# AMERICAN INDIAN LAW

## CASES AND COMMENTARY

**Fourth Edition**

By


**Robert T. Anderson**
Professor of Law Emeritus
University of Washington School of Law

**Sarah Krakoff**
Moses Lasky Professor
University of Colorado Law School

**Monte Mills**
Charles I. Stone Professor of Law
Director, Native American Law Center
University of Washington School of Law

**Kevin K. Washburn**
N. William Hines Dean and Professor of Law
University of Iowa College of Law



**AMERICAN CASEBOOK SERIES®**

Please note the following updates to the casebook:

**On p. 3:**

Change the number of federally recognized tribes to 574. *See* Bureau of Indian Affairs, *Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 88 Fed. Reg. 2112–2116 (Jan. 12, 2023).

**On pp. 251–52, add the following after the paragraph that begins on Page 251 and extends to page 252:**

The list required by the Tribal List Act is published approximately once each year in the Federal Register. As of this writing, the most recent published list is here: Bureau of Indian Affairs, *Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 88 Fed. Reg. 2112-2116 (Jan. 12, 2023).

**On pp. 267–68, add a new note 4:**

4. In the last five years, several tribes have gained recognition by Act of Congress. In 2018, Congress enacted Public Law 115-121, recognizing six tribes in Virginia, including the Chickahominy, the Eastern Chickahominy, the Upper Mattaponi, the Rappahannock, the Monacan and the Nansemond tribes. In late 2019 as part of an annual Defense Appropriations Act, Congress included a provision granting recognition to the Little Shell Tribe of Chippewa Indians of Montana, making Little Shell the 574th tribe to gain federal recognition.

Recognition through Congress is challenging because it requires years of lobbying. In some ways, however, it is easier than proceeding through the federal administrative process. Recognition by the Office of Federal Acknowledgement requires substantial historical, genealogical, and anthropological research that takes years to develop and undergoes extensive scrutiny by Ph.D.-level professionals at the Department of the Interior. Because Congress is not bound by those criteria, it may recognize a tribe that cannot meet the rigorous administrative criteria.

The existence of the Congressional route assures a means of correction of any injustice created by the rigorous bar to recognition set in federal regulations. Thus, the two paths to recognition are complementary. The legitimacy of decisions by the Office of Federal Acknowledgement derives from rigorous criteria and the careful research and scrutiny exercised by federal social scientists in making those decisions. The legitimacy of recognition by Congress comes from the political realm and the plenary power of Congress in Indian affairs. When Congress recognizes a tribe, it may well impose limitations on tribal authority to conduct Indian gaming free of state jurisdiction. Recognition by the Office of Federal Acknowledgment contains no such limitations.

**On p. 273, add the following at the end of note 5:**

In 2020, in *Chinook Indian Nation v. Bernhardt*, the U.S. District Court for the Western District of Washington struck down the ban on repetitioning as "illogical, conclusory and unsupported by the administrative record in violation of the APA." Finding this part of the new Final Rule arbitrary and capricious, it remanded to the Department of the Interior for further consideration of the repetitioning ban.

**On p. 294, delete note 4 and insert the following:**

**MCGIRT V. OKLAHOMA**

140 S. Ct. 2452, 207 L.Ed.2d 985 (2020)

**JUSTICE GORSUCH** delivered the opinion of the Court.

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 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.

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, and, including rights-of-way running through the reservation." § 1151(a). Mr. McGirt submits he can satisfy 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 277 (2018).

**II.**

Start with what should be obvious: Congress established a reservation for the Creeks. In a series of treaties, Congress 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.

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, *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, 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 "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?

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).

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.

---

**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).

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 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). 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, 194L.Ed.2d 152(2016).

**B.**

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.

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

**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.

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 were eventually free to sell their land to Indians and non-Indians alike.

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.

**C.**

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, 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 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.

**D**

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.

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 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 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 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.

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).

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 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.

**VI**

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 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 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.

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.

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.

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 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 consequences will be "drastic precisely because they depart from *** more than a century [of] settled understanding." *Post*, at 2502. The prediction is a 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 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 time. It has no shortage of tools at its disposal.

