Tulsa Law Review

Volume 56
Issue 3 *Special McGirt Issue*

Spring 2021

The Indian Treaty Canon and McGirt v. Oklahoma: Righting the Ship

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THE INDIAN TREATY CANON AND *MCGIRT V. OKLAHOMA*: RIGHTING THE SHIP

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I. INTRODUCTION

For over half a century until its 2020 decision in *McGirt v. Oklahoma*,[1] the United States Supreme Court evaluated alleged congressional abrogation of Indian treaty rights differently based on whether the alleged abrogation was of usufructuary rights (e.g., hunting and fishing rights) or of rights to a homeland (i.e., a tribe's reservation). Without justification, the Supreme Court applied a less stringent test for evaluating alleged abrogation of rights to a homeland than it applied to alleged abrogation of usufructuary rights.

The Supreme Court's standards for establishment and abrogation of treaty usufructuary rights follow a logical path. First, due to the particular nature of treaties with Indian tribes, and due to the negotiating disadvantage of the tribes, treaty rights are *established* by construing the relevant contract (i.e., treaty) as the signatory tribes would have understood it, with ambiguities resolved in the tribes' favor.[2] Second, and again due to the particular nature of treaties with Indian tribes, *abrogation* of those rights requires express Congressional intent.[3]

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1. 140 S. Ct. 2452 (2020).

2. *See* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (2019); Richard B. Collins, *Never Construed to Their Prejudice: In Honor of David Getches*, 84 U. COLO. L. REV. 1, 5–9 (2013).

3. *See* 1 COHEN'S HANDBOOK, *supra* note 2, at § 2.02.

In contrast, the Supreme Court's standard for determining whether Congress had abrogated tribal rights to a homeland included consideration of extratextual factors, such as subsequent demographic change following passage of a statute.

McGirt v. Oklahoma corrected this unequal treatment of treaty rights by jettisoning consideration of extratextual factors in determining whether Congress abrogated a tribe's treaty right to a homeland, absent ambiguity in the statutory language.

II. THE DISPARATE STANDARDS FOR TREATY RIGHT ABROGATION

Since the turn of the twentieth century, the Supreme Court has adhered to the plenary power doctrine, which holds that Congress has "[p]lenary authority" over tribes.[4] The Court has established high standards for congressional abrogation of treaty usufructuary rights, counterbalancing the great weight it attaches to the solemnity of treaty promises in the Indian canon and the unique trust relationship shared between Indian tribes and the federal government. However, prior to *McGirt*, the Court had established a much lower bar for abrogation of treaty rights to a reservation. The Court's erroneous standard for reservation diminishment is irreconcilable with the Indian canons of construction and with the Court's disparate treatment of other types of treaty abrogation claims.

A. The Indian Canons

Courts must construe treaties "in the sense in which they would naturally be understood by the Indians" who signed them.[5] The treaty language "should never be construed to [the tribe's] prejudice."[6] Courts must not restrict a treaty right by using the "technical meaning of its words to learned lawyers,"[7] the "'double sense' [of the language] which might some time be urged against" the signatory tribes,[8] or an "artificial meaning which might be given to it by the law and by lawyers."[9] Ambiguities in treaties must be resolved in the tribal signatory's favor;[10] a treaty must not be given "the narrowest construction it will bear."[11] The canons have been extended to apply to statutes and executive orders as well.[12]

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4. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903); *see also* Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 782 (2014).

5. Jones v. Meehan*,* 175 U.S. 1, 11 (1899); *see also* Herrera v. Wyoming, 139 S. Ct. 1686, 1699 (2019); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 676–77 (1979) (hereinafter "*Fishing Vessel*"); Tulee v. Washington, 315 U.S. 681, 684 (1942); Seufert Bros. Co. v. United States, 249 U.S. 194, 198 (1919).

6. Minnesota v. Hitchcock, 185 U.S. 373, 396 (1902) (quoting Worcester v. Georgia, 31 U.S. 515, 582 (1832)); *see also* Antoine v. Washington, 420 U.S. 194, 199 (1975) ("The canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice.").

7. *Jones,* 175 U.S. at 11; *see also Fishing Vessel*, 443 U.S. at 676.

8. Winters v. United States, 207 U.S. 564, 577 (1908).

9. *Seufert Bros.*, 249 U.S. at 199.

10. *Herrera*, 139 S. Ct. at 1699; Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 194 n.5 (1999); Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 269 (1992); Choctaw Nation v. Oklahoma, 397 U.S. 620, 642 (1970).

