# CAN CRIMINALS RESHAPE ENVIRONMENTAL LAW? AN ANALYSIS OF *MCGIRT* AND ITS IMPLICATIONS ON REGULATING THE ENVIRONMENT

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## INTRODUCTION

On July 9, 2020, the United States Supreme Court held in *McGirt v. Oklahoma* that a portion of eastern Oklahoma was an Indian reservation.[1] Though the case specifically addressed whether the State of Oklahoma or the Muscogee (Creek) Nation had prosecuting authority over the defendant,[2] the Justices anticipated the decision's implications on other areas of law.[3] Chief Justice Roberts voiced this concern in his dissent, solemnly warning that the decision "creates significant uncertainty for the State's continuing authority over . . . environmental law"[4] and that "'many' federal laws, triggering a variety of rules, spring into effect when land is declared a reservation."[5] But writing for the majority, Justice Gorsuch noted: "In reaching our conclusion . . . we do not pretend to foretell the future and we proceed well aware of the potential for cost and conflict around jurisdictional boundaries . . . . [b]ut it is unclear why pessimism should rule the day."[6]

Both Justices indicate that, as a result of the Court's ruling in *McGirt*, Oklahoma's jurisdiction for regulating the environment in the eastern part of the state is in question.[7] Are the Chief Justice's concerns warranted for these laws, or is there reason for Justice Gorsuch's optimism?

This Note argues that the Muscogee Nation and the State of Oklahoma can work together to successfully navigate this conflict, without the enlistment of Congress. On a broader scale, this Note analyzes the options that Indigenous tribes have in the face of jurisdictional conflicts over environmental regulation, specifically in the wake of *McGirt*. These analyses, in turn, ultimately support Justice Gorsuch's optimistic outlook on solving jurisdictional conflicts. Part I of this Note analyzes the framework of environmental regulation between the

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1. 140 S. Ct. 2452, 2464 (2020).
2. *Id.* at 2459.
3. *Id.* at 2480-81.
4. *Id.* at 2482 (Roberts, C. J., dissenting).
5. *Id.* at 2501.
6. *Id.* at 2481 (majority opinion).
7. *Id.* at 2476.

federal government, the Muscogee Nation, and Oklahoma, with a focus on potential areas of conflict. Part II assesses the history of the Muscogee Nation leading up to *McGirt v. Oklahoma* and then examines the Court's ruling in this case concerning the Muscogee Nation. Part III assesses the post-*McGirt* impact on the tribe's relationship with the State, specifically concerning environmental regulation. And last, Part IV identifies and examines potential paths for the Muscogee Nation to regulate the environment in light of jurisdictional conflicts, arguing for negotiation as the most beneficial course for the tribe and the environment at this time.

## I. OVERVIEW OF ENVIRONMENTAL REGULATION IN OKLAHOMA PRE-*MCGIRT V. OKLAHOMA*

### *A. Jurisdiction of the United States on Environmental Regulation*

The United States has power to create environmental laws when the authority for these laws is rooted in a constitutional provision.[8] Though the Constitution does not explicitly mention environmental protection, it contains several provisions which Congress can rely on as a foundation for passing environmental statutes: the Commerce Clause,[9] the Spending Clause,[10] the Property Clause,[11] and the Necessary and Proper Clause[12] together with the Treaty Clause.[13] A few of the most impactful landmark federal environmental statutes based on these provisions have been the National Environmental Policy Act,[14] the Clean Water Act,[15] the Clean Air Act,[16] and the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund).[17]

Federal environmental laws apply to the states by virtue of being passed by Congress pursuant to one of the aforementioned constitutionally enumerated powers.[18] Furthermore, under the Supremacy Clause in Article Six of the Constitution, laws passed by Congress are the "supreme Law of the Land."[19]

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8. CRAIG N. JOHNSTON ET AL., LEGAL PROTECTION OF THE ENV'T 39 (4th ed. 2018).

9. U.S. CONST. art. I, § 8, cl. 3; *see* Hodel v. Va. Surface Mining Reclamation Ass'n, Inc., 452 U.S. 264 (1981) (the only Supreme Court case to decide the Constitutional authority for an environmental law).

10. U.S. CONST. art. I, § 8, cl. 1; JOHNSTON ET AL., *supra* note 8, at 39-40.

11. U.S. CONST. art. IV, § 3, cl. 2; JOHNSTON ET AL., *supra* note 8, at 39.

12. U.S. CONST. art. I, § 8, cl. 18; JOHNSTON ET AL., *supra* note 8, at 40.

13. U.S. CONST. art. II, § 2, cl. 2; JOHNSTON ET AL., *supra* note 8, at 40.

14. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347.

15. Federal Water Pollution Control Act (the "Clean Water Act"), 33 U.S.C. §§ 1251-1387.

16. Clean Air Act, 42 U.S.C. §§ 7401-7671.

17. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675.

18. JOHNSTON ET AL., *supra* note 8, at 59

19. U.S. CONST. art. VI, § 1, cl. 2; JOHNSTON ET AL., *supra* note 8, at 59; *see generally* McCulloch v. Maryland, 17 U.S. 316 (1819).

Thus, in applying these federal environmental laws to the states, these laws preempt any potentially conflicting state laws regarding the protection of the environment.[20]

However, applying federal environmental laws within Indian country is more nuanced. As a preliminary manner, tribal lands must first be defined in order to delineate the boundaries of jurisdictions. The definition for "Indian country" is set in 18 U.S.C. § 1151 as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . (b) all dependent Indian communities within the borders of the United States . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished . . . ."[21]

Because the Constitution categorizes Indian tribes as sovereign entities, this sets certain limits on the practices of the different branches of the federal government in relation to tribes.[22] In this regard, consonant with the limitations imposed by the Constitution, environmental laws passed by Congress are only applicable to Indian Country if the Constitution enumerates this power for Congress.[23] The Indian Commerce Clause, which allows Congress to "regulate commerce . . . with the Indian tribes,"[24] arguably confers the power for federal environmental laws to have jurisdiction within Indian Country.[25] It is only under this framework that the Supremacy Clause may then apply to Indian Country and preempt potentially conflicting environmental statutes passed by a tribe.[26] By the same token, the Supremacy Clause, combined with the Indian Commerce Clause, precludes state environmental laws from having force within Indian Country.[27] Under this framework, Congress claims to hold "plenary and exclusive power" to recognize

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20. JOHNSTON ET AL., *supra* note 8, at 59.

21. 18 U.S.C. § 1151. This definition is relevant in regard to civil jurisdiction despite the fact that it is found in the federal criminal code. U.S. ENV'T PROTECTION AGENCY, APPROVAL OF ST. OF OKLA. REQUEST UNDER SEC. 10211(A) OF THE SAFE, ACCOUNTABLE, FLEXIBLE, EFFICIENT TRANSP. EQUITY ACT OF 2005 (Oct. 1, 2020), https://turtletalk.files.wordpress.com/2020/10/epa-letter-to-gov.-stitt.pdf [https://perma.cc/ CRM5-DJ5L]; *see also* DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975).

