UNIVERSITY OF OKLAHOMA COLLEGE OF LAW

2025 AMERICAN INDIAN LAW REVIEW SYMPOSIUM

MARCH 28, 2025

Table of Contents of Supplied Materials

1. *McGirt v. Oklahoma*, 591 U.S. 894 (2020). The landmark *McGirt* case was arguably the biggest criminal jurisdiction shift in American history. All the speakers will be commenting on how *McGirt* has changed their professional lives in various intersections. Audiences will gain a deeper understanding on how various Federal and Tribal entities have been impacted and adapted in a post *McGirt* world.

2. *Bosse v. State*, 2021 OK CR 3, __P. 3d __. Post *McGirt*, the Oklahoma Criminal Court of Appeals extended *McGirt's* applicability to land granted to Oklahoma's Chickasaw Nation.

3. *Sizmore v. State,* 2021 OK CR 6, __P. 3d __ (Choctaw Nation). Post *McGirt*, the Oklahoma Criminal Court of Appeals extended *McGirt's* applicability to land granted to Oklahoma's Choctaw Nation.

4. *Spears v. State*, 2021 OK CR 7, __P. 3d __ (Cherokee Nation). Post *McGirt*, the Oklahoma Criminal Court of Appeals extended *McGirt's* applicability to land granted to Oklahoma's Cherokee Nation.

5. *Grayson v. State,* 2021 OK CR 8, __P. 3d __ (Seminole Nation). Post *McGirt*, the Oklahoma Criminal Court of Appeals extended *McGirt's* applicability to land granted to Oklahoma's Seminole Nation.

6. 18 U.S.C.A. § 1151. This statute defines "Indian Country." Indian Country will be referred to multiple times throughout this event. It is imperative that the audience understands: (i) what Indian Country is; (ii) where Indian Country is and, (iii) what lands in Oklahoma are classified as Indian Country.

7. *Matloff v. Wallace*, 2021 OKCR 21, 497 P. 3d 686. This case is very important for audiences to hear about as it directly combats misinformation regarding "lawlessness" due to McGirt. However, in Matloff, the Oklahoma Criminal Court of Appeals held that the *McGirt* implications would not apply retroactively. Meaning prior convicted criminals could no longer have their convictions overturned with a *McGirt* jurisdictional argument.

8. *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022). The Supreme Court determined there is concurrent state and federal jurisdiction where there is a non-indian defendant, an indian victim, and the crime takes place in Indian Country. *Castro-Huerta* not only had impacts on Indian Country in Oklahoma, but across the country. This case has impacted the caseload of both the Northern and Eastern Districts of Oklahoma, something many of the speakers will be able to speak to.

9. *United States v. Antelope*, 430 U.S. 641 (1977). This case is where the Supreme Court determined a person's Indian status to be a political classification, rather than a racial classification. Political classifications do not invoke strict scrutiny. Without strict scrutiny review, it is much more challenging for any plaintiff to prevail on an Equal Protection cause of action.

KeyCite Yellow Flag - Negative Treatment
Abrogation Recognized by City of Tulsa v. O'Brien, Okla.Crim.App., December 5, 2024

140 S.Ct. 2452
Supreme Court of the United States.

Jimcy MCGIRT, Petitioner
v.
OKLAHOMA

No. 18-9526
|
Argued May 11, 2020
|
Decided July 9, 2020

Synopsis

Background: Following defendant's conviction for three serious sexual offenses in state court, defendant, an enrolled member of an American Indian tribe, applied for postconviction relief, arguing that only federal courts had jurisdiction under the federal Major Crimes Act (MCA). The Oklahoma District Court, Wagoner County, denied the application. Defendant appealed. The Oklahoma Court of Criminal Appeals affirmed. Defendant's petition for a writ of certiorari was granted.

Holdings: The Supreme Court, Justice Gorsuch, held that:

[1] Congress established a reservation for Creek Nation;

[2] government's allotment agreement with Creek Nation did not terminate Creek Reservation;

[3] Congress's intrusions on Creek Nation's promised right of self-governance did not disestablish Creek Reservation;

[4] historical practices, demographics, and other extratextual evidence were insufficient to prove disestablishment of Creek Reservation;

[5] Creek Nation originally holding fee title to land did not make land "dependent Indian community," rather than reservation;

[6] eastern Oklahoma is not exempt from the MCA; and

[7] potential for transformative effects was insufficient justification to disestablish Creek Reservation.

Judgment of the Court of Criminal Appeals reversed.

Chief Justice Roberts filed dissenting opinion in which Justice Alito and Justice Kavanaugh joined, and in which Justice Thomas joined in part.

Justice Thomas filed dissenting opinion.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (31)

[1] **Indians** State court or authorities

State courts generally have no jurisdiction to try Indians for conduct committed in "Indian country." 18 U.S.C.A. § 1153(a).

63 Cases that cite this headnote

[2] **Indians** Reservations or Grants to Indian Nations or Tribes

Indians Federal court or authorities

Congress established a reservation for Creek Nation, as relevant to determining whether area of land was "Indian Country" under federal Major Crimes Act (MCA); even though early treaties did not refer to Creek lands as "reservation," treaties "solemnly guarantied" land and established boundary lines to secure "permanent home" to Creek Nation, later treaty that reduced size of land restated commitment that remaining land would "be forever set apart" as home for Creek Nation and referred to lands as "reduced Creek reservation," and Creek were

assured right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any State. 18 U.S.C.A. § 1151(a); Treaty with the Creek Nation of Indians, Arts. 3, 9, June 14, 1866, 14 Stat. 786; Treaty with the Creek Nation of Indians, Arts. 4, 15, 1856, 11 Stat. 700; Treaty with the Creek Nation of Indians, Arts. 3, 9, 1833, 7 Stat. 418, 420; Treaty with the Creek Nation of Indians, Arts. 1, 12, 14, 15, 1832, 7 Stat. 366, 367, 368.

40 Cases that cite this headnote

[3] **Indians** Government of Indian Country, Reservations, and Tribes in General

To determine whether a tribe continues to hold a reservation, there is only one place a court may look: the Acts of Congress.

9 Cases that cite this headnote

[4] **Indians** Authority over and regulation of tribes in general

Indians Alteration or abrogation in general

The Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties; but that power belongs to Congress alone. U.S. Const. art. 1, § 8.

4 Cases that cite this headnote

[5] **Indians** Authority over and regulation of tribes in general

Indians Alteration or abrogation in general

A court will not lightly infer that Congress breached its own promises and treaties once Congress has established a reservation. U.S. Const. art. 1, § 8.

3 Cases that cite this headnote

[6] **Indians** Lands included and boundaries; appropriation and diminishment

Indians State regulation

States have no authority to reduce federal reservations lying within their borders. U.S. Const. art. 1, § 8; U.S. Const. art. 6, cl. 2.

[7] **Indians** Lands included and boundaries; appropriation and diminishment

Courts have no proper role in the adjustment of reservation borders.

[8] **Indians** Lands included and boundaries; appropriation and diminishment

Indians Disestablishment and termination

Only Congress can divest a reservation of its land and diminish its boundaries.

31 Cases that cite this headnote

[9] **Indians** Authority over and regulation of tribes in general

It is no matter how many other promises to a tribe the federal government has already broken, if Congress wishes to break the promise of a reservation, it must say so.

1 Case that cites this headnote

[10] **Indians** Disestablishment and termination

Disestablishment of a reservation has never required any particular form of words, but it does require that Congress clearly express its intent to do so, commonly with an explicit reference to cession or other language evidencing the present and total surrender of all tribal interests.

11 Cases that cite this headnote

[11] **Indians** Disestablishment and termination

Indians Operation and effect

Government's allotment agreement with Creek Nation, which established procedures for allotting 160-acre parcels to individual Tribe

members, did not terminate Creek Reservation; even if allotment was first step in plan aimed at disestablishment of reservations, agreement did not evince anything like a present and total surrender of all tribal interests in affected lands, private land ownership within reservation boundaries was contemplated by statute, and Congress was able to allow tribes to continue to exercise governmental functions over land even if they no longer owned it communally. 18 U.S.C.A. § 1151(a).

5 Cases that cite this headnote

[12] **Indians** Disestablishment and termination

Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others.

34 Cases that cite this headnote

[13] **Indians** Disestablishment and termination

Congress's intrusions on Creek Nation's promised right of self-governance, during period in which Congress sought to pressure tribes to parcel their lands into smaller lots owned by individual tribe members, did not disestablish Creek Reservation; even though Congress abolished the Creeks' tribal courts, required presidential approval of tribal ordinances, and empowered President to remove and replace principal chief, among other incursions on tribal autonomy, Congress left Tribe with significant sovereign functions over lands, such as power to collect taxes, operate schools, legislate, and oversee the federally mandated allotment process, Congress never withdrew its recognition of the tribal government, and eventually Congress enabled Creek government to resume previously suspended functions. Act of June 26, 1936, § 3, 49 Stat. 1967; Act of May 24, 1924, ch. 181, 43 Stat. 139; Act of Mar. 3, 1909, ch. 263, 35 Stat. 781, 805; Act of May 27, 1908, § 13, 35 Stat. 316; Five Civilized Tribes Act, §§ 6, 10, 11, 27, 28, 34 Stat. 139-141, 148; Curtis Act of 1898, § 28, 30 Stat. 504-505.

5 Cases that cite this headnote

[14] **Indians** Disestablishment and termination

Historical practices, demographics, and other extratextual evidence were insufficient to prove disestablishment of Creek Nation's reservation, as relevant to state court jurisdiction under federal Major Crimes Act (MCA), in light of Congress's failure to explicitly disestablish reservation, even if state had long historical prosecutorial practice of asserting jurisdiction over Indians in state court, many people had thought reservation system would be disbanded soon, and non-Indians swiftly moved on to reservation, such that Tribe members constituted small fraction of those now residing on land. 18 U.S.C.A. § 1153(a).

70 Cases that cite this headnote

[15] **Indians** Disestablishment and termination

When interpreting Congress's work in the arena of disestablishment of reservations, no less than any other, a court's charge is usually to ascertain and follow the original meaning of the law before it.

5 Cases that cite this headnote

[16] **Statutes** Contemporary and Historical Circumstances

If during the course of the Supreme Court's work an ambiguous statutory term or phrase emerges, the Court will sometimes consult contemporaneous usages, customs, and practices to the extent they shed light on the meaning of the language in question at the time of enactment.

7 Cases that cite this headnote

[17] **Statutes** Contemporary and Historical Circumstances

A court may not favor contemporaneous or later practices instead of the laws Congress passed.

5 Cases that cite this headnote

[18] **Indians** Reservations or Grants to Indian Nations or Tribes

Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.

8 Cases that cite this headnote

[19] **Statutes** Absence of Ambiguity; Application of Clear or Unambiguous Statute or Language

Statutes Extrinsic Aids to Construction

There is no need to consult extratextual sources when the meaning of a statute's terms is clear.

15 Cases that cite this headnote

[20] **Statutes** Language

Statutes Extrinsic Aids to Construction

Extratextual sources may not overcome the terms of a statute.

9 Cases that cite this headnote

[21] **Statutes** Extrinsic Aids to Construction

The only role extratextual materials can properly play is to help clear up, not create, ambiguity about a statute's original meaning.

8 Cases that cite this headnote

[22] **Indians** Construction and operation

Indians Disestablishment and termination

Disestablishment of a reservation may not be lightly inferred, and treaty rights are to be construed in favor, not against, tribal rights.

1 Case that cites this headnote

[23] **Indians** Disestablishment and termination

Indians Federal court or authorities

Creek Nation originally holding fee title to land did not make land "dependent Indian community," rather than reservation, for purposes of evaluating disestablishment and a state court's jurisdiction under federal Major Crimes Act (MCA); even though Creek Tribe did not hold usual Indian right of occupancy, President was authorized not only to solemnly assure that United States would forever secure and guaranty to Tribe the country so exchanged with them, but also to cause patent or grant to be made and executed to Tribe as additional protection, Creek Nation insisted on fee title when negotiating treaty and received land patent, and land was reserved from sale in sense that government could not give tribal lands to others or appropriate them without engaging in act of confiscation. 18 U.S.C.A. §§ 1151(b), 1153; Indian Removal Act of 1830, § 3, 4 Stat. 412; Treaty with the Creek Nation of Indians, Art. 3, 1833, 7 Stat. 419.

5 Cases that cite this headnote

[24] **Indians** Reservations or Grants to Indian Nations or Tribes

Indians Disestablishment and termination

Just as there is no particular form of words required when it comes to disestablishing a reservation, there are no particular form of words required when it comes to establishing one.

[25] **Indians** Federal court or authorities

Eastern Oklahoma is not exempt from the federal Major Crimes Act's (MCA) provision allowing only the federal government to try certain crimes committed by American Indians in Indian country. 18 U.S.C.A. §§ 1151, 1153(a).

52 Cases that cite this headnote

[26] **Indians** State court or authorities

Indians Federal court or authorities

The Supreme Court has long required a clear expression of the intention of Congress before the state or federal government may try Indians for conduct on their lands.

2 Cases that cite this headnote

[27] **Indians** Disestablishment and termination

Indians Federal court or authorities

Potential for transformative effects was insufficient justification to disestablish Creek Nation's reservation, for purposes of state court's jurisdiction under federal Major Crimes Act (MCA), despite contentions that half Oklahoma's land and roughly 1.8 million of its residents could wind up within Indian country, and that thousands of state-court convictions of Native Americans would be upset; number of people who would challenge jurisdictional basis of their state-court convictions was speculative, contrary decision would have called into question every federal conviction obtained for crimes committed on trust lands and restricted Indian allotments, and only question was statutory definition of "Indian country" under MCA. 18 U.S.C.A. § 1153(a).

113 Cases that cite this headnote

[28] **Indians** Non-Indian Defendant

Indians Crime committed in Indian country or on reservation

Aside from certain crimes committed in Indian country by Indian defendants and a broader range of crimes by or against Indians in Indian country, as addressed by the federal Major Crimes Act (MCA), states are otherwise free to apply their criminal laws in cases of non-Indian victims and defendants, including within Indian country. 18 U.S.C.A. §§ 1152, 1153.

151 Cases that cite this headnote

[29] **Federal Courts** Review of state courts

Oklahoma's general rule that issues that were not raised previously on direct appeal, but which could have been raised, were waived for further review, did not bar United States Supreme Court from addressing defendant's claim that federal Major Crimes Act (MCA) precluded state court jurisdiction; Oklahoma Court of Criminal Appeals, after noting potential state-law obstacle, proceeded to address merits of defendant's federal MCA claim anyway, and Oklahoma Court's opinion fairly appeared to rest primarily on federal law or to be interwoven with federal law and lacked any plain statement that it was relying on a state-law ground. 18 U.S.C.A. § 1153(a).

73 Cases that cite this headnote
More cases on this issue

[30] **Courts** Previous Decisions as Controlling or as Precedents

The magnitude of a legal wrong is no reason to perpetuate it.

2 Cases that cite this headnote

[31] **Statutes** Implied amendment

Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law.

2 Cases that cite this headnote

****2456** *Syllabus* [*]

***894** The Major Crimes Act (MCA) provides that, within "the Indian country," "[a]ny Indian who commits" certain enumerated offenses "shall be subject to the same law and penalties as all other persons committing any of [those] offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a). "Indian country" includes

"all land within the limits of any Indian reservation under the jurisdiction of the United States Government." § 1151. Petitioner Jimcy McGirt was convicted by an Oklahoma state court of three serious sexual offenses. He unsuccessfully argued in state postconviction proceedings that the State lacked jurisdiction to prosecute him because he is an enrolled member of the Seminole Nation and his crimes took place on the Creek Reservation. He seeks a new trial, which, he contends, must take place in federal court.

Held: For MCA purposes, land reserved for the Creek Nation since the 19th century remains "Indian country." Pp. 2460 – 2482.

(a) Congress established a reservation for the Creek Nation. An 1833 Treaty fixed borders for a "permanent home to the whole Creek Nation of Indians," 7 Stat. 418, and promised that the United States would "grant a patent, in fee simple, to the Creek nation of Indians for the [assigned] land" to continue "so long as they shall exist as a nation, and continue to occupy the country hereby assigned to them," *id.*, at 419. The patent formally issued in 1852.

Though the early treaties did not refer to the Creek lands as a "reservation," similar language in treaties from the same era has been held sufficient to create a reservation, see, *e.g.*, *Menominee Tribe v. United States*, 391 U.S. 404, 405, 88 S.Ct. 1705, 20 L.Ed.2d 697, and later Acts of Congress—referring to the "Creek reservation"—leave no room for doubt, see, *e.g.*, 17 Stat. 626. In addition, an 1856 Treaty promised that "no portion" of Creek lands "would ever be embraced or included within, or annexed to, any Territory or State," 11 Stat. 700, and that the Creeks would have the "unrestricted right of self-government," with "full jurisdiction" over enrolled Tribe members and their property, *id*., at 704. Pp. 2460 – 2462.

(b) Congress has since broken more than a few promises to the Tribe. Nevertheless, the Creek Reservation persists today. Pp. 2461 – 2474.

***895** (1) Once a federal reservation is established, only Congress can diminish or disestablish it. Doing so requires a clear expression of congressional intent. Pp. 2461 – 2463.

(2) Oklahoma claims that Congress ended the Creek Reservation during the so-called "allotment era"—a period when Congress sought to pressure many tribes to abandon their communal lifestyles and parcel their lands into smaller lots owned by individual tribal members. Missing from the allotment-era agreement with the Creek, see 31 Stat. 862–864, however, is any statute evincing anything like the "present and total surrender of all tribal interests" in the affected lands. And this Court has already rejected the argument that allotments automatically ended reservations. Pp. 2462 – 2466.

(3) Oklahoma points to other ways Congress intruded on the Creeks' promised right to self-governance during the allotment era, including abolishing the Creeks' tribal courts, 30 Stat. 504–505, and requiring Presidential approval for certain tribal ordinances, 31 Stat. 872. But these laws fall short of eliminating all tribal interest in the contested lands. Pp. 2462 – 2468.

(4) Oklahoma ultimately claims that historical practice and demographics are enough by themselves to prove disestablishment. This Court has consulted contemporaneous usages, customs, and practices to the extent they shed light on the meaning of ambiguous statutory terms, but Oklahoma points to no ambiguous language in any of the relevant statutes that could plausibly be read as an act of cession. Such extratextual considerations are of " 'limited interpretive value,' " *Nebraska* v. *Parker*, 577 U. S. 481, ——, 136 S.Ct. 1072, 1082, 194 L.Ed.2d 152, and the "least compelling" form of evidence, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 356, 118 S.Ct. 789, 139 L.Ed.2d 773. In the end, Oklahoma resorts to the State's long historical practice of prosecuting Indians in state court for serious crimes on the contested lands, various statements made during the allotment era, and the speedy and persistent movement of white settlers into the area. But these supply little help with the law's meaning and much potential for mischief. Pp. 2467 – 2468.

(c) In the alternative, Oklahoma contends that Congress never established a reservation but instead created a "dependent Indian community." To hold that the Creek never had a reservation would require willful blindness to the statutory language and a belief that the land patent the Creek received somehow made their tribal sovereignty easier to divest. Congress established a reservation, not a dependent Indian community, for the Creek Nation. Pp. 2474 – 2476.

(d) Even assuming that the Creek land is a reservation, Oklahoma argues that the MCA has never applied in eastern

Oklahoma. It claims that the Oklahoma Enabling Act, which transferred all non-federal cases ***896** pending in the territorial courts to Oklahoma's state courts, made the State's courts the successors to the federal territorial courts' sweeping authority to try Indians for crimes committed on reservations. That argument, however, rests on state prosecutorial practices that defy the MCA, rather than on the law's plain terms. Pp. 2476 – 2478.

(e) Finally, Oklahoma warns of the potential consequences that will follow a ruling against it, such as unsettling an untold number of convictions and frustrating the State's ability to prosecute crimes in the future. This Court is aware of the potential for cost and conflict around jurisdictional boundaries. But Oklahoma and its tribes have proven time and again that they can work successfully together as partners, and Congress remains free to supplement its statutory directions about the lands in question at any time. Pp. 2478 – 2482.

Reversed.

GORSUCH, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which ALITO and KAVANAUGH, JJ., joined, and in which THOMAS, J., joined, except as to footnote 9. THOMAS, J., filed a dissenting opinion.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

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Opinion

Justice GORSUCH delivered the opinion of the Court.

***897** ****2459** 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. In exchange for ceding "all their land, East of the Mississippi river," the U. S. government agreed by treaty that "[t]he Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians." Treaty With the Creeks, Arts. I, XIV, Mar. 24, 1832, 7 Stat. 366, 368 (1832 Treaty). Both parties settled on boundary lines for a new and "permanent home to the whole Creek nation," located in what is now Oklahoma. Treaty With the Creeks, preamble, Feb. 14, 1833, 7 Stat. 418 (1833 Treaty). The government further promised that "[no] State or Territory [shall] ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves." 1832 Treaty, Art. XIV, 7 Stat. 368.

Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal ***898** criminal law. Because Congress has not said otherwise, we hold the government to its word.

I

At one level, the question before us concerns Jimcy McGirt. Years ago, an Oklahoma state court convicted him of three serious sexual offenses. Since then, he has argued in postconviction proceedings that the State lacked jurisdiction to prosecute him because he is an enrolled member of the Seminole Nation of Oklahoma and his crimes took place on the Creek Reservation. A new trial for his conduct, he has contended, must take place in federal court. The Oklahoma

state courts hearing Mr. McGirt's arguments rejected them, so he now brings them here.

[1] Mr. McGirt's appeal rests on the federal Major Crimes Act (MCA). The statute provides that, within "the Indian country," "[a]ny Indian who commits" certain enumerated offenses "against the person or property of another Indian or any 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." 18 U.S.C. § 1153(a). By subjecting Indians to federal trials for crimes committed on tribal lands, Congress may have breached its promises to tribes like the Creek that they would be free to govern themselves. But this particular incursion has its limits—applying only to certain enumerated crimes and allowing only the federal government to try Indians. State courts generally have no jurisdiction to try Indians for conduct committed in "Indian country." *Negonsott v. Samuels*, 507 U.S. 99, 102–103, 113 S.Ct. 1119, 122 L.Ed.2d 457 (1993).

The key question Mr. McGirt faces concerns that last qualification: Did he commit his crimes in Indian country? A neighboring provision of the MCA defines the term to include, among other things, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, ***899** and, including rights-of-way running through the reservation." § 1151(a). Mr. McGirt submits he can satisfy ****2460** this condition because he committed his crimes on land reserved for the Creek since the 19th century.

The Creek Nation has joined Mr. McGirt as *amicus curiae*. Not because the Tribe is interested in shielding Mr. McGirt from responsibility for his crimes. Instead, the Creek Nation participates because Mr. McGirt's personal interests wind up implicating the Tribe's. No one disputes that Mr. McGirt's crimes were committed on lands described as the Creek Reservation in an 1866 treaty and federal statute. But, in seeking to defend the state-court judgment below, Oklahoma has put aside whatever procedural defenses it might have and asked us to confirm that the land once given to the Creeks is no longer a reservation today.

At another level, then, Mr. McGirt's case winds up as a contest between State and Tribe. The scope of their dispute is limited; nothing we might say today could unsettle Oklahoma's authority to try non-Indians for crimes against non-Indians on the lands in question. See *United States v. McBratney*, 104 U.S. 621, 624, 26 L.Ed. 869 (1882). Still, the stakes are not insignificant. If Mr. McGirt and the Tribe are right, the State has no right to prosecute Indians for crimes committed in a portion of Northeastern Oklahoma that includes most of the city of Tulsa. Responsibility to try these matters would fall instead to the federal government and Tribe. Recently, the question has taken on more salience too. While Oklahoma state courts have rejected any suggestion that the lands in question remain a reservation, the Tenth Circuit has reached the opposite conclusion. *Murphy v. Royal*, 875 F.3d 896, 907–909, 966 (2017). We granted certiorari to settle the question. 589 U. S. ——, 138 S.Ct. 2026, 201 L.Ed.2d 27 (2018).

II

[2] Start with what should be obvious: Congress established a reservation for the Creeks. In a series of treaties, Congress ***900** not only "solemnly guarantied" the land but also "establish[ed] boundary lines which will secure a country and permanent home to the whole Creek Nation of Indians." 1832 Treaty, Art. XIV, 7 Stat. 368; 1833 Treaty, preamble, 7 Stat. 418. The government's promises weren't made gratuitously. Rather, the 1832 Treaty acknowledged that "[t]he United States are desirous that the Creeks should remove to the country west of the Mississippi" and, in service of that goal, required the Creeks to cede all lands in the East. Arts. I, XII, 7 Stat. 366, 367. Nor were the government's promises meant to be delusory. Congress twice assured the Creeks that "[the] Treaty shall be obligatory on the contracting parties, as soon as the same shall be ratified by the United States." 1832 Treaty, Art. XV, *id*., at 368; see 1833 Treaty, Art. IX, 7 Stat. 420 ("agreement shall be binding and obligatory" upon ratification). Both treaties were duly ratified and enacted as law.

Because the Tribe's move west was ostensibly voluntary, Congress held out another assurance as well. In the statute that precipitated these negotiations, Congress authorized the President "to assure the tribe ... that the United States will forever secure and guaranty to them ... the country so exchanged with them." Indian Removal Act of 1830, § 3, 4 Stat. 412. "[A]nd if they prefer it," the bill continued, "the United States will cause a patent or grant to be made and

executed to them for the same; *Provided always*, that such lands shall revert to the United States, if the Indians become extinct, or abandon the same." *Ibid.* If agreeable to all sides, a tribe would not only enjoy the government's solemn treaty promises; it would hold legal title to its lands.

****2461** It was an offer the Creek accepted. The 1833 Treaty fixed borders for what was to be a "permanent home to the whole Creek nation of Indians." 1833 Treaty, preamble, 7 Stat. 418. It also established that the "United States will grant a patent, in fee simple, to the Creek nation of Indians for the land assigned said nation by this treaty." Art. III, ***901** *id.*, at 419. That grant came with the caveat that "the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, and continue to occupy the country hereby assigned to them." *Ibid.* The promised patent formally issued in 1852. See *Woodward v. De Graffenried*, 238 U.S. 284, 293–294, 35 S.Ct. 764, 59 L.Ed. 1310 (1915).

These early treaties did not refer to the Creek lands as a "reservation"—perhaps because that word had not yet acquired such distinctive significance in federal Indian law. But we have found similar language in treaties from the same era sufficient to create a reservation. See *Menominee Tribe v. United States*, 391 U.S. 404, 405, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968) (grant of land " 'for a home, to be held as Indian lands are held,' " established a reservation). And later Acts of Congress left no room for doubt. In 1866, the United States entered yet another treaty with the Creek Nation. This agreement reduced the size of the land set aside for the Creek, compensating the Tribe at a price of 30 cents an acre. Treaty Between the United States and the Creek Nation of Indians, Art. III, June 14, 1866, 14 Stat. 786. But Congress explicitly restated its commitment that the remaining land would "be forever set apart as a home for said Creek Nation," which it now referred to as "the reduced Creek reservation." Arts. III, IX, *id.*, at 786, 788. [1] Throughout the late 19th century, ***902** many other federal laws also expressly referred to the Creek Reservation. See, *e.g.,* Treaty Between United States and Cherokee Nation of Indians, Art. IV, July 19, 1866, 14 Stat. 800 ("Creek reservation"); Act of Mar. 3, 1873, ch. 322, 17 Stat. 626; (multiple references to the "Creek reservation" and "Creek India[n] Reservation"); 11 Cong. Rec. 2351 (1881) (discussing "the dividing line between the Creek reservation and their ceded lands"); Act of Feb. 13, 1891, 26 Stat. 750 (describing a cession by referencing the "West boundary line of the Creek Reservation").

There is a final set of assurances that bear mention, too. In the Treaty of 1856, Congress promised that "no portion" of the Creek Reservation "shall ever be embraced or included within, or annexed to, any Territory or State." Art. IV, 11 Stat. 700. And within their lands, with exceptions, the Creeks were to be "secured in the unrestricted right of self-government," with "full jurisdiction" over enrolled Tribe members and their property. Art. XV, *id.*, at 704. So the Creek were promised not only a "permanent home" that would be ****2462** "forever set apart"; they were also assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any State. Under any definition, this was a reservation.

III

A

While there can be no question that Congress established a reservation for the Creek Nation, it's equally clear that Congress has since broken more than a few of its promises to the Tribe. Not least, the land described in the parties' treaties, once undivided and held by the Tribe, is now fractured into pieces. While these pieces were initially distributed to Tribe members, many were sold and now belong to persons unaffiliated with the Nation. So in what sense, if any, can we say that the Creek Reservation persists today?

***903** **[3]** **[4]** **[5]** To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress. This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566–568, 23 S.Ct. 216, 47 L.Ed. 299 (1903). But that power, this Court has cautioned, belongs to Congress alone. Nor will this Court lightly infer such a breach once Congress has established a reservation. *Solem v. Bartlett*, 465 U.S. 463, 470, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984).

[6] Under our Constitution, States have no authority to reduce federal reservations lying within their borders. Just

imagine if they did. A State could encroach on the tribal boundaries or legal rights Congress provided, and, with enough time and patience, nullify the promises made in the name of the United States. That would be at odds with the Constitution, which entrusts Congress with the authority to regulate commerce with Native Americans, and directs that federal treaties and statutes are the "supreme Law of the Land." Art. I, § 8; Art. VI, cl. 2. It would also leave tribal rights in the hands of the very neighbors who might be least inclined to respect them.

[7] **[8]** **[9]** **[10]** Likewise, courts have no proper role in the adjustment of reservation borders. Mustering the broad social consensus required to pass new legislation is a deliberately hard business under our Constitution. Faced with this daunting task, Congress sometimes might wish an inconvenient reservation would simply disappear. Short of that, legislators might seek to pass laws that tiptoe to the edge of disestablishment and hope that judges—facing no possibility of electoral consequences themselves—will deliver the final push. But wishes don't make for laws, and saving the political branches the embarrassment of disestablishing a reservation is not one of our constitutionally assigned prerogatives. "[O]nly Congress can divest a reservation of its land and diminish its boundaries." *Solem*, 465 U.S., at 470, 104 S.Ct. 1161. So it's no matter ***904** how many other promises to a tribe the federal government has already broken. If Congress wishes to break the promise of a reservation, it must say so.

History shows that Congress knows how to withdraw a reservation when it can muster the will. Sometimes, legislation has provided an "[e]xplicit reference to cession" or an "unconditional commitment ... to compensate the Indian tribe for its opened land." *Ibid.* Other times, Congress has directed that tribal lands shall be " 'restored to the public domain.' " *Hagen v. Utah*, 510 U.S. 399, 412, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) (emphasis deleted). ****2463** Likewise, Congress might speak of a reservation as being " 'discontinued,' " " 'abolished,' " or " 'vacated.' " *Mattz v. Arnett*, 412 U.S. 481, 504, n. 22, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973). Disestablishment has "never required any particular form of words," *Hagen*, 510 U.S., at 411, 114 S.Ct. 958. But it does require 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.' " *Nebraska* v. *Parker*, 577 U. S. 481, ——– ——, 136 S.Ct. 1072, 1079, 194 L.Ed.2d 152 (2016).

B

[11] In an effort to show Congress has done just that with the Creek Reservation, Oklahoma points to events during the so-called "allotment era." Starting in the 1880s, Congress sought to pressure many tribes to abandon their communal lifestyles and parcel their lands into smaller lots owned by individual tribe members. See 1 F. Cohen, Handbook of Federal Indian Law § 1.04 (2012) (Cohen), discussing General Allotment Act of 1887, ch. 119, 24 Stat. 388. Some allotment advocates hoped that the policy would create a class of assimilated, landowning, agrarian Native Americans. See Cohen § 1.04; F. Hoxie, A Final Promise: The Campaign To Assimilate 18–19 (2001). Others may have hoped that, with lands in individual hands and (eventually) freely alienable, white settlers would have more space of their own. See *id*., at 14–15; cf. General Allotment Act of 1887, § 5, 24 Stat. 389–390.

***905** The Creek were hardly exempt from the pressures of the allotment era. In 1893, Congress charged the Dawes Commission with negotiating changes to the Creek Reservation. Congress identified two goals: Either persuade the Creek to cede territory to the United States, as it had before, or agree to allot its lands to Tribe members. Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 645–646. A year later, the Commission reported back that the Tribe "would not, under any circumstances, agree to cede any portion of their lands." S. Misc. Doc. No. 24, 53d Cong., 3d Sess., 7 (1894). At that time, before this Court's decision in *Lone Wolf*, Congress may not have been entirely sure of its power to terminate an established reservation unilaterally. Perhaps for that reason, perhaps for others, the Commission and Congress took this report seriously and turned their attention to allotment rather than cession. [2]

The Commission's work culminated in an allotment agreement with the Tribe in 1901. Creek Allotment Agreement, ch. 676, 31 Stat. 861. With exceptions for certain pre-existing town sites and other special matters, the Agreement established procedures for allotting 160-acre parcels to individual Tribe members who could not sell, transfer, or otherwise encumber their allotments for a number

of years. §§ 3, 7, *id*., at 862–864 (5 years for any portion, 21 years for the designated "homestead" portion). Tribe members were given deeds for their parcels that "convey[ed] to [them] all right, title, and interest of the Creek Nation." § 23, *id*., at 867–868. In 1908, Congress relaxed these alienation restrictions in some ways, and even allowed the Secretary of the Interior to waive them. Act of May 27, 1908, ch. 199, § 1, 35 Stat. 312. One way or the other, individual Tribe members ***906** were eventually free to sell their land to Indians and non-Indians alike.

****2464** Missing in all this, however, is a statute evincing anything like the "present and total surrender of all tribal interests" in the affected lands. Without doubt, in 1832 the Creek "cede[d]" their original homelands east of the Mississippi for a reservation promised in what is now Oklahoma. 1832 Treaty, Art. I, 7 Stat. 366. And in 1866, they "cede[d] and convey[ed]" a portion of that reservation to the United States. Treaty With the Creek, Art. III, 14 Stat. 786. But because there exists no equivalent law terminating what remained, the Creek Reservation survived allotment.

[12] In saying this we say nothing new. For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument. Remember, Congress has defined "Indian country" to include "all land within the limits of any Indian reservation ... notwithstanding the issuance of any patent, and, including any rights-of-way running through the reservation." 18 U.S.C. § 1151(a). So the relevant statute expressly contemplates private land ownership within reservation boundaries. Nor under the statute's terms does it matter whether these individual parcels have passed hands to non-Indians. To the contrary, this Court has explained repeatedly that Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others. See *Mattz*, 412 U.S., at 497, 93 S.Ct. 2245 ("[A]llotment under the ... Act is completely consistent with continued reservation status"); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356–358, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962) (holding that allotment act "did no more than open the way for non-Indian settlers to own land on the reservation"); *Parker*, 577 U. S., at ——, 136 S.Ct., at 1079–1080 ("[T]he 1882 Act falls into another category of surplus land Acts: those that merely opened reservation land to settlement.... Such schemes allow non-Indian settlers to own land on the reservation" (internal quotation marks omitted)).

***907** It isn't so hard to see why. The federal government issued its own land patents to many homesteaders throughout the West. These patents transferred legal title and are the basis for much of the private land ownership in a number of States today. But no one thinks any of this diminished the United States's claim to sovereignty over any land. To accomplish that would require an act of cession, the transfer of a sovereign claim from one nation to another. 3 E. Washburn, American Law of Real Property *521–*524. And 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. Indeed, such an arrangement seems to be contemplated by § 1151(a)'s plain terms. Cf. *Seymour*, 368 U.S., at 357–358, 82 S.Ct. 424. [3]

Oklahoma reminds us that allotment was often the first step in a plan ultimately aimed at disestablishment. As this Court explained in *Mattz*, Congress's expressed policy at the time "was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing." 412 U.S. at 496, 93 S.Ct. 2245. Then, "[w]hen all the lands had been allotted and ****2465** the trust expired, the reservation could be abolished." *Ibid.* This plan was set in motion nationally in the General Allotment Act of 1887, and for the Creek specifically in 1901. No doubt, this is why Congress at the turn of the 20th century "believed to a man" that "the reservation system would cease" "within a generation at most." *Solem*, 465 U.S., at 468, 104 S.Ct. 1161. Still, just as wishes are not laws, future plans aren't either. Congress may have passed allotment laws to create the conditions for ***908** disestablishment. But to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination. [4]

Ignoring this distinction would run roughshod over many other statutes as well. In some cases, Congress chose not to wait for allotment to run its course before disestablishing a reservation. When it deemed that approach appropriate, Congress included additional language expressly ending reservation status. So, for example, in 1904, Congress allotted reservations belonging to the Ponca and Otoe Tribes, reservations also lying within modern-day Oklahoma, and

then provided "further, That the reservation lines of the said ... reservations ... are hereby abolished." Act of Apr. 21, 1904, § 8, 33 Stat. 217–218 (emphasis deleted); see also *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 439–440, n. 22, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975) (collecting other examples). Tellingly, however, nothing like that can be found in the nearly contemporary 1901 Creek Allotment Agreement or the 1908 Act. That doesn't make these laws special. Rather, in using the language that they did, these allotment laws tracked others of the period, parceling out individual tracts, while saving the ultimate fate of the land's reservation status for another day. [5]

***909** C

[13] If allotment by itself won't work, Oklahoma seeks to prove disestablishment by pointing to other ways Congress intruded on the Creek's promised right to self-governance during the allotment era. It turns out there were many. For example, just a few years before the 1901 Creek Allotment Agreement, and perhaps in an effort to pressure the Tribe to the negotiating table, Congress abolished the Creeks' tribal courts and transferred all pending civil and criminal cases to the U. S. Courts of the Indian Territory. Curtis Act of 1898, § 28, 30 Stat. 504–505. Separately, ****2466** the Creek Allotment Agreement provided that tribal ordinances "affecting the lands of the Tribe, or of individuals after allotment, or the moneys or other property of the Tribe, or of the citizens thereof" would not be valid until approved by the President of the United States. § 42, 31 Stat. 872.

Plainly, these laws represented serious blows to the Creek. But, just as plainly, they left the Tribe with significant sovereign functions over the lands in question. For example, the Creek Nation retained the power to collect taxes, operate schools, legislate through tribal ordinances, and, soon, oversee the federally mandated allotment process. §§ 39, 40, 42, *id.*, at 871–872; *Buster v. Wright*, 135 F. 947, 949–950, 953–954 (C.A.8 1905). And, in its own way, the congressional incursion on tribal legislative processes only served to prove the power: Congress would have had no need to subject ***910** tribal legislation to Presidential review if the Tribe lacked any authority to legislate. Grave though they were, these congressional intrusions on pre-existing treaty rights fell short of eliminating all tribal interests in the land.

Much more ominously, the 1901 allotment agreement ended by announcing that the Creek tribal government "shall not continue" past 1906, although the agreement quickly qualified that statement, adding the proviso "subject to such further legislation as Congress may deem proper." § 46, 31 Stat. 872. Thus, while suggesting that the tribal government *might* end in 1906, Congress also necessarily understood it had not ended in 1901. All of which was consistent with the Legislature's general practice of taking allotment as a first, not final, step toward disestablishment and dissolution.

When 1906 finally arrived, Congress adopted the Five Civilized Tribes Act. But instead of dissolving the tribal government as some may have expected, Congress "deem[ed] proper" a different course, simply cutting away further at the Tribe's autonomy. Congress empowered the President to remove and replace the principal chief of the Creek, prohibited the tribal council from meeting more than 30 days a year, and directed the Secretary of the Interior to assume control of tribal schools. §§ 6, 10, 28, 34 Stat. 139–140, 148. The Act also provided for the handling of the Tribe's funds, land, and legal liabilities in the event of dissolution. §§ 11, 27, *id.*, at 141, 148. Despite these additional incursions on tribal authority, however, Congress expressly recognized the Creek's "tribal existence and present tribal governmen[t]" and "continued [them] in full force and effect for all purposes authorized by law." § 28, *id.*, at 148.

In the years that followed, Congress continued to adjust its arrangements with the Tribe. For example, in 1908, the Legislature required Creek officials to turn over all "tribal properties" to the Secretary of the Interior. Act of May 27, ***911** 1908, § 13, 35 Stat. 316. The next year, Congress sought the Creek National Council's release of certain money claims against the U. S. government. Act of Mar. 3, 1909, ch. 263, 35 Stat. 781, 805. And, further still, Congress offered the Creek Nation a one-time opportunity to file suit in the federal Court of Claims for "any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation." Act of May 24, 1924, ch. 181, 43 Stat. 139; see, *e.g.*, *United States v. Creek Nation*, 295 U.S. 103, 55 S.Ct. 681, 79 L.Ed. 1331 (1935). But Congress never withdrew its recognition of the tribal government, and none of its adjustments would have made any sense if Congress thought it had already completed that job.

****2467** Indeed, with time, Congress changed course completely. Beginning in the 1920s, the federal outlook toward Native Americans shifted "away from assimilation policies and toward more tolerance and respect for traditional aspects of Indian culture." 1 Cohen § 1.05. Few in 1900 might have foreseen such a profound "reversal of attitude" was in the making or expected that "new protections for Indian rights," including renewed "support for federally defined tribalism," lurked around the corner. *Ibid.*; see also M. Scherer, Imperfect Victories: The Legal Tenacity of the Omaha Tribe, 1945–1995, pp. 2–4, (1999). But that is exactly what happened. Pursuant to this new national policy, in 1936, Congress authorized the Creek to adopt a constitution and bylaws, see Act of June 26, 1936, § 3, 49 Stat. 1967, enabling the Creek government to resume many of its previously suspended functions. *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1442–1447 (C.A.D.C. 1988). [6]

***912** The Creek Nation has done exactly that. In the intervening years, it has ratified a new constitution and established three separate branches of government. *Ibid.*; see Muscogee Creek Nation (MCN) Const., Arts. V, VI, and VII. Today the Nation is led by a democratically elected Principal Chief, Second Chief, and National Council; operates a police force and three hospitals; commands an annual budget of more than $350 million; and employs over 2,000 people. Brief for Muscogee (Creek) Nation as *Amicus Curiae* 36–39. In 1982, the Nation passed an ordinance reestablishing the criminal and civil jurisdiction of its courts. See *Hodel*, 851 F.2d at 1442, 1446–1447 (confirming Tribe's authority to do so). The territorial jurisdiction of these courts extends to any Indian country within the Tribe's territory as defined by the Treaty of 1866. MCN Stat. 27, § 1–102(A). And the State of Oklahoma has afforded full faith and credit to its judgments since at least 1994. See *Barrett v. Barrett*, 878 P.2d 1051, 1054 (Okla. 1994); Full Faith and Credit of Tribal Courts, Okla. State Cts. Network (Apr. 18, 2019), https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=458214.

Maybe some of these changes happened for altruistic reasons, maybe some for other reasons. It seems, for example, that at least certain Members of Congress hesitated about disestablishment in 1906 because they feared any reversion of the Creek lands to the public domain would trigger a statutory ***913** commitment to hand over portions of these lands to already powerful railroad interests. See, *e.g.*, 40 Cong. Rec. 2976 (1906) (Sen. McCumber); *Id.*, at 3053 (Sen. Aldrich). Many of those who advanced the reorganization efforts of the 1930s may have done so more out of frustration with efforts to assimilate Native Americans than any disaffection with assimilation ****2468** as the ultimate goal. See 1 Cohen § 1.05; Scherer, Imperfect Victories, at 2–4. But whatever the confluence of reasons, in all this history there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation. In the end, Congress moved in the opposite direction. [7]

D

[14] Ultimately, Oklahoma is left to pursue a very different sort of argument. Now, the State points to historical practices and demographics, both around the time of and long after the enactment of all the relevant legislation. These facts, the State submits, are enough by themselves to prove disestablishment. Oklahoma even classifies and categorizes how we should approach the question of disestablishment into three "steps." It reads *Solem* as requiring us to examine the laws passed by Congress at the first step, contemporary events at the second, and even later events and demographics at the third. On the State's account, we have so far finished only the first step; two more await.

[15] **[16]** **[17]** **[18]** This is mistaken. 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 ***914** us. *New Prime Inc.* v. *Oliveira*, 586 U. S. ——, ——, 139 S.Ct. 532, 538–539, 202 L.Ed.2d 536 (2019). That is the only "step" proper for a court of law. To be sure, if during the course of our work an ambiguous statutory term or phrase emerges, we will sometimes consult contemporaneous usages, customs, and practices to the extent they shed light on the meaning of the language in question at the time of enactment. *Ibid.* But Oklahoma does not point to any ambiguous language in any of the relevant statutes that could plausibly be read as an Act of disestablishment. Nor may a court favor contemporaneous or later practices *instead of* the laws Congress passed. As *Solem* explained, "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until

Congress explicitly indicates otherwise." 465 U.S. at 470, 104 S.Ct. 1161 (citing *United States v. Celestine*, 215 U.S. 278, 285, 30 S.Ct. 93, 54 L.Ed. 195 (1909)).

Still, Oklahoma reminds us that *other* language in *Solem* isn't so constrained. In particular, the State highlights a passage suggesting that "[w]here 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." 465 U.S. at 471, 104 S.Ct. 1161. While acknowledging that resort to subsequent demographics was "an unorthodox and potentially unreliable method of statutory interpretation," the Court seemed nonetheless taken by its "obvious practical advantages." *Id.*, at 472, n. 13, 471, 104 S.Ct. 1161.

Out of context, statements like these might suggest historical practices or current demographics can suffice to disestablish or diminish reservations in the way Oklahoma envisions. But, in the end, *Solem* itself found these kinds of arguments provided "no help" in resolving the dispute **2469 before it. *Id.*, at 478, 104 S.Ct. 1161. Notably, too, *Solem* suggested that whatever utility historical practice or demographics might have was "demonstrated" by this Court's earlier decision in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). See *915 *Solem*, 465 U.S., at 470, n. 10, 104 S.Ct. 1161. And *Rosebud Sioux* hardly endorsed the use of such sources to find disestablishment. Instead, based on the statute at issue there, the Court came "to the firm conclusion that congressional intent" was to diminish the reservation in question. 430 U.S. at 603, 97 S.Ct. 1361. At that point, the Tribe sought to cast doubt on the clear import of the text by citing subsequent historical events—and the Court rejected the Tribe's argument *exactly because* this kind of evidence could not overcome congressional intent as expressed in a statute. *Id.*, at 604–605, 97 S.Ct. 1361.

This Court has already sought to clarify that extratextual considerations hardly supply the blank check Oklahoma supposes. In *Parker*, for example, we explained that "[e]vidence of the subsequent treatment of the disputed land ... has 'limited interpretive value.' " 577 U. S., at ——, 136 S.Ct., at 1082 (quoting *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 355, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998)). [8] *Yankton Sioux* called it the "least compelling" form of evidence. *Id.*, at 356, 118 S.Ct. 789. Both cases emphasized that what value such evidence has can only be *interpretative*—evidence that, at best, might be used to the extent it sheds light on what the terms found in a statute meant at *916 the time of the law's adoption, not as an alternative means of proving disestablishment or diminishment.

[19] [20] [21] To avoid further confusion, we restate the point. There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help "clear up ... not create" ambiguity about a statute's original meaning. *Milner v. Department of Navy*, 562 U.S. 562, 574, 131 S.Ct. 1259, 179 L.Ed.2d 268 (2011). And, as we have said time and again, once a reservation is established, it retains that status "until Congress explicitly indicates otherwise." *Solem*, 465 U.S., at 470, 104 S.Ct. 1161 (citing *Celestine*, 215 U.S., at 285, 30 S.Ct. 93); see also *Yankton Sioux*, 522 U.S., at 343, 118 S.Ct. 789 ("[O]nly Congress can alter the terms of an Indian treaty by diminishing a reservation, and its intent to do so must be clear and plain") (citation and internal quotation marks omitted).

[22] The dissent charges that we have failed to take account of the "compelling reasons" for considering extratextual evidence **2470 as a matter of course. *Post*, at 2487 – 2488. But Oklahoma and the dissent have cited no case in which this Court has found a reservation disestablished without first concluding that a statute required that result. Perhaps they wish this case to be the first. To follow Oklahoma and the dissent down that path, though, 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. *Solem*, 465 U.S., at 472, 104 S.Ct. 1161. [9]

*917 To see the perils of substituting stories for statutes, we need look no further than the stories we are offered in the case before us. Put aside that the Tribe could tell more than a few stories of its own: Take just the evidence on which Oklahoma and the dissent wish to rest their case. First, they point to Oklahoma's long historical prosecutorial practice of asserting jurisdiction over Indians in state court,

even for serious crimes on the contested lands. If the Creek lands really were part of a reservation, the argument goes, all of these cases should have been tried in federal court pursuant to the MCA. Yet, until the Tenth Circuit's *Murphy* decision a few years ago, no court embraced that possibility. See *Murphy*, 875 F.3d 896. Second, they offer statements from various sources to show that "everyone" in the late 19th and early 20th century thought the reservation system—and the Creek Nation—would be disbanded soon. Third, they stress that non-Indians swiftly moved on to the reservation in the early part of the last century, that Tribe members today constitute a small fraction of those now residing on the land, and that the area now includes a "vibrant city with expanding aerospace, healthcare, technology, manufacturing, and transportation sectors." Brief for Petitioner in *Carpenter* v. *Murphy*, O. T. 2018, No. 17–1107, p. 15. All this history, we are told, supplies "compelling" evidence about the lands in question.

Maybe so, but even taken on its own terms none of this evidence tells the story we are promised. Start with the State's argument about its longstanding practice of asserting jurisdiction over Native Americans. Oklahoma proceeds on the implicit premise that its historical practices are unlikely ***918** to have defied the mandates of the federal MCA. That premise, though, appears more than a little shaky. In conjunction with the MCA, § 1151(a) not only sends to federal court certain major crimes committed by Indians on reservations. Two doors down, in § 1151(c), the statute does the same for major crimes committed by Indians on "Indian allotments, the Indian titles of which have not been extinguished." Despite this direction, however, Oklahoma state courts erroneously entertained prosecutions for major crimes by Indians on Indian allotments for *decades*, ****2471** until state courts finally disavowed the practice in 1989. See *State v. Klindt*, 782 P.2d 401, 404 (Okla. Crim. App. 1989) (overruling *Ex parte Nowabbi*, 60 Okla. Crim. 111, 61 P.2d 1139 (1936)); see also *United States v. Sands*, 968 F.2d 1058, 1062–1063 (C.A.10 1992). And if the State's prosecution practices disregarded § 1151(c) for so long, it's unclear why we should take those same practices as a reliable guide to the meaning and application of § 1151(a).

Things only get worse from there. Why did Oklahoma historically think it could try Native Americans for any crime committed on restricted allotments or anywhere else? Part of the explanation, Oklahoma tells us, is that it thought the eastern half of the State was always categorically exempt from the terms of the federal MCA. So whether a crime was committed on a restricted allotment, a reservation, or land that wasn't Indian country at all, to Oklahoma it just didn't matter. In the State's view, when Congress adopted the Oklahoma Enabling Act that paved the way for its admission to the Union, it carved out a special exception to the MCA for the eastern half of the State where the Creek lands can be found. By Oklahoma's own admission, then, for decades its historical practices in the area in question didn't even *try* to conform to the MCA, all of which makes the State's past prosecutions a meaningless guide for determining what counted as Indian country. As it turns out, too, Oklahoma's claim to a special exemption was itself mistaken, ***919** yet one more error in historical practice that even the dissent does not attempt to defend. See Part V, *infra*. [10]

To be fair, 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. But all that only underscores further the danger of relying on state practices to determine the meaning of the federal MCA. See, *e.g.*, *Negonsott*, 507 U.S., at 106–107, 113 S.Ct. 1119 ("[I]n practice, Kansas had exercised jurisdiction over all offenses committed on Indian reservations involving Indians" (quoting memorandum from Secretary of the Interior, H. R. Rep. No. 1999, 76th Cong., 3d Sess., 4 (1940)); Scherer, Imperfect Victories, at 18 (describing "nationwide jurisdictional confusion" as a result of the MCA); Cohen § 6.04(4)(a) ("Before 1942 the state of New York regularly exercised or claimed the right to exercise jurisdiction over the New York reservations, but a federal court decision in that year raised questions about the validity of state jurisdiction"); Brief for United States as *Amicus Curiae* in *Carpenter* v. *Murphy*, O. T. 2018, No. 17–1107, pp. 7a–8a (Letter from Secretary of the Interior, Mar. 27, 1963) (noting that many States have asserted criminal jurisdiction over Indians without an apparent basis in a federal law). [11]

***920** ****2472** Oklahoma next points to various statements during the allotment era which, it says, show that even the Creek understood their reservation was under threat. And there's no doubt about that. By 1893, the leadership of the Creek Nation saw what the federal government had in mind: "They [the federal government] do not deny any of our rights under treaty, but say they will go to the people themselves

and confer with them and urge upon them the necessity of a change in their present condition, and upon their refusal will force a change upon them." P. Porter & A. McKellop, Printed Statement of Creek Delegates, reprinted in Creek Delegation Documents 8–9 (Feb. 9, 1893). Not a decade later, and as a result of these forced changes, the leadership recognized that " '[i]t would be difficult, if not impossible to successfully operate the Creek government now.' " App. to Brief for Respondent 8a (Message to Creek National Council (May 7, 1901), reprinted in The Indian Journal (May 10, 1901)). Surely, too, the future looked even bleaker: " 'The remnant of a government now accorded to us can be expected to be maintained only until all settlements of our landed and other interests growing out of treaty stipulations with the government of the United States shall have been settled.' " *Ibid*.

