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Righting the Wrongs of Native American Removal and Advocating for Tribal Recognition: A Binding Promise, The Trail of Tears, and the Philosophy of Restorative Justice, 54 UIC L. Rev. 933 (2021)

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RIGHTING THE WRONGS OF NATIVE AMERICAN REMOVAL AND ADVOCATING FOR TRIBAL RECOGNITION: A BINDING PROMISE, THE TRAIL OF TEARS, AND THE PHILOSOPHY OF RESTORATIVE JUSTICE

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I. INTRODUCTION

In 1977, Oklahoma charged a registered member of the Muscogee Creek Nation for crimes committed against another tribal member on reservation lands.[1] After a jury found him guilty, he was sentenced to 500 years in prison and life without parole.[2] Forty-two years later, his conviction was reviewed on writ of certiorari to the United States Supreme Court.[3] On appeal, he argued that Oklahoma had no jurisdiction to prosecute him, as the act was committed in Indian country and he was a registered member of the Muscogee Creek Nation.[4] Despite Oklahoma exercising criminal jurisdiction over the land in question for more than 100 years, the United States Supreme Court held in a 5-4 decision that for purposes of the Indian Major Crimes Act, the land reserved for the

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*Maria Conversa, Juris Doctor Candidate 2022, UIC School of Law. Thank you to those whom have supported my dreams of going to law school and continue to encourage me to advocate for change. I chose this topic to discuss restorative justice, but also to shed light on the injustices indigenous persons continue to face in this country. To my father, who has taught me strength. To my mother, who has taught me empathy. And to W.T., who consistently challenges me to be better. Your collective influence has been imperative to my academic career.

Throughout this Note, the terms "Native American" and "Indian" are used interchangeably. "Indian" is primarily used in this Note when referencing specific laws, treaties, or cases that explicitly include the term "Indian." "Native American" (also commonly referred to as "American Indian" or "Indigenous American" outside of this Note) is used to refer to a person with ancestry originating from a tribe from the Contiguous United States, as well as Alaska, who maintain their tribal affiliation.

1. *See* McGirt v. State, No. F-1997-967 (Okla. Crim. App. Aug. 26, 1998) (listing the surrounding facts and circumstances that led to the multiple criminal charges by the State of Oklahoma against Jimcy McGirt for sexual crimes committed against a four-year-old girl in Broken Arrow, OK).

2. *See id.* (finding Jimcy McGirt guilty on three counts of criminal sexual crimes by a jury in Oklahoma state criminal court and issuing his criminal sentencing).

3. *See* McGirt v. Oklahoma, PC-2018-1057, *cert. granted*, (U.S. Dec. 13, 2019) (No. 18-9526) (granting certiorari by the United States Supreme Court to determine whether Oklahoma courts can continue to unlawfully exercise, under state law, criminal jurisdiction as justiciable matter in Indian country over Indians accused of major crimes enumerated under the Indian Major Crimes Act, which are under exclusive federal jurisdiction).

4. *See* McGirt v. Warden Bryant, WH-2017-0022 (2017) (basing his appeal on the notion that the state of Oklahoma did not have the jurisdiction to prosecute him since he is a member Muscogee Creek Nation and the act occurred on lands promised to the Muscogee Creek Nation tribe in the 1832 treaty and that the federal government).

Muscogee Creek Nation in Oklahoma constituted Indian Country.[5] As a result, Oklahoma could not legally try a Muscogee Creek Nation citizen in state court for criminal conduct, thereby reversing McGirt's conviction.[6]

One hundred and eighty-nine years ago, in 1832, Congress made a promise to the Muscogee Creek Nation of American Indians and guaranteed them fixed borders for a "permanent home to the whole Creek Nation of Indians."[7] This promise granted land in fee simple[8] to the Muscogee Creek Nation to continue so long as they existed as a Nation and occupied the lands.[9] Jump ahead to 2019 and Oklahoma insists that the Muscogee Creek Reservation had been disestablished as a result of persistent white-settler movement and the continued prosecution of Indians in Oklahoma state courts."[10] In rejecting Oklahoma's argument, the Supreme Court held, in a landmark decision fortifying tribal rights, that only the federal government—not Oklahoma—may prosecute tribal members for major crimes committed in Indian country.[11]

McGirt is a staggering decision that fortifies federal tribal rights observed by treaties with Congress. The majority in *McGirt* took a textual approach in deciding "whether the land [the] treaties [originally] promised remains an Indian reservation for purposes of federal criminal law."[12] Throughout this Case Note's analysis, the majority and dissenting opinions will be examined to identify the different modes of interpretation used to determine the fate of federal tribal rights. Part II will discuss the Indian Major Crimes Act to explain how the statute grants the federal government criminal jurisdiction over tribal lands. Part III will discuss the history behind the Treaty with the Muscogee Creek Nation to create

5. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020) (holding that the state of Oklahoma lacked the subject matter jurisdiction to criminally prosecute Jimcy McGirt for the major crimes of rape, sodomy, and molestation, which are enumerated crimes in the Indian Major Crimes Act committed on lands that constitute Indian country).

6. *Id.*

7. *McGirt*, 140 S. Ct. at 2459 (citing 1933 Treaty with the Creeks, preamble, 7 Stat. 417).

8. A form of ownership in real property representing the full and entire interest.

9. *McGirt*, 140 S. Ct. at 2461.

10. *Id.* at 2457 (Oklahoma arguing that its "long historical prosecutorial practice of asserting jurisdiction over Indians in state court, even for serious crimes on the contested lands" demonstrated its ability to prosecute petitioner, "Jimcy McGirt, [for] molesting, raping, and forcibly sodomizing a four-year-old girl.").

11. *Id.* at 2478.

12. *See McGirt*, 140 S. Ct. at 2460 (reasoning that Congress had not clearly expressed that the lands promised did not remain Indian country, so the land remained Indian country for purposes of the Indian Major Crimes Act, thus subjecting Jimcy McGirt to the exclusive criminal jurisdiction of the federal government).

a backdrop for the Supreme Court's discussion. Part IV will look at the Court's analysis in interpreting the Treaty. Finally, this Case Note will argue that the majority's method is overly broad in application and that the Muscogee Creek Nation tribe should have the sole authority to prosecute their members without federal interference because of their traditional values and adherence to the philosophies of restorative justice.

II. BACKGROUND

A. Indian Major Crimes Act (MCA): What is Included?

According to the Indian Major Crimes Act ("MCA"), originally enacted in 1885, any Indian who commits certain offenses "shall be subject to the same law and penalties as all other persons committing any of [those] offenses, within the exclusive jurisdiction of the United States."[13] For purposes of the MCA, the term "Indian country" encompasses:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent . . . (b) all dependent Indian communities within the borders of the United States . . . and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished.[14]

The enumerated crimes include, among others, "murder, incest, felony child abuse or neglect, and an assault against an individual who has not attained the age of sixteen years."[15]

B. Hostility - The Context of the Treaties

At the turn of the 18th century, the Muscogee Creek Nation was forced to vacate their ancestral lands in modern-day Alabama and Georgia while receiving assurances that the lands in the west would be theirs forever.[16] Between "1802 and 1833, the Creeks ceded their homelands, which spanned millions of acres."[17] In consideration for

13. 18 U.S.C. § 1153(a) (1949).

14. 18 U.S.C. § 1151 (1949).

15. *See* 18 U.S.C. § 1153 (1949) (enumerating crimes designated as major crimes for purposes of the applicable statute).

16. *See* 1832 Treaty, Art. XIV, 7 Stat. 368 (guaranteeing to the Creek Indians the country west of the Mississippi without any interference by any state or territory in the pursuit of the Creek Indians right to self-govern and granting a land patent to be executed to the Creek tribe as soon as the boundaries of the Creek country West of the Mississippi are ascertained).

17. Brief of Amici Curiae Historians, Legal Scholars, and Cherokee Nation in Support of Petitioner at 4, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No.

the Muscogee Creek Nation parting with their land East of the Mississippi river, the "government agreed by treaty that '[t]he Creek country west of the Mississippi shall be solemnly guarantee[e]d to the Creek Indians'"[18] and that "[n]o State or Territory [shall] ever have a right to pass laws for the government of such Indians, but [that] they shall be allowed to govern themselves."[19] This was part of a federal effort to relocate Native Americans to permanent reservations in order to achieve the contemporaneous goal of separating Native Americans from white settlers.[20]

There are two treaties that were enacted that are directly relevant to Jimcy McGirt's argument on appeal: the 1832 Indian Removal Treaty and the 1833 Treaty promising fee simple title to the Creek Nation so long as they continue to exist and occupy the land granted to them.[21] Recognizing the general hostility towards Native Americans during this era is important in understanding the later actions taken by Oklahoma in its unlawful prosecutorial practices.

1. Creek Occupancy Over Eastern Lands

By 1790, there was a long history of the Muscogee Creek Nation tribe occupying vast stretches of land in the east, including land "in the present states of Alabama, Georgia and Mississippi."[22] As white settlers began to migrate onto Muscogee Creek lands, there were efforts to remove tribal members from the east and relocate them west in order to enter Alabama, Georgia, and Mississippi into statehood.[23] With these efforts, hostility towards the tribes grew as more white settlers were occupying the eastern regions of the continent and believed that Native Americans were incapable of civilization.[24] The Muscogee Creek Nation wished to

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18-9526).

18. *McGirt*, 140 S. Ct. at 2459 (citing 1832 Treaty, Arts. I, XIV, 7 Stat. 366, 368).

19. *McGirt*, 140 S. Ct. at 2459 (citing 1832 Treaty, Art. XIV, 7 Stat. 368).

20. *See* Brief of Amici Curiae Historians, Legal Scholars, and Cherokee Nation in Support of Petitioner, *supra* note 17 (describing the federal policy and public hostility towards Indian people and the tendency to separate non-Indians from Indians).

21. *See McGirt*, 140 S. Ct. at 2460 (noting the two treaties implicated as a result of Jimcy McGirt's appeal).

22. United States v. Creek Nation, 476 F.2d 1290, 1292 (Ct. Cl. 1973).

23. *See* Brief of Amici Curiae Historians, Legal Scholars, and Cherokee Nation in Support of Petitioner, *supra* note 17, (chronicling the hostility towards Indian tribes by the territories trying to enter statehood).

