
ESSAY

MCGIRT V. OKLAHOMA AND THE PAST, PRESENT, AND FUTURE OF RESERVATION BOUNDARIES

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“Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law.” So reads McGirt v. Oklahoma, the most important reservation boundary case in the history of the Supreme Court. But before McGirt, courts often rewarded unlawful acts with reservation diminishment. This Essay first places McGirt in the context of the Muscogee (Creek) Nation’s century-long fight to restore sovereign rights illegally denied after allotment, and the even longer fight by the Muscogee Nation and others to survive a trail of broken treaty promises. It then corrects the false assumptions about the past and present of reservation boundaries that led the Court to turn lawbreaking into law.

As to the past, I show that the allotment-era Congress knew that reservations did not depend on land tenure, and that its statutes distinguished between allotment acts that diminished reservations and those that did not. States, however, regularly broke the law, asserting jurisdiction in violation of federal Indian law rules. Before McGirt, the Court wrongly assumed that “[t]he notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century,” and so justified relying on state violations of tribal sovereignty as “evidence” of congressional intent.

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As to the present, I show that reservation status is not disruptive for non-Indian communities, and often benefits tribal and non-tribal citizens alike. In high-profile cases in Tacoma, Washington and Pender, Oklahoma, life in those communities began to improve at the same time reservation boundaries were affirmed. Throughout the country tribal governments contribute to the economies and social welfare of their surrounding communities. The Muscogee (Creek) Nation, whose sophisticated law enforcement, health care, governance, and economic development arms already partner with non-tribal governments throughout its territory, exemplifies the benefits that strengthening tribal self-governance can provide.

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INTRODUCTION

The federal government promised the Creek a reservation in perpetuity. Over time, Congress has diminished that reservation. It has sometimes restricted and other times expanded the Tribe's authority. But Congress has never withdrawn the promised reservation. As a result, many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would

be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.¹

So reads the penultimate paragraph of *McGirt v. Oklahoma*, the most important reservation boundary case in the history of the United States Supreme Court.² But the reality is that until *McGirt*, these arguments often succeeded. From the first moment reservations were “allotted”—divided among individual tribal citizens and opened for sale to non-Indians—states started acting as though they had complete authority, and tribes lacked all authority, over the land. The United States sometimes resisted, but often acquiesced or encouraged these “unlawful acts.” And although the Supreme Court consistently said that clear evidence of congressional intent was necessary to change reservation boundaries, it followed interpretive rules that accepted this official lawbreaking as evidence of what Congress intended.

Governments have rewarded vigorous law-breaking for so long for three reasons. First, because of the centuries-old assumption that tribal rights are less important than non-Indian interests and expectations. Second, because they misunderstood the legal history of allotment, Indian country, and state jurisdiction. And third, because they assumed that being within reservation boundaries would be terrible for the non-Indians there, so the “price of keeping [promises] has become too great.”³ As to the first reason, extensive scholarship, by myself and others, has examined the racist disregard of Indian interests, and Justice Gorsuch’s opinion alluded to the reality that non-Indian expectations are not the only ones that matter.⁴ This Essay, therefore, focuses on the second and third reasons, correcting the legal history of reservation boundaries, and showing why non-Indian communities will not suffer, and may even thrive, within reservations.

¹ 140 S. Ct. 2452, 2482 (2020).

² Scholars have already called the decision a “bombshell” and a potential “sea change” in federal Indian law. *See, e.g.*, Robert J. Miller & Torey Dolan, *The Indian Law Bombshell: McGirt v. Oklahoma*, 101 B.U. L. REV. (forthcoming Dec. 2021) (manuscript at 1); Ann E. Tweedy, *Has Federal Indian Law Finally Arrived at ‘The Far End of the Trail of Tears’?*, 37 GA. ST. L. REV. 739, 744-45 (2021).

³ *McGirt*, 140 S. Ct. at 2482.

⁴ *See, e.g.*, ROBERT A. WILLIAMS, *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005); Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591 (2009). Justice Gorsuch’s opinion implicitly critiqued this assumption, wryly responding to Oklahoma’s argument that existing precedent should not apply to it “because the affected population here is large and many of its residents will be surprised to find out they have been living in Indian country this whole time[.]” that “we imagine some members of the 1832 Creek Tribe would be just as surprised to find them there.” *McGirt*, 140 S. Ct. at 2479. For a more in-depth examination of non-Indian expectations, see Ann E. Tweedy, *Unjustifiable Expectations: Laying to Rest the Ghosts of Allotment-Era Settlers*, 36 SEATTLE U. L. REV. 129 (2012).

McGirt affirms that the Muscogee (Creek) Reservation⁵ still exists, more than a century since most of its land was allotted and sold, and Oklahoma began acting as though the reservation was no more. Because the statutes interpreted in *McGirt* also allotted the reservations of the other members of the Five Tribes (Cherokee, Chickasaw, Choctaw, Creek, and Seminole), most agree that those reservations, encompassing most of eastern Oklahoma, remain intact.⁶ The boundaries of “Indian country” are key to tribal self-governance, marking the line at which state jurisdiction over tribal citizens generally stops and tribal and federal authority begins.⁷ All land within an Indian reservation constitutes Indian country, regardless of who owns the land.⁸ In *McGirt*, for example, this means that the State of Oklahoma lacked jurisdiction to prosecute Creek citizen Jimcy McGirt for the crime he was convicted of in 1999. More broadly, this means that the Five Tribes will have authority to govern their citizens throughout their treaty-promised territories.

Part I places the decision in its historical and legal context. *McGirt* comes at the end of a long line of broken treaties and is only the latest in a century-long fight against post-allotment violations of Muscogee rights. It also corrects almost a half century of jurisprudence that suggested that, even though reservations cannot be diminished absent “clear” or “unequivocal” evidence of congressional intent, subsequent state exercises of jurisdiction, non-Indian expectations, and even demographics could substitute for statutory text or legislative history. As *McGirt* made clear, reliance on such factors is “at odds with the Constitution, which entrusts Congress with the authority to regulate commerce with Native Americans”⁹

Part II corrects the flawed history that contributed to this unconstitutional usurpation of congressional authority. Past jurisprudence relied on the mistaken belief that the idea of reservations encompassing lands not owned by tribal nations “was unfamiliar at the turn of the century,” so that “the surplus land Acts themselves seldom detail whether opened lands

⁵ This article alternates between the terms Muscogee, the term the people use for themselves, and the term Creek, that is often used in legal and historical materials. See Sarah Deer & Cecilia Knapp, *Muscogee Constitutional Jurisprudence: Vhaku Em Pvtaku (The Carpet Under the Law)*, 49 TULSA L. REV. 125, 125 n.2 (2013) (discussing terms).

⁶ See, e.g., *McGirt*, 140 S. Ct. at 2482 (Roberts, C.J., dissenting) (“[T]he Court’s reasoning portends that there are four more such reservations in Oklahoma. The rediscovered reservations encompass the entire eastern half of the State—19 million acres that are home to 1.8 million people, only 10%–15% of whom are Indians.”).

⁷ See *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 527 n.1 (1998) (“Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States.”).

⁸ 18 U.S.C. § 1151(a).

⁹ 140 S. Ct. at 2462.

retained reservation status.”¹⁰ But history shows that the allotment-era Congress was aware that “reservation” was a broader category than Indian country, one that conveyed jurisdiction regardless of land tenure; that allotment statutes drew clear distinctions between those that changed reservation boundaries and those that did not; and that state exercises of jurisdiction should have no role in the reservation boundary question because states frequently broke the law.

Part III shows why handwringing about non-Indians within reservation boundaries is misguided by presenting evidence that affirmance does not disrupt, and may even improve, life for both tribal and non-tribal citizens within reservation boundaries. Because of Supreme Court decisions narrowing tribal authority and expanding state authority over non-Indians on fee lands, affirming reservations boundaries has little impact on jurisdiction over non-Indians. But it does contribute to trends that benefit Indians and non-Indians alike. Across the United States, tribal governments are partnering with federal, state, and local governments to improve services for all people in their territories. They are powerful engines of economic development, numbering among the largest employers in many areas. By clarifying tribal territorial sovereignty, affirming reservation boundaries facilitates these trends in ways that serve everyone’s interests. *McGirt* not only holds the United States to its word and corrects a century of lawbreaking; it may also engender a renaissance for both tribal nations and eastern Oklahoma as a whole.

I. THE LONG TRAIL TO *MCGIRT*

McGirt v. Oklahoma opens with these words:

On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever. . . . Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.¹¹

In one sense, *McGirt v. Oklahoma* began with the conviction of a Muscogee citizen, Jimcy McGirt, for a 1999 crime. But in another, its roots lie at the beginning of U.S. Indian policy, and its culmination was the end of a long trail of broken promises. This section outlines that history, the reservation boundary jurisprudence that interpreted it, and how the McGirt decision altered that jurisprudence.

¹⁰ *Solem v. Bartlett*, 465 U.S. 463, 468 (1984).

¹¹ *McGirt*, 140 S. Ct. at 2459.

A. *A Trail of Broken Promises*

The Muscogee people call their forced removal from their expulsion from their Eastern homelands not the Trail of Tears, but the Road of Suffering, *Nene 'Stemerketv*.¹² Allotment began a new road of suffering, and *McGirt v. Oklahoma* was just the latest step of the long road to overcome illegal denial of their sovereignty and property that followed it. Although the history that led to *McGirt* is unique to the Muscogee, it parallels the history of broken promises suffered by indigenous peoples throughout the United States.

The earliest U.S. treaties with tribal peoples treated them as nations, drawing boundaries between tribal and U.S. authority, and specifying jurisdiction and allegiance between the sovereigns. A 1790 treaty between the United States and the Muscogee, for example, declared a “perpetual peace and friendship” between the nations, established a “boundary between the citizens of the United States and the Creek Nation” and “solemnly guarantee[d] to the Creek Nation, all their lands within the limits of the United States to the westward and southward of the boundary.”¹³ But the United States always assumed that tribes would ultimately disappear, and was not willing to honor treaty promises when tribal nations persisted in existing.

By the 1820s, the United States began trying to force all tribes to give up their eastern homelands and settle west of the Mississippi River. The Muscogee were one of many peoples swept up in what was called the “removal policy.”¹⁴ First, they lost their lands in Georgia through a treaty that the United States later declared “null and void” for its fraudulence.¹⁵ But the Muscogee resisted federal attempts to make them leave their Alabama lands, even though the state illegally asserted jurisdiction over tribal citizens, and they suffered from illegal squatters and a smallpox outbreak.¹⁶ To persuade the Muscogee to migrate voluntarily, an 1832 Treaty pledged U.S. assistance in removing intruders from their Alabama lands, but also promised that “[t]he Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians, nor shall any State or Territory ever have a right to pass laws for the government of such Indians”¹⁷ An 1833 Treaty built on these promises, “establish[ing] boundary lines which will secure a country and permanent home to the whole Creek Nation of Indians.”¹⁸ Although most

¹² Deer & Knapp, *supra* note 5, at 143-44.

¹³ A Treaty of Peace and Friendship, Creek Nation-U.S., arts. I, IV & V, Aug. 7, 1790, 7 Stat. 35.

¹⁴ ROBERT T. ANDERSON, BETHANY BERGER, SARAH KRAKOFF & PHILIP T. FRICKEY, *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 76 (3d ed. 2015).

¹⁵ Treaty of Washington, Creek Nation-U.S., art. I, Jan. 24, 1826, 7 Stat. 286.

¹⁶ CHRISTOPHER D. HAVEMAN, *RIVERS OF SAND: CREEK INDIAN EMIGRATION, RELOCATION, AND ETHNIC CLEANSING IN THE AMERICAN SOUTH* 82, 85, 92 (2016).

¹⁷ Treaty of Washington, Creek Nation-U.S., arts. V & XIV, Mar. 24, 1832, 7 Stat. 366.

¹⁸ Treaty of Fort Gibson, Creek Nation-U.S., preamble, Feb. 14, 1833, 7 Stat. 417, 418.

Muscogee still refused to leave their lands, settlers “commenced flocking into the country of the Indians” and many “were driven from their habitations and homes by these lawless people, and subjected to great suffering.”¹⁹ When some, starving and landless, fought back, the United States used this as a justification to drive the entire nation west by force.²⁰ Thousands, perhaps as many as forty percent of the relocated Creeks, died on the way or from disease soon after arriving.²¹

Like other tribal nations, the Muscogee people rebuilt in their new lands,²² but as with other tribal nations, the United States did not honor its treaty promises for long. Tribal leaders carried the embers of their last Alabama council fire on the long journey west and rekindled the fire by an oak tree in the village they named Talasi, later corrupted to Tulsa.²³ But almost immediately, the Muscogee were beset by the kinds of lawless white men, fraudulent merchants, and land speculators that had plagued them in the east.²⁴

In 1866, the Nation signed a new treaty ceding the western half of their territory to the United States, but pledging that the remainder would be “forever set apart as a home for said Creek Nation” and “guarantee[ing] them quiet possession of their country.”²⁵ The Muscogee people prospered on their reduced reservation. In the words of Chief Pleasant Porter,

In those days they always raised enough to eat, and that was all we wanted. We had little farms, and we raised patches of corn and potatoes, and poultry and pigs, horses and cattle, and a little of everything, and the country was prosperous. In fact in my early life I don't know that I ever knew of an Indian family that were paupers.²⁶

This prosperous time was not to last. As the Supreme Court declared in 1893, “longing eyes were turned by many upon this body of land . . . occupied only by Indians, and though the Territory was reserved by statute for the occupation of the Indians, there was great difficulty in restraining settlers from entering and occupying it,” despite numerous federal proclamations.²⁷ Or, as Chief Porter declared, despite all their efforts to keep the illegal

¹⁹ H.R. REP. NO. 31-37, at 25 (1851).

²⁰ HAVEMAN, *supra* note 16, at 184-86, 201.

²¹ Deer & Knapp, *supra* note 5, at 144 n.159 (discussing different estimates of deaths from relocation).

²² See ANGIE DEBO, *THE ROAD TO DISAPPEARANCE: A HISTORY OF THE CREEK INDIANS* 113-21 (1941) (discussing economic development and education).

²³ RANDY KREHBIEL, *TULSA, 1921: REPORTING A MASSACRE* (2019).

²⁴ HAVEMAN, *supra* note 16, at 285.

²⁵ Treaty Between the United States of America and the Creek Nation of Indians, Creek Nation-U.S., arts. I, III & IX, June 14, 1866, 14 Stat. 785.

²⁶ ANGIE DEBO, *AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES* 14 (1940).

