-ads/9169707002/.

24. *E.g.*, McGirt v. Oklahoma*: Supreme Court Decision and Aftermath*, TULSA WORLD, https://tulsaworld.com/news/local/crime-and-courts/mcgirt-v-oklahoma-supreme-court-decision-and-aftermath/collection_1a8d881c-80ff-11eb-a084-2ba1ff24554d.html#1_(last updated Feb. 4, 2022); McGirt, OKLAHOMAN, https://www.oklahoman.com/search/?q=McGirt (last visited Feb. 5, 2022). One Oklahoma-based independent media outlet has also set an interactive resource page as a service to its readers. *See* McGirt v. Oklahoma, FRONTIER, https://interactive.readfrontier.org/mcgirt-v-oklahoma (last visited Mar. 2, 2022).

25. *E.g.*, Brief for Cherokee Nation, Chickasaw Nation, Choctaw Nation of Oklahoma, Muscogee (Creek) Nation, and Seminole Nation of Oklahoma as Amici Curiae Supporting Respondent at 4–19, Oklahoma v. Castro-Huerta, No. 21-429 (Apr. 4, 2022).

https://digitalcommons.law.utulsa.edu/tlr/vol57/iss3/7

criminal justice system capacities[26] and deepened their networks of intergovernmental agreements, e.g., cross-deputation and detention agreements, to support day-to-day policing.[27] Taking stock of broader implications and taking advantage of existing federal law authorizations,[28] five of those Native nations have formed child welfare agreements with Oklahoma to ensure consistency in Indian Child Welfare Act proceedings as we work toward long-term implementation goals.[29] Finally, several of the affected nations have called on Congress to act—whether to increase appropriations, to enact new compacting authorizations, or to lift statutory limits on Tribal jurisdiction and sentencing authority—which, when viewed as a whole, suggests some level of Tribal consensus that federal action will be necessary to support implementation of the Court's ruling.[30] And Congress has, in fact, already begun to act—authorizing additional funding for Tribes implementing *McGirt* and, more substantively, reauthorizing the Violence Against Women Act and including within it new recognitions of Tribal criminal jurisdiction over non-Indian

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26. *Id.*; *see also Chickasaw Nation Expands Criminal Justice Capabilities*, CHICKASAW NATION (Mar. 11, 2022), https://www.chickasaw.net/News/Press-Releases/Release/Chickasaw-Nation-expands-criminal-justice-capabili-57980.aspx; Inter-Tribal Council of the Five Civilized Tribes, Res. No. 21-34 (Oct. 8, 2021), http://www.fivecivilizedtribes.org/Docs/Resolutions/2021/ITC%20R21-34.pdf; Michael Overall, *The Cherokee Nation's Budget Will Hit a Record $3 Billion as the Tribe Responds to COVID and* McGirt, TULSA WORLD, https://tulsaworld.com/news/state-and-regional/govt-and-politics/the-cherokee-nations-budget-will-hit-a-record-3-billion-as-the-tribe-responds-to/article_33d25a2e-157d-11ec-963e-7ff77df58054.html (last updated Oct. 22, 2021); Ashley Ellis, *Cherokee Nation Files 1,000th Case in Tribal Court Since* McGirt *Ruling*, KTUL (June 8, 2021), https://ktul.com/news/local/cherokee-nation-files-1000th-case-in-tribal-court-since-mcgirt-ruling.

27. *E.g.*, Nancy Marie Spears, *Tribal Law Enforcement Officials Say* McGirt *Strengthening Public Safety*, INDIAN COUNTRY TODAY (Nov. 3, 2021), https://indiancountrytoday.com/news/tribal-law-enforcement-officials-say-mcgirt-strengthening-public-safety; K. Querry-Thompson, *Oklahoma Sheriff Supports Cross-deputation Agreements*, KFOR, https://kfor.com/news/oklahoma-media-center/oklahoma-sheriff-supports-cross-deputation-agreements/ (last updated June 24, 2021, 10:36 AM).

28. 25 U.S.C. § 1919(a).

29. LIMITED CONCURRENT JURISDICTION AGREEMENT (Seminole Nation of Oklahoma) (July 15, 2021), https://www.sos.ok.gov/documents/filelog/94409.pdf; INTERGOVERNMENTAL AGREEMENT BETWEEN THE STATE OF OKLAHOMA AND EACH OF THE FIVE TRIBES REGARDING JURISDICTION OVER INDIAN CHILDREN WITHIN EACH TRIBES RESERVATION (Cherokee Nation) (filed Sept. 1, 2020), https://www.sos.ok.gov/documents/filelog/93672.pdf; INTERGOVERNMENTAL AGREEMENT BETWEEN THE STATE OF OKLAHOMA AND THE CHOCTAW NATION OF OKLAHOMA REGARDING JURISDICTION OVER INDIAN CHILDREN WITHIN THE TRIBE'S RESERVATION (filed Aug. 17, 2020), https://www.sos.ok.gov/documents/filelog/93655.pdf; INTERGOVERNMENTAL AGREEMENT BETWEEN THE STATE OF OKLAHOMA AND EACH OF THE FIVE TRIBES REGARDING JURISDICTION OVER INDIAN CHILDREN WITHIN EACH TRIBES RESERVATION (Chickasaw Nation) (filed Aug. 7, 2020), https://www.sos.ok.gov/documents/filelog/93637.pdf; INTERGOVERNMENTAL AGREEMENT BETWEEN THE STATE OF OKLAHOMA AND THE MUSCOGEE (CREEK) NATION REGARDING JURISDICTION OVER INDIAN CHILDREN WITHIN THE NATION'S RESERVATION (filed Aug. 4, 2020), https://www.sos.ok.gov/documents/filelog/93632.pdf.

30. *E.g.*, Rob Capriccioso, *Oklahoma Tribes Don't Expect to See Pro-tribal* McGirt *Funding in Infrastructure Bills*, TRIBAL BUS. NEWS (Aug. 4, 2021), https://tribalbusinessnews.com/sections/sovereignty/13579-oklahoma-tribes-don-t-expect-to-see-pro-tribal-mcgirt-funding-in-infrastructure-bills; Chris Casteel, *Cherokee, Chickasaw Leaders Endorse Criminal Jurisdiction Bill in Congress*, OKLAHOMAN (May 10, 2021), https://www.oklahoman.com/story/news/2021/05/10/chickasaw-cherokee-nation-leaders-endorse-criminal-jurisdiction-bill-congress-mcgirt/5023678001/; *cf.* Dominga Cruz, Sarah Deer & Kathleen Tipler, *The Oklahoma Decision Reveals Why Native Americans Have a Hard Time Seeking Justice*, WASH. POST (July 22, 2020), https://www.muscogeenation.com/muscogee-creek-nation-announces-appointments-to-mvskoke-reservation-protection-commission/ (presenting context, in a piece co-written by member of Mvskoke Reservation Protection Commission, for potentially lifting limits on Tribal court sentencing powers and congressional overrule of caselaw restricting inherent Tribal criminal jurisdiction over non-Natives).

offenders.[31] In short, as the commentary and declamations continue, good work is getting done and more lies ahead.[32]

When considering all the words and opinions offered so far, a person might be excused if they remain somewhat uncertain as to what happened and what might come next. Here locally, it has sometimes seemed we have had more heat than light, as much chest-thumping and thigh-slapping cacophony as analysis, and precious little in the way of conversation, at least in the public sphere and certainly across manufactured divides. At the risk of throwing one more stack of pages on the pile, this Article offers an in-house Tribal practitioner's take on things—the case itself, the path we are on here in Oklahoma, and the path we might choose if our goal is to support meaningful Tribal self-determination and effective public safety.

A non-native from the East coast, I have spent my entire legal career in Indian country—working exclusively, after a two-year judicial clerkship, on behalf of Indigenous peoples in New Mexico and now Oklahoma. What began as a compelling intellectual challenge in law school, the study of Federal Indian law, evolved into my profession and a deep personal commitment—the legal representation of Tribal governments. More than fifteen years ago, I left firm practice to serve in-house as counsel for the Chickasaw Nation, and one way or another, I have been involved that entire time with what was addressed and decided in *McGirt*. Considering all this, it would be impossible for me to climb some perch and feign dispassionate distance from it all, so I will not pretend. Instead, with the reader's indulgence, this Article offers part analysis, part summation, and part personal reflection on the case.

Regardless of any failure in my own personal boundaries, this piece is meant to offer a useful take on it all, starting with a reading and deconstruction of the ruling itself from three vantage points before turning to current events and what may lie ahead, including my own call for greater Tribal self-determination in this field. Breaking it down, Part II(A) offers a practitioner's reading of the case, or at least *this* practitioner's reading (Part II(A)(i)), before borrowing from the work of the late-Professor Philip Frickey to explore what *McGirt* may represent as a cultural text, underscoring the ruling's significance as reaching far beyond its holding (Part II(A)(ii)). Next, the timing of the decision is placed generally within the context of intergovernmental relations, examining its relationship to the ongoing (but presently interrupted) project of effective Tribal-State engagement (Part II(A)(iii)). Finally, turning away from the ruling itself, Part II(B) offers a view from the ground following the ruling, a topic covered more fully in another article in this Journal,[33] before addressing what federal actions might be available as we move forward and arguing for changes to federal law that would empower *meaningful* Tribal choice in the management and allocation of prosecutorial jurisdiction within each Tribe's *own* Indian country.

My friend and colleague Cherokee Nation Attorney General Sara Hill (Cherokee)

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31. *E.g.*, Brief for Cherokee Nation, Chickasaw Nation, Choctaw Nation of Oklahoma, Muscogee (Creek) Nation, and Seminole Nation of Oklahoma as Amici Curiae Supporting Respondent at 4–19, Oklahoma v. Castro-Huerta, No. 21-429 (Apr. 4, 2022).

32. *E.g.*, Killman, *supra* note 21.

33. Hill, *supra* note 10.

has asked: "Is there a jurisdictional system that makes more sense than the one that's been piecemealed together by federal court decisions over the past hundred years?"[34] The *McGirt* ruling places that question squarely in our laps—or at least the laps of (so far) six Tribal nations, their federal trustee, and the State of Oklahoma. I believe there *could* be a better system. What is more, I believe it is time to deepen our exploration of what that system might be—and, in doing so, to put the voices of Tribal sovereigns out front.

II. DISCUSSION

A. What Happened: A Tribal Practitioner's Reading of McGirt

McGirt is of historic resonance. It should, therefore, not be a surprise that it prompted a flood of commentary, not all of which was helpful. For example, even before the ruling had issued, national media curiosity spun up some unfortunate and exoticizing misperceptions of the matter.[35] This prompted the *National Law Review* to observe that commentator errors may have led to early public confusion.[36]

Meanwhile, among Native academics, advocates, and activists, the ruling was almost immediately declared "[t]he [m]ost [s]ignificant Indian [l]aw [c]ase of the [c]entury"[37] and "[t]he Indian [l]aw [b]ombshell"[38]—epithets that immediately elevated expectations and alarm, depending on audience. Much of this commentary seemed to focus on basic Federal Indian law principles presumed to be of new or expanded relevance here in Oklahoma, some of which has been helpful or at least promises to be as matters develop.[39] But as a practitioner long involved in the work of Indian law here in Oklahoma, much of the observations and analyses so far offered has seemed notable more for its removal from the day-to-day challenges Tribal governments have been facing on the ground. The Tribes affected by *McGirt* are addressing practical matters in real time, and much of the academic commentary has seemed, at minimum, aimed further down the road

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34. Grant D. Crawford, *Tribe Seeks New Justice System Framework*, TAHLEQUAH DAILY PRESS (Jan. 14, 2021), https://www.tahlequahdailypress.com/news/tribe-seeks-new-justice-system-framework/article_4cba7a4f-99a7-56ec-a006-bae3c8c56f24.html.

35. For example, in 2018, the *Washington Post* headlined an otherwise accurate analysis of the matter with a whopper of a misleading headline. Rebecca Nagle, *Half the Land in Oklahoma Could Be Returned to Native Americans. It Should Be.*, WASH. POST (Nov. 28, 2018), https://www.washingtonpost.com/outlook/2018/11/28/half-land-oklahoma-could-be-returned-native-americans-it-should-be/.

36. McGirt v. Oklahoma*: Understanding What the Supreme Court's Native American Treaty Rights Decision Is and Is Not*, NAT'L L. REV. (Aug. 12, 2020), https://www.natlawreview.com/article/mcgirt-v-oklahoma-understanding-what-supreme-court-s-native-american-treaty-rights ("Not since a grinning incumbent President Harry S. Truman hoisted *The Chicago Daily Tribune*'s 'Dewey Defeats Truman' special edition on Nov. 3, 1948—proclaiming his "loss" to New York Gov. Thomas E. Dewey—have so many commentators missed what really happened and why it matters.").

37. *The Most Significant Indian Law Case of the Century:* McGirt v. Oklahoma, ARIZ. STATE UNIV., https://asuevents.asu.edu/content/most-significant-indian-law-case-100-years-mcgirt-v-oklahoma (last visited Mar. 17, 2022).

38. Robert J. Miller, McGirt v. Oklahoma*: The Indian Law Bombshell*, FED. L., Mar.–Apr. 2021.

39. In this category, I *gratefully* include the evolving effort sponsored by the Harvard Project on American Indian Economic Development and University of Oklahoma Native Nations Center, who are assembling a "*McGirt* Colloquium Toolbox" for developing and providing access to research products that address the case "through the lens of a tribal government's responsibilities to its citizens, to other Indians, and to non-Indians on trust lands and fee lands within the external borders of recognized reservations." MCGIRT & REBUILDING TRIBAL NATIONS, https://sites.google.com/g.harvard.edu/mcgirt-rebuilding-nations/home (last visited Mar. 1, 2022).

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than where we found ourselves the morning after the case was decided. Furthermore, it is unclear how much post-*McGirt* academic production was developed with input from Tribal governments on the more prosaic aspects of day-to-day Tribal operations, programs, and capacities and how much may have been produced to influence the decision-making processes of those Tribes. As such, while much of it was insightful, much of it also called to mind Ed Meese's quip on experts, "somebody who is more than 50 miles away from home, has no responsibility for implementing the advice he gives, and shows slides."[40]

At the same time, and with the Oklahoma Governor leading the parade, others have decried the ruling in apocalyptic terms, alternately labeling it "catastrophic,"[41] a "threat to [Oklahoma's] economic future,"[42] potentially undermining Oklahoma's very viability as a state,[43] and the state's "most pressing issue."[44] Oklahoma's Governor has maintained this polarizing bombast and failed to engage with Tribal leaders,[45] which has drawn repeated criticism from the editorial board of one of the state's largest papers.[46] Sadly, this

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40. Francis X. Clines & Warren Weaver, Jr., *Meese's Expert View*, N.Y. TIMES (Mar. 27, 1982), https://www.nytimes.com/1982/03/27/us/briefing-023580.html.

41. Patrick B. McGuigan, *'*McGirt v. Oklahoma*' and the Course of Human Events in My Native State: Updated Opinion*, OKLA. CITY SENTINEL (Jan. 4, 2022), https://www.city-sentinel.com/government/mcgirt-v-oklahoma-and-the-course-of-human-events-in-my-native-state-updated-opinion/article_7d18a230-6d82-11ec-98e8-97aa9227df94.html.

42. Ray Carter, McGirt *Called Threat to State's Economic Future*, OCPA (Aug. 16, 2021), https://www.ocpathink.org/post/mcgirt-called-threat-to-states-economic-future.

43. Tomlinson & Savage, *supra* note 3 ("For us to have a viable state going forward, we need to overturn *McGirt* completely."); *see also* Randy Krehbiel, *State AG John O'Connor Speaks on* McGirt *Court Decision, Contact with Some Tribal Leaders*, TULSA WORLD (Jan. 12, 2022), https://tulsaworld.com/news/state-and-regional/govt-and-politics/state-ag-john-oconnor-speaks-on-mcgirt-court-decision-contact-with-some-tribal-leaders/article_6708c20a-6f34-11ec-ac1b-0feebee166a7.html (quoting the Oklahoma Attorney General as characterizing *McGirt* as relegating Oklahoma to a "51st state" and alleging Tribal nations are now "trying to take over the eastern half of our state, in all respects.").

44. Randy Krehbiel, *Watch Now: Gov. Kevin Stitt Says* McGirt *Legal Decision Is State's 'Most Pressing Issue'*, TULSA WORLD, https://tulsaworld.com/news/state-and-regional/govt-and-politics/watch-now-gov-kevin-stitt-says-mcgirt-legal-decision-is-states-most-pressing-issue/article_f6d8abac-05df-11ec-8949-9f3194062845.html (last updated Oct. 3, 2021); *see also* Dan Snyder, *Gov. Stitt: 'Don't Think There's Ever Been A Bigger Issue' For Oklahoma Than* McGirt *Ruling*, KOKH (May 17, 2021), https://okcfox.com/news/local/gov-stitt-dont-think-theres-ever-been-a-bigger-issue-for-oklahoma-than-mcgirt-ruling; Charlene Belew, *Gov. Stitt Visits Duncan Rotary;* McGirt *Decision Highlights Conversation with Club*, DUNCAN BANNER (Sept. 9, 2021), https://www.duncanbanner.com/community/gov-stitt-visits-duncan-rotary-mcgirt-decision-highlights-conversation-with-club/article_798cef3a-118f-11ec-86b4-63903d0d746d.html. *But see* Chris Casteel, McGirt *Decision Not Most Pressing Issue in Oklahoma, Voters Say*, OKLAHOMAN (Oct. 9, 2021), https://www.oklahoman.com/story/news/local/oklahoma-city/2021/10/09/poll-few-oklahoma-voters-see-mcgirt-decision-most-pressing-issue/6051832001/.

45. Carmen Forman & Molly Young, *Gov. Kevin Stitt, Tribal Leaders Not Meeting as* McGirt *Rhetoric Hits Boiling Point*, OKLAHOMAN (Dec. 16, 2021), https://www.oklahoman.com/story/news/2021/12/16/choctaw-cherokee-nation-hunting-oklahoma-governor-stitt-tribes-stop-meetings-mcgirt-ruling/6433140001/. *Compare* @CarlyAtch, TWITTER (July 13, 2021, 10:47 PM), https://twitter.com/CarlyAtch/status/1415155887052840966 (responding as the Oklahoma Governor's Communication Director to public criticism for the governor's failure to reach out to Tribal leaders prior to, or following, a mishandled public forum with: "For the 'tHeRe WaS nO fOrMaL iNvitAtIoN' [sic] folks - no elected official has their direct email for invitations to events."), *with* Bill Anoatubby, *Viewpoint: Intergovernmental Engagement in Indian Country Benefits All Oklahomans*, OKLAHOMAN (Jan. 29, 2022), https://www.oklahoman.com/story/opinion/2022/01/29/all-benefit-better-intergovernmental-engagement-indian-country/9231850002/ [hereinafter *Intergovernmental Engagement*], *and* Bill Anoatubby, *Viewpoint: Chickasaw Nation Continues Leadership, Partnerships Through Challenges*, OKLAHOMAN (Sept. 19, 2021), https://www.oklahoman.com/story/opinion/2021/09/19/chickasaw-nation-partners-others-rise-challenges/8263018002/.

