

# Dissenting into the Future: The Supreme Court’s Dissent in *McGirt*, UNDRIP, and the Future of Indigenous Land Rights

## INTRODUCTION

In *McGirt v. Oklahoma*, parties disputed sovereignty over a criminal defendant for a crime committed on contested native lands. In a groundbreaking decision, the Supreme Court held that large parts of Oklahoma fell under tribal criminal jurisdiction previously unrecognized.<sup>1</sup> The ruling was widely celebrated amid growing support for indigenous land rights.<sup>2</sup> Over the last few decades, the United States has seen a rebirth of the Land Back Movement, which pushes for the restoration of native land rights to tribes.<sup>3</sup> Additionally, indigenous leaders have been pushing for the ratification of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which defines the rights of indigenous people to land ownership and cultural heritage.<sup>4</sup> The effects *McGirt* will have on tribal land rights nationally remains unclear. While the majority’s holding outlines this case as a specific, isolated occurrence, the Roberts dissent claims

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1. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2469–72 (2020). This In Brief was written over the course of 2021 and finalized in early October of that year. Since then, courts have acted to define *McGirt*, and the scope of the precedent set. These conversations are not included in the in Brief, as they occurred post publication. Importantly, while not all included here, the evolving case law around *McGirt* displays an ongoing discussion of the future of this case, and its role in the Indigenous Rights movement, discussed below.

2. The Supreme Court uses the phrase “Indian” throughout *McGirt*. This In Brief, however, uses the terms “Indigenous” and “Native” people for generalized statements, and specific tribe names when possible. This term “Indian” originates from colonial roots, and is a misnomer for the country of India where Christopher Columbus thought he had landed. See Dacoda McDowell-Wahpekeche, *Which is Correct? Native American, American Indian or Indigenous*, OKLAHOMAN, <https://eu.oklahoman.com/story/special/2021/04/22/what-do-native-people-prefer-called/4831284001/> (last visited Sept. 10, 2021).

3. For more on the Land Back Movement, see *#LandBack Is Climate Justice*, LAKOTA PEOPLE’S L. PROJECT (Aug. 14, 2020), <https://lakotalaw.org/news/2020-08-14/land-back-climate-justice> (noting that “[o]n July 9, 2020, the Supreme Court ruled that 3 million acres of land, nearly half of Oklahoma, is Native American land.”).

4. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, at Art. 26 (Sept. 13, 2007) (“Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”).

such a precedent could be widely used—and misused—in future cases.<sup>5</sup> This In Brief compares the fears of the Roberts dissent in *McGirt* against the realities of land rights for indigenous people. Ultimately, it concludes that while *McGirt* may advance native land rights of the Muscogee Tribe, a larger human rights framework is needed to meet the expectations of tribal land return the Roberts dissent puts forth.

## I. BACKGROUND

### A. History of *McGirt*, the Muscogee, and the Five Tribes

Prior to the establishment of Oklahoma's statehood in 1907, the land was the government mandated home of the Cherokee, Muscogee (Creek), Seminole, Chickasaw, and Choctaw Nations, often referred to as the "Five Tribes."<sup>6</sup> These Tribes had previously been removed from their ancestral homelands in Alabama, Mississippi, Georgia, Florida, and more, as settler and federal government interests in the lands grew.<sup>7</sup> President Andrew Jackson, with the authority of the congressional Indian Removal Act of 1830, incentivized forfeiture of tribal homelands through the promise of sovereignty on lands west of the Mississippi.<sup>8</sup> Ultimately, through "a combination of bribery, trickery, and intimidation the Federal agents induced all five tribes . . . to cede the remainder of their Eastern lands."<sup>9</sup> Treaties were subsequently formed between the U.S. government and the individual tribes guaranteeing sovereignty and rights to the

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5. Ronald Mann, *Opinion Analysis Justices Toe Hard Line Affirming Reservation Status for Eastern Oklahoma*, SCOTUSBLOG (July 9, 2020, 7:15 PM), <https://www.scotusblog.com/2020/07/opinion-analysis-justices-toe-hard-line-in-affirming-reservation-status-for-eastern-oklahoma/>; Julian Brave NoiseCat, *The McGirt Case Is a Historic Win for Tribes*, ATLANTIC (July 12, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/McGirt-case-historic-win-tribes/614071/>.

