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*United States–Muscogee (Creek) Nation Treaty — Federal Indian Law — Disestablishment of Indian Reservations — McGirt v. Oklahoma*

“On the far end of the Trail of Tears [were] promise[s].”<sup>1</sup> Much of federal Indian law jurisprudence is about whether promises to Indian tribes have been broken or kept.<sup>2</sup> In the past, those promises were often broken by Congress<sup>3</sup> or sometimes by judges on federal common law grounds.<sup>4</sup> But last Term, in *McGirt v. Oklahoma*,<sup>5</sup> the Supreme Court held that one such promise had been kept. Relying on a textualist methodology, the Court rejected extratextual sources in aid of interpreting statutes and reaffirmed that Congress is the only entity that can break the promise of a reservation.<sup>6</sup> *McGirt*’s sole reliance on the text of statutes and treaties is part of a recent trend in the Court’s federal Indian law cases. This trend might call into question judge-made limitations on tribal authority developed in cases such as *Montana v. United States*,<sup>7</sup> which governs tribal authority to regulate nonmembers on reservations.<sup>8</sup>

In 1996, Jimcy McGirt, a citizen of the Seminole Tribe of Oklahoma, raped, molested, and sodomized his wife’s four-year-old granddaughter.<sup>9</sup> He was found guilty and convicted on all counts, for which he received 1,000 years plus life in prison without the possibility of parole.<sup>10</sup> The Oklahoma Court of Criminal Appeals (OCCA) affirmed, noting that McGirt had been convicted of forcible sodomy twice before.<sup>11</sup>

On August 8, 2017, the Tenth Circuit decided *Murphy v. Royal*<sup>12</sup> and held that Congress had not disestablished the Muscogee (Creek) Reservation.<sup>13</sup> In response to this ruling, McGirt filed a petition for writ

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<sup>1</sup> *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020); see also, e.g., Treaty with the Cherokees, Cherokee Nation–U.S., pmbl., Dec. 29, 1835, 7 Stat. 478 (promising to “secur[e] a permanent home for [the Cherokees] and their posterity”).

<sup>2</sup> See generally, e.g., Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, HUM. RTS., May 2015, at 3.

<sup>3</sup> See, e.g., Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 151 (1977) (collecting congressional acts that terminated approximately 109 tribes).

<sup>4</sup> See, e.g., Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 829–30 (2007).

<sup>5</sup> 140 S. Ct. 2452.

<sup>6</sup> See *id.* at 2459, 2468–74.

<sup>7</sup> 450 U.S. 544 (1981).

<sup>8</sup> *Id.* at 564–66.

<sup>9</sup> See *McGirt*, 140 S. Ct. at 2459; *McGirt v. State*, No. F-1997-967 (Okla. Crim. App. Aug. 26, 1998) (Okla. Pub. Legal Rsch. Sys.); see also Brief in Opposition at 6, *McGirt*, 140 S. Ct. 2452 (2020) (No. 18-9526).

<sup>10</sup> See *McGirt*, No. F-1997-967.

<sup>11</sup> *Id.*

<sup>12</sup> 866 F.3d 1164 (10th Cir. 2017).

<sup>13</sup> *Id.* at 1172. The Court granted certiorari and heard oral arguments in *Murphy* in the 2018 Term, *Royal v. Murphy*, 138 S. Ct. 2026, 2026 (2018) (mem.), but did not issue a decision until the

of habeas corpus in Alfalfa County District Court, arguing that the state lacked subject matter jurisdiction under the Major Crimes Act<sup>14</sup> to prosecute his crimes.<sup>15</sup> That petition was dismissed on procedural grounds,<sup>16</sup> and McGirt filed a petition for writ of habeas corpus in the Oklahoma Supreme Court.<sup>17</sup> The Oklahoma Supreme Court transferred that petition to the OCCA, which dismissed both it and McGirt’s appeal of the Alfalfa County District Court’s decision on procedural grounds.<sup>18</sup> The Oklahoma Supreme Court declined to review the OCCA decision.<sup>19</sup> After the U.S. Supreme Court granted certiorari in *Murphy*, McGirt filed an application for postconviction relief, which was denied by the Wagoner County District Court.<sup>20</sup> The OCCA affirmed, concluding that McGirt had failed to establish that the trial court lacked jurisdiction to prosecute him.<sup>21</sup> McGirt appealed to the Supreme Court.