²⁷ *Smith v. Townsend*, 148 U.S. 490, 495 (1893).

settlers out, “they would come back, and others would come, and we could not keep them out, so they would flow all over us.”²⁸

Despite their treaty guarantees, therefore, the Muscogee, like tribes across the nation, were swept up in the allotment policy. In the 1880s, Congress began dividing tribal lands among individual tribal citizens, allowing allotted land to be purchased, taxed, and seized after an initial period of trust status, and immediately selling the surplus to non-Indians.²⁹ Most reservation land in western Oklahoma, including those of the Osage, Kiowa, Comanche, Cheyenne, and Arapaho tribes, was allotted or sold to non-Indians by the end of the century.³⁰ Congress hesitated in allotting the Five Tribes’ reservations in eastern Oklahoma, because those tribes held their land in communal fee simple, which both sides believed afforded stronger protection against federal expropriation.³¹ But the United States was determined to secure non-Indian land ownership and join the Indian and Oklahoma Territories into a new state of Oklahoma.³²

In 1893, therefore, Congress created a commission (soon called the “Dawes Commission,” because it was headed by retired Senator Henry Dawes) to negotiate with the Five Tribes. The Commission was authorized to negotiate either “cession . . . to the United States” or “allotment . . . in severalty” of their lands.³³ After finding “unanimity among the people against the cession of any of their lands to the United States,” the Commission early on “abandoned all idea of purchasing any of it and determined to offer them an equal division of all their lands.”³⁴ When the tribes refused to consent even to allotment, Congress began to strip the tribes of sovereign authority,³⁵ extending federal judicial jurisdiction and U.S. and Arkansas law over all in the Indian Territory,³⁶ and abolishing the tribal courts and preventing enforcement of tribal laws in U.S. courts.³⁷ The tribes finally approved allotment agreements in 1901 and 1902, and allotment began in earnest. In

²⁸ DEBO, *supra* note 26, at 13.

²⁹ See Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 8 (1995).

³⁰ FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN CRISIS: CHRISTIAN REFORMERS AND THE INDIAN, 1865–1900, at 385–90 (1976).

³¹ Tom Holm, *Indian Lobbyists: Cherokee Opposition to the Allotment of Tribal Lands*, 5 AM. INDIAN Q. 115, 121–22 (1979); see also Dawes Act, § 8, ch. 119, 24 Stat. 388, 391 (1887) (exempting Five Tribes and Seneca Tribe, which also had fee simple title in its land, from the allotments prescribed by the Dawes Act).

³² *Harjo v. Kleppe*, 420 F. Supp. 1110, 1121–22 (D.D.C. 1978).

³³ Act of Mar. 3, 1893, ch. 209, Pub. L. No. 52–209, § 16, 27 Stat. 612, 645.

³⁴ HENRY L. DAWES, MEREDITH H. KIDD & ARCHIBALD S. MCKENNON, REPORT OF THE COMMISSION TO THE FIVE CIVILIZED TRIBES, S. MISC. DOC. NO. 53–24, at 7 (3d. Sess. 1894).

³⁵ See *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 978 (10th Cir. 1987) (discussing the progressive exclusion of tribal peoples from federal lands and courts).

³⁶ Act of June 7, 1897, Pub. L. No. 55–3, 30 Stat. 62, 83.

³⁷ Act of June 28, 1898, Pub. L. No. 55–517, §§ 26, 28, 30 Stat. 495, 504–05.

1906, the Five Tribes Act authorized non-Indian purchase of all lands not allotted,³⁸ and the Oklahoma Enabling Act was ratified later that year.³⁹

Allotment was a disaster for the Muscogee people. Historian Angie Debo wrote that allotment spurred “an orgy of plunder and exploitation probably unparalleled in American history.”⁴⁰ Even before the allotment agreements were signed, “a vast number of [land] companies sprang into existence,” many “frankly organized for systematic and wholesale exploitation of the Indian through evasion or defiance of the law.”⁴¹ Discoveries of oil, on the Creek Nation and elsewhere in Indian Territory, only added to the fever of speculation.⁴²

Congress added to the despoliation by removing protections for the allottees. Although the United States had agreed that allotments to the Five Tribes would remain immune from taxation, foreclosure, or sale for between five and twenty-five years,⁴³ Congress removed these restrictions for allottees with less than one-half Indian blood in 1908.⁴⁴ The same act gave state courts authority to appoint white “guardians” who could administer and even sell allotments of minors and those of more than one-half Indian blood.⁴⁵ Even when these guardians did not sell allotments outright, they charged exorbitant rates to their wards, sometimes as much as twenty to fifty percent of the value of the estate.⁴⁶ Speculators, meanwhile, resorted to fraud, kidnapping, rape, and even murder, to obtain allottees’ land.⁴⁷ When the 1908 statute was enacted, the Five Tribes possessed 15,800,000 acres of land; by 1935, they had lost all but 1,500,000 acres, almost ninety-five percent of their land.⁴⁸

Both the United States and the State of Oklahoma, moreover, immediately began illegally thwarting Muscogee governmental authority. Although Congress had earlier provided that the tribal government would

³⁸ Five Tribes Act, Pub. L. No. 59-129 § 16, 34 Stat. 137, 143 (1906).

³⁹ Act of June 16, 1906, Pub. L. No. 59-234, § 1, 34 Stat. 267, 267.

⁴⁰ DEBO, *supra* note 26, at 91.

⁴¹ *Id.* at 117.

⁴² *Id.* at 86-87.

⁴³ See Five Tribes Act § 19 (restricting lands owned by full-bloods for twenty-five years); Act of June 30, 1902, Pub. L. No. 57-200, § 16, 32 Stat. 500, 503 (restricting allotments for five years, and homesteads for twenty-one years).

⁴⁴ Act of May 27, 1908, Pub. L. No. 60-140, §§ 1, 4, 35 Stat. 312, 312-13.

⁴⁵ *Id.* §§ 2, 6, 9.

⁴⁶ *To Promote the General Welfare of the Indians of Oklahoma: Hearings on H.R. 6234 Before the H. Comm. on Indian Affs.*, 74th Cong. 198-99 (1935) [hereinafter *Hearings on H.R. 6234*] (statement of John Collier, Comm’r of Indian Affairs)

⁴⁷ *Id.* at 197 (describing the kidnapping and rape of a Creek minor to force her to relinquish her allotment, worth over \$315,000, for merely \$1,000); DEBO, *supra* note 26, at 181 (“[A] speculator who had obtained temporary control of large areas through legal or almost legal leases might now resort to forgery, kidnaping, or even murder to acquire permanent possession [of the land].”).

⁴⁸ *Hearings on H.R. 6234*, *supra* note 46, at 196.

not continue past March 4, 1906,⁴⁹ it reversed this position in the Five Tribes Act of 1906, providing that “the tribal existence and present tribal governments of the [Five Tribes] are hereby continued in full force and effect for all purposes authorized by law.”⁵⁰ Nevertheless, until losing in federal court in 1976, the Interior Department insisted that it had authority to appoint the principal chief of the Muscogee (Creek) Nation, and refused to recognize its elected tribal council.⁵¹ Even after that, the Department insisted the tribe could not establish a court system until the U.S. Court of Appeals held otherwise in 1988.⁵²

Oklahoma, meanwhile, immediately asserted jurisdiction over the tribe and its members regardless of land status. The 1906 Oklahoma Enabling Act made clear that Oklahoma statehood should not be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed.⁵³

Even where there is no reservation, restricted allotments are Indian country, and states have no jurisdiction over Indians there.⁵⁴ Nevertheless, the state insisted that it could regulate Creek governmental activities even on such land the Tenth Circuit decreed otherwise in 1987.⁵⁵ Until 1989, moreover, the state exercised criminal jurisdiction over tribal members on restricted tribal lands throughout Oklahoma with impunity,⁵⁶ and took several more

⁴⁹ Act of Mar. 1, 1901, ch. 676, § 46, 31 Stat. 861, 872 (“The tribal government of the Creek Nation shall not continue longer than March fourth, nineteen hundred and six, subject to such further legislation as Congress may deem proper.”).

⁵⁰ Five Tribes Act, Pub. L. No. 128, § 28, 34 Stat. 137, 148 (1906).

⁵¹ *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976) (suing in federal court to halt the practice of the Interior Department’s refusal to recognize, facilitate, or deal with a Creek national council as a coordinate branch of tribal government).

⁵² *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1446-47 (D.C. Cir. 1988) (holding that the Muscogee (Creek) Nation has the power to establish Tribal Courts with civil and criminal jurisdiction).

⁵³ Act of June 16, 1906, Pub. L. No. 234, § 1, 34 Stat. 267, 267-68; *see also* Indian Country, U.S.A., Inc. v. Oklahoma, 829 F.2d 967, 979 (10th Cir. 1987) (describing this proviso as “a general reservation of federal and tribal jurisdiction over ‘Indians, their lands, [and] property’”).

⁵⁴ 18 U.S.C. § 1151 (defining the term “Indian country”); *United States v. Pelican*, 232 U.S. 442, 449 (1914) (narrowing state jurisdiction in Indian country); *United States v. Ramsey*, 271 U.S. 467, 471-72 (1926) (holding that the murder of an Indian committed in Indian country is exclusively federal jurisdiction).

⁵⁵ *Indian Country*, 829 F.2d, at 967 (involving the state of Oklahoma’s attempts to regulate Indian tribe activity).

⁵⁶ *State v. Klindt*, 782 P.2d 401, 403-04 (Okla. Crim. App. 1989) (holding state lacked criminal jurisdiction over Indians on restricted allotments in western Oklahoma).

years to apply these decisions to the Five Tribes.⁵⁷ Finally, it took three U.S. Supreme Court losses in the 1990s for Oklahoma to start following federal Indian law regarding taxation of tribal citizens.⁵⁸ More recently, Oklahoma has had a more cooperative relationship with tribal nations, entering into hundreds of cooperative agreements to coordinate jurisdiction and services.⁵⁹ But this relationship came at the end of a long history of state insistence that federal Indian law hardly applied in the state at all.

McGirt is only the latest step in this long journey to recover Muscogee sovereignty. The path to the decision was circuitous. The case did not begin with Mr. McGirt, but with a federal habeas challenge by Dwayne Murphy, a Creek citizen who had been on Oklahoma's death row since 2000.⁶⁰ After exhausting his remedies in state court, Mr. Murphy filed a federal habeas petition, arguing his state conviction was illegal because his crime was committed on the Creek Reservation.⁶¹ In 2017, the U.S. Court of Appeals for the Tenth Circuit agreed, and the Supreme Court granted certiorari.⁶² The Court heard arguments in *Carpenter v. Murphy* in 2018,⁶³ but struggled to decide the case, first asking for supplemental briefing,⁶⁴ and then holding the case over for reargument the following term.⁶⁵

Before scheduling reargument in *Carpenter*, the Court granted certiorari in *McGirt*, a pro se state habeas petition raising the same question. Justice Gorsuch, who recused himself in *Carpenter*,⁶⁶ was able to participate in *McGirt*. The arguments were scheduled for April 21, 2020, but were

⁵⁷ See *Cravatt v. State*, 825 P.2d 277, 279 (Okla. Crim. App. 1992) (rejecting Oklahoma's argument that state courts lacked criminal jurisdiction over Five Tribes citizens on restricted allotments in eastern Oklahoma); *United States v. Sands*, 968 F.2d 1058, 1061-63 (10th Cir. 1992) (rejecting argument of the United States that it lacked criminal jurisdiction over Indian country in eastern Oklahoma).

⁵⁸ *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995) (holding that Oklahoma could not tax fuel sold by the Chickasaw Nation in Indian country but could impose an income tax on those who worked for the tribe but resided outside Indian country); *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993) (holding that Oklahoma could not impose income taxes or motor vehicle taxes on tribal members who live in Indian Country); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991) (holding that state could not tax sales of goods to tribe members but could collect taxes on sales to nonmembers).

⁵⁹ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2481 (2020).

⁶⁰ See *Murphy v. State*, 2002 OK CR 24, ¶ 1 & n.1, ¶¶63-64, 47 P.3d 876, 879 & n.1, 888 (affirming defendant's death sentence).

⁶¹ *Murphy v. Royal*, 875 F.3d 896, 910-11 (10th Cir. 2017).

⁶² *Royal v. Murphy*, 138 S. Ct. 2026 (2018).

⁶³ Transcript of Oral Argument, *Carpenter v. Murphy*, *decided sub nom.* *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (No. 17-1107).

⁶⁴ *Carpenter v. Murphy*, 139 S. Ct. 626 (2018).

⁶⁵ Ronald Mann, *Justices Call for Reargument in Dispute About Oklahoma Prosecutions of Native Americans*, SCOTUSBLOG (July 2, 2019, 12:08 PM), <https://www.scotusblog.com/2019/07/justices-call-for-reargument-in-dispute-about-oklahoma-prosecutions-of-native-americans> [<https://perma.cc/9JT4-YNU5>].

⁶⁶ *Id.* The recusal was likely because *Carpenter* reviewed a decision from the U.S. Court of Appeals for the Tenth Circuit, on which Justice Gorsuch sat until recently.

postponed due to COVID-19, and took place remotely on May 11.⁶⁷ Finally, on July 9—two weeks after the official end of the Supreme Court term, and over a century since the end of allotment—Justice Gorsuch issued a five-four opinion affirming that the Creek Reservation still exists.

B. *A Trail of Flawed Jurisprudence*

McGirt may be the Supreme Court’s biggest reservation boundary decision, but it is not its first. The Court began struggling with the jurisdictional impact of allotment as early as 1894.⁶⁸ In 1948, Congress codified this jurisprudence, providing that Indian country included “all land within the limits of any Indian reservation” including fee land and rights-of-way.⁶⁹ The modern Court has decided eight cases on the reservation boundary question since 1962, holding that boundaries were unchanged in four cases,⁷⁰ and were diminished or disestablished in four more.⁷¹ These decisions all agree that sale to non-Indians alone does not remove a parcel from the reservation, and that there must be “clear” or “unequivocal” evidence of congressional intent to diminish or disestablish its boundaries.⁷² But in applying this test, the Supreme Court has relied on flawed history and recited

⁶⁷ Proceedings and Orders, *McGirt v. Oklahoma*, No. 18-9526, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-9526.html> [<https://perma.cc/FJ7W-E4NJ>]; *Calendar of Events: May 2020*, SCOTUSBLOG, <https://www.scotusblog.com/events/2020-05> [<https://perma.cc/9HYK-EWAY>].

⁶⁸ *United States v. Thomas*, 151 U.S. 577 (1894) (upholding federal jurisdiction over a Chippewa citizen for a murder committed on school lands within a Reservation).

⁶⁹ 18 U.S.C. § 1151(a).

⁷⁰ See *Nebraska v. Parker*, 577 U.S. 481 (2016) (holding that an 1882 Act did not diminish the Omaha Indian Reservation); *Solem v. Bartlett*, 465 U.S. 463 (1984) (holding that the 1906 Cheyenne River Act did not diminish the Cheyenne River Sioux reservation); *Mattz v. Arnett*, 412 U.S. 481 (1973) (holding that the Klamath River Reservation was not terminated by the Act of June 17, 1892); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351 (1962) (holding that the Colville Indian Reservation was not diminished by the Act of March 22, 1906).

⁷¹ See *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (holding that unallotted reservation lands that were opened for settlement by non-Indians were ceded to the United States); *Hagen v. Utah*, 510 U.S. 399 (1994) (holding that the Uintah Reservation was diminished by Congress when the land was opened to non-Indians); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (holding that the language and legislative history of the Acts of 1904, 1907, and 1910 demonstrated a congressional intent to diminish the boundaries of the reservations); *DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425 (1975) (holding that the 1891 Act diminished Indian tribe land).

⁷² See *Parker*, 577 U.S. at 487-88 (“[O]nly Congress can divest a reservation of land . . . , and its intent to do so must be clear.”) (citing *Solem*, 465 U.S. at 470) (internal quotations omitted); *Yankton Sioux Tribe*, 522 U.S. at 343 (holding that only Congress can alter the terms of an Indian treaty by diminishing a reservation but its intent to do so must be “clear and plain”); *Solem*, 465 U.S. at 470 (requiring Congress to provide a clear intent to diminish an Indian reservation); *DeCoteau*, 420 U.S. at 444 (stating congressional intent must be clear); *Mattz*, 412 U.S. at 505 (“A congressional determination to terminate must be expressed on the fact of the Act or be clear from the surrounding circumstances and legislative history.”).