6. These tribes were referred to historically as the "five civilized tribes." See *McGirt*, 140 S. Ct. at 2499 (citing to F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 4.07(1)(a), pp. 289–90 (N. Newton ed. 2012)); see also Andrew K. Frank, *Five Civilized Tribes*, ENCYCLOPEDIA OKLA. HIST. AND CULTURE, <https://www.okhistory.org/publications/enc/entry.php?entry=FI011> ("Although these Indian tribes had various cultural, political, and economic connections before removal in the 1820s and 1830s, the phrase was most widely used in Indian Territory and Oklahoma. . . . Americans, and sometimes American Indians, called the five Southeastern nations 'civilized' because they appeared to be assimilating to Anglo-American norms."). Twenty-first century groupings of these individual tribes refer to them as the "Five Tribes" instead. *Five Tribes*, ENCYCLOPEDIA OKLA. HIST. AND CULTURE (Jan. 24, 2018), <https://www.okhistory.org/publications/enc/entry?entry=FI015>.

7. See ANGIE DEBO, *AND STILL THE WATER RUNS: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES* 4–6 (May 21, 1973) ("The period of forcible removal began when Andrew Jackson became President in 1829 . . . Jackson began to negotiate with the Indians under authority of the Indian Removal Act, he pointed to the inability of the Federal Government to prevent [] extension of state sovereignty, and held out a guarantee of perpetual autonomy in the West as the strongest incentive to emigration."); for more on the history of indigenous removal from their native lands in the United States, see JOHN P. BOWES, *LAND TOO GOOD FOR INDIANS: NORTHERN INDIAN REMOVAL* 5, 282 (Univ. of Oklahoma Press, May 10, 2016).

8. See DEBO, *supra* note 7, at 4–6; see generally, Indian Removal Act, Pub. L. 21-148 (1830).

9. See DEBO, *supra* note 7, at 5.

land in modern Oklahoma.<sup>10</sup> These treaties with the Five Tribes were formed separately, but are all similar in text and timeline.<sup>11</sup> The subsequent tribal deportation to the land in Oklahoma was marked by brutality and hardship, now referred to as the “Trail of Tears.”<sup>12</sup>

However, while tribal sovereignty was promised to tribes on this land west of the Mississippi, encroachment on this tribal land led many to question whether land reservations still existed. Since the Oklahoma Enabling Act of 1906, which established Oklahoma as a state and sought to combine native and non-native territories under state authority,<sup>13</sup> larger swaths of indigenous land were taken by the Oklahoma state government and by non-tribal citizens. As tribal ownership of the land decreased, many believed the reservations of the Five Tribes no longer existed or did not exist in their former capacity outlined in their Treaties.<sup>14</sup> Some scholars, however, argue that the reservations ceased to exist.<sup>15</sup>

Jimcy McGirt, a member of the Seminole Nation, was tried and convicted in Oklahoma state court for sex crimes against a minor in 1997.<sup>16</sup> These crimes occurred on what was originally Muscogee tribal land, covered under the 1832 Treaty with the Creek Nation.<sup>17</sup> Importantly, the case was not adjudicated in tribal courts, as the state believed the reservation no longer existed.<sup>18</sup> However, in 2017, the Tenth Circuit found tribal jurisdiction in a similar case, *Murphy v. Royal*, under the interpretation that the treaties between the U.S. government and the Oklahoma Five Tribes had never been formally disestablished, creating a new

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Congress established a reservation for the Creek Nation. An 1833 Treaty fixed borders for a ‘permanent home to the whole Creek Nation of Indians,’ . . . and promised that the United States would ‘grant a patent, in fee simple, to the Creek nation of Indians for the [assigned] land’ to continue ‘so long as they shall exist as a nation, and continue to occupy the country hereby assigned to them.’

*McGirt*, 140 S. Ct. at 2452 (citing to Treaty with the Creeks, Feb. 14, 1833, 7 Stat. 418, 419).

11. See generally Treaty with the Choctaw, Choctaw-U.S., Sept. 27, 1830, 7 Stat. 333; Treaty with the Creeks, Creek-U.S., Art. 14, Mar. 24, 1832, 7 Stat. 366; Treaty with the Chickasaw, Chickasaw-U.S., Art. 13, May 24, 1834, 7 Stat. 450; Treaty with the Cherokee, Cherokee-U.S., Dec. 29, 1835, 7 Stat. 478; Treaty with the Seminole, Seminole-U.S., Mar. 28, 1833, at 424, 7 Stat. 423, 424.