22. MATTHEW L.M. FLETCHER, FED. INDIAN L. 3 (2016).

23. *See id*.

24. U.S. CONST. art. I, § 8, cl. 3.

25. FLETCHER, *supra* note 22, at 3; however, not all agree with the interpretation that the Indian Commerce Clause confers this power. Hillary M. Hoffmann, *Congressional Plenary Power and Indigenous Environmental Stewardship: The Limits of Environmental Federalism*, 97 OR. L REV. 353, 359-60 (2019).

26. This commonly held presupposition is challenged by many who reject the notion that federal laws have legal supremacy over tribal laws. *See* Robert N. Clinton, *There Is No Federal Supremacy Clause For Indian Tribes*, 34 ARIZ. ST. L.J. 113, 115 (2002).

27. FLETCHER *supra* note 22, at 5, 21; Worcester v. Georgia, 31 U.S. 515, 561 (1831). Of course, there are many exceptions to this general rule. FLETCHER *supra* note 22, at 5.

Indian tribes, regulate Indian affairs, and statutorily define tribal sovereignty in Indian affairs.[28] This power is frequently delegated to the executive branch; specifically, in the form implementing federal environmental policy, it is often delegated to the Secretary of the Interior or the Administrator of the Environmental Protection Agency.[29] Thus, the federal government, and not the states, is responsible for implementing federal environmental regulations within Indian Country.[30] The federal government can, however, delegate the authority to implement these laws in Indian Country to Indigenous tribes or to states.[31]

Not to be overlooked, the United States also interacts with Indian tribes through treaties, pursuant to the Treaty Clause.[32] Ratified by the Senate, these treaties are the supreme law of the land per the Supremacy Clause, and therefore preempt conflicting state laws.[33] The Constitution and these treaties form the basis of what is commonly characterized as a "trust relationship" between the federal government and Indian tribes; the federal government is in a trustee position and Indian tribes are in a trust beneficiary position.[34] While Indigenous peoples often view these treaties as "sacred, often familial arrangements that cannot be broken," Congress approaches the treaties as legislation that can be "unilaterally abrogated."[35] Consequently, Congress reserves for itself the power to abrogate treaties, and thus the power to abrogate Indian treaty rights.[36] Treaties, along with the Supreme Court's interpretations of treaties, have been critical to establishing or diminishing many of the rights that Indian tribes have regarding protecting the environment and relating to the land.[37]

### *B. Jurisdiction of Muscogee (Creek) Nation on Environmental Regulations*

The jurisdictional blueprint for tribal environmental regulation is based on federal Indian law doctrine, which is "as incoherent as it is complicated," and is often described as a "maze."[38] While tribes are "distinct, independent political

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28. FLETCHER *supra* note 22, at 4-5.

29. *Id.*

30. *Id.*; Judith V. Royster, *Oil and Water in the Indian Country*, 37 NAT. RES. J. 457, 462 (1997).

31. FLETCHER *supra* note 22, at 4; Royster, *supra* note 26, at 462.

32. FLETCHER *supra* note 22, at 3; U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .").

33. FLETCHER *supra* note 22, at 212; U.S. CONST. art. VI, § 1, cl. 2; Worcester v. Georgia, 31 U.S. 515, 561 (1831).

34. FLETCHER *supra* note 22, at 3, 169.

35. *Id.* at 212.

36. *Id.* at 4; *see* Lone Wolf v. Hitchcock, 187 U.S. 553, 556 (1903).

37. *See, e.g.*, Herrera v. Wyoming, 139 S. Ct. 1686 (2019) (holding Wyoming's statehood did not extinguish Crow Tribe treaty rights to hunt and harvest wildlife away from reservation lands).

38. Elizabeth A. Reese, *Welcome to the Maze: Race, Justice, and Jurisdiction in* McGirt v. Oklahoma, 87 U. CHI. L. REV. ONLINE 1, 4 (2020).

communities,"[39] tribes are also considered "domestic dependent nations"[40] (as opposed to international sovereigns with external sovereignty)[41] that relate to states and the federal government on a "government-to-government basis."[42] As a fundamental principle of federal Indian law, "the sovereign authority of Indian tribes is inherent."[43] This sovereignty is aboriginal under federal law: "[I]t does not derive from the Constitution, is not necessarily constrained by the Constitution, and predates the Constitution."[44] Thus, this authority is neither delegated nor granted by the United States government. But, pursuant to the federal government's trust responsibilities and exercise of plenary power, Congress reserves for itself the right to diminish this sovereign authority.[45]

This somewhat of a "legal pluralism" of tribes being subordinate, but also self-governing, is reflected in American policies.[46] The United States, since its inception, has had an "inconsistent and opportunistic" approach toward inherent tribal sovereignty.[47] These "oscillating American impulses" have switched between policies designed to "crush tribes and tribalism" to "motives of pure humanity" in policies designed to promote tribal self-determination.[48] In clarifying tribal sovereignty, it is important to recognize that "[a] diminished sovereignty is not an extinguished sovereignty. And limited sovereignty does not render tribal sovereignty itself a nullity."[49]

Thus, within this matrix, tribes have two sources for their authority over environmental regulations: (1) tribes have inherent governmental power to regulate, unless this is ceded by treaty, federal statute, or "inconsistent with" the "dependent sovereign status of tribes;"[50] and (2) the federal government can delegate federal environmental programs to Indian tribes so that tribes are

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39. Worcester v. Georgia, 31 U.S. 515, 519 (1831); *see also* ELIZABETH ANN KRONK WARNER & HEATHER TANANA, *Indian Country Post McGirt: Implications for Traditional Energy Development and Beyond* 20 (Univ. of Utah C. of L. Res. Paper No. 379, Aug. 28, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3680658 [https://perma.cc/F7ZZ-2YBV].

40. Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831); *see also Native American Policies*, JUSTICE.GOV, https://www.justice.gov/otj/native-american-policies [https://perma.cc/CU6J-4SFJ].

41. Michalyn Steele, *Congressional Power and Sovereignty in Indian Affairs,* 2018 UTAH L. REV. 307, 309 (2018).

42. WARNER & TANANA, *supra* note 39, at 3.

43. FLETCHER, *supra* note 22, at 4.

44. Steele, *supra* note 41, at 313-14; *see* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); *see also* United States v. Wheeler, 435 U.S. 313, 323 (1978).

45. FLETCHER, *supra* note 21, at 4.

46. Michalyn Steele, *Breaking Faith with the Tribal Sovereignty Doctrine*, 64 FED. LAW. 48, 50 (2017).

47. Steele, *supra* note 41, at 311.

48. *Id.* at 311-12. (quoting, in part, Letter from Thomas Jefferson to William Henry Harrison (Feb. 27, 1803), Founders Online, Nat. Archives, https://founders.archives.gov/documents/Jefferson/01-39-02-0500 [https://perma.cc/G9RQ-3ZQM]).

49. *Id.* at 313.