46. *Now Is a Good Time for State to Sit Down With Tribes Concerning* McGirt, TULSA WORLD, https://tulsa

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rhetoric has seemed to give life to more problematic aspects of Oklahoma's sense of itself—the parts that seem convinced the state can only exist if the Tribes do not.[47] These noises were—and, to the extent they continue, *are*—toxic to hopes for respectful intergovernmental engagement.[48]

In perhaps the most unfortunate turn, though, Tribal advocates have publicly attacked each other. For example, the leader and officials of one Oklahoma Native nation working to implement *McGirt* came under social media attack based on unfounded rumor accusing them of working to harm other Tribes[49]—specifically, working to get Muscogee Creek Nation disestablished.[50] Likewise, a Washington, D.C. attorney published an attack on Oklahoma Tribal leaders who explored and advocate policies with which he disagrees and accused them in personal and historically loaded terms of betraying deeper Tribal causes.[51] Even if intended in earnest good will and the best of intentions, those attacks

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world.com/opinion/editorials/editorial-now-is-a-good-time-for-state-to-sit-down-with-tribes-concerning-mcgirt/article_1f2932b0-7d5f-11ec-b1b8-73000ef7aaa3.html (last updated Mar. 4, 2022); McGirt *Not Causing Sky to Fall as State Leaders, Law Enforcement Claim*, TULSA WORLD, https://tulsaworld.com/opinion/editorial/editorial-mcgirt-not-causing-sky-to-fall-as-state-leaders-law-enforcement-claim/article_b64a2e4e-725e-11ec-9cf4-0bf95f0b4545.html (last updated Feb. 22, 2022); *Resources Better Spent to Adapt to Work Through* McGirt *Consequences, Not Against It*, TULSA WORLD, https://tulsaworld.com/opinion/editorial/editorial-resources-better-spent-to-adapt-to-work-through-mcgirt-consequences-not-against-it/article_bc84b3e6-37f4-11ec-a6e4-431adc817f4d.html (last updated Dec. 7, 2021).

47. *E.g.*, Barbara Hoberock, *OCPA Launches Fundraising Campaign for Disestablishment to Push 'Unification of Oklahoma'*, TULSA WORLD, https://tulsaworld.com/news/state-and-regional/ocpa-launches-fundraising-campaign-for-disestablishment-to-push-unification-of-oklahoma/article_4876127a-1940-11eb-93ea-db09f17628a0.html (last updated Dec. 3, 2021); *cf.* Cobb-Greetham, *supra* note 10 (expressing dismay that current Oklahoma administration seems incapable of shaking free from "an unquestioned but mistaken belief that the state could not exist unless tribal nations were terminated and our histories and cultures erased.").

48. One recent commentary expressed its authors were "very encouraged by the fact that on January 22, 2021, Governor Stitt appointed a state negotiator and invited the Five Tribes to start negotiating about *McGirt*." Robert J. Miller & Torey Dolan, *The Indian Law Bombshell:* McGirt v. Oklahoma, 101 B.U. L. REV. 2049, 2104 (2021); *see also id.* at 2052, 2092. I would like to share their optimism, notwithstanding the disappointing context surrounding the letter that is not mentioned in the recent commentary, *e.g.*, Allison Herrera, *'We're Not Going To Give up Our Jurisdiction': Chickasaw Nation Gov. Anoatubby on* McGirt *Impact*, KOSU (May 6, 2021), https://www.kosu.org/local-news/2021-05-06/were-not-going-to-give-up-our-jurisdiction-chickasaw-nation-gov-anoatubby-on-mcgirt-fallout; c*f. generally* Reese Gorman, *Cole Encourages State-Tribal Relations over Challenges to* McGirt, NORMAN TRANSCRIPT (July 23, 2021), https://www.normantranscript.com/news/cole-encourages-state-tribal-relations-over-state-challenges-to-mcgirt/article_e15e2378-eb4b-11eb-80f4-c39595196dbb.html (featuring interview with Governor Stitt's negotiator who expresses the State's opposition to engagement due to *McGirt*). In fact, the public record of the Oklahoma Governor's obstinance and opposition to any recognition of Tribal sovereignty means, at least at this time, prospects are quite dim for meaningful engagement. *E.g.*, *infra* Part A(iii)(b)–Part B. (discussing current chill in Oklahoma-Tribal relations). *But cf. infra* Part A(iii)(a) (discussing prior successful Oklahoma-Tribal relations).

49. Suzan Shown Harjo, *The Oklahoma Attorney General and the Cherokee Chief Are at It Again*, INDIAN COUNTRY TODAY (Nov. 2, 2020), https://indiancountrytoday.com/opinion/the-oklahoma-attorney-general-and-the-cherokee-chief-are-at-it-again.

50. Kolby Kickingwoman, McGirt *Case Is Still Making Waves*, INDIAN COUNTRY TODAY (July 25, 2020), https://indiancountrytoday.com/news/mcgirt-case-still-making-waves.

51. *E.g.*, Jonodev Chaudhuri, *The Past May Be Prologue, But It Does Not Dictate Our Future: This Is the Muscogee (Creek) Nation's Table*, 56 TULSA L. REV. 369, 385 (2021).

> Just as William Mc'Intosh and Pleasant Porter were willing to sacrifice sovereignty, so too are a handful of tribal leaders today. Instead of opposing those who seek to reverse or undo McGirt and proudly standing for sovereignty, some tribal leaders have worked directly with the Oklahoma leaders to draft sovereignty-sacrificing proposals.

See also Jonodev Chaudhuri, Panel A: Criminal Law at the Sovereignty Symposium XXXIII: After *McGirt*? (Oct. 11, 2021) [hereinafter Sovereignty Symposium XXXIII] (attacking those advocating for ability to compact

strained inter-Tribal relations in the midst of difficult *McGirt* implementation efforts.[52] Perhaps more problematically, they seemed to have the effect of silencing local Tribal voices (including Tribal leaders' voices) in favor of unaccountable national ones or others that spoke at safe distance from the material complexities of local work. This can sometimes be the way of it, of course, and *McGirt*'s significance suggests some reason for messiness. But regardless of how one may view any sincerely expressed opinion or concern from folks of presumed good will, the fact remains these attacks were corrosive to the sort of free and collaborative exchange that might help us rise to the shared challenges we faced the morning after *McGirt* was decided, which we continue to face, and to which we are all working to rise.

i. *McGirt* as Court Ruling

Setting errors, ideologies, and transitory heat aside, *McGirt* remains a court decision and should be read and understood as such. Not to kick off by waxing too pedantic, but court cases have parties, questions in play, and a controlling sense of the law to apply to facts the parties have developed through the staged combat of judicial proceedings. In handing down a ruling, a court will generally distill what it views as the most pertinent facts. It may also offer its views on the parties' competing arguments. Regardless, it will show its math as it answers the question presented—i.e., it will attempt to help the reader understand the law in application to the dispute before it. That is all a ruling *should* do.

In this manner, individual rulings might be seen as representing one peak among many in a long mountain range of the law, with each peak shaped by its own particulars but offering a point from which the broader mass of the range might be surveilled. Given what all has already been said about *McGirt*, it seems prudent to strip matters back to basics and plant our feet firmly on our own peak before we go further.

a. The Parties

McGirt involved two litigating parties: The State of Oklahoma and Mr. Jimcy McGirt—that is, a sovereign seeking to vindicate its prosecutorial authority and an individual defendant seeking to undermine that authority.[53]

Of course, several Tribes filed briefs as amici at various stages of the proceedings, including Muscogee Creek Nation in particular, which participated in an oral argument in defense of its own treaties,[54] as well as the others of the Five Tribes,[55] each of which has a legal history that largely parallels the others. The brief filed by two of those Tribes, Chickasaw and Choctaw, was joined by several former Oklahoma government officials

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on criminal jurisdiction as "sovereignty detractors").

52. *Cf.* Letter from Chief Greg Chilcoat, Seminole Principal, to the Chiefs and Governor of the Five Tribes (Apr. 7, 2021), http://fivecivilizedtribes.org/docs/LTR_From_Seminole_Nation_ITC.pdf (suspending Seminole Nation of Oklahoma's participation in the Inter-Tribal Council of the Five Tribes in the midst of differences over *McGirt* implementation).

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

54. *See* Brief for Muscogee (Creek) Nation as Amicus Curiae Supporting Petitioners, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526).

55. *E.g.*, Brief for Historians, Legal Scholars, and Cherokee Nation as Amici Curiae Supporting Petitioners, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526).

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and a sitting member of Congress.[56] Likewise, academics and national Native advocacy organizations filed as amici to support Mr. McGirt's jurisdictional analysis.[57] Particularly as this crowd was a mix of both Tribal and non-Tribal voices, it is perhaps best if we simply call it the *pro*-Indian country team.

Oklahoma also obtained support from other amici filers, each offering its take on why the lower court got it wrong.[58] The United States participated, too, albeit more in the capacity of a prosecutor not looking to increase its workload than a trustee with relevant responsibilities to Native peoples.[59] We can call this crowd the *anti*-Indian country team.

No matter how significant or impactful the participation of *any* of the secondary brief filers on *either* team may have been, *none* of them were party to the case.[60] It was just Oklahoma and Mr. McGirt, standing alone, together, in the dock before the Court.

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56. Brief for Tom Cole, et al. as Amici Curiae Supporting Petitioners, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526).

57. Brief for Nation Indigenous Women's Resource Center, et al. as Amici Curiae Supporting Petitioners, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526); Brief for National Congress of American Indians Fund as Amicus Curiae Supporting Petitioners, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526). Additionally, former United States Attorneys Troy A. Eid, Barry R. Grissom, Thomas B. Heffelfinger, David C. Iglesias, Brendan V. Johnson, Wendy Olson, Timothy Q. Purdon, and Danny C. Williams filed a brief as amici in support of Petitioner, as did the National Association of Criminal Defense Lawyers. Brief for Troy A. Eid, et. al. as Amici Curiae Supporting Petitioner, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526); Brief for National Ass'n of Criminal Defense Lawyers as Amici Curiae Supporting Petitioner, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526).

58. Brief for Seventeen Oklahoma District Attorneys and the Oklahoma District Attorneys Ass'n as Amici Curiae Supporting Respondent, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526); Brief for City of Tulsa as Amicus Curiae Supporting Respondent, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526); Brief for Environmental Federation of Oklahoma, Inc., et al. as Amici Curiae Supporting Respondent, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526); Brief for United States as Amicus Curiae Supporting Respondent, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526); Brief for States of Kansas, et al. as Amici Curiae Supporting Respondent, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526); Brief for International Municipal Lawyers Ass'n and National Sheriffs' Ass'n as Amici Curiae Supporting Respondent, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526).

59. Brief for United States as Amicus Curiae Supporting Respondent, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526).

60. This is unfortunately the way of most Indian country criminal jurisdiction litigation: The Tribe, whose *sovereign interests* are in the dock along with the prosecutor whose jurisdiction is challenged, is not a *party* to the case. Instead, the Tribal nation must beg leave of the Court to participate as Amicus. *See, e.g.*, Blanket Consent filed by Petitioner and Respondent, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526) (allowing amici participation in briefing on Jan. 17 and 21, 2020, respectively); *see also* Joint Application of the United States and Muscogee (Creek) Nation for Leave to File Amici Briefs Exceeding the Word Limits, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526). As such, the rights of the Tribal nation risk treatment as mere bystander interests. Given this reality of so much of Indian country litigation, a reality which is unavoidable when the fight is between a prosecuting jurisdiction and an individual defendant, particular credit and appreciation is due the criminal defense teams that consistently reached out and worked effectively with Muscogee Creek Nation and its counsel to explicate Muscogee Creek legal history, a level of cooperation that extended to supporting Muscogee Creek's participation in oral argument so it could speak directly to the Justices on these sensitive matters. Joint Application of the Parties, the United States, and the Muscogee (Creek) Nation for Divided Argument and Enlargement of Time for Argument, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526). Even if the law did not afford Muscogee Creek Nation the respect of party status, the enlightened self-interest of the defense and the preparation, commitment, and ability of the Nation's legal team offered a practical and powerful substitute. *See generally* Riyaz Kanji, David Giampetroni & Philip Tinker, *Reflections on* McGirt v. Oklahoma*: A Case Team Perspective*, 56 TULSA L. REV. 387 (2021).

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b. The Question and Issue

McGirt presented a single question: Do the Muscogee Creek Nation's boundaries define Indian country for purposes of criminal jurisdiction?[61] The answer determined which sovereign had jurisdiction to prosecute Mr. McGirt for the counts against him.[62] If the boundaries embraced Indian country, then felony jurisdiction lay with the United States, with the Muscogee Creek Nation retaining an inherent jurisdiction and Oklahoma having none. If Congress either never vested Muscogee Creek with a reservation or if it did so but later disestablished it, then jurisdiction lay exclusively with Oklahoma.[63] No other question was presented for adjudication, no matter how many secondary considerations may have been implicated.

"Indian country," of course, is a critical term of Federal Indian law, denoting among other things the geography in which federal law treats a Tribe's sovereignty as most intact. While the phrase has taken on broad and generalized jurisdictional significance in both federal and state courts,[64] it remains a statutory term found in a particular title and section of the United States Code—specifically, the Major Crimes Act.[65] As this case arose squarely under that Act, the term's significance was uncomplicated and direct.[66]

But let us pause to put this in some local context. Oklahoma has long resisted the notion that *any* Indian country exists within the state. Relying on its elevation and construction of a *proviso* to the General Allotment Act, for example, the Oklahoma Court of Criminal Appeals long ago held that even restricted allotments do not count as "Indian country" in Oklahoma, a place seemingly and fundamentally different from all other states because of how it was formed.[67] Yielding to a contrary ruling from the Oklahoma Supreme Court (albeit some fifty-two years later), the appeals court eventually reversed its error.[68] In the meantime, this early (and durable) error helped promote a sense of *Oklahoma exceptionalism*—a notion that principles of Indian law just did not have the same traction here as elsewhere. Dr. Cobb-Greetham (Chickasaw) recently wrote of this phenomenon as

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61. 140 S. Ct. at 2459; *see also id.* at 2480 ("The only question before us, however, concerns the statutory definition of 'Indian country' as it applies in federal criminal law in the [Major Crimes Act, 18 U.S.C. § 1153].").

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

63. *Id.*

64. *E.g.*, Indian Country U.S.A., Inc. v. Okla. Tax Comm'n, 829 F.2d 967, 973 (10th Cir. 1987) (referencing the existence of "Indian country" as "the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands"); Ahboah v. Hous. Auth. of Kiowa Tribe, 660 P.2d 625, 627 (Okla. 1983) ("The touchstone for allocating authority among the various governments has been the concept of 'Indian Country.'").

65. 18 U.S.C. §§ 1151, 1153.

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

67. *Ex parte* Nowabbi, 61 P.2d 1139, 1154, 1156 (Okla. Crim. App. 1936).

> We think the obvious purpose of the final and explicit proviso of the [General Allotment Act, 25 U.S.C. § 349] was to take the Indians of the Indian Territory out of the category of Reservation Indians. . . . Our conclusion is that Congress has not reserved to the federal courts the jurisdiction to punish Indians in the Indian Territory for the crimes enumerated in the Act of March 3, 1885, even when committed upon a restricted Indian Allotment..

Id.

68. State v. Klindt, 782 P.2d 401, 403–04 (Okla. Crim. App. 1989) (citing Okla., *ex rel.* May v. Seneca-Cayuga Tribe, 711 P.2d 77 (Okla. 1985) and concluding "[t]here is ample evidence to indicate that the *Nowabbi* Court misinterpreted the statutes and cases upon which it based its opinion.").

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part of the state's broader culture:

> Oklahoma's identity is made up of the stories it tells itself. Too many of those stories arise from an unquestioned but mistaken belief that the state could not exist unless tribal nations were terminated and our histories and cultures erased. As that story goes, this is where the frontier closed and Indigenous America reached its proverbial "End of the Trail." That story tells of a brand-new-state rising from some mythical, vast, and empty plain, kicked off with a madcap, mad-dash game we reenact every time the Sooners score a touchdown.[69]

For years, this was not merely a matter of *local* culture; it was embedded also within its *legal* culture.

As Tribal governments reorganized in the 1970s and 1980s following a series of favorable congressional actions[70] and court rulings,[71] more and more disputes turning on, among other things, whether Indian country existed in Oklahoma found their way into the courts, which mostly tended to rule narrowly on questions presented.[72] Though as time passed, that was not always the case.[73] In these cases, Oklahoma argued its position in existential terms, suggesting Indian country and Tribal sovereignty were simply incompatible with the presumed preemptive needs of effective state governance.[74]

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69. Cobb-Greetham, *supra* note 10.

70. *E.g.*, Principal Chiefs Act, Pub. L. No. 91-495, 84 Stat. 1091 (1970); *cf.* Indian Self-Determination and Education Act, Pub. L. No. 93-638 (1975) (codified as amended 25 U.S.C. ch. 14) (authorizing Tribal governments to assume direct administration of federal programs for Indians pursuant to intergovernmental compact).

71. *E.g.*, Choctaw v. Oklahoma, 397 U.S. 620 (1970); Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439 (D.C. Cir. 1988); Harjo v. Kleppe, 420 F. Supp. 1110 (1976), *aff'd sub nom.* Harjo v. Andrus, 582 F.2d 949 (D.C. Cir. 1978).

72. *E.g.*, Indian Country, U.S.A. v. Okla. Tax Comm'n, 829 F.2d 967, 975 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 2870 (1988).

> In the present case, we need not decide whether the exterior boundaries of the 1866 Creek Nation have been disestablished. Instead, because title to the [land at issue] is still held by the Creek Nation, we need only decide whether Congress has explicitly acted to divest Creek tribal lands of their Indian country status and to divest itself of jurisdictional authority over such lands.

Id.

73. *See* Osage Nation v. Irby, 597 F.3d 1117, 1124–26 (10th Cir. 2010) (ruling based on consideration of "circumstances surrounding the passage of the act" and "subsequent events" even after concluding "the operative language of the statute does not unambiguously suggest diminishment or disestablishment of the Osage reservation"); Murphy v. Sirmons, 497 F. Supp. 2d 1257, 1289–90 (E.D. Okla. 2007) ("[T]here is no question, based on the history of the Creek Nation, that Indian reservations do not exist in Oklahoma."), *rev'd sub nom.* Murphy v. Royal, 875 F.3d 896 (10th Cir. 2017), *aff'd sub nom.* Sharp v. Murphy, 140 S. Ct. 2412 (2020).