But note the nature of these statements. The Creek Nation recognized that the federal government *will* seek to get popular support or otherwise *would* force change. Likewise, the Tribe's government *would* continue for only so long. These were prophesies, and hardly groundbreaking ones at that. After all, the 1901 Creek Allotment Agreement explicitly said that the tribal government "shall not ***921** continue" past 1906. § 46, 31 Stat. 872. So what might statements like these tell us that isn't already evident from the statutes themselves? Oklahoma doesn't suggest they shed light on the meaning of some disputed and ambiguous statutory direction. More nearly, the State seeks to render the Creek's fears self-fulfilling. [12]

We are also asked to consider commentary from those outside the Tribe. In particular, the dissent reports that the federal government "operated" on the "understanding" that the reservation was disestablished. *Post,* at 2499. In support of its claim, the dissent highlights a 1941 statement from Felix Cohen. Then serving as an official at the Interior Department, Cohen opined that " 'all offenses by or against Indians' in the former Indian Territory 'are subject to State laws.' " *Ibid.* (quoting App. to Supp. Reply Brief for Petitioner in *Carpenter* v. *Murphy*, O. T. 2018, No. 17–1107, p. 1a (Memorandum for Commissioner of Indian Affairs (July 11, 1941)). But that statement is incorrect. As we have just seen, Oklahoma's courts acknowledge that the State lacks jurisdiction over Indian crimes on Indian allotments. See *Klindt*, 782 P.2d at 403–404. And the dissent does not dispute that Oklahoma is ****2473** without authority under the MCA to try Indians for crimes committed on restricted allotments and any reservation. All of which highlights the pitfalls of elevating commentary over the law. [13]

***922** Finally, Oklahoma points to the speedy and persistent movement of white settlers onto Creek lands throughout the late 19th and early 20th centuries. But this history proves no more helpful in discerning statutory meaning. Maybe, as Oklahoma supposes, it suggests that some white settlers in good faith thought the Creek lands no longer constituted a reservation. But maybe, too, some didn't care and others never paused to think about the question. Certain historians have argued, for example, that the loss of Creek land ownership was accelerated by the discovery of oil in the region during the period at issue here. A number of the federal officials charged with implementing the laws of Congress were apparently openly conflicted, holding shares or board positions in the very oil companies who sought to deprive Indians of their lands. A. Debo, And Still the Waters Run 86–87, 117–118 (1940). And for a time Oklahoma's courts appear to have entertained sham competency and guardianship proceedings that divested Tribe members of oil rich allotments. *Id*., at 104–106, 233–234; Brief for Historians et al. as *Amici Curiae* 26–30. Whatever else might be ***923** said about the history and demographics placed before us, they hardly tell a story of unalloyed respect for tribal interests. [14]

****2474** In the end, only one message rings true. Even the carefully selected history Oklahoma and the dissent recite is not nearly as tidy as they suggest. It supplies us with little help in discerning the law's meaning and much potential for mischief. If anything, the persistent if unspoken message here seems to be that we should be taken by the "practical advantages" of ignoring the written law. How much easier it would be, after all, to let the State proceed as it has always assumed it might. But just imagine what it would mean to indulge that path. A State exercises jurisdiction over Native Americans with such persistence that the practice seems normal. Indian landowners lose their titles by fraud or otherwise in sufficient volume that no one remembers whose land it once was. All this continues for long enough that a reservation that was once beyond doubt becomes questionable, and then even farfetched. Sprinkle in a few predictions here, some contestable commentary there, and the job ***924** is done, a reservation is disestablished. None of

these moves would be permitted in any other area of statutory interpretation, and there is no reason why they should be permitted here. That would be the rule of the strong, not the rule of law.

IV

[23] Unable to show that Congress disestablished the Creek Reservation, Oklahoma next tries to turn the tables in a completely different way. Now, it contends, Congress never established a reservation in the first place. Over all the years, from the federal government's first guarantees of land and self-government in 1832 and through the litany of promises that followed, the Tribe never received a reservation. Instead, what the Tribe has had all this time qualifies only as a "dependent Indian community."

Even if we were to accept Oklahoma's bold feat of reclassification, however, it's hardly clear the State would win this case. "Reservation[s]" and "Indian allotments, the Indian titles to which have not been extinguished," qualify as Indian country under subsections (a) and (c) of § 1151. But "dependent Indian communities" *also* qualify as Indian country under subsection (b). So Oklahoma lacks jurisdiction to prosecute Mr. McGirt whether the Creek lands happen to fall in one category or another.

About this, Oklahoma is at least candid. It admits the entire point of its reclassification exercise is to avoid *Solem*'s rule that only Congress may disestablish a reservation. And to achieve that, the State has to persuade us not only that the Creek lands constitute a "dependent Indian community" rather than a reservation. It *also* has to convince us that we should announce a rule that dependent Indian community status can be lost more easily than reservation status, maybe even by the happenstance of shifting demographics.

To answer this argument, it's enough to address its first essential premise. Holding that the Creek never had a reservation ***925** would require us to stand willfully blind before a host of federal statutes. Perhaps that is why the Solicitor General, who supports Oklahoma's disestablishment argument, refuses to endorse this alternative effort. It also may be why Oklahoma introduced this argument for affirmance only for the first time in this Court. And it may be why the dissent makes no attempt to defend Oklahoma here. What are we to make of the federal government's repeated treaty promises that the land would be "solemnly guarantied to the Creek Indians," that it would be a "permanent home," "forever set apart," in which the Creek would be "secured in the unrestricted right of self-government"? What about Congress's repeated references to a ****2475** "Creek reservation" in its statutes? No one doubts that this kind of language normally suffices to establish a federal reservation. So what could possibly make this case different?

Oklahoma's answer only gets more surprising. *The* reason that the Creek's lands are not a reservation, we're told, is that the Creek Nation originally held fee title. Recall that the Indian Removal Act authorized the President not only to "solemnly ... assure the tribe ... that the United States will forever secure and guaranty to them ... the country so exchanged with them," but also, "if they prefer it, ... the United States will cause a patent or grant to be made and executed to them for the same." 4 Stat. 412. Recall that the Creek insisted on this additional protection when negotiating the Treaty of 1833, and in fact received a land patent pursuant to that treaty some 19 years later. In the eyes of Oklahoma, the Tribe's choice on this score was a fateful one. By asking for (and receiving) fee title to their lands, the Creek inadvertently made their tribal sovereignty easier to divest rather than harder.

The core of Oklahoma's argument is that a reservation must be land "reserved from sale." *Celestine*, 215 U.S., at 285, 30 S.Ct. 93. Often, that condition is satisfied when the federal government promises to hold aside a particular piece of federally ***926** owned land in trust for the benefit of the Tribe. And, admittedly, the Creek's arrangement was different, because the Tribe held "fee simple title, not the usual Indian right of occupancy." *United States v. Creek Nation*, 295 U.S. 103, 109, 55 S.Ct. 681, 79 L.Ed. 1331 (1935). Still, as we explained in Part II, the land *was* reserved from sale in the very real sense that the government could not "give the tribal lands to others, or to appropriate them to its own purposes," without engaging in " 'an act of confiscation.' " *Id.*, at 110, 55 S.Ct. 681.

[24] It's hard to see, too, how any difference between these two arrangements might work to the detriment of the Tribe. Just as we have never insisted on any particular form of words when it comes to disestablishing a reservation, we have never

done so when it comes to establishing one. See *Minnesota v. Hitchcock*, 185 U.S. 373, 390, 22 S.Ct. 650, 46 L.Ed. 954 (1902) ("[I]n order to create a reservation it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been there results a certain defined tract appropriated to certain purposes"). As long as 120 years ago, the federal court for the Indian Territory recognized all this and rightly rejected the notion that fee title is somehow inherently incompatible with reservation status. *Maxey v. Wright*, 54 S.W. 807, 810 (Indian Terr. 1900).

By now, Oklahoma's next move will seem familiar. Seeking to sow doubt around express treaty promises, it cites some stray language from a statute that does not control here, a piece of congressional testimony there, and the scattered opinions of agency officials everywhere in between. See, *e.g.*, Act of July 31, 1882, ch. 360, 22 Stat. 179 (referring to Creek land as "Indian country" as opposed to an "Indian reservation"); S. Doc. No. 143, 59th Cong., 1st. Sess., 33 (1906) (Chief of Choctaw Nation—which had an arrangement similar to the Creek's—testified that both Tribes "object to being classified with the reservation Indians"); Dept. of Interior, Census Office, Report on Indians Taxed and Indians ***927** Not Taxed in the U. S. 284 (1894) (Creeks and neighboring Tribes were "not on the ordinary Indian reservation, but on lands patented to them by the United States"). Oklahoma stresses that this Court even once called the Creek lands a "dependent Indian community," ****2476** though it used that phrase in passing and only to show that the Tribe's "property and affairs were subject to the control and management of that government"—a point that would also be true if the lands were a reservation. *Creek Nation*, 295 U.S., at 109, 55 S.Ct. 681. Unsurprisingly given the Creek Nation's nearly 200-year occupancy of these lands, both sides have turned up a few clues suggesting the label "reservation" either did or did not apply. One thing everyone can agree on is this history is long and messy.

But the most authoritative evidence of the Creek's relationship to the land lies not in these scattered references; it lies in the treaties and statutes that promised the land to the Tribe in the first place. And, if not for the Tribe's fee title to its land, no one would question that these treaties and statutes created a reservation. So the State's argument inescapably boils down to the untenable suggestion that, when the federal government agreed to offer more protection for tribal lands, it really provided less. All this time, fee title was nothing more than another trap for the wary.

V

That leaves Oklahoma to attempt yet another argument in the alternative. We alluded to it earlier in Part III. Now, the State accepts for argument's sake that the Creek land is a reservation and thus "Indian country" for purposes of the Major Crimes Act. It accepts, too, that this would normally mean serious crimes by Indians on the Creek Reservation would have to be tried in federal court. But, the State tells us, none of that matters; everything the parties have briefed and argued so far is beside the point. It's all irrelevant because it turns out the MCA just doesn't apply to the eastern ***928** half of Oklahoma, and it never has. That federal law may apply to other States, even to the western half of Oklahoma itself. But eastern Oklahoma is and has always been exempt. So whether or not the Creek have a reservation, the State's historic practices have always been correct and it remains free to try individuals like Mr. McGirt in its own courts.

[25] Notably, the dissent again declines to join Oklahoma in its latest twist. And, it turns out, for good reason. In support of its argument, Oklahoma points to statutory artifacts from its territorial history. The State of Oklahoma was formed from two territories: the Oklahoma Territory in the west and Indian Territory in the east. Originally, it seems criminal prosecutions in the Indian Territory were split between tribal and federal courts. See Act of May 2, 1890, § 30, 26 Stat. 94. But, in 1897, Congress abolished that scheme, granting the U. S. Courts of the Indian Territory "exclusive jurisdiction" to try "all criminal causes for the punishment of any offense." Act of June 7, 1897, 30 Stat. 83. These federal territorial courts applied federal law and state law borrowed from Arkansas "to all persons ... irrespective of race." *Ibid.* A year later, Congress abolished tribal courts and transferred all pending criminal cases to U. S. courts of the Indian Territory. Curtis Act of 1898, § 28, 30 Stat. 504–505. And, Oklahoma says, sending Indians to federal court and all others to state court would be inconsistent with this established and enlightened policy of applying the same law in the same courts to everyone.

[26] Here again, however, arguments along these and similar lines have been "frequently raised" but rarely "accepted." *United States v. Sands*, 968 F.2d 1058, 1061 (C.A.10 1992) (Kelly, J.). "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history." *Rice v. Olson*, 324 U.S. 786, 789, 65 S.Ct. 989, 89 L.Ed. 1367 (1945). Chief Justice Marshall, for example, ****2477** held that Indian Tribes were "distinct political communities, having territorial boundaries, within which their authority is exclusive ... which is not ***929** only acknowledged, but guarantied by the United States," a power dependent on and subject to no state authority. *Worcester v. Georgia*, 6 Pet. 515, 557, 8 L.Ed. 483 (1832); see also *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 168–169, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). And in many treaties, like those now before us, the federal government promised Indian Tribes the right to continue to govern themselves. For all these reasons, this Court has long "require[d] a clear expression of the intention of Congress" before the state or federal government may try Indians for conduct on their lands. *Ex parte Crow Dog*, 109 U.S. 556, 572, 3 S.Ct. 396, 27 L.Ed. 1030 (1883).

Oklahoma cannot come close to satisfying this standard. In fact, the only law that speaks expressly here speaks *against* the State. When Oklahoma won statehood in 1907, the MCA applied immediately according to its plain terms. That statute, as phrased at the time, provided exclusive federal jurisdiction over qualifying crimes by Indians in "*any Indian reservation*" located within "the boundaries of *any State*." Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385 (emphasis added); see also 18 U.S.C. § 1151 (defining "Indian country" even more broadly). By contrast, every one of the statutes the State directs us to merely discusses the assignment of cases among courts in the *Indian Territory*. They say nothing about the division of responsibilities between federal and state authorities after Oklahoma entered the Union. And however enlightened the State may think it was for territorial law to apply to all persons irrespective of race, some Tribe members may see things differently, given that the same policy entailed the forcible closure of tribal courts in defiance of treaty terms.

Left to hunt for some statute that might have rendered the MCA inapplicable in Oklahoma after statehood, the best the State can find is the Oklahoma Enabling Act. Congress adopted that law in preparation for Oklahoma's admission in 1907. Among its many provisions sorting out the details associated with Oklahoma's transition to statehood, the Enabling Act transferred all nonfederal cases pending in territorial ***930** courts to Oklahoma's new state courts. Act of June 16, 1906, § 20, 34 Stat. 277; see also Act of Mar. 4, 1907, § 3, 34 Stat. 1287 (clarifying treatment of cases to which United States was a party). The State says this transfer made its courts the inheritors of the federal territorial courts' sweeping authority to try Indians for crimes committed on reservations.

But, at best, this tells only half the story. The Enabling Act not only sent all nonfederal cases pending in territorial courts to state court. It *also* transferred pending cases that arose "under the Constitution, laws, or treaties of the United States" to federal district courts. § 16, 34 Stat. 277. Pending criminal cases were thus transferred to federal court if the prosecution would have belonged there had the Territory been a State at the time of the crime. § 1, 34 Stat. 1287 (amending the Enabling Act). Nor did the statute make any distinction between cases arising in the former eastern (Indian) and western (Oklahoma) territories. So, simply put, the Enabling Act sent state-law cases to state court and federal-law cases to federal court. And serious crimes by Indians in Indian country were matters that arose under the federal MCA and thus properly belonged in federal court from day one, wherever they arose within the new State.

Maybe that's right, Oklahoma acknowledges, but that's not what happened. Instead, ****2478** for many years the State continued to try Indians for crimes committed anywhere within its borders. But what can that tell us? The State identifies not a single ambiguous statutory term in the MCA that its actions might illuminate. And, as we have seen, its own courts have acknowledged that the State's historic practices deviated in meaningful ways from the MCA's terms. See *supra,* at 2470 – 2471. So, once more, it seems Oklahoma asks us to defer to its usual practices *instead of* federal law, something we will not and may never do.

That takes Oklahoma down to its last straw when it comes to the MCA. If Oklahoma lacks the jurisdiction to try Native ***931** Americans it has historically claimed, that means at the time of its entry into the Union *no one* had the power to try minor Indian-on-Indian crimes committed in Indian country. This much follows, Oklahoma reminds us, because the MCA provides federal jurisdiction only for major crimes, and no tribal forum existed to try lesser cases after Congress

abolished the tribal courts in 1898. Curtis Act, § 28, 30 Stat. 504–505. Whatever one thinks about the plausibility of other discontinuities between federal law and state practice, the State says, it is unthinkable that Congress would have allowed such a significant "jurisdictional gap" to open at the moment Oklahoma achieved statehood.

But what the State considers unthinkable turns out to be easily imagined. Jurisdictional gaps are hardly foreign to this area of the law. See, *e.g.*, *Duro v. Reina*, 495 U.S. 676, 704–706, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990) (Brennan, J., dissenting). Many tribal courts across the country were absent or ineffective during the early part of the last century, yielding just the sort of gaps Oklahoma would have us believe impossible. Indeed, this might be why so many States joined Oklahoma in prosecuting Indians without proper jurisdiction. The judicial mind abhors a vacuum, and the temptation for state prosecutors to step into the void was surely strong. See *supra*, at 2471 – 2472.

With time, too, Congress has filled many of the gaps Oklahoma worries about. One way Congress has done so is by reauthorizing tribal courts to hear minor crimes in Indian country. Congress chose exactly this course for the Creeks and others in 1936. Act of June 26, 1936, § 3, 49 Stat. 1967; see also *Hodel*, 851 F.2d at 1442–1446. Another option Congress has employed is to allow affected Indian tribes to consent to state criminal jurisdiction. 25 U.S.C. §§ 1321(a), 1326. Finally, Congress has sometimes expressly expanded state criminal jurisdiction in targeted bills addressing specific States. See, *e.g.*, 18 U.S.C. § 3243 (creating jurisdiction for Kansas); Act of May 31, 1946, ch. 279, 60 Stat. 229 (same for a reservation in North Dakota); Act of June 30, ***932** 1948, ch. 759, 62 Stat. 1161 (same for certain reservations in Iowa); 18 U.S.C. § 1162 (creating jurisdiction for six additional States). But Oklahoma doesn't claim to have complied with the requirements to assume jurisdiction voluntarily over Creek lands. Nor has Congress ever passed a law conferring jurisdiction on Oklahoma. As a result, the MCA applies to Oklahoma according to its usual terms: Only the federal government, not the State, may prosecute Indians for major crimes committed in Indian country.

VI

[27] In the end, Oklahoma abandons any pretense of law and speaks openly about the potentially "transform[ative]" effects of a loss today. Brief for Respondent 43. Here, at least, the State is finally rejoined by the dissent. If we dared to recognize that the Creek Reservation was never disestablished, Oklahoma and dissent ****2479** warn, our holding might be used by other tribes to vindicate similar treaty promises. Ultimately, Oklahoma fears that perhaps as much as half its land and roughly 1.8 million of its residents could wind up within Indian country.

It's hard to know what to make of this self-defeating argument. Each tribe's treaties must be considered on their own terms, and the only question before us concerns the Creek. Of course, the Creek Reservation alone is hardly insignificant, taking in most of Tulsa and certain neighboring communities in Northeastern Oklahoma. But neither is it unheard of for significant non-Indian populations to live successfully in or near reservations today. See, *e.g.*, Brief for National Congress of American Indians Fund as *Amicus Curiae* 26–28 (describing success of Tacoma, Washington, and Mount Pleasant, Michigan); see also *Parker*, 577 U. S., at —— – ——, 136 S.Ct., at 1081–1082 (holding Pender, Nebraska, to be within Indian country despite tribe's absence from the disputed territory for more than 120 years). Oklahoma replies that its situation is different because the affected population here is large ***933** and many of its residents will be surprised to find out they have been living in Indian country this whole time. But we imagine some members of the 1832 Creek Tribe would be just as surprised to find them there.

[28] What are the consequences the State and dissent worry might follow from an adverse ruling anyway? Primarily, they argue that recognizing the continued existence of the Creek Reservation could unsettle an untold number of convictions and frustrate the State's ability to prosecute crimes in the future. But the MCA applies only to certain crimes committed in Indian country by Indian defendants. A neighboring statute provides that federal law applies to a broader range of crimes by or against Indians in Indian country. See 18 U.S.C. § 1152. States are otherwise free to apply their criminal laws in cases of non-Indian victims and defendants, including within Indian country. See *McBratney*, 104 U.S., at 624. And Oklahoma tells us that somewhere between 10% and 15% of its citizens identify as Native American. Given all this, even Oklahoma admits that the vast majority of its prosecutions will be unaffected whatever we decide today.

[29] Still, Oklahoma and the dissent fear, "[t]housands" of Native Americans like Mr. McGirt "wait in the wings" to challenge the jurisdictional basis of their state-court convictions. Brief for Respondent 3. But this number is admittedly speculative, because many defendants may choose to finish their state sentences rather than risk reprosecution in federal court where sentences can be graver. Other defendants who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on postconviction review in criminal proceedings. [15]

***934** ****2480** **[30]** In any event, the magnitude of a legal wrong is no reason to perpetuate it. When Congress adopted the MCA, it broke many treaty promises that had once allowed tribes like the Creek to try their own members. But, in return, Congress allowed only the federal government, not the States, to try tribal members for major crimes. All our decision today does is vindicate that replacement promise. And if the threat of unsettling convictions cannot save a precedent of this Court, see *Ramos* v. *Louisiana*, 590 U. S. ——, —— – ——, 140 S.Ct. 1390, 1406–1408, 206 L.Ed.2d 583 (2020) (plurality opinion), it certainly cannot force us to ignore a statutory promise when no precedent stands before us at all.

What's more, a decision for *either* party today risks upsetting some convictions. Accepting the State's argument that the MCA never applied in Oklahoma would preserve the state-court convictions of people like Mr. McGirt, but simultaneously call into question every *federal* conviction obtained for crimes committed on trust lands and restricted Indian allotments since Oklahoma recognized its jurisdictional error more than 30 years ago. See *supra*, at 2470. It's a consequence of their own arguments that Oklahoma and the dissent choose to ignore, but one which cannot help but illustrate the difficulty of trying to guess how a ruling one way or the other might affect past cases rather than simply proceeding to apply the law as written.

Looking to the future, Oklahoma warns of the burdens federal and tribal courts will experience with a wider jurisdiction ***935** and increased caseload. But, again, for every jurisdictional reaction there seems to be an opposite reaction: recognizing that cases like Mr. McGirt's belong in federal court simultaneously takes them out of state court. So while the federal prosecutors might be initially understaffed and Oklahoma prosecutors initially overstaffed, it doesn't take a lot of imagination to see how things could work out in the end.

Finally, the State worries that our decision will have significant consequences for civil and regulatory law. The only question before us, however, concerns the statutory definition of "Indian country" as it applies in federal criminal law under the MCA, and often nothing requires other civil statutes or regulations to rely on definitions found in the criminal law. Of course, many federal civil laws and regulations do currently borrow from § 1151 when defining the scope of Indian country. But it is far from obvious why this collateral drafting choice should be allowed to skew our interpretation of the MCA, or deny its promised benefits of a federal criminal forum to tribal members.

It isn't even clear what the real upshot of this borrowing into civil law may be. Oklahoma reports that recognizing the existence of the Creek Reservation for purposes of the MCA might potentially trigger a variety of federal civil statutes and rules, including ones making the region eligible for assistance with homeland security, 6 U.S.C. §§ 601, 606, historical preservation, 54 U.S.C. § 302704, schools, 20 U.S.C. § 1443, highways, 23 U.S.C. § 120, roads, § 202, primary care clinics, 25 U.S.C. § 1616e–1, housing assistance, § 4131, nutritional programs, 7 U.S.C. §§ 2012, 2013, disability programs, 20 U.S.C. § 1411, and more. But what are we to make of this? Some may find developments like these unwelcome, but from what we are told others may celebrate them.

The dissent isn't so sanguine—it assures us, without further elaboration, that the ****2481** consequences will be "drastic precisely because they depart from ... more than a century [of] settled understanding." *Post,* at 2502. The prediction is a ***936** familiar one. Thirty years ago the Solicitor General warned that "[l]aw enforcement would be rendered very difficult" and there would be "grave uncertainty regarding the application" of state law if courts departed from decades of "long-held understanding" and recognized that the federal MCA applies to restricted allotments in Oklahoma. Brief for United States as *Amicus Curiae* in *Oklahoma* v. *Brooks*, O.T. 1988, No. 88–1147, pp. 2, 9, 18, 19. Yet, during the intervening decades none of these predictions panned out,

and that fact stands as a note of caution against too readily crediting identical warnings today.

More importantly, dire warnings are just that, and not a license for us to disregard the law. By suggesting that our interpretation of Acts of Congress adopted a century ago should be inflected based on the costs of enforcing them today, the dissent tips its hand. Yet again, the point of looking at subsequent developments seems not to be determining the meaning of the laws Congress wrote in 1901 or 1906, but emphasizing the costs of taking them at their word.

Still, we do not disregard the dissent's concern for reliance interests. It only seems to us that the concern is misplaced. Many other legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few—are designed to protect those who have reasonably labored under a mistaken understanding of the law. And it is precisely because those doctrines exist that we are "fre[e] to say what we know to be true ... today, while leaving questions about ... reliance interest[s] for later proceedings crafted to account for them." *Ramos*, 590 U. S., at ——, 140 S.Ct., at 1047 (plurality opinion).

In reaching our conclusion about what the law demands of us today, we do not pretend to foretell the future and we proceed well aware of the potential for cost and conflict around jurisdictional boundaries, especially ones that have gone unappreciated for so long. But it is unclear why pessimism should rule the day. With the passage of time, Oklahoma and its Tribes have proven they can work successfully ***937** together as partners. Already, the State has negotiated hundreds of intergovernmental agreements with tribes, including many with the Creek. See Okla. Stat., Tit. 74, § 1221 (2019 Cum. Supp.); Oklahoma Secretary of State, Tribal Compacts and Agreements, www.sos.ok.gov/tribal.aspx. These agreements relate to taxation, law enforcement, vehicle registration, hunting and fishing, and countless other fine regulatory questions. See Brief for Tom Cole et al. as *Amici Curiae* 13–19. No one before us claims that the spirit of good faith, "comity and cooperative sovereignty" behind these agreements, *id.*, at 20, will be imperiled by an adverse decision for the State today any more than it might be by a favorable one. [16] And, of course, should agreement prove elusive, Congress remains free to supplement its statutory directions about the lands in question at any ****2482** time. It has no shortage of tools at its disposal.

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[31] 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 ***938** 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.

The judgment of the Court of Criminal Appeals of Oklahoma is

Reversed.

Chief Justice ROBERTS, with whom Justice ALITO and Justice KAVANAUGH join, and with whom Justice THOMAS joins except as to footnote 9, dissenting.

In 1997, the State of Oklahoma convicted petitioner Jimcy McGirt of molesting, raping, and forcibly sodomizing a four-year-old girl, his wife's granddaughter. McGirt was sentenced to 1,000 years plus life in prison. Today, the Court holds that Oklahoma lacked jurisdiction to prosecute McGirt—on the improbable ground that, unbeknownst to anyone for the past century, a huge swathe of Oklahoma is actually a Creek Indian reservation, on which the State may not prosecute serious crimes committed by Indians like McGirt. Not only does the Court discover a Creek reservation that spans three million acres and includes most of the city of Tulsa, but the 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.

Across this vast area, the State's ability to prosecute serious crimes will be hobbled and decades of past convictions could well be thrown out. On top of that, the Court has profoundly destabilized the governance of eastern Oklahoma. The decision today creates significant uncertainty for the State's continuing authority over any area that touches Indian affairs, ranging from zoning and taxation to family and environmental law.

***939** None of this is warranted. What has gone unquestioned for a century remains true today: A huge portion of Oklahoma is not a Creek Indian reservation. Congress disestablished any reservation in a series of statutes leading up to Oklahoma statehood at the turn of the 19th century. The Court reaches the opposite conclusion only by disregarding the "well settled" approach required by our precedents. *Nebraska* v. *Parker*, 577 U. S. 481, ——, 136 S.Ct. 1072, 1078, 194 L.Ed.2d 152 (2016).

Under those precedents, we determine whether Congress intended to disestablish a reservation by examining the relevant Acts of Congress and "all the [surrounding] circumstances," including the "contemporaneous and subsequent understanding of the status of the reservation." *Id.*, at ——, 136 S.Ct., at 1079 (internal quotation marks omitted). Yet the Court declines to consider such understandings here, preferring to examine only individual statutes in isolation.

****2483** Applying the broader inquiry our precedents require, a reservation did not exist when McGirt committed his crimes, so Oklahoma had jurisdiction to prosecute him. I respectfully dissent.

I

The Creek Nation once occupied what is now Alabama and Georgia. In 1832, the Creek were compelled to cede these lands to the United States in exchange for land in present day Oklahoma. The expanse set aside for the Creek and the other Indian nations that composed the "Five Civilized Tribes"—the Cherokees, Chickasaws, Choctaws, and Seminoles—became known as Indian Territory. See F. Cohen, Handbook of Federal Indian Law § 4.07(1)(a), pp. 289–290 (N. Newton ed. 2012) (Cohen). Each of the Five Tribes formed a tripartite system of government. See *Marlin v. Lewallen*, 276 U.S. 58, 60, 48 S.Ct. 248, 72 L.Ed. 467 (1928). They "enact[ed] and execut[ed] their own laws," "punish[ed] their own criminals," and "rais[ed] and expend[ed] their own revenues." *Atlantic & Pacific R. Co. v. Mingus*, 165 U.S. 413, 436, 17 S.Ct. 348, 41 L.Ed. 770 (1897).

***940** The Five Tribes also enjoyed unique property rights. While many tribes held only a "right of occupancy" on lands owned by the United States, *United States* v. *Creek Nation*, 295 U.S. 103, 109, 55 S.Ct. 681, 79 L.Ed. 1331 (1935), each of the Five Tribes possessed title to its lands in communal fee simple, meaning the lands were "considered the property of the whole." *E.g.*, Treaty with the Creeks, Arts. III and IV, Feb. 14, 1833, 7 Stat. 419; see *Marlin*, 276 U.S., at 60, 48 S.Ct. 248. Congress promised the Tribes that their lands would never be "included within, or annexed to, any Territory or State," see, *e.g.*, Treaty with Creeks and Seminoles, Art. IV, Aug. 7, 1856, 11 Stat. 700 (1856 Treaty), and that their new homes would be "forever secure," Indian Removal Act, § 3, 4 Stat. 412; see also Treaty with the Creeks, Arts. I and XIV, Mar. 24, 1832, 7 Stat. 368.

Forever, it turns out, did not last very long, because the Civil War disrupted both relationships and borders. The Five Tribes, whose members collectively held at least 8,000 slaves, signed treaties of alliance with the Confederacy and contributed forces to fight alongside Rebel troops. See Gibson, Native Americans and the Civil War, 9 Am. Indian Q. 4, 385, 388–389, 393 (1985); Doran, Negro Slaves of the Five Civilized Tribes, 68 Annals Assn. Am. Geographers 335, 346–347, and Table 3 (1978); Cohen § 4.07(1)(a), at 289. After the war, the United States and the Tribes formed new treaties, which required each Tribe to free its slaves and allow them to become tribal citizens. *E.g.*, Treaty with the Creek Indians, Art. II, June 14, 1866, 14 Stat. 786 (1866 Treaty); see Cohen § 4.07(1)(a), at 289, and n. 9. The treaties also stated that the Tribes had "ignored their allegiance to the United States" and "unsettled the [existing] treaty relations," thereby rendering themselves "liable to forfeit" all "benefits and advantages enjoyed by them"—including their lands. *E.g.*, 1866 Treaty, Preamble, 14 Stat. 785. Due to "said liabilities," the treaties departed from prior promises and required each Tribe to give up the "west half" of its "entire domain." *E.g.*, Preamble and Art. III, *id.*, at 785–786. ***941** These western lands became the Oklahoma Territory. As before, the new treaties promised that the reduced Indian Territory would be

"forever set apart as a home" for the Tribes. *E.g.*, Art. III, *id.*, at 786. [1]

****2484** Again, however, it was not to last. In the wake of the war, a renewed "determination to thrust the nation westward" gripped the country. Cohen § 1.04, at 71. Spurred by new railroads and protected by the repurposed Union Army, settlers rapidly transformed vast stretches of territorial wilderness into farmland and ranches. See *id.*, at 71–74. The Indian Territory was no exception. By 1900, over 300,000 settlers had poured in, outnumbering members of the Five Tribes by over 3 to 1. See H. R. Rep. No. 1762, 56th Cong., 1st Sess., 1 (1900). There to stay, the settlers founded "[f]lourishing towns" along the railway lines that crossed the territory. S. Rep. No. 377, 53d Cong., 2d Sess., 6 (1894).

Coexistence proved complicated. The new towns had no municipal governments or the things that come with them —laws, taxes, police, and the like. See H. R. Doc. No. 5, 54th Cong., 1st Sess., 89 (1895). No one had meaningful access to private property ownership, as the unique communal titles of the Five Tribes precluded ownership by Indians and non-Indians alike. Despite the millions of dollars that had been invested in the towns and farmlands, residents had no durable claims to their improvements. *Ibid.* Members of the Tribes were little better off, as the Tribes failed to hold the communal lands for the "equal benefit" of all members. ***942** *Woodward v. De Graffenried*, 238 U.S. 284, 297, 35 S.Ct. 764, 59 L.Ed. 1310 (1915). Instead, a few "enterprising citizens" of the Tribes "appropriate[d] to their exclusive use almost the entire property of the Territory that could be rendered profitable." Id., at 297, 299 35 S.Ct. 764 (internal quotation marks omitted). As a result, "the poorer class of Indians [were] unable to secure enough lands for houses and farms," and "the great body of the tribe derive[d] no more benefit from their title than the neighbors in Kansas, Arkansas, or Missouri." *Id.*, at 299–301, n. 1, 35 S.Ct. 764 (emphasis deleted; internal quotation marks omitted).

Attuned to these new realities, Congress decided that it could not maintain an Indian Territory predicated on "exclusion of the Indians from the whites." S. Rep. No. 377, at 6. Congress therefore set about transforming the Indian Territory into a State.

Congress began by establishing a uniform body of law applicable to all occupants of the territory, regardless of race. To apply these laws, Congress established the U. S. Courts for the Indian Territory. Next Congress systematically dismantled the tribal governments. It abolished tribal courts, hollowed out tribal lawmaking power, and stripped tribal taxing authority. Congress also eliminated the foundation of tribal sovereignty, extinguishing the Creek Nation's title to the lands. Finally, Congress made the tribe members citizens of the United States and incorporated them in the drafting and ratification of the constitution for their new State, Oklahoma.

In taking these transformative steps, Congress made no secret of its intentions. It created a commission tasked with extinguishing the Five Tribes' territory and, in one report after another, explained that it was creating a homogenous population led by a common government. That contemporaneous understanding was shared by the tribal leadership and the State of Oklahoma. The tribal leadership acknowledged that its only remaining power was to parcel out the last of ***943** its land, and the State assumed jurisdiction over criminal cases ****2485** that, if a reservation had continued to exist, would have belonged in federal court.

A century of practice confirms that the Five Tribes' prior domains were extinguished. The State has maintained unquestioned jurisdiction for more than 100 years. Tribe members make up less than 10%–15% of the population of their former domain, and until a few years ago the Creek Nation itself acknowledged that it no longer possessed the reservation the Court discovers today. This on-the-ground reality is enshrined throughout the U. S. Code, which repeatedly terms the Five Tribes' prior holdings the "former" Indian reservations in Oklahoma. As the Tribes, the State, and Congress have recognized from the outset, those "reservations were destroyed" when "Oklahoma entered the Union." S. Rep. No. 101–216, pt. 2, p. 47 (1989).

II

Much of this important context is missing from the Court's opinion, for the Court restricts itself to viewing each of the statutes enacted by Congress in a vacuum. That approach is wholly inconsistent with our precedents on reservation disestablishment, which require a highly contextual inquiry.

Our "touchstone" is congressional "purpose" or "intent." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998). To "decipher Congress' intention" in this specialized area, we are instructed to consider three categories of evidence: the relevant Acts passed by Congress; the contemporaneous understanding of those Acts and the historical context surrounding their passage; and the subsequent understanding of the status of the reservation and the pattern of settlement there. *Solem v. Bartlett*, 465 U.S. 463, 470–472, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). The Court resists calling these "steps," because "the only 'step' proper for a court of law" is interpreting the laws enacted by Congress. *Ante*, at 2467 – 2468. Any ***944** label is fine with us. What matters is that these are categories of evidence that our precedents "direct[ ] us" to examine *in determining* whether the laws enacted by Congress disestablished a reservation. *Hagen v. Utah*, 510 U.S. 399, 410–411, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994). Because those precedents are not followed by the Court today, it is necessary to describe several at length. [2]

In *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), a unanimous Court summarized the appropriate methodology. "Congress [must] clearly evince an intent to change boundaries before diminishment will be found." *Id.*, at 470, 104 S.Ct. 1161 (internal quotation marks and alterations omitted). This inquiry first considers the "statutory language used to open the Indian lands," which is the "most probative evidence of congressional intent." *Ibid.* "Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Ibid.* But "explicit language of cession and unconditional compensation are not prerequisites" for a ****2486** finding of disestablishment. *Id.*, at 471, 104 S.Ct. 1161.

Second, we consider "events surrounding the passage of [an] Act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress." *Ibid.* When such materials "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," we will "infer that Congress shared the understanding that its action ***945** would diminish the reservation," even in the face of "statutory language that would otherwise suggest reservation boundaries remained unchanged." *Ibid.*

Third, to a "lesser extent," we examine "events that occurred after the passage of [an] Act to decipher Congress' intentions." *Ibid.* "Congress' own treatment of the affected areas, particularly in the years immediately following the opening, has some evidentiary value, as does the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with [the areas]." *Ibid.* In addition, "we have recognized that who actually moved onto opened reservation lands is also relevant." *Ibid.* "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." *Ibid.* This "subsequent demographic history" provides an "additional clue as to what Congress expected would happen." *Id.*, at 471–472, 104 S.Ct. 1161.

Fifteen years later, another unanimous Court described the same methodology more pithily in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct.789, 139 L.Ed.2d 773 (1998). First, the Court reiterated that the "most probative evidence of diminishment is, of course, the statutory language." *Id.*, at 344, 118 S.Ct. 789 (internal quotation marks omitted). The Court continued that it would also consider, second, "the historical context surrounding the passage of the ... Acts," and third, "the subsequent treatment of the area in question and the pattern of settlement there." *Ibid.* (quoting *Hagen*, 510 U.S., at 411, 114 S.Ct. 958).

The Court today treats these precedents as aging relics in need of "clarif[ication]." *Ante*, at 2468 – 2469. But these precedents have been clear enough for some time. Just a few Terms ago, the same inquiry was described as "well settled" by the unanimous Court in *Nebraska* v. *Parker*, 577 U. S. 481, ——, 136 S.Ct. 1072, 1078, 194 L.Ed.2d 152 (2016). First, the Court explained, "we start with the statutory text." *Ibid.* "Under our precedents," the Court continued, "we also 'examine all the circumstances surrounding the opening of a reservation.' " *Id.*, at ——, 136 S.Ct., at 1079 (quoting ***946** *Hagen*, 510 U.S., at 412, 114 S.Ct. 958). Thus, second and third, we "look to any unequivocal evidence of the contemporaneous and subsequent understanding of the status of the reservation by members and nonmembers, as well as the United States and the State." 577 U. S., at ——, 136 S. Ct., at 1079 (internal quotation marks omitted). These inquiries

include, respectively, the "history surrounding the passage of the [relevant] Act" as well as the subsequent "demographic history" and "treatment" of the lands at issue. *Id.*, at ——, ——, 136 S.Ct., at 1080, 1081.

Today the Court does not even discuss the governing approach reiterated throughout these precedents. The Court briefly recites the general rule that disestablishment requires clear congressional "intent," *ante*, at 2462 – 2463, but the Court then declines to examine the categories of evidence that our precedents demand we consider. Instead, the Court argues at length that allotment alone is not **2487 enough to disestablish a reservation. *Ante*, at 2462 – 2465. Then the Court argues that the "many" "serious blows" dealt by Congress to tribal governance, and the creation of the new State of Oklahoma, are each insufficient for disestablishment. *Ante*, at 2465 – 2467. Then the Court emphasizes that "historical practices or current demographics" do not "by themselves" "suffice" to disestablish a reservation. *Ante*, at 2467 – 2468.

This is a school of red herrings. No one here contends that any individual congressional action or piece of evidence, standing alone, disestablished the Creek reservation. Rather, Oklahoma contends that all of the relevant Acts of Congress together, viewed in light of contemporaneous and subsequent contextual evidence, demonstrate Congress's intent to disestablish the reservation. "[O]ur traditional approach ...*requires* us" to determine Congress's intent by "examin[ing] *all* the circumstances surrounding the opening of a reservation." *Hagen*, 510 U.S., at 412, 114 S.Ct. 958 (emphasis added). Yet the Court refuses to confront the cumulative import of all of Congress's actions here.

The Court instead announces a new approach sharply restricting consideration of contemporaneous and subsequent *947 evidence of congressional intent. The Court states that such "extratextual sources" may be considered in "only" one narrow circumstance: to help " 'clear up' " ambiguity in a particular "statutory term or phrase." *Ante*, at 2467 – 2468, 2469 – 2470 (quoting *Milner v. Department of Navy*, 562 U.S. 562, 574, 131 S.Ct. 1259, 179 L.Ed.2d 268 (2011), and citing *New Prime Inc.* v. *Oliveira*, 586 U. S. ——, ——, 139 S.Ct. 532, 538–539, 202 L.Ed.2d 536 (2019)).

But, if that is the right approach, what have we been doing all these years? Every single one of our disestablishment cases has considered extratextual sources, and in doing so, none has required the identification of ambiguity in a particular term. That is because, while it is well established that Congress's "intent" must be "clear," *ante,* at 2469 – 2470 (quoting *Yankton Sioux Tribe*, 522 U.S., at 343, 118 S.Ct. 789), in this area we have expressly held that the appropriate inquiry does not focus on the statutory text alone.

Today the Court suggests that only the text can satisfy the longstanding requirement that Congress "explicitly indicate[ ]" its intent. *Ante,* at 2469 – 2470 (quoting *Solem*, 465 U.S., at 470, 104 S.Ct. 1161). The Court reiterates that a reservation persists unless Congress "said otherwise," *ante*, at 2459; if Congress wishes to disestablish a reservation, "it must say so," with the right "language." *Ante*, at 2462 – 2463, 2468; see *ante*, at 2481 – 2482 (same). Our precedents disagree. They explain that disestablishment can occur "[e]ven in the absence of a clear expression of congressional purpose in the text of [the] Act." *Yankton Sioux Tribe*, 522 U.S., at 351, 118 S.Ct. 789. The "notion" that "express language in an Act is the *only* method by which congressional action may result in disestablishment" is "quite inconsistent" with our precedents. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586, 588, n. 4, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); see *Solem*, 465 U.S., at 471, 104 S.Ct. 1161 (intent may be discerned from a "widely held, contemporaneous understanding," "notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged"); see also *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 444, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975); *Mattz v. Arnett*, 412 U.S. 481, 505, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973).

*948 These are not "stiche[d] together quotes" but rather plain language reflecting a consistent theme running through **2488 our precedents. *Ante*, at 2470, n. 9. They make clear that the Court errs in focusing on whether "a statute" alone "required" disestablishment, *ante,* at 2469 – 2470; under these precedents, we cannot determine what Congress "required" without first considering evidence in addition to the relevant statutes. Oddly, the Court claims these precedents actually support its new approach because they "emphasize that '[t]he focus of our inquiry is congressional intent.' " *Ante,* at 2470, n. 9 (quoting *Rosebud Sioux Tribe*, 430 U.S., at 588, n. 4, 97 S.Ct. 1361, and citing *Yankton Sioux Tribe*, 522 U.S., at 343, 118 S.Ct. 789). But in this context that intent is

determined by examining a broad array of evidence—"all the circumstances." *Parker*, 577 U. S., at ——, 136 S.Ct., at 1079 (quoting *Hagen*, 510 U.S., at 412, 114 S.Ct. 958). Unless the Court is prepared to overrule these precedents, it should follow them.

The Court appears skeptical of these precedents, but does not address the compelling reasons they give for considering extratextual evidence. At the turn of the century, the possibility that a reservation might persist in the absence of "tribal ownership" of the underlying lands was "unfamiliar," and the prevailing "assumption" was that "Indian reservations were a thing of the past." *Solem*, 465 U.S., at 468, 104 S.Ct. 1161. Congress believed "to a man" that "within a short time" the "Indian tribes would enter traditional American society and the reservation system would cease to exist." *Ibid.* As a result, Congress—while intending disestablishment—did not always "detail" precise changes to reservation boundaries. *Ibid.* Recognizing this distinctive backdrop, our precedents determine Congress's intent by considering a broader variety of evidence than we might for more run-of-the-mill questions of statutory interpretation. See *id.*, at 468–469, 104 S.Ct. 1161; *Parker*, 577 U. S., at ——, 136 S.Ct., at 1079; *Yankton Sioux Tribe*, 522 U.S., at 343, 118 S.Ct. 789. See also Cohen § 2.02(1), at 113 ("The theory and practice ***949** of interpretation in federal Indian law differs from that of other fields of law.").

The Court next claims that *Parker* "clarif[ied]" that evidence of the subsequent treatment of the disputed land by government officials " 'has limited interpretive value.' " *Ante*, at 2457 (quoting *Parker*, 577 U. S., at ——, 136 S.Ct., at 1082). But *Parker* held that the subsequent evidence *in that case* "ha[d] 'limited interpretive value,' " as in the case that *Parker* relied on. 577 U. S., at —— – ——, 136 S.Ct., at 1081–1083 (quoting *Yankton Sioux Tribe*, 522 U. S., at 355, 118 S.Ct. 789). The adequacy of evidence in a particular case says nothing about whether our precedents require us to consider such evidence in others. [3]

The Court finally resorts to torching strawmen. No one relying on our precedents ****2489** contends that "practical advantages" require "ignoring the written law." *Ante*, at 2474. No one claims a State has "authority to reduce federal reservations." *Ante*, at 2462. No one says the role of courts is to "sav[e] the political branches" from "embarrassment." *Ibid.* No one argues that courts can "adjust[ ]" reservation borders. *Ibid.* Such notions have nothing to do with our precedents. What our precedents do provide is the settled approach for determining whether Congress disestablished a ***950** reservation, and the Court starkly departs from that approach here.

III

Applied properly, our precedents demonstrate that Congress disestablished any reservation possessed by the Creek Nation through a relentless series of statutes leading up to Oklahoma statehood.

A

The statutory texts are the "most probative evidence" of congressional intent. *Parker*, 577 U. S., at ——, 136 S.Ct., at 1079 (quoting *Hagen*, 510 U.S., at 411, 114 S.Ct. 958). The Court appropriately examines the Original Creek Agreement of 1901 and a subsequent statute for language of disestablishment, such as "cession," "abolish[ing]" the reservation, "restor[ing]" land to the "public domain," or an "unconditional commitment" to "compensate" the Tribe. *Ante*, at 2462 – 2465 (internal quotation marks omitted). But that is only the beginning of the analysis; there is no "magic words" requirement for disestablishment, and each individual statute may not be considered in isolation. See *supra,* at 2487 – 2488; *Hagen*, 510 U.S., at 411, 415–416, 114 S.Ct. 958 (when two statutes "buil[d]" on one another in this area, "[both] statutes—as well as those that came in between—must therefore be read together"); see also *Rosebud Sioux Tribe*, 430 U.S., at 592, 97 S.Ct. 1361 (recognizing that a statute "cannot, and should not, be read as if it were the first time Congress had addressed itself to" disestablishment when prior statutes also indicate congressional intent). In this area, "we are not free to say to Congress: 'We see what you are driving at, but you have not said it, and therefore we shall go on as before.' " *Id.*, at 597, 97 S.Ct. 1361 (quoting *Johnson v. United States*, 163 F. 30, 32 (C.A.1 1908) (Holmes, J.)). Rather, we recognize that the language Congress uses to accomplish its objective is adapted to the circumstances it confronts.

For example, "cession" is generally what a tribe does when it conveys land to a fellow sovereign, such as the United States or another tribe. See *Mitchel v. United States*, 9 Pet. 711, 734, 9 L.Ed. 283 (1835); *e.g.*, 1856 Treaty, Art. I, 11 Stat. 699. But ***951** here, given that Congress sought direct allotment to tribe members in order to enable private ownership by both Indians and the 300,000 settlers in the territory, it would have made little sense to "cede" the lands to the United States or "restore" the lands to the "public domain," as Congress did on other occasions. So too with a "commitment" to "compensate" the Tribe. Rather than buying land from the Creek, Congress provided for allotment to tribe members who could then "sell their land to Indians and non-Indians alike." *Ante*, at 2463; see *Hagen*, 510 U.S., at 412, 114 S.Ct. 958 (a "definite payment" is not required for disestablishment). That other allotment statutes have contained various "hallmarks" of disestablishment tells us little about Congress's intent here. Contra, *ante,* at 2465 – 2466, and n. 5. "[W]e have never required any particular form of words" to disestablish a reservation. *Hagen*, 510 U.S., at 411, 114 S.Ct. 958. There are good reasons the statutes here do not include the language the Court looks for, and those reasons have nothing to do with ****2490** a failure to disestablish the reservation. Respect for Congress's work requires us to look at what it actually did, not search in vain for what it might have done or did on other occasions.

What Congress actually did here was enact a series of statutes beginning in 1890 and culminating with Oklahoma statehood that (1) established a uniform legal system for Indians and non-Indians alike; (2) dismantled the Creek government; (3) extinguished the Creek Nation's title to the lands at issue; and (4) incorporated the Creek members into a new political community—the State of Oklahoma. These statutes evince Congress's intent to terminate the reservation and create a new State in its place.

First, Congress supplanted the Creek legal system with a legal code and court system that applied equally to Indians and non-Indians. In 1890, Congress subjected the Indian Territory to specified federal criminal laws. Act of May 2, 1890, § 31, 26 Stat. 96. For offenses not covered by federal law, Congress did what it often did when establishing a new territorial government. It provided that the criminal laws ***952** from a neighboring State, here Arkansas, would apply. § 33, *id.*, at 96–97. Seven years later, Congress provided that the laws of the United States and Arkansas "shall apply to *all* persons" in Indian Territory, "*irrespective of race*." Act of June 7, 1897 (1897 Act), 30 Stat. 83 (emphasis added). In the same Act, Congress conferred on the U. S. Courts for the Indian Territory "exclusive jurisdiction" over "all civil causes in law and equity" and "all criminal causes" for the punishment of offenses committed by "any person" in the Indian Territory. *Ibid.*

The following year, the 1898 Curtis Act "abolished" all tribal courts, prohibited all officers of such courts from exercising "any authority" to perform "any act" previously authorized by "any law," and transferred "all civil and criminal causes then pending" to the U. S. Courts for the Indian Territory. Act of June 27, 1898 (Curtis Act), § 28, *id.,* at 504–505. In the same Act, Congress completed the shift to a uniform legal order by banning the enforcement of tribal law in the newly exclusive jurisdiction of the U. S. Courts. See § 26, *id.*, at 504 ("[T]he laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory."). Congress reiterated yet again in 1904 that Arkansas law "continued" to "embrace *all* persons and estates" in the territory—"whether Indian, freedmen, or otherwise." Act of Apr. 28, 1904, ch. 1824, § 2, 33 Stat. 573 (emphasis added). In this way, Congress replaced tribal law with local law in matters at the core of tribal governance, such as inheritance and marital disputes. See, *e.g.*, *George v. Robb*, 4 Ind.T. 61, 64 S.W. 615, 615–616 (1901); *Colbert v. Fulton*, 74 Okla. 293, 157 P. 1151, 1152 (1916).

In addition, the Curtis Act established municipalities to govern both Indians and non-Indians. It authorized "any city or town" with at least 200 residents to incorporate. § 14, 30 Stat. 499. The Act gave incorporated towns "all the powers" and "all the rights" of municipalities under Arkansas ***953** law. *Ibid.* "All male inhabitants," including Indians, were deemed qualified to vote in town elections. *Ibid.* And "all inhabitants"—"*without regard to race*"—were made subject to "all" town laws and were declared to possess "*equal* rights, privileges, and protection." *Id.*, at 499–500 (emphasis added). These changes reorganized the approximately 150 towns in the territory—including Tulsa, Muscogee, and 23 others within the Creek Nation's former territory—that were home to tens of thousands of people and nearly one third of the territory's population at the time, ****2491** laying the foundation for the state governance that was to come. See H. R. Doc. No. 5, 57th Cong., 2d Sess., pt. 2, pp. 299–300, Table 1 (1903); Depts. of Commerce and Labor, Bureau of Census,

Population of Oklahoma and Indian Territory 1907, pp. 8, 30–33.

Second, Congress systematically dismantled the governmental authority of the Creek Nation, targeting all three branches. As noted, Congress dissolved the Tribe's judicial system. Congress also specified in the Original Creek Agreement that the Creek government would "not continue" past March 1906, essentially preserving it only as long as Congress thought necessary for the Tribe to wind up its affairs. § 46, 31 Stat. 872. In the meantime, Congress radically curtailed tribal legislative authority, providing that no statute passed by the council of the Creek Nation affecting the Nation's lands, money, or property would be valid unless approved by the President of the United States. § 42, *id.*, at 872. When 1906 came around, the Five Tribes Act provided for the "final disposition of the affairs of the Five Civilized Tribes." Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137. Along with "abolish[ing]" all tribal taxes, the Act directed the Secretary of the Interior to assume control over the collection of the Nation's remaining revenues and to distribute them among tribe members on a per capita basis. §§ 11, 17, *id.*, at 141, 143–144. Thus, by the time Oklahoma became the 46th State in 1907, there was little left of the Creek Nation's ***954** authority: No tribal courts. No tribal law. No tribal fisc. And any lingering authority was further reduced in 1908, when Congress amended the Five Tribes Act to require tribal officers and members to surrender all remaining tribal property, money, and records. Act of May 27, 1908, § 13, 35 Stat. 316.