In a 5–4 decision, the Supreme Court reversed.<sup>22</sup> Writing for the Court, Justice Gorsuch<sup>23</sup> held that the land promised to the Creek Nation remained an Indian reservation.<sup>24</sup> Justice Gorsuch began the analysis where most major federal Indian law opinions begin: the treaties between Indian tribes, here the Creek Nation, and the United States.<sup>25</sup> The Court found that the 1832 and 1833 Treaties that led to the many Trails of Tears were in exchange for a “permanent home to the whole Creek Nation of Indians,”<sup>26</sup> and, relying in part on *Menominee Tribe of Indians v. United States*,<sup>27</sup> it held that homeland was a reservation — even though the word “reservation” was not used in the treaties.<sup>28</sup> The

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companion per curiam opinion to *McGirt* this Term, *Sharp v. Murphy*, 140 S. Ct. 2412, 2412 (2020) (per curiam). Justice Gorsuch was not involved in the consideration of *Murphy*.

<sup>14</sup> 18 U.S.C. § 1153. The Major Crimes Act provides that, within “the Indian country,” “[a]ny Indian who commits” certain enumerated major crimes “against the person or property of another Indian or other person . . . shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.” *Id.* § 1153(a).

<sup>15</sup> See Brief in Opposition, *supra* note 9, at 6–7.

<sup>16</sup> *Id.* at 7 (citing *McGirt v. Bryant*, No. WH-17-22, slip op. at 2 (Alfalfa Cnty. Dist. Ct. Nov. 6, 2017); *McGirt v. Bryant*, No. HC-2017-1169, slip op. at 3 (Okla. Crim. App. Nov. 29, 2017)).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* (citing *McGirt v. Bryant*, No. HC-2018-131, slip op. at 1 (Okla. Crim. App. Mar. 2, 2018)).

<sup>19</sup> *Id.* (citing *McGirt v. Bryant*, No. 116,873 (Okla. May 21, 2018)).

<sup>20</sup> *Id.* at 7–8.

<sup>21</sup> *Id.* at 8; *McGirt v. State*, No. PC-2018-1057, slip op. at 2–3 (Okla. Crim. App. Feb. 25, 2019).

<sup>22</sup> *McGirt*, 140 S. Ct. at 2482.

<sup>23</sup> Justice Gorsuch was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.

<sup>24</sup> *McGirt*, 140 S. Ct. at 2482.

<sup>25</sup> *Id.* at 2460–62; see, e.g., *Wash. State Dep’t of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1007 (2019).

<sup>26</sup> *McGirt*, 140 S. Ct. at 2460 (quoting Treaty with the Creeks, Muscogee (Creek) Nation–U.S., pmb., Feb. 14, 1833, 7 Stat. 418).

<sup>27</sup> 391 U.S. 404 (1968).

<sup>28</sup> *McGirt*, 140 S. Ct. at 2461–62. The treaties at issue in *McGirt* were born out of first the State of Georgia forcing Creeks out of their lands, and then federal removal policy and forced relocation by the United States military. ROBERT T. ANDERSON ET AL., *AMERICAN INDIAN LAW* 76–77

Court noted that the reservation created by the two original treaties was reaffirmed in the 1856 Treaty, which “promised . . . within their lands . . . the Creeks were to be ‘secured in the unrestricted right of self-government.’”<sup>29</sup>

The Court next turned to whether Congress had broken its promise of a reservation. While the Court noted that Congress had broken many promises to the Creeks,<sup>30</sup> it found that Congress had never abrogated the promise of a reservation.<sup>31</sup> The Court announced that “there is only one place” it can look for an answer to whether a disestablishment has occurred: “[T]he Acts of Congress.”<sup>32</sup> It further clarified that “States have no authority to reduce” and “courts have no proper role in the adjustment of reservation borders.”<sup>33</sup> Indeed, the Court reaffirmed that disestablishment “require[s] that Congress clearly express its intent to do so, ‘[c]ommon[ly] with an’ “[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests.”<sup>34</sup>

