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## Introduction

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## INTRODUCTION

Mary Kathryn Nagle\*

“On the far end of the Trail of Tears was a promise.”<sup>1</sup> The Supreme Court’s decision to uphold this promise—a promise that the U.S. Constitution declares to be the “supreme law of the land”<sup>2</sup>—has inspired more celebration, poetry, and tears than quite possibly any other U.S. Supreme Court case concerning tribal nations in the Court’s entire 230 years of existence.

On July 9, 2020, the Court upheld the continued existence of the Muscogee (Creek) Nation’s treaty-established reservation.<sup>3</sup> In response, Principal Chief David Hill issued the following statement of acknowledgment and celebration: “The Supreme Court today kept the United States’ sacred promise to the Muscogee (Creek) Nation of a protected reservation. Today’s decision will allow the Nation to honor our ancestors by maintaining our established sovereignty and territorial boundaries.”<sup>4</sup>

Joy Harjo, a citizen of the Muscogee (Creek) Nation and the first ever Native U.S. Poet Laureate, wrote in the *New York Times*: “Justice is sometimes seven generations away, or even more. And it is inevitable.”<sup>5</sup> And Muscogee (Creek) Nation’s Ambassador, Jonodev Chaudhuri, penned an op ed in the *Washington Post*, stating:

For me and for thousands of other Muscogees, the court’s ruling is more than legal confirmation of a treaty. It is confirmation that the sacrifices of my mom, my Mamagee and all of our ancestors were not in vain. That my children won’t be erased in their own home. That we are still here.<sup>6</sup>

The Creek Nation was not alone in acknowledging the hallowed foundation of the Court’s historic decision. National Congress of American Indians (“NCAI”) President Fawn Sharp stated the “historic Supreme Court decision in *McGirt v. Oklahoma* was

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

2. U.S. CONST. art. VI, § 2.

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

4. *Muscogee (Creek) Nation statement regarding U.S. Supreme Court decision*, MUSCOGEE (CREEK) NATION (July 9, 2020), <https://www.mcn-nsn.gov/muscogee-creek-nation-statement-regarding-u-s-supreme-court-decision/>.

5. *After a Trail of Tears, Justice for ‘Indian Country’*, N.Y. TIMES (July 14, 2020), <https://www.nytimes.com/2020/07/14/opinion/mcgirt-oklahoma-muscogee-creek-nation.html>.

6. *Opinion: Our Muscogee people suffered for generations in the hope of a better tomorrow. It’s finally here.*, WASH. POST (July 14, 2020, 5:29 PM), [https://www.washingtonpost.com/opinions/our-muscogee-people-suffered-for-generations-in-the-hope-of-a-better-tomorrow-its-finally-here/2020/07/14/3caf0638-c60a-11ea-8ffe-372be8d82298\\_story.html](https://www.washingtonpost.com/opinions/our-muscogee-people-suffered-for-generations-in-the-hope-of-a-better-tomorrow-its-finally-here/2020/07/14/3caf0638-c60a-11ea-8ffe-372be8d82298_story.html).

pivotal for its recognition of tribal sovereignty and the perpetual sanctity of treaties with tribal nations.”<sup>7</sup> And then presidential candidate Joe Biden celebrated the Court’s decision, stating:

In a critical decision today, the U.S. Supreme Court upheld the federal government’s treaty responsibilities to protect homelands in Indian Country . . . . I am proud to stand with the Muscogee (Creek) Nation and all of Indian Country in celebrating tribal sovereignty and self-determination, which has been denied to them far too long and far too often.<sup>8</sup>

What makes Justice Gorsuch’s majority opinion in *McGirt* so “historic” and noteworthy? The answer is simple. For quite possibly the first time in the modern era, the Court’s adjudication of an Indian law case was guided by *the law*, and not white expectations of tribal diminishment. Make no mistake about it, *McGirt* is our *Brown v. Board of Education*.