The Court stresses that the Five Tribes Act separately stated that the Creek government was "continued" in "full force and effect for all purposes authorized by law." *Ante*, at 2466 (quoting § 28, 34 Stat. 148). By that point, however, such "authorized" purposes were nearly nonexistent, and the Act's statement is readily explained by the need to maintain a tribal body to wrap up the distribution of Creek lands. Indeed, the Court does not cite any examples of the Creek Nation exercising significant government authority in the wake of the statutes discussed above. Instead, the Court alludes to subsequent changes in the 1920s to the general "federal outlook towards Native Americans," and it observes that in the 1930s Congress authorized the Creek Nation to reconstitute its tribal courts and adopt a constitution and bylaws. *Ante*, at 2466 – 2467. That, however, simply highlights the drastic extent to which Congress erased the Nation's authority at the turn of the century.

Third, Congress destroyed the foundation of sovereignty by stripping the Creek Nation of its territory. The communal title held by the Creek Nation, which "did not recognize private property in land," "presented a serious obstacle to the creation of [a] State." *Choate v. Trapp*, 224 U.S. 665, 667, 32 S.Ct. 565, 56 L.Ed. 941 (1912). Well aware of this impediment, Congress established the Dawes Commission and directed it to negotiate with the Five Tribes for "the extinguishment of the national or tribal title to any lands" within the Indian Territory. Act of Mar. 3, 1893, § 16, 27 Stat. 645. That extinguishment could be accomplished through "cession" of the tribal lands to the United States, "allotment" of the lands among the Indians, or any other agreed upon method. *Ibid.* The Commission ***955** initially sought cession, but ultimately sought to extinguish the title through allotment. See *ante*, at 2463.

****2492** In the Original Creek Agreement of 1901, Congress did just that. The agreement provided that "*[a]ll lands* belonging to the Creek tribe," except town sites and lands reserved for schools and public buildings, "shall be allotted among the citizens of the tribe." §§ 2, 3, 31 Stat. 862 (emphasis added). Town sites, rather than being allotted, were made available for purchase by the non-Indians residing there. §§ 11–16, *id.*, at 866–867. Unclaimed lots were to be sold at public auction, with the proceeds divvied up among the Creeks. §§ 11, 14, *id.*, at 866. The agreement required that the deeds for the allotments and town site purchases convey "all right, title, and interest of the Creek Nation and of all other [Creek] citizens," and that the deeds be executed by the leader of the Creek Nation (the "principal chief"). § 23, *id.*, at 867–868. The conveyances were then approved by the Secretary of the Interior, who in turn "relinquish[ed] to the grantee ... all the right, title, and interest of the United States" in the land. *Id.*, at 868. In this way, Congress provided for the complete termination of the Creek Nation's interest in the lands, as well as the interests of individual Creek members apart from their personal allotments. Indeed, the language Congress used in the Original Creek Agreement resembles what the Court regards as model disestablishment language. See *ante*, at 2462 – 2463, 2463 – 2464 (looking for language evincing "the present and total surrender of all tribal interests in the affected lands" (internal quotation marks omitted)). And, making even more clear its intent

to place Indian-held land under the same laws as all other property, Congress subsequently eliminated restrictions on the alienation of allotments, freeing tribe members "to sell their land to Indians and non-Indians alike." *Ante*, at 2463.

In addition, while the Original Creek Agreement did not allot lands reserved for schools and tribal buildings, the Creek Nation's interest in those lands was subsequently terminated ***956** by the Five Tribes Act. That Act directed the Secretary of the Interior to take possession of—and sell off—"all" tribal buildings and underlying lands, whether used for "governmental" or "other tribal purposes." § 15, 34 Stat. 143. The Secretary was also ordered to assume control of all tribal schools and the underlying property until the federal or state governments established a public school system. See § 10, *id.*, at 140–141.

These statutes evince a clear intent to leave the Creek Nation with no communally held land and no meaningful governing authority to exercise over the newly distributed parcels. Contrary to the Court's portrayal, this is not a scenario in which Congress allowed a tribe to "continue to exercise governmental functions over land" that it "no longer own[ed] communally." *Ante*, at 2464. From top to bottom, these statutes, which divested the Tribes and the United States of their interests while displacing tribal governance, "strongly suggest[ ] that Congress meant to divest" the lands of reservation status. *Solem*, 465 U.S., at 470, 104 S.Ct. 1161.

Finally, having stripped the Creek Nation of its laws, its powers of self-governance, and its land, Congress incorporated the Nation's members into a new political community. Congress made "every Indian" in the Oklahoma territory a citizen of the United States in 1901—decades before conferring citizenship on all native born Indians elsewhere in the country. Act of Mar. 3, 1901, ch. 868, 31 Stat. 1447. In the Oklahoma Enabling Act of 1906—the gateway to statehood—Congress confirmed that members of the Five Tribes would participate in equal measure alongside non-Indians in the choice regarding statehood. The Act gave Indians the right to vote on delegates to a constitutional convention ****2493** and ultimately on the state constitution that the delegates proposed. §§ 2, 4, 34 Stat. 268, 271. Fifteen members of the Five Tribes were elected as convention delegates, many of them served on significant committees, and a member of the Chickasaw Nation even served as president of the convention. ***957** See Brief for Seventeen Oklahoma District Attorneys et al. as *Amici Curiae* 9–13.

The Enabling Act also ensured that Indians and non-Indians would be subject to uniform laws and courts. It replaced Arkansas law, which had applied to all persons "irrespective of race," 1897 Act, 30 Stat. 83, with the laws of the adjacent Oklahoma Territory until the new state legislature provided otherwise. Enabling Act §§ 2, 13, 21, 34 Stat. 268–269, 275, 277–278; see *Jefferson v. Fink*, 247 U.S. 288, 294, 38 S.Ct. 516, 62 L.Ed. 1117 (1918). All of the pending cases in the territorial courts arising under federal law were transferred to the newly created U. S. District Courts of Oklahoma. See § 16, 34 Stat. 276. Pending cases not involving federal law, including those that involved Indians on Indian land and had arisen under Arkansas law, were transferred to the new Oklahoma state courts. §§ 16, 17, 20, *id.*, at 276–277. To dispel any potential confusion about the distribution of criminal cases, Congress amended the Enabling Act the following year, clarifying that all cases for crimes that would have fallen under federal jurisdiction had they been committed in a State would be transferred to the U. S. District Courts. Act of Mar. 4, 1907, § 1, *id.*, at 1286–1287. All other pending criminal cases would be "prosecuted to a final determination in the State courts of Oklahoma." § 3, *id.*, at 1287. As for civil cases, the new state courts were immediately empowered to resolve even disputes that previously lay at the core of tribal self-governance. *E.g.*, *Palmer v. Cully*, 52 Okla. 454, 463–469, 153 P. 154, 157–158 (1915) (*per curiam*) (marital dispute). [4]

***958** In sum, in statute after statute, Congress made abundantly clear its intent to disestablish the Creek territory. The Court, for purposes of the disestablishment question before us, defines the Creek territory as "lands that would lie outside both the legal jurisdiction and geographic boundaries of any State" and on which a tribe was "assured a right to self-government." *Ante*, at 2462. That territory was eliminated. By establishing uniform laws for Indians and non-Indians alike in the new State of Oklahoma, Congress brought Creek members and the land on which they resided under state jurisdiction. By stripping the Creek Nation of its courts, lawmaking authority, and taxing power, Congress dismantled the tribal government. By extinguishing the Nation's title, Congress erased the geographic boundaries that once defined Creek territory. And, by conferring citizenship on tribe

members and giving them a vote in the formation of the State, Congress incorporated them into a new political community. "Under any definition," that was disestablishment. *Ibid.*

In the face of all this, the Court claims that recognizing Congress's intent would permit disestablishment in the absence of **2494 "a statute requir[ing] that result." *Ante*, at 2470. Hardly. The numerous statutes discussed above demonstrate Congress's plain intent to terminate the reservation. The Court resists the cumulative force of these statutes by attacking each in isolation, first asking whether allotment alone disestablished the reservation, then whether restricting tribal governance was sufficient, and so on. But the Court does not consider the full picture of what Congress accomplished. Far from justifying its blinkered approach, the Court repeatedly tells the reader to wait until the "*next* section" of the opinion—where the Court will again nitpick discrete aspects of Congress's disestablishment effort while *959 ignoring the full picture our precedents require us to honor. *Ante*, at 2465, n. 5, 2468, n. 7; see *supra,* at 2487 – 2488, 2489.

The Court also hypothesizes that Congress may have taken significant steps toward disestablishment but ultimately could not "complete[ ]" it; perhaps Congress just couldn't "muster the will" to finish the job. *Ante*, at 2462 – 2463, 2466 – 2467. The Court suggests that Congress sought to "tiptoe to the edge of disestablishment," fearing the "embarrassment of disestablishing a reservation" but hoping that judges would "deliver the final push." *Ante*, at 2462. This is fantasy. The congressional Acts detailed above do not evince any unease about extinguishing the Creek domain, or any shortage of "will." Quite the opposite. Through an open and concerted effort, Congress did what it set out to do: transform a reservation into a State. "Mustering the broad social consensus required to pass new legislation is a deliberately hard business," as the Court reminds us. *Ibid.* Congress did that hard work here, enacting not one but a steady progression of major statutes. The Court today does not give effect to the cumulative significance of Congress's actions, because Congress did not use explicit words of the sort the Court insists upon. But Congress had no reason to suppose that such words would be required of it, and this Court has held that they were not. See *Hagen*, 510 U.S., at 411–412, 114 S.Ct. 958; *Yankton Sioux Tribe*, 522 U.S., at 351, 118 S.Ct. 789; *Solem*, 465 U.S., at 471, 104 S.Ct. 1161.

B

Under our precedents, we next consider the contemporaneous understanding of the statutes enacted by Congress and the subsequent treatment of the lands at issue. The Court, however, declines to consider such evidence because, in the Court's view, the statutes clearly do not disestablish any reservation, and there is no "ambiguity" to "clear up." *Ante*, at 2469 – 2470 (internal quotation marks omitted). That is not the approach demanded by our precedent, *supra*, at 2487 – 2489, and, in any event, the Court's argument fails on its own *960 terms here. I find it hard to see how anyone can come away from the statutory texts detailed above with *certainty* that Congress had no intent to disestablish the territorial reservation. At the very least, the statutes leave some ambiguity, and thus "extratextual sources" ought to be consulted. *Ante*, at 2469 – 2470.

Turning to such sources, our precedents direct us to "examine all the circumstances" surrounding Congress's actions. *Parker*, 577 U. S., at ——, 136 S.Ct., at 1079 (quoting *Hagen*, 510 U.S., at 412, 114 S.Ct. 958). This includes evidence of the "contemporaneous understanding" of the status of the reservation and the "history surrounding the passage" of the relevant Acts. *Parker*, 577 U. S., at ——, 136 S.Ct., at 1080 (internal quotation marks omitted); see *Yankton Sioux Tribe*, 522 U.S., at 351–354, 118 S.Ct. 789; *Solem*, 465 U.S., at 471, 104 S.Ct. 1161. The available evidence overwhelmingly confirms that Congress **2495 eliminated any Creek reservation. That was the purpose identified by Congress, the Dawes Commission, and the Creek Nation itself. And that was the understanding demonstrated by the actions of Oklahoma, the United States, and the Creek.

According to reports published by Congress leading up to Oklahoma statehood, the Five Tribes had failed to hold the lands for the equal benefit of all Indians, and the tribal governments were ill equipped to handle the largescale settlement of non-Indians in the territories. See *supra*, at 2483 – 2484; *Woodward*, 238 U.S., at 296–297, 35 S.Ct. 764. The Senate Select Committee on the Five Tribes explained that it was "imperative[ ]" to "establish[ ] a government over [non-Indians] and Indians" in the territory "in accordance with the principles of our constitution and laws." S. Rep. No. 377, at 12–13. On the eve of the Original Creek Agreement,

the House Committee on Indian Affairs emphasized that "[t]he independent self-government of the Five Tribes ha[d] practically ceased," "[t]he policy of the Government to abolish classes in Indian Territory and make a homogeneous population [wa]s being rapidly carried out," and all Indians "should at once be ***961** put upon a level and equal footing with the great population with whom they [were] intermingled." H. R. Rep. No. 1188, 56th Cong., 1st Sess., 1 (1900).

The Dawes Commission understood Congress's intent in the same way. The Commission explained that the "object of Congress from the beginning has been the dissolution of the tribal governments, the extinguishment of the communal or tribal title to the land, the vesting of possession and title in severalty among the citizens of the Tribes, and the assimilation of the peoples and institutions of this Territory to our prevailing American standard." H. R. Doc. No. 5, 58th Cong., 2d Sess., pt. 2, p. 5 (1903). Accordingly, the Commission's aim—"in all [its] endeavors"—was a "uniformity of political institutions to lay the foundation for an ultimate common government." H. R. Doc. No. 5, 56th Cong., 2d Sess., 163 (1900).

The Creek shared the same understanding. In 1893, the year Congress formed the Dawes Commission, the Creek delegation to Washington recognized that Congress's "unwavering aim" was to " 'wipe out the line of political distinction between an Indian citizen and other citizens of the Republic' " so that the Tribe could be " 'absorbed and become a part of the United States.' " P. Porter & A. McKellop, Printed Statement of Creek Delegates, reprinted in Creek Delegation Documents 8–9 (Feb. 9, 1893) (quoting Senate Committee Report); see also S. Doc. No. 111, 54th Cong., 2d Sess., 5, 8 (1897) (resolution of the Creek Nation "recogniz[ing]" that Congress proposed to "disintegrat[e] the land of our people" and "transform[ ]" "our domestic dependent states" "into a State of the Union").

Particularly probative is the understanding of Pleasant Porter, the principal Chief of the Creek Nation. He described Congress's decisions to the Creek people and legislature in messages published in territorial newspapers during the run-up to statehood. Following the extinguishment of the Nation's title, dissolution of tribal courts, and curtailment ***962** of lawmaking authority, he told his people that "[i]t would be difficult, if not impossible to successfully operate the Creek government now." App. to Brief for Respondent 8a (Message to Creek National Council (May 7, 1901), reprinted in The Indian Journal (May 10, 1901)). The "remnant of a government" had been reduced to a land office for finalizing the distribution of allotments and would be "maintained only until" the ****2496** Tribe's "landed and other interests ... have been settled." App. to Brief for Respondent 8a. He reiterated this understanding following the Five Tribes Act of 1906, which stated that the tribal government would "continue[ ] in full force and effect for all purposes authorized by law." § 28, 34 Stat. 148. While the Court believes that meant Congress decided against disestablishing the reservation, see *ante*, at 2466 – 2467, Chief Porter saw things differently. From his vantage point as the contemporaneous leader of the government at issue, Congress had temporarily continued the tribal government but left it with only "limited and circumscribed" authority: The council could "pass[ ] resolutions respecting our wishes" regarding the property "now in the process of distribution," but the council no longer had any authority to "mak[e] laws for our government." App. to Brief for Respondent 14a (Message to Creek National Council (Oct. 18, 1906), reprinted in The New State Tribune (Oct. 18, 1906)). Apart from distributing the Nation's property, Chief Porter maintained that "all powers over the governing even of our landed property will cease" once the new state government was established. App. to Brief for Respondent 15a; see also S. Rep. No. 5013, 59th Cong., 2d Sess., pt. 1, p. 885 (1907) (Choctaw governor mourning that his "only" remaining authority was "to sign deeds").

The Creek remained of that view after Oklahoma was officially made a State through the Enabling Act. At that point, the new principal Chief confirmed that it was "utterly impossible" to resume "our old tribal government." App. to Brief for Respondent 16a–17a (Address by Moty Tiger to ***963** Creek National Council (Oct. 8, 1908), reprinted in The Indian Journal (Oct. 9, 1908)). And any "appeal to the government at Washington to alter its purpose to wipe out all tribal government among the five civilized tribes" would "be to no purpose." App. to Brief for Respondent 16a. "[C]ontributions" for such efforts would be "just that much money thrown away," and "all attorneys at Washington or elsewhere who encourage and receive any part of such contributions do it knowing that they can give no return or service for same and that they take such money fraudulently and dishonestly." *Id.*, at 17a. [5]

In addition to their words, the contemporaneous actions of Oklahoma, the Creek, and the United States in criminal matters confirm their shared understanding that Congress did not intend a reservation to persist. Had the land been a reservation, the federal government—not the new State—would have had jurisdiction over serious crimes committed by Indians under the Major Crimes Act of 1885. See § 9, 23 Stat. 385. Yet, at statehood, Oklahoma immediately began prosecuting serious crimes committed by Indians in the new state courts, and the federal government immediately ceased prosecuting such crimes in federal court. At argument, McGirt's counsel acknowledged that he could not cite a single example of federal prosecutions for such crimes. Tr. of Oral Arg. 17–18. Rather, the record demonstrates that case after case was transferred to state court or filed there outright ****2497** by Oklahoma after 1907—without objection by anyone. See, ***964** *e.g.*, *Bigfeather v. State*, 7 Okla.Crim. 364, 123 P. 1026 (1912) (manslaughter); *Rollen v. State*, 7 Okla.Crim. 673, 125 P. 1087 (1912) (assault with intent to kill); *Jones v. State*, 3 Okla.Crim. 593, 107 P. 738 (1910) (murder); see also Brief for Petitioner in *Carpenter* v. *Murphy*, O. T. 2018, No. 17–1107, pp. 40–41 (collecting more cases). These prosecutions were lawful, the Oklahoma Supreme Court recognized at the time, because Congress had not intended to "except out of [Oklahoma] an Indian reservation" upon its admission as a State. *Higgins v. Brown*, 20 Okla. 355, 419, 94 P. 703, 730, 1 Okla.Crim. 33 (1908).

Instead of explaining how everyone at the time somehow missed that a reservation still existed, the Court resorts to misdirection. It observes that Oklahoma state courts have held that they erroneously entertained prosecutions for crimes committed by Indians on the small number of remaining restricted allotments and tribal trust lands from the 1930s until 1989. But this Court has not addressed that issue, and regardless, it would not tell us whether the State properly prosecuted major crimes committed by Indians on the lands at issue here—the unrestricted fee lands that make up more than 95% of the Creek Nation's former territory. Perhaps most telling is that the State's jurisdiction over crimes on Indian allotments was hotly contested from an early date, whereas nobody raised objections based on a surviving reservation. See, *e.g.*, *Ex parte Nowabbi*, 60 Okla.Crim. 111, 61 P.2d 1139 (1936), overruled by *State v. Klindt*, 782 P.2d 401, 404 (Okla. Crim. App. 1989); see also *ante*, at 2470 ("no court" suggested the "possibility" that "the Creek lands really were part of a reservation" until 2017). [6]

***965** Lacking any other arguments, the Court suspects uniform lawlessness: The State must have "overstepped its authority" in prosecuting thousands of cases for over a century. *Ante*, at 2471. Perhaps, the Court suggests, the State lacked "good faith." *Ibid.* In the Court's telling, the federal government acquiesced in this extraordinary alleged power grab, abdicating its responsibilities over the purported reservation. And, all the while, the state and federal courts turned a blind eye.

But we normally presume that government officials exercise their duties in accordance with the law. Certainly the presumption may be strained from time to time in this area, but not so much as to justify the Court's speculations, which posit that government officials at every level either conspired to violate the law or uniformly misunderstood the fundamental structure of their society and government. Whatever the imperfections of our forebears, neither option seems tenable. And it is downright inconceivable that this could occur without prompting objections—from anyone, including from the Five Tribes themselves. Indians frequently asserted their rights during this period. The cases above, for example, involve criminal appeals brought by Indians, and Indians raised numerous objections to land graft in the former Territory. See Brief for Historians et al. as *Amici Curiae* 28–31. Yet, according to the extensive record compiled over several years for this case and a similar case, *Sharp* v. *Murphy*, *post*, p. ****2498** —— (*per curiam*), Indians and their counsel did not raise a single objection to state prosecutions on the theory that the lands at issue were still a reservation. It stretches the imagination to suggest they just missed it.

C

Finally, consider "the subsequent treatment of the area in question and the pattern of settlement there." *Yankton Sioux Tribe*, 522 U.S., at 344, 118 S.Ct. 789. This evidence includes the "subsequent understanding of the status of the reservation by members and nonmembers as well as the United States ***966** and the [relevant] State," and the "subsequent demographic history" of the area. *Parker*, 577 U. S., at ——, ——, 136 S.Ct., at 1079, 1081; see *Solem*, 465

U.S., at 471, 104 S.Ct. 1161. Each of the indicia from our precedents—subsequent treatment by Congress, the State's unquestioned exercise of jurisdiction, and demographic evidence—confirms that the Creek reservation did not survive statehood.

First, "Congress' own treatment of the affected areas" strongly supports disestablishment. *Id.*, at 471, 104 S.Ct. 1161. After statehood, Congress enacted several statutes progressively eliminating restrictions on the alienation and taxation of Creek allotments, and Congress subjected even restricted lands to state jurisdiction. Since Congress had already destroyed nearly all tribal authority, these statutes rendered Creek parcels little different from other plots of land in the State. See Act of May 27, 1908, 35 Stat. 312; Act of June 14, 1918, 40 Stat. 606; Act of Apr. 10, 1926, 44 Stat. 239. This is not a scenario where Congress merely opened land for "purchase ... by non-Indians" while allowing the Tribe to "continue to exercise governmental functions over [the] land," *ante*, at 2464, and n. 3; rather, Congress eliminated both restrictions on the lands here and the Creek Nation's authority over them. Such developments would be surprising if Congress intended for all of the former Indian Territory to be reservation land insulated from state jurisdiction in significant ways. The simpler and more likely explanation is that they reflect Congress's understanding through the years that "all Indian reservations as such have ceased to exist" in Oklahoma, S. Rep. No. 1232, 74th Cong., 1st Sess., 6 (1935), and that "Indian reservations [in the Indian Territory] were destroyed" when "Oklahoma entered the union," S. Rep. No. 101–216, p. 47 (1989).

That understanding is now woven throughout the U. S. Code, which applies numerous statutes to the land here by extending them to the "*former* reservation[s]" "in ***967** Oklahoma"—underscoring that no reservation exists today. 25 U.S.C. § 2719(a)(2)(A)(i) (emphasis added) (Indian Gaming Regulatory Act); see Brief for United States as *Amicus Curiae* 23; 23 U.S.C. § 202(b)(1)(B)(v) (road grants; "former Indian reservations in the State of Oklahoma"); 25 U.S.C. § 1452(d) (Indian Financing Act; "former Indian reservations in Oklahoma"); § 2020(d) (education grants; "former Indian reservations in Oklahoma"); § 3103(12) (National Indian Forest Resources Management Act; "former Indian reservations in Oklahoma"); 29 U.S.C. § 741(d) (American Indian Vocational Rehabilitation Services Act; "former Indian reservations in Oklahoma"); 33 U.S.C. § 1377(c)(3)(B) (waste treatment grants; "former Indian reservations in Oklahoma"); 42 U.S.C. § 5318(n)(2) (urban development grants; "former Indian reservations in Oklahoma"). [7]

****2499** Second, consider the State's "exercis[e] [of] unquestioned jurisdiction over the disputed area since the passage of " the Enabling Act, which deserves "weight" as "an indication of ***968** the intended purpose of the Act." *Rosebud Sioux Tribe*, 430 U.S., at 599, n. 20, 604, 97 S.Ct. 1361. As discussed above, for 113 years, Oklahoma has asserted jurisdiction over the former Indian Territory on the understanding that it is not a reservation, without any objection by the Five Tribes until recently (or by McGirt for the first 20 years after his convictions). See Brief for Respondent 4, 40. The same goes for major cities in Oklahoma. Tulsa, for example, has exercised jurisdiction over both Indians and non-Indians for more than a century on the understanding that it is not a reservation. See Brief for City of Tulsa as *Amicus Curiae* 27–28.

All the while, the federal government has operated on the same understanding. Brief for United States as *Amicus Curiae* 24. No less than Felix Cohen, whose authoritative treatise the Court repeatedly cites, agreed while serving as Acting Solicitor of the Interior in 1941 that "all offenses by or against Indians" in the former Indian Territory "are subject to State laws." App. to Supp. Reply Brief for Petitioner in *Carpenter* v. *Murphy*, O. T. 2018, No. 17–1107, p. 1a (Memorandum for Commissioner of Indian Affairs (July 11, 1941)). In the view of the Department of the Interior, such state jurisdiction was appropriate because the reservations in the Territory "lost their character as Indian country" by the time Oklahoma became a State. App. to Brief for United States as *Amicus Curiae* 4a (Letter from O. Chapman, Assistant Secretary of the Interior, to the Attorney General (Aug. 17, 1942)); see also *supra,* at 2497, n. 6.

Indeed, far from disputing Oklahoma's jurisdiction, the Five Tribes themselves have repeatedly and emphatically agreed that no reservation exists. After statehood, tribal leaders and members frequently informed Congress that "there are no reservations in Oklahoma." App. to Brief for Respondent 19a (Testimony of Hon. Bill Anoatubby, Governor, Chickasaw Nation, Hearings before the Subcommittee on Indian, Insular and Alaska Native Affairs of the House ***969** Committee on

Natural Resources (Feb. 24, 2016)). [8] They took the **2500 same position before federal courts. Before this litigation started, the Creek Nation represented to the Tenth Circuit that there is only " 'checkerboard' Indian country within its *former* reservation boundaries." Reply Brief in No. 09–5123, p. 5 (emphasis added). And the Nation never once contended in this Court that a sprawling reservation still existed in the more than a century that preceded the present disputes.

Like the Creek, this Court has repeatedly described the area in question as the "former" lands of the Creek Nation. See *Grayson v. Harris*, 267 U.S. 352, 353, 45 S.Ct. 317, 69 L.Ed. 652 (1925) (lands "lying within the former Creek Nation"); *Woodward*, 238 U.S., at 285, 35 S.Ct. 764 (lands "formerly part of the domain of the Creek Nation"); *Washington v. Miller*, 235 U.S. 422, 423, 35 S.Ct. 119, 59 L.Ed. 295 (1914) (lands "within what until recently was the Creek Nation"). Yet today the Court concludes that the lands have been a Creek reservation all along—contrary to the position shared for the past century by this Court, the United States, Oklahoma, and the Creek Nation itself.

Under our precedent, Oklahoma's unquestioned, century-long exercise of jurisdiction supports the conclusion that no reservation persisted past statehood. See *Yankton Sioux Tribe*, 522 U.S., at 357, 118 S.Ct. 789; *Hagen*, 510 U.S., at 421, 114 S.Ct. 958; *Rosebud Sioux Tribe*, 430 U.S., at 604–605, 97 S.Ct. 1361. "Since state jurisdiction over the area within a reservation's boundaries is quite limited, the fact that neither Congress nor the Department of *970 Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority is a factor entitled to weight as part of the 'jurisdictional history.' " *Id.*, at 603–604, 97 S.Ct. 1361 (citations omitted).

Third, consider the "subsequent demographic history" of the lands at issue, which provides an " 'additional clue' " as to the meaning of Congress's actions. *Parker*, 577 U. S., at ——, 136 S.Ct., at 1081 (quoting *Solem*, 465 U.S., at 472, 104 S.Ct. 1161). Continuing from statehood to the present, the population of the lands has remained approximately 85%–90% non-Indian. See Brief for Respondent 43; *Murphy v. Royal*, 875 F.3d 896, 965 (C.A.10 2017). "[T]hose demographics signify a diminished reservation." *Yankton Sioux Tribe*, 522 U. S., at 357, 118 S.Ct. 789. The Court questions whether the consideration of demographic history is appropriate, *ante*, at 2468 – 2469, 2473 – 2474, but we have determined that it is a "*necessary* expedient." *Solem*, 465 U.S., at 472, and n. 13, 104 S.Ct. 1161 (emphasis added); see *Parker*, 577 U. S., at ——, 136 S.Ct., at 1081. And for good reason. Our precedents recognize that disestablishment cases call for a wider variety of tools than more workaday questions of statutory interpretation. *Supra*, at 2488. In addition, the use of demographic data addresses the practical concern that "[w]hen an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of state and local governments." *Solem*, 465 U.S., at 471–472, n. 12, 104 S.Ct. 1161.

Here those burdens—the product of a century of settled understanding—are extraordinary. Most immediately, the Court's decision draws into question thousands of convictions obtained by the State for crimes involving Indian defendants or Indian victims across several decades. This includes convictions for serious crimes such as murder, rape, kidnapping, and maiming. Such convictions are now subject to jurisdictional challenges, leading to the potential release of numerous individuals **2501 found guilty under state law of the most *971 grievous offenses. [9] Although the federal government may be able to reprosecute some of these crimes, it may lack the resources to reprosecute all of them, and the odds of convicting again are hampered by the passage of time, stale evidence, fading memories, and dead witnesses. See Brief for United States as *Amicus Curiae* 37–39. No matter, the court says, these concerns are speculative because "many defendants may choose to finish their state sentences rather than risk reprosecution in federal court." *Ante*, at 2479. Certainly defendants like McGirt—convicted of serious crimes and sentenced to 1,000 years plus life in prison—will not adopt a strategy of running out the clock on their state sentences. At the end of the day, there is no escaping that today's decision will undermine numerous convictions obtained by the State, as well as the State's ability to prosecute serious crimes committed in the future.

Not to worry, the Court says, only about 10%–15% of Oklahoma citizens are Indian, so the "majority" of prosecutions will be unaffected. *Ibid.* But the share of serious crimes committed by 10%–15% of the 1.8 million people in eastern Oklahoma, or of the 400,000 people in Tulsa, is no small number.

Beyond the criminal law, the decision may destabilize the governance of vast swathes of Oklahoma. The Court, despite briefly suggesting that its decision concerns only a narrow question of criminal law, ultimately acknowledges that "many" federal laws, triggering a variety of rules, spring into effect when land is declared a reservation. *Ante*, at 2480 – 2481.

***972** State and tribal authority are also transformed. As to the State, its authority is clouded in significant respects when land is designated a reservation. Under our precedents, for example, state regulation of even non-Indians is preempted if it runs afoul of federal Indian policy and tribal sovereignty based on a nebulous balancing test. This test lacks any "rigid rule"; it instead calls for a "particularized inquiry into the nature of the state, federal, and tribal interests at stake," contemplated in light of the "broad policies that underlie" relevant treaties and statutes and "notions of sovereignty that have developed from historical traditions of tribal independence." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 144–145, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980). This test mires state efforts to regulate on reservation lands in significant uncertainty, guaranteeing that many efforts will be deemed permissible only after extensive litigation, if at all. [10]

****2502** In addition to undermining state authority, reservation status adds an additional, complicated layer of governance over the massive territory here, conferring on tribal government power over numerous areas of life—including powers over non-Indian citizens and businesses. Under our precedents, tribes may regulate non-Indian conduct on reservation land, so long as the conduct stems from a "consensual relationship[ ] with the tribe or its members" or directly affects "the political integrity, the economic security, or the health or welfare of the tribe." ***973** *Montana v. United States*, 450 U.S. 544, 565–566, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981); see Cohen § 6.02(2)(a), at 506–507. Tribes may also impose certain taxes on non-Indians on reservation land, see *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 198, 105 S.Ct. 1900, 85 L.Ed.2d 200 (1985), and in this litigation, the Creek Nation contends that it retains the power to tax nonmembers doing business within its borders. Brief for Muscogee (Creek) Nation as *Amicus Curiae* 18, n. 6. No small power, given that those borders now embrace three million acres, the city of Tulsa, and hundreds of thousands of Oklahoma citizens. Recognizing the significant "potential for cost and conflict" caused by its decision, the Court insists any problems can be ameliorated if the citizens of Oklahoma just keep up the "spirit" of cooperation behind existing intergovernmental agreements between Oklahoma and the Five Tribes. *Ante*, at 2481. But those agreements are small potatoes compared to what will be necessary to address the disruption inflicted by today's decision.

The Court responds to these and other concerns with the truism that significant consequences are no "license for us to disregard the law." *Ibid.* Of course not. But when those consequences are drastic precisely because they depart from how the law has been applied for more than a century—a settled understanding that our precedents demand we consider —they are reason to think the Court may have taken a wrong turn in its analysis.

* * *

As the Creek, the State of Oklahoma, the United States, and our judicial predecessors have long agreed, Congress disestablished any Creek reservation more than 100 years ago. Oklahoma therefore had jurisdiction to prosecute McGirt. I respectfully dissent.

Justice THOMAS, dissenting.

I agree with THE CHIEF JUSTICE that the former Creek Nation Reservation was disestablished at statehood and Oklahoma therefore has jurisdiction to prosecute petitioner ***974** for sexually assaulting his wife's granddaughter. *Ante*, at 2482 – 2483 (dissenting opinion). I write separately to note an additional defect in the Court's decision: It reverses a state-court judgment that it has no jurisdiction to review. "[W]e have long recognized that 'where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.' " *Michigan v. Long*, 463 U.S. 1032, 1038, n. 4, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) (quoting *Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 56 S.Ct. 183, 80 L.Ed. 158 (1935)). Under this well-settled rule, we lack jurisdiction to review the Oklahoma Court of

Criminal Appeals' decision, because it rests on an adequate and independent state ground.

****2503** In his application for state postconviction relief, petitioner claimed that Oklahoma lacked jurisdiction to prosecute him because his crime was committed on Creek Nation land and thus was subject to the exclusive jurisdiction of the Federal Government under the Major Crimes Act, 18 U.S.C. § 1153. In support of his argument, petitioner cited the Tenth's Circuit's decision in *Murphy v. Royal*, 875 F.3d 896 (2017).

The Oklahoma Court of Criminal Appeals concluded that petitioner's claim was procedurally barred under state law because it was "not raised previously on direct appeal" and thus was "waived for further review." 2018 OK CR 1057 ¶2, —— P. 3d ——, —— (citing Okla. Stat., Tit. 22, § 1086 (2011)). The court found no grounds for excusing this default, explaining that "[p]etitioner [had] not established any sufficient reason why his current grounds for relief were not previously raised." —— P. 3d, at ——. This state procedural bar was applied independent of any federal law, and it is adequate to support the decision below. We therefore lack jurisdiction to disturb the state court's judgment.

There are two possible arguments in favor of jurisdiction, neither of which hold water. First, one might claim that the state procedural bar is not an "adequate" ground for decision ***975** in this case. In *Murphy*, the Tenth Circuit suggested that Oklahoma law permits jurisdictional challenges to be raised for the first time on collateral review. 875 F.3d at 907, n. 5 (citing *Wallace v. State*, 1997 OKCR 18, 935 P.2d 366). But the Oklahoma Court of Criminal Appeals did not even hint at such grounds for excusing petitioner's default here. More importantly, however, we may not go beyond "the four corners of the opinion" and delve into background principles of Oklahoma law to determine the adequacy of the independent state ground. *Long*, 463 U.S., at 1040, 103 S.Ct. 3469. This Court put an end to that approach in *Long*, noting that "[t]he process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar, and which often, as in this case, have not been discussed at length by the parties." *Id.*, at 1039, 103 S.Ct. 3469. Moreover, such second-guessing disrespects "the independence of state courts," *id.*, at 1040, 103 S.Ct. 3469, and the State itself, *Coleman v. Thompson*, 501 U.S. 722, 738–739, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

Second, one might argue, as the Court does, that we have jurisdiction because the decision below rests on federal, not state, grounds. See *ante,* at 2479, n. 15. It is true that the Oklahoma Court of Criminal Appeals briefly recited the procedural history of *Murphy* and recognized that the Tenth Circuit's decision—which we granted certiorari to review—is not yet final. But contrary to the Court's assertion that brief discussion of federal case law did not come close to "address[ing] the merits of [petitioner's] federal [Major Crimes Act] claim." *Ante*, at 2479, n. 15. The state court did not analyze the relevant statutory text or this Court's decisions in *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), and *Nebraska* v. *Parker*, 577 U. S. 481, 136 S.Ct. 1072, 194 L.Ed.2d 152 (2016). It reads far too much into the opinion to claim that the court's brief reference to the Tenth Circuit's decision in *Murphy* transformed the state court's decision into one that "fairly appear[s] to rest primarily on federal law or to be interwoven with federal law," *Long*, *supra*, at 1040–1041, 103 S.Ct. 3469; see also *ante,* at 2479, n. 15. Nothing in ***976** the court's opinion suggests that its judgment was at all based on federal law. Thus, even if we were to set aside the fact that the state court "clearly and expressly state[d] ****2504** that [its decision] was based on state procedural grounds," we could not presume jurisdiction here. *Coleman*, *supra*, at 735–736, 111 S.Ct. 2546 (internal quotation marks omitted).

The Court might think that, in the grand scheme of things, this jurisdictional defect is fairly insignificant. After all, we were bound to resolve this federal question sooner or later. See *Royal* v. *Murphy*, 584 U. S. ——, 138 S.Ct. 2026, 201 L.Ed.2d 277 (2018). But our desire to decisively "settle [important disputes] for the sake of convenience and efficiency" must yield to the "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere." *Hollingsworth v. Perry*, 570 U.S. 693, 704–705, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013) (internal quotation marks omitted). Because the Oklahoma court's "judgment does not depend upon the decision of any federal question[,] we have no power to disturb it." *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164, 37 S.Ct. 318, 61 L.Ed. 644 (1917).

I agree with THE CHIEF JUSTICE that the Court misapplies our precedents in granting petitioner relief. *Ante*, at 2484 – 2502 (dissenting opinion). But in doing so, the Court also

overrides Oklahoma's statutory procedural bar, upsetting a violent sex offender's conviction without the power to do so. The State of Oklahoma deserves more respect under our Constitution's federal system. Therefore, I respectfully dissent.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

* Not admitted in D.C.; supervised by principals of the Firm.

1 The dissent by THE CHIEF JUSTICE (hereinafter the dissent) suggests that the Creek's intervening alliance with the Confederacy " 'unsettled' " and " 'forfeit[ed]' " the longstanding promises of the United States. *Post,* at 2483. But the Treaty of 1866 put an end to any Civil War hostility, promising mutual amnesty, "perpetual peace and friendship," and guaranteeing the Tribe the "quiet possession of their country." Art. I, 14 Stat. 786. Though this treaty expressly reduced the size of the Creek Reservation, the Creek were compensated for the lost territory, and otherwise "retained" their unceded portion. Art. III, *ibid*. Contrary to the dissent's implication, nothing in the Treaty of 1866 purported to repeal prior treaty promises. Cf. Art. XII, *id.,* at 790 (the United States expressly "reaffirms and reassumes all obligations of treaty stipulations with the Creek nation entered into before" the Civil War).

2 The dissent stresses, repeatedly, that the Dawes Commission was charged with seeking to extinguish the reservation. *Post,* at 2491– 2492, 2495. Yet, the dissent fails to mention the Commission's various reports acknowledging that those efforts were unsuccessful precisely because the Creek refused to cede their lands.

3 The dissent not only fails to acknowledge these features of the statute and our precedents. It proceeds in defiance of them, suggesting that by moving to eliminate communal title and relaxing restrictions on alienation, "Congress destroyed the foundation of [the Creek Nation's] sovereignty." *Post*, at 2491. But this Court long ago rejected the notion that the purchase of lands by non-Indians is inconsistent with reservation status. See *Seymour*, 368 U.S., at 357–358, 82 S.Ct. 424.

4 The dissent seemingly conflates these steps in other ways, too, by implying that the passage of an allotment Act *itself* extinguished title. *Post,* at 2491 – 2492. The reality proved more complicated. Allotment of the Creek lands did not occur overnight, but dragged on for years, well past Oklahoma's statehood, until Congress finally prohibited any further allotments more than 15 years later. Act of Mar. 2, 1917, 39 Stat. 986.

5 The dissent doesn't purport to find any of the hallmarks of diminishment in the Creek Allotment Agreement. Instead, the dissent tries to excuse their absence by saying that it would have made "little sense" to find such language in an Act transferring the Tribe's lands to private owners. *Post*, at 2489. But the dissent's account is impossible to reconcile with history and precedent. As we have noted, plenty of allotment agreements during this era included precisely the language of cession and compensation that the dissent says it would make

"little sense" to find there. And this Court has confirmed time and again that allotment agreements without such language do not necessarily disestablish or diminish the reservation at issue. See *Mattz v. Arnett*, 412 U.S. 481, 497, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 358, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962). The dissent's only answer is to suggest that allotment combined with *other* statutes limiting the Creek Nation's governing authority amounted to disestablishment —in other words that it's the arguments in the *next* section that really do the work.

6 The dissent calls it "fantasy" to suggest that Congress evinced "any unease about extinguishing the Creek domain" because Congress "did what it set out to do: transform a reservation into a State." *Post,* at 2494. The dissent stresses, too, that the Creek were afforded U. S. citizenship and the right to vote. *Post,* at 2492 – 2493. But the only thing implausible here is the suggestion that "creat[ing] a new State" or enfranchising Native Americans implies an "intent to terminate" any and all reservations within a State's boundaries. *Post,* at 2490. This Court confronted—and rejected—that sort of argument long ago in *United States v. Sandoval*, 231 U.S. 28, 47–48, 34 S.Ct. 1, 58 L.Ed. 107 (1913). The dissent treats that case as a one-off: special because "the tribe in *Sandoval*, the Pueblo Indians of New Mexico, retained a rare communal title to their lands." *Post*, at 2493, n. 4. But *Sandoval* is not only a case about the Pueblos; it is a foundational precedent recognizing that Congress can welcome Native Americans to participate in a broader political community without sacrificing their tribal sovereignty.

7 The dissent ultimately concedes what Oklahoma will not: that no "individual congressional action or piece of evidence, standing alone, disestablished the Creek reservation." *Post*, at 2487. Instead we're told we must consider "all of the relevant Acts of Congress together, viewed in light of contemporaneous and subsequent contextual evidence." *Ibid*. So, once again, the dissent seems to suggest that it's the arguments in the *next* section that will get us across the line to disestablishment.

8 The dissent suggests *Parker* meant to say only that evidence of subsequent treatment had limited interpretative value "*in that case*." *Post,* at 2488. But the dissent includes just a snippet of the relevant passage. Read in full, there is little room to doubt *Parker* invoked a general rule:

"This subsequent demographic history cannot overcome our conclusion that Congress did not intend to diminish the reservation in 1882. And it is not our rule to 'rewrite' the 1882 Act in light of this subsequent demographic history. *DeCoteau*, 420 U.S., at 447 [, 95 S.Ct. 1082]. After all, evidence of the changing demographics of disputed land is 'the least compelling' evidence in our diminishment analysis, for '[e]very surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the "Indian character" of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation.' *Yankton Sioux*, 522 U. S., at 356 [118 S.Ct. 789].... Evidence of the subsequent treatment of the disputed land by Government officials likewise has 'limited interpretive value.' *Id.*, at 355 [118 S.Ct. 789]." 577 U. S., at ——, 136 S.Ct., at 1082.

9 In an effort to support its very different course, the dissent stitches together quotes from *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977), and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998). *Post,* at 2487 – 2488. But far from supporting the dissent, both cases emphasize that "[t]he focus of our inquiry is congressional intent," *Rosebud*, 430 U.S., at 588, n. 4, 97 S.Ct. 1361; see also *Yankton Sioux*, 522 U.S., at 343, 118 S.Ct. 789, and merely acknowledge that extratextual sources may help resolve ambiguity about Congress's directions. The dissent's appeal to *Solem* fares no better. As we have seen, the extratextual sources in *Solem* only confirmed what the relevant

statute already suggested—that the reservation in question was not diminished or disestablished. 465 U.S. at 475–476, 104 S.Ct. 1161.

10 The dissent tries to avoid this inconvenient history by distinguishing fee allotments from reservations, noting that the two categories are legally distinct and geographically incommensurate. *Post,* at 2496 – 2497. But this misses the point: The *reason* that Oklahoma thought it could prosecute Indians for crimes on restricted allotments applied with equal force to reservations. And it hardly "stretches the imagination" to think that reason was wrong, *post*, at 2497, when the dissent itself does not dispute our rejection of it in Part V.

11 Unable to answer Oklahoma's admitted error about the very federal criminal statute before us, the dissent travels far afield, pointing to the fact an Oklahoma court heard a civil case in 1915 about an inheritance—involving members of a different Tribe—as "evidence" Congress disestablished the Creek Reservation. See *post,* at 2493 (citing *Palmer v. Cully*, 52 Okla. 454, 455–465, 153 P. 154, 155–157 (1915) (*per curiam*)). But even assuming that Oklahoma courts exercised civil jurisdiction over Creek members, too, the dissent never explains why this jurisdiction implies the Creek Reservation must have been disestablished. After all, everyone agrees that the Creeks were prohibited from having their own courts at the time. So it should be no surprise that some Creek might have resorted to state courts in hope of resolving their disputes.

12 The dissent finds the statements of the Creek leadership so probative that it cites them not just as evidence about the meaning of treaties the Tribe signed but even as evidence about the meaning of general purpose laws the Creek had no hand in. See *post,* at 2496 (citing Chief Porter's views on the legal effects of the Oklahoma Enabling Act). That is quite a stretch from using tribal statements as "historical evidence of 'the manner in which [treaties were] negotiated' with the ... Tribe." *Parker*, 577 U. S., at ——, 136 S.Ct., at 1081 (quoting *Solem v. Bartlett*, 465 U.S. 463, 471, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984)).

13 Part of the reason for Cohen's error might be explained by a portion of the memorandum the dissent leaves unquoted. Cohen concluded that Oklahoma was free to try Indians anywhere in the State because, among other things, the Oklahoma Enabling Act "transfer[red] ... jurisdiction from the Federal courts to the State courts upon the establishment of the State of Oklahoma." App. to Supp. Reply Brief for Petitioner in *Carpenter* v. *Murphy*, O. T. 2018, No. 17–1107, p. 1a (Memorandum for Commissioner of Indian Affairs (July 11, 1941)). Yet, as we explore below, the Oklahoma Enabling Act did *not* send cases covered by the federal MCA to state court. See Part V, *infra*. Other, contemporaneous Interior Department memoranda acknowledged that Oklahoma state courts had simply "assumed jurisdiction" over cases arising on restricted allotments without any clear authority in the Oklahoma Enabling Act or the MCA, and much the same appears to have occurred here. App. to Supp. Reply Brief for Respondent in *Carpenter* v. *Murphy*, O. T. 2018, No. 17–1107, p. 1a (Memorandum from N. Gray, Dept. of Interior, for Mr. Flanery (Aug. 12, 1942)). So rather than Oklahoma and the United States having a "shared understanding" that Congress had disestablished the Creek Reservation, *post*, at 2496 – 2497, it seems more accurate to say that for many years much uncertainty remained about whether the MCA applied in eastern Oklahoma.

14 The dissent asks us to examine a hodge-podge of other, but no more compelling, material. For example, the dissent points to later statutes that do no more than confirm there are former reservations in the State of Oklahoma. *Post*, at 2498 – 2499. It cites legislative history to show that Congress had the Creek Nation—or, at least, its neighbors—in mind when it added these in 1988. *Post,* at 2499, n. 7. The dissent cites a Senate Report from 1989 and post-1980 statements made by representatives of other tribes. *Post*, at 2498, 2499 – 2500. It highlights three occasions on which this Court referred to something like a "former Creek Nation," though it neglects to add that in each the Court was referring to the loss of the Nation's communal fee title, not its sovereignty. *Grayson v. Harris*, 267 U.S. 352, 357, 45 S.Ct. 317, 69 L.Ed. 652 (1925); *Woodward v.*

De Graffenried, 238 U.S. 284, 289–290, 35 S.Ct. 764, 59 L.Ed. 1310 (1915); *Washington v. Miller*, 235 U.S. 422, 423–425, 35 S.Ct. 119, 59 L.Ed. 295 (1914). The dissent points as well to a single instance in which the Creek Nation disclaimed reservation boundaries for purposes of litigation in a lower court, *post,* at 2499, but ignores that the Creek Nation has repeatedly filed briefs in this Court to the contrary. This is thin gruel to set against treaty promises enshrined in statutes.

15 For example, Oklahoma appears to apply a general rule that "issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review." *Logan v. State*, 2013 OKCR 2, ¶ 1, 293 P.3d 969, 973. Indeed, Justice THOMAS contends that this state-law limitation on collateral review prevents us from considering even the case now before us. *Post,* at 2503 (dissenting opinion). But while that state-law rule may often bar our way, it doesn't in this case. After noting a potential state-law obstacle, the Oklahoma Court of Criminal Appeals (OCCA) proceeded to address the merits of Mr. McGirt's federal MCA claim anyway. Because the OCCA's opinion "fairly appears to rest primarily on federal law or to be interwoven with federal law" and lacks any "plain statement" that it was relying on a state-law ground, we have jurisdiction to consider the federal-law question presented to us. See *Michigan v. Long*, 463 U.S. 1032, 1040–1041, 1044, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

16 This sense of cooperation and a shared future is on display in this very case. The Creek Nation is supported by an array of leaders of other Tribes and the State of Oklahoma, many of whom had a role in negotiating exactly these agreements. See Brief for Tom Cole et al. as *Amici Curiae* 1 ("Amici are a former Governor, State Attorney General, cabinet members, and legislators of the State of Oklahoma, and two federally recognized Indian tribes, the Chickasaw Nation and Choctaw Nation of Oklahoma") (brief authored by Robert H. Henry, also a former State Attorney General and Chief Judge of the Tenth Circuit).

1 I assume that the Creek Nation's territory constituted a "reservation" at this time. See *ante*, at 2461 – 2462. The State contends that no reservation existed in the first place because the territory instead constituted a "dependent Indian communit[y]." Brief for Respondent 8 (quoting 18 U.S.C. § 1151(b)). The United States disagrees and states that defining the territory as a dependent Indian community could disrupt the application of various federal statutes. Tr. of Oral Arg. 79–80. I do not address this debate because, regardless, I conclude that any reservation was disestablished.

2 Our precedents have generally considered whether Congress disestablished or diminished a reservation by enacting "surplus land Acts" that opened land to non-Indian settlement. Here Congress did much more than that, as I will explain. Even so, there is broad agreement among the parties, the United States, the Creek Nation, and even the Court that our precedents on surplus land Acts provide the governing framework for this case, so I proceed on the same course. See Brief for Petitioner 1; Brief for Respondent 29, 35, 40; Brief for United States as *Amicus Curiae* 4–5; Brief for Muscogee (Creek) Nation as *Amicus Curiae* 1–2; *ante*, at 2462 – 2463, 2468 – 2469.

3 The Court rejects this reading of *Parker* based on a quotation that ends with what sounds like a general principle that "[e]vidence of the subsequent treatment of the disputed land by Government officials likewise has 'limited interpretive value.' " *Ante*, at 2469, n. 8 (quoting *Parker*, 577 U. S., at ——, 136 S.Ct., at 1081). But that sentence was actually the topic sentence of a new paragraph that addressed the *particular* evidence of subsequent treatment of the *particular* land by the *particular* government officials in that case. *Id.*, at 2464 – 2465, 136 S.Ct. at 1081–1083. It is clear that *Parker* merely concluded that the evidence cited by the parties provided a "mixed record of subsequent treatment" that did not move the needle either way. *Ibid.* (internal quotation marks omitted). *Parker* did not silently overturn our precedents requiring us to consider—

and accord "weight" to—subsequent evidence that plainly favors, or undermines, disestablishment. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); see *supra,* at 2484 – 2487.

4 The Court, citing *United States v. Sandoval*, 231 U.S. 28, 47–48, 34 S.Ct. 1, 58 L.Ed. 107 (1913), argues that including a tribe within a new State is not necessarily incompatible with the continuing existence of a reservation. *Ante*, at 2467, n. 6. But the tribe in *Sandoval*, the Pueblo Indians of New Mexico, retained a rare communal title to their lands—which Congress explicitly extinguished here. 231 U.S. at 47, 34 S.Ct. 1. More fundamentally, the Court's argument suffers from the same flaw that runs through its entire approach, which maintains that each of Congress's actions alone would not be enough for disestablishment but never confronts the import of all of them.

5 The Court discounts the views of the principal chiefs as mere predictions about what Congress "*would*" do, *ante,* at 2472, but the Court ignores statements made after statehood, describing what Congress *did* do. The Court also asserts that the chiefs' views cannot serve as "evidence" of the "meaning" of laws enacted by Congress. *Ante*, at 2472, n. 12. That is inconsistent with our precedent, which specifically instructs us to determine Congress's intent by considering the "understanding of the status of the reservation by members" of the affected tribe. *Parker*, 577 U. S., at ——, 136 S.Ct., at 1079. The contemporaneous understanding of the leaders of the tribe is highly probative.

6 The Court claims that the Oklahoma courts' reasons for treating restricted allotments as Indian country must apply with "equal force" to the unrestricted fee lands at issue here, but the Court ultimately admits the two types of land are "legally distinct." *Ante*, at 2471, n. 10. And any misstep with regard to the small number of restricted allotments hardly means the Oklahoma courts made the far more extraordinary mistake of failing to notice that the Five Tribes' reservations—encompassing 19 million acres—continued to exist.

7 The Court suggests that these statutes only show that there are some "former reservations" in Oklahoma, not that the Five Tribes' former domains are necessarily among them. *Ante*, at 2473 – 2474, n. 14. History says otherwise. For example, the Five Tribes actively lobbied for inclusion of this language in the Indian Gaming Regulatory Act. See Hearing on S. 902 et al. before the Senate Select Committee on Indian Affairs, 99th Cong., 2d Sess., 299–300 (1986). They observed that the term "reservation," as originally defined, did not pertain to the "eastern Oklahoma tribes, including the Five Civilized Tribes." *Ibid.*(statement of Charles Blackwell, representative of the Chickasaw Nation of Oklahoma). Accordingly, they "recommend[ed] inclu[ding] ... the wording 'or in the case of Oklahoma tribes, their *former* jurisdictional and/or reservation boundaries in Oklahoma.' " *Id.*, at 300 (emphasis added). The National Indian Gaming Association, which proposed the language on which the final act was ultimately modeled, made the same point, observing that in Oklahoma "reservation boundaries have been extinguished for most purposes" so the statute should refer to "former reservation[s] in Oklahoma." *Id.*, at 312 (Memorandum from the National Indian Gaming Assn. to the Senate Select Committee on Indian Affairs (June 17, 1986)).