The Court then rejected Oklahoma’s suggestion that extratextual evidence of a policy to break up reservations terminated them. The Court concluded that the allotment era — an era of federal Indian law policy that sought to break up reservations into individual parcels that could eventually be sold — may have had the goal of disestablishing the reservation and the end result of transferring individually allotted Creek land to non-Indians, but that did not satisfy the necessity of a statute actually disestablishing the reservation.<sup>35</sup> The Court also rejected Oklahoma’s claim that jurisdictional statutes passed by Congress broke the promise of a reservation to the Creeks.<sup>36</sup> While these statutes dealt serious blows and sent ominous signals to Creek authority by abolishing

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(3d ed. 2015). Alexis de Tocqueville observed Indian removal at the time and described those relocated on the Trail of Tears as “on the point of death. They had neither tents nor wagons, but only some provisions . . . I saw them embark to cross the great river, and the sight will never fade from my memory.” 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 324 (J.P. Mayer ed., George Lawrence trans., HarperCollins Publishers 2006) (1835).

<sup>29</sup> *McGirt*, 140 S. Ct. at 2461 (quoting Treaty with Creeks and Seminoles art. XV, Aug. 7, 1856, 11 Stat. 704). Later in the opinion, the Court rejected Oklahoma’s classification of the Creek Nation as a “dependent Indian community.” *Id.* at 2474–76.

<sup>30</sup> *See id.* at 2462–63.

<sup>31</sup> *See id.* at 2474.

<sup>32</sup> *Id.* at 2462.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 2463 (second, third, and fourth alterations in original) (quoting *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016)).

<sup>35</sup> *Id.* at 2463–65. The Court noted that, importantly, some allotment-era acts did disestablish reservations, but the agreement with the Creeks was different because it did not say the reservation was, for instance, “abolished.” *Id.* at 2465. Justice Gorsuch also included in dicta that “there is no reason why Congress cannot reserve land for tribes in much the same way, allowing them to continue to exercise governmental functions over land even if they no longer own it communally.” *Id.* at 2464.

<sup>36</sup> *Id.* at 2465–66.

Creek courts, subjecting tribal legislation to presidential review, and suggesting that the Creek government might end in 1906, Congress ultimately did not disestablish the reservation in 1906 — or at any time — and later reversed course on these earlier curtailments.<sup>37</sup>

The Court proceeded to reject Oklahoma's suggestion that demographics and historical practices disestablished the reservation. Here — and throughout this line of analysis — the Court explicitly rejected the dissent's broader reading of *Solem v. Bartlett*<sup>38</sup> and clarified that extratextual evidence of disestablishment may not be used “when the meaning of a statute's terms is clear,” as the Court found it was.<sup>39</sup> The Court recounted all of the “stories” that Oklahoma had told about how historical practice and demographics should inform the Court to find the reservation was disestablished.<sup>40</sup> However, the Court rejected all of this historical practice as likely illegal,<sup>41</sup> concluding that “[u]nlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law.”<sup>42</sup>

Finally, the Court turned to find that the Major Crimes Act applied to Oklahoma as soon as it was admitted as a state, relying on the plain text of the Major Crimes Act, which did not create exceptions.<sup>43</sup> It spent three pages excoriating the idea that the possible effects of the decision should inform interpretation of the statute.<sup>44</sup> Ultimately, the Creek Reservation was still a reservation, and the Oklahoma court that tried *McGirt* did not have jurisdiction to do so because *McGirt* was an Indian who committed a major crime against an Indian on a reservation.<sup>45</sup>

Chief Justice Roberts dissented.<sup>46</sup> He characterized the majority's holding as based “on the improbable ground that, unbeknownst to anyone for the past century, a huge swathe of Oklahoma is actually a Creek Indian reservation.”<sup>47</sup> First, he explained that congressional reports over a long period of time showed that the ultimate goal was complete assimilation of

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<sup>37</sup> *Id.* at 2465–68. Indeed, opposition to railroad interests may have been the saving grace of the Creeks in 1906. *Id.* at 2467.