74. In *Ex parte* Nowabbi, for example, the State emphasized (even before it got to a statement of the relevant law) that:

> The question presented is an important one to the state of Oklahoma, in that it involves the validity of the trial, conviction, and sentence of several hundred prisoners convicted of the crimes of "murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary and larceny," in the state courts, particularly where said crimes were committed in that part of the state that was formerly the Indian Territory.

61 P.2d 1139, 1143 (Okla. Crim. App. 1936). By 2009, when litigating the Indian country status of the Osage Nation, the court itself kicked matters off by reciting the following extra-legal context from Oklahoma's statements in a Joint Status Report:

> Because of its potentially far-reaching impact on the State of Oklahoma, this is one of the more important cases relating to state sovereignty and jurisdiction to arise since statehood in 1907. In this case, the Osage Nation seeks to divest the state of over 100 years of the exercise of sovereignty and jurisdiction over all of Osage County, the largest county in Oklahoma in area. If the Osage Nation

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Oklahoma consistently expressed a preoccupation more with normative expectations of state primacy than with the requirements of the law, presenting the former as a necessary filter for applying the latter. It hung to a sort of *Oklahoma-is-different* school of thought, an arrogation of *Oklahoma exceptionalism* even as the law continued to move forward and apply with the same force and consequence here as it does elsewhere in these United States.[75]

And while we are digressing to provide some local flavor, let us also pause to comment on the Major Crimes Act. Congress first enacted the statute in 1885,[76] though it has amended and reformed it several times over the years.[77] Within the body of law that makes up Federal Indian law, this enactment is of profound historic, legal, and cultural significance—marking Congress' *first* direct intrusion into intramural Tribal affairs. And in case it is not immediately obvious, Congress did not step in to *protect* Tribal sovereignty. Far from it. It acted, instead, to shore up federal power in response to non-Tribal outrage over one Lakota's act of violence against another within a Sioux community—outrage, it should be noted, that the historical record suggests had been "whipped up" by federal agents for purposes of justifying the jurisdictional intrusion.[78]

In its first attempt to intrude, the government brought federal charges against the perpetrator. The Supreme Court, however, blocked the effort for lack of jurisdiction, concluding that nothing in federal law authorized federal charges in what was understood to be an exclusively Lakota matter.[79] In its second attempt, Congress enacted the forebear to the statute at the heart of the *McGirt* dispute, the Act of March 3, 1885.[80] It changed everything.

On its face, the Act provided the positive law the Court had previously found to be lacking to support the earlier prosecution, and when the Court was presented with a later jurisdictional challenge, it held: (1) While nothing in the text of the Constitution seemed to authorize this sort of intrusion on internal Tribal affairs,[81] Congress nonetheless retained

> were to prevail, precedent would be set potentially threatening the jurisdiction of the state as a whole, the counties, and local jurisdictions. If the Osage Nation's original reservation boundaries have not been disestablished, then a number of other tribes in Oklahoma could assert the same claim. The implications of this on the civil and criminal jurisdiction of the state are staggering, because this is a state that is largely made up of former Indian reservations.

Osage Nation v. Okla. Tax Comm'n, 597 F. Supp. 2d 1250, 1254 (N.D. Okla. 2009).

75. To offer some personal color on this dynamic, participating once in a leadership-to-leadership meeting between two Tribal nations and the State of Oklahoma several years ago, one long-time Oklahoma Assistant Attorney General, who had been growing visibly agitated as the leaders proceeded to discuss sovereignty among themselves, interrupted to lecture the Tribal leaders that "we can't recognize you as sovereign because if we do," pausing to wave a hand toward an imagined backdrop for emphasis, "there will be more than thirty other Tribes lining the runway behind you." To the credit of the Oklahoma Governor at the head of that team and the success of later talks, this lawyer did not participate further in any non-litigation aspects of the matter then under discussion.

76. Act of March 3, 1885, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. §§ 1151, 1153).

77. *Id.*

78. *See generally* ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 99–103 (4th ed. 2003); *accord* David Heska Wanbli Weiden, *This 19th-Century Law Helps Shape Criminal Justice in Indian Country*, N.Y. TIMES (July 19, 2020), https://www.nytimes.com/2020/07/19/opinion/mcgirt-native-reservation-implications.html.

79. *Ex parte* Crow Dog, 109 U.S. 556 (1883). *See generally* CLINTON ET AL., *supra* note 78, at 100.

80. Act of March 3, 1885, § 9.

81. United States v. Kagama, 118 U.S. 375, 382 (1886).

a residuum of some extra-constitutional colonial power over Tribal peoples on which the Act could be affirmed;[82] and (2) in light of context, history, and law, no state could claim such powers to do what only Congress could do—namely, to intrude on internal Tribal affairs.[83]

This is the statute under which *McGirt* arose. To help explain its curious place in Indian law, consider a hypothetical analogy: Imagine California and Massachusetts went to Congress with outrage about Oklahoma's competency to administer capital punishment,[84] and Congress responded by enacting law that placed *all* capital cases in *all* states, not just Oklahoma, within the exclusive purview of the federal courts. If this were to occur, one can imagine how those who are concerned with the proper metes and bounds of federal versus state power might react. Yet this approximates what Congress did to Tribal nations when it enacted the Major Crimes Act—though, to make it worse, remember: Natives could not vote at this time and had no say in any of it.[85] While the Court has affirmed the intrusion as within Congress's lawful powers,[86] it has also characterized its having done so as a breach of federal treaty promises and other obligations under the law.[87] Seen in this light, Tribal advocacy invoking an uncomplicated and unmodified application of the Major Crimes Act in any circumstance can be challenging—to say the least.

The original lawmakers' calculus notwithstanding, subsequent legislative acts[88] and rulings[89] have clarified that Tribes retain and exercise an *inherent* law enforcement jurisdiction within "Indian country" irrespective of any congressional act, though the Court has severely limited[90] such authority and Congress has also acted to restrain it.[91]

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82. *Id.* at 378.

83. *Id.* at 383–84.

84. *E.g.*, Sean Murphy, *Oklahoma Executes Inmate Who Dies Vomiting and Convulsing*, APNEWS (Oct. 28, 2021), https://apnews.com/article/us-supreme-court-prisons-executions-oklahoma-oklahoma-attorney-generals-office-6e5eedd1956a38f83db96187651f145c; Trevor Brown, *After Latest Execution, Death Penalty Under the Political Spotlight in Oklahoma*, OKLA. WATCH (Nov. 1, 2021), https://oklahomawatch.org/newsletter/capitol-watch-after-latest-execution-death-penalty-under-the-political-spotlight-in-oklahoma/.

85. While some Natives became United States citizens by prior treaty or statutory provision relating to allotment, American Indians, as a class, were not considered citizens until 1924. 8 U.S.C. § 1401(a)(2).

86. *Kagama*, 118 U.S. at 384.

87. *E.g.*, McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020) ("By subjecting Indians to federal trials for crimes committed on tribal lands, Congress may have breached its promises to tribes like the Creek that they would be free to govern themselves.").

88. *See* Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, § 804(3)(B); Violence Against Women Act, Pub. L. No. 113-4, §§ 904, 905 (2013); Tribal Law and Order Act, Pub. L. No. 111-211, tit. II (2010); Indian Civil Rights Act (ICRA), Pub. L. No. 90-284, tit. II (1968), as amended Pub. L. No. 102-137 (1991).

89. *See* United States v. Wheeler, 435 U.S. 313 (1978); United States v. Lara, 541 U.S. 193 (2004).

90. Duro v. Reina, 495 U.S. 676 (1990); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

91. *See* Indian Civil Rights Act ("ICRA"), Pub. L. No. 90-284, tit. II (1968), as amended Pub. L. No. 102-137 (1991); 25 U.S.C. § 1302(a)(7)(B),(C) (imposing sentencing limitations on Tribal courts). Particularly as the intrusion of the Major Crimes Act was motivated by perceived public outrage over Tribal leniency, Congress's restraint of Tribal criminal jurisdiction seems ironic. At the same time, though, Congress has also *relieved* judicially imposed limitations on inherent Tribal jurisdiction, and the Court has affirmed Congress's power to do so, *Lara*, 541 U.S. at 211, though in doing so, its split opinion suggests expanding statutory recognition of such inherent powers may raise constitutional implications or, at least, considerations where the rights of non-Tribal member United States citizens are touched.

> To hold that Congress can subject [a citizen of the United States], within our domestic borders, to a sovereignty outside the basic structure of the Constitution is a serious step. . . . Here, contrary to [the

Finally, while the Supreme Court will entertain Oklahoma's argument this session on the point,[92] courts have consistently held states have no jurisdiction over crimes involving Indians within Indian country but remain "otherwise free to apply their criminal laws in cases of non-Indian victims and defendants."[93]

As between federal and Tribal jurisdiction on the one hand and state jurisdiction on the other, the Major Crimes Act provides for an *exclusive* allocation of jurisdiction—meaning, each sovereign's prosecutorial authorities are fixed by federal law and cannot be altered at a party's option or even by an agreement among parties.[94] Instead, it can be modified *only* by operation of federal law—namely, another statute or contrary court opinion.[95] The issue before the Court in *McGirt* was whether these rules applied to Mr. McGirt's crimes.[96] Anything else posited or argued was to the side of this central legal issue.

c. Oklahoma's Argument and the Law Before McGirt

Oklahoma argued many things in the case, characteristically casting matters in existential terms and, from there, generally contesting the existence of *any* Indian country relevant to the charges against Mr. McGirt.[97] As the matter came up from the Tenth Circuit, however, the issue was defined as addressing whether the Muscogee Creek Nation's treaty territory was or remained a "reservation,"[98] a statutorily designated subspecies of Indian country.[99] The gravitational center of the case ultimately turned on whether Congress had ever disestablished a Muscogee Creek reservation, an issue Oklahoma appeared to be spoiling to take on.[100]

> constitutional design], the National Government seeks to subject a citizen to the criminal jurisdiction of a third entity to be tried for conduct occurring wholly within the territorial borders of the Nation and one of the States. This is unprecedented.

Cf. Lara, 541 U.S. at 212 (Kennedy, J., concurring).

92. Oklahoma v. Castro-Huerta, 142 S. Ct. 877 (2022) (granting certiorari on question of concurrent federal-state jurisdiction under the General Crimes Act).

93. McGirt v. Oklahoma, 140 S. Ct. 2452, 2479 (2020) (citing United States v. McBratney, 104 U.S. 621, 624 (1882)).

94. 18 U.S.C. § 1152.

95. *Id.*

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

97. *See generally* Brief for Respondent, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-95-26) (Mar. 13, 2020).

98. *Compare* Petition for Writ of Certiorari, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526) (Apr. 17, 2018) (challenging conviction and detention based on Indian country claims), *with* Brief in Opposition, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526) (Aug. 19, 2019) (responding and arguing case presents same matter as was then-pending in Sharp v. Murphy, No. 17-1107 (Apr. 9, 2018), i.e., "whether the historical boundaries of the Muscogee (Creek) Nation is an Indian reservation today.").

99. 18 U.S.C. § 1151(a).

100. As the Court observed, "Oklahoma has put aside whatever procedural defenses it might have and asked us to confirm that the land once given to the Creeks is no longer a reservation today." *McGirt*, 140 S. Ct. at 2460. *Cf.* Murphy v. Royal, 875 F.3d 896, 929 n.36 (noting Oklahoma's failure to argue procedural defenses in an earlier reservation disestablishment case). This was not the first time Oklahoma was ready to swing for the fences in a Muscogee Creek Nation Indian country dispute. Indian Country, U.S.A. v. Okla. Tax Comm'n, 829 F.2d 967, 975 n.3 (10th Cir. 2013) ("The State seems to believe that the Indian Country status of the [relevant site] rests on whether the exterior boundaries of the 1866 Creek reservation have been disestablished. It does not. Our inquiry is narrower: whether Congress has divested the unallotted Creek tribal lands of their Indian country status.").

The Court's "fairly clean analytical structure" for addressing the issue is set forth in *Solem v. Bartlett*, a unanimous ruling authored by Justice Thurgood Marshall in 1984.[101] *Solem* held that congressional intent is the dispositive consideration, and it recognized three forms of evidence that had, in various ways, previously been used to determine such intent: (i) Statutory language; (ii) contemporaneous understanding of that language, if the statutory language lacked certain key indicia; and (iii) in the event those other sources still left judges scratching their heads, the modern demographics and subsequent treatment of the affected area.[102] As formulated in *Solem*, the central consideration is what *Congress* said and did.[103] While later rulings have been interpreted as suggesting a slide from an otherwise exacting focus on *Congress*'s actions, the Court reiterated in *Nebraska v. Parker*, a unanimous ruling authored by Justice Clarence Thomas in 2016, that Congress's intent must be shown by direct evidence, not inference.[104] Importantly, *Parker* recognized that the Court had never before held inferential evidence, such as "the subsequent demographic history of opened lands" or "the United States' 'treatment of the affected lands in the years immediately following the opening,'" to be sufficient *by itself* "to find diminishment."[105] Accordingly, as *McGirt* rose to the Supreme Court, we had two unanimous rulings that had been issued by different Courts more than thirty years apart, both of which required *direct* evidence of Congress's intent to disestablish and both of which discounted the use of *inferential* evidence.

This, of course, put Oklahoma at something of a disadvantage, given the absence of any clear statutory statement of disestablishment. The State, therefore, relied on a more impressionistic telling of relevant legal history. It started with events contemporaneous to Muscogee Creek allotment and Oklahoma statehood[106] and moved on to itemize other congressional abuses of the Nation, seeming to invite the Court to perpetuate these abuses rather than to apply its precedent.[107] Next, Oklahoma invoked demographics[108] and its *Oklahoma-is-different* standard, calling for deference to how *the State* had previously interpreted federal law.[109] Finally, it noted that non-Indians moved in on Muscogee Creek lands really fast when they had the chance, a development it argued should be relevant to

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101. 465 U.S. 463, 470–72 (1984).

102. *Id.*

103. *Id.* ("The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries.").

104. 577 U.S. 481, 494 (2016).

> Petitioners' concerns about upsetting the "justifiable expectations" of the almost exclusively non-Indian settlers who live on the land are compelling, but these expectations alone, resulting from the Tribe's failure to assert jurisdiction, cannot diminish reservation boundaries. Only Congress has the power to diminish a reservation. And though petitioners wish that Congress would have "spoken differently" in 1882, "we cannot remake history."

Id. (internal citations omitted).

105. *Id.*

106. McGirt v. Oklahoma, 140 S. Ct. 2452, 2463–65 (2020).

107. *Id.* at 2465–68.

108. *Id.* at 2468–70.

109. *Id.* at 2470–71, 2476–78. Leaving aside the inherently suspect mode of the State's argument, i.e., relying on how a litigant *understood* the law as opposed to what the law *requires*, Oklahoma's track record in this area is perhaps not the strongest foundation one might use for pressing its case. *E.g.*, *supra* notes 9–10, 67–68 and accompanying text.

the understanding what Congress had earlier enacted.[110] As the Court put it, Oklahoma's argument then culminated with an abandonment of "any pretense of law" and instead spoke "openly about the potentially 'transform[ative]' effects of a loss today."[111]

In some respects, Oklahoma's argumentation can be justified based on reading the Rehnquist-era trajectory of disestablishment caselaw.[112] Nonetheless, *Parker* rendered that reading a bold one: Essentially a direct, front-door run at urging the Court to hold, for the first time and premised largely on its *Oklahoma-is-different* theory, that inferential evidence *alone* should be sufficient to find disestablishment.

To be fair, though, this sort of "[w]e are told we should worry"[113] approach has worked for Oklahoma in the past. For example, it previously obtained a Tenth Circuit ruling that the Osage Nation's reservation had been disestablished even where the court could point to no statutory provision to support the conclusion.[114] Likewise, it obtained a district court ruling that broadly held—on a seemingly cursory consideration of inferential evidence relating to a single Tribe's legal history—that *all* reservations had been disestablished in Oklahoma.[115] In those cases, as in *McGirt*, the State supplemented its argument with statements of the grave policy consequences that would result from a finding that a reservation had not been disestablished.

In other words, Oklahoma committed itself in *McGirt* to a broad and risky adversarial position, it stepped up to the plate, and it swung with the best argument it could think of in the absence of statutory language that could satisfy the test of *Solem* and *Parker*.

d. The Court's Holding and Analysis

Opening with the now famous line "[o]n the far end of the Trail of Tears was a promise,"[116] the Court conducted two inquiries into Muscogee Creek legal history: (i) Whether Congress had created a reservation, as such, for Muscogee Creek Nation,[117] and (ii) if so, did it ever disestablish it so that it no longer constituted Indian country for purposes of Mr. McGirt's prosecution?[118] Based thereon, it held in favor of an established and continuing reservation, i.e., Indian country, and vacated the State's conviction of Mr. McGirt.[119] In getting there and keeping Oklahoma's bold play in mind, the Court

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110. *Id.* at 2473.

111. *McGirt*, 140 S. Ct. at 2478.

112. *Cf. e.g.*, CONF. OF WESTERN ATT'YS GEN., AMERICAN INDIAN LAW DESKBOOK 168–72 (2020 ed.) (discussing inferential evidence more broadly).

113. Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1020 (2019) (Gorsuch, J., concurring).

114. Osage Nation v. Irby, 597 F.3d 1117, 1126 (10th Cir. 2010) ("The operative language of the statute does not unambiguously suggest diminishment or disestablishment of the Osage reservation.").

115. Murphy v. Sirmons, 497 F. Supp. 2d 1257, 1289–90 (E.D. Okla. 2007).

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

117. *Id*. at 2460–62.

118. *Id*. at 2462–74.

119. *Id.* at 2482. Following the Court's ruling, the United States indicted and tried Mr. McGirt for two counts of Aggravated Sexual Abuse in Indian Country and one count of Abusive Sexual Contact in Indian Country in violation of 18 U.S.C §§ 1151, 1153, 2241(c), 2246(2), for which he was convicted by a jury on November 6, 2020, and sentenced to life imprisonment. *See Jimcy* McGirt *Sentenced to Life Imprisonment*, U.S. DEP'T OF JUST. (Aug. 25, 2021), https://www.justice.gov/usao-edok/pr/jimcy-mcgirt-sentenced-life-imprisonment#:~:text=In%201997%2C%20Jimcy%20McGirt%20was,District%20Court%20of%20Wagoner%20County.&text=

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definitely showed its math.