8 See App. to Brief for Respondent 18a–19a (excerpting various statements before Congress, including: "[w]e are not a reservation tribe" (Principal Cherokee Chief, 1982), "Oklahoma, ... of course, is not a reservation State" (Chickasaw Governor, 1988), "Oklahoma is not [a reservation State]" and "[w]e have no surface reservations in Oklahoma" (Chickasaw advisor, 2011), as well as references to the boundaries and lands of "former reservation[s]" (Chickasaw nominee for Assistant Secretary of Indian Affairs, 2012; Inter-Tribal Council of the Five Civilized Tribes, 2016)).

9 The Court suggests that "well-known" "procedural obstacles" could prevent challenges to state convictions. *Ante*, at 2479 – 2480. But, under Oklahoma law, it appears that there may be little bar to state habeas relief

because "issues of subject matter jurisdiction are never waived and can therefore be raised on a collateral appeal." *Murphy v. Royal*, 875 F.3d 896, 907, n. 5 (C.A.10 2017) (quoting *Wallace v. State*, 935 P.2d 366, 372 (Okla. Crim. App. 1997)).

10 See, *e.g.*, *White Mountain Apache Tribe*, 448 U.S., at 148–151, 100 S.Ct. 2578 (barring State from imposing motor carrier license tax and fuel use taxes on non-Indian logging companies that harvested timber on a reservation); *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 690–692, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965) (barring State from taxing income earned by a non-Indian who operated a trading post on a reservation); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 325, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983) (barring State from regulating hunting and fishing by non-Indians on a reservation); see also *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 448, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989) (opinion of Stevens, J.) (arguing that it is "impossible to articulate precise rules that will govern whenever a tribe asserts that a land use approved by a county board is pre-empted by federal law").

499 P.3d 771
Court of Criminal Appeals of Oklahoma.

Shaun Michael BOSSE, Petitioner,
v.
The STATE of Oklahoma, Respondent.

Case No. PCD-2019-124
|
FILED OCTOBER 7, 2021

Synopsis

Background: Defendant was convicted in the District Court, McClain County, Gregory Dixon, J., of three counts of first degree murder and one count of first degree arson. Defendant appealed. The Court of Criminal Appeals, 360 P.3d 1203, affirmed, and certiorari was granted. The United States Supreme Court, 137 S.Ct. 1, 196 L.Ed.2d 1, vacated and remanded. The Court of Criminal Appeals, 400 P.3d 834, affirmed. Defendant filed second application for post-conviction relief.

Holdings: The Court of Criminal Appeals, Lewis, J., held that:

[1] defendant was not entitled to post-conviction relief;

[2] defendant's challenge to trial counsel's effectiveness was procedurally barred in second application for relief;

[3] defendant's claim that appellate counsel was ineffective was procedurally barred in second application for relief; and

[4] defendant's claim that original post-conviction counsel was deficient was procedurally barred in second application for relief.

Petition denied.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (5)

[1] **Criminal Law** Change in the law
Criminal Law Jurisdiction

Petitioner convicted of three counts of first degree murder and one count of first degree arson was not entitled to post-conviction relief on ground that State lacked jurisdiction to prosecute petitioner, although victims were American Indians and crimes occurred within historic boundaries of Chickasaw Reservation, where convictions were final prior to Supreme Court's decision in another case regarding disestablishment of reservation by Congress, and State's faulty jurisdiction did not affect procedural protections petitioner was afforded at trial.

9 Cases that cite this headnote

[2] **Criminal Law** Particular issues and cases

Post-conviction relief petitioner's challenge to trial counsel's effectiveness due to alleged failure to conduct reasonable mitigation investigation, adequately prepare witnesses, and utilize mitigation experts was procedurally barred in second application for relief; claims could have been raised in earlier proceedings, and claims could have been ascertained with reasonable diligence and presented in prior post-conviction application or on direct appeal of conviction. U.S. Const. Amend. 6; 22 Okla. Stat. Ann. §§ 1089(D)(8)(b)(1), 1089(D)(8)(b)(2).

3 Cases that cite this headnote

[3] **Criminal Law** Particular issues and cases

Post-conviction relief petitioner's claim that appellate counsel was ineffective in handling of claim that trial counsel was ineffective was procedurally barred in second application for relief; claim was ascertainable with reasonable diligence at time of prior post-conviction

application. U.S. Const. Amend. 6; 22 Okla. Stat. Ann. §§ 1089(D)(8)(b)(1), 1089(D)(8)(b)(2).

3 Cases that cite this headnote

[4] **Criminal Law** Particular issues and cases

Post-conviction relief petitioner's claim that original post-conviction counsel was deficient for omitting claim that appellate counsel was deficient was procedurally barred in second application for relief; claim could have been ascertained with reasonable diligence on or before prior application. U.S. Const. Amend. 6; 22 Okla. Stat. Ann. §§ 1089(D)(8)(b)(1), 1089(D)(8)(b)(2).

2 Cases that cite this headnote

[5] **Criminal Law** Successive Post-Conviction Proceedings

Court of Criminal Appeals does not review or consider errors raised or decided in previous proceedings in a successive post-conviction application.

1 Case that cites this headnote

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OPINION

LEWIS, JUDGE:

***773** ¶1 Shaun Michael Bosse was tried by jury and convicted of three counts of first degree murder and one count of first degree arson in the District Court of McClain County, Case No. CF-2010-213. The jury sentenced to him to death for each murder and thirty-five years imprisonment and a $25,000.00 fine for arson. The Honorable Greg Dixon, District Judge, pronounced judgment and sentence accordingly. On direct appeal, this Court affirmed Mr. Bosse's convictions and sentences. *Bosse v. State,* 2015 OK CR 14, 360 P.3d 1203. The Court also denied an original application for post-conviction relief. *Bosse v. State,* No. PCD-2013-360 (Okl.Cr., Dec.16, 2015) (unpublished).

¶2 The United States Supreme Court vacated the judgment on direct appeal and remanded for further consideration of the death sentences in light of *Booth v. Maryland,* 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) and *Payne v. Tennessee,* 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). *Bosse v. Oklahoma,* —— U.S. ——, 137 S.Ct. 1, 196 L.Ed.2d 1 (2016). After further consideration, this Court again affirmed. *Bosse v. State*, 2017 OK CR 10, 400 P.3d 834.

¶3 Mr. Bosse's convictions and sentences became final on March 5, 2018, when the Supreme Court denied his petition for certiorari to review that decision. *Bosse v. Oklahoma,* —— U.S. ——, 138 S.Ct. 1264, 200 L.Ed.2d 421 (2018). Mr. Bosse filed this second application for post-conviction relief on February 20, 2019, arguing three grounds for relief:

1. Because jurisdiction for Indian Country crimes rests exclusively in federal court, Oklahoma lacked jurisdiction to prosecute Mr. Bosse, and his convictions are void ab initio;

2. Trial counsel were ineffective by failing to adequately investigate Bosse's life history, and failing to adequately prepare witnesses, which deprived him of a fair and reliable sentencing. Direct appeal and post-conviction counsel were equally ineffective for failing to raise that

issue. These failings all violated the Sixth, Eighth, and Fourteenth Amendments.

3. The cumulative effect of errors deprived Mr. Bosse of his constitutional rights to due process and a fair capital sentencing under the Sixth, Eighth, and Fourteenth Amendments.

¶4 We have said many times that the post-conviction procedure is not intended to provide a second appeal. *Carter v. State,* 1997 OK CR 22, ¶ 2, 936 P.2d 342, 343. The statutes governing our review of second or successive capital post-conviction applications provide even fewer grounds to collaterally attack a judgment and sentence than the narrow grounds permitted in an original post-conviction proceeding. *Sanchez v. State*, 2017 OK CR 22, ¶ 6, 406 P.3d 27, 29.

¶5 This Court "may not consider the merits of or grant relief" on a second or successive capital post-conviction application unless the claims "have not been and could not have been presented" in a previous application, either because the legal basis was unavailable; or because the factual basis was unavailable, and that factual basis, "if proven and viewed in light of the evidence as a whole," would establish "clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death." 22 O.S.2011, § 1089(D)(8)(a), (b)(1) and (2).

¶6 A successive application must be filed within sixty days from the date the previously unavailable legal or factual basis is announced or discovered. Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021). On review of the application, this Court must determine: (1) whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist; (2) whether the claims were or could have been raised in earlier proceedings; and (3) whether relief may be granted. § 1089(D)(4).

***774** ¶7 Mr. Bosse's first ground for relief, alleging a defect of state criminal jurisdiction because these crimes were committed against Indians in Indian Country, involved potentially controverted and unresolved factual issues. This Court remanded to the District Court of McClain County for an evidentiary hearing on the status of Mr. Bosse's victims as Indians; and whether, applying the Supreme Court's intervening decision in *McGirt v. Oklahoma,* —— U.S. ——, 140 S. Ct. 2452, 207 L.Ed.2d 985 (2020), the Chickasaw Reservation had been disestablished by Congress, and thus, whether the crimes occurred in Indian Country.

¶8 After hearing evidence, the District Court entered undisputed findings of fact and conclusions of law determining that Mr. Bosse's victims were Chickasaw Indians; and that the crimes were committed in Indian Country, because the Chickasaw Reservation was never disestablised by Congress.

¶9 This Court accepted these determinations. We further concluded that Mr. Bosse's Indian Country claim was cognizable in this second post-conviction proceeding. The legal basis was unavailable at the time of his direct appeal and prior post-conviction application, because no final decision of an Oklahoma or federal appellate court had recognized any of the Five Tribes' historic reservations as Indian Country prior to *McGirt* in 2020. *See* § 1089(D)(8)(a). [1] We therefore initially granted post-conviction relief, reversing the convictions and remanding with instructions to dismiss in *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286.

¶10 At the State's request, this Court stayed the mandate on April 15, 2021, and the Supreme Court subsequently stayed the issuance of mandate on May 26, 2021. On August 6, 2021, the State of Oklahoma filed a petition for a writ of certiorari seeking review of this Court's opinion granting Mr. Bosse post-conviction relief with the Supreme Court. *Oklahoma v. Bosse*, No. 21-186.

¶11 However, on August 12, 2021, this Court, in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, —— P.3d ——, held that *McGirt's* holding, and its impact on state criminal jurisdiction in a vastly expanded Indian Country, was a procedural change of law that would not apply retroactively to convictions already final when *McGirt* was announced. Based on *Matloff*, on August 31, 2021, this Court set aside its earlier order pending further consideration of Mr. Bosse's successive post-conviction claims. *Bosse v. State*, 2021 OK CR 23, 495 P.3d 669. [2] We now turn again to Mr. Bosse's grounds for relief.

[1] ¶12 With respect to Mr. Bosse's first ground for relief, we again affirm the trial court's undisputed determinations that Mr. Bosse's victims were Indians, and that the crimes occurred

within the historic boundaries of the Chickasaw Reservation. Applying the Supreme Court's analysis in *McGirt*, we also affirm the trial court's legal conclusion that the Chickasaw Reservation was never disestablished by Congress, and the lands within its historic boundaries are Indian Country. 18 U.S.C. § 1151 ("Indian country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government").

¶13 However, no post-conviction relief should be granted on Mr. Bosse's first ground for relief. Mr. Bosse's convictions and sentences were final in 2018, long before the Supreme Court decided *McGirt* in July, 2020. What we said in *Matloff* applies with even greater force here:

> [Mr. Bosse's] legitimate interests in post-conviction relief for this jurisdictional error are minimal or non-existent. *McGirt* raises no serious questions about the truth-finding function of the state courts that tried [Mr. Bosse] and so many others in latent ***775** contravention of the Major Crimes Act. The state court's faulty jurisdiction (unnoticed until many years later) did not affect the procedural protections Mr. [Bosse] was afforded at trial. The trial produced an accurate picture of his criminal conduct; the conviction was affirmed on direct review; and the proceedings did not result in the wrongful conviction or punishment of an innocent person. A reversal of Mr. [Bosse's] final conviction now undoubtedly would be a monumental victory for him, but it would not be justice.

Matloff, 2021 OK CR 21, ¶ 39, 497 P.3d 686, 694.

¶14 Following the state law analysis set forth in *Matloff* in interpreting the remedial scope of the post-conviction statutes, we decline to apply *McGirt* and our post-*McGirt* reservation rulings retroactively to void Mr. Bosse's final convictions. Mr. Bosse's first ground for post-conviction relief is denied.

[2] ¶15 In his second ground for relief, Mr. Bosse alleges that all of his prior counsel were ineffective, and requests an evidentiary hearing to further develop his claim. He first alleges that a "dysfunctional" trio of trial attorneys failed to conduct reasonable mitigation investigation,[3] adequately prepare witnesses, and utilize mitigation experts. He also argues that trial counsel acted contrary to his interests to avoid future ineffectiveness claims. Mr. Bosse maintains that as a result of their deficient performance, he suffered prejudice in the form of an unreliable sentencing trial that resulted in his sentences of death.

¶16 Our cognizance of this claim turns initially on whether it has not and could not have been presented in his earlier post-conviction application because the factual basis was unavailable. § 1089(D)(8)(b)(1). A claim is factually unavailable in the sense required here when the facts were "not ascertainable through the exercise of reasonable diligence" on or before the filing of a previous application. *Id*. If the factual basis of the claim was unavailable, the applicant must also show that the error resulted in a miscarriage of justice,[4] that is, either a wrongful conviction or sentence. The proven facts, viewed in light of the evidence as a whole, must "establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death." § 1089(D)(8)(b)(2) Stating these two requirements in the conjunctive "and," the statute procedurally bars review or relief unless the applicant satisfies *both* factual requisites.[5]

¶17 Mr. Bosse's trial counsel ineffectiveness claim could have been raised in earlier proceedings. The factual basis—including the proffered testimony of lay and expert witnesses about mitigating aspects of Mr. Bosse's life history; trial counsel's allegedly unethical countermeasures to avoid an ineffectiveness claim; and the evidence of their failure to reasonably investigate or prepare—could have been ascertained with reasonable ***776** diligence and presented in his previous post-conviction application, or even on direct appeal. This challenge to trial counsel's effectiveness on the

factual basis now asserted is procedurally barred. *Sanchez*, 2017 OK CR 22, ¶ 8, 406 P.3d at 29.

[3] ¶18 The related argument that appellate counsel mishandled *this* viable claim [6] of ineffective trial counsel—due to their allegedly erroneous opinions about the effect of Mr. Bosse's on-the-record admission that he was satisfied with trial counsel—also involves a factual basis that was ascertainable with reasonable diligence at the time of the earlier post-conviction application. Appellate counsel made their decision to forego an ineffectiveness claim (on factual grounds like those now asserted) before the direct appeal brief was filed in August, 2014. The facts concerning that decision were ascertainable with reasonable diligence before or at the time the first post-conviction application was filed almost a year later in August, 2015. This ground for relief is also procedurally barred. *Id*.

[4] ¶19 Mr. Bosse finally argues that original post-conviction counsel was deficient for omitting the current claim that appellate counsel was deficient for omitting the current claim that trial counsel was deficient. [7] The only additional fact involved is that post-conviction counsel filed the previous application. This claim depends entirely on the same factual basis as the others, which could have been ascertained with reasonable diligence on or before the earlier post-conviction application. This ground for relief is also procedurally barred. *Id*.

¶20 The foregoing conclusions are sufficient to preclude further review on Mr. Bosse's second ground for relief. However, we also conclude from this record that the facts presented, if proven, when viewed in the light of the evidence as a whole, do not establish clear and convincing evidence that, but for counsel's alleged errors, no reasonable fact finder would have rendered the penalty of death. [8] Mr. Bosse's motion requesting an evidentiary hearing to further develop his new factual claims, and his second ground for post-conviction relief, are therefore denied.

[5] ¶21 In his third ground for relief, Mr. Bosse seeks post-conviction relief based on cumulative error. As we have said previously, we do not review or consider errors raised or decided in previous proceedings in a successive post-conviction application. *Coddington v. State*, 2011 OK CR 21, ¶ 22, 259 P.3d 833, 840. The third ground for post-conviction relief is denied.

DECISION

¶22 The motion for evidentiary hearing and second application for post-conviction relief are **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

ROWLAND, P.J.: Concur

HUDSON, V.P.J.: Concur

LUMPKIN, J.: Concur

All Citations

499 P.3d 771, 2021 OK CR 30

Footnotes

1 *See also McGirt*, 140 S.Ct. at 2460 (noting this Court's rejection of the claimed Muscogee (Creek) Reservation, the Tenth Circuit's opposite conclusion in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), and the Supreme Court's grant of certiorari to settle the question).

2021 OK CR 30

2 The State subsequently dismissed its petition for certiorari in *Oklahoma v. Bosse* as moot. Bosse has since moved to stay further proceedings in this case pending the Supreme Court's consideration of a certiorari petition to review this Court's decision in *Matloff*. The motion to stay is **DENIED**.

3 Bosse presents with his application a series of affidavits from witnesses to his family history, stating that from an early age Bosse was subjected to ongoing physical (some of it sexual) and mental abuse and neglect from his parents and a grandfather, and cruelty and beatings from his brother; and that he developed a drug problem and mental health problems as a result of these adverse experiences.

4 This latter requirement is similar to the Supreme Court's "miscarriage of justice" exception allowing limited review of successive, abusive, or procedurally defaulted claims in federal habeas corpus. *See Sawyer v. Whitley,* 505 U.S. 333, 336, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992) (finding successive habeas challenge to death sentence can obtain otherwise barred relief by showing a miscarriage of justice, i.e., "by clear and convincing evidence that, but for a constitutional error, no reasonable juror" would have found the petitioner eligible for the death penalty); *Schlup v. Delo,* 513 U.S. 298, 326-27, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995)(finding successive habeas ineffectiveness and *Brady* claims were cognizable upon showing that the error more likely than not resulted in miscarriage of justice by the conviction of a factually innocent person).

5 Because Mr. Bosse requests an evidentiary hearing on this claim, we also consider whether the application and exhibits contain sufficient information to establish by "clear and convincing evidence" the materials are "likely to have support in law and fact to be relevant to an allegation raised in the application for post-conviction relief." Rule 9.7(D)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021).

6 Appellate counsel *did* raise two other claims of ineffectiveness against trial counsel, challenging their failure to object to a medical examiner's testimony and improper closing argument. *See Bosse v. State*, 2015 OK CR 14, ¶ 84, 360 P.3d at 1234.

7 Bosse's first post-conviction application initially *alleged* both trial and appellate counsel's ineffectiveness, but the actual claim presented argued only trial counsel's ineffectiveness for failing to interview a particular witness, and "offer[ed] no factual claim or argument directed at appellate counsel ...." *See Bosse v. State*, No. PCD-2013-360, at 2 (Okl.Cr., Dec. 16, 2015) (unpublished).

8 Mr. Bosse concedes that his guilt in this triple homicide and arson is overwhelming, so there is no issue whether the alleged errors of his prior counsel resulted in wrongful convictions.

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Oklahoma v. United States Department of the Interior, W.D.Okla., November 9, 2022

485 P.3d 867
Court of Criminal Appeals of Oklahoma.

Devin Warren SIZEMORE, Appellant,
v.
The STATE of Oklahoma, Appellee.

Case No. F-2018-1140
|
FILED APRIL 1, 2021

Synopsis

Background: Defendant, who was enrolled member of Choctaw Nation, was convicted in the District Court, Pittsburg County, Timothy E. Mills, J., of first degree murder and battery/assault and battery on a police officer. Defendant appealed. During pendency of appeal, the Court of Criminal Appeals remanded for an evidentiary hearing. On remand, the District Court, Mills, J., entered findings of fact and conclusions of law relevant to determining whether area of land where offenses occurred was "Indian country" under federal criminal jurisdiction statutes.

[Holding:] The Court of Criminal Appeals, Rowland, V.P.J., held that State of Oklahoma did not have jurisdiction to prosecute defendant.

Vacated and remanded with instructions.

Lumpkin, J., filed opinion concurring in result.

Lewis, J., filed specially concurring opinion.

Hudson, J., filed opinion concurring in result.

Procedural Posture(s): Appellate Review.

West Headnotes (4)

[1] Indians What is Indian country in general

Land upon which defendant, who was enrolled member of Choctaw Nation, allegedly committed first degree murder and battery/assault and battery on a police officer constituted "Indian country" under federal statutes providing for federal criminal jurisdiction in "Indian country"; Congress established a Choctaw Reservation through treaties, and subsequent treaties that redefined geographical boundaries of reservation did not show Congressional intent to erase original boundaries or terminate existence of reservation. (Per opinion of Rowland, V.P.J., with one judge concurring, two judges concurring in result, and one judge specially concurring.) 18 U.S.C.A. §§ 1152, 1153; 21 Okla. Stat. Ann. §§ 649, 701.7.

11 Cases that cite this headnote

[2] Indians Reservations or Grants to Indian Nations or Tribes

To determine whether a Native American tribe continues to hold a reservation, there is only one place a court may look: the Acts of Congress. (Per opinion of Rowland, V.P.J., with one judge concurring, two judges concurring in result, and one judge specially concurring.)

1 Case that cites this headnote

[3] Indians Disestablishment and termination

Disestablishment of a Native American reservation does not require any particular form of words, but it does require that Congress clearly express its intent to do so, commonly with an explicit reference to cession or other language evidencing the present and total surrender of all tribal interests. (Per opinion of Rowland, V.P.J., with one judge concurring, two judges

concurring in result, and one judge specially concurring.)

1 Case that cites this headnote

[4] **Indians** Authority over and regulation of tribes in general

Indians Alteration or abrogation in general

Congress, and Congress alone, has the power to abrogate treaties with Native American tribes establishing reservations, and the Court of Criminal Appeals will not lightly infer such a breach once Congress has established a reservation. (Per opinion of Rowland, V.P.J., with one judge concurring, two judges concurring in result, and one judge specially concurring.)

AN APPEAL FROM THE DISTRICT COURT OF PITTSBURG COUNTY; THE HONORABLE TIMOTHY E. MILLS, ASSOCIATE DISTRICT JUDGE

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OPINION

ROWLAND, VICE PRESIDING JUDGE:

***868** ¶1 This appeal turns on whether Appellant Devin Warren Sizemore is an Indian as defined by federal law, and whether he committed murder and assault and battery upon a police officer within Indian country as that term is defined by federal law. Because the answer to both questions is yes, federal law grants exclusive criminal jurisdiction to the federal government on the murder charge at the very least and possibly the assault charge as well. Regardless, the State of Oklahoma was without jurisdiction to prosecute him.

1. Factual Background

¶2 In July of 2016, police in Krebs, Oklahoma were contacted by Sizemore's family members, worried about his and his

twenty-one month old daughter's safety. Some fifteen hours after this call to police, officers searching for the pair heard screaming from a local pond and discovered Sizemore there. Upon seeing the police, he fled into the water and officers encountered him near what appeared to be a small body floating face down. Attempts to subdue him resulted in a fight both in and out of the water, but the officers eventually took him into custody. His young daughter was pulled from the water but did not survive; she had drowned.

¶3 Sizemore was tried by jury in the District Court of Pittsburg County, Case No. CF-2016-593, and convicted of First Degree Murder (Count 1), in violation of 21 O.S.Supp.2012, § 701.7 and Battery/Assault and Battery on a Police Officer (Count 2), in violation of 21 O.S.Supp.2015, § 649. In accordance with the jury's verdict, the Honorable Tim Mills, Associate District Judge, sentenced Sizemore to life imprisonment without the possibility of parole on Count 1 and five years imprisonment on Count 2, with the sentences to be served concurrently.

¶4 In this direct appeal, Sizemore alleges the following errors:

(1) The State of Oklahoma lacked jurisdiction to prosecute him because he is an "Indian" and the crime occurred in "Indian Country";

(2) He received ineffective assistance of trial counsel;

(3) The evidence was insufficient to prove all elements of First Degree Murder beyond a reasonable doubt;

(4) The district court erred in admitting his recorded interrogation;

(5) The district court erred by denying his motion to quash his arrest; and

(6) An accumulation of error deprived him of a fair trial.

¶5 Because, as noted above, we find relief is required on Sizemore's jurisdictional challenge ***869** in Proposition 1, his other claims are moot.

2. The Legal Background

A. The Major Crimes Act

¶6 Title 18 Section 1153 of the United States Code, known as the Major Crimes Act, grants exclusive federal jurisdiction to prosecute certain enumerated offenses committed by Indians within Indian country. It reads in relevant part as follows:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, 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.

18 U.S.C. § 1153(a) (2013).

¶7 Count 1, the murder charge, fits squarely within the Major Crimes Act and its exclusive federal jurisdiction, but whether Count 2 is among these enumerated crimes is much less clear. It may constitute a "felony assault under section 113", but that is not something we must decide today. If the assault on a police officer is not covered by Section 1153, it is subject to the Act's sister statute, 18 U.S.C. § 1152 (1948), which applies to other offenses and provides for federal or tribal jurisdiction. In either event, the State of Oklahoma was without jurisdiction to prosecute such an assault by an Indian within Indian country. *See State v. Klindt*, 1989 OK CR 75, ¶ 3, 782 P.2d 401, 403 ("[T]he State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country.")

B. *McGirt v. Oklahoma*

¶8 Nothing we have said thus far is in any way new, as these federal statutes asserting federal criminal jurisdiction in Indian country are more than one hundred years old. What has recently changed is the definition of Indian country, within the borders of Oklahoma, for purposes of these statutes. In *McGirt v. Oklahoma*, 591 U.S. ——, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020), the Supreme Court held that land set aside for the Muscogee-Creek Nation in the 1800's was intended by Congress to be an Indian reservation, and that this reservation exists today for purposes of federal criminal law because Congress has never explicitly disestablished it. Although the case now before us involves the lands of the Choctaw Nation, we find *McGirt's* reasoning controlling.

3. Two Questions Upon Remand

A. Sizemore's Status as Indian

¶9 After *McGirt* was decided, this Court, on August 19, 2020, remanded this case to the District Court of Pittsburgh County for an evidentiary hearing. The District Court was directed to make findings of fact and conclusions of law on two issues: (a) Sizemore's status as an Indian; and (b) whether the crime occurred in Indian Country, namely within the boundaries of the Choctaw Nation Reservation. Our Order provided that, if the parties agreed as to what the evidence would show with regard to the questions presented, the parties could enter into a written stipulation setting forth those facts, and no hearing would be necessary. On October 14, 2020, the parties stipulated to the first of these requirements, agreeing that (1) Sizemore has some Indian blood; (2) he was an enrolled member of the Choctaw Nation on the date of the charged offenses; and (3) the Choctaw Nation is a federally recognized tribe. Judge Mills accepted this stipulation and found that on the date of the charged crimes, Sizemore was an Indian for purposes of federal law. We adopt the district court's findings and conclusion.

B. Whether Crimes Were Committed in Indian Country

1. Congress Established a Choctaw Reservation in the 1800s

[1] ¶10 As to the second question on remand, whether the crimes were committed ***870** in Indian country, the stipulation of the parties was less dispositive. They acknowledged only that the charged crimes occurred within the historical geographic area of the Choctaw Nation as designated by various treaties. The stipulation went on to state that the crimes occurred in Indian country "only if the Court determines that those treaties established a reservation, and if the Court further concludes that Congress never explicitly erased those boundaries and disestablished that reservation."

¶11 In a thorough and well-reasoned order, Judge Mills examined the 19th century treaties between the Choctaw Nation and the United States of America. He concluded that the land set aside for the Choctaw Nation, beginning with the Treaty of Dancing Rabbit Creek in 1830, as reaffirmed and modified by the Treaty of Washington in 1855, and further modified by the post-civil war Treaty of Washington in 1866, established a Choctaw Reservation.

¶12 This finding is consistent with *McGirt*, where the majority found it "obvious" that a similar course of dealing between Congress and the Creeks had created a reservation, even though that term had not always been used to refer to the lands set aside for them, "perhaps because that word had not yet acquired such distinctive significance in federal Indian law." *McGirt*, 140 S.Ct. at 2461. Following the reasoning in *McGirt*, Judge Mills ruled that through its treaties with the Choctaw Nation, Congress established a Choctaw Reservation in the 1800's.

2. Congress Has Never Disestablished the Choctaw Reservation

[2] **[3]** ¶13 "To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress." *McGirt*, 140 S.Ct. at 2462. No particular words or verbiage are required, but there must be a clear expression of congressional intent to terminate the reservation.

> History shows that Congress knows how to withdraw a reservation when it can muster the will. Sometimes, legislation has provided an "[e]xplicit reference to cession" or an "unconditional commitment ... to compensate the Indian tribe for its opened land." *Ibid.* Other times, Congress has directed that tribal lands shall be " 'restored to the public domain.' " *Hagen v. Utah*, 510 U.S. 399, 412, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) (emphasis deleted). Likewise, Congress might speak of a reservation as being " 'discontinued,' " " 'abolished,' " or " 'vacated.' " *Mattz v. Arnett*, 412 U.S. 481, 504, n. 22, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973). Disestablishment has "never required any particular form of words," *Hagen*, 510 U.S., at 411, 114 S.Ct. 958. But it does require 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.' " *Nebraska v. Parker*, 577 U. S. 481, 488, 136 S.Ct. 1072, 1079, 194 L.Ed.2d 152 (2016).

Id., 140 S.Ct. at 2462-63.

[4] ¶14 The record before the district court in this case, similar to that in *McGirt*, shows Congress, through treaties, removed the Choctaw people from one area of the United States to another where they were promised certain lands. Subsequent treaties redefined the geographical boundaries of those lands, but nothing in any of those documents showed a congressional intent to erase the boundaries of the Reservation and terminate its existence. [1] Congress, and Congress alone, has the power to abrogate those treaties, and "this Court [will not] lightly infer such a breach once Congress has established a reservation." *McGirt*, 140 S.Ct. at 2462 (citing *Solem v. Bartlett*, 465 U.S. 463, 470, 104 S.Ct. 1161, 79 L.Ed.2d 443, (1984)).

¶15 Noting that the State of Oklahoma presented no evidence to show that Congress erased or disestablished the boundaries of the Choctaw Nation Reservation, and citing language from *McGirt* noting that allotment of individual plots of land within this area do not equate to disestablishment, Judge Mills ***871** found that the Choctaw Reservation remains in existence. This finding is supported by the record.

¶16 We hold that for purposes of federal criminal law, the land upon which the parties agree Sizemore allegedly committed these crimes is within the Choctaw Reservation and is thus Indian country. The ruling in *McGirt* governs this case and requires us to find the District Court of Pittsburgh County did not have jurisdiction to prosecute Sizemore. Accordingly, we grant Proposition 1.

DECISION

¶17 The Judgment and Sentence of the district court is **VACATED** and this matter is **REMANDED WITH INSTRUCTIONS TO DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021), the **MANDATE** is **ORDERED** to issue in twenty (20) days from the delivery and filing of this decision.

KUEHN, P.J.: Concur

LUMPKIN, J.: Concur in Results

LEWIS, J.: Specially Concur

HUDSON, J.: Concur in Results

LUMPKIN, JUDGE: CONCURRING IN RESULTS:

¶1 Bound by my oath and the Federal-State relationships dictated by the U.S. Constitution, I must at a minimum concur in the results of this opinion. While our nation's judicial structure requires me to apply the majority opinion in the 5-4 decision of the U.S. Supreme Court in *McGirt v. Oklahoma*, —— U.S. ——, 140 S. Ct. 2452, 207 L.Ed.2d 985 (2020), I do so reluctantly. Upon the first reading of the majority opinion in *McGirt*, I initially formed the belief that it was a result in search of an opinion to support it. Then upon reading the dissents by Chief Justice Roberts and Justice Thomas, I was forced to conclude the Majority had totally failed to follow the Court's own precedents, but had cherry picked statutes and treaties, without giving historical context to them. The Majority then proceeded to do what an average citizen who had been fully informed of the law and facts as set out in the dissents would view as an exercise of raw judicial power to reach a decision which contravened not only the history leading to the disestablishment of the Indian reservations in Oklahoma, but also willfully disregarded and failed to apply the Court's own precedents to the issue at hand.

¶2 My quandary is one of ethics and morality. One of the first things I was taught when I began my service in the Marine Corps was that I had a duty to follow lawful orders, and that same duty required me to resist unlawful orders. Chief Justice Roberts's scholarly and judicially penned dissent, actually following the Court's precedents and required analysis, vividly reveals the failure of the majority opinion to follow the rule of law and apply over a century of precedent and history, and to accept the fact that no Indian reservations remain in the State of Oklahoma. [1] The result seems to be some form of "social justice" created out of whole cloth ***872** rather than a continuation of the solid precedents the Court has established over the last 100 years or more.

¶3 The question I see presented is should I blindly follow and apply the majority opinion or do I join with Chief Justice Roberts and the dissenters in *McGirt* and recognize "the emperor has no clothes" as to the adherence to following the rule of law in the application of the *McGirt* decision?

¶4 My oath and adherence to the Federal-State relationship under the U.S. Constitution mandate that I fulfill my duties and apply the edict of the majority opinion in *McGirt*. However, I am not required to do so blindly and without noting the flaws of the opinion as set out in the dissents. Chief Justice Roberts and Justice Thomas eloquently show the Majority's mischaracterization of Congress's actions and history with the Indian reservations. Their dissents further demonstrate that at the time of Oklahoma Statehood in 1907, all parties accepted the fact that Indian reservations in the state had been disestablished and no longer existed. I take this position to adhere to my oath as a judge and lawyer without any disrespect to our Federal-State structure. I simply believe that when reasonable minds differ they must both be reviewing the totality of the law and facts.

LEWIS, JUDGE, SPECIALLY CONCURRING:

¶1 Based on my special writings in *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286 and *Hogner v. State*, 2021 OK CR 4, —— P.3d ——, I specially concur. Following the precedent of *McGirt v. Oklahoma*, —— U.S. ——, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020), Oklahoma has no jurisdiction over an Indian who commits a crime in Indian Country, or over any person who commits a crime against an Indian in Indian Country. This crime occurred within the historical boundaries of the Choctaw Nation Reservation and that Reservation has not been expressly disestablished by the United States Congress. Additionally, Appellant is an Indian, thus the jurisdiction is governed by the Major Crimes Act found in the United States Code.

¶2 Oklahoma, therefore, has no jurisdiction, concurrent or otherwise, over Appellant in this case. Thus, I concur that this case must be reversed and remanded with instructions to dismiss. Jurisdiction is in the hands of the United States Government.

HUDSON, J., CONCUR IN RESULTS:

¶1 Today's decision applies *McGirt v. Oklahoma*, —— U.S. ——, 140 S. Ct. 2452, 207 L.Ed.2d 985 (2020) to the facts of this case and dismisses convictions from Pittsburg County for first degree murder and assault and battery on a police officer. I concur in the results of the majority's opinion based on the stipulations below concerning the Indian status of Appellant and the location of this crime within the historic boundaries of the Choctaw Reservation. Under *McGirt*, the State cannot prosecute Appellant because of his Indian status and the occurrence of this murder within Indian Country as defined by federal law. I therefore as a matter of *stare decisis* fully concur in today's decision.

¶2 I disagree, however, with the majority's adoption as binding precedent that Congress never disestablished the Choctaw Reservation. Here, the State took no position below on whether the Choctaw Nation has, or had, a reservation. The State's tactic of passivity has created a legal void in this Court's ability to adjudicate properly the facts underlying Appellant's argument. This Court is left with only the trial court's conclusions of law to review for an abuse of discretion. We should find no abuse of discretion based on the record evidence presented. But we should not establish as binding precedent that the Choctaw Nation was never disestablished based on this record.

¶3 Finally, I write separately to note that *McGirt* resurrects an odd sort of Indian reservation. One where a vast network of cities and towns dominate the regional economy and provide modern cultural, social, educational and employment opportunities for all people on the reservation. Where the landscape is blanketed by modern roads and highways. Where non-Indians own property (lots of it), run businesses and

make up the vast majority of inhabitants. On its face, this ***873** reservation looks like any other slice of the American heartland—one dotted with large urban centers, small rural towns and suburbs all linked by a modern infrastructure that connects its inhabitants, regardless of race (or creed), and drives a surprisingly diverse economy. This is an impressive place—a modern marvel in some ways—where Indians and non-Indians have lived and worked together since at least statehood, over a century.

¶4 *McGirt* orders us to forget all of that and instead focus on whether Congress expressly disestablished the reservation. We are told this is a cut-and-dried legal matter. One resolved by reference to treaties made with the Five Civilized Tribes dating back to the nineteenth century. Ignore that Oklahoma has continuously asserted jurisdiction over this land since statehood, let alone the modern demographics of the area.

¶5 The immediate effect under federal law is to prevent state courts from exercising criminal jurisdiction over a large swath of Greater Tulsa and much of eastern Oklahoma. Yet the effects of *McGirt* range much further. Crime victims and their family members in a myriad of cases previously prosecuted by the State can look forward to a do-over in federal court of the criminal proceedings where *McGirt* applies. And they are the lucky ones. Some cases may not be prosecuted at all by federal authorities because of issues with the statute of limitations, the loss of evidence, missing witnesses or simply the passage of time. All of this foreshadows a hugely destabilizing force to public safety in eastern Oklahoma.

¶6 *McGirt* must seem like a cruel joke for those victims and their family members who are forced to endure such extreme consequences in *their* case. One can certainly be forgiven for having difficulty seeing where—or even when—the reservation begins and ends in this new legal landscape. Today's decision on its face does little to vindicate tribal sovereignty and even less to persuade that a reservation in name only is necessary for anybody's well-being. The latter point has become painfully obvious from the growing number of cases that come before this Court where non-Indian defendants are challenging their state convictions using *McGirt* because *their victims* were Indian.

¶7 Congress may have the final say on *McGirt*. In *McGirt*, the court recognized that Congress has the authority to take corrective action, up to and including disestablishment of the reservation. We shall see if any practical solution is reached as one is surely needed. In the meantime, cases like Appellant's remain in limbo until federal authorities can work them out. Crime victims and their families are left to run the gauntlet of the criminal justice system once again, this time in federal court. And the clock is running on whether the federal system can keep up with the large volume of new cases undoubtedly heading their way from state court.

All Citations

485 P.3d 867, 2021 OK CR 6

Footnotes

1 The State presented no evidence or argument on whether a reservation was ever established or disestablished for the Choctaw Nation.

1 Senator Elmer Thomas, D-Oklahoma, was a member of the Senate Committee on Indian Affairs. After hearing the Commissioner's speech regarding the Indian Reorganization Act (IRA) in 1934, Senator Thomas opined as follows:

> I can hardly see where it (the IRA) could operate in a State like mine where the Indians are all scattered out among the whites and **they have no reservation**, and they could not get them into a community without you would go and buy land and put them on it. Then they would be surrounded very likely with thickly

> populated white sections with whom they would trade and associate. I just cannot get through my mind how this bill can possibly be made to operate in a State of thickly-settled population. (emphasis added).

John Collier, Commissioner of Indian Affairs, *Memorandum of Explanation* (regarding S. 2755), p. 145, hearing before the United States Senate Committee on Indian Affairs, February 27, 1934. Senator Morris Sheppard, D-Texas, also on the Senate Committee on Indian Affairs, stated in response to the Commissioner's speech that in Oklahoma, he did not think "we could look forward to building up huge reservations such as we have granted to the Indians in the past." *Id.* at 157. In 1940, in the Foreword to Felix S. Cohen, *Handbook of Federal Indian Law* (1942), Secretary of the Interior Harold Ickes wrote in support of the IRA, "[t]he continued application of the allotment laws, **under which Indian wards have lost more than two-thirds of their reservation lands**, while the costs of Federal administration of these lands have steadily mounted, must be terminated." (emphasis added).

SPEARS V. STATE

2021 OK CR 7 | 485 P.3d 873

Case: F-2019-330

Decided: 4/1/2021

O P I N I O N

ROWLAND, VICE PRESIDING JUDGE:

¶1 Michael Eugene Spears was tried by jury in the District Court of Rogers County, Case No. CF-2017-1013, and convicted of First Degree Murder, in violation of 21 O.S.Supp.2012, § 701.7. In accordance with the jury's recommendation, the Honorable Sheila Condren sentenced Spears to life imprisonment with the possibility of parole.

¶2 Spears appeals his Judgment and Sentence raising the following issues:

(1) whether the State of Oklahoma lacked jurisdiction to prosecute him;

(2) whether the evidence was sufficient to prove all elements of first degree murder;

(3) whether he was prejudiced by the admission of improper and speculative expert opinion testimony;

(4) whether the trial court erred in allowing the prosecution to define reasonable doubt; and

(5) whether he received ineffective assistance of counsel.

¶3 Because we find relief is required on Spears's jurisdictional challenge in Proposition 1, his other claims are moot. Spears claims the State of Oklahoma did not have jurisdiction to prosecute him relying upon 18 U.S.C. § 1153 and *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020).

¶4 On August 19, 2020, this Court remanded this case to the District Court of Rogers County for an evidentiary hearing. The District Court was directed to make findings of fact and conclusions of law on two issues: (a) Spears's status as an Indian; and (b) whether the crime occurred in Indian Country, namely within the boundaries of the Cherokee Nation Reservation. Our order provided that, if the parties agreed as to what the evidence would show with regard to the questions presented, the parties could enter into a written stipulation setting forth those facts, and no hearing would be necessary.

¶5 On September 28, 2020, the parties appeared for an evidentiary hearing and filed written stipulations. On November 12, 2020, the District Court filed its Findings of Fact and Conclusions of Law. We discuss the stipulations and District Court's Findings of Fact and Conclusions of Law below.

A. The Major Crimes Act

¶6 Title 18 Section 1153 of the United States Code, known as the Major Crimes Act, grants exclusive federal jurisdiction to prosecute certain enumerated offenses committed by Indians within Indian country. It reads in relevant part as follows:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, 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.

18 U.S.C. § 1153(a) (2013).

¶7 The first degree murder charge fits squarely within the Major Crimes Act and its exclusive federal jurisdiction.

B. McGirt v. Oklahoma

¶8 Federal statutes asserting federal criminal jurisdiction in Indian country are more than one hundred years old. What has recently changed is the definition of Indian country, within the borders of Oklahoma, for purposes of these statutes. In *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020) the Supreme Court held that land set aside for the Muscogee Creek Nation in the 1800's was intended by Congress to be an Indian reservation, and that this reservation exists today for purposes of federal criminal law because Congress never explicitly disestablished it. Although the case now before us involves the lands of the Cherokee Nation, we find *McGirt's* reasoning controlling.

C. Questions Upon Remand

1. Spears's Status as Indian

¶9 The parties agreed by stipulation that (1) Spears has some Indian blood (2) he was an enrolled member of the Cherokee Nation on the date of the charged offense; and (3) the Cherokee Nation is a federally recognized tribe. The District Court accepted this stipulation and reached the same conclusion in its Findings of Fact and Conclusions of Law.

2. Whether Crime Was Committed in Indian Country

¶10 As to the second question on remand, whether the crime was committed in Indian country, the stipulation of the parties was less dispositive. They agreed only that the charged crime occurred within the historical geographic area of the Cherokee Nation as designated by various treaties.

a. Establishment of the Cherokee Reservation

¶11 In a thorough and well-reasoned order, the District Court examined the 19th century treaties between the Cherokee Nation and the United States of America. The court noted that "[t]he Cherokee treaties were negotiated and finalized during the same period of time as the Creek treaties, contained similar provisions that promised a permanent home that would be forever set apart, and assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state."[1] The District Court concluded that the current boundaries of the Cherokee Nation are as established in the 1833 Treaty with the Western Cherokee, 1835 Treaty with the Cherokee, 1846 Treaty with the Cherokee, and the 1866 Treaty with the Cherokee.

¶12 The District Court found, "[l]ike Creek treaties, the Cherokee treaties that promised land in Indian Territory to the Cherokee Nation established the tribe's relationships with that land and created a reservation." This finding is consistent with *McGirt*, where the majority found it "obvious" that a similar course of dealing between Congress and the Creeks had

created a reservation, even though that term had not always been used to refer to the lands set aside for them, "perhaps because that word had not yet acquired such distinctive significance in federal Indian law." *McGirt*, 140 S.Ct. at 2461.

b. Failure to Disestablish the Cherokee Reservation

¶13 "To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress." *McGirt*, 140 S.Ct. at 2462. No particular words or verbiage are required, but there must be a clear expression of congressional intent to terminate the reservation.

> History shows that Congress knows how to withdraw a reservation when it can muster the will. Sometimes, legislation has provided an "[e]xplicit reference to cession" or an "unconditional commitment ... to compensate the Indian tribe for its opened land." *Ibid.* Other times, Congress has directed that tribal lands shall be "'restored to the public domain.'" *Hagen v. Utah*, 510 U.S. 399, 412, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) (emphasis deleted). Likewise, Congress might speak of a reservation as being "'discontinued,'" "'abolished,'" or "'vacated.'" *Mattz v. Arnett*, 412 U.S. 481, 504, n. 22, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973). Disestablishment has "never required any particular form of words," *Hagen*, 510 U.S., at 411, 114 S.Ct. 958. But it does require 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.'" *Nebraska v. Parker*, 577 U. S. 481, -------- -- --------, 136 S.Ct. 1072, 1079, 194 L.Ed.2d 152 (2016).

Id. 140 S.Ct. 2462--63.

¶14 The record before the District Court in this case, similar to that in *McGirt*, shows Congress, through treaties, removed the Cherokee people from one area of the United States to another where they were promised certain lands. Subsequent treaties redefined the geographical boundaries of those lands, but nothing in any of those documents showed a congressional intent to erase the boundaries of the reservation and terminate its existence. Congress, and Congress alone, has the power to abrogate those treaties, and "this Court [will not] lightly infer such a breach once Congress has established a reservation." *McGirt,* 140 S.Ct. at 2462 (citing *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)).

¶15 Noting that the State of Oklahoma presented no evidence to show that Congress erased or disestablished the boundaries of the Cherokee Nation Reservation, the District Court found that the Cherokee Reservation remains in existence. This finding is supported by the record.

¶16 We hold that for purposes of federal criminal law, the land upon which the parties agree Spears allegedly committed the crime is within the Cherokee Reservation and is thus Indian country. The ruling in *McGirt* governs this case and requires us to find the District Court of Rogers County did not have jurisdiction to prosecute Spears. Accordingly, we grant relief based upon argument raised in Proposition 1.

DECISION

¶17 The Judgment and Sentence of the District Court is **VACATED**. The matter is **REMANDED WITH INSTRUCTIONS TO DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021), the **MANDATE** is **ORDERED** to issue in twenty (20) days from the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF ROGERS COUNTY

THE HONORABLE SHEILA CONDREN, DISTRICT JUDGE

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OPINION BY: ROWLAND, V.P.J.

KUEHN, P.J.: Concur

LUMPKIN, J.: Concur in Results

LEWIS, J.: Specially Concur

HUDSON, J.: Concur in Results

FOOTNOTES

[1] This Court has also acknowledged that, "[t]he treaties concerning the Five Tribes which were resettled in Oklahoma in the mid-1800s (the Muscogee Creek, Cherokee, Chickasaw, Choctaw, and Seminole) have significantly similar provisions; indeed, several of the same treaties applied to more than one of those tribes." *Bosse v. State*, 2021 OK CR 3, ¶ 5, __ P.3d __, __.

LUMPKIN, JUDGE: CONCURRING IN RESULTS:

¶1 Bound by my oath and the Federal-State relationships dictated by the U.S. Constitution, I must at a minimum concur in the results of this opinion. While our nation's judicial structure requires me to apply the majority opinion in the 5-4 decision of the U.S. Supreme Court in *McGirt v. Oklahoma*, __ U.S. __, 140 S. Ct. 2452 (2020), I do so reluctantly. Upon the first reading of the majority opinion in *McGirt,* I initially formed the belief that it was a result in search of an opinion to support it. Then upon reading the dissents by Chief Justice Roberts and Justice Thomas, I was forced to conclude the Majority had totally failed to follow the Court's own precedents, but had cherry picked statutes and treaties, without giving historical context to them. The Majority then proceeded to do what an average citizen who had been fully informed of the law and facts as set out in the dissents would view as an exercise of raw judicial power to reach a decision which contravened not only the history leading to the disestablishment of the Indian reservations in Oklahoma, but also willfully disregarded and failed to apply the Court's own precedents to the issue at hand.

¶2 My quandary is one of ethics and morality. One of the first things I was taught when I began my service in the Marine Corps was that I had a duty to follow lawful orders, and that same duty required me to resist unlawful orders. Chief Justice Roberts's scholarly and judicially penned dissent, actually following the Court's precedents and required analysis, vividly reveals the failure of the majority opinion to follow the rule of law and apply over a century of precedent and history, and to accept the fact that no Indian reservations remain in the State of Oklahoma.[1] The result seems to be some form of "social justice" created out of whole cloth rather than a continuation of the solid precedents the Court has established over the last 100 years or more.

¶3 The question I see presented is should I blindly follow and apply the majority opinion or do I join with Chief Justice Roberts and the dissenters in *McGirt* and recognize "the emperor has no clothes" as to the adherence to following the rule of law in the application of the *McGirt* decision?

¶4 My oath and adherence to the Federal-State relationship under the U.S. Constitution mandate that I fulfill my duties and apply the edict of the majority opinion in *McGirt*. However, I am not required to do so blindly and without noting the flaws of the opinion as set out in the dissents. Chief Justice Roberts and Justice Thomas eloquently show the Majority's mischaracterization of Congress's actions and history with the Indian reservations. Their dissents further demonstrate that

at the time of Oklahoma Statehood in 1907, all parties accepted the fact that Indian reservations in the state had been disestablished and no longer existed. I take this position to adhere to my oath as a judge and lawyer without any disrespect to our Federal-State structure. I simply believe that when reasonable minds differ they must both be reviewing the totality of the law and facts.

FOOTNOTES

[1] Senator Elmer Thomas, D-Oklahoma, was a member of the Senate Committee on Indian Affairs. After hearing the Commissioner's speech regarding the Indian Reorganization Act (IRA) in 1934, Senator Thomas opined as follows:

> I can hardly see where it (the IRA) could operate in a State like mine where the Indians are all scattered out among the whites and **they have no reservation**, and they could not get them into a community without you would go and buy land and put them on it. Then they would be surrounded very likely with thickly populated white sections with whom they would trade and associate. I just cannot get through my mind how this bill can possibly be made to operate in a State of thickly-settled population. (emphasis added).

John Collier, Commissioner of Indian Affairs, *Memorandum of Explanation* (regarding S. 2755), p. 145, hearing before the United States Senate Committee on Indian Affairs, February 27, 1934. Senator Morris Sheppard, D-Texas, also on the Senate Committee on Indian Affairs, stated in response to the Commissioner's speech that in Oklahoma, he did not think "we could look forward to building up huge reservations such as we have granted to the Indians in the past." *Id.* at 157. In 1940, in the Foreword to Felix S. Cohen, *Handbook of Federal Indian Law* (1942), Secretary of the Interior Harold Ickes wrote in support of the IRA, "[t]he continued application of the allotment laws, **under which Indian wards have lost more than two-thirds of their reservation lands**, while the costs of Federal administration of these lands have steadily mounted, must be terminated." (emphasis added).

LEWIS, JUDGE, SPECIALLY CONCURRING:

¶1 Based on my special writings in *Bosse v. State*, 2021 OK CR 3, ___ P.3d ___ and *Hogner v. State*, 2021 OK CR 4, ___ P.3d ___, I specially concur. Following the precedent of *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), Oklahoma has no jurisdiction over an Indian who commits a crime in Indian Country, or over any person who commits a crime against an Indian in Indian Country. This crime occurred within the historical boundaries of the Cherokee Nation Reservation and that Reservation has not been expressly disestablished by the United States Congress. Additionally, Appellant is an Indian, thus the jurisdiction is governed by the Major Crimes Act found in the United States Code.

¶2 Oklahoma, therefore, has no jurisdiction, concurrent or otherwise, over Appellant in this case. Thus, I concur that this case must be reversed and remanded with instructions to dismiss. Jurisdiction is in the hands of the United States Government.

HUDSON, J., CONCUR IN RESULTS:

¶1 Today's decision applies *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) to the facts of this case and dismisses a first degree murder conviction from Rogers County. I concur in the results of the majority's opinion based on the stipulations below concerning the Indian status of Appellant and the location of this crime within the historic boundaries of the

Cherokee Reservation. Under *McGirt*, the State cannot prosecute Appellant because of his Indian status and the occurrence of this murder within Indian Country as defined by federal law. I therefore as a matter of *stare decisis* fully concur in today's decision.

¶2 I disagree, however, with the majority's adoption as binding precedent that Congress never disestablished the Cherokee Reservation. Here, the State took no position below on whether the Cherokee Nation has, or had, a reservation. The State's tactic of passivity has created a legal void in this Court's ability to adjudicate properly the facts underlying Appellant's argument. This Court is left with only the trial court's conclusions of law to review for an abuse of discretion. We should find no abuse of discretion based on the record evidence presented. But we should not establish as binding precedent that the Cherokee Nation was never disestablished based on this record.