12. See generally CHARLES RIVER EDITORS, THE TRAIL OF TEARS: THE FORCED REMOVAL OF THE FIVE CIVILIZED TRIBES (Aug. 15, 2013).

13. See Albert Bender, *The Lost State of Sequoyah The Five Tribes’ Fight Against Oklahoma Statehood*, PEOPLE’S WORLD (Aug. 24, 2020, 11:53 AM), <https://www.peoplesworld.org/article/the-lost-state-of-sequoyah-the-five-tribes-fight-against-oklahoma-statehood/>.

14. *Id.*

15. *Id.* (“Congress, in egregious violation of sacred treaties—the law of the land, mandated March 4, 1906, as the date for the dissolution of tribal governments and Indigenous communal lands in Indian Territory. Congress sought to combine Oklahoma Territory and Indian Territory into one state, Oklahoma, which would be white dominated and controlled.”)

16. See *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2454 (2020); see also U.S. Attorney’s Office Eastern District of Oklahoma, *Jimcy McGirt Found Guilty of Aggravated Sexual Abuse, Abusive Sexual Contact in Indian Country*, DEP’T OF JUSTICE (Nov. 6, 2020), <https://www.justice.gov/usao-edok/pr/jimcy-mcgirt-found-guilty-aggravated-sexual-abuse-abusive-sexual-contact-indian-country> (discussing crimes that McGirt was found guilty of both prior to, and after, the Supreme Court ruling on July 9, 2020).

17. Treaty with the Creeks, supra note 11; see *McGirt*, 140 S. Ct. at 2460.

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

argument for *McGirt*.<sup>19</sup> He filed a writ of habeas corpus, claiming the state court did not have jurisdiction for his previous conviction, as the crime occurred on tribal land.<sup>20</sup> Simply put, if the Muscogee Nation still had an existing treaty with the United States, the state could not prosecute crimes committed by tribal citizens on tribal land.<sup>21</sup> *McGirt* challenged the state court's jurisdiction over him, since the crime occurred on what was protected Muscogee land under their treaty.<sup>22</sup> In 2020, the Supreme Court granted certiorari to both *Murphy* and *McGirt*, intending to address the sovereignty and land rights of the Muscogee Nation.<sup>23</sup>

### B. The Holding

On July 9, 2020, the Supreme Court decided in favor of *McGirt*.<sup>24</sup> The holding, written by Justice Gorsuch,<sup>25</sup> stated, in part, that *McGirt*'s jurisdictional challenge was correct because the federal government had never formally removed the land rights of the Muscogee Nation, and, therefore, the Tribe still had jurisdictional rights over its land.<sup>26</sup> Gorsuch stated that disestablishment of a reservation is a power only Congress can exercise, and that encroachment does not remove the Muscogee Nation of its reservation rights. Thus, the land remains within the Muscogee Nation, and so does criminal jurisdiction.<sup>27</sup> As Justice Gorsuch wrote, "[t]oday 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."<sup>28</sup>

Notably, this decision made waves in the media and in activist spaces, with many celebrating *McGirt* as a victory for indigenous sovereignty. However, while the holding specifies *McGirt* is only applicable to criminal jurisdiction for the Muscogee Treaty in question, some outlets declared that "half of Oklahoma is owned by Indian Tribes."<sup>29</sup> This holding also resolved, *per curiam*, the Tenth

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19. *Id.*; see generally *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017). *Murphy* was a similar case to *McGirt*, where Patrick Murphy was convicted of murder, but challenged the jurisdiction of the Oklahoma state court. See *id.*

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

21. *Id.*; see also Treaty with the Choctaw, *supra* note 11; Treaty with the Creeks, *supra* note 11; Treaty with the Chickasaw, *supra* note 11; Treaty with the Cherokee, *supra* note 11; Treaty with the Seminole, *supra* note 11.

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

23. *No. 18-9526 McGirt v. Oklahoma Proceedings and Order*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-9526.html> (Dec. 13, 2019 – "Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED."); see also *McGirt*, 140 S. Ct. at 2455.