24. *See id.* (noting the negative public opinion towards Indian tribes, historically and commonly referred to as the "Indian Problem," and explaining the Native Americans' common refusal to compromise their traditional way of life in order to assimilate to the culture of the white settlers that were

remain in Alabama because the land held religious significance and was the last enclave of their ancestral lands. Ultimately, they were compelled to cede their ancestral lands and were forcibly moved westward.[25]

2. 1832 Treaty with the Creeks

Understandably, the Muscogee Creek Nation's removal was met with resistance, as its members did not wish to uproot their livelihoods from their ancestral lands.[26] In response, the government created a treaty between the increasing number of white settlers and the Muscogee Creek Nation in an effort to persuade the Muscogee Creek Chiefs to cede their lands.[27] Although the terms of the removal are commonly referred to as a "treaty," this hardly constituted an agreement since the Muscogee Creek Nation was legally powerless to protect their land.[28] As such, it is more appropriate to view this situation as a "forced removal," rather than a "treaty."[29] Nonetheless, it will be referred to as a treaty for clarification purposes throughout this Note. In 1832, the treaty was signed by Lewis Cass and the Muscogee Creek Nation.[30] Lewis Cass was an American military officer, politician, and statesman who accepted the appointment as Secretary of War under President Andrew Jackson in 1831.[31] This treaty was relatively concise and consisted of fifteen articles.[32] The treaty primarily required the Muscogee Creek Nation to "cede to the United States all their land,

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increasingly taking over their ancestral lands).

25. *McGirt,* 140 S. Ct. at 2483 (Roberts, C.J., dissenting).

26. *See The Muscogee Creek Nation, Culture History Videos-Removal to Allotment*, MUSCOGEE CREEK NATION (last visited Nov. 2, 2021), www.muscogeenation.com/culturehistory/history-videos/ [perma.cc/XBG7-VAXX] [hereafter Muscogee Videos] (mentioning the fast rate of white settlers invading Creek lands and the general resistance of Creek tribe members to removal thus leading to federal efforts to deal with the 'Indian Problem').

27. *Id.*

28. ANGIE DEBO, THE ROAD TO DISAPPEARANCE: A HISTORY OF THE CREEK INDIANS 129 (1941) ("In 1833 they had been tricked into signing such an agreement").

29. Muscogee Videos, *supra* note 26 (recounting the tragedies Creek members faced due to forcible removal and explaining how Creek members were without legal or political power to defend their ancestral lands and were peaceful people trying to avoid combat).

30. *See* 1832 Treaty, 7 Stat., 366 (listing the endorsed names of the executors of the treaty at the end of the agreement).

31. *See* WILLARD C. KLUNDER, LEWIS CASS AND THE POLITICS OF MODERATION 67 (1996) (narrating the history of President Andrew Jackson's appointment of Lewis Cass as the secretary of war and delegating the authority to him to help implement President Jackson's Indian Removal policies).

32. *See* 1832 Treaty, 7 Stat., 366 (containing fifteen articles within the document).

East of the Mississippi river."[33] Arguably, the most important provision of this treaty was Article 14, which provided that "the Creek country west of the Mississippi shall be solemnly guaranteed to the Creek Indians."[34] The Article also guaranteed that no other State or Territory would ever have the right to pass laws for the Indians.[35] The effect of this Article was that it guaranteed the Muscogee Creek Nation's right to self-governance, so long as it was compatible with the general jurisdiction which Congress thought proper to exercise over them.[36]

3. Tribal Recognition in the Courts: The Marshall Trilogy

Fearful that "only the acquisition of the white man's culture would save the Creeks from extinction,"[37] the chief leaders of the Muscogee Creek Nation "tried to maintain peace between the invading settlers and those Creek factions who actively resisted the invasion."[38] These efforts were ultimately unsuccessful even though the Muscogee Creek Nation had long self-governed.[39] The Muscogee Creek Nation needed stronger protections and recognition of their lands.

Three seminal cases commemorating the history of Indian law in the Supreme Court are now referred to as "the Marshall Trilogy."[40] In 1823, Chief Justice John Marshall authored the opinion of *Johnson v. M'Intosh*, which established federal supremacy over the states regarding Indian affairs.[41] In 1831 and 1832, out east, among resistance from Georgia, the Court issued two landmark decisions, *Worcester v. Georgia* and *Cherokee Nation v. Georgia*.[42] These cases recognized Cherokee Nation rights and held

33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. DEBO, *supra* note 28, at 85.
38. Brief of Amici Curiae Historians, Legal Scholars, and Cherokee Nation in Support of Petitioner, *supra* note 17, at 5.
39. *See id.* (noting the efforts of Muscogee Creek leaders in trying to maintain peace with the settlers and federal government).
40. *See* Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, HUMAN RIGHTS MAG. (Oct. 1, 2014), www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol--40--no--1--tribal-sovereignty/short_history_of_indian_law (describing the United States Supreme Court's history of interpreting Federal Indian Law and the three seminal cases recognizing tribal rights and affirming both the political and legal standing of the remaining Indian nations while also establishing federal authority over many Indian affairs).
41. *See* Johnson v. M'Intosh, 21 U.S. 543, 604 (1823) (establishing the federal government's authority to oversee Indian affairs and the Supreme Court's recognition of the federal government's legitimacy in handling such matters).
42. *See* Worcester v. Georgia, 31 U.S. 515, 540 (1832) (holding that the law

that Georgia laws did not apply on Cherokee Nation land[43] as the Cherokee Nation was regarded as a "domestic dependent nation."[44]

In defining tribal sovereign powers, the Court described tribes as domestic dependent nations, "meaning that although tribes were distinct independent political communities, they remained subject to the paternalistic powers of the United States."[45] After these decisions were issued and the 1833 treaty was executed, Muscogee Creek Nation members were hopeful because they were promised relatively strong protections against state regulation.[46] However, the implementation of the treaty was nothing short of disastrous.[47] Due to the hostility and savagery from an increasing amount of non-Indian settlers, thousands of Muscogee Creek Nation members died en route to their promised lands.[48] In the twenty-year period after the treaty, the Muscogee Creek Nation population decreased by more than 10,000 citizens.[49] Discussion of the Marshall Trilogy is important because it codified the concept that the federal government, not the states, had the jurisdiction to prosecute Indians — the very issue the Supreme Court deals with in *McGirt*.

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of the State of Georgia that redrew the boundaries of Indian lands and criminalized living on Indian lands was inconsistent with the treaties made with the tribes because it went against the very notion found in treaties that actually civilized the Indian tribes and therefore would not be upheld because the State of Georgia had no right to interfere with an agreement between the federal government and the tribes); Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

43. *See* cases cited *supra* note 41 (set of three Supreme Court cases that demonstrate Court's recognition that states couldn't exercise power over tribal lands).

44. *Cherokee Nation*, 30 U.S. at 17.

45. *Our Government*, PAUMA BAND OF LUISEÑO INDIANS, www.paumatribe.com/government/tribal-sovereignty [perma.cc/TJP6-X273] (last visited Nov. 1, 2021) (internal quotations omitted).

46. *See* 1832 Treaty, Art. XIV, 7 Stat., 366 (promising the tribes the country west of the Mississippi and preventing any State or Territory from having a right to pass laws for the government of such Indians, but that the Creeks shall be allowed to govern themselves, also stating that the United States will also defend the Creeks from the unjust hostilities of other Indians, and will cause a patent or grant to be executed to the Creek tribe).

47. *See* FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 22 (1984) (recounting the complexities of implementation of the treaty and the public resistance to the policies that liberally recognized tribal rights).

48. Brief of Amici Curiae Historians, Legal Scholars, and Cherokee Nation in Support of Petitioner, *supra* note 17, at 8 (citing GRANT FOREMAN, THE FIVE CIVILIZED TRIBES: CHEROKEE, CHICKASAW, CHOCTAW, CREEK, SEMINOLE (1934)).

49. *Id.*

4. Abrading Tribal Authority: Trail of Tears through Allotment

As a result of the forced removal of the Muscogee Creek Nation, approximately 23,000 tribal members forcibly marched on the 5,043-mile agonizing journey to their land out west — a journey commonly referred to as the Trail of Tears.[50] The Trail of Tears is the most blatant example of the unfortunate tragedy and loss faced by the tribes and is of critical significance because the Treaty of 1832 was the inception of their travel westward to Oklahoma. Although the Muscogee Creek Nation encountered terrible tragedy and loss, once arriving out west, they remained courageous and eager to establish strong tribal towns.[51] The Muscogee Creek Nation was able to establish towns by building new homes and schools in an effort to strengthen their tribe and independent republic.[52]

a. Fee Patent of 1852

Despite state attempts to diminish the control of tribal leaders over their people, the Treaty granting the Muscogee Creek Nation their lands was reinforced by a fee patent.[53] This patent, executed on August 11, 1852, by the President, versed title in them as a tribe.[54] The effect was that they would continue "to exist as a nation and continue to occupy the country thereby assigned to them."[55] With time, the Creek Nation was able to establish towns, schools, a police force, and tribal courts that exercised both civil and criminal jurisdiction over its members.[56] This demonstrated the tribe's ability to self-govern without state intervention. Notwithstanding that the Muscogee Creek Nation was independently functioning

50. *See Trail of Tears*, HISTORY (Nov. 9, 2009), www.history.com/topics/native-american-history/trail-of-tears [perma.cc/VT8B-GTPB] (last visited Oct. 20, 2021) (estimating the number of Native American tribes negatively impacted by the coercive, tragic, and deadly journey known as the "Trail of Tears" and how this history shaped many territories eventual entry into statehood).

51. *See* Muscogee Videos, *supra* note 26 (describing the resilience of Creek members upon arriving to their new lands in the West and the hope they had to build a strong independent republic for their tribe despite the numerous tragedies they endured).

52. *Id.*

53. Brief for Amicus Curiae Muscogee (Creek) Nation in Support of Petitioner, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526) at 6 (citing Fee Patent, Aug, 11, 1852, Land Title Plant, Muscogee Creek Nation, Book 1:748).