On the first inquiry, the Court did not articulate the test it applied. Instead, it jumped in with both feet and "[s]tart[ed] with what should be obvious: Congress established a reservation for the Creeks."[120] The Court recited federal offers and treaty promises used to induce and coerce the agreement of the Muscogee Creek people to remove from their aboriginal homelands and resettle as a self-governing Tribal nation within "establish[ed] boundary lines which will secure a country and permanent home to the whole Creek Nation of Indians" to enjoy "so long as they shall exist as a nation, and continue to occupy the country hereby assigned to them."[121] As had many courts before it, the Court noted Muscogee Creek Nation continued not only as a Tribal sovereign but as one recognized by and which maintained a government-to-government relationship with the United States.[122] The Court acknowledged that the Muscogee Creek Nation's early treaties with the United States "did not refer to the Creek lands as a 'reservation,'"[123] but it dismissed the point as raising a distinction without a difference,[124] noting the government's promises were sufficiently strong and clear when compared to language in other treaties recognized as establishing a reservation.[125] Concluding as strongly as it started, the Court said: "Under any definition, this was a reservation."[126]

As to the second and more significant part of its analysis, the Court relied on *Solem*[127] and *Parker*.[128] Weaving these authorities together with other caselaw, the Court carved through to the heart of its inquiry:

> To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress. This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties. *But that power, this Court has cautioned, belongs to Congress alone*. Nor will this Court lightly infer such a breach once Congress has established a reservation.[129]

Recognizing the checkered history of the government's dealings with Tribal nations, the Court made plain that its general history of abuse is of little analytical value, *particularly* when divorced from statutory language communicating Congress's intent: "[O]nly Congress can divest a reservation of its land and diminish its boundaries. . . . So it's no matter how many other promises to a tribe the federal government has already broken. *If*

Last%20November%2C%20McGirt%20was%20convicted,four%2Dyear%2Dold%20child.

120. *McGirt*, 140 S. Ct. at 2460.

121. *Id.* at 2460–61.

122. *Id.* at 2465–68.

123. *Id.* at 2461.

124. *Cf.* Indian Country, U.S.A. v. Okla. Tax Comm'n, 829 F.2d 967, 973 (10th Cir. 1987) (observing with reference to Muscogee Creek Nation lands that "[t]he term 'Indian reservation' has been used in various ways to define Indian country" and that "[a] formal designation of Indian lands as a 'reservation' is not required for them to have Indian country status," concluding the term "Indian country . . . simply refers to those lands which Congress intended to reserve for a tribe and over which Congress intended primary jurisdiction to rest in the federal and tribal governments").

125. *McGirt*, 140 S. Ct. at 2461 (citing Menominee Tribe v. United States, 391 U.S. 404, 405 (1968)).

126. *Id.* at 2462.

127. 465 U.S. 463, 470–71 (1984).

128. 577 U.S. 481, 488 (2016).

129. *McGirt*, 140 S. Ct. at 2462 (emphasis added).

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Congress wishes to break the promise of a reservation, it must say so."[130] The Court then offered examples of how Congress has done this (when it has chosen to do so).[131]

With respect to Oklahoma's reliance on claimed *inferential* evidence, the Court was clear that in the absence of a "statute evincing anything like the 'present and total surrender of all tribal interests' in the affected lands," such evidence was no evidence at all.[132] After surveying Oklahoma's telling of Congress's dealings with the nation, the Court observed that "in all this history there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation."[133]

With respect to Oklahoma's pressing for disestablishment based on its own historical practices and current demographics, the Court dug in and pushed back: "When interpreting Congress's work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us."[134] The Court reiterated its observations from prior decisions that "[e]vidence of the subsequent treatment of the disputed land . . . has 'limited interpretative value'",[135] noting also that such evidence is "the 'least compelling.'"[136] Finally, seeming to give over to exasperation, the Court stated:

> To avoid further confusion, we restate the point. There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help "clear up . . . not create" ambiguity about a statute's original meaning. And as we have said time and again, once a reservation is established, *it retains that status "until Congress explicitly indicates otherwise."*[137]

Perhaps to underscore its view of the inherent subjectivity and *lack* of probative value in such "extratextual sources" (e.g., Oklahoma's prior criminal jurisdiction practices,[138] statements made by various persons during the allotment era,[139] the speed and magnitude of non-Indian settlement of the relevant area following Oklahoma statehood[140]), the Court walked through Oklahoma's points, took off its gloves, and called out the broken logic on which it saw its case as resting. Its statement merits full recitation:

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

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130. *Id.* (emphasis added).
131. *Id.* at 2462–63.
132. *Id.* at 2464 ("In saying this we say nothing new. For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected that argument.").
133. *Id.* at 2468.
134. *McGirt*, 140 S. Ct. at 2468.
135. *Id.* at 2469.
136. *Id.*
137. *Id.* (emphasis added).
138. *Id.* at 2470–71.
139. *McGirt*, 140 S. Ct. at 2472–73.
140. *Id.* at 2473.

> seems normal. Indian landowners lose their titles by fraud or otherwise in sufficient volume that no one remembers whose land it once was. All this continues for long enough that a reservation that was once beyond doubt becomes questionable, and then even farfetched. Sprinkle in a few predictions here, some contestable commentary there, and the job is done—a reservation is disestablished. None of these moves would be permitted in any other area of statutory interpretation, and there is no reason why they should be permitted here. *That would be the rule of the strong, not the rule of law*.[141]

One can say many things about the Court's opinion, but one cannot suggest the Court hid the ball as to how it viewed the issues and arguments presented.

Building on Oklahoma's policy arguments, a four-Justice minority dissented and accused the Court of ignoring "compelling reasons" for ruling otherwise and as having "profoundly destabilized the governance of eastern Oklahoma."[142] The majority addressed the accusation but was unpersuaded: It concluded the charge had nothing to do with the established legal inquiry,[143] proposed a dangerous mode of subjective and results-oriented analysis that would be tolerated in no other area of the law,[144] was uncompelling in light of existing rules of law designed to protect reliance interests,[145] and was unnecessarily dismissive of both the successful history of Tribal-State compacting in Oklahoma[146] as well as Congress's institutional role.[147]

Throughout its opinion, in fact, the Court emphasized its job is *not* Congress's job,[148] with perhaps its most powerful invocation of this point offered in its final passage:

> [M]any of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.[149]

Further, as it did in 2016,[150] the Court stated the obvious, i.e., the adjudication and affirmation of Indian country for purposes of criminal jurisdiction does not, *of itself*,

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141. *Id.* at 2474 (emphasis added).
142. *Id.* at 2482 (Roberts, C.J., dissenting).
143. *E.g.*, *id* at 2478–80 (characterizing various policy arguments as "abandoning any pretense of law" and characterizing the alleged impact on civil and regulatory law as neither clear nor within the scope of the litigation).
144. *McGirt*, 140 S. Ct. at 2474.
145. *Id.* at 2481 ("Many other legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few—are designed to protect those who have reasonably labored under a mistaken understanding of the law.").
146. *Id.* at 2481.
147. *Id.* at 2481–82.
148. *E.g.*, *id* at 2462.

> Congress sometimes might wish an inconvenient reservation would simply disappear. Short of that, legislators might seek to pass laws that tiptoe to the edge of disestablishment and hope that judges—facing no possibility of electoral consequences—will deliver the final push. But wishes don't make for laws, and saving the political branches the embarrassment of disestablishing a reservation is not one of our constitutionally assigned prerogatives.

Id.

149. *McGirt*, 140 S. Ct. at 2482.
150. *E.g.*, Nebraska v. Parker, 577 U.S. 481, 493 (2016).

predetermine the answer to any particular secondary consideration, such as civil jurisdiction.[151] Such considerations, while inarguably suggested by Indian country's existence, must be analyzed in light of particular facts and legal tests appropriate to whatever issue presents, including rules designed to protect reasonable reliance interests.[152] But more importantly, given the context in which such points were offered, such considerations merely presented hypotheticals, not questions for judicial review. Sitting as it did with these two parties and the single issue presented, the Court could *not* even say *any* of the proffered considerations, let alone *which* of those considerations, might someday ripen into a justiciable case or controversy. As such, these hypotheticals could offer only heat and color, not analysis; the Court's giving them some dispositive weight—as the dissent appears inclined to have done—would have been wildly inappropriate and inconsistent with the Court's established constitutional and institutional role.

Finally, critically, and as it has done before,[153] the Court did not leave it there, simply dismissing out of hand the extra-legal concerns argued. Instead, it held up Tribal and state governments as best suited to work on such dynamic and variable considerations, of course mindful of Congress's authority in this area. This passage also merits recitation:

> In reaching our conclusion about what the law demands of us today, we do not pretend to foretell the future and we proceed well aware of the potential for cost and conflict around jurisdictional boundaries, especially ones that have gone unappreciated for so long. But it is unclear why pessimism should rule the day. With the passage of time, Oklahoma and its Tribes have proven they can work successfully together as partners. Already, the State has negotiated hundreds of intergovernmental agreements with tribes . . . . These agreements relate to taxation, law enforcement, vehicle registration, hunting and fishing, and countless other fine regulatory questions. No one before us claims that the spirit of good faith, "comity and cooperative sovereignty" behind these agreements will be imperiled by an adverse decision for the State today any more than it might be by a favorable one. And, of course, should agreement prove elusive, Congress remains free to supplement its statutory directions about the lands in question at any time. It has no shortage of tools at its disposal.[154]

In short, the Court ruled based on an application of established law and pushed back against what it viewed as irrelevant extra-legal argument. In doing so, it retrenched and restated its inquiry, obviously impatient with pleas for deference to some partisan sense of the way things ought to be, and declined the invitation to make *new* law. As to any potential *consequences* of the ruling, the Court did not turn a deaf ear but pointed the parties to available mechanisms for working it out. For anyone who may have doubted the Court meant what it said, such doubt was dispelled when on January 24, 2022, it rejected—again—Oklahoma's dogged effort to get one more time at bat to make the same arguments.[155] Read as such, the ruling can and perhaps should be viewed as unremarkable and even conservative in approach. Plainly, though, that is not how it has been received,

151. *McGirt*, 140 S. Ct. at 2480–81.
152. *Id.*
153. *E.g.*, Okla. Tax Comm'n v. Citizen Potawatomi Nation, 498 U.S. 505, 514 (1991).
154. *McGirt*, 140 S. Ct. at 2481–82.
155. *Accord* Matt Ford, *Oklahoma Wants a Supreme Court Do-over on Tribal Sovereignty*, NEW REPUBLIC (Aug. 12, 2021), https://newrepublic.com/article/163243/gorsuch-kevin-stitt-tribal-sovereignty; *see supra* notes 6–8 and accompanying text.

but more on that in the next section.

Meanwhile, to my eyes, sitting at my desk as a Tribal lawyer, this is the mountain peak on which we stand. The Court answered a critical question that had been working its way through the courts for years and, in doing so, reaffirmed an important test while offering one more instance of Federal Indian law's application in Oklahoma just as it does in the rest of the country. Meanwhile, arrayed around us, we see the peaks of multiple and related (but largely unripe) questions that shape the rest of our mountain range. We have long known those other peaks were there, and while our view now may seem clearer, we do not yet stand on *those* peaks. Valleys and slopes still mark the landscape between here and there.[156] And importantly, while we take in our landscape, the Court has reminded us what *courts* do, and it has reminded us also that we need not *only* rely on litigation.

Considering all this, it seems to me to give the ruling short shrift to read it only as a Federal Indian law decision. So let me emphasize: In keeping with some of the Court's more important rulings in this area, *McGirt* addressed not only the core issues and interests implicated in the presented dispute, but it did so mindful of its own place in the mix and the constitutional structure in which everything played out. Matters of Tribal sovereignty within the United States legal system can be complex, and throughout our shared histories, the Court has played a significant role in shaping the mold of it all. Rather than pretending to hold itself above and apart, the Court remained clear on both its role and the related fact that it is but one of three branches that, together, make up only one of the three separate governments actively contributing to the dynamic that informs this area of the law. In doing so, it hewed to both its precedent *and* its institutional role while navigating some of the country's most fraught history and law.

Such a ruling merits celebration—not just among Tribal peoples and advocates but among those also who believe the Court should operate in accord with clear adjudicative rules and methods, not as some quasi-legislative body deployed in *ad hoc* service to one litigant or another. In other words, it should be celebrated by all of us who prefer the "rule of law" to "the rule of the strong."[157]

ii. *McGirt* Through the Lens of Professor Frickey's Reading of the Marshall Trilogy

McGirt was certainly not received with such sanguinity. If it was, as I argue, merely the application of established legal principles and a declined invitation to make new law,

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156. *McGirt* did not address, for example, whether the law compels the same conclusion with respect to any other Tribal nation, 140 S. Ct. at 2479 ("Each tribe's treaties must be considered on their own terms, and the only question before us concerns the Creek."), nor did it address secondary civil jurisdiction implications of Indian country status under the Major Crimes Act, within Muscogee Creek Nation or elsewhere, *id.* at 2480 ("The only question before us, however, concerns the statutory definition of 'Indian country' as it applies in federal criminal jurisdiction under the [Major Crimes Act]."). Those and other questions will require additional fact finding and analysis of a broader legal context within separate legal processes (*e.g.*, litigation, compacting, or legislation), as has already been the case with respect to five other Tribal reservations in Oklahoma. *See* Hogner v. State, 500 P.3d 629 (Okla. Crim. App. 2021) (Cherokee); Bosse v. State, 484 P.3d 286 (Okla. Crim. App. 2021), *withdrawn on other grounds*, 495 P.3d 669, *aff'd*, 499 P.3d 771 (Chickasaw); Sizemore v. State, 485 P.3d 867 (Okla. Crim. App. 2021) (Choctaw); Grayson v. State, 485 P.3d 250 (Okla. Crim. App. 2021) (Seminole); State v. Lawhorn, 499 P.3d 777 (Okla. Crim. App. 2021) (Quapaw).

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

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what is with all the hubbub? Why is this case so aggressively, if alternately, demonized and celebrated? Sure, the ruling has significant practical implications, but what makes it so special as a *court* ruling? To answer those questions, we need to step back and read the case in the context of the broader sweep of Federal Indian law and understand it not just as a ruling embodying doctrine and law but as a cultural text as well.

What do I mean by "cultural text"? Nothing more than an interpretable manifestation of who we are, something that is amenable to being read and understood as a piece of writing or other piece of heritage production. Our courts are not mechanistic arbiters of our differences; they are both the value-laden *product* and *producer* of value-laden content that discloses our traits as a nation. All court rulings are amenable to be read as cultural texts, and *McGirt* is a particularly rich one. For my purposes, the work of Professor Philip Frickey is of real aid for our doing so.

In 1993, Professor Frickey offered a synthesizing account of the foundational Court rulings that frame virtually every principle at play in Federal Indian law, i.e., the Marshall Trilogy[158]—*Johnson v. McIntosh*,[159] *Cherokee Nation v. Georgia*,[160] and *Worcester v. Georgia*.[161] In a single sentence early on, he laid out the law's core contradictions in its dealings with Indigenous peoples: "Federal Indian law is . . . rooted in the fundamental contradiction between the historical fact and continuing reality of colonization, on the one hand, and the constitutional themes of limited government, democracy, inclusion, and fairness that, on the other hand, constitute part of our 'civil religion.'"[162] This tension between colonial realities and constitutional ideals has long been a featured tug-of-war in Federal Indian law.

Lawyers in the United States are bound by training, oath, and various other means to abide and affirm our country's constitutional system. The law, that great-if-too-often-theoretical equalizer, provides our core methodology. Those who represent Indigenous Nations can grow only *too* familiar with (and *too weary of*) that system's limitations—its inescapable contradictions and habit of defaulting, typically without even the courtesy of acknowledging it, to norms that serve to perpetuate the inequitable prerogatives of prior generations. While none of that excuses any lawyer from their bond and responsibility *as lawyers*, it can certainly be challenging.

While the tug-of-war continues, a wrestling match between federal and state interests can predominate in these cases, and to perhaps understate the matter, that match sometimes seems to matter more than the judiciary's commitment to developing and maturing constitutional doctrines to mitigate the reverberations of our country's colonial origins. Oklahoma's arguments leaned into these tendencies in the law, and the *McGirt* dissenters certainly read matters by its light.

Although things may have grown more coded over the years,[163] the Court used to

158. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

159. 21 U.S. 543 (1823).

160. 30 U.S. 1 (1831).

161. 31 U.S. 515 (1832).

162. Frickey, *supra* note 158, at 384.

163. *See generally* ROBERT A. WILLIAMS, LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005); DAVID E. WILKINS, AMERICAN INDIAN

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be quite blunt about the wrestling match.[164] For example, in *Worcester v. Georgia*, another case—like *McGirt*—in which no Tribe was a party, the Court's holding operated to protect, as a legal matter, the legal and political autonomy of Cherokee Nation against incursion by a state government, but it did so only as incident to its protection of *federal* interests. As the Chief Justice wrote:

> [T]he acts of Georgia are repugnant to the Constitution, laws and treaties of the United States. They interfere forcibly with the relations established between the United States and the Cherokee nation, *the regulation of which, according to the settled principles of our Constitution, are committed exclusively to the government of the Union*.[165]

Justice McClean drives my point home in his concurring opinion, expressing his view that Tribal interests are merely the stuff of transitory judicial accommodation:

> The exercise of self-government by the Indians, within a state, is undoubtedly contemplated to be temporary. . . . At best, they can enjoy a very limited independence within the boundaries of a state, and such a residence must always subject them to encroachments from the settlements around them; and their existence within a state, as a separate and independent community, may seriously embarrass or obstruct the operation of the state laws. If, therefore, it would be inconsistent with the political welfare of the states, and the social advance of their citizens, that an independent and permanent power should exist within their limits, this power must give way to the greater power which surrounds it, or seek its exercise beyond the sphere of state authority.[166]

These passages help illustrate a set of presumptions that seem, superficially, to be baked into the law—a set of presumptions that treat Tribes as anachronistic bystanders. That has never been the case, however—now or then.[167] Tribes have *always* fought for their voices to be heard and for their agency to affect their conditions and relations.

After all, Cherokee Nation brought suit and resorted to the United States' then-new legal system to protect its rights against Georgia's oppression,[168] and no matter the turn of the tide, it did not just stay and yield; instead, under the admitted pressures of coercion, it chose and acted so it could retain its national integrity, i.e., Cherokee negotiated the best treaty it could and removed to Indian Territory.[169] So did the Chickasaw Nation, stating

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SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE (1997).

164. *E.g.*, United States v. Kagama, 118 U.S. 375, 379 (1886).

> But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States, or of the states of the Union. *There exists within the broad domain of sovereignty but these two*.

Id. (emphasis added).

165. *Worcester*, 31 U.S. at 561 (emphasis added); *accord* Johnson v. McIntosh, 21 U.S. 543, 574 (1823) (restraining legal effect of tribal alienation of lands in favor of centralized federal control).

