

MUSKRAT TEXTUALISM

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ABSTRACT—The Supreme Court decision *McGirt v. Oklahoma*, confirming the boundaries of the Creek Reservation in Oklahoma, was a truly rare case in which the Court turned back arguments by federal and state governments in favor of American Indian and tribal interests. For more than a century, Oklahomans had assumed that the reservation had been terminated and acted accordingly. But only Congress can terminate an Indian reservation, and it simply had never done so in the case of the Creek Reservation. Both the majority and dissenting opinions attempted to claim the mantle of textualism, but their respective analyses led to polar opposite outcomes.

Until *McGirt*, a “faint-hearted” form of textualism had dominated the Court’s federal Indian law jurisprudence. This methodology enables the Court to seek outcomes consistent with the Justices’ views on how Indian law “ought to be.” This Article labels this thinking Canary Textualism, named after the dominant metaphor used for decades to describe Indian law, the miner’s canary—a caged bird used to warn of toxic gases in a mine. Canary textualists treat Indians and tribes as powerless and passive subjects of federal law and policy dictated by Congress and the Supreme Court. Canary Textualism relies on confusion in the doctrinal landscape and fear of tribal powers to justify departures from settled law. The 1978 decision *Oliphant v. Suquamish Indian Tribe*, in which the Supreme Court stripped Indian tribes of critical law enforcement powers by judicial fiat, is the prototypical Canary Textualism case. *Oliphant*’s hallmark is the Court’s legal acknowledgment that Indian tribes are dependent on the federal government in light of centuries of precedents that presumed the racial inferiority of Indian people. This allowed the Court to quietly assume that tribal governments are inferior as well.

Scholars long have decried the Court’s Canary Textualism but have rarely offered a better theory. This Article attempts to fill that gap and to provide more certainty in federal Indian law textualist doctrine that will help preclude Canary textualist activism. A far better metaphor than the miner’s canary is that of the muskrat—the hero of the Anishinaabe origin story of the great flood, a lowly, humble animal that nevertheless took courageous and thoughtful action to save creation. Indians and tribes are no longer caged birds. Tribal governments are active participants in reservation governance. They are innovative and forward-thinking. Luckily, the *McGirt* decision

exemplifies a new form of textualism, Muskrat Textualism, that acknowledges and respects tribal actions and advancement. Muskrat textualists accept tribal governments as full partners in the American polity. Muskrat textualists accept the relevant interpretative rules that govern federal Indian law where texts are ambiguous and where texts are absent or not controlling. As a result, Muskrat Textualism is also a superior form of textualism more generally, illustrating the proper role of the judiciary in constitutional law and statutory interpretation and ensuring more predictable and just Indian law adjudication.

This Article argues that *McGirt*—and its embrace of Muskrat Textualism—is a sea change in federal Indian law, and rightfully so. If that is the case, then cases like *Oliphant* should be reconsidered and tossed into the dustbin of history.

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INTRODUCTION

McGirt v. Oklahoma,¹ decided at the end of the 2019 Term, is a momentous, paradigm-shifting decision that has already altered the Indian law landscape.² But *McGirt* is also a case that underscores the fault lines in our textualism—both majority and dissent claimed to offer the textualist result but reached strikingly divergent answers. It turns out that Indian law, long considered a “tiny backwater” of constitutional law,³ is an area where textualists duel over which texts matter and why, offering important insights into the defining conflict of the Roberts Court.⁴ Textualism’s focus on the written word presumptively diverts attention away from the impact of race

¹ 140 S. Ct. 2452 (2020).

² See generally *United States–Muscogee (Creek) Nation Treaty — Federal Indian Law — Disestablishment of Indian Reservations — McGirt v. Oklahoma*, 134 HARV. L. REV. 600, 605–09 (2020) (discussing the trend in recent federal Indian law).

³ Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 383 (1993).

⁴ See generally Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, 266, 279–90 (2020) (identifying “important tensions within textualism”).

and ethnicity on judicial processes.⁵ What is missing is a candid assessment of the salient judicial biases that influence textualism. Federal Indian law is a perfect foil to explore the tectonic forces at play in that struggle.

Felix Cohen originally proposed the metaphor of the miner's canary that, for decades, contextualized Indian tribes in the constitutional canon,⁶ and even today is considered "a barometer for the constitutional soul of the United States."⁷ The miner's canary was a caged bird used to detect when the air in the mine became dangerously toxic. A dead or dying canary was a warning to others. In Cohen's time, the miner's canary metaphor was a powerful defense against illiberal forces seeking a "final solution" to the Indian problem.⁸ If Indian tribes in America failed, then other marginalized groups could follow. More recently, Professors Lani Guinier and Gerald Torres employed the miner's canary metaphor more broadly to advocate for "[t]hose who are racially marginalized."⁹

But even for a metaphor as dark as the miner's canary, there is an even darker side. The metaphor presumes that Indian tribes are passive, caged birds waiting for outside forces to decide their fates. Indians and tribes are weak, powerless, and ultimately *inferior* to the forces that could save them, the forces with the power and ability to act that require warning before they

⁵ It is a tenet of critical race theory that textualist (and originalist) judges' methodology is harmful to the interests of racial minorities. *See, e.g.*, Roy L. Brooks, *Brown v. Board of Education Fifty Years Later: A Critical Race Theory Perspective*, 47 HOW. L.J. 581, 588 (2004) ("African Americans have much to fear in Justice Scalia's jurisprudence."). In federal Indian law cases, the late Professor David Getches argued that textualists should "adhere to the foundational Indian law cases and, absent clear textual treatment in congressional legislation, resist the temptation to fill in gaps or introduce the judge's own preferences to redefine the historic political arrangement between tribes and the United States." 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, 301 (2001). But the Supreme Court's textualist precedents (prior to *McGirt*) have made it abundantly clear that they have not done so. *Id.*

⁶ Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953) ("Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith."); *see e.g.*, Steven Paul McSloy, *The "Miner's Canary": A Bird's Eye View of American Indian Law and Its Future*, 37 NEW ENG. L. REV. 733, 733, 738 (2003) (referencing Cohen's discussion of the phrase); Rennard Strickland, *Indian Law and the Miner's Canary: The Signs of Poison Gas*, 39 CLEV. ST. L. REV. 483, 483 (1991) (crediting Cohen with coining the phrase).

⁷ Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1801 (2019).

⁸ *New Rider v. Bd. of Educ. of Indep. Sch. Dist. No. 1, Pawnee Cnty.*, 414 U.S. 1097, 1101 (1973) (Douglas, J., dissenting from the denial of certiorari) (quoting S. REP. NO. 91-501, at 13-14 (1969)).

⁹ LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 11 (2002).

act. At its heart is the trope of the vanishing Indian.¹⁰ “[O]rdinary Americans,” to borrow Justice Samuel Alito’s phrasing,¹¹ often express surprise when they see Indians and tribes do more than merely host powwows and operate casinos.¹² In these observers’ minds, the only likely conflict is whether the end of Indian tribes will be compassionate or ruthless.

As I have argued elsewhere, many people believe and act like Indians and tribes should no longer exist, that they died out in the past, and that their inferiority condemned them (sadly perhaps) to extinction.¹³ Indians almost did vanish, but they did not. One can peruse the cultural stories of Indigenous peoples, including that of my own, the Michigan Anishinaabeg, and see why.¹⁴ Judges too often seek to enforce the role of Indians and tribes as canaries—passive, captive, and weak. These judges employ a kind of textualism that presumes the inferiority of Indians and tribes. The judges assume without evidence that tribal governance is normatively substandard compared to federal, state, and local governance.¹⁵ What tribes *actually* do,

¹⁰ Cf. Kathryn E. Fort, *The Vanishing Indian Returns: Tribes, Popular Originalism, and the Supreme Court*, 57 ST. LOUIS U. L.J. 297, 299 (2013) (“Unpacking what the Court is doing in its American Indian law cases can demonstrate its assumptions about the role of tribes in the United States. And that assumption is that they should no longer exist.”).

¹¹ *Bostock v. Clayton County*, 140 S. Ct. 1731, 1767 (2020) (Alito, J., dissenting).

¹² Cf. Kevin Noble Maillard, *Parental Ratification: Legal Manifestations of Cultural Authenticity in Cross-Racial Adoption*, 28 AM. INDIAN L. REV. 107, 131–39 (2003) (surveying stereotypes about Indians employed by judges in Indian Child Welfare Act cases). See generally ANTON TREUER, EVERYTHING YOU WANTED TO KNOW ABOUT INDIANS BUT WERE AFRAID TO ASK 128–37 (2012) (answering questions typically asked by non-Indians about Indians and tribes).

¹³ MATTHEW L.M. FLETCHER, THE GHOST ROAD: ANISHINAABE RESPONSES TO INDIAN-HATING, at xi–xiv (2020) [hereinafter FLETCHER, THE GHOST ROAD] (arguing that many Americans resent Indians or do not recognize Indian-hating because Indians are now American citizens); cf. *id.* at 34 (“The first policy makers, the Founders, were not even consistent on what their goals were in relation to Indian affairs, with one exception – they wanted Indians gone.”).

¹⁴ See, e.g., *id.* at 73–82 (telling the Anishinaabe story of the defeat of Paul Bunyan by a trickster god named Nanaboozhoo and arguing that a prominent legal philosopher incorrectly assumes Indian people are passive actors with no agency); Jonodev Chaudhuri, *Reflection on McGirt v. Oklahoma*, 134 HARV. L. REV. F. 82, 82–83 (2020) (telling the Muscogee story of Corn Woman and discussing the Court’s opinion in *Johnson v. M’Intosh* falsely portraying Muscogee culture as unable to cultivate and control Indian land).

¹⁵ See, e.g., *Nevada v. Hicks*, 533 U.S. 353, 384–85 (2001) (Souter, J., concurring) (describing tribal laws as “unusually difficult for an outsider to sort out”). The lengthy history of commentators asserting the inferiority of tribal governments, and in particular tribal courts, is exemplified by the work of Professor Samuel J. Brakel, director of the American Bar Foundation’s study of tribal courts in the 1970s. See SAMUEL J. BRAKEL, AMERICAN INDIAN TRIBAL COURTS: THE COSTS OF SEPARATE JUSTICE 103–05 (1978) (arguing for the abandonment of tribal courts); Samuel J. Brakel, *American Indian Tribal Courts: Separate? “Yes,” Equal? “Probably Not,”* 62 A.B.A. J. 1002, 1002–06 (1976) (discussing the inferiority of tribal courts). Brakel’s study arrived at the same time as Professor Getches’s study, which relied upon data rather than anecdotes. Though Getches’s study similarly found weaknesses in tribal courts, the study ultimately encouraged procedural improvements to protect the tribal justice system. See NAT’L AM.

and how Indians *actually* govern themselves and others, is usually irrelevant.¹⁶ This is Canary Textualism.¹⁷

This Article draws upon the *aadizookaan* (sacred stories) of the Anishinaabeg to employ a competing metaphor, the metaphor of the muskrat.¹⁸ The muskrat is the hero of the story of the great flood that destroyed the world, a critical origin story for the Anishinaabeg. While the stronger animals and the trickster god Nanaboozhoo floated on the water, despairing and close to drowning, it was the humble and lowly muskrat that dove the farthest down to reach the ground, bringing back a single pawful of dirt that Nanaboozhoo used to magically recreate the world.¹⁹ Indians know a thing or two about apocalyptic destruction, and the muskrat is the symbol of the humility, courage, and thoughtfulness that guided the Anishinaabeg back from near extinction.²⁰

Many Indians thrive in our modern era, operating governments that often govern more effectively than their non-Indian neighbors.²¹ Indian tribes are active, innovative, and disruptive (in a good way).²² Indian tribes now

INDIAN CT. JUDGES ASS'N, INDIAN COURTS AND THE FUTURE 85–87, 103–09 (Judge Orville N. Olney & David Getches eds., 1978). For a discussion of the historical significance of Getches' report, see Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. COLO. L. REV. 59, 64–70 (2013).

¹⁶ Professor Kathryn Fort put it best when she concluded that the judiciary attempts “to enforce a history of assimilation . . . [b]y focusing on the continued limitation of tribal sovereignty.” Fort, *supra* note 10, at 338.

¹⁷ While Canary Textualism is an original term coined for this Article, criticism of the Court's Indian law jurisprudence has focused on Canary Textualism's hallmarks, including the Court's assumption of the power to determine national Indian affairs policy. See, e.g., David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1582 (1996) (“Indian rights are losing the limited protection they had as the Court forsakes foundation principles and expands the ambit of control over Indian tribes to include not just congressional but also judicial power to redefine and restrict tribal sovereignty.”); Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433, 454 (2005) (noting that in reservation-boundaries cases, “the Court aggrandized a power to act in the absence of clear congressional directives — a dormant plenary power over Indian affairs, if you will”).

¹⁸ One version of the muskrat's role in the Anishinaabe creation story is reproduced in FLETCHER, *THE GHOST ROAD*, *supra* note 13, at 3.

¹⁹ *Id.* For another version of the Anishinaabe creation story, see EDWARD BENTON-BENAI, *THE MISHOMIS BOOK: THE VOICE OF THE OJIBWAY* 29–34 (1979).

²⁰ Perhaps this metaphor falls flat on some level because, as many Anishinaabe people know, the courageous muskrat dies after saving the world. I like to think the muskrat's sacrifice represents the sacrifice my Anishinaabe ancestors made to preserve our culture, language, and lands.

²¹ Matthew L.M. Fletcher, *Indian Tribes Are Governing Well. It's the States that Are Failing*, WASH. MONTHLY (Sept. 30, 2021), <https://washingtonmonthly.com/2021/09/30/indian-tribes-are-governing-well-its-the-states-that-are-failing/> [<https://perma.cc/65RJ-KXWH>].

²² Matthew L.M. Fletcher, *Tribal Disruption and Federalism*, 76 MONT. L. REV. 97, 103 (2015) (“Tribal disruption theory posits that tribal governance initiatives that interfere with state and local governance may generate short-term harms that are abated by long-term comparative advantage.”).

exercise self-determination, engaging in active sovereignty and innovative government.²³ Tribes are leaders in good governance.²⁴ Indian tribes no longer wait around for the federal government to grant them powers, they *earn* their sovereignty.²⁵ The miner's canary metaphor does not describe modern tribes. The struggles of tribes are not warnings to non-Indians; if anything, now the struggles of non-Indians are warnings to tribes. More and more, non-Indian governments turn to Indian tribes for leadership and invention. Professor Phil Frickey could be said to have seen the need for more engaged scholarship on Indian law and policy with his passionate call in the mid-2000s for more practical and pragmatic scholarly work, or what he called "pragmatic instrumentalism,"²⁶ that would describe and analyze the lived experience of tribes.

Like the muskrat, Indian tribes take initiative, make their own choices, and impact the world in positive ways; they are laboratories of democracy.²⁷ A judge acknowledging this reality would adopt an attitude allowing the marketplace of governmental ideas to develop. That often means deferring to acts of Congress or federal regulations that have been enacted or promulgated with tribal interests, while applying the default canons that instruct treaties and statutes designed to benefit tribal interests to be

²³ See Michael L.M. Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 86–87 (2007) [hereinafter Fletcher, *Retiring the "Deadliest Enemies"*]; see also Randall K.Q. Akee, Katherine A. Spilde & Jonathan B. Taylor, *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development*, 29 J. ECON. PERSPECTIVES 185, 186, 196–203 (2015) (describing the impacts of the \$30 billion Indian gaming industry on tribal governments); Wenona T. Singel, *The Institutional Economics of Tribal Labor Relations*, 2008 MICH. ST. L. REV. 487, 498–503 (describing tribal labor laws); CONF. OF W. ATT'YS GEN., AMERICAN INDIAN LAW DESKBOOK, §§ 14:1–:76 (2020 ed.) (surveying numerous tribal–state intergovernmental agreements).

²⁴ See Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1052–55, 1125 (2007) (proposing a theory of good Native governance that is broader than the conventional Western view); see also Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 233 (2014) (emphasizing the development of human rights in Indigenous governance); Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, 49 SAN DIEGO L. REV. 567, 579–85 (2012) (describing tribal self-governance as a means to benefit the community).

²⁵ See Fletcher, *Retiring the "Deadliest Enemies,"* *supra* note 23, at 81–87.

²⁶ Philip P. Frickey, *Address at University of Kansas Conference on Tribal Law and Institutions, Feb. 2, 2008, Tribal Law, Tribal Context, and the Federal Courts*, 18 KAN. J.L. & PUB. POL'Y 24, 28–32 (2008); see also Matthew L.M. Fletcher, *American Indian Legal Scholarship and the Courts: Heeding Frickey's Call*, 4 CALIF. L. REV. CIR. 1, 7–11 (2013) (summarizing Professor Frickey's appeal for a new type of Indian law scholarship grounded in the realities of Indian Country).

²⁷ See, e.g., Wenona T. Singel, *The First Federalists*, 62 DRAKE L. REV. 775, 830–44 (2014) (describing the tribal legislative process and its advantages); Elizabeth Ann Kronk Warner, *Tribes as Innovative Environmental "Laboratories,"* 86 U. COLO. L. REV. 789, 831–46 (2015) (arguing that tribal governments are ideal laboratories of environmental law).

interpreted in light of that purpose.²⁸ And when no federal text controls, a judge would adopt a wait-and-see approach and would apply default rules—such as the clear statement rules—which limits the judiciary’s preferences.²⁹ This approach is Muskrat Textualism. As the following discussion will show, Muskrat Textualism is normatively superior in every way to Canary Textualism.

Muskrat Textualism has been on the ascent in the federal and state judiciaries for several years now,³⁰ but Canary Textualism remains a powerful force. In *McGirt*, however, a case with enormous political and legal implications, Muskrat Textualism prevailed. *McGirt* was a dispute about the boundaries of the Creek Reservation,³¹ considered by most to have been extinguished long ago,³² and the future of criminal jurisdiction over wide swaths of the State of Oklahoma.³³ Oklahoma lost.³⁴ In a parallel case, Oklahoma attempted to frame the issue in the classic canary metaphor by including a color photo of the Tulsa skyline³⁵ and a color map showing the broad swath of Oklahoma’s reservations,³⁶ implying that the Muscogee (Creek) Nation’s sovereignty was ancient, inferior, and threatening.³⁷ The

²⁸ MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW, §§ 5.4–.5 (2016) [hereinafter FLETCHER, FEDERAL INDIAN LAW].

²⁹ *Id.* § 5.6.

³⁰ *See, e.g.*, United States v. Cooley, No. 19-1414, slip op. at *5–9 (U.S. June 1, 2021) (finding that the provisions in question do not show a clear statement from Congress to infringe on tribal sovereignty); Wash. State Dep’t of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring) (interpreting the treaty in question in the way the Indians would have understood the terms); Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649, 1652–55 (2018) (concluding that “restraint is the best use of discretion” when confronted with a novel question of tribal sovereign immunity); United States v. Bryant, 136 S. Ct. 1954, 1966 (2016) (upholding cases tried under the Indian Civil Rights Act as predicate offenses to be integrated with other federal statutes); Nebraska v. Parker, 557 U.S. 481, 488–90 (2016) (finding no clear indication that Congress intended to diminish the tribal reservation); Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 790 (2014) (requiring a clear decision from Congress before infringing on tribal sovereignty); *In re Dependency of Z.J.G.*, 471 P.3d 853, 856, 866 (Wash. 2020) (invoking the canon that requires liberal construction in favor of Native tribes).

³¹ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459–60 (2020).

³² *See* Philip H. Tinker, *Is Oklahoma Still Indian Country? “Justifiable Expectations” and Reservation Disestablishment in Murphy v. Simons and Osage Nation v. Irby*, 9 DARTMOUTH L.J. 120, 156 (2011).

³³ *See* Elizabeth A. Reese, *Welcome to the Maze: Race, Justice, and Jurisdiction in McGirt v. Oklahoma*, U. CHI. L. REV. ONLINE (Aug. 13, 2020), <https://lawreviewblog.uchicago.edu/2020/08/13/mcgirt-reese/> [https://perma.cc/5E2V-W6WS].

³⁴ *McGirt*, 140 S. Ct. at 2482. That same day, the Supreme Court decided an analogous case regarding the Creek Reservation boundary by adopting the reasoning in *McGirt*. *See* Sharp v. Murphy, 140 S. Ct. 2412, 2412 (2020).

³⁵ Brief of Petitioner at 3, *Carpenter v. Murphy*, 140 S. Ct. 2412 (2020) (No. 17-1107).

³⁶ *Id.* at 2.

³⁷ *See id.* at 2–3 (arguing that affirming the lower courts’ conclusion would “reincarnate” over three million acres into Indian Territory, thereby “overturn[ing] 111 years of Oklahoma history”).

Court was not persuaded. Justice Neil Gorsuch, for a bare majority, emphasized that courts should not “substitut[e] stories for statutes”³⁸ and that the “rule of the strong” must give way to the “rule of law.”³⁹ Normally, these are innocuous sentiments. But in an Indian law decision in which the Court split 5–4 and in which as many as 1.8 million Americans were affected,⁴⁰ these statements comprised an audacious shot across the bow of Canary Textualism. The shocking novelty of *McGirt v. Oklahoma* is that the Court *did not* succumb to the temptation of Canary Textualism.⁴¹

If Muskrat Textualism is the new way, then what of the old way? This Article targets *Oliphant v. Suquamish Indian Tribe*, the 1978 decision that stripped tribes of the power to prosecute non-Indians by virtue of an “unspoken assumption” that tribes never possessed that power,⁴² as the worst—and most vulnerable—offender in the canon of Canary Textualism. Scholars have long criticized *Oliphant*, pointing to its embrace of ethnocentric views of the inferiority of Indian people and tribal governments, and rightfully so. But few, if any, scholars have offered substantive proposals to eradicate cases like *Oliphant* from the canon, other than to say it was wrongly decided.⁴³ Recent generations of Indian law scholars, namely Indian people themselves, have begun to describe how modern tribal governments

³⁸ *McGirt*, 140 S. Ct. at 2470.

³⁹ *Id.* at 2474.

⁴⁰ *Id.* at 2458, 2479.

⁴¹ Cf. Gregory Ablavsky, *McGirt: Gorsuch Affirms “Rule of Law,” Not “Rule of the Strong,” in Key Federal Indian Law Decision*, STAN. L. SCH. BLOGS: LEGAL AGGREGATE (July 10, 2020), <https://law.stanford.edu/2020/07/10/mcgirt-gorsuch-affirms-rule-of-law-not-rule-of-the-strong-in-key-federal-indian-law-decision/> [<https://perma.cc/L8RE-UZ79>] (“Arguably, all the decision did was decline to craft a different legal standard for when the stakes were high than for when the stakes were perceived to be low.”).

⁴² 435 U.S. 191, 201–12 (1978).