54. *Id.*

55. Woodward v. De Graffenried, 238 U.S. 284, 293 (1915).

56. *See* DEBO, *supra* note 28, at 181-82 (listing the Creek's governmental accomplishments with their new land out West and their efforts to legitimize their tribe).

successfully, the settlers' desire "for more land in the western United States by the late nineteenth century was . . . [a] precipitating factor"[57] in the federal allotment and assimilation era.

b. The Dawes Commission

The Cherokee, Choctaw, Chickasaw, Creek and, Seminole tribes expressed opposition to reaching an agreement on the allotment of their lands.[58] In response, the Dawes Commission was created to assist the division of tribal land into plots that were subsequently divided among the members of the tribe.[59] After ten years of negotiations with the Five Civilized Tribes, the Dawes Commission finally secured allotment agreements with each of the tribes.[60] Coercive laws that threatened the extinction of tribal courts were among the main reason these tribes agreed to the allotments.[61] As a part of the Dawes Commission's work, Congress enacted the Dawes Act in 1897, which was among the first laws created to force the five tribes to confer with the Dawes Commission.[62] The statute provided that the federal courts in Indian Territory have original and exclusive jurisdiction—as opposed to the states—for criminal offenses.[63]Although the Dawes Commission was created to coerce the tribes into allotment agreements, their land remained federal Indian country.

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57. Brief of Amici Curiae Historians, Legal Scholars, and Cherokee Nation in Support of Petitioner, *supra* note 17, at 10.

58. *Id.*

59. *See Dawes Commission*, CHEROKEE HERITAGE CTR., www.cherokeeheritage.org/cherokeeheritagegenealogy-html/dawes-commission/ [perma.cc/2YHZ-JC34] (last visited Oct. 20, 2021) (chronicling the creation of the Dawes Commission to aid in negotiations with the tribes in order to secure allotment of their plots of lands).

60. *See* Brief of Amici Curiae Historians, Legal Scholars, and Cherokee Nation in Support of Petitioner, *supra* note 17, at 12 (noting that "[i]t required 10 years of negotiations for the Dawes Commission to secure allotment agreements with all five tribes").

61. *Id.*

62. *See* Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1441 (D.C. Cir. 1988) (citing Act of June 7, 1897, ch. 3, 30 Stat. 62, 83) (listing the coercive tactics used by the federal government to force the Five Civilized Tribes to expedite negotiations with the Dawes Commission to further the federal agenda of allotment).

63. *See* Brief of Amici Curiae Historians, Legal Scholars, and Cherokee Nation in Support of Petitioner, *supra* note 17, at 13 (citing 30 Stat. 62, 83) (stating that after "January 1, 1898, the federal courts in Indian Territory 'shall have original and exclusive jurisdiction and authority to try and determine all . . . criminal causes for the punishment of any offense committed' after that date."). An additional condition provided that that "any agreement with a tribe, when ratified would 'operate to suspend any provisions of this Act if in conflict therewith to said nation.'" *Id.*

c. Federal Legislation: Major Crimes Act (MCA)

As the creation of the Dawes Commission created momentum for federal legislation regulating Indian affairs, Congress needed to address the occurrence of crimes that arose in Indian Country between tribal members. The MCA was enacted by Congress in 1885 to confer federal jurisdiction over specific crimes by a Native American offender when committed on an Indian reservation within a state or federal territory.[64] This statute is central to this case because McGirt's argument that Oklahoma did not have the jurisdiction to criminally prosecute him is based on an application and interpretation of the MCA.[65]

d. The Curtis Act

In another attempt to diminish tribal authority, Congress passed the Curtis Act in 1898, which threatened to abolish "all tribal courts in Indian Territory" and remove all tribal cases, including civil and criminal, to federal court while containing an exception for the tribes that ratified the allotment agreements.[66] Since the Muscogee Creek Nation failed to ratify the allotment agreement by the required deadline, the final allotment agreement proclaimed that the agreement was not to be interpreted to reinstate the power of the Muscogee Creek National tribal courts.[67]

The effect of the Curtis Act resulted in the eradication of Muscogee Creek Nation tribal courts.[68] As such, the Department of the Interior Courts of Indian Offenses had started to exercise criminal jurisdiction over tribal members.[69] However, the Muscogee Creek Nation was able to procure their jurisdiction back when the Curtis Act was repealed.[70] On par with the repeal of the Curtis Act,

64. 18 U.S.C. § 1153 (1948).

65. *McGirt*, 140 S. Ct. at 2459 ("Mr. McGirt's appeal rests on the Federal Major Crimes Act.").

66. *See* Act of June 28, 1898, ch. 517, 30 Stat. 495 (containing a favorable exception for tribes who ratified the allotment agreement in order to incentivize tribal cooperation with the government).

67. *See Woodward*, 238 U.S. at 311-12 (describing the nature of the allotment agreement and the 3,000,000 acres of land owned by the Creek Indians that were implicated as a result thereof).

68. M. Kaye Tatro, *Curtis Act (1898)*, ENCYCLOPEDIA OF O.K. HISTORY AND CULTURE, www.okhistory.org/publications/enc/entry.php?entry=CU006 [perma.cc/9KU3-KAMG].

69. *See* For the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes, Sec. 13, 35 Stat. 312 (1908), (granting the Department of the Interior temporary criminal jurisdiction over Indians).

70. *See Hodel*, 851 F.2d at 1446-47 (repealing the Curtis Act and finding that the Oklahoma Indian Welfare Act of 1936 conferred all powers associated with self-government on the Creek tribe because it gave the tribe the authority

in 1901, all members of the Five Civilized Tribes were made US citizens while still maintaining their tribal citizenship rights.[71] Later, in 1924, all Native Americans won citizenship under the Indian Citizenship Act.[72] This is historically significant because it symbolized the federal government's recognition of the tribes as sovereigns, therefore supporting McGirt's argument that Oklahoma did not have the jurisdiction to criminally prosecute him.[73]

e. Federal Legislation: Five Civilized Tribes Act

Enacted in 1906, the Five Civilized Tribes Act is recognized as the final act that led to Oklahoma's statehood. In this Act, Congress empowered the President to remove and replace the tribal chief leader of the Muscogee Creek Nation and to prohibit the tribal council from meeting more than thirty days a year and directed the Secretary of the Interior to assume control of tribal schools[74] and the Department of the Interior started to exercise dominion over tribal government. Despite these numerous intrusions into Muscogee Creek Nation's power, Congress did not enact a statute that led to the total surrender of tribal interests in the Indian lands, nor did Congress expressly indicate a desire to do so.[75] This is a key argument for the majority in their textual approach in determining whether Congress clearly expressed its intent to disestablish the Creek reservation for purposes of the MCA.[76]

f. Oklahoma Entered Statehood

In 1890, Congress began to carve out territory from Indian

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to adopt its own constitution in furtherance of its right to self-organize for the common welfare).

71. *See* Muscogee Videos, *supra* note 26 (recounting the granting of United States citizenship to Creek Nation tribe members while they remained recognized as tribal members with tribal rights).

72. *See* 8 U.S.C. § 1401 (1952) (marking the end of a long battle to receive full birthright citizenship in the United States of America for all American Indians, named the Indian Citizenship Act and signed by President Calvin Coolidge into law on June 2, 1924).

73. *See McGirt*, 140 S. Ct. at 2456-57 (recognizing McGirt's postconviction argument that the state of Oklahoma lacked jurisdiction to prosecute him because he is an enrolled member of the Muscogee Creek Nation and his crime took place on the reservation lands of the Muscogee Creek Nation).

74. *Id.* at 2466 (explaining the how the Act gave the President the authority to severely limit tribal autonomy).

75. *See id.* at 2463 (explaining that to determine whether a tribe continues to hold a reservation on its lands, the court will look to the acts of congress, and if Congress desires to disestablish an Indian reservation, Congress must clearly express its intent to do so, the Court also recognizing the historical instances in which Congress had clearly expressed its intent to disestablish a reservation but that these actions were not present in the current case).

76. *Id.*

lands to become present-day Oklahoma, and the long-debated issues of jurisdiction began.[77] Although the MCA conferred federal jurisdiction on enumerated criminal offenses within Indian territory, the Five tribes "retained exclusive jurisdiction over all civil and criminal disputes involving only tribal members."[78] The Oklahoma Enabling Act of 1906 authorized Oklahoma courts to create and adopt their own criminal laws to employ and execute Oklahoma criminal laws to crimes that were subject to state jurisdiction.[79] The Act preserved federal jurisdiction over Native Americans and their lands, requiring Oklahoma to disclaim all rights and titles to such lands.[80] At the time that Oklahoma entered statehood, there was no official Muscogee Creek Nation reservation since the lands were either allotted to the members of the tribes or held by the government in trust.[81] However, under the definition of the MCA, these lands remained Indian country for purposes of the MCA.[82] The fact that the lands remained Indian lands is predominant in the majority's analysis because it demonstrates the applicability of the MCA, thus granting the federal government—not Oklahoma—the jurisdiction to prosecute tribal members.[83]

C. Shifting Attitude: Re-affirming Tribal Authority

As the twentieth century was underway, the public and federal opinion towards Native Americans was changing.[84] In the 1920s, there were federal efforts that suggested the consensus was changing "away from assimilation policies and toward more tolerance and respect for traditional aspects of Indian culture."[85]

77. *See* Brief of Amici Curiae Historians, Legal Scholars, and Cherokee Nation in Support of Petitioner, *supra* note 17, at 19 (citing § 33-35, 26 Stat. 81. ("When Congress carved Oklahoma territory out of Indian territory in 1890, Congress specified the jurisdiction to be exercised by [the] courts over the reduced federal Indian Territory.")).

78. Indian Country, U.S.A., Inc. v. Oklahoma *ex rel.* Oklahoma Tax Comm'n, 829 F.2d 967, 977-78 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988).

79. Oklahoma Enabling Act of 1906, ch. 3335, 34 Stat. 267.

80. *See* OKLA. CONST. art. 1, § 3 (preserving federal jurisdiction over Indian matters and recognizing Indian rights to the land taking priority over Oklahoma's claims).

81. ROY GITTINGER, THE FORMATION OF THE STATE OF OKLAHOMA, 1803-1906 309 (1939).

82. *See* 18 U.S.C. § 1153 (1948) (describing what constitutes Indian country for purposes the exercise of exclusive federal jurisdiction applicable to the enumerated crimes in the act).

83. *McGirt*, 140 S. Ct. at 2482.

84. *See* Muskogee Videos, *supra* note 26 (expressing the changing public opinion about Indians in the United States of America signaling a recognition and respect for the Muscogee Creek Nation culture).