<sup>38</sup> 465 U.S. 463 (1984). The three-part test in *Solem* consists of first looking to the language of the statute, then to the circumstances surrounding its passage, and last to the demographics of the land. *See id.* at 472–80.

<sup>39</sup> *McGirt*, 140 S. Ct. at 2469; *see id.* at 2468–70.

<sup>40</sup> *Id.* at 2470–73.

<sup>41</sup> *See id.* at 2474.

<sup>42</sup> *Id.* at 2482. The Court also dismissed the jurisdictional statutes Oklahoma pointed to as evidence of disestablishment and noted that jurisdictional gaps like the ones Oklahoma seemed concerned about are common in Indian law. *Id.* at 2476–78.

<sup>43</sup> *See id.* at 2477.

<sup>44</sup> *See id.* at 2479–82.

<sup>45</sup> *Id.* at 2459–60, 2462, 2478.

<sup>46</sup> Chief Justice Roberts was joined by Justices Thomas (except as to footnote 9 of his opinion), Alito, and Kavanaugh.

<sup>47</sup> *McGirt*, 140 S. Ct. at 2482 (Roberts, C.J., dissenting).

the Creeks — including disestablishment.<sup>48</sup> He read the analysis set forth in *Solem* and affirmed in *Nebraska v. Parker*<sup>49</sup> more broadly than the majority did and declared the majority got it wrong.<sup>50</sup> While the majority held that extratextual sources can only be considered to “clear up” ambiguity,<sup>51</sup> Chief Justice Roberts argued that all “contemporaneous and subsequent contextual evidence” should be viewed together to decide if a reservation was disestablished, regardless of ambiguity.<sup>52</sup>

The Chief Justice then applied his broader reading of the precedents. First, he read the series of statutes starting in 1890 against the context of one another, finding that, taken together, they evidenced congressional intent to disestablish the Creek reservation.<sup>53</sup> He then turned to consideration of contemporaneous understanding of what the statutes meant.<sup>54</sup> He cited a myriad of congressional reports, reports of the Dawes Commission, and statements by Creek officials to show that it was the contemporary understanding that the statutes had disestablished the reservation.<sup>55</sup> He also noted the contemporary practice of Oklahoma exercising criminal jurisdiction over individuals like *McGirt*.<sup>56</sup> Finally, the Chief Justice argued that these factors, along with the subsequent demographics, all supported the finding that Congress disestablished the reservation.<sup>57</sup> In particular, he considered that most of the people who live on the land in question are not Indians, and this demographic evidence is a “practical” consideration.<sup>58</sup> He concluded his dissent by arguing that the reliance interests were high, given the non-Indians’ belief that they were not in Indian Country, and that the evidence together leads to a finding of disestablishment.<sup>59</sup>

Justice Thomas wrote separately to argue that a jurisdictional bar precluded the Court from reviewing the case.<sup>60</sup> He argued that, since there was “an adequate and independent state ground” for the ruling below, the Court did not have jurisdiction to review the case.<sup>61</sup> According to the opinion below, the case was dismissed because of a state law

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<sup>48</sup> See *id.* at 2484–85. The Chief Justice argued that although this context is “missing” from the majority opinion, it is “important” because the disestablishment inquiry is “highly contextual.” *Id.* at 2485.

<sup>49</sup> 136 S. Ct. 1072 (2016).

<sup>50</sup> See *McGirt*, 140 S. Ct. at 2485–89 (Roberts, C.J., dissenting).

<sup>51</sup> *Id.* at 2469 (majority opinion) (quoting *Milner v. Dep’t of the Navy*, 562 U.S. 562, 574 (2011)).

<sup>52</sup> *Id.* at 2487 (Roberts, C.J., dissenting).

<sup>53</sup> *Id.* at 2490–93.

<sup>54</sup> *Id.* at 2494.

<sup>55</sup> *Id.* at 2494–96.

<sup>56</sup> *Id.* at 2496–97.

<sup>57</sup> *Id.* at 2498–500.

<sup>58</sup> *Id.* at 2500.

<sup>59</sup> See *id.* at 2500–02.

<sup>60</sup> *Id.* at 2502 (Thomas, J., dissenting).