It has sometimes restricted and other times expanded the Tribe's authority. But Congress has never withdrawn the promised reservation. As a result, many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.

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

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).

State's continuing authority over any area that touches Indian affairs, ranging from zoning and taxation to family and environmental law.

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 ——, 136S.Ct., at 1079 (internal quotation marks omitted). Yet the Court declines to consider such understandings here, preferring to examine only individual statutes in isolation.

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.

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).

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. 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]

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. *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 its land, and the State assumed jurisdiction over criminal cases that, if a reservation had continued to exist, would have belonged in federal court.

---

**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.

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 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]

---

***NOTES AND QUESTIONS***

1. Does *McGirt* alter the "well settled" framework that the Court used in prior cases to determine whether a reservation had been diminished? If so, how? Of the two approaches to analyzing diminishment cases described above, see Note 1 on p. 283, which did the Court follow in *McGirt*?

2. *McGirt* has had significant ramifications in Oklahoma, with continuing criticism by the State of Oklahoma and demands that the issue be reconsidered. Although a criminal appeal, the Supreme Court's confirmation of the Muscogee (Creek) Nation's Reservation prompted a reassessment of the respective authorities of the Nation, the State of Oklahoma, the federal government over other activities within the Reservation as well. As Justice Gorsuch noted on behalf of the majority, some federal laws rely on language similar to 18 U.S.C. § 1151(a) to delineate where state authority stops and federal and tribal power begins. *See, e.g.*, The Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1291(9); 1291(11) (incorporating § 1151(a) language as to define "Indian lands," which are excluded from "lands within such State"

---

**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.

where the state may regulate surface mining); The National Historic Preservation Act (NHPA) 54 U.S.C. §§ 300319, 3002702 (2018) (defining "tribal land" as "all lands within the exterior boundaries of a reservation," and authorizing tribes to assume the authority of the State Historic Preservation Officer on those lands).

And, given the similarities between the Muscogee (Creek) Nation's history and those of the other so-called "Five Civilized Tribes" now in Eastern Oklahoma, similar cases involving those Reservations are percolating through the judiciary. In *Bosse v. State*, 2021 OK CR 3 (Mar. 11, 2021) and *Bench v. State*, 2021 OK CR 12 (May 26, 2021), the Oklahoma Court of Criminal Appeals granted post-conviction relief in capital murder cases with death penalty sentences in cases involving the Chickasaw treaty language, which is similar to the Creek treaty discussed in *McGirt*.

Following *McGirt*, the State of Oklahoma engaged in a sustained and broad-based effort to limit, negate, or overturn that decision. Oklahoma sought certiorari to the United States Supreme Court in a number of cases requesting that the Court expressly reconsider *McGirt* or the resulting jurisdictional scheme. In *Oklahoma v. Castro-Huerta*, the Court refused to consider the State's request to revisit *McGirt* but did consider the sole question of whether "a state has authority to prosecute non-Indians who commit crimes against Indians in Indian country." *See infra* p. 319. In ruling that Oklahoma possesses criminal jurisdiction over non-Indians concurrently with the federal government, Justice Kavanaugh, writing for the *Castro-Huerta* majority, was clearly influenced by Oklahoma's assertions regarding *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 … jurisdictional ground[s]. 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 the people of Oklahoma. ***
>
> 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 with the Federal government to prosecute crimes committed by non-Indians against Indians in Indian Country.

**On p. 301, subsection D. Federal Expansion of Indian Country:**

The Indian Reorganization Act ("IRA"), including Section 5, was editorially reclassified and renumbered in the United States Code. Therefore, the citations in this subsection should be modified as follows:

Former section 25 U.S.C. § 465 is now found at 25 U.S.C. § 5108; former section 467 is now section 5110; and the "under Federal jurisdiction" language at issue in *Confederated Tribes of the Grande Ronde Community of Oregon* (page 302) and *Carcieri* (page 303) is now found at 25 U.S.C. § 5129. For a complete list of the reclassified and renumbered sections of the IRA, see Statutory Notes and Short Title at 25 U.S.C. § 5101.