⁴³ See, e.g., ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 97–113 (2005) (emphasizing that *Oliphant* perpetuates a judicial philosophy grounded in racism); DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE* 210–13 (1997) (arguing that *Oliphant* racializes tribal–state–federal jurisdiction over Indian Country); see also Sarah Krakoff, *Mark the Plumber v. Tribal Empire, or Non-Indian Anxiety v. Tribal Sovereignty?: The Story of Oliphant v. Suquamish Indian Tribe*, in *INDIAN LAW STORIES* 261, 280 & n.69 (Carole Goldberg, Kevin K. Washburn & Philip P. Frickey eds., 2011) (summarizing the *Oliphant* decision and consolidating critical scholarly works).

operate⁴⁴ and why Indian law is important.⁴⁵ One could say this endeavor is a form of Muskrat scholarship. Building on the work of scholars such as Professors Wenona Singel⁴⁶ and Michalyn Steele,⁴⁷ this Article fills a gap by linking that scholarship to the dominant interpretive methodology in the Supreme Court, textualism, and looks to further the normatively superior work of Muskrat textualists. If Muskrat Textualism holds, as it should, then *Oliphant* should be considered a dead letter.

Part I of this Article describes Canary Textualism. This form of textualism is rigorous, but it also can be understood (like Justice Antonin Scalia described himself) as “faint-hearted”⁴⁸ when the text’s plain meaning is unclear or where a text is absent. In Indian law, which virtually everyone believes is confounding, Canary Textualism is unrecognizable as textualism, appearing more like pure policy preferences thinly disguised. While it is true that Indian affairs are complicated, it should be relatively simple for the judiciary. Canonical and ancient interpretative rules adopted and applied by the judiciary itself, such as the canons of construction of Indian treaties and statutes and the clear statement rules, should make Indian law less complicated for judges.⁴⁹ But Canary Textualists will deviate from the default rules to enforce policy preferences, citing policy objections based on assumed facts on the ground. This textualism often intervenes, before Congress or tribes can act, effectively enforcing the passivity of tribal governments. Canary Textualism therefore prioritizes a top-down approach to Indian law, with a federal–state–tribal hierarchy, and occasionally makes embarrassing mistakes, such as *Oliphant*.

⁴⁴ See, e.g., Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 584–85 (2021) (describing numerous examples of tribal governmental innovations); Angela R. Riley, *Tribal Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 835–48 (2007) (arguing in defense of tribal civil rights norms).

⁴⁵ See, e.g., Blackhawk, *supra* note 7 at 1804 n.74 (arguing that federal Indian law is a canonical part of public law); Seth Davis, *The Constitution of Our Tribal Republic*, 65 UCLA L. REV. 1460, 1463–65 (2018) (arguing partly that modern tribal intergovernmental agreements are akin to historic Indian treaties as a matter of constitutional law).

⁴⁶ See, e.g., Singel, *supra* note 27, at 777–83 (arguing that the judiciary should acknowledge the important innovations on governance when rendering decisions involving federalism matters).

⁴⁷ Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666, 668–74 (2016) (arguing that Congress, not the judiciary, possesses the institutional capacity to address the scope and contours of inherent tribal powers).

⁴⁸ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (“I hasten to confess that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging.”). Admittedly, originalism and textualism are different judicial philosophies. Because Justice Scalia employed both philosophies, they are used interchangeably in this Article.

⁴⁹ See *supra* notes 28–29 and accompanying text.

Part II engages with *Oliphant v. Suquamish Indian Tribe*. *Oliphant* is almost universally reviled by advocates of tribal sovereignty and almost as universally unknown within the public law universe. This Part strips the decision down to its essence and its individual parts, showing how the Court applied Canary Textualism to reach a decision contrary to federal policy and its own precedents. *Oliphant* was a case of first impression for the Court—and for the entire federal judiciary. The Court intervened to adopt a bright-line rule applicable to all Indian tribes that held that no tribe could prosecute a non-Indian criminal offender, despite a lack of congressional guidance on the question. The basis of the decision was an unspoken assumption rooted entirely in the long history of federal officials assuming Indian people are racially inferior. This approach is Canary Textualism writ large.

Part III describes Muskrat Textualism. Muskrat Textualism puts Canary Textualism to shame. There is nothing faint-hearted about it. It places a premium on “semantic context”;⁵⁰ that is, the meaning of the word controls over the intent of the legislature or the policy preferences of the judges. This textualism highlights government-to-government relations in geopolitical and federalism terms. In this school, tribes are laboratories of democracy, contributing to the marketplace of governance theories. Muskrat Textualism is patient, waiting for Congress and tribes to act before intervening. Muskrat textualists are faithful to the default interpretative rules specific to Indian law. Muskrat Textualism encourages the bottom-up thinking that Congress has prioritized since the 1970s, giving tribes room to propose, adopt, and implement solutions. If things go badly, Congress can then step in.

McGirt v. Oklahoma is the defining opinion of Muskrat Textualism. That case held that the Creek Reservation boundaries remained extant, rejecting the assumptions of the state and federal governments, non-Indians, and even some Indians and tribes that considered the reservation relinquished. The Court prioritized the semantic meaning of the relevant treaties and acts of Congress, then filled gaps with the default interpretive rules that prioritized the prerogatives of Congress and the tribes over the preferences of the states and the judges.

Part IV ponders the implications of Muskrat Textualism. This Article shows that *Oliphant* is incompatible with Muskrat Textualism and should be overruled. Muskrat Textualism can and should be used to address specific areas of current dispute, particularly challenges to the Indian Child Welfare Act.

⁵⁰ Grove, *supra* note 4, at 269.

I. CANARY TEXTUALISM

The Justices of the Roberts Court have consistently identified as textualists. “[W]e’re all textualists now,” is the common refrain.⁵¹ Justice Scalia’s relentlessly influential polemic, *A Matter of Interpretation*, is the go-to guide for twenty-first-century judging. Scalian textualism is the counterpoint to several jurisprudential theories—primarily legal realism, but also any other form of purposivism.⁵² Justice Scalia situated his textualism as the only proper theory of judging in a world where judges (federal judges, anyway) are unelected, life tenured, and antidemocratic. It is probably fair to say that Scalia’s insistence on textualism drove the Court in the direction of textualism as the dominant methodology of the judiciary.⁵³ Chief Justice John Roberts’s famed statement that judges are like umpires who “call balls and strikes” serves as the layperson’s gloss on what this textualism means.⁵⁴ That is to say, judges merely read, apply, and (only as a last resort) interpret the law. Textualism is so dominant today as a judging philosophy in large part because it merely restates what everyone already assumed judges do—judges are not supposed to make law or policy; they apply law and policy dispassionately.

As argued elsewhere, I have grave misgivings with textualism for a variety of reasons.⁵⁵ Part I focuses on how textualism has worked in the last several decades of Indian affairs cases in the Supreme Court. This Part concludes that some judges are willing to depart from their textualist shackles more easily or quickly than others when Indians and tribes are likely to prevail. Justices Scalia and Gorsuch, who never overlapped on the Court but who are both considered archtextualist judges, are my primary foils.

A. *What Is Canary Textualism?*

Canary Textualism is judicial maximalism in federal Indian law. Canary textualist judges view Indians and Indian tribes as passive recipients

⁵¹ Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 08:28 (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg> [<https://perma.cc/FBK5-XCMN>]; see also Grove, *supra* note 4, at 265 n.1 (emphasizing the increasing prominence of textualism).

⁵² See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 18–25 (Amy Gutmann ed., 1997).

⁵³ Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857, 870–74 (2017).

⁵⁴ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., J., D.C. Cir.).

⁵⁵ Matthew L.M. Fletcher, *Textualism’s Gaze*, 25 MICH. J. RACE & L. 111, 144–46 (2020) [hereinafter Fletcher, *Textualism’s Gaze*].

of federal law and policy, with little or no input in the process. These judges invoke the federal plenary power over Indian affairs to enforce the legal and political inferiority of Indian tribes. These judges consider tribal governmental innovations and economic development activities as threats to state governments, private businesses, and property interests. Canary textualists intervene before Congress can act, ostensibly to protect non-Indian and state interests from tribes. Canary textualists regularly invoke policy preferences over the text. They are willing to deviate from the default Indian law interpretative rules. Canary textualists regularly assert that Indian law is confusing and irregular, the declaration of which provides space for mischief.

Examples of Canary Textualism abound, even in cases in which tribal interests prevail. For example, in *Kiowa Tribe v. Manufacturing Technologies*, a case in which the Court affirmed tribal sovereign immunity,⁵⁶ three dissenters would have held that tribes possessed no immunity for off-reservation commercial activities even where Congress had supported tribal immunity.⁵⁷ The majority was openly critical of upholding tribal immunity. The Court assumed without evidence that Indian tribes will injure non-Indian interests without providing a remedy and therefore should not be outside the reach of federal court jurisdiction.⁵⁸ Years later in *Michigan v. Bay Mills Indian Community*, when the Court again affirmed tribal immunity,⁵⁹ there were then four dissenters. Notably, Justice Scalia—having previously joined the majority in *Kiowa*⁶⁰—changed his position, writing: “Rather than insist that Congress clean up a mess that I helped make, I would overrule *Kiowa*.”⁶¹

Observers could argue that this textualism is not textualism at all, and there is a great deal of force to this characterization.⁶² But this Article takes the judges at their word. Even Justice Scalia’s faint-hearted brand of textualism purports to grant primacy to the text.⁶³ At the point where the text

⁵⁶ 523 U.S. 751, 753 (1998).

⁵⁷ *Id.* at 760 (Stevens, J., dissenting); see also *id.* at 759 (majority opinion) (emphasizing that Congress has the authority to dispense with tribal sovereign immunity, but had not done so).

⁵⁸ See *id.* at 758 (majority opinion) (“There are reasons to doubt the wisdom of perpetuating the doctrine. . . . In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.”). However, the Court ultimately “defer[red] to the role Congress may wish to exercise in this important judgment.” *Id.*

⁵⁹ 572 U.S. 782, 785 (2014).

⁶⁰ 523 U.S. at 752.

⁶¹ *Bay Mills*, 572 U.S. at 814 (Scalia, J., dissenting).

⁶² Fletcher, *supra* note 55, at 118–19.

⁶³ Scalia, *supra* note 48, at 861–62.

becomes ambiguous, a Scalian textualist merely engages in the game of persuasion, that is, which position can garner the most votes. Justice Scalia early and often recognized the limits of a purer form of textualism, claiming to be a textualist, not “a nut,” unlike, say, Justice Clarence Thomas (again, I borrow from Scalia himself).⁶⁴ Even with this gaping hole, we will see that a Canary textualist departs even more quickly from textualism for reasons unique to Indian law.

In the Indian law context, Justice Scalia’s textualism is captured in an internal memorandum from Justice Scalia to Justice William Brennan, taken from Justice Thurgood Marshall’s files in *Duro v. Reina*.⁶⁵ Scalia wrote:

[O]ur opinions in this field have not posited an original state of affairs that can subsequently be altered only by explicit legislation, but have rather sought to discern what the current state of affairs *ought to be* by taking into account all legislation, and the congressional “expectations” that it reflects, down to the present day. I would not have taken that approach as an original matter, but it seems too deeply imbedded in our jurisprudence to be changed at this stage.⁶⁶

The *Duro* memo could be read as a declaration that federal Indian law is so riddled with policy-based decision-making as to justify an entirely atextualist approach. Scalia’s memo should be seen as a Canary Textualism manifesto. It is an announcement that the faint-hearted textualist has seen enough of federal Indian law to toss aside the shackles of textualism. The memo came on the heels of Scalia’s vote with the majority in *Mississippi Band of Choctaw Indians v. Holyfield*,⁶⁷ a vote he would later claim to be the most difficult vote of his career, a vote mandated by his textualism.⁶⁸ The *Duro* memo suggests that Scalia would no longer feel constrained, at least regarding Indian law matters not governed by the plain language of a statute.

The memo neatly separates out an “original[ist]” position from an “ought-to-be” position. Importantly, Scalia explicitly rejected the clear

⁶⁴ Joe Patrice, *Scalia Calls Thomas ‘A Nut,’* ABOVE THE LAW (July 11, 2014), <https://abovethelaw.com/2014/07/scalia-calls-thomas-a-nut/> [<https://perma.cc/3F37-S4QM>] (recounting Justice Scalia saying, “Look, I’m an originalist, but I’m not a nut,” when asked to compare Justice Thomas’s judicial philosophy with his own).

⁶⁵ Memorandum from Justice Antonin Scalia to Justice William Brennan, Jr. (April 4, 1990) [hereinafter *Scalia Memorandum*]. The memo is reproduced in FLETCHER, *FEDERAL INDIAN LAW*, *supra* note 28, § 7.6.

⁶⁶ *Scalia Memorandum*, *supra* note 65 (emphasis added).

⁶⁷ 490 U.S. 30, 31 (1989).

⁶⁸ Adam Liptak, *Case Pits Adoptive Parents Against Tribal Rights*, N.Y. TIMES (Dec. 24, 2012), <https://www.nytimes.com/2012/12/25/us/american-indian-adoption-case-comes-to-supreme-court.html> [<https://perma.cc/4S7W-97JU>] (recalling Justice Scalia’s explanation that he was bound to his decision because “that’s what the law said, without a doubt”).

statement rules on tribal powers. As we will see, by referencing “congressional ‘expectations,’” Scalia endorsed Canary Textualism.

Scalia wrote relatively few Indian law opinions,⁶⁹ but when he did, he was forthright in announcing that his vote was driven by policy concerns. As noted above, he wrote in *Bay Mills* that he had changed his mind about tribal sovereign immunity on policy grounds, lamenting a perceived “mess” he helped to create and which Congress failed to resolve to his satisfaction. Later, he wrote in *Adoptive Couple v. Baby Girl*, an Indian Child Welfare Act case, that he was voting for the biological father on men’s-rights grounds,⁷⁰ another apparent policy-oriented vote.

Perhaps Justice Scalia’s Indian law record is predictable, given his politics. He rarely voted in favor of tribal interests, and when he did, it was usually because he seemed to have discerned there was no room for a rational textualist to depart from the text.⁷¹ When he did depart, which was frequent, and he put on his policymaker hat, he was viciously anti-tribal.⁷² Justice Scalia did not invent Canary Textualism, but he perfected it. And for years, the Court followed his lead.⁷³

Canary Textualism’s pursuit of judicial policy preferences stands in stark opposition to the stated default interpretive rules that had governed federal Indian law since the early nineteenth century.

⁶⁹ See Matthew L.M. Fletcher, *Justice Scalia’s Indian Law Record*, TURTLE TALK (Feb. 17, 2016), <https://turtletalk.blog/2016/02/17/justice-scalias-indian-law-record/> [https://perma.cc/SCLQ-JATA].

⁷⁰ 570 U.S. 637, 667–68 (2013) (Scalia, J., dissenting).

⁷¹ Scalia joined opinions supporting tribal interests where there was no room for textual interpretation. See, e.g., *Cherokee Nation v. Leavitt*, 543 U.S. 631, 633–34 (2005) (“The United States and two Indian Tribes have entered into agreements in which the Government promises to pay certain ‘contract support costs’ that the Tribes incurred during fiscal years (FYs) 1994 through 1997. The question before us is whether the Government’s promises are legally binding. We conclude that they are.”); *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998) (“As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.”).

⁷² See, e.g., *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 814 (2014) (Scalia, J., dissenting) (“I concurred in [*Kiowa*]. For the reasons given today in Justice Thomas’s dissenting opinion, which I join, I am now convinced that *Kiowa* was wrongly decided; that, in the intervening 16 years, its error has grown more glaringly obvious; and that *stare decisis* does not recommend its retention. Rather than insist that Congress clean up a mess that I helped make, I would overrule *Kiowa* and reverse the judgment below.”); *Nevada v. Hicks*, 533 U.S. 353, 354, 371–72 (2001) (referring to *Montana v. United States*, which allowed tribal jurisdiction over nonmembers who threaten a tribe’s political integrity, as “an opinion, bear in mind, not a statute”). But see *Adoptive Couple*, 570 U.S. at 667–68 (Scalia, J., dissenting) (stating that he would rule in favor of tribal interests in part based on policy grounds favoring the rights of a biological parent).

⁷³ See *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 217–21 (2005) (applying equitable doctrine of laches to a tribe’s claim to a tax immunity despite favorable federal statutes); *Duro v. Reina*, 495 U.S. 676, 679 (1990) (stripping tribes of criminal jurisdiction over nonmember Indians despite the absence of contrary statutory statements); Getches, *supra* note 5, at 306 (describing Justice Scalia’s *Duro* memo as a “manifesto”).

B. Indian Law Default Interpretive Rules

Canary Textualism's principal foil is the default interpretative rules that require the judiciary to defer to Congress and Indian tribes. These default rules, unique to Indian law, include the canons of interpreting Indian treaties⁷⁴ and Indian affairs statutes,⁷⁵ and the clear statement rules applicable to tribal sovereign interests.⁷⁶ Such interpretative rules should make the judiciary's job easier. But the lengths to which Canary textualists will go to avoid these rules are impressively complex.

It is well settled that Congress has the plenary power to determine the contours of federal, tribal, and state relationships.⁷⁷ It is also well settled that the United States owes a "duty of protection" to individual Indians and Indian tribes⁷⁸—or what the courts usually refer to as a trust obligation.⁷⁹ Dating back to the earliest foundational cases in federal Indian law, the Supreme Court adopted a series of prophylactic rules that realize the federal government's duty of protection. This Article is most concerned with the clear statement rules of federal Indian law providing that reservation boundaries, tribal sovereign immunity, Indian tax immunities, treaty rights, and inherent tribal powers remain extant absent a clear statement (or expression) of intent by Congress to abrogate or modify them.⁸⁰

Examples abound of the application of these rules. In *Ex parte Crow Dog*, the Court found that the federal government could not prosecute an Indian for a crime against another Indian in Indian Country without a federal statute authorizing the prosecution that demonstrated "a clear expression of

⁷⁴ See generally *Indian Canon Originalism*, 126 HARV. L. REV. 1100, 1100–01 (2013) (outlining the Indian canon of construction as applied to treaties).

⁷⁵ See generally Alex Tallchief Skibine, *Textualism and the Indian Canons of Statutory Construction*, U. MICH. J.L. REFORM (forthcoming Mar. 2022) (manuscript at 5–9), <https://papers.ssrn.com/sol3/a=3813569> [<https://perma.cc/S43M-K9L9>] (explaining how courts developed Indian canons of statutory construction).

⁷⁶ See generally FLETCHER, FEDERAL INDIAN LAW, *supra* note 28, § 5.6 (defining the clear statement rules).

⁷⁷ See, e.g., *United States v. Lara*, 541 U.S. 193, 200 (2004) ("[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'" (quoting *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470 (1979))).

⁷⁸ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556, 560–61 (1832), *abrogated by* *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164 (1973), *as recognized in* *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

⁷⁹ See, e.g., *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011) ("The trust obligations of the United States to the Indian tribes are established and governed by statute . . ."); *id.* at 205 (Sotomayor, J., dissenting) ("[C]ourts have similarly observed that . . . 'the government has longstanding and substantial trust obligations to Indians.'" (quoting *Cobell v. Norton*, 240 F.3d 1081, 1098 (D.C. Cir. 2001))).

⁸⁰ See FLETCHER, FEDERAL INDIAN LAW, *supra* note 28, § 5.6.

the intention of Congress” to do so.⁸¹ In *Menominee Tribe of Indians v. United States*, the Court held that treaty rights to hunt and fish remained intact even where Congress terminated its relationship to the tribe in a law that was silent as to treaty rights, finding that “the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.”⁸² The clear statement rule originated, as Phil Frickey showed, in *Worcester v. Georgia*, where the Court would not allow Indian treaties to be used “covertly” to undermine tribal governance.⁸³ Frickey referred to the rule as “quasi-constitutional,” a reference to the heightened separation of powers impact on treaty making.⁸⁴ To be sure, Congress has the power to abrogate Indian treaties.⁸⁵ But the Court is hesitant to find congressional treaty abrogation in the absence of “explicit statutory language.”⁸⁶

Related to the clear statement rules are the canons for construction of Indian treaties. Since the Marshall Trilogy—three cases authored by Chief Justice John Marshall that are foundational for federal Indian law⁸⁷—the Court has recognized that the United States frequently possessed an unfair bargaining position relative to that of Indian nations.⁸⁸ For example, the treaties were always negotiated and written in English. And sometimes the United States imposed its will against Indian nations to force agreement to treaties with bad terms for Indian people.⁸⁹ Hence, the Court has always held that ambiguous terms in Indian treaties are to be construed to the benefit of Indians and tribes, treaty terms are to be interpreted as the Indians at the time of the negotiation understood those terms, and the courts may look to extraneous evidence of the historical context in which the treaties were negotiated in support of the tribes’ interpretations.⁹⁰

⁸¹ 109 U.S. 556, 557, 572 (1883).

⁸² 391 U.S. 404, 412–13 (1968) (quoting *Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 160 (1934)).

⁸³ Frickey, *supra* note 3, at 412–17 (quoting *Worcester*, 31 U.S. (6 Pet.) at 554).

⁸⁴ *See id.* at 412, 415 & n.149.

⁸⁵ *See, e.g.*, *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) (“When . . . treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress . . .”).

⁸⁶ *United States v. Dion*, 476 U.S. 734, 739 (1986) (quoting *Washington v. Washington State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 690 (1979)).

⁸⁷ *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester*, 31 U.S. (6 Pet.) 515. For a critical analysis of the trilogy, see Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 627–30 (2006).

⁸⁸ FLETCHER, *FEDERAL INDIAN LAW*, *supra* note 28, § 5.4.

⁸⁹ *See id.* § 3.2 (2016) (“[T]he government did on occasion use military force to compel tribal leaders to ‘consent’ to a removal treaty, or to physically compel removal.”).

⁹⁰ *See, e.g.*, *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) (describing the canons of construction); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 206 (1999) (same); *Winters v. United States*, 207 U.S. 564, 576–77 (1908) (looking to the historical context to determine that Indians had rights to the waterways near their reservation).

Indian law is federal law.⁹¹ Congress makes federal policy, first, foremost, and exclusively.⁹² In the modern era, congressional plenary power is tempered by the rising political and economic power of Indian tribes.⁹³ The clear statement rules are default rules designed to allow Congress to run Indian affairs without interference from states, private interests, and even the judiciary.⁹⁴ Despite these presumptions and rules in favor of Indian tribes, as we will see, Canary textualists are unimpressed, rejecting these rules at will on the grounds that they are not “mandatory.”⁹⁵ In fact, the primary goal of Canary Textualism, as explored in the next Section, is to enforce the dependency of Indian tribes. This tool is so unfortunately permeated with the language of racial inferiority of Indian people as to be illegitimate.

C. “Dependency” as the Language of the Canary Textualist

The “ought-to-be” thinking of Canary Textualism utilizes the language of Indian and tribal “dependency” as the primary tool to enforce tribal passivity and weakness. It is true that with dependency comes the federal government’s duty of protection.⁹⁶ But throughout the history of federal Indian law, the Supreme Court has warped the meaning of dependency by insisting that dependency was justified by the assumed racial inferiority of Indian people.⁹⁷ Even though civil society has moved past that dark history, Canary textualists rely heavily on that history in their methodology.