¶3 Finally, I maintain my previously expressed views on the significance of *McGirt*, its far-reaching impact on the criminal justice system in Oklahoma and the need for a practical solution by Congress. *See Bosse v. State*, 2021 OK CR 3, __P.3d__ (Hudson, J., Concur in Results); *Hogner v. State*, 2021 OK CR 4, __P.3d__ (Hudson, J., Specially Concurs); and *Krafft v. State*, No. F-2018-340 (Okl.Cr., Feb. 25, 2021) (Hudson, J., Specially Concurs) (unpublished).

2021 OK CR 8

485 P.3d 250
Court of Criminal Appeals of Oklahoma.

Kadetrix Devon GRAYSON, Appellant,
v.
The STATE of Oklahoma, Appellee.

No. F-2018-1229
|
FILED APRIL 1, 2021

Synopsis

Background: Defendant was convicted in the District Court, Seminole County, George W. Butner, J., of first degree murder and possession of a firearm by a felon. Defendant appealed. On remand, the District Court held an evidentiary hearing and filed findings of fact and conclusions of law, regarding defendant's membership in the Seminole Nation, and boundaries of the reservation for the Seminole Nation of Oklahoma.

[Holding:] The Court of Criminal Appeals, Kuehn, V.P.J., held that defendant's status as a member of the Seminole Nation and fact that crime was committed on Indian reservation deprived trial court of jurisdiction to prosecute defendant.

Vacated and remanded.

Lumpkin, J., concurred in results.

Lewis, P.J., specially concurred.

Hudson, J., concurred in results.

Procedural Posture(s): Appellate Review.

West Headnotes (3)

[1] Indians Disestablishment and termination

After Congress has established a reservation, only Congress may disestablish it by clearly expressing its intent to do so; usually, this will require an explicit reference to cession or other language evidencing the present and total surrender of all tribal interests. (Per opinion of Kuehn, V.P.J., with one judge concurring, two judges concurring in result, and one judge specially concurring).

[2] Indians Disestablishment and termination

Indians Operation and effect

Allotment of Indian reservation land may be a step towards disestablishment of reservation, but is not itself a clear expression of the intention to disestablish a reservation. (Per opinion of Kuehn, V.P.J., with one judge concurring, two judges concurring in result, and one judge specially concurring).

1 Case that cites this headnote

[3] Indians State court or authorities

Trial court lacked jurisdiction to prosecute defendant, who was a member of the Seminole Nation, for first degree murder and possession of a firearm by a felon, where his alleged crimes were committed within the boundaries of the Seminole Nation reservation of Oklahoma, all parties allegedly involved were Indians, and there was no express reference or indication that Congress disestablished the reservation, even though the term "reservation" was absent in the original treaty that established the reservation. (Per opinion of Kuehn, V.P.J., with one judge concurring, two judges concurring in result, and one judge specially concurring). Okla. Const. art. 2, §§ 7, 20; 18 U.S.C.A. § 1153; Treaty with the Seminole, March 28, 1833, art. IV, 7 Stat. 423; Treaty with the Seminole, 14 Stat. 755.

1 Case that cites this headnote

AN APPEAL FROM THE DISTRICT COURT OF SEMINOLE COUNTY; THE HONORABLE GEORGE BUTNER, DISTRICT JUDGE

Attorneys and Law Firms

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MIKE HUNTER, ATTORNEY GENERAL OF OKLA., JENNIFER L. CRABB, ASST. ATTORNEY GENERAL, 313 NE 21ST STREET, OKLAHOMA CITY, OK 73105, COUNSEL FOR APPELLEE

OPINION REMANDING WITH INSTRUCTIONS TO DISMISS

KUEHN, PRESIDING JUDGE:

***251** ¶1 Kadetrix Devon Grayson was tried by jury and convicted of Counts I and II, First Degree Murder, and Count III, Possession of a Firearm After Former Conviction of a Felony, in the District Court of Seminole County, Case No. CF-2015-370. Following the jury's recommendation, the Honorable George Butner sentenced Appellant to life imprisonment on each of Counts I and II, to run consecutively, and ten (10) years imprisonment on Count III, to run concurrently. Appellant must serve 85% of his sentences on Counts I and II before becoming eligible for parole consideration. Appellant appeals from these convictions and sentences.

¶2 Appellant raises five propositions of error in support of his appeal:

1. Counsel was ineffective because he refused to adequately communicate with Mr. Grayson and allow Mr. Grayson to assist in his own defense.

2. Counsel was ineffective for failing to question the medical examiner regarding Ms. Gokey's broken ribs.

3. The trial court lacked jurisdiction because all parties allegedly involved were Native American and the crimes allegedly happened on Seminole Nation Tribal Territory.

4. The trial court abused its discretion in refusing to give a "credibility of informers" instruction.

5. The accumulation of error in this case deprived Mr. Grayson of due process of law and a reliable sentencing proceeding in violation of the Fourteenth Amendment to the United States Constitution and Article II, §§ 7 and 20 of the Oklahoma Constitution.

¶3 In Proposition III Appellant claims the State of Oklahoma did not have jurisdiction to prosecute him. He relies on 18 U.S.C. § 1153 and *McGirt v. Oklahoma*, 591 U.S. ——, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020).

¶4 On August 25, 2020, this Court remanded this case to the District Court of Seminole County for an evidentiary hearing. The District Court was directed to make findings of fact and conclusions of law on two issues: (a) Appellant's status as an Indian; and (b) whether the crime occurred within the boundaries of the Seminole Nation Reservation. Our Order provided that, if the parties agreed as to what the evidence would show with regard to the questions presented, the parties could enter into a written stipulation setting forth those facts, and no hearing would be necessary.

¶5 On October 26, 2020, the District Court filed its Findings of Fact and Conclusions of Law. The parties agreed by stipulation that Grayson is a member of the Seminole Nation, with some Indian blood, and was at the time of the crimes, and that the Seminole Nation is a federally recognized tribe.

¶6 The District Court found that Congress established a reservation for the Seminole Nation of Oklahoma. As the State took no position on the issue, the District Court found that these facts are uncontroverted:

1. The Treaty of Payne's Landing, 7 Stat. 368 (1832) (1832 Treaty), provided that the Seminoles would relinquish all claims to the lands they occupied in Florida and emigrate to "the country assigned to the Creek, west of the Mississippi River." *Id*. art. I. The 1832 Treaty was made to implement the Indian Removal Act, Pub. L. 21-148, 4 Stat 411 (1830).

***252** 2. The Treaty with the Creeks, 7 Stat. 417 (1833 Creek Treaty), provided that the Seminole Nation shall "have a permanent and comfortable home" by themselves on lands set aside for the Creek Nation. *Id*. art. IV. The Seminoles and the United States entered into the Treaty with the Seminole, confirming the Creek Treaty's provisions on March 28, 1833. Treaty with the Seminoles, art. IV, 7 Stat. 423 (1833) (1833 Seminole Treaty). The Seminole Nation's desire for genuine political autonomy resulted in the Treaty with the Creeks and Seminoles, 11 Stat. 699 (1856) (1856 Treaty). The 1856 Treaty, entered into on August 7, 1856, set forth specific boundaries for the Seminole Nation Reservation. *Id*. art. 1.

3. Ten years later, the United States and the Seminole Nation entered into the Treaty with the Seminole, 14 Stat. 755 (1866) (1866 Treaty). This redefined the boundaries of the Seminole Nation Reservation. For payment of the fixed sum of $325,362.00, the Seminoles ceded and conveyed the entirety of their previous territory to the United States, guaranteed to them under the 1856 Treaty. *Id*. art. 3. The Treaty established a new reservation, carved from part of the western half of the Creek Nation Reservation, to "constitute the national domain of the Seminole Indians." *Id*. art. 3. These boundaries were:

> Beginning on the Canadian River where the line dividing the Creek lands according to the terms of their sale to the United States by their treaty of February 6, 1866, following said line due north to where said line crosses the north fork of the Canadian River; thence up said north fork of the Canadian River a distance sufficient to make two hundred thousand acres by running due south to the Canadian River; thence down said Canadian river to the place of beginning. *Id.* art. 3.

4. The precise boundaries of the Reservation set forth in the 1866 Treaty depended on the determination of the location of "the line dividing the Creek lands according to the terms of their sale to the United States by their treaty of February 6, 1866...." 1866 Treaty, art. 3, 14 Stat. 755. The original line was surveyed by Rankin in 1867 but never formally approved. In 1871, the Department of the Interior instead adopted the line from the Bardwell survey, which was seven miles west of the Rankin line. This discrepancy led to considerable uncertainty for Seminole Nation citizens living within the disputed corridor. In 1881, the United States purchased those lands from the Creek Nation and included them in the Seminole Reservation. *Seminole Nation v. United States*, 316 U.S. 310, 313, 62 S.Ct. 1061, 86 L.Ed. 1497 (1942); 22 Stat. 257, 265 (1882).

5. The boundaries of the Seminole Nation of Oklahoma Reservation remain those defined in the 1866 Treaty, plus the land purchased from the Creek Nation in 1881.

¶7 The District Court found, and we agree, that the absence of the word "reservation" in the 1866 Treaty is not dispositive. *McGirt*, 140 S.Ct. at 2461. And subsequent acts of Congress referred to the Seminole Reservation. *See*, *e.g.*, Act of March 3, 1891, 26 Stat. 989, 1016 (1891); 11 Cong. Rec. 2351 (1881). The record supports the District Court's findings that by treaty and purchase, the United States established a reservation for the Seminole Nation of Oklahoma.

[1] **[2]** **[3]** ¶8 The District Court found that Congress has not disestablished the Seminole Nation Reservation. After Congress has established a reservation, only Congress may disestablish it by clearly expressing its intent to do so; usually, this will require "an explicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *McGirt*, 140 S.Ct. at 2463 (internal quotation omitted). The District Court found no explicit indication or expression of Congressional intent to disestablish the Seminole Reservation. The State took no position on this issue, and the Court found:

1. Allotment did not disestablish the Reservation. Allotment of Seminole tribal lands was formally authorized in 1893. Act of March 3, 1893, 27 Stat. 612, at 645. The Dawes Commission and the Seminole Nation reached an allotment agreement on December 16, 1897, ratified by Congress on July 1, 1898. Act of July 1, 1898, 30 ***253** Stat. 567, at 567. This created three land classes based on appraised value; each tribal member would be allotted a share of land of equal value, with sole right of occupancy; the allotments were inalienable until the date of

the patent, with some leases allowed. *Id*. Nowhere in either the allotment statute or the agreement is there language indicating an intent to disestablish the Reservation. There is no mention of cession, a fixed sum in return for total surrender of tribal claims, or any other text supporting disestablishment. As *McGirt* made clear, allotment may be a step towards disestablishment but is not itself a clear expression of the intention to disestablish a reservation. *McGirt*, 140 S.Ct. at 2465; *see also Mattz v. Arnett*, 412 U.S. 481, 497, 93 S.Ct. 2245, 37 L.Ed.2d 92 (allotment entirely consistent with continued reservation status).

2. Although Congress has, from time to time, imposed restrictions on the sovereignty of the Seminole Nation, these restrictions did not disestablish the Reservation. For example, the Act of March 3, 1903, stated that the tribal government of the Seminole Nation "shall not continue" past March 4, 1906. Act of March 3, 1903, 34 Stat. 982, 1008 (1903). However, in March 1906, Congress did not terminate the Seminole Nation tribal government. Instead, in the Five Tribes Act, Congress recognized that the existence of the Seminole Nation tribe and tribal government "are hereby continued in full force and effect for all purposes authorized by law." Five Tribes Act, 34 Stat. 137, 148 (1906). This Act restricted the tribal government's power, but it neither terminated the Nation nor expressly indicated an intent to disestablish the Reservation.

3. Oklahoma statehood did not disestablish the Reservation. The Oklahoma Enabling Act, 34 Stat. 267 (1906), authorized Oklahoma statehood. It contains nothing suggesting that, by allowing statehood, Congress intended to disestablish the Seminole Reservation. The Act expressly prohibited the Oklahoma constitution from limiting the federal government's authority to make laws or regulations respecting Indians living within the new state's boundaries. *Id*., 34 Stat at 267-68. Congress never disestablished the Seminole Reservation, and it currently exists.

4. The parties stipulated to the current boundaries of the Seminole Nation Reservation. The parties further stipulated that the location of the crimes charged was within the historical boundaries of the Seminole Nation of Oklahoma Reservation.

5. The District Court adopted a map, attached as Exhibit A to the Seminole Nation's brief filed in the District Court, showing those stipulated boundaries. The District Court first noted that, with one deviation, the borders of Seminole County set forth in the Oklahoma Constitution are defined by reference to the Seminole Reservation boundaries:

> Beginning at a point where the east boundary line of the Seminole nation intersect[s] the center line of the South Canadian River; thence north along the east boundary line of said Seminole nation to its intersection with the township line between townships seven and eight North; thence east along said township line to the southwest corner of section thirty-five, township eight North, range eight East; thence north along the section line between sections thirty-four and thirty-five, in said township and range, projected to its intersection with the centerline of the North Canadian River; thence westward along the center line of said river to its intersection with the east boundary line of Pottawatomie County; thence southward along said east boundary line to its intersection with the centerline of the South Canadian River; thence down along the center line of said river to the point of beginning. Wewoka is hereby designated the County Seat of Seminole County.

Okla. Const. art. 17, § 8.

¶9 The District Court described the Reservation northeastern boundary thus: County lines depart from the Reservation border, beginning at the point where the Reservation's eastern boundary intersects with the line between townships seven and eight north (just southwest of the intersection of East/West ***254** Rd. 131 and State Highway 56). From that point, the County line runs due east for slightly less than three miles (until reaching the southwest corner of section 35 of Township 8 North, Range 8 East). Then the County line runs due north until the midpoint of the North Canadian River, at which point the County line runs along the river back toward the Seminole Nation.

¶10 The District Court found that Congress has never, by treaty or statute, either erased the Seminole Nation Reservation boundaries or expressed an intent to do so or disestablish the Reservation otherwise. The record supports the District Court's findings that the United States

has not disestablished the Seminole Nation of Oklahoma Reservation.

¶11 After making these findings of fact, the District Court reached the following conclusions of law:

1. The Defendant/Appellant is an "Indian" as defined by the Oklahoma Court of Criminal Appeals.

2. By applying the analysis set out in *McGirt*, Congress established a reservation for the Seminole Nation of Oklahoma.

3. By using the analysis set out in *McGirt*, Congress has not explicitly erased the reservation boundaries and disestablished the Seminole Nation Reservation.

4. The Seminole Nation of Oklahoma is "Indian Country" for purposes of criminal law jurisdiction.

5. The Crimes that Defendant/Appellant was convicted of occurred in Indian Country.

¶12 In its Supplemental Brief, Appellee does not contest the District Court's findings and conclusions. The record supports the findings of fact, and we adopt the conclusions of law. Appellant is a member of the Seminole Nation, and the crimes were committed within the boundaries of the Seminole Nation Reservation. The ruling in *McGirt* applies to this case. The District Court of Seminole County did not have jurisdiction to try Appellant.

¶13 Accordingly, Proposition III is granted. Propositions I, II, IV, and V are moot.

DECISION

The Judgment and Sentence of the District Court of Seminole County is **VACATED**, and the case is **REMANDED** with instructions to **DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020), the **MANDATE** is **STAYED** for twenty (20) days from the delivery and filing of this decision.

ROWLAND, V.P.J.: CONCUR

LUMPKIN, J.: CONCUR IN RESULTS

LEWIS, J.: SPECIALLY CONCUR

HUDSON, J.: CONCUR IN RESULTS

LUMPKIN, JUDGE: CONCURRING IN RESULTS:

¶1 Bound by my oath and the Federal-State relationships dictated by the U.S. Constitution, I must at a minimum concur in the results of this opinion. While our nation's judicial structure requires me to apply the majority opinion in the 5-4 decision of the U.S. Supreme Court in *McGirt v. Oklahoma*, —— U.S. ——, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020), I do so reluctantly. Upon the first reading of the majority opinion in *McGirt*, I initially formed the belief that it was a result in search of an opinion to support it. Then upon reading the dissents by Chief Justice Roberts and Justice Thomas, I was forced to conclude the Majority had totally failed to follow the Court's own precedents, but had cherry picked statutes and treaties, without giving historical context to them. The Majority then proceeded to do what an average citizen who had been fully informed of the law and facts as set out in the dissents would view as an exercise of raw judicial power to reach a decision which contravened not only the history leading to the disestablishment of the Indian reservations in Oklahoma, but also willfully disregarded and failed to apply the Court's own precedents to the issue at hand.

¶2 My quandary is one of ethics and morality. One of the first things I was taught when I began my service in the Marine Corps was that I had a duty to follow lawful orders, and that same duty required me to resist unlawful orders. Chief Justice Roberts's scholarly ***255** and judicially penned dissent, actually following the Court's precedents and required analysis, vividly reveals the failure of the majority opinion to follow the rule of law and apply over a century of precedent and history, and to accept the fact that no Indian reservations remain in the State of Oklahoma.[1] The result seems to be some form of "social justice" created out of whole cloth rather than a continuation of the solid precedents the Court has established over the last 100 years or more.

¶3 The question I see presented is should I blindly follow and apply the majority opinion or do I join with Chief Justice Roberts and the dissenters in *McGirt* and recognize "the

emperor has no clothes" as to the adherence to following the rule of law in the application of the *McGirt* decision?

¶4 My oath and adherence to the Federal-State relationship under the U.S. Constitution mandate that I fulfill my duties and apply the edict of the majority opinion in *McGirt*. However, I am not required to do so blindly and without noting the flaws of the opinion as set out in the dissents. Chief Justice Roberts and Justice Thomas eloquently show the Majority's mischaracterization of Congress's actions and history with the Indian reservations. Their dissents further demonstrate that at the time of Oklahoma Statehood in 1907, all parties accepted the fact that Indian reservations in the state had been disestablished and no longer existed. I take this position to adhere to my oath as a judge and lawyer without any disrespect to our Federal-State structure. I simply believe that when reasonable minds differ they must both be reviewing the totality of the law and facts.

LEWIS, JUDGE, SPECIALLY CONCURRING:

¶1 Based on my special writings in *Bosse v. State*, 2021 OK CR 3, 484 P.3d 286, 2021 WL 958372 and *Hogner v. State*, 2021 OK CR 4, —— P.3d ——, 2021 WL 958412, I specially concur. Following the precedent of *McGirt v. Oklahoma*, —— U.S. ——, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020), Oklahoma has no jurisdiction over an Indian who commits a crime in Indian Country, or over any person who commits a crime against an Indian in Indian Country. This crime occurred within the historical boundaries of the Seminole Nation Reservation and that Reservation has not been expressly disestablished by the United States Congress. Additionally, Appellant is an Indian, thus the jurisdiction is governed by the Major Crimes Act found in the United States Code.

¶2 Oklahoma, therefore, has no jurisdiction, concurrent or otherwise, over Appellant in this case. Thus, I concur that this case must be reversed and remanded with instructions to dismiss. Jurisdiction is in the hands of the United States Government.

HUDSON, J., CONCUR IN RESULTS:

¶1 Today's decision applies *McGirt v. Oklahoma*, —— U.S. ——, 140 S. Ct. 2452, 207 L.Ed.2d 985 (2020) to the facts of this ***256** case and dismisses convictions from Seminole County for two counts of first degree murder and one count of felonious possession of a firearm. I concur in the results of the majority's opinion based on the stipulations below concerning the Indian status of Appellant and the location of these crimes within the historic boundaries of the Seminole Reservation. Under *McGirt*, the State cannot prosecute Appellant because of his Indian status and the occurrence of the murders and felonious possession of firearm within Indian Country as defined by federal law. I therefore as a matter of *stare decisis* fully concur in today's decision.

¶2 I disagree, however, with the majority's adoption as binding precedent that Congress never disestablished the Seminole Reservation. Here, the State took no position below on whether the Seminole Nation has, or had, a reservation. The State's tactic of passivity has created a legal void in this Court's ability to adjudicate properly the facts underlying Appellant's argument. This Court is left with only the trial court's conclusions of law to review for an abuse of discretion. We should find no abuse of discretion based on the record evidence presented. But we should not establish as binding precedent that the Seminole Reservation was never disestablished based on this record.

¶3 Finally, I write separately to note that *McGirt* resurrects an odd sort of Indian reservation. One where a vast network of cities and towns dominate the regional economy and provide modern cultural, social, educational and employment opportunities for all people on the reservation. Where the landscape is blanketed by modern roads and highways. Where non-Indians own property (lots of it), run businesses and make up the vast majority of inhabitants. On its face, this reservation looks like any other slice of the American heartland—one dotted with large urban centers, small rural towns and suburbs all linked by a modern infrastructure that connects its inhabitants, regardless of race (or creed), and drives a surprisingly diverse economy. This is an impressive place—a modern marvel in some ways—where Indians and non-Indians have lived and worked together since at least statehood, over a century.

¶4 *McGirt* orders us to forget all of that and instead focus on whether Congress expressly disestablished the reservation. We are told this is a cut-and-dried legal matter. One resolved by reference to treaties made with the Five Civilized Tribes dating back to the nineteenth century. Ignore that Oklahoma

has continuously asserted jurisdiction over this land since statehood, let alone the modern demographics of the area.

¶5 The immediate effect under federal law is to prevent state courts from exercising criminal jurisdiction over a large swath of Greater Tulsa and much of eastern Oklahoma. Yet the effects of *McGirt* range much further. Crime victims and their family members in a myriad of cases previously prosecuted by the State can look forward to a do-over in federal court of the criminal proceedings where *McGirt* applies. And they are the lucky ones. Some cases may not be prosecuted at all by federal authorities because of issues with the statute of limitations, the loss of evidence, missing witnesses or simply the passage of time. All of this foreshadows a hugely destabilizing force to public safety in eastern Oklahoma.

¶6 *McGirt* must seem like a cruel joke for those victims and their family members who are forced to endure such extreme consequences in *their* case. One can certainly be forgiven for having difficulty seeing where—or even when—the reservation begins and ends in this new legal landscape. Today's decision on its face does little to vindicate tribal sovereignty and even less to persuade that a reservation in name only is necessary for anybody's well-being. The latter point has become painfully obvious from the growing number of cases that come before this Court where non-Indian defendants are challenging their state convictions using *McGirt* because *their victims* were Indian.

¶7 Congress may have the final say on *McGirt*. In *McGirt*, the court recognized that Congress has the authority to take corrective action, up to and including disestablishment of the reservation. We shall see if any practical solution is reached as one is surely ***257** needed. In the meantime, cases like Appellant's remain in limbo until federal authorities can work them out. Crime victims and their families are left to run the gauntlet of the criminal justice system once again, this time in federal court. And the clock is running on whether the federal system can keep up with the large volume of new cases undoubtedly heading their way from state court.

All Citations

485 P.3d 250, 2021 OK CR 8

Footnotes

1 Senator Elmer Thomas, D-Oklahoma, was a member of the Senate Committee on Indian Affairs. After hearing the Commissioner's speech regarding the Indian Reorganization Act (IRA) in 1934, Senator Thomas opined as follows:

> I can hardly see where it (the IRA) could operate in a State like mine where the Indians are all scattered out among the whites and **they have no reservation**, and they could not get them into a community without you would go and buy land and put them on it. Then they would be surrounded very likely with thickly populated white sections with whom they would trade and associate. I just cannot get through my mind how this bill can possibly be made to operate in a State of thickly-settled population. (emphasis added).

John Collier, Commissioner of Indian Affairs, *Memorandum of Explanation* (regarding S. 2755), p. 145, hearing before the United States Senate Committee on Indian Affairs, February 27, 1934. Senator Morris Sheppard, D-Texas, also on the Senate Committee on Indian Affairs, stated in response to the Commissioner's speech that in Oklahoma, he did not think "we could look forward to building up huge reservations such as we have granted to the Indians in the past." *Id.* at 157. In 1940, in the Foreword to Felix S. Cohen, *Handbook of Federal Indian Law* (1942), Secretary of the Interior Harold Ickes wrote in support of the IRA, "[t]he continued application of the allotment laws, **under which Indian wards have lost more than two-thirds of their reservation lands**, while the costs of Federal administration of these lands have steadily mounted, must be terminated." (emphasis added).

Grayson v. State, 485 P.3d 250 (2021)

2021 OK CR 8

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 53. Indians (Refs & Annos)

18 U.S.C.A. § 1151

§ 1151. Indian country defined

Currentness

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 757; May 24, 1949, c. 139, § 25, 63 Stat. 94.)

Notes of Decisions (173)

18 U.S.C.A. § 1151, 18 USCA § 1151
Current through P.L. 118-66. Some statute sections may be more current, see credits for details.

End of Document

2021 OK CR 21

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Roth v. State, Okla.Crim.App., September 16, 2021

497 P.3d 686
Court of Criminal Appeals of Oklahoma.

STATE EX REL. Mark MATLOFF,
District Attorney, Petitioner
v.
The Honorable Jana WALLACE,
Associate District Judge, Respondent.

Case No. PR-2021-366
|
FILED AUGUST 12, 2021

Synopsis

Background: State petitioned for a writ of prohibition, seeking to vacate a post-conviction order by the District Court, Pushmataha County, Jana Kay Wallace, J., that vacated and dismissed defendant's second degree murder conviction, which was committed in the Choctaw Reservation, in light of Supreme Court's decision in *McGirt v. Oklahoma*, U.S. 140 S.Ct. 2452.

Holdings: The Court of Criminal Appeals, Lewis, J., held that:

[1] rule in *McGirt v. Oklahoma* did not apply retroactively to convictions that were final at the time it was decided, overruling *Bosse v. State*, 484 P.3d 286, *Cole v. State*, 492 P.3d 11, *Ryder v. State*, 489 P.3d 528, and *Bench v. State*, 492 P.3d 19;

[2] rule announced in *McGirt* was procedural;

[3] rule announced in *McGirt* was new; and

[4] trial court judge could not apply rule in *McGirt* retroactively.

Petition granted; order granting postconviction relief reversed.

Hudson, J., filed a specially concurring opinion.

Lumpkin, J., filed a specially concurring opinion.

Procedural Posture(s): Appellate Review; Post-Conviction Review; Petition for Writ of Prohibition.

West Headnotes (7)

[1] **Criminal Law** Effect of change in law or facts

New rules of criminal procedure generally apply to cases pending on direct appeal when the rule is announced, with no exception for cases where the rule is a clear break with past law.

3 Cases that cite this headnote

[2] **Courts** In general; retroactive or prospective operation

New rules of criminal procedure generally do not apply retroactively to convictions that are final, with a few narrow exceptions.

38 Cases that cite this headnote
More cases on this issue

[3] **Courts** In general; retroactive or prospective operation

Rule announced in *McGirt v. Oklahoma*, 140 S. Ct. 2452, which held that state courts in Oklahoma lacked subject matter jurisdiction under the Major Crimes Act to try a Native American defendant for crimes committed in a Native American territory, did not apply retroactively to void a conviction that was final when *McGirt* was decided; overruling *Bosse v. State*, 484 P.3d 286, *Cole v. State*, 492 P.3d 11, *Ryder v. State*, 489 P.3d 528, and *Bench v. State*,492 P.3d 19. 18 U.S.C.A. § 1153.

40 Cases that cite this headnote

[4] **Criminal Law** Change in the law

Rule announced in *McGirt v. Oklahoma*, 140 S. Ct. 2452, which held that state courts in Oklahoma lacked subject matter jurisdiction under the Major Crimes Act to try a Native American defendant for crimes committed in a Native American territory, was only a procedural change in the law, and thus, did not constitute a substantive or watershed rule that would permit retroactive collateral attacks. 18 U.S.C.A. § 1153.

3 Cases that cite this headnote

[5] **Courts** In general; retroactive or prospective operation

For purposes of retroactivity analysis, a case announces a "new rule" when it breaks new ground, imposes new obligation on the state or federal government, or in other words, result was not dictated by precedent when defendant's conviction became final.

5 Cases that cite this headnote
More cases on this issue

[6] **Courts** In general; retroactive or prospective operation

Rule announced in *McGirt v. Oklahoma*, 140 S. Ct. 2452, which held that state courts in Oklahoma lacked subject matter jurisdiction under the Major Crimes Act to try a Native American defendant for crimes committed in a Native American territory, was new, and thus, did not apply retroactively to convictions that were final at the time it was decided, since the rule imposed new and different obligations on the state and federal government, and rule also broke new legal ground in the sense that it was not dictated by Supreme Court precedent. 18 U.S.C.A. § 1153.

52 Cases that cite this headnote

[7] **Criminal Law** Change in the law
Prohibition Criminal prosecutions

Trial court judge could not retroactively apply rule in *McGirt v. Oklahoma*, 140 S. Ct. 2452, which held that state courts in Oklahoma lacked subject matter jurisdiction under the Major Crimes Act to try a Native American defendant for crimes committed in a Native American territory, to defendant's petition for post-conviction relief, and thus, issuance of a writ of prohibition to vacate trial court's order vacating and dismissing defendant's final second degree murder conviction was warranted, since trial court judge was unauthorized take such action under state law. 18 U.S.C.A. § 1153.

33 Cases that cite this headnote

***687 OPINION**

LEWIS, JUDGE:

¶1 The State of Oklahoma, by Mark Matloff, District Attorney of Pushmataha County, petitions this Court for the writ of prohibition to vacate the Respondent Judge Jana Wallace's April 12, 2021 order granting post-conviction relief. Judge Wallace's order vacated and dismissed the second degree murder conviction of Clifton Merrill Parish in Pushmataha County Case No. CF-2010-26. Because the Respondent's order is unauthorized by law and prohibition is a proper remedy, the writ is **GRANTED**.

FACTS

¶2 Clifton Parish was tried by jury and found guilty of second degree felony murder in March, 2012. The jury sentenced him to twenty-five years imprisonment. This Court affirmed the conviction on direct appeal in *Parish v. State*, No. F-2012-335 (Okl.Cr., March 6, 2014) (unpublished). Mr.

Parish did not petition for rehearing, and did not petition the U.S. Supreme Court for *certiorari* within the allowed ninety-day time period. On or about June 4, 2014, Mr. Parish's conviction became final. [1]

¶3 On August 17, 2020, Mr. Parish filed an application for post-conviction relief alleging that the State of Oklahoma lacked subject matter jurisdiction to try and sentence him for murder under the Supreme Court's decision in *McGirt v. Oklahoma*, —— U.S. ——, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020). Judge Wallace held a hearing and found that Mr. Parish was an Indian and committed his crime within the Choctaw Reservation, the continued existence of which was recently recognized by this Court, following *McGirt*, in *Sizemore v. State*, 2021 OK CR 6, ¶ 16, 485 P.3d 867, 871.

¶4 Because the Choctaw Reservation is Indian Country, Judge Wallace found that the State lacked subject matter jurisdiction to try Parish for murder under the Major Crimes Act. 18 U.S.C. § 1153. Applying the familiar rule that defects in subject matter jurisdiction can never be waived, and can be raised at any time, Judge Wallace found Mr. Parish's conviction for second degree murder was void and ordered the charge dismissed.

¶5 Judge Wallace initially stayed enforcement of the order. The State then filed in this Court a verified request for a stay and petitioned for a writ of prohibition against enforcement of the order granting post-conviction relief. In *State ex rel. Matloff v. Wallace*, 2021 OK CR 15, —— P.3d ——, this Court stayed all proceedings and directed counsel for the interested parties to submit briefs on the following question:

> In light of *Ferrell v. State*, 1995 OK CR 54, 902 P.2d 1113, *United States v. Cuch,* 79 F.3d 987 (10th Cir. 1996), *Edwards v. Vannoy* (No. 19-5807), 593 U.S. —— [141 S.Ct. 1547, 209 L.Ed.2d 651] (May 17, 2021), cases cited therein, and related authorities, should the recent judicial recognition of federal criminal jurisdiction in the Creek and Choctaw Reservations announced in *McGirt* and *Sizemore* be applied retroactively to void a state conviction that was ***688** final when *McGirt* and *Sizemore* were announced?

¶6 The parties and *amici curiae* [2] subsequently filed briefs on the question presented. For reasons more fully stated below, we hold today that *McGirt v. Oklahoma* announced a new rule of criminal procedure which we decline to apply retroactively in a state post-conviction proceeding to void a final conviction. The writ of prohibition is therefore **GRANTED** and the order granting post-conviction relief is **REVERSED**.

ANALYSIS

¶7 In state post-conviction proceedings, this Court has previously applied its own non-retroactivity doctrine—often drawing on, but independent from, the Supreme Court's non-retroactivity doctrine in federal habeas corpus—to bar the application ***689** of new procedural rules to convictions that were final when the rule was announced. *See Ferrell v. State*, 1995 OK CR 54, ¶¶ 5-9, 902 P.2d 1113, 1114-15 (citing *Teague*, *supra*) (finding new rule governing admissibility of recorded interview was not retroactive on collateral review); *Baxter v. State*, 2010 OK CR 20, ¶ 11, 238 P.3d 934, 937 (noting our adoption of *Teague* non-retroactivity analysis for new rules in state post-conviction review); and *Burleson v. Saffle*, 278 F.3d 1136, 1141 n.5 (10th Cir. 2002) (noting incorporation "into state law the Supreme Court's *Teague* approach to analyzing whether a new rule of law should have retroactive effect," citing *Ferrell*, *supra*).

[1] **[2]** ¶8 New rules of criminal procedure generally apply to cases pending on direct appeal when the rule is announced, with no exception for cases where the rule is a clear break with past law. *See Carter v. State*, 2006 OK CR 42, ¶ 4, 147 P.3d 243, 244 (citing *Griffith v. Kentucky*, 479 U.S. 314, 323, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)) (applying new instructional rule of *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273 to case tried before the rule was announced, but pending on direct review). But new rules generally do *not* apply retroactively to convictions that are final, with a few narrow exceptions. *Ferrell,* 1995 OK CR 54, ¶ 7, 902 P.2d at 1114-15; *Thomas v. State*, 1994 OK CR 85, ¶ 13, 888 P. 2d 522, 527 (decision

requiring that prosecution file bill of particulars no later than arraignment did not apply to convictions already final).

¶9 Following *Teague* and its progeny, we would apply a new *substantive* rule to final convictions if it placed certain primary (private) conduct beyond the power of the Legislature to punish, or categorically barred certain punishments for classes of persons because of their status (capital punishment of persons with insanity or intellectual disability, or juveniles, for example). *See, e.g., Pickens v. State*, 2003 OK CR 16, ¶¶ 8-9, 74 P.3d 601, 603 (retroactively applying *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) because *Atkins* barred capital punishment for persons with intellectual disability).

¶10 Under *Ferrell*, we also would retroactively apply a new "watershed" procedural rule that was essential to the accuracy of trial proceedings, but such a rule is unlikely ever to be announced. *Ferrell*, 1995 OK CR 54, ¶ 7, 902 P.2d at 1115; *see Beard v. Banks,* 542 U.S. 406, 417, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004) (identifying *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) as the paradigmatic watershed rule, and likely the only one ever announced by the Supreme Court); *Edwards v. Vannoy*, —— U.S. ——, 141 S.Ct. 1547, 1561, 209 L.Ed.2d 651 (2021) (acknowledging the "watershed" rule concept was moribund and would no longer be incorporated in *Teague* retroactivity analysis).

¶11 Like the Supreme Court, we have long adhered to the principle that the narrow purposes of collateral review, and the reliance, finality, and public safety interests in factually accurate convictions and just punishments, weigh strongly against the application of new procedural rules to convictions already final when the rule is announced. Applying new procedural rules to final convictions, after a trial or guilty plea and appellate review according to then-existing procedures, invites burdensome litigation and potential reversals unrelated to accurate verdicts, undermining the deterrent effect of the criminal law. *Ferrell*, 1995 OK CR 54, ¶¶ 6-7, 902 P.2d at 1114-15.

¶12 Just as *Teague*'s doctrine of non-retroactivity "was an exercise of [the Supreme Court's] power to interpret the federal habeas statute," *Danforth v. Minnesota*, 552 U.S. 264, 278, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008), we have barred state post-conviction relief on new procedural rules as part of our independent authority to interpret the remedial scope of state post-conviction statutes. *Smith v. State*, 1994 OK CR 46, ¶ 3, 878 P.2d 375, 377-78 (declining to apply rule on flight instruction to conviction that was final six years earlier); *Thomas*, 1994 OK CR 85, ¶ 13, 888 P.2d at 527 (declining to apply rule on filing bill of particulars at arraignment to conviction that was final when rule was announced).

¶13 Before and after *McGirt*, this Court has treated Indian Country claims as presenting non-waivable challenges to criminal subject matter jurisdiction. *Bosse v. State*, 2021 OK CR 3, ¶¶ 20-21, 484 P.3d 286, 293-94; *Magnan v. State*, 2009 OK CR 16, ¶ 9, 207 P.3d 397, 402 (both characterizing claim as subject matter jurisdictional challenge that may be raised at any time). After *McGirt* was decided, relying on this theory of non-waivability, this Court initially granted post-conviction relief and vacated several capital murder convictions, and at least one non-capital conviction (Jimcy McGirt's), that were final when *McGirt* was announced. [3]

¶14 We acted in those post-conviction cases without our attention ever having been drawn to the potential non-retroactivity of *McGirt* in light of the Court of Appeals' opinion in *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), *cert. denied*, 519 U.S. 963, 117 S.Ct. 384, 136 L.Ed.2d 301 (1996) and cases discussed therein, which we find very persuasive in our analysis of the state law question today. *See also, e.g., Schlomann v. Moseley*, 457 F.2d 1223, 1227, 1230 (10th Cir. 1972) (finding Supreme Court's "newly announced jurisdictional rule" restricting courts-martial in *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969) had made a "clear break with the past;" retroactive application to void final convictions was not compelled by jurisdictional nature of *O'Callahan*; and *O'Callahan* would not be applied retroactively to void court-martial conviction that was final when *O'Callahan* was decided).

[3] ¶15 After careful examination of the reasoning in *Cuch*, as well as the arguments of counsel and *amici curiae*, we reaffirm our recognition of the Cherokee, Choctaw, and Chickasaw Reservations [4] in those earlier cases. However, exercising our independent state law authority to interpret the remedial scope of the state post-conviction statutes, we now hold that *McGirt* and our post-*McGirt* decisions recognizing these reservations shall not apply retroactively to void a conviction that was final when *McGirt* was decided. Any

statements, holdings, or suggestions to the contrary in our previous cases are hereby overruled.

¶16 In *United States v. Cuch, supra*, the Tenth Circuit Court of Appeals held that the Supreme Court's Indian Country jurisdictional ruling in *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) was not retroactive to convictions already final when *Hagen* was announced. In *Hagen*, the Supreme Court held that certain lands recognized ***690** as Indian Country by *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir.1985) (en banc) were not part of the Uintah Reservation; and that Utah, rather than the federal government, had subject matter jurisdiction over crimes committed in the area. *Cuch*, 79 F.3d at 988.

¶17 Cuch and Appawoo, defendants who pled guilty and were convicted of major crimes (sexual abuse and second degree murder respectively) in the federal courts of Utah, challenged their convictions in collateral motions to vacate pursuant to 28 U.S.C. § 2255. They argued the subject matter jurisdiction defect recognized in *Hagen* voided their federal convictions. *Cuch,* 79 F.3d at 989-90. The federal district court found *Hagen* was not retroactive to collateral attacks on final convictions under section 2255. *Id*. at 990. The Tenth Circuit affirmed.

¶18 The Court of Appeals noted that the Supreme Court had applied non-retroactivity principles to new rules that alter subject matter jurisdiction. *Id*. at 990 (citing *Gosa v. Mayden*, 413 U.S. 665, 93 S.Ct. 2926, 37 L.Ed.2d 873 (1973)) (refusing to apply new jurisdictional limitation on military courts-martial retroactively to void final convictions). The policy of non-retroactivity was grounded in principles of finality of judgments and fundamental fairness: *Hagen* had been decided after the petitioners' convictions were final; it was not dictated by precedent; and the accuracy of the underlying convictions weighed against the disruption and costs of retroactivity. *Id*. at 991-92.

¶19 The Court of Appeals found non-retroactivity of the *Hagen* ruling upheld the principle of finality and foreclosed the harmful effects of retroactive application, including

> the prospect that the invalidation of a final conviction could well mean that the guilty will go unpunished due to the impracticability of charging and retrying the defendant after a long interval of time. Wholesale invalidation of convictions rendered years ago could well mean that convicted persons would be freed without retrial, for witnesses no longer may be readily available, memories may have faded, records may be incomplete or missing, and physical evidence may have disappeared. Furthermore, retroactive application would surely visit substantial injustice and hardship upon those litigants who relied upon jurisdiction in the federal courts, particularly victims and witnesses who have relied on the judgments and the finality flowing therefrom. Retroactivity would also be unfair to law enforcement officials and prosecutors, not to mention the members of the public they represent, who relied in good faith on binding federal pronouncements to govern their prosecutorial decisions. Society must not be made to tolerate a result of that kind when there is no significant question concerning the accuracy of the process by which judgment was rendered.

79 F.3d at 991-92 (citing and quoting from *Gosa*, 413 U.S. at 685, 93 S.Ct. 2926, and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (internal citations, quotation marks, brackets, and ellipses omitted)).

¶20 The Court of Appeals found that no questions of innocence arose from the jurisdictional flaw in the petitioners' convictions. Their conduct was criminal under both state and federal law. The question resolved in *Hagen* was simply "*where* these Indian defendants should have been tried for committing major crimes." 79 F.3d at 992 (emphasis in

original). The petitioners did not allege unfairness in the processes by which they were found guilty. *Id.*

¶21 The Court of Appeals reasoned that a jurisdictional ruling like *Hagen* raised no fundamental questions about the basic truth-finding functions of the courts that tried and sentenced the defendants. *Id.* The legal processes resulting in those convictions had "produced an accurate picture of the conduct underlying the movants' criminal charges and provided adequate procedural safeguards for the accused." *Id.*

¶22 The Court of Appeals also noted that the chances of successful state prosecution were slim after so many years. "The evidence is stale and the witnesses are probably unavailable or their memories have dimmed." *Id.* at 993. The Court also considered the "violent and abusive nature" of the underlying ***691** convictions, and the burdens that immediate release of these prisoners would have on victims, many of whom were child victims of sexual abuse. *Id.*

¶23 The Court of Appeals distinguished two lines of Supreme Court holdings that retroactively invalidated final convictions. The first involved the conclusion that a court lacked authority to convict or punish a defendant in the first place. But in those cases, the bar to prosecution arose from a constitutional immunity against punishment for the conduct in *any* court, or prohibited a trial altogether. The defendants in *Cuch* could hardly claim immunity for acts of sexual abuse and murder. The only issue touched by *Hagen* was the federal court's exercise of jurisdiction. *Id.* at 993.

¶24 The second line of Supreme Court cases retroactively invalidating final convictions involved holdings that narrowed the scope of a penal statute defining elements of an offense, and thus invalidated convictions for acts that Congress had never criminalized. *Hagen*, on the other hand, had not narrowed the scope of *liability* for conduct under a statute, it had modified the extent of Indian Country jurisdiction, and thus altered the *forum* where crimes would be prosecuted. *Id.* at 994.

¶25 Finding neither of the exceptional circumstances that might warrant retroactive application of *Hagen's* jurisdictional ruling to final convictions, the Court of Appeals found "the circumstances surrounding these cases make prospective application of *Hagen* unquestionably appropriate in the present context." *Id.* Prior federal jurisdiction was well-established before *Hagen*; the convictions were factually accurate; the procedural safeguards and truth-finding functions of the courts were not impaired; and retroactive application would compromise both reliance and public safety interests that legitimately attached to prior proceedings.

[4] ¶26 We find *Cuch*'s analysis and authorities persuasive as we consider the independent state law question of collateral non-retroactivity for *McGirt*. First, we conclude that *McGirt* announced a rule of criminal *procedure*, using prior case law, treaties, Acts of Congress, and the Major Crimes Act to recognize a long dormant (or many thought, non-existent) federal jurisdiction over major crimes committed by or against Indians in the Muscogee (Creek) Reservation. And like *Hagen* before it, "the [*McGirt*] decision effectively overruled the contrary conclusion reached in [the *Murphy*] case,[5] redefined the [Muscogee (Creek)] Reservation boundaries ... and conclusively settled the question." *Cuch,* 79 F.3d at 989.

¶27 *McGirt* did not "alter[ ] the range of conduct or the class of persons that the law punishes" for committing crimes. *Schriro v. Summerlin*, 542 U.S. 348, 353, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). *McGirt* did not determine whether specific conduct is criminal, or whether a punishment for a class of persons is forbidden by their status. *McGirt's* recognition of an existing Muscogee (Creek) Reservation effectively decided *which sovereign* must prosecute major crimes committed by or against Indians within its boundaries, crimes which previously had been prosecuted in Oklahoma courts for more than a century. But this significant change to the extent of state and federal criminal jurisdiction affected "only the *manner of determining* the defendant's culpability." *Schriro,* 542 U.S. at 353, 124 S.Ct. 2519 (emphasis in original). For purposes of our state law retroactivity analysis, *McGirt's* holding therefore imposed only *procedural* changes, and is clearly a procedural ruling.

[5] **[6]** ¶28 Second, the procedural rule announced in *McGirt* was new.[6] For purposes ***692** of retroactivity analysis, a case announces a new rule when it breaks new ground, imposes a new obligation on the state or federal government, or in other words, the result was not dictated by precedent when the defendant's conviction became final. *Ferrell*, 1995 OK CR 54, ¶ 7, 902 P.2d at 1114 (finding rule

of inadmissibility of certain evidence broke new ground and was not dictated by precedent when defendant's conviction became final).

¶29 *McGirt* imposed new and different obligations on the state and federal governments. Oklahoma's new obligations included the reversal on direct appeal of at least some major crimes convictions prosecuted (without jurisdictional objections at the time, and apparently lawfully) in these newly recognized parts of Indian Country; and to abstain from some future arrests, investigations, and prosecutions for major crimes there. The federal government, in turn, was newly obligated under *McGirt* to accept its jurisdiction over the apprehension and prosecution of major crimes by or against Indians in a vastly expanded Indian Country.

¶30 *McGirt's* procedural rule also broke new legal ground in the sense that it was not dictated by, and indeed, arguably involved controversial innovations upon, Supreme Court precedent. For today's purposes, the holding in *McGirt* was dictated by precedent only if its essential conclusion, i.e., the continued existence of the Muscogee (Creek) Reservation, was "apparent to all reasonable jurists" when Mr. Parish's conviction became final in 2014. *Lambrix v. Singletary*, 520 U.S. 518, 527-28, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997).

¶31 In 2005, this Court had declined to recognize the claimed Muscogee (Creek) Reservation, and thus denied the essential premise of the claim on its merits, in *Murphy v. State*, 2005 OK CR 25, ¶¶ 50-52, 124 P.3d at 1207-08. From then until the Tenth Circuit Court of Appeals' 2017 decision in *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017), no court that had addressed the issue, including the federal district court that initially denied Murphy's habeas claim, had embraced the possibility that the old boundaries of the Muscogee (Creek) Nation remained a reservation. [7]

¶32 With no disrespect to the views that later commanded a Supreme Court majority in *McGirt*, the dissenting opinion of Chief Justice Roberts, joined by Justices Alito, Kavanaugh, and Thomas, whom we take to be "reasonable jurists" in the required sense, certainly did *not* view the holding in *McGirt* as dictated by precedent even in 2020, much less in 2014. [8] Chief Justice Roberts's dissent raised a host of reasonable doubts about the majority's adherence to precedent, [9] arguing ***693** at length that it had divined the existence of a reservation only by departing from the governing standards for proof of Congress's intent to disestablish one, *McGirt,* 140 S.Ct. at 2489; and in many other ways besides, [10] "disregarding the 'well settled' approach required by our precedents." *Id.* at 2482 (Roberts, C.J., dissenting). The *McGirt* majority, of course, remains just that, but the Chief Justice's reasoned, precedent-based objections are additional proof that *McGirt's* holding was not "apparent to all reasonable jurists" when Mr. Parish's conviction became final in 2014.

¶33 Third, our independent exercise of authority to impose remedial constraints under state law on the collateral impact of *McGirt* and post-*McGirt* litigation is consistent with both the text of the opinion and the Supreme Court's apparent intent. As already demonstrated, *McGirt* is neither a substantive rule nor a watershed rule of criminal procedure. The Supreme Court itself has not declared that *McGirt* is retroactive to convictions already final when the ruling was announced.

¶34 *McGirt* was never intended to annul decades of final convictions for crimes that might never be prosecuted in federal court; to free scores of convicted prisoners before their sentences were served; or to allow major crimes committed by, or against, Indians to go unpunished. The Supreme Court's intent, as we understand it, was to fairly and conclusively determine the claimed existence and geographic extent of the reservation.

¶35 The Supreme Court predicted that *McGirt's* disruptive potential to unsettle convictions ultimately would be limited by "other legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few," designed to "protect those who have reasonably labored under a mistaken understanding of the law." *McGirt*, 140 S.Ct. at 2481. The Court also well understood that collateral attacks on final state convictions based on *McGirt* would encounter "well-known state and federal limitations on post-conviction review in criminal proceedings." *Id.* at 2479. "[P]recisely because those doctrines exist," the Court said, it felt "free" to announce a momentous holding effectively recognizing a new jurisdiction and supplanting a longstanding previous one, "leaving questions about reliance interests for later proceedings crafted to account for them." *Id.* at 2481 (brackets and ellipses omitted).

¶36 Those questions are now properly before us and urgently demand our attention. Because *McGirt's* new jurisdictional holding was a clear break with the past, we have applied *McGirt* to reverse several convictions for major crimes pending on direct review, and not yet final, when *McGirt* was announced. The balance of competing interests is very different in a final conviction, and the reasons for non-retroactivity of a new *jurisdictional* rule apply with particular force. Non-retroactivity of *McGirt* in state post-conviction proceedings can mitigate some of the negative consequences so aptly described in *Cuch*, striking a proper balance between the public safety, finality, and reliance interests in settled convictions against the competing interests of those tried and sentenced under the prior jurisdictional rule.

¶37 The State's reliance and public safety interests in the results of a guilty plea or trial on the merits, and appellate review according to then-existing rules, are always substantial. Though Oklahoma's jurisdiction over major crimes in the newly recognized reservations was limited in *McGirt* and our post-*McGirt* reservation rulings, the State's jurisdiction was hardly open to doubt for over a century and often went wholly unchallenged, as it did at Mr. Parish's trial in 2012.

¶38 We cannot and will not ignore the disruptive and costly consequences that retroactive application of *McGirt* would now have: the shattered expectations of so many crime victims that the ordeal of prosecution would assure punishment of the offender; the trauma, expense, and uncertainty awaiting victims and witnesses in federal re-trials; the outright release of many major crime offenders due to the impracticability of new prosecutions; and the incalculable loss to agencies and officers who have reasonably labored for decades to apprehend, prosecute, defend, and punish those convicted of major crimes; all ***694** owing to a longstanding and widespread, but ultimately mistaken, understanding of law.

¶39 By comparison, Mr. Parish's legitimate interests in post-conviction relief for this jurisdictional error are minimal or non-existent. *McGirt* raises no serious questions about the truth-finding function of the state courts that tried Mr. Parish and so many others in latent contravention of the Major Crimes Act. The state court's faulty jurisdiction (unnoticed until many years later) did not affect the procedural protections Mr. Parish was afforded at trial. The trial produced an accurate picture of his criminal conduct; the conviction was affirmed on direct review; and the proceedings did not result in the wrongful conviction or punishment of an innocent person. A reversal of Mr. Parish's final conviction now undoubtedly would be a monumental victory for him, but it would not be justice.

[7] ¶40 Because we hold that *McGirt* and our post-*McGirt* reservation rulings shall not apply retroactively to void a final state conviction, the order vacating Mr. Parish's murder conviction was unauthorized by state law. The State ordinarily may file a regular appeal from an adverse post-conviction order, but here, it promptly petitioned this Court for extraordinary relief and obtained a stay of proceedings. The time for filing a regular post-conviction appeal (twenty days from the challenged order) has since expired. Rule 5.2(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021).

¶41 The petitioner for a writ of prohibition must establish that a judicial officer has, or is about to, exercise unauthorized judicial power, causing injury for which there is no adequate remedy. Rule 10.6(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021). There being no adequate remedy by appeal, the injury caused by the unauthorized dismissal of this final conviction justifies the exercise of extraordinary jurisdiction. The writ of prohibition is **GRANTED**. The order granting post-conviction relief is **REVERSED**.

ROWLAND, P.J.: CONCURS

HUDSON, V.P.J.: SPECIALLY CONCURS

LUMPKIN, J.: SPECIALLY CONCURS

HUDSON, VICE PRESIDING JUDGE, SPECIALLY CONCUR:

¶1 I commend Judge Lewis for his thorough discussion of the retroactivity principles governing this case. I write separately to summarize my understanding of today's holding. Today's ruling holds that *McGirt v. Oklahoma*, —— U.S. ——, 140 S. Ct. 2452, 207 L.Ed.2d 985 (2020) does not apply retroactively on collateral review to convictions that were final before *McGirt*. We apply on state law grounds

the retroactivity principles from *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) in reaching this conclusion because the United States Supreme Court has not previously ruled on the retroactivity of *McGirt*. We hold that *McGirt* is a new rule of criminal procedure not dictated by precedent, that represents a clear break with past law and that imposes a new obligation on the State. The Supreme Court recently acknowledged there is no longer an exception in its *Teague* jurisprudence for watershed procedural rules to be applied retroactively and we incorporate this ruling in today's decision. *See Edwards v. Vannoy*, —— U.S. ——, 141 S. Ct. 1547, 1561, 209 L.Ed.2d 651 (2021). Today's decision is also based on *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996) which addressed a similar situation. We overrule our previous decisions in which we have applied *McGirt* on post-conviction review. Today's decision, however, reaffirms our previous recognition of the existence of the various reservations in those cases.