**On p. 319, insert the following after the carryover paragraph:**

In both *McBratney* and *Draper*, neither of which involved an Indian defendant or victim, the Supreme Court recognized the limitations on state authority over crimes committed "by or against Indians" within Indian Country. *See McBratney*, 104 U.S. at 624; *Draper*, 164 U.S. at 247. This recognition reflected the long-standing principles of *Worcester* and the historical, treaty-based roots

of the Indian Country Crimes Act. Nonetheless, in the wake of *McGirt v. Oklahoma*, *see supra* p. 294, the Supreme Court reconsidered those foundational concepts in a case involving a claim by the State of Oklahoma that it possesses criminal jurisdiction concurrent with that of the United States under the Indian Country Crimes Act.

Victor Castro-Huerta was arrested, charged, convicted, and sentenced to 35 years in prison by the State of Oklahoma for child neglect. Castro-Huerta appealed his conviction and, while his appeal was pending, the United States Supreme Court decided *McGirt*, and, because Castro-Huerta had committed his crime against an Indian victim within the boundaries of the Muskogee (Creek) Nation as confirmed by *McGirt*, he included the lack of state jurisdiction as a basis for his appeal. The Oklahoma Court of Criminal Appeals, relying on *McGirt* and determining that federal jurisdiction was exclusive, agreed and vacated his state court conviction. During the appeal, Castro-Huerta was indicted by a federal grand jury and accepted a plea agreement for a seven-year sentence followed by his removal from the country on the basis of his lack of legal citizenship. Oklahoma sought certiorari to the United States Supreme Court, asking the Court expressly to reconsider *McGirt* and to review whether federal jurisdiction under the Indian Country Crimes Act is exclusive or whether Oklahoma possesses concurrent authority.

## OKLAHOMA V. CASTRO-HUERTA

142 S.Ct. 2486 (2022)

---

**JUSTICE KAVANAUGH** delivered the opinion of the Court.

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 (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, 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 (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.*

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 (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 (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 (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." *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251, 257–258 (1992).

And as recently as 2001: "State sovereignty does not end at a reservation's border." *Nevada v. Hicks*, 533 U. S. 353, 361 (2001).

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 (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." *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 (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.

***

The central question 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.

***

By its terms, the [Indian Country Crimes] 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. *** 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.

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

***

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 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.

[The *Castro-Huerta* majority proceeded to determine that Public Law 280 also did not preempt state jurisdiction nor was such authority preempted under the majority's analysis of *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), *see infra* p. 453.]

**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 (1832). The Court's decision was deeply unpopular, and both Georgia 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 (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.

***

Really *** 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 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 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." 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 prose- cute crimes on tribal

reservations until and unless Congress "preempt[s]" that authority. The Court emphasizes that States normally wield broad police powers within their borders absent some preemptive federal law.

But the effort to wedge Tribes into that paradigm is a category error. Tribes are not private organizations within 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.

Nor is this "'notion,'" 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. 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. ___, ___ [142 S.Ct. 1838, 1845] (2022) (slip op., at 6) (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 (2014). Throughout our history, "the basic policy of *Worcester*" that Tribes are separate sovereigns "has remained." *Williams v. Lee*, 358 U. S., at 219.

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 (1980); *see also Cotton Petroleum Corp. v. New Mexico*, 490 U. S. 163, 176 (1989); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U. S. 463, 475–476 (1976); *McClanahan v. Arizona Tax Comm'n*, 411 U. S. 164, 170–172 (1973). In typical preemption cases, courts "start with the assumption" that Congress has not displaced state authority. But when a State tries to regulate tribal affairs, the same "backdrop" does not apply because Tribes have a "claim to sovereignty [that] long pre- dates that of our own Government." *McClanahan*, 411 U. S., at 172; *see also Bracker*, 448 U. S., at 143. So instead of searching for an Act of Congress displacing state authority, our cases require a search for federal legislation confer- ring state authority: "[U]nless and until Congress acts, the tribes retain their historic sovereign authority." *Bay Mills Indian Community*, 572 U.S., at 788 (internal quotation marks omitted); see *United States v. Cooley*, 593 U.S. ___, ___–___ [141 S.Ct. 1638, 1643, 210 L.Ed.2d 1] (2021) (slip op., at 3–4) (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 [v. Martinez]*, 436 U.S. [49,] at 60 (1978). 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. And, if anything, these rules bear special force in the criminal context, which lies at the heart of tribal sovereignty and in which Congress "has provided a nearly comprehensive set of statutes allocating criminal jurisdiction" among federal, tribal, and state authorities. Cohen 527.