11. *Tulee*, 315 U.S. at 684.

12. *See, e.g.*, *Cty. of Yakima*, 502 U.S. at 269; Montana v. Blackfeet Tribe of Indians*,* 471 U.S. 759, 766 (1985); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 173, 173–75 (1973).

The rationale for the Indian canons of construction lies in the numerous disadvantages the tribes had in treaty negotiations and in the unique trust relationship between the United States and Indian tribes.

Specifically, the treaties were negotiated "on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves," with the treaty "drawn up by them and in their own language;" while the Indians (in the Court's view) were "a weak and dependent people, who ha[d] no written language and [we]re wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty [wa]s framed [wa]s that imparted to them by the interpreter employed by the United States."[13] Given the severely disadvantaged position of the tribes in these negotiations, "[i]t is our responsibility to see that the terms of the treaty are carried out, so far as possible, . . . in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people."[14]

With respect to the trust relationship between the United States and Indian tribes, the Supreme Court held in its earliest Indian law cases that by entering into treaties, tribes "placed themselves under the protection of the United States."[15] Tribes "look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants;" and thus "[t]heir relation to the United States resembles that of a ward to his guardian."[16]

The Constitution entrusts Congress with the authority to regulate commerce with Indian tribes, and dictates that treaties are the "supreme Law of the Land."[17] The supremacy of Indian treaties, the weight given to treaty promises, and the deference the Indian canons accord the breadth of those promises demand an accordingly high bar for abrogation of treaty rights. Although the Supreme Court has established a relatively high bar for abrogation of treaty usufructuary rights, it has established an inexplicably low bar for abrogation of treaty rights to a homeland, i.e., for reservation disestablishment.

B. The High Bar for Abrogation of Treaty Usufructuary Rights

Since the turn of the century when the Supreme Court ruled that Congress could unilaterally abrogate tribal treaty rights pursuant to its plenary power over Indian affairs,[18] the Court has developed a stringent standard requiring a clear statement of congressional intent to abrogate treaty usufructuary rights.[19] For example, in 1968 in *Menominee Tribe of Indians v. United States*, the Court declined to construe a statute terminating federal recognition of the Menominee Tribe "as a backhanded way [of] abrogating the hunting

13. Jones v. Meehan, 175 U.S. 1, 11 (1899).
14. *Tulee*, 315 U.S. at 684–85.
15. *Worcester*, 31 U.S. at 581.
16. Cherokee Nation v. Georgia, 30 U.S. 1, 14, 17 (1831); *see also Antoine*, 420 U.S at 199.
17. U.S. CONST. art. I, § 8, cl. 3; *id.* art. VI, cl. 2.
18. *Lone Wolf*, 187 U.S. 553.
19. *See* Collins, *supra* note 2, at 11 ("Though results are mixed and decisions [regarding treaty hunting and fishing rights] cannot be reconciled, tribes won most cases and all of the important ones, and decisions often relied on the treaty canon.").

and fishing rights of these Indians."[20] The Court emphasized that it was "difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying a property right[] conferred by treaty."[21]

By 1999, when the Court decided *Minnesota v. Mille Lacs Band of Chippewa Indians*,[22] the rule regarding treaty usufructuary right abrogation was well established: "Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so."[23] Thus, a treaty that obligated the Mille Lacs Band to "'fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere,'"[24] but that was silent as to usufructuary rights, did not extinguish the usufructuary rights that were reserved to the Band in a prior treaty.[25]

In 2019, the Court further clarified its stance on abrogation of treaty usufructuary rights in *Herrera v. Wyoming*.[26] There, it rejected Wyoming's claim that congressional approval of its statehood implicitly abrogated the Crow Tribe's treaty hunting rights.[27] Importantly, the Court expressly repudiated *Ward v. Race Horse*,[28] a century-old case holding that the Shoshone and Bannock Tribes' treaty hunting right was abrogated by virtue of Wyoming's admission to the United States "because affording the Tribes a protected hunting right lasting after statehood would be 'irreconcilably in conflict'" with the state's power to regulate game hunting within its borders.[29] The *Race Horse* court also reasoned that "Congress 'clearly contemplated the disappearance of the conditions' specified in the treaty" because the treaty hunting rights were "'essentially perishable.'"[30]