24. *McGirt*, 140 S. Ct. at 2458.

25. *Id.* at 2494. Justice Gorsuch was joined by Justices Bader Ginsburg, Breyer, Sotomayor, and Kagan. See *id.* at 2458, 2482, 2502.

26. *Id.* at 2494.

27. *Id.*

28. See *id.* at 2459.

29. See, e.g., Tucker Higgins & Dan Mangan, *Supreme Court Says Eastern Half of Oklahoma is Native American Land*, CNBC (July 9, 2020, 2:12 PM), <https://www.cnbc.com/2020/07/09/supreme->

Circuit's *Murphy* case, which could not reach a majority in the Supreme Court due to Justice Gorsuch's recusal on the case.<sup>30</sup> Instead, the precedent set by *McGirt* subsequently resolved *Murphy*, closing both cases and determining that Muscogee land was still Muscogee land.

### C. The Roberts Dissent's View of *McGirt v. Oklahoma*

Chief Justice Roberts filed a dissenting opinion, joined by Justices Alito, Kavanaugh, and, in part, Thomas.<sup>31</sup> Roberts wrote that express congressional authority was not needed to revoke land rights, but that implied action, such as the forming of Oklahoma statehood, was enough.<sup>32</sup> The Roberts dissent believed that returning jurisdiction to the Muscogee people "creates significant uncertainty for the State's continuing authority over any area that touches Indian affairs, ranging from zoning and taxation to family and environmental law."<sup>33</sup>

The majority and the Roberts dissent disagreed about whether a treaty establishing a reservation must be directly revoked by Congress or whether the treaty can be revoked through invasive state and federal action.<sup>34</sup> The Roberts dissent argued that the Five Tribes of Oklahoma, including the Muscogee Tribe, lost their reservations through a history of land grabs.<sup>35</sup>

The Roberts dissent, outside of its focus on the congressional role in dissolving treaties, discussed the implications of *McGirt* if expanded to a national stage.<sup>36</sup> Interestingly, the Roberts dissent implied that the holding of this case set powerful precedent for the Land Back Movement.<sup>37</sup> Specifically, Roberts argued that the holding was "drastic precisely because [it] depart[ed] from more than a century [of] settled understanding," potentially establishing new common law in favor of native land rights.<sup>38</sup> As Roberts wrote,

[i]n addition to undermining state authority, reservation status adds an additional, complicated layer of governance over the massive territory here,

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court-says-eastern-half-of-oklahoma-is-native-american-land.html; Laurel Wamsley, *Supreme Court Rules That About Half Of Oklahoma Is Native American Land*, NPR (July 9, 2020, 7:17 PM), <https://www.npr.org/2020/07/09/889562040/supreme-court-rules-that-about-half-of-oklahoma-is-indian-land?t=1631369413147>; Lawrence Hurley, *Supreme Court Deems Half of Oklahoma a Native American Reservation*, REUTERS (July 9, 2020, 3:10 PM), <https://www.reuters.com/article/us-usa-court-oklahoma-idUSKBN24A268>; but see Matthew L.M. Fletcher, *News Media Writers Please Stop Saying "Half" of Oklahoma is "Indian Lands" or "Indian Territory" – It's Not (Yet)*, TURTLE TALK (Aug. 5, 2020), <https://turtletalk.blog/2020/08/05/news-media-writers-please-stop-saying-half-of-oklahoma-is-indian-lands-or-indian-territory-its-not-yet/>.

30. *McGirt*, 140 S. Ct. at 2452; *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (previously *Murphy v. Royal*, discussed *supra* Subpart II.B.).

31. *McGirt*, 140 S. Ct. at 2482 (Roberts, C.J., dissenting, Thomas, J., joining only in part). Justice Thomas also filed an additional dissenting opinion. *Id.* at 2502 (Thomas, J., dissenting).

32. *Id.* at 2487–93 (Roberts, C.J., dissenting).

33. *Id.* at 2482.

34. *See generally id.*

35. *Id.* at 2491, 2498.

36. *Id.* at 2500–02.

37. *See id.* at 2501–02.