Just as *Brown* rejected a legal regime designed to preserve white entitlement to segregation by race, *McGirt* rejects a legal regime that has, until now, catered to white expectations that tribal nations, and their reservations, will someday simply cease to exist.<sup>9</sup> Just as *Brown* declared *Plessy v. Ferguson*’s “separate but equal” to be unconstitutional, *McGirt* rejects the notion that a tribal nation loses its treaty-created reservation simply because white Americans decided they wanted to live on it.<sup>10</sup>

To be clear, the Court’s decision in *McGirt* has no effect on land ownership. No one living on the Muscogee (Creek) Nation Reservation lost their land, home, or property because of the Court’s recognition that the Reservation boundaries remain in existence. Although the Court’s decision makes clear that Oklahoma had been unlawfully exercising criminal jurisdiction over tribal citizens who commit crimes within the borders of the Muscogee Reservation, post-*McGirt*, Oklahoma retains criminal jurisdiction over more than 90% of the crimes committed within Oklahoma’s borders. As of now, Oklahoma maintains its authority to tax the majority of individuals earning income and conducting business within the borders of the Muscogee Reservation, and Oklahoma maintains its authority over all state highways and roads within the borders of the Reservation. Oklahoma lost very little, in reality—except for its hundred year-old hope that the

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7. *NCAI Statement on Legislative Efforts to Diminish Tribal Sovereignty in Oklahoma*, NAT’L CONG. OF AM. INDIANS (July 23, 2020), <https://www.ncai.org/news/articles/2020/07/23/ncai-statement-on-legislative-efforts-to-diminish-tribal-sovereignty-in-oklahoma>.

8. *Statement by Vice President Joe Biden on the Supreme Court’s Decision in McGirt v. Oklahoma*, INDIANZ (July 9, 2020), <https://www.indianz.com/supremecourt/2020/07/13/joe-biden/>.

9. In his dissent, Chief Justice Roberts noted that at the time of Oklahoma’s statehood, the general expectation of white settlers was that “Indian tribes would enter traditional American society and *the reservation system would cease to exist*.” *McGirt*, 140 S. Ct. at 2488 (emphasis added) (quoting *Solem v. Bartlett*, 465 U.S. 463, 468 (1984)). In his majority opinion, Justice Gorsuch addressed this point, stating: “Oklahoma replies that . . . many of its residents will be surprised to find out they have been living in Indian country this whole time. But we imagine some members of the 1832 Creek Tribe would be just as surprised to find them there.”

10. *McGirt*, 140 S. Ct. at 2470 (considering the fact that more non-Indian settlers live on the reservation now than tribal citizens and dismissing this fact as a legitimate basis for disestablishing a reservation); *see id.* at 2473 (“Finally, Oklahoma points to the speedy and persistent movement of white settlers onto Creek lands throughout the late 19th and early 20th centuries. But this history proves no more helpful in discerning statutory meaning. Maybe, as Oklahoma supposes, it suggests that some white settlers in good faith thought the Creek lands no longer constituted a reservation. But maybe, too, some didn’t care and others never paused to think about the question.”).

Muscogee Reservation would someday cease to exist.

At its core, *McGirt* upholds the constitutional separation of powers within the United States federal government. As the majority opinion notes, courts do not have the authority to disestablish reservations created by a treaty, but Congress does.<sup>11</sup> As the Court concluded, “saving the political branches the embarrassment of disestablishing a reservation is not one of [the Court’s] constitutionally assigned prerogatives.”<sup>12</sup> Thus, “if Congress wishes to break the promise of a reservation, *it must say so*.”<sup>13</sup>

To date, Congress has not said so. And what was politically possible in 1830 will not be as easily accomplished today. In 1830, during President Jackson’s administration, Congress passed the Indian Removal Act—an unfortunate piece of legislation used to force the Muscogee (Creek) Nation onto the Trail of Tears. President Jackson pushed for and supported the removal of the Muscogee (Creek) Nation, and other tribal nations in the Southeast, on the basis that they were “[e]stablished in the midst of another and a superior race,” but could not “appreciat[e] the causes of [their] inferiority.”<sup>14</sup> With this rhetoric landing Jackson in the White House, the political climate was ripe for Congress to pass legislation harmful to tribal nations. But even then, with a President in the White House who openly supported the termination of tribal nations, the 1830 Indian Removal Act passed by *one vote alone*.

