Back to Basics: The Supreme Court's Return to Fundamental Principles of Federal Indian Law in *McGirt v. Oklahoma* Ahead of Equal Protection Challenge to the Indian Child Welfare Act of 1978

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"[T]he Supreme Court has been inattentive, flippant, and disrespectful of Indian rights, and has seen its task as one of finding arguments that will make actions by the other two branches appear legal. Many 'doctrines' have emerged over the course of 170 years of hearing Indian cases, but the various courts have felt no compulsion to follow precedent, nor have they paid much attention to the historical activities of the federal government toward Indians, often inventing their own version of historical activities of the federal government toward Indians, often inventing their own version of history as they decided each case."[1]

I. INTRODUCTION

The body of law referred to as "federal Indian law" governs the legal status of Indian tribes and regulates the relationships between tribes, the federal government, and states.[2] This body of law is comprised of constitutional text, treaties between tribes and the federal government, regulations, legislation, and the

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1. VINE DELORIA, JR. & DAVID E. WILKINS, TRIBES, TREATIES, & CONSTITUTIONAL TRIBULATIONS 52 (1st ed. 1999).

2. *See* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 1 (7th ed. 2020) (defining body of federal Indian law). In this context, it can be thought of as "Federal Law About Indians." *See id.* (characterizing application of term "Indian law"). Federal Indian law should not be confused with tribal law, which refers to the specific bodies of law of tribal nations. *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 3-4 (7th ed. 2017) (distinguishing tribal law from federal Indian law). This Note uses a variety of terms interchangeably to refer to indigenous peoples in a collective sense including "Native nations," "tribal nations," and "tribes." When referring to individual indigenous persons, this Note uses the terms "Indian," "American Indian," and terms used in quoted source material. The terms "Indian" and "American Indian" are undoubtedly geographically inaccurate and ignore the cultural diversity demonstrated by the hundreds of distinct tribal nations in North America. *See* DAVID E. WILKINS & HEIDI KIIWETINEPINESIIK STARK, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM, at xvii-xviii (3d ed. 2011) (describing both variety and inadequacy of terms used to describe indigenous peoples, particularly in academic literature). Nevertheless, these terms are the most commonly used by indigenous and nonindigenous persons and institutions alike, particularly when no specific tribal name is used. *See id.* (recognizing terms used most to describe indigenous persons despite inaccuracies).

jurisprudence of the United States Supreme Court.[3] Under Chief Justice John Marshall, the Court established some of the fundamental principles of federal Indian law for navigating these relationships and interpreting these sources of law in the cases commonly referred to as "the Marshall Trilogy."[4] The Supreme Court's application of those principles, however, has become increasingly inconsistent and "haphazard."[5]

On July 9, 2020, the Supreme Court issued its opinion, written by Justice Gorsuch, in *McGirt v. Oklahoma*,[6] a case referred to as "the most important reservation boundary case in the history of the United States Supreme Court."[7] The Court, in a five-to-four decision, held that the Muscogee (Creek) Nation's land in Oklahoma retained its status as a reservation because Congress never explicitly disestablished it.[8] As a result, the Court determined the federal government, not the State of Oklahoma, had criminal jurisdiction under the Major Crimes Act (MCA) to prosecute McGirt for his crimes committed on the land reaffirmed as part of "Indian country."[9] More broadly, the opinion represents the Court's

3. *See* GETCHES ET AL., *supra* note 2, at 3 (introducing field of federal Indian law); *see also* Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579, 592 (2008) (pointing to treaties, acts of Congress, and regulations for basis of federal Indian law). *See generally* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton ed., 2017). Cohen's *Handbook of Federal Indian Law* is a comprehensive treatise, originally published by the United States Department of Interior in 1941, created by compiling the entire applicable body of statutes, case law, treaties, and regulations. *See* Fletcher, *supra* (calling Cohen's *Handbook* clearest source of general principles and rules of federal Indian law). The *Handbook* continues to be regarded as the "standard-bearer" for federal Indian law. *See id.* (noting *Handbook* one of most successful treatises in American law).

4. *See* GETCHES ET AL., *supra* note 2, at 268 (explaining congressional plenary power, trust doctrine, and canons of construction traceable to Marshall Trilogy); Fletcher, *supra* note 3, at 593 (identifying basis for much of federal Indian law). For over two centuries, these principles have shaped discussions of federal Indian law and policy in the United States. *See* GETCHES ET AL., *supra* note 2, at 86 (explaining principles' influence on federal Indian law discourse).

5. *See* Jill De La Hunt, Note, *The Canons of Indian Treaty and Statutory Construction: A Proposal for Codification*, 17 U. MICH. J.L. REFORM 681, 693 (1984) (describing Court's retreat from canons of construction and lack of special consideration for Indian interests). While the Court has not expressly repudiated the canons, it has ignored or merely superficially applied them. *See id.* at 694 (noting Court has neglected canons of federal Indian law). Professor David Getches suggests that "[w]hile the Court may continue to cite the canons, it is difficult to attribute any significance to them in many recent cases." *See* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1621 (1996).

6. 140 S. Ct. 2452 (2020).

7. *See* Bethany R. Berger, McGirt v. Oklahoma *and the Past, Present, and Future of Reservation Boundaries*, 169 U. PA. L. REV. ONLINE 250, 251-52 (2021) (highlighting Court's rejection of arguments casting blind eye to promises made to tribes). *McGirt* has also been labeled "the most significant sovereignty decision in Oklahoma history," and it is likely that judges and federal Indian law advocates will be widely quoting this opinion in the future. *See* Mike McBride, *Reservation Ruling Shows Gorsuch's Tribal Rights Support*, LAW360 (July 17, 2020, 5:48 PM), https://www.law360.com/articles/1292799/reservation-ruling-shows-gorsuch-s-tribal-rights-support [https://perma.cc/A4BM-9HGL] (calling Justice Gorsuch emerging, modern champion of tribal treaty rights).

8. *See McGirt*, 140 S. Ct. at 2482 (explaining Congress had not explicitly withdrawn promised reservation).

9. *See id.* at 2474 (stating Oklahoma did not have criminal jurisdiction to prosecute McGirt). The MCA broadens the federal government's jurisdiction over crimes in Indian country, establishing a list of crimes that, if

recognition of tribal sovereignty, the sanctity of treaties, and "hold[ing] the government to its word" in its promises to tribes.[10]

While *McGirt* represents a win for Indian interests, the Court will soon address a threat to federal Indian law—in February 2022, the Court granted certiorari to an appeal attacking the constitutionality of the Indian Child Welfare Act of 1978 (ICWA), which the Fifth Circuit Court of Appeals had reviewed en banc in April 2021.[11] The challenge argues in part that statutory distinctions made between Indians and non-Indians constitutes racial discrimination under the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment.[12] The stakes could not be higher, as almost all of federal Indian law—including statutes and regulations *advantageous* to Indian

committed by Indians, fall under federal criminal jurisdiction rather than that of the state. *See* Major Crimes Act § 1153, 18 U.S.C. § 1153(a) (enumerating applicable crimes under federal jurisdiction). "Indian country" includes, among other things, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent." *See id.* § 1151 (defining Indian country for purposes of chapter).

10. *See McGirt*, 140 S. Ct. at 2459 (holding government to its treaty promise of reservation land); Ann E. Tweedy, *Has Federal Indian Law Finally Arrived at "the Far End of the Trail of Tears"?*, 37 GA. ST. U. L. REV. 739, 743 (2021) (highlighting Court's potential return to relatively predictable, well-reasoned federal Indian law jurisprudence); McBride, *supra* note 7 (calling attention to majority's commitment to sanctity of treaties).

11. *See* Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963; *infra* Section II.D (describing ongoing challenge to ICWA's constitutionality); Brackeen v. Haaland, 994 F.3d 249, 272 (5th Cir. 2021) (en banc) (per curiam) (reviewing district court's decision declaring ICWA unconstitutional), *cert. granted*, No. 21-380, 2022 WL 585881 (U.S. Feb. 28, 2022) (mem.); Michael Doran, *The Equal-Protection Challenge to Federal Indian Law*, 6 U. PA. J.L. & PUB. AFF. 1, 1-2 (2020) (introducing equal protection challenge to federal Indian law). The Supreme Court agreed to review the en banc Fifth Circuit Court of Appeals' decision, as observers expected. *See Haaland*, 2022 WL 585881, at *1 (granting certiorari to hear appeal); Andrew Westney, *Native American Cases to Watch in 2nd Half of 2020*, LAW360 (July 31, 2020, 10:43 AM), https://www.law360.com/articles/1296190/native-american-cases-to-watch-in-2nd-half-of-2020 [https://perma.cc/D7W7-9RRM] (noting expected appeal to Supreme Court regardless of Fifth Circuit en banc review outcome). The ICWA provides a legal framework for conducting child custody proceedings and placements that supports both tribal autonomy and culture. *See* Indian Child Welfare Act of 1978 § 3 (declaring policy to promote tribal stability and security and values of Indian cultures).

12. *See* Doran, *supra* note 11, at 2 (describing basis for challengers' claims). The challenge asserts that these distinctions are based on race, a suspect classification, and are therefore subject to the strict scrutiny standard of review. *See id.* (describing heart of challenge). While the Fifth Amendment does not explicitly provide for equal protection of the law, the Court has interpreted it to forbid discrimination that "is so unjustifiable as to be violative of due process." *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (recognizing due process not interchangeable with equal protection, but discrimination can violate due process). Consequently, the Court's approach to equal protection challenges to the federal government under the Fifth Amendment is the same as challenges to state or local government actions under the Fourteenth Amendment. *See id.* at 500 (stating it unthinkable to impose lesser duty on federal government than states). The challengers have also argued that provisions of the ICWA are unconstitutional pursuant to the Tenth Amendment in light of the anticommandeering doctrine, but that is beyond the scope of this Note, which focuses on the equal protection issues. *See* Brackeen v. Zinke, 338 F. Supp. 3d 514, 530 (N.D. Tex. 2018) (listing plaintiffs' claims), *rev'd sub nom.* Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019), *rev'd in part sub nom. Haaland*, 994 F.3d 249, *cert. granted*, 2022 WL 585881.

interests—distinguishes between Indians and non-Indians and could be deemed unconstitutional if this challenge ultimately succeeds.[13]

This Note begins by tracing the Supreme Court's development of the fundamental principles of federal Indian law back to the Marshall Trilogy cases.[14] Next, this Note examines the Court's wavering adherence to these principles, resulting in incoherent Indian law jurisprudence leading up to the *McGirt* decision.[15] This Note then provides the factual background for the *McGirt* case and explains the majority's holding and reasoning.[16] Next, this Note provides context to a current threat to federal Indian law: equal protection challenges.[17] This Note asserts that the *McGirt* opinion represents the Court's return to the bedrock principles of federal Indian law and an opportunity to establish consistency in its jurisprudence as it confronts critical issues of tribal sovereignty in the future.[18] Finally, this Note argues that if the Court maintains its faithfulness to fundamental principles of federal Indian law after *McGirt*, it should reject the equal protection challenges to the ICWA.[19]

13. *See* GETCHES ET AL., *supra* note 2, at 261 (emphasizing equal protection challenge jeopardizes government's solemn commitment toward tribes); Doran, *supra* note 11, at 8 (warning case may overturn most, if not all, of federal Indian law); Leah Litman & Matthew L.M. Fletcher, *The Necessity of the Indian Child Welfare Act*, ATLANTIC (Jan. 22, 2020), https://www.theatlantic.com/ideas/archive/2020/01/fifth-circuit-icwa/605167/ [https://perma.cc/LV6F-GCBW] (calling challenge "frontal attack" on "entire corpus of federal law that governs Indian affairs today"); Mary Annette Pember, *The New War on ICWA*, PUB. EYE, Fall 2019, at 18, 19, https://www.politicalresearch.org/sites/default/files/2020-08/ThePublicEye_2019_Fall_nobleeds.pdf [https://perma.cc/AJ3Q-QU55] (warning tribal sovereignty and all federal Indian law at stake). Every statute in Title 25 of the United States Code, entitled "Indians," and every regulation issued under it draws distinctions between both Indians and non-Indians and federally recognized tribal members and nonmembers. *See* Pember, *supra* (characterizing grave nature of threat to federal Indian law); Gregory Smith & Caroline Mayhew, *Apocalypse Now: The Unrelenting Assault on* Morton v. Mancari, FED. LAW., Apr. 2013, at 47, 48 (calling attention to risk of erasing entirety of Title 25); Katie L. Gojevic, Note, *Benefit or Burden?:* Brackeen v. Zinke *and the Constitutionality of the Indian Child Welfare Act*, 68 BUFF. L. REV. 247, 274 (2020) (describing potential consequences of Fifth Circuit's en banc ruling).

14. *See infra* Section II.A (describing development of foundational federal Indian law principles).