“evidence” that has nothing whatsoever to do with congressional intent. This Section quickly outlines this jurisprudence and discusses why, until recently, the Court strayed so far from accepted rules of statutory interpretation.

Tribal interests won the first two reservation boundary cases, but lost the next two. In *Seymour v. Superintendent* (concerning the Colville Reservation) and *Mattz v. Arnett* (concerning the Klamath Reservation), unanimous Courts refused to find diminishment from statutes allowing unallotted lands to be sold to non-Indians, with the proceeds going to the tribes.⁷³ But in *DeCoteau v. District County Court for Tenth Judicial District*, the Court held that the Sisseton-Wahpeton Sioux reservation was diminished by a statute that ratified an agreement by the tribe to “cede, sell, relinquish, and convey to the United States all the unallotted land within the reservation” after completing allotments, in exchange for a payment of \$2.2 million.⁷⁴ A dissent by Justice Douglas, with Justices Brennan and Marshall joining, noted that the same act included language that disestablished other reservations in far more absolute terms,⁷⁵ and that the “tragedy” of the error was compounded because most of the tribe lived in the open area and the tribe was the major provider of governmental services there.⁷⁶

Justice Rehnquist’s 1977 opinion in *Rosebud Sioux Tribe v. Kneip*⁷⁷ was far more tragic for the course of the law.⁷⁸ In a 1901 agreement, the tribe had agreed to “cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted,” in exchange for \$1.04 million.⁷⁹ The agreement was never ratified because Congress balked at paying this sum, and the tribe refused to consent to sell the land without a sum certain.⁸⁰ Nevertheless, a 1904 act declared that it was ratifying the 1901 agreement, and that tribe did “cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted,” and the proceeds from any sales

⁷³ *Mattz*, 412 U.S. at 504-06; *Seymour*, 368 U.S. at 354-57.

⁷⁴ *DeCoteau*, 420 U.S. at 439 n.22, 441.

⁷⁵ *Id.* at 463 (Douglas, J., dissenting) (“Congress in the very Act that opened the instant reservation opened several other reservations also. But as respects them it used different language.”).

⁷⁶ *Id.* at 464 (“The dimensions of the tragedy inflicted by today’s decision are made apparent by the facts pertaining to the management of this reservation.”).

⁷⁷ 430 U.S. 584 (1977).

⁷⁸ See Robert Laurence, *The Unseemly Nature of Reservation Diminishment by Judicial, as Opposed to Legislative, Fiat and the Ironic Role of the Indian Civil Rights Act in Limiting Both*, 71 N.D. L. REV. 393, 400 (1995) (discussing the impact of *Rosebud*).

⁷⁹ *Rosebud*, 430 U.S. at 591 n.8.

⁸⁰ *Id.* at 591, 592-94 (noting that the government refused to pay outright, and the majority of Indians refused to consent to a different form of payment).

would go to the tribe.⁸¹ The Court found the statute merely implemented the agreement, which everyone agreed would have diminished the reservation.⁸² It also held that later statutes, in 1907 and 1910, also diminished the reservation, even though these acts made no reference to the 1901 agreement, and only authorized sales as in *Mattz* and *Seymour*.⁸³

Rosebud did three things that diverted the Court from focusing on clear congressional intent and toward what Philip Frickey called “the common law of colonialism.”⁸⁴ First, it reduced the importance of statutory text, by holding that even though the tribe had not agreed to cede the land, “cession” language in the 1904 act indicated diminishment, although the Court agreed that “[a]s a matter of strict English usage, petitioner is undoubtedly correct: ‘cession’ refers to a voluntary surrender of territory or jurisdiction.”⁸⁵ Second, it allowed this agreement to diminish, formed at one time and never implemented, to control the effect of 1907 and 1910 statutes that did not refer to the agreement.⁸⁶ And finally, the Court relied heavily on state exercise of jurisdiction of the territory to affirm its finding:

[T]he single most salient fact is the unquestioned actual assumption of state jurisdiction over the unallotted lands 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.⁸⁷

Still, *Rosebud* referenced non-Indian expectations only to buttress what it had already concluded from the statutory text.

It took *Solem v. Bartlett*,⁸⁸ a tribal win, to elevate *Rosebud*’s offhand reference to non-Indian expectations into an interpretive principle. The 1908 statute opening part of the Cheyenne River Sioux Reservation to non-Indian purchase followed the piecemeal sale/proceeds to the tribe pattern of the *Seymour* and *Mattz* wins, and lacked the absolute cession / lump sum / tribal

⁸¹ Act of Apr. 23, 1904, Pub. L. No. 58-148, art. I, 33 Stat. 254, 254; 430 U.S. at 597.

⁸² *Rosebud*, 430 U.S. at 597-98.

⁸³ *Id.* at 605-06 (construing Act of Mar. 2, 1907, Pub. L. No. 59-195, 34 Stat. 1230 and Act of May 27, 1910, Pub. L. No. 61-193, 36 Stat. 448).

⁸⁴ See generally Philip Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1 (1999) (discussing the evolution of the Supreme Court’s tribal sovereignty jurisprudence).

⁸⁵ *Rosebud*, 430 U.S. at 597.

⁸⁶ *Id.* at 605-06.

⁸⁷ *Id.* at 603-05.

⁸⁸ *Solem v. Bartlett*, 465 U.S. 463 (1984).

agreement features of the *DeCoteau* and *Rosebud* losses.⁸⁹ After a brilliant argument by Lumbee attorney Arlinda Locklear, the success of the tribal argument seemed assured.⁹⁰ But Justice Marshall's majority opinion did not rely on the statute and its history alone. Rather, it declared:

On a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred.⁹¹

This “subsequent demographic history” provided an “additional clue” as to congressional intent, and avoided “serious[] burdens” on state and local governments, or checkerboard jurisdiction for tribal governments.⁹² Although the demographics favored the Cheyenne River Sioux Tribe in *Solem*, they weighed against tribes in subsequent decisions.⁹³

Why would the Court insert this poison pill into an opinion that could have been resolved on statutory language alone? Neither the petitioner nor the respondent proposed such a test, emphasizing instead statutory text, legislative history, and official treatment of the area. The Cheyenne River Sioux Tribe's brief mentioned that the disputed area included the seat of the tribal government, that the population was mostly Indian, and that most of the tribal population lived there.⁹⁴ But it did so only to illustrate its own interest in the dispute, and the potential negative consequences of holding the reservation diminished.

Only the U.S. Solicitor General, in a brief whose language and arguments clearly influenced the opinion, advocated for the fatal demographics factor. The solicitor's brief asserted that “[i]n cases where the opened area of a Reservation was entirely—or almost entirely—sold off to non-Indian settlers . . . it may well be right to treat the Reservation as diminished

⁸⁹ *Id.* at 473.

⁹⁰ Videoconference Interview with Professor Howell Jackson, Clerk for J. Thurgood Marshall (July 24, 2020).

⁹¹ *Solem*, 465 U.S. at 471.

⁹² *Id.* at 471-72, 471 n.12.

⁹³ See *Hagen v. Utah*, 510 U.S. 399, 421 (1994) (“Th[e] ‘jurisdictional history,’ as well as the [current demographics] demonstrate[] a practical acknowledgment that the Reservation was diminished; a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area.”); *Osage Nation v. Irby*, 597 F.3d 1117, 1127 (10th Cir. 2010) (stating that the “dramatic shift” in population of Osage County supported the finding that Congress had disestablished the Osage reservation); Laurence, *supra* note 78, at 403 (arguing that demographics can explain the Court's willingness or reluctance to find diminishment).

⁹⁴ Brief for Cheyenne River Sioux Tribe et al. as Amici Curiae Supporting Respondent at 2, *Solem*, 465 U.S. 481 (No. 82-1253).

today.”⁹⁵ Recognizing that all allotment acts resulted in extensive sales to non-Indians, the brief declared “[i]t is only when the Indian character of former tribal lands is wholly destroyed that it seems justifiable to sever the area from the Reservation.”⁹⁶

This test had no support from statutory text or legislative history, and was not discussed in oral argument, but clearly influenced the *Solem* opinion. *Solem* called the “[r]esort to subsequent demographic history . . . an unorthodox and potentially unreliable method of statutory interpretation,” but declared that because “various factors kept Congress from focusing on the diminishment issue . . . the technique is a necessary expedient.”⁹⁷ The opinion immediately qualified the significance of such evidence, stating that “[w]hen both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound . . . to rule that . . . the old reservation boundaries survived the opening.”⁹⁸ Nevertheless, two subsequent Supreme Court cases relied on this factor to confirm findings of diminishment from ambiguous language,⁹⁹ as did several lower court cases.¹⁰⁰

The negative impact of the demographics–character factor may have been unintentional. Solicitor General Rex Lee was a key figure in the Reagan administration’s efforts to bring a conservative ideology to judicial decisions, and greatly raised the policymaking role of the Solicitor General’s office.¹⁰¹ But on Indian law issues, his office appears to have generally intervened on the side of tribal sovereignty and against state jurisdiction,¹⁰² as it did in

⁹⁵ Brief for United States as Amicus Curiae Supporting Respondent at 20, *Solem*, 465 U.S. 481 (No. 82-1253) [hereinafter Amicus Brief for U.S., *Solem v. Bartlett*].

⁹⁶ *Id.* at 21.

⁹⁷ 465 U.S. at 472 n.13.

⁹⁸ *Id.* at 472.

⁹⁹ See *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 356 (1998) (relying on the fact that “fewer than 10 percent of the 1858 reservation lands are in Indian hands, [and] non-Indians constitute over two-thirds of the population” to support a finding of diminishment); *Hagen v. Utah*, 510 U.S. 399, 404-07, 420-21 (1994) (relying on evidence that the population of the area is approximately eighty-five percent non-Indian to support a finding of diminishment).

¹⁰⁰ See *Osage Nation v. Irby*, 597 F.3d 1117, 1126-27 (10th Cir. 2010) (relying on this factor in part to find diminishment despite lack of statutory text); *Oneida Nation v. Village of Hobart*, 371 F. Supp. 3d 500, 519-20 (E.D. Wis. 2019), *rev’d* 968 F.3d 664 (7th Cir. 2020) (relying on this factor to hold that when lands passed into fee, the Oneida reservation was diminished); *Yellowbear v. State*, 174 P.3d 1270, 1282 (Wyo. 2008) (relying in part on demographics and Indian character to find the Wind River Reservation diminished).

¹⁰¹ REBECCA MAE SALOKA, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 49-52 (1992).

¹⁰² See Brief for the United States as Amicus Curiae Supporting Respondents, *Nat’l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985) (No. 84-320), 1985 WL 670183 at *8-20 (advocating for tribal adjudicatory jurisdiction); Brief for the United States as Amicus Curiae Supporting Respondents, *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985) (No. 84-68), 1984 WL 565790 at *6-28 (advocating for tribal taxing jurisdiction); Brief for the United States as Amicus Curiae,

Solem. Justice Marshall, who wrote the opinion, has one of the most consistently pro-tribal records on the modern Court,¹⁰³ and indeed wrote a searing dissent in *Rosebud*.¹⁰⁴

The modern impact factor was likely posited partly to distinguish *Rosebud*, although the text of the operative statutes at issue should have been sufficient to do that. It was also likely an effort to placate a growing number of justices who voted consistently against tribal interests when they clashed with state interests.¹⁰⁵ Indeed, despite the unanimity of the final opinion, Chief Justice Burger and Justice O'Connor thought it was a close call in conference, and Justice Rehnquist would have voted for diminishment.¹⁰⁶ But whatever the goal, the elevation of demographics, subsequent treatment, and general legislative history over statutory text contributed to an emerging Indian law jurisprudence allowing the Supreme Court, rather than Congress, to decide the scope of tribal sovereignty.¹⁰⁷

The Supreme Court decisively undermined the demographics and subsequent treatment factor in 2016.¹⁰⁸ *Nebraska v. Parker* concerned whether an 1882 statute opening part of the Omaha Reservation to non-Indian purchase diminished the reservation.¹⁰⁹ Less than two percent of the population in the opened area was Indian, no allotments remained in Indian ownership, and the tribe had exerted little governmental presence there until recently.¹¹⁰ But the statute took the form seen in *Mattz*, *Solem*, and *Seymour*, and textualism had become the watchword of the conservative members of

Ramah-Navajo Sch. Bd. v. N.M. Bureau of Revenue, 458 U.S. 832 (1982) (No. 80-2162), 1982 WL 608765 at *17-24 (advocating against state taxing jurisdiction); Brief for the United States as Amicus Curiae Supporting Respondent, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (No. 82-331), 1983 WL 961678 at *13-21 (advocating against state jurisdiction over non-Indian hunting and fishing); Brief for the United States as Amicus Curiae in Support of the Respondent, Montana v. Blackfeet Tribe, 471 U.S. 759 (1985) (No. 83-2161), 1984 WL 566090 at *6-29 (arguing against state taxing jurisdiction); Brief for the United States as Amicus Curiae, Cnty. of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (Nos. 83-1065, 83-1240), 1984 WL 566161, at *7-41 (arguing in favor of tribal land claim).

¹⁰³ See Grant Christensen, *Judging Indian Law: What Factors Influence Individual Justice's Votes on Indian Law in the Modern Era*, 43 U. TOL. L. REV. 267, 292 tbl.I (2012) (showing Justice Marshall with 65 votes, or 74.71% of all votes, in favor of Indian interests).

¹⁰⁴ *Rosebud Sioux Tribe v. Kniep*, 430 U.S. 584, 615-33 (1977) (Marshall, J. dissenting).

¹⁰⁵ See also Laurence, *supra* note 78, at 403-04 (identifying non-Indian presence as an important factor for a growing segment of the Court).

¹⁰⁶ Legal Papers and Conference Notes of Justice Harry Blackmun, *Solem v. Bartlett*, 465 U.S. 481 (1984) (No. 82-1253) (available at Library of Congress).

¹⁰⁷ See Laurence, *supra* note 78, at 394 (describing diminishment cases as part of a "pernicious method of diminishment of Indian reservations under federal common law, begun in the notorious *Oliphant v. Suquamish Indian Tribe*" (citing 435 U.S. 191 (1978))).

¹⁰⁸ *Nebraska v. Parker*, 577 U.S. 481 (2016).

¹⁰⁹ *Id.* at 483-84.