This language of dependency is important. There are two ways to characterize the dependency of Indian tribes and consequently two very different meanings of dependency. Chief Justice Marshall’s opinions in *Cherokee Nation v. Georgia*, which introduced the term “domestic dependent nations,”⁹⁸ and *Worcester v. Georgia* established that tribal

⁹¹ FLETCHER, FEDERAL INDIAN LAW, *supra* note 28, § 1.2.

⁹² *Id.* § 1.2.

⁹³ *E.g.*, Carole Goldberg & Duane Champagne, *Ramona Redeemed? The Rise of Tribal Political Power in California*, 17 WICAZO SA REV. 43, 45 (2002) (“Today, California Indian tribes have greater political access to and influence in state and federal governments than ever before.” (citing Ioana Patringsenaru, *Tribes Come of Age*, 30 CAL. J. 1, 8 (1999))).

⁹⁴ *Cf.* FLETCHER, FEDERAL INDIAN LAW, *supra* note 28, § 1.3 (“The clear statement rule is a defining rule in federal Indian law. The clear statement rule is, simply put, that courts will not find a limitation of tribal governance authority absent a clear statement by Congress to that effect.”).

⁹⁵ *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001).

⁹⁶ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551–56, 560–61 (1832), *abrogated by* *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164 (1973), *as recognized in* *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *see also* *United States v. Candelaria*, 271 U.S. 432, 442 (1926) (“Congress . . . was but continuing a policy which prior governments had deemed essential to the protection of such Indians.”).

⁹⁷ *See, e.g.*, *Ex parte Crow Dog*, 109 U.S. 556, 568–69 (1883) (asserting the “savage” nature of Indians to justify their “pupilage” under the federal government).

⁹⁸ 30 U.S. (5 Pet.) 1, 17 (1831).

dependency was intended to serve as a term of art akin to its usage in international customary law.⁹⁹ Marshall’s description of dependence in his *Cherokee Nation* opinion—an opinion which only one other Justice joined—was that Indian tribes “are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.”¹⁰⁰ Dissenting, Justice Smith Thompson, joined by Justice Joseph Story, argued that the dependence of Indian tribes should be read in the context of the duty of protection, allowing for the continued robust sovereignty of dependent tribes.¹⁰¹ A year later, Chief Justice Marshall roundly endorsed the *Cherokee Nation* dissenters’ understanding of the duty of protection in a 6–1 opinion, writing that “Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights.”¹⁰² The *Worcester* Court held that the existence of the “duty of protection” between the United States and the tribe, a relationship between sovereigns, meant that tribes retained the powers of self-government.¹⁰³ It is this duty of protection from which the default rules preserving tribal self-government originate.¹⁰⁴

The other characterization, the language of guardianship or pupilage, is the justification for the imposition of centuries of horrific abuses perpetrated upon Indian people. This characterization justified the confiscation, allotment, and sale of the lands “of an ignorant and dependent race.”¹⁰⁵ This characterization justified—and authorized—the Major Crimes Act’s application to the lands of people “[d]ependent largely for their daily food,” “[d]ependent for their political rights,” and “weak[] and helpless[.]”¹⁰⁶ Indian people long have been the Supreme Court’s punching bag: “a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races” (describing Pueblo Indians);¹⁰⁷ “nomadic and savage” (other

⁹⁹ 31 U.S. (6 Pet.) 515, 561 (1832).

¹⁰⁰ 30 U.S. (5 Pet.) at 17. Chief Justice Marshall’s opinion was joined by Justice John McLean. Rennard Strickland, *The Tribal Struggle for Indian Sovereignty: The Story of the Cherokee Cases*, in INDIAN LAW STORIES, *supra* note 43, at 61, 71.

¹⁰¹ See 30 U.S. (5 Pet.) at 53 (Thompson, J., dissenting).

¹⁰² *Worcester*, 31 U.S. (6 Pet.) at 536, 559, 563, 596.

¹⁰³ See *id.* at 556.

¹⁰⁴ Cf. *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883) (“To give to the clauses in the treaty of 1868 and the agreement of 1877 effect, so as to uphold the jurisdiction exercised in this case, would be to reverse in this instance the general policy of the government towards the Indians, as declared in many statutes and treaties, and recognized in many decisions of this court, from the beginning to the present time. To justify such a departure, in such a case, requires a clear expression of the intention of Congress, and that we have not been able to find.” (emphasis added)).

¹⁰⁵ *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

¹⁰⁶ *United States v. Kagama*, 118 U.S. 375, 384 (1886). The Major Crimes Act is the section of the Indian Appropriations Act implicated in *Kagama*. See S. Lee Martin, *Indian Rights and the Constitutional Implications of the Major Crimes Act*, 52 NOTRE DAME L. REV. 109, 114 & n.34 (1976).

¹⁰⁷ *United States v. Candelaria*, 271 U.S. 432, 442 (1926).

Indians living in New Mexico);¹⁰⁸ “ignorant and wild Indians” (the Pueblos again);¹⁰⁹ and “[i]mmorality and a general laxness in regard to their family relations, together with . . . Pagan practices” (the Zunis).¹¹⁰ A list like this would be much, much longer if the statements of the lower courts were included.

Keep in mind that since the late 1960s and early 1970s, Congress and the Executive Branch departed from the race-tinged dependency metaphor that characterized federal Indian law and policy.¹¹¹ The policymaking branches of government now consistently refer to the federal–tribal relationship not as a guardianship, but as a trust relationship.¹¹² In the last half century or so, Congress and the Executive Branch have consistently implemented the United States’ duty of protection to Indians and tribes in a manner that favors tribal sovereignty.¹¹³

Canary textualists, on the other hand, will have none of it. Consider *Montana v. United States*, in which the Supreme Court articulated a rule that allows the Court to—at will—deviate from the default Indian law interpretative rules. There, the Court held that an “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the *dependent* status of the tribes.”¹¹⁴ Whether intentionally or not, Canary textualists equate dependency with inferiority rooted not in the duty of protection, but in race. For Canary textualists, tribal powers do not extend beyond what is consistent with their conception of tribal dependency. Default interpretative rules, treaty terms, congressionally announced policy, and even precedent must give way if the Canary textualist has deemed the tribal power inconsistent with the dependent status of Indian tribes.¹¹⁵ In applying this rule, the Court arrogates to itself the status of policymaker. In these cases, it is the Court, not

¹⁰⁸ *Id.*

¹⁰⁹ *United States v. Sandoval*, 231 U.S. 28, 43 (1913).

¹¹⁰ *Id.* at 44.

¹¹¹ FLETCHER, *FEDERAL INDIAN LAW*, *supra* note 28, §§ 3.12–15.

¹¹² *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 192–93 (2011) (Sotomayor, J., dissenting) (“Indeed, ‘[n]early every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government.’” (quoting COHEN’S *HANDBOOK OF FEDERAL INDIAN LAW* § 5.04[4][a] (2005 ed.))).

¹¹³ FLETCHER, *FEDERAL INDIAN LAW*, *supra* note 28, § 3.12.

¹¹⁴ 450 U.S. 544, 564–67 (1981) (emphasis added).

¹¹⁵ *See id.* at 569 (Blackmun, J., dissenting in part) (“Only two years ago, this Court reaffirmed that the terms of a treaty between the United States and an Indian tribe must be construed ‘in the sense in which they would naturally be understood by the Indians.’ In holding today that the bed of the Big Horn River passed to the State of Montana upon its admission to the Union, the Court disregards this settled rule of statutory construction.” (citations omitted) (quoting *Washington v. Wash. State Comm. Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 676 (1979))).

Congress, that decides which powers are inconsistent with the dependent status of Indian tribes.

How do Canary textualists apply the dependency rule? In *Montana*, the Crow Nation (backed by the federal government) argued that it possessed civil regulatory jurisdiction over nonmember hunting and fishing on its reservation, even on nonmember-owned land. The tribe and the federal government pointed out that no act of Congress had divested tribal powers over the reservation. The Court held instead that the power to regulate nonmember hunting and fishing on nonmember land was inconsistent with the dependent status of the tribe.¹¹⁶ The Court essentialized the Crow Nation people as mere bison hunters who never had expressed much interest in fish before.¹¹⁷ Similarly, in *Strate v. A-1 Contractors*, the Court held that the tribal court of the Three Affiliated Tribes of the Fort Berthold Reservation (now known as the Mandan Hidatsa Arikara Nation) possessed no jurisdiction over a tort claim brought by a nonmember reservation resident and her tribal-member family against a nonmember business.¹¹⁸ The Court emphasized that the tribes were “strangers” to the parties and their dispute¹¹⁹ and that tribal court jurisdiction was not critical to the tribal governance of the reservation, which is all the power that a dependent nation was entitled.¹²⁰ The Court made further reference to the state courthouse being closer to the scene of the accident than the tribal court building.¹²¹ Finally, the Court acknowledged an exception, whereby the tribe may retain jurisdiction over conduct that impairs “the health or welfare of the tribe.”¹²² In declining to uphold such an exception, the Court suggested that a single car accident that seriously injured or killed a tribal member was not enough to justify tribal jurisdiction,¹²³ thereby raising the morbid question: How many Indians will nonmembers have to kill or maim in order for the Court to allow tribal jurisdiction?

Additionally, lurking in the background of these tribal jurisdiction cases is the baseless worry, concern, and skepticism about tribes and nonmembers rooted in assumptions of inferiority of Indians and tribes. Amici and occasionally the nonmember parties make outrageous claims rooted in

¹¹⁶ *Id.* at 548–50, 564–65 (majority opinion).

¹¹⁷ *Id.* at 570 (Blackmun, J., dissenting) (criticizing the majority’s reliance on the factual premise “that fish were not ‘a central part of the Crow diet’” (quoting *United States v. Montana*, 457 F. Supp. 599, 602 (D. Mont. 1978))).

¹¹⁸ 520 U.S. 438, 442–43, 453 (1997).

¹¹⁹ *See id.* at 457.

¹²⁰ *Id.* at 459.

¹²¹ *Id.* at 445 n.4.

¹²² *Id.* at 457–58 (quoting *Montana v. United States*, 450 U.S. 544, 566 (1981)).

¹²³ *Id.*

anecdote about tribal judges, tribal courts, and tribal laws. That strategy reached fruition in *Nevada v. Hicks*, when Justice David Souter wrote a lengthy concurrence restating a wide variety of those claims about tribes.¹²⁴ That concurrence's worst crime is essentializing all tribal justice systems as the same. Like tribes, tribal justice systems differ—no one tribal court is exactly like another. Still, Justice Souter's concurrence is a regular citation in tribal jurisdiction cases¹²⁵—and is often the centerpiece of anti-tribal briefs.¹²⁶

Perhaps it is not a perfect match, but Justice Scalia's majority opinion in *Nevada v. Hicks*, arguably the most important Indian law opinion he authored, looks for all intents and purposes to be a maximal Canary textualist opinion, designed to resolve a whole host of open questions in opposition to tribal interests. *Hicks* involved a 28 U.S.C. § 1983 civil rights action and related tort claim against Nevada police officers brought by a tribal citizen in a tribal court.¹²⁷ The majority opinion delved deep into dependency talk, reminding tribes again that non-necessary tribal powers are “inconsistent” with their status as “dependent[s].”¹²⁸ Justice Scalia noted that, as dependent nations, tribal governments possessed no general powers to enforce federal civil rights norms against state officials. As dependent nations, tribes had no reason to believe that the Congress that enacted § 1983 (the Ku Klux Klan Act) would have thought it was abrogating state sovereign immunity in tribal courts.¹²⁹ In response to the tribe's claim that the intervention of state officers on trust lands was an affront to core tribal authority, the majority asserted that states have considerable freedom in enforcing outside interests on reservation land.¹³⁰ The Court added that the general rule against tribal jurisdiction over nonmembers on nonmember-owned land impliedly extended to tribal lands, as well.¹³¹ Justice Scalia took a case about the

¹²⁴ 533 U.S. 353, 383–85 (2001) (Souter, J., concurring) (emphasizing the inferiority of tribal courts).

¹²⁵ See, e.g., *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 331, 337, 339 (2008) (referencing Souter's concurrence as foundational for the nature of tribal justice); *Dolgener Corp. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 176 (5th Cir. 2014) (same), *aff'd by an equally divided Court sub nom. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (mem.).

¹²⁶ See Supplemental Brief of Respondents at 7–8, *Poarch Band of Creek Indians v. Wilkes*, 139 S. Ct. 305 (2019) (No. 17-1175), 2019 WL 2370267, at *7–8; Brief for the Petitioners at 6, *Dollar Gen.*, 136 S. Ct. 2159 (No. 13-1496), 2015 WL 5169095, at *6; Petitioner Plains Commerce Bank's Brief at 41–42, *Plains Com. Bank*, 554 U.S. 316 (No. 07-411), 2008 WL 449965, at *41–42.

¹²⁷ 533 U.S. at 355–57.

¹²⁸ *Id.* at 359 (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981)).

¹²⁹ *Id.* at 367–69 & n.8.

¹³⁰ *Id.* at 361–62.

¹³¹ *Id.* at 360 (explaining that the *Montana* Court implied that its rule applies to both nonmember-owned land and tribal land). Justice Souter would have made that ruling explicit. *Id.* at 375–76 (Souter, J., concurring).

authority of tribal courts to entertain § 1983 claims, broadly endorsed state criminal law enforcement authority, and rewrote the law on tribal powers over nonmembers generally. The *Hicks* majority was so broad that even though the Court ruled unanimously against tribal interests,¹³² multiple Justices wrote or joined separate opinions objecting against the enormous breadth of the opinion.¹³³ Nearly two decades later, one can see that the Supreme Court believed that tribes (and their Ninth Circuit enablers)¹³⁴ had gone egregiously too far in asserting their powers.

Canary textualists did not invent the weaponization of the dependency metaphor to defeat the policy prerogatives of Congress and Indian tribes. It is apparent that Canary textualists borrow heavily from older cases that explicitly derogated Indians as inferior, all the while ignoring the dark history of those cases, to upset federal and tribal interests.

Consider *City of Sherrill v. Oneida Indian Nation*, a relatively minor case that has the potential to devastate tribal interests in virtually any context.¹³⁵ The case involved an effort by the tribe to claim a tax immunity on lands owned by the tribe in fee within the exterior boundaries of its reservation.¹³⁶ The tribe's theory was that since only Congress can terminate a reservation, and Congress had not done so, the tribe's reacquisition of lands in fee that had passed out of Indian ownership was enough to restore the tax immunity.¹³⁷ The Court rejected the theory, relying on a different rule providing that the lands protected by federal superintendency passed out of Indian control, so the lands lost the tax immunity unless the federal government restored the immunity. The Court expounded at length on the disruption that private citizens and municipalities would suffer if tribes could unilaterally restore the reservation status of their lands. The Court worried about the impact on the local tax base, land use regulations, criminal

¹³² *Id.* at 354 (majority opinion).

¹³³ *Id.* at 386 (Ginsburg, J., concurring) (explaining that the opinion did not address certain jurisdictional questions); *id.* at 387 (O'Connor, J., concurring in part and concurring in the judgment) (expressing concern that the holding undermined tribal authority).

¹³⁴ The Ninth Circuit upheld tribal jurisdiction on "the fact that respondent's home is located on tribe-owned land within the reservation." *Id.* at 357 (majority opinion).

¹³⁵ See generally Sarah Krakoff, *City of Sherrill v. Oneida Indian Nation of New York: A Regretful Postscript to the Taxation Chapter in Cohen's Handbook of Federal Indian Law*, 41 TULSA L. REV. 5, 6 (2005) (arguing that this case may embolden further encroachment by state and local tax authorities); Wenona T. Singel & Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 TULSA L. REV. 21, 45–47 (2005) (arguing that this case and its progeny have been used to "dispossess Indian people and communities of their lands"); Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 ALB. GOV'T L. REV. 1, 43 (2017) (explaining that the Second Circuit has broadly interpreted *Sherrill* to deny New York tribes' land claims).

¹³⁶ *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 213–14 (2005).

¹³⁷ Brief for Respondents at 12–19, *Sherrill*, 544 U.S. 197 (No. 03–855).

jurisdiction, and the rising powers of the tribe¹³⁸—all without supporting evidence.

The Court articulated a set of equitable defenses—laches, impossibility, and acquiescence—that states and local governments could employ to protect state interests.¹³⁹ No party had made any of those arguments or asked the Court to adopt those equitable defenses. Never mind that the original alienation of the reservation lands had been illegal under a law on the books since the very first Trade and Intercourse Act.¹⁴⁰ Never mind that the Court disregarded the disruption imposed on the tribes created by local government interference. Never mind that the Court articulated a new rule that appeared to be heavily fact-dependent in its application but would not allow a remand to allow the parties to develop a factual record to address the rule (this is a theme in Indian law¹⁴¹).

Until *Sherrill*, the Court abided by the rule that transactions made in violation of the Act were void *ab initio*.¹⁴² In *Sherrill*, the Court enforced a view of Indian tribes as dependent nations under the wardship of the federal government, discarding the clear statement rules.

Montana, Strate, Hicks, and Sherrill exemplify Canary Textualism. But the case that normalized—indeed, weaponized—Canary Textualism is their predecessor, *Oliphant v. Suquamish Indian Tribe*, discussed in the next Part.

II. OLIPHANT V. SUQUAMISH INDIAN TRIBE

Oliphant v. Suquamish Indian Tribe is the paradigmatic Canary textualist case, weaponizing the view that the Court's role in Indian affairs

¹³⁸ *Sherrill*, 544 U.S. at 214–21.

¹³⁹ *Id.* at 217–20.

¹⁴⁰ Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137, 138 (codified as amended at 25 U.S.C. § 177).

¹⁴¹ The Court routinely announces new rules that no party could have known would eventually control the outcome of a case, applies those rules to the record at hand—a record that could not have been developed in light of those rules—and then declines to remand for reconsideration in light of those rules. For example, in an adoption case, the Supreme Court rejected a motion from the biological Indian father to stay the judgment. *Birth Father v. Adoptive Couple*, 570 U.S. 940, 940 (2013). The outcome was driven by the Court's recent interpretation of the Indian Child Welfare Act, which limited the rights of the biological father. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 654 (2013); *see also* *Carcieri v. Salazar*, 555 U.S. 379, 395–96 (2009) (adopting representations made by the United States in brief opposing a petition for certiorari as a reason for declining to remand after announcing an interpretation of the Indian Reorganization Act); *Montana v. United States*, 450 U.S. 544, 566 (1981) (applying a new rule that tribes can only assert regulatory jurisdiction over nonmembers that imperiled the tribe's welfare and ignoring that the tribe never could have known prior to the announcement of the new rule that it had to show imperilment of its welfare).

¹⁴² *See* *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 245 (1985); *Ewert v. Bluejacket*, 259 U.S. 129, 138 (1922); *see also* *Black Hills Inst. of Geological Rsch. v. S.D. Sch. of Mines & Tech.*, 12 F.3d 737, 741 (8th Cir. 1993) (emphasizing the restriction on alienating Indian trust land in violation of the Indian Reorganization Act of 1934).

is—in Justice Scalia’s words—to “discern what the current state of affairs ought to be.”¹⁴³ There, the Court “implied” a divestiture of tribal powers to prosecute non-Indians.¹⁴⁴ Through an extensive review of statements of members of Congress and low-level officials in the Executive Branch, as well as federal court dicta,¹⁴⁵ the Court reversed the Ninth Circuit that had faithfully applied the rule to not divest tribal powers by implication over a dissent from then-Judge Anthony Kennedy.¹⁴⁶

The Supreme Court agreed with Judge Kennedy and reversed the Ninth Circuit, holding that no Indian tribe possessed criminal jurisdiction over non-Indians.¹⁴⁷ In the absence of a clear expression of the intent of Congress to divest Indian tribes of the power to prosecute non-Indians, the Court began with a survey of federal materials and ended with an analysis of the Treaty of Point Elliott. Ultimately, the Court concluded that there had always existed among the three branches of government and all Indian tribes an “unspoken assumption” that Indian tribes did not possess criminal jurisdiction over non-Indians.¹⁴⁸ This is Canary Textualism writ large.

A. *The Court’s History on Tribal Criminal Jurisdiction over Non-Indians*

The Court led with a lengthy dissertation on the history of tribal court jurisdiction over non-Indians, finding that, in the nineteenth century, “few Indian tribes maintained any semblance of a formal court system”;¹⁴⁹ in 1834, “the Indian tribes [were] without laws,” save “two or three”;¹⁵⁰ and that only thirty-three tribes (or forty-five, depending on how the Court was counting) asserted jurisdiction over non-Indians at the time the case was pending.¹⁵¹

¹⁴³ See *supra* note 66 and accompanying text.

¹⁴⁴ See *United States v. Wheeler*, where the Court—sixteen days after issuing its opinion in *Oliphant*—stated, “In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.” 435 U.S. 313, 313, 323 (1978) (emphasis added) (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 191 (1978)).

¹⁴⁵ *Oliphant*, 435 U.S. at 191–208.

¹⁴⁶ *Oliphant v. Schlie*, 544 F.2d 1007, 1010 (9th Cir. 1976) (applying “the long-standing rule that ‘legislation affecting the Indians is to be construed in their interest’” (quoting *United States v. Nice*, 241 U.S. 591, 599 (1916))), *rev’d sub nom.* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *id.* at 1014–19 (Kennedy, J., dissenting) (“Unlike that majority, [Judge Kennedy] would not require an express congressional withdrawal of jurisdiction.”).

¹⁴⁷ *Oliphant*, 435 U.S. at 195.

¹⁴⁸ *Id.* at 203, 206–08.

¹⁴⁹ *Id.* at 197.

¹⁵⁰ *Id.* (quoting H.R. REP. NO. 23-474, at 91 (1834)).

¹⁵¹ *Id.* at 196 (“Of the 127 reservation court systems that currently exercise criminal jurisdiction in the United States, 33 purport to extend that jurisdiction to non-Indians. Twelve other Indian tribes have enacted ordinances which would permit the assumption of criminal jurisdiction over non-Indians.” (footnote omitted)).

The Court could find only one federal court decision addressing the power of tribes to prosecute non-Indians,¹⁵² *Ex parte Kenyon*, a case involving the Cherokee Nation of Oklahoma.¹⁵³ There, the court ruled against the Cherokee Nation's assumption of jurisdiction over a non-Indian offender.¹⁵⁴ On appeal in *Oliphant*, the Ninth Circuit found *Kenyon* inapposite, pointed out that the crime was committed off-reservation—which would have stripped the tribe of jurisdiction anyway—likely making the broader statement about tribal powers dicta.¹⁵⁵ The Court noted that a 1970 opinion of the Interior Solicitor (that was withdrawn after the *Oliphant* and *Belgarde* district courts confirmed tribal jurisdiction¹⁵⁶) “reaffirmed” the *Kenyon* judgment.¹⁵⁷ The Court's apparent conclusion from this history was that the assertion of tribal criminal jurisdiction by modern-era tribes was a “relatively new phenomenon.”¹⁵⁸

The Court further implied that tribes also did not believe they possessed this jurisdiction. The Court asserted that “[f]rom the earliest treaties with these tribes, it was apparently assumed that the tribes did not have criminal jurisdiction over non-Indians absent a congressional statute or treaty provision to that effect.”¹⁵⁹ The Court referenced the 1830 Treaty with the Choctaw Nation, in which the tribe “express[ed] a wish” that the United States “grant” the tribe the power to punish non-Indians.¹⁶⁰ The Court cited two Attorney General opinions asserting that the Choctaw Nation did not possess that power without Congressional authorization.¹⁶¹ The Court here

¹⁵² *Id.* at 199.