50. Royster, *supra* note 30, at 459.

authorized to run these programs.[51] To understand and interpret tribal authority for regulating the environment under the framework of federal Indian law, tribes should be presumed to possess sovereignty over regulations unless the federal government has curtailed this sovereignty.[52]

Under this framework for tribal jurisdiction, Article 1, Section 2 of the Muscogee Constitution states that the Nation's political jurisdiction "shall be as it geographically appeared in 1900 which is based upon . . . Treaties."[53] While this extends to property held by the Muscogee (Creek) Nation and land that is held in trust by the United States, it is not limited to such property.[54] In accordance with its constitution, the Muscogee Nation has promulgated various rules and regulations concerning the environment in the Muscogee Code.[55] These include regulations on oil and gas (Title 43), animals (Title 41), the Green Government Initiative (Title 40), lands and minerals (Title 28), and hunting and fishing (Title 23).[56] Additionally, a title of the Code is reserved for water rights (Title 46).[57] Specifically, regarding oil and gas operations, the Muscogee Nation has enacted various regulations concerning oil and gas operations in NCA 13-266, including permitting requirements.[58]

The second source for tribal authority over environmental regulations finds its foundation in the federal government's authority to delegate the implementation of federal environmental regulations on tribal lands to tribes.[59] As a federally recognized Indian tribe, the Muscogee Nation can be authorized by the federal government to implement federal environmental programs within their territory.[60] Under the major federal environmental regulations, such as the Clean Water Act, the Safe Drinking Water Act, and the Clean Air Act, tribes are permitted to obtain treatment-as-state ("TAS") status to implement federal environmental programs with the EPA.[61] However, the Muscogee Nation has not chosen to implement any of the major federal environmental programs by seeking TAS status.[62] In order to qualify for this status under the two water acts, tribes

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51. *Id.*

52. WARNER & TANANA, *supra* note 39, at 3; *see also* Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024 (2014) (holding that tribes retain inherent powers if they have not been extinguished).

53. *Muscogee Constitution (Annotated)*, MUSCOGEE (CREEK) NATION SUP. CT., http://www.creeksupremecourt.com/mcn-constitutiion/ [https://perma.cc/ZR9R-BQ6P].

54. *Id.*

55. *Muscogee Code (Annotated)*, MUSCOGEE (CREEK) NATION SUP. CT., http://www.creeksupremecourt.com/mcn-code/ [https://perma.cc/ MT8V-28DF].

56. *Id.*

57. *Id.*

58. *A Law of the Muscogee (Creek) Nation Creating New Law in Title 43, Titled Oil and Gas*, MUSCOGEE (CREEK) NATION SUP. CT., http://www.creeksupremecourt.com/wp-content/uploads/T43-NCA13-266.pdf [https://perma.cc/S4R3-LHDC].

59. Royster, *supra* note 30, 459.

60. *Id.*

61. *Id.* at 462.

62. *Tribes Approved for Treatment as a State (TAS)*, EPA.GOV, https://www.epa.gov/tribal/

must generally fulfill three basic requirements: (1) tribes must show they have a functioning government; (2) tribes must show that they have the jurisdiction to implement this program; and (3) tribes must show that they are reasonably capable of carrying out the program.[63]

### *C. Jurisdiction of the State of Oklahoma on Environmental Regulation*

States have inherent power to make laws within their territory, as long as these laws are not prohibited by the Constitution.[64] This authority stems from a state's territorial sovereignty,[65] and is confirmed by the Tenth Amendment's reservation of power to the states as long as this power is not delegated in the Constitution to the federal government.[66] Thus, states (including Oklahoma) have passed laws and regulations concerning the protection of the environment and regulating activities with environmental impacts.[67] In this regard, states have the power to regulate the environment subject to the limitations of the Supremacy Clause and the Dormant Commerce Clause.[68] One of the ways states regulate the environment is by regulating oil and gas production.[69] In Oklahoma, the Oklahoma Corporation Commission ("OCC") is responsible for regulating the oil and gas industry within the State of Oklahoma, along with regulating public utilities and intrastate transportation.[70]

State governments are excluded from regulating Indian affairs.[71] The seminal case on this matter is *Worcester v. Georgia*, where the Supreme Court held that state laws do not apply within Indian Country.[72] However, while this concept may not have been one welcomed by the states, it was not necessarily a new concept presented by Chief Justice Marshall at the time of *Worcester*.[73] Already in Federalist No. 42, James Madison argued that state authority over Indian tribes was one of the great failures of the Articles of Confederation,[74] noting that the

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tribes-approved-treatment-state-tas#tas-grants [https://perma.cc/ 62ML-STVL].

63. Marren Sanders, *Clean Water in Indian Country: The Risks (and Rewards) of Being Treated in the Same Manner as a State*, 36 WM. MITCHELL L. REV. 533, 538 (2010).

64. JOHNSTON ET AL., *supra* note 8, at 39.

65. *Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power*, EVERYCRSREPORT.COM, https://www.everycrsreport.com/reports/RL30315.html#_Toc386612615 [https://perma.cc/JD4L-PVV5].

66. U.S. CONST. amend. X; JOHNSTON ET AL., *supra* note 8, at 52.

67. *See, e.g.*, OKLA. STAT. tit. 27a. § 2-6-501.5 (2020).

68. JOHNSTON ET AL., *supra* note 8, at 59, 61.

69. *See, e.g.*, *Oklahoma Corporation Commission*, OK.gov, https://www.ok.gov/portal/agency.php?agency_id=160 [https://perma.cc/WE6T-84AB].

70. *Id.*

71. FLETCHER, *supra* note 22, at 4; there are, of course, exceptions to this rule. *Id.* at 4-5.

72. 31 U.S. 515, 561 (1831).

73. *See* THE FEDERALIST NO. 42, at 257-258 (James Madison) (Bantam Classic ed., 2003).

74. FLETCHER, *supra* note 22, at 5 (citing THE FEDERALIST NO. 42, at 284-85 (James Madison) (Jacob E. Cooke ed., 1961).

idea was "absolutely incomprehensible" and an endeavor to "accomplish impossibilities."[75]

### *D. Jurisdictional Overlap & Conflict Between the Three Sovereigns*

Different ramifications of power inevitably lead to overlap in jurisdiction between the federal government, Indian tribes, and the states.[76] While conflict can occur between any of the three sovereigns, many of the disputes over jurisdiction within Indian Country involve disagreements between Indian tribes and states.[77] Though the Supreme Court firmly addressed the issue early on in *Worcester*, holding that state laws were of no force in Indian Country, entanglements on different angles of this matter continued for the next two centuries—and even continue today.[78]

Jurisdictional issues on this front have been further compounded by the fragmentation of tribal lands due to the passage of the General Allotment Act of 1887.[79] This act transferred parcels of tribal land into individual ownership to tribal members.[80] Furthermore, the act transferred ownership of many parcels to non-tribal members.[81] The implications of these policies are seen today through the checkerboard pattern of land ownership on historically tribal lands, resulting in a checkerboard pattern of jurisdictional application.[82]

A primary issue of contention surrounding jurisdictional authority relates to tribes regulating non-tribal member activities on Indian lands.[83] Under the Implicit Divesture Doctrine, while "tribes retain full regulatory authority over tribal members and tribal lands," loss of title to lands essentially equals loss to regulate, and the tribe "may exercise authority over nonmembers on fee lands only in certain circumstances."[84] As a result, tribal authority over non-tribal members, on land that is owned in fee by non-tribal members, yet located within the Indian reservation, is limited.[85] The seminal case establishing this doctrine is *Montana v. United States*.[86] In *Montana*, the Court expressed limitations on the inherent sovereignty of the Crow Tribe, conveying that inherent tribal sovereignty is generally limited to "what is necessary to protect tribal self-government or to

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75. THE FEDERALIST NO. 42, *supra* note 73, at 257-58.