In considering the familiar question of whether statehood implicitly abrogated a treaty right, the Court in *Herrera* emphasized that "the crucial inquiry for treaty termination analysis is whether Congress has expressly abrogated an Indian treaty right or whether a termination point identified in the treaty itself has been satisfied. Statehood is irrelevant to this analysis unless a statehood Act otherwise demonstrates Congress' clear intent to abrogate a treaty, or statehood appears as a termination point in the treaty."[31] Because the parties in *Herrera* disputed whether *Race Horse* had continuing force, the Supreme Court clarified that "*Race Horse* 'must be regarded as retaining no vitality' after [*Mille Lacs*]": "To avoid any future confusion, we make clear today that *Race Horse* is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood."[32]

Because the Wyoming Statehood Act was silent as to Indian treaty rights and the

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20. 391 U.S. 404, 412 (1968).
21. *Id.* at 413 (footnote omitted).
22. 526 U.S. 172 (1999).
23. *Id.* at 202.
24. *Id.* at 195 (quoting 1855 Treaty with the Chippewa, 10 Stat. 1166).
25. *Id.* at 200.
26. 139 S. Ct. 1686.
27. *Id*.
28. 163 U.S. 504 (1896).
29. *Herrera*, 139 S. Ct. at 1694–95 (quoting *Race Horse*, 163 U.S. at 509).
30. *Id.* at 1695 (quoting *Race Horse*, 163 U.S. at 509, 515).
31. *Id.* at 1696 (citing *Mille Lacs*, 526 U.S. at 207).
32. *Id.* at 1697.

treaty negotiations did not show that the Crow Tribe understood the treaty to sunset its hunting rights at statehood, the Court in *Herrera* held that Congress had not abrogated the Crow's hunting right.[33]

The strict standard the Court has adopted to evaluate alleged abrogation of treaty usufructuary rights stands in stark contrast to the startlingly lax standard it has adopted to evaluate alleged abrogation of treaty rights to a homeland.

C. The Solem *Standard for Abrogation of Treaty Rights to a Homeland*

In 1948, Congress enacted a definition of "Indian country" in 18 U.S.C. § 1151 that included "all land within the limits of any Indian reservation."[34] The definition of "Indian country" remains the same today.[35] The 1948 enactment resulted in a steady stream of cases disputing whether various tribes' reservations survived the allotment era.[36] In 1984 in *Solem v. Bartlett*,[37] the Court formalized a three-part test for reservation disestablishment that drastically—and indefensibly—departed from the "express congressional intent" test from the treaty usufructuary rights context.

To be sure, the better course of action at that time would have been to align the reservation disestablishment test with the relatively bright-line test for treaty usufructuary right abrogation. Instead, *Solem* perpetuated the Court's gradual departure from the high standards it laid out in its earlier disestablishment cases.

Things started off well enough. In its 1962 decision in *Seymour v. Superintendent of Washington State Penitentiary*,[38] the Court held that the Colville Indian Tribe's reservation was not diminished by a 1906 allotment act that allotted the Tribe's reservation to tribal members and opened surplus lands to non-Indian settlement. Absent clear congressional language, the Court refused to assume Congress intended for the land to revert to the public domain.[39] The Court found that, rather than returning the land to the public domain, the allotment act was simply a mechanism for non-Indians to settle on land *within* the reservation.[40] In dicta, the Court noted that its understanding of the purpose of the act "finds support in subsequent congressional treatment of the reservation," including explicit recognition of the continued existence of the reservation by Congress.[41]

A similar allotment act was involved in the Court's 1973 decision in *Mattz v. Arnett*.[42] Holding that the act had the same effect as the one in *Seymour*, the Court reaffirmed that mere allotment and opening of surplus lands within a reservation to non-Indian settlement is not enough to achieve diminishment: "clear termination language was

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33. *Id.* at 1698–700.
34. 18 U.S.C § 1151.
35. *Id.*
36. *See* Nebraska v. Parker, 136 S. Ct. 1072 (2016); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998); Hagen v. Utah, 510 U.S. 399 (1994); Solem v. Bartlett, 465 U.S. 463 (1984); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. Dist. Cty. Court, 420 U.S. 425 (1975); Mattz v. Arnett, 412 U.S. 481 (1973); Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351 (1962).
37. 465 U.S. 463 (1984).
38. 368 U.S. 351 (1962).
39. *Id.* at 355.
40. *Id.* at 356.
41. *Id.*
42. 412 U.S. 481 (1973).