¹¹⁰ *Id.* at 486-87.

the Court.¹¹¹ In a rare unanimous pro-tribal opinion written by Justice Thomas (usually a stalwart against the tribal position),¹¹² the Court ruled that the reservation remained intact.¹¹³

Parker reaffirmed that “‘only Congress can divest a reservation of its land and diminish its boundaries,’ and its intent to do so must be clear.”¹¹⁴ “As with any other question of statutory interpretation,” moreover, statutory language was “of course” the “most probative evidence.”¹¹⁵ Without a “clear textual signal” supporting reservation diminishment, the surrounding history must “*unequivocally* reveal[] a widely held, contemporaneous understanding that the affected reservation would shrink.”¹¹⁶ Although the Court declared that the state’s evidence about demographics and non-Indian “justifiable expectations” was “compelling,” it held it did not give the Court license to rewrite congressional history.¹¹⁷

McGirt challenged the Court’s commitment to both textualism and its own precedent in *Parker*. Ruling for the tribe wouldn’t affect a few thousand non-Indians in small-town Nebraska as in *Parker*, but hundreds of thousands in Tulsa and its surroundings.¹¹⁸ The Chief Justice, along with Justices Thomas, Alito, and Kavanaugh, dissented, finding ways to distinguish *Parker* and resurrect reliance on demographics.¹¹⁹ But Justice Gorsuch, writing for himself and Justices Ginsburg, Breyer, Kagan, and Sotomayor, gave an unqualified victory to the tribe.¹²⁰

Although the opinion broke little new legal ground, it is one of the most eloquent paeans to tribal rights in the history of the Court. And it resoundingly rejected *Solem*’s “step three,” that demographics or subsequent treatment of the area could provide evidence of congressional intent.¹²¹ In part, this was simply an application of textualism to federal Indian affairs: “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

¹¹¹ *Id.* at 487-88.

¹¹² Christensen, *supra* note 103, at 292 tbl.I (stating that Justice Thomas has ruled in favor of tribal interests only twelve percent of the time).

¹¹³ *Parker*, 577 U.S. at 494.

¹¹⁴ *Id.* at 487-88 (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)).

¹¹⁵ *Id.* at 488 (quoting *Solem*, 465 U.S. at 470).

¹¹⁶ *Id.* at 490 (emphasis in original) (quoting *Solem*, 465 U.S. at 471) (internal quotation marks omitted).

¹¹⁷ *Id.* at 494.

¹¹⁸ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020) (Roberts, C.J., dissenting).

¹¹⁹ *Id.* at 2482-89.

¹²⁰ *Id.* at 2459 (majority opinion).

¹²¹ *Id.* at 2468-69. For a discussion of *McGirt*’s impact on the *Solem* test, see also Miller & Dolan, *supra* note 2.

us.”¹²² But it also suggested that it was not just improper but unjust for courts to undermine tribal rights when they became inconvenient:

Under our Constitution, States have no authority to reduce federal reservations lying within their borders. . . . [This would] leave tribal rights in the hands of the very neighbors who might be least inclined to respect them.

Likewise, courts have no proper role in the adjustment of reservation borders. . . . Congress sometimes might wish an inconvenient reservation would simply disappear. . . . But . . . saving the political branches the embarrassment of disestablishing a reservation is not one of our constitutionally assigned prerogatives.¹²³

The Court recognized that Congress could break—and had broken—its treaty promises to the Muscogee Nation. But where it had not clearly broken the promise of reservation boundaries, Justice Gorsuch wrote, “we hold the government to its word.”¹²⁴

II. UNDERSTANDING RESERVATION BOUNDARIES PAST

Although *McGirt* holds that demographics and subsequent treatment may not, without clear statutory text, result in diminishment, one must understand congressional history to determine congressional intent. Past decisions include several historical mistakes that could plague future boundary cases. This Part seeks to correct those mistakes. First, when Congress allotted reservations, it knew that reservation boundaries did not depend on tribal ownership and did not believe individual sales would change jurisdiction. Second, because of this, when Congress wanted to change reservation boundaries it included statutory language making this intent clear. And, finally, state and local exercises of jurisdiction provide no evidence of congressional intent, because such governments routinely broke the law.

A. Congress Knew Reservation Boundaries Did Not Depend on Tribal Ownership

Much of the Court’s reference to evidence that should have nothing to do with congressional intent stems from the misconception that “[t]he notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century.”¹²⁵ This assertion, made in *Solem*, appears to come from that same influential Solicitor General

¹²² *McGirt*, 140 S. Ct. at 2468.

¹²³ *Id.* at 2462.

¹²⁴ *Id.* at 2459.

¹²⁵ *Solem v. Bartlett*, 465 U.S. 463, 468 (1984).

brief.¹²⁶ But both assertions incorrectly rely on decisions regarding “Indian country,” conflating Indian country with reservation status.¹²⁷ This conflation is understandable in the modern era, when “Indian country” is a statutory catch-all including all reservations, as well as allotments and dependent Indian communities.¹²⁸ But during the allotment period, Indian country and reservation meant different things, and reservation was the broader category. While courts had limited Indian country to tribally owned lands, “reservation” included lands that tribes did not own. When Congress enacted the Indian Country Act in 1948, it codified this understanding; it did not create it.

From the first days of the United States, jurisdiction was different in Indian country, but statutes did not make clear whether this was primarily a governmental and territorial term or one that turned on land ownership. The 1790 Trade and Intercourse Act, for example, referred to “any town, settlement or territory belonging to any nation or tribe of Indians,” as the place where special criminal jurisdiction applied.¹²⁹ The terms “town” and “territory,” seem to refer to a governmental category, while “settlement” and “belonging to” might be read to refer to land ownership. The 1802 version of the Act emphasized the governmental categorization, referring repeatedly to the “boundary lines, established by treaty between the United States and Indian tribes,”¹³⁰ More ambiguously, however, one section of the Act refers to lands “belonging, or secured by treaty with the United States.”¹³¹ The 1816 Act seemed to refer to both government-drawn and property-based boundary lines as alternative bases for jurisdiction, referring to “any country which is allotted or secured by treaty to either of the Indian tribes within the territorial limits of the United States, or to which the Indian title has not been extinguished.”¹³²

It was not until the 1830s, when the United States was forcing most tribes west, that Congress attempted a comprehensive definition. The 1834 Trade and Intercourse Act declared:

That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within

¹²⁶ Amicus Brief for U.S., *Solem v. Bartlett*, *supra* note 95, at 12 n.12.

¹²⁷ *Id.* (citing *Bates v. Clark*, 95 U.S. 204 (1877), and *Dick v. United States*, 208 U.S. 340 (1908)); *Solem*, 465 U.S. at 468 (citing *Bates*).

¹²⁸ 18 U.S.C. § 1151; *see also* *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 526-27 (1998) (discussing the three categories).

¹²⁹ Act of July 22, 1790, ch. 33, § 5, 1 Stat. 137, 138.

¹³⁰ Act of Mar. 30, 1802, ch. 13, § 1, 2 Stat. 139, 139-140.

¹³¹ *Id.* § 4, 2 Stat. at 141.

¹³² Act of Apr. 29, 1816, ch. 165, § 3, 3 Stat. 332, 333.

any state to which Indian title has not been extinguished, [shall] be taken and deemed to be the Indian country.¹³³

As in 1816, the text seemed to define two different categories of Indian country, a broad one west of the Mississippi relying on governmental boundary lines, and a narrower one east of the Mississippi relying on land tenure. This was consistent with promises to tribes that if they moved west, their territory would never be claimed by settlers and states. But within a few decades, tribes were herded onto ever smaller territories, and states and settlers had spread across the west. In 1877, the Supreme Court held in *Bates v. Clark* that even in the west, in order to be Indian country, land must be “not within any State,” and must be a place where “Indian title has not been extinguished.”¹³⁴ The United States, therefore, could not enforce its prohibition on selling liquor to Indians in the Dakota Territory.¹³⁵

But by this time, a new jurisdictional category had begun to emerge: the reservation. Until the 1850s, “reservation” was not an Indian law term of art; it was any land the United States had set apart for any purpose, public or private.¹³⁶ But when policymakers realized that settlers were overrunning tribes on their western lands as they had in the east, they proposed a new policy.¹³⁷ Tribes would be confined in smaller territories, too small to support them by hunting, where they could be forced to farm or starve.¹³⁸ Within these “reservations,” the United States pledged, tribes could find a “permanent home” with “well-defined boundaries,”¹³⁹ where “guarantees of their treaty grants” would be “sacred and binding.”¹⁴⁰ In these smaller territories, the federal government would have authority to coerce and cajole the residents toward assimilation.

Few of these reservations were Indian country as the Supreme Court defined it in *Bates*. Most tribes had been forced from their original homelands, so reservations were rarely places where original “Indian title

¹³³ Act of June 30, 1834, ch. 161, § 1, 4 Stat. 729, 729.

¹³⁴ 95 U.S. 204, 207-09 (1877).

¹³⁵ *Id.* at 209.

¹³⁶ See *Reservation*, BLACK'S LAW DICTIONARY (2d ed. 1910) (“[A] reservation is a tract of land . . . which is by public authority withdrawn from sale or settlement, and appropriated to specific public uses; such as parks, military posts, Indian lands, etc.”). In this period, public authorities used the term reservation to describe everything from naval timber reserves to individual veterans' lands and public salt licks. See, e.g., Act of Mar. 1, 1817, ch. 22, 3 Stat. 347, 347 (granting the Secretary of the Navy power to take control of any land with naval timber); *Edwards' Lessee v. Darby*, 25 U.S. 206, 211 (1827) (upholding a statute concerning veterans' lands that reserved salt licks for public use).

¹³⁷ See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.03[6][a] (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK] (discussing the history of the reservation system).

¹³⁸ 1850 OFF. OF INDIAN AFFS. ANN. REP. 3-4 (discussing the reservation policy).

¹³⁹ *Id.* at 4.

¹⁴⁰ OFF. OF INDIAN AFFS. ANN. REP. 18 (1855).

ha[d] not been extinguished.”¹⁴¹ Treaties after 1834, moreover, often included provisions that individual Indians could acquire individual ownership of sections of land within the reservation, ending tribal title to the land.¹⁴² In the same period, many territories gained statehood, so that most reservations were now within state boundaries. If the federal government did not have jurisdiction over these lands—and thus could not, for example, enforce liquor, trading, and criminal rules—key aspects of the reservation plan for assimilation would be thwarted.¹⁴³

After *Bates*, Congress quickly retreated from the 1834 definition of Indian country. In 1878, Congress published the first comprehensive publication of federal statutes.¹⁴⁴ The compilation included most existing Indian affairs statutes.¹⁴⁵ But it excluded the Indian country statute,¹⁴⁶ and the revision expressly declared that all earlier acts and parts of acts not contained in the revision “are hereby repealed.”¹⁴⁷ It is hard to avoid the impression that the omission of the Indian country statute was a reaction to *Bates*. In 1879, a federal district court interpreted it that way: *United States v. Leathers* relied on the repeal to hold that although a Nevada reservation did not meet the 1834 definition of Indian country, it should nevertheless be treated as Indian country.¹⁴⁸ In 1882, Congress discussed creating a new statutory definition of Indian country but decided not to in part because of *Leathers*’ holding that reservations were already Indian country.¹⁴⁹

Rather than enacting a new Indian country statute, Congress began tying federal Indian affairs statutes to reservations instead of, or in addition to, Indian country. In 1882, Congress amended part of the Indian trader laws to provide that they would apply not only in “Indian country,” but also “on any Indian reservation.”¹⁵⁰ An 1884 Act declared that earlier statutes regarding liquor sales in “Indian country” would not prevent prosecutions for those

¹⁴¹ Act of June 30, 1834, Ch. 161, § 1, 4 Stat. 729.

¹⁴² See, e.g., Treaty with the Navajo Indians, Navajo-U.S., art. V, June 1, 1868, 15 Stat. 667 (allowing Navajos to acquire individually owned land within reservation); Treaty with Ottowas and Chippewas, art. I, July 31, 1855, 11 Stat. 621 (providing for individual allotments to tribal citizens).

¹⁴³ See, e.g. OFF. OF INDIAN AFFS. ANN. REP., *supra* note 140, at 19 (“I do not see how the obligations of the government to its Indian wards can be fully met and faithfully discharged without the aid of penal statutes to protect them from the evils referred to . . .”).

¹⁴⁴ Rev. Stat. (2d ed. 1878).

¹⁴⁵ 28 Rev. Stat. §§ 2039–2078 (2d ed. 1878).

¹⁴⁶ See *United States v. Leathers*, 26 F. Cas. 897, 900 (D. Nev. 1879) (No. 15,581) (discussing such omission).

¹⁴⁷ 74 Rev. Stat. § 5596 (2d ed. 1878).

¹⁴⁸ *Leathers*, 26 F. Cas. at 900.

¹⁴⁹ COMM. ON THE REVISION OF THE L., DEFINITION OF THE WORDS “INDIAN COUNTRY”, S. REP. NO. 47-773, at 2 (1882) (considering *Leathers* in discussion of a new definition of Indian country).

¹⁵⁰ Act of July 31, 1882, ch. 360, 22 Stat. 179.

providing liquor to “Indians upon or belonging to any Indian reservation.”¹⁵¹ Most important, in 1885, when Congress enacted the Major Crimes Act, which authorized federal prosecution of crimes between Indians for the first time, it used the term “Indian reservation” rather than “Indian country” to describe the scope of its jurisdiction.¹⁵² When Congress enacted the General Allotment Act in 1887, moreover, it provided that “reservations,” rather than “Indian country,” were where allotments would take place.¹⁵³

The Supreme Court quickly affirmed that the older definition of Indian country did not limit jurisdiction on reservations. The first cases concerned the Major Crimes Act. First, in 1894, in *United States v. Thomas*, the Supreme Court upheld federal prosecution of a murder committed on reservation lands set aside for state school purposes, holding that jurisdiction existed “independently of any question of title.”¹⁵⁴ Then, in *United States v. Celestine*, the Court declared that “when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress,”¹⁵⁵ upholding a federal prosecution on the Tulalip Reservation. In the same period, both the Supreme Court and lower courts upheld tribal and federal jurisdiction over non-Indians on non-Indian owned land within reservation boundaries.¹⁵⁶

In 1912, however, in *United States v. Clairmont*, the Supreme Court held that where a statute explicitly tied jurisdiction to “Indian country,” the *Bates* definition controlled, even within reservations.¹⁵⁷ But the following year, *United States v. Donnelly* implicitly repudiated *Clairmont*, applying the Indian Country Crimes Act to the Klamath Reservation, stating that “in our judgment, nothing can more appropriately be deemed ‘Indian country,’ . . . than a tract of land that, being a part of the public domain, is lawfully set

¹⁵¹ Act July 4, 1884, ch. 160, 23 Stat. 76, 94.

¹⁵² Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385.

¹⁵³ Act of Aug. 18, 1894, ch. 301, 28 Stat. 372, 394.

¹⁵⁴ *United States v. Thomas*, 151 U.S. 577, 582, 585 (1893); *cf.* *Kills Plenty v. United States*, 133 F.2d 292, 294-95 (8th Cir. 1943) (upholding federal criminal jurisdiction over a crime committed on non-Indian land within reservation boundaries, “notwithstanding the extinguishment of the government’s title to particular tracts within the reservation”).

¹⁵⁵ *United States v. Celestine*, 215 U.S. 278, 285 (1909) (upholding prosecution of murder involving Indian allottees within the Tulalip reservation).

¹⁵⁶ *See* *Morris v. Hitchcock*, 194 U.S. 384, 392-93 (1904) (holding Chickasaw grazing laws applied to non-Indians grazing cattle on land they owned within the Chickasaw reservation); *Buster v. Wright*, 135 F. 947, 949, 951 (8th Cir. 1905) (holding that it was “beyond debate” that the Creek Nation retained “authority to fix the terms upon which noncitizens might conduct business within its territorial boundaries”); *Maxey v. Wright*, 54 S.W. 807, 810 (1900) (upholding Creek authority to regulate economic activity by non-Indians on fee land within the Creek Reservation).