15. *See infra* Section II.B (characterizing Court's inconsistent adherence to fundamental principles of federal Indian law).

16. *See infra* Section II.C (providing factual background and explanation of Court's reasoning in *McGirt*).

17. *See infra* Section II.D (introducing equal protection challenges to federal Indian law).

18. *See infra* Section III.A (asserting Court utilized foundational principles in *McGirt*).

19. *See infra* Section III.B (arguing Court should reject equal protection challenge if it continues to follow fundamental principles).

II. HISTORY

A. The Fundamental Principles of Federal Indian Law

1. The Special Trust Relationship Between the Federal Government and American Indian Tribes

Much of federal Indian law revolves around the unique and evolving relationship between the Indian tribes and the federal government.[20] This relationship is "founded upon historic government-to-government dealings and a long-held recognition of Indians' special legal status."[21] The Marshall Trilogy serves as the judicial origin of the trust doctrine that would shape the contours of this relationship and the status of tribes as sovereigns.[22] These three cases are *Johnson v. M'Intosh*,[23] *Cherokee Nation v. Georgia*,[24] and *Worcester v. Georgia*.[25]

The first case, *Johnson*, arose from a land ownership dispute between a non-Indian who bought a parcel of land from a tribe and another non-Indian who subsequently purchased the same parcel from the federal government.[26] The Court invalidated the tribe's sale, reasoning that Native nations had merely an occupancy interest in their land while the U.S. government held superior title.[27] As "occupants," only the tribes' *possession* and *use* of their land was to be protected by the federal government, but they were prohibited from transferring title

20. *See* CANBY, *supra* note 2, at 40-41 (introducing concept of relationship between tribes and federal government).

21. COHEN, *supra* note 3, § 1.01 (characterizing complex and deep-rooted relationship between United States and Native nations).

22. *See* Ian Falefuafua Tapu, *How to Say Sorry: Fulfilling the United States' Trust Obligation to Native Hawaiians by Using the Canons of Construction to Interpret the Apology Resolution*, 44 N.Y.U. REV. L. & SOC. CHANGE 445, 453 (2020) (tracing establishment of trust relationship and underlying principles of federal Indian law to Marshall Trilogy); Ray Torgerson, Note, *Sword Wielding and Shield Bearing: An Idealistic Assessment of the Federal Trust Doctrine in American Indian Law*, 2 TEX. F. ON C.L. & C.R. 165, 170 (1996) (highlighting Marshall Trilogy established trust doctrine which became foundation of federal government–Indian tribe relationship).

23. 21 U.S. (8 Wheat.) 543 (1823).

24. 30 U.S. (5 Pet.) 1 (1831).

25. 31 U.S. (6 Pet.) 515 (1832). While the Marshall Trilogy holdings are significant, the Court's analyses are ultimately more important for their lasting influence on shaping federal Indian law jurisprudence. *See Cherokee Nation*, 30 U.S. at 32, 5 Pet. at 22 (Baldwin, J., concurring) (stating "reasons for the judgment of the court seem . . . more important than the judgment itself"); Fletcher, *supra* note 3, at 593 (noting Marshall Trilogy holdings secondary to reasoning in importance).

26. *See Johnson*, 21 U.S. (8 Wheat.) at 562-63 (describing parties' claims to land in dispute). Johnson's father purchased the parcel of land from a tribe in 1775, but the federal government later granted the same land to M'Intosh in 1818. *See id.* at 560-61 (describing parties' respective purchases of same land parcel). Johnson, having inherited claim to the land on his father's death, brought the action to remove M'Intosh from the land, claiming superior title. *See id.* at 561 (describing commencement of suit).

27. *See id.* at 587-89 (explaining tribes' interest in land subject to extinguishment solely by federal conquest or purchase). This meant that tribes did not have the right to transfer or alienate their property interests to anyone but the United States government. *See id.*

to anyone other than the federal government.[28] Chief Justice Marshall applied the Doctrine of Discovery, a principle that justified the European colonization of the "new" world by granting ownership to a government based on its "discovery" of the land.[29] The Court, however, recognized that tribes retained inherent—albeit limited—sovereignty.[30] In dicta, the Court indicated that tribes are a "distinct people," and this statement served as a predicate for the legal status of tribes and their relationship to the federal government as sovereigns.[31]

In *Cherokee Nation*, the Cherokee Nation brought an original action in the Supreme Court seeking an injunction against the State of Georgia for enacting laws designed to "annihilate the Cherokees as a political society" and seize lands solemnly promised to them in treaties.[32] The Court determined it lacked subject-matter jurisdiction to hear the tribe's requests upon deciding that tribes were not "foreign states" under Article III, Section 2 of the Constitution.[33] The Court pointed to the Commerce Clause granting Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes" to demonstrate the explicit distinction between tribes, foreign nations, and states of the union.[34] Nevertheless, Chief Justice Marshall's lead opinion acknowledged the sovereign nature of tribes, calling them "a distinct political society, separated from others, capable of managing its own affairs and governing itself."[35] Chief Justice Marshall compared the distinctive relationship between tribes and the federal government to a "ward to his guardian," a phrase

28. *See id.* at 574 (deeming tribes "occupants" with right to possession and use, but no authority to transfer title).

29. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573 (1823) (stating doctrine gave discovering nation sole right of acquiring land from Indians). The Court justified its application of the doctrine through racial animus and cultural superiority, saying there was "some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them." *See id.* at 589-90 (justifying European conquest of Indian tribes). Chief Justice Marshall emphasized the importance of stripping Indians of their land by characterizing them as "fierce savages" who, in his view, were violent and did not use the land properly. *See id.* at 590 (arguing leaving tribes in possession of land "was to leave the country a wilderness").

30. *See id.* at 574 (recognizing rights of original inhabitants not entirely disregarded but still considerably impaired).

31. *See id.* at 589-90, 596 (describing possibilities of either complete assimilation or treating tribes like distinct peoples).

32. *See* Cherokee Nation v. Georgia, 30 U.S. 1, 15, 5 Pet. 1, 11 (1831) (explaining Cherokee Nation's reason for bringing action).

33. *See* U.S. CONST. art. III, § 2 (granting Court original jurisdiction over cases between states and foreign states); *Cherokee Nation*, 30 U.S. at 16, 20, 5 Pet. at 11, 15 (stating question at issue and denying motion for injunction); Fletcher, *supra* note 3, at 594 (explaining purpose of foreign nations issue).

34. *See* U.S. CONST. art. I, § 8, cl. 3 (granting Congress power to regulate commerce with foreign nations, Indian nations, and among states); *Cherokee Nation*, 30 U.S. at 18, 5 Pet. at 13 (quoting Commerce Clause).

35. *See Cherokee Nation*, 30 U.S. at 16, 5 Pet. at 12 (explaining Cherokee Nation treated like state). Chief Justice Marshall explained, "[w]e perceive plainly that the constitution in this article does not comprehend Indian tribes in the general term 'foreign nations;' not we presume because a tribe may not be a nation, but because it is not foreign to the United States." *Id.* at 19, 5 Pet. at 14 (explaining Commerce Clause's wording did not preclude nation status).

that established the trust relationship at the foundation of federal Indian law.[36] By labeling tribes "domestic dependent nations," Chief Justice Marshall recognized that while under the protection of—and arguably at the mercy of—the federal government, tribes retain limited sovereignty and nation status.[37]

While the Cherokee Nation was not able to obtain relief from the Supreme Court, the Court addressed the applicability of Georgia law on the reservation the following year in *Worcester*, a case brought by a non-Indian litigant.[38] The Court held the sovereign-to-sovereign trust relationship existing between tribes and the federal government preempted a Georgia statute such that it "had no force" on the reservation.[39] The Court elaborated upon Chief Justice Marshall's argument for federal supremacy, which was based on the fact that Indian tribes were nations whose sovereignty predated the Constitution and therefore dealings with the United States were governed by international and constitutional law principles.[40]

While this opinion reflects the Court primarily arguing for supremacy of federal law, Chief Justice Marshall also recognized the inherent sovereignty of Indian tribes.[41] Referencing the trust relationship between tribes and the federal government, Chief Justice Marshall explained, "a weaker power does not surrender its independence—its right to self-government, by associating with a

36. *See id.* at 16-17, 5 Pet. at 12-13 (noting particularly unique and dependent nature of relationship compared to foreign nations or states); *see also* Blake A. Watson, *The Thrust and Parry of Federal Indian Law*, 23 U. DAYTON L. REV. 437, 450 (1998) (stating dicta in *Cherokee Nation* origin for fiduciary relationship between tribes and federal government); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 826 (1996) (pointing to *Cherokee Nation* opinion for establishment of fiduciary relationship between tribes and federal government). Specifically, the Court pointed to tribes' reliance on the government for protection and the limits on their sovereignty, such as the inability to transfer land and the United States' exclusive right to regulate trade with them. *See* Scott C. Hall, *The Indian Law Canons of Construction v. The* Chevron *Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 37 CONN. L. REV. 495, 500 (2004) (explaining Chief Justice Marshall's reasoning for calling tribes domestic dependent nations).

37. *See Cherokee Nation*, 30 U.S. at 17, 19, 5 Pet. at 13, 14 (calling tribes "domestic dependent nations" occupying territory federal government can assert title over without consent).

38. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 579 (1832) (asking whether Georgia or federal law applied to conduct on reservation). Georgia imprisoned a white man for violating a state law requiring him to obtain the state's permission to reside within the limits of the reservation and to swear loyalty to the state. *See id.* at 537 (describing charges in indictment).

39. *See id.* at 561 (holding Georgia law had no force on reservation); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 393-94 (1993) (explaining how holding defined sovereign status of tribes by deciding state law preempted).

40. *See Worcester*, 31 U.S. (6 Pet.) at 561 (recognizing sovereignty of tribes); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 202 (1984) (explaining Chief Justice Marshall's justification for federal power trumping states' power). Chief Justice Marshall wrote, "[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial." *Worcester*, 31 U.S. (6 Pet.) at 559 (explaining inherent sovereignty of tribes predates Constitution).

41. *See* Newton, *supra* note 40, at 202 (noting Marshall recognized tribal sovereignty but emphasizing tribe not even party in case).

stronger, and taking its protection."[42] This case remains a basis for the fundamental principle of inherent sovereignty: Tribes do not merely possess the rights and powers granted to them by the federal government, but rather retain all sovereign powers and rights not explicitly taken away by the government.[43]

2. The Plenary Power Doctrine

Starting in the late-nineteenth century, there was a shift in the Supreme Court's interpretation of the federal trust doctrine informing the relationship between the federal government and tribes.[44] Initially, the doctrine stood for a "special relationship" between tribes and the U.S. government wherein the government had an obligation to protect tribes from state intervention on the reservation, adhere to moral principles and "do the right thing," and follow traditions with respect to tribes.[45] As national policy goals changed dramatically to civilization and assimilation of Indians within settler culture, however, the Court manipulated the trust doctrine principles in the Marshall Trilogy from a source of obligation and protection to a source of plenary federal authority over tribes.[46]

The plenary power doctrine stands for the principle that Congress has broad, exclusive, and "plenary" authority over both external and internal Indian affairs.[47] The Supreme Court established the plenary power doctrine in *United States v. Kagama*,[48] when it considered the constitutionality of the MCA, which made it a federal offense for an Indian to commit any one of a list of enumerated

42. *See Worcester*, 31 U.S. (6 Pet.) at 560-61 (clarifying tribes do not entirely relinquish sovereignty by means of relationship with U.S. government).

43. *See* COHEN, *supra* note 3, § 6.01 (highlighting inherent tribal sovereignty from *Worcester* opinion).

44. *See* Torgerson, *supra* note 22, at 173-74 (identifying shift in judicial interpretation of trust doctrine leading into twentieth century).

45. *See id.* at 169, 171 (describing nature of trust doctrine and resulting obligations in federal relationship with tribes); *see also* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) (stating Georgia's laws had "no force" in Indian country). *Worcester* stands for the supremacy of federal law, including treaties with Indian tribes, over state law in Indian affairs. *See* Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J.C.R. & C.L. 45, 82 (2012) (explaining *Worcester* put Supremacy Clause on pedestal); Comment, *Federal Plenary Power in Indian Affairs After* Weeks *and* Sioux Nation, 131 U. PA. L. REV. 235, 243 n.49 (1982) (explaining Court applied Supremacy Clause to bind states and federal government to treaties with tribes).

46. *See* Torgerson, *supra* note 22, at 174 (explaining roots of shift lie in policy changes regarding relationship between federal government and tribes); GETCHES ET AL., *supra* note 2, at 339 (explaining roots in trust relationship and protective duty to justify federal power over tribes); *see also infra* note 102 (describing national assimilation policy toward Indians during end of nineteenth century).