85. NELL JESSUP NEWTON ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.05 (2019).

1. Oklahoma Indiana Welfare Act (OIWA)

In 1936, "Congress authorized the Creek[s] to adopt a constitution and bylaws enabling the Creek government to resume many of its previously suspended functions."[86] The Oklahoma Indiana Welfare Act ("OIWA") was enacted due to the belief that "Indian culture and Indian values had much to offer non-Indian society and that Indian problems were best solved by Indians."[87] This Act stopped the allotment process, ended the further loss of tribal lands, and reestablished tribal governments.[88] In 1982, the Muscogee Creek Nation passed an ordinance that re-established both the criminal and civil jurisdiction of the Muscogee Creek Nation's courts by authorizing the Muscogee Creek Tribal Court to exercise authority over its tribal members.[89] Indeed, Oklahoma began to enforce these tribal court judgments early on.[90] This recognition of tribal court judgments by Oklahoma courts tends to undermine Oklahoma's argument that they had the jurisdiction to criminally prosecute tribal members for major crimes committed in Indian country because they had been doing so for years.[91]

2. Legitimizing the Muscogee Creek Nation

In 1944, the Muscogee General Convention adopted a new constitution and bylaws, which merged the executive and legislative branches into the Muscogee Creek Nation Indian Council.[92] Throughout the 1960s, the federal government established multiple

86. *McGirt*, 140 S. Ct. at 2467.

87. Muscogee Videos, *supra* note 26.

88. *See id.* (explaining the Commissioner of Indian Affairs, John Collier's, involvement in the movement to respect the cultural values of the tribes and the steps he took to stop allotment in attempt to re-establish tribal courts and tribal government).

89. *See Hodel*, 851 F.2d at 1446-47 (noting the enactment of the ordinance the Creek Nation drafted to authorize their Creek Tribal Court to enforce both civil and criminal jurisdiction over their members and describing the efforts of the tribe to legitimize itself in other typical and conventional governmental functions).

90. *See* Barrett v. Barrett, 878 P. 2d 1051, 1054 (Okla. 1994) (holding that the court had previously adopted the approach that the courts of the State of Oklahoma shall grant full faith and credit and cause to be enforced any tribal judgment and that full faith and credit should be accorded with tribal court decrees moving forward).

91. *See McGirt*, 140 S. Ct. at 2470 (evaluating Oklahoma's argument that it had the authority to criminally prosecute tribal members because they had done so for many years).

92. *See* Muscogee Videos, *supra* note 26 (chronicling the independent efforts of the Muscogee Creek Nation tribe to self-govern and retain authority over its own tribe members and the commencement of the Muscogee General Convention).

task forces to review and stay informed on tribal decisions.[93] With these advancements, tribal governments asserted more control over their tribe while the federal government remained involved at a legislative level.[94] This corroborates the policy behind the MCA by recognizing tribal jurisdiction over tribal members, while the federal government has the jurisdiction to prosecute for the major crimes enumerated in the statute.

III. ANALYSIS

A. McGirt's Crimes and Convictions

In 1996, Jimcy McGirt lived and committed the alleged crimes in Broken Arrow, Oklahoma.[95] Broken Arrow, Oklahoma is located "on lands described as the Creek Reservation in . . . [a] treaty and federal statute."[96] On Oct. 21, 1996, he was charged with first degree rape, lewd molestation, and forcible sodomy.[97] He was found guilty by a jury in an Oklahoma state court on all three counts.[98] In 1998 after his initial appeal to the Oklahoma Court of Criminal Appeals, his conviction was affirmed.[99] In 2017, he filed a writ of habeas corpus alleging that he was illegally detained because the court that convicted him was without jurisdiction, but this writ was denied.[100] After a series of appeals, the Supreme Court granted certiorari to address the issue of "[w]hether Oklahoma courts can continue to unlawfully exercise, under state law, criminal jurisdiction as justiciable matter in Indian country over Indians accused of Major Crimes enumerated under the Indian Major Crimes Act-which are under exclusive federal jurisdiction."[101]

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93. *Id*. (discussing establishment of the Commission on the Rights Liberties and Responsibilities of the Indian 1966, Coleman Report 1966, White House Task Force on Indian Health 1966, Indian Education: A National Tragedy-A National Challenge 1969, American Indian Policy Review Commission 1977, U.S. Senate Select Committee on Indian Affairs 1977).

94. *Id.*

95. *See* Petition for Writ of Certiorari, McGirt v. Oklahoma, 591 U.S. __, 4 (2020) (expressing "[t]he alleged crimes were at Petitioner's rural Broken Arrow, Wagoner County, Oklahoma home in August 1996").

96. *McGirt*, 140 S. Ct. at 2460.

97. *See McGirt,* PC-2018-1057, (enumerating the charged offenses that Jimcy McGirt faced from the State of Oklahoma and the Court's convictions).

98. *See* Petition for Writ of Certiorari, *supra* note 96, at 5 (stating the jury found Petitioner guilty of all three counts recommending 500 years each for counts 1 and 2 and life without parole for count 3).

99. *See id.* (detailing the appeal of Jimcy McGirt's criminal conviction from the Oklahoma state court and the affirmation of his conviction by the Oklahoma Criminal Court of Appeals).

100. Order Affirming Denial of Application for Post-Conviction Relief at 3, McGirt v. State, (No. 18-1057) (Okla. Crim. App. 2019).

101. *McGirt*, PC-2018-1057, *cert. granted*, (U.S. Dec. 13, 2019) (No. 18-9526).

The Supreme Court held in a 5-4 decision that for purposes of the MCA, "[o]nly the federal government, not the State, may prosecute Indians for major crimes committed in Indian country."[102] The majority of the court took a textual approach[103] to resolve the issue before it.[104] In contrast, the dissenters conducted a contextual inquiry[105] and concluded that "a reservation did not exist when McGirt committed his crimes, so Oklahoma had jurisdiction to prosecute him."[106]

First, an understanding of the different approaches of interpreting Congressional intent in the context of treaties is needed. Second, the majority opinion authored by Justice Neil Gorsuch will be examined to reveal the reasoning behind the textual approach to statutory interpretation in this case.[107] Third, the dissenting opinion of Chief Justice John Roberts will be analyzed to highlight his tendency to provide deference to Congress in his decisions.[108] Fourth, the dissenting opinion of Justice Clarence Thomas will be dissected to reveal his view that the Court reversed "a state-court judgment that it has no jurisdiction to review."[109]

B. Only Congress Can Disestablish a Reservation

Despite their different approaches, both the majority and the dissenters agreed that "[o]nce a federal reservation is established, only Congress can diminish or disestablish it . . . [and] doing so

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102. *McGirt*, 140 S. Ct. at 2478.

103. *See id*. at 2469 (emphasizing the statutory interpretation framework for discerning the original meaning of a law and mentioning that the Court only looks to contemporaneous practices to shed light on ambiguous or vague statutory language).

104. *See id*. at 2459 (stating the issue as whether Oklahoma courts can continue to unlawfully exercise, under state law, criminal jurisdiction as 'justiciable matter' in Indian Country over Indians accused of major crimes enumerated under the Indian Major Crimes Act – which are under exclusive federal jurisdiction).

105. *See id*. at 2468 (emphasizing that the Court's precedents require the Court to start its statutory interpretation analysis with statutory text and then examining all the circumstances surrounding the opening of the reservation to then discern whether the contemporaneous and subsequent understanding of the reservation's status is affirmative or negative).

106. *Id*. at 2483 (Roberts, C.J., dissenting).

107. *See id*. at 2463-64 (insisting that only Congress can disestablish a reservation, disestablishment requires an Congressional expression of its intent to do so and external sources should only be considered to resolve ambiguities).

108. *See id*. at 2497 (Roberts, C.J., dissenting) (stating that the Court should presume that governmental officials are exercising their duties in a lawful manner and inferring that this deferential approach better accommodates the case here because the majority is speculating as to whether governmental officials in the state of Oklahoma conspired to violate the laws in prosecuting for criminal acts of Indians).

109. *Id*. at 2502 (Thomas, J., dissenting).

requires a clear expression of congressional intent."[110] As such, "[o]nly Congress can divest a reservation of its land and diminish its boundaries."[111] Although both the majority and dissent agreed that Congress has the sole authority here, they differed in determining the Congressional intent to disestablish a reservation.[112]

C. Majority's Approach

Since the majority required that Congress "clearly express its intent to disestablish a reservation, 'commonly with an explicit reference to cession or other language evidencing the present and total surrender of all tribal interests,'"[113] it follows that the Acts of Congress had to be closely analyzed.[114] The majority noted the historical context of hostility surrounding Native Americans in America but refused to read into Congress' acts an intent to disestablish the Creek reservation absent an express desire to do so.[115]

1. Historical Context

Analogous to Part II of this Case Note,[116] the majority in *McGirt* spent some thirteen pages of its opinion recounting the historical context surrounding the treaty with the Muscogee Creek Nation.[117] Although the majority noted numerous intrusions into tribal authority,[118] the requisite remained the same: "[d]isestablishment has 'never required any particular form of words,'"[119] "[b]ut it does require that Congress clearly express its

110. *Id.* at 2457.

111. Solem v. Bartlett, 465 U.S. 463, 470 (1984).

112. *See McGirt*, 140 S. Ct. at 2469 (majority addressing dissenter's approach in analysis and how the correct approach is strictly textual).

113. McGirt, 140 S. Ct. at 2463 (citing Nebraska v. Parker, 136 S. Ct. 1072, 1082 (2016)).

114. *Id.* at 2485.

115. *See id.* at 2462 (arguing that no matter how many promises the federal government breaks with the tribes that may have disfigured trust between them and ultimately led to abrogation of tribal authority, if Congress wants to disestablish a reservation, it must explicitly say so).

116. *See* discussion *supra* Part II (narrarating the history of the Muscogee Creek Nation before the execution of the treaty).

117. *See generally McGirt,* 140 S. Ct. at 2456-59 (reciting the various historical events surrounding the treaty and noting that despite the antagonistic attitude of the federal government towards the Indian tribes, Congress failed to pass a statute that disestablished the Creek nation reservation in Eastern Oklahoma).

118. *See id.* at 2462 (describing the events that clearly demonstrate Congress has broken more than a few promises to the Muscogee Creek Nation tribe including the land that was promised to be the solely the property of the Creek Nation but eventually being divided into pieces from allotment by Congress).