38. *Id.* at 2502.

conferring on tribal government power over numerous areas of life—including powers over non-Indian citizens and businesses . . . . Recognizing the significant ‘potential for cost and conflict’ caused by its decision, the Court insists any problems can be ameliorated if the citizens of Oklahoma just keep up the ‘spirit’ of cooperation behind existing intergovernmental agreements between Oklahoma and the Five Tribes. But those agreements are small potatoes compared to what will be necessary to address the disruption inflicted by today’s decision.<sup>39</sup>

*McGirt*, the Roberts dissent implied, is the start of a major move in the wrong direction, recognizing native land rights previously ignored.<sup>40</sup>

## II. ANALYSIS

The reality of the *McGirt* holding is that it can’t simply be applied to other native land disputes.<sup>41</sup> While the majority established that implied dissolution of reservation land is not permissible, the holding was specific to the Muscogee (Creek) Nation. *McGirt* stated clearly, “[e]ach tribe’s treaties must be considered on their own terms, and the only question before us concerns the Creek.”<sup>42</sup> However, while the holding laid out the limitations of *McGirt*, the Roberts dissent expressed fear of *McGirt*’s wide implications. This Part examines (1) the limitations of expanding *McGirt* to other tribal lands, (2) the potential benefits of *McGirt* for expanded land rights, and (3) the similarities between *McGirt* and UNDRIP.

### A. Expanding *McGirt* to Other Tribal Lands

The holding of *McGirt*, while monumental, is directed at the Muscogee Tribe. The majority recognized the Roberts dissent’s concern but was not convinced of the expandable nature of *McGirt*.<sup>43</sup> As the Court narrated,

[i]f we dared to recognize that the Creek Reservation was never disestablished, Oklahoma and [the Roberts] dissent warn, our holding might be used by other tribes to vindicate similar treaty promises. Ultimately, Oklahoma fears that perhaps as much as half its land and roughly 1.8 million of its residents could wind up within Indian country.<sup>44</sup>

For many tribes, the holding in *McGirt* comes too little too late. Scholars have pointed out that a similar treaty to that of the Muscogee Tribe existed between the Lakota Sioux Tribe and the federal government over the heavily

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39. *Id.* at 2502 (Roberts, C.J., dissenting) (citation omitted).

40. *Id.*

41. For more on textualist application of land rights, see Matthew L.M. Fletcher, *Muskrat Textualism*, NW. U. L. REV. (forthcoming 2022), <https://ssrn.com/abstract=3767096>.

42. *McGirt*, 140 S. Ct. at 2479.

43. *Id.* at 2478–79.

44. *Id.*

disputed Black Hills and Mount Rushmore.<sup>45</sup> The Supreme Court has already reviewed this dispute, upholding a \$1.3 billion-dollar (uncashed and unrequested) settlement rather than return the land.<sup>46</sup> The same can be seen with the Southern Paiute Tribe, whose claims to the north rim of the Grand Canyon were met with monetary relief.<sup>47</sup> Since these cases have already had their time in court, *McGirt* does not help these Tribes return to their ancestral land. Their claims have been “resolved.”<sup>48</sup> Moreover, while similar treaties exist between the other Five Tribes of Oklahoma (the Cherokee, Choctaw, Chickasaw, and Seminole), *McGirt* does not automatically recognize their treaty rights either.<sup>49</sup> Instead, since *McGirt*, lower courts have debated the criminal jurisdiction rights of these tribes, with some courts finding tribal land rights, while others finding the holding was specific to the Muscogee Tribe.<sup>50</sup>

Instead, *McGirt* will help tribes in the United States who have existing treaties that have not been honored support their claims for land ownership.<sup>51</sup> For example, post-*McGirt*, the Seventh Circuit ruled that the Oneida Nation in Wisconsin retained its land rights based on the precedent the Supreme Court set.<sup>52</sup> In Rogers County, Oklahoma, a judge dismissed over 100 criminal cases that occurred on previously unrecognized Cherokee land.<sup>53</sup> In both instances, the courts used *McGirt* and the language of treaty dissolution to support Native land rights claims.<sup>54</sup> However, while *McGirt* sets precedent saying only Congress can disestablish treaties, it does not automatically apply to all Native lands. Tribes still have to litigate land dispute claims and hope for a friendly Supreme Court that upholds *McGirt*'s ruling. Notably, with the passing of Justice Ruth Bader Ginsberg in 2020, should the Supreme Court rehear this legal issue, the Court is not likely to be friendly to native land rights. So, what is Roberts so concerned about if *McGirt* does not automatically apply to other tribal lands? Arguably, the

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45. See Leonard Little Finger, *We Walk on Our Ancestors The Sacredness of the Black Hills*, 38 CULTURAL SURVIVAL Q. MAG. 14 (2014), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/we-walk-our-ancestors-sacredness-black-hills>.