[citations omitted]

[The dissent then reviewed the Indian Country Crimes Act and determined that it did not authorize state jurisdiction and that Oklahoma had not taken the steps necessary to assume jurisdiction under Public Law 280.]

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.

---

***NOTES AND QUESTIONS***

1. *Is* Worcester v. Georgia *still good law?* The majority and dissent in *Castro-Huerta* have vastly different views on the meaning and continuing import of *Worcester*. According to the majority, when did *Worcester* lose its relevance? In the dissent's view, what does *Worcester* require of the Court in *Castro-Huerta*?

2. *Law or policy?* Did the majority's view of the effects of *McGirt* influence its holding in *Castro-Huerta*? In an un-excerpted portion of the majority opinion, Justice Kavanaugh noted that "Castro-Huerta in effect received a 28-year reduction of his sentence as a result of McGirt" and that "[g]oing 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." The dissent offered a different view, presenting evidence of the continuing cooperation of the federal, state, and tribal governments in Oklahoma to handle the shifting jurisdictional rules in light of *McGirt*. Even so, however, Justice Gorsuch, writing for the dissent, noted his unease with the majority's consideration of these issues:

> 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.

**On pp. 320, add the subsection heading as follows:**

**B. THE ASSIMILATIVE CRIMES ACT, 18 U.S.C. § 7**

**On pp. 320-25, revise the subsection headings as follows:**

**C. MAJOR CRIMES ACT, 18 U.S.C. § 1153**

**D. BASIC CHART FOR FEDERAL CRIMINAL JURISDICTION**

**E. WHO COUNTS AS AN "INDIAN"?**

**F. CRISIS OF CRIMINAL JURISDICTION IN INDIAN COUNTRY**

**G. FIXING THE SYSTEM?**

**On p. 321–22, replace the chart as below (adding the concurrent jurisdiction under *Castro-Huerta*)**

If the perpetrator is a non-Indian:

— and the crime is one of the offenses specified in the Major Crimes Act, there is nonetheless no federal jurisdiction under that statute because it applies only to Indian perpetrators

— and the victim is non-Indian, there is exclusive state jurisdiction (under *McBratney*).

— and the victim is Indian:

— if the crime violates either the federal criminal code or the criminal code of the state of occurrence, there is federal jurisdiction under the Indian Country Crimes Act.

__ there is concurrent state jurisdiction (under *Castro-Huerta*)

— and there is no victim?

— unclear, but both states (under *McBratney*) and the federal government (under the ICCA) have exercised jurisdiction.

If the perpetrator is Indian:

— and the victim is Indian:

— if the crime is one of the enumerated major crimes, federal jurisdiction lies under the Major Crimes Act

— if the crime is not a "major crime," there is no jurisdiction under either the Major Crimes Act or the Indian Country Crimes Act (recall the first exception to the ICCA); hence, tribal criminal jurisdiction is exclusive

— and the victim is non-Indian:

— if it is a "major crime," there is federal jurisdiction under the Major Crimes Act

— if it is not a major crime there is federal jurisdiction under the Indian Country Crimes Act, unless the perpetrator has already been punished by the tribe.

**On p. 328, erratum:**

The citation at the beginning of the first full paragraph of (non-quoted) text should read *United States v. Bryant*, 579 U.S. 140 (2016).