119. *Id.* at 2463 (citing Hagen v. Utah, 510 U.S. 399, 411 (1994)).

intent to do so."[120] With this in mind, the majority carried on with its opinion using a textual approach to resolve the issue before it.[121]

2. An Established Reservation

For the sake of clarity at the outset, the majority sought to determine whether the Muscogee Creek Nation continued to hold a reservation.[122] The Court first looked to the Acts of Congress[123] and recognized that "[u]nder our Constitution, States have no authority to reduce federal reservations lying with their borders."[124] The majority was concerned that such state encroachment into federal tribal jurisdiction would be dangerous because this "would be at odds with the Constitution . . . [and i]t would also leave tribal rights in the hands of the very neighbors who might be least inclined to respect them."[125] Because there were numerous Congressional intrusions into Muscogee Creek Nation authority but no particular instance of Congress expressly demonstrating its intent to disestablish the reservation, the Court held that the land remained an Indian reservation for purposes of the federal criminal law.[126]

3. Allotment Era

Oklahoma argued that Congress expressed its intention to disestablish the Creek reservation through its acts of allotment, which divided the land into lots for sale to homesteaders.[127] The majority addressed this argument[128] finding unpersuasive the

120. *McGirt,* 140 S. Ct. at 2463 (citing *Parker*, 136 S. Ct. at 1082).

121. *See id.* at 2474 (describing the ways Congress has disestablished a reservation in the past and explaining that determining congressional intent starts with the statute so the Court's charge is to determine the original meaning of the law).

122. *See generally id*. at 2459-69 (determining whether Congress created an Indian reservation for the Muscogee Creek Nation while recounting historic acts of Congress to resolve this issue).

123. *See id*. at 2462 (stating that to determine whether the Muscogee Creek Nation tribe continues to hold a reservation for purposes of the Indian Major Crimes Act, the place for the Court to look is at the acts of Congress and explaining that the legislature has significant constitutional power to breach its own treaties).

124. *Id.*

125. *Id.*

126. *See id.* at 2456 (holding that the land the treaty promised remains an Indian reservation for purposes of federal criminal law).

127. *See id.* at 2463 (noting Oklahoma's argument that Congress intended to disestablish the Creek reservation through enactment of the Allotment Acts).

128. *See generally id*. at 2463-66 (addressing the state of Oklahoma's argument that the acts by Congress and the events that occurred in the allotment era indicate disestablishment because it was the first step in a Congressional plan that was aimed at total disestablishment).

argument that "allotments automatically ended reservations."[129] Thus, "allotment under the . . . Act is completely consistent with continued reservation status."[130] Importantly, "no matter how many other promises to a tribe the federal government has already broken[, i]f Congress wishes to break the promise of a reservation, it must say so."[131] Citing to *Lone Wolf v. Hitchcock*[132] and *Solem v. Bartlett,*[133] the majority recognized that the Legislature has broad authority when dealing with tribal relations, but the Court will not lightly infer a breach of a Congressional promise once Congress has established a reservation.[134] Consistent with this line of reasoning, the majority found the Allotment Era, by itself, insufficient to disestablish the reservation.[135]

Since Congress does not disestablish a reservation simply by "allowing the transfer of individual plots whether to Native Americans or others,"[136] the majority rejected Oklahoma's argument that the purchase or transfer of lands by non-Indians is inconsistent with the status of a reservation.[137] Consistent with its textual approach to statutory interpretation, the majority pointed out that the MCA's definition of 'Indian Country' "expressly contemplates private land ownership within reservation boundaries . . . [and therefore it is irrelevant] whether these individual parcels have passed hands to non-Indians."[138] In concluding that the Allotment Era, by itself, did not demonstrate Congressional intent to disestablish the reservation,[139] the majority recognized that although "Congress may have passed allotment laws to create the conditions for disestablishment . . . to equate allotment with

129. *Id.* at 2464.

130. *Id.* (citing Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 356-358 (1962)).

131. *McGirt,* 140 S. Ct at 2462.

132. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903) (holding that the power to abrogate provisions of a treaty exists with Congress, but such power will only be recognized in circumstances which not only justify the government's disregard of the stipulation, but also when the interest of the United States and tribes demand this result).

133. *See* Solem v. Bartlett, 465 U.S. 463, 470 (1984) (recognizing that diminishment of Indian reservations will not lightly be inferred, and that Congress must clearly evince an intent to change boundaries before diminishment will be found).

134. *See McGirt*, 140 S. Ct. at 2462 (noting that the legislative power to handle tribal relations is significant and that it belongs to Congress alone).

135. *See id.* at 2465, note 4 (rejecting the dissent's approach that suggests the passing of the allotment act itself extinguished title).

136. *Id.* at 2464 (citing Mattz v. Arnett, 412 U.S. 481, 497 (1973); *Seymour*, 368 U.S. at 356-358).

137. *See McGirt,* 140 S. Ct at 2504, n. 3 (recognizing that the Court long ago denied the contention that non-Indians purchasing Native lands was inconsistent with reservation status).

138. *Id.* at 2464.

139. *McGirt*, 140 S. Ct. at 2465.

disestablishment would confuse the first step of a march with arrival at its destination."[140] The Allotment Era did not disestablish the reservation because Congress did not draft a statute that called for the total surrender of tribal interests in the land.[141]

4. State Historical Practice Does Not Prove Disestablishment

In support of its position, Oklahoma further argued that the historical practices of prosecution and demographic compilation of the land at issue would be enough to prove disestablishment.[142] The majority found that Oklahoma's argument failed to meet the "law's meaning and [created] much potential for mischief."[143] Justice Gorsuch identified that Oklahoma failed to point out ambiguous language in the relevant statutes of the case that would lead to the conclusion that Congress disestablished the reservation.[144] Citing to *New Prime Inc. v. Oliveira*[145] and *United States v. Celestine*[146], the majority reasoned that a court cannot favor later practices over the laws actually passed by Congress since the primary goal of interpretation is to ascertain and follow the original meaning of the law.[147]

Oklahoma further argued it had been prosecuting tribal members for decades and should be able to continue to do so,[148]

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140. *Id.*

141. *See McGirt*, 140 S. Ct. at 2485 ("missing in all this, however, is a statute evincing anything like the present and total surrender of all tribal interests in the affected land.").

142. *See id.* at 2468-69 (analyzing Oklahoma's argument that the demographics of the land and the historical prosecutorial practices around the time of and after the enactment of the MCA establishes that Congress disestablished the Creek reservation).

143. *Id.* at 2458.

144. *Id.* at 2474 (explaining that the Court's charge is to ascertain the original meaning of the law, recognizing a contextual approach only if there is an ambiguity or phrase leading to the need to consult usage, customs, and practices in order to shed light on the context and meaning behind the vague language at the time it was used).

145. *See* New Prime, Inc. v. Oliviera, 139 S. Ct. 532, 539 (2019) (describing the process of statutory interpretation, "it's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute.").

146. *See* United States v. Celestine, 215 U.S. 278, 289-90 (1909) (holding that the federal courts had exclusive jurisdiction over a crime committed by an Indian on another Indian because although the crime was committed on land in which defendant received a patent for the land, the land remained within the reservation").

147. *See McGirt*, 140 S. Ct. at 2474 (explaining that Oklahoma is mistaken by asking the Court to review contemporary or later Congressional events to approach the question of disestablishment).

148. *See* 18 U.S.C. §1151 (a)-(c) (1948) (including language that expressly indicates that the enumerated crimes in the statute committed by Indians on

despite the MCA's clear language that indicates otherwise.[149] The majority took issue with this argument, recognizing "[b]y Oklahoma's own admission . . . its historical practices . . . didn't even try to conform to the MCA, all of which makes the State's past prosecutions a meaningless guide for determining what counted as Indian country."[150]

Writing arguendo, Justice Gorsuch entertained Oklahoma's argument[151] but took issue with declaring that the reservation was disestablished without clear legislative intent. Doing so, in the majority's opinion, may have undermined the legislative function.[152] Ultimately, "Oklahoma [wa]s without authority under the MCA to try Indians for crimes committed on restricted allotments and any reservation."[153] The mere fact that it assumed jurisdiction for decades over cases that were exclusively federal did not render the Muscogee Creek Nation reservation disestablished.[154]

5. Interpretating the Acts of Congress Should Not Be Inflected Based on the Costs of Enforcing Them Today

Lastly, the majority addressed Oklahoma's final argument that a ruling for McGirt would have severe consequences by unsettling numerous convictions and frustrating Oklahoma's future ability to prosecute crimes committed by tribal members within its boundaries.[155] Justice Gorsuch was firm in his conviction that "the

reservations, allotments, and titles are to be in the exclusive jurisdiction of the United States, not the States).

149. *See McGirt*, 140 S. Ct. at 2470 (including Oklahoma's arguments that their long historical prosecutorial practice of asserting criminal jurisdiction over tribal members even for the enumerated crimes of the MCA on contested lands indicates that the Muscogee Creek Reservation in the Eastern portion of Oklahoma was disestablished).

150. *Id.* at 2471.

151. *See id.* at 2472 (stating that to even follow Oklahoma down their path of reasoning would create an unjust result).

152. *See id.* at 2470 (warning of potential federalism issues and explaining that Courts should not invade on the legislative function by finishing the work Congress has left undone).

153. *Id.* at 2472-73.

154. *See id.* (explaining that just because Oklahoma's courts were entertaining sham proceedings over tribal members for years without any authority to do so does nothing to discern the necessary Congressional statutory meaning needed to disestablish a reservation).