46. Tom LeGro, *Why the Sioux Are Refusing \$1.3 Billion*, PBS (Aug. 24, 2011, 3:57 PM), [https://www.pbs.org/newshour/arts/north\\_america-july-dec11-blackhills\\_08-23](https://www.pbs.org/newshour/arts/north_america-july-dec11-blackhills_08-23).

47. See *Southern Paiute Traditional Lands*, KAIBAB BAND OF PAIUTE INDIANS, <https://www.kaibabpaiute-nsn.gov/spc/SPCp2.html> (last visited July 25, 2021); see also Alleen Brown, *Half of Oklahoma Is “Indian Country.” What If All Native Treaties Were Upheld?*, INTERCEPT (July 17, 2020, 6:00 AM), <https://theintercept.com/2020/07/17/McGirt-v-oklahoma-indian-native-treaties/>.

48. See Brown, *supra* note 47.

49. *Questions Remain about State Jurisdiction Over Crimes in Post- McGirt Oklahoma*, ABA (Jan. 25, 2021), [https://www.americanbar.org/groups/committees/death\\_penalty\\_representation/project\\_press/2020/year-end-2020/jurisdictional-issues-in-post-McGirt-oklahoma/](https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/year-end-2020/jurisdictional-issues-in-post-McGirt-oklahoma/).

50. *Id.*

51. NoiseCat, *supra* note 5.

52. See *Oneida Nation v. Vill. of Hobart*, 968 F.3d 664, 684–85 (7th Cir. 2020).

53. Curtis Killman, *Rogers County Judge Dismisses Over 100 Criminal Cases, Citing McGirt Ruling*, TULSA WORLD (Mar. 4, 2021), [https://tulsaworld.com/news/local/crime-and-courts/rogers-county-judge-dismisses-over-100-criminal-cases-citing-McGirt-ruling/article\\_94116330-7c58-11eb-b3a7-0f33272e2bc0.html](https://tulsaworld.com/news/local/crime-and-courts/rogers-county-judge-dismisses-over-100-criminal-cases-citing-McGirt-ruling/article_94116330-7c58-11eb-b3a7-0f33272e2bc0.html).

54. See *id.*; *Oneida Nation*, 968 F.3d at 664.

Roberts dissent saw the potential implications of this holding for both Oklahoma land rights and the broader push for indigenous rights the precedent would support.

*B. Potential Benefits of McGirt for Environmental Protections*

While the holding in *McGirt* directly answered the debate around congressional disestablishment, it created more questions in the process. One of these is the implication of recognizing Muscogee jurisdiction when it comes to environmental law.<sup>55</sup> As mentioned earlier, the majority was relatively silent on the larger impacts of *McGirt*, leading many to believe the case is limited to only criminal jurisdiction.<sup>56</sup> The Roberts dissent, however, indicated that jurisdictional recognition of Muscogee land may in fact extend farther than just criminal jurisdiction, such as giving tribes general jurisdiction over their land, including jurisdiction in cases of environmental law.<sup>57</sup>

If this is true, this decision opens the door to greater environmental protections in Oklahoma simply by allowing indigenous tribes to now bring federal claims for damage on their ancestral land. *McGirt* does not change land ownership in Oklahoma. It does not change our understanding of land ownership for tribes across the United States. It does not confirm “Oklahoma[’s] fear[] that perhaps as much as half its land and roughly 1.8 million of its residents could wind up within Indian country.”<sup>58</sup>

However, for the Muscogee Tribe, if general jurisdiction is the next step, the *McGirt* case restores some of the rights to natural resources previously denied. As the Environmental Protection Agency (EPA) explains, this “expressly provide[s] the authority for Indian tribes to play essentially the same role in Indian country that states do within state lands.”<sup>59</sup> For tribes hoping to bring claims under the Clean Water Act, the Clean Air Act, the Toxic Substance Control Act, and the Safe Drinking Water Act, this distinction could allow claims to be brought under tribal law.<sup>60</sup>

While this may not seem on its face like a massive change, this recognition of tribal authority allows for much greater environmental protections in potentially more friendly federal courts, rather than claims being brought in

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55. Micah Goodwin, *Does McGirt Cede Oklahoma Waters to Native American Tribes?*, JDSUPRA (July 21, 2020), <https://www.jdsupra.com/legalnews/does-mcGirt-cede-oklahoma-waters-to-13937/>.