166. *Worcester*, 31 U.S. at 593 (McLean, J., concurring opinion).

167. *See generally, e.g.*, JENNY HALE PULSIPHER, SUBJECTS UNTO THE SAME KING: INDIANS, ENGLISH, AND THE CONTEST FOR AUTHORITY IN COLONIAL NEW ENGLAND (2007) (offering fascinating and detailed analysis of the sophisticated use Indigenous peoples made of international relations in one region of the colonial Americas).

168. Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

169. Treaty with the Cherokee, Cherokee-U.S., May 23, 1836, 7 Stat. 478.

> Whereas, the Cherokees are anxious to make some arrangements with the Government of the United States whereby the difficulties they have experienced by a residents within the settled parts of the United States under the jurisdiction and laws of the State Governments may be terminated and

the matter of its own agency plainly in its Removal treaty:

> The Chickasaw Nation find themselves oppressed in their present situation; by being made subject to the laws of the States in which they reside. Being ignorant of the language and the laws of the white man, they cannot understand or obey them. *Rather than submit to this great evil, they prefer to seek a home in the west, where they may live and be governed by their own laws*. . . .[170]

These dynamics have roiled federal law for nearly 200 years and continue to shape it today, i.e., a colonial-constitutional tug-of-war and federal-state wrestling match that plays out in relation to Tribal rights, though the Tribes themselves are too often set to the side by the law even as they retain some measure of agency and choice. Every Indian law case should be read with this in mind, and every such case offers a cultural text that further explicates the dynamic, allowing us to hold a mirror up to ourselves—if we choose to—and whether its authors intended as much or not.

Let us turn now to Professor Frickey's article, in which he digs in and chews on the Trilogy, navigating his readers through what might be read as the colonial apologia of *Johnson* to the ambiguous promise of *Cherokee Nation* and finally the maturation of *Worcester*. Frickey presented the three cases as the conscious and coherent product of a jurist's attempt to create a set of rules *within* the United States' legal system that can be used to secure the legal survival and even success of Native peoples.[171] Frickey never sounds like someone trying to rehabilitate any historical figure or, alternatively, to offer an "it's not all *that* bad" take on the law. Instead, he deconstructs the Trilogy into a useable model so it might be converted to fuel for helping the law achieve a sort of escape velocity from the gravitational trap of its colonial origins.

When the Tenth Circuit decided *Murphy v. Royal*,[172] the case that would lead eventually to the Supreme Court's decision in *McGirt*, I had, like many others, already been engaged in these issues for some years. That particular day, I was standing at an airport gate waiting when an alert on my phone indicated the ruling had come down. I remember standing there, heart pounding, skimming through the pages on my phone's small screen, and thinking: "My god, they did it." Though it may be sad to admit, the appellate panel's intellectual honesty, courage, and adherence to precedent on such an important issue here in Oklahoma surprised me. It was not its statement and application of the law that floored me; it was the sticking to the law despite what it might mean. As a Tribal lawyer, it can be all too easy to presume the courts will shy away from the law if its application would upset the perceived apple cart of non-Native expectations, that it will give over to operating on a sort of unspoken autopilot that applies normative cultural presumptions dressed up as the law rather than the law itself. But that is *not* what the Tenth

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> adjusted; and with a view to reuniting their people in one body and securing a permanent home for themselves and their posterity in the country selected by their forefathers without the territorial limits of the State sovereignties, and where they can establish and enjoy a government of their choice and perpetuate such a state of society as may be most consonant with their views, habits and condition; and as may tend to their individual comfort and their advancement in civilization.

Id.

170. Treaty with the Chickasaw, Chickasaw-U.S., Mar. 1, 1883, 7 Stat. 381 (emphasis added).

171. *See* Frickey, *supra* note 158.

172. 875 F.3d 896 (10th Cir. 2017), *aff'd sub nom.* Sharp v. Murphy, 140 S. Ct. 2412 (2020).

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Circuit did in *Murphy*. Instead, with careful and deliberate analysis, it hewed to and affirmed the law. The power and hope of that filled my sails for weeks to come, though not without some trepidation about what all might come next.

My second thought standing at that airport gate, reading the opinion as my flight boarded around me, was of Professor Frickey's article. By the time the Supreme Court decided *McGirt*, his article was nearly my first thought, and I will use it here to explain why I read *McGirt* as inarguably important.

a. McGirt *as Oklahoma's Attempt at a* Johnson *Redux*

Johnson, of course, addressed the question of which land title was superior within the United States' legal system, i.e., title conveyed through the government to an individual in accord with colonial or constitutional systems versus title conveyed to a person who transacted directly with an Indigenous people.[173] As every student of Indian law knows, this is the case that incorporated the doctrine of discovery into United States law, integrating the pre-constitutional dispossession of Native lands to our legal system.[174] Professor Frickey, however, pulls much more from the case.

Frickey argues *Johnson* manifests an institutionally ambivalent acceptance of colonization's brutality,[175] with Marshall effectively throwing up his judicial hands and claiming a helplessness "to undo by law what had already occurred in fact."[176] His Court justified this helplessness by, first, blaming the continent's aboriginal inhabitants for refusing to integrate to the normative rules of colonialization[177] and, second, declining to "'enter into the controversy, whether agriculturalists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits'" or otherwise to "'engage in the defence of those principles which Europeans have applied to Indian title.'"[178] In other words, the Court—or to use Marshall's famous phrase, "the Courts of the conqueror"[179]—applied the classic double barrels of the colonialist: Claimed *cultural superiority* and *judicial incompetence*.[180] Thus, in Frickey's view:

> *Johnson* seemed to establish a rigid dichotomy between power and law. Colonialism, *Johnson* seemed to say, raises almost exclusively nonjusticiable, *normative* questions beyond judicial authority and competence. Colonialism was thus prior to, and the antithesis of, constitutionalism, which involves justiciable, *legal* questions about judicially enforceable limits on governmental action traceable to the founding of the United States.[181]

Turning back to *McGirt*, this distillation of *Johnson* suggests the lens—the "rigid dichotomy between power and law"[182]—through which Oklahoma and the dissenters

173. *See* 21 U.S. 543 (1823).
174. *Id.*
175. Frickey, *supra* note 158, at 386.
176. *Id.*
177. *Id.* at 387–88.
178. *Id.* at 388–89 (quoting *Johnson*, 21 U.S. at 589).
179. *Johnson*, 21 U.S. at 588.
180. Frickey, *supra* note 158, at 388.
181. *Id.* at 389.
182. *Id.*

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seemed to view the case.

Of course, the context and sources of controlling law are different, but the arguments offered in support of disestablishment smacked of *Johnson*. Both Oklahoma and the dissent essentially suggested the Court's *best* role would simply be to normalize whatever errors or ambiguities may be left unresolved from the messiness of Oklahoma's formation, treating the state's creation as something akin to the pre-constitutional colonization of the continent.[183] By this formulation, the law would matter less than the normative habits, expectations, and presumptions of the successor people and government—all of which the Court would be incompetent to remedy, even if it found it all terribly distasteful. To the extent the law conflicted with this received "state of things,"[184] it should yield in deference to the current prevailing order. This is, in fact, how Oklahoma has argued these matters for years, positing itself as somehow *different* from any other state in which Indigenous nations are found, invoking a sort of Oklahoman exceptionalism and casting itself as a state occupying a more purely colonial relationship to Native peoples than other states do.

But that is *not* the lens the Court applied. Rejecting Oklahoma's and the dissenters' arguments, the Court opted for "the rule of law."[185] It hewed to precedent and the full capacities of its institutional role, declining to defer to the perpetuation of a received "state of things"[186] that might continue the pressures for Tribal disappearance or, otherwise, to privilege the "'practical advantages' of ignoring the written law."[187] As the Court refreshingly noted, such approach would be tolerated *in no other area of the law*,[188] and no justification could be found for it in the established context of Federal Indian law, including Congress's centuries of dealings and misdealings with Tribal nations.[189] Rather than treat principles of Federal Indian law as somehow *less than* other law, the Court simply applied them *as law*. This alone makes *McGirt* important.

b. McGirt *as* Worcester*'s Descendent*

Continuing his tour, Professor Frickey turns to *Cherokee Nation v. Georgia*,[190] and observes:

> Unlike in *Johnson*, in *Cherokee Nation* there was an Indian party in the case and Indian sovereignty was a central aspect of the controversy. Moreover, rather than challenge the very premises of colonization, the Cherokee crafted their position to fall on the "law" side of Chief Justice Marshall's power-law dichotomy, by positing the issue as whether the Georgia legislature had acted outside of its authority under the United States constitutional structures.[191]

The case did not turn out well for the Cherokee,[192] but Frickey highlights the *structure*

183. McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (Roberts, C.J., dissenting).
184. *Johnson*, 21 U.S. at 590.
185. *McGirt*, 140 S. Ct. at 2474.
186. *Johnson*, 21 U.S. at 590.
187. *McGirt*, 140 S. Ct. at 2474.
188. *Id.*
189. *Id.* at 2465–68.
190. 30 U.S. 1 (1831).
191. Frickey, *supra* note 158, at 390.
192. *Cherokee Nation*, 30 U.S. at 16–20.

Chief Justice Marshall gave his opinion, namely, he started with a statement of the merits that "assumed the truth of the underlying facts and legal conclusions alleged by the Cherokee" *before* he turned to the dispositive jurisdictional issue, an ordering of analysis that seems unnecessary and unorthodox.[193] And even when he turned to the jurisdictional question, Chief Justice Marshall "again reached conclusions about tribal sovereignty that were not necessary to resolve the matter," starting with recognition of the Cherokee as "sovereign" and comprising "'a distinct political society, separated from others, capable of managing its own affairs and governing itself.'"[194] Ultimately, it is *these* passages that give *Cherokee Nation* its importance, i.e., Chief Justice Marshall's conceptualization and acknowledgement of the Cherokee Nation as a self-governing polity, even if it were not a "*foreign* nation" for purposes of the jurisdictional question presented. Frickey acknowledges that "[i]t may be tempting to dismiss these discussions by Chief Justice Marshall as mere musing about platonic notions of sovereignty, . . . in other words, dictum,"[195] but he cautions that would misread matters, which are made clearer when we turn to the third stop on his tour.

In *Worcester v. Georgia*,[196] we return to a dispute *without* a Tribal party, but here, we have at least an earnest young missionary who challenged essentially the same acts by Georgia that Cherokee Nation previously attempted to litigate. In ruling against Georgia, "Chief Justice Marshall translated the dictum on tribal sovereignty in *Cherokee Nation* into a full-fledged holding that defined the sovereign status of Indian tribes."[197] In doing so, he also framed the Court's analysis to bring forward those nonjusticiable realities of the United States' colonial past across the threshold into our constitutional present—*not* to provide relief based on claimed past wrongs but to keep them "in our recollection" so they "might shed some light on existing pretensions."[198] As Frickey explains:

> As *Johnson* indicated, the judiciary was simply powerless to review the *historical* aspects of colonization. American courts were the "Courts of the conqueror" and could not turn against the government and people from which they derived their authority. It follows in *Worcester* that courts could not invalidate the root assumptions of colonization. Chief Justice Marshall thus implicitly endorsed the plenary power of Congress to implement colonization, a notion later squarely embraced by the Court. Moreover, any effort to undo the settled aspects of colonization would be futile. American courts could not annul the effects of the theories of discovery and original Indian title, upon which all Euro-American land titles were based. These prudential concerns about judicial restraint, Chief Justice Marshall suggested, matter far less when indigenous peoples are challenging *current* efforts to destroy whatever rights they still possess. To return to Chief Justice Marshall's language in *Worcester*, "existing pretensions" are subject to judicial scrutiny, and their lawfulness must be informed by "holding" an honest assessment of colonization "in our recollection."[199]

In other words, while the effects of the *past acts of colonization* cannot be undone by the

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193. Frickey, *supra* note 158, at 391.
194. *Id.* at 392 (quoting *Cherokee Nation*, 30 U.S. at 16).
195. *Id.*
196. 31 U.S. 515 (1832).
197. Frickey, *supra* note 158, at 394.
198. *Worcester*, 31 U.S. at 543.
199. Frickey, *supra* note 158, at 395 (internal citations omitted).

federal courts, the federal courts need not tolerate *current and ongoing* abuse of Native peoples that would violate *established principles of our constitutional order*. To continue such *Johnson*-like judicial helplessness in such instance would carry colonial practices too far over the threshold into our governing legal system, doing injury *not only* to Cherokee Nation but *also* degrading the constitutional ideals to which we aspire. On this theory in *Worcester*, the Court reviewed Georgia's acts and struck them down as an offense against the country's civil religion and constitutional order.[200]

Turning back to *McGirt*, it is more than just *not Johnson*; instead, it can be viewed as *Worcester*'s descendent. The "pretensions"[201] Oklahoma urged on the Court were its claims to exceptionalism and those "'practical advantages'"[202] of just letting things slide. In *Johnson*, the Court held itself incompetent to redress the presumed wrongs of our colonial era, and in *McGirt*, Oklahoma seemed to hope the Court would view the messy implementation of its own statehood with a similar impotence, crafting a resolution based on "the rule of the strong, not the rule of law."[203] As in *Worcester*, however, the Court declined to do so.[204] What is more, it did so with gratifying vigor, doing justice by both the integrity of our constitutional system as well as to the remaining implicated legal interests of a non-party Tribal people.

c. McGirt*, Frickey, and the Trilogy*

Building on this deconstruction of the Trilogy, Professor Frickey goes on to analyze the Court's interpretive strategies and identifies three elements of an analytic model that capitalizes on the best of Chief Justice Marshall's work, all of which holds the realities of colonization in mind as it operationalizes coherent legal doctrines within our constitutional system: (i) To view treaty disputes as relating to sovereignty, not contract;[205] (ii) to construe treaties as constitutive documents, deploying interpretive rules to effectuate their spirit and given them effect as they would have been understood by Native peoples;[206] and (iii) particularly given the tremendous power the Court's rulings have affirmed in Congress's hands,[207] to impose quasi-constitutional clear-statement rules to questions of treaty right abrogation.[208]

Writing in 1993, Frickey acknowledges "the current [Rehnquist] Court's approach to federal Indian law is in great tension" with his view of Marshall's analytical legacy.[209] He identifies and reads certain modern cases in relation to his model,[210] and while I will leave to others to conduct a deeper or more orthodox analysis, I believe *McGirt* belongs among those that get Marshall right. At minimum, the ruling suggests a shift from doctrinal

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200. 31 U.S. at 561.
201. *Id.* at 543.
202. McGirt v. Oklahoma, 140 S. Ct. 2452, 2474 (2020).
203. *Id.*; Johnson v. McIntosh, 21 U.S. 543, 574 (1823).
204. 31 U.S. at 561.
205. Frickey, *supra* note 158, at 406–08.
206. *Id.* at 408–11.
207. *E.g.*, *supra* notes 76–87 and accompanying text.
208. Frickey, *supra* note 158, at 412–17.
209. *Id.* at 418.
210. *Id.* at 429–33.

slack of the Rehnquist Court,[211] most especially in its tacit application of Marshall's principled "holding in our recollections" how things came to be as a means for shining a clearer "light on existing pretentions" manifest in whatever "actual state of things" might be argued at bar. As the Court applied this principle in *McGirt*, it reminds us that the law requires us to read matters by *this* light rather than giving over to some "'practical advantage'" that might result from replacing law with a perpetuation of presumed cultural norms and expectations.[212] As such, *McGirt* moves us closer to an analytic model that better mediates the tensions between our colonial past and constitutional present, reminding us we are *not* powerless when the wrongs of our past are on track to repeat. And therein lies much of *McGirt*'s power: Not only for *what* the Court held but also for *how* it got there—by addressing the question with analytic, institutional, and moral integrity and deployment of what Frickey teaches is the *best* reading of Marshall's foundational cases.

iii. *McGirt* and Oklahoma-Tribal Intergovernmental Relations

Let us now shift gears, climb down out of the mountains, and return to the day-to-day doings of Tribal-State intergovernmental relations here in Oklahoma. As we discussed earlier, *McGirt* addressed only one issue, and it did so only with respect to one Tribal people. Since it came down, it has been applied to five other Tribal nations, and most of eastern Oklahoma is now judicially affirmed Indian country. *McGirt* does not implement itself, nor does *McGirt* alone answer its myriad jurisdictional implications. Nor does the law, particularly: While we know doctrine and caselaw, that is just one framework for evaluating the questions *McGirt* did not answer. Another and arguably more important framework depends on the goals a Tribal people, *as a people*, may have—those Native voices and choices that give Tribal sovereignty meaning and purpose. The law may build the box in which we must operate, but there is some play in its joints where real work can still happen. At the end of the day and as the Court has regularly reminded us, we have many tools from which to choose as we figure our way around inside that box, and here in Oklahoma, we have a lot of experience with all that.

Once upon a time, before I had an idea I might end up here, I taught Federal Indian Tax Law at the University of New Mexico Law School and would joke with my students that the course ought to be titled "The Oklahoma Tax Commission Just Doesn't Get It." Why? Because so many of the cases that seemed to address critical and practical elements of the subject matter seemed to result from litigation coming out of Oklahoma. What is more, in many of those cases, it seemed Oklahoma would lose, recalibrate its canons a few degrees to the side, and then light the fuse again—only to fail to strike the decisive blow against Tribal interests it aimed at, thus retreating to recalibrate and set fresh powder. At the time, it seemed a colorful one-liner to use for bonding with my students. When I moved here, though, I learned a deeper, more practical, more complex, and far more human story.

The State and Tribal nations of Oklahoma have many times landed at that proverbial crossroads with a choice: To keep fighting or try to work with each other.[213] A lot of

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211. *See generally* Dylan R. Hedden-Nicely & Stacy Leeds, *A Familiar Crossroads:* McGirt v. Oklahoma *and the Future of Federal Indian Law Canon*, 51 N.M. L. REV. 300 (2021).

212. *Compare* Worcester v. Georgia, 31 U.S. 31 U.S. 515, 543 (1832), *with* Frickey, *supra* note 158, at 395.

213. *See* Hedden-Nicely & Leeds, *supra* note 211.