¹⁵³ 14 F. Cas. 353, 353 (C.C.W.D. Ark. 1878) (No. 7,720).

¹⁵⁴ *Id.* at 355.

¹⁵⁵ *Oliphant v. Schlie*, 544 F.2d 1007, 1011 (9th Cir. 1976), *rev'd sub nom.* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191.

¹⁵⁶ See Bench Memorandum from Nancy Bregstein, Clerk to Justice Lewis Powell, to Justice Lewis Powell, at 21 (Jan. 6, 1978) [hereinafter Bregstein Memorandum] (on file with journal).

¹⁵⁷ *Oliphant*, 435 U.S. at 200–01 (citing *Criminal Jurisdiction of Indian Tribes Over Non-Indians*, 77 I.D. 113, 115 (Aug. 10, 1970)).

¹⁵⁸ *Id.* at 196–97.

¹⁵⁹ *Id.* at 197.

¹⁶⁰ *Id.* (emphasis omitted) (quoting A Treaty of Perpetual Friendship, Cession and Limits, U.S.-Choctaw Nation, art. 4, Sept. 27, 1830, 7 Stat. 333, 333–34).

¹⁶¹ *Id.* at 199 (first citing 2 Op. Att'y Gen. 693 (1834); and then citing 7 Op. Att'y Gen. 175 (1855)). The Court cited the 1834 opinion for the proposition that “tribal criminal jurisdiction over non-Indians is, *inter alia*, inconsistent with treaty provisions recognizing the sovereignty of the United States over the territory assigned to the Indian nation and the dependence of the Indians on the United States.” *Id.* That opinion concerned the Choctaw Nation's death sentence ordered on an enslaved man where “a negro woman, belonging to a white citizen of the United States, domiciled in the Choctaw country west of the Mississippi, ha[d] been murdered by [the] negro man, belonging to another white citizen.” 2 Op. Att'y Gen. at 693. As my colleague Professor Justin Simard has pointed out, “Courts routinely cite [slave] cases without acknowledging that they may no longer be, in a formal sense, good law. More important, courts

was essentializing Indian nations as the same, which is a bit of a logical fallacy—simply because two things are similar in one respect does not mean they necessarily are similar in all respects. The Choctaw Nation’s 1830 treaty was a removal treaty in which the tribe agreed at figurative gunpoint to leave their homelands in the American southeast for a completely different territory in Oklahoma.¹⁶²

Asking the United States for jurisdiction over new lands was not a situation the Suquamish Tribe, which never faced removal, ever had to consider.¹⁶³ Indeed, according to the tribe, the original treaty language proposed but not approved would have stripped the tribe of criminal jurisdiction over non-Indians:

Citizens of the United States may safely pass through their reserve. . . . *Injuries committed by whites towards them not to be revenged, but on complaint being made they shall be tried by the Laws of the United States and if convicted the offenders punished.* Injuries by Indians to whites to be in like manner prosecuted and punished according to law.¹⁶⁴

It would have been possible—preferable, in fact—for the Court to conclude that the Choctaw Nation in 1830 and the Suquamish Tribe of 1855 negotiated their respective treaties in far different contexts. The Port Madison Reservation was then and now located in the traditional homelands of the Suquamish Tribe, and it would have made much less sense for the tribe to ask the federal government for governance power over its own lands in 1855.¹⁶⁵ The majority never addressed this claim, instead leaving its own

rarely consider the ways in which a case’s slave context makes it less persuasive authority.” Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79, 82 (2020). The Attorney General’s opinion rested on the horrific principle that since slaves were property of white men, and white men were not subject to tribal jurisdiction under the terms of the treaty, the tribe could not prosecute the defendant:

It is, therefore, very certain that the white men who owned the negro slaves in question were not amenable to the laws or courts of the Choctaw nation; and that, for offences against the person or property of each other, or of the Choctaws, they could only be tried and punished under the laws of the United States.

2 Op. Att. Gen. at 695.

¹⁶² See generally Arthur H. DeRosier, Jr., *Andrew Jackson and Negotiations for the Removal of the Choctaw Indians*, 29 HISTORIAN 343, 356, 361 (1967) (elaborating on the consequences for the tribe if it did not agree to the treaty).

¹⁶³ *History & Culture*, SUQUAMISH TRIBE (2015), <https://suquamish.nsn.us/home/about-us/history-culture/#tab-id-3> [<https://perma.cc/NRS6-JXLD>] (“The Port Madison Indian Reservation reserved in the Treaty of Point Elliott and was intended primarily for the use of Suquamish and Duwamish peoples. Most of the Suquamish agreed to move to the reservation, which was located within their own territory.”).

¹⁶⁴ Brief for the Respondents at 42, *Oliphant*, 435 U.S. 191 (No. 76-5729), 1977 WL 189289, at *42.

¹⁶⁵ For a discussion of Port Madison, see *Frequently Asked Questions*, SUQUAMISH TRIBE (2015) <https://suquamish.nsn.us/home/about-us/faqs/> [<https://perma.cc/A2J9-G6HE>].

evidence—and the Court’s leaps of logic—to stand alone without additional explanation.¹⁶⁶

B. *The Federal Statutory Background*

The next stage of the Court’s analysis focused on Congress.¹⁶⁷ Unlike the opinions at every other stage in this litigation, the Supreme Court’s opinion buried the statutory analysis in a narrative about the legislative atmosphere affecting Indian affairs in the nineteenth century.¹⁶⁸ The Court first established the national policy behind the key statute in the case, the law now known as the Indian Country Crimes Act,¹⁶⁹ “was with providing effective protection for the Indians ‘from the violences of the lawless part of our frontier inhabitants.’”¹⁷⁰ Section five of the Trade and Intercourse Act of 1790 subjected “any citizen or inhabitant of the United States” to federal criminal jurisdiction if they committed a crime against “peaceable and friendly Indian or Indians.”¹⁷¹ That provision was silent as to tribal criminal jurisdiction over those same criminals. Then “[i]n 1817, Congress . . . extended federal enclave law to the Indian country,”¹⁷² but again the law was silent as to tribal jurisdiction.

The Court’s survey of the history of congressional engagement with the power of Indian tribes to prosecute non-Indians that followed the discussion of the Indian Country Crimes Act is a lively narrative designed to cover for the fact that Congress never divested tribes of the power to prosecute non-Indians. The Court opened with a discussion of the Western Territory bill, a bill that never became law, and which was designed to apply only to tribes in what is now Oklahoma.¹⁷³ The purpose of the bill, should it have become law, was to induce the removal of eastern Indian tribes with their own

¹⁶⁶ Justice Powell’s clerk similarly noted the tribe’s treaty evidence as an afterthought but considered the excluded language not helpful to determine the “contemporaneous understanding” of the treaty. Bregstein Memorandum, *supra* note 156, at 29–30.

¹⁶⁷ *Oliphant*, 435 U.S. at 201–03.

¹⁶⁸ *See id.* This choice to avoid reliance on federal statutes could be explained by what appears to be the firm understanding of the clerks that worked on the opinion that no federal statute stripped tribes of criminal jurisdiction over non-Indians. *See* Bregstein Memorandum, *supra* note 156, at 22–23.

¹⁶⁹ 18 U.S.C. § 1152.

¹⁷⁰ *Oliphant*, 435 U.S. at 201 (quoting George Washington, President of the United States, Seventh Annual Address (Dec. 8, 1795) [hereinafter Seventh Annual Address], reprinted in 1 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 181, 185 (Washington, Gov’t Printing Off. 1896)).

¹⁷¹ Act of July 22, 1790, ch. 34, § 5, 1 Stat. 138 (1790).

¹⁷² *Oliphant*, 435 U.S. at 201 (citing Act of Mar. 3, 1817, ch. 92, 3 Stat. 383 (1817) (codified as amended at 18 U.S.C. § 1152)).

¹⁷³ *Id.* at 201–03.

territory and government.¹⁷⁴ The Court quoted a portion of the legislative history that described provisions for the immunization of federal officials assigned to the territory from the jurisdiction of the territorial government:

Officers, and persons in the service of the United States, and persons required to reside in the Indian country by treaty stipulations, must necessarily be placed under the protection, and subject to the laws of the United States. To persons merely travelling in the Indian country the same protection is extended. The want of fixed laws, of competent tribunals of justice, which must for some time continue in the Indian country, absolutely requires for the peace of both sides that this protection should be extended.¹⁷⁵

As a matter of Indian affairs policy, that choice makes sense. But what of non-Indian settlers? The legislative history explained that those who “voluntarily” moved to the territory would be subject to the plenary jurisdiction of the territorial government: “As to those persons not required to reside in the Indian country, who voluntarily go there to reside, they must be considered as voluntarily submitting themselves to the laws of the tribes.”¹⁷⁶ The Court, in a footnote, attempted to explain away this language by supposing that congressional policy behind such a provision was “to discourage settlement on land that was reserved exclusively for the use of the various Indian tribes.”¹⁷⁷ The legislative history offered no such explanation. The legislation did authorize the governor of the territory and the President to reprieve and pardon those convicted of a capital offence under tribal law, respectively, and to restrict the power of more powerful tribes over weaker tribes.¹⁷⁸ The history concluded by noting that other than these two restrictions, the United States would not interfere in the government of the territory: “This [restriction designed to protect weaker tribes], and the pardon of offenders in capital cases, are the only instances in which the political power of the United States will interfere with that of the tribes, or the confederation.”¹⁷⁹ In this history of a bill that never became law, involving tribes worlds away from the Suquamish Indian Tribe (the Suquamish and the tribes of Oklahoma share little in terms of history and culture), Congress did not seem overly concerned about tribal criminal jurisdiction over non-Indians. The Court’s narrative here lands with a dull thud.

¹⁷⁴ H.R. REP. NO. 23-474, at 14 (1834).

¹⁷⁵ *Oliphant*, 435 U.S. at 202 (quoting H.R. REP. NO. 23-474, at 18 (1834)).

¹⁷⁶ H.R. REP. NO. 23-474, at 18 (1834).

¹⁷⁷ *Oliphant*, 435 U.S. at 202 n.13.

¹⁷⁸ H.R. REP. NO. 23-474, at 18–19 (1834).

¹⁷⁹ *Id.* at 19–20.

The Court then turned to congressional intent behind the 1854 amendments to the Trade and Intercourse Act and behind the Major Crimes Act of 1885.¹⁸⁰ The 1854 amendment barred federal prosecution of an Indian for crimes that were subject to Indian jurisdiction.¹⁸¹ The Court inferred from that provision that Congress must have assumed tribes did not possess the power to prosecute non-Indians or else Congress would have adopted a parallel provision to protect non-Indians.¹⁸² That logic does not follow, as Congress might have decided to defer to tribal sovereignty on the prosecution of Indians, while retaining a federal interest in prosecuting non-Indians.

Similarly, in the 1885 Act, the Court again inferred that Congress assumed tribes could not prosecute non-Indians because the Act only authorized federal felony criminal jurisdiction over Indians, improbably leaving tribes with the power to prosecute non-Indian felonies.¹⁸³ At first glance, this interpretation appears to be a closer question, but several problems remain with the Court's assumption. First, despite what appears to be the plain language of the Act (and two federal circuits cited by the Court¹⁸⁴), the federal government's jurisdiction over these crimes is *not* exclusive in that tribes have always prosecuted lesser-included crimes enumerated in the Act, as the Ninth Circuit recognized in 1995.¹⁸⁵ Second, the legislative history of the Act shows that Congress was far more concerned with the tribe's refusal to adequately punish Indian offenders with whom the United States had no jurisdiction due to *Ex parte Crow Dog*,¹⁸⁶ in which the Court dismissed an indictment of an Indian for a crime against another Indian for lack of a federal authorizing statute.¹⁸⁷ Finally, the *Crow Dog* Court articulated the proper rule for limiting tribal powers, the rule that tribal powers should not be abrogated by implication,¹⁸⁸ exactly what the majority opinion in *Oliphant* was doing.

¹⁸⁰ *Oliphant*, 435 U.S. at 203.

¹⁸¹ *Id.* at 203 (citing Act of March 27, 1854, ch. 26, § 3, 10 Stat. 269, 270 (codified as amended at 18 U.S.C. § 1152)).

¹⁸² *See id.* at 191.

¹⁸³ *Id.* at 203.

¹⁸⁴ *Id.* at 203–04 n.14 (citing *Sam v. United States*, 385 F.2d 213, 214 (10th Cir. 1967); *Felicia v. United States*, 495 F.2d 353, 354 (8th Cir. 1974)).

¹⁸⁵ *Wetsit v. Stafne*, 44 F.3d 823, 825–26 (9th Cir. 1995).

¹⁸⁶ *See* S. DOC. NO. 48-105, at 2–3 (1st Sess. 1884) (expressing caution that the federal government lacked jurisdiction to prosecute a murder case because both parties were Indian); 16 CONG. REC. 934 (1885) (same).

¹⁸⁷ *Ex parte Crow Dog*, 109 U.S. 556, 570–72 (1883).

¹⁸⁸ *Id.*

Having exhausted its review of nineteenth-century congressional intent, the Court turned to its own sparse precedents on the issue.

C. *The Supreme Court's Dictum in Mayfield*

On the matter of congressional assumptions about tribal powers, the Court relied on its own dictum in *In re Mayfield*, an 1891 decision dismissing the indictment under the Indian Country Crimes Act of a Cherokee Nation citizen for committing an act of adultery with a white woman.¹⁸⁹ The *Oliphant* Court quoted *Mayfield* for the proposition that the “general object” of federal Indian Country criminal statutes was to “reserve” federal jurisdiction over all criminal matters in which a non-Indian is a party.¹⁹⁰ But that is a statement that appears to have been taken out of context. The *Mayfield* Court was specifically referring to an 1890 act that governed criminal jurisdiction in the “Indian Territory” (again, what is now Oklahoma), not “Indian country” more generally.¹⁹¹ Additionally, the *Mayfield* Court’s description of general Indian affairs policy reversed the policy as described by the *Oliphant* Court. The *Mayfield* Court asserted that congressional policy prioritized the “safety of the white population” that came into contact with Indians,¹⁹² while in the *Oliphant* opinion, the Court stated that congressional policy was the opposite, to protect Indians from “the lawless part of our frontier inhabitants.”¹⁹³ Tellingly, the *Mayfield* Court’s assertion cited no authority, whereas the *Oliphant* statement was supported by a statement of President Washington. The different statements of policy matter a great deal—if Congress was interested in protecting non-Indians from Indians, then it would stand to reason that Congress would not support tribal criminal jurisdiction over non-Indians, but if Congress was interested in protecting Indians from non-Indians, then the Congress would be more likely to support tribal powers over non-Indians, if nothing else, to allow tribes to contribute to the effort to ensure law and order in Indian Country. At bottom, the *Mayfield* Court’s dictum is most surely incorrect.

Moreover, the modern-era Supreme Court demands interrogation for depending on policy statements from a nineteenth-century case addressing the federal indictment of an Indian for adultery. The United States of the 1880s and 1890s was deeply involved in an abusive program to assimilate

¹⁸⁹ 141 U.S. 107, 116 (1891).

¹⁹⁰ *Oliphant*, 435 U.S. at 204 (quoting *Mayfield*, 141 U.S. at 116).

¹⁹¹ *Mayfield*, 141 U.S. at 115 (citing Act of May 2, 1890, ch. 182, § 30, 26 Stat. 81, 94 (1890)); see also *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2476 (2020) (“Originally, it seems criminal prosecutions in the Indian Territory were split between tribal and federal courts.” (citing § 30, 26 Stat. at 94)).

¹⁹² *Mayfield*, 141 U.S. at 115–16.

¹⁹³ 435 U.S. at 201 (quoting Seventh Annual Address, *supra* note 170, at 185).

Indian people by stripping them of their lands, languages, and cultures.¹⁹⁴ In a separate case tangentially involving the prosecution of an Indian in Oregon for adultery, one federal district court even referred to an Indian reservation as a “school.”¹⁹⁵ The federal prosecution of adults for adultery long has been anathema in the United States.¹⁹⁶ Despite the fact that the Court dismissed the indictment in *Mayfield*, segregationist-era dicta praising the federal government’s paternalism should have been given no credence in *Oliphant*.

The Court then turned to twentieth-century statements of congressional intent.

D. The 1960 Acts

For its final argument, the Court returned again to the statutory realm, this time arriving in the twentieth century, pointing to the legislative history of a pair of 1960 statutes that criminalized the destruction of reservation signs¹⁹⁷ and poaching on Indian lands.¹⁹⁸ As the statutes do nothing more than establish new federal crimes and are silent as to tribal powers, the *Oliphant* Court again was forced to turn to the legislative record for support.¹⁹⁹ The report accompanying the legislation offers statements that directly support the majority’s conclusion: first, “Indian tribal law is enforceable against Indians only; not against non-Indians” and, second, “Non-Indians are not subject to the jurisdiction of Indian courts and cannot be tried in Indian courts on trespass charges.”²⁰⁰ The *Oliphant* Court included these statements in its concluding remarks of its section on congressional powers,²⁰¹ which are by far the plainest statements in the *Congressional Record* on tribal powers, but the history of how the Senate adopted this position is a comedy of errors.

The colloquies in 1958 between the representatives supporting the bill, the federal government, the tribes’ attorneys, and the representatives on the Judiciary Subcommittee suggest that not a single one of them knew of authority that definitively answered any questions about the powers of Indian tribes (as the *Oliphant* Court would later learn)—but that both the Executive branch and tribal council had clear opinions about tribal powers.

¹⁹⁴ See Rose Strelau, “To Domesticate and Civilize Wild Indians”: Allotment and the Campaign to Reform Indian Families, 1875–1887, 30 J. FAM. HIST. 265, 266 (2005).

¹⁹⁵ *United States v. Clapox*, 35 F. 575, 577 (D. Or. 1888).

¹⁹⁶ See generally Martin J. Siegel, *For Better or For Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 46–49 (1991) (summarizing the history of adultery criminal laws in the United States through the American Law Institute’s removal of adultery from the Model Penal Code in 1955).

¹⁹⁷ Pub. L. No. 86-634, § 1, 74 Stat. 469, 469 (1960) (codified as amended at 18 U.S.C. § 1164).

¹⁹⁸ See *id.* § 2 (codified as amended at 18 U.S.C. § 1165).

¹⁹⁹ 435 U.S. at 204–06.

²⁰⁰ *Id.* at 205–06 (quoting S. REP. NO. 86-1686, at 2 (1960)).

²⁰¹ *Id.* at 205–06.

Representative Walt Horan of Washington State testified on behalf of the bills, describing them incorrectly as statutes authorizing tribes to prosecute trespassers²⁰²—implying jurisdiction over non-Indians. A representative of the Department of the Interior Solicitor’s Office then asserted that tribes cannot prosecute non-Indians “*either in the Federal or in the state courts,*”²⁰³ a statement that, while true, is irrelevant—tribes cannot prosecute criminals in federal or state court any more than federal or state governments can prosecute lawbreakers in tribal court. A member of the Subcommittee, Representative Roland V. Libonati of Illinois, asked the Solicitor’s representative about Representative Horan’s statement that tribes should be able to prosecute non-Indians.²⁰⁴ In response, the government official corrected an assumption in Representative Libonati’s question, asserting that tribes could not prosecute non-Indians for lack of jurisdiction.²⁰⁵ Cyril Brickfield, counsel to the Judiciary Committee, pressed the Interior Solicitor’s representative for reasons why tribes could not prosecute non-Indians, and the representative responded by asserting that tribal powers were “personal,” not territorial.²⁰⁶ That statement seemingly contradicted the official’s statement a moment earlier when he acknowledged tribes have the power to exclude non-Indians from their territories and to regulate those within their territories.²⁰⁷ The federal government has acknowledged the power of tribes to exclude persons from their lands since at least 1821.²⁰⁸ Even the attorney for several tribes supporting the bills, Marvin Sonosky,

²⁰² *Bills to Amend Title 18 of the U.S. Code to Make It Unlawful to Destroy, Deface, or Remove Certain Boundary Markers on Indian Reservations, and to Trespass on Indian Reservations to Hunt, Fish, or Trap: Hearing on H.R. 8224 and H.R. 7240 Before the Third Subcom. of the H. Comm. on the Judiciary, 85th Cong., 3–4 (1958) [hereinafter 1958 Hearing]* (statement of Rep. Horan) (“It has always been assumed that it was unlawful to do that on an Indian reservation without explicit consent of the tribal councils, and yet this measure is necessary, as I understand it, to enable to [sic] tribal councils to prosecute those who trespass on the reservation.”); *id.* at 5 (“Also, it will give the Indians the authority and somewhat of a privilege to take an unlawful trespasser to the courts and prosecute.”).

²⁰³ *Id.* at 14 (statement of Lewis A. Sigler, Interior Solicitor’s Office) (emphasis added).

²⁰⁴ *Id.* at 16 (statement of Rep. Libonati) (“There are some Congressmen who seem to think that they should have the power to enforce these laws against these violators by the tribes themselves.”).

²⁰⁵ *Id.* (statement of Lewis A. Sigler, Interior Solicitor’s Office) (“There is no jurisdiction in the tribal courts. You [sic] question indicated you assumed the tribal courts have jurisdiction.”).

²⁰⁶ *Id.* at 21 (statement of Cyril Brickfield) (“The Indian jurisdiction is primarily personal rather than territorial. That is subject to many qualifications, but the best I can do in answering your question is that the Indians do not have jurisdiction over an area of land and all people within that area.”).

²⁰⁷ *Id.* at 19–20 (statement of Lewis A. Sigler, Interior Solicitor’s Office) (“I think that there should be no question about the authority of the owner of that property to exclude others or to permit them to come on after paying a fee for that purpose. It is merely the right that goes with ownership of the land, and these are Indian lands, and they are entitled to their fish and wildlife -- they are entitled to use their fish and wildlife resources for their own benefit, and if anybody comes on their land, they can properly be charged for it, in my judgment.”).

²⁰⁸ Powers of Indian Tribes, 55 Interior Dec. 14, 48 (1934) (citing 1 Op. Att’y Gen. 465, 466 (1821)).

asserted that tribes possessed no powers over non-Indians: “Tribal law does not touch this trespasser since it is enforceable against Indians only.”²⁰⁹ If nothing else, this mid-twentieth-century exchange shows a severe deficiency of understanding on all sides on the question of the scope of tribal powers.