56. *Id.*; see also Kimberly Chen, *Toward Tribal Sovereignty: Environmental Regulation in Oklahoma after McGirt*, COLUM. L. REV. FORUM, <https://www.columbialawreview.org/content/toward-tribal-sovereignty-environmental-regulation-in-oklahoma-after-mcGirt/>.

57. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020) (Roberts, C.J., dissenting). (“On top of that, the Court has profoundly destabilized the governance of eastern Oklahoma. The decision today creates significant uncertainty for the State’s continuing authority over any area that touches Indian affairs, ranging from zoning and taxation to family and environmental law. None of this is warranted.”).

58. *Id.* at 2479 (majority opinion).

59. See *Tribal Assumption of Federal Laws – Treatment as a State (TAS)*, EPA, <https://www.epa.gov/tribal/tribal-assumption-federal-laws-treatment-state-tas> (last visited July 25, 2021).

60. *Id.*



Oklahoma state courts, which have a history of supporting large oil producers over environmental regulation.<sup>61</sup> The implications of this jurisdictional change mean the Muscogee Tribe can establish its own regulations protecting the environment, its cultural properties, and its historic lands.<sup>62</sup> In fact, this change was so imminent and concerning that Governor Kevin Stitt of Oklahoma wrote to EPA Administrator Andrew Wheeler immediately after *McGirt*, who granted approval to administer Oklahoma's environmental programs in "Indian country" for the foreseeable future.<sup>63</sup> This put any Muscogee environmental jurisdiction claims temporarily on hold, but in the process, implied that a valid claim to jurisdiction may exist for the Tribe.<sup>64</sup>

While *McGirt* may not apply to other tribal lands, it expands the rights of the Muscogee, recognizing tribal land and the benefits that comes with it. When the Roberts dissent highlighted the expansive nature of the decision, it was in part referencing the return of these rights, beyond just criminal jurisdiction. Moreover, the Roberts dissent may have seen *McGirt* for what it is: a symbol of changing times and an indication of the greater push for indigenous land rights that is still to come.

### C. Land Back and UNDRIP

For many, the discussion around *McGirt* ultimately leads back to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). UNDRIP is an international convention introduced to the United Nations on September 13, 2007 after decades of debate.<sup>65</sup> Its goal is to "constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."<sup>66</sup> While the Supreme Court cannot sign onto or ratify international declarations, the fact that *McGirt* echoes the notions of tribal sovereignty in UNDRIP strengthens the arguments for UNDRIP's ultimate ratification in the United States. Many indigenous land rights activists see *McGirt* as a first step but not an answer to reclaiming Native land. The Berkley Center for Religion, Peace and World Affairs, for example, highlighted that while *McGirt* was a

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61. For more on Oklahoma's mixed environmental history, see Valerie Volcovici, *Tribes Slam EPA Move to Give Oklahoma Control of Environmental Rules*, REUTERS (Oct. 7, 2020, 6:04 AM), <https://www.reuters.com/article/us-usa-tribes-oklahoma/tribes-slam-epa-move-to-give-oklahoma-control-of-environmental-rules-idUSKBN26S1OS>.

62. See *Implications for the Energy Industry in Light of the U.S. Supreme Court Decision in McGirt v. Oklahoma*, KIRKLAND & ELLIS (Aug. 13, 2020), <https://www.kirkland.com/publications/blog-post/2020/08/supreme-court-McGirt-decision> ("The Creek Nation might be able to impose certain Creek Nation-specific regulations, including environmental (to the extent not preempted by federal law), employment and health regulations, on non-Indian activities.").

63. This process is too lengthy to fit in this In Brief, but utilizes the Safe, Accountable, Flexible, Efficient Transportation Equity Act to keep the environmental structure the same as it was prior to *McGirt*. See Chen, *supra* note 56.