Today, there is significantly less political support for the passage of acts that diminish tribal sovereignty and tribal nations than during the era of Andrew Jackson. Since the Court concluded this past July that the Muscogee Reservation remains in existence, a small handful of Oklahoma, federal, and even a few tribal, officials began calling for Congress to pass legislation either disestablishing the Muscogee Reservation altogether, or significantly diminishing the Muscogee (Creek) Nation’s sovereign authority to govern it. In his essay in this Issue, Muscogee (Creek) Nation Ambassador Jonodev Chaudhuri explores the parallels between the arguments that Oklahoma officials used in their attempt to eradicate the Muscogee (Creek) Nation at the time of Oklahoma’s statehood in 1907, with the arguments used today to undermine the Court’s decision in *McGirt*. They are strikingly similar. Likewise, the efforts of Mvskoke citizens to preserve the Muscogee (Creek) Nation and its Reservation at the time of Oklahoma’s statehood draw strong parallels to the efforts of Principal Chief David Hill and other Mvskoke leaders today. As Ambassador Chaudhuri recounts: “Our recent victory in the Supreme Court is the direct consequence of generations of Mvskokvlke who sacrificed and fought so we would still have a Nation today.”<sup>15</sup> And just as Chitto Harjo and other Mvskoke leaders defeated Oklahoma’s attempt to eradicate the Muscogee (Creek) Nation more than one hundred years ago, their modern day descendants are defeating the repeated attempts being made to eradicate them and their Nation today.

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11. *McGirt*, 140 S. Ct. at 2462 (“[C]ourts have no proper role in the adjustment of reservation borders.”).

12. *Id.*

13. *Id.*

14. President Andrew Jackson, *Fifth Annual Message* (Dec. 3, 1833), in THE AMERICAN PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley, eds.) (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29475> [<https://perma.cc/55V5-S5F2>]).

15. Ambassador 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, 371 (2021).

Next, the attorneys who represented the Muscogee (Creek) Nation before the Court, Riyaz Kanji, David Giampetroni, and Phillip Tinker, recount “some of the experiences of the Nation and the diverse coalition that supported its tireless efforts to protect its historic rights, efforts that culminated in Justice Gorsuch’s opinion in *McGirt*.”<sup>16</sup> The trajectory of a case to the United States Supreme Court is never straightforward, and this one was quite complex, involving state and federal habeas petitions, an appeal from the Oklahoma Criminal Court of Appeals as well as the Tenth Circuit Court of Appeals, and two oral arguments before the Supreme Court, first in November 2018, and then again in April 2020 (virtually, which was a unique experience in and of itself). The landscape these brave, brilliant lawyers had to traverse was full of legal landmines, but they were given an incredible gift in 2016, when Justice Thomas penned his unanimous decision in *Nebraska v. Parker*, wherein the Court concluded that the Omaha Tribe’s Reservation had not been disestablished, despite the fact that the majority of the population on the Reservation, as of 2016, constituted non-Indians. As these authors note, *Parker* “seemed intended to halt that drift (at least in the disestablishment context) and direct the analysis back toward the textual emphasis of *Solem*’s step one”—a step that places primacy on the analysis of whether or not Congress has actually passed legislation to disestablish the reservation in question. This reinvigoration of step one of the *Solem* test set the foundation for Justice Gorsuch’s decision in *McGirt*.