not employed in the 1892 Act. This being so, we are not inclined to infer an intent to terminate" the Klamath River Indian Reservation.[43] As in *Seymour*, the Court observed that "our conclusion that the 1892 Act did not terminate the Klamath River Reservation is reinforced by repeated recognition of the reservation status of the land after 1892 by the Department of the Interior and by Congress."[44] The Court reiterated that clear congressional intent is required to effect disestablishment, but introduced unfortunate language that would serve to distort the focus of the disestablishment inquiry in subsequent cases: "congressional determination to terminate must be expressed on the face of the Act **or be clear from the surrounding circumstances and legislative history**."[45]

Just two years later in *DeCoteau v. District County Court*,[46] the Court seized on the language from *Mattz* to give greater weight to extratextual factors in evaluating whether the Lake Traverse reservation had been diminished. The 1891 act at issue obligated the Sisseton-Wahpeton Indian Tribe to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation" in exchange for payment of a sum certain.[47] The Court held that this language revealed clear congressional intent to diminish the reservation.

The Court reaffirmed the concept that "congressional intent must be clear, to overcome 'the general rule that "(d)oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith."'"[48] The Court further acknowledged that events subsequent to the congressional act at issue were "largely irrelevant to the issues before us."[49] However, the Court spent several pages of its analysis detailing what happened in the decades after Congress passed the act. That discussion revealed conflicting evidence regarding whether entities other than Congress believed the reservation still existed.[50] The Court ultimately concluded that the act, its "surrounding circumstances," and "legislative history" "all point[ed] unmistakably to the conclusion that the Lake Traverse Reservation was terminated in 1891."[51]

In dissent, Justices Douglas, Brennan, and Marshall accused the majority of manufacturing congressional intent.[52] Because the 1891 act obligating the Tribe to sell its claim to "the unallotted lands within the limits of the reservation" without "a word to suggest that the boundaries of the reservation were altered," the dissent opined that Congress did not intend to disestablish the reservation.[53]

Two years later in 1977, the Court held in *Rosebud Sioux Tribe v. Kneip* that an act requiring the Rosebud Sioux Tribe to "cede, surrender, grant, and convey to the United

43. *Id.* at 504.
44. *Id*. at 505.
45. *Id.* at 505 (emphasis added).
46. 420 U.S. 425 (1975).
47. Sioux Land Agreement of 1889, U.S.-Sioux, art. I, Dec. 12, 1889, 26 Stat. 1036.
48. *DeCoteau*, 420 U.S. at 444 (quoting McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) (quoting Carpenter v. Shaw, 280 U.S. 363, 367 (1930))).
49. *Id.* at 437–38.
50. *Id.* at 442–44.
51. *Id.* at 445.
52. *Id.* at 460–63.
53. *DeCoteau*, 420 U.S. at 461 (quoting 26 Stat. 1036).

States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted" constituted language that was "'precisely suited' to disestablishment."[54] Despite the canon requiring the Court not to use technicalities or construe ambiguities in a manner that would prejudice the Indians, the Court disregarded wording in the act that required consent of the Tribe for the surrender of its lands (which was not obtained), finding that the wording was merely "technically misused" such that the lack of consent did not defeat disestablishment.[55]

The Court also accorded subsequent jurisdictional history much greater weight in *Rosebud Sioux Tribe* than it had in its prior opinions. The Court admitted that the subsequent jurisdictional history was "not entirely clear," but chose to seize upon "the unquestioned actual assumption of state jurisdiction over the unallotted lands" in the years since the passage of the act as the "single most salient fact" "entitled to weight as a part of the 'jurisdictional history.'"[56] The Court emphasized that:

> The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian both in population and in land[] use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress as petitioner urges.[57]

The Court also held that two subsequent congressional acts containing similar language effected further diminishments of the Tribe's reservation.[58]

As in *Decoteau*, the dissent in *Rosebud Sioux Tribe* objected to a finding of diminishment absent clear congressional language, noting that the three acts contained no "express provision disestablishing the Reservation" but instead merely opened the reservation land to white settlers.[59] The dissent lamented that:

> Until today, the effect on reservation boundaries of Acts disposing of surplus reservation land was well settled. The general rule, entitled to the broadest possible scope, is that in interpreting these Acts[,] legal ambiguities are resolved to the benefit of the Indians . . . . Congressional intent therefore must be 'clear' before this Court will find that a reservation established by Congress (or the Executive) was disestablished.[60]