<sup>61</sup> *Id.*

procedural bar; as a matter of respect for state courts, the Court must take that finding at essentially face value.<sup>62</sup> Justice Thomas noted that the Court might have decided this case for the efficiency of settling an important federal question, but he cautioned against such justifications for expanding the role of Article III.<sup>63</sup>

Courts have long divested tribes of promises of sovereignty or jurisdiction based on a sort of federal Indian common law.<sup>64</sup> However, in some recent Supreme Court decisions, the Court has increasingly focused on what Congress has taken away by statute. Justice Gorsuch's *McGirt* opinion is a continuation of this emerging trend away from divestiture by common law. If this trend continues, and if parts of the reasoning of *McGirt* are applied in other contexts, the reasoning of cases like *Montana* might be called into question.

Over the years, the Supreme Court has developed a judicial common law approach to federal Indian law that has severely undercut tribal authority, both by reducing the geographical boundaries of tribes and by undermining the extent of tribal authority within a tribe's own borders.<sup>65</sup> The extent of this lawmaking by the Supreme Court has varied over the years, gone both for and against Native Americans, and touched on basically all of federal Indian law, ranging from criminal and civil jurisdiction to reservation diminishment, hunting rights, and water rights.<sup>66</sup>

The Court in three recent federal Indian law cases evinced an interest in divesting tribal nations of aspects of sovereignty only when Congress has passed a law clearly doing so. Six years ago, the Court in *Michigan v. Bay Mills Indian Community*<sup>67</sup> held that the tribe's sovereign immunity barred Michigan's lawsuit.<sup>68</sup> The opinion held that "unless and 'until Congress acts, the tribes retain' their historic sovereign authority,"<sup>69</sup> and such congressional acts divesting tribes of sovereignty "must be clear."<sup>70</sup> Therefore, the case turned on whether the Indian

<sup>62</sup> See *id.* at 2503.

<sup>63</sup> See *id.* at 2504.

<sup>64</sup> See generally Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 28–57, 58–63 (1999).

<sup>65</sup> See Bethany R. Berger, "Power over this Unfortunate Race": *Race, Politics and Indian Law in United States v. Rogers*, 45 WM. & MARY L. REV. 1957, 2046–48 (2004); Frickey, *supra* note 64, at 24–28, 57.

<sup>66</sup> See, e.g., *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351–58 (1998) (applying a common law framework for disestablishment); *Hagen v. Utah*, 510 U.S. 399, 410–11 (1994) (same); Frickey, *supra* note 64, at 34–57 (documenting cases of common law divestiture of criminal and civil jurisdiction for tribal governments and arguing that divestiture by common law is a defining feature of federal Indian law); Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623, 627–86 (2011) (documenting the same and additionally hunting, fishing, water, and diminishment cases).

<sup>67</sup> 572 U.S. 782 (2014).

<sup>68</sup> *Id.* at 803–04.

<sup>69</sup> *Id.* at 788 (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

<sup>70</sup> *Id.* at 790.

Gaming Regulatory Act<sup>71</sup> (IGRA) clearly abrogated tribal sovereign immunity in the context of the suit.<sup>72</sup> Justice Kagan’s opinion engaged in a textual analysis of the statute and found that no such clear abrogation existed in the IGRA.<sup>73</sup> Further, Justice Kagan noted that “it is fundamentally Congress’s job, not ours, to determine whether or how to limit tribal [sovereignty].”<sup>74</sup>

Two years later, the Court unanimously held in *Parker* that the Omaha Reservation had not been diminished and that only Congress could diminish it.<sup>75</sup> As already discussed, the Chief Justice’s dissent in *McGirt* read *Parker* broadly, but, as Justice Gorsuch pointed out in the majority, *Parker* emphasized that extratextual evidence can only be “*interpretative*” — it cannot form an “alternative means of proving disestablishment or diminishment.”<sup>76</sup> *Parker*, while not going as far as *McGirt*, “seriously discounted” the judicial use of nonstatutory sources to find the disestablishment of reservations.<sup>77</sup> Finally, in *Herrera v. Wyoming*,<sup>78</sup> the Court, in a narrow 5–4 majority that included Justice Gorsuch, held that “Congress ‘must clearly express’ any intent to abrogate Indian treaty rights.”<sup>79</sup> Since the statute at issue did not explicitly abrogate hunting rights in the tribe’s treaty, the promise of hunting rights remained.<sup>80</sup> A commentator at the time noted that *Herrera* was significant due to its “abrogat[ion of] judicial . . . plenary power [over treaty rights] without clear statements from Congress.”<sup>81</sup> In other words, the Court in *Herrera* refused to judicially break a promise made to a tribe and reaffirmed that only Congress may do so.<sup>82</sup>