76. *Indian Law,* Intermountain Oil and Gas BMP Project, https://www. oilandgasbmps.org/laws/tribal/ [https://perma.cc/K6GY-PPUH].

77. *See, e.g.*, *Worcester,* 31 U.S. at 542.

78. *Id.* at 561.

79. *See Indian Law*, *supra* note 76.

80. *See* 25 U.S.C. §§ 331-358; *see also Indian Law*, *supra* note 76.

81. *Id.*

82. *Fractionation,* U.S. DEP'T INTERIOR, https://www.doi.gov/buybackprogram/fractionation [https://perma.cc/SK2X-YZQD].

83. *See Royster*, *supra* note 30, at 464-65.

84. *Id.* at 460.

85. *Id.*

86. 450 U.S. 544 (1981).

control internal relations."[87] However, the Court maintained that within the reservation the tribe still possessed forms of governing authority over non-Indigenous people: "To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands."[88] In line with this, the Court established two exceptions in which tribes have inherent authority over nonmembers of the tribe who own land in fee.[89] In the first exception, tribes may exercise authority over a non-member if there is a "consensual relationship"[90] between the non-member and the tribe: "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[91] The second exception set forth by the Court, commonly referred to as the Direct Effects Test, held that "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[92]

Subsequent cases modifying this test are *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation* and *South Dakota v. Bourland*.[93] However, a sharply divided Court in *Brendale*, which did not issue a majority opinion, created more questions than it answered by leaving the applicability of the *Montana* test uncertain.[94] Rather than address the questions left open by *Brendale*, the Court in *Bourland* clarified little in regard to the applicability of the *Montana* Direct Effects Test and which plurality opinion to follow from *Brendale* to interpret the test.[95] As it stands, the Court has yet to reexamine the issue of tribal inherent sovereignty over nontribal members on nontribal fee lands.[96]

Other issues tend to arise when tribes have power to assert authority outside of Indian Country. These most often arise in the context of Indigenous peoples' hunting, fishing, and gathering rights off of tribal reservations pursuant to treaties.[97] The seminal (and perhaps controversial) cases on such matters are *United States v. Washington*[98] and *United States v. Michigan*,[99] with the more

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87. *Id.* at 564.

88. *Id.* at 565.

89. *Id.* at 565-66; Royster, *supra* note 30, at 460-61; FLETCHER, *supra* note 22, at 368.

90. *Montana*, 450 U.S. at 565.

91. *Id.*

92. *Id.* at 566.

93. 492 U.S. 408 (1989); 508 U.S. 679 (1993); Royster, *supra* note 30, at 461.

94. *See* 492 U.S. 408; FLETCHER, *supra* note 22, at 370.

95. *See* 508 U.S. 679; FLETCHER, *supra* note 22, at 371.

96. FLETCHER, *supra* note 19, at 371; the *Montana* test has been held to apply to tribal adjudicatory jurisdiction and tribal taxation authority. FLETCHER, *supra* note 22, at 371

97. *Id.* at 520.

98. 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

99. 471 F. Supp. 192 (W.D. Mich. 1979), *aff'd as modified*, 653 F.2d 277 (6th Cir. 1981); FLETCHER, *supra* note 22, at 520.

recent *Herrera v. Wyoming* decision.[100] While a discussion on the complexities of these cases is beyond the scope of this Note, in general, courts have affirmed off-reservation treaty rights while also acknowledging a state's interest in regulating resources for conservation purposes.[101] These cases, however, ultimately underscore the importance of treaties for affirming the rights of Indigenous people. Additionally, these cases reflect the uniqueness of treaties and the necessity to assess each one on a case-by-case basis.

Specifically, in the situation between the Muscogee Nation, Oklahoma, and the United States, concurrent jurisdictional conflict arises over oil and gas regulation on tribal lands.[102] The genesis of this entanglement began with the Congressional passage of the Stigler Act, which made the Muscogee Nation (including the other Five Civilized Tribes of Oklahoma) "subject to all oil and gas conservation laws of the State of Oklahoma."[103] Under Congressional delegation of power to regulate Indian affairs, the Secretary of the Interior has authority to regulate oil and gas operations in Indian Country.[104] Yet under this Act, it would appear that Congress is delegating this authority to the State of Oklahoma in the case of Muscogee lands.[105] Because of this, the OCC has "exclusive jurisdiction, power, and authority" over oil and gas development within the reservation boundaries.[106] This results in concurrent jurisdiction between the OCC, the tribe, and the United States when it comes to regulating oil and gas operations within the Muscogee (Creek) Reservation.[107]

## II. ANALYSIS OF *MCGIRT V. OKLAHOMA*

### *A. History of the Muscogee (Creek) Nation*

To understand the central conflict within *McGirt*, the history of the Muscogee Nation must first be understood. The Muscogee (Creek) Nation, along with the other tribes currently in Oklahoma, originally lived east of the Mississippi River.[108] Eventually, settlers began to move into these lands in search of gold.[109]

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100. 139 S. Ct. 1686 (2019).

101. FLETCHER, *supra* note 22, at 520.

102. Stephanie Moser Goins, *Don't Panic: The Implications of McGirt v. Oklahoma for the Oil and Gas Industry in Oklahoma*, BALL MORSE LOWE, PLLC (July 15, 2020), https://www.ballmorselowe.com/oil-gas-energy/oklahomacity-blog/don't-panic-the-implications-of-mcgirt-v.-oklahoma-for-the-oil-and-gas-industry-in-oklahoma [https://perma.cc/6NJ3-R5JM].

103. *Id.* (quoting Stigler Act of August 4, 1947, ch. 458, 61 Stat. 731 (1947)).

104. *Id.*

105. Goins, *supra* note 102.

106. *See* Schiffer Hicks Johnson et al., *Oklahoma Oil and Gas Business Braces for Change in Wake of Supreme Court Decision*, JD SUPRA (July 16, 2020), https://www.jdsupra.com/legalnews/oklahoma-oil-and-gas-business-braces-47615/ [https://perma.cc/CH5K-J6U8]; *see also* OKLA. STAT. tit. 52, § 139(B)(1)(a) (2021).