155. *See id.* at 2479 (addressing Oklahoma's argument that an adverse ruling could lead to roughly 1.8 million of its residents winding up in Indian country further confusing the prosecutorial power of the state of Oklahoma and burdening its ability to prosecute future crimes while also reversing a number of criminal convictions for crimes that are extremely severe i.e., rape, molestation, murder).

magnitude of a legal wrong is no reason to perpetuate it."[156] Justice Gorsuch addressed Oklahoma's concerns and advised that warnings are not a license for the Court to disregard the law.[157] The majority refused to allow the interpretation of Congressional acts adopted more than 100 years ago to be disregarded merely because the costs of enforcing them in the present day could have consequences.[158] Justice Gorsuch examined the dangers of allowing Oklahoma to prevail on this sort of argument and compared this case to other areas of statutory interpretation.[159]

The majority recognized that a State exercising jurisdiction over Native Americans with such persistence that the practice seems normal would not be permitted in any other area of statutory interpretation and therefore should not be allowed in this case.[160] The majority refused to give priority to a "rule of the strong, [over] . . . the rule of law"[161] and held that the practical concerns of Oklahoma were not sufficient to demonstrate the disestablishment of the reservation.[162]

The majority's analysis in *McGirt* is important for the future of federal tribal rights because it signals a beacon of hope to tribes that Congress will be held accountable for its promises made in its treaties.[163] This is significant federal recognition for tribal members of the Muscogee Creek Nation because it validates the proposition that Oklahoma does not have the authority to criminally prosecute tribal members for major crimes that were committed in Indian

156. *Id.* at 2480.

157. *See id.* at 2481 (suggesting that the interpreting the acts of Congress requires following precedent and that a textual statutory interpretation best accomplishes the goal of following the law).

158. *See id.* (refusing to disregard Congressional intent in statutory interpretation simply because there may be consequences adverse to the state of Oklahoma's prosecutorial practices).

159. *See id.* at 2469 (listing the potential consequences of allowing the practical advantages of continuing Oklahoma's prosecutorial practices over the tribe to overcome the written law and arguing that the State would cause many Indian landowners to lose their titles to their properties by fraudulent practices and it would occur so frequently that the true original owner would be soon forgotten and that allowing this to be permitted in a case of statutory interpretation would create a rule of the strong willed and not a rule of the written law).

160. *Id.* at 2474.

161. *Id.*

162. *See id.* at 248 (refusing to allow the practical concerns of Oklahoma to overcome the required express congressional intent to disestablish a reservation). The Court pointed out that Oklahoma does not offer these justifications in order to shed light to resolve the meaning of ambiguous language in a statute, but does so to insist that the evidence demonstrated the disestablishment of the reservation. *Id.* Ultimately, the Court ultimately rejects this line of reasoning and holds that the reservation was not disestablished merely because Oklahoma took unlawful control and advantage over Native members. *Id.*

163. *McGirt*, 140 S. Ct. at 2459.

country, while also assuring tribal members that they will be criminally prosecuted either by their own tribe or the federal government.

D. Chief Justice Roberts' Dissenting Opinion

In interpreting congressional intent, Chief Justice John Roberts, joined by Justices Samuel Alito, Brett Kavanaugh, and Clarence Thomas, agreed with the majority in that the Court should first "start with the statutory text [then] we also examine all the circumstances surrounding the opening of a reservation."[164] Then, the court will

> look to any unequivocal evidence of the contemporaneous and subsequent understanding of the status of the reservation by members and non-members, as well as the United States and the State [and that] [t]hese inquiries include . . . the history surrounding the passage of the relevant Act as well as the subsequent demographic history and treatment of the lands at issue.[165]

Chief Justice Roberts criticized the majority for refusing "to confront the cumulative import of all of Congress's actions."[166] He argued that every case that has considered disestablishment in the past has "considered extratextual sources . . . because, while it is well established that Congress's intent must be clear . . . the appropriate inquiry does not focus on the statutory text alone."[167]

1. Congress Enacted a Series of Statutes Strongly Suggesting Congress' Intent to Divest the Lands of Reservation Status

Chief Justice Roberts insisted that respect for the legislature required the Court to look at what Congress actually did, "not search in vain for what it might have done or did on other occasions."[168] In doing so, he gathered a series of statutes and argued that the statutes, taken together, clearly demonstrated "Congress's intent to terminate the reservation and create a new State [of Oklahoma] in its place."[169] Beginning in 1890 and peaking when Oklahoma entered statehood, he insisted that Congress establish a system of laws that was uniform for both Native

164. *McGirt*, 140 S. Ct. at 2486 (Roberts, C.J., dissenting) (citing Hagen v. Utah, 510 U.S. 399, 412 (1994).

165. *McGirt*, 140 S. Ct. at 2482-83 (citing *Hagen*, 510 U.S. at 412; *Parker*, 136 S. Ct. at 1082).

166. *McGirt*, 140 S. Ct. at 2482-83.

167. *Id.*

168. *Id.* at 2490.

169. *Id.*

Americans and non-Natives, and in doing so, Congress dismantled both the Muscogee Creek Nation's government and the tribal courts while extinguishing the Muscogee Creek Nation's title to the lands.[170]

In support of his argument that the Muscgoee Creek Nation had been disestablished, Chief Justice Roberts highlighted a number of historical events that took away tribal authority.[171] First, he pointed to the enactment of the Curtis Act as the initial step in disestablishing the Muscogee Creek Nation.[172] The dissolving of the Muscogee Creek Nation's judicial system indicated that Congress intended to completely excise the authority of Muscogee Creek Nation leaders from the authority to govern its own members.[173] Next, he pointed to how Congress took drastic steps to divest the tribes of their interests to govern their own people and divest the lands of its reservation status,[174] Congress "incorporated the Nation's members into a new political community,"[175] Oklahoma.[176] The Enabling Act, Chief Justice Roberts insisted, transferred all pending cases in the territorial courts not involving federal law to "the new Oklahoma state courts."[177] Through these various acts, he reasoned that Congress "erased the geographic boundaries that once defined the Creek territory."[178]

Chief Justice Roberts criticized the majority for refusing to identify the cumulative force of these statutes to determine Congressional intent and instead evaluated each statute in isolation.[179] By failing to "consider the full picture of what Congress accomplished,"[180] he insisted the majority reached an erroneous result.[181]

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170. *See id.* at 2492 (explaining that Congress established a legal system for both Indians and non-Indians, dismantled the government and tribal courts for the Creek Nation, extinguished their title to the treaty lands, and incorporated Creek tribal members into the state of Oklahoma).

171. *McGirt*, 140 S. Ct. at 2490 (Roberts, C.J., dissenting) (citing Act of May 2, 1890 § 31, 26 Stat. 96).

172. *McGirt*, 140 S. Ct.at 2490 (Roberts, C.J., dissenting) (citing Act of June 27, 1898 § 28, 30 Stat. 83 at 504-05).

173. *See McGirt*, 140 S. Ct. at 2491 (Roberts, C.J., dissenting) (insisting that Congress intended to abrogate tribal authority and did so by radically disassembling the tribal judicial system, allowing no statute by the tribes to be valid unless the President of the United States endorsed it, and abolishing tribal taxes).

174. *See McGirt*, 140 S. Ct. at 2497-99 (Roberts, C.J., dissenting) (arguing that Congress's actions strongly indicate that Congress intentionally meant to dispossess the lands at issue of reservation status).

175. *McGirt*, 140 S. Ct. at 2490 (Roberts, C.J., dissenting).

176. *Id.*

177. *Id.* at 2493 (citing § 16, 17, 20 34 Stat. 276 at 276-77).

178. *McGirt*, 140 S. Ct. at 2493 (Roberts, C.J., dissenting).

179. *Id.*

180. *Id.* at 2494.

181. *Id.* at 2493.

2. The Demographics Indicate There is No Reservation

Chief Justice Roberts further suggested that the land at issue in this case had long lost its Indian character and that the character of land may be indicative of diminishment.[182] He was of the opinion that demographics could "signify a diminished reservation."[183] Because the subsequent demographic history of lands may provide more insight as to the meaning of Congressional action, he found it persuasive that "[c]ontinuing from statehood [of Oklahoma] to the present, the population of the lands [in question] has remained approximately 85%-95% non-Indian."[184] He insisted that precedent required the Court to consider the demographic history of land for disestablishment purposes, and the majority's failure to address this was an error.[185]

3. Oklahoma's Prosecutions Were Long and Lawful

Chief Justice Roberts noted that once admitted as a state, "Oklahoma immediately began prosecuting serious crimes committed by Indians in the new state courts, and the federal government immediately ceased prosecuting such crimes in federal court."[186] He criticized the majority for its failure to presume that government officials exercise their duties in accordance with the law, and here Oklahoma prosecutors should be given the benefit of the doubt.[187] He also found it persuasive that the tribal members' failed to fight back against state prosecutions[188] and that this demonstrated that Congress did not intend the Muscogee Creek reservation to persist and that Oklahoma's prosecutions were valid.[189]

For more support, Chief Justice Roberts pointed out that for "113 years, Oklahoma has asserted jurisdiction over the former

182. *McGirt*, 140 S. Ct. at 2468 (Roberts, C.J., dissenting) (insisting 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").

183. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 357 (1998).

184. *McGirt*, 140 S. Ct. at 2500 (Roberts, C.J., dissenting).

185. *See id.* (stating that the Court has determined that demographic history in a disestablishment case is an important consideration and further explaining that disestablishment cases require the Court use a variety of tools to determine Congressional intent).

186. *McGirt*, 140 S. Ct. at 2496 (Roberts, C.J., dissenting).

187. *Id.* at 2497.

188. *Id.*

189. *See id.* at 2496, n. 5 (Roberts, C.J., dissenting) (suggesting that the contemporaneous understanding of tribal leaders is probative evidence in determining Congressional intent because it demonstrates the understanding of the reservation's status by its own members).

Indian Territory on the understanding that it [was] not a reservation, without any objection by [the Creeks] until recently."[190] He specifically insisted that the "State's exercise of unquestioned jurisdiction over the disputed area since the passage of the Enabling Act"[191] deserved "weight as an indication of the intended purpose of the Act."[192]

Finally, he argued that using a broader contextual inquiry required the Court to find that the failure of the Department of Indian Affairs to attempt to exercise jurisdiction was a factor entitled to weight.[193] He was also worried about the practical consequences of the majority's decision because a "finding that the land remains Indian country seriously burdens the administration of state and local governments."[194]

Chief Justice Roberts expressed concern that the Court's decision could result in jurisdictional challenges being raised by defendants who have committed grievous offenses.[195] He was worried that the majority's holding would ultimately undermine Oklahoma's criminal governance.[196] Specifically, he insisted that the majority's "decision may destabilize the governance of vast swathes of Oklahoma."[197] Chief Justice Roberts suggested that state authority is diluted in important aspects when it contains land that is designated as a reservation because "state regulation of even non-Indians is preempted if it runs afoul of federal Indian policy."'[198] He argued Oklahoma had an important interest in the Court affirming the legitimacy of the state court's decisions.[199]

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190. *McGirt*, 140 S. Ct. at 2499 (Roberts, C.J., dissenting).