¹⁵⁷ *See* *Clairmont v. United States*, 225 U.S. 551, 560 (1912) (liquor statutes did not apply on rights-of-way within reservations, because they were not “Indian country” under the 1834 definition).

apart as an Indian reservation.”¹⁵⁸ The same year, in *United States v. Sandoval*, the Court held that all lands set aside for tribal nations constituted “Indian country” for purposes of the liquor laws, and it did not matter that the lands were held in fee.¹⁵⁹ Later, in *United States v. McGowan*, the Court declared that despite the 1834 definition, the Court must consider changes in federal Indian policy, and the liquor laws should apply to the “Reno Indian colony” even though it was not a formal reservation.¹⁶⁰

When Congress enacted 18 U.S.C. § 1151 in 1948, it codified both the broad judicial definitions of reservation, and the broad inclusion of other land within the definition of Indian country. The Reviser’s Note declares:

Definition is based on latest construction of the term by the United States Supreme Court in *U.S. v. McGowan*, 58 S. Ct. 286, 302 U.S. 535, following *U.S. v. Sandoval*, 34 S. Ct. 1, 5, 231 U.S. 28, 46. (See also *Donnelly v. U.S.*, 33 S. Ct. 449, 228 U.S. 243; and *Kills Plenty v. U.S.*, 133 F.2d 292, certiorari denied, 1943, 63 S. Ct. 1172).¹⁶¹

(The *Kills Plenty* case mentioned in the Reviser’s Note held that fee land within the Rosebud Sioux Reservation was Indian Country subject to federal criminal jurisdiction).¹⁶² Together, the cases cited stand for the proposition that reservations do not depend on land tenure, and that federal Indian affairs jurisdiction exists in all federal Indian territories, even if not designated as reservations.

Solem, in other words, got it backwards when it said “[o]nly in 1948 did Congress uncouple reservation status from Indian ownership.”¹⁶³ Reservation status had never required Indian ownership, and Congress and courts had recognized that since the allotment period. Although the 1834 statute still haunted the definition of “Indian country,” Congress had repealed that definition, and the Supreme Court had held it should no longer apply. In 1948, therefore, Congress did not change the definition of Indian country or reservation, it simply made clear that the judicial interpretations of congressional intent were correct.

¹⁵⁸ *Donnelly v. United States*, 228 U.S. 243, 269 (1913); *United States v. McGowan*, 302 U.S. 535, 539 (1938) (holding that the Reno “Indian colony” on lands owned by the federal government was Indian country for purposes of liquor laws).

¹⁵⁹ *United States v. Sandoval*, 231 U.S. 28, 48 (1913).

¹⁶⁰ *McGowan*, 302 U.S. at 537-39.

¹⁶¹ 18 U.S.C. § 1151 reviser’s note (1952).

¹⁶² *Kills Plenty v. United States*, 133 F.2d 292 (8th Cir. 1943).

¹⁶³ *Solem v. Bartlett*, 465 U.S. 463, 468 (1984).

B. *When It Wanted to Change Reservation Boundaries, Congress Used Clear Statutory Language to Do So*

Some of the most mischief in application of the reservation boundary test comes from the judicial assumption that “the surplus land Acts themselves seldom detail whether opened lands retained reservation status or were divested of all Indian interests.”¹⁶⁴ In fact, when Congress wanted to change reservation boundaries, it used statutory language showing this intent. In doing so, it was drawing on a century of land cession treaties that expressly changed the boundaries of tribal territories.¹⁶⁵ Given congressional awareness of the increasing importance of reservation boundaries for federal jurisdiction, it would be odd if it discarded this tradition during the allotment era.

First, the Congress that enacted the Dawes Allotment Act was clear that reservation boundaries should remain despite allotment. The Dawes Act reflected a “policy of gradualism,” under which Indians would be assimilated under federal protection and control.¹⁶⁶ Terminating reservations would terminate federal authority in the territory. The Commissioner of Indian Affairs, therefore, insisted that despite allotment “[t]he lines of the reservations should also be maintained, so that the government can retain its control over them.”¹⁶⁷ Similarly, Senator Dawes and his supporters agreed, “[e]ach change in the reservation’s borders would have to be approved by the Indians.”¹⁶⁸ The Dawes Act itself, therefore, provides a separate procedure to change reservation boundary lines:

[A]t any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by

¹⁶⁴ *Id.*

¹⁶⁵ *E.g.*, Treaty with the Creek Indians, *supra* note 25, at art. III (agreement by the Creek Nation to “cede and convey to the United States . . . the west[ern] half of their entire domain” in exchange for almost a million dollars); Treaty with the Omahas, U.S.-Omaha Tribe art. 1, Mar. 16, 1854, 10 Stat. 1043 (agreement by Omaha Nation to “cede” and “forever relinquish all right and title to” its land west of the Missouri River, excepting the reservation, in exchange for \$840,000); Treaty with the Wyandot, Ottawa, Chipawa, Munsee and Delaware, Shawanee, and Pottawatima nations, arts. II & III, July 4, 1805, 7 Stat. 87, (declaring the tribes “do hereby cede and relinquish to said United States for ever” lands outside a new “boundary line between the United States, and the nations aforesaid”).

¹⁶⁶ FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880–1920, at 52 (2001).

¹⁶⁷ DEP’T OF INTERIOR, OFF. OF INDIAN AFFS., LANDS TO INDIANS IN SEVERALTY, H.R. REP. NO. 45-165, at 2 (1879).

¹⁶⁸ HOXIE, *supra* note 166, at 52.

said tribe . . . of such portions of its reservation not allotted as such tribe shall . . . consent to sell.¹⁶⁹

Of course—like earlier plans for tribal extinction—allotment failed miserably, but this only increased federal insistence that allotment did not change jurisdiction. Far from becoming landowning farmers, allottees lost their land in huge numbers. Within a few decades, allotted Indians had “drift[ed] toward complete impoverishment” and many were “totally landless.”¹⁷⁰ In response, the Indian Department made clear that allotment and citizenship did not end federal guardianship.¹⁷¹ The Supreme Court, which had initially resisted federal exercises of jurisdiction over allotted Indians,¹⁷² soon agreed, holding in 1909 that “[t]he act of 1887 . . . clearly does not emancipate the Indians from all control, or abolish the reservations.”¹⁷³

Although Congress also wanted to make reservation land available for non-Indian settlement, it did so primarily through separate land cession agreements that clearly shrank reservation boundaries. As historian Frederick Hoxie points out, although courts and scholars often say that tribal land holdings went from 138 million acres to 48 million acres during the allotment period,¹⁷⁴ sixty percent of tribal land lost during the allotment period was due to these large land cessions.¹⁷⁵

Congress used a variety of terms to make intent to diminish clear. As the Supreme Court has noted, the dominant language is to provide tribes with a fixed sum from the United States, in exchange for either agreeing to cede all its interests in a defined area, abolishing their reservations, or restoring the area to the “public domain.”¹⁷⁶ For example, an 1888 statute provided that Montana tribes would “cede and relinquish to the United States all their right, title, and interest in and to all the [ceded] lands . . . reserving to themselves

¹⁶⁹ Act of Feb. 18, 1887, ch. 119, § 5, 24 Stat. 388, 389.

¹⁷⁰ *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the H. Comm. on Indian Affs.*, 73d Cong. 15, 17 (1934) (statement of Commissioner John Collier).

¹⁷¹ HOXIE, *supra* note 166, at 235-36.

¹⁷² *United States v. Heff*, 197 U.S. 488, 509 (1905) (reversing conviction under liquor laws on grounds that once an Indian had received a patent to his allotment, the United States could no longer exercise guardianship over him). The Court formally repudiated *Heff* in *United States v. Nice*, 241 U.S. 591, 601 (1916), declaring that “reexamining the question in the light of other provisions in the [Dawes] act and of many later enactments clearly reflecting what was intended by Congress, we are constrained to hold that the decision in that case is not well grounded, and it is accordingly overruled.”

¹⁷³ *United States v. Celestine*, 215 U.S. 278, 287 (1909) (quoting *Eells v. Ross*, 64 F. 417, 420 (9th Cir. 1894)); *see also* *United States v. Sandoval*, 231 U.S. 28, 46 (1913) (“Congress, in pursuance of the long-established policy of the government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease.”).

¹⁷⁴ COHEN’S HANDBOOK, *supra* note 137, §1.04.

¹⁷⁵ HOXIE, *supra* note 166, at 44.

¹⁷⁶ *Nebraska v. Parker*, 136 S. Ct. 1072, 1079-80 (2016).

only the reservation herein set apart for their separate use and occupation.”¹⁷⁷ The 1889 act dividing the Great Sioux Nation into seven separate reservations specified that “all the lands . . . outside of the separate reservations herein described are hereby restored to the public domain” and that the act was a “release of all title on the part of the Indians,” in exchange for three million dollars.¹⁷⁸ In 1891, Congress diminished the Fort Berthold Reservation with an agreement to “cede . . . their right, title, and interest” to land outside certain boundaries, declaring it “the policy of the Government to reduce to proper size existing reservations when entirely out of proportion to the number of Indians existing thereon,” in exchange for \$800,000 over ten years.¹⁷⁹ An 1892 statute declared that the northern half of the Colville Reservation was “vacated and restored to the public domain, notwithstanding any [law] whereby the same was set apart as a reservation,”¹⁸⁰ implementing an 1891 agreement to pay the tribes \$1.5 million in exchange.¹⁸¹

Although Congress was less exacting about paying tribes a sum certain for their lands after *Lone Wolf v. Hitchcock* held that tribal consent was not necessary to abrogate treaties,¹⁸² it still made intent to diminish explicit. For example, a 1904 statute regarding the Red Lake Reservation shifted from paying a lump sum to paying the proceeds of land sales, but declared that the tribe agreed to “cede, surrender, grant, and convey . . . all their claim, right, title, and interest in and to all that part of the Red Lake Indian Reservation” within certain boundaries, and to “remove to the diminished reservation within six months after the ratification of this agreement.”¹⁸³ A 1906 Act ratifying a 1901 agreement maintained the payment of \$537,000 to the Klamath Tribe in exchange for agreeing to “cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Klamath Indian Reservation lying between the boundaries” of its treaty reservation and an erroneous 1888 survey.¹⁸⁴ In fact, as *McGirt* noted, the Supreme Court has never found diminishment in the absence of clear text.¹⁸⁵

¹⁷⁷ Act of May 1, 1888, ch. 233, art. II, 25 Stat. 113, 114.

¹⁷⁸ Act of Mar. 2, 1889, ch. 405, §§ 16, 17, 21, 25 Stat. 888, 893-96.

¹⁷⁹ Act of Mar. 3, 1891, ch. 543, § 23, pmb., art. I, art. II, 26 Stat. 989, 1032-33.

¹⁸⁰ Act of July 1, 1892, ch. 140, § 1, 27 Stat. 62, 63.

¹⁸¹ *Antoine v. Washington*, 420 U.S. 194, 197-98 (1975) (discussing the statutory implementation of the agreement and subsequent payment to the Colville people).

¹⁸² *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-67 (1905).

¹⁸³ Act of Feb. 20, 1904, Pub. L. No. 58-23, art. I, 33 Stat. 46, 48; *see also* *United States v. Jackson*, 853 F.3d 436, 444-45 (8th Cir. 2017) (stating that the absence of terms like “cede, surrender, grant, and convey,” in the 1905 Act, unlike the 1904 Act, where diminishment was found, showed a lack of Congressional intent to diminish).

¹⁸⁴ Act of June 21, 1906, Pub. L. No. 59-258, Oregon, art. I, 34 Stat. 325, 367 (1906).

¹⁸⁵ *Hagen* and *Rosebud* found diminishment based on statutes or agreements proposed but never implemented, thereby relying on official text, albeit in ways that appear to violate the clear intent rule. *See Hagen v. Utah*, 510 U.S. 399, 422 (1993) (Blackmun, J., dissenting); *see also* *Rosebud Sioux*

The Supreme Court is also right that Congress did not intend diminishment when it “merely opened reservation land to settlement and provided that the uncertain future proceeds of settler purchases should be applied to the Indians’ benefit.”¹⁸⁶ This is clear in the language of the 1887 Dawes Act itself, which allowed any allotment to be sold to non-Indians after twenty-five years, but created a separate procedure “to negotiate with such Indian tribe for the purchase and release by said tribe . . . of such portions of its reservation not allotted as such tribe shall . . . consent to sell.”¹⁸⁷ The second procedure was necessary to diminish a reservation.

The difference between allotment and diminishment was evident in the history before the Court in *McGirt*. In 1893, Congress authorized a commission to negotiate with the Five Tribes for the “cession . . . to the United States, or . . . the allotment and division of the same in severalty among the Indians of such nations . . .”¹⁸⁸ Cession and purchase was preferable—it would have “immeasurably simplified” the Commission’s work, “saved incalculable expense,” and created huge advantages with respect to the “mineral resources, developed and undeveloped,” in the tribes’ lands.¹⁸⁹ After finding “unanimity among the people against the cession of any of their lands to the United States,” however, the commission early on “abandoned all idea of purchasing any of it and determined to offer them equal division of all their lands.”¹⁹⁰

Congress knew that allotting land to tribal citizens was different from purchasing parts of a reservation outright. Allotment changed land tenure but did not end the special legal status of the land and tribal rights within it. Throughout the allotment period Congress enacted statutes showing it could make that distinction clear.

v. Kneip, 430 U.S. 584, 591-95, 591 n.8 (1977) (finding a 1904 statute which provided that tribes would “cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted” implemented an unratified 1901 agreement that did so for a sum certain and diminished the reservation (quoting AGREEMENT WITH INDIANS OF ROSEBUD AGENCY, S. DAK., S. DOC. NO. 57-31, at 28 (1901))).

¹⁸⁶ *Nebraska v. Parker*, 577 U.S. 481, 489 (2016) (quoting *DeCoteau v. District Cnty. Ct.*, 420 U.S. 425, 448 (1975)); *see also* *Solem v. Bartlett*, 465 U.S. 463, 473 (1984) (finding no diminishment in such a case without explicit cessation language); *Mattz v. Arnett*, 412 U.S. 481, 497 (1973) (same); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356 (1962) (same).

¹⁸⁷ Act of Feb. 8, 1887, ch. 119, § 5, 24 Stat. 388, 389.

¹⁸⁸ Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 612, 645.

¹⁸⁹ HENRY L. DAWES, TAMS BIXBY, THOMAS B. NEEDLES & CLIFTON R. BRECKINRIDGE, SEVENTH ANNUAL REPORT OF THE COMMISSION TO THE FIVE CIVILIZED TRIBES, H.R. REP. NO. 56-5, at 9 (2d. Sess. 1900).

¹⁹⁰ HENRY L. DAWES, MEREDITH H. KIDD & ARCHIBALD S. MCKENNON, REPORT OF THE COMMISSION TO THE FIVE CIVILIZED TRIBES, S. MISC. DOC. NO. 53-24, at 7 (3d. Sess. 1894).