47. *See* Doran, *supra* note 11, at 3 (defining concept of Congress's plenary power). Under this doctrine, Congress has the power to regulate "the external relations of Indian tribes, the internal governance of Indian tribes, the economic activity of Indian tribes, and the health, safety, morals, and general welfare of Indians." *See id.* (describing scope of plenary power over individual Indians and tribes). "Plenary" refers to the breadth of Congress's power to legislate in Indian affairs, while "exclusive" refers to the federal government's supremacy over states in this area of law. *See* COHEN, *supra* note 3, § 5.02 (describing application of "plenary" and "exclusive").

48. 118 U.S. 375 (1886).

offenses in Indian country.[49] Referring to the special relationship between the federal government and tribes, the Court explained that tribes are the "wards of the nation," and that the duty of protection arising from tribes' "weakness and helplessness" comes with an exclusive, plenary authority over Indian affairs.[50]

Perhaps the most prevalent demonstration of Congress's plenary power—and the judicial deference toward it—is *Lone Wolf v. Hitchcock*.[51] In *Lone Wolf*, the Court held that the Kiowa Nation tribe did not have access to judicial review of

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49. *See id.* at 376 (identifying questions presented); Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1760 (1997) (labeling *Kagama* first major plenary power case); 18 U.S.C. § 1151(a) (defining Indian Country); Major Crimes Act § 1153 (enumerating applicable crimes under federal jurisdiction when committed in Indian country). There were two specific issues for the Court to address in *Kagama*: whether Congress had the constitutional authority to enact a law governing crimes committed by one Indian against another on a reservation, and whether federal courts have the authority to punish a tribal member for killing another tribal member on their reservation. *See Kagama*, 118 U.S. at 376 (identifying certified questions posed to Court). Congress passed the MCA in response to the Court's 1883 decision in *Ex parte Crow Dog*, holding no federal crime occurred where an Indian killed another on a reservation. *See Ex parte* Crow Dog, 109 U.S. 556, 572 (1883) (holding federal court lacked jurisdiction); Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153) (codifying federal criminal offenses committed by Indians against Indians); Newton, *supra* note 40, at 212 (noting Congress moved quickly to enact MCA following *Ex parte Crow Dog* decision).

50. *See Kagama*, 118 U.S. at 383-84 (grounding power of federal government over tribes in duty of protection over "dependent" tribes). The Court wrote:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States; dependent largely for their daily food; dependent for their political rights. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

See id. (holding tribes' helplessness justifies federal government's duty of protection and resulting power). The Court has also pointed to the Indian Commerce Clause and the Treaty Clause as textual bases of this broad, plenary authority of the federal government over tribes. *See, e.g.*, Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788-89 (2014) (characterizing Congress's plenary and exclusive power to legislate with respect to Indian tribes); United States v. Lara, 541 U.S. 193, 200 (2004) (identifying Congress's broad powers in Indian affairs originated with Indian Commerce Clause and Treaty Clause); Cotton Petrol. Corp. v. New Mexico, 490 U.S. 163, 192 (1989) (stating Indian Commerce Clause provides Congress with plenary power to legislate in Indian affairs). Conversely, critics have asserted that there is no sufficient textual basis for the doctrine in the Constitution. *See* Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. BAR FOUND. RSCH. J. 1, 51 (doubting legitimate basis for attributing plenary power to Congress); Newton, *supra* note 40, at 196 (noting Constitution does not explicitly grant federal government general power to regulate Indian affairs); Fletcher, *supra* note 45, at 84-85 (indicating sparse support for such "incredible" plenary power in Constitution or treaties); Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and* United States v. Lara*: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651, 661-63 (2009) (rejecting constitutional justifications of Congress's plenary power in Indian Commerce Clause and Treaty Clause). Some assert that the federal government's plenary power over Indian affairs stems not from the Constitution, but rather the Doctrine of Discovery. *See* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 43 (2006) (pointing to *Kagama*'s reference to Doctrine of Discovery for source of plenary power).

51. 187 U.S. 553 (1903); *see* Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666, 681 (2016) (stating *Lone Wolf* represents apex of judicial deference in realm of Indian affairs).

Congress's unilateral decision to abrogate the terms of a treaty between them.[52] The Court, exercising great deference to the legislature, pointed to the breadth of Congress's exclusive power over Indian affairs to set the precedent that it can unilaterally abrogate terms promised in treaties with tribes.[53] With these two cases, the trust doctrine principle that was meant to act as a shield for tribes against non-Indian intervention simultaneously became a sword for the federal government to assert its authority over tribes.[54]

3. The Canons of Construction

The federal Indian law canons of construction are judicially created rules for interpreting treaties between tribes and the federal government in a manner sympathetic to Indian interests.[55] These canons recognize the unequal bargaining position of tribes when making treaties with the federal government and the fiduciary trust relationship between them.[56] There is not a universally agreed-upon

52. *See Lone Wolf*, 187 U.S. at 566 (noting Congress's inherent authority to abrogate treaties); Steele, *supra* note 51, at 679 (stating *Lone Wolf* epitomizes painful losses to tribal interests).

53. *See Lone Wolf*, 187 U.S. at 567-68 (stating Congress possessed full power in matter). "[T]he judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned . . . by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts." *Id.* at 568.

54. *See* Frickey, *supra* note 39, at 395 n.59 (expressing "serious qualms" about use of plenary power against tribes). Professor Philip Frickey suggests that the plenary power doctrine ought not to be a congressional sword to use against tribes, but rather as a shield against states regulating Indian affairs. *See id.* Scholars have criticized the plenary power doctrine for providing the federal government with virtually unchecked power over Indian tribes, effectively suppressing tribal sovereignty. *See* Steele, *supra* note 51, at 670 (calling plenary power doctrine tool fostering legal oppression of Indian people by unchecked federal government); Newton, *supra* note 40, at 197 (stating deference to congressional power closely related to courts' failure to protect tribal rights). "The plenary power doctrine appears to be extraconstitutional in its origins and extravagant in its placement of unlimited authority in the hands of the Congress at the expense of tribal sovereignty." Frank Pommersheim, *Is There a (Little or Not so Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay*, 5 U. PA. J. CONST. L. 271, 278 (2003) (criticizing unlimited authority of Congress to detriment of tribal sovereignty).

55. *See* Note, *Indian Canon Originalism*, 126 HARV. L. REV. 1100, 1102 (2013) (attributing creation of canon to Chief Justice Marshall's opinion in *Worcester*); CANBY, *supra* note 2, at 132 (explaining reasons for establishing canons). The canons have since been applied to other sources of law such as statutes, agreements, executive orders, and federal regulations. *See* COHEN, *supra* note 3, § 2.02 (identifying other types of law interpreted through canons); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) (explaining standard principles of statutory construction do not have usual force in Indian law cases); Choate v. Trapp, 224 U.S. 665, 675 (1912) (extending interpretive canons of construction to statutes).

56. *See* Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows upon the Earth"—How Long a Time Is That?*, 63 CALIF. L. REV. 601, 617 (1975) (identifying inequality in bargaining power reason for developing canons). A significant factor contributing to unequal bargaining power was the language barrier between the tribes and government during the negotiation process. *See* Jones v. Meehan, 175 U.S. 1, 11 (1899) (explaining Indians lacked understanding of written language used in treaties).

> [T]he negotiations for the treaty are conducted, on the part of the United States . . . by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law . . . [T]he Indians, on the other hand, are a weak and dependent people, who have no written language . . . and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States.

number of canons, but this Note will refer to the four identified in Felix Cohen's *Handbook of Federal Indian Law*.[57]

The first canon states that judges should interpret Indian treaties "as the Indians themselves would have understood them."[58] The second canon states that judges should construe treaties liberally in favor of the Indians.[59] The third canon flows from the second, requiring courts to resolve all ambiguities in the favor of Indians.[60] The fourth canon reflects the principle—often referred to as the clear statement rule—that tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous.[61] The reserved rights doctrine, though not a canon, is a related principle stating that Indians retain all rights not explicitly abrogated by treaties or legislation.[62]

Id. (pointing to Indians' lack of understanding of treaty terms during negotiations).

57. *See* COHEN, *supra* note 3, § 2.02 (identifying four Indian law canons); *supra* note 3 (explaining Cohen's *Handbook of Federal Indian Law* comprehensive authority on subject). It should be noted that in practice, these four canons have substantial overlap and are not always analyzed individually. *See Indian Canon Originalism*, *supra* note 55, at 1104 (stating canons sometimes reduced to single canon favoring signatory tribe's perspective).

58. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999) (interpreting treaty terms in way Indians understood them at time of agreement); Herrera v. Wyoming, 139 S. Ct. 1686, 1699 (2019) (noting treaty terms construed in way understood by Indians); Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1011 (2019) (deciding language of treaty should bear meaning Yakamas understood it to have in 1855); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 551-54 (1832) (interpreting Treaty of Hopewell in way Cherokees would have understood its meaning). Highlighting the language barrier, the Court explained that treaties "must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *See Jones*, 175 U.S. at 11 (calling for interpretation of treaties in accordance with tribes' understanding at time of writing).

59. *See* COHEN, *supra* note 3, § 2.02 (identifying canon of construction favoring Indian interests); Cnty. of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) (stating "it is well established that treaties should be construed liberally in favor of the Indians"); Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue, 458 U.S. 832, 846 (1982) (arguing for interpretations to comport with traditional notions of Indian sovereignty and independence).

60. *See* COHEN, *supra* note 3, § 2.02 (identifying third canon of construction). The Court has emphasized in many cases that doubtful expressions should be resolved in Indians' favor. *See, e.g.*, McClanahan v. State Tax Comm'n, 411 U.S. 164, 174-75 (1973) (interpreting Navajo treaty to preclude extension of state tax law on reservation); Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970) (construing Treaty of Dancing Rabbit Creek favorably to Choctaw understanding); Winters v. United States, 207 U.S. 564, 576-77 (1908) (applying canon to analyze whether tribe intended to cede water rights when making agreement).

61. *See* Nebraska v. Parker, 577 U.S. 481, 487-88 (2016) (explaining congressional intent to diminish boundaries of Indian reservation "must be clear"); Menominee Tribe of Indians v. United States, 391 U.S. 404, 412-13 (1968) (stating intent to abrogate or modify treaty not lightly imputed to Congress). As the Court explained, "a congressional decision [to abrogate tribal immunity] must be clear. . . . That rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 790 (2014) (declaring intrusions on tribal sovereignty not lightly imputed to Congress).

62. *See* United States v. Winans, 198 U.S. 371, 381 (1905) (holding tribe retained fishing rights). The Court in *Winans* explained that a treaty is "not a grant of rights to the Indians, but a grant of right from them; a reservation of those not granted." *Id.* (explaining treaty limited fishing rights rather than taking them away).

In summary, the foundation of federal Indian law can be distilled into three fundamental principles.[63] First, Congress has plenary and exclusive authority over Indian affairs.[64] This authority stems in part from the federal government's special trust relationship with tribes that comes with obligations and responsibilities to tribes and individual Indians.[65] Second, states have no authority to regulate Indian affairs without express delegation from the federal government.[66] Third, tribal sovereignty predates the Constitution because it is inherent and not granted by the United States, but it can be limited in accordance with Congress's trust responsibilities and plenary authority.[67] Relatedly, Congress must clearly express its intent before an aspect of tribal sovereignty is considered abrogated.[68] The canons of construction, created by the Court for interpreting treaties, agreements, statutes, and executive orders in a way sympathetic to Indian interests, are rooted in these fundamental principles.[69]

B. The Supreme Court's Wavering Adherence to Fundamental Principles

The Supreme Court has been inconsistent with its application of the fundamental principles and canons of federal Indian law.[70] In the "modern era," from 1959 to the mid-1980s, the Court adapted the foundational principles of federal Indian law to match the federal government's evolving national policy surrounding Indians.[71] Beginning with the Rehnquist Court, however, the Court began to stray from these principles in favor of judicial subjectivism.[72] Scholars have

63. *See* MATTHEW L.M. FLETCHER, PRINCIPLES OF FEDERAL INDIAN LAW 2 (2017) (reducing constitutional text, treaties, statutes, and Supreme Court jurisprudence into general principles).

64. *See id.* (identifying first fundamental principle regarding federal authority over Indian affairs).

65. *See id.* (grounding Congress's plenary authority in special trust relationship between tribes and federal government); *see also supra* notes 47-50 and accompanying text (discussing development of plenary power doctrine from trust doctrine).

66. *See* FLETCHER, *supra* note 63, at 2 (identifying fundamental principle regarding lack of state authority over Indian affairs); *see also* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) (holding Georgia laws "had no force" on Cherokee reservation).

67. *See* FLETCHER, *supra* note 63, at 2 (highlighting inherent but limited sovereignty of tribes).

68. *See id.* (emphasizing tribes retain all rights until Congress expressly abrogates them).