¶2 Based on this understanding of our holding, I fully concur in today's decision. While this decision resolves one aspect of the post-*McGirt* jurisdictional puzzle, many challenges remain for which there are no easy answers. So far, Congress has missed the opportunity to implement a practical solution which, at this point, seems unlikely. It is now up to the leaders of the State of Oklahoma, the Tribes and the federal government to address the jurisdictional fallout from the *McGirt* decision. Only in this way, with all of these parties working together, can public ***695** safety be ensured across jurisdictional boundaries in the historic reservation lands of eastern Oklahoma. It will require this type of cooperation in the post-*McGirt* world to ensure that stability is restored to Oklahoma's criminal justice system.

LUMPKIN, JUDGE, SPECIALLY CONCURRING:

¶1 I compliment my colleague on a well-researched opinion which accurately sets out the decisions of the U.S. Supreme Court and the Tenth Circuit Court of Appeals regarding giving retroactive effect to Supreme Court decisions. I especially compliment him for recognizing the scholarly analysis of Chief Justice Roberts in the *McGirt* dissent which shows by established precedent that the *McGirt* majority was not fully analyzing and applying past precedent of the Court in its decision.

¶2 I join this opinion based on the precedent set by the United States Supreme Court and the Tenth Circuit Court of Appeals. In doing so I cannot divert from basic principles of stating the obvious. In recognizing that the federal precedents set forth in the opinion and this writing are binding on this Court, I cannot overlook the legal fact that each of them applied a policy relating to collateral attacks on judgments rendered by courts lacking jurisdiction to render those judgments. When those courts found the lower courts rendering the subject judgments had no jurisdiction to render them, the result of this finding should have been to render the judgments void. Rather than declaring those judgments void, the courts instead formulated a policy limiting the retroactive application of their decisions, thereby preserving from collateral attack final judgments preceding them.

¶3 Keeping the policy decisions reflected in those opinions in mind, I do diverge from the court in labeling the *McGirt* ruling as procedural. When the federal government pre-empts a field of law, the legal effect is to deprive states of their jurisdiction in that area of the law. If a court lacks jurisdiction to act then any rulings and judgments would appear to be void when rendered. [1] As the opinion notes, this Court since statehood has recognized and honored federal jurisdiction as to Indian allotments and dependent Indian communities. Those areas are subject to federal jurisdiction and that jurisdiction is recognized by the federal government, the tribes and the State of Oklahoma. There was no question Oklahoma had jurisdiction over the rest of the state and this Court, as the court with exclusive jurisdiction in criminal cases, faithfully honored those jurisdictional claims.

¶4 Regardless, a 5-4 majority of the Supreme Court disregarded the precedent set out by Chief Justice Roberts in his dissent to *McGirt*, and for the first time in legal history determined the existence of a reservation in Oklahoma based on "magic words" rather than historical context. [2] In doing so, the majority ***696** in *McGirt* declared this reservation has always been in existence, even after Oklahoma became a state. This operative wording in the opinion creates a legal conundrum in that *McGirt* states that legally Oklahoma never had jurisdiction on this newly identified Indian reservation. This holding creates a question as to every criminal judgment entered by a state court regarding its validity. If all courts involved in this issue held themselves to the legal effect of this holding then those judgments would be void.

¶5 However both the Supreme Court and the Tenth Circuit have shown us by their precedents that courts have an option other than the legal one in cases of this type and that is the application of legal policy. As set out in the opinion, each of those courts has applied policy regarding retroactive application of cases based on the chaos, confusion, harm to victims, *etc*., if retroactive application occurred. The *McGirt* decision is the *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994), decision in reverse. In upholding the state court conviction, the Court held in *Hagen* that Congress had disestablished the Uintah reservation; therefore, the federal district court did not have jurisdiction to decide the subject case. In a later case involving the same land area, *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), the Tenth Circuit found that although the federal district court lacked jurisdiction to try the subject cases, there was no need to vacate the judgments for lack of jurisdiction because of the harm it would cause and because those defendants were given a fair trial and made no complaints regarding the fairness. Thus the court applied policy rather than the law which would have rendered the judgments void due to lack of subject matter jurisdiction.

¶6 The legal effect of the *McGirt* decision, finding Oklahoma lacked jurisdiction to try cases by or against Indians in Indian Country due to federal preemption through the Major Crimes Act, would be to declare the associated judgments void. However, we now adopt the federal policy and established precedent of selective retroactive application in these type of cases due to the ramifications retroactive application would have on the criminal justice system and victims. This is hard to explain in an objective legal context but provides a just and pragmatic resolution to the *McGirt* dilemma.

All Citations

497 P.3d 686, 2021 OK CR 21

Footnotes

1 *Teague v. Lane*, 489 U.S. 288, 295, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (defining a final conviction as one where judgment was rendered, the availability of appeal exhausted, and the time to petition for certiorari had elapsed).

2 The Cherokee, Chickasaw, Choctaw, and Muscogee (Creek) Nations filed a joint brief as *amici curiae* in response to our invitation. The Acting Attorney General of Oklahoma, counsel from the Capital Habeas Unit of the Federal Public Defender's Office for the Western District of Oklahoma, and the Oklahoma Criminal Defense Lawyer's Association also submitted briefs as *amicus curiae.* We thank counsel for their scholarship and vigorous advocacy.

3 *Bosse*, *supra*; *Cole v. State*, 2021 OK CR 10, 492 P.3d 11; *Ryder v. State*, 2021 OK CR 11, 489 P.3d 528, *Bench v. State*, 2021 OK CR 12, 492 P.3d 19. We later stayed the mandate in these capital post-conviction cases pending the State's petition for certiorari to the Supreme Court. We have also granted *McGirt*-based relief and vacated many convictions in appeals pending on direct review. *E.g.,* *Hogner v. State*, 2021 OK CR 4, —— P.3d ——, 2021 WL 958412; *Spears v. State*, 2021 OK CR 7, 485 P.3d 873; *Sizemore v. State*, *supra*.

4 We first recognized the Seminole Reservation in the post-*McGirt* direct appeal of *Grayson v. State*, 2021 OK CR 8, 485 P.3d 250, and have no occasion to revisit that decision today.

5 *Murphy v. State*, 2005 OK CR 25, 124 P.3d 1198 (denying post-conviction relief on claim that Muscogee (Creek) Reservation was Indian Country and jurisdiction of murder was federal under the Major Crimes Act).

6 *McGirt's* recognition of the entire historic expanse of the Muscogee (Creek) Nation as a reservation was undoubtedly new in the *temporal* sense. We take it as now well-established that "Oklahoma exercised jurisdiction over all of the lands of the former Five [ ] Tribes based on longstanding caselaw from statehood until the Tenth Circuit in *Indian Country, U.S.A. v. State of Oklahoma*, 829 F.2d 967 (10th Cir.1987) found a small tract of tribally-owned treaty land existed along the Arkansas River in Tulsa County, Oklahoma." *Murphy v. Sirmons*, 497 F. Supp.2d 1257, 1288-89 (E.D. Okla. 2007). Until *McGirt*, this Court, and Oklahoma law enforcement officials generally, declined to recognize the historic boundaries of *any* Five Tribes reservation, *as such*, as Indian Country. *See, e.g.,* 11 Okla. Op. Att'y. Gen. 345 (1979), available at 1979 WL 37653, at *8-9 (stating the Attorney General's opinion that "there is no 'Indian country' in said former 'Indian Territory' over which tribal and thus federal jurisdiction exists").

7 *McGirt*, 140 S.Ct. at 2497 (Roberts, C.J., dissenting). In *Murphy v. Sirmons*, 497 F.Supp.2d 1257, 1289-90 (E.D. Okla. 2007), the federal habeas court held thus:

> While the historical boundaries of once tribally owned land within Oklahoma may still be determinable today, there is no question, based on the history of the Creek Nation, that Indian reservations do not exist in Oklahoma. State laws have applied over the lands within the historical boundaries of the Creek nation for over a hundred years.

The federal district court found "no doubt the historic territory of the Creek Nation was disestablished as a part of the allotment process." *Id*., at 1290. The court concluded that our 2005 decision "refusing to find the crime occurred on an Indian 'reservation' [was] not 'contrary to nor an unreasonable application of Federal law as determined by the United States Supreme Court.' " *Id*.

8 The mere existence of a dissent does not establish that a rule is new, but a 5-4 split among Justices on whether precedent dictated a holding is strong evidence of a novel departure from precedent. *Beard*, 542 U.S. at 414-15, 124 S.Ct. 2504 (finding that the four dissents in *Mills v. Maryland* [486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988)] strongly indicated that the rule announced was not dictated by *Lockett v. Ohio* [438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)]).

9 Principally *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998), and *Nebraska v. Parker,* 577 U.S. 481, 136 S.Ct. 1072, 194 L.Ed.2d 152 (2016).

10 *See generally*, *McGirt*, 140 S.Ct. at 2485-2489 (Roberts, C.J., dissenting).

1 I realize courts in the past have engaged in legal gymnastics to keep from voiding judgments rendered by a court without jurisdiction by finding that a court's judgment must be void on its face before it can be held void. *Springer v. Townsend*, 336 F.2d 397, 401 (10th Cir. 1964) (in deciding whether a probate decree was void, the Court stated "our scope of review is limited to determining whether a lack of jurisdiction in the approval proceeding affirmatively appears from the record."; "[a] judgment will not be held to be void on its face unless an inspection will affirmatively disclose that the court had no jurisdiction of the person, no jurisdiction of the subject matter, or had no judicial power to render the particular judgment." *Clay v. Sun River Mining Co.*, 302 F.2d 599, 601 (10th Cir. 1962); "[a]s long as the supporting record does not reflect the district court's lack of authority, the district court order cannot be declared "void." Such an order is instead only "voidable." *Bumpus v. State*, 1996 OK CR 52, ¶ 7, 925 P.2d 1208, 1210; "[t]his Court has held in numerous cases that in order for a judgment to be void as provided in the Statute just quoted, it must be void on the face of the record, and that extrinsic evidence is not admissible to show judgment is void on the face of the record." *Scoufos v. Fuller*, 1954 OK 363, 280 P.2d 720, 723. However, logic and common sense dictate that if a court

had no authority to act then any actions would be a nullity. Regardless, I apply the precedent cited in the opinion and specially concur.

2 In *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), the Court enunciated several factors which must be considered in determining whether a reservation has been disestablished. Those factors are: the explicit language of Congress evincing intent to change boundaries; events surrounding the passage of surplus land acts which "reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation ..."; Congress's subsequent treatment of the subject areas; identity of who moved onto the affected land; and the subsequent demographic history of those lands. *Id*. at 470-72, 104 S.Ct. 1161.

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by United States v. Johnson, D.Minn., December 1, 2023

142 S.Ct. 2486
Supreme Court of the United States.

OKLAHOMA, Petitioner
v.
Victor Manuel CASTRO-HUERTA

No. 21-429
|
Argued April 27, 2022
|
Decided June 29, 2022

Synopsis

Background: Defendant, a non-Indian, was convicted in the Oklahoma District Court, Tulsa County, William D. LaFortune, J., of neglecting his stepdaughter, a member of the Cherokee Tribe, and he appealed. After portion of Oklahoma was recognized as Indian country, the Court of Criminal Appeals of Oklahoma, Rowland, V.P.J., 2021 WL 8971915, vacated defendant's conviction on the basis that the State did not have concurrent jurisdiction to prosecute crimes committed by non-Indians in Indian country. While state appellate proceedings were ongoing, federal grand jury indicted defendant for same conduct, and defendant accepted plea agreement. Certiorari was granted.

Holdings: The Supreme Court, Justice Kavanaugh, held that:

[1] General Crimes Act does not preempt state jurisdiction over crimes committed by non-Indians against Indians in Indian country;

[2] Public Law 280, which affirmatively grants certain States broad jurisdiction to prosecute state-law offenses committed in Indian country, does not preempt state authority to prosecute crimes committed by non-Indians against Indians in Indian country;

[3] Oklahoma Enabling Act did not preempt Oklahoma's authority to prosecute non-Indian for child neglect, a crime that was committed against member of Cherokee Tribe in Indian country; and

[4] Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country, abrogating *Roth v. State*, 499 P. 3d 23.

Reversed and remanded.

Justice Gorsuch, with whom Justice Breyer, Justice Sotomayor, and Justice Kagan joined, filed dissenting opinion.

Procedural Posture(s): Appellate Review.

West Headnotes (21)

[1] **Indians** What is Indian country in general
Indians Jurisdiction and Power to Enforce Criminal Laws

The Constitution allows a State to exercise jurisdiction in Indian country; Indian country is part of the State, not separate from the State. U.S. Const. Amend. 10; 18 U.S.C.A. § 1151.

12 Cases that cite this headnote

[2] **Federal Preemption** Conflicting or Conforming Laws or Regulations; Conflict Preemption
Indians State regulation
Indians Preemption
States Nature, status, and sovereignty

Federal law may preempt state jurisdiction in certain circumstances; but otherwise, as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country. U.S. Const. art. 6, cl. 2; U.S. Const. Amend. 10; 18 U.S.C.A. § 1151.

7 Cases that cite this headnote

[3] **States** Territorial Extent and Boundaries

A State is generally entitled to the sovereignty and jurisdiction over all the territory within her limits. U.S. Const. Amend. 10.

1 Case that cites this headnote

[4] **Indians** Jurisdiction and Power to Enforce Criminal Laws

States have jurisdiction to prosecute crimes committed in Indian country unless preempted. U.S. Const. art. 6, cl. 2; 18 U.S.C.A. § 1151.

5 Cases that cite this headnote

[5] **Indians** Jurisdiction and Power to Enforce Criminal Laws

Under the General Crimes Act, both the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed in Indian country. 18 U.S.C.A. §§ 1151, 1152.

23 Cases that cite this headnote

[6] **Statutes** Language and intent, will, purpose, or policy

The text of a law controls over purported legislative intentions unmoored from any statutory text.

7 Cases that cite this headnote

[7] **Statutes** Language and intent, will, purpose, or policy

Statutes Language

The Supreme Court may not replace the actual text of a statute with speculation as to Congress' intent; rather, the Supreme Court will presume more modestly that the legislature says what it means and means what it says.

13 Cases that cite this headnote

[8] **Constitutional Law** Judicial rewriting or revision

The Supreme Court does not rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that it never faced.

7 Cases that cite this headnote

[9] **Statutes** Reenactment or Incorporation of Prior Statutes

The reenactment canon used for statutory interpretation does not apply to dicta.

2 Cases that cite this headnote

[10] **Statutes** Continuance or alteration of existing law by revision

Supreme Court does not infer that Congress, in revising and consolidating the laws, intended to change their policy, unless such an intention be clearly expressed.

[11] **Indians** Crime committed in Indian country or on reservation

General Crimes Act granting federal government jurisdiction to prosecute crimes in Indian country does not preempt state jurisdiction over crimes committed by non-Indians against Indians in Indian country. U.S. Const. art. 6, cl. 2; 18 U.S.C.A. §§ 1151, 1152.

43 Cases that cite this headnote

[12] **Indians** Crime committed in Indian country or on reservation

Public Law 280, which affirmatively grants certain States broad jurisdiction to prosecute state-law offenses committed in Indian country, does not preempt state authority to prosecute

crimes committed by non-Indians against Indians in Indian country. U.S. Const. art. 6, cl. 2; 18 U.S.C.A. § 1162; 25 U.S.C.A. § 1321.

23 Cases that cite this headnote

[13] **Indians** Preemption

Even when federal law does not preempt state jurisdiction under ordinary preemption analysis, preemption may still occur if the exercise of state jurisdiction would unlawfully infringe upon tribal self-government. U.S. Const. art. 6, cl. 2.

2 Cases that cite this headnote

[14] **Indians** State regulation

Under the *Bracker* balancing test, 100 S.Ct. 2578, used when federal law does not preempt state jurisdiction under ordinary preemption analysis to determine if the exercise of state jurisdiction would unlawfully infringe upon tribal self-government, the Supreme Court considers tribal interests, federal interests, and state interests. U.S. Const. art. 6, cl. 2.

2 Cases that cite this headnote

[15] **Indians** Crime committed in Indian country or on reservation

Bracker balancing test, 100 S.Ct. 2578, under which a court considers tribal interests, federal interests, and state interests when federal law does not preempt state jurisdiction under ordinary preemption analysis to determine if the exercise of state jurisdiction would unlawfully infringe upon tribal self-government, does not bar the State from prosecuting crimes committed by non-Indians against Indians in Indian country. U.S. Const. art. 6, cl. 2; 18 U.S.C.A. § 1151.

12 Cases that cite this headnote

[16] **Criminal Law** Locality of Offense

Indians Jurisdiction and Power to Enforce Criminal Laws

Under the Constitution, States have jurisdiction to prosecute crimes within their territory except when preempted, in a manner consistent with the Constitution, by federal law or by principles of tribal self-government. U.S. Const. art. 6, cl. 2; U.S. Const. Amend. 10.

[17] **Indians** Crime committed in Indian country or on reservation

Oklahoma Enabling Act did not preempt Oklahoma's authority to prosecute non-Indian for child neglect, a crime that was committed against member of Cherokee Tribe in Indian country, since the Act contained no clear statutory language creating exception to the general rule that admission of a State into the Union necessarily repeals the provisions of any prior statute, or of any existing treaty that is inconsistent with the State's exercise of criminal jurisdiction throughout the whole of the territory within its limits. U.S. Const. art. 6, cl. 2; 18 U.S.C.A. § 1151; Oklahoma Enabling Act, 34 Stat. 267.

6 Cases that cite this headnote

[18] **Indians** Jurisdiction and Power to Enforce Criminal Laws

Admission of a State into the Union necessarily repeals the provisions of any prior statute, or of any existing treaty that is inconsistent with the State's exercise of criminal jurisdiction throughout the whole of the territory within its limits, including Indian country, unless the enabling act says otherwise by express words. 18 U.S.C.A. § 1151.

[19] **Indians** Jurisdiction and Power to Enforce Criminal Laws

Supreme Court requires clear statutory language in an enabling act to create an exception to the rule that admission of a State into the Union necessarily repeals the provisions of any

prior statute, or of any existing treaty that is inconsistent with the State's exercise of criminal jurisdiction throughout the whole of the territory within its limits, including Indian country. 18 U.S.C.A. § 1151.

[20] Constitutional Law Nature and scope in general

Supreme Court's proper role under Article III of the Constitution is to declare what the law is, not what Supreme Court thinks the law should be. U.S. Const. art. 3.

1 Case that cites this headnote

[21] Indians Crime committed in Indian country or on reservation

The Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country; abrogating *Roth v. State*, 499 P. 3d 23. 18 U.S.C.A. § 1151.

35 Cases that cite this headnote

****2488** *Syllabus* [*]

***629** In 2015, respondent Victor Manuel Castro-Huerta was charged by the State of Oklahoma for child neglect. Castro-Huerta was convicted in state court and sentenced to 35 years of imprisonment. While Castro-Huerta's state-court appeal was pending, this Court decided *McGirt* v. *Oklahoma*, 591 U.S. ——, 140 S.Ct. 2452, 207 L.Ed.2d 985. There, the Court held that the Creek Nation's reservation in eastern Oklahoma had never been properly disestablished and therefore remained ****2489** "Indian country." *Id.*, at ——, 140 S.Ct. 2452. In light of *McGirt*, the eastern part of Oklahoma, including Tulsa, is recognized as Indian country. Following this development, Castro-Huerta argued that the Federal Government had exclusive jurisdiction to prosecute him (a non-Indian) for a crime committed against his stepdaughter (a Cherokee Indian) in Tulsa (Indian country), and that the State therefore lacked jurisdiction to prosecute him. The Oklahoma Court of Criminal Appeals agreed and vacated his conviction. This Court granted certiorari to determine the extent of a State's jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.

Held: The Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country. Pp. 2492 - 2505.

(a) The jurisdictional dispute in this case arises because Oklahoma's territory includes Indian country. In the early Republic, the Federal Government sometimes treated Indian country as separate from state territory. See *Worcester v. Georgia*, 6 Pet. 515, 8 L.Ed. 483. But that view has long since been abandoned. *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 72, 82 S.Ct. 562, 7 L.Ed.2d 573. And the Court has specifically held that States have jurisdiction to prosecute crimes committed by non-Indians against non-Indians in Indian country. *United States v. McBratney*, 104 U.S. 621, 26 L.Ed. 869; see also *Draper v. United States*, 164 U.S. 240, 244–247, 17 S.Ct. 107, 41 L.Ed. 419. Accordingly, States have jurisdiction to prosecute crimes committed in Indian country unless preempted. Pp. 2492 - 2494.

(b) Under Court precedent, a State's jurisdiction in Indian country may be preempted by federal law under ordinary principles of federal preemption, or when the exercise of state jurisdiction would unlawfully infringe on tribal self-government. Neither serves to preempt state jurisdiction in this case. Pp. 2492 - 2502.

***630** (1) Castro-Huerta points to two federal laws—the General Crimes Act and Public Law 280—that, in his view, preempt Oklahoma's authority to prosecute crimes committed by non-Indians against Indians in Indian country. Neither statute, however, preempts the State's jurisdiction. Pp. 2492 - 2501.

(i) The General Crimes Act does not preempt state authority to prosecute Castro-Huerta's crime. It provides that "the general laws of the United States as to the punishment of offenses committed ... within the sole and exclusive jurisdiction of the United States ... shall extend to the Indian country." 18 U.S.C. § 1152. By its terms, the Act simply "extend[s]" the federal laws that apply on federal enclaves to Indian country. The

Act does not say that Indian country is equivalent to a federal enclave for jurisdictional purposes, that federal jurisdiction is exclusive in Indian country, or that state jurisdiction is preempted in Indian country.

Castro-Huerta claims that the General Crimes Act does indeed make Indian country the jurisdictional equivalent of a federal enclave. Castro-Huerta is wrong as a matter of text and precedent.

Pointing to the history of territorial separation and Congress's reenactment of the General Crimes Act after this Court suggested in dicta in *Williams v. United States*, 327 U.S. 711, 714, 66 S.Ct. 778, 90 L.Ed. 962, that States lack jurisdiction over crimes committed by non-Indians against Indians in Indian country, Castro-Huerta argues that Congress *implicitly intended* for the Act to provide the Federal Government with exclusive jurisdiction over crimes committed by non-Indians against Indians in Indian country. But the ****2490** text of the Act says no such thing; the idea of territorial separation has long since been abandoned; and the reenactment canon cannot be invoked to override clear statutory language of the kind present in the General Crimes Act. Castro-Huerta notes that the Court has repeated the *Williams* dicta on subsequent occasions, but even repeated dicta does not constitute precedent and does not alter the plain text of the General Crimes Act. Pp. 2494 - 2500.

(ii) Castro-Huerta's attempt to invoke Public Law 280, 67 Stat. 588, is also unpersuasive. That law affirmatively grants certain States (and allows other States to acquire) broad jurisdiction to prosecute state-law offenses committed by or against Indians in Indian country. 18 U.S.C. § 1162; 25 U.S.C. § 1321. Castro-Huerta contends that the law's enactment in 1953 would have been pointless surplusage if States already had concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian country. But Public Law 280 contains no language preempting state jurisdiction. And Public Law 280 encompasses far more than just non-Indian on Indian crimes. Thus, resolution ***631** of the narrow jurisdictional issue here does not negate the significance of Public Law 280. Pp. 2499 - 2501.

(2) The test articulated in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665, does not bar the State from prosecuting crimes committed by non-Indians against Indians in Indian country. There, the Court held that even when federal law does not preempt state jurisdiction under ordinary preemption analysis, preemption may still occur if the exercise of state jurisdiction would unlawfully infringe upon tribal self-government. *Id.,* at 142–143, 100 S.Ct. 2578. Under *Bracker*'s balancing test, the Court considers tribal interests, federal interests, and state interests. *Id.,* at 145, 100 S.Ct. 2578. Here, the exercise of state jurisdiction would not infringe on tribal self-government. And because a State's jurisdiction is concurrent with federal jurisdiction, a state prosecution would not preclude an earlier or later federal prosecution. Finally, the State has a strong sovereign interest in ensuring public safety and criminal justice within its territory, including an interest in protecting both Indian and non-Indian crime victims. Pp. 2500 - 2502.

(c) This Court has long held that Indian country is part of a State, not separate from it. Under the Constitution, States have jurisdiction to prosecute crimes within their territory except when preempted by federal law or by principles of tribal self-government. The default is that States have criminal jurisdiction in Indian country unless that jurisdiction is preempted. And that jurisdiction has not been preempted here. Pp. 2502 - 2505.

Reversed and remanded.

KAVANAUGH, J., delivered the opinion of the Court, in which ROBERTS, C.J., and THOMAS, ALITO, and BARRETT, JJ., joined. GORSUCH, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined.

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Opinion

Justice KAVANAUGH delivered the opinion of the Court.

***632** ****2491** This case presents a jurisdictional question about the prosecution of crimes committed by non-Indians against Indians in Indian country: Under current federal law, does the Federal Government have *exclusive* jurisdiction to prosecute those crimes? Or do the Federal Government and the State ***633** have *concurrent* jurisdiction to prosecute those crimes? We conclude that the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.

I

In 2015, Victor Manuel Castro-Huerta lived in Tulsa, Oklahoma, with his wife and their several children, including Castro-Huerta's then-5-year-old stepdaughter, who is a Cherokee Indian. The stepdaughter has cerebral palsy and is legally blind. One day in 2015, Castro-Huerta's sister-in-law was in the house and noticed that the young girl was sick. After a 911 call, the girl was rushed to a Tulsa hospital in critical condition. Dehydrated, emaciated, and covered in lice and excrement, she weighed only 19 pounds. Investigators later found her bed filled with bedbugs and cockroaches.

When questioned, Castro-Huerta admitted that he had severely undernourished his stepdaughter during the preceding month. The State of Oklahoma criminally charged both Castro-Huerta and his wife for child neglect. Both were convicted. Castro-Huerta was sentenced to 35 years of imprisonment, with the possibility of parole. This case concerns the State's prosecution of Castro-Huerta.

After Castro-Huerta was convicted and while his appeal was pending in state court, this Court decided *McGirt* v. *Oklahoma*, 591 U.S. ——, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020). In *McGirt*, the Court held that Congress had never properly disestablished the Creek Nation's reservation in eastern Oklahoma. As a result, the Court concluded that the Creek Reservation remained "Indian country." *Id.,* at —— – ——, ——, ——, 140 S.Ct., at 2459–2460, 2467–2468, 2474. The status of that part of Oklahoma as Indian country meant that different jurisdictional rules might apply for the prosecution of criminal offenses in that area. See 18 U.S.C. §§ 1151–1153. Based on *McGirt*'s reasoning, the Oklahoma Court of Criminal ***634** Appeals later recognized that several other Indian reservations in Oklahoma had likewise never been ****2492** properly disestablished. See, *e.g.*, *State ex rel. Matloff v. Wallace*, 2021 OKCR 21, ¶15, 497 P.3d 686, 689 (reaffirming recognition of the Cherokee, Choctaw, and Chickasaw Reservations); *Grayson v. State*, 2021 OKCR 8, ¶10, 485 P.3d 250, 254 (Seminole Reservation).

In light of *McGirt* and the follow-on cases, the eastern part of Oklahoma, including Tulsa, is now recognized as Indian country. About two million people live there, and the vast majority are not Indians.

The classification of eastern Oklahoma as Indian country has raised urgent questions about which government or governments have jurisdiction to prosecute crimes committed there. This case is an example: a crime committed in what is now recognized as Indian country (Tulsa) by a non-Indian (Castro-Huerta) against an Indian (his stepdaughter). All agree that the Federal Government has jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country. The question is whether the Federal Government's jurisdiction is exclusive, or whether the State also has concurrent jurisdiction with the Federal Government.

In the wake of *McGirt*, Castro-Huerta argued that the Federal Government's jurisdiction to prosecute crimes committed by a non-Indian against an Indian in Indian country is exclusive and that the State therefore lacked jurisdiction to prosecute

him. The Oklahoma Court of Criminal Appeals agreed with Castro-Huerta. Relying on an earlier Oklahoma decision holding that the federal General Crimes Act grants the Federal Government exclusive jurisdiction, the court ruled that the State did not have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country. The court therefore vacated Castro-Huerta's conviction. No. F–2017–1203 (Apr. 29, 2021); see also *Bosse* v. *State*, 2021 OK CR 3, 484 P. 3d 286; *Roth v. State*, 2021 OKCR 27, 499 P.3d 23.

***635** While Castro-Huerta's state appellate proceedings were ongoing, a federal grand jury in Oklahoma indicted Castro-Huerta for the same conduct. Castro-Huerta accepted a plea agreement for a 7-year sentence followed by removal from the United States. (Castro-Huerta is not a U.S. citizen and is unlawfully in the United States.) In other words, putting aside parole possibilities, Castro-Huerta in effect received a 28-year reduction of his sentence as a result of *McGirt*.

Castro-Huerta's case exemplifies a now-familiar pattern in Oklahoma in the wake of *McGirt*. The Oklahoma courts have reversed numerous state convictions on that same jurisdictional ground. After having their state convictions reversed, some non-Indian criminals have received lighter sentences in plea deals negotiated with the Federal Government. Others have simply gone free. Going forward, the State estimates that it will have to transfer prosecutorial responsibility for more than 18,000 cases per year to the Federal and Tribal Governments. All of this has created a significant challenge for the Federal Government and for the people of Oklahoma. At the end of fiscal year 2021, the U.S. Department of Justice was opening only 22% and 31% of all felony referrals in the Eastern and Northern Districts of Oklahoma. Dept. of Justice, U.S. Attorneys, Fiscal Year 2023 Congressional Justification 46. And the Department recently acknowledged that "many people may not be held accountable for their criminal conduct due to resource constraints." *Ibid.*

In light of the sudden significance of this jurisdictional question for public safety and the criminal justice system in Oklahoma, this Court granted certiorari to decide whether a State has concurrent jurisdiction ****2493** with the Federal Government to prosecute crimes committed by non-Indians against Indians in Indian country. 595 U.S. ——, 142 S.Ct. 877, 211 L.Ed.2d 585 (2022). [1]

***636** II

The jurisdictional dispute in this case arises because Oklahoma's territory includes Indian country. Federal law defines "Indian country" to include, among other things, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." 18 U.S.C. § 1151.

[1] **[2]** **[3]** To begin with, the Constitution allows a State to exercise jurisdiction in Indian country. Indian country is part of the State, not separate from the State. To be sure, under this Court's precedents, federal law may preempt that state jurisdiction in certain circumstances. But otherwise, as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country. See U.S. Const., Amdt. 10. As this Court has phrased it, a State is generally "entitled to the sovereignty and jurisdiction over all the territory within her limits." *Lessee of Pollard v. Hagan*, 3 How. 212, 228, 11 L.Ed. 565 (1845).

In the early years of the Republic, the Federal Government sometimes treated Indian country as separate from state territory—in the same way that, for example, New Jersey is separate from New York. Most prominently, in the 1832 decision in *Worcester v. Georgia*, 6 Pet. 515, 561, 8 L.Ed. 483 this Court held that Georgia state law had no force in the Cherokee Nation because the Cherokee Nation "is a distinct community occupying its own territory."

But the "general notion drawn from Chief Justice Marshall's opinion in *Worcester* v. *Georgia*" "has yielded to closer analysis." *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 72, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962). "By 1880 the Court no longer viewed reservations as distinct nations." *Ibid.* Since the latter half of the 1800s, the Court has consistently and explicitly held that Indian reservations are "part of the surrounding State" and subject to the State's jurisdiction "except as forbidden by federal law." *Ibid.*

***637** To take a few examples: In 1859, the Court stated: States retain "the power of a sovereign over their persons and

property, so far as" "necessary to preserve the peace of the Commonwealth." *New York ex rel. Cutler v. Dibble*, 21 How. 366, 370, 16 L.Ed. 149 (1859).

In 1930: "[R]eservations are part of the State within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards." *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651, 50 S.Ct. 455, 74 L.Ed. 1091 (1930).

In 1946: "[I]n the absence of a limiting treaty obligation or Congressional enactment each state ha[s] a right to exercise jurisdiction over Indian reservations within its boundaries." *New York ex rel. Ray v. Martin*, 326 U.S. 496, 499, 66 S.Ct. 307, 90 L.Ed. 261 (1946).

In 1992: "This Court's more recent cases have recognized the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands." ****2494** *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 257–258, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992).

And as recently as 2001: "State sovereignty does not end at a reservation's border." *Nevada v. Hicks*, 533 U.S. 353, 361, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001).

[4] In accord with that overarching jurisdictional principle dating back to the 1800s, States have jurisdiction to prosecute crimes committed in Indian country unless preempted. In the leading case in the criminal context—the *McBratney* case from 1882—this Court held that States have jurisdiction to prosecute crimes committed by non-Indians against non-Indians in Indian country. *United States v. McBratney*, 104 U.S. 621, 623–624, 26 L.Ed. 869 (1882). The Court stated that Colorado had "criminal jurisdiction" over crimes by non-Indians against non-Indians "throughout the whole of the territory within its limits, including the Ute Reservation." ***638** *Id.*, at 624. Several years later, the Court similarly decided that Montana had criminal jurisdiction over crimes by non-Indians against non-Indians in Indian country within that State. *Draper v. United States*, 164 U.S. 240, 244–247, 17 S.Ct. 107, 41 L.Ed. 419 (1896). The *McBratney* principle remains good law.

In short, the Court's precedents establish that Indian country is part of a State's territory and that, unless preempted, States have jurisdiction over crimes committed in Indian country.

III

The central question that we must decide, therefore, is whether the State's authority to prosecute crimes committed by non-Indians against Indians in Indian country has been preempted. U.S. Const., Art. VI.

Under the Court's precedents, as we will explain, a State's jurisdiction in Indian country may be preempted (i) by federal law under ordinary principles of federal preemption, or (ii) when the exercise of state jurisdiction would unlawfully infringe on tribal self-government.

In Part III–A, we consider whether state authority to prosecute crimes committed by non-Indians against Indians in Indian country is preempted by federal law under ordinary principles of preemption. In Part III–B, we consider whether principles of tribal self-government preclude the exercise of state jurisdiction over crimes committed by non-Indians against Indians in Indian country.

A

Castro-Huerta points to two federal laws that, in his view, preempt Oklahoma's authority to prosecute crimes committed by non-Indians against Indians in Indian country: (i) the General Crimes Act, which grants the Federal Government jurisdiction to prosecute crimes in Indian country, 18 U.S.C. § 1152; and (ii) Public Law 280, which grants States, or authorizes States to acquire, certain additional jurisdiction over crimes committed in Indian country, 67 Stat. 588; ***639** see 18 U.S.C. § 1162; 25 U.S.C. § 1321. Neither statute preempts preexisting or otherwise lawfully assumed state authority to prosecute crimes committed by non-Indians against Indians in Indian country.

1

As relevant here, the General Crimes Act provides: "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country." 18 U.S.C. § 1152.

**2495 By its terms, the Act does not preempt the State's authority to prosecute non-Indians who commit crimes against Indians in Indian country. The text of the Act simply "extend[s]" federal law to Indian country, leaving untouched the background principle of state jurisdiction over crimes committed within the State, including in Indian country. *Ibid.*

The Act also specifies the body of federal criminal law that extends to Indian country—namely, "the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States." *Ibid.* Those cross-referenced "general laws" are the federal laws that apply in federal enclaves such as military bases and national parks. *Ibid.*

Importantly, however, the General Crimes Act does not say that Indian country is equivalent to a federal enclave for jurisdictional purposes. Nor does the Act say that federal jurisdiction is exclusive in Indian country, or that state jurisdiction is preempted in Indian country.

[5] Under the General Crimes Act, therefore, both the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed in Indian country.[2] The General *640 Crimes Act does not preempt state authority to prosecute Castro-Huerta's crime.

To overcome the text, Castro-Huerta offers several counterarguments. None is persuasive.

First, Castro-Huerta advances what he describes as a textual argument. He contends that the text of the General Crimes Act makes Indian country the jurisdictional equivalent of a federal enclave. To begin, he points out that the Federal Government has exclusive jurisdiction to prosecute crimes committed in federal enclaves such as military bases and national parks. And then Castro-Huerta asserts that the General Crimes Act in effect equates federal enclaves and Indian country. Therefore, according to Castro-Huerta, it follows that the Federal Government also has exclusive jurisdiction to prosecute crimes committed in Indian country.

Castro-Huerta's syllogism is wrong as a textual matter. The Act simply borrows the body of federal criminal law that applies in federal enclaves and extends it to Indian country. The Act does not purport to equate Indian country and federal enclaves for jurisdictional purposes. Moreover, it is not enough to speculate, as Castro-Huerta does, that Congress might have implicitly intended a jurisdictional parallel between Indian country and federal enclaves.

Castro-Huerta's argument also directly contradicts this Court's precedents. As far back as 1891, the Court stated that the phrase "sole and exclusive jurisdiction" in the General Crimes Act is "only used in the description of the laws which are extended" to Indian country, not "to the jurisdiction extended over the Indian country." *In re Wilson*, 140 U.S. 575, 578, 11 S.Ct. 870, 35 L.Ed. 513 (1891). The Court repeated that analysis in 1913, concluding that the phrase "sole and exclusive jurisdiction" *641 is "used in order to describe the laws of the United States which by that **2496 section are extended to the Indian country." *Donnelly v. United States*, 228 U.S. 243, 268, 33 S.Ct. 449, 57 L.Ed. 820 (1913).

Stated otherwise, the General Crimes Act provides that the federal criminal laws that apply to federal enclaves also apply in Indian country. But the extension of those federal laws to Indian country does not silently erase preexisting or otherwise lawfully assumed state jurisdiction to prosecute crimes committed by non-Indians in Indian country.

Moreover, if Castro-Huerta's interpretation of the General Crimes Act were correct, then the Act would preclude States from prosecuting *any* crimes in Indian country—presumably even those crimes committed by non-Indians against non-Indians—just as States ordinarily cannot prosecute crimes committed in federal enclaves. But this Court has long held that States may prosecute crimes committed by non-Indians against non-Indians in Indian country. See *McBratney*, 104 U.S. at 623–624; *Draper*, 164 U.S. at 242–246, 17 S.Ct. 107. Those holdings, too, contravene Castro-Huerta's argument regarding the General Crimes Act.

In advancing his enclave argument, Castro-Huerta also tries to analogize the text of the General Crimes Act to the text of the Major Crimes Act. He asserts that the Major Crimes

Act grants the Federal Government exclusive jurisdiction to prosecute certain major crimes committed by Indians in Indian country. But the Major Crimes Act contains substantially different language than the General Crimes Act. Unlike the General Crimes Act, the Major Crimes Act says that defendants in Indian country "shall be subject to the same law" as defendants in federal enclaves. See 18 U.S.C. § 1153 ("Any Indian who commits against the person or property of another Indian or other person any of" certain major offenses "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 ***642** States"). So even assuming that the text of the Major Crimes Act provides for exclusive federal jurisdiction over major crimes committed by Indians in Indian country, see, *e.g.*, *United States v. John*, 437 U.S. 634, 651, and n. 22, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978); *Negonsott v. Samuels*, 507 U.S. 99, 103, 113 S.Ct. 1119, 122 L.Ed.2d 457 (1993), that conclusion does not translate to the differently worded General Crimes Act.

In short, the General Crimes Act does not treat Indian country as the equivalent of a federal enclave for jurisdictional purposes. Nor does the Act make federal jurisdiction exclusive or preempt state law in Indian country.

Second, Castro-Huerta contends that, regardless of the statutory text, Congress *implicitly intended* for the General Crimes Act to provide the Federal Government with exclusive jurisdiction over crimes committed by non-Indians against Indians in Indian country.

[6] **[7]** The fundamental problem with Castro-Huerta's implicit intent argument is that the text of the General Crimes Act says no such thing. Congress expresses its intentions through statutory text passed by both Houses and signed by the President (or passed over a Presidential veto). As this Court has repeatedly stated, the text of a law controls over purported legislative intentions unmoored from any statutory text. The Court may not "replace the actual text with speculation as to Congress' intent." *Magwood v. Patterson*, 561 U.S. 320, 334, 130 S.Ct. 2788, 177 L.Ed.2d 592 (2010). Rather, the Court "will presume more modestly" that "the legislature says what it means and means what it says." ****2497** *Henson* v. *Santander Consumer USA Inc.*, 582 U.S. 79, ——, 137 S.Ct. 1718, 1725, 198 L.Ed.2d 177 (2017) (internal quotation marks and alterations omitted); see, *e.g.*, *McGirt*, 591 U.S., at ——, 140 S.Ct., at 2465 ("[W]ishes are not laws"); *Virginia Uranium, Inc.* v. *Warren*, 587 U.S. ——, ——, 139 S.Ct. 1894, 1907, 204 L.Ed.2d 377 (2019) (lead opinion) (The Supremacy Clause cannot "be deployed" "to elevate abstract and unenacted legislative desires above state law"); *Alexander v. Sandoval*, 532 U.S. 275, 287–288, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) (The Court does not ***643** give "dispositive weight to the expectations that the enacting Congress had formed in light of the contemporary legal context," because we "begin (and find that we can end) our search for Congress's intent with ... text and structure" (internal quotation marks omitted)); *Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A.*, 511 U.S. 164, 173, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994) ("[T]he text of the statute controls our decision").

To buttress his implicit intent argument, Castro-Huerta seizes on the history of the General Crimes Act. At the time of the Act's earliest iterations in 1817 and 1834, Indian country was separate from the States. Therefore, at that time, state law did not apply in Indian country—in the same way that New York law would not ordinarily have applied in New Jersey. But territorial separation—*not* jurisdictional preemption by the General Crimes Act—was the reason that state authority did not extend to Indian country at that time.

[8] Because Congress operated under a different territorial paradigm in 1817 and 1834, it had no reason at that time to consider whether to preempt preexisting or lawfully assumed state criminal authority in Indian country. For present purposes, the fundamental point is that the text of the General Crimes Act does not preempt state law. And this Court does not "rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that ... it never faced." *Henson*, 582 U.S., at ——, 137 S.Ct., at 1725. The history of territorial separation during the early years of the Republic is not a license or excuse to rewrite the text of the General Crimes Act.

As noted above, the *Worcester*-era understanding of Indian country as separate from the State was abandoned later in the 1800s. After that change, Indian country in each State became part of that State's territory. But Congress did not alter the General Crimes Act to make federal criminal jurisdiction ***644** exclusive in Indian country. To this day, the text of the General Crimes Act still does not make federal jurisdiction exclusive or preempt state jurisdiction.

In 1882, in *McBratney*, moreover, this Court held that States have jurisdiction to prosecute at least some crimes committed in Indian country. Since 1882, therefore, Congress has been specifically aware that state criminal laws apply to some extent in Indian country. Yet since then, Congress has never enacted new legislation that would render federal jurisdiction exclusive or preempt state jurisdiction over crimes committed by non-Indians in Indian country. Additionally, in 1979, the Office of Legal Counsel stated that this Court had not resolved the specific issue of state jurisdiction over crimes committed by non-Indians against Indians in Indian country, and that the issue was not settled. 3 Op. OLC 111, 117–119 (1979). Yet Congress still did not act to make federal jurisdiction exclusive or to preempt state jurisdiction.

On a different tack, Castro-Huerta invokes the reenactment canon. Castro-Huerta points out that, in 1948, Congress recodified the General Crimes Act. Two years before that recodification, this Court ****2498** suggested in dicta that States lack jurisdiction over crimes committed by non-Indians against Indians in Indian country. See *Williams v. United States*, 327 U.S. 711, 714, 66 S.Ct. 778, 90 L.Ed. 962 (1946). Castro-Huerta contends that the 1948 Congress therefore intended to ratify the *Williams* dicta.

[9] **[10]** Castro-Huerta's reenactment-canon argument is misplaced. First of all, the reenactment canon does not override clear statutory language of the kind present in the General Crimes Act. See *BP p.l.c.* v. *Mayor and City Council of Baltimore*, 593 U.S. ——, ——, 141 S.Ct. 1532, 1541, 209 L.Ed.2d 631 (2021). In addition, the canon does not apply to dicta. See *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 349, 351, n. 12, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005). The Court's statements in *Williams* were pure dicta. Indeed, the *Williams* dicta did not even purport to ***645** interpret the text of the General Crimes Act. Dicta that does not analyze the relevant statutory provision cannot be said to have resolved the statute's meaning. Moreover, any inference from Congress's 1948 recodification is especially weak because that recodification was not specific to the General Crimes Act, but instead was simply a general recodification of all federal criminal laws. This Court has previously explained that "the function" of the 1948 recodification "was generally limited to that of consolidation and codification." *Muniz v. Hoffman*, 422 U.S. 454, 474, 95 S.Ct. 2178, 45 L.Ed.2d 319 (1975) (internal quotation marks omitted). This Court does not infer that Congress, "in revising and consolidating the laws, intended to change their policy, unless such an intention be clearly expressed." *Id.,* at 470, 95 S.Ct. 2178 (internal quotation marks omitted).

For many reasons, then, we cannot conclude that Congress, by recodifying the entire Federal Criminal Code in 1948, silently ratified a few sentences of dicta from *Williams*. The reenactment canon does not apply in this case.

Third, Castro-Huerta contends that the Court has repeated the 1946 *Williams* dicta on several subsequent occasions. But the Court's dicta, even if repeated, does not constitute precedent and does not alter the plain text of the General Crimes Act, which was the law passed by Congress and signed by the President. See *National Collegiate Athletic Assn.* v. *Alston*, 594 U.S. ——, ——, 141 S.Ct. 2141, 2158, 210 L.Ed.2d 314 (2021). [3]

***646** ****2499** Moreover, there is a good explanation for why the Court's previous comments on this issue came only in the form of tangential dicta. The question of whether States have concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian country did not previously matter all that much and did not warrant this Court's review. Through congressional grants of authority in Public Law 280 or state-specific statutes, some States with substantial Indian populations have long possessed broad jurisdiction to prosecute a vast array of crimes in Indian country (including crimes *by Indians*). See Brief for National Congress of American Indians as *Amicus Curiae* 20, and n. 2. Indeed, Castro-Huerta notes that "21 States have jurisdiction over crimes 'by or against' Indians in some Indian country." Brief for Respondent 7. So the General Crimes Act question—namely, whether that Act preempts inherent state prosecutorial authority in Indian country—was not relevant in those States.

In any event, this Court never considered the General Crimes Act preemption question. As the Office of Legal Counsel put it, "many courts, without carefully considering the question, have assumed that Federal jurisdictio[n] whenever it obtains is exclusive. We nevertheless believe that it is a matter that should not be regarded as settled before it ***647** has been fully explored by the courts." 3 Op. OLC, at 117. This case is

the first time that the matter has been fully explored by this Court.

Until the Court's decision in *McGirt* two years ago, this question likewise did not matter much in Oklahoma. Most everyone in Oklahoma previously understood that the State included almost no Indian country. *McGirt*, 590 U.S., at —— – ——, 140 S.Ct., at 2498–2499 (ROBERTS, C.J., dissenting). But after *McGirt*, about 43% of Oklahoma —including Tulsa—is now considered Indian country. Therefore, the question of whether the State of Oklahoma retains concurrent jurisdiction to prosecute non-Indian on Indian crimes in Indian country has suddenly assumed immense importance. The jurisdictional question has now been called. In light of the newfound significance of the question, it is necessary and appropriate for this Court to take its first hard look at the text and structure of the General Crimes Act, rather than relying on scattered dicta about a question that, until now, was relatively insignificant in the real world.

[11] After independently examining the question, we have concluded that the General Crimes Act does not preempt state jurisdiction over crimes committed by non-Indians against Indians in Indian country.

2

Castro-Huerta next invokes Public Law 280 as a source of preemption. That argument is similarly unpersuasive.

Public Law 280 affirmatively grants certain States broad jurisdiction to prosecute state-law offenses committed by or against Indians in Indian country. See 18 U.S.C. § 1162. (Other States may opt in, with tribal consent. 25 U.S.C. § 1321.) But Public Law 280 does not preempt any preexisting or otherwise lawfully assumed jurisdiction that States possess to prosecute crimes in Indian country. Indeed, the Court has already concluded as much: "Nothing in the language or legislative ****2500** history of Pub. L. 280 indicates that it was meant to divest States of pre-existing and otherwise lawfully assumed jurisdiction." ***648** *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P. C.*, 467 U.S. 138, 150, 104 S.Ct. 2267, 81 L.Ed.2d 113 (1984). The Court's definitive statement in *Three Affiliated Tribes* about Public Law 280 applies to both civil and criminal jurisdiction. And the Court's statement follows ineluctably from the statutory text: Public Law 280 contains no language that preempts States' civil or criminal jurisdiction.

Castro-Huerta separately contends that the enactment of Public Law 280 in 1953 would have been pointless surplusage if States already had concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian country. So he says that, as of 1953, Congress must have assumed that States did not already have concurrent jurisdiction over those crimes. To begin with, assumptions are not laws, and the fact remains that Public Law 280 contains no language preempting state jurisdiction, as the Court already held in *Three Affiliated Tribes*. Apart from that, Public Law 280 encompasses far more than just non-Indian on Indian crimes (the issue here). Public Law 280 also grants States jurisdiction over crimes committed *by Indians*. See Conference of Western Attorneys General, American Indian Law Deskbook § 4.6, p. 250–251 (2021 ed.); cf. *Negonsott*, 507 U.S. at 105–107, 113 S.Ct. 1119. Absent Public Law 280, state jurisdiction over those Indian-defendant crimes could implicate principles of tribal self-government. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142–143, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980); Part III–B, *infra*. So our resolution of the narrow jurisdictional issue in this case does not negate the significance of Public Law 280 in affording States broad criminal jurisdiction over other crimes committed in Indian country, such as crimes committed by Indians. [4]

***649** In any event, to the extent that there is any overlap (or even complete overlap) between Public Law 280's jurisdictional grant and some of the States' preexisting jurisdiction with respect to crimes committed in Indian country, it made good sense for Congress in 1953 to explicitly grant such authority in Public Law 280. The scope of the States' authority had not previously been resolved by this Court, except in cases such as *McBratney* and *Draper* with respect to non-Indian on non-Indian crimes. Congressional action in the face of such legal uncertainty cannot reasonably be characterized as unnecessary surplusage. See *Nielsen* v. *Preap*, 586 U.S. ——, —— – ——, 139 S.Ct. 954, 968–970, 203 L.Ed.2d 333 (2019). And finally, even if there is some surplusage, the Court has stated that "[r]edundancy is not a silver bullet" when interpreting statutes. *Rimini Street, Inc.* v.

Oracle USA, Inc., 586 U.S. ——, ——, 139 S.Ct. 873, 881, 203 L.Ed.2d 180 (2019).

[12] In sum, Public Law 280 does not preempt state authority to prosecute crimes committed by non-Indians against Indians in Indian country.

B

[13] **[14]** Applying what has been referred to as the *Bracker* balancing test, this Court has recognized that even when ****2501** federal law does not preempt state jurisdiction under ordinary preemption analysis, preemption may still occur if the exercise of state jurisdiction would unlawfully infringe upon tribal self-government. See *Bracker*, 448 U.S. at 142–143, 100 S.Ct. 2578; see also *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333–335, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983). Under the *Bracker* balancing test, the Court considers tribal interests, federal interests, and state interests. 448 U.S. at 145, 100 S.Ct. 2578. [5]

***650** **[15]** Here, *Bracker* does not bar the State from prosecuting crimes committed by non-Indians against Indians in Indian country.

First, the exercise of state jurisdiction here would not infringe on tribal self-government. In particular, a state prosecution of a crime committed by a non-Indian against an Indian would not deprive the tribe of any of its prosecutorial authority. That is because, with exceptions not invoked here, Indian tribes lack criminal jurisdiction to prosecute crimes committed by non-Indians such as Castro-Huerta, even when non-Indians commit crimes against Indians in Indian country. See *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 195, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978).

Moreover, a state prosecution of a non-Indian does not involve the exercise of state power over any Indian or over any tribe. The only parties to the criminal case are the State and the non-Indian defendant. Therefore, as has been recognized, any tribal self-government "justification for preemption of state jurisdiction" would be "problematic." American Indian Law Deskbook § 4.8, at 260; see *Three Affiliated Tribes*, 467 U.S. at 148, 104 S.Ct. 2267; see also *Hicks*, 533 U.S. at 364, 121 S.Ct. 2304; *McBratney*, 104 U.S. at 623–624; *Draper*, 164 U.S. at 242–243, 17 S.Ct. 107. [6]

Second, a state prosecution of a non-Indian likewise would not harm the federal interest in protecting Indian victims. State prosecution would supplement federal authority, not supplant federal authority. As the United States has explained in the past, "recognition of concurrent state jurisdiction" ***651** could "facilitate effective law enforcement on the Reservation, and thereby further the federal and tribal interests in protecting Indians and their property against the actions of non-Indians." Brief for United States as *Amicus Curiae* in *Arizona* v. *Flint*, O. T. 1988, No. 603, p. 6. The situation might be different if state jurisdiction ousted federal jurisdiction. But because the State's jurisdiction would be concurrent with federal jurisdiction, a state prosecution would not preclude an earlier or later federal prosecution and would not harm the federal interest in protecting Indian victims.

Third, the State has a strong sovereign interest in ensuring public safety and criminal justice within its territory, and in protecting ****2502** all crime victims. See *Dibble*, 21 How. at 370. The State also has a strong interest in ensuring that criminal offenders—especially violent offenders—are appropriately punished and do not harm others in the State.