C. Historical State Exercise of Jurisdiction Means Nothing, Because States Regularly Broke the Law

McGirt finally ended the practice of relying on historical exercises of state jurisdiction as evidence of reservation diminishment. Since at least *DeCoteau*, states have vociferously argued that because they historically exercised jurisdiction in ways inconsistent with reservation status, the reservation must have been diminished. But as *McGirt* pointed out, there is “no case in which this Court has found a reservation disestablished without first concluding that a statute required that result.”¹⁹¹ Doing so, the Court continued, would only serve to allow states and courts to finish work Congress has left undone, usurp the legislative function in the process, and treat Native American claims of statutory right as less valuable than others. None of that can be reconciled with our normal interpretive rules, let alone our rule that disestablishment may not be lightly inferred and treaty rights are to be construed in favor, not against, tribal rights.¹⁹²

This Section shows why relying on jurisdictional history is wrong not just as a matter of interpretation, but as a matter of history, showing that for generations after allotment, states regularly exercised jurisdiction in ways that are now clearly illegal.

Again, the actions of Oklahoma exemplify this history. Oklahoma’s briefs in *McGirt* relied heavily on its exercise of criminal jurisdiction over Creek citizens within the reservation borders as evidence of diminishment.¹⁹³ But, as the Court noted, Indian country includes not just reservations but also Indian allotments.¹⁹⁴ “Despite this direction,” the Court continued, “Oklahoma state courts erroneously entertained prosecutions for major crimes by Indians on Indian allotments for *decades*, until state courts finally disavowed the practice in 1989.”¹⁹⁵

But the *McGirt* opinion did not show how much Oklahoma’s illegal exercise of jurisdiction flew in the face of judicial decisions, some even by the Supreme Court. The Supreme Court first held that restricted allotments were Indian country in 1914,¹⁹⁶ and applied this rule to Oklahoma in *United States v. Ramsey*, a case involving an Osage allotment, in 1926.¹⁹⁷ Even after *Ramsey*, however, Oklahoma continued to prosecute Indians on allotments, and the

¹⁹¹ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2470 (2020).

¹⁹² *Id.*

¹⁹³ Brief for Respondent at 16-21, *McGirt*, 140 S. Ct. 2452 (No. 18-9526).

¹⁹⁴ 140 S. Ct. at 2470 (citing 18 U.S.C. § 1151(c)).

¹⁹⁵ *Id.* at 2470-71 (citing *State v. Klindt*, 782 P.2d 401, 404 (Okla. Crim. App. 1989)).

¹⁹⁶ *United States v. Pelican*, 232 U.S. 442, 449 (1914).

¹⁹⁷ See *United States v. Ramsey*, 271 U.S. 467, 471-72 (1926) (holding that a restricted Osage allotment was Indian country).

Oklahoma Court of Criminal Appeals upheld the practice in 1936.¹⁹⁸ And although the state court held such jurisdiction illegal with respect to Osage in 1989,¹⁹⁹ state officials continued to assert power to prosecute citizens of the Five Tribes on restricted allotments until the Oklahoma courts stopped them three years later.²⁰⁰ The United States Department of Justice, meanwhile, continued to insist it lacked jurisdiction on restricted allotments in Oklahoma until the Tenth Circuit held otherwise in 1992.²⁰¹ In other words, for almost a century after allotment, the state was exercising jurisdiction where it should not have, and the federal government was refusing to exercise jurisdiction where it should have, despite more than half a century of Supreme Court precedent. Ample evidence indeed of “the perils of substituting stories for statutes.”²⁰²

The *Ramsey* case also illustrates state and federal disregard of Indian rights. The case was the first federal prosecution of the white Oklahomans who conspired to kill dozens of Osage Indians to obtain the oil rights in their allotted land.²⁰³ The federal government initially refused to investigate, forcing the Osage Nation to spend thousands to investigate themselves.²⁰⁴ The United States finally took up the case only after the scandal threatened J. Edgar Hoover’s leadership of the FBI.²⁰⁵ Given the lawlessness of the state system, federal officials decided it would be “not only useless but positively dangerous” to try the case in state court.²⁰⁶ Even in federal court, despite the presence of an eyewitness to the murders, it took two trials to convict the defendants, and the second jury would not sentence the defendants to death.

Nebraska’s actions leading to *Nebraska v. Parker* provide another example. In *Parker* as in *McGirt*, the state’s case rested partly on its alleged “longstanding exercise of jurisdiction” in the disputed western corner of the reservation.²⁰⁷ But, as in Oklahoma, Nebraska had for many decades asserted jurisdiction over Indians on the entire reservation, not simply the disputed portion.²⁰⁸ This jurisdiction was not based on reservation boundaries, but on the belief that by making allottees “subject to the laws, both civil and criminal,

¹⁹⁸ *Ex parte Nowabbi*, 61 P.2d 1139, 1156 (Okla. Crim. App. 1936), *overruled by* *State v. Klindt*, 782 P.2d 401, 403-04 (Okla. Crim. App. 1989).

¹⁹⁹ *State v. Klindt*, 782 P.2d 401, 403-04 (Okla. Crim. App. 1989).

²⁰⁰ *Cravatt v. State*, 825 P.2d 277, 279 (Okla. Crim. App. 1992).

²⁰¹ *United States v. Sands*, 968 F.2d 1058, 1062-63 (10th Cir. 1992).

²⁰² *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2470 (2020).

²⁰³ See generally DAVID GRANN, *KILLERS OF THE FLOWER MOON: THE OSAGE MURDERS AND THE BIRTH OF THE FBI* (Vintage Books ed. 2018) (2017) (investigating the murders of wealthy Osage Indians after oil was discovered underneath their allotments).

²⁰⁴ *Id.* at 118-19.

²⁰⁵ *Id.* at 120.

²⁰⁶ *Id.* at 214.

²⁰⁷ Brief for Petitioners at 31-33, *Nebraska v. Parker*, 577 U.S. 481 (2016) (No. 14-1406).

²⁰⁸ MARK R. SCHERER, *IMPERFECT VICTORIES: THE LEGAL TENACITY OF THE OMAHA TRIBE, 1945-1995*, at 16-17 (1999).

of the State of Nebraska” the 1882 Act removed the Omahas’ protection from state jurisdiction.²⁰⁹ This position was inconsistent with several Supreme Court decisions,²¹⁰ including two involving Nebraska itself. First, in 1911, the Court held that the 1882 act did not remove federal jurisdiction over an Omaha Indian on his allotment.²¹¹ In 1945, in *Rice v. Olson*, the Supreme Court reversed a state conviction of a Winnebago man after Nebraska made this argument about identical language in the 1887 Dawes Act.²¹² Despite these decisions, Nebraska sporadically exercised jurisdiction throughout the Omaha reservation until the 1970s.²¹³

Indeed, as the Court noted in *McGirt*, “Oklahoma is far from the only State that has overstepped its authority in Indian country. Perhaps often in good faith, perhaps sometimes not, others made similar mistakes in the past.”²¹⁴ After allotment, states throughout the country exercised jurisdiction over Indians in ways that today clearly violate federal Indian law.²¹⁵ These states relied, like Nebraska, on arguments that after receiving their allotments Indians became citizens subject to state law,²¹⁶ and, like Oklahoma, on arguments that allotments held in fee were no longer part of reservation, even if they were within reservation boundaries.²¹⁷ Even Felix Cohen, in the 1941 edition of the *Handbook of Federal Indian Law*, concluded that although the issue was “questionable,” the “weight of authority” was that land held by an Indian in fee within a reservation was “not ‘Indian country’ within the

²⁰⁹ *Id.* at 16.

²¹⁰ *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356 (1962) (holding allotment did not subject Indians to state jurisdiction on fee land); *United States v. Nice*, 241 U.S. 591, 600 (1916) (holding that the Burke Act language was “to be taken with some implied limitations, and not literally” and did not remove trust protection from allotted Indians).

²¹¹ *Hallowell v. United States*, 221 U.S. 317, 324 (1911) (holding that the 1882 Act did not remove federal liquor jurisdiction over an Omaha who had received an allotment, but not deciding the Indian country question).

²¹² *Rice v. Olson*, 324 U.S. 786, 790-91 (1945) (reversing conviction and stating in dicta that case law cast significant doubt on state’s assertions); Brief for Respondents at 18-19, *Rice*, 324 U.S. 786 (No. 391).

²¹³ *Omaha Tribe v. Vill. of Walthill*, 334 F. Supp. 823, 835-37 (D. Neb. 1971), *aff’d* 460 F.2d 1327 (8th Cir. 1972) (rejecting jurisdiction under 1882 Act).

²¹⁴ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2471 (2020).

²¹⁵ See Brief for Respondents, *supra* note 212, at 19-21 (discussing cases from Kansas, Idaho, North Dakota, and Oregon).

²¹⁶ See *State v. Big Sheep*, 243 P. 1067, 1070-71 (Mont. 1926) (“[A]n Indian who has obtained patent in fee to his allotment . . . is subject to the civil and criminal laws of the state of Montana.”).

²¹⁷ See *Louie v. United States*, 274 F. 47, 49 (9th Cir. 1921) (“The fact that the land was situate [sic] within the limits or boundaries of an Indian reservation is immaterial, because the allottee of the fee-simple patent was expressly declared to be subject to the laws of the state within which the land is situated.”); *State v. Johnson*, 249 N.W. 284, 287 (Wis. 1933) (“[T]he correct rule, supported by sound reason and the weight of authority, is that the state courts have jurisdiction to try Indians for offenses committed upon fully patented lands even though such lands are located within the exterior boundaries of an Indian reservation . . .”).

meaning of federal penal statutes.”²¹⁸ Supreme Court decisions contradicted all of these positions, but state and federal officials continued to assert them until the Indian Country Act of 1948, and sometimes beyond.²¹⁹

As *McGirt* declared, these widespread illegal actions, in good faith or not, “only underscore[] further the danger of relying on state practices to determine” federal law.²²⁰ States regularly exercised jurisdiction over Indians within agreed-upon reservations, and on other land that is clearly outside their jurisdiction. Even in the face of contrary Supreme Court holdings, they continued to do so until they lost cases involving the particular reservation and land at issue (and sometimes, as in Oklahoma and Nebraska, even then). If such actions decided modern reservation status, historical lawbreaking would become modern lawmaking.

III. WHAT THE COURT GETS WRONG ABOUT MODERN NON-INDIAN COMMUNITIES IN RESERVATIONS

Why did the Supreme Court create a test that, until *McGirt* and *Parker*, encouraged departure from normal rules of statutory construction and treaty interpretation, and instead relied on historical mistakes, demographics, and illegal state action? Why has the Court repeatedly granted certiorari to reconsider so many reservation boundary rulings in favor of Indian tribes? The answer lies in a series of misconceptions about the present impact of reservation status on non-Indians, some repeated by the Justices themselves. This Part tries to clear up the three main misconceptions. It shows first, that affirming reservation boundaries does not mean that tribes own the land; second, that reservation status has little effect on jurisdiction over non-Indians on the reservation; and third, that affirming reservation status will not harm, and may even benefit, non-Indian communities.

A. *Affirming a Reservation Does Not Mean Tribes Own the Land*

If you understand Indian law, the reality seems obvious: reservation status does not affect land ownership. Reservation status is so important because it is a jurisdictional category that does not depend on who owns the land.²²¹ And no law anywhere says that tribes can claim ownership of land just because it is within a reservation.

²¹⁸ FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 359 (1941).

²¹⁹ See *McGirt*, 140 S. Ct. at 2471 (citing examples of improper state exercise of jurisdiction over Indians).

²²⁰ *Id.*

²²¹ 18 U.S.C. § 1151(a).

But prestigious speakers have encouraged this misconception. The “gray lady” herself, the *New York Times*, greeted the grant of certiorari in *McGirt v. Oklahoma* with this headline: *Court Will Decide if Much of Oklahoma Belongs to the Indians*.²²² The paper changed the headline after receiving immediate criticism that it was inaccurate (and, with its anachronistic reference to “the Indians,” evoked an image of horseback warriors war-whooping through Oklahoma). In a less glaring error, after the Court granted certiorari in *Carpenter v. Murphy*, *The New Republic* published an article headlined *The Grisly Murder that Could Turn Half Of Oklahoma Back into Tribal Lands*.²²³ Even more startling, at oral argument in *Carpenter*, Justice Breyer, not necessarily an opponent of tribal interests, asked, “And now, if we say really this land, if that’s the holding, belongs to the tribe, what happens to all those people?”²²⁴ So while it should not need repeating, repeat I will: affirming reservation boundaries does not change land ownership.

B. *Affirming a Reservation Does Not Change Jurisdiction Involving Non-Indians*

The second misconception is that reservation status fundamentally changes jurisdiction in the area. We can return to the colloquy with Justice Breyer for an example of this assumption. After asking at oral argument, “what happens to all those people,” he continued, “[w]hat happens to all those laws?”²²⁵ The answer is that all those laws will stay the same, and most of them will be applied exactly as they have been before. Because trust lands and restricted allotments are already Indian country under federal law,²²⁶ reservation status affects only fee lands. On such lands states almost always have jurisdiction over non-Indians and tribes almost always lack it.

With respect to tribal jurisdiction, the modern Court has declared that tribal jurisdiction over non-Indians on fee land is “presumptively invalid.”²²⁷ To qualify for such jurisdiction, the dispute must either have a direct nexus with a consensual relationship between the non-Indian and the tribe or its

²²² Adam Liptak, *Supreme Court to Rule on Whether Much of Oklahoma Is an Indian Reservation*, N.Y. TIMES (Dec. 13, 2019) <https://www.nytimes.com/2019/12/13/us/supreme-court-oklahoma-indian-reservation.html> [<https://perma.cc/NU69-EWDX>]. The headline was changed online after many tweeted critically about the heading, but the original headline can still be found at the bottom of the website.

²²³ Matt Ford, *The Grisly Murder Case that Could Turn Half of Oklahoma Back into Tribal Lands*, NEW REPUBLIC (Mar. 15, 2018), <https://newrepublic.com/article/147472/grisly-murder-case-turn-half-oklahoma-back-tribal-lands> [<https://perma.cc/G6LL-HZ7Q>].

²²⁴ Transcript of Oral Argument at 44:19-21, *Carpenter v. Murphy*, *decided sub nom.* Sharp v. Murphy 140 S. Ct. 2412 (2020) (No. 17-1107).

²²⁵ *Id.* at 44:21-22.

²²⁶ 18 U.S.C. § 1151(c).

²²⁷ *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 330 (2008).

citizens,²²⁸ or involve conduct that “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”²²⁹ Although the second exception might seem to encompass all actions within general police powers, the Supreme Court has repeatedly narrowed it.²³⁰

Under this test, the Supreme Court has rejected tribal taxing jurisdiction over non-member activities on fee land,²³¹ civil jurisdiction over personal injury suits arising on highways running through reservations,²³² and zoning jurisdiction over fee land that was not within an enclosed tribal area preserved for subsistence and ceremonial activities.²³³ Although lower courts have sometimes upheld tribal jurisdiction over non-Indians, almost all of these cases arose on land owned by the tribe, its citizens, or the United States in trust for the tribe.²³⁴ On fee land, in contrast, tribal jurisdiction over non-members rarely exists absent congressional authorization,²³⁵ or a direct nexus to consensual relationships to tribal members.²³⁶ And this is only for civil jurisdiction—with respect to criminal jurisdiction, outside one narrow exception for non-Indians who live or work on reservations and abuse their Indian intimate partners, criminal jurisdiction does not exist at all.²³⁷ In 2021

²²⁸ *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001).

²²⁹ *Montana v. United States*, 450 U.S. 544, 566 (1981).