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lessons have been learned, and we would all be well served to review and remember them.

a. Lessons Learned: The Value of Effective Tribal-State Engagement[214]

The Supreme Court once riffed that, "[b]ecause of the local ill feeling, the people of the states where they are found are often [Tribes'] deadliest enemies."[215] With reality-based optimism, Professor Matthew Fletcher (Grand Traverse Band) cited this "deadliest enemies" model at the centennial of Oklahoma statehood, and argued:

> But American Indian law is transforming. The political relationship between the United States and Indian tribes remains, but a new and more dynamic relationship between *states* and Indian tribes is growing. States and Indian tribes are beginning to smooth over the rough edges of federal Indian law—jurisdictional confusion, historical animosity between states and Indian tribes, competition between sovereigns for tax revenue, economic development opportunities, and regulatory authority—through cooperative agreements.[216]

Likewise, the Conference of Western Attorneys General has recognized adversarial processes can be of limited use in this area, advising instead: "Rather than spend resources and goodwill in litigation, it can be more fruitful to attempt to find a cooperative way to solve the underlying problem."[217] The leading treatise on Federal Indian law amplifies the point:

> In the face of potentially overlapping or conflicting jurisdictional claims, tribal-state cooperative agreements offer both sets of governments the opportunity to coordinate the exercise of authority, share resources, reduce administrative costs, deliver services in more efficient and culturally appropriate ways, address future contingencies, and save costs of litigation. They also enable governments to craft legal arrangements reflecting the particular circumstances of individual Indian nations, rather than relying on uniform national rules. Insofar as cooperative agreements create a stable legal environment conducive to economic development, they may appeal to the common interests of tribes and states.[218]

And more to the point, Bruce Babbitt once quipped: "What we have is an intergovernmental environment in which, if we could just quit thinking of Indian Tribes and Nations as problems and start thinking of them as peoples, communities, and governmental units, we can get on with business and make it happen."[219] This is all easily illustrated in Oklahoma, where thirty-eight federally recognized Indian tribes[220] occupy

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214. Portions of this discussion and analysis are excerpted and modified from an amicus brief filed by the Chickasaw and Cherokee Nation in a closed-docket deprived child dispute. Brief for Chickasaw Nation and Cherokee Nation as Amici Curiae Supporting Respondent, *In re* S.J.W., No. 119,404 (Aug. 3, 2021). I have repurposed such portions with the consent of my co-authors. The Article, including those modified excerpts, nonetheless remains my own work and should be understood as expressing only my views, without any attribution—whether for better or for worse—to any contributor to that prior brief or any client they may represent.

215. U.S. v. Kagama, 118 U.S. 375, 384 (1886).

216. Matthew L.M. Fletcher, *Retiring the 'Deadliest Enemies' Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 74 (2007).

217. CONF. OF WESTERN ATT'YS GEN., *supra* note 112, at 1092.

218. NELL JESSUP NEWTON ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 588–89 (2012 ed.).

219. *See* COLBY ET AL., *supra* note 2.

220. Bureau of Indian Affairs, Interior, *Indian Entities Recognized by and Eligible to Receive Service from the United States Bureau of Indian Affairs*, 86 FED. REG. 18 (2022).

https://digitalcommons.law.utulsa.edu/tlr/vol57/iss3/7

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aboriginal or treaty homelands (and six, for now, formal reservations) and hundreds of Tribal-State agreements already shape law enforcement, civil law, taxation, and regulatory frameworks. Getting there, however, took time.

In the 1980s and 1990s, Tribal-State relations in Oklahoma were intensely litigious, but the Supreme Court laid down a marker for the parties in *Oklahoma Tax Commission v. Citizen Potawatomi Nation*.[221] This dispute turned on Oklahoma's attempt to enforce its taxes against a tribe. In making its case, the State urged the Court to abandon basic Federal Indian law principles, which it claimed were unworkable,[222] and to make new law to advantage its position against the Tribe. (Sound familiar?) Unpersuaded, the Court stuck to precedent[223] and, importantly, admonished that Oklahoma was free to "enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax" or, if it so chose, it could resort to Congress.[224] (How about now? Sound familiar yet?)

Having ridden this horse to those proverbial crossroads, Oklahoma and several Tribes took up the Court's advice and started talking—ultimately producing Oklahoma's first statutory framework to address a Tribal-State tax dispute.[225] By the end of the following year, 1992, four Tribes had entered tobacco tax agreements with Oklahoma under this statute; the next year, 1993, eight more Tribes signed such agreements; and by 2001, twenty-eight Tribes had signed such pacts.[226] Tribal nations continue today to operate and license tobacco retail enterprises under these agreements.

Of course, periodic litigated conflict re-occurs, but more frequently and on balance, Tribes and the State have cooperated. Over the years, the State and various Tribal nations have formed and entered nearly 900 intergovernmental agreements that are now on file with the Oklahoma Secretary of State and cover a broad range of subjects.[227] Oklahoma receives payments under several of those agreements (e.g., payments in lieu of taxes with respect to tobacco product sales;[228] revenues derived from Tribal non-contestation of State motor fuel taxation of Indian country sales to third-party consumers;[229] and monies received as revenue-share payments from Tribal governments in relation to certain of their Tribal gaming operations).[230] And as the Supreme Court recognized in *Citizen Potawatomi*, Oklahoma would have no lawful claim to collect *any* of those monies without a negotiated and "mutually satisfactory regime."[231] What is more, these agreements support regulatory stability conducive to Tribal government operations and economic development while fostering predictability and neutralizing certain disputes that previously gave rise to litigation, all of which works to the benefit of all involved. In fiscal

221. 498 U.S. 505 (1991).
222. *Id.* at 514.
223. *Id.* at 505.
224. *Id.* at 514.
225. OKLA. STAT. tit. 68, § 346 (1992).
226. *See Tribal Compacts and Agreements*, OKLA. SEC'Y OF STATE, https://www.sos.ok.gov/gov/tribal.aspx (last visited. Feb. 25, 2022).
227. *See generally id.*; *accord* McGirt v. Oklahoma, 140 S. Ct. 2452, 2481–82 (2020).
228. OKLA. STAT. tit. 68, § 346 (1992).
229. OKLA. STAT. tit. 68, § 500.63 (1996).
230. OKLA. STAT. tit. 3A, §§ 280, 280.1, 281 (2018).
231. 498 U.S. 505, 514 (1991).

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year 2019 alone, the Tribal nations of Oklahoma had an estimated $15.6 billion impact on Oklahoma's economy while supporting 113,442 jobs with combined wages and benefits totalling $5.4 billion.[232] And as a matter of current interest during the ongoing COVID pandemic, Tribal health care systems have materially contributed to the welfare of *all* Oklahomans.[233]

To its credit, Oklahoma has embraced this collaborative approach, codifying it as its preferred policy for Tribal-State relations: "The State of Oklahoma recognizes the unique status of Indian tribes within the federal government and shall work in a spirit of cooperation with all federally recognized Indian tribes in furtherance of federal policy for the benefit of both the State of Oklahoma and tribal governments."[234]

Intergovernmental differences and disagreements still occur (and *always* will occur), but this statement remains Oklahoma's codified policy. When I first read *McGirt*, I was heartened the Court offered something of an affirming bookend to its *Citizen Potawatomi* admonition:

> With the passage of time, Oklahoma and its Tribes have proven they can work successfully together as partners. Already, the State has negotiated hundreds of intergovernmental agreements with tribes. . . . These agreements relate to taxation, law enforcement, vehicle registration, hunting and fishing, and countless other fine regulatory questions.[235]

This is a great story of engagement, collaboration, and problem solving. Consistent with its spirit and no matter the heat of our fight, the Five Tribes had engaged for years with Oklahoma's prior attorney general to explore common ground and identify potential paths forward that would work for all of us. Knowing the weight and significance of the issues in play, we engaged in the hope that this discussion could provide a center of gravity for whatever conversations would be necessary after the Court ruled. It was a good effort, though it collapsed[236]—at least for the time being.

b. Lessons Forgotten: The Winter Chill at This Moment in Our Relations

Each of these pacts Oklahoma Tribes have formed with the State has expanded and deepened a cooperative intergovernmental fabric that offers a legal clarity that benefits everyone, certainly the Tribes and the State but also all those who live and work here. What is more, the parties have endeavored to craft these agreements to respect their

232. Kyle D. Dean, *The Economic Impact of Tribal Nations in Oklahoma; Fiscal Year 2019*, OKLA. NATIVE IMPACT (Mar. 23, 2022), http://www.oknativeimpact.com/wp-content/uploads/2022/03/All-Tribe-Impact-Report-2022-Final.pdf; *cf.* Molly Young, *Oklahoma's Indian Gaming Industry Pays Record $167 Million to State*, OKLAHOMAN, https://www.oklahoman.com/story/news/2021/08/18/oklahomas-gaming-industry-pays-record-amount-exclusivity-fees/8169141002/ (last updated Aug. 18, 2021, 9:27 AM).

233. *E.g.*, *Tribal Investments in Health Care Should Boost Oklahoma's Prospects*, TULSA WORLD (Jan. 3, 2022), https://tulsaworld.com/opinion/editorials/editorial-tribal-investments-in-health-care-should-boost-oklahomas-prospects/article_ec3a44dc-637a-11ec-9cab-b340b8eaa289.html; Nancy Marie Spears, *Oklahoma Tribes Pivot to Booster Shots in COVID-19 Battle*, SHAWNEE NEWS-STAR (Aug. 31, 2021, 11:06 AM), https://www.news-star.com/story/news/coronavirus/2021/08/31/oklahoma-tribes-pivot-booster-shots-covid-19-battle/5661162001/; *cf.* Meg Wingerter, *Oklahoma Tribes Make Multimillion Dollar Investments in Health Care*, OKLAHOMAN (Jan. 14, 2018, 5:00 AM), https://www.oklahoman.com/article/5579288/oklahoma-tribes-make-multimillion-dollar-investments-in-health-care (reporting on pre-pandemic Tribal investments).

234. OKLA. STAT. tit. 74, § 1221(b) (1998).

235. *Id.*; McGirt v. Oklahoma, 140 S. Ct. 2452, 2481 (2020).

236. *See supra* note 15.

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separate sovereignties. It has not always been easy, to state the obvious, but one particular challenge has periodically been an issue; namely, there have always been tensions with respect to the State's legal and institutional infrastructure for forming and binding itself to these agreements.[237] While Oklahoma has codified a policy of cooperation, its law is thin on how that policy is implemented.[238]

Iron-clad clarity notwithstanding, lawyers and government officials often find ways to operate effectively, even with some margin of procedural ambiguity, and that has certainly been the case in Oklahoma.[239] In my experience, finding legitimate paths around uncertainties is impossible without a mutual commitment to respectful, intergovernmental engagement and recognition of shared interests in matters of common welfare and governance. The relationships between and among community leaders can provide the lubricant that is necessary to make rough pieces work together. Without such relationships, those "rough edges" Professor Fletcher referenced can leave the friction that leads to conflict.

The respect and recognition necessary for these purposes took a blow in 2019, exposing weaknesses in Oklahoma law, amplifying a breakdown in relations, and closing paths for more effective intergovernmental work. The year started promisingly enough, with a new state governor nominating Oklahoma's first cabinet-level Secretary of Native American Affairs, Lisa J. Billy (Chickasaw),[240] but it took a sharp turn toward the ditch when the governor announced his view that the compact under which thirty-five tribal governments operated scores of Indian Gaming Regulatory Act facilities would terminate by year's end.[241] His approach through this period led to Oklahoma's first Secretary for Native American Affairs' resigning and declaring "[i]t has become increasingly clear you are committed to an unnecessary conflict that poses a real risk of lasting damage to the State-Tribal relationship and our economy."[242] The compact dispute led to litigation, a

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237. *Compare* OKLA. STAT. tit. 74, § 1221 (1998), *with* 2004 OK AG 27. Much of this tension has since been clarified. Treat v. Stitt, 473 P.3d 43 (Okla. 2020); Treat v. Stitt, 481 P.3d 240 (Okla. 2021).

238. *Cf. e.g.*, Stephen H. Greetham, *Water Planning, Tribal Voices, and Creative Approaches: Seeking New Paths Through Tribal-State Water Conflict by Collaboration on State Water Planning Efforts*, 58 NAT. RES. J. 1, 38–47 (2018) (evaluating Oklahoma's mechanisms for engaging with Tribal governments in the context of water rights).

239. Oklahoma has, for example, bound itself to Tribal-State agreements via codified compact offer, OKLA. STAT. tit. 68, § 500.63 (1996) (motor fuels) and OKLA. STAT. tit. 3A, §§ 280, 280.1 (2018) (IGRA gaming); statutory direction to the governor to negotiate terms within policy parameters, OKLA. STAT. tit. 68, § 346 (1992) (tobacco compacts); authorized a specified agency to form and enter an agreement, OKLA. STAT. tit. 10, § 40.7 (1992) (ICWA agreements); or to provide for a general quasi-ratification process within the state's legislative body, OKLA. STAT. tit. 74, § 1221 (1998); *see also* State v. Tyson Foods, Inc., 258 F.R.D. 472, 475–76 (N.D. Okla. 2009).

240. Harlan McKosato, *Lisa J. Billy, Chickasaw, Is First Secretary of Native American Affairs in Oklahoma*, INDIAN COUNTRY TODAY (Apr. 11, 2019), https://indiancountrytoday.com/news/lisa-j-billy-chickasaw-is-first-secretary-of-native-american-affairs-in-oklahoma.

241. *Id.*; *see also* Kevin Stitt, *New Gaming Compacts Must Protect the Interests of the Tribes and the State*, TULSA WORLD (July 8, 2019), https://tulsaworld.com/opinion/columnists/gov-kevin-stitt-new-gaming-compacts-must-protect-the-interests-of-the-tribes-and-the/article_ae5596f7-e9e5-5613-9bbb-c6341af9259f.html.

242. Randy Ellis, *Oklahoma Secretary of Native American Affairs Resigns from Governor's Cabinet, Citing Disagreement over Gaming Compacts*, OKLAHOMAN (Dec. 24, 2019), https://www.oklahoman.com/article/5650639/secretary-of-native-american-affairs-resigns-from-governors-cabinet-citing-disagreement-over-gaming-compacts. To date, the Oklahoma Governor has left the cabinet-level Native American Affairs position

court ruling that rejected the governor's position,[243] and a generally recognized trainwreck in Tribal-State relations.[244]

During this period, the governor also formed and purported to enter new gaming agreements with four separate Tribes,[245] but he did so with disregard to existing mechanisms for the formation of valid Tribal-State agreements, which drew the pointed objections of leadership in the Oklahoma Legislature as well as the Oklahoma Attorney General.[246] Those acts, too, led to litigation, which resulted in a pair of Oklahoma Supreme Court rulings that affirmed the limited role the Oklahoma Governor has in this area.[247] All this contributed to further acrimony between the State and Tribal governments as well as, now, among several of the Tribes and between the state's executive and legislative departments.[248]

A first principle of transactional work is to establish who has authority to bind a party to an agreement. Oklahoma, having formed hundreds of intergovernmental agreements with Tribes, seemed to have long mastered the answer to that question for itself. But a revived disagreement between the State's executive and legislative departments has complicated matters, and the Oklahoma Governor—on the losing end of court rulings in this area—appears resistant in defeat, exercising what authority he has to pull up more floorboards from the work of prior administrations.[249] This dynamic contributes to a paralysis within Oklahoma government with respect to its ability to return to more effective work with Tribal governments.

To underscore how much a departure the current administration's position has been, Tribal-State relations in Oklahoma had been active and productive until the very eve of the current governor's taking office. In 2018, Oklahoma enacted law to make a supplemental gaming compact offer to Tribal governments, expanding the scope of games

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empty.

243. Cherokee Nation v. Stitt, 475 F. Supp. 3d 1277 (W.D. Okla. 2020).

244. *Much Has Transpired, Little Has Changed with Oklahoma Gaming Dispute*, OKLAHOMAN, https://www.oklahoman.com/article/5668092/opinion-much-has-transpired-little-has-changed-with-oklahoma-gaming-dispute (last updated Aug. 2, 2020, 1:35 AM).

245. @GovStitt, TWITTER (July 2, 2020, 10:30 PM), https://twitter.com/govstitt/status/1278893963873792001; *Gov. Stitt Signs Two New Gaming Compacts with the Otoe-Missouria Tribe and Comanche Nation*, OKLA.: GOV. J. KEVIN STITT (Apr. 21, 2020), https://oklahoma.gov/governor/newsroom/newsroom/2020/april/gov--stitt-signs-two-new-gaming-compacts-with-the-otoe-missouria.html.

246. Randy Krehbiel, *Oklahoma AG Mike Hunter Says Gov. Stitt's New Tribal Gaming Compacts 'Not Authorized' by State Law*, TULSA WORLD (Apr. 22, 2020), https://tulsaworld.com/news/state-and-regional/oklahoma-ag-mike-hunter-says-gov-stitts-new-tribal-gaming-compacts-not-authorized-by-state/article_1e9bd0d3-3d50-50c0-8233-a3d924f01f44.html.

247. Treat v. Stitt, 481 P.3d 240 (Okla. 2021). *Accord* Chris Casteel, *In Blow to Gov. Kevin Stitt, Oklahoma Supreme Court Tosses Two More Indian Gaming Compacts*, OKLAHOMAN (Jan. 27, 2021), https://www.oklahoman.com/story/news/columns/2021/01/27/in-blow-to-gov-kevin-stitt-oklahoma-supreme-court-tosses-two-more-indian-gaming-compacts/324697007/; Randy Ellis, *State Supreme Court Rejects Gaming Compacts Negotiated by Gov. Kevin Stitt*, OKLAHOMAN (July 22, 2020), https://www.oklahoman.com/article/5667316/state-supreme-court-rejects-gaming-compacts-negotiated-by-gov-kevin-stitt.

248. *E.g.*, D. Sean Rowley, *OIGA Suspends 2 Tribes That Signed Gaming Compacts with Stitt*, CHEROKEE PHOENIX (May 11, 2020), https://www.cherokeephoenix.org/news/oiga-suspends-2-tribes-that-signed-gaming-compacts-with-stitt/article_32814194-1e73-5d02-9791-c6fb83bb494f.html; Cherokee Nation v. Dep't of the Interior, Civ. No. 20-2167 (D.D.C. 2021).

249. *E.g.*, Molly Young, *Oklahoma Gov. Stitt Won't Renew Hunting, Fishing Compacts with Cherokee, Choctaw Tribes*, OKLAHOMAN (Dec. 15, 2021), https://www.oklahoman.com/story/news/2021/12/13/oklahoma-tribes-gov-kevin-stitt-cancel-hunting-fishing-compacts-cherokee-choctaw/6496127001/.

compacted Tribes could operate within their lands.[250] The Fallin administration, i.e., the immediate predecessor administration in the Oklahoma Governor's office, formed and entered new tobacco tax compacts with several tribes pursuant to authority established in Oklahoma statute[251] as well as executive-level agreements with several Tribes relating to motor vehicle license taxation[252] and hunting and fishing.[253] In 2016, Oklahoma, the Chickasaw Nation, and the Choctaw Nation of Oklahoma entered and Congress approved a broad and historic water settlement after extensive litigation and negotiation with the administration.[254] These were productive years in Oklahoma Tribal-State relations, appearing all the more so in our rear-view mirror.

This is where we found ourselves when the *McGirt* decision came down—frayed relations getting more strained.