Despite these well-reasoned objections to the Court's straying from congressional intent in its diminishment analysis, the Court formally embraced extratextual factors in the analytical framework for reservation diminishment that it announced in *Solem v. Bartlett*.[61]

Solem begins by describing precedent as having "established a fairly clean analytical structure" for evaluating whether a reservation has been diminished.[62] According to *Solem*, this structure comprises three principles:

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54. 430 U.S. 584, 597 (1977).
55. *Rosebud Sioux Tribe*, 430 U.S. at 597.
56. *Id.* at 603–04.
57. *Id.* at 604–05.
58. *Id.* at 607–15.
59. *Id.* at 618–19.
60. *Rosebud Sioux Tribe*, 430 U.S. at 617 (citations and quotation marks omitted).
61. 465 U.S. 463 (1984).
62. *Id.* at 470.

1. First, Congress alone "can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."[63] The text of the statute is "[t]he most probative evidence of congressional intent," and "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unalloted [sic] opened lands."[64] If Congress also commits to compensate the tribe for the land, "there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished."[65]

2. Second, "events surrounding the passage of a surplus land act-particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative reports presented to Congress" can suffice to diminish a reservation if they "unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation."[66] In other words, "explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment."[67]

3. Third, and "[t]o a lesser extent, . . . events that occurred after the passage of a surplus land act" may "decipher Congress's intentions."[68] Such events may include "Congress's own treatment of the affected areas," "the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with unalloted [sic] open lands," and "who actually moved onto opened reservation lands."[69] Where a flood of non-Indians settled the opened lands and "the area has long since lost its Indian character," "*de facto,* if not *de jure,* diminishment may have occurred."[70]

Solem's dogma persisted for nearly four decades,[71] and the Court did not question why the standard for abrogation of tribal treaty rights varied depending on whether the treaty right alleged to have been abrogated was a right to a homeland or a right to hunt, fish, and gather. The following chart summarizes the outcome of the various reservation diminishment cases:

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63. *Id.*
64. *Id.*
65. *Id.* at 470–71.
66. *Solem*, 465 U.S. at 471.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. The Court followed *Solem*'s analytical framework in *Hagen v. Utah*, 510 U.S. 399 (1994); *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329 (1998); and *Nebraska v. Parker*, 136 S. Ct. 1072 (2016).

Case	Statutory language	Outcome
Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351 (1962)	"[S]ell or dispose of unallotted lands" with "allotments . . . to be made to all [Indians]," and "surplus lands shall be open to settlement and entry under the provisions of the homestead laws," with proceeds "expended for the [Indians'] benefit, under the direction of the Secretary of the Interior." 34 Stat. 80.	Reservation not diminished.
Mattz v. Arnett, 412 U.S. 481 (1973)	"[A]ll of the lands embraced in what was the Klamath River Reservation" are "subject to settlement, entry, and purchase under the laws of the United States granting homestead rights," with proceeds to be used "for the maintenance and education of the Indians," and provided that Indians may "apply to the Secretary of the Interior for an allotment," and the Secretary "may set apart" lands on which Indians currently reside "for the[ir] permanent use and occupation." 27 Stat. 52.	Reservation not diminished.
DeCoteau v. Dist. Cty. Court, 420 U.S. 425 (1975)	"The Sisseton and Wahpeton bands of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation . . . remaining after the allotments" to the Indians in exchange for a sum certain payment from the United States, and the ceded lands are "subject to entry and settlement" under homestead laws, with proceeds to be used "for the sole use and benefit of the said bands of Indians." Act of Mar. 3, 1891, 26 Stat. 989.	Reservation diminished.
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977)	Act of Apr. 23, 1904, 33 Stat. 254: The "Indians belonging on the Rosebud Reservation . . . cede, surrender, grant, and convey to the United States all their claim, right, title, and interest to all that part of the Rosebud Indian Reservation now remaining unallotted," and the ceded lands "shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry," with proceeds to be	Reservation diminished.