69. *See* Dylan R. Hedden-Nicely & Stacy L. Leeds, *A Familiar Crossroads:* McGirt v. Oklahoma *and the Future of the Federal Indian Law Canon*, 51 N.M. L. REV. 300, 321 (2021) (explaining judicial canons of construction stem from fundamental principles of federal Indian law).

70. *See* Frickey, *supra* note 49, at 1754 (noting competing and inconsistent norms in federal Indian law).

71. *See* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 272 (2001) (noting modern era characterized by Court slightly adapting principles to fit national Indian policy). The United States' national Indian policy has gone through several eras since the time of first contact with tribes. *See generally* COHEN, *supra* note 3, § 1.01–1.07 (detailing periods of evolving national Indian policy).

72. *See* Getches, *supra* note 71, at 273-74 (noting Court began veering away from foundations of Indian law on Chief Justice Rehnquist's appointment); Getches, *supra* note 5, at 1595 (stating judicial subjectivism took roots in cases decided between 1978 and 1989); Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 647 (2006) (highlighting Marshall Trilogy no longer driving force behind constitutional common law since Rehnquist Court era). Ultimately, it would be difficult to point to a group of litigants that

gone as far as to say the canons of federal Indian law are no longer tools constraining the Court's interpretation, but rather manipulative devices justices strategically utilized—or blatantly ignored—to support their desired outcomes.[73] The Court has been accused of curbing tribal sovereignty to fit its contemporary perception of non-Indian interests, leading critics to describe its approach as a "rudderless exercise in judicial subjectivism."[74] An example of this from 1978 is *Oliphant v. Suquamish Indian Tribe*,[75] one of the most heavily criticized cases in the Court's federal Indian law jurisprudence.[76]

In *Oliphant*, the Court held that tribes did not have criminal jurisdiction over non-Indians for crimes committed on reservations, reasoning that tribes' inherent sovereignty was limited because to say otherwise would deprive non-Indians of personal liberties.[77] The Court defied the fundamental principles of reserved rights and inherent sovereignty, asserting that retained tribal powers were not just limited by explicit actions of Congress, but also did not include powers "inconsistent with their status."[78] The damaging result of the Court's failure to adhere to these principles is that Indian law jurisprudence has become "characterized by doctrinal incoherence" more than any other field of public law.[79]

"fare[d] worse than Indians d[id] in the Rehnquist Court." *See* Getches, *supra* note 71, at 280-81 (highlighting disparity in percent of favorable outcomes for tribal interests during Rehnquist Court era).

73. *See* Watson, *supra* note 36, at 438 (discussing scholars calling canons result-oriented, post hoc tools for achieving desired outcomes); *see also* Michael R. Faz, *Conquering a Legislative Court:* Murphy *and an Opportunity for Clarity in Indian Country*, NEB. L. REV. BULL. 32 (May 21, 2020), https://lawreview.unl.edu/downloads/Conquering%20a%20Legislative%20Court%20by%20Michael%20Faz.pdf [https://perma.cc/9ZH6-U7G5] (arguing judges should not legislate from bench when Indian rights and privileges at stake).

74. *See* Getches, *supra* note 5, at 1575-76 (asserting Court gauges tribal sovereignty based on changing demographic, social, political, and economic conditions). Indian-law scholars have argued that recent federal Indian law cases "are an abomination, a derogation of tribal sovereignty and Indian interests, and the worst form of judicial activism and assertions of judicial supremacy." *See* Fletcher, *supra* note 3, at 588 (describing Court's practice of ignoring foundational principles of federal Indian law in its jurisprudence).

75. 435 U.S. 191 (1978).

76. *See* Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623, 629 (2011) (noting *Oliphant* among most criticized cases in federal Indian law). The Court's opinion in *Oliphant* represents "a carelessness with history, logic, precedent, and statutory construction" that the Supreme Court would not normally deem acceptable. *See* Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609, 610 (1979) (noting close look at *Oliphant* opinion reveals shortcomings).

77. *See Oliphant*, 435 U.S. at 210-11 (holding tribes do not have authority to punish non-Indians because of liberty interests).

78. *See id.* at 208 (arguing tribes lost both powers Congress explicitly took away and those inconsistent with status).

79. *See* Frickey, *supra* note 49, at 1754 (noting competing and inconsistent norms in federal Indian law); Getches, *supra* note 71, at 276 (stating Court making new rules rather than forcing political branches to deliberate issues caused incoherence). Commonly referred to as a "maze," the areas of criminal and civil jurisdiction in Indian country are so complex that there are intricate charts to keep track of the rules. *See* Elizabeth A. Reese, *Welcome to the Maze: Race, Justice, and Jurisdiction in* McGirt v. Oklahoma, U. CHI. L. REV. ONLINE *5-6 (Aug. 13, 2020), https://lawreviewblog.uchicago.edu/2020/08/13/mcgirt-reese/ [https://perma.cc/D7ZD-HYVS] (describing incoherent and complicated nature of federal Indian law doctrine).

C. McGirt v. Oklahoma

1. Factual Background

In 1997, Jimcy McGirt, a citizen of the Seminole Tribe in Oklahoma, was convicted in Oklahoma state court for three sexual offenses against his wife's then four-year-old granddaughter.[80] McGirt filed a petition for post-conviction relief with the Oklahoma District Court in 2018, arguing that the federal government, not Oklahoma, had jurisdiction to prosecute him under the MCA because he was a tribal member whose crimes occurred on the Creek Nation Reservation.[81] Consequently, any new trial for his conduct, McGirt argued, had to happen in federal court.[82] McGirt cited *Murphy v. Royal*,[83] a Tenth Circuit case then under review by the Supreme Court, because the Tenth Circuit held that Congress had not disestablished the Creek Reservation.[84]

The Oklahoma District Court of Wagoner County denied McGirt's application for relief, a decision subsequently affirmed by the Oklahoma Court of Criminal Appeals (OCCA).[85] The Supreme Court subsequently granted certiorari to hear the case in 2019.[86] The question for the Court was whether the land on which McGirt's crimes occurred is a reservation that constitutes Indian country under the MCA, and therefore, falls under federal rather than state jurisdiction.[87] In a five-to-four decision, the Court reaffirmed the reservation status of the Creek Nation Reservation in Oklahoma.[88]

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80. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020) (identifying McGirt enrolled member of Seminole Nation of Oklahoma); *id.* at 2482 (Roberts, J., dissenting) (stating McGirt convicted in 1997); Brief in Opposition, *McGirt*, 140 S. Ct. 2452 (No. 18-9526), 2019 WL 7372928 at *6 (providing details of McGirt's sexual crimes against four-year-old B.B.). McGirt received 500-year sentences for each of the first-degree rape and lewd molestation charges, and life imprisonment without the possibility of parole for the forcible sodomy charge, to be served consecutively. *See* Brief for Petitioner, *McGirt*, 140 S. Ct. 2452 (No. 18-9526), 2020 WL 583959 at *16 (describing sentences recommended by jury and imposed by trial court).

81. *See McGirt*, 140 S. Ct. at 2459 (stating McGirt's basis for post-conviction claims under MCA); Brief for Petitioner, *supra* note 80, at *16 (stating petitioner filed petition for post-conviction relief in August 2018).

82. *See McGirt*, 140 S. Ct. at 2459 (recounting McGirt's argument for federal trial if needed).

83. 875 F.3d 896 (10th Cir. 2017), *aff'd sub nom.* Sharp v. Murphy, 140 S. Ct. 2412 (2020) (per curiam).

84. *See id.* at 937 (concluding Congress had not disestablished Creek Nation Reservation); Brief for Petitioner, *supra* note 80, at *16-17 (stating *Murphy* basis of McGirt's claims and decision remains pending in Supreme Court). Justice Gorsuch recused himself from participating in *Murphy* due to his prior involvement in the case as a judge on the Tenth Circuit. *See* Matthew L.M. Fletcher, *Textualism's Gaze*, 25 MICH. J. RACE & L. 111, 113 (2020) (explaining Justice Gorsuch recused because of involvement in Tenth Circuit en banc vote).

85. *See* Brief for Petitioner, *supra* note 80, at *16-17 (describing procedural history and path to United States Supreme Court). The OCCA reasoned in part that the Tenth Circuit's decision in *Murphy* was not final because review of the case was still pending in the Supreme Court. *See id.* at *17 (explaining Court's grant of certiorari led to conclusion *Murphy* decision not final).

86. *See* McGirt v. Oklahoma, 140 S. Ct. 659 (mem.) (2019) (granting certiorari). The Court split four-to-four in its review of *Murphy*, so *McGirt* gave the Court a chance to rehear the issue with a full court to break the tie. *See* Fletcher, *supra* note 84, at 113 (stating Justice Gorsuch presumptive tiebreaker on issue).

87. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020) (identifying key question for Court).

88. *See id.* at 2482 (holding while Congress diminished reservation over time, it never withdrew promised reservation status).

2. The Majority's Holding and Reasoning

Justice Gorsuch wrote the majority opinion in *McGirt*, joined by Justice Breyer, Justice Sotomayor, Justice Kagan, and the late Justice Ruth Bader Ginsburg.[89] Justice Gorsuch began the majority opinion by stating what he believed should be obvious: Congress established a reservation for the Creek Nation, in what is now Oklahoma, with a series of treaties promising land in exchange for removing them from their ancestral land in Georgia and Alabama.[90] In the early 1800s, the federal government's Indian policy revolved around removing Indians to the western United States and was primarily driven by a desire to obtain their territory in the East.[91] The Creek Nation was among the "Five Civilized Tribes" that were most severely impacted by this policy.[92] The 1832 treaty between the United States and the Creek Nation stated that in exchange for ceding "all their land, East of the Mississippi river," the land west of the Mississippi "shall be solemnly guaranteed to the Creek Indians."[93] The following year, the parties decided on the boundary lines for this "permanent home to the whole Creek nation," in what is now Oklahoma.[94] The United States entered into another treaty

89. *See id.* at 2458 (listing justices joining Justice Gorsuch's majority opinion). Justice Ruth Bader Ginsburg has since passed away, with Justice Amy Coney Barrett taking her place on the Court. *See* Hedden-Nicely & Leeds, *supra* note 69, at 342 (noting Court's future federal Indian law possibly in Justice Barrett's hands).

90. *See McGirt*, 140 S. Ct. at 2459 (recognizing promise of permanent home in exchange for removal to Oklahoma). The powerful opening language of the opinion recognizes the importance of upholding treaty promises made to tribes:

> On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever. . . . Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.

Id. (holding government accountable for promises it made to tribe); *see "On the Far End of the Trail of Tears Was a Promise,"* CTR. FOR NATIVE AM. YOUTH, https://www.cnay.org/on-the-far-end-of-the-trail-of-tears-was-a-promise/ [https://perma.cc/87FL-R2SU] (praising Supreme Court for upholding treaty with Creek Nation).

91. *See* COHEN, *supra* note 3, § 1.03[4][a] (describing beginning of national removal policy in response to tribes resisting demands for their lands). The federal government initially sought to remove tribes through "exchange treat[ies]," wherein the federal government removed tribes from their lands in the East in exchange for lands in the West. *See id.* (explaining exchange treaty method of removal).

92. *See id.* (noting dramatic impact on "Five Civilized Tribes"). The "Five Civilized Tribes," today known as the "Five Tribes," consisted of the Cherokees, Chickasaws, Choctaws, Creeks, and Seminoles. *See id.* § 1.03[4][a] n.135. While these tribes are most often associated with removal, it is important to note that removal was a national policy that the federal government implemented in other parts of the United States and impacted other tribes. *See* Ethan Davis, *An Administrative Trail of Tears: Indian Removal*, 50 AM. J. LEGAL HIST. 49, 49 (2010) (explaining federal government's uprooting of "Five Tribes"); *Potawatomi History*, MILWAUKEE PUB. MUSEUM, https://www.mpm.edu/content/wirp/ICW-152#:~:text=On%20September%2026%2C%201833%2C%20the,lands%20between%201835%20and%201838 [https://perma.cc/CF25-TV29] (explaining Potawatomi of Illinois and Wisconsin removed from land after signing 1835 Treaty of Chicago).

93. *See* Treaty with the Creeks, Creek-U.S., Mar. 24, 1832, 7 Stat. 366 (promising land west of Mississippi in exchange for ceding lands in east).