B. What Might Come Next: Reimagining Native Futures and Empowering Meaningful Tribal Self-determination

McGirt is not an end, but a beginning. And much work remains. The choice at the crossroads has been made for now, but nothing is permanent. Heat dissipates. The sun comes up. It goes down. And through it all, our best option will always be to look for ways to work together. I honestly believe that[255]—even if we have a lot of rebuilding to do.

i. The New State of Things

But let us start with the basics: Federal statute now hardwires a new paradigm for criminal jurisdiction among the federal, state, and various Tribal governments throughout the reservations of Eastern Oklahoma. Indian country criminal jurisdiction has a solid reputation for being complex.[256] Providing for the public's safety within our reservations touches on the responsibilities of each of these separate sovereigns. None of us, on our

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250. OKLA. STAT. tit. 3A, § 280.1 (2018).

251. *E.g.*, Tobacco Tax Compact Between the State of Oklahoma and the Chickasaw Nation, Oct. 29, 2013, https://www.sos.ok.gov/documents/filelog/89572.pdf; First Amended Tobacco Tax Compact Between the State of Oklahoma and the Muscogee (Creek) Nation of Oklahoma, Aug. 27, 2014, https://www.sos.ok.gov/documents/filelog/90156.pdf.

252. *E.g.*, Motor Vehicle Registration and License Tag Compact Between the State of Oklahoma and the Chickasaw Nation, Oct. 23, 2014, https://www.sos.ok.gov/documents/filelog/90185.pdf; Motor Vehicle Registration and License Tag Compact Between the State of Oklahoma and the Chickasaw Nation, Aug. 29, 2014, https://www.sos.ok.gov/documents/filelog/90157.pdf.

253. Hunting and Fishing Compact Between the State of Oklahoma and the Choctaw Nation, Aug. 31, 2016, https://www.sos.ok.gov/documents/filelog/91317.pdf; Hunting and Fishing Compact Between the State of Oklahoma and the Cherokee Nation, May 29, 2015, https://www.sos.ok.gov/documents/filelog/90614.pdf.

254. Water Infrastructure Improvement for the Nation Act, Pub. L. No. 114-322, § 3608, 130 Stat. 1628 (2016); Joe Wertz & Logan Layden, *Inside the Landmark State and Tribal Agreement That Ends Standoff over Water in Southeast Oklahoma*, STATE IMPACT OKLA.-NPR (Aug. 12, 2016), https://stateimpact.npr.org/oklahoma/2016/08/12/inside-the-landmark-state-and-tribal-agreement-that-ends-standoff-over-water-in-southeast-oklahoma/.

255. Chris Casteel, *With Muscogee Reservation Question Settled, Tribal Attorneys Look to Future Talks with Oklahoma*, OKLAHOMAN (Feb. 4, 2022), https://www.oklahoman.com/story/news/2022/02/04/mcgirt-ruling-settled-cherokee-chickasaw-nations-hope-robust-talks-oklahoma/6650149001/ ("'We work best when we work together,' Greetham said. 'And we work best together when both sides respect each other. So that's what I'm going to count on.'").

256. *E.g.*, CONF. OF WESTERN ATT'YS GEN., *supra* note 112, at 244.

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own, have much choice in this as we play our assigned roles on a new field, but we always have certain fundamental choices to make: To collaborate or compete, to cooperate or obstruct.

For their part, Tribal nations have stepped up to get the job done. They have invested in expanding law enforcement capacities and local-level cooperation. These are early days, but the Tribal nations of Oklahoma have handled thousands of cases within the new jurisdictional map.[257] For example, at Chickasaw, since our reservation was affirmed on March 11, 2021,[258] and through January 20, 2022, Chickasaw Lighthorse made 1,972 arrests and Chickasaw prosecutors in our Office of Tribal Justice Administration brought 2,109 criminal cases and traffic citations to tribal court.[259] For comparison, the Chickasaw Nation District Court previously adjudicated about 75 criminal cases each year while during this period alone, it completed adjudications in 765 criminal cases.[260] And illustrating significant cross-jurisdictional collaboration, 70% of Lighthorse charges are referred for prosecution in *non*-tribal court, and 62% of our prosecutors' cases are referred to them by *non*-Chickasaw police.[261] Chickasaw is not alone in it, either; each of the affected Tribes is doing similar work.[262] And the work is not easy; there are growing pains. But as the *Tahlequah Daily Press* recently editorialized: "The observation of most media following this evolving situation is that tribes and feds are working at a steady pace to bring these cases to bear."[263] Tribes and their partners are getting it done.

Meanwhile, the Oklahoma Governor casts the situation as unworkable.[264] In court filings and speeches, he depicts Oklahoma as some fallen Edenic paradise, a place that has been relegated to frontier Deadwood status.[265] Leaving the context of the litigation behind, he claims we are not only now *unsafe*, but it is only a matter of time until the ruling dooms Oklahoma's economy, too.[266] The facts do not bear that out.

For example, he continues to boast of the state's economic performance and

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257. Inter-Tribal Council of the Five Civilized Tribes, Res. No. 21-34 (Oct. 8, 2021), http://www.fivecivilizedtribes.org/Docs/Resolutions/2021/ITC%20R21-34.pdf.

258. Proclamation from the Office of the Governor of the Chickasaw Nation (Mar. 11, 2021), https://www.chickasaw.net/cn/Proclamation.aspx.

259. Office of Senior Counsel, Chickasaw Nation Criminal Justice Dashboard, current through January 30, 2022 (on file with Author).

260. *Id.*

261. *Id.*

262. *See generally* Brief for Cherokee Nation, Chickasaw Nation, Choctaw Nation of Oklahoma, Muscogee (Creek) Nation, and Seminole Nation of Oklahoma as Amici Curiae Supporting Respondent at 4–19, Oklahoma v. Castro-Huerta, No. 21-429 (Apr. 4, 2022).

263. *New Public Approach Doesn't Mean Coverup*, TAHLEQUAH DAILY PRESS (Nov. 24, 2021), https://www.tahlequahdailypress.com/opinion/editorials/editorial-new-public-approach-doesnt-mean-coverup/article_5843786d-9e2c-52ff-a1fb-20c79aee29a1.html; *see also* Killman, *supra* note 21; Melissa Harris-Perry & Allison Herrera, *A Year and a Half After* McGirt v. Oklahoma*, State Officials Still Want Ruling Overturned*, TAKEAWAY (Jan. 20, 2022), https://www.wnycstudios.org/podcasts/takeaway/segments/year-and-half-after-mcgirt-v-oklahoma-state-officials-still-want-ruling-overturned.

264. Carmen Forman, *Stitt Again Blasts* McGirt *Ruling, Saying Martin Luther King Jr. Might be 'Disgusted' by Decision*, OKLAHOMAN (Jan. 17, 2022), https://www.oklahoman.com/story/news/2022/01/17/martin-luther-king-jr-mlk-day-2022-kevin-stitt-mcgirt-ruling/6557404001/.

265. *Id.*; Krehbiel, *supra* note 44; Brief for Petitioner at 8–9, Oklahoma v. Bosse, 141 S. Ct. 2891 (2021) (No. 21-186), 2021 WL 3552204, at *8–9.

266. Krehbiel, *supra* note 44.

https://digitalcommons.law.utulsa.edu/tlr/vol57/iss3/7

attractiveness to out-of-state investors,[267] and Tribal nations continue to provide economic support, stability, and growth throughout the state.[268] Oklahoma continues to break revenue records each month, and its treasurer reports "the outlook for Oklahoma's economy remains favorable."[269] The Department of Commerce even declared 2021 to be "historic" in terms of economic expansion, and fully half of the success stories it highlighted occurred in the Tulsa area, i.e., the heart of Oklahoma Indian country.[270]

This is not Deadwood.

State tax powers will, of course, be impacted by *McGirt*. No one seems to reasonably dispute that, but it is no crisis: Oklahoma presently operates with a budget surplus, despite an ongoing pandemic and significant state income tax cuts enacted last year.[271] If disputes and challenges arise, the Oklahoma Tax Commission has advised the governor on the best available path: "Historically, tribal compacts have been a powerful tool for facilitating cooperation and revenue-sharing between tribal and state governments, allowing the State to avoid the otherwise difficult task of administering and enforcing state taxes on tribal lands."[272] This counsel is affirmed by *both* the Conference of Western States Attorneys General[273] *and* Oklahoma's own experience.[274]

True to this experience, the *Tulsa World* has called for greater collaboration while criticizing the governor's approach as manifesting "a bit of psychological denial" that "does nothing to make Oklahoma safer."[275] Speaking to our better angels, Muscogee Nation Principal Chief David Hill (Muscogee Creek) has offered: "We will realize our greatest potential only when all sovereigns are working together and in collaboration, not by seeking ways to weaken our jurisdiction or return to a broken system of the past."[276] Likewise, Chickasaw Nation Governor Bill Anoatubby recently wrote with respect to Tribal work being done to step up to the challenge of implementing *McGirt*:

> [W]e will keep rising to those challenges, just as Chickasaws and Oklahomans have done

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267. Governor Kevin Stitt, *Governor Kevin Stitt Speaks at the Tulsa Regional Chamber's State of the State*, YOUTUBE (Aug. 26, 2021), https://www.youtube.com/watch?v=QbYpjJRIKww; *accord* Kevin Canfield, *Mayor Talks Heroes, Hardship and the Outrage Industrial Complex' in State of the City Address*, TULSA WORLD (Nov. 5, 2021), https://tulsaworld.com/news/local/govt-and-politics/mayor-talks-heroes-hardship-and-the-outrage-industrial-complex-in-state-of-the-city-address/article_ccb31314-3cce-11ec-abaa-bbafdc1b6e45.html.

268. *E.g.*, Dean, *supra* note 232.

269. RANDY MCDANIEL, GROSS RECEIPTS TO THE TREASURY: OCTOBER 2021.

270. *Oklahoma Department of Commerce Celebrates Historic 2021*, OKLA. COMMERCE (Jan. 5, 2022), https://www.okcommerce.gov/oklahoma-department-of-commerce-celebrates-historic-2021/.

271. *E.g.*, MCDANIEL, *supra* note 269.

272. OKLA. TAX COMM'N, REPORT OF POTENTIAL IMPACT OF MCGIRT V. OKLAHOMA 3 (2020).

273. CONF. OF WESTERN ATT'YS GEN., *supra* note 112.

274. *E.g.*, McGirt v. Oklahoma 140 S. Ct. 2452, 2481 (2020). A database of agreements is available at https://www.sos.ok.gov/gov/tribal.aspx.

275. *Defending State Sovereignty or Psychological Denial? Oklahoma's Attorney General Pushes U.S. Supreme Court to Reconsider the* McGirt *Decision*, TULSA WORLD (Aug. 12, 2021), https://tulsaworld.com/opinion/editorial/editorial-defending-state-sovereignty-or-psychological-denial-oklahomas-attorney-general-pushes-u-s-supreme-court/article_82bd2f72-f9ff-11eb-8236-ff9b60f2b849.html; *accord Depoliticize the* McGirt *Ruling*, MCALESTER NEWS-CAPITAL (July 21, 2021), https://www.mcalesternews.com/opinion/our-view-depoliticize-the-mcgirt-ruling/article_ba04ad12-f8dc-51a8-9eab-3f9d9cfab670.html.

276. *Muscogee Nation Proclaims Sovereignty Day on 1-Year Anniversary of Historic U.S. Supreme Court* McGirt *Decision*, INDIANZ (July 9, 2021), https://www.indianz.com/News/2021/07/09/muscogee-nation-proclaims-sovereignty-day-on-anniversary-of-historic-supreme-court-ruling/.

> throughout our shared history. The Chickasaw Nation will continue working to enhance the strength, health, vitality and security of our local communities. We understand we can accomplish much more together when we focus on the needs of those we serve and work together to meet those needs.
>
> We will continue to do our part in the work that remains, confident that together we can overcome most any challenge we may face. Our history clearly demonstrates that what is good for the Chickasaw Nation is good for the state of Oklahoma and what is good for Oklahoma is good for the Chickasaw Nation.
>
> We look forward to working with all those who bring this same spirit to the effort.[277]

Tribal nations do not *need* the State to be sovereigns, nor does the State *need* Tribal nations to be sovereign. But as Congressman Tom Cole (Chickasaw) put it, "[w]hen we partner, we do some pretty amazing things together."[278]

These may be trying times in our relations, but that happens. Intergovernmental relations can cycle, and when we end up in the ditch together, we tend to keep rocking the car until we free ourselves from the mud to get back on the road. This period neither *defines* our relations nor *changes* the fact that we accomplish more together than apart. No matter current chills, we should assemble tools appropriate to move forward when the thaw comes and reimagine the sorts of programs and collaborations that could better serve our communities.

ii. What More Might Be Done

In rising to post-*McGirt* challenges, the Native nations of Oklahoma are doing what needs to be done—working with local partners and turning, also, to the federal trustee. Consistent with the recommendations of the 2013 Report of the Indian Law and Order Commission (ILOC),[279] the nations have called on the government to fulfill its duty to fund Indian country criminal justice, with additional appropriations to the Departments of Justice and Interior as well as directly to the affected Tribal nations.[280] While the Oklahoma Governor has indicated he opposes such measures,[281] the Oklahoma delegation has been supportive[282] and has already enacted a new budget that increases funding for *McGirt*-related Tribal criminal justice work[283]—though it amounts to only a drop in the bucket for what would be appropriate.[284] The federal duty in this area is fundamental. It

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277. *Intergovernmental Engagement*, *supra* note 45.

278. Gorman, *supra* note 48; *accord* Cobb-Greetham, *supra* note 10 ("Our sovereignty is not, as he has suggested, a matter of existential crisis. It is, quite simply, a matter of fact—a fact on which our shared future rests.").

279. *See generally A Roadmap for Maaking Native America Safer: Report to the President and Congress of the United States*, INDIAN L. & ORDER COMM'N, https://www.aisc.ucla.edu/iloc/report/ (last updated May 2015).

280. Inter-Tribal Council of the Five Civilized Tribes, Res. No. 21-35 (Oct. 8, 2021), http://www.fivecivilizedtribes.org/Docs/Resolutions/2021/ITC%20R21-35.pdf.

281. *E.g.*, Gorman, *supra* note 48.

282. Chris Casteel, *Oklahoma Lawmakers Seek $308 Million for Tribal Justice, Say* McGirt *'Bankrupting' Tribes*, OKLAHOMAN (Jan. 31, 2022), https://www.oklahoman.com/story/news/2022/01/31/oklahoma-lawmakers-say-tribes-need-308-million-meet-mcgirt-needs/9288352002/.

283. *See* Brief for Cherokee Nation, Chickasaw Nation, Choctaw Nation of Oklahoma, Muscogee (Creek) Nation, and Seminole Nation of Oklahoma as Amici Curiae Supporting Respondent at 33–44, Oklahoma v. Castro-Huerta, No. 21-429 (Apr. 4, 2022).

284. *Compare* Casteel, *supra* note 282, *with* Chris Casteel, *Massive Spending Bill Includes More Than $62*

arises from the promises and treaties made as the government pushed Native peoples aside to occupy and develop Native lands, and as well documented in the ILOC Report, it is a duty on which the government has, for too long, fallen short.

The Tribes will continue to advocate for fulfillment of federal trust duties. All the same, calls for funding are inherently limited. First, it is doubtful Congress will finally, *this* time, fully fund its Indian country obligations. Congressman Cole has quipped, "I think we would be naïve if we thought we're going to get in Oklahoma what we need automatically when nobody else in Indian Country gets what they need automatically."[285] In the meantime, Tribal nations are forced to reallocate Tribal resources away from established programs for purposes of meeting new responsibilities. When considering that point, remember also that those *existing* Tribal programs and services were built based on a Native community's own assessment of its needs, goals, and capacities, while the *new and expanded* criminal justice responsibilities are established by a federal statutory scheme in which no Native community has any current choice. What is more, even if Congress does come through from time to time on its funding responsibilities, a simple reliance on or even aggressive pursuit of this process masks the fact that it would amount to tacit *acceptance* of the system *as it is*. To me, such approach would show a failure of imagination. Congress *must*, of course, fully fund Indian country criminal justice. But it *should also* do more. To not call on Congress to do more risks simply accepting an assigned role in an imperfect system and *performing* sovereignty rather than *exercising* it.

To this end (also building on ILOC recommendations), advocacy has slowly succeeded in reforming federal statutes to expand federal recognition of Tribal criminal jurisdiction—including jurisdiction over non-Indian perpetrators of violence against Native domestic partners, children, and law enforcement officers. These have been critical and historic reforms, but they are not without complication. Statutory recognition of expanded Tribal jurisdictions typically comes with conditions that impose normative rules on Tribal systems, which imposition carries the risk of converting those Tribal systems into proxies for federal policy and power. And as with all Indian country matters, expanded jurisdictional authorities are seldom accompanied by resources sufficient for full implementation. These are not insurmountable issues (nor are they the *only* ones[286]), but they are nonetheless considerations each Tribal government should weigh as it determines whether to accept and exercise newly statutorily affirmed authorities.

As we implement *McGirt* and consider how to improve public safety in Indian country, let us remember: This all arises in the context of the Major Crimes Act,[287] a statute that intruded rough-shod on Indigenous autonomy.[288] Let us also remember: The Court long ago affirmed the Major Crimes Act as lawful *not* based on any identifiable text in the Constitution but on a presumption that ignored the competency of Tribal

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Million to Help Tribes Address McGirt *Ruling*, OKLAHOMAN (Mar. 10, 2022), https://www.oklahoman.com/story/news/2022/03/10/massive-spending-bill-includes-millions-tribes-mcgirt-ruling-oklahoma/9440561002/.

285. Chris Casteel, *With Oklahoma Tribes Deeply Divided, Rep. Tom Cole's* McGirt *Bill Faces Long Road*, OKLAHOMAN (May 16, 2021), https://www.oklahoman.com/story/news/2021/05/16/oklahoma-tribes-divided-over-tom-cole-bill-addressing-mcgirt-ruling/5063947001/.

286. *See, e.g.*, United States v. Lara, 541 U.S. 193 (2004).

287. 18 U.S.C. § 1153.