**On p. 339, delete the period at the end of note 1 and add the following:**

, and *Denezpi v. United States*, ___ U.S. ____**,** 142 S.Ct. 1838 (2022) (relying in part on *Wheeler* to find prosecution in so-called "CFR Court" on the Ute Mountain Ute Reservation does not amount to a federal prosecution sufficient to violate the Double Jeopardy Clause when considered in conjunction with subsequent prosecution in federal court).

**On p. 343, replace the carry-over paragraph at the bottom of the page (entitled "§ 1304. Tribal Jurisdiction over Crimes of Domestic Violence") with the following:**

**§ 1304. Tribal Jurisdiction over Covered Crimes.**

Section 1304, added by the VAWA reauthorization of 2013 and expanded by the 2022 VAWA reauthorization, recognizes tribal criminal jurisdiction over non-Indians committing various covered crimes against Indians in Indian country. These crimes include domestic and sexual violence as well as violent crimes against children and sex trafficking, among others. Tribes may also exercise criminal jurisdiction over certain other covered crimes, such as assault of tribal justice personnel or obstruction of (tribal) justice even where neither the defendant nor the victim are

Indian. *See* § 1304(b)(4). Defendants must be granted all of the protections of § 1302(b) (extended sentences) and have:

1. all rights described in section 1302(c) if a term of imprisonment of any length may be imposed;
2. a right to a trial by a jury that includes a "fair cross-section of the community" and does not systemically exclude any group, including non-Indians; and
3. all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special Tribal criminal jurisdiction over the defendant. § 1304(d)(4).

In addition, a convicted defendant may seek a stay of detention as part of a habeas corpus petition filed under § 1303; however, such petitions may be filed only after sentencing by the tribal court, the exhaustion of available tribal remedies, or upon the demonstration that no such remedies are available or would be ineffective to protect the petitioner's rights. §§ 1304(e)–(f).

**On p. 382, add a new note 10:**

10. *Bankruptcy Proceedings*. In 2019, Lendgreen, a tribal business operated by the Lac du Flambeau Band of Lake Superior Chippewa Indians (LdF Band), made a high-interest, short-term loan of $1,100 to Brian Coughlin. Coughlin subsequently filed for bankruptcy and sought protection from Lendgreen's efforts to collect on the unpaid debt. When Lendgreen continued those efforts, Coughlin filed a motion in Bankruptcy Court requesting that the Court order a stay pursuant to the federal Bankruptcy Code. Responding on behalf of Lendgreen, the LdF Band asserted sovereign immunity, claimed that the Bankruptcy Court therefore lacked subject matter jurisdiction, and sought dismissal of Coughlin's motion. The case, which was heard by the U.S. Supreme Court in its October 2023 term, highlighted a split among circuits over the relationship between the Bankruptcy Code and tribal sovereign immunity, with the Ninth Circuit holding that the Code abrogated such immunity and the Sixth Circuit holding the opposite. In an 8-1 decision, the Supreme Court held that the Bankruptcy Code did abrogate tribal sovereign immunity based on the Court's reading of the Code's definition of "governmental unit[s]," found at 11 U.S.C. § 106(a). That section of the Code abrogates immunity of all such units and defines that term broadly to include the "United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government." 11 U.S.C. § 101(27). According to the Court's majority in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. ___, 143 S.Ct. 1689 (2023), that definition includes all governments and, therefore, The Bankruptcy Code "equivocally abrogates the sovereign immunity of any and every government that possesses the power to assert such immunity," including tribal governments. 143 S.Ct. at 1696. In doing so, the Court rejected the LdF Band's argument (and Justice Gorsuch's contention in dissent) that Congress needed to specifically include "Indian tribes" in the definition of government unit in order to abrogate tribal sovereign immunity. Instead, the majority accepted a broad and inclusive reading of Congress' words and intent, noting that "[a]s long as Congress speaks unequivocally, it passes the clear-statement test—regardless of whether it articulated its intent in the most straightforward way." *Id.* at 1699.