The Court in *McGirt* continued this emerging trend and firmly cemented the shift away from judicial promise breaking in cases involving disestablishment of reservations. In the opinion, Justice Gorsuch explicitly rejected the idea that courts should “finish work [disestablishing reservations] Congress has left undone.”<sup>83</sup> To do so, he bluntly added, would be to “substitut[e] stories for statutes.”<sup>84</sup> The upshot, as Justice Gorsuch saw

<sup>71</sup> 25 U.S.C. §§ 2701–2721.

<sup>72</sup> *Bay Mills*, 572 U.S. at 791.

<sup>73</sup> *Id.* at 792–97.

<sup>74</sup> *Id.* at 800.

<sup>75</sup> *Nebraska v. Parker*, 136 S. Ct. 1072, 1076, 1078–79 (2016).

<sup>76</sup> *See McGirt*, 140 S. Ct. at 2469.

<sup>77</sup> *See* Bethany R. Berger, *Hope for Indian Tribes in the U.S. Supreme Court?: Menominee, Nebraska v. Parker, Bryant, Dollar General . . . and Beyond*, 2017 U. ILL. L. REV. 1901, 1925.

<sup>78</sup> 139 S. Ct. 1686 (2019).

<sup>79</sup> *Id.* at 1696 (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999)).

<sup>80</sup> *Id.* at 1698.

<sup>81</sup> *The Supreme Court, 2018 Term — Leading Cases*, 133 HARV. L. REV. 242, 407 (2019).

<sup>82</sup> *See id.* at 410.

<sup>83</sup> *McGirt*, 140 S. Ct. at 2470.

<sup>84</sup> *Id.*

it: “If Congress wishes to withdraw its promises, it must say so,” and the judiciary should not be in such business.<sup>85</sup>

Although *McGirt* was decided in the disestablishment context, its reasoning calls into question the past practice of judicial rulemaking in other areas of federal Indian law, such as regulatory jurisdiction over nonmembers. The Court in *Montana* created a judge-made common law doctrine that limited tribal authority without a clear expression from Congress.<sup>86</sup> Justice Stewart’s language in *Montana* speaks for itself: “[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations . . . cannot survive without express congressional delegation.”<sup>87</sup> The result of the case was that tribal governments could not impose civil regulations on nonmembers on fee lands.<sup>88</sup> But, in perhaps the best evidence of this doctrine being judge-made common law, there are two completely invented exceptions: Indian tribes can regulate nonmembers who “enter consensual relationships with the tribe or its members” through commerce<sup>89</sup> or when nonmember activity on a tribe’s reservation “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”<sup>90</sup> Indeed, in the wake of *Montana*, the Court has had much to sort out about what this common law doctrine means.<sup>91</sup>

Comparing the reasoning in *McGirt* with that in *Montana* raises questions about whether the Court will continue to follow *Montana*’s reasoning. Prior to *Montana*, authorities agreed that tribes had the sovereign authority to regulate nonmembers within their reservation

<sup>85</sup> *Id.* at 2482.

<sup>86</sup> See Frickey, *supra* note 64, at 43–44.

<sup>87</sup> *Montana v. United States*, 450 U.S. 544, 564 (1981) (emphasis added).

<sup>88</sup> *Id.* at 565.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 566; see Frickey, *supra* note 64, at 44. One scholar has similarly described *Montana*’s general rule as “based . . . on a completely subjective and arbitrary definition of what amounts to external relations, . . . followed up with some exceptions focusing on either the existence of consensual relations or a subjective analysis of what is necessary for tribal self-government. *It is an analysis divorced from any constitutional or statutory moorings.*” Alex Tallchief Skibine, *Constitutionalism, Federal Common Law, and the Inherent Powers of Indian Tribes*, 39 AM. INDIAN L. REV. 77, 89 (2014) (emphasis added).