288. CONF. OF WESTERN ATT'YS GEN., *supra* note 112, at 256–59.

governments and chose, instead, to affirm in Congress a colonial power in Tribal affairs.[289] In turn, Congress has used this broad power to, among other things, implement massive dispossessions of Native land[290] and roll back inherent Native rights to economic development free from state interference.[291] This is the box in which we are trying to work, and it is not, after all, as if it were built to *facilitate* the sort of empowered Tribal self-determination and intergovernmental collaboration that would benefit Indigenous communities.

iii. A Call for Meaningful Tribal Self-determination

What might such reform look like? The exercise of Indigenous sovereignty within the United States legal system is protected and controlled by federal law,[292] though often more the latter than the former. Regardless of the outsized role federal law plays, the meaning and soul of Tribal sovereignty remains a Native people's organic and self-determining expressions of its own identity, its goals, and its way of being in the world. It is that collective sense of self—both *internally* and *in relation* to other peoples, communities, and systems—that brings what are too often theoretical abstractions and generalities into relief and application to affect *real* people in the *real* world. It is also an intensely local thing, with each Indigenous nation's sense of itself being *its own*, not a homogenized or essentialized pan-Indianism imposed from the outside.[293]

Given all this, it should be no surprise that in the mix of Federal Indian law, the *only* policies that have served to ameliorate the odious legacy of the United States' exploitation of Indian country and its peoples have been those that have increased federal support for Tribal self-determination. By giving greater effect to Native voice and decision-making within federal law, Tribal governments have brought their perspectives, creativities, and considerable abilities to bear for the benefit of their communities and, frequently, their neighbors. Similarly, given the complex fact-patterns that characterize much of Indian country (certainly Oklahoma Indian country), some of the most effective Tribal initiatives have involved intergovernmental work with state and local partners, and vice versa—with most state and local efforts benefiting from direct Tribal engagement.[294] It is time to apply these lessons and to empower meaningful Tribal self-determination and enlightened intergovernmental engagement in the allocation of criminal jurisdiction in Indian country.

Meaningful Tribal self-determination is *more* than funding Tribal programs. It is *more* than permitting Tribal agents to step in as a sort of federal understudy, taking over from the government in the performance of roles conceived and defined by federal statute

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289. *See supra* notes 76–87 and accompanying text.

290. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

291. *Compare* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), *with* Indian Gaming Regul. Act, 25 U.S.C. § 2701 *et seq*.

292. 25 U.S.C. § 1301. *See, e.g.*, CONF. OF WESTERN ATT'YS GEN., *supra* note 112, at 305–07 (in context of criminal law, at least, Congress amended the Indian Civil Rights Act so tribal "powers of self-government" would include criminal jurisdiction over "Indians" as defined).

293. *See generally* Amanda J. Cobb-Greetham, *Understanding Tribal Sovereignty: Definitions, Conceptualizations, and Interpretations*, 46 AM. STUD. & J. OF INDIGENOUS NATIONS 115 (2005) (offering analysis of various modes in which Native sovereignty manifests).

294. CONF. OF WESTERN ATT'YS GEN., *supra* note 112, at 1134–35, 1147–48, 1151, 1154–55.

and regulation. Meaningful self-determination should provide Native peoples access to that proverbial table *as nations*, to sit with states and the federal government *as sovereigns* in relation to other sovereigns, as possessing powers and responsibilities relevant to addressing broader *shared challenges*, and as capable of contributing to both *the definition and fulfillment of a shared sense of the general welfare*. It is only through this sort of intergovernmental engagement that Tribal voices might speak Indigenous futures into being.

Respectful intergovernmental work can be challenging. Nonetheless, experience tends to demonstrate it is far from impossible and tends to produce results that are preferrable to mutually entrenched opposition and zero-sum games. In my opinion, *all* government officials and advocates engaged in *McGirt*'s implementation have an obligation to consider, soberly and seriously, what paths might be better than the rote application of existing federal law.

And cutting a bit deeper and closer to home, I also believe that in these matters advocates should listen closely and particularly to the voices of Tribal leaders who are responsible for implementing Tribal programs and are directly in touch with and accountable to Native nation constituencies in a way that lawyers, academics, and activists will never be. Those voices carry with them a legitimacy that should be privileged, not drowned out.

Seeing broader possibilities, two Tribal nations have called for more.[295] Earlier this year, Chickasaw and Cherokee called on Congress to authorize them to pursue, negotiate, and enter enforceable agreements that could allocate roles and authorities with respect to Indian country law enforcement—not just with respect to policing, but prosecution, adjudication, and detention as well.[296] Congress has enacted this sort of authorization elsewhere. For example, the Indian Child Welfare Act (ICWA) establishes an exclusive and controlling jurisdictional framework *but also and expressly* authorizes Tribal-State jurisdictional and procedural agreements *within* that framework.[297] Here in Oklahoma, five of the six Tribal nations affected by *McGirt* have already formed such pacts, each of which can be adjusted as implementation within new jurisdictional understandings evolve.[298] Why should the panoply of responsibilities involved in criminal jurisdiction be different?

One size does not always fit all, and such statutory authorizations in jurisdictional frameworks otherwise controlled by federal statute build on Tribal sovereignty. They embrace Native self-determination to provide flexibility in tailoring implementation to include Tribal voices and choices. Such work is the *exercise* of sovereignty, not its mere performance—and *certainly* not its cession.[299] Such mechanisms provide room for a Tribal government to pursue its own solutions outside the otherwise homogenizing strictures of federal law. Federal laws now controlling criminal jurisdiction in Indian

295. *E.g.*, Casteel, *supra* note 30.
296. H.R. Res. 3091, 117th Cong. (2022).
297. 25 U.S.C. § 1919.
298. *See supra* note 29 and accompanying text.
299. *E.g.*, Allison Herrera, *'We're Not Going to Give up Our Jurisdiction': Chickasaw Nation Gov. Anoatubby on* McGirt *Impact*, KOSU (May 6, 2021, 4:00 AM), https://www.kosu.org/local-news/2021-05-06/were-not-going-to-give-up-our-jurisdiction-chickasaw-nation-gov-anoatubby-on-mcgirt-fallout.

country offer no such opportunity; they operate instead to bar Tribal abilities to explore more nuanced and effective collaborations. To the extent the law keeps Tribal nations from their own driver's seats, it should yield.

Imagine what could be possible with such an opportunity. One nation might prefer to invest in offender rehabilitation and restorative justice rather than punishment and imprisonment. Empowered to act on this, it could pursue a partnership that invited state government to play a more traditional role in conjunction with a prioritization of Native intervention programs. Since federal law has stripped Tribal nations of criminal jurisdiction over most non-Native offenders, another nation may invite broader state jurisdiction over non-Native offenders, coupled with oversight and accountability mechanisms to ensure justice for Native victims—something at which Oklahoma has long failed.[300] Such projects would not be easy, but they suggest future improvements are possible and likely diverse.

Of course, some bristle at the prospect of Tribal agency in this area, and chief among them is the Oklahoma Governor, who has made his own view plain: "For us to have a viable state going forward, we need to overturn *McGirt* completely. . . . We need to take a case back and have the courts tell us that we're going back to the way we've operated the state for 114 years."[301] As of January 24, 2022, however, the Court closed its doors to this plea,[302] and it is unclear whether the Oklahoma Governor has any other plan than to continue his efforts to oppose Tribal sovereignty and the law.

Some Tribal advocates, too, have bristled, citing Public Law 280[303] to argue no change in the law is necessary to accomplish the goals Chickasaw and Cherokee have identified.[304] But this is not true. Public Law 280 *does* provide a means for state acquisition of Indian country jurisdiction,[305] but it *does not empower meaningful Tribal self-determination*. It works, instead, by means of a termination-era federal-state transaction that leaves Tribes, as is too often the case, largely in the role of bystander. While Congress amended the law in 1968 to create *some* means for Native consent,[306] that measure, too, degrades Indigenous sovereignty—disregarding government-to-government relations and internal Tribal decision-making processes to dictate *how* Native nations are even to manifest their consent, even going so far as to interpose the Department of the

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300. Hogan Gore, *Oklahoma Rates 10 in Missing and Murdered Indigenous Women Cases*, GAYLORD NEWS (Mar. 23, 2020), https://gaylordnews.net/5970/featured/oklahoma-rates-10-in-missing-and-murdered-indigenous-women-cases/; *see, e.g.*, Brief for Cherokee Nation, Chickasaw Nation, Choctaw Nation of Oklahoma, Muscogee (Creek) Nation, and Seminole Nation of Oklahoma as Amici Curiae Supporting Respondent at 22–25, Oklahoma v. Castro-Huerta, No. 21-429 (Apr. 4, 2022).

301. Tomlinson & Savage, *supra* note 3.

302. *See supra* notes 6–8 and accompanying text.

303. 18 U.S.C. § 1162; 28 U.S.C. § 1360.

304. Chaudhuri, *supra* note 51, at 382.

> As a matter of law, tribal nations *already* have a mechanism, through Public Law 280, for inviting the state to share concurrent criminal jurisdiction by requesting a special election from the Department of Interior either through tribal council request or by referendum request of at least twenty present of the tribe's adult citizenry.

Id.; *see also* Sovereignty Symposium XXXIII, *supra* note 51 (positing further reform is unnecessary given availability of Pub. L. No. 83-280).

305. 18 U.S.C. § 1162; 28 U.S.C. § 1360.

306. 25 U.S.C. § 1326.

Interior as overseer and referee of a Tribal decision-making process set by the statute itself.[307] As Professor Carole Goldberg notes, "[n]o Native Nation has consented to state jurisdiction under Public Law 280 since 1968. There has never even been a vote taken."[308] She also observes, "Native Nations in Oklahoma should approach Public Law 280 with great caution. The consent feature bypasses tribal governments in favor of direct vote by the tribal electorate, which could be viewed as a challenge to tribal sovereignty."[309]

Further, Public Law 280 has *failed* Tribes, including their members and citizens and the communities in which they live. Its model has certainly served to increase state power in Indian country *but with no attendant accountability or limitation on discretion in the exercise of that power*. This point cuts to the heart of the terminationist failure of Public Law 280, a failure found in too many federal reform policies: The imposition of others' decisions *on* Tribes, which then leaves Native communities—typically with hands legally and politically tied—to wrestle with implementation and adverse consequences as external decision makers either look on in worry from afar or simply walk away with averted eyes. Indian country deserves better.

Rather than argue Native nations should consider this archaic model, Tribal advocates should press to *improve* the law so it *empowers* Indigenous sovereigns—not merely to play a role defined by federal law but to shape the provision of services through *Tribal* voices, choices, and intergovernmental collaborations that are sufficiently resourced.[310] Tribal nations have worked and fought to establish the lawful integrity of their governing systems, the tangible mechanisms of organic Tribal law. No Tribal advocate should blithely recommend the intrusion Public Law 280 represents or otherwise denigrate the significance of a Tribal government's being able to engage with other governments in accord with the system *its own people* have established.[311]

As I shared earlier, Cherokee Nation Attorney General Sara Hill (Cherokee) has asked: "Is there a jurisdictional system that makes more sense than the one that's been piecemealed together by federal court decisions over the past hundred years?"[312] There certainly could be, and Native peoples deserve as much. Congress should build on the success of its prior self-determination polices and, consistent with its fiduciary role, afford Tribal nations *more* options, *more* tools, *more* choice for serving Tribal communities. Such action would move us closer to the deeper exercise of sovereignty as each nation implements this historic ruling and works to build its own future.

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307. *See generally id.*

308. CAROLE GOLDBERG, THE PERILS AND POSSIBILITIES OF EMPLOYING PUBLIC LAW 280 IN OKLAHOMA 15 (2020).

309. *Id.*

310. Some academics and activists argue for even more progressive intervention, calling for an end to federal law's limitations on Tribal criminal jurisdiction, in general. *E.g.*, Dominga Cruz, Sarah Deer & Kathleen Tipler, *The Oklahoma Decision Reveals Why Native Americans Have a Hard Time Seeking Justice*, WASH. POST (July 22, 2020), https://www.washingtonpost.com/politics/2020/07/22/oklahoma-decision-reveals-why-native-americans-have-hard-time-seeking-justice/. How the Court might view such reform, however, would have to be carefully considered. *See, e.g.*, *supra* note 91 and accomanying text.

311. *But cf.* Chaudhuri, *supra* note 51, at 382 (arguing departure from Pub. L. No. 280's established Tribal consent mechanism would represent effort "to circumvent the will of tribal citizens and enable a deal with more pliable tribal leaders").

312. Crawford, *supra* note 34.

III. CONCLUSION

The Court's *McGirt* ruling applied precedent to bring jurisdictional clarity with respect to the legal history of one Tribal nation but with implications for several. In doing so, it applied the law with intellectual honesty, institutional integrity, and striking rhetorical vigor. The Court had, after all, only recently and unanimously reaffirmed the controlling test in *Nebraska v. Parker*,[313] and the Tenth Circuit marked a sound and careful path through the Muscogee Creek Nation's legal history in *Murphy v. Royal*.[314] What is more, and as something of particular note given the easy relegation of Tribes to bystander status in such cases, the defense team on the case (as on *Murphy* before it) worked closely with counsel for Muscogee Creek Nation to ensure a clear and robust exposition of the Nation's rich legal history.[315] Viewed as such, the ruling hit with a particularly gratifying resonance for Tribal advocates, or at least this one, too long accustomed to late-game rule changes or moved goalposts. When Oklahoma's courts applied the Court's analysis to the parallel legal histories of a handful of other Oklahoma Tribes,[316] the reaction was similar.

Others, though, viewed the ruling ominously and objected from positions of power.[317] These voices did not offer discernable legal grounds for protest but seemingly expressed outrage over a lost claim to exceptionalism. Despite the dire prognostications and doomsaying, though, Oklahoma seems to be okay. As the Court has again shut down efforts to relitigate the case,[318] there is opportunity for new beginnings. We will see.[319]

These are not the only voices, of course. Some expressed a simpler kind of shock and animation, some celebratory and some outraged. This group tended to offer perspectives grounded not as much in the law as in topical or policy-based judgments of whether the ruling was fair and just, whether the world was now turned upside down, or whether so-and-so needed to pipe and settle. Regrettably, some of this turned acrimonious, lit by social media hot takes and fueled by an enthusiasm the ruling and its context inspired. As we move deeper into *McGirt*'s implementation, these voices should continue to be heard as Tribal governments and their partners look for what will work best, though a

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313. *See* 577 U.S. 481, 487–88 (2016).

314. *See* 875 F.3d 896, 932–38 (10th Cir. 2017).

315. *E.g.*, Kanji, Giampetroni & Tinker, *supra* note 60.

316. *See* Hogner v. State, 500 P.3d 629 (Okla. Crim. App. 2021) (Cherokee); Bosse v. State, 484 P.3d 286 (Okla. Crim. App. 2021), *withdrawn on other grounds*, 495 P.3d 669, *aff'd*, 499 P.3d 771 (Chickasaw); Sizemore v. State, 485 P.3d 867 (Okla. Crim. App. 2021) (Choctaw); Grayson v. State, 485 P.3d 250 (Okla. Crim. App. 2021) (Seminole); State v. Lawhorn, 499 P.3d 777 (Okla. Crim. App. 2021) (Quapaw).

317. *E.g.*, Stitt, *supra* note 267; Tomlinson & Savage, *supra* note 3; Forman, *supra* note 264.

318. Castro-Huerta v. State, No. F-2017-1203 (Okla. Crim. App. 2021), *cert. granted*, 2022 WL 187939 (2022) (No. 21-429) (Supreme Court rejected a bid to overturn *McGirt* but will rule on its application to non-members who commit crimes against tribal members on reservation lands).

319. Stitt, *supra* note 18, at 3–4. In his 2022 State of the State address, the Oklahoma Governor stuck to his position, with ruling featured prominently and early in his speech. "From the beginning, I've sounded the alarm on the Supreme Court's *McGirt* decision. Because I knew then, and I know now, that even a narrow Supreme Court ruling can fundamentally change a state. Oklahoma has been robbed of the authority to prosecute crimes. Put simply, *McGirt* jeopardizes justice." *Id.* at 3. He told of "our broad coalition" that has been working "to protect law and order and limit the impacts of the decision"—a coalition that notably excluded any Tribal nations or agencies. *Id.* And after recognizing the grieving Native mother of a child killed and who still waits for justice, he made the closing argument that will likely be filled out in future court filings, i.e., "This isn't about winning and losing. This isn't personal. It's not about Kevin Stitt versus the Tribes. Instead, it's about certainly. It's about law and order. It's about fairness, equal protection under the law, and one set of rules." *Id.* at 4.

respect for Tribal systems and sovereignty counsels that these voices not be put in charge.

There are also the voices from an important but often quiet fourth group: Those victimized by crimes and whose cases were affected, directly or indirectly, by *McGirt*. The Court's ruling affected scores of cases, real victims, and the families of real victims. Regardless of any political view or legal perspective on the ruling, each of these people was inescapably affected by its outcome. For this group, *McGirt* tended to mean anxiety, anger, and uncertainty. Would the person who harmed a loved one be released? Would the trauma of a new trial be required? Or worse, might it be that there would be *no* new trial? And perhaps most fundamentally, where could one find concrete answers to these and other questions? While less directly affected, this group can be expanded to include those Native and non-Native persons who live and work in the communities primarily affected by the ruling—the persons who listened to battling pundits and wondered what exactly it might mean for themselves, their families, their neighbors, etc.

Finally, there are those charged with *McGirt*'s implementation, who may be the quietest of all. This group has been busy conforming programs, operations, and activities to adapt to a new jurisdictional paradigm. To this group, any noise from the public sphere was secondary to the facts that, one, *McGirt* is the law and, two, it now must be implemented. For this group, particularly with the fourth group in mind, getting implementation wrong meant any number of unacceptable outcomes. While this group is primarily made up of Tribal officials, it includes also those *non*-Tribal officials of good will in federal, state, and local offices who work in collaboration with Tribal government and criminal justice systems every day to get the work done. For this group, what mattered most was what happened the morning after the case was decided—and each morning thereafter.

All these voices, and many more besides, are generally valid when heard on their own terms. Eventually and as matters proceed and mature, each of them will inform what this historic ruling ultimately means in people's lives here in Oklahoma Indian country. With the reader's indulgence, I have laid out my view on it all, at least as calibrated to this moment in time. We will all see what comes next. After all, this is not an end, but a new beginning.

Meanwhile, as voices converge, I offer one final thought: The ones that should matter most are the voices of Tribal peoples themselves, speaking through their government systems as they work to rebuild nations and provide for communities. It may be a form of legal malpractice to admit, but counsel does *not* always know best. Nor do activists and academics. Even those in positions to make decisions on behalf of their communities might not always be sure what the best thing to do may be, but their community has nonetheless entrusted them with the responsibility of figuring it out. This is not meant as a silencing suggestion, but a tactical one—to remind that our advocacy should *build* on the construction of Indigenous nations' systems through which Native voices are organized and most effectively heard in the intergovernmental mix.

The law may treat sovereignty as an abstraction at times, but the real-world vessel through which Tribal sovereigns interface with the United States' legal system is *Tribal government*. The rest of us, building on the work of those who have fought to retain Tribal rights and to empower Native communities, should work to support *each* Tribal nation's

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ability to be heard on its own, if it chooses to be heard. For it to be otherwise, I fear, would be a disservice to the countless who came before and helped us climb this latest peak.

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