The State's interest in protecting crime victims includes both Indian and non-Indian victims. If his victim were a non-Indian, Castro-Huerta could be prosecuted by the State, as he acknowledges. But because his victim is an Indian, Castro-Huerta says that he is free from state prosecution. Castro-Huerta's argument would require this Court to treat Indian victims as second-class citizens. We decline to do so. [7]

***652** IV

The dissent emphasizes the history of mistreatment of American Indians. But that history does not resolve the legal questions presented in this case. Those questions are: (i) whether Indian country is part of a State or instead is separate and independent from a State; and (ii) if Indian country is part of a State, whether the State has concurrent jurisdiction with the Federal Government to prosecute crimes committed by non-Indians against Indians in Indian country.

The answers to those questions are straightforward. On the first question, as explained above, this Court has repeatedly ruled that Indian country is part of a State, not separate from a State. By contrast, the dissent lifts up the 1832 decision in *Worcester* v. *Georgia* as a proper exposition of Indian law. But this Court long ago made clear that *Worcester* rested on a mistaken understanding of the relationship between Indian country and the States. The Court has stated that the "general notion drawn from Chief Justice Marshall's opinion in *Worcester* v. *Georgia*" "has yielded to closer analysis": "By 1880 the Court no longer viewed reservations as distinct nations. On the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law." *Organized Village of Kake*, 369 U.S., at 72, 82 S.Ct. 562.

[16] Because Indian country is part of a State, not separate from a State, the second question here—the question regarding the State's jurisdiction to prosecute Castro-Huerta—is also straightforward. Under the Constitution, States have ***653** jurisdiction to prosecute crimes within their territory except when preempted (in a manner consistent with the Constitution) by federal law or by principles of tribal self-government. As we have explained, no federal law preempts the State's exercise ****2503** of jurisdiction over crimes committed by non-Indians against Indians in Indian country. And principles of tribal self-government likewise do not preempt state jurisdiction here.

As a corollary to its argument that Indian country is inherently separate from States, the dissent contends that Congress must affirmatively authorize States to exercise jurisdiction in Indian country, even jurisdiction to prosecute crimes committed by non-Indians. But under the Constitution and this Court's precedents, the default is that States may exercise criminal jurisdiction within their territory. See Amdt. 10. States do not need a permission slip from Congress to exercise their sovereign authority. In other words, the default is that States have criminal jurisdiction in Indian country unless that jurisdiction is *preempted*. In the dissent's view, by contrast, the default is that States do *not* have criminal jurisdiction in Indian country unless Congress specifically *provides* it. The dissent's view is inconsistent with the Constitution's structure, the States' inherent sovereignty, and the Court's precedents.

[17] **[18]** Straying further afield, the dissent seizes on treaties from the 1800s. *Post*, at 2514 - 2515, and n. 4 (opinion of GORSUCH, J.). [8] But those treaties do not preclude state jurisdiction here. The dissent relies heavily on the 1835 Treaty of New Echota, which stated that Indian country was separate from States, and which the dissent says was preserved in relevant part by the 1866 Treaty. See Treaty with the Cherokee (New Echota), Art. 5, Dec. 29, 1835, 7 Stat. 481; Treaty with the ***654** Cherokee, July 19, 1866, 14 Stat. 709. But history and legal development did not end in 1866. Some early treaties may have been consistent with the *Worcester*-era theory of separateness. But as relevant here, those treaties have been supplanted: Specific to Oklahoma, those treaties, in relevant part, were formally supplanted no later than the 1906 Act enabling Oklahoma's statehood. See Oklahoma Enabling Act, ch. 3335, 34 Stat. 267. As this Court has previously concluded, "admission of a State into the Union" "necessarily repeals the provisions of any prior statute, or of any existing treaty" that is inconsistent with the State's exercise of criminal jurisdiction "throughout the whole of the territory within its limits," including Indian country, unless the enabling act says otherwise "by express words." *McBratney*, 104 U.S. at 623–624; see *Draper*, 164 U.S. at 242–246, 17 S.Ct. 107. The Oklahoma Enabling Act contains no such express exception. Therefore, at least since Oklahoma's statehood in the early 1900s, Indian country has been part of the territory of Oklahoma.

[19] The dissent responds that the language of the 1906 statute enabling Oklahoma's statehood itself established a jurisdictional division between the State and Indian country. See *post*, at 2515 - 2517 (discussing the Oklahoma Enabling Act). That argument is mistaken. This Court long ago explained that interpreting a statehood act to divest a State of jurisdiction over Indian country "wholly situated within [its] geographical boundaries" would undermine "the very nature of the equality conferred on the State by virtue of its admission into the Union." *Draper*, 164 U.S. at 242–243, 17 S.Ct. 107. So the Court requires clear statutory language "to create an exception" to that "rule." *Id.*, at 244, 17 S.Ct. 107. To reiterate, the ****2504** Oklahoma Enabling Act contains no such clear language. Indeed, the Court has interpreted similar statutory language in other state enabling acts not to displace state jurisdiction. See *id.*, at 243–247, 17 S.Ct. 107; *Organized Village of Kake*, 369 U.S., at 67–71, 82 S.Ct. 562. In *Organized Village of Kake*, the Court specifically ***655** addressed several state enabling acts, including the Oklahoma Enabling Act, and stated that statutory language reserving

jurisdiction and control to the United States was meant to preserve federal jurisdiction to the extent that it existed before statehood, not to make federal jurisdiction exclusive. *Id.,* at 67–70, 82 S.Ct. 562. Consistent with that precedent, today's decision recognizes that the Federal Government and the State have concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian country. [9]

The dissent incorrectly seeks to characterize various aspects of the Court's decision as dicta. To be clear, the Court today holds that Indian country within a State's territory is part of a State, not separate from a State. Therefore, a State has jurisdiction to prosecute crimes committed in Indian country unless state jurisdiction is preempted. With respect to crimes committed by non-Indians against Indians in Indian country, the Court today further holds that the General Crimes Act does not preempt the State's authority to prosecute; that Public Law 280 does not preempt the State's authority to prosecute; that no principle of tribal self-government preempts the State's authority to prosecute; that the cited treaties do not preempt Oklahoma's authority to prosecute; and that the Oklahoma Enabling Act does not ***656** preempt Oklahoma's authority to prosecute (indeed, it solidifies the State's presumptive sovereign authority to prosecute). Comments in the dissenting opinion suggesting anything otherwise "are just that: comments in a dissenting opinion." *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 177, n. 10, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980).

[20] From start to finish, the dissent employs extraordinary rhetoric in articulating its deeply held policy views about what Indian law should be. The dissent goes so far as to draft a proposed statute for Congress. But this Court's proper role under Article III of the Constitution is to declare what the law is, not what we think the law should be. The dissent's views about the jurisdictional question presented in this case are contrary to this Court's precedents and to the laws enacted by Congress.

* * *

[21] We conclude that the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian ****2505** country. We therefore reverse the judgment of the Oklahoma Court of Criminal Appeals and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice GORSUCH, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

In 1831, Georgia arrested Samuel Worcester, a white missionary, for preaching to the Cherokee on tribal lands without a license. Really, the prosecution was a show of force—an attempt by the State to demonstrate its authority over tribal lands. Speaking for this Court, Chief Justice Marshall refused to endorse Georgia's ploy because the State enjoyed no lawful right to govern the territory of a separate sovereign. See *Worcester v. Georgia*, 6 Pet. 515, 561, 8 L.Ed. 483 (1832). The Court's decision was deeply unpopular, and both Georgia ***657** and President Jackson flouted it. But in time, *Worcester* came to be recognized as one of this Court's finer hours. The decision established a foundational rule that would persist for over 200 years: Native American Tribes retain their sovereignty unless and until Congress ordains otherwise. *Worcester* proved that, even in the "[c]ourts of the conqueror," the rule of law meant something. *Johnson's Lessee* v. *McIntosh*, 8 Wheat. 543, 588, 5 L.Ed. 681 (1823).

Where this Court once stood firm, today it wilts. After the Cherokee's exile to what became Oklahoma, the federal government promised the Tribe that it would remain forever free from interference by state authorities. Only the Tribe or the federal government could punish crimes by or against tribal members on tribal lands. At various points in its history, Oklahoma has chafed at this limitation. Now, the State seeks to claim for itself the power to try crimes by non-Indians against tribal members within the Cherokee Reservation. Where our predecessors refused to participate in one State's unlawful power grab at the expense of the Cherokee, today's Court accedes to another's. Respectfully, I dissent.

I

A

Long before our Republic, the Cherokee controlled much of what is now Georgia, North Carolina, South Carolina,

and Tennessee. See 1 G. Litton, History of Oklahoma at the Golden Anniversary of Statehood 91 (1957) (Litton). The Cherokee were a "distinct, independent political communit[y]," who "retain[ed] their original" sovereign right to "regulat[e] their internal and social relations." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (internal quotation marks omitted).

As colonists settled coastal areas near Cherokee territory, the Tribe proved a valuable trading partner—and a military threat. See W. Echo-Hawk, In the Court of the Conqueror 89 (2010). Recognizing this, Great Britain signed a treaty ***658** with the Cherokee in 1730. See 1 Litton 92. As was true of "tributary" and "feudatory states" in Europe, the Cherokee did not cease to be "sovereign and independent" under this arrangement, but retained the right to govern their internal affairs. E. de Vattel, Law of Nations 60–61 (1805); see *Worcester*, 6 Pet. at 561. Meanwhile, under British law the crown possessed "centraliz[ed]" authority over diplomacy with Tribes to the exclusion of colonial governments. See C. Berkey, United States–Indian Relations: The Constitutional Basis, in Exiled in the Land of the Free 192 (H. Lyons ed. 1992).

****2506** Ultimately, the American Revolution replaced that legal framework with a similar one. When the delegates drafted the Articles of Confederation, they debated whether the national or state authorities should manage Indian affairs. See 6 Journals of the Continental Congress, 1774–1789, pp. 1077–1079 (W. Ford ed. 1906). The resulting compromise proved unworkable. The Articles granted Congress the "sole and exclusive right and power of ... regulating the trade and managing all affairs with the Indians." Art. IX. But the Articles undermined that assignment by further providing that "the legislative right of any state[,] within its own limits," could not be "infringed or violated." *Ibid.* Together, these provisions led to battles between national and state governments over who could oversee relations with various Tribes. See G. Ablavsky, Beyond the Indian Commerce Clause, 124 Yale L. J. 1012, 1033–1035 (2015) (Ablavsky). James Madison later complained that the Articles' division of authority over Indian affairs had "endeavored to accomplish [an] impossibilit[y]; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States." The Federalist No. 42, p. 269 (C. Rossiter ed. 1961).

When the framers convened to draft a new Constitution, this problem was among those they sought to resolve. To that end, they gave the federal government "broad general powers" over Indian affairs. *United States v. Lara*, 541 U.S. 193, 200, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004). The Constitution afforded Congress ***659** authority to make war and negotiate treaties with the Tribes. See Art. I, § 8; Art. VI, cl. 2. It barred States from doing either of these things. See Art. I, § 10. And the Constitution granted Congress the power to "regulate Commerce ... with the Indian Tribes." Art. I, § 8, cl. 3. Nor did the Constitution replicate the Articles' carveout for state power over Tribes within their borders. Madison praised this change, contending that the new federal government would be "very properly unfettered" from this prior "limitatio[n]." The Federalist No. 42, at 268. Antifederalist Abraham Yates agreed (but bemoaned) that the Constitution "totally surrender[ed] into the hands of Congress the management and regulation of the Indian affairs." Letter to the Citizens of the State of New York (June 13–14, 1788), in 20 Documentary History of the Ratification of the Constitution 1153, 1158 (J. Kaminski et al. eds. 2004).

Consistent with that view, "the Washington Administration insisted that the federal government enjoyed exclusive constitutional authority" over tribal relations. Ablavsky 1019. The new Administration understood, too, that Tribes remained otherwise free to govern their internal affairs without state interference. See *id.*, at 1041–1042, 1065–1067. In a letter to the Governor of Pennsylvania, President Washington stated curtly that "the United States ... posses[es] the only authority of regulating an intercourse with [the Indians], and redressing their grievances." Letter to T. Mifflin (Sept. 4, 1790), in 6 Papers of George Washington: Presidential Series 396 (D. Twohig ed. 1996). Even Thomas Jefferson, the great defender of the States' powers, agreed that "under the present Constitution" no "State [has] a right to Treat with the Indians without the consent of the General Government." Letter to H. Knox (Aug. 10, 1791), in 22 Papers of Thomas Jefferson 27 (C. Cullen, E. Sheridan, & R Lester eds. 1986).

Nor was this view confined to the Executive Branch. Congress quickly exercised its new constitutional authority. In 1790, it enacted the first Indian Trade and Intercourse ***660** Act, which pervasively regulated commercial and social exchanges among Indians and non-Indians. Ch. 33, 1 Stat. ****2507** 137. Congress also provided for federal jurisdiction over crimes by non-Indians against Indians on tribal lands. §§ 5–6, *id.*, at 138. States, too, recognized

their lack of authority. See Ablavsky 1019, 1043. In 1789, South Carolina Governor Charles Pinckney acknowledged to Washington that "the sole management of India[n] affairs is now committed" to "the general Government." Letter to G. Washington (Dec. 14), in 4 Papers of George Washington: Presidential Series 401, 404 (D. Twohig ed. 1993). Initially, even Georgia took the same view. See Letter from Georgia House of Representatives to Governor Edward Telfair (June 10, 1790), in 3 Documentary History of the Ratification of the Constitution: Delaware, New Jersey, Georgia, and Connecticut 178 (M. Jensen ed. 1978) (Microform Supp. Doc. No. 50).

It was against this background that Chief Justice Marshall faced *Worcester*. After gold was discovered in Cherokee territory in the 1820s, Georgia's Legislature enacted laws designed to "seize [the] whole Cherokee country, parcel it out among the neighboring counties of the state ... abolish [the Tribe's] institutions and its laws, and annihilate its political existence." *Worcester*, 6 Pet. at 542. Like Oklahoma today, Georgia also purported to extend its criminal laws to Cherokee lands. See *ibid.*; see also S. Breyer, The Cherokee Indians and the Supreme Court, 87 The Georgia Historical Q. 408, 416–418 (2003) (Breyer). In refusing to sanction Georgia's power grab, this Court explained that the State's "assertion of jurisdiction over the Cherokee nation" was "void," because under our Constitution only the federal government possessed the power to manage relations with the Tribe. *Worcester*, 6 Pet. at 542, 561–562.

B

Two years later, and exercising its authority to regulate tribal affairs in the shadow of *Worcester*, Congress adopted ***661** the General Crimes Act of 1834 (GCA). That law extended federal criminal jurisdiction to tribal lands for certain crimes and, in doing so, served two apparent purposes. First, as a "courtesy" to the Tribes, the law represented a promise by the federal government "to punish crimes ... committed ... by and against our own [non-Indian] citizens." H. Rep. No. 474, 23d Cong., 1st Sess., 13 (1834) (H. Rep. No. 474). That jurisdictional arrangement was also consistent with, and even seemingly compelled by, the federal government's treaties with various Tribes. See F. Cohen, Handbook of Federal Indian Law 731 (N. Newton et al. eds. 2005) (Cohen); R. Clinton, Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective, 17 Ariz. L. Rev. 951, 958–962 (1975) (Clinton). Second, because *Worcester* held that States lacked criminal jurisdiction on tribal lands, Congress sought to ensure a federal forum for crimes committed by and against non-Indians. See H. Rep. No. 474, at 13. Otherwise, Congress understood, non-Indian settlers would be subject to tribal jurisdiction alone. See *id.*, at 13, 18; R. Barsh & J. Henderson, The Betrayal, *Oliphant* v. *Suquamish Indian Tribe* and the Hunting of the Snark, 63 Minn. L. Rev. 609, 625–626 (1979). Congress reenacted the GCA in 1948 with minor amendments, but it remains in force today more or less in its original form. See 18 U.S.C. § 1152 (1946 ed., Supp. II).

Shortly after it adopted the GCA, the Senate ratified the Treaty of New Echota with the Cherokee in 1836. After the Tribe's removal from Georgia, the United States promised the Cherokee that they would enjoy a new home in the West where they could "establish ... a government of their choice." Treaty with the Cherokee, Preamble, Dec. 29, 1835, 7 Stat. 478. Acknowledging the Tribe's past "difficulties ****2508** ... under the jurisdiction and laws of the State Governments," the treaty also pledged that the Tribe would remain forever free from "State sovereignties." *Ibid.*; see Art. 5, *id.*, at 481. These promises constituted an "indemnity," guaranteed ***662** by "*the faith of the nation*," that "[t]he United States and the Indian tribes [would be] the sole parties" with power on new western reservations like the Cherokee's. H. Rep. No. 474, at 18 (emphasis in original).

Over time, Congress revised some of these arrangements. In 1885, dissatisfied with how the Sioux Tribe responded to the murder of a tribal member, Congress adopted the Major Crimes Act (MCA). See R. Anderson, S. Krakoff, & B. Berger, American Indian Law: Cases and Commentary 90–96 (4th ed. 2008) (Anderson). There, Congress directed that, moving forward, only the federal government, not the Tribes, could prosecute certain serious offenses by tribal members on tribal lands. See 18 U.S.C. § 1153(a). On its own initiative, this Court then went a step further. Relying on language in certain laws admitting specific States to the Union, the Court held that States were now entitled to prosecute crimes by non-Indians against non-Indians on tribal lands. See *United States v. McBratney*, 104 U.S. 621, 623, 26 L.Ed. 869 (1882); *Draper v. United States*, 164 U.S. 240, 243, 247, 17 S.Ct. 107, 41 L.Ed. 419 (1896). Through all these developments, however, at least one promise remained: States could play

no role in the prosecution of crimes by or against Native Americans on tribal lands. See *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

In 1906, Congress reaffirmed this promise to the Cherokee in Oklahoma. As a condition of its admission to the Union, Congress required Oklahoma to "declare that [it] forever disclaim[s] all right and title in or to ... all lands lying within [the State's] limits owned or held by any Indian, tribe, or nation." 34 Stat. 270. Instead, Congress provided that tribal lands would "remain subject to the jurisdiction, disposal, and control of the United States." *Ibid*. As if the point wasn't clear enough, Congress further provided that "nothing contained in the [new Oklahoma state] constitution shall be construed to ... limit or affect the authority of the Government of the United States ... respecting [the State's] Indians ... which it would have been competent to make ***663** if this Act had never been passed." *Id.*, at 267–268. The following year, Oklahoma adopted a State Constitution consistent with Congress's instructions. Art. I, § 3; see also Clinton 961.

In the years that followed, certain States sought arrangements different from Oklahoma's. And once more, Congress intervened. In 1940, Kansas asked for and received permission from Congress to exercise jurisdiction over crimes "by or against Indians" on tribal lands. 18 U.S.C. § 3243. Through the rest of the decade, Congress experimented with similar laws for New York, Iowa, and North Dakota.[1] Then, in 1953, Congress adopted Public Law 280. That statute granted five additional States criminal "jurisdiction over offenses ... by or against Indians" and established procedures by which further States could secure the same authority. See ch. 505, § 2, 67 Stat. 588. Ultimately, however, some of these arrangements proved unpopular. Not only with affected Tribes. See C. Goldberg-Ambrose, Public Law 280 and the Problem of Lawlessness in California Indian Country, 44 UCLA L. Rev. 1405, 1406–1407 (1997) (Goldberg-Ambrose). ****2509** These arrangements also proved unpopular with certain States that viewed their new law enforcement responsibilities on tribal lands as unfunded federal mandates. See Anderson 436. A few States even renounced their Public Law 280 jurisdiction. See Cohen 579.

By 1968, the federal government came to conclude that, "as a matter of justice and as a matter of enlightened social policy," the "time ha[d] come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions." Richard M. Nixon, Special Message on Indian Affairs (July 8, 1970). Consistent with that vision, Congress ***664** amended Public Law 280 to require tribal consent before any State could assume jurisdiction over crimes by or against Indians on tribal lands. Act of Apr. 11, 1968, § 401, 82 Stat. 78, § 406, *id.*, at 80 (25 U.S.C. §§ 1321(a), 1326). Recognizing that certain States' enabling acts barred state authority on tribal lands and required States to adopt constitutional provisions guaranteeing as much, Congress also authorized States to "amend, where necessary, their State constitution or ... statutes." § 404, 82 Stat. 79 (25 U.S.C. § 1324). In doing so, however, Congress emphasized that affected States could not assume jurisdiction to prosecute offenses by or against tribal members on tribal lands until they "appropriately amended their State constitution or statutes." *Ibid.* To date, Oklahoma has not amended its state constitutional provisions disclaiming jurisdiction over tribal lands. Nor has Oklahoma sought or obtained tribal consent to the exercise of its jurisdiction. See *The Honorable E. Kelly Haney*, 22 Okla. Op. Atty. Gen. No. 90–32, 72, 1991 WL 567868, *1 (Mar. 1, 1991) (*Haney*). Thus, Oklahoma has remained, in Congress's words, a State "not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within" its borders. 25 U.S.C. § 1321(a).

C

Rather than seek tribal consent pursuant to Public Law 280 or persuade Congress to adopt a state-specific statute authorizing it to prosecute crimes by or against tribal members on tribal lands, Oklahoma has chosen a different path. In the decades following statehood, many settlers engaged in schemes to seize Indian lands and mineral rights by subterfuge. See A. Debo, And Still the Waters Run 92–125 (1940) (Debo). These schemes resulted in "the bulk of the landed wealth of the Indians" ending up in the hands of the new settlers. See *ibid.*; see also *id.*, at 181–202. State officials and courts were sometimes complicit in the process. See *id.*, at 182–183, 185, 195–196. For years, too, Oklahoma ***665** courts asserted the power to hear criminal cases involving Native Americans on lands allotted to and owned by tribal members despite the contrary commands of the Oklahoma Enabling Act and the State's own constitution. The State only

disavowed that practice in 1991, after defeats in state and federal court. See *Haney*, 1991 WL 567868, *1–*3; see also *State v. Klindt*, 782 P.2d 401, 404 (Okla. Crim. App. 1989); *Ross v. Neff*, 905 F.2d 1349, 1353 (CA10 1990).

Still, it seems old habits die slowly. Even after renouncing the power to try criminal cases involving Native Americans on *allotted* tribal lands, Oklahoma continued to claim the power to prosecute crimes by or against Native Americans within tribal *reservations*. The State did so on the theory that at some (unspecified) point in the past, Congress had disestablished those reservations. In *McGirt* v. *Oklahoma*, this Court rejected that argument in a case involving the Muscogee (Creek) Tribe. ****2510** 591 U.S. ——, ——, 140 S.Ct. 2452, 2459, 207 L.Ed.2d 985 (2020). We explained that Congress had never disestablished the Creek Reservation. Nor were we willing to usurp Congress's authority and disestablish that reservation by a lawless act of judicial fiat. See *id.*, at ——, 140 S.Ct., at 2481–2482. Accordingly, only federal and tribal authorities were lawfully entitled to try crimes by or against Native Americans within the Tribe's reservation. *Ibid.* Following *McGirt*, Oklahoma's courts recognized that what held true for the Creek also held true for the Cherokee: Congress had never disestablished its reservation and, accordingly, the State lacked authority to try offenses by or against tribal members within the Cherokee Reservation. See *Spears v. State*, 2021 OKCR 7, ¶¶ 10–14, 485 P.3d 873, 876–877.

Once more, Oklahoma could have responded to this development by asking Congress for state-specific legislation authorizing it to exercise criminal jurisdiction on tribal lands, as Kansas and various other States have done. The State could have employed the procedures of Public Law 280 to amend its own laws and obtain tribal consent. Instead, ***666** Oklahoma responded with a media and litigation campaign seeking to portray reservations within its State—where federal and tribal authorities may prosecute crimes by and against tribal members and Oklahoma can pursue cases involving only non-Indians—as lawless dystopias. See Brief for Cherokee Nation et al. as *Amici Curiae* 18 (Cherokee Brief) ("The State's tale of a criminal dystopia in eastern Oklahoma is just that: A tale").

That effort culminated in this case. In it, Oklahoma has pursued alternative lines of argument. First, the State has asked this Court to revisit *McGirt* and unilaterally eliminate all reservations in Oklahoma. Second, the State has argued that it enjoys a previously unrecognized "inherent" authority to try crimes within reservation boundaries by non-Indians against tribal members—a claim Oklahoma's own courts have rejected. See *Bosse* v. *State*, 2021 OK CR 3, 484 P. 3d 286, 294–295.

Ultimately, this Court declined to entertain the State's first argument but agreed to review the second. Nominally, the question comes to us in a case involving Victor Castro-Huerta, a non-Indian who abused his Cherokee stepdaughter within the Tribe's reservation. Initially, a state court convicted him for a state crime. After *McGirt*, the Oklahoma Court of Criminal Appeals determined that his conviction was invalid because only federal and tribal officials possess authority to prosecute crimes by or against Native Americans on the Cherokee Reservation. See App. to Pet. for Cert. 4a. The federal government swiftly reindicted Mr. Castro-Huerta, and a federal court again found him guilty. Now before us, Oklahoma seeks to undo Mr. Castro-Huerta's federal conviction and have him transferred from federal prison to a state facility to resume his state sentence.

Really, though, this case has less to do with where Mr. Castro-Huerta serves his time and much more to do with Oklahoma's effort to gain a legal foothold for its wish to exercise jurisdiction over crimes involving tribal members on ***667** tribal lands. To succeed, Oklahoma must disavow adverse rulings from its own courts; disregard its 1991 recognition that it lacks legal authority to try cases of this sort; and ignore fundamental principles of tribal sovereignty, a treaty, the Oklahoma Enabling Act, its own state constitution, and Public Law 280. Oklahoma must pursue a proposition so novel and so unlikely that in over two centuries not a single State has successfully attempted it in this Court. Incredibly, too, the defense of tribal interests against the State's gambit falls to a non-Indian criminal defendant. The real party ****2511** in interest here isn't Mr. Castro-Huerta but the Cherokee, a Tribe of 400,000 members with its own government. Yet the Cherokee have no voice as parties in these proceedings; they and other Tribes are relegated to the filing of *amicus* briefs.

II

A

Today the Court rules for Oklahoma. In doing so, the Court announces that, when it comes to crimes by non-Indians against tribal members within tribal reservations, Oklahoma may "exercise jurisdiction." *Ante*, at 2492 - 2493. But this declaration comes as if by oracle, without any sense of the history recounted above and unattached to any colorable legal authority. Truly, a more ahistorical and mistaken statement of Indian law would be hard to fathom.

The source of the Court's error is foundational. Through most of its opinion, the Court proceeds on the premise that Oklahoma possesses "inherent" sovereign power to prosecute crimes on tribal reservations until and unless Congress "preempt[s]" that authority. *Ante*, at 2492 - 2501. The Court emphasizes that States normally wield broad police powers within their borders absent some preemptive federal law. See *ante*, at 2492 - 2494; see also *Virginia Uranium, Inc. v. Warren*, 587 U.S. ——, ——, 139 S.Ct. 1894, 1906, 204 L.Ed.2d 377 (2019) (lead opinion).

But the effort to wedge Tribes into that paradigm is a category error. Tribes are not private organizations within ***668** state boundaries. Their reservations are not glorified private campgrounds. Tribes are sovereigns. And the preemption rule applicable to them is exactly the opposite of the normal rule. Tribal sovereignty means that the criminal laws of the States "can have no force" on tribal members within tribal bounds unless and until Congress clearly ordains otherwise. *Worcester*, 6 Pet. at 561. After all, the power to punish crimes by or against one's own citizens within one's own territory to the exclusion of other authorities is and has always been among the most essential attributes of sovereignty. See, *e.g.*, *Wilson v. Girard*, 354 U.S. 524, 529, 77 S.Ct. 1409, 1 L.Ed.2d 1544 (1957) (*per curiam*) ("A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders"); see also *Schooner Exchange v. McFaddon*, 7 Cranch 116, 136, 3 L.Ed. 287 (1812); E. de Vattel, Law of Nations 81–82 (1835 ed.).

Nor is this " 'notion,' " *ante*, at 2493, some discarded artifact of a bygone era. To be sure, Washington, Jefferson, Marshall, and so many others at the Nation's founding appreciated the sovereign status of Native American Tribes. See Part I–A, *supra*. But this Court's own cases have consistently reaffirmed the point. Just weeks ago, the Court held that federal prosecutors did not violate the Double Jeopardy Clause based on the essential premise that tribal criminal law is the product of a "separate sovereig[n]" exercising its own "retained sovereignty." *Denezpi* v. *United States*, 596 U.S. ——, ——, 119 S.Ct. 1573, ——, 143 L.Ed.2d 669 (2022) (internal quotation marks omitted). Recently, too, this Court confirmed that Tribes enjoy sovereign immunity from suit. See *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788–789, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014). Throughout our history, "the basic policy of *Worcester*" that Tribes are separate sovereigns "has remained." *Williams v. Lee*, 358 U.S. at 219, 79 S.Ct. 269. [2]

****2512** ***669** Because Tribes are sovereigns, this Court has consistently recognized that the usual "standards of pre-emption" are "unhelpful." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980); see also *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 475–476, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 170–172, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). In typical preemption cases, courts "start with the assumption" that Congress has not displaced state authority. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). But when a State tries to regulate tribal affairs, the same "backdrop" does not apply because Tribes have a "claim to sovereignty [that] long predates that of our own Government." *McClanahan*, 411 U.S. at 172, 93 S.Ct. 1257; see also *Bracker*, 448 U.S. at 143, 100 S.Ct. 2578. So instead of searching for an Act of Congress *displacing* state authority, our cases require a search for federal legislation *conferring* state authority: "[U]nless and until Congress acts, the tribes retain their historic sovereign authority." *Bay Mills Indian Community*, 572 U.S. at 788, 134 S.Ct. 2024 (internal quotation marks omitted); see *United States* v. *Cooley*, 593 U.S. ——, —— – ——, 141 S.Ct. 1638, 1643, 210 L.Ed.2d 1 (2021) (instructing courts to ask if a "treaty or statute has explicitly divested Indian tribes of the ... authority at issue"); Anderson 317. What is more, courts must "tread lightly" before concluding Congress has abrogated tribal sovereignty in favor of state authority. *Santa Clara Pueblo*, 436 U.S. at 60, 98 S.Ct. 1670. Any ambiguities in Congress's work must be resolved in favor of tribal sovereignty and against state power. See *ibid.*; see also *Cotton Petroleum*, 490 U.S. at 177, 109 S.Ct. 1698. And, if anything, these rules bear special force in the criminal context, which lies at the heart of tribal

sovereignty and in ***670** which Congress "has provided a nearly comprehensive set of statutes allocating criminal jurisdiction" among federal, tribal, and state authorities. Cohen 527. [3]

****2513** B

From 1834 to 1968, Congress adopted a series of laws governing criminal jurisdiction on tribal lands. Those laws are many, detailed, and clear. Each operates against the backdrop understanding that Tribes are sovereign and that in our constitutional order only Congress may displace their authority. Nor does anything in Congress's work begin to confer on Oklahoma the authority it seeks.

1

Start with the GCA, first adopted by Congress in 1834 and most recently reenacted in 1948. The GCA provides:

"Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to Indian Country.

***671** This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." 18 U.S.C. § 1152.

As recounted above, Congress adopted the GCA in the aftermath of *Worcester*'s holding that the federal government alone may regulate tribal affairs and States do not possess inherent authority to apply their criminal laws on tribal lands. Responding to that decision, Congress did not choose to exercise its authority to allow state jurisdiction on tribal lands. Far from it. Congress chose only to extend *federal* law to tribal lands—and even then only for certain crimes involving non-Indian settlers. Otherwise, Congress recognized, those settlers might be subject to *tribal* criminal jurisdiction alone. See Part I–B, *supra*. Several features of the law confirm this understanding. Take just three.

First, the GCA compares "Indian country" to "place[s] within the sole and exclusive jurisdiction of the United States." § 1152. The latter category refers to federal enclaves like national parks and military bases that the Constitution places under exclusive federal control. See Art. I, § 8, cl. 17; *United States v. Cowboy*, 694 F.2d 1228, 1234 (CA10 1982); see also *Ex parte Crow Dog*, 109 U.S. 556, 567, 3 S.Ct. 396, 27 L.Ed. 1030 (1883). And state laws generally do not apply in federal enclaves. See, *e.g.*, *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 532–533, 5 S.Ct. 995, 29 L.Ed. 264 (1885). Rather than unambiguously endow States with any sort of prosecutorial authority on tribal lands, the GCA thus makes plain that tribal lands are to be treated like federal enclaves subject to federal, not state, control.

Second, the GCA provides that the "general laws of the United States as to the punishment of offenses" shall apply ***672** on tribal lands. § 1152. Again, nothing here purports to extend state criminal laws to tribal lands. Quite the contrary. It would hardly make sense to apply federal general criminal law—to address all crimes ranging from murder to jaywalking—if state general criminal law already did the job. Traditionally, this Court does not assume multiple "sets of [general] criminal laws" apply to those subject to federal protection. *Lewis v. United States*, 523 U.S. 155, 163, 118 S.Ct. 1135, 140 L.Ed.2d 271 (1998). Instead, when Congress converts an area into a federal enclave, we usually presume later-enacted state law "does not ****2514** apply." *Parker Drilling Management Services, Ltd.* v. *Newton*, 587 U.S. ——, ——, 139 S.Ct. 1881, 1890, 204 L.Ed.2d 165 (2019).

Third, after applying the federal government's general criminal laws to tribal lands, the GCA carves out some exceptions. It provides that federal law "shall not extend" to crimes involving only Indians, crimes by Indians where the perpetrator "has been punished by the local law of the tribe," or where a treaty grants a Tribe exclusive jurisdiction. § 1152. These exceptions ensure that the federal government does not meddle in cases most likely to implicate tribal sovereignty. And it defies the imagination to think Congress would have taken such care to limit federal authority over these most sensitive cases while (somewhere, somehow) leaving States, so often the Tribes' "deadliest enemies," to enjoy free rein.

United States v. Kagama, 118 U.S. 375, 384, 6 S.Ct. 1109, 30 L.Ed. 228 (1886).

2

When Congress enacted the MCA in 1885, it proceeded once more against the "backdrop" rule that only tribal criminal law applies on tribal lands, that States enjoy no inherent authority to prosecute cases on tribal lands, and that only Congress may displace tribal power. Nor, once more, did Congress's new legislation purport to allow States to prosecute crimes on tribal lands. In response to concerns with how tribal authorities were handling major crimes committed by tribal members, in the MCA Congress took a step ***673** beyond the GCA and instructed that, in the future, the *federal* government would have "exclusive jurisdiction" to prosecute certain crimes by Indian defendants on tribal lands. 18 U.S.C. § 1153(a); see also Part I–B, *supra*. Here again, Congress's work hardly would have been necessary or made sense if States already possessed jurisdiction to try crimes by or against Indians on tribal reservations. Plainly, Congress's "purpose" in adopting the MCA was to answer the "objection" that major crimes by tribal members on tribal lands would otherwise be subject to prosecution by tribal authorities alone. See *Kagama*, 118 U.S. at 383–385, 6 S.Ct. 1109.

3

Consider next the Treaty of New Echota and the Oklahoma Enabling Act. In 1835, the United States entered into a treaty with the Cherokee. In that treaty, the Nation promised that, within a new reservation in what was to become Oklahoma, the Tribe would enjoy the right to govern itself and remain forever free from "State sovereignties" and "the jurisdiction of any State." Treaty with the Cherokee, Preamble, 7 Stat. 478. This Court has instructed that tribal treaties must be interpreted as they "would naturally be understood by the Indians" at ratification. *Herrera* v. *Wyoming*, 587 U.S. ——, ——, 139 S.Ct. 1686, 1701, 203 L.Ed.2d 846 (2019) (internal quotation marks omitted). And having just lost their traditional homelands to Georgia, who can doubt that the Cherokee understood this promise as a guarantee that they would retain their sovereign authority over crimes by or against tribal members subject only to federal, not state, law? That was certainly the contemporaneous understanding of the House Committee on Indian Affairs, which observed that "[t]he United States and the Indian tribes [would be] the sole parties" with power over new reservations in the West. H. Rep. No. 474, at 18; see also Part I–B, *supra*. This Court has long shared the same view. "By treaties and statutes," the Court has said, "the right of the Cherokee [N]ation to exist as an autonomous ***674** body, subject always to the paramount authority of the United States, has been recognized." ****2515** *Talton v. Mayes*, 163 U.S. 376, 379–380, 16 S.Ct. 986, 41 L.Ed. 196 (1896). [4]

***675** In 1906, Congress sought to deliver on its treaty promises when it adopted the Oklahoma Enabling Act. That law paved the way for the new State's admission to the Union. But in doing so, Congress took care to require Oklahoma to "agree and declare" that it would "forever disclaim all right and title in or to ... all lands lying within [the State's] limits owned or held by any Indian, tribe, or nation." 34 Stat. 270. Instead of granting the State some new power to prosecute crimes by or against tribal members, Congress insisted that tribal lands "shall be and remain subject to the jurisdiction, disposal, and control of the United States." *Ibid*. Oklahoma complied with Congress's instructions by adopting both of these commitments verbatim in its Constitution. Art. I, § 3.

Underscoring the nature of this arrangement, the Enabling Act further provided that "nothing contained in the [Oklahoma] constitution shall be construed ... 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*." 34 Stat. 267–268 (emphasis added). Prior ****2516** to statehood, too, no one could have questioned Congress's exclusive authority to regulate tribal lands and affairs in the Oklahoma territory. See, *e.g.*, U.S. Const., Art. IV; *Kagama*, 118 U.S. at 380, 6 S.Ct. 1109 (citing federal government's "exclusive sovereignty" over federal territories); *Simms v. Simms*, 175 U.S. 162, 168, 20 S.Ct. 58, 44 L.Ed. 115 (1899) ("In the Territories of the United States, Congress has the entire dominion and sovereignty, ... Federal and state"); *Harjo v. Kleppe*, 420 F.Supp. 1110, 1121 (DDC 1976) (federal courts had pre-statehood jurisdiction); Clinton 960–962. The Oklahoma ***676** Enabling Act and the

commitments it demanded in the new Oklahoma Constitution sought to maintain this status quo.

Recognizing the point, this Court has explained that, "[i]n passing the enabling act for the admission of the State of Oklahoma ... Congress was careful to preserve the authority of the Government of the United States over the Indians, their lands and property, *which it had prior to the passage of the act*." *Tiger v. Western Investment Co.*, 221 U.S. 286, 309, 31 S.Ct. 578, 55 L.Ed. 738 (1911) (emphasis added). This Court has explained, too, that the "grant of statehood" to Oklahoma did nothing to disturb "the long-settled rule" that the "guardianship of the United States" over Native American Tribes in Oklahoma "has not been abandoned." *United States v. Ramsey*, 271 U.S. 467, 469, 46 S.Ct. 559, 70 L.Ed. 1039 (1926). Instead, this Court has acknowledged, the federal government's "authority in respect of crimes committed by or against Indians continued after the admission of the state as it was before." *Ibid.* In fact, the Court has long interpreted nearly identical language in the Arizona Enabling Act—enacted close in time to its Oklahoma counterpart—as reinforcing the traditional rule "that the States lac[k] jurisdiction" on tribal lands over crimes by or against Native Americans. *McClanahan*, 411 U.S. at 175, 93 S.Ct. 1257; see also *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 687, n. 3, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965). [5]

***677 **2517** 4

The few occasions on which Congress has even arguably authorized the application of state criminal law on tribal reservations still do not come anywhere near granting Oklahoma the power it seeks. In the late 1800s, this Court in *McBratney* and *Draper* held that federal statutes admitting certain States to the Union effectively meant those States could now prosecute crimes on tribal lands involving only non-Indians. Yet, as aggressive as these decisions were, they took care to safeguard the rule that a State's admission to the Union does not convey with it the power to punish "crimes committed by or against Indians." *McBratney*, 104 U.S. at 624; *Draper*, 164 U.S. at 247, 17 S.Ct. 107. Indeed, soon after Oklahoma became a State, this Court explained that the "grant of statehood" may have endowed Oklahoma with authority to try crimes "not committed by or against Indians," but with statehood did not come any authority to try "crimes by or against Indians" on tribal lands. *Ramsey*, 271 U.S. at 469, 46 S.Ct. 559; see also n. 5, *supra*; *Donnelly v. United States*, 228 U.S. 243, 271, 33 S.Ct. 449, 57 L.Ed. 820 (1913); *Williams v. Lee*, 358 U.S. at 220, 79 S.Ct. 269; Cohen ***678** 506–509. The decision whether and when this arrangement should "cease" "rest[ed] with Congress alone." *Ramsey*, 271 U.S. at 469, 46 S.Ct. 559.

The truth is, Congress has authorized the application of state criminal law on tribal lands for offenses committed by or against Native Americans only in very limited circumstances. The most notable examples can be found in Public Law 280 and related statutes. In 1940, Kansas successfully lobbied Congress for criminal jurisdiction in Indian country. Nearly identical laws for North Dakota, Iowa, and New York followed close behind. Then in 1953, Congress adopted Public Law 280 in which it authorized five States to exercise criminal jurisdiction on tribal lands and established procedures for additional States to assume similar authority. In 1968, Congress amended Public Law 280. Now, before a State like Oklahoma may try crimes by or against Native Americans arising on tribal lands, it must take action to amend any state law disclaiming that authority; then, the State must seek and obtain tribal consent to any extension of state jurisdiction. See Part I–B, *supra*; Clinton 958–962. Unless a State takes these steps, it does "not hav[e] jurisdiction." 25 U.S.C. §§ 1321(a), 1323(b). [6]

5

The Court's suggestion that Oklahoma enjoys "inherent" authority to try crimes against Native Americans within the Cherokee Reservation makes a mockery of all of Congress's work from 1834 to 1968. The GCA and MCA? On the ***679** Court's account, Congress foolishly extended federal criminal law to tribal lands on a mistaken assumption that only tribal law would otherwise apply. Unknown to anyone until today, state law applied all along. The treaty, the Oklahoma Enabling Act, and the provision in Oklahoma's constitution that Congress insisted upon as a condition of statehood? The Court effectively ignores them. The Kansas Act and its sibling statutes? On the Court's account, they were ****2518** needless too. Congress's instruction in Public Law 280 that States may not exercise jurisdiction over crimes by or against tribal members on tribal lands until they amend contrary state law

and obtain tribal consent? Once more, it seems the Court thinks Congress was hopelessly misguided.

Through it all, the Court makes no effort to grapple with the backdrop rule of tribal sovereignty. The Court proceeds oblivious to the rule that only a clear act of Congress may impose constraints on tribal sovereignty. The Court ignores the fact that Congress has never come close to subjecting the Cherokee to state criminal jurisdiction over crimes against tribal members within the Tribe's reservation. The Court even disregards our precedents recognizing that the "grant of statehood" to Oklahoma did not endow the State with any power to try "crimes committed by or against Indians" on tribal lands but reserved that authority to the federal government and Tribes alone. *Ramsey*, 271 U.S. at 469, 46 S.Ct. 559; see also *Tiger*, 221 U.S. at 309, 31 S.Ct. 578. From start to finish, the Court defies our duty to interpret Congress's laws and our own prior work "harmoniously" as "part of an entire *corpus juris*." A. Scalia & B. Garner, Reading Law 252 (2012); see also *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184–185, 108 S.Ct. 1704, 100 L.Ed.2d 158 (1988).

C

Putting aside these astonishing errors, Congress's work and this Court's precedents yield three clear principles that firmly resolve this case. First, tribal sovereign authority excludes the operation of other sovereigns' criminal laws unless and ***680** until Congress ordains otherwise. Second, while Congress has extended a good deal of federal criminal law to tribal lands, in Oklahoma it has authorized the State to prosecute crimes by or against Native Americans within tribal boundaries only if it satisfies certain requirements. Under Public Law 280, the State must remove state-law barriers to jurisdiction and obtain tribal consent. Third, because Oklahoma has done neither of these things, it lacks the authority it seeks to try crimes against tribal members within a tribal reservation. Until today, all this settled law was well appreciated by this Court, the Executive Branch, and even Oklahoma.

Consider first our own precedents and those of other courts. In 1946 in *Williams* v. *United States*, this Court recognized that, while States "may have jurisdiction over offenses committed on th[e] reservation between persons who are not Indians, the laws and courts of the United States, rather than those of [the States], have jurisdiction over offenses committed there ... by one who is not an Indian against one who is an Indian." 327 U.S. 711, 714, 66 S.Ct. 778, 90 L.Ed. 962 (footnote omitted). In *Williams* v. *Lee*, issued in 1959, this Court was clear again: "[I]f the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive." 358 U.S. at 220, 79 S.Ct. 269. As early as 1926, this Court made the same point while speaking directly to Oklahoma. *Ramsey*, 271 U.S. at 469–470, 46 S.Ct. 559. It is a point our cases have continued to make in recent years. [7] It is a point a host ****2519** of other courts—including state courts issuing decisions contrary to their own interests—have acknowledged too. [8]

***681** The Executive Branch has likewise understood the States to lack authority to try crimes by or against Indians in Indian country absent congressional authorization. Not only did the Washington Administration recognize as much. See Part I–A, *supra*. The same view has persisted throughout the Nation's history. In 1940, the Acting Secretary of the Interior advised Congress that state criminal jurisdiction extends "only to situations where both the offender and the victim" are non-Indians. S. Rep. No. 1523, 76th Cong., 3d Sess., 2 (Vol. 2). A few decades later, the Solicitor General made a similar representation to this Court. See Brief for United States as *Amicus Curiae* in *Arizona v. Flint*, O. T. 1988, No. 88603, p. 3 (*Flint Amicus* Brief). In *McGirt*, the federal government once more acknowledged that States cannot prosecute crimes by or against tribal members within still-extant tribal reservations. See Brief for United States as *Amicus Curiae* in *McGirt* v. *Oklahoma*, O. T. 2019, No. 18–9526, p. 38. In this case, the government has espoused the same view yet again. See Brief for United States as *Amicus Curiae* 4; see also Dept. of Justice, Criminal Resource Manual 685 (updated Jan. 22, 2020). [9]

In the past, even Oklahoma has more or less conceded the point. The last time Oklahoma was before us, it asked this ***682** Court to usurp congressional authority and disestablish the Creek Reservation because, otherwise, the State "would not have jurisdiction over" "crimes committed against Indians" within its boundaries. See Tr. of Oral Arg. in *McGirt* v. *Oklahoma*, No. 18–9526, O. T. 2019, p. 54; see also *McGirt*, 591 U.S., at —— – ——, 140 S.Ct., at 2487–2480. In 1991, Oklahoma's attorney general formally resolved that major "[c]rimes committed by or against Indians ... are under

the exclusive province of the United States," while Tribes retain exclusive jurisdiction over "minor crimes committed by Indians." *Haney*, 22 Okla. Opp. Atty. Gen. 71, 1991 WL 567868, *3. And Oklahoma's own courts have recently taken the same position even in the face of vehement opposition from the State's executive branch. See, *e.g.*, *Spears*, 485 P.3d at 875, 877.

D

Against all this evidence, what is the Court's reply? It acknowledges that, at the ****2520** Nation's founding, tribal sovereignty precluded States from prosecuting crimes on tribal lands by or against tribal members without congressional authorization. See *ante*, at 2493. But the Court suggests this traditional " 'notion' " flipped 180 degrees sometime in "the latter half of the 1800s." *Ante*, at 2492, 2502. Since then, the Court says, Oklahoma has enjoyed the "inherent" power to try at least crimes by non-Indians against tribal members on tribal reservations until and unless Congress preempts state authority.

But exactly when and how did this change happen? The Court never explains. Instead, the Court seeks to cast blame for its ruling on a grab bag of decisions issued by our predecessors. But the failure of that effort is transparent. Start with *McBratney*, which the Court describes as our "leading case in the criminal context." *Ante*, at 2494. There, as we have seen, the Court said that States admitted to the Union may gain the right to prosecute cases involving only non-Indians on tribal lands, but they do *not* gain any inherent ***683** right to punish "crimes committed by or against Indians" on tribal lands. *McBratney*, 104 U.S. at 624. The Court's reliance on *Draper* fares no better, for that case issued a similar disclaimer. See 164 U.S. at 247, 17 S.Ct. 107. Tellingly, not even Oklahoma thinks *McBratney* and *Draper* compel a ruling in its favor. See Brief for Petitioner 12. And if anything, the Court's invocation of *Donnelly*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820, is more baffling still. *Ante*, at 2498 - 2499, n. 3. There, the Court once more reaffirmed the rule that "offenses committed by or against Indians" on tribal lands remain subject to federal, not state, jurisdiction. *Donnelly*, 228 U.S. at 271, 33 S.Ct. 449; see also *Ramsey*, 271 U.S. at 469, 46 S.Ct. 559.

That leaves the Court to assemble a string of carefully curated snippets—a clause here, a sentence there—from six decisions out of the galaxy of this Court's Indian law jurisprudence. *Ante*, at 2493- 2494. But this collection of cases is no more at fault for the Court's decision than the last. *Organized Village of Kake* v. *Egan*—which the Court seems to think is some magic bullet, see *ante*, at 2493, 2498 - 2499, n. 3, 2502, 2502-2504—addressed the prosaic question whether Alaska could apply its fishing laws on lands owned by a native Alaska tribal corporation. 369 U.S. 60, 61–63, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962); see also n. 5, *supra*. Subsequently, the Court cabined that case to circumstances "dealing with Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government." *McClanahan*, 411 U.S. at 167–168, 93 S.Ct. 1257. Meanwhile, *New York ex rel. Cutler* v. *Dibble* allowed New York to use civil proceedings to eject non-Indian trespassers on Indian lands. 21 How. 366, 369–371, 16 L.Ed. 149 (1859). In *Surplus Trading Co*. v. *Cook*, the crime at issue did not take place on tribal lands but on a "supply station of the United States" sold by Arkansas to the federal government. 281 U.S. 647, 649, 50 S.Ct. 455, 74 L.Ed. 1091 (1930). In *New York ex rel. Ray* v. *Martin*, this Court merely reaffirmed *McBratney* and held that States could exercise jurisdiction over crimes involving only non-Indians. ***684** 326 U.S. 496, 499–500, 66 S.Ct. 307, 90 L.Ed. 261 (1946). Both *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation* and *Nevada* v. *Hicks* issued holdings about state civil jurisdiction, not criminal jurisdiction striking at the heart of tribal sovereignty. See 502 U.S. 251, 256–258, 270, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992); 533 U.S. 353, 361, 363, 374, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001).

In the end, the Court cannot fault our predecessors for today's decision. The ****2521** blame belongs only with this Court here and now. Standing before us is a mountain of statutes and precedents making plain that Oklahoma possesses no authority to prosecute crimes against tribal members on tribal reservations until it amends its laws and wins tribal consent. This Court may choose to ignore Congress's statutes and the Nation's treaties, but it has no power to negate them. The Court may choose to disregard our precedents, but it does not purport to overrule a single one. As a result, today's decision surely marks an embarrassing new entry into the anticanon of Indian law. But its mistakes need not—and should not—be repeated.

III

Doubtless for some of these reasons, even the Court ultimately abandons its suggestion that Oklahoma is "*inherent[ly]*" free to prosecute crimes by non-Indians against tribal members on a tribal reservation absent a federal statute "preempt[ing]" its authority. *Ante*, at 2499. In the end, the Court admits that tribal sovereignty *can* require the exclusion of state authority even absent a preemptive federal statute. *Ante*, at 2500 - 2501. But then, after correcting course, the Court veers off once more. To determine whether tribal sovereignty displaces state authority in a case involving a non-Indian defendant and an Indian victim on a reservation in Oklahoma, the Court resorts to a "*Bracker* balancing" test. *Ibid.* Applying that test, the Court concludes that Oklahoma's interests in this case outweigh those of the Cherokee. All this, too, is mistaken root and branch.

***685** A

Begin with the most fundamental problem. The Court invokes what it calls the "*Bracker* balancing" test with no more appreciation of that decision's history and context than it displays in its initial suggestion that the usual rules of preemption apply to Tribes. The Court tells us nothing about *Bracker* itself, its reasoning, or its limits. Perhaps understandably so, for *Bracker* never purported to claim for this Court the raw power to "balance" away tribal sovereignty in favor of state criminal jurisdiction over crimes by or against tribal members—let alone ordain a wholly different set of jurisdictional rules than Congress already has.

Bracker involved a relatively minor civil dispute. Arizona sought to tax vehicles used by the White Mountain Apache Tribe in logging operations on tribal lands. See *Bracker*, 448 U.S. at 138–140, 100 S.Ct. 2578. The Tribe opposed the effort, pointing to a federal law that regulated tribal logging but did not say anything about preempting the State's vehicle tax. See *id.*, at 141, 145, 100 S.Ct. 2578. The Court began by recognizing that the usual rules of preemption are not "properly applied" to Tribes. *Id.*, at 143, 100 S.Ct. 2578. Instead, the Court started with the traditional " 'backdrop' " presumption that States lack jurisdiction in Indian country. *Ibid.* And the Court explained that any ambiguities about the scope of federal law must be "construed generously" in favor of the Tribes as sovereigns. *Id.*, at 143–144, 100 S.Ct. 2578. With these rules in mind, the Court proceeded to turn back the State's tax based on a "particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Id.*, at 145, 100 S.Ct. 2578. The Court judged that "traditional notions of [tribal] sovereignty," the federal government's "policy of promoting tribal self-sufficiency," and the rule requiring it to resolve "[a]mbiguities" in favor of the Tribe trumped any competing state interest. *Id.*, at 143–144, 151, 100 S.Ct. 2578.