Muscogee (Creek) Nation citizen and attorney Lauren King takes an even deeper dive into the line of precedents leading up to the Supreme Court’s decision in *Solem*, giving an overview of how the Court came to craft the three-factor *Solem* test applied in *McGirt*. Although some critics have claimed that *McGirt* undervalued the second and third *Solem* factors, King argues that “[i]f *McGirt* marked a sea change in the Court’s analysis of reservation disestablishment and diminishment claims, it is only because *McGirt* righted the ship.”<sup>17</sup> Ultimately, King examines *McGirt*’s impact on an entirely separate line of precedents—those relating to Indian land possession claims—stemming from a case authored by Justice Ginsburg, wherein the Court concluded that the affirmative defense of laches will block a tribe’s claim that it still legally possesses lands over which the tribe has, for quite some time, not exercised ownership or governance. King questions whether, after *McGirt*, *City of Sherrill* remains good law. She offers a strong argument that it does not.

While the Court’s decision in *McGirt* dealt with criminal law alone, Oklahoma, in its briefs before the Court, asserted that the Court’s decision could result in disastrous tax implications because Oklahoma “generally lacks the authority to tax Indians in Indian country,” and thus a decision in the tribe’s favor would “turn[] half the State into Indian country [and] would decimate state and local budgets.”<sup>18</sup> Since losing before the Court, however, Oklahoma has begun to sing a different tune. Suddenly, the State is not so eager to maintain that it cannot lawfully tax tribal citizens living on reservation lands. Thus, as Professor Stacy Leeds and Professor Lonnie Beard note, *McGirt* raises questions regarding

16. Riyaz Kanji, David Giampetroni & Phillip Tinker, *Reflections on McGirt v. Oklahoma: A Case Team Perspective*, 56 TULSA L. REV. 387, 388 (2021).

17. Lauren King, *Revisiting City of Sherrill after McGirt*, 56 TULSA L. REV. 401, 411–12 (2021).

18. Brief for Respondent at 45, *McGirt*, 140 S. Ct. 2452 (No. 18-9526).

what taxes the State of Oklahoma may no longer have authority to collect, as well as what taxes the Muscogee (Creek) Nation—and other tribes in Oklahoma—may now have the authority to collect. As these two esteemed professors note, “[t]he promise Justice Gorsuch highlights was not simply an empty promise of geographic boundaries, it also included a permanent homeland with fully functioning tribal governments, including powers of taxation.”<sup>19</sup>

In addition to “decimating” Oklahoma’s budget, Oklahoma also argued that a decision in the Muscogee (Creek) Nation’s favor would free hundreds of dangerous criminals onto Oklahoma’s streets. In 2018, when the Court heard arguments in *Sharp v. Murphy*, Lisa Blatt, arguing for the State of Oklahoma, told the Court that a victory for the Muscogee (Creek) Nation would result in the chaotic, immediate release of “155 murderers, 113 rapists, and over 200 felons who committed crimes against children.”<sup>20</sup> In his article *The Sky Will Not Fall in Oklahoma*, Muscogee (Creek) Nation citizen and attorney Clint Summers summarizes the jurisdictional landscape left in the wake of *McGirt*, complete with a review of the jurisdictional challenges brought by tribal citizen defendants to Oklahoma state court prosecutions since the Court’s decision on July 9.<sup>21</sup> As of the publication of this Issue, Jimcy McGirt has been sentenced in federal court, Patrick Murphy has been indicted, and many others have lost their jurisdictional challenges due to the expiration of the statute of limitations or other legal limitations statutorily imposed on the use of federal habeas. Although much has been said about the chaos that would ensue, Summers’ article demonstrates that reality does not match Oklahoma’s hyperbolic rhetoric.

The Court’s ability to look past this rhetoric and decide *McGirt* on the law, and not on white expectations of tribal diminishment, is a testament to the intellectual rigor of Justice Gorsuch’s Indian law jurisprudence. Sadly, to date, he is one of only a small handful of Justices to have truly approached federal Indian law as a subject worthy of intellectual rigor. As *Tulsa Law Review* student Julie Combs notes in her essay, most American Bar Association accredited law schools do not teach Indian law,<sup>22</sup> and most state bars do not include questions concerning Indian law on the test attorneys must take in order to be licensed to practice law in that particular state.<sup>23</sup> And until Justice Gorsuch, no Supreme Court Justice, in the history of the Court, had ever hired a tribal citizen law clerk. As Combs posits, to fully address and solve this problem, we need to see more tribal citizens serving as Article III federal judges and Supreme Court law clerks. And schools and states need to treat federal Indian law with the same rigor with which they approach subjects such as contracts and trusts. Indeed, the Constitution does not say contracts are