As a practical matter, the bills seemed facially unworkable and the justifications for the bills did not make much sense to the nonexperts in the room. Representative Libonati questioned the practicality of extending federal criminal jurisdiction over reservation trespass and poaching when the tribal government could effectively do it themselves,²¹⁰ probably because tribal officials could respond more quickly than federal officials, who likely were hours away. Glen Wilkinson, another attorney representing several tribes supporting the bill, strangely declined to address the question, and instead pointed out that the bill did not contemplate the expansion of tribal jurisdiction.²¹¹ Brickfield more directly asked about the efficiency of the bill, wondering whether placing primary jurisdiction in the hands of the federal government would be defeated by “delay[s].”²¹² Representative Libonati pressed Wilkinson on this point further, wondering why the bill should not just place “exclusive[]” jurisdiction in the tribal court.²¹³ Wilkinson (recall he was counsel to Indian tribes) asserted that such a bill would subject non-Indians to tribal jurisdiction when they are already subject to state jurisdiction,²¹⁴ a non sequitur given that the dual sovereignty exception to double jeopardy had long been established.²¹⁵ In short, none of the witnesses

²⁰⁹ 1958 Hearing, *supra* note 202, at 30 (statement of Marvin J. Sonosky).

²¹⁰ *Id.* at 48 (statement of Rep. Libonati) (“[T]he tribal court could sit as a court just to determine whether the defendant was directly or indirectly connected with the crime, or misdemeanor, not to pass upon the merits, if you follow me.”).

²¹¹ *Id.* (statement of Glen Wilkinson) (“Mr. Chairman, again all I can say is that the jurisdiction of the tribal courts would not be enlarged, and this would be purely a matter for determination by the Federal courts; so I can see no room for discrimination with respect to any accused.”).

²¹² *Id.* at 49 (statement of Cyril Brickfield) (“Would there be a delay, or how much delay would there be between his apprehension or arrest and being brought as a preliminary matter before some Federal officer? As I understand it, it is conceivable that there would be instances where you would have great distances between the point of arrest and the Federal officer who could sit preliminarily or to dispose of the case for that matter.”).

²¹³ *Id.* at 50 (statement of Rep. Libonati) (“I do not understand why you did not place jurisdiction in the tribal court exclusively, or at least a review hearing for a tribal court to determine if a crime was actually committed; and in line with the statements of counsel for the committee, determine whether or not a person is an innocent trespasser or one intent on violating or conspiring against the laws relative to fishing or hunting.”).

²¹⁴ *Id.* at 50–51 (statement of Glen Wilkinson) (“Mr. Chairman, I feel that that approach would get us into very serious constitutional questions, because a non-Indian citizen of a state in which a reservation is located is subject to the jurisdiction of that state. If we attempt to enlarge tribal court jurisdiction to that point, I fear I would have valid objection.”).

²¹⁵ *Cf.* *Gamble v. United States*, 139 S. Ct. 1960, 1966–67 (2019) (discussing the earliest dual sovereignty doctrine cases, which date back to before the Civil War).

knew the answer to the question of tribal powers, but reiterated unsupported assumptions. And ironically, the Court could point to congressional authorities confirming that at least federal government and tribal attorneys assumed tribes had no criminal jurisdiction over non-Indians. Yet, like the *Oliphant* Court two decades later, they knew of no reasoned basis for reaching that conclusion.

This comedy of errors is the Court's best evidence that some government officials did indeed share an assumption that tribes did not possess the power to prosecute non-Indians.

E. The Treaty of Point Elliott

The second part of the *Oliphant* opinion, which purported to address the Treaty of Point Elliott that established the Port Madison Reservation,²¹⁶ offered little discussion of the treaty. Instead, it focused on developing a narrative of tribal dependency—in other words, the inferiority of Indian people to non-Indian people.

The Court first highlighted Article IX of the treaty, which provides that the signatory tribes “acknowledge their dependence on the government of the United States.”²¹⁷ The Court looked in the Marshall Trilogy for a meaning of “dependence” and settled on language that suggested tribes relied on the United States for physical protection from “lawless and injurious intrusions into their country.”²¹⁸ The Court determined that dependence means that “Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers ‘inconsistent with their status.’”²¹⁹ Hence, here, the Court suggested that there could be tribal powers that Congress has not explicitly terminated or modified that may still be divested from tribes by virtue of the dependency of tribes.

²¹⁶ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206–11 (1978).

²¹⁷ *Id.* at 207 (quoting Treaty Between the United States and the Dwámish, Suquámish, and Other Allied and Subordinate Tribes of Indians in Washington Territory, art. IX, Jan. 22, 1855, 12 Stat. 927, 929).

²¹⁸ *Id.* (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 555 (1832)).

²¹⁹ *Id.* at 208 (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976)).

The *Oliphant* majority referenced the dependence of Indian tribes *ten times*,²²⁰ and the power of tribal self-government once.²²¹ Recall that the Port Madison reservation was and is part of the homeland of the Suquamish Indian Tribe, not the other way around.

* * *

As should be clear by now, the *Oliphant* Court did not credit the understanding of dependence that allowed for robust tribal self-government. For the *Oliphant* majority, it is the dependence of Indian tribes that divests them of the power of criminal prosecution of non-Indians.²²² The Court quoted *Johnson v. M'Intosh* for this principle: “[T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished.”²²³ *Johnson*, of course, is the first case in the Marshall Trilogy, a case in which the Court decided that Indian nations did not possess the power to alienate their original title to any nation other than the discovering nation, reasoning that the “Indians inhabiting this country were fierce savages, whose occupation was war . . . and who could not be governed as a distinct society, . . . and [who exposed European settlers] and their families to the perpetual hazard of being massacred.”²²⁴ These dependent Indians are the Indians that the *Oliphant* Court worried about when contemplating tribal jurisdiction over non-Indians.

Perhaps the federal treaty negotiators believed in 1855 that the Suquamish Tribe and the few dozen other tribes that signed and agreed to similar treaties²²⁵—the Stevens treaties²²⁶—were fierce savages, and that Article IX placed the tribes into a wardship, or a state of pupilage. Not so. In fact, the complete opposite was true, as the Supreme Court in 1978 knew fully well. Judge Boldt’s famed 1974 decision in *United States v.*

²²⁰ *Id.* at 196 (*Oliphant v. Schlie*); *id.* at 199 (1834 Attorney General opinion); *id.* at 204 (*Ex parte Mayfield*); *id.* at 206 n.16 (Article IX of the 1855 Treaty); *id.* at 207 (Article IX of the 1855 Treaty); *id.* (*Worcester*); *id.* (1855 Treaty again); *id.* at 208 (*Cherokee Nation v. Georgia*); *id.* at 208 n.17 (*McClanahan v. Arizona State Tax Comm’n*); *id.* at 209 (*Johnson v. M’Intosh*, for the proposition that tribes are no longer “independent”).

²²¹ See *id.* at 205 n.15 (referencing the 1977 American Indian Policy Review Commission that acknowledged inherent tribal powers). A few days after *Oliphant*, the Court confirmed that Indian tribes possessed robust inherent powers. *United States v. Wheeler*, 435 U.S. 313, 322–23 (1978).

²²² 435 U.S. at 209–10.

²²³ *Id.* at 209 (quoting *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823)).

²²⁴ 21 U.S. (8 Wheat.) at 590.

²²⁵ *History & Culture*, *supra* note 163.

²²⁶ Kent Richards, *The Stevens Treaties of 1854–1855*, 106 OR. HIST. Q. 342, 342–47 (2005).

Washington had already established that tribes in what is now Washington State had been *self-governing*, civilized tribes in 1855 and ever since.²²⁷

It would have been reasonable—and compelled by the canons of construing Indian treaties—for the *Oliphant* Court to interpret the silence of the Treaty of Point Elliott on the question of tribal criminal jurisdiction over non-Indians as evidence of retained tribal jurisdiction. That interpretation, however, would have allowed modern-day Indian tribes to exercise jurisdiction over white men like Mark David Oliphant, and that the Supreme Court seemingly could not abide—as a matter of Canary Textualism.

Decades have passed since the Court delivered the *Oliphant* decision. The Court seems to be split on whether to stay on that road. The next Part details a superior theory.

III. MUSKRAT TEXTUALISM

We have reached a point in American legal history where textualism is the dominant interpretive theory in public law. But we have also reached a point where textualism is broad enough that fierce textualists can reach opposite outcomes in analyzing the same texts.²²⁸ In federal Indian law, that divide is as stark as anywhere in public law. This Part details the normatively superior version of textualism in federal Indian law, Muskrat Textualism.

A. *What Is Muskrat Textualism?*

Muskrat Textualism is a metaphor that comes from the *aadizookaan* (sacred stories) of the Anishinaabeg.²²⁹ In one of these stories, the lowly muskrat helps rebuild the world after the great flood. While the stronger animals and the trickster god Nanaboozhoo floated on the water without hope, the humble muskrat dove beneath the waters, swimming the farthest down to reach the ground and return with a single pawful of dirt. With this

²²⁷ 384 F. Supp. 312, 339–40, 359–82 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

²²⁸ See, e.g., *Yellen v. Confederated Tribes of the Chehalis Reservation*, 141 S. Ct. 2434, 2452 (2021) (holding 6–3 that the Alaska Native Corporations are “recognized governing bod[ies]” under the CARES Act); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1736, 1753–54 (2020) (holding 6–3 that the Title VII prohibition on discrimination “because of” sex protects LGTBTQ+ persons). The commentators on the *Strict Scrutiny* podcast have helpfully critiqued the Court’s textualism in *Yellen*, which led to a 6–3 split Court for entirely unsatisfying reasons. *Comrade Thomas*, STRICT SCRUTINY, at 36:30 (June 25, 2021), https://strict-scrutiny.simplecast.com/episodes/comrade-thomas_qOlsSDF [https://perma.cc/U8JP-WWY5]. Professor Kate Shaw pointed out that the Court’s divisions in textualist cases might be attributed to “shadow decision points, . . . [p]oints at which the court decides what text to emphasize.” *Id.* at 48:00. I made a similar point in *Textualism’s Gaze*, where I argued textualists privilege texts depending on the outcome they wish to reach. Fletcher, *Textualism’s Gaze*, *supra* note 55, at 112 (“The narrow focus of the textualist’s gaze also warps how Indian law matters are decided.”).

²²⁹ One version of the muskrat’s role in the Anishinaabe creation story is reproduced in FLETCHER, *THE GHOST ROAD*, *supra* note 13, at 3.

crucial contribution from the muskrat, Nanaboozhoo used the dirt to magically recreate the world. The muskrat is the symbol of the humility, courage, and thoughtfulness that guided the Anishinaabeg back from near extinction. Tribes should no longer be viewed as helpless birds; they should be viewed as courageous muskrats.

Muskrat Textualism is a form of judicial minimalism applied in the context of federal Indian law. Like the meek animal that courageously acted to allow the trickster god to save creation, Indian tribes innovate and proactively make their own choices that beneficially impact society. Therefore, Muskrat textualists do not view Indians as helpless canaries; Muskrat textualists view Indians and tribes as active participants in matters of Indian Country governance. These judges invoke federal plenary power in Indian affairs to create space to allow tribes, the federal government, and state and local governments to negotiate away disputes and confusion over reservation governance.²³⁰ These judges defer to acts of Congress and federal regulations governing Indian affairs, leaving policy preferences for or against tribal, state, or federal interests to the side.²³¹ Muskrat textualists are faithful to the text, when there is one, and defer to the default interpretative rules, such as the clear statement rules, when there is no controlling text.²³² The added benefit of Muskrat Textualism is that it restores a significant amount of order to the confusion that has permeated Indian law since the rise of Canary Textualism.

Justice Gorsuch is the leading Muskrat textualist on the Roberts Court. Justice Gorsuch has not been a member of the Supreme Court for long, but it is hard to believe this Justice would ever have (or will ever have) authored a document (even an internal memo never intended to be illuminated by the light of the public eye) like Scalia's *Duro* memo. Gorsuch's Indian record is already extensive. His opinions in *Upper Skagit Indian Tribe v. Lundgren*,²³³ *Washington State Department of Licensing v. Cougar Den*,²³⁴ and, finally,

²³⁰ See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) ("But unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that [25 U.S.C.] § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.").

²³¹ See, e.g., *Morton v. Mancari*, 417 U.S. 535, 555 (1974) ("As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process.").

²³² See, e.g., *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014) ("Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government.").

²³³ 138 S. Ct. 1649 (2018).

²³⁴ 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring).

McGirt v. Oklahoma,²³⁵ are examples of a textualism we did not see from Justice Scalia and other textualists.

Justice Gorsuch's Muskrat Textualism was already on display before he authored *McGirt v. Oklahoma*. In *Upper Skagit*, he declined to intervene in a legal question of first impression, preferring to let the issue percolate in the lower courts. There, the Court addressed whether the tribe possessed sovereign immunity from quiet title actions involving tribe-owned fee land. Lower courts had split on the question, both lines of cases resting on an earlier Supreme Court decision, *County of Yakima v. Yakima Indian Nation*.²³⁶ The *Skagit* majority merely held that *Yakima* did not control the outcome, a position that the party suing the tribe had already conceded in its merits brief.²³⁷ At the recommendation of the United States, the Lundgrens changed their position at the merits stage to argue, instead of relying on *Yakima*, that the Court should hold that the immovable property exception to sovereign immunity applied to Indian tribes. The Court remanded back to the lower court to address this question on first instance, with a total of seven Justices agreeing on the remand.²³⁸

Unlike his four conservative brethren, Justice Gorsuch declined to address the merits of the immovable property exception in *Upper Skagit*. The Chief Justice, writing a concurrence joined by Justice Kennedy, claimed that tribal immunity in these types of cases is "intolerable" and strongly recommended on policy grounds that courts apply the exception.²³⁹ Justice Thomas, writing a dissent joined by Justice Alito, expounded at length on the origins and the benefits of the exception.²⁴⁰ Of course, the immovable property exception originated as a response to foreign princes owning land and asserting sovereign authority over the land of another sovereign.²⁴¹ Whether the doctrine should apply to Indian tribes is very much a policy question, one Congress is usually deemed the most competent to address. Four Justices had already made their policy choice. But like a faithful

²³⁵ 140 S. Ct. 2452 (2020).

²³⁶ *Upper Skagit*, 138 S. Ct. at 1651–52.

²³⁷ *Id.* at 1653–54.

²³⁸ *Id.* at 1651, 1654–55 (justifying a remand); *id.* at 1655–56 (Roberts, C.J., concurring) (joining majority decision to remand). Since the Court's remand decision, some courts have addressed the immovable property exception to sovereign immunity; each has determined that the exception does not apply to tribes. See *Seneca County v. Cayuga Indian Nation*, 978 F.3d 829, 832 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 2722 (2021); *Self v. Cher-Ae Heights Indian Cmty.*, 60 Cal. App. 5th 209, 212 (2021), *cert. petition filed*, No. 21-477 (U.S. Sept. 27).

²³⁹ *Upper Skagit*, 138 S. Ct. at 1655 (Roberts, C.J., concurring).

²⁴⁰ *Id.* at 1656–63 (Thomas, J., dissenting).

²⁴¹ *Id.* at 1657–58.

Muskrat textualist, Justice Gorsuch humbly pushed that policy decision down the road.²⁴²

In *Cougar Den*, Gorsuch addressed a claimed Indian tax immunity with deference toward the value (or lack thereof) the tribe received from the United States in its treaty. There, a split Court held that the 1855 Treaty with the Yakamas²⁴³ (now known as the Yakama Nation) either preempted a state motor fuels tax or impliedly immunized Indians from the tax through a right to travel the highways.²⁴⁴ Four dissenters argued that no such preemption or immunity existed.²⁴⁵ Justice Gorsuch's concurrence, joined only by Justice Ginsburg, provided the argument favoring an implied treaty right to a tax immunity. Gorsuch wrote that the treaty firmly established that Indians had negotiated for the right to travel unencumbered on the highways.²⁴⁶ Following a lengthy road of precedent involving the interpretation of Indian treaties, Gorsuch rejected the state's position that the treaty merely allowed Indians to travel the same as all other people²⁴⁷ (which of course would have rendered the right to travel language in the treaty superfluous). The rest of the Court debated the preemptive value of the federal, state, and tribal interests.²⁴⁸ Preemption analysis, which in Indian law is a balancing test between competing federal, state, and tribal taxation and regulatory interests, is inherently a policy debate.²⁴⁹ Gorsuch, even though joined by only one other, refused to engage in that policy debate. Instead, foreshadowing his opinion in *McGirt*, Gorsuch pointed out that the value of the lands ceded by the Yakama Nation far exceeded the giveaways presented by the modern state.²⁵⁰

²⁴² It may already be that the Court has decided to leave well enough alone on this question, having declined the review of a Second Circuit decision rejecting the immovable property exception in the 2020 Term. See *supra* note 238.

²⁴³ Treaty Between the United States and the Yakama Nation of Indians, June 9, 1855, 12 Stat. 951.

²⁴⁴ Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1011, 1017 (2018).

²⁴⁵ *Id.* at 1021–26 (Roberts, C.J., dissenting).

²⁴⁶ *Id.* at 1016–17 (Gorsuch, J., concurring).

²⁴⁷ *Id.* at 1017–18.

²⁴⁸ *Id.* at 1013 (majority opinion) (“[T]o impose a tax upon traveling with certain goods burdens that travel. And the right to travel on the public highways without such burdens is, as we have said, just what the treaty protects. Therefore, our precedents tell us that the tax must be pre-empted.”); *id.* at 1026 (Roberts, C.J., dissenting) (“In the meantime, do not assume today’s decision is good news for tribal members across the country. Application of state safety regulations, for example, could prevent Indians from hunting and fishing in their traditional or preferred manner, or in particular ‘usual and accustomed places.’”).

²⁴⁹ See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 203, 209 (1987) (“The shorthand test is whether the conduct at issue violates the State’s public policy.”).

²⁵⁰ *Cougar Den*, 139 S. Ct. at 1018 (Gorsuch, J., concurring).

Justice Gorsuch’s opinion in *McGirt* is perhaps the best example of Muskrat Textualism in many decades, perhaps ever. We turn now to that case.

B. *McGirt v. Oklahoma*

Observers claimed, among other things, that *McGirt v. Oklahoma* is a “landmark” decision with “ramifications for the Creek Nation, Oklahoma, and federal Indian law.”²⁵¹ It is a “historic” win for tribal interests.²⁵² The case involved an area of federal Indian law—reservation boundaries diminishment—that tribal advocates usually expect tribes to lose because of Canary Textualism.²⁵³

1. *The Law of Reservation Boundaries Diminishment*

The general rule is, again, that only Congress can terminate a reservation or modify reservation boundaries. Despite the clarity of the rule, the Court’s cases are a complex jumble.²⁵⁴ It is fair to say that Congress rarely legislated clear intent to terminate or modify reservation boundaries without tribal agreement. The impact of federal legislation, however—and the bureaucratic implantation of these laws—often was to allow crowds of non-Indians to enter reservations en masse, putting enormous pressure on the Court many decades later to ratify the facts on the ground.²⁵⁵ Moreover, these

²⁵¹ Allison Barnwell, *McGirt v. Oklahoma*, 0 PUB. LAND & RES. L. REV. 1, 6 (2020).

²⁵² Julian Brave NoiseCat, *The McGirt Case Is a Historic Win for Tribes*, ATLANTIC (July 12, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/mcgart-case-historic-win-tribes/614071/> [https://perma.cc/7J9W-NM6S].

²⁵³ See, e.g., Charlene Koski, Comment, *The Legacy of Solem v. Bartlett: How Courts Have Used Demographics to Bypass Congress and Erode the Basic Principles of Indian Law*, 84 WASH. L. REV. 723, 724 (2009) (explaining that courts’ consideration of the reservation’s demographics overwhelmingly supports diminishment).

²⁵⁴ See, e.g., Marc Slonim, *Indian Country, Indian Reservations, and the Importance of History in Indian Law*, 45 GONZ. L. REV. 517, 519–20 (2009) (summarizing the extensive litigation that resulted from the definition of “Indian country” in a federal criminal statute).

²⁵⁵ See Randall Akee, *Land Titles and Dispossession: Allotment on American Indian Reservations*, 3 J. ECON., RACE, & POL’Y 123, 125 (2020) (explaining that, under the Dawes Act, “[f]or reservations that were larger than the total assignment of acreage to the total number of heads of households, the extra land was deemed ‘surplus’ and sold to non-Indians”); see also, e.g., *Ready for Indian Land Rush: Five Hundred Reach Bonesteel, S. D., on Special Train*, DAILY TIMES, Jul. 8, 1904, at 6 (reporting that one “special train” arrived and one was en route “for the opening of the Rosebud Indian reservation”); “*Sooners’ Crowd Reservation Already: Daring Prospectors Cross the Line and Locate Claims.*,” EVENING BEE, Jul. 3, 1907, at 7 (recounting reports “that ‘sooners’ are rapidly rushing over the lines into the Pyramid Lake Indian Reservation”). The Court has often referred to demographic information when it is about to rule against tribal interests. E.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 193 n.1 (1978) (“Residing on the reservation is an estimated population of approximately 2928 non-Indians living in 976 dwelling units. There lives on the reservation approximately 50 members of the Suquamish Indian Tribe.”); *DeCoteau v. Dist. Ct.*, 420 U.S. 425, 428 (1975) (“Within the 1867 boundaries, there reside

reservation boundaries cases typically involved efforts by convicted criminals to vacate jail terms on jurisdictional grounds.

The leading case, at least until *McGirt*, was *Solem v. Bartlett*.²⁵⁶ That case involved a tribal member's prosecution by the State of South Dakota for a crime committed on the Cheyenne River Sioux Reservation.²⁵⁷ The Court drew from its experience in earlier reservation boundaries cases and consolidated its learning into one statement of the law: "The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries."²⁵⁸ Reservation diminishment "will not be lightly inferred."²⁵⁹ Congress must "clearly evince an 'intent . . . to change . . . boundaries' before diminishment will be found."²⁶⁰ If the congressional act makes "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests," and when the "cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished."²⁶¹ Ultimately, the Court concluded that Congress did not terminate the reservation, failing to find the clear statement of intent.²⁶²

But the seeds for Canary textualist mischief were laid in the *Solem* opinion, as the Court added that "explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment."²⁶³ The Court would also look to subsequent treatment of the lands in later enactments "[t]o a lesser extent": "Congress' own treatment of the affected areas, particularly in the years immediately following the opening, has some evidentiary value, as does the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with unallotted open lands."²⁶⁴ Finally, the Court stated it would look at the "pragmatic" story of an Indian reservation as well, in particular the demographics of the reservation: "Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have

about 3,000 tribal members and 30,000 non-Indians."); cf. FLETCHER, FEDERAL INDIAN LAW, *supra* note 28, § 7.2 (discussing reservation boundaries litigation).

²⁵⁶ 465 U.S. 463 (1984); FLETCHER, FEDERAL INDIAN LAW, *supra* note 28, § 7.2.

²⁵⁷ *Solem*, 465 U.S. at 465.

²⁵⁸ *Id.* at 470.

²⁵⁹ *Id.*

²⁶⁰ *Id.* (quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 (1977)).