Nothing in any of this gets the Court close to where it wishes to go. If Arizona ****2522** had to proceed against the traditional ***686** "backdrop" rule excluding state jurisdiction, Oklahoma must. And if Arizona could not overcome that backdrop rule because it could not point to clear federal statutory language authorizing its comparatively minor civil tax, it is unfathomable how Oklahoma might overcome that rule here. The State has pointed—and can point—to nothing in Congress's work granting it the power to try crimes against tribal members on a tribal reservation. In *Bracker*, the Court found it instructive that Congress had "comprehensive[ly]" regulated "the harvesting of Indian timber," even if it had not spoken directly to the question of vehicle taxes. *Id.*, at 145–146, 148, 100 S.Ct. 2578. Here, Congress has not only pervasively regulated criminal jurisdiction in Indian country, it has spoken to the very situation we face: States like Oklahoma may exercise jurisdiction over crimes within tribal boundaries by or against tribal members only with tribal consent.

The simple truth is *Bracker* supplies zero authority for this Court's course today. If Congress has not always "been specific about the allocation of civil jurisdiction in Indian country," the same can hardly be said about the allocation of criminal authority. Cohen 527. Congress "has provided a nearly comprehensive set of statutes allocating criminal jurisdiction." *Ibid.* In doing so, Congress has *already* "balanced" competing tribal, state, and federal interests—and its balance demands tribal consent. Exactly nothing in *Bracker* permits us to ignore Congress's directive.

B

Plainly, the Court's balancing-test game is not one we should be playing in this case. But what if we did? Suppose this Court could (somehow) ignore Congress's decision to allow States like Oklahoma to exercise criminal jurisdiction in cases like ours only with tribal consent. Suppose we could (somehow) replace that rule with one of our own creation. Even proceeding on that stunning premise, it is ***687** far from obvious how the Court arrives at its preferred result.

In reweighing competing state and tribal interests for itself, the Court stresses two points. First, the Court suggests that its balance is designed to "help" Native Americans. *Ante*, at 2501 - 2502 (suggesting that Indians would be "second-class citizens" without this Court's intervention); Tr. of Oral Arg. 66 (suggesting state jurisdiction is designed to "help" tribal members). Second, the Court says state jurisdiction is needed on the Cherokee Reservation today because "in the wake of *McGirt*" some defendants "have simply gone free." *Ante*, at 2492. On both counts, however, the Court conspicuously loads the dice.

1

Start with the assertion that allowing state prosecutions in cases like ours will "help" Indians. The old paternalist overtones are hard to ignore. Yes, under the laws Congress has ordained Oklahoma may acquire jurisdiction over crimes by or against tribal members only with tribal consent. But to date, the Cherokee have misguidedly shown no interest in state jurisdiction. Thanks to their misjudgment, they have rendered themselves "second-class citizens." *Ante*, at 2501 - 2502. So, the argument goes, five unelected judges in Washington must now make the "right" choice for the Tribe. To state the Court's staggering argument should be enough to refute it.

Nor does the Court even pause to consider some of the reasons why the Cherokee might not be so eager to invite state prosecutions in cases like ours. Maybe the Cherokee have so far withheld their consent ****2523** because, throughout the Nation's history, state governments have sometimes proven less than reliable sources of justice for Indian victims. As early as 1795, George Washington observed that "a Jury on the frontiers" considering a crime by a non-Indian against an Indian could "hardly be got to listen to a charge, much less to convict a culprit." Letter to E. Pendleton (Jan. 22), in 17 ***688** Papers of George Washington: Presidential Series 424, 426 (D. Hoth & C. Ebel eds. 2013). Undoubtedly, too, Georgia once proved among the Cherokee's "deadliest enemies." *Kagama*, 118 U.S. at 384, 6 S.Ct. 1109.

Maybe the Cherokee also have in mind experiences particular to Oklahoma. Following statehood, settlers embarked on elaborate schemes to deprive Indians of their lands, rents, and mineral rights. "Many young allottees were virtually kidnaped just before they reached their majority"; some were "induced to sign deeds at midnight on the morning they became of age." Debo 197–198. Others were subjected to predatory guardianships; state judges even "reward[ed] their supporters [with] guardianship appointments." *Id.*, at 183. Oklahoma's courts also sometimes sanctioned the "legalized robbery" of these Native American children "through the probate courts." *Id.*, at 182. Even almost a century on, the federal government warned of "the possibility of prejudice [against Native Americans] in state courts." *Flint Amicus* Brief 5.

Whatever may have happened in the past, it seems the Court can imagine only a bright new day ahead. Moving forward, the Court cheerily promises, more prosecuting authorities can only "help." Three sets of prosecutors—federal, tribal, and state—are sure to prove better than two. But again it's not hard to imagine reasons why the Cherokee might see things differently. If more sets of prosecutors are always better, why not allow Texas to enforce its laws in California? Few sovereigns or their citizens would see that as an improvement. Yet it seems the Court cannot grasp why the Tribe may not.

The Court also neglects to consider actual experience with concurrent state jurisdiction on tribal lands. According to a group of former United States Attorneys, in practice concurrent jurisdiction has sometimes "create[d] a pass-the-buck dynamic ... with the end result being fewer police and more crime." Brief for Former United States Attorneys ***689** et al. as *Amici Curiae* 13; see also C. Goldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians, 22 UCLA L. Rev. 535, 552, and n. 92 (1975); Goldberg-Ambrose 1423. Federal authorities may reduce their involvement when state authorities are present. In turn, some States may not wish to devote the resources required and may view the responsibility as an unfunded federal mandate. Thanks to realities like these, "[a]lmost as soon as Congress began granting States [criminal] jurisdiction" through Public

Law 280, "affected Tribal Nations began seeking retrocession and repeal." Brief for National Indigenous Women's Resource Center et al. as *Amici Curiae* 12. Recently, a bipartisan congressional commission agreed that more state criminal jurisdiction in Indian country is often not a good policy choice. See Indian Law and Order Commission, A Roadmap for Making Native America Safer: Report to the President and Congress of the United States xi, xiv, 11–15 (Nov. 2013). Still, none of this finds its way into the Court's cost-benefit analysis.

2

Instead, the Court marches on. The second "factor" it weighs in its "balance"—and the only history it seems interested in consulting—concerns Oklahoma's account ****2524** of its experiences in the last two years since *McGirt*. Adopting the State's representations wholesale, the Court says that decision has posed Oklahoma with law-and-order "challenge[s]." *Ante*, at 2492 - 2493. To support its thesis, the Court cites the State's unsubstantiated "estimat[e]" that *McGirt* has forced it to "transfer prosecutorial responsibility for more than 18,000 cases per year to" federal and tribal authorities. *Ibid*. Apparently on the belief that the transfer of cases from state to federal prosecutors equates to an eruption of chaos and criminality, the Court remarks casually that traditional limitations on state prosecutorial authority on tribal lands were "insignificant in the real world" before *McGirt*. *Ante*, at 2499.

***690** But what does this prove? Put aside for the moment questions about the accuracy of Oklahoma's statistics and what the number of cases transferred from state to federal prosecutors may or may not mean for law and order. See Tr. of Oral Arg. 26 (questioning whether the State's "figures" might be "grossly exaggerated"). Taking the Court's account at face value, it might amount to a reason for Oklahoma to lobby the Cherokee to consent to state jurisdiction. It might be a reason for the State to petition Congress to revise criminal jurisdictional arrangements in the State even without tribal consent. But it is no act of statutory or constitutional interpretation. It is a policy argument through and through.

Nor is the Court's policy argument exactly complete in its assessment of the costs and benefits. When this Court issued *McGirt*, it expressly acknowledged that cases involving crimes by or against tribal members within reservation boundaries would have to be transferred from state to tribal or federal authorities. 591 U.S., at —— – ——, 140 S.Ct., at 2478–2482. This Court anticipated, too, that this process would require a period of readjustment. But, the Court recognized, all this was necessary only because Oklahoma had long overreached its authority on tribal reservations and defied legally binding congressional promises. See *ibid*.

Notably, too, neither the tribal nor the federal authorities on the receiving end of this new workload think the "costs" of this period of readjustment begin to justify the Court's course. For their part, Tribes in Oklahoma have hired more police officers, prosecutors, and judges. See Cherokee Brief 10–11. Based on that investment, Oklahoma's Tribes have begun to prosecute substantially more cases than they once did. See *id.*, at 12–13. And they have also shown a willingness to work with Oklahoma, having signed hundreds of cross-deputization agreements allowing local law enforcement to collaborate with tribal police. *Id.*, at 15–16, and n. 39. Even Oklahoma's *amici* concede these agreements ***691** have proved "an important tool" for law enforcement. Brief for Oklahoma District Attorneys Association et al. as *Amici Curiae* 14.

Both of the federal government's elected branches have also responded, if not in the way this Court happens to prefer. Instead of forcing state criminal jurisdiction onto Tribes, Congress has chosen to allocate additional funds for law enforcement in Oklahoma. See, *e.g.*, Consolidated Appropriations Act, H. R. 2471, 117th Cong., 2d Sess., 78 (2022). Meanwhile, the Solicitor General has offered the Executive Branch's judgment that *McGirt*'s "practical consequences" do not justify this Court's intervention, explaining that the Department of Justice is "working diligently with tribal and State partners" in Oklahoma. See Brief for United States as *Amicus Curiae* 32.

There is even more evidence cutting against the Court's dystopian tale. According ****2525** to a recent United States Attorney in Oklahoma, "the sky isn't falling" and "partnerships between tribal law enforcement and state law enforcement" are strong. A. Herrera, Trent Shores Reflects on His Time as U.S. Attorney, Remains Committed to Justice for Indian Country, KOSU-NPR (Feb. 24, 2021), www.kosu.org/politics/2021-02-24/trent-shores-reflects-on-his-time-as-u-s-attorney-remains-committed-to-

justice-for-indian-country. A Federal Bureau of Investigation special agent in charge of Oklahoma has stated that violent crimes " 'are being pursued as heavily as they were in the past, and in some cases, maybe even stronger.' " A. Brothers, Oklahoma Special Agent Says FBI Faces Challenges in 3 Categories, News on 6 (Feb. 14, 2022), https://www.newson6.com/story/620b261bf8cd4a07e5cb845b/oklahoma-special-agent-says-fbi-faces-challenges-in-3-categories. And the Tribes—those most affected by all this supposed lawlessness within their reservations—tell us that, after a period of adjustment, federal prosecutors are now pursuing lower level offenses vigorously too. See Brief for Muscogee (Creek) Nation as *Amicus Curiae* on Pet. for Cert. ***692** 11–12, and nn. 21–22 (collecting indictments). The federal government has made a similar representation to this Court. Tr. of Oral Arg. 118. Nor is it any secret that those convicted of federal crimes generally receive longer sentences than individuals convicted of similar state offenses. See, *e.g.*, Bureau of Justice Statistics, Felony Sentences in State Courts, 2006—Statistical Tables 9 (2009) (Table 1.6).

In recounting all this, I do not profess certainty about the optimal law enforcement arrangements in Oklahoma. I do not pretend to know all the relevant facts, let alone how to balance each of them in this complex picture. Nor do I claim to know what weight to give historical wrongs or future hopes. I offer the preceding observations only to illustrate the one thing I am sure of: This Court has no business usurping congressional decisions about the appropriate balance between federal, tribal, and state interests. If the Court's ruling today sounds like a legislative committee report touting the benefits of some newly proposed bill, that's because it is exactly that. And given that a nine-member court is a poor substitute for the people's elected representatives, it is no surprise that the Court's cost-benefit analysis is radically incomplete. The Court's decision is not a judicial interpretation of the law's meaning; it is the pastiche of a legislative process.

C

As unsound as the Court's decision is, it would be a mistake to overlook its limits. In the end, the Court admits that tribal sovereignty *can* displace state authority even without a preemptive statute. See Part III–A, *supra*. To be sure, the Court proceeds to disparage a federal statute requiring Oklahoma to obtain tribal consent before trying any crime involving an Indian victim within the Cherokee Reservation. But look at what the Court leaves unresolved. The Court does not pass on Public Law 280's provision that States "shall not" be entitled to assume jurisdiction on tribal lands until they "appropriately amen[d]" state laws disclaiming ***693** authority over tribal reservations. 25 U.S.C. § 1324. The Court gestures toward the Cherokee's treaties and the Oklahoma Enabling Act, but ultimately abandons any argument that those treaties were lawfully abrogated or that the Oklahoma Enabling Act endowed Oklahoma with inherent authority to try cases involving Native Americans within tribal bounds. See *ante*, at 2500 - 2501. Nor does the Court address the relevant text of those treaties or the Enabling Act—let alone come to terms ****2526** with our precedents holding that Oklahoma's "grant of statehood" did not include the power to try "crimes committed by or against Indians" on tribal lands. *Ramsey*, 271 U.S. at 469, 46 S.Ct. 559; see also *Tiger*, 221 U.S. at 309, 31 S.Ct. 578. Nothing in today's decision could or does begin to preclude the Cherokee or other Tribes from pressing arguments along any of these lines in future cases. The unamended Oklahoma Constitution and other state statutes and judicial decisions may stand as independent barriers to the assumption of state jurisdiction as a matter of state law too.

The Court's decision is limited in still other important ways. Most significantly, the Court leaves undisturbed the ancient rule that States cannot prosecute crimes by Native Americans on tribal lands without clear congressional authorization—for that would touch the heart of "tribal self-government." *Ante*, at 2500. At least that rule (and maybe others) can never be balanced away. Indeed, the Court's ruling today rests in significant part on the fact that Tribes currently lack criminal jurisdiction over non-Indians who commit crimes on tribal lands—a factor that obviously does not apply to cases involving Native American defendants. *Ante*, at 2501.

Additionally, nothing in the "*Bracker* balancing" test the Court employs foreordains today's grim result for different Tribes in different States. *Bracker* instructs courts to focus on the "specific context" at issue, taking cognizance of the particular circumstances of the Tribe in question, including ***694** all relevant treaties and statutes. 448 U.S. at 145, 100 S.Ct. 2578. Nor are Tribes and their treaties "fungible." S. Prakash, Against Tribal Fungibility, 89 Cornell L. Rev. 1069,

1071–1072 (2004). There are nearly 600 federally recognized Indian Tribes across the country. See Anderson 3. Some of their treaties appear to promise tribal freedom from state criminal jurisdiction in express terms. See, *e.g.*, Treaty with the Navajo, Art. I, June 1868, 15 Stat. 667 (guaranteeing that those who commit crimes against tribal members will be "arrested and punished according to the laws of the United States"). Any analysis true to *Bracker* must take cognizance of all of this. Any such analysis must recognize, too, that the standards of preemption applicable "in other areas of the law" are "unhelpful" when it comes to Tribes. *Bracker*, 448 U.S. at 143, 100 S.Ct. 2578. Instead, courts must proceed against the " 'backdrop' " of tribal sovereignty, *ibid.*, with an "assumption that the States have no power to regulate the affairs of Indians on a reservation" or other tribal lands, *Williams*, 358 U.S. at 219–220, 79 S.Ct. 269. To overcome that backdrop assumption, a clear congressional statement is required and any ambiguities must be "construed generously" in favor of the Tribes. *Bracker*, 448 U.S. at 143–144, 100 S.Ct. 2578; see also *Cotton Petroleum*, 490 U.S. at 177–178, 109 S.Ct. 1698.

The Court today may ignore a clear jurisdictional rule prescribed by statute and choose to apply its own balancing test instead. The Court may misapply that balancing test in an effort to address one State's professed "law and order" concerns. In the process, the Court may even risk unsettling longstanding and clear jurisdictional rules nationwide. But in the end, any faithful application of *Bracker* to other Tribes in other States should only confirm the soundness of the traditional rule that state authorities may not try crimes like this one absent congressional authorization. [10]

***695** ****2527** Nor must Congress stand by as this Court sows needless confusion across the country. Even the Court acknowledges that Congress can undo its decision and preempt state authority at any time. *Ante*, at 2493 - 2494. And Congress could do exactly that with a simple amendment to Public Law 280. It might say: A State lacks criminal jurisdiction over crimes by or against Indians in Indian Country, unless the State complies with the procedures to obtain tribal consent outlined in 25 U.S.C. § 1321, and, where necessary, amends its constitution or statutes pursuant to 25 U.S.C. § 1324. Of course, that reminder of the obvious should hardly be necessary. But thanks to this Court's egregious misappropriation of legislative authority, "the ball is back in Congress' court." *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 661, 127 S.Ct. 2162, 167 L.Ed.2d 982 (2007) (Ginsburg, J., dissenting).

***696 ***

In the 1830s, this Court struggled to keep our Nation's promises to the Cherokee. Justice Story celebrated the decision in *Worcester*: " '[T]hanks be to God, the Court can wash [its] hands clean of the iniquity of oppressing the Indians and disregarding their rights.' " Breyer 420. " 'The Court had done its duty,' " even if Georgia refused to do its own. *Ibid*. Today, the tables turn. Oklahoma's courts exercised the fortitude to stand athwart their own State's lawless disregard of the Cherokee's sovereignty. Now, at the bidding of Oklahoma's executive branch, this Court unravels those lower-court decisions, defies Congress's statutes requiring tribal consent, offers its own consent in place of the Tribe's, and allows Oklahoma to intrude on a feature of tribal sovereignty recognized since the founding. One can only hope the political branches and future courts will do their duty to honor this Nation's promises even as we have failed today to do our own.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Both the United States and the Cherokee Nation, along with several other Tribes, filed *amicus* briefs in this case articulating their views on the legal questions before the Court.

2 To the extent that a State lacks prosecutorial authority over crimes committed by Indians in Indian country (a question not before us), that would not be a result of the General Crimes Act. Instead, it would be the result of a separate principle of federal law that, as discussed below, precludes state interference with tribal self-government. See Part III–B, *infra; White Mountain Apache Tribe v.* Bracker, 448 U.S. 136, 142–143, 145, 100 S.Ct. 2578 (1980); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 171–172, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973).

3 In addition to citing *Williams* and later cases, Castro-Huerta also cites the earlier 1913 decision in *Donnelly v. United States*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820. According to Castro-Huerta, *Donnelly* determined that States may not exercise jurisdiction in Indian country over crimes by or against Indians. Castro-Huerta is wrong. In *Donnelly*, the Court simply concluded that although States have exclusive jurisdiction over crimes committed by non-Indians against non-Indians in Indian country, States do not have similarly "*undivided* authority" over crimes committed by or against Indians in Indian country. *Id.,* at 271–272, 33 S.Ct. 449 (emphasis added). In other words, the Federal Government also maintains jurisdiction under the General Crimes Act over crimes by or against Indians in Indian country because of the Federal Government's interest in protecting and defending tribes. See *ibid*. (citing *United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886)). *Donnelly* did not address the distinct question we confront here: whether States have concurrent jurisdiction with the Federal Government over non-Indians who commit crimes against Indians in Indian country. If anything, *Donnelly*'s rejection of the argument that the State had "undivided" authority, without the Court's saying more, suggests that the Court thought that the State had concurrent authority with the Federal Government in Indian country, unless otherwise preempted. The Court's subsequent decision in *United States v. Ramsey*, 271 U.S. 467, 46 S.Ct. 559, 70 L.Ed. 1039 (1926), likewise considered whether the Federal Government's "authority" to prosecute crimes committed by or against Indians "was ended by the grant of statehood." *Id.,* at 469, 46 S.Ct. 559. The Court held that federal authority was not "ended" by statehood. *Ibid.* But the Court did not say that States lacked concurrent jurisdiction.

4 Castro-Huerta also points to several state-specific grants of jurisdiction from 1940 through 1948. See Act of July 2, 1948, ch. 809, 62 Stat. 1224 (New York); Act of June 30, 1948, ch. 759, 62 Stat. 1161 (Iowa); Act of May 31, 1946, ch. 279, 60 Stat. 229 (North Dakota); Act of June 8, 1940, ch. 276, 54 Stat. 249 (Kansas). Those statutes operate similarly to Public Law 280.

5 The dissent suggests that we should not reach *Bracker* because Congress has already spoken to the issue and preempted state jurisdiction. *Post*, at 2521 - 2522 (opinion of GORSUCH, J.). As already discussed, Congress did not preempt the State's jurisdiction over crimes committed by non-Indians against Indians in Indian country. Therefore, we proceed to *Bracker* balancing to determine whether the exercise of state jurisdiction would unlawfully infringe on tribal self-government.

6 To the extent that some tribes might have a policy preference for federal jurisdiction or tribal jurisdiction, but not state jurisdiction, over crimes committed by non-Indians in Indian country, that policy preference does not factor into the *Bracker* analysis.

Furthermore, this case does not involve the converse situation of a State's prosecution of crimes committed by an Indian against a non-Indian in Indian country. We express no view on state jurisdiction over a criminal case of that kind.

7 Castro-Huerta notes that many tribes were enemies of States in the 1700s and 1800s. The theory appears to be that States (unlike the Federal Government) cannot be trusted to fairly and aggressively prosecute crimes committed by non-Indians against Indians in 2022. That theory is misplaced for at least two reasons. *First*, the State's jurisdiction would simply be concurrent with, not exclusive of, the Federal Government's. If concurrent state jurisdiction somehow poses a problem, Congress can seek to alter it. *Second*, many tribes were also opposed to the *Federal Government* at least as late as the Civil War. Indeed, some of those tribes, including the Cherokees, held black slaves and entered into treaties with the Confederate government. A. Gibson, Native Americans and the Civil War, 9 Am. Indian Q. 4, 385, 388 (1985); 1 F. Cohen, Handbook of Federal Indian Law § 4.07(1)(a), p. 289 (2012); see *McGirt* v. *Oklahoma*, 591 U.S. ——, —— – ——, 140 S.Ct. 2452, 2483–2484, 207 L.Ed.2d 985 (2020) (ROBERTS, C.J., dissenting); *Cherokee Nation v. Nash*, 267 F.Supp.3d 86, 89–90 (DDC 2017). In any event, it is not evident why the pre-Civil War history of tribal discord with States—unconnected from any statutory text—should disable States from exercising jurisdiction in 2022 to ensure that crime victims in state territory are protected under the State's laws.

8 Congress "abolished treatymaking with the Indian nations in 1871 and has itself subjected the tribes to substantial bodies of state and federal law." *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 257, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992) (citation omitted).

9 The dissent characterizes the Court's opinion in several ways that are not accurate. *Post*, at 2525 - 2527. For example, the dissent suggests that States may not exercise jurisdiction over crimes committed by Indians against non-Indians in Indian country—the reverse of the scenario in this case. To reiterate, we do not take a position on that question. See *supra,* at 2501, n. 6.

The dissent also hints that the jurisdictional holding of the Court in this case may apply only in Oklahoma. That is incorrect. The Court's holding is an interpretation of federal law, which applies throughout the United States: Unless preempted, States may exercise jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.

Finally, the statutory definition of Indian country includes "all Indian allotments, the Indian titles to which have not been extinguished." See 18 U.S.C. § 1151. Therefore, States may prosecute crimes committed by non-Indians against Indians in those allotments.

1 See Act of July 2, 1948, ch. 809, 62 Stat. 1224 (25 U.S.C. § 232) (New York); Act of June 30, 1948, ch. 759, 62 Stat. 1161 (Iowa), repealed, Act of Dec. 11, 2018, Pub. L. 115–301, 132 Stat. 4395; Act of May 31, 1946, ch. 279, 60 Stat. 229 (North Dakota).

2 See also *Ysleta del Sur Pueblo* v. *Texas*, 596 U.S. ——, ——, 142 S.Ct. 1929, ——, —— L.Ed.2d —— (2022); *United States* v. *Cooley*, 593 U.S. ——, —— – ——, 141 S.Ct. 1638, 1642–1643, 210 L.Ed.2d 1 (2021); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of* Okla., 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991); *United States v. Wheeler*, 435 U.S. 313, 322–323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975); *Talton v. Mayes*, 163 U.S. 376, 383–384, 16 S.Ct. 986, 41 L.Ed. 196 (1896); *United States v. Kagama*, 118 U.S. 375, 381–382, 6 S.Ct. 1109, 30 L.Ed. 228 (1886); *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831).

3 In the *civil* context, Congress has not always provided comprehensive rules allocating jurisdiction. See Cohen 527. In light of that fact, this Court has, in "exception[al]" cases, *id.*, at 524, allowed certain state laws to apply on tribal lands without express congressional approval, see, *e.g.*, *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 154–159, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980). But even in the civil context this Court has proceeded against the backdrop of tribal sovereignty, followed the presumption against state authority, sought to abide its own repeated admonitions to tread cautiously, and generally refused to consider competing state interests. See, *e.g.*, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143–144, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980); Cohen 520–525. So, for example, in *Confederated Tribes*, this Court allowed the application of a state civil law only on a showing that the State sought to regulate market activities with primarily off-reservation effects and "in which the Tribes ha[d no] significant interest." 447 U.S. at 152, 100 S.Ct. 2069. Meanwhile, in *Bracker* this Court refused to permit a State to apply its civil tax laws on tribal lands even though Congress had not expressly prohibited the State from doing so. 448 U.S. at 143, 100 S.Ct. 2578.

4 In a fleeting aside, the Court suggests that the treaty was "supplanted" by the Oklahoma Enabling Act in 1906, which endowed the State with "inherent" authority to try crimes by or against tribal members on tribal lands. *Ante*, at 2502 - 2504. But the Court cites no proof for its *ipse dixit*, nor could it. As we shall see, Congress took pains to abide its treaty promises when it adopted the Oklahoma Enabling Act and has never revoked them. Nor may this Court abrogate treaties or statutes by wishing them away in passing remarks. In a Nation governed by the rule of law, not men (or willful judges), only Congress may withdraw this Nation's treaty promises or revise its written laws. See *McGirt* v. *Oklahoma*, 591 U.S. ——, ——, 140 S.Ct. 2452, 2462 207 L.Ed.2d 985 (2020). Even on its own terms, too, the Court's discussion of the treaty turns out to be dicta. In the end, the Court abandons any suggestion that, with its admission to the Union, the Cherokee's treaties somehow evaporated and Oklahoma gained an "inherent" right to prosecute crimes by or against tribal members on tribal lands. Instead, the Court resorts to a case-specific "balancing test" that acknowledges state law may not apply on tribal lands even in the absence of a preemptive statute. See Part III–A, *infra*.

In the course of its dicta on the treaty, the Court highlights still two other irrelevant facts—that the Cherokee engaged in treaties with the Confederacy during the Civil War and that "Congress abolished treatymaking with the Indian nations in 1871." *Ante*, at 2502, n. 7, 2503, n. 8 (internal quotation marks omitted). In truth, while some members of the Tribe did side with the Confederacy, others fought for the Union. See 1 Litton 222, 224, 239. Regardless, after the Civil War the federal government punished the entire Tribe by stripping some of its lands in the 1866 Treaty of Washington. See *id*., at 245. But that pact did not terminate the government's other existing treaty promises. To the contrary, the new treaty expressly confirmed that "[a]ll provisions of treaties, heretofore ratified ... and not inconsistent with the provisions of this treaty, are hereby reaffirmed." Treaty with the Cherokee, Art. XXXI, 14 Stat. 806. As for the 1871 statute the Court cites, it makes plain that "nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any ... Indian nation or tribe." 16 Stat. 566. Recognizing as much, this Court in 1896 expressly recognized that the Tribe's "guarantee of self-government" in the Treaty of New Echota remained in force. *Talton*, 163 U.S. at 380, 16 S.Ct. 986. In the years since, this Court and others have recognized the continuing vitality of various aspects of the treaty too. See, *e.g.*, *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 628, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970); *EEOC v. Cherokee Nation*, 871 F.2d 937, 938 (CA10 1989). And in this very case, the federal government has confirmed that the Nation's treaties continue to "protect" the Tribe. See Tr. of Oral Arg. 121.

5 In places, the Court seems to suggest that the Oklahoma Enabling Act endowed the State with "inherent" jurisdiction to try any crime committed within its borders. See *ante*, at 2502 - 2504. But in the end the Court

abandons any suggestion that with statehood Oklahoma gained an inherent right to try cases involving tribal members within tribal bounds. See Part III–A, *infra*. So, once more, the Court's discussion of the Oklahoma Enabling Act turns out to be dicta future litigants are free to correct. Much correction is warranted. Not only does the Court fail to quote, let alone offer any analysis of, the relevant statutory text. Its suggestion that the Oklahoma Enabling Act granted the State criminal jurisdiction over tribal lands would require us to suppose that Congress abrogated two treaties with the Cherokee without ever saying so—an interpretation that would grossly defy our Nation's promises and this Court's obligation to read congressional work as a harmonious whole. Reading the Oklahoma Enabling Act in line with the Court's ill-considered dicta would also defy this Court's longstanding precedents in *Tiger*, *Ramsey*, and *McClanahan*. Of course, the Court tries to invoke *McBratney* and *Draper* as contrary authority. But as we will see in a moment, both cases carefully reiterated the rule that statehood does not imply the right to try crimes on tribal lands by or against tribal members. The Court also cites *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962). But that case involved Alaska's Anti-Fish-Trap Conservation Law, not the Oklahoma Enabling Act. Admittedly, *Egan* quotes comments from a 1954 legislative committee hearing about the Alaska Enabling Act in which a few participants also happened to express views on the meaning of the Oklahoma Enabling Act, passed almost 50 years earlier. See *id.*, at 71, 82 S.Ct. 562. But surely this Court cannot think a few stray post-enactment legislative comments, "unmoored from any statutory text," *ante*, at 2496, control over the statutory terms or our more specific precedents.

6 The Court observes that Public Law 280 and related statutes did more than just grant States jurisdiction over crimes by non-Indians against Indians on tribal lands—"the issue here." *Ante*, at 2500. Congress also granted "States ... jurisdiction over crimes committed *by Indians*." *Ibid.* (emphasis in original). But that observation fails to answer the fact that, under the Court's view, a major portion of all these laws is surplusage—and none of them was necessary if States really enjoyed "inherent" criminal jurisdiction on tribal lands from the start.

7 See, *e.g.*, *United States v. Bryant*, 579 U.S. 140, 146, 136 S.Ct. 1954, 195 L.Ed.2d 317 (2016); *Nevada v. Hicks*, 533 U.S. 353, 365, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001); *Solem v. Bartlett*, 465 U.S. 463, 465, n. 2, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984); *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 470–471, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 170–171, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973).

8 See, *e.g.*, *State v. Cungtion*, 969 N.W.2d 501, 504–505 (Iowa 2022); *State v. Sebastian*, 243 Conn. 115, 128, and n. 21, 701 A.2d 13, 22, and n. 21 (1997); *State v. Larson*, 455 N.W.2d 600, 600–601 (S. D. 1990); *State v. Flint*, 157 Ariz. 227, 228, 756 P.2d 324, 324–325 (App. 1988); *State v. Greenwalt*, 204 Mont. 196, 204–205, 663 P.2d 1178, 1182–1183 (1983); *State v. Warner*, 71 N.M. 418, 421–422, 379 P.2d 66, 68–69 (1963); *State v. Kuntz*, 66 N.W.2d 531, 532 (N. D. 1954); *State v. Jackson*, 218 Minn. 429, 430, 16 N.W.2d 752, 754–755 (1944); see also *United States v. Langford*, 641 F.3d 1195, 1199 (CA10 2011); *United States v. Bruce*, 394 F.3d 1215, 1221 (CA9 2005).

9 As sometimes happens when the government considers a legal question over centuries, differing views have occasionally popped up. In 1979, the Office of Legal Counsel opined—with little analysis—that States might be able to exercise concurrent criminal jurisdiction on tribal lands, though it conceded the question was "exceedingly difficult." 3 Op. OLC 111, 117, 120. This kind of surface-level, hedged analysis is hardly robust evidence. In any event, the Executive Branch reverted to its traditional position in short order. That makes the Court's repeated reliance on this isolated opinion—and its failure to acknowledge the mountain of contradictory evidence—especially bewildering. See *ante*, at 2497 - 2500.

10 In a final drive-by flourish, the Court asserts that its "jurisdictional holding[s]" today apply "throughout the United States." For emphasis, the Court repeats the point in a footnote. *Ante*, at 2503 - 2504, n. 8, 2504 - 2505. But not only does the Court acknowledge that Congress may preempt state jurisdiction over crimes like this one. See *ante*, at 2493 - 2494. The truth is, in this case involving one Tribe in one State the Court does not purport to evaluate the (many) treaties, federal statutes, precedents, and state laws that may preclude state jurisdiction on specific tribal lands around the country. Nor are we legislators entitled to pass new laws of general applicability, but a court charged with resolving cases and controversies involving particular parties who are entitled to make their own arguments in their own cases. The very precedent the Court invokes as authority to reach its decision today recognizes as much—and demands future courts conduct any analysis sensitive to the "specific context" of each Tribe, its treaties, and relevant laws. *Bracker*, 448 U.S. at 145, 100 S.Ct. 2578. For that matter, even when it comes to the Cherokee the Court leaves much unanswered. The Court does not confront the relevant text of the Cherokee's treaties, the Oklahoma Enabling Act, or the relevant portions of our precedents interpreting both. And the Court does not mention the terms of Public Law 280 that require Oklahoma to amend its laws before asserting jurisdiction. Even more than all that, the Court ultimately retreats from its claim that statehood confers an "inherent" right to prosecute crimes by non-Indians against tribal members on tribal lands. It rests instead on a "balancing test" that makes anything it does say about the "inherent" right of States to try cases within Indian country dicta through and through.

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Ladd v. Boeing Co., E.D.Pa., November 13, 2006

97 S.Ct. 1395
Supreme Court of the United States

UNITED STATES, Petitioner,
v.
Gabriel Francis ANTELOPE et al.

No. 75-661
|
Argued Jan. 18, 1977.
|
Decided April 19, 1977.

Synopsis

Two enrolled Coeur d'Alene Indians were convicted in the United States District Court for the District of Idaho for first-degree murder under the felony-murder provisions of the federal enclave murder statute, made applicable to the Indians by the Major Crimes Act, and were also convicted of burglary and robbery, while third Indian was convicted of second-degree murder, and they appealed. The United States Court of Appeals for the Ninth Circuit, 523 F.2d 400, reversed the murder convictions, and certiorari was granted. The Supreme Court, Mr. Chief Justice Burger, held that federal legislation with respect to Indian tribes, though relating to Indians as such, is not based on impermissible racial classifications; and that prosecution of defendants under federal felony-murder statute for murder of a non-Indian within Indian country, subject to the same body of laws as any other individual charged with first-degree murder committed in a federal enclave, did not deny them due process or equal protection despite fact that a non-Indian charged with the same crime would have been tried under Idaho law which lacks a felony-murder provision, so that the prosecution would have been required to prove premeditation and deliberation.

Judgment of Court of Appeals reversed and case remanded.

West Headnotes (7)

[1] **Indians** Tribal court or authorities
Indians Crime committed in Indian country or on reservation

Except for the offenses enumerated in the Major Crimes Act, all crimes committed by enrolled Indians against other Indians within Indian country are subject to the jurisdiction of tribal courts, but a non-Indian charged with committing crimes against other non-Indians in Indian country is subject to prosecution under state law. 18 U.S.C.A. §§ 1152, 1153.

71 Cases that cite this headnote

[2] **Indians** Authority over and regulation of tribes in general

Federal legislation with respect to Indian tribes, though relating to Indians as such, is not based on impermissible racial classification but is instead rooted in the unique status of Indians as "a separate people" with their own political institutions, and amounts to governance of once-sovereign communities, rather than legislation of a "racial" group consisting of Indians. U.S.C.A.Const. art. 1, § 8, cl. 3.

90 Cases that cite this headnote

[3] **Indians** Who is an Indian; tribal status
Indians Federal court or authorities
Indians Federal court or authorities

Members of Indian tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act, and crimes by enrolled tribal members occurring elsewhere than within the confines of Indian country are not subject to exclusive federal jurisdiction. 18 U.S.C.A. § 1153.

78 Cases that cite this headnote

[4] **Constitutional Law** Criminal Law
Constitutional Law Misuse or abuse

Enrolled members of the Coeur d'Alene Indian Tribe who were prosecuted under the Major Crimes Act for felony-murder of a non-Indian within the boundaries of the Indian reservation and who were subject to the same body of laws as any other individual charged with first-degree murder committed within a federal enclave were not denied due process or equal protection on ground that, if they had not been Indians, they would have been prosecuted under Idaho law which, unlike federal law, lacked felony-murder provision so that the prosecution would have been required to prove premeditation and deliberation. U.S.C.A.Const. Amend. 5; 18 U.S.C.A. §§ 1111, 1153, 3242; I.C. § 18–4003.

65 Cases that cite this headnote

[5] **Indians** Offenses and Prosecutions

Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian country.

18 Cases that cite this headnote

[6] **Constitutional Law** Selective enforcement in general

It is of no consequence for equal protection purposes that federal scheme of criminal law applicable in federal enclaves differs from a state criminal code otherwise applicable within the boundaries of the state; the national Government does not violate equal protection when its own body of law is evenhanded, regardless of the laws of states with respect to the same subject matter. U.S.C.A.Const. Amend. 5.

17 Cases that cite this headnote

[7] **Federal Preemption** Criminal law; prisons

Rule that federal prosecution arising from federal enclave would have to be governed by state law to the extent that state law was more "lenient" than federal would be inconsistent with the supremacy clause. U.S.C.A.Const. art. 6, cl. 2.

3 Cases that cite this headnote

**1396 *641 Syllabus [*]

Respondents, enrolled Coeur d'Alene Indians, were indicted by a federal grand jury on charges of burglary, robbery, and murder of a non-Indian within the boundaries of their reservation. One respondent was convicted of second-degree murder only; the other two were convicted of all three crimes as charged, including first-degree murder under the felony-murder provisions of the federal-enclave murder statute, 18 U.S.C. s 1111, as made applicable to Indians by the Major Crimes Act, 18 U.S.C. s 1153. The Court of Appeals reversed on the ground that respondents had been denied their constitutional rights under the equal protection component of the Fifth Amendment's Due Process Clause. The court agreed with respondents' contention that their felony-murder convictions were racially discriminatory since a non-Indian charged with the same crime would have been subject to prosecution only under Idaho law, under which premeditation and deliberation would have had to be proved, whereas no such elements were required under the felony-murder provisions of 18 U.S.C. s 1111. Held : Respondent Indians were not deprived of the equal protection of the laws. Pp. 1398-1401.

(a) The federal criminal statutes enforced here are based neither in whole nor in part upon impermissible racial classifications. Federal regulation of Indian tribes is rooted in the unique status of Indians as "a separate people" with their own political institutions, and is not to be viewed as legislation of a " 'racial' group consisting of 'Indians'. . . ." Morton v. Mancari, 417 U.S. 535, 553 n. 24, 94 S.Ct. 2474, 2484, 41 L.Ed.2d 290. Pp. 1398-1399.

(b) The challenged statutes do not otherwise violate equal protection. Respondents were subjected to the same body of law as any other individuals, Indian or non-Indian, charged

with first-degree murder committed in a federal enclave. Congress has undoubted power to prescribe a criminal code applicable to Indian country, and the disparity between federal law and Idaho law has no equal protection or other constitutional significance. Pp. 1399-1400.

523 F.2d 400, reversed and remanded.

Attorneys and Law Firms

***642** Andrew L. Frey, Washington, D. C., for petitioner.

John W. Walker, Moscow, Idaho, for respondents Leonard and William Davison.

Allen V. Bowles, Moscow, Idaho, for respondent Gabriel Antelope.

Opinion

Mr. Chief Justice BURGER delivered the opinion of the Court.

The question presented by our grant of certiorari is whether, under the circumstances of this case, federal criminal statutes violate the Due Process Clause of the Fifth Amendment by subjecting individuals to federal prosecution by virtue of their status as Indians.

****1397** (1)

[1] On the night of February 18, 1974, respondents, enrolled Coeur d'Alene Indians, broke into the home of Emma Johnson, an 81-year-old non-Indian, in Worley, Idaho; they robbed and killed Mrs. Johnson. Because the crimes were committed by enrolled Indians within the boundaries of the Coeur d'Alene Indian Reservation, respondents were subject to federal jurisdiction under the Major Crimes Act, 18 U.S.C. s 1153.[1] They were, accordingly, indicted by a federal grand jury on ***643** charges of burglary, robbery, and murder.[2] Respondent William Davison was convicted of second-degree murder only. Respondents Gabriel Francis Antelope and Leonard Davison were found guilty of all three crimes as charged, including first-degree murder under the felony-murder provisions of 18 U.S.C. s 1111,[3] as made applicable to enrolled Indians by 18 U.S.C. s 1153.

(2)

In the United States Court of Appeals for the Ninth Circuit, respondents contended that their felony-murder convictions ***644** were unlawful as products of invidious racial discrimination. They argued that a non-Indian charged with precisely the same offense, namely the murder of another non-Indian within Indian country,[4] would have been subject to prosecution only under Idaho law, which in contrast to the federal murder statute, 18 U.S.C. s 1111, does not contain a felony-murder provision.[5] To establish ****1398** the crime of first-degree murder in state court, therefore, Idaho would have had to prove premeditation and deliberation. No such elements were required under the felony-murder component of 18 U.S.C. s 1111.

Because of the difference between Idaho and federal law, the Court of Appeals concluded that respondents were "put at a serious racially-based disadvantage," 523 F.2d 400, 406 (1975), since the Federal Government was not required to establish premeditation and deliberation in respondents' federal prosecution. This disparity, so the Court of Appeals concluded, violated equal protection requirements implicit in the Due Process Clause of the Fifth Amendment. We granted the United States' petition for certiorari, 424 U.S. 907, 96 S.Ct. 1100, 47 L.Ed.2d 311 (1976), and we reverse.

***645** (3)

[2] The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution[6] and supported by the ensuing history of the Federal Government's relations with Indians.

"Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, Worcester v. Georgia, 31 U.S. 515, 6 Pet. 515, 557, 8 L.Ed. 483 (1832); they are 'a separate people' possessing 'the power of regulating their internal and social relations . . ..' " United

States v. Mazurie, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975).

Legislation with respect to these "unique aggregations" has repeatedly been sustained by this Court against claims of unlawful racial discrimination. In upholding a limited employment preference for Indians in the Bureau of Indian Affairs, we said in Morton v. Mancari, 417 U.S. 535, 552, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974):

"Literally every piece of legislation dealing with Indian tribes and reservations . . . single(s) out for special treatment a constituency of tribal Indians living on or near reservations. If these laws . . . were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased . . .."

In light of that result, the Court unanimously concluded in Mancari :

"The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities . . .." Id., at 554, 94 S.Ct., at 2484.

***646** Last Term, in Fisher v. District Court, 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976), we held that members of the Northern Cheyenne Tribe could be denied access to Montana State courts in connection with an adoption proceeding arising on their reservation. Unlike Mancari, the Indian plaintiffs in Fisher were being denied a benefit or privilege available to non-Indians; nevertheless, a unanimous Court dismissed the claim of racial discrimination:

"(W)e reject the argument that denying (the Indian plaintiffs) access to the Montana courts constitutes impermissible racial discrimination. The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law." 424 U.S., at 390, 96 S.Ct., at 948.

[3] Both Mancari and Fisher involved preferences or disabilities directly promoting Indian interests in self-government, ****1399** whereas in the present case we are dealing, not with matters of tribal self-regulation, but with federal regulation of criminal conduct within Indian country implicating Indian interests. But the principles reaffirmed in Mancari and Fisher point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a " 'racial' group consisting of 'Indians' . . . ." Morton v. Mancari, supra, at 553 n. 24, 94 S.Ct., at 2484. Indeed, respondents were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d'Alene Tribe. [7] We ***647** therefore conclude that the federal criminal statutes enforced here are based neither in whole nor in part upon impermissible racial classifications.

(4)

[4] The challenged statutes do not otherwise violate equal protection. [8] We have previously observed that Indians indicted ***648** under the Major Crimes Act enjoy the same procedural benefits and privileges as all other persons within federal jurisdiction. Keeble v. United States, 412 U.S. 205, 212, 93 S.Ct. 1993, 1997, 36 L.Ed.2d 844 (1973). See 18 U.S.C. s 3242. Respondents were, therefore, subjected to the same body of law as any other individual, Indian or non-Indian, charged with first-degree murder committed in a federal enclave. [9] They do not, and could not, contend otherwise.

****1400** **[5]** **[6]** There remains, then, only the disparity between federal and Idaho law as the basis for respondents' equal protection claim. [10] Since Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian country, United States v. Kagama, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886), it is of no consequence that the federal scheme differs from a state criminal code otherwise applicable within the boundaries of the State ***649** of Idaho. Under our federal system, the National Government does not violate equal protection when its own body of law is evenhanded, [11] regardless of the laws of States with respect to the same subject matter. [12]

[7] The Federal Government treated respondents in the same manner as all other persons within federal

jurisdiction, pursuant to a regulatory scheme that did not erect impermissible ***670** racial classifications; hence, no violation of the Due Process Clause infected respondents' convictions. [13]

The judgment of the Court of Appeals is reversed, and the case is remanded for further ****1401** proceedings consistent with this opinion.

Reversed and remanded.

All Citations

430 U.S. 641, 97 S.Ct. 1395, 51 L.Ed.2d 701

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Title 18 U.S.C. s 1153 at the time in question provided in pertinent part:

> "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."

The background leading up to enactment of the Major Crimes Act is discussed in Keeble v. United States, 412 U.S. 205, 209-212, 93 S.Ct. 1993, 1996-1998, 36 L.Ed.2d 844 (1973). As noted in that case, the Government has characterized the Major Crimes Act as "a carefully limited intrusion of federal power into the otherwise exclusive jurisdiction of the Indian tribes to punish Indians for crimes committed on Indian land." Id., at 209, 93 S.Ct., at 1996.

2 Except for the offenses enumerated in the Major Crimes Act, all crimes committed by enrolled Indians against other Indians within Indian country are subject to the jurisdiction of tribal courts. 18 U.S.C. s 1152. Not all crimes committed within Indian country are subject to federal or tribal jurisdiction, however. Under United States v. McBratney, 104 U.S. 621, 26 L.Ed. 869 (1882), a non-Indian charged with committing crimes against other non-Indians in Indian country is subject to prosecution under state law.

3 Title 18 U.S.C. s 1111 is the federal murder statute. It provides in pertinent part:

"(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed

in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

"Any other murder is murder in the second degree."

It should be emphasized that respondent William Davison was convicted only of second-degree murder, not felony murder, under 18 U.S.C. s 1111.

4 See n. 2, supra. Federal law ostensibly extends federal jurisdiction to all crimes occurring in Indian country, except offenses subject to tribal jurisdiction. 18 U.S.C. s 1152. However, under United States v. McBratney, supra, and cases that followed, this Court construed s 1152 and its predecessors as not applying to crimes by non-Indians against other non-Indians. Thus, respondents correctly argued that, had the perpetrators of the crimes been non-Indians, the courts of Idaho would have had jurisdiction over these charges.

5 Idaho statutes contain the following definition of first-degree murder:

"All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate and premeditated killing is murder of the first degree. Any murder of any peace officer of this state or of any municipal corporation or political subdivision thereof, when the officer is acting in line of duty, . . . shall be murder in the first degree. . . . All other kinds of murder are of the second degree." Idaho Code s 18-4003 (Supp.1976).

6 Article I, s 8, of the Constitution gives Congress power "(t)o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."

7 As was true in Mancari, federal jurisdiction under the Major Crimes Act does not apply to "many individuals who are racially to be classified as 'Indians.' " 417 U.S., at 553 n. 24, 94 S.Ct., at 2484. Thus, the prosecution in this case offered proof that respondents are enrolled members of the Coeur d'Alene Tribe and thus not emancipated from tribal relations. Moreover, members of tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act. United States v. Heath, 509 F.2d 16, 19 (C.A.9 1974) ("While anthropologically a Klamath Indian even after the Termination Act obviously remains an Indian, his unique status vis-a-vis the Federal Government no longer exists"). In addition, as enrolled tribal members, respondents were subjected to federal jurisdiction only because their crimes were committed within the confines of Indian country, as defined in 18 U.S.C. s 1151. Crimes occurring elsewhere would not be subject to exclusive federal jurisdiction. Puyallup Tribe v. Department of Game, 391 U.S. 392, 397 n. 11, 88 S.Ct. 1725, 1728, 20 L.Ed.2d 689 (1968).

It should be noted, however, that enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction, at least where the Indian defendant lived on the reservation and "maintained tribal relations with the Indians thereon." Ex parte Pero, 99 F.2d 28, 30 (C.A.7 1938). See also United States v. Ives, 504 F.2d 935, 953 (C.A.9 1974) (dicta). Since respondents are enrolled tribal members, we are not called on to decide whether nonenrolled Indians are subject to 18 U.S.C. s 1153, and we therefore intimate no views on the matter.

8 Other than their argument that the federal statutes create an invidious racial classification, respondents do not seriously contend that application of federal law to Indian tribes is so irrational as to deny equal protection. See n. 11, infra. They do point, however, to Congress' relinquishment of criminal jurisdiction over Indians in six States pursuant to 18 U.S.C. s 1162. But s 1162 is simply one manifestation of Congress' continuing concern with the welfare of Indian tribes under federal guardianship. Indeed, in adopting s 1162, Congress singled out certain reservations to remain subject to federal criminal jurisdiction. Congress' selective approach in s 1162 reinforces, rather than undermines, the conclusion that legislation directed toward Indian tribes is a necessary and appropriate consequence of federal guardianship under the Constitution.

9 Federal jurisdiction would extend to crimes, regardless of the race of the perpetrator or victim, committed on federal enclaves, such as military installations, or on vessels of the United States on the high seas.

Congress has provided for federal jurisdiction over the crime of murder on a reservation, much as on other federal enclaves, 18 U.S.C. ss 1111, 1153. But as our opinions have recognized that Indian reservations differ in certain respects from other federal enclaves, the statute has been construed as not encompassing crimes on the reservation by non-Indians against non-Indians. United States v. McBratney, 104 U.S. 621, 26 L.Ed. 869 (1882); see Surplus Trading Co. v. Cook, 281 U.S. 647, 651, 50 S.Ct. 455, 456, 74 L.Ed. 1091 (1930); Williams v. Lee, 358 U.S. 217, 219-220, 79 S.Ct. 269, 270-271, 3 L.Ed.2d 251 (1959); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 171, 93 S.Ct. 1257, 1262-1263, 36 L.Ed.2d 129 (1973). Federal statutes do not single out Indians as such; non-Indian defendants are also covered if the victim was a member of the tribe.

10 Respondents base their equal protection claim on the assumption that they have been disadvantaged by being prosecuted under federal law. In their view, their murder convictions were made more likely by the fact that federal prosecutors were not required to prove premeditation. However, they do not seriously question that the evidence adduced at their federal trial might well have supported a finding of premeditation and deliberation, since respondents were found to have beaten and kicked Mrs. Johnson to death during the course of a planned robbery.

11 It should be noted, however, that this Court has consistently upheld federal regulations aimed solely at tribal Indians, as opposed to all persons subject to federal jurisdiction. See, e. g., United States v. Holliday, 70 U.S. 407, 417-418, 3 Wall. 407, 417-418, 18 L.Ed. 182 (1866); Perrin v. United States, 232 U.S. 478, 482, 34 S.Ct. 387, 389, 58 L.Ed. 691 (1914). See also Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, at 613-615, n. 47, 97 S.Ct. 1361, 1376, 51 L.Ed.2d 660. Indeed, the Constitution itself provides support for legislation directed specifically at the Indian tribes. See n. 6, supra. As the Court noted in Morton v. Mancari, the Constitution therefore “singles Indians out as a proper subject for separate legislation.” 417 U.S., at 552, 94 S.Ct., at 2483.

In this regard, we are not concerned with instances in which Indians tried in federal court are subjected to differing penalties and burdens of proof from those applicable to non-Indians charged with the same offense. Compare United States v. Big Crow, 523 F.2d 955 (C.A.8 1975), cert. denied, 424 U.S. 920, 96 S.Ct. 1126, 47 L.Ed.2d 327 (1976), and United States v. Cleveland, 503 F.2d 1067 (C.A.9 1974), with United States v. Analla, 490 F.2d 1204 (C.A.10), vacated and remanded, 419 U.S. 813, 95 S.Ct. 28, 42 L.Ed.2d 40 (1974). See 18 U.S.C. s 1153 (1976 ed.) (which provides for uniform penalties for both Indians and non-Indians charged with assault resulting in serious bodily injury). That issue is not before us, and we intimate no views on it.

12 Indeed, had respondents been prosecuted under state law, they may well have argued, under this Court's holding in Seymour v. Superintendent, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962), that the state conviction was void for want of jurisdiction. In Seymour, an enrolled member of the Colville Indian Tribe was

convicted in state court of attempted burglary within Indian country. In reversing the state conviction, this Court held:

"Since the burglary with which petitioner was charged occurred on property . . . within the . . . (Indian) reservation, the courts of Washington had no jurisdiction to try him for that offense." Id., at 359, 82 S.Ct., at 429.

If state courts would have had no jurisdiction over respondents' case, then state law does not constitute a meaningful point of reference for establishing a claim of equal protection.

13 If we accepted respondents' contentions, persons charged with crimes on federal military bases or other federal enclaves could demand that their federal prosecutions be governed by state law to the extent that state law was more "lenient" than federal law. The Constitution does not authorize this kind of gamesmanship. Indeed, any such rule, even assuming its workability, is flatly inconsistent with the Supremacy Clause of the Constitution, Art. VI, cl. 2.