<sup>91</sup> See, e.g., *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 329–30 (2008) (holding that neither *Montana* exception allowed a tribe to adjudicate a non-Indian bank’s sale of fee land); *Nevada v. Hicks*, 533 U.S. 353, 358–65 (2001) (determining whether regulation of state officers is essential to self-government); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 654–59 (2001) (holding the *Montana* exceptions did not permit taxation of nonmembers on fee lands); *Strate v. A-1 Contractors*, 520 U.S. 438, 454–56 (1997) (applying *Montana* to public rights-of-way on reservations); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 430–31 (1989) (holding *Montana* does not permit zoning over alienated fee lands); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 167, 171–72 (1982) (Stevens, J., dissenting) (analyzing tribal authority to tax oil and gas produced on tribal land).



boundaries.<sup>92</sup> But the Court in *Montana* wrote that such authority “cannot survive without express congressional delegation,” thus presuming that tribes lacked power over nonmembers unless Congress had expressly granted that power.<sup>93</sup> In contrast, *McGirt*, *Bay Mills*, *Herrera*, and *Parker* all required express congressional action in order to *reduce* tribal authority, whether that authority was outlined in a treaty, as in *McGirt*, *Herrera*, and *Parker*,<sup>94</sup> or inherent to tribal sovereignty, as in *Bay Mills*.<sup>95</sup> These cases suggest the Court will refuse to “finish work [of breaking promises to tribal nations that] Congress has left undone,”<sup>96</sup> and decline to diminish any aspect of tribal sovereignty without a clear congressional enactment, undermining the reasoning in *Montana*. Justice Stewart’s framing in *Montana* was almost the exact opposite of Justice Gorsuch’s in *McGirt*: the tribal right to a reservation survives unless “Congress clearly express[es] its intent to” break that promise.<sup>97</sup> As Justice Gorsuch put it, “there is no reason why Congress cannot reserve land for tribes . . . allowing them to continue to exercise governmental functions over land even if they no longer own it communally.”<sup>98</sup>

Viewing the text of congressional enactments as dispositive, *McGirt* utterly dismissed balancing the interests of tribes against those of states or non-Indians.<sup>99</sup> That is relevant because some have read *Montana* as simply a good ol’ ad hoc balancing test.<sup>100</sup> Now that might be right: the Court in *Montana* might have based its decision on the expectations of nonmembers living on the land and balanced their interests against the

<sup>92</sup> See, e.g., *Morris v. Hitchcock*, 194 U.S. 384, 389–90, 393 (1904) (sustaining a tribal tax on a nonmember on fee land); *Buster v. Wright*, 135 F. 947, 950, 958 (8th Cir. 1905) (same and stating the “authority of the [tribe] to prescribe the terms upon which noncitizens may transact business within its borders” remains until Congress acts, *id.* at 950); FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 146 (1942) (“Such [regulatory] jurisdiction continues to this day, save as it has been expressly limited by the acts of [Congress].”); see also, e.g., *United States v. Mazurie*, 419 U.S. 544, 547–48, 556–57 (1975) (upholding a tribal regulation of alcohol sales, including as applied to nonmembers on fee land within the reservation); *Williams v. Lee*, 358 U.S. 217, 217–18, 223 (1959) (refusing to allow a state court to exercise jurisdiction over a civil dispute arising on reservation fee land involving a nonmember); *Powers of Indian Tribes*, 55 Interior Dec. 14, 46 (1934) (Solicitor General’s opinion that tribes can regulate nonmembers within their reservations).

<sup>93</sup> *Montana*, 450 U.S. at 564.

<sup>94</sup> *McGirt*, 140 S. Ct. at 2460–62 (assuming the view that a promise of a homeland is a promise of a reservation); *Herrera v. Wyoming*, 139 S. Ct. 1686, 1691–92 (2019) (assuming the hunting right survived); *Nebraska v. Parker*, 136 S. Ct. 1072, 1076–77 (2016).

<sup>95</sup> *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (describing sovereign immunity as a “core aspect[]” of traditional tribal sovereignty).