107. Goins, *supra* note 102; *see also* 25 C.F.R. pt. 213 (2021).

108. Melissa Cottle, *Indian Land Reform: Justice for All? An Examination of Property Laws*

This encroachment on tribal sovereignty escalated to the Indian Removal Act of 1830, where these nations ceded their original lands in exchange for lands in fee simple in what is currently Oklahoma.[110] These thirty-eight federally recognized tribes in Oklahoma were relocated to the state after forcible removal from native lands.[111] However, eventually non-tribal settlement began to escalate in these new tribal lands west of the Mississippi, and Congress passed the General Allotment Act in 1887.[112] In general, this act assigned parcels of communal reservation land to individuals.[113] Later, through the Curtis Act in 1898, the Five Tribes unwillingly agreed to land allotment.[114]

### *B. Analysis of the Court's Decision in* McGirt

The saga surrounding the jurisdictional issue of the Muscogee (Creek) Nation began with an earlier case, *Sharp v. Murphy*.[115] In *Murphy*, the defendant was prosecuted for committing murder; however, the defendant argued that he could not be tried for the crime in Oklahoma state court because the crime took place on an Indian reservation and because the Major Crimes Act did not authorize state prosecution of crimes on Indian reservations.[116] As a result, the Supreme Court granted the petition for writ of certiorari to answer the issue: "Whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an 'Indian reservation' today under 18 U.S.C. § 1151(a)."[117]

However, before the Supreme Court decided the case, the Court granted certiorari and heard *McGirt*, which raised the same question.[118] In *McGirt*, Jimcy McGirt was prosecuted in Oklahoma state court for three serious sexual offenses.[119] Though he was convicted, he argued postconviction that the State lacked jurisdiction because he was a member of the Seminole Nation and his

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*Pertaining to the Five Tribes Indians and a New Call for Reform*, 39 OKLA. CITY U. L. REV. 71, 76-77 (2014).

109. *Id.* at 76.

110. *Id.*

111. *Id.* at 75-76.

112. *Id.* at 76.

113. *Id.* at 76.

114. *Id.* at 78.

115. 140 S. Ct. 2412 (2020) (mem.) (per curiam).

116. Murphy v. Royal, 875 F.3d 896, 915, 929-30 (10th Cir. 2017).

117. 17-1107 Sharp v. Murphy, Sharp v. Murphy, 140 S. Ct. 2412 (2020) (mem.) (per curiam), https://www.supremecourt.gov/docket/docketfiles/html/qp/17-01107qp.pdf [https://perma.cc/292L-SMQU].

118. McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020). Justice Gorsuch recused himself from hearing *Sharp*; he was a judge on the Tenth Circuit when the case was before the Tenth Circuit. *Sharp*, 140 S. Ct. at 2412; *Royal*, 875 F.3d at 896.

119. *McGirt*, 140 S. Ct. at 2456.

crime was committed on the Muscogee (Creek) reservation.[120] Thus, the Court was tasked with determining whether the land on which the crime took place was, in fact, "Indian country."[121]

Before addressing the issue of whether Congress disestablished the Creek reservation, Justice Gorsuch addressed a necessary presupposition: whether Congress had established a reservation for the Creeks in the first place.[122] In doing so, Justice Gorsuch held on tightly to the language of the 1832, 1833, and 1856 treaties between the Creek Nation and the United States to conclude that "Congress established a reservation for the Creeks."[123]

With this premise established, Justice Gorsuch tackled the key question: "[C]an we say that the Creek Reservation persists today?"[124] For an answer, Justice Gorsuch looked to the applicable test, the *Solem* diminishment test,[125] established by Supreme Court precedent, *Solem v. Bartlett*.[126] *Solem*, from the outset, stands for the principle that "only Congress can divest a reservation of its land and diminish its boundaries."[127] Following this principle closely is the confirmation that such diminishment "will not be lightly inferred."[128]

It is at this point where Justice Gorsuch's interpretation of the *Solem* diminishment test breaks with that of the Chief Justice's.[129] In his dissent, Chief Justice Roberts interprets *Solem* as requiring the consideration of "three categories of evidence" to decide whether Congress intended to diminish a reservation: (1) "the relevant Acts passed by Congress;" (2) "the contemporaneous understanding of those Acts and the historical context surrounding their passage;" and (3) "the subsequent understanding of the status of the reservation and the pattern of settlement there."[130] Yet in Justice Gorsuch's judgment, "[t]his is mistaken."[131] For him, the Court's usual, sole charge is "to ascertain and follow the original meaning of the law before us."[132] Thus, for the Justice writing for the majority, "[t]hat is the only 'step' proper for a court of law."[133] There are no three steps.

Yet, Justice Gorsuch does not completely do away with the other "steps" of

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120. *Id.*

121. *Id.*

122. *Id.* at 2460-62.

123. *Id.* at 2460.

124. *Id.* at 2462.

125. *Id.*

126. 465 U.S. 463 (1984).

127. *Id.* at 470.

128. *Id.*

129. *Compare McGirt*, 140 S. Ct. at 2485 (Roberts, C. J., dissenting), *with id.* at 2468 (majority opinion).

130. *McGirt*, 140 S. Ct. at 2485 (Roberts, C. J., dissenting).

131. *Id.* at 2468 (majority opinion).

132. *Id.*

133. *Id.*

the *Solem* test.[134] He explained that extratextual sources of evidence "can only be *interpretative*."[135] Though this evidence can be used "to the extent it sheds light on what the terms found in a statute meant," if the terms are ambiguous,[136] he contends that "[t]here is no need to consult extratextual sources when the meaning of a statute's terms is clear."[137] This evidence, it seems, is second-tier for Justice Gorsuch. Extratextual sources cannot "overcome" the terms in the statute, and by no means can they be used "as an alternative means of proving disestablishment or diminishment."[138] For Justice Gorsuch, acts alone cannot constitute the means to disestablish a reservation.[139] Put more bluntly: "If Congress wishes to break the promise of a reservation, it must say so."[140]

It is in this way that Justice Gorsuch marries his textualism to the Court's precedent. To support his interpretation, Justice Gorsuch notes that there are no cases where the Court found that a reservation was disestablished without a statute that explicitly indicated this intent.[141] By neither creating a new rule nor explicitly reversing a previous rule, Justice Gorsuch's rule in *McGirt* can be understood as an "adjustment" to the *Solem* test,[142] placing different weights on the elements of the test.

Armed with his new version of the *Solem* test, Gorsuch methodically rejects the forms of extratextual evidence that Oklahoma presents to support the disestablishment of the Creek reservation.[143] First, Oklahoma showcased events from the "allotment era" to indicate that Congress intended to disestablish the Creek reservation.[144] Following this, Oklahoma pointed to Congress' intrusion on "the Creek's promised right to self-governance" as intent to disestablish the reservation.[145] And next, Oklahoma pointed to "historical practices and demographics" to demonstrate Congress' intention to disestablish the Creek reservation.[146] Yet, for the Justice from the other side of the Rockies, all of this evidence fell short for a key reason: "wishes are not laws, future plans aren't either."[147] Seemingly for Justice Gorsuch, anything short of an explicit written

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134. *See id*. at 2468-69.