	"paid to the Rosebud Indians or expended on their account." Act of Mar. 2, 1907, 34 Stat. 1230: "[S]ell or dispose of all that portion of the Rosebud Indian Reservation . . . except such portions thereof as have been . . . allotted to Indians," and the ceded lands "shall be disposed of . . . under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry," with proceeds to be "paid to the Rosebud Indians or expended on their account." Act of May 30, 1910, c. 260, 36 Stat. 448: "[S]ell and dispose of all that portion of the Rosebud Indian Reservation," provided that Indians with allotments in the ceded lands may "select allotments in lieu thereof on the diminished reservation," and the ceded land "shall be disposed of . . . under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry," with proceeds to be "deposited in the Treasury of the United States to the credit of said Indians [and that] shall be at all times subject to appropriation by Congress for their education, support, and civilization."	
Solem v. Bartlett, 465 U.S. 463 (1984)	"[S]ell and dispose of all that portion of the Cheyenne River and Standing Rock Indian reservations," and the ceded land "shall be disposed of . . . under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry," provided that Indians with allotments in the sold lands may "select allotments in lieu thereof an allotment anywhere within the respective reservations thus diminished," with proceeds to be "deposited in the Treasury of the United States to the credit of said Indians [and that] shall be expended for their benefit under the direction of the Secretary of the Interior." Act of May 29, 1908, ch. 218, 35 Stat. 460 *et seq*.	Reservation <u>not</u> diminished.

Hagen v. Utah, 510 U.S. 399 (1994)	Act of May 27, 1902, ch. 888, 32 Stat. 263: Allotments shall be made for the Indians of the Uintah and the White River tribes of Ute Indians, and thereafter "all the unallotted lands within said reservation shall be restored to the public domain," provided "[t]hat persons entering any of said land under the homestead law shall pay [$1.25] per acre," with proceeds to be "used for the benefit of said Indians." Act of March 3, 1905, ch. 1479, 33 Stat. 1069: "The time for opening [the Uintah Reservation] shall be extended to the first of September, [1905]," and certain unallotted lands "shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry," with the proceeds to be used "as provided in the [1902 Act]."	Reservation diminished.
South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998)	"The Yankton tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians" in exchange for a sum certain payment from the United States, and the ceded lands shall be "opened to settlement, and shall be subject to disposal under the homestead and town-site laws of the United States." Act of Aug. 15, 1894, 28 Stat. 286.	Reservation diminished.
Nebraska v. Parker, 136 S. Ct. 1072 (2016)	"[W]ith the consent of the Omaha tribe of Indians . . . the Secretary of the Interior . . . is authorized to cause to be surveyed, if necessary, and sold under such rules and regulations as he may prescribe," and "unallotted lands are open for settlement," with proceeds to be "placed to the credit of said Indians in the Treasury of the United States." Act of Aug. 7, 1882, 22 Stat. 341.	Reservation <u>not</u> diminished.

If one focuses solely on the express statutory text, the varying outcomes of these cases appear irreconcilable. To the extent *McGirt* marked a sea change in the Court's analysis of reservation disestablishment and diminishment claims, it is only because

McGirt righted the ship.

III. *McGirt* Corrects the Test for Treaty Rights Abrogation, Rejecting Consideration of Extratextual Factors.

In *McGirt* and *Sharp v. Murphy*, the Court evaluated whether Oklahoma had jurisdiction to prosecute two Indian defendants for major crimes committed on lands located within the boundaries of the Muscogee (Creek) Nation's 1866 reservation.[72] If the reservation had not been disestablished, the State lacked jurisdiction.[73]

The State of Oklahoma, the United States, and numerous others invited the Supreme Court to further lower the already indefensibly low bar for reservation disestablishment in evaluating whether Congress had disestablished the reservation the United States promised to the Muscogee (Creek) Nation in its 1866 treaty.

Oklahoma and the United States urged the Court to find congressional abrogation of the Muscogee (Creek) Nation's reservation not through any particular statutory text, but instead through a series of events that restricted tribal authority and assets. Oklahoma argued that disestablishment need not be achieved in one fell swoop of the legislative pen, but instead could be achieved by the federal government taking steps over a course of years to reduce the Muscogee (Creek) Nation's authority and assets.[74] In *Murphy*, Oklahoma's counsel asserted at oral argument, "we don't have to give you a date [for congressional abrogation]."[75] "Rome did not fall in a day."[76]

But it would be *Oklahoma* that toppled if the Court found that the Muscogee (Creek) reservation still existed, Oklahoma warned. Oklahoma argued that such a decision would "reincarnate Indian Territory," "cleaving the State in half" and "creat[ing] the largest Indian reservation in America today"—a "revolutionary result" that "would shock the 1.8 million residents of eastern Oklahoma who have universally understood that they reside on land regulated by state government, not by tribes."[77] On top of that, it "would plunge eastern Oklahoma into civil, criminal, and regulatory turmoil," "overturn 111 years of Oklahoma history," and "invite a tsunami of jurisdictional consequences."[78] Oklahoma emphasized that a finding that the reservation was still extant would "upset[] a century of settled expectations across half of Oklahoma, including the major metropolitan area around Tulsa," "drastically chang[ing]" the lives of eastern Oklahoma residents and causing "significant risk and uncertainty" regarding issues "ranging from taxation to construction permits."[79] For nearly a century, Oklahoma "asserted jurisdiction over the former Indian Territory" "unchallenged by the federal government or the Tribe."[80] Because "[t]he State generally lacks the authority to tax Indians in Indian country,"