94. *See* Treaty with the Creeks, Creek-U.S., Feb. 14, 1833, 7 Stat. 417 (stating promised land permanent home to Creek Nation); McGirt v. Oklahoma, 140 S. Ct. 2452, 2460-61 (2020) (explaining process of removing

with the Creeks in 1866 that reduced the size of the Creek Nation's land, restating that the land would "be forever set apart as a home" for the tribe.[95] Recognizing that Congress has broken several of its promises to the Creek Nation, the majority framed the issue as determining whether the Creek Nation Reservation still exists today.[96]

The majority firmly stated there is only one place the Court may look to determine whether a reservation still exists: Acts of Congress.[97] Pointing to precedent, the Indian Commerce Clause, and the Supremacy Clause, the majority explained only Congress—not the courts, the executive branch, or the State of Oklahoma—can diminish or disestablish a reservation.[98] The majority highlighted that while the Court has never required any specific language for reservation disestablishment, Congress must clearly express its intent to disestablish.[99] The majority then pointed to examples in history demonstrating that Congress knows how to diminish or revoke a reservation "when it can muster the will" to do so.[100]

Creek Nation with treaties). While these early treaties did not explicitly refer to the Creek Nation lands as a "reservation," the Court pointed out that the term was not yet prominent in federal Indian law at that time. *See McGirt*, 140 S. Ct. at 2461 (explaining term "reservation" not yet in use). Furthermore, the Court acknowledged it has found similar treaty language from that era to be sufficient in the past. *See id.* (stating similar language created reservation in past); Menominee Tribe of Indians v. United States, 391 U.S. 404, 405-06 (1968) (holding grant of "a home, to be held as Indian lands are held," established reservation).

95. *See* Treaty with the Creeks, Creek-U.S., June 14, 1866, 14 Stat. 785 (promising land "forever set apart as a home" for Creek Nation).

96. *See McGirt*, 140 S. Ct. at 2462 (noting promised land now fractured into pieces).

97. *See id.* (indicating Acts of Congress starting point for analysis of reservation status).

98. *See id.* (citing *Lone Wolf*, Commerce Clause, and Supremacy Clause to emphasize exclusive role of Congress); *see also* U.S. CONST. art. VI, cl. 2 (establishing federal law supreme law of land); U.S. CONST. art. I, § 8, cl. 3 (establishing federal authority over commerce with Indian tribes). The majority also pointed out that allowing states the authority to reduce federal reservations would "leave tribal rights in the hands of the very neighbors who might be least inclined to respect them." *See McGirt*, 140 S. Ct. at 2462 (highlighting potential consequences for tribal sovereignty if states granted authority over reservation boundaries).

99. *See McGirt*, 140 S. Ct. at 2463 (noting while no specific words required, Congress must express clear intent to disestablish). The majority cited *Nebraska v. Parker*, where the Court stated that clear expression of congressional intent to disestablish a reservation is commonly achieved with an "explicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *See id.* (citing holding of *Parker*); Nebraska v. Parker, 577 U.S. 481, 488 (2016) (describing approach to statutory interpretation regarding diminishment of reservation boundaries). The Court explained that while Congress may "tiptoe" to the edge of disestablishing an "inconvenient reservation" hoping judges will finish the job, it is not the judiciary's job to save the legislative branch the embarrassment of disestablishing a reservation. *See McGirt*, 140 S. Ct. at 2462 (stating "wishes don't make for laws").

100. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020) (providing examples of Congress explicitly disestablishing reservations in past). Specifically, Congress has put explicit references to cession in legislation, directed that tribal land be "restored to the public domain," or used words such as "abolished" or "discontinued" to indicate disestablishment. *See id.* at 2462-63 (highlighting exact phrases Congress previously used to disestablish reservation).

The majority then addressed Oklahoma's argument that the Creek Nation Reservation was disestablished by Congress during the Allotment Era.[101] In 1887, Congress enacted the General Allotment Act, pressuring tribes to abandon their communal lifestyles by dividing tribal land into smaller allotments to be owned privately by individual Indians while the surplus became available to white settlers.[102] Congress established an allotment agreement with the Creek Nation in 1901, giving title to 160-acre plots of land to individual Creek Nation families who could not sell, transfer, or encumber their plots for a set number of years.[103] Oklahoma argued that allotment was often the first step in Congress's ultimate plan of disestablishment.[104] The majority responded that "to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination."[105] Furthermore, the majority noted Congress's own definition of "Indian country" includes "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent."[106] Put another way, transferring specific plots of land within the reservation to individual Indians was not sufficient to disestablish a reservation absent clearly expressed congressional intent.[107] Because there was no clear statement by Congress to show otherwise, the Creek Nation Reservation persisted and survived allotment.[108]

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101. *See id.* at 2463 (stating Oklahoma's argument regarding allotment); Brief for Respondent at *6, *McGirt*, 140 S. Ct. 2452 (No. 18-9526), 2020 WL 1478582 (arguing allotment explicitly divested Creek Nation of all rights and property interests in its land).

102. *See* COHEN, *supra* note 3, § 1.04 (providing context for allotment period and passing of General Allotment Act); General Allotment (Dawes) Act of 1877, ch. 119, 24 Stat. 388 (allowing federal government to allot reservation lands to individuals). The end of treaty making between the U.S. government and tribes in 1871 led to the shift of Indian policymaking from agreements with individual tribes to Congress enacting comprehensive and broad legislation. *See* COHEN, *supra* note 3, § 1.04 (discussing shift of focus from treaties to widespread congressional legislation). The United States' Indian policy in the late 1800s focused on the goals of "civilizing" and assimilating Indians and tribes into mainstream American lifestyles. *See id.* (describing nation's direction of Indian policy leading into Allotment Era). Assimilation policies aimed to force Indians into mainstream American society, with the underlying idea that if Indians adopted the lifestyle of "civilized" life they would occupy less land, opening it up to white settlers. *See id.* (describing underlying reason for allotment). Under the guise of benefitting the Indians, tribal cultures, identities, and land were erased. *See id.* (explaining "moral improvement" and progress of civilization justifications given for assimilation policies).

103. *See* Creek Allotment Agreement, ch. 676, 31 Stat. 861, 862-63 (1901) (declaring each citizen allotted 160 acres and restricting alienability of allotted lands).

104. *See McGirt*, 140 S. Ct. at 2464 (introducing Oklahoma's argument allotment initiated disestablishment).

105. *See id.* at 2465 (stating allotment not sufficient to demonstrate disestablishment). The Court recognized that Congress may have thought at the height of allotment that the reservation system would not last more than a generation. *See id.* (acknowledging belief reservations would end at turn of twentieth century). The Court, however, wrote that "just as wishes are not laws, future plans aren't either." *See id.* (explaining Congress's plan to create conditions promoting disestablishment not enough).

106. *See* 18 U.S.C. § 1151(a) (defining Indian country); McGirt v. Oklahoma, 140 S. Ct. 2452, 2464 (2020) (explaining statute contemplated private land ownership on reservations).

107. *See McGirt*, 140 S. Ct. at 2464 (noting Court has repeatedly explained allowing individual plot transfers does not disestablish reservation); *see also* Mattz v. Arnett, 412 U.S. 481, 497 (1973) (noting allotment consistent with continued reservation status).

108. *See McGirt*, 140 S. Ct. at 2465 (noting Congress included explicit disestablishment language when it deemed such language appropriate). The majority pointed to Congress's 1904 allotment agreement with the Ponca and Otoe Tribes in present-day Oklahoma that included language expressly abolishing the reservation,

Oklahoma argued further that other government intrusions on the Creek Nation's self-governance during the Allotment Era proved the reservation was disestablished.[109] Examples included abolishing the Creek Nation's tribal courts, empowering the President to remove and replace the tribe's principal chief, and stating that many tribal ordinances would not be valid until the President approved them.[110] While recognizing the severe impact these intrusions had on tribal self-governance, the Court responded that the reservation was not disestablished because the intrusions "fell short of eliminating all tribal interests in the land."[111]

The Court then rebuked Oklahoma's argument that historical practices and the demographics of the area were sufficient to prove disestablishment.[112] Oklahoma argued that *Solem v. Bartlett*[113] requires the Court to engage in a three-step analysis to answer the question of reservation disestablishment: examine the laws passed by Congress, consider contemporary events, and finally look to later events and demographics of the area.[114] The Court responded by declaring that the only proper "step" for a court of law is to determine and follow the original meaning of the law at issue, reiterating that reservations maintain their status until Congress explicitly expresses otherwise.[115] Ultimately, the Court concluded that extratextual sources should serve only to "clear up" ambiguities and thus have no place in this analysis when the statute's meaning is clear.[116]

Accepting for argument's sake that the Creek Nation's land is a reservation, Oklahoma argued alternatively that the MCA never applied to the eastern half of Oklahoma.[117] The majority rejected that argument by pointing to the longstanding policy, going back to the Marshall Trilogy, of tribes not being subject to state

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which is notably absent in the 1901 allotment agreement with the Creek Nation. *See id.* (pointing out explicit language sufficient to abolish reservation in Ponca and Otoe agreement).

109. *See id.* (introducing Oklahoma's alternative argument if allotment itself not enough to prove disestablishment).

110. *See id.* at 2465-66 (identifying many serious blows to Creek Nation's self-governance).

111. *See id.* at 2466 (concluding grave intrusions fell short of eliminating tribe's complete interests in land). The majority explained that while Congress suggested the Creek Nation's tribal government might end in 1906 based on the Creek Nation's 1901 allotment agreement, Congress continually adjusted its arrangements with the Creek Nation in the years after 1906. *See id.* (showing Congress recognized Creek Nation's tribal existence and government after 1906). The majority explained that these adjustments in the government-to-government relationship would not have made sense if Congress thought they had already withdrawn recognition of the Creek Nation's status. *See id.* (explaining Congress's lack of intent to end Creek Nation's tribal government).

112. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2468 (2020) (declaring Oklahoma's demographics and historical practices argument mistaken).

113. 465 U.S. 463 (1984).

114. *See McGirt*, 140 S. Ct. at 2468 (describing Oklahoma's reading of *Solem* to require three steps in analysis of disestablishment questions). According to Oklahoma, the Court failed to engage with the second and third steps. *See id.* (explaining Oklahoma's view Court failed to fulfill required steps in analysis).

115. *See id.* (emphasizing Court cannot favor historical or recent practices *instead of* laws of Congress).

116. *See id.* at 2469 (rejecting applicability of extratextual sources in analysis).

117. *See id.* at 2476 (explaining Oklahoma argued State's historical practice correctly tried Indians in state court); *see also* Brief for Respondent, *supra* note 101, at *18 (arguing MCA did not apply to Indian territory in eastern Oklahoma).

authority on reservations.[118] Furthermore, the majority highlighted the federal government's promises to tribes in many treaties that the tribes would continue to self-govern.[119]

Finally, Oklahoma and the dissent argued that the Creek Nation Reservation should be deemed disestablished simply because of the potential practical implications of doing otherwise.[120] The State primarily argued that the Court's holding could disrupt many state convictions, with "thousands of cases like this one wait[ing] in the wings" to challenge convictions.[121] The State also warned that this holding would result in the federal and tribal courts becoming overly burdened with expanded jurisdiction.[122] The Court rejected each of the State's purported practical justifications to find the reservation disestablished, stating firmly that these "dire warnings" were not a license to disregard the law.[123] Ultimately, the Court held the Creek Nation Reservation was never disestablished, stating that if Congress wants to break its promises to tribes, "it must say so."[124]

D. Current Threat to Federal Indian Law: Equal Protection Challenges

While the *McGirt* decision represents a win for Indian interests, there is a significant challenge to federal Indian law currently brewing in the federal courts: an attack on the constitutionality of statutory distinctions between Indians and non-Indians under the Equal Protection Clause of the Fourteenth Amendment

118. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2476-77 (2020) (citing Marshall Trilogy for tribes' distinct-political-community status and freedom from state authority).

119. *See id.* at 2477 (recognizing sanctity of treaty promises of self-governance).

120. *See id.* at 2478 (stating Oklahoma abandoned pretense of law by basing argument on potentially "transform[ative]" effects of loss). As a threshold matter, Oklahoma expressed a fear that approximately half of the state and 1.8 million residents would now be within Indian country if other tribes use this holding to vindicate their treaty promises of land. *See id.* at 2479 (noting Oklahoma's emphasis on logistical consequences for state and residents); Brief for Respondent, *supra* note 101, at *3 (arguing decision equates to judicial abrogation of state sovereignty and will cleave Oklahoma in half). The majority explained that the only issue before the Court concerned the Creek Nation, and that the Court must evaluate each tribe's treaties individually. *See McGirt*, 140 S. Ct. at 2479 (rejecting argument to consider large-scale, potential implications stemming from other tribes). Oklahoma argued that this was a unique situation due to the sheer quantity of people that would be impacted and "surprised" to discover they lived in Indian country, but the majority pointed out that "members of the 1832 Creek Tribe would be just as surprised to find them there." *See id.* (rejecting Oklahoma's argument focusing on non-Indian interests and expectations).

121. *See* Brief for Respondent, *supra* note 101, at *3 (arguing holding will frustrate State's ability to prosecute).

122. *See id.* at *43 (emphasizing 1.8 million residents now under federal and tribal jurisdiction). Finally, Oklahoma pointed to the potentially significant implications for civil and regulatory law. *See id.* at *44-45 (identifying consequences in areas of tax and family law).