**On p. 476, add the following at the end of note 1:**

In contrast, in *Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th 1024, 1037–39 (9th Cir. 2022), the Ninth Circuit held that provisions related to family law, environmental law,

and tort law (for injuries occurring at the gaming facility), were not "directly related to gaming" and thus were not proper subjects for states to require tribal negotiation under IGRA. *See also Navajo Nation v. Dalley*, 896 F.3d 1196 (10th Cir. 2018) (tort claims not proper subjects for compact).

**On p. 486, note the following update in the first paragraph:**

By 2023, governors had concurred in 14 positive Secretarial two-part determinations.

**On p. 539, add the following at the end of note 5:**

In April 2021, the Fifth Circuit, sitting *en banc*, reconsidered the *Brackeen* case, discussed above. In *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021), the *en banc* court issued a wide-ranging and splintered opinion spanning 325 pages. On February 28, 2022, the United States Supreme Court granted certiorari and subsequently consolidated the appeals related to the Fifth Circuit's opinion. The case raised a number of issues, including constitutional challenges to ICWA based on equal protection and the Commerce Clause. On June 15, 2023, the Supreme Court issued its decision in the consolidated cases, now titled *Haaland v. Brackeen*. By a 7–2 majority, the Court rejected the challenges to ICWA, but declined to reach the equal protection issue. Case No. 21-376, 599 U.S. ____, 143 S.Ct. 1609 (2023).

Writing for the majority, Justice Coney Barrett described Congress' plenary authority over Indian affairs as follows:

> *** "plenary" does not mean "free-floating." A power unmoored from the Constitution would lack both justification and limits. So like the rest of its legislative powers, Congress's authority to regulate Indians must derive from the Constitution, not the atmosphere. Our precedent traces that power to multiple sources. 143 S.Ct. at 1627.

The majority opinion then described the foundations of that plenary power found in the constitution's Commerce and Treaty Clauses as well as "principles inherent in the Constitution's structure" and the federal government's trust duty to Indian tribes. 143 S.Ct. at 1630–31. Recognizing the Court's numerous and varied precedents recognizing and upholding this broad Congressional authority, the majority concluded ICWA was well within its scope.

The majority then rejected the challenges to ICWA based on state authority, holding that neither the Tenth Amendment nor anticommandeering principles precluded the law, and held that the parties challenging ICWA lacked standing to bring equal protection claims and those based on the non-delegation doctrine.

Justice Gorsuch authored a concurring opinion, joined in parts by Justices Sotomayor and Jackson, emphasizing the historical context of ICWA and setting forth his own views on how the structure of the constitution and the federal-tribal-state relationship support Congress' authority to enact that law:

> Often, Native American Tribes have come to this Court seeking justice only to leave with bowed heads and empty hands. But that is not because this Court has no justice to offer them. Our Constitution reserves for the Tribes a place—an enduring place—in the structure of American life. It promises them sovereignty for as long as they wish to keep it. And it secures that promise by divesting States of authority over Indian affairs and by giving the federal government certain significant (but limited and enumerated) powers aimed at building a lasting peace. In adopting the Indian Child Welfare Act, Congress exercised that lawful authority to secure the right of Indian parents to raise their families as they please; the right of Indian children to grow in their culture; and the right of Indian

> communities to resist fading into the twilight of history. All of that is in keeping with the Constitution's original design. 143 S.Ct. at 1661 (Gorsuch, J. concurring).

Justice Kavanaugh also authored a concurring opinion to emphasize that, while he agreed with the majority that the parties lacked standing to bring the equal protection claims, he viewed the "equal protection issue [a]s serious." 143 S.Ct. at 1661 (Kavanaugh, J. concurring).

Both Justices Thomas and Alito authored dissenting opinions. Like his earlier opinions questioning the foundations of Congressional plenary power, Thomas' dissent made clear his view that, despite the Constitutional framework and precedents cited by the majority, "[p]roperly understood, the Constitution's enumerated powers cannot support ICWA." 143 S.Ct. at 1677 (Thomas, J. dissenting). Furthermore, according to Thomas, the focus and purpose of ICWA rendered it well outside of the authorities relied upon by the majority: "[n]ot one of those powers, as originally understood, comes anywhere close to including the child custody proceedings of U.S. citizens living within the sole jurisdiction of States." *Id.* at 1677–68.