²⁶¹ *Id.* at 470–71 (citing *DeCoteau v. Dist. Ct.*, 420 U.S. 425, 447–48 (1975)).

²⁶² *Id.* at 475–76.

²⁶³ *Id.* at 471.

²⁶⁴ *Id.*

acknowledged that *de facto*, if not *de jure*, diminishment may have occurred.”²⁶⁵

In two later reservation boundaries cases, the Court relied on the two nonstatutory factors. In *Hagen v. Utah*, the Court found reservation diminishment where the demographics of the reservation supported the narrative of diminishment despite contravening congressional records.²⁶⁶ Similarly, in *South Dakota v. Yankton Sioux Tribe*, the Court found diminishment with at least some reliance on reservation demographics.²⁶⁷

But in *Nebraska v. Parker*, the Court focused its attention on the statutes, “[t]he most probative evidence of diminishment.”²⁶⁸ The Court found insufficient evidence of diminishment and moved on to the subsequent history of the reservation and the demographics.²⁶⁹ Despite the fact that “the [t]ribe was almost entirely absent from the disputed territory for more than 120 years,”²⁷⁰ the Court refused to infer from that history the congressional intent to diminish the reservation.²⁷¹ The decision was unanimous. A victory for Muskrat Textualism? Perhaps.²⁷²

2. *The McGirt Majority*

In *McGirt v. Oklahoma*, the Supreme Court held that the reservation boundaries of the Creek Nation had never been disestablished by Congress, and so they remained extant.²⁷³ Because the Creek Reservation remained extant, all of the lands within the reservation boundaries are considered “Indian country” under federal law.²⁷⁴ State governments such as Oklahoma do not possess criminal jurisdiction over Indians within Indian Country without authorization from Congress.²⁷⁵ Therefore, the state’s prosecution and conviction of the respondent, Jimcy McGirt, a Seminole Nation member who had committed a crime in Creek Indian Country, was invalid.²⁷⁶

²⁶⁵ *Id.*

²⁶⁶ 510 U.S. 399, 411–21 (1994).

²⁶⁷ 522 U.S. 329, 333, 351, 356–57 (1998).

²⁶⁸ 136 S. Ct. 1072, 1079–80 (2016) (quoting *Hagen*, 510 U.S. at 411).

²⁶⁹ *Id.* at 1079–81.

²⁷⁰ *Id.* at 1081.

²⁷¹ *Id.* at 1080–82.

²⁷² The Court did leave open the possibility that tribal powers over portions of its undiminished reservation may be subject to the defenses of “laches and acquiescence,” potentially undermining the tribe’s victory on the reservation boundaries issue. *Id.* at 1076, 1082 (citing *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 217–21 (2005)).

²⁷³ 140 S. Ct. 2452, 2464 (2020).

²⁷⁴ *Id.* (citing 18 U.S.C. § 1151(a)).

²⁷⁵ *See id.* at 2459–60.

²⁷⁶ *Id.* at 2459, 2478.

The Supreme Court's rule on whether an Indian reservation's boundaries remain extant was (and is) whether Congress terminated or altered those boundaries.²⁷⁷ The Court also held that it will not find a reservation diminished or disestablished unless Congress has made clear its intent to do so.²⁷⁸ At the risk of reductionism, the *McGirt* Court applied a simple syllogism: First, the Court found that various treaties with the Creek Nation—now the Muscogee (Creek) Nation—and the United States had established and altered reservation boundaries.²⁷⁹ Next, the Court found no acts of Congress explicitly terminating the reservation.²⁸⁰ As a result, the reservation remained. Muskrat Textualism is usually far less complicated than Canary Textualism.

a. The creation of the reservation

Highlighting “what should be obvious,” the Court pointed to two treaties in reaching its conclusion that the United States and the Creek Nation agreed to establish a reservation.²⁸¹ The first treaty, from 1832, involved a bargained-for exchange—in exchange for the Creek lands east of the Mississippi River, the United States guaranteed lands west of the Mississippi.²⁸² The second treaty, from 1833, “settled on boundary lines for a new and ‘permanent home to the whole Creek nation,’ located in what is now Oklahoma.”²⁸³

The Court couched the creation of the reservation in the terms of a bargained-for exchange. The United States offered the Creek Nation a deal—move to the western territories and receive that permanent home.²⁸⁴ In 1852, the United States issued a fee patent to the Creek Reservation.²⁸⁵ In 1856, the United States promised that “no portion” of the reservation “shall ever be embraced or included within, or annexed to, any Territory or State.”²⁸⁶

b. Reservation disestablishment

The next and final step in determining whether an Indian reservation remains extant is to determine whether Congress has ever acted to terminate

²⁷⁷ *Id.* at 2462.

²⁷⁸ *Id.* (“Nor will this Court lightly infer such a breach once Congress has established a reservation.”).

²⁷⁹ *Id.* at 2460–62.

²⁸⁰ *Id.* at 2462–68.

²⁸¹ *Id.* at 2460.

²⁸² *Id.* at 2459 (citing Treaty with the Creeks, Creek Nation-U.S., arts. I, XIV, Mar. 24, 1832, 7 Stat. 366, 366, 368).

²⁸³ *Id.* (quoting Treaty with the Creeks, pmbl., 7 Stat. at 417–18).

²⁸⁴ *Id.* at 2460–61.

²⁸⁵ *Id.* at 2461.

²⁸⁶ *Id.* (quoting Treaty with Creeks and Seminoles, art. IV, Aug. 7, 1856, 11 Stat. 699, 700).

or disestablish the reservation.²⁸⁷ Quoting the most cited case on the subject, *Solem v. Bartlett*, the *McGirt* Court reminded Oklahoma of the controlling law on the subject: “Only Congress can divest a reservation of its land and diminish its boundaries.”²⁸⁸ Moreover, if Congress does act to terminate a reservation, it must make its intent to do so clear: “Disestablishment has ‘never required any particular form of words.’ But it does require that Congress clearly express its intent to do so, ‘commonly with an explicit reference to cession or other language evidencing the present and total surrender of all tribal interests.’”²⁸⁹

The *McGirt* Court applied these rules faithfully and held that Congress never terminated the reservation.²⁹⁰ The majority did so over dozens of pages of historical evidence, inferences based on the legislative text, and the multitude of policy claims by the state and others, but the Court’s core focus of its analysis was on the legislative text.

The State argued that the allotment of the Creek Reservation by Congress terminated the reservation.²⁹¹ Allotment—and an accompanying surplus land act—has terminated several reservations,²⁹² but many other reservations have survived allotment.²⁹³ Allotment is a process by which the United States sought to break up Indian reservation land masses and to encourage (read: coerce) individual Indians to become landowners, farmers, and the like.²⁹⁴ The United States apparently wanted the same for the Creek Nation.²⁹⁵ Congress and the Creek Nation reached an agreement on allotment in 1901.²⁹⁶ In 1908, Congress authorized individual Creek allotment owners

²⁸⁷ *Id.* at 2462–43.

²⁸⁸ *Id.* at 2462 (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)) (internal alteration omitted).

²⁸⁹ *Id.* at 2463 (first quoting *Hagen v. Utah*, 510 U.S. 399, 411 (1994); and then quoting *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016) (internal quotation marks omitted)) (internal citations and alteration omitted).

²⁹⁰ *Id.* at 2459.

²⁹¹ *Id.* at 2463.

²⁹² *See, e.g.*, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 333 (1998) (holding the Yankton Reservation disestablished); *Hagen v. Utah*, 510 U.S. 399, 420–22 (1994) (holding the Uintah Reservation diminished); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 585–86 (1977) (holding the Rosebud Sioux Reservation diminished); *DeCoteau v. Dist. Ct.*, 420 U.S. 425, 427–28 (1975) (holding the Lake Traverse Reservation disestablished).

²⁹³ *See, e.g.*, *Parker*, 136 S. Ct. at 1076 (holding the Omaha Reservation remained extant); *Solem v. Bartlett*, 465 U.S. 463, 481 (1984) (holding the Cheyenne River Reservation remained extant); *Mattz v. Arnett*, 412 U.S. 481, 505–06 (1973) (holding the Yurok Tribe portion of the Hoopa Valley Reservation remained extant); *Seymour v. Superintendent*, 368 U.S. 351, 359 (1962) (holding the Colville Reservation remained extant).

²⁹⁴ *See generally* FLETCHER, FEDERAL INDIAN LAW, *supra* note 28, § 3.6 (discussing various methods used to break up Indian reservations).

²⁹⁵ *McGirt*, 140 S. Ct. at 2463 & n.2.

²⁹⁶ *Id.* at 2463 (citing Act of Mar. 1, 1901, ch. 676, 31 Stat. 861).

to sell their allotments,²⁹⁷ but the Court held that this authorization was as far as Congress got in terms of terminating the reservation—“because there exists no equivalent law terminating what remained, the Creek Reservation survived allotment.”²⁹⁸

Justice Gorsuch seeded the *McGirt* opinion with reminders to the state, the United States, and his colleagues on the bench that the role of the Supreme Court is not to make policy, or to give effect to a national policy that was not effectuated on a specific reservation. In the section of the opinion on the Creek allotment acts, the Court acknowledged that Congress hoped allotment would lead to the end of reservations,²⁹⁹ but Congress never reached that final stage in the case of the Creek Reservation: “Still, just as wishes are not laws, future plans aren’t either. Congress may have passed allotment laws to create the conditions for disestablishment. But to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination.”³⁰⁰

Anticipating, as it should have, that the Court would find no disestablishment of the Creek Reservation by Act of Congress, Oklahoma turned to history and policy, providing what ammunition it could to the Court’s Canary textualists.³⁰¹

c. Responding to the historical and policy claims

The majority extensively addressed the arguments of the State of Oklahoma, the United States, and the four dissenters that sought to direct the analysis toward the policy impacts and the history of the reservation³⁰²—both of which arguably supported a reservation disestablishment holding. But the majority held its Muskrat textualist ground, concluding that once an Indian reservation is established, “extratextual” authorities cannot be applied to undo that reservation.³⁰³

²⁹⁷ *Id.* (citing Act of May 27, 1908, ch. 199, 35 Stat. 312).

²⁹⁸ *Id.* at 2464.

²⁹⁹ *Id.* at 2465 (“No doubt, this is why Congress at the turn of the 20th century ‘believed to a man’ that ‘the reservation system would cease’ ‘within a generation at most.’” (quoting *Solem v. Bartlett*, 465 U.S. 463, 468 (1984))).

³⁰⁰ *Id.*

³⁰¹ The *McGirt* dissent’s primary arguments involved the force of history, *see id.* at 2485 (Roberts, C.J., dissenting) (“A century of practice confirms that the Five Tribes’ prior domains were extinguished.”), and the subjective political intent of Congress, *see id.* at 2484 (“[Congress] created a commission tasked with extinguishing the Five Tribes’ territory and, in one report after another, explained that it was creating a homogenous population led by a common government.”). The dissent ultimately adhered to a different textual interpretation, finding that identification of Congress’s express intent was not confined to “the statutory text alone.” *Id.* at 2487.

³⁰² *See id.* at 2465–82.

³⁰³ *Id.* at 2469.

The Court made two important points that forcefully defeated the State's claims. First, states cannot themselves undo the reservation status of Indian lands. This guided the Court's rejection of extratextual evidence of Oklahoma's dissident historical understanding and practice, having asserted jurisdiction for the past century on the Creek Reservation.³⁰⁴ It has been the law, at least since 1832, that state law has "no force" in Indian Country absent congressional authorization.³⁰⁵

Second, *McGirt* stripped the judiciary of the pretense that judges can unilaterally terminate reservations—"courts have no proper role in the adjustment of reservation borders."³⁰⁶ Engaging in a bit of federal government *realpolitik*, the Court explained that Congress, and not the judiciary, is the only body authorized to make the decision to terminate an Indian reservation:

Mustering the broad social consensus required to pass new legislation is a deliberately hard business under our Constitution. Faced with this daunting task, Congress sometimes might wish an inconvenient reservation would simply disappear. Short of that, legislators might seek to pass laws that tiptoe to the edge of disestablishment and hope that judges—facing no possibility of electoral consequences themselves—will deliver the final push. But wishes don't make for laws, and saving the political branches the embarrassment of disestablishing a reservation is not one of our constitutionally assigned prerogatives. "[O]nly Congress can divest a reservation of its land and diminish its boundaries." So it's no matter how many other promises to a tribe the federal government has already broken. If Congress wishes to break the promise of a reservation, it must say so.³⁰⁷

Again and again, Justice Gorsuch would not allow the Court to treat tribal interests in such a shoddy manner.³⁰⁸ The *McGirt* majority reminded the dissenters that the role of the Supreme Court in Indian affairs policy is limited. The Court concluded that to allow the State to continue to exercise jurisdiction Congress never authorized, because of historical practice, would be to validate "the rule of the strong, not the rule of law."³⁰⁹

³⁰⁴ *Id.* at 2462.

³⁰⁵ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832), *abrogated by* *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164 (1973), *as recognized in* *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

³⁰⁶ 140 S. Ct. at 2462.

³⁰⁷ *Id.* (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)) (alteration in original) (citation omitted).

³⁰⁸ *See id.* at 2470.

³⁰⁹ *Id.* at 2474; *see also id.* at 2482 ("Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.").

d. Oklahoma's antics

In its effort to persuade the Court to assent to the current state of affairs (in the companion case, *Sharp v. Murphy*),³¹⁰ the State of Oklahoma's position on whether the Creek Reservation remained extant was apocalyptic:

This case is too important and the stakes too high—for the State, the federal government, and the 1.8 million residents of eastern Oklahoma—to be resolved by “gotcha textualism” that casts aside the universal contemporaneous understanding and implementation of decades of legislative action. No court, no tribe, and no member of Congress recognized that eastern Oklahoma was reservation land. This Court should not countenance the largest abrogation of state sovereignty by a federal court in American history by blinding itself to obvious congressional intent. At stake here is the history and identity of our country's forty-sixth state. The Court should decide—now—that Congress created Oklahoma as one unified state.³¹¹

Oklahoma's core argument was that “thousands” of state convictions would be upset by the Court's holding that the Creek Nation (and the reservations of the other tribes that are similarly situated) was Indian Country.³¹² Whether or not this assertion would come to pass, for the *McGirt* majority, was not so clear. This is especially so given that many *federal* convictions might also be impacted, rendering the question a matter of policy for a policymaking branch of government to address, not the Court.³¹³ Similarly, when the State claimed that several federal programs would be affected, the Court pointed out that the effects might be good or bad, but again, that issue was not for the Court to consider.³¹⁴ On the criminal justice front, the Court acknowledged that for decades, the United States has warned against upsetting the criminal jurisdictional regime in Oklahoma, but it also pointed out that nothing catastrophic has happened there or elsewhere.³¹⁵ Reiterating the role of the Court, the majority concluded: “More importantly, dire warnings are just that, and not a license for us to disregard the law.”³¹⁶

Finally, the Court gave credit to the tribe, the State, and local governments for cooperating on difficult jurisdiction matters.³¹⁷ The Court

³¹⁰ See *supra* notes 34–37 and accompanying text.

³¹¹ Supplemental Reply Brief for Petitioner at 1, *Carpenter v. Murphy*, 139 S. Ct. 626 (2018) (No. 17-1107), 2019 WL 181596, at *1; see also Petition for a Writ of Certiorari, at 2–4, *Royal v. Murphy*, 138 S. Ct. 2026 (2018) (No. 17-1107), 2018 WL 776368, at *2–4 (repeating many of the same arguments).

³¹² *McGirt*, 140 S. Ct. at 2479.

³¹³ See *id.* at 2480–82.

³¹⁴ *Id.* at 2480.

³¹⁵ *Id.* at 2481.

³¹⁶ *Id.*

³¹⁷ *Id.*

left it for those governments and Congress—not the judiciary—to address how jurisdiction would be shared.³¹⁸ For many citizens of the Five Tribes, the majority’s opening line was the most compelling statement many of them had ever heard from the Supreme Court, and one few observers would ever have expected to be written: “On the far end of the Trail of Tears was a promise.”³¹⁹ Muskrat Textualism won the day.

IV. WITHER *OLIPHANT*

McGirt v. Oklahoma is a paradigm shift in Indian affairs jurisprudence. The Court has now denounced the Canary Textualism that would allow it to choose what the “current state of affairs ought to be.” *McGirt* is not an isolated instance of Justices counting to five (so to speak), but the culmination of two decades of tribal strategies reaching agreement with an emerging form of textualism on the Supreme Court.³²⁰

In the last decade, the Supreme Court has embarked on a shift to prioritize Muskrat Textualism and properly situate the Court as the interpreter of the law rather than the maker of the law. That program began in earnest in *Michigan v. Bay Mills Indian Community*, where the Court deferred to Congress on the scope of tribal immunity in the gaming context, holding it would “not rewrite Congress’s handiwork.”³²¹ Then again in *Nebraska v. Parker*, the Court, in finding that the Omaha Indian reservation remained extant, stated that “it is not our role to ‘rewrite’” an Act of Congress.³²²

What does that mean for the Canary Textualism? This Part argues that the reasoning of *McGirt* and the reasoning of *Oliphant* cannot exist in the same universe. Not only has the *McGirt* Court stripped the *Oliphant* decision of its persuasive force, the *McGirt* reasoning is normatively superior in every meaningful way. The first Section applies the factors the Court considers when addressing whether to overrule one of its decisions. The second Section briefly describes how Muskrat Textualism would resolve contested areas of federal Indian law and work to advance the legitimacy of the Court as an institution. *Oliphant* and its progeny must give way.

³¹⁸ *Id.* at 2481–82.

³¹⁹ *Id.* at 2459.

³²⁰ For details on tribal strategies designed to appeal to conservative judges, see Delilah Friedler, *How Native Tribes Started Winning at the Supreme Court*, MOTHER JONES (Aug. 5, 2020), <https://www.motherjones.com/crime-justice/2020/08/how-native-tribes-started-winning-at-the-supreme-court/> [<https://perma.cc/N5RT-9VDR>].

³²¹ 572 U.S. 782, 804 (2014).

³²² 136 S. Ct. 1072, 1082 (2016) (quoting *DeCoteau v. Dist. Ct.*, 420 U.S. 425, 447 (1975)).

A. *Stare Decisis Factors*1. *Quality of Reasoning*

When the Supreme Court overrules a prior decision, it often invokes the quality of the decision's reasoning.³²³ As my discussion of *Oliphant* in Section III.A makes clear, that decision in *Oliphant* is poorly reasoned.

First, Congress had recently spoken on the scope of tribal powers at the time the Court decided *Oliphant* in the Indian Civil Rights Act of 1968³²⁴—and the Court all but ignored Congress. The Act defined “powers of self-government” to “mean[] and include[] all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses.”³²⁵ Section 202 of the Act, popularly known as the “Indian Bill of Rights,” repeatedly referred to tribal governments that exercised powers over “any person,” again not distinguishing between Indians and non-Indians (or members and nonmembers).³²⁶ That Act was the most recent statement from Congress about the scope of tribal powers, a result of several years of hearings and debate, with at least some of it about the powers of tribes to prosecute non-Indians.³²⁷ In 1963, the Chairman of the Navajo Tribal Council testified that the tribal court was exercising jurisdiction over

³²³ *E.g.*, *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2478–79 (2018) (concluding that *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), was poorly reasoned as justification for its overruling); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 636–42 (1943) (refuting all the key lines of analyses in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940)). *See generally* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864 (1992) (plurality opinion) (“[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.”).

³²⁴ Pub. L. 90-284, tit. II, §§ 201–202, Apr. 11, 1968, 82 Stat. 73, 77–78 (codified as amended at 25 U.S.C. §§ 1301 *et seq.*).

³²⁵ *Id.* at § 201(2). The current version includes an amendment known as the “Duro fix,” which includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.

25 U.S.C. § 1301(2).

³²⁶ Pub. L. 90-284, tit. II, § 202(3)–(4), (6), (8), (10), 82 Stat. at 77–78 (guaranteeing rights to “any person”); *id.* § 202(1)–(2) (guaranteeing rights to “the people”).

³²⁷ Congress heard testimony in the years leading up to the passage of the Act from tribal representatives who complained that Bureau of Indian Affairs officials had ordered the tribes to stop arresting non-Indian offenders. *Constitutional Rights of the American Indian, Part 3: Hearing Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 87th Cong., 2nd Sess. 610, 616 (1962) (statement of Alfreda Janis, member of Oglala Sioux tribe); *id.* at 634, 640–41 (statement of Robert Burnette, National Congress of American Indians). Other tribal leaders complained that the Bureau-operated tribal court dismissed cases involving non-Indians. *Id.* at 792 (statement of Francis Cree, Chairman, Turtle Mountain Band of Chippewa Indians) (“Our court should have the right to prosecute non-Indians.”).

non-Indians.³²⁸ But when given the chance in 1968, Congress did not directly address whether tribal powers included powers over non-Indians.

What did this mean in 1978? Perhaps it meant that Congress had decided to allow tribal jurisdiction over non-Indians to proceed in the same manner as before, on a reservation-by-reservation manner. After 1975, the federal government and tribes could negotiate over that very question while they negotiated self-determination compacts.³²⁹ The Supreme Court did not have to foreclose additional deliberation by the legislature. But it did so anyway.

Second, the Supreme Court should not have granted certiorari in *Oliphant*. It was a case of first impression for both the Supreme Court and all other federal courts, meaning there were no splits in authority whatsoever.³³⁰ The obvious errors committed by the *Oliphant* Court in its historical narrative likely would have been avoided had the Court allowed the matter to percolate below. This is exactly what happened in the years that followed the congressional fix to the Supreme Court's decision in *Duro v. Reina*.³³¹ After Congress enacted a statutory reversal of the *Duro* decision, the Court allowed the lower courts several opportunities to assess all the conceivable arguments and waited for a true circuit split (between two courts that had heard the issues en banc) before granting a petition for review.³³² By the time the Court granted certiorari in a case involving the *Duro* fix, it had the benefit of numerous lower court decisions that focused the issues. But on the issue of tribal jurisdiction over non-Indians, the Court immediately jumped in. Given that the most jail time the tribe could have sentenced

³²⁸ *Constitutional Rights of the American Indian, Part 4: Hearing Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 88th Cong., 1st Sess. 851, 854 (1963) (statement of Paul Jones, Chairman, Navajo Tribal Council).

³²⁹ See generally 25 U.S.C. § 5301 *et seq.* (reporting on Indian self-determination, contracts, and self-governance); FLETCHER, *FEDERAL INDIAN LAW*, *supra* note 28, § 3.15 (discussing the Indian Self-Determination and Education Assistance Act of 1975); Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 4 (2014) (same).

³³⁰ See *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976) (“This case involves a question of Indian law which has been unresolved since it first arose almost a century ago: what is the jurisdiction of an Indian tribe over non-Indians who commit crimes while on Indian tribal land within the boundaries of the reservation?” (citing *Ex parte Kenyon*, 14 F. Cas. 353, 353 (C.C.W.D. Ark. 1878) (No. 7,720))), *rev'd sub nom.* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

³³¹ 495 U.S. 676 (1990).