<sup>96</sup> *McGirt*, 140 S. Ct. at 2470.

<sup>97</sup> *Id.* at 2463.

<sup>98</sup> *Id.* at 2464.

<sup>99</sup> For example, the Court dismissed Oklahoma’s interest in preventing potentially thousands of its convictions from being overturned. See *id.* at 2479–80.

<sup>100</sup> See Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1774–76 (1997).

tribe's interests to come up with the "right" answer.<sup>101</sup> If that is right, then *McGirt* certainly puts a burr in *Montana*'s saddle. In fact, *McGirt* would have been where nonmembers' interests were highest, with 1.8 million non-Indians waking up to find out they live in Indian Country.<sup>102</sup> Yet that consideration was rejected because, as put by Justice Gorsuch, "[i]t isn't so hard to see" that when the federal government issued land patents to western-bound homesteaders, the homesteaders received legal title, but there is no balancing test questioning the United States' sovereignty over those lands.<sup>103</sup> Justice Gorsuch seems to suggest likewise for Indian tribes.<sup>104</sup>

The changing current brought about by *McGirt* certainly undermines the reasoning of *Montana* and its progeny, but it remains to be seen how the principle of stare decisis will affect the Court's willingness to revisit these precedents and apply *McGirt*'s reasoning to other areas of federal Indian law.<sup>105</sup> Recent Supreme Court cases do suggest that tribal nations have cause for hope. The addition of Justice Gorsuch seems to have brought about a reorientation to the Court's approach to federal Indian law. Other commentators have noted that Justice Gorsuch has tilted the Court toward a jurisprudence of promise keeping, and, perhaps, might be willing to overrule poorly reasoned past precedents in the field.<sup>106</sup> For now, tribes can celebrate Justice Gorsuch's recognition that "[o]n the far end"<sup>107</sup> of a nearly 1,000 mile "ostensibly voluntary"<sup>108</sup> Trail of Tears "was a promise."<sup>109</sup>

<sup>101</sup> The test in *Montana* could be read as balancing non-Indians' interests in not having their conduct on fee lands within the reservation subject to tribal regulations without their consent against the tribe's interests in political integrity, economic security, health, and welfare. See *Montana v. United States*, 450 U.S. 544, 564–66 (1981).

<sup>102</sup> *McGirt*, 140 S. Ct. at 2479.

<sup>103</sup> *Id.* at 2464.

<sup>104</sup> See *id.*

<sup>105</sup> Much ink has been spilled over the principle of stare decisis, but coverage of that debate is outside the scope of this comment. It will suffice to point out that in *Herrera*, the Court — although not overruling directly — expressed a willingness to explicitly repudiate an over one-hundred-year-old federal Indian law precedent. See *Herrera v. Wyoming*, 139 S. Ct. 1686, 1697 (2019) ("[W]e make clear today that [*Ward v. Race Horse*], 163 U.S. 504 (1896),] is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood.")

<sup>106</sup> See, e.g., Berger, *supra* note 77, at 1941–42 (speculating Justice Gorsuch "will almost certainly," *id.* at 1941, uphold promises more often and implying that he could be instrumental in reconsidering past federal Indian law precedents). While on the Supreme Court, Justice Gorsuch — a Westerner — has recently authored another opinion that evinced a strong commitment to keeping promises to tribes. See *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1016–17 (2019) (Gorsuch, J., concurring in the judgment). He showed a similar interest in promise keeping while sitting on the Tenth Circuit. See, e.g., *United Planners Fin. Servs. of Am., L.P. v. Sac & Fox Nation*, 654 F. App'x 376, 377–78 (10th Cir. 2016); *Ute Indian Tribe v. Utah (Ute VI)*, 790 F.3d 1000, 1005 (10th Cir. 2015); *Fletcher v. United States*, 730 F.3d 1206, 1207–08 (10th Cir. 2013); *Somerlott v. Cherokee Nation Distribs., Inc.*, 686 F.3d 1144, 1154 (10th Cir. 2012) (Gorsuch, J., concurring).

<sup>107</sup> *McGirt*, 140 S. Ct. at 2459.

<sup>108</sup> *Id.* at 2460.

<sup>109</sup> *Id.* at 2459.