135. *Id*. at 2469.

136. *Id*.

137. *Id*.

138. *Id*.

139. *See id*.

140. *Id*. at 2462.

141. *Id*. at 2470.

142. Oneida Nation v. Vill. of Hobart, 968 F.3d 664, 668 (7th Cir. 2020) (holding that "[w]e read *McGirt* as adjusting the *Solem* framework to place a greater focus on statutory text, making it even more difficult to establish the requisite congressional intent to disestablish or diminish a reservation").

143. *See McGirt*, 140 S. Ct. at 2463-68.

144. *Id*. at 2463.

145. *Id*. at 2465.

146. *Id*. at 2468.

147. *Id*. at 2465.

word from Congress fails to satisfy *Solem's* "clear expression of congressional intent" requirement.[148] Without this congressional statute in the evidence indicating the disestablishment of the reservation, Oklahoma's evidence of promise-breaking suffered from a fatal flaw: "Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law."[149]

Determined to "hold the government to its word" for the reason that "Congress has not said otherwise," the Court held that lands referenced in the treaties between the United States and the Creek Nation remained an Indian reservation.[150]

## III. CONSEQUENCES OF *MCGIRT V. OKLAHOMA* ON ENVIRONMENTAL REGULATION

### *A. Direct Impacts of* McGirt *on Tribal Environmental Regulation in Oklahoma*

Oklahoma had refused to acknowledge much of the land referred to in the treaties with the Muscogee Nation as Indian country.[151] Despite this, in light of *McGirt*, on July 9, 2020 the boundaries of the Muscogee Nation reservation were reaffirmed as those drawn in the 1866 treaty between the Muscogee Nation and the United States.[152] These Muscogee lands within the boundaries of the 1866 treaty span approximately three million acres and include most of the city of Tulsa.[153]

Though the Court's holding only applied to the Muscogee (Creek) Nation, one could quickly deduce that this holding would result in other tribes in Oklahoma expanding their recognized borders to those granted in similar treaties; indeed, Oklahoma state courts have already affirmed the Chickasaw Nation's reservation borders in applying *McGirt*.[154] Furthermore, Oklahoma courts have also approved the historical boundaries of the Cherokee Nation and the Choctaw Nation.[155] Of the Five Civilized Tribes in Oklahoma, this would only leave the Seminole Nation's historical reservation boundaries yet to be recognized by Oklahoma state courts.[156] The recognition of the historical reservation boundaries for all five of these tribes would place 1.8 million people and 19 million acres

148. *Id.* at 2456.

149. *Id.* at 2482.

150. *Id.* at 2459.

151. Brief for Respondent at 8-22, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526).

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

153. *Id.* at 2482 (Roberts, C. J., dissenting).

154. *See id.* at 2459; Bosse v. State, Case No. CF-2010-213, 2021 WL 4704316, at *2 (Okla. Crim. App. Oct. 7, 2021).

155. *E.g.* Hogner v. State, Case No. F-2018-138, 2021 WL 958412, at *4 (Okla. Crim. App. Mar. 11, 2021).

156. Mike W. Ray, *Judges Contend McGirt Applies to All 5 Tribes*, SOUTHWEST LEDGER (Oct. 28, 2020), https://www.southwestledger.news/news/judges-contend-mcgirt-applies-all-5-tribes-0 [https://perma.cc/2MEL-BJAZ].

within Indian Country.[157]

More significant than simply changing the definition of the land to Indian country, *McGirt* had the implication of formally expanding the Muscogee Nation's jurisdiction under certain statutes.[158] In the arena of environmental law, because the Muscogee Nation does not have TAS status to implement federal environmental regulations, *McGirt*, in theory, calls for the federal government—essentially the EPA—to begin implementing federal environmental regulations within the lands described in the 1866 treaty.[159] On this note, the multiplied effect of *McGirt* in Oklahoma could have been the federal government implementing federal environmental regulations throughout Chickasaw Nation, Choctaw Nation, and Seminole Nation reservations, along with certain regulations on the Cherokee Nation reservation.[160] In essence, *McGirt* calls for the federal government or the tribes (should the tribes seek TAS status) to begin implementing federal environmental regulations in nearly the entire eastern half of Oklahoma.[161] However, as discussed in Part III B *infra*, certain events following *McGirt* have resulted in this not taking place.

### *B. Complications for Tribal & Federal Jurisdiction: The SAFETEA ACT of 2005 Midnight Rider*

In what seems to be an incredible amount of foresight, U.S. Senator Jim Inhofe from Oklahoma began to act on this issue of potentially conflicting jurisdiction over a decade ago.[162] In 2005, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) was on the table in Congress, largely dealing with issues on transportation systems, such as highway funds.[163] Seemingly unrelated to the bill altogether, Senator Jim Inhofe inserted Section 10211 of this act, which essentially allows for the State of Oklahoma, and only the State of Oklahoma, to take primacy of federal environmental programs if the State makes such a request to the EPA.[164] This section of the Act is often referred to as the "Midnight Rider,"[165] so called

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157. *McGirt*, 140 S. Ct. at 2482 (Roberts, C. J., dissenting).

158. *Id.* at 2501.

159. *Tribes Approved for Treatment as a State (TAS)*, *supra* note 62.

160. The Chickasaw Nation, Choctaw Nation, and Seminole Nation currently do not have TAS status to implement federal environmental regulations, while the Cherokee Nation has TAS status to implement parts of the Clean Air Act. *Id.*

161. *McGirt*, 140 S. Ct. at 2459; *see Tribes Approved for Treatment as a State (TAS)*, *supra* note 62.

162. Raymond Nolan, *The Midnight Rider: The EPA and Tribal Self-Determination*, 42.3 THE AMERICAN INDIAN QUARTERLY 329 (2018).

163. *Id.*; Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 199 Stat. 1144 (codified as amended in scattered sections of U.S.C.).

164. Nolan, *supra* note 162, at 329; Pub. L. 109-59, 199 Stat. 1144 § 10211

165. Nolan, *supra* note 162, at 329.

because it was it was written in the night before the House vote and thus included in the Act right before the act was passed.[166] With such a swift inclusion in the Act, the rider did not go through legitimate Congressional procedures.[167]

Fifteen years later, the State of Oklahoma relied on this obscure provision in an effort to maintain its environmental jurisdiction over lands within eastern Oklahoma;[168] the State's request was sent to the EPA shortly after the release of the *McGirt* opinion and with little tribal input.[169] On October 1, 2020, the EPA granted Oklahoma's request to carry out these federal programs within the Muscogee Nation.[170] In the letter addressed to Governor Stitt, the EPA details that prior to *McGirt* Oklahoma had implemented federal environmental programs in much of the land that the Supreme Court declared to be Indian country in *McGirt*.[171] However, the EPA clarifies that this grant to implement the programs does not "extend the State's programs into areas of Indian country over which the State had not previously implemented such programs."[172] Essentially, the request was to preserve the pre-*McGirt* status quo of federal regulation implementation.[173] However, it is unclear whether this letter would be sufficient to enable Oklahoma to implement federal environmental programs in the other tribal reservations that were formally recognized by Oklahoma state courts after the submission of the letter.