Ultimately, the result in *Haaland v. Brackeen* was a resounding (and surprising) lopsided victory for ICWA, with a strong majority of the Court reaffirming core aspects of its foundational and long-standing view of Congressional authority in Indian affairs. Still, however, with suggestions in the majority opinion that such authority is limited (although the opinion did not specify those limits), Justice Kavanaugh's concerns about equal protection issues, and sharp dissents from Justices Alito and Thomas, results in an outcome that left some questions unresolved.

**On p. 610, erratum:**

Chief Justice Roberts delivered the opinion of the Court in *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008).

**On p. 618, add a new note 6:**

6. *A revival of* Montana's *exceptions?* In 2021, the Supreme Court relied on *Montana* in *United States v. Cooley*, 141 S. Ct. 1638 (2021), a criminal case challenging the authority of tribal police officer to temporarily detain and search a non-Indian motorist stopped on the side of a state highway running through a reservation. In *Cooley*, the Court upheld tribal authority, finding that it "rests upon a tribe's retention of sovereignty as interpreted by *Montana*, and in particular its second exception." According to the majority, that exception fit the case "almost like a glove," because denying "a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats."

While *Cooley* marked the first time a clear majority of the Court upheld tribal authority under *Montana* (recall the confusing plurality in *Brendale*, *supra* pp. 575–76), its lasting impact on broader tribal jurisdiction over nonmembers may be limited. After being detained and investigated by the tribal officer, Mr. Cooley, a non-Indian, was subject only to state or federal—but not tribal—prosecution. Therefore, the majority distinguished *Cooley* from prior cases where "full tribal jurisdiction would require the application of tribal laws to non-Indians who do not belong to the tribe and consequently had no say in creating the laws that applied to them." *See also* p. 594, note 6, *supra*.

**On p. 644, add the following after the second full paragraph:**

On March 15, 2022, President Biden signed into law the Violence Against Women Act Reauthorization Act of 2022, which Congress passed as part of a larger Consolidated Appropriations Act. *See* Division W, Pub. L. 117-103, 117th Cong. (2022). Title VIII of the VAWA

Reauthorization Act of 2022 replaced the "special domestic violence criminal jurisdiction" authorized in the 2013 VAWA reauthorization with "special Tribal criminal jurisdiction" over a broader range of "covered crimes," including assaulting tribal justice personnel, crimes of violence against children, stalking, protection order violations, sexual violence, sex trafficking, and obstruction of justice, among others. Pub. L. 117-103, Title VIII, § 804. With the passage of these amendments, tribes may now choose to exercise jurisdiction over additional crimes committed by non-Indians, provided they opt-in to the additional procedural protections described above.

**On p. 795, replace the remainder of note 6, beginning at "In a case now on appeal," with the following:**

In a more recent case, the Ninth Circuit allowed the Navajo Nation to raise a breach of trust claim against the Department of the Interior for failing to determine and secure water sufficient to make the Nation's Reservation a permanent homeland. Relying on the Nation's 1868 Treaty and *Winters*, the Ninth Circuit held that the Department "ha[s] a duty to protect the Nation's water supply that arises, in part, from specific provisions in the 1868 Treaty that contemplated farming by the members of the Reservation." Therefore, the Nation's efforts to seek injunctive relief based on a breach of trust claim were not futile and could proceed. *Navajo Nation v. United States Department of the Interior*, 996 F.3d 623, 639 (9th Cir. 2021).