123. *See McGirt*, 140 S. Ct. at 2481 (refusing to decide issue based on "dire warnings" rather than law). The majority criticized the dissent for interpreting Acts of Congress based on such implications: "[T]he point of looking at subsequent developments seems not to be determining the meaning of the laws Congress wrote . . . but emphasizing the costs of taking them at their word." *See id.* (criticizing dissent for interpretation based on consequences).

124. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020) (saying to hold otherwise would elevate brazen and longstanding injustices over law).

and the Due Process Clause of the Fifth Amendment.[125] The standard of judicial review applied to a law in an Equal Protection analysis depends on the classification or distinction being used.[126] It is well-settled constitutional law that race is a "suspect classification" under the Equal Protection Clause of the Fourteenth Amendment, and laws distinguishing on the basis of such classifications are subject to a strict scrutiny standard of judicial review.[127] For laws to survive this heightened standard, the government must show that its actions were necessary to serve a compelling governmental interest and were narrowly tailored to achieve that interest.[128] Laws that distinguish based on classifications that are not "suspect" are subject to a more forgiving rational basis standard of judicial review, and are valid as long as they are rationally related to a legitimate governmental purpose.[129] The general premise of the challenge to federal Indian law is

125. *See* Doran, *supra* note 11, at 2 (introducing critics' challenge to federal Indian law's statutory distinctions). The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Court interprets the Due Process Clause of the Fifth Amendment to impose equal protection limitations on the federal government as well. *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (imposing same duty on federal government and states).

126. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 684-85 (6th ed. 2020) (stating identification of classification first step of equal protection analysis). There are two basic types of classifications. *See id.* at 684 (explaining categories of classifications analyzed under equal protection). The first is where the classification exists on the face of the law, such as requiring people to be a certain age to acquire a driver's license or prohibiting persons of a particular race from engaging in an activity. *See id.* at 684-85 (providing examples where classifications exist on face of law). The second type of classification exists where the law itself is facially neutral, but it has a discriminatory impact on particular groups of people when applied. *See id.* at 685 (noting height requirements for law enforcement disproportionately impact female recruits).

127. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (explaining standard of review for racial classifications); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (holding all government-imposed racial classifications subject to strict scrutiny by reviewing courts); COHEN, *supra* note 3, § 14.03[2][b][i] (discussing standard of review for classifications on basis of race and other innate group characteristics); *see also* Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984) (stating purpose of Fourteenth Amendment to stop government-imposed racial discrimination). Another example of a suspect classification subject to strict scrutiny is national origin. *See* CHEMERINSKY, *supra* note 126, at 685 (listing suspect classifications subject to strict scrutiny).

128. *See Grutter*, 539 U.S. at 327 (explaining racial classifications constitutional if narrow-tailoring requirement satisfied). Being subject to strict scrutiny does not automatically invalidate the use of a suspect classification; the reviewing court then determines whether the law survives that heightened standard. *See Adarand*, 515 U.S. at 230 (stating ultimate validity of law not determined until reviewing court applies standard). This is a difficult standard to meet, as the Court has rarely upheld the constitutionality of classifications subject to strict scrutiny. *See* Doran, *supra* note 11, at 6 (noting surviving strict scrutiny both difficult and rare). The racial classifications that have survived strict scrutiny are most often affirmative action programs in higher education. *See id.* (identifying affirmative action programs rare example of legislation surviving strict scrutiny); *see also* Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2214 (2016) (deciding university's affirmative action program narrowly tailored to compelling interest of educational benefits of diversity); *Grutter*, 539 U.S. at 343 (upholding law school's use of race in admissions to further compelling interest of student diversity).

129. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 325 (1980) (upholding Hyde Amendment because rationally related to legitimate government objective of protecting potential life); U.S. Dept. of Agric. v. Moreno, 413 U.S. 528, 533 (1973) (identifying and defining standard of review applied in case). The party challenging the classification has the burden of proof that the law fails to meet the rational basis standard, and there is a strong presumption of validity when the Court evaluates laws under rational basis review. *See* CHEMERINSKY, *supra* note 126, at 690 (introducing deferential rational basis standard of review). The Supreme Court has held that laws should be upheld under this rational basis standard if it is possible to conceive any legitimate legislative purpose, even if that purpose was not the government's actual legislative goal. *See, e.g.*, FCC v. Beach Commc'ns, Inc.,

that statutes distinguishing Indians and non-Indians constitute a suspect, racial classification that should be subject to the strict scrutiny standard of review.[130] If this challenge is successful, any law distinguishing Indians, even those serving Indian interests, could be invalidated as unconstitutional racial discrimination.[131]

1. Indian Status as a Political Classification

The Supreme Court first applied the equal protection framework to federal Indian law in 1974 in *Morton v. Mancari*.[132] In *Mancari*, non-Indian Bureau of Indian Affairs (BIA) employees challenged provisions in the Indian Reorganization Act giving preferential treatment to members of federally recognized tribes in BIA employment decisions.[133] The non-Indian employees argued in part that the preference violated the Due Process Clause of the Fifth Amendment because it subjected them to invidious racial discrimination and denied them equal employment opportunity.[134] The Court explained that resolving this issue turned on the unique legal status of tribes, the plenary power of Congress, a history of treaties, and the guardian–ward relationship wherein Congress should legislate on behalf of tribes.[135] The Court concluded that the preference did not constitute racial discrimination because it was a political rather than racial preference.[136]

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508 U.S. 307, 314-15 (1993) (stating challenger has burden to negate every conceivable basis of support for classification in statute); U.S.R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) (stating Court's inquiry ends upon plausible reasons for Congress's action). While not the norm, the Court has declared some government actions unconstitutional under the rational basis review standard. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632 (1996) (holding Colorado voter initiative lacked rational relationship to legitimate governmental interest); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 435 (1985) (invalidating zoning ordinance preventing operation of home for mentally disabled under rational basis standard); *Moreno*, 413 U.S. at 538 (holding Food Stamp Act excluding households containing unrelated persons not rationally related to legitimate purpose).

130. *See* Doran, *supra* note 11, at 2 (explaining essence of equal protection challenge to federal Indian law).

131. *See supra* note 13 and accompanying text (explaining potential significant consequences of equal protection challenges to federal Indian law).

132. *See* 417 U.S. 535, 545 (1974) (discussing equal protection framework); Newton, *supra* note 40, at 272 (noting *Mancari* broke important ground in Court's federal Indian law jurisprudence); Doran, *supra* note 11, at 6 (highlighting Supreme Court's unique treatment of federal Indian law in equal protection analyses); COHEN, *supra* note 3, § 14.03[2][b][ii] (identifying first equal protection attack on federal Indian law to reach Supreme Court).

133. *See* Indian Reorganization Act § 12, 25 U.S.C. § 5116 (stating qualified Indians shall receive preference in appointments); *Mancari*, 417 U.S. at 537-38 (introducing BIA employees' claims challenging preferential treatment of American Indians). The BIA initially applied the Indian Reorganization Act preference to hiring decisions, but in 1972 the Commissioner of Indian Affairs issued a directive that the preference would extend to promotion decisions. *See Mancari*, 417 U.S. at 538 (noting expansion of preference).

134. *See Mancari*, 417 U.S. at 539 (explaining basis of employees' Fifth Amendment challenge).

135. *See id.* at 551 (providing historical and legal context within which validity of preference determined).

136. *See id.* at 553 n.24 (concluding preference for Indians not racial preference). Justice Blackmun's footnote twenty-four was the first to suggest that strict scrutiny used with racial classifications is not applicable to classifications favoring Indians. *See* Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 ST. JOHN'S L. REV. 153, 158 (2008) (calling footnote twenty-four possibly most important footnote in twenty-first century). Justice Blackmun wrote, "[t]he preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates

Consequently, the Court concluded that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians, such legislative judgments will not be disturbed."[137] Applying the rational basis standard, the Court upheld the preference because it was rationally related to the purpose of promoting Indian self-government.[138] The framework established by the Court in *Mancari* remains controlling precedent for addressing equal protection challenges to legislative classifications based on tribal status.[139]

2. The Indian Child Welfare Act of 1978

Congress passed the ICWA in 1978 to address the widespread displacement of Indian children from their communities and families due to generations of abusive state and private welfare practices.[140] Starting in the 1800s, the federal government utilized formalized education to "civilize" American Indians by "kill[ing] the Indian so as to save the man within."[141] Consequently, Indian children were removed from their families and sent to boarding schools where they were subject to various forms of abuse and forced to abandon their tribal languages and culture.[142] Additionally, state welfare and private adoption agencies began increasingly removing Indian children from their families and communities and placing them in non-Indian foster and adoptive homes.[143] The

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to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature." *Mancari*, 417 U.S. at 553 n.24.

137. *Mancari*, 417 U.S. at 555.

138. *See* Morton v. Mancari, 417 U.S. 535, 555 (1974) (concluding Congress's classification does not violate due process). The Court explained that by enacting the Indian Reorganization Act of 1934, Congress decided that fulfilling its trust responsibility required promoting the self-government of tribes. *See id.* at 553 (explaining federal government's interest in promoting tribal self-government).

139. *See* Doran, *supra* note 11, at 21 (noting *Mancari* remains controlling precedent on this issue).

140. *See* Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 2(4), 92 Stat. 3069, 3069 (codified as amended at 25 U.S.C. § 1901(4)) (lamenting "alarmingly high" percentage of Indian families broken up by often unwarranted removal of children); Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989) (recognizing ICWA product of concerns in 1970s over consequences to Indian children, families, and tribes); Pember, *supra* note 13, at 19 (describing federal government coercively sent Indian children to boarding schools).

141. *See* Gojevic, *supra* note 13, at 251 (providing policy context for onset of government boarding schools for Indian children). The government passed a compulsory attendance law in 1898 and would withhold rations, clothing, and annuities if parents refused to send their children to school in accordance with those rules. *See* 25 U.S.C. § 283 (granting discretion to withhold rations, clothing, and annuities from Indians for school attendance issues); TABATHA TONEY BOOTH, SE. OKLA. STATE UNIV., CHEAPER THAN BULLETS: AMERICAN INDIAN BOARDING SCHOOLS AND ASSIMILATION POLICY, 1890–1930, at 47-48 (2010) https://www.se.edu/native-american/wp-content/uploads/sites/49/2019/09/NAS-2009-Proceedings-Booth.pdf [https://perma.cc/MK93-X9PS] (explaining many parents had no choice but to send children to school).

142. *See* Gojevic, *supra* note 13, at 252 (describing erasure of tribal culture in school). Some describe the use of boarding schools for Indian children as "an act of genocide under international law" because they were designed "not to educate those children but, instead, to instill in them the whites' belief that everything 'Indian' was bad, inferior, and evil." *See* Ann Piccard, *Death by Boarding School: "The Last Acceptable Racism" and the United States' Genocide of Native Americans*, 49 GONZ. L. REV. 137, 141 (2013) (highlighting ongoing, intergenerational trauma created by federal government's compulsory boarding schools).

143. *See* Gojevic, *supra* note 13, at 256 (describing transition from boarding school era to abusive adoption practices). Congress found the reasons for these removals especially disturbing; non-Indian social workers

congressional investigation leading up to the ICWA's passage revealed that between 25% and 35% of all Indian children were removed from their homes and placed in adoptive homes, foster care, or other institutions.[144] The ICWA was Congress's effort to rectify this "cultural genocide."[145]

The ICWA's stated aim is to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families."[146] Furthermore, it sought to protect the rights of Native nations to retain their children within their society.[147] To accomplish these goals, the ICWA established a national policy that "where possible, an Indian child should remain in the Indian community."[148] Section 101(a) of the ICWA gives tribes exclusive jurisdiction over custody proceedings involving an Indian child domiciled on the reservation.[149] For Indian children not domiciled on the reservation, the Court has interpreted that there is concurrent jurisdiction with the state, but there is a presumption in favor of tribal jurisdiction.[150] The Act defines an "Indian child" as any unmarried person who is under the age of eighteen and is either a member of an Indian tribe or "eligible for membership in an Indian tribe and is the biological child" of a tribal member.[151]

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justified 99% of removals on vague "neglect" or "social deprivation," often finding fault in the traditional Indian child-raising methods. *See* H.R. REP. No. 95-1386, at 10 (1978) (explaining social workers unfamiliar with ways of Indian family life and assuming them irresponsible).

144. *See Setting the Record Straight: The Indian Child Welfare Act Fact Sheet*, NAT'L INDIAN CHILD WELFARE ASS'N (2018), https://www.nicwa.org/wp-content/uploads/2018/10/Setting-the-Record-Straight-2018.pdf [https://perma.cc/44WP-ZCRV] (outlining reasons for ICWA). Social workers placed 85% of the Indian children removed in placements outside of their tribal communities and away from their families. *See id.* (highlighting children removed from community even when willing relatives available).