²³⁰ *See Plains Com. Bank*, 554 U.S. at 336 (stating that tribal jurisdiction must be necessary to protect tribal “political integrity,” or at least protect tribal members from “noxious uses that threaten tribal welfare or security”). *But see United States v. Cooley*, 141 S. Ct. 1638, 1643 (2021) (applying the *Montana* direct effects exception without narrowing).

²³¹ *Atkinson Trading Co.*, 532 U.S. at 659.

²³² *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997).

²³³ *Brendale v. Confederated Bands & Tribes of the Yakima Indian Nation*, 492 U.S. 408, 430 (1989); *see also Evans v. Shoshone-Bannock Land Use Pol’y Comm’n*, 736 F.3d 1298, 1305-06 (9th Cir. 2013) (rejecting tribal zoning jurisdiction on fee land).

²³⁴ *See, e.g., Norton v. Ute Indian Tribe of the Uintah & Ouray Rsrsv.*, 862 F.3d 1236, 1246 (10th Cir. 2017) (upholding the plausibility of tribal jurisdiction over state police officers who allegedly trespassed and interfered with tribal police authority on tribal trust land); *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014), *aff’d by an equally divided court*, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (upholding tribal court jurisdiction over a tort claim brought by a tribal member alleging sexual molestation at a store on tribal trust land); *Att’y’s Process & Investigation Servs., Inc. v. Sac & Fox Tribe*, 609 F.3d 927, 945-46 (8th Cir. 2010) (upholding jurisdiction over non-Indian contractor agency that raided governmental offices).

²³⁵ The major example of congressional authorization is the Indian Child Welfare Act (ICWA), which codifies exclusive tribal jurisdiction over foster care and adoption matters involving children on reservations who are citizens of Indian tribes or eligible for citizenship and biological children of tribal citizens. 25 U.S.C. §§ 1903, 1911. Because ICWA does not apply to custody disputes between parents, ICWA only enhances, and does not undermine, rights of non-Indian parents to maintain custody of their children. *Id.* § 1903.

²³⁶ *See, e.g., Williams v. Lee*, 358 U.S. 217, 222-23 (1959) (holding state lacked jurisdiction over debt collection action regarding sale of goods on credit at non-Indians’ store because it would interfere with the authority of tribal courts).

²³⁷ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (“Indian tribes do not have inherent jurisdiction to try and to punish non-Indians.”).

in *United States v. Cooley*, the Supreme Court held that tribal police had the power to temporarily detain non-Indians on public roads for potential arrest by state or federal officers, but this is a rare and limited exception to the Court's recent holdings.²³⁸

State jurisdiction over non-Indians, in contrast, is presumptively valid. To preempt state jurisdiction over non-Indians, one must show that jurisdiction undermines tribal sovereignty or federal interests protected by federal law, and that state involvement with the on-reservation activity, or off-reservation effects on state interests, don't outweigh the tribal and federal interests.²³⁹ Under this test, the Supreme Court has upheld jurisdiction over non-Indian activities even on tribal trust land, including by allowing imposition of state oil and gas severance taxes on tribally owned oil reserves,²⁴⁰ and cigarette taxes on cigarettes sold to non-Indians by tribally owned businesses.²⁴¹ Jurisdiction over non-Indians on fee lands in activities with lesser connections to tribes is even more unlikely.

On fee lands, moreover, states and local governments have jurisdiction to levy property taxes even on tribal citizens. Under the Burke Act of 1906 and similar acts governing Indian allotments, even Indians on reservations must pay state and local property taxes for fee land they own.²⁴² So while in *Carpenter v. Murphy*, opponents decried the impact reservation status would have on municipal property taxes, the ability to collect these taxes is, in fact, unchanged.

States arguing against reservation status also claim that despite the general rules favoring state jurisdiction, uncertainty about jurisdiction has substantial costs of its own. These arguments ignore the intergovernmental agreements those very states already have with tribes within their borders. According to the Conference of Western Attorneys General—whose members frequently sue tribes over jurisdiction—such agreements not only “resolve the core uncertainties” on jurisdiction, but often result in more effective service delivery.²⁴³ The National Conference of State Legislatures

²³⁸ *United States v. Cooley*, 141 S. Ct. 1638, 1641 (2021).

²³⁹ See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-45 (1980) (“[A] particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.”).

²⁴⁰ *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 185-86 (1989).

²⁴¹ *Washington v. Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. 134, 155-56 (1980).

²⁴² E.g., *Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 258-59 (1992) (holding that the Dawes Act, as amended by the Burke Act, authorized taxation of allotments).

²⁴³ CONFERENCE OF W. ATT'YS GEN., AMERICAN INDIAN LAW DESKBOOK § 14 (2020) [hereinafter DESKBOOK]. In settling a reservation boundary dispute between the Saginaw Chippewa Tribe and Michigan, for example, the parties negotiated jurisdictional agreements on child welfare, law enforcement, zoning, land use, natural resources, and taxation, which the district court declared provide “greater certainty and stability for the parties and their

agrees that intergovernmental agreements are often “the best way to provide services to these unique populations without wasting valuable resources on ineffective programs.”²⁴⁴ With respect to taxation in particular (the focus of most state jurisdiction disputes) “[n]early every state that has Indian lands within its borders has reached some type of tax agreement with the tribes.”²⁴⁵ These agreements “benefit both governmental entities by streamlining the tax collection process and facilitating compliance with state and tribal law.”²⁴⁶

It is, of course, ironic that tribal advocates have to rely on judicial divestiture of tribal jurisdiction and expansion of state jurisdiction to withstand judicial divestiture of reservation boundaries. Like the pre-*McGirt* reservation boundary cases, these cases are unmoored from prior jurisprudence, and stem instead from desires to protect perceived non-Indian interests over tribal interests.²⁴⁷ Like those reservation boundary cases, they also illegitimately allow “our least democratic branch,” the Court, to “become our most enthusiastic colonial agent.”²⁴⁸ Indeed, like those cases, they even originated from the same person, then-Associate Justice Rehnquist, who, in three opinions between 1976 and 1978, elevated the common law of colonialism in tribal jurisdiction,²⁴⁹ state jurisdiction,²⁵⁰ and reservation boundaries.²⁵¹

But because of those cases, with respect to non-Indians today, state and tribal jurisdiction largely remains the same regardless of reservation

constituents.” *Saginaw Chippewa Indian Tribe v. Granholm*, No. 05-10296-BC, 2010 WL 5185114, at *1, *4 (E.D. Mich. Dec. 17, 2010).

²⁴⁴ SUSAN JOHNSON, JEANNE KAUFMANN, JOHN DOSSETT, SARAH HICKS & SIA DAVIS, NAT’L CONF. OF STATE LEGISLATURES & NAT’L CONG. OF AM. INDIANS, *GOVERNMENT TO GOVERNMENT: MODELS OF COOPERATION BETWEEN STATES AND TRIBES* 3 (2009), <https://www.ncsl.org/documents/statetribe/item019417.pdf> [<https://perma.cc/QPT3-MUPV>].

²⁴⁵ JUDY A. ZELIO, NAT’L CONF. STATE LEGISLATURES, *PIECING TOGETHER THE STATE-TRIBAL TAX PUZZLE* 5 (2005).

²⁴⁶ DESKBOOK, *supra* note 243, § 14.8.

²⁴⁷ *See, e.g.*, Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1053-54 (2005) (arguing that these decisions do not reflect established Indian law doctrine, but rather assumptions about unfairness to nonmembers and the needs of tribes); Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609, 609 (1979) (suggesting that the legal method in the first of these cases was comparable to Lewis Carroll’s absurdist hunting of the snark).

²⁴⁸ Frickey, *supra* note 84, at 7; *see also* Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666, 709-10 (2016) (arguing that whether tribal sovereignty endures is a political question committed to congress rather than the judiciary).

²⁴⁹ *See* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (holding tribes had been divested of criminal jurisdiction over non-Indians).

²⁵⁰ *See* *Moe v. Confederated Tribes of the Salish & Kootenai Tribes*, 425 U.S. 463, 483 (1976) (holding states had jurisdiction to tax cigarette sales from tribal members to non-Indians on reservation lands).

²⁵¹ *See* *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 (1977) (holding that Congressional intent in the Acts of 1904, 1907, and 1910 was to alter the Rosebud Sioux reservation boundaries).

boundaries. As discussed in the next Section, while jurisdiction does change in some civil matters for tribal citizens and criminal matters for all Indians, this generally benefits all concerned. But to respond to Justice Breyer's question, "What about all the laws?," the answer is that they and their impact are virtually unchanged.

C. Non-Indian Communities Do Fine Within Reservation Boundaries

Although it may be hard for some to imagine non-Indian cities within reservation boundaries, they are actually fairly common. According to a 2015 analysis of 2010 census data by the National Congress of American Indians, there are 138 cities and towns within reservation boundaries outside the state of Oklahoma.²⁵² Some of these are in areas that until recently were assumed to be outside reservations. These communities exist, and even flourish, despite and perhaps in part because of their reservation status.

The most striking example comes from Pender, Nebraska. In *Nebraska v. Parker*, the Supreme Court held that Pender and the area that surrounded it were within the Omaha Reservation. In its briefs, Nebraska asserted that if the Court affirmed reservation status it would "seriously disrupt" the community, and "the practical consequences will be profound."²⁵³ The Supreme Court was moved by these assertions, declaring that "Petitioners' concerns about upsetting the 'justifiable expectations' of the almost exclusively non-Indian settlers who live on the land are compelling."²⁵⁴ Nevertheless, the Court held that these modern concerns were legally irrelevant to what Congress had done in the 1882 allotment act.²⁵⁵

It is five years since the Court's decision, and the "profound" practical consequences are nowhere to be found. Pender's population took a hit after the Great Recession, and stayed flat through 2013.²⁵⁶ But it started to increase in 2014, the same year that the U.S. District Court first held the town to be within the reservation,²⁵⁷ and has grown further since the Supreme Court affirmed the decision.²⁵⁸ A 2018 news report declared that Pender was

²⁵² NAT'L CONG. AM. INDIANS, POL'Y RSCH. CTR., POPULATION AND LAND AREA OF CITIES/TOWNS WITHIN RESERVATIONS OR OKLAHOMA TRIBAL STATISTICAL AREAS 1 (2015) [hereinafter NCAI, POPULATION], <http://www.ncai.org/policy-research-center/research-data/publications/2015AnalysisOfTownsInReservations.pdf> [https://perma.cc/9P3R-S58Y].

²⁵³ Brief for Petitioner, *supra* note 207, at 20, 23.

²⁵⁴ *Nebraska v. Parker*, 577 U.S. 481, 494 (2016).

²⁵⁵ *Id.*

²⁵⁶ *Public Data Explorer*, GOOGLE, https://www.google.com/publicdata/explore?ds=kf7tgg1uo9ude_&met_y=population&idim=sub_county:3138750&hl=en&dl=en [https://perma.cc/U962-ZASS].

²⁵⁷ *Smith v. Parker*, 996 F. Supp. 2d 815, 844 (D. Neb. 2014).

²⁵⁸ *Pender, Nebraska, Population 2021*, WORLD POPULATION REV., <http://worldpopulationreview.com/us-cities/pender-ne-population> [https://perma.cc/XY4T-GU3T].

“[t]hriving when small-town America is shrinking.”²⁵⁹ Another noted that Pender recently opened a new community center, hospital clinic, and renovated hotel, leaving many wondering how a small town could pull off so many projects.²⁶⁰ COVID-19 reveals the deficiencies of many small town hospitals, but Pender Community Hospital received a Women’s Choice Award for obstetrics in 2020²⁶¹ and was named a top 100 Critical Access hospital in 2019.²⁶² There’s no evidence that reservation status contributed to Pender’s recent flourishing, but it certainly didn’t stop it.

A less well-known example comes from Tacoma, Washington. After a long disagreement, a 1989 settlement act declared that a large chunk of Tacoma, as well as several smaller non-Indian cities, was within the Puyallup Reservation.²⁶³ As with Pender, the affirmation of reservation status coincided with improvement in the city’s fortunes. After a long period of economic decline, Tacoma began to turn around in the early 1990s, driven by revitalization of the downtown and marina area that included the reservation.²⁶⁴ Today, Tacoma is “experiencing unprecedented growth,” becoming a center for private investment, higher education, and the arts.²⁶⁵ While reservation status was not the primary driver behind Tacoma’s economic and civic boom,²⁶⁶ tribal economic development has contributed to the city’s prosperity. With a casino, 400-slip marina, retail stores and gas

²⁵⁹ Brian Mastre, *Pender: Thriving When Small-Town America Is Shrinking*, WOWT (Jan. 3, 2018, 10:40 PM), <https://www.wowt.com/content/news/Pender-Thriving-when-small-town-America-is-shrinking-467969593.html> [<https://perma.cc/GZY7-FZYR>].

²⁶⁰ Paul Hammel, *How Does Pender, Nebraska, Pull off \$25 Million in Improvement Projects? Local Pride, Residents Say*, OMAHA WORLD-HERALD (Oct. 16, 2019), https://www.omaha.com/news/state_and_regional/how-does-pender-nebraska-pull-off-million-in-improvement-projects/article_1905c4c6-2b96-5d63-ba3c-3b7b05deed6e.html [<https://perma.cc/6YMD-MDD5>].

²⁶¹ *Pender Community Hospital Receives 2020 Women’s Choice Award for Obstetrics*, SIOUX CITY J. (Jan. 18, 2020), https://siouxcityjournal.com/business/local/briefs/pender-community-hospital-receives-women-s-choice-award-for-obstetrics/article_228812de-2ebc-5bc2-bd14-ee5094629940.html [<https://perma.cc/T6P7-TURZ>].

²⁶² Mason Dockter, *Pender Community Hospital Named to Top 100 Critical Access Hospitals*, SIOUX CITY J. (May 5, 2019), https://siouxcityjournal.com/business/local/briefs/pender-community-hospital-named-to-top-100-critical-access-hospitals/article_87ec5e1d-f7c4-539f-af80-f0547cf830a9.html [<https://perma.cc/UT28-5WSK>].

²⁶³ Puyallup Tribe of Indians Settlement Act of 1989, Pub. L. No. 101-41, § 3(b)(3), 103 Stat. 83, 84-85; *see also* NCAI, POPULATION, *supra* note 252, at 23 (listing cities located within the Puyallup reservation).

²⁶⁴ *E.g.*, John Stearns, *Tacoma Rising*, S. SOUND BUS. (Jan. 6, 2020), <https://southsoundbiz.com/tacoma-rising> [<https://perma.cc/FB9V-YSWV>].

²⁶⁵ *About Tacoma*, CITY OF TACOMA, http://www.cityoftacoma.org/about_tacoma [<https://perma.cc/3GVY-SXKU>].