However, the Supreme Court granted certiorari and, in a 5–4 decision issued on June 22, 2023, the Court reversed the Ninth Circuit. *Arizona v. Navajo Nation*, 143 S.Ct. 1804 (2023). The majority opinion, authored by Justice Kavanaugh, distinguished the existence of reserved rights to water under the 1868 Treaty and *Winters* from any "duty on the United States to take affirmative steps to secure water for the Tribe." 143 S.Ct. at 1812. Because, in the majority's view, nothing in the Treaty imposed such a duty and because, in the majority's view, nothing in the Treaty created a "conventional trust relationship," the Navajo Nation could not bring its breach of trust claim. In so holding, the majority relied on precedent, such as *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011) (discussed *supra* p. 242), narrowly interpreting the federal government's trust duty and limiting its enforceability to situations in which "the text of a treaty, statute, or regulation imposed certain duties on the United States." 143 S.Ct. at 1813. The Navajo Nation had sought to distinguish those cases, arguing that each of those precedents arose in the context of damages claims (under the Indian Tucker Act) while its claims sough injunctive relieve under the Administrative Procedures Act. The majority disagreed, noting that "*Jicarilla's* framework for determining the trust obligations of the United States applies to any claim seeking to impose trust duties on the United States, including claims seeking equitable relief," because, in the majority's view, that framework is rooted in separation of powers principles, not the nature of Tucker Act claims. *Id.* at 1813, n.1.

**On p. 847, add the following to the end of note 1:**

While courtroom battles over mining and other potential impacts to areas important to tribes continue, *see, e.g.*, *Apache Stronghold v. United States*, No. 21-15295 (9th Cir.) (*en banc* review pending); *Reno-Sparks Indian Colony v. Haaland*, 2023 WL 3613201 (Mar. 23, 2023) (appeal pending), various agencies of the Biden Administration entered into a Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indigenous Sacred Sites (Nov. 2021), *available at* https://www.doi.gov/sites/doi.gov/files/mou-interagency-coordination-and-collaboration-for-the-protection-of-indigenous-sacred-sites-11-16-2021.pdf [https://perma.cc/5CNH-EYCD].

**On p. 848, replace the second to last sentence of note 5, starting with "Whether President Trump's revocation of the monument …" with the following:**

While litigation over President Trump's revocation of the monument continues, *see Hopi Tribe, et al. v. Trump et al.*, Case No. 1:17-cv-02590 (DC Dist. *filed* Dec. 14, 2017), President Biden restored Bears Ears National Monument in October 2021. *See* Proclamation 10285 of October 8, 2021, *Bears Ears National Monument*, 86 Fed. Reg. 57,321 (Oct. 15, 2021). In June 2022, the five Tribes of the Bears Ears Commission and various federal land management agencies entered into an Inter-Governmental Cooperative Agreement to implement the joint management of the monument called for in President Obama's original proclamation and reiterated in President Biden's restoration proclamation. The agreement, which is available here: https://www.blm.gov/sites/default/files/docs/2022-06/Bears%20Ears%20National%20Monument%20Inter-Governmental%20Cooperative%20Agreement%202022.pdf [https://perma.cc/7Y9S-FN2G], represents a leading effort in the implementation of policy initiatives from the Biden Administration promoting tribal co-stewardship and co-management of federal public lands. *See* Order No. 3403, *Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters* (Nov. 15, 2021), *available at* https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3403-joint-secretarial-order-on-fulfilling-the-trust-responsibility-to-indian-tribes-in-the-stewardship-of-federal-lands-and-waters.pdf [https://perma.cc/M46Q-SC5F].

**On p. 878, add the following to the end of note 4:**

Despite their corporate status and unique origins in ANCSA, the Supreme Court recently determined that Alaska Native Corporations (ANCs) may be eligible for certain benefits as an "Indian tribe," depending on how that term is defined by applicable federal law. *See Yellen v. Confederated Tribes of the Chehalis Reservation*, ___ U.S. ___; 141 S.Ct. 2434, 210 L.Ed.2d 517 (2021) (interpreting the definition of "Indian tribe" in the Indian Self-Determination and Education Assistance Act (ISDA) to include ANCs for purposes of receiving funds under the Coronavirus Aid, Recovery, and Economic Security (CARES) Act).

**On p. 974, add the following to the end of note 7:**

Most recently, in *R. v. Desautel*, 2021 S.C.C. 17, a case challenging a wildlife citation issued to a member of one of the Confederated Tribes of the Colville Reservation in Washington State, the Canadian Supreme Court determined that tribal groups retaining aboriginal rights in Canada may still be entitled to consultation and other rights, even if no longer residing there.