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72. *McGirt*, 140 S. Ct. 2452; Sharp v. Murphy, 140 S. Ct. 2412 (2020).

73. *See McGirt*, 140 S. Ct. at 2459.

74. *See* Brief for Respondent, *McGirt*, 140 S. Ct. 2452 (No. 18-9526); Brief for the United States as *Amicus Curiae* Supporting Respondent, *McGirt*, 140 S. Ct. 2452 (No. 18-9526).

75. Transcript of Oral Argument at 6, *Sharp*, 140 S. Ct. 2412 (No. 17-1107).

76. *Id.*

77. Brief of Petitioner at 3, Sharp v. Murphy, 139 S. Ct. 626 (No. 17-1107).

78. *Id.* at 3–4.

79. *Id.* at 56.

80. Brief for Respondent at 40, *McGirt*, 140 S. Ct. 2412 (No. 18-9526).

"turning half the State into Indian country would decimate state and local budgets."[81]

Oklahoma did not go so far as to argue that the Court should modify the test from *Solem*; instead, it argued that *Solem* did not require any clear language from Congress in order to discern congressional intent to disestablish a reservation.[82]

But others felt that this case exposed the shortcomings of *Solem* and provided a strong basis for modifying the test for disestablishment and diminishment. Specifically, the concurring opinion in the Tenth Circuit's denial of *en banc* review in *Murphy v. Royal* (which would become *Murphy v. Sharp* at the Supreme Court) made the bold suggestion that the Court give even heavier weight to extratextual factors, including demographic change, in determining whether Congress disestablished a reservation:

> I am not without sympathy for Oklahoma's argument that Congress's series of actions here effectively constitute disestablishment, but the panel properly rejected that argument: *Solem* is clear that "[o]nce a block of land is set aside for an Indian Reservation and *no matter what happens to the title of individual plots within the area*, the entire block retains its reservation status until Congress explicitly indicates otherwise." 465 U.S. at 470, 104 S.Ct. 1161 (emphasis added); *see also Murphy*, 866 F.3d at 1219 (explaining that allotment alone cannot terminate a reservation under Supreme Court precedent).
>
> Supreme Court precedent thus requires that evidence of intent to disestablish be "unequivocal[ ]." *Nebraska v. Parker*, —— U.S. ——, 136 S.Ct. 1072, 1080–81, 194 L.Ed.2d 152 (2016). History, however, is not always well suited to provide the unequivocal evidence of disestablishment that *Solem* requires. . . . *Solem* itself recognized that "[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character . . . *de facto*, if not *de jure*, diminishment may have occurred." 465 U.S. at 471, 104 S.Ct. 1161. . . . This case may present the high-water mark of *de facto* disestablishment: the boundaries of the Creek Reservation outlined by the panel opinion encompass a substantial non-Indian population, including much of the city of Tulsa; and Oklahoma claims the decision will have dramatic consequences for taxation, regulation, and law enforcement. The panel faithfully applied Supreme Court precedent holding that such "demographic evidence [cannot] overcome the absence of statutory text disestablishing the Creek Reservation." *Murphy*, 866 F.3d at 1232. But this may be the rare case where the Supreme Court wishes to enhance Steps Two and Three of *Solem* if it can be persuaded that the square peg of *Solem* is ill suited for the round hole of Oklahoma statehood.[83]

The Supreme Court rejected these invitations to find disestablishment without a clear expression of congressional intent. Instead, the Court eschewed the latter two principles in *Solem*, aligning its reservation disestablishment test with the test for abrogation of other types of treaty rights.