145. *See Indian Child Welfare Act of 1977: Hearing Before the U.S.S. Select Comm. on Indian Affs.*, 95th Cong. 2 (1977) [hereinafter *ICWA Senate Hearing*] (calling removal of Indian children into non-Indian settings cultural genocide).

> Officials seemingly would rather place Indian children in non-Indian settings where their Indian culture, their Indian traditions and, in general, their entire Indian way of life is smothered. . . . [Agencies] strike at the heart of Indian communities by literally stealing Indian children. This course can only weaken rather than strengthen the Indian child, the family, and the community. . . . It has been called cultural genocide.

Id. (statement of Sen. James Abourezk, Chairman, Select Comm. on Indian Affs.).

146. *See* Indian Child Welfare Act of 1978 § 3, 25 U.S.C. § 1902 (declaring national policy to protect Indian children and promote tribes' stability).

147. *See* H.R. REP. No. 95-1386, at 23 (stating goal to protect rights of Indian children and tribes).

148. *See id.* (establishing federal policy of keeping Indian children in Indian community where possible).

149. *See* Indian Child Welfare Act of 1978 § 101(a) (granting tribes exclusive jurisdiction). There are exceptions when the state has jurisdiction if designated by existing federal law. *See id.* (identifying exception to exclusive tribal jurisdiction).

150. *See* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989) (interpreting jurisdiction designated by ICWA for children not domiciled on reservation).

151. *See* Indian Child Welfare Act of 1978 § 4(4) (defining Indian child for purposes of determining which children covered by ICWA).

The United States Supreme Court has heard only two cases interpreting the ICWA since its enactment: *Mississippi Band of Choctaw Indians v. Holyfield* in 1989 and *Adoptive Couple v. Baby Girl*[152] in 2013.[153] In *Holyfield*, two tribal member parents domiciled on the Mississippi Band of Choctaw Indian tribe reservation intentionally gave birth to their twins 200 miles away and consented to the adoption of the twins by the non-Indian Holyfields.[154] The Mississippi Band of Choctaw Indians moved to vacate the adoption because the ICWA granted exclusive jurisdiction to tribal courts for adoption proceedings of any Indian child domiciled on a reservation.[155] The Court held that the twins were domiciled on the reservation because their parents were, giving the tribal court exclusive jurisdiction over their adoption proceedings.[156] The Court explained that the voluntary nature of the adoption did not change the outcome; tribal jurisdiction could not be trumped by the actions of individual members of the tribe because when enacting the ICWA, Congress was concerned with the impact on tribes as a whole, not just the individual children or families.[157]

3. The Ongoing Equal Protection Challenge to the ICWA

Equal protection challenges to the ICWA gained traction following the Court's decision in *Adoptive Couple*.[158] In *Adoptive Couple*, the Court held that the ICWA's protections did not apply to noncustodial Indian fathers.[159] While

152. 570 U.S. 637 (2013).

153. *See* Dustin C. Jones, Article, Adoptive Couple v. Baby Girl*: The Creation of Second-Class Native American Parents Under the Indian Child Welfare Act of 1978*, 32 LAW & INEQ. 421, 422 (2014) (noting *Adoptive Couple* only second ICWA-related case Court considered).

154. *See Holyfield*, 490 U.S. at 37-38 (recounting birth and adoption of twin babies by Holyfields).

155. *See id.* at 38-39 (explaining tribe opposed to non-Indian Holyfields adopting twins).

156. *See* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48-49 (1989) (explaining children domiciled on reservation despite never living there). While the Court recognized this may not comport with the state's definition of "domicile," it reasoned that Congress could not have intended state law to determine this issue when enacting the ICWA. *See id.* at 49 (stating argument twins not domiciled on reservation inconsistent with Congress's intent in ICWA).

157. *See id.* (noting Congress concerned with broader implications for tribes when children removed from community). The Court recognized that the negative effects of Indian children being placed outside their tribal culture extended beyond the particular individuals involved. *See id.* at 50 (recognizing impacts on survival of tribal communities). In the ICWA itself, Congress stated that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." Indian Child Welfare Act of 1978 § 2(3) (recognizing special relationship between United States and tribes and federal responsibility to Indians).

158. *See* Adoptive Couple v. Baby Girl, 570 U.S. 637, 651 (2013) (holding lower court erred by finding ICWA barred termination of biological father's parental rights); Pember, *supra* note 13, at 20 (noting challenges to ICWA increased post-*Adoptive Couple*). After the *Adoptive Couple* decision, opponents of the ICWA "seized" upon the equal protection language in the opinion to file their constitutional challenges. *See* Gojevic, *supra* note 13, at 263 (noting *Adoptive Couple* catalyst for constitutional challenges to ICWA). The Court stated that interpreting the ICWA in a way that would allow an absentee Indian father to "play his ICWA trump card at the eleventh hour" and prevent an adoption would raise equal protection concerns because prospective adoptive parents may hesitate to adopt Indian children in the future. *See Adoptive Couple*, 570 U.S. at 656 (noting ICWA raises equal protection concerns for non-Indian potential adoptive parents).

159. *See Adoptive Couple*, 570 U.S. at 654 (holding ICWA did not bar termination of noncustodial father's parental rights).

the case turned on this noncustodial parent issue, the majority repeatedly mentioned its hesitance to apply the ICWA where a child was only "3/256 Cherokee" despite no dispute over the child's status as an Indian child.[160]

In 2018, a Texas district court applied strict scrutiny because they deemed "Indian child" to be a race-based classification, and found the ICWA unconstitutional under the Equal Protection Clause of the Fifth Amendment.[161] This "egregious" and "disturbing" decision received widespread backlash for "ignor[ing] the direct federal government-to-government relationship and decades upon decades of precedent that have upheld tribal sovereignty and the rights of Indian children and families."[162]

The following year, a three-judge panel of the Fifth Circuit Court of Appeals concluded that the ICWA's use of the term "Indian child" represents a political classification that is "rationally related to the fulfillment of Congress's unique obligation toward Indians."[163] Consequently, the panel reversed the district court decision and held that the ICWA was constitutional.[164] Shortly after, however, the Fifth Circuit voted to rehear the case en banc while it garnered national attention for the potentially dangerous implications for all federal Indian law.[165] In April 2021, the Fifth Circuit ultimately produced a 325-page, deeply divided order wherein a slim majority affirmed the constitutionality of some ICWA

160. *See id.* at 646 (mentioning reluctance to apply ICWA to 3/256 Cherokee child).

161. *See* Brackeen v. Zinke, 338 F. Supp. 3d 514, 536 (N.D. Tex. 2018) (finding ICWA classification race based and not narrowly tailored to achieve compelling governmental interest), *rev'd sub nom.* Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019), *rev'd in part sub nom.* Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (en banc) (per curiam), *cert. granted*, No. 21-380, 2022 WL 585881 (U.S. Feb. 28, 2022) (mem.); *see also supra* note 12 (explaining equal protection component of Fifth Amendment). The plaintiffs also challenged the ICWA on several other grounds, claiming:

> [T]he ICWA and the Final Rule violate: (1) the equal protection requirements of the Fifth Amendment; (2) the Due Process Clause of the Fifth Amendment; (3) the Tenth Amendment; and (4) the proper scope of the Indian Commerce Clause. Plaintiffs also argue that . . . the ICWA violates Article I of the Constitution.

Zinke, 338 F. Supp. 3d. at 530 (describing plaintiffs' claims). The plaintiffs included the states of Texas, Louisiana, and Indiana alongside multiple non-Indians trying to adopt Indian children. *See id.* at 519 (identifying plaintiffs). The defendants included several federal agencies and four tribes: the Cherokee Nation, Oneida Nation, Quinalt Indian Nation, and Morengo Band of Mission Indians. *See id.* (identifying defendants).

162. *See Official Statement: Joint Statement on Indian Child Welfare Case* Brackeen v. Zinke *Ruling*, NAT'L CONG. OF AM. INDIANS (Oct. 8, 2018), https://www.ncai.org/news/articles/2018/10/08/official-statement-joint-statement-on-indian-child-welfare-case-brackeen-v-zinke-ruling [https://perma.cc/EFZ7-XYXG] (calling decision "egregious" and "disturbing").

163. *See Bernhardt*, 937 F.3d at 441 (applying rational basis standard of review).

164. *See id.* (reversing district court's decision granting summary judgment to plaintiffs).

165. *See* Brackeen v. Bernhardt, 942 F.3d 287, 289 (5th Cir. 2019) (granting en banc review by full Fifth Circuit Court of Appeals); Gojevic, *supra* note 13, at 249 (noting Fifth Circuit granted en banc rehearing in November 2019).

provisions including the "Indian child" classification, but remained strongly divided on others.[166] The Supreme Court will hear the issue in the near future.[167]

III. ANALYSIS

A. McGirt *May Represent the Court's Needed Return to Foundational Principles of Federal Indian Law*

In light of the Court's repeated disregard of the canons of construction, the plenary power of Congress relative to states and the judiciary, and the sovereign status of tribes, scholars have called for new justices or future appointees to steer the Court back to the foundations of federal Indian law.[168] Justice Gorsuch may be the person who does just that, as the majority opinion in *McGirt* faithfully applied foundational principles in deciding the status of the Creek Nation Reservation.[169] The majority opinion in *McGirt* adhered to the fundamental principle that Congress—not the Court or the states—has broad and exclusive plenary power in the realm of Indian affairs.[170] Pointing to precedent, the Indian Commerce Clause, and the Supremacy Clause, the majority firmly stated that Acts of Congress are the only place the Court may look to determine whether a reservation still exists.[171]

The majority's opinion in *McGirt* is also a faithful application of the reserved rights doctrine and clear statement rule.[172] The Court highlighted that while disestablishment of a reservation has never required any specific language, it does

166. *See Haaland*, 994 F.3d at 267-69 (summarizing issues decided by majority and those still divided). The Fifth Circuit addressed several issues such as standing, anticommandeering, and the nondelegation doctrine. *See id.*

167. *See* Brackeen v. Haaland, No. 21-380, 2022 WL 585881 (U.S. Feb. 28, 2022) (mem.) (granting certiorari); Roxanna Asgarian, *How a White Evangelical Family Could Dismantle Adoption Protections for Native Children*, VOX (Feb. 20, 2020, 7:30 AM), https://www.vox.com/identities/2020/2/20/21131387/indian-child-welfare-act-court-case-foster-care [https://perma.cc/KCU6-NQXX] (noting Indian advocates expected appeal to Supreme Court).

168. *See* Getches, *supra* note 5, at 1631 (asserting new justices could get Court back on track if faithful to foundational principles).

169. *See* Tweedy, *supra* note 10, at 744 (highlighting Court applied relevant principles rather than playing role of "conqueror").

170. *See supra* notes 47-50 and accompanying text (explaining definition, source, and criticisms of plenary power doctrine in federal Indian law).

171. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020) (noting power belongs to Congress alone because of supremacy of Congress's authority in tribal affairs). The majority cited *Lone Wolf v. Hitchcock*, where the Court reaffirmed the plenary power of Congress by holding Congress has the authority to unilaterally breach its own promises and treaties with tribes. *See id.* (noting Court held Congress has significant constitutional authority in tribal relations). The majority explained that states have no authority over reservation boundaries, citing the Indian Commerce Clause and the Supremacy Clause. *See id.* (noting states least inclined to respect tribal rights); U.S. CONST. art. I, § 8 (giving Congress authority to regulate commerce among Native tribes); U.S. CONST. art. VI, cl. 2 (designating federal statutes and treaties supreme law of land).

172. *See* Tweedy, *supra* note 10, at 743 (calling *McGirt* noteworthy for its respectful tone regarding tribal sovereignty); *supra* notes 61-62 and accompanying text (explaining reserved rights doctrine and clear statement rule).

require Congress to clearly express its intent to do so.[173] The Court applied these principles when rejecting Oklahoma's argument that Congress disestablished the Creek Nation Reservation during the Allotment Era, reasoning that there was no explicit termination of the remaining reservation land.[174] Because there was no clear statement by Congress to show otherwise, the Court correctly decided that the Creek Nation Reservation persisted and survived allotment.[175] The majority applied the reserved rights doctrine and clear statement rule by declaring that the only proper "step" for a court of law is to determine and follow the original meaning of the law before it, reaffirming that reservations maintain their status until Congress explicitly expresses otherwise.[176] While the Court recognized Congress's significant authority to limit tribal sovereignty and break its own promises, the underlying principle remained that "[i]f Congress wishes to break the promise of a reservation, it must say so."[177] Consequently, the majority also correctly applied—or rather, knew when not to apply—the canons of construction.[178] Because the Court found absolutely no expressed intent by Congress to

173. *See McGirt*, 140 S. Ct. at 2463 (stating disestablishment never required particular words). The majority cited *Nebraska v. Parker*, where the Court stated that language explicitly surrendering all tribal interests typically constitutes clear expression of congressional intent to disestablish a reservation. *See id.*; Nebraska v. Parker, 577 U.S. 481, 488 (2016) (describing approach to statutory interpretation regarding diminishing reservation boundaries). The Court also pointed to historical examples to demonstrate that Congress does in fact know how to diminish or revoke a reservation "when it can muster the will" to do so. *See McGirt*, 140 S. Ct. at 2462-63 (providing examples of Congress explicitly disestablishing reservations in past).