²⁶⁶ Reports attribute this resurgence largely to the creation of the University of Washington-Tacoma campus and investment in arts downtown. *See* Sanjay Bhatt, *Tacoma Works to Recover from Economic Blows*, SEATTLE TIMES (Jan. 13, 2012, 2:12 PM), <https://www.seattletimes.com/business/tacoma-works-to-recover-from-economic-blows> [<https://perma.cc/MN3V-NDB6>]; *see also* Stearns, *supra* note 264.

stations,²⁶⁷ as well as an oncology center fusing cutting edge science with traditional healing,²⁶⁸ the Puyallup Tribe was the seventh largest employer in Pierce County in 2019.²⁶⁹ It is also a major source of charitable giving. In 2019, for example, the tribe donated nearly four million dollars to local charities: almost two million dollars under its gaming compact with the state and an additional two million beyond its compact obligations.²⁷⁰

Tacoma also profits and builds on its connection to the Puyallup Tribe. The University of Washington-Tacoma has long opened convocations with a Puyallup blessing, and in 2015 launched a program to “infuse Native ways of knowing into UW Tacoma teaching, learning and research.”²⁷¹ The city government has also embraced its Puyallup connection, permanently installing the Puyallup Nation flag in the Tacoma City Council Chambers in 2018,²⁷² and renaming the Puyallup River Bridge the Fishing Wars Memorial Bridge to commemorate the tribal struggle for treaty rights.²⁷³ In the same year, the city hosted thousands of attendees for the opening ceremonies of the annual Paddle to Puyallup, a multi-leg canoe journey celebrating the traditions of the Pacific Northwest tribes.²⁷⁴

Across the country, tribal governments are valuable economic and governmental partners. Many tribes are the largest employers in their regions,²⁷⁵ and are the lifeblood of areas where manufacturing jobs have disappeared. The Oneida Indian Nation of New York, for example, is the

²⁶⁷ TILLER’S GUIDE TO INDIAN COUNTRY: ECONOMIC PROFILES OF AMERICAN INDIAN RESERVATIONS 758-59 (Veronica E. Velarde Tiller ed., 3d ed. 2015).

²⁶⁸ Richard Arlin Walker, *Blending Modern and Traditional—Puyallup Tribe Opens Oncology Center*, INDIAN COUNTRY TODAY (Sept. 13, 2018), <https://indiancountrytoday.com/archive/blending-modern-and-traditionalpuyallup-tribe-opens-oncology-center> [<https://perma.cc/XQ5H-6MRR>].

²⁶⁹ *Pierce County Major Employers List 2019*, ECON. DEV. BD. FOR TACOMA, PIERCE CNTY., <https://www.edbtacomapierce.org/wp-content/uploads/2020/02/Economic-Development-Board-for-Tacoma-Pierce-Co.-uncategorized-593.pdf> [<https://perma.cc/HH6H-LYXD>].

²⁷⁰ Lisa Pemberton, *Puyallup Tribe Gives Back Through Charitable Donations*, PUYALLUP TRIBAL NEWS (Dec. 23, 2019) <http://news.puyalluptribe-nsn.gov/puyallup-tribe-gives-back-through-charitable-donations> [<https://perma.cc/8HRB-7FX6>].

²⁷¹ UNIV. OF WASH.-TACOMA, REPORT TO THE PUYALLUP TRIBE OF INDIANS, BUILDING EXCELLENCE THROUGH SCIENCE AND TRADITION ACCOMPLISHMENTS THROUGH AUGUST 2016, at 3 (2016), <https://www.tacoma.uw.edu/sites/default/files/sections/AmericanIndianPrograms/BEST-report-2016b.pdf> [<https://perma.cc/ER83-RTDL>].

²⁷² Courtney Wolfe, *Puyallup Nation Flag Now a Permanent Fixture in Downtown Tacoma*, SOUTH SOUND MAG. (Aug. 1, 2018), <https://southsoundmag.com/puyallup-nation-flag-now-a-permanent-fixture-in-downtown-tacoma> [<https://perma.cc/ER9X-S5NC>].

²⁷³ Allison Needles, *Long-Closed Bridge over the Puyallup River in Tacoma to Reopen Saturday*, NEWS TRIB. (Sept. 11, 2019), <https://www.kiro7.com/news/south-sound-news/long-closed-bridge-over-the-puyallup-river-in-tacoma-to-re-open-saturday/985361155> [<https://perma.cc/R23H-V38H>].

²⁷⁴ Leslie Fisher, *Paddle to Puyallup: The Annual Pacific Northwest Canoe Journey*, THE DAILY (Univ. of Wash.) (Jan. 29, 2019), http://www.dailyuw.com/events/article_2b2fbbe8-8e10-11e8-87bb-47963b48d240.html [<https://perma.cc/NK2F-HFNP>].

²⁷⁵ Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 833 (2007).

largest employer in central New York and turned around a region that had been in economic decline.²⁷⁶ The Tonto Apache Tribe similarly became the largest employer in Payson, Arizona, after the local lumber mill closed.²⁷⁷ In 2010, a federal settlement declared that the Saginaw Chippewa Reservation encompassed Mount Pleasant, Michigan as well as several smaller towns.²⁷⁸ Today, the tribe is the largest employer in Isabella County, outstripping even Central Michigan University.²⁷⁹ Non-Indian businesses also get direct federal tax benefits from operating on reservations, enjoying accelerated depreciation, economic empowerment zone credits, and other incentives.²⁸⁰

The intergovernmental cooperation spurred by reservation status also allows tribes to share the burden of service delivery. Native children are vastly overrepresented in child welfare systems, but tribal-state cooperation can help provide the culturally grounded, community-based support families and children need.²⁸¹ In law enforcement, the Conference of Western Attorneys General reports that cross-deputization agreements between tribal and non-tribal police departments “can enhance the effectiveness of law enforcement.”²⁸²

More broad-based evidence comes from studies of reservation communities under Public Law 280. As is the case on fee land outside reservations, states have full criminal jurisdiction over Indians on reservations subject to 280.²⁸³ A comprehensive federally-funded study found that Public Law 280 reservation residents rated police less available, slower in response time, culturally insensitive, and less able to provide community policing than those on non-280 reservations.²⁸⁴ The study also looked at reports from two reservations that ended their Public Law 280 status, mirroring the jurisdictional change after reservation boundaries are re-affirmed. On these reservations, respondents report that crime decreased, and

²⁷⁶ Allison M. Dussias, *The Reports of Our Death Are Greatly Exaggerated—Reflections on the Resilience of the Oneida Indian Nation of New York*, 2018 BYU L. REV. 1231, 1270-71 (2018).

²⁷⁷ JONATHAN B. TAYLOR, THE ECONOMIC IMPACT OF TRIBAL GOVERNMENT GAMING IN ARIZONA 9 (2012).

²⁷⁸ See *Saginaw Chippewa Indian Tribe v. Granholm*, No. 05-10296-BC, 2010 WL 5185114, *1 (E.D. Mich. Dec. 17, 2010) (outlining the terms of the agreement).

²⁷⁹ *Top Employers for Isabella County (as of 2011)*, MORNING SUN (June 17, 2021, 6:36 AM), <https://www.themorningsun.com/2015/02/23/top-employers-for-isabella-county-as-of-2011> [<https://perma.cc/2UG2-PUXD>].

²⁸⁰ See COHEN’S HANDBOOK, *supra* note 137, § 21.02[4].

²⁸¹ JOHNSON ET AL., *supra* note 244, at 72-75.

²⁸² DESKBOOK, *supra* note 243, § 14:10.

²⁸³ 18 U.S.C. § 1162.

²⁸⁴ Carole Goldberg, Duane Champagne & Kevin Washburn, *Final Report: Law Enforcement and Criminal Justice Under Public Law 280*, at 112, 476-79 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf> [<https://perma.cc/PGU7-9QPM>].

policing, prosecutions, and community well-being all increased after retroceding from state jurisdiction.²⁸⁵

Again, the Muscogee (Creek) Nation is a stellar example of the benefits of cooperation with tribal nations. As its amicus brief explained, the Nation has three hospitals and six clinics serving the residents of its rural territory.²⁸⁶ Its Family Violence Prevention Program serves Indians and non-Indians alike, and is the only provider in much of the reservation.²⁸⁷ Its gaming operations employ over 2,000 Oklahomans, and its governmental services employ another 1,000.²⁸⁸ The Nation also coordinates with local governments to improve transportation infrastructure in its territory,²⁸⁹ using its own funds and federal funds available to tribal nations to improve roads and bridges on the reservation.²⁹⁰

Because *McGirt* arises from a question of criminal jurisdiction, the role of the Muscogee (Creek) Nation in law enforcement is particularly striking. The Nation's Police Department, the Lighthorse, has cross-deputization agreements with the state and virtually all the counties and municipalities within its reservation and is frequently asked to partner with them in pursuing both Indian and non-Indian lawbreakers.²⁹¹ It did so in spectacular fashion just days before the Creek Nation submitted its amicus brief in *McGirt*, using K-9 units and tracks in the snow to capture a non-Indian wanted for two murders.²⁹²

Affirming reservation boundaries will make this cooperation easier and bring additional resources to law enforcement. Before *McGirt*, whether the state or federal and tribal governments had criminal jurisdiction over Indians depended on who owned the land.²⁹³ The Supreme Court has acknowledged that this kind of "crazy quilt" or "checkerboard" jurisdiction is terrible for law

²⁸⁵ *Id.* at 457-59.

²⁸⁶ Brief for Amicus Curie Muscogee (Creek) Nation in Support of Petitioner at 38-39, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-95260) [hereinafter Muscogee Brief].

²⁸⁷ *Id.* at 39.

²⁸⁸ OKLA. DEP'T COM., OKLAHOMA TOP EMPLOYERS BY # OF EMPLOYEES (2021 RANKING), <https://www.okcommerce.gov/wp-content/uploads/2021-Oklahoma-Employers-1000-Employees.pdf> [https://perma.cc/45Y6-3LS6].

²⁸⁹ Muscogee Brief, *supra* note 286, at 38.

²⁹⁰ *Id.*; *see also, e.g.*, Press Release, The Muscogee (Creek) Nation, Muscogee (Creek) Nation Completes \$734K Improvement on Public Intersection (Nov. 14, 2019), <https://muscogeenation.com/wp-content/uploads/2020/02/MCN-Transportation-Department-Project-Mission-Road.pdf> [https://perma.cc/EC62-TUPH] (describing the completion of a project in partnership with Oklahoma state to improve a public intersection using federal funds available through the Bureau of Indian Affairs (BIA) and Tribal Transportation Program (TTP) funding).

²⁹¹ Muscogee Brief, *supra* note 286, at 37.

²⁹² *Id.* at 38.

²⁹³ 18 U.S.C. § 1151 (providing jurisdiction on reservations regardless of land ownership, but jurisdiction on allotments outside reservations "the Indian titles to which have not been extinguished").

enforcement.²⁹⁴ Amnesty International, investigating the crisis of sexual violence against Native women, found that “[i]n Oklahoma, confusion around jurisdictional boundaries means it is not always immediately clear whether a case should be prosecuted by a tribal prosecutor, a federal prosecutor or a state prosecutor [C]ourts may take years to determine whether the land in question is tribal or not.”²⁹⁵ Now that reservation status is accepted, jurisdiction is clear, regardless of land status: the state has jurisdiction over non-Indians committing crimes against non-Indians,²⁹⁶ the tribe has criminal jurisdiction over all Indians, and certain non-Indians committing domestic violence,²⁹⁷ and the United States has jurisdiction over crimes between the Indians and non-Indians, as well as all felonies by Indians.²⁹⁸ Reservation status also makes the area eligible for federal funding for law enforcement in Indian country,²⁹⁹ adding fiscal resources to the governmental cooperation already occurring.

As the facts regarding the Muscogee (Creek) Nation show, it makes sense that non-Indian communities thrive after they are declared to be within reservations. Jurisdiction over non-Indians does not significantly change, and non-Indian communities gain valuable economic and governmental partners in tribal nations. While much of the opposition to reservation status comes from fear of its practical consequences, examples from Pender, Tacoma, and Mount Pleasant show those consequences to be, if anything, positive.

CONCLUSION

Litigation over reservation boundaries before *McGirt* has revolved around two sets of false assumptions—those about the past and those about the present. The assumptions about the past are that Congress did not know the significance of reservation boundaries when it allotted reservations and that

²⁹⁴ *DeCoteau v. Dist. Cnty Ct.*, 420 U.S. 425, 466-67 (1975) (Douglas, J., dissenting) (quoting *Seymour*, 368 U.S. at 358).

²⁹⁵ AMNESTY INT’L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 62 (2007), <https://www.amnestyusa.org/pdfs/mazeofinjustice.pdf> [<https://perma.cc/ZDJ3-9YBN>].

²⁹⁶ *Draper v. United States*, 164 U.S. 240, 242-43 (1896) (“[W]here a State was admitted into the Union, and the enabling act contained no exclusion of jurisdiction as to crimes committed on an Indian reservation by others than Indians or against Indians, the state courts were vested with jurisdiction to try and punish such crimes.” (citing *U.S. v. McBratney*, 104 U.S. 621, 623-24 (1881))).

²⁹⁷ 25 U.S.C. §§ 1301(2), 1304.

²⁹⁸ 18 U.S.C. §§ 1152–1153.

²⁹⁹ *See, e.g.*, 25 U.S.C. § 5412 (establishing the Indian Law Enforcement Foundation to provide funding for public safety and justice services in Native communities); U.S. DEPT OF JUST., OMB NO. 1121-0329, COORDINATED TRIBAL ASSISTANCE SOLICITATION: FISCAL YEAR 2020 COMPETITIVE GRANT ANNOUNCEMENT 39-40 (2020), <https://www.justice.gov/file/1223441/download> [<https://perma.cc/5ZEB-QGYD>] (announcing almost \$100 million in 2020 grants to improve safety and victim services in Indian country).

states, in contrast, knew and scrupulously followed the rules governing jurisdiction in Indian country. The assumption about the present is that reservation status will have huge, disruptive consequences for the non-Indian communities within reservation borders. These two falsehoods generated the legal cover for judges who wished to elevate solicitude for non-Indian interests over their constitutional role.

This Essay shows why courts and the public should discard these falsehoods. By the time Congress was allotting reservations, the importance of reservation boundaries for jurisdiction was clear and statutory text differentiated between acts that diminished reservations and those that did not. States and the federal government, in contrast, repeatedly violated jurisdictional rules in Indian country, sometimes in the face of Supreme Court decisions on point. For modern day non-Indian communities, moreover, reservation status is not disruptive and often benefits tribal and non-tribal citizens alike. In the high-profile cases of Tacoma and Pender, reservation status actually coincided with improved fortunes, and throughout the country tribal governments contribute to the economies and social welfare of their surrounding communities.

And let us not forget why getting these determinations right is important. Allotment was one of many chapters in the United States' history of breaking promises to tribal nations and taking their land. It unleashed a wave of fraudulent, illegal, and even murderous actions by non-Indians to acquire even more. Within a few decades, it had impoverished Native people and decimated their communities. In the last fifty years, tribes have begun to rebuild, taking control over their governments and lifting up their communities in the process. But without reservation borders, that progress is stymied: tribal governments cannot govern in a coordinated way, and their citizens are vulnerable to having their children removed and their rights trampled by state and local governments.

The reservation boundary test was supposed to temper these historic injustices, preserve the faith of a sometimes faithless government, and protect tribal self-determination. Until *McGirt v. Oklahoma*, however, implementation often missed this goal, driven not by law but by perceived non-Indian interests and poorly understood history. As *McGirt* made clear, the Court's job is to interpret what Congress unambiguously did. It is not to assume the mantle of colonialism and decide what the Justices or states wish it had done, or even what Congress would have done had it been willing to more blatantly violate tribal rights. *McGirt* is a welcome step preserving tribal self-determination and undermining the common law of colonialism. This Essay, hopefully, contributes to this task, by showing how the past and present of reservation boundaries work together to serve the interests of all people within them.