In response to Oklahoma's assertion that the Court was required "to examine the laws passed by Congress at the first step, contemporary events at the second, and even later events and demographics at the third," the Court emphasized that, absent ambiguity, "the only 'step' proper for a court of law" is to "ascertain and follow the original meaning of the law before us."[84] Accordingly, a court may not "favor contemporaneous or later

81. *Id.* at 44.
82. Brief of Petitioner at 46–57, *Sharp*, 139 S. Ct. 626 (No. 17-1107).
83. Murphy v. Royal, 875 F.3d 896, 966–67 (10th Cir. 2017) (Tymkovich, J., concurring).
84. *McGirt*, 140 S. Ct. at 2468.

practices *instead of* the laws Congress passed."[85] "As *Solem* explained, '[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.'"[86]

As to the latter two *Solem* principles, the Court cautioned that "extratextual considerations hardly supply the blank check Oklahoma supposes."[87] Specifically, when statutory terms are clear, "[t]here is no need to consult extratextual sources," "[n]or may extratextual sources overcome those terms."[88] Extratextual sources may only be consulted to help resolve "ambiguity about a statute's original meaning."[89] Even then, not all extratextual sources are created equal. For example, a flood of white settlers onto Indian lands could suggest "that some white settlers in good faith thought the Creek lands no longer constituted a reservation," but it is just as likely that "some didn't care and others never paused to think about the question."[90] The muddy and conflicting history surrounding Indian country in Oklahoma "supplies us with little help in discerning the law's meaning and much potential for mischief."[91] "[T]he most authoritative evidence of the Creek's relationship to the land lies not in these scattered references; it lies in the treaties and statutes that promised the land to the Tribe in the first place."[92]

Were the Court to allow such extratextual evidence to disestablish a reservation absent a statute that required that result, it "would only serve to allow States and courts to finish work Congress has left undone, usurp the legislative function in the process, and treat Native American claims of statutory right as less valuable than others."[93] In fact, the Court stated, established law gives special meaning to Native American claims. Therefore, a disestablishment standard that would allow extratextual evidence to abrogate a statutory right cannot "be reconciled with our normal interpretive rules, let alone our rule that disestablishment may not be lightly inferred and treaty rights are to be construed in favor, not against, tribal rights."[94] And, allowing a state's continued practice of overstepping its authority in Indian country to destroy the treaty promise would "be the rule of the strong, not the rule of law."[95] "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."[96]

Finally, the Court held the expectations of the modern inhabitants of the subject land plays no role in discerning congressional intent. Therefore, Oklahoma's speculative fears regarding the disruption and administrative burdens that might be caused to its inhabitants as a result of honoring the treaty promise to the Muscogee (Creek) Nation could not serve

85. *Id.*
86. *Id.* (quoting *Solem*, 465 U.S. at 470).
87. *Id.* at 2469.
88. *Id*.
89. *McGirt*, 140 S. Ct. at 2469.
90. *Id.* at 2473.
91. *Id.* at 2474.
92. *Id.* at 2476.
93. *Id.* at 2470.
94. *McGirt*, 140 S. Ct. at 2470.
95. *Id.* at 2474.
96. *Id.*

as a basis to find disestablishment or to somehow evade the jurisdictional effect of a ruling in the Nation's favor. "In any event, the magnitude of a legal wrong is no reason to perpetuate it,"[97] and "[m]ore importantly, dire warnings are just that, and not a license for us to disregard the law."[98] If the law is really so harmful, it is the province of the legislature, not the courts, to change it.[99]

Thus, the Court reverted to its original bright-line standard for abrogation of a treaty right of any kind:

> 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.[100]

After *McGirt*, there are no longer two different standards for abrogation of tribal treaty rights. The result in *McGirt* is consistent with the Court's recent emphasis in *Herrera* that "numerous decisions" since 1896 firmly established that "Congress 'must clearly express' any intent to abrogate Indian treaty rights."[101]

V. CONCLUSION

The Supreme Court's decision in *McGirt v. Oklahoma* corrected the Court's unwarranted dual-track analysis of abrogation of treaty rights, bringing its previously erroneous standard for abrogation of a treaty right to a homeland in harmony with the relatively bright-line standard for abrogation of treaty usufructuary rights.

97. *Id.* at 2480.

98. *Id.* at 2481.

99. *McGirt*, 140 S. Ct. at 2481–82 ("Congress remains free to supplement its statutory directions about the lands in question at any time.").

100. *Id.* at 2482.

101. *Herrera*, 139 S. Ct. at 1696–97 (citing *Mille Lacs*, 526 U.S. at 202; United States v. Dion, 476 U.S. 734, 738–40 (1986); *Fishing Vessel*, 443 U.S. at 690; *Menominee Tribe*, 391 U.S. at 413).