³³² *United States v. Lara*, 541 U.S. 193, 198–99 (2004) (noting split between the Eighth and Ninth Circuits). For additional reference, see *United States v. Lara*, 324 F.3d 635, 636 (8th Cir. 2003) (en banc) (dismissing indictment on grounds of double jeopardy), *rev'd*, 541 U.S. 193 (2004), and *United States v. Enas*, 255 F.3d 662, 664–65 (9th Cir. 2001) (en banc) (upholding double prosecutions), and see also *United States v. Weaselhead*, 165 F.3d 1209, 1209 (8th Cir. 1999) (en banc) (mem.) (same issue heard en banc by an evenly divided court).

Oliphant and Belgarde was six months each, the stakes were low enough not to require immediate intervention.³³³ The *Oliphant* decision exemplifies the problem with the Court reviewing a case of first impression.

2. Workability

A second reason for overruling a precedent is workability.³³⁴ On one hand, in the *Oliphant* context, the decision has no workability problems at all. The outcome of *Oliphant* is a bright-line rule barring tribal criminal jurisdiction over non-Indians. All a court has to do is determine whether a defendant is “non-Indian” and determine whether the tribe’s charge against the defendant is “criminal.”

On the other hand, the methodology of the Court’s analysis is not workable. The *Oliphant* methodology may be invoked whenever there is no dispositive federal treaty or statute, for example, on the scope of inherent tribal powers. Consider a challenge to a tribe’s exercise of the power of eminent domain.³³⁵ The *Oliphant* methodology would be to gather the historical record, try to generate a compelling narrative on whether nineteenth-century authorities would have “assumed” that tribes possessed those powers, and reach a bright-line rule. The Court has had several opportunities to address the scope of inherent tribal powers since *Oliphant*, but outside of one decision seven years later, the Court has not used the methodology again.³³⁶ The Court has considered the tribal power to tax,³³⁷ tribal powers to regulate nonmembers,³³⁸ tribal criminal jurisdiction over

³³³ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 203 n.14 (1978) (“Indian Civil Rights Act of 1968 . . . limits the punishment that can be imposed by Indian tribal courts to a term of 6 months . . .”). The Supreme Court was not so squeamish about tribal powers over non-Indians long ago. In 1896, the Court rejected a habeas corpus petition from a Cherokee Nation citizen who had been sentenced to death by the tribal court. *Talton v. Mayes*, 163 U.S. 376, 385 (1896). The Cherokee Nation eventually executed Bob Talton. *Hanged an Indian*, ST. LOUIS POST-DISPATCH, Aug. 1, 1896, at 5. Apparently, Bob Talton was a white man, adopted by the tribe as a citizen. *Cherokee Executions Postponed*, TYRONE DAILY HERALD, Aug. 21, 1893, at 1.

³³⁴ *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009) (“[T]he fact that a decision has proved ‘unworkable’ is a traditional ground for overruling it.”).

³³⁵ See, e.g., *Grand Canyon Skywalk Dev., LLC v. ‘Sa’ Nyu Wa Inc.*, 715 F.3d 1196, 1199 (9th Cir. 2013) (describing a tribe’s exercise of the power of eminent domain over a nonmember’s contract rights).

³³⁶ Justice Thomas praised the *Oliphant* methodology in 2004 but found only one other case that followed that type of analysis: *National Farmers Union Insurance Companies v. Crow Tribe*. See *United States v. Lara*, 541 U.S. 193, 221–22 (2004) (Thomas, J., concurring in the judgment) (“That is why we have analyzed extant federal law (embodied in treaties, statutes, and Executive Orders) before concluding that particular tribal assertions of power were incompatible with the position of the tribes.” (first citing *Nat’l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 853–56 (1985); and then citing *Oliphant*, 435 U.S. at 204)).

³³⁷ *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 133 (1982).

³³⁸ *Montana v. United States*, 450 U.S. 544, 547 (1981).

nonmember Indians,³³⁹ and tribal powers to detain suspected non-Indian criminal offenders.³⁴⁰ None of those decisions delved into the historical record with the same abandon as the *Oliphant* Court. In fact, one opinion effectively recharacterized the *Oliphant* decision as a much simpler case of statutory divestiture of tribal jurisdiction.³⁴¹

To my knowledge, none of the lower courts have attempted anything close to what the *Oliphant* Court did. Nor should they.

3. *Inconsistency with Related Decisions*

In the Indian law canon, the *Oliphant* decision sticks out like a sore thumb. As noted above, the Court weakly distinguished centuries of settled law by making the poorly reasoned claim that everyone “assumed” that law was inapplicable. Within sixteen days of the *Oliphant* decision, the Court issued an opinion reaffirming the same centuries of settled law.³⁴² And by the end of the calendar year, the Court would reach a *second* decision that undermined the reasoning in *Oliphant*.³⁴³ A few years later, when asked by a non-Indian party to extend the *Oliphant* reasoning to civil cases, the Court refused to do so and recharacterized its reasoning to make somewhat more sense.³⁴⁴ Finally, the Court has never turned to the reasoning of the *Oliphant* decision as a beacon of useful analysis. Let’s take each of these claims in turn.

a. *Inconsistency with earlier precedents*

The lower courts in *Oliphant* and *Belgarde* applied the settled precedent, which was that tribal powers remained extant absent divestiture by Congress or the tribe.³⁴⁵ That precedent was derived from *Worcester v.*

³³⁹ *Duro v. Reina*, 495 U.S. 676, 679 (1990).

³⁴⁰ *United States v. Cooley*, No. 19-1414, slip op. at *1 (U.S. June 1, 2021).

³⁴¹ *Nat’l Farmers Union*, 471 U.S. at 853–54 (“That holding adopted the reasoning of early opinions of two United States Attorneys General, and concluded that federal legislation conferring jurisdiction on the federal courts to try non-Indians for offenses committed in Indian Country had implicitly pre-empted tribal jurisdiction.” (footnote omitted) (citing *Oliphant*, 435 U.S. at 198–99)).

³⁴² See *United States v. Wheeler*, 435 U.S. 313, 323–25, 332 (1978).

³⁴³ See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) (suggesting that any intrusion into tribal sovereignty must be clearly intended by Congress).

³⁴⁴ See *Nat’l Farmers Union*, 471 U.S. at 854 (“Congress’ decision to extend the criminal jurisdiction of the federal courts to offenses committed by non-Indians against Indians within Indian Country [in the 1793 Trade and Intercourse Act] supported the holding in *Oliphant* . . .”).

³⁴⁵ *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976) (“The proper approach to the question of tribal criminal jurisdiction is to ask ‘first, what the original sovereign powers of the tribes were, and, then, how far and in what respects these powers have been limited.’” (quoting *Powers of Indian Tribes*, 1934 55 Interior Dec. 14, 57 (1934))), *rev’d sub nom.* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); Memorandum Decision at 1–2, *Oliphant v. Schlie*, No. 511-73C2, at 4–5 (W.D. Wash., Apr. 5, 1974) (“The nature of Indian tribal powers is marked by three fundamental principles: (1) an Indian tribe

Georgia and *Ex parte Crow Dog*. In *Worcester*, the Court held that tribes retained the powers of internal self-government.³⁴⁶ In *Crow Dog*, the Court held that the federal government could not prosecute Indian-on-Indian crimes arising in Indian Country without a federal statute that evidenced a clear intent of Congress to limit or modify tribal powers.³⁴⁷ *Oliphant* ultimately rejected the precedents and reversed the presumption that normally favored the retention of tribal powers.³⁴⁸

b. Inconsistency with later precedents

Oliphant conflicted with two precedents from the same year in tone if not directly in substance. Sixteen days after the Court released *Oliphant*, the Court issued *United States v. Wheeler*. *Wheeler* confirmed that tribal governments retain the power to prosecute tribal members for tribal crimes.³⁴⁹ *Wheeler* reaffirmed the general rule on retained tribal powers: “But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.”³⁵⁰ The Court then cited to *Oliphant*, which of course declined to apply the retained powers rule.³⁵¹

possessed, in the first instance, all the powers of any sovereign state; (2) Congress rendered the tribe subject to the legislative power of the United States, and, in substance, terminated the external powers of sovereignty of the tribe but did not by itself terminate the internal sovereignty of the tribe, i.e., its powers of local self-government; and (3) these internal powers were, of course, subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, the powers of internal sovereignty have remained in the Indian tribe and their duly constituted organs of government.” (citation omitted); *Belgarde v. Morton*, No. C74-683S, at 7–8 (W.D. Wash., Aug. 1, 1975) (adopting the district court ruling in *Oliphant*), adopted by Order Denying Writ of Habeas Corpus, *Belgarde v. Morton*, No. C74-683S (W.D. Wash., Aug. 18, 1975).

³⁴⁶ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556–57 (1832), abrogated by *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164 (1973), as recognized in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

³⁴⁷ *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883), superseded by statute, Act of March 3, 1885, ch. 341, § 9, 23 Stat. 362, 385, as recognized in *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *aff’d sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (mem.); see also *Keeble v. United States*, 412 U.S. 205, 209–10 (1973) (“The Court held there that a federal court lacked jurisdiction to try an Indian for the murder of another Indian, a chief of the Brule Sioux named Spotted Tail, in Indian Country. Although recognizing the power of Congress to confer such jurisdiction on the federal courts, the Court reasoned that, in the absence of explicit congressional direction, the Indian tribe retained exclusive jurisdiction to punish the offense.” (footnote omitted)).

³⁴⁸ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978) (“[T]he commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians carries considerable weight.”).

³⁴⁹ 435 U.S. 313, 324 (1978).

³⁵⁰ *Id.* at 323 (emphasis added).

³⁵¹ See *Oliphant*, 435 U.S. at 206.

Two months later, in *Santa Clara Pueblo v. Martinez*, the Supreme Court further confirmed the rule that when Congress does act to modify tribal powers (in that case, the jurisdiction of tribal courts), it must make its intent to do so clear.³⁵² There, the Court considered whether to imply a federal court cause of action to enforce the Indian Civil Rights Act (ICRA) beyond the right to petition a federal court for a writ of habeas corpus.³⁵³ The Court refused, deferring to Congress.³⁵⁴

B. Correcting the Supreme Court's Error

Imagine a non-Indian person enters a tribal casino in the Lower Peninsula of Michigan with a loaded shotgun. Let's assume that possession of a gun in a casino is a misdemeanor under both state and tribal law. Casino security and tribal police respond and disarm the suspect, but only after the suspect resists arrest, potentially a felony under the Major Crimes Act.³⁵⁵ The tribe refers the case to the United States Attorney's Office for prosecution under the Assimilative Crimes Act³⁵⁶ (or other relevant statute). The federal government declines to prosecute. Under *Oliphant*, the tribe could not prosecute. Or could it?

My view is that *McGirt v. Oklahoma* undermines *Oliphant v. Suquamish Indian Tribe*, and therefore "a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law" exists.³⁵⁷ This Section broadly outlines how a court in good faith might address that question.

³⁵² 436 U.S. 49, 60 (1978) ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.")

³⁵³ *Id.* at 59, 61. For reference to Congress's (express) authorization for habeas corpus, see 25 U.S.C. § 1303.

³⁵⁴ *Santa Clara Pueblo*, 436 U.S. at 61 ("Not only are we unpersuaded that a judicially sanctioned intrusion into tribal sovereignty is required to fulfill the purposes of the ICRA, but to the contrary, the structure of the statutory scheme and the legislative history of Title I suggest that Congress' failure to provide remedies other than habeas corpus was a deliberate one.")

Oliphant also conflicts with more recent Supreme Court decisions that defer to Congress on the proper scope of tribal powers. Earlier in this Part, I mentioned two recent cases that explicitly stated the Court would not "rewrite" Acts of Congress. *Nebraska v. Parker*, 136 S. Ct. 1072, 1082 (2016); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 804 (2014). The Court has also deferred to Congress on the use of tribal court convictions as a basis for a federal habitual offender conviction, so long as those convictions comply with the baseline rules established by Congress in the Indian Civil Rights Act. *United States v. Bryant*, 136 S. Ct. 1954, 1966 (2016).

³⁵⁵ See 18 U.S.C. § 1153.

³⁵⁶ The Act allows the federal prosecutor to assimilate state criminal law for purposes of charging an Indian Country perpetrator. 18 U.S.C. § 13.

³⁵⁷ FED. R. CIV. P. 11(b)(2).

1. *The Rights of Non-Indian Defendants*

Assuming the same Michigan tribe brought charges against the non-Indian perpetrator, the tribe upon showing of need would offer the defendant paid counsel.³⁵⁸ Four of the twelve Michigan tribes have established rules to allow them to prosecute non-Indians for certain domestic- and intimate-partner-violence crimes,³⁵⁹ as authorized by the tribal jurisdictional provision in the 2013 Violence Against Women Reauthorization Act.³⁶⁰ When tribal forums implement those criminal procedure regulations, tribal judges and any court-appointed defense are required to be licensed attorneys,³⁶¹ and the

³⁵⁸ See, e.g., CT. R. GRAND TRAVERSE BAND OF OTTAWA & CHIPPEWA INDIANS TRIBAL CT. r. 6.005, http://www.gtbindians.org/downloads/court_rules_32009.pdf [https://perma.cc/ZRV7-YUPX] (“[T]he court will appoint an attorney at the Tribe’s expense if the defendant wants one and is financially unable to retain one.”); CT. R. LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS r. 1.203(1), <https://lbbodawa-nsn.gov/wp-content/uploads/2020/12/Chapter-1-Criminal-Procedures.pdf> [https://perma.cc/E9FB-5BVD] (“[T]he defendant shall have the . . . right[] . . . [t]o self-representation unless the Court deems defendant unfit and appoints counsel to represent or assist the defendant. Defendant may hire, at his or her own expense, counsel admitted to practice before the Tribal Court.”); NOTTAWASEPPI HURON BAND OF THE POTAWATOMI CT. R. CRIM. PROC., ch. 12, § 4(C), <https://www.nhbpi.org/wp-content/uploads/2018/07/Chap-12-CR-of-Criminal-Procedure-Amended-1-5-2018.pdf> [https://perma.cc/UNC5-65QG] (“All criminal defendants are entitled to court-appointed assistance of counsel during criminal proceedings. . . .”); POKAGON BAND OF POTAWATOMI INDIANS CT. R. APPOINTMENT COUNS., ch. 10, <http://www.pokagonband-nsn.gov/government/tribal-courts/court-rules> [https://perma.cc/9QT2-Z7QP] (“The Tribal Court must appoint counsel for a criminal defendant who is determined by the Tribal Court to be indigent and when a potential penalty includes incarceration.”).

³⁵⁹ *Currently Implementing Tribes*, NAT’L CONG. OF AM. INDIANS, <https://www.ncai.org/tribal-vawa/get-started/currently-implementing-tribes> [https://perma.cc/NQH9-RMSG] (listing four Michigan tribes: Grand Traverse Band of Ottawa and Chippewa Indians, Little Traverse Bay Bands of Odawa Indians, Nottawaseppi Huron Band of Potawatomi, and Sault Ste. Marie Tribe of Chippewa); *What Is Special Domestic Violence Criminal Jurisdiction (SDVCJ)?*, NAT’L CONG. OF AM. INDIANS, <https://www.ncai.org/tribal-vawa/sdvcj-overview> [https://perma.cc/9U8A-KK7K] (describing tribal “jurisdiction over certain non-Indians”); *Tribal Governments*, MICHIGAN.GOV., https://www.michigan.gov/som/0,4669,7-192-29701_41909---,00.html [https://perma.cc/MCC6-CY3Q] (“Michigan is home to a total of twelve federally-acknowledged Indian tribes . . .”).

³⁶⁰ 25 U.S.C. § 1304. For more, see Sarah Deer, *Native People and Violent Crime: Gendered Violence and Tribal Jurisdiction*, 15 DU BOIS REV. 89, 97–98 (2018).

³⁶¹ Federal law requires tribal judges exercising criminal jurisdiction over non-Indians to be law trained and licensed. 25 U.S.C. §§ 1302(c)(2)–(3), 1304(d)(2).

I am aware of several Michigan tribal judges who would meet the criteria required in 25 U.S.C. § 1302(c). Four of these tribal judges are profiled in *Michigan’s Judiciary Success Stories*. Those judges, who are all licensed attorneys with the State Bar of Michigan, are Michael Petoskey (Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and Pokagon Band of Potawatomi Indians), Jocelyn Fabry (Sault Ste. Marie Tribe of Chippewa Indians), Allie Greenleaf Maldonado (Little Traverse Bay Bands of Odawa Indians), and Patrick Shannon (Saginaw Chippewa Indian Tribe). MICH. SUP. CT., SUCCESS STORIES IN THE COURTS: HOW TRIBAL, STATE, AND FEDERAL COURTS ARE COLLABORATING TO BENEFIT MICHIGAN FAMILIES 4, 8, 12, 16, [http://walkingoncommonground.org/files/MI%20Tribal-State-Fed%20Success%20Stories%2011-3_FINAL%20\(1\)%20\(002\).pdf](http://walkingoncommonground.org/files/MI%20Tribal-State-Fed%20Success%20Stories%2011-3_FINAL%20(1)%20(002).pdf) [https://perma.cc/5KNN-SJSZ].

Other Michigan tribal judges who are lawyers include Ken Akini (Grand Traverse Band of Ottawa and Chippewa Indians), Melissa Pope (Nottawaseppi Huron Band of the Potawatomi), and Angela Sherigan (Little River Band of Ottawa Indians).

courts have established rules for diverse juries,³⁶² public availability of laws,³⁶³ and maintenance of record.³⁶⁴ In short, these tribes already provide criminal procedural protections comparable to those required by the U.S. Constitution.

Once the non-Indian defendant is charged, they likely would seek immediate federal court review, either under the ICRA³⁶⁵ or the general federal habeas statutes.³⁶⁶ While it is possible that the federal court would order the exhaustion of tribal remedies,³⁶⁷ it is very possible that a federal court would place a stay on the tribal prosecution first.³⁶⁸ In any event, a federal court likely would eventually review the tribe's jurisdiction.

Non-Indian criminal defendants under 25 U.S.C. § 1304 enjoy greater criminal jurisdiction protections than Indian criminal defendants³⁶⁹—and likely state and federal defendants, given that tribal judges must be licensed to practice law.³⁷⁰

No doubt the defendant will argue that Congress, either by declining to overrule *Oliphant* over the last several decades or by legislating piecemeal to reaffirm limited tribal powers, has acquiesced to the Supreme Court's decision in *Oliphant*. There are several responses. One, *Oliphant* was wrong the day it was decided, and “the magnitude of a legal wrong is no reason to perpetuate it.”³⁷¹ Two, tribes complying with the special jurisdiction established in § 1304 are already extending the rights Congress would extend to non-Indian defendants for all crimes. Three, it is conceivable, however unlikely, that the Supreme Court could strike down § 1304 as exceeding Congress's powers.³⁷²

A federal court would be justified in finding that *McGirt* undermines *Oliphant*. The court would further be justified in finding an Indian tribe exercising misdemeanor jurisdiction over a non-Indian criminal has

³⁶² 25 U.S.C. § 1304(d)(3).

³⁶³ *Id.* § 1302(c)(4).

³⁶⁴ *Id.* § 1302(c)(5).

³⁶⁵ *Id.* § 1303.

³⁶⁶ 28 U.S.C. § 2241.

³⁶⁷ *See, e.g.,* Valenzuela v. Silversmith, 699 F.3d 1199, 1206 (10th Cir. 2012) (collecting cases in which federal courts have ordered the exhaustion of tribal remedies).

³⁶⁸ *See* 25 U.S.C. § 1304(e) (authorizing a stay of the tribal court proceedings under § 1304).

³⁶⁹ *Id.* § 1304(d)(2)–(4) (requiring greater protections than available to Indians under the rest of the Act).

³⁷⁰ *Id.* § 1302(c)(3).

³⁷¹ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2480 (2020).

³⁷² *See, e.g.,* Adam Creppelle, *Concealed Carry to Reduce Sexual Violence Against American Indian Women*, 26 KAN. J.L. & PUB. POL'Y, 236, 241 n.35 (2017) (questioning Congress's constitutional authority to enact Indian Country legislation (citing *United States v. Lara*, 541 U.S. 193, 224 (2004) (Thomas, J., concurring))).

provided greater criminal procedure protections to that defendant than they are entitled to under federal or state law. That court would be justified in confirming the power of the tribe to prosecute the non-Indian. Not all tribes. That tribe.

2. *The Statutory Scheme of Indian Country Criminal Jurisdiction*

One might argue that Congress has acquiesced to the Court's judgment in *Oliphant* by not quickly and thoroughly overruling the Court as it did in the *Duro* fix, or by restoring only a small portion of tribal power over non-Indians in the tribal jurisdictional provisions of the Violence Against Women Act (VAWA).³⁷³ The strength of the *Duro*-fix argument depends on whether one is persuaded by the force of congressional silence, which the Court and commentators agree is unclear at best.³⁷⁴ That argument is left for another day.

Instead, this Article shows that the statutory scheme makes more sense if tribes retain the inherent power to prosecute non-Indians for misdemeanor offenses. Currently, a tribe can prosecute non-Indians for specific intimate-and dating-violence crimes so long as the tribe follows the rules laid out by Congress in the ICRA (as adopted in 1968 and amended in 1986), the Tribal Law and Order Act of 2010 (TLOA), and the Violence Against Women Reauthorization Act of 2013.³⁷⁵ Those convicted can be sentenced up to three years jail time (or nine years if the defendant has committed multiple offenses and the court decides to stack the offenses).³⁷⁶ Also, currently, a tribe can prosecute all Indians for any crimes for up to one year by following the ICRA.³⁷⁷ ICRA's criminal procedure protections are more limited than those under TLOA and VAWA: for example, there is no right to paid defense for the indigent.³⁷⁸ The reversal of *Oliphant* would mean that tribes could prosecute non-Indians for any crime under ICRA and sentence those persons to up to a year in jail as well. The Supreme Court has already ratified the use of tribal court convictions, even uncounseled convictions, in federal court proceedings,³⁷⁹ so this would not be too far removed from sturdy precedent.

³⁷³ 25 U.S.C. § 1304(b)–(c).

³⁷⁴ See William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 67 (1988).

³⁷⁵ See 25 U.S.C. §§ 1302(a)(7), 1304, 2802(c)(9).

³⁷⁶ *Id.* § 1302(a)(7)(C)–(D).

³⁷⁷ *Id.* § 1302(a)(7)(B), (b).

³⁷⁸ Compare *id.* § 1302(a)(6) (protecting the right of a defendant “at his own expense to have the assistance of counsel for his defense”), with *id.* § 1302(c)(1) (requiring tribes exercising enhanced sentencing authority to “provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution”).

³⁷⁹ *United States v. Bryant*, 136 S. Ct. 1954, 1959 (2016). *Bryant*, of course, involved a tribe's conviction of an Indian, *see id.*, a power Congress previously affirmed in 25 U.S.C. § 1301(2).