64. *Id.*

65. See G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, at Art. 26 (Sept. 13, 2007).

66. *Id.* at Art. 43.

landmark decision for Oklahoma, “[r]eal progress will happen when decision-making authority over what constitutes the sacred and how best to approach it is restored to Native peoples. This will not be achieved through forms of piecemeal sovereignty.”<sup>67</sup> Instead, this will be achieved when the United States establishes a body of law that protects and restores indigenous rights.

Like *McGirt*’s holding, the Declaration states that “[i]ndigenous peoples have the right to the lands, territories, and resources which they have traditionally owned, occupied or otherwise used or acquired.”<sup>68</sup> It commands signatory states to respect and observe previous treaties they made, including the right to land.<sup>69</sup> The Court in *McGirt* held that treaties must be respected unless they have been disestablished by Congress.<sup>70</sup> This echoes the sentiments of UNDRIP, which does not override existing treaties but commands cooperation.<sup>71</sup> As of 2020, only two nations have outstanding votes against UNDRIP, the United States and Canada, with both nations announcing plans to revisit their position.<sup>72</sup> If reconsidered, the push for indigenous land recognition could result in the United States’ ratification of UNDRIP and the instilling of land rights outlined in its text.

While the Roberts dissent never mentions international law or UNDRIP, if the Supreme Court holds that respecting treaty rights is the law of the land, it would be hard for Congress to disavow that aspect of UNDRIP. If adopted, UNDRIP would effectively apply the holding of *McGirt* to all tribal treaty disputes, including past disputes solved by monetary claims, to protect tribal sovereignty.

It is an impossible argument to state that the intention of the Court in *McGirt* was to adopt coveted international language, but one could argue this offers part of an explanation for the Roberts dissent’s extreme hesitance. *McGirt* does not expand indigenous land rights past general jurisdiction, yet maybe the Roberts dissent saw where this holding was going. By stating that Congress must explicitly disavow a treaty for a tribe to lose its reservation, the Court in *McGirt* established a precedent akin to the language of UNDRIP, leaving activists with hope and reason to push further for the ratification of UNDRIP in the upcoming years.

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67. Greg Johnson, *Religious Freedom, Direct Action, and Rethinking Foundations*, BERKLEY CTR. FOR RELIGION, PEACE & WORLD AFFS.: BERKLEY FORUM (Oct. 21, 2020), <https://berkeleycenter.georgetown.edu/responses/religious-freedom-direct-action-and-rethinking-foundations>.

68. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 65, at Art. 26.

69. *Id.*

70. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020).

71. See United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 65, at Art. 37; see also OFFICIAL RECORDS OF THE GENERAL ASSEMBLY, Sixty-first Session, Supplement No. 53 (A/61/53), part one, chap. II, sect. A.

72. See *UN Declaration on the Rights of Indigenous Peoples*, INDIGENOUS FOUNDS., [https://indigenousfoundations.arts.ubc.ca/un\\_declaration\\_on\\_the\\_rights\\_of\\_indigenous\\_peoples/#:~:text=permission%20from%20UNPFII,The%20United%20Nations%20Declaration%20on%20the%20Rights%20of%20Indigenous%20Peoples,of%20the%20indigenous%20peoples%20of](https://indigenousfoundations.arts.ubc.ca/un_declaration_on_the_rights_of_indigenous_peoples/#:~:text=permission%20from%20UNPFII,The%20United%20Nations%20Declaration%20on%20the%20Rights%20of%20Indigenous%20Peoples,of%20the%20indigenous%20peoples%20of) (last visited July 26, 2021).

## CONCLUSION

On its face, *McGirt* seems like an isolated case specific to Oklahoma, and in many ways it is. It revolves around criminal jurisdiction, but by recognizing the treaty rights of the Muscogee Tribe, it also affects the rights of other tribes to jurisdiction, and potentially even in federal environmental claims. This alone is a positive step for environmental land rights and justice. However, the Court's language adopts the very principals of UNDRIP that have made it contested in the past. The Roberts dissent in *McGirt* implies strongly that the holding is opening a theoretical Pandora's box of issues by granting tribal sovereignty to the Muscogee Tribe. This isn't based solely in federal law but offers a glimpse into what the Roberts dissent fears as potential consequences of the case. *McGirt* is an isolated case but creates a strong argument in favor of greater land rights and land returns to tribes, both on a case-by-case basis and through the eventual adoption of UNDRIP.

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