191. *Id.* at 2499 (Roberts, C.J., dissenting) (citing Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 599, n. 20, 604 (1977)).

192. *McGirt*, 140 S. Ct at 2499 (Roberts, C.J., dissenting) (internal quotations omitted).

193. *Id.*

194. *Solem*, 465 U.S. at 470.

195. *See McGirt*, 140 S. Ct. at 2500 (Roberts, C.J., dissenting) (arguing that the Court's decision draws into question thousands of convictions obtained by the State for crimes involving Indian defendants . . . [spanning] across several decades.").

196. *See id.* at 2501 (suggesting that these convictions for serious crimes are "now subject to jurisdictional challenges, leading to the potential release of numerous individuals found guilty under state law of the most grievous offenses.").

197. *Id.*

198. *See id.* (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142, 144-45 (1980)) (arguing that state regulation of non-Indians is preempted if it runs afoul of federal Indian policy and tribal sovereignty based on a nebulous balancing test).

199. *See McGirt*, 140 S. Ct. at 2501 (Roberts, C.J., dissenting) (explaining how the majority's ruling transforms state and tribal authority and leads to greater uncertainty of who has the power to prosecute nearly 270,000 people).

4. Roberts's Conclusion

Chief Justice Roberts concluded his dissenting opinion by arguing that "Congress disestablished any Creek reservation more than 100 years ago . . . [and] Oklahoma therefore had jurisdiction to prosecute McGirt."[200] Unsurprisingly, given his philosophy of judicial restraint throughout his opinion, he adopted a deferential view to the government officials' actions.[201] Throughout his analysis, Chief Justice Roberts adopted a starkly different approach than the majority, using a contextual inquiry and relying primarily on Congressional acts taken as a whole to conclude that Congress's intention was to disestablish the Creek reservation.[202]

Chief Justice Roberts's dissenting opinion may persuade the Supreme Court in the future to interpret acts of Congress by using a contextual approach. However, this approach may lead to more confusion in tribal jurisdiction cases. Thus, more unpredictability in the outcomes of jurisdictional challenges in the tribal context.

E. Justice Thomas's Dissenting Opinion

Justice Thomas joined Chief Justice Roberts in the substantive portions of his dissenting opinion but briefly addressed a separate procedural defect he took issue with. Specifically, he found that the Supreme Court lacked jurisdiction to render a judgment against McGirt.[203] He mentions "where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment."[204]

1. The Supreme Court Reversed a State Court Judgment that it Has No Jurisdiction to Review

McGirt failed to raise the jurisdictional issue previously on direct appeal, and it was thus waived for further review because the

200. *McGirt*, 140 S. Ct. at 2502 (Roberts, C.J., dissenting).

201. *See id.* at 2497 (Roberts, C.J., dissenting) (arguing that the Supreme Court is to afford great deference to government officials by presuming that they exercise their official duties in accordance with the law and criticizing the majority's accusations of the state of Oklahoma lacking good faith in its prosecutorial practices because it is inconsistent with the correct analysis of presumption in favor of officials).

202. *See id.* at 2482 (using a contextual approach that takes into consideration legislative history, subsequent demographics, and circumstances surrounding the passing of the legislation).

203. *McGirt*, 140 S. Ct. 2502 (Thomas, J., dissenting).

204. *Id.* (Thomas, J., dissenting) (citing Michigan v. Long, 463 U.S. 1032, 1038, n. 4 (1983) (quoting Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935))).

court failed to find grounds to excuse his default.[205] Despite the waiver, Justice Thomas argued that the Supreme Court wholly "lack[ed] jurisdiction to disturb the state court's judgment."[206] Even if the Court were to ignore the fact that the Oklahoma state court's decision was based on state procedural grounds, the Court could not presume jurisdiction here.[207]

2. Thomas's Conclusion

Even though he recognized that the resolution of this dispute was an important one, he insisted that the Court must keep "the Judiciary's power within its proper constitutional sphere."'[208] Justice Thomas found that "[b]ecause the Oklahoma court's 'judgment does not depend upon the decision of any federal question[,] we have no power to disturb it.'"[209] Justice Thomas's approach to resolving *McGirt* lies in a technicality that the majority opinion, as well as Chief Justice Roberts's dissenting opinion, fails to fully address.[210]

IV. ARGUMENT

Although a majority of the Supreme Court took a step towards recognizing tribal sovereignty in holding that Oklahoma did not have the authority to prosecute McGirt, its holding falls short of fully honoring traditional Native American values. Since many tribes believe there is a deep connection between justice and

205. *See McGirt*, 140 S. Ct. at 2503 (Thomas, J., dissenting) (recounting the Oklahoma Court of Criminal Appeals's holding that Jimcy McGirt's claim was procedural barred under Oklahoma state law due to his failure to not previously raise it on direct appeal).

206. *Id.* (Thomas, J., dissenting).

207. *Id.* at 2504 (Thomas, J., dissenting) (citing Coleman v. Thompson, 501 U.S. 722, 735-36 (1991)).

208. *McGirt*, 140 S. Ct. at 2504 (Thomas, J., dissenting) (citing Hollingsworth v. Perry, 570 U.S. 693, 704-05 (2013)); *see also* Michigan v. Long, 463 U.S. 1032, 1038, n. 4 (1983) (quoting Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935)) (explaining subject matter jurisdiction and recognizing where the judgment of a state court rests upon one federal ground and one state ground, federal jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment).

209. *See McGirt*, 140 S. Ct. at 2504 (Thomas, J., dissenting) (citing Enterprise Irrigation Dist. V. Farmers Mut. Canal Co., 243 U.S. 157, 164 (1917)) (suggesting that nothing in the majority's judgment was based on federal law and insisting that the majority is second guessing the independence of the Oklahoma state court).

210. *See generally McGirt*, 140 S. Ct. at 2456-2482; *McGirt*, 140 S. Ct., 2482-2503 (Roberts, C.J., dissenting) (failing to express assent or disagreement to Justice Thomas's claim that the Court does lacks jurisdiction to decide this case, while the majority opinion mentions Justice Thomas's argument in footnote 15, it does not elaborate on its reasoning of its rejection in the opinion itself).

spirituality, the Anglo-American justice system fails to adequately recognize these values. The tribal philosophy on justice has an emphasis on "healing, [so it follows that] . . . reintegrating individuals into their community, is more important than punishment,"[211] in contrast to the Anglo-American justice system.

To conclude the analysis of the issue addressed in *McGirt* and propose an alternative solution, first, another brief look at the Major Crimes Act is needed to contrast the Anglo-American justice system with the philosophy of restorative justice. Next, my Personal Analysis will explain why restorative justice principles are essential to many tribes and how the implementation of these policies can lead to more recognition for these oppressed groups. Lastly, this section will demonstrate how Jimcy McGirt's case could have been an opportunity for the Supreme Court to limit the scope of the MCA and implement a holding that better appreciates the restorative justice philosophies of the Muscogee Creek Nation and Native American tribes more generally.

In 1885, the MCA was enacted to place certain crimes under federal jurisdiction, given that they are committed by a Native American citizen on a federally recognized Native territory.[212] The policy behind the enactment of this statute was that federal regulation "is rooted in the unique status of Indians as 'a separate people' with their own political institutions."[213] This statute was drafted by Congress to make clear that the states did not have the jurisdiction to prosecute Native Americans for major crimes committed between tribal members and on their territory.[214] However, it is unclear whether, under this statute, federal courts have jurisdiction exclusive of tribes.[215] This uncertainty puts the rights of many Native Americans to be criminally tried by their own tribes at risk — an important function of a sovereign nation. The

211. Laura Mirsky, *Restorative Justice Practices of Native American, First Nation and Other Indigenous People of North America: Part One*, INT'L INST. FOR RESTORATIVE PRAC. 1 (Apr. 27, 2004), www.iirp.edu/pdf/natjust1.pdf [perma.cc/W4Y4-NS28].

212. *See* 18 U.S.C. § 1153 (1948) (requiring that the crime be committed by a Native American person on an Indian territory for this federal statute to be applicable).

213. United States v. Antelope, 430 U.S. 641, 646 (1977).

214. *See* United States v. John, 437 U.S. 634, 647 (1978) (holding that the federal courts have exclusive criminal jurisdiction over the states to prosecute Native Americans for crimes committed between them on Native American reservation or other Indian country).

215. *See* Wetsit v. Stafne, 44 F.3d 823, 825 (9th Cir. 1995) (petitioner challenging tribal jurisdiction and authority to prosecute for manslaughter, the Court holding that her tribal membership subjects her to the tribe's procedures consistent with the Indian Civil Rights Act); *see also* Duro v. Reina, 495 U.S. 676, 697 (1990) (holding that Indian tribes could not prosecute Indians who were members of different tribes for the crimes that have been committed by the different tribe members on their own reservation).

Court had an opportunity to address this issue in *McGirt*, and its failure to do so is regrettable.

The Anglo-American justice system has its roots in English common law and has approximately four theories of punishment, "(1) retributive (2) deterrent, (3) preventive, and (4) reformatory."[216] Retribution focuses on the punishment of an offender.[217] Deterrence serves to prevent a repeat offender or another person from participating in a crime by increasing the certainty of a severe punishment so that they are deterred from the conduct by fear of punishment.[218] A preventive theory of punishment focuses on the individual offender and involves either surveillance, execution, or imprisonment to prevent them from committing a similar offense.[219] A reformatory theory of punishment, out of the four theories listed above, most closely resembles the peacemaking philosophies of many tribes and has an emphasis on the rehabilitation of the criminal by educating and treating them in an individualistic way.[220] These theories are abstract, and in any given case, there is sure to be more than one that is applicable in the sentencing of a criminal defendant.[221]

In contrast, restorative justice is an alternative approach to punishment that is at the heart of this Note's proposed solution to deciding this case. As such, a comparison to the Anglo-American philosophy is necessary. Restorative justice differs from the Anglo-American form of punishment by conceptualizing a crime as a

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216. Westel Woodbury Willoughby, *Anglo-American Philosophies of Penal Law*, 1 J. AM. INST. CRIM. L. & CRIMINOLOGY 354 (1910).