## IV. ARGUMENT FOR THE PATH FORWARD ON ENVIRONMENTAL REGULATION

While the Muscogee Nation still has the authority to promulgate and implement its own environmental regulations, under the current climate, the choice of whether to pursue TAS status for these lands has been stripped away from the Muscogee Nation.[174] Such an action taken by Oklahoma and Congress demonstrates the continued willingness of these governments to go behind the backs of the Muscogee Nation (and other Indigenous nations) in the realm of regulating the environment.[175] The passage of the Midnight Rider has been described as "'the most scary, direct, take-the-gloves-off-and-go-for-the-jugular attack on tribal sovereignty' ever seen."[176] Excluding the Muscogee Nation from participating in environmental regulation is an infringement on tribal sovereignty, as it attacks "tribal self-determination, [and] goes against centuries of

166. *Id.* at 335.
167. *Id.*
168. *Id.*
169. U.S. ENV'T PROTECTION AGENCY, *supra* note 21.
170. *Id.* at 1.
171. *Id.* at 3.
172. *Id.*
173. *See id.*
174. *See supra* Section III.B.
175. *See supra* Section III.B.
176. Sanders, *supra* note 63, at 553.

precedent."[177] In *City of Albuquerque v. Browner*, the Tenth Circuit listed "land, water rights, mineral rights, and governmental jurisdiction" as "the four critical elements necessary for tribal sovereignty."[178] Furthermore, denying tribes the ability to regulate pollution has a particularly great effect on Indigenous nations because they have a very close relationship with the land, which is described as "the heart of tribes."[179] Thus, Section 10211 of the SAFETEA Act of 2005 is an infringement on not only the tribal sovereignty of the Muscogee Nation, but on all other tribes in Oklahoma.[180] Tribal government has little meaning without jurisdiction.[181]

Not only does this present the tribe with a significant setback in protecting the environment on tribal lands and protecting members of the tribe from environmental hazards, but it also serves as a warning to other tribes in the United States of the potential to curtail tribal sovereignty.[182] Historically, states have not successfully carried out their duty as an instrument of federal trust responsibility on tribal lands, leading to neglected tribal interests.[183] Additionally, even the federal government has failed to successfully implement federal programs in Indian Country.[184] With this insight, tribes such as the Muscogee Nation cannot rely on either the federal government, the state, or industry to protect adequately their interests—the tribes must seek this for themselves.[185] As a result, it is up to the Muscogee Nation to take it upon themselves to secure their right to regulate the environment and protect their Nation. In an effort to reassert environmental jurisdiction over its lands, the Muscogee Nation has several paths that it can pursue. Of these paths, the path of negotiating jurisdiction with the State of Oklahoma is the most beneficial for both the Muscogee Nation and Oklahoma.

### *A. Litigation*

Though the tribe has mentioned litigation as a potential response, a historical analysis of tribal litigation has shown that is can be largely ineffective and is certainly not cost-effective.[186] Despite the fact that litigation can backfire with unintended results, litigation can be a useful tool to implement change. For example, in the late 1970s, Tenneco Oil Company contaminated the Vamoosa-Ada groundwater aquifer in Oklahoma while conducting operations on Sac and

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177. NOLAN, *supra* note 162, at 335.

178. 97 F.3d 415, 418 (10th Cir. 1996).

179. Royster, *supra* note 30, at 458.

180. *See id*.

181. Cottle, *supra* note 108, at 91.

182. *See Royster*, *supra* note 30, at 458.

183. Cottle, *supra* note 108, at 98.

184. *See Royster*, *supra* note 30, at 458

185. *Id*.

186. Taylor Henderson, *Five Tribes' Water Rights: Examining the Aamodt Adjudications' Mechem Doctrine to Predict Tribal Water rights Litigation Outcomes in Oklahoma*, 36 AM. INDIAN L. REV. 125, 160 (2012).

Fox tribal lands.[187] With the aquifer as the only source of drinking water for the Sac and Fox, this left the Nations without access to clean water.[188] While this was brought to the attention of the Department of Interior, no action was taken until 1996, when the Department of Justice filed a lawsuit against Tenneco.[189] As a result of the lawsuit, the Sac and Fox Nations settled with Tenneco for an award of $3.5 million.[190] Though the case demonstrates the historical lessons of poor federal implementation of the programs in on tribal lands, it also shows the important power of litigation.[191] However, had the environmental protections been adequately enforced, contamination of this aquifer could have been prevented in the first place.[192]

Should the path of litigation be pursued, the constitutionality of the Act could be raised on a number of fronts. And success on the argument is not foreclosed, despite the Court's longstanding upholding of Congressional plenary powers over Indigenous tribal affairs and lands.[193] Under the Constitution, the tribe might be able to raise an issue based on the trust doctrine, which applies to agencies such as the EPA.[194] Under this theory, the EPA is responsible for doctrinal obligations.[195] Because the United States has a fiduciary obligation to the tribe, the United States can be liable for breach of fiduciary duty under this doctrine by improperly granting the authority to Oklahoma.[196]

Additionally, the Muscogee Nation could attack the foundational support for the implementation of federal regulations on Indigenous lands.[197] While congressional legislation regulating Indian affairs is upheld on a general notion of congressional plenary power over this area, there has been little judicial inquiry into the doctrine's viability since the early twentieth century.[198] While it is grounded in the Indian Commerce Clause, the Supreme Court has not been consistent as to whether this plenary power is a constitutional or extraconstitutional power.[199] Additionally, arguments can be made that the plain text of the Clause does not support regulating Indian affairs.[200] For example, Justice Thomas rejects the notion that the Indian Commerce Clause confers

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187. Royster, *supra* note 30, 477.

188. *Id.*

189. *Id.* at 476.

190. *Id.* at 479.

191. *See id.*

192. *Id.*

193. Joe W. Stuckey, *Tribal Nations: Environmentally More Sovereign than States*, 31 ELR 11198, 11199 (2001); *see* U.S. CONST. art. I, § 8, cl. 3.

194. Stuckey, *supra* note 193, at 11199.

195. *Id.*; *see also* United States v. Creek Nation, 295 U.S. 103 (1935).

196. Stuckey, *supra* note 193, at 11199.

197. Hoffmann, *supra* note 24, at 377.

198. *Id.* at 371-74.

199. *Id.* at 374.

200. *Id.* at 378-79.

plenary power on Congress over internal Indian affairs.[201] With Justice Gorsuch's strict textualism, it is not hard to imagine that he could also follow such a plain meaning interpretation of the constitutional text.