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19. Stacy Leeds & Lonnie Beard, *A Wealth of Sovereign Choices: Tax Implications of McGirt v. Oklahoma and the Promise of Tribal Economic Development*, 56 TULSA L. REV. 417, 419 (2021).

20. See generally Transcript of Oral Argument, *McGirt*, 140 S. Ct. 2452 (No. 18-9526).

21. See generally Clint Summers, *The Sky Will Not Fall in Oklahoma*, 56 TULSA L. REV. 471 (2021).

22. Julie Combs, Comment, *A Coherent Ethic of Lawyering in Post-McGirt Oklahoma*, 56 TULSA L. REV. 501, 506 (2021) (“When examining the meaning of competent and diligent Native representation, it is important to note the basic fact that the majority of students will graduate from law school without taking a single Indian law class.”).

23. See, e.g., *id.* at 513 (“Federal Indian law is currently not tested on the essay portion of the Oklahoma Bar Exam and special issues around lawyering for Native Nations are not tested on the Multistate Professional Responsibility Examination.”).

the supreme law of the land. Nor does the Constitution mention trusts. But, according to the Constitution, *treaties are the supreme law of the land*.<sup>24</sup> It is time for American law students to start studying them.

Last, and as the antithesis of the least, Muscogee (Creek) Nation citizen and scholar Professor Sarah Deer shares an interview she undertook with two fellow women Mvskoke citizens, Rosemary McCombs Maxey and Jennifer Foerster, just a few months after the Court's decision. "I was frustrated to hear the attorney representing Oklahoma essentially 'brag' for twenty minutes about all the things Oklahoma had done in the early twentieth century to try to destroy the Mvskoke Nation,"<sup>25</sup> Professor Deer states to Maxey and Foerster in the midst of their joyful, but honest conversation. And it is true, during oral argument, Oklahoma focused heavily on the argument that although Congress did not explicitly disestablish the Muscogee Reservation, it was Oklahoma's understanding that Congress would, ultimately, destroy the Muscogee (Creek) Nation altogether—both Reservation and government. Congress, however, did not. And no matter how hard Oklahoma fought for the Muscogee (Creek) Nation's destruction in 1907, the Nation, and the Reservation, remain today. As Foerster shared, "[t]his court decision is meaningful to me because it says yes, this is a promise that was made. And there was a lot of hope wrapped up in that promise."<sup>26</sup>

And yes, although *McGirt* constitutes an incredible victory of law over fiction, and precedent over prejudice, for Mvskoke citizens—and in particular, Mvskoke women—the victory is much more than that. As Maxey offers:

There is a chorus of one of our Mvskoke hymns that can be interpreted broadly to encourage us in times like these: "*Cehotosakvres, cenaorakvtes, Momis komet, awacken o-vpeyvkvres, hvlwen*. Do not be weary, do not be troubled. Keep striving, you all come. Let us go toward the high goal."<sup>27</sup>

Because of *McGirt*, today's metric of justice will no longer be what white settlers expected, but could not lawfully secure, more than one hundred years ago. Because of *McGirt*, when it comes to treaties and tribal nations, today's measure of justice will be the *law*. Nothing less. Nothing more.

*McGirt* is yet another promise. It is now in all of our hands to keep it.

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24. U.S. CONST. art. VI, § 2.

25. Sarah Deer, Edited Transcript, *Reclaiming Our Reservation: Mvskoke Tvstvnyke Hoktvke Tuccenet (Etem) Opunayakes*, 56 TULSA L. REV. 519, 525 (2021).

26. *Id.* at 528.

27. *Id.* at 530.