174. *See McGirt*, 140 S. Ct. at 2464 (stating Creek Nation Reservation survived allotment). The Court pointed out that Congress's own definition of "Indian country" includes "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent." *Id.* (defining Indian country). Put another way, transferring plots of land within the reservation to individual Indians is not alone sufficient to disestablish a reservation absent Congress's clearly expressed intent. *See id.* (explaining private ownership of land does not equate to disestablishment of reservation). Ultimately, the majority explained that allotment is merely a first step toward a final destination of disestablishment. *See id.* at 2465 (stating wishes and future plans not laws).

175. *See id.* at 2466 (noting Congress included explicit disestablishment language when it deemed appropriate). The Court demonstrated that more was needed to prove disestablishment using the example of Congress's 1904 allotment agreement with the Ponca and Otoe Tribes in modern day Oklahoma. *See id.* at 2465 (providing example of successful disestablishment). That allotment agreement included the express language that the reservation lines were to be abolished, which is notably absent in the 1901 allotment agreement with the Creek Nation. *See id.* at 2466 (explaining Creek agreement saved ultimate fate of reservation status "for another day"). Oklahoma argued further that other government intrusions on the Creek Nation's self-governance during the Allotment Era disestablished the reservation. *See id.* at 2465 (identifying Oklahoma's argument if allotment itself does not suffice). Examples include abolishing the Creek Nation's tribal courts, empowering the President to remove and replace the tribe's principal chief, and stating that many tribal ordinances would not be valid until approved by the President. *See id.* at 2465-66 (listing congressional intrusions on Creek Nation's tribal self-governance). While recognizing the severe impact these intrusions had on tribal self-governance, the majority wrote that they "fell short of eliminating all tribal interests in the land" so that the reservation was disestablished. *See id.* at 2466 (stating intrusions insufficient to effectively disestablish reservation).

176. *See id.* at 2468 (explaining Court's role of following meaning of law before it).

177. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020) (reiterating tribes retain all sovereignty not expressly taken away by Congress).

178. *See* Hedden-Nicely & Leeds, *supra* note 69, at 337 (explaining no need to apply interpretive canons in absence of ambiguity).

disestablish the Creek Nation Reservation, there was no room for ambiguity warranting the application of the canons to decide the issue.[179]

The Court refrained from engaging in judicial subjectivism by rejecting Oklahoma and the dissent's argument to consider the implications for non-Indian interests in its decision.[180] The majority "reject[ed] that thinking," explaining that to do otherwise would "elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right."[181] The Court also rejected Oklahoma's argument that the State's historical practices of treating the area like it had not been a reservation, along with the non-Indian demographics of the area, proved disestablishment of the reservation.[182] If the Court continues to follow the approach the majority took in *McGirt* by adhering to fundamental principles of federal Indian law, the fate of tribal sovereignty will not rest on a Court that makes subjective decisions based on its assessment of the implications for non-Indian interests.[183]

B. Looking Forward: The Court Should Reject Equal Protection Challenges to ICWA if It Continues to Adhere to Fundamental Principles

1. Rational Basis Is the Correct Standard of Review for Indian Classifications

The fundamental principle of federal Indian law that there is a special trust relationship between the federal government and tribes—one that comes with both obligations and plenary and exclusive authority over Indian affairs—supports the assertion that Indian status is a political, rather than racial, classification.[184] Congress would simply be unable to exercise its plenary authority to

179. *See McGirt*, 140 S. Ct. at 2452 (requiring Congress's express intent to disestablish reservation).

180. *See id.* (rejecting idea to ignore promises when price to keep them becomes too great). The majority criticized the dissent's emphasis on potential consequences in its analysis, arguing the dissent focused on the costs of the law's meaning rather than the meaning itself. *See id.* at 2481 (arguing dire warnings not license to disregard law). The majority did not completely disregard the practical concerns of Oklahoma and the dissent. *See id.* (recognizing potential conflict and cost associated with changing jurisdictional boundaries). The majority noted, however, that Oklahoma and its tribes have a demonstrated history of working together and pointed out that Congress could always intervene regarding the land in question if needed. *See id.* at 2481-82 (noting Congress "has no shortage of tools at its disposal" if agreement proves elusive).

181. *Id.* at 2482 (saying to hold otherwise would elevate brazen and longstanding injustices over law).

182. *See id.* at 2468 (dismissing historical practices and demographics argument).

183. *See* Faz, *supra* note 73, at 32 (arguing judges should not legislate from bench regarding Indian rights and privileges). Despite the Court's clear application of the fundamental principles of federal Indian law in *McGirt*, it is important to note that the Court decided this case when Justice Ruth Bader Ginsburg was a member of the majority. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2458 (2020) (listing justices joining Justice Gorsuch's majority opinion). With her death, the Court's composition has changed, and scholars fear that federal Indian law may "once again find[] itself at a crossroads." *See* Hedden-Nicely & Leeds, *supra* note 69, at 302 (expressing concern about future of federal Indian law with change in Court's makeup). As of now, it is unclear whether newly appointed Justice Amy Coney Barrett's approach to federal Indian law would be in line with the fundamental principles rather than judicial subjectivism in favor of non-Indian interests. *See id.* at 342-43 (noting no record to indicate how Justice Barrett views tribal rights or sovereignty).

184. *See* Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974) (explaining hiring preference political distinction based on unique tribal status and relationship to federal government); Fletcher, *supra* note 136, at 175 (stating

regulate Indian affairs or fulfill its trust obligations without making distinctions based on Indian status or tribal membership.[185]

When upholding the employment preferences in *Mancari* as a political rather than racial classification, the Court highlighted that the purposes of the employment preferences were to "give Indians a greater participation in their own self-government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life."[186] Similarly, Congress enacted the ICWA to promote tribal sovereignty over the welfare decisions regarding their children and reduce the effect of the abusive child welfare practices that removed Indian children from their communities.[187] Additionally, the provisions of the ICWA apply only to an Indian child who is either a member of a tribe or is eligible for membership in a tribe and is the biological child of a member of a tribe.[188] Similar to the employment preference in *Mancari*, this excludes some children who might racially be categorized as "Indian," making the classification political rather than racial.[189] Consequently, the Court should apply a rational basis standard of review if and when it hears an equal protection challenge to the ICWA.[190]

When applying this standard in *Mancari*, the Court explained that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians, such legislative judgments will not be disturbed."[191] The text of the ICWA itself demonstrates that it meets this standard by explicitly referencing the federal government's assumed responsibility for protecting and preserving tribes.[192] Giving tribes increased authority and jurisdiction over child welfare decisions is rationally related to the federal

outcomes of Marshall Court recognized distinctly political nature of tribal–federal relationship). Of course, Marshall Trilogy cases used rhetoric that characterized Indians as racially inferior, referring to them as "savages." *See* Fletcher, *supra* note 136, at 175 (noting underlying racial stereotypes). Despite this language, the Court made it clear that Indian tribes are political entities with inherent—albeit limited—sovereignty. *See id.* (highlighting Court's clear political characterization of tribes).

185. *See* Doran, *supra* note 11, at 9 (arguing congressional plenary power inconsistent with strict scrutiny standard of review).

186. *Mancari*, 417 U.S. at 541-42 (noting purposes of BIA employment preferences).

187. *See supra* notes 140-45 and accompanying text (describing history of Indian children removed to boarding schools and through state child welfare policies).

188. *See* Indian Child Welfare Act § 4(4), 25 U.S.C. § 1903(4) (defining scope of Indian child for purposes of ICWA).

189. *See Mancari*, 417 U.S. at 553 n.24 (explaining preference excludes some people "racially Indian").

190. *See supra* note 129 and accompanying text (explaining rational basis standard applied to classifications not suspect).

191. *See supra* note 136 and accompanying text (describing how Court characterized standard of review in *Mancari*).

192. *See* Indian Child Welfare Act § 2(2) (pointing to federal government's trust relationship with tribes).

government's unique obligation toward Indians because it serves to preserve tribes' existence and culture.[193]

2. *Even if Indian Status Were Racial and Strict Scrutiny Were Applied, ICWA Survives It*

To pass constitutional muster under a strict scrutiny standard of review, a race-based classification must have a compelling governmental purpose and use means that are both necessary and narrowly tailored to achieving that purpose.[194] The compelling governmental purpose for the ICWA was to help remedy the long history of removing Indian children from their families and communities, which is a threat to tribal culture and survival.[195] As was the case with the employment preference in *Mancari*, this purpose helps the federal government fulfill its unique responsibilities to tribes stemming from the special trust relationship between them.[196] The goals of the ICWA—protecting both tribes and the best interests of Indian children—fall squarely within these responsibilities.[197] With respect to means, giving tribes more autonomy over child custody decisions for Indian children and preventing the removal of children from their communities are vital for the future for tribes.[198] Furthermore, Congress narrowly tailored the language for the "Indian child" distinction, demonstrated by the fact that some children racially categorized as "Indian" do not qualify under the language of the statute.[199] Consequently, even if the Court applies the strict scrutiny standard of review to the ICWA, the law is narrowly tailored to a compelling governmental interest inherent in the federal government's special trust relationship to tribes and therefore the Court should hold it is constitutional if it correctly applies fundamental principles of federal Indian law.[200]

IV. CONCLUSION

In its earliest Indian law jurisprudence under Chief Justice Marshall, the Supreme Court laid the foundations for the fundamental principles of this body of law governing the relationships between tribes, individual Indians, the federal government, and the states. A conversation about the Marshall Trilogy would

193. *See id.* § 4(3) (stating United States has direct interest in protecting Indian children). "[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." *Id.* (emphasizing critical importance of children for survival of tribes).

194. *See supra* Section II.D (explaining strict scrutiny standard of review).

195. *See* Indian Child Welfare Act § 3 (declaring national policy to protect Indian children and promote tribes' stability).

196. *See* Morton v. Mancari, 417 U.S. 535, 555 (1974) (concluding Congress's classification does not violate due process).

197. *See supra* Section II.D.2 (describing Congress's motivation for passing ICWA).

198. *See* Indian Child Welfare Act § 2 (stating Indian children crucial to future of tribes).

199. *See Mancari*, 417 U.S. at 553 n.24 (explaining preference excludes some "racially Indian" people).

200. *See supra* Section II.D (describing application of strict scrutiny standard of review to suspect classifications).

be incomplete without recognizing the racial animus, paternalism, and cultural superiority laced in the opinions. These cases, however, also serve as a basis for the interpretive canons of construction in favor of Indian interests, the special trust relationship, and that tribal sovereignty is inherent so that rights are retained unless Congress explicitly takes them away. The Court has wavered in its faithfulness to these principles, with the Rehnquist Court ushering in an era of judicial subjectivism wherein the Court issued decisions largely based on their conceptions of non-Indian interests without meaningful regard to these principles.

Consequently, *McGirt*'s importance extends far beyond the validity of Jimcy McGirt's state conviction, the territorial boundaries of the Creek Nation Reservation, or the reservation status of other tribes if the Court continues to apply this reasoning. *McGirt* represents a clear assertion of the Court's role in such cases: to determine a reservation is disestablished only if Congress has explicitly done so and recognize the retained inherent sovereignty of tribes. Perhaps more importantly, the majority opinion explained what the Court's role is not: to decide matters of tribal sovereignty and rights based on the practical implications for non-Indian interests, poorly understood history, or the justices' subjective conceptions of what "should be." The *McGirt* opinion signals the Court's return to the faithful adherence to fundamental principles of federal Indian law.

The subjectivist nature of the Court's Indian law jurisprudence is particularly threatening as tribal sovereignty and rights hang in the balance. The ongoing equal protection challenge to the ICWA represents such a threat, putting all laws designed to promote tribal sovereignty at risk for invalidation based on classifications of Indian status. The Court should follow the path it returned to in *McGirt* as it confronts cases implicating tribal sovereignty and rights in the future, such as the current challenges to the ICWA. When the Court reviews such a challenge, it should apply the fundamental principles of federal Indian law as it did in *McGirt*, and hold that Indian status is a political classification subject to a rational basis standard of review. Even if the Court erroneously deems Indian status a racial classification, it should find that the ICWA is constitutional because it is narrowly tailored to a compelling governmental interest inherent in the federal government's trust relationship and obligation to tribes and within its plenary authority over Indian affairs.