### *B. Legislation*

Another potential path for the tribe to pursue would be through new legislation or repealing Section 10211 of the SAFETEA Act. However, efforts at legislation have been largely ineffective in the past.[202] When the act came up for renewal in 2009, efforts were made to repeal the rider, but those efforts fell short as the rider was not overturned.[203] On the path of new legislation, the Indian Environmental Act of 2009 was introduced in Congress with hopes to negate the effects of the Midnight Rider, but the Act did not receive enough muster to pass.[204] Similarly, tribes pursued other legislation as a step toward more sovereignty with The Five Nations Citizens Reform Act (Five Nations Act) in 2002.[205] This Act proposed that all oil and gas leases on restricted lands of the Five Tribes would be handled by the Secretary of the Interior.[206] However, this Act likewise did not pass, as it was met with opposition from the oil and gas industry and was seen as extra "bureaucratic hassles."[207] With little representation in Congress and a historical track record of unpassed legislation, successful legislation granting the tribe more authority for regulating the environment seems unlikely.

### *C. Negotiation*

Through the process of negotiation, both the tribe and the State can work together by recognizing common interests.[208] Because of the significant presence of tribes in Oklahoma, excluding tribes from decision-making is not a wise decision for Oklahoma and the energy industry.[209] As a result, tribes in Oklahoma can use this presence as an effective tool in negotiation. Through the framework of relational federalism, both tribes and states benefit as both use resources to achieve a common goal, as opposed to using the resources in an adversarial manner.[210] States often have experience with implementing and enforcing

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201. Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2567 (2013) (Thomas, J., concurring); *see also* Hoffmann, *supra* note 24, at 380.

202. Nolan, *supra* note 162, at 337.

203. *Id.*

204. *Id.*

205. Cottle, *supra* note 108, at 93-95.

206. *Id.* at 93.

207. *Id.* at 95.

208. Grover, Stetson, and Williams, P.C., *Tribal-State Dispute Resolution: Recent Attempts*, 36 S.D. L. REV. 277, 298 (1991).

209. Goins, *supra* note 102.

210. Lilias Jones Jarding, *Tribal-State Relations Involving Land and Resources in the Self-Determination Era*, 57:2 POL. RSCH. Q. 295 (2004).

environmental regulations, which can prove beneficial for tribes.[211] Additionally, scientific studies increasingly incorporate historical influence in understanding ecology and sustainability practices,[212] and thus tribes have valuable perspectives to incorporate in environmental regulations. Other studies indicate the benefits of tribal involvement in environmental regulation, as tribal experimentation with environmental law outside of federal regulations creates "laboratories" for developing new insights into environmental law.[213] This then has the additional benefit of new insights for federal and state policy.[214] Moreover, scholars have proposed that tribal primacy over federal environmental programs results in increased enforcement.[215] Because concurrent jurisdiction between the Muscogee Nation and the State of Oklahoma can provide both the tribe and the state with benefits, this path forward through negotiation is the most preferable for both parties. Furthermore, compared with the other potential paths, the Muscogee Nation stands to lose the least through negotiation. In light of this, a potential solution for the Muscogee Nation and Oklahoma could be a cooperative agreement with Oklahoma.[216] Additionally, there is evidence of successful negotiation between Oklahoma and Indigenous people; Oklahoma has already "negotiated hundreds of intergovernmental agreements with tribes."[217]

In implementing negotiations, lessons can be learned from the effective cooperation between the Blackfeet tribe and the United States Forest Service regarding the Badger-Two Medicine area in Montana.[218] In this instance, the tribe was opposed to oil and gas leases in the Badger-Two Medicine area which were granted to operators because of the historical importance of the area to the tribe.[219] The consultation between the tribe and the Forest Service shows that initially progress will require willingness, time, and even financial resources in order to effectively understand the concerns on both sides.[220] Despite the length of time in resolving the issue, the negotiation led to an increased relationship of trust between the two governmental entities and showed that both can cooperate to

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211. Elizabeth Ann Kronk Warner, *Returning to the Tribal Environmental "Laboratory": An Examination of Environmental Enforcement Techniques in Indian Country*, 6 MICH. J. ENVTL. & ADMIN. L. 341, 344-346 (2017).

212. Jonathan W. Long & Frank K. Lake, *Escaping Social-Ecological Traps Through Tribal Stewardship on National Forest Lands in the Pacific Northwest, United States of America*, 23:2 ECOLOGY & SOC'Y 10 (2018).

213. Warner, *supra* note 211, at 345-347.

214. *Id.* at 345.

215. Mellie Haider & Manuel P. Teodoro, *Environmental Federalism in Indian Country: Sovereignty, Primacy, and Environmental Protection*, POLICY STUDIES J. 887, 889 (May 29, 2020), *available at* https://doi.org/10.1111/psj.12395 [https://perma.cc/6R6K-XKBR].

216. Sanders, *supra* note 63, at 556.

217. *McGirt*, 140 S. Ct. at 2481.

218. Kathryn Sears Ore, *Form and Substance: The National Historic Preservation Act, Badger-Two Medicine, and Meaningful Consultation*, 38 PUB. LAND & RES. L. REV. 205, 241-43 (2017).

219. *Id.*

220. *Id.* at 240.

achieve a common goal.[221] In an overall survey of cooperative agreements between the federal government, Indigenous nations, and states, jurisdictional conflicts have often been successfully resolved through these agreements and have resulted in continued cooperation.[222] Because of the long-term benefits of negotiation, this route not only aids in solving the current problem on the table, but also creates a safety net for solving potential problems in the future.

## CONCLUSION

Environmental laws have a significant impact on the lives of all individuals; these laws implicate people's health, economic activity, and recreation. However, inefficient environmental regulation may miss its purpose, leading to unintended effects and creating a legal quagmire. With the issuance of *McGirt*, it is important to understand from the outset the potential pitfalls that the decision may give rise to for environmental protection in Oklahoma. A proper understanding of jurisdictional conflicts can provide valuable clarity on the scope of these environmental protections. Furthermore, such an understanding will aid in navigating these issues down the road, and ultimately, provide for better protection of the environment between states, Indian tribes, and the federal government.

This Note argued that in light of the issuance of *McGirt* and the subsequent development of the State of Oklahoma asserting primacy over environmental programs within the Muscogee reservation, negotiation stands as the best solution for the Muscogee Nation to obtain a seat at the environmental regulation table. This is based on the limitations and restrictions placed on the Muscogee Nation through federal Indian law, a historical analysis of instances of tribes seeking to assert sovereignty through litigation, legislation, and negotiation, and a comparison of the lessons from these instances. The Muscogee Nation's fight to maintain sovereignty and regulate the environment presents unique challenges because of the SAFETEA Act, coupled with the EPA's recognition of Oklahoma's request for primacy of federal environmental programs under this Act.[223] Still, as the Muscogee Nation continues to press forward to preserve the jurisdiction of their laws, other federally recognized tribes may be able to heed important lessons from the Muscogee Nation's endeavor to regulate the environment.

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221. *Id.*

222. FLETCHER, *supra* note 22, at 520.

223. *See* U.S. ENV'T PROTECTION AGENCY, *supra* note 21.