217. *See* Alec Walen, *Retributive Justice*, STAN. ENCYCLOPEDIA OF PHIL. (Jun. 18, 2014), www.plato.stanford.edu/entries/justice-retributive/ [perma.cc/AK9W-ZK8Q] (explaining that retributive theory is based on the premise that "those who commit wrongful acts, especially serious crimes, should be punished even if punishing them would produce no other good").

218. *See* Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment*, SENTENCING PROJ. 2 (Nov. 2010) (explaining policy of deterrence and how it may fail because it assumes that human beings are rational beings who consider adverse consequences of their conduct before they commit a crime).

219. *See* Willoughby, *supra* note 218, at 369 (explaining preventive theory and the methods used to accomplish this theory of punishment often include execution, imprisonment, or continued surveillance of the convicted person to make sure that they do not continue to participate in illegal conduct).

220. *See* Tanu Priya, *Reformative Theory of Punishment*, ACADEMIKE (Sept. 2, 2014), www.lawctopus.com/academike/reformative-theory-of-punishment/ [perma.cc/JQ6X-MPVU] (describing the theory behind reformation in the penal system and how it attempts to protect the basic human rights of a convicted person by changing the offenders' behavior through education and treatment to reduce the likelihood of the offender committing a future crime).

221. *See* Willoughby, *supra* note 218, at 369 (mentioning that these theories are not mutually exclusive and that it is rationally impossible to select any single theory of punishment and declare it in a system of penal justice that should be the sole motive for both its enactment and its enforcement).

violation of trust between members of a community to restore relationships and establish harmony.[222] In traditional Native American culture, "justice, healing, along with reintegrating individuals into their community, is paramount . . . [and it] involves bringing together victims, offenders, and their supporters to resolve a problem."[223] In many tribes, "there is a deep connection between justice and spirituality; [and] harmony and balance are essential to both."[224] The key to restorative justice lies in its principle that crime is not only a morally-wrong act, but is also an offense against human relationships.[225]

Unlike Anglo-American culture that "consists of an elective identity added to the essential American character,"[226] Native American culture is "pervasive, encircling, [and] all-inclusive."[227] Thus, it serves as no surprise that the Anglo-American justice system differs greatly from tribal philosophies because the very idea of justice holds an entirely different meaning. The Anglo-American perception of justice is "relegated to one institution, and all other things are left to a marketplace of religion and culture that prospers or fails depending on how individuals choose to exercise the liberty given to them under American law,"[228] whereas the tribal concept of justice stems from the human spirit.[229]

As eluded to above, the main departure of Anglo-American law and restorative justice lies in the relation of the punishment with law and morality. In the Anglo-American system, "legal rights and duties are also moral rights and duties, but they are recognized by the law not . . . because they are such, but . . . because their enforcement is deemed advantageous."[230] Under this system, a specific act is prohibited because public safety—not morality—

222. *See* J.F Meyer. *History Repeats Itself: Restorative Justice in Native American Communities*, 14 J. OF CONTEMP. CRIM. JUST. 42 (1998) (explaining the framework for Native American legal systems and discussing the policy behind restorative justice measures in a tribal context).

223. Mirsky, *supra* note 213, at 1.

224. *Id.*

225. *See Restorative Justice On-Line Notebook*, NAT'L CRIM. JUST. REFERENCES SERV. (Nov. 2007), www.ncjrs.gov/pdffiles1/nij/242196.pdf [perma.cc/BS6L-QB9Y] (listing the principles of restorative justice: crime is an offense against human relationships, victims and the community are central to justice processes, the first priority of justice processes is to assist victims, the second priority is to restore the community)).

226. Carey Vicenti. *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE 134 (1995).

227. *Id.*

228. *Id.*

229. *See id.* (explaining justice as a concept "in which all aspects of the person and his or her society are integrated . . . [and] [e]very action in daily life is read to have meaning and implication to the individual and guides how . . . [they interact] with tribal society or [fulfill] obligations imposed by society, law, and religion.").

230. Willoughby, *supra* note 218, at 371.

depends on it.[231] In contrast, restorative justice is closely tied with morality. Restorative justice focuses on the individual and emphasizes that no human is capable of being thrown away for an act; that a community is obliged to promote the healing and well-bring of its members.[232] The process of restorative justice aims to focus on the individual, by separating the criminal action from the person who committed it.[233] To many tribes, "spirituality helps to connect and bind [members] to each other as a community, as a tribe, and as a nation . . . [and] it clarifies relationships and is what makes healing happen."[234]

There is no question that tribal courts and their notions of justice differ greatly from that of the Anglo-American formulations.[235] Because of the differing ideals and philosophies behind these two concepts of justice, it is a disservice to force the Anglo-American penal system on Native American tribes. It may be that these tribes are better honored by the recognition of self-governance to foster restorative justice philosophies.

Because a stark contrast exists between the Anglo-American penal system and the philosophy of restorative justice, the type of punishment a tribal member receives for crimes committed against another tribal member needs to be reconsidered. In restorative justice, "there is a deep connection between justice and spirituality,"[236] and the Anglo-American justice system is inconsistent with this because punishment in this context is not viewed with morality. Therefore, a tribal member being prosecuted for a crime committed against another tribal member by the federal government is inconsistent with this justice ideology.[237]

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231. *See id.* (recognizing that something is "prohibited by the law, not because it is considered sinful, as tested by some moral standard, but because the safety or welfare of society demands it").

232. *See generally* GORDON BAZEMORE, RESTORATIVE COMMUNITY JUSTICE: REPAIRING HARM AND TRANSFORMING COMMUNITIES, CENTRE FOR JUSTICE & RECONCILIATION (2015) (explaining how restorative justice leads to restoration of harmony for the community and allows both the victim and offender to heal).

233. *See* Mirsky, *supra* note 213, at 4 (identifying that the process of restorative justice is not focused on law and principles, but rather that the process is paramount, noting that disputes are better resolved by the idea of relationships instead of resorting to rules for guidance on how to punish a wrongdoer).

234. *Id.* at 6.

235. *See id.* at 3-4 (highlighting the differences between Anglo-American and Indian justice systems, recognizing the Indian tradition as grounded in the process of justice and the fundamental preservation of relationships within the tribal community).

236. *Id.* at 1.

237. *See* Carol A. Hand et al., *Restorative Justice: The Indigenous Justice System*, 15 CONTEMP. JUST. REVIEW ISSUES IN CRIM., SOC., & RESTORATIVE JUST. 4 (2012) (summarizing the different beliefs about achieving justice, comparing the traditional Indigenous restorative justice system with the European-based system practiced in the present-day United States).

The MCA is overly broad in its application and should only grant federal courts criminal jurisdiction for major crimes committed between a tribal member and a non-tribal member. Failure to recognize Native American traditional values in the context of restorative justice will only further oppress a culture that has already been forced to adapt to the Anglo-American way of life. As such, major crimes committed between tribal members are more appropriately left to be adjudicated and dealt with under exclusive tribal jurisdiction.

In *McGirt*, the Supreme Court ultimately reversed Jimcy McGirt's Oklahoma state conviction due to lack of prosecutorial jurisdiction because of the MCA.[238] Instead of spending a significant amount of its opinion on recounting the events Oklahoma claimed gave rise to Congress disestablishing a reservation, the Supreme Court could have used this case as a vehicle to limit the scope and application of the MCA. Jimcy McGirt, a member of the Muscogee Creek Nation, was convicted of molesting his wife's four-year-old daughter, another member of the Creek Nation.[239]

In filing an amicus brief in support of reversing McGirt's conviction, the Muscogee Creek Nation made it clear that they were not interested in preventing Mr. McGirt from being held accountable for his crimes.[240] Instead, they argued that the outcome would implicate the Tribe's interests in how crimes are prosecuted on tribal lands moving forward. The Muscogee Creek Nation sought to participate in this case in order to advocate for their own member's tribal rights by seeking judicial and federal vindication of their right to prosecute their own members at the exclusion of Oklahoma.[241]

Instead of using this case as an opportunity to address whether the federal statute should apply at the exclusion of the tribes in criminal cases involving two tribal members, the Court simply held that the federal government, to the exclusion of Oklahoma, had the authority to prosecute McGirt.[242] Perhaps the members of the Muscogee Creek Nation would have preferred to handle Jimcy

238. *See McGirt*, 140 S. Ct. at 2456 (holding that the judgment of the Court of Criminal Appeals of Oklahoma had to be reversed because the federal courts, not the Oklahoma state courts, had the jurisdiction to criminally prosecute him).

239. *See id.* at 2459 (stating that McGirt's crimes were committed on lands described as the Creek reservation and that the offender as well as the victim were registered members of the Muscogee Creek Nation).

240. *Id.* at 2460.

241. *See generally* Brief for Muscogee (Creek) Nation as Amicus Curiae, *supra* note 54 (filing an amicus brief to support Petitioner Jimcy McGirt's argument that the State of Oklahoma did not have the authority to criminally prosecute him and therefore cannot criminally prosecute other Indians for crimes committed in Indian country).

242. *McGirt,* 140 S. Ct. at 2459.

McGirt's sentencing in a manner more consistent with their tribe's values. Although the Muscogee Creek Nation did not condone McGirt's criminal behavior, they did not clearly express agreement with the sentence imposed upon him by the Oklahoma courts. Given the differences between Anglo-American penal theories and the general philosophies of restorative justice, it is not implausible to contemplate that the Muscogee Creek Nation may have preferred Jimcy McGirt to face his community in order to promote healing for the victims of his actions, as well as McGirt himself.

V. CONCLUSION

Regardless of whether or not the Muscogee Creek Nation would actually implement a restorative justice proceeding in McGirt's case is inconsequential. What is paramount is the Muscogee Creek Nation's values surrounding the criminal sentencing of one of its own members against another is essential to its very existence as a tribe. In rendering its decision, the Supreme Court's failure to narrow the scope and application of the MCA may have precluded healing for the tribal community. The Muscogee Creek Nation, as well as many other tribes, deserve to exercise discretion in how they want their members to be criminally prosecuted — it should not be left to an institution that is far removed from traditional tribal values and promotes an Anglo-American penal system.

The theft of ancestral tribal lands, the genocide of tribal members, public hostility towards Native peoples, and irreversible oppression – these are the realities that every indigenous person has had to face because of colonization. By recognizing and respecting the Muscogee Creek Nation's authority to criminally sentence its own members, the United States Supreme Court could have taken a small step towards righting these wrongs.