3. Addressing Bias Against Indian People

Let's now address the elephant in the room, the real reason many people do not think any tribe should prosecute non-Indians—racial bias against Indians and tribes. First, consider the reasons that are proffered for barring tribes from prosecuting non-Indians. Synthesize the main arguments from Justice Kennedy's majority opinion in *Duro v. Reina*,³⁸⁰ and from the minority views of the Senate Judiciary Committee on the Violence Against Women Reauthorization Act of 2012.³⁸¹ In short, those reasons are, in reverse order of importance: (1) non-Indians cannot vote in tribal elections or run for tribal office;³⁸² (2) non-Indians cannot serve on tribal juries;³⁸³ (3) applying tribal law to non-Indians is unfair;³⁸⁴ (4) the U.S. Constitution does not apply;³⁸⁵ and (5) Indians and tribes are dependent.³⁸⁶

Each of the first four concerns are either easily dismissed or can be resolved by the federal court, upon a habeas petition, by reviewing whether the tribal court exercising jurisdiction met the requirements of the ICRA. The *Duro* Court could not review the 2010 TLOA that added 25 U.S.C. § 1302(c), nor the 2013 Violence Against Women Reauthorization Act that added 25 U.S.C. § 1304(d), which resolves the criminal procedure and other fairness issues, such as jury representation, law-trained judges, and the right to counsel. The concern about political participation should not be discounted, but a tribe can alleviate this concern by allowing for nonmember participation on juries and in political forums open to all residents and interested persons. The concern about the application of the Constitution has little impact if the tribe actually provides greater procedural guarantees than are required. And federal court review of tribal convictions is available through the habeas process.

That leaves inferiority as the real objection to tribal jurisdiction. One might say non-Indians' perception that Indians and their governments are

³⁸⁰ 495 U.S. 676 (1990).

³⁸¹ S. REP. NO. 112-153, at 36 (2012). In contrast, the dissenters in the House argued that the bill did not go far enough in support of tribal criminal jurisdiction over non-Indians. H.R. REP. NO. 112-480, at 245-46 (2012).

³⁸² *Duro*, 495 U.S. at 688 (“Neither he nor other [non]members of [the] Tribe may vote, hold office, or serve on a jury . . .”). Though *Duro* addressed tribal jurisdiction over a nonmember Indian defendant, the Court explained that “[f]or purposes of criminal jurisdiction, petitioner’s relations with [the] Tribe are the same as the non-Indian’s in *Oliphant*.” *Id.*; see also *id.* at 693 (“We hesitate to adopt a view of tribal sovereignty that would single out another group of citizens, nonmember Indians, for trial by political bodies that do not include them.”).

³⁸³ See *supra* note 382.

³⁸⁴ *Duro*, 495 U.S. at 693 (suggesting procedural limitations exist in tribal courts); see also S. REP. NO. 112-153, at 38 (2012) (emphasizing potential limitations of tribal courts to uphold guaranteed rights).

³⁸⁵ *Duro*, 495 U.S. at 693.

³⁸⁶ *Id.* at 686 (citing *United States v. Wheeler*, 435 U.S. 313, 326 (1978)).

inferior is the unspoken assumption of the judiciary and others who object to tribal powers. The Supreme Court has stated time and again that tribes cannot exert powers “inconsistent” with their “dependent” status.³⁸⁷ This rule is a subjective, Canary textualist standard that arrogates to the judiciary the Indian affairs policymaking function and disregards the duty of protection owed by the federal government to Indians and tribes. Dependency is not inferiority. Indian people are not inferior. Congress (unilaterally or in negotiation with a tribe) is authorized to determine whether the federal–tribal relationship strips tribes of the power to prosecute non-Indians—not the judiciary.

If federal courts began to recognize inherent tribal powers to prosecute non-Indians, Congress could then act based on evidence of the fairness of those prosecutions. In the meantime, federal courts can hold tribal governments to the law. If a tribe runs roughshod over a non-Indian defendant’s procedural rights, and the tribal appellate court affirms, the federal habeas right is available. This is how state and federal criminal procedures operate. Tribes are no different.³⁸⁸

C. *The Implications of Muskrat Textualism*

Commentators on all sides agree, for various reasons, that the impact of *McGirt v. Oklahoma* is potentially paradigmatic.³⁸⁹ This Article suggests in more specific ways how the Muskrat Textualism embodied by *McGirt* could have immediate consequences in the context of the Indian Child Welfare Act, federal statutes of general applicability regulating private employment, and the legitimacy of the judiciary.

1. *Indian Child Welfare Act*

The Supreme Court may soon address the constitutionality of the Indian Child Welfare Act (ICWA),³⁹⁰ one of the most monumental federal statutes

³⁸⁷ *United States v. Lara*, 541 U.S. 193, 228 (2004) (Souter, J., dissenting); *South Dakota v. Bourland*, 508 U.S. 679, 695 (1993); *Duro*, 495 U.S. at 686; *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 425 (1989); *Montana v. United States*, 450 U.S. 544, 564 (1981); *United States v. Wheeler*, 435 U.S. 313, 326 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196 (1978) (internal quotations omitted).

³⁸⁸ Well, tribal courts actually *are* different: “tribal courts often provide litigants with due process that ‘exceed[s] the protections offered by state and federal courts.’” *Norton v. Ute Indian Tribe*, 862 F.3d 1236, 1250 (10th Cir. 2017) (quoting MATTHEW L.M. FLETCHER, *AMERICAN INDIAN TRIBAL LAW* 325 (2011)); *see also* *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 944 (9th Cir. 2019) (quoting *Norton* for the same proposition).

³⁸⁹ Compare Chaudhuri, *supra* note 14, at 85 (arguing that *McGirt* serves as a turning point for the Muscogee Creek Nation people who had grown accustomed to losing rights), with Kimberly Chen, *Toward Tribal Sovereignty: Environmental Regulation in Oklahoma After McGirt*, 121 COLUM. L. REV. F. 95, 114 (2021) (positing that *McGirt* provides an optimal time to rethink environmental regulations).

³⁹⁰ 25 U.S.C. §§ 1901–1963.

in the history of Indian affairs. The Fifth Circuit, sitting en banc, recently addressed a multipronged challenge to the Act brought by three states, several adoptive families, and a biological Indian mother.³⁹¹ The primary constitutional challenges to the ICWA, if successful, could have unsettled a large swath of settled federal Indian law.

The district court decision exemplified Canary Textualism.³⁹² The first key constitutional challenge was an equal protection claim.³⁹³ The court acknowledged the rule articulated by the Supreme Court: a federal act adopted in furtherance of the federal government's trust responsibility could not violate the Fifth Amendment's equal protection component.³⁹⁴ The court found that the ICWA applied to child welfare proceedings involving Indian children who were not yet enrolled with a tribe so long as they were eligible for membership.³⁹⁵ The court incorrectly assumed that the United States did not have a trust relationship with those children despite Congress's acknowledgement of that "special relationship"³⁹⁶—in fact, the opinion never references the trust relationship, and therefore deemed the ICWA as creating a classification based on race.³⁹⁷ The court then found that because some Indian children were included who should not have been (under its reasoning), the challenged sections were unconstitutional.³⁹⁸ The district court opinion relied heavily on solitary concurrences from Justice Thomas.³⁹⁹ Of course, Justice Thomas's solitary views are his own and not the law.

³⁹¹ *Brackeen v. Haaland*, 994 F.3d 249, 267 (5th Cir. 2021) (en banc), *cert. petition filed*, No. 21-380 (U.S. Sept. 3).

³⁹² *E.g.*, *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 538 (N.D. Tex. 2018) (asserting without any authority that "[n]o matter how Defendants characterize Indian tribes—whether as quasi-sovereigns or domestic dependent nations—the Constitution does not permit Indian tribes to exercise federal legislative or executive regulatory power over non-tribal persons on non-tribal land" (emphasis omitted)), *aff'd in part, rev'd in part sub nom.* *Brackeen v. Haaland*, 994 F.3d 249.

³⁹³ *Id.* at 530–36.

³⁹⁴ *Id.* at 531 (citing *Morton v. Mancari*, 417 U.S. 535, 554–55 (1974)).

³⁹⁵ *Id.* at 533.

³⁹⁶ 25 U.S.C. § 1901.

³⁹⁷ *Zinke*, 338 F. Supp. at 533–34.

³⁹⁸ *Id.* at 536.

³⁹⁹ *See, e.g., id.* at 535 (deeming the ICWA as categorically overbroad (citing *United States v. Bryant*, 136 S. Ct. 1954, 1968 (2016) (Thomas, J., concurring)); *id.* at 538 (discussing impermissible commandeering on behalf of the federal government (quoting *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 658 (2013) (Thomas, J., concurring)). Justice Thomas is well known for challenging the foundational precedents of Indian law, recently asserting, "[T]he Court has never identified a sound constitutional basis for any of [the foundational precedents' principles], and I see none." *Bryant*, 136 S. Ct. at 1967 (Thomas, J., concurring).

A panel of the Fifth Circuit unanimously rejected the primary constitutional challenges.⁴⁰⁰ The Fifth Circuit sitting en banc issued a 209-page document consisting of numerous individual opinions, with the two primary opinions reaching 112 and sixty-nine pages.⁴⁰¹ The sixteen judges of the en banc court split evenly on several questions of federal Indian law, resulting in the affirmance of the district court on several points.⁴⁰² There most certainly will be multiple requests for Supreme Court review, reopening all of the issues addressed by the district court.

If ICWA falls, then critical statutes such as the Major Crimes Act⁴⁰³ and the ICRA⁴⁰⁴ would likely be subject to equal protection challenges. These two statutes form the core legal infrastructure for criminal jurisdiction over Indian Country. A Muskrat textualist would acknowledge that tribal citizenship is not a birthright. Individuals must apply for enrollment, and tribes must accept that application.⁴⁰⁵ Given that consideration, it was rational for Congress to include children eligible for tribal membership but not yet enrolled.⁴⁰⁶ The Washington Supreme Court recently acknowledged that very reality, holding that the ICWA is triggered whenever any party in a child welfare proceeding “indicates that the child has tribal heritage.”⁴⁰⁷

2. *Federal Statutes of General Applicability*

The Supreme Court likely will be asked (again) to address a circuit split on the question of whether so-called federal statutes of general applicability (in other words, statutes that are silent as to their application to Indian tribes)

⁴⁰⁰ *Brackeen v. Bernhardt*, 937 F.3d 406, 437 (5th Cir. 2019), *reh’g en banc granted, opinion vacated sub nom.* *Brackeen v. Haaland*, 994 F.3d 249, 267 (5th Cir. 2021) (en banc), *cert. petition filed*, No. 21-380 (U.S. Sept. 3). Though one judge did not join the opinion of the court, she dissented in part on other grounds (anti-commandeering). *Id.* at 441–42 (Owen, J., concurring in part, dissenting in part).

⁴⁰¹ *See generally Brackeen*, 994 F.3d 249.

⁴⁰² *Id.* at 268 (“[T]he en banc court is equally divided on whether the placement preferences, § 1915(a)–(b), violate anticommandeering to the extent they direct action by state agencies and officials; on whether the notice provision, § 1912(a), unconstitutionally commandeers state agencies; and on whether the placement record provision, § 1951(a), unconstitutionally commandeers state courts. To that extent, the district court’s judgment declaring those sections unconstitutional under the anticommandeering doctrine is affirmed without precedential opinion.” (footnotes omitted)); *see also* Kate Fort, *Brackeen Decision Summary*, TURTLE TALK (April 7, 2021), <https://turtletalk.blog/2021/04/07/brackeen-decision-summary/> [<https://perma.cc/JPJ3-JBJG>] (discussing the unique nature of the evenly split bench).

⁴⁰³ 18 U.S.C. § 1153.

⁴⁰⁴ 25 U.S.C. §§ 1301–1303.

⁴⁰⁵ *See Tribal Enrollment Process*, U.S. DEP’T OF THE INTERIOR, <https://www.doi.gov/tribes/enrollment> [<https://perma.cc/Y2JF-LDCB>].

⁴⁰⁶ *See* 25 U.S.C. § 1903(4).

⁴⁰⁷ *In re Dependency of Z.J.G.*, 471 P.3d 853, 865 (Wash. 2020).

regulating private employment apply to tribes.⁴⁰⁸ The default interpretative rule requires a clear statement of intent by Congress to make a federal statute applicable, most recently applied by the Supreme Court in 1987 in a case federal diversity jurisdiction.⁴⁰⁹ Other than the Tenth Circuit,⁴¹⁰ the federal circuits still have applied these federal employment statutes to tribal employers.⁴¹¹ The Canary textualist thinking behind these decisions appears to be the belief that tribal governmental economic activities are not analogous to those of states.⁴¹² As the Sixth Circuit put it, “The right to conduct commercial enterprises free of federal regulation is not an aspect of tribal self-government.”⁴¹³ This is not the judgment of Congress at all, which acknowledged that gaming activities, for example, are used “as a means of generating tribal governmental revenue.”⁴¹⁴ The lower courts’ decisions corraling Indian tribes into the federal employment law regime rely on numerous and competing theories designed to avoid the clear statement rules.⁴¹⁵ In the words of one dissenting judge (in the same Sixth Circuit case described above), “The sheer length of the majority’s opinion, to resolve the single jurisdictional issue before us, betrays its error. Under governing law,

⁴⁰⁸ See Alex T. Skibine, *Practical Reasoning and the Application of General Federal Regulatory Laws to Indian Nations*, 21 WASH. & LEE J.C.R. & SOC. JUST. 123, 169–70 & n.263 (2016) (discussing recent developments in the growing circuit split in federal labor law). See generally Riley Plumer, *Overriding Tribal Sovereignty by Applying the National Labor Relations Act to Indian Tribes in Soaring Eagle Casino and Resort v. National Labor Relations Board*, 35 LAW & INEQ. 131, 134–35 (2016) (arguing that the NLRA should not extend to Indian tribes); Bryan H. Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction*, 86 OR. L. REV. 413, 454–55 (2007) (analyzing the status of generally applicable employment laws in the tribal context); Note, *Tribal Power, Worker Power: Organizing Unions in the Context of Native Sovereignty*, 134 HARV. L. REV. 1162, 1169–1172 (2021) (describing tensions between organized labor reliance on federal employment law statutes and tribal sovereignty).

⁴⁰⁹ *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17–18 (1987).

⁴¹⁰ *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1200 (10th Cir. 2002).

⁴¹¹ See *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1308 (D.C. Cir. 2007) (finding the NLRB may apply the NLRA to a casino operated on a reservation); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 177 (2d Cir. 1996) (holding that OSHA applies to a construction site owned by a federally recognized Indian tribe and operated on a reservation); *NLRB v. Little River Band of Ottawa Indians Tribal Gov’t*, 788 F.3d 537, 539–40 (6th Cir. 2015) (holding the NLRA applies to operation of an Indian casino); *Menominee Tribal Enters. v. Solis*, 601 F.3d 669, 674 (7th Cir. 2010) (concluding that OSHA applies to the commercial activities of an enterprise owned by the Menominee Indian Tribe); *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1114 (9th Cir. 1985) (holding the commercial activities of a farm owned and operated by an Indian tribe are subject to OSHA).

⁴¹² See Oral Argument at 3:04–3:17, *Little River Band of Ottawa Indians v. NLRB*, 788 F.3d 537 (6th Cir. 2015) (No. 13-1464), [https://www.courtlistener.com/audio/25822/little-river-band-of-ottaw-v-nlr/ \[https://perma.cc/6JZH-QP65\]](https://www.courtlistener.com/audio/25822/little-river-band-of-ottaw-v-nlr/ [https://perma.cc/6JZH-QP65]) (distinguishing tribal casino employer from other state employers, the latter exempt from the federal labor laws in question).

⁴¹³ *Little River*, 788 F.3d at 553 (collecting cases).

⁴¹⁴ 25 U.S.C. § 2701(1).

⁴¹⁵ See *supra* note 29 and accompanying text.

the question presented is really quite simple. Not content with the simple answer, the majority strives mightily to justify a different approach.”⁴¹⁶

A Muskrat textualist would first apply the general rule that requires a clear statement of intent by Congress that the federal employment laws should apply to tribes. Almost by definition, the silence of these laws as to tribes answers that question. A Muskrat textualist might or might not like that regime as a policy preference, but would at least acknowledge (as the Tenth Circuit did⁴¹⁷) that tribes have adopted their own versions of employment laws that fill the regulatory landscape of tribal employment.⁴¹⁸ Moreover, a Muskrat textualist would acknowledge that tribal government businesses are not merely for-profit, private enterprises, but that the revenues generated by those businesses go directly to the provision of governmental services.⁴¹⁹

3. *Legitimacy of the Judiciary*

As a matter of principle, Muskrat Textualism is beneficial because it enhances the legitimacy of the judiciary. The business of judging in federal Indian law typically involves the push and pull between the powers of Congress to legislate in Indian affairs and the obligations of the United States to protect tribal interests from outside interference. Federal Indian law is primarily statutory, with hundreds of treaties and thousands of federal statutes and the regulations that interpret and implement those statutes.⁴²⁰ The Court’s institutional capacity to question national policy in Indian affairs is doubtful, especially compared to Congress.⁴²¹

Indian law commentators long have argued that the Supreme Court’s federal Indian law jurisprudence is illegitimate.⁴²² The Supreme Court

⁴¹⁶ *Little River*, 788 F.3d at 556 (McKeague, J., dissenting).

⁴¹⁷ *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1199 (10th Cir. 2002).

⁴¹⁸ See, e.g., Singel, *supra* note 23, at 498–503 (describing the landscape of tribal labor relations laws).

⁴¹⁹ See *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 810 (2014) (Sotomayor, J., concurring); cf. Robert A. Williams, Jr., *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Governmental Tax Status Act of 1982*, 22 HARV. J. LEGIS. 335, 385 (1985) (emphasizing the absence of a “stable tax base”).

⁴²⁰ See, e.g., Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 ARIZ. ST. L.J. 75, 89 (2002) (“Two volumes of the United States Code, . . . volumes of regulations, and numerous administrative decisions and rulings, all serve as the foundation for a mountain of [Tribal] law . . .”).

⁴²¹ See generally Steele, *supra* note 47, at 669 (emphasizing that the judiciary is limited by both the political question doctrine and Congress’s plenary power over Indian affairs).

⁴²² See, e.g., N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353, 379–80 (1994) (arguing that the Court relies on sources that show “a frequently encountered ethnocentric bias toward tribal political organizations denying the legitimacy of political systems that relied on consensus, not coercion, to regulate social

Justices, like many other judges, know little about reservation governance or what tribal governments actually do. For example, Justice Breyer asked at oral argument in a recent case what scholarly work he should read to learn about tribal courts.⁴²³ Not to denigrate Justice Breyer in any way because he at least acknowledged his lack of knowledge by asking the question, but one imagines that judges would not ask that or a similar question of state or local governments. Few law students at elite law schools hear much about federal Indian law, and tribal law—where one would learn the most about tribal courts, for example—is offered at only a token number of schools.⁴²⁴ Despite this distance from the facts on the ground, Canary textualists routinely make value judgments about tribal governance. For example, Justice Souter’s concurring opinion in *Nevada v. Hicks* expressing skepticism about tribal courts and tribal laws is the classic case.⁴²⁵

Unfortunately for the Court, those value judgments often are not just unfair to tribal interests, they are occasionally embarrassing to the Court. Consider the majority opinion in *Plains Commerce Bank v. Long Family Land and Cattle Co.*, which held that the Cheyenne River Sioux Tribe’s court did not have jurisdiction over a nonmember-owned bank.⁴²⁶ The majority quoted Justice Souter’s assertion that tribal courts “differ from traditional American courts in a number of significant respects” as a means to

relations”). See generally Porter, *supra* note 422, at 85 (“American legal theories . . . sustain illegitimate and unconsented-to assertions of American authority over [Indigenous peoples.]”); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 219, 264–65 (arguing that the “plenary power paradigm” in U.S. jurisprudence of tribal matters led to “justifying unquestioned abrogation and unilateral determination of tribal treaty and property rights” as well as “permit[ting] the denial of other fundamental human rights of Indian people”).

⁴²³ Transcript of Oral Argument at 41, *Dollar General Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (mem.) (2016) (No. 13-1496), 2015 WL 9919326, at *41 (“I wanted to know if you wanted me to read one thing that you have cited in respect to what is only impressionistic, that the vast number of tribal courts are indistinguishable in terms of fairness, et cetera, from the courts of – other courts in the United States, what would I read?”).

⁴²⁴ A reasonably complete list of law schools that currently offer programs on Indian law is available at the American Indian Law Center, Inc.’s website, which lists twenty-six schools. *Law School Recruitment*, AM. INDIAN L. CTR., INC., <https://www.ailec-inc.org/plsi/law-school-recruitment/> [https://perma.cc/E98L-AFV3]. Some of these schools offer tribal law or tribal courts classes regularly.

In recent years, several elite law schools have hired tenure-system faculty who teach federal Indian law or a similar class: Berkeley (Seth Davis), Northwestern (Clifford Zimmerman), NYU (Maggie Blackhawk, previously of Penn), Stanford (Greg Ablavsky and Elizabeth Reese), UCLA (Angela Riley), and Yale (Gerald Torres, previously of Cornell). Harvard has a chair in Indian law filled by longtime visitor Robert Anderson. Michigan offers Indian law classes taught by me, a longtime visitor. Chicago, Columbia, and other top-fourteen schools rely on adjuncts or visitors. Until the last few years, when I taught Tribal Law at Michigan (once) and Stanford (twice), my impression is that no top-fourteen law school had offered a tribal law or tribal courts class.

⁴²⁵ See *supra* notes 124–126 and accompanying text.

⁴²⁶ 554 U.S. 316, 320 (2008).

undermine the legitimacy of tribal law.⁴²⁷ Justice Souter’s *Hicks* concurrence essentialized all tribal courts and tribal law as the same, but said nothing specifically about the Cheyenne River Sioux court system. It turned out that the non-Indian bank opposing tribal jurisdiction in *Plains Commerce* had repeatedly invoked tribal court jurisdiction to its own advantage by “regularly fil[ing] suit in that forum.”⁴²⁸ More importantly, in the Court’s effort to attack tribal laws, it forgot that the bank gained little by winning the case. In the end, the Indian-owned company prevailed in large part—the bank’s appeal of tribal jurisdiction was limited to only one of the several claims raised by the Long Family Land and Cattle Co., leaving intact the rest of the claims.⁴²⁹ In short, the Court decided very little. It made no new law; the Court merely applied the *Montana* test to a specific fact pattern. All of this raises the question, did the Court actually do anything at all in *Plains Commerce* except forcing an outcome preference?

Muskrat Textualism imposes discipline on the Court. Instead of deviating at will from the restraints of textualism to impose what “ought to be,” Muskrat textualists invoke the default interpretive rules that leave Congress and Indian tribes in a position to answer those questions first and foremost.

CONCLUSION

In recent months, media outlets have asked me to envision what the world would look like if treaty rights had been enforced from the outset.⁴³⁰ I imagine that each time a big Indian law case reaches the Supreme Court, the Justices think about just how much tribal power is too much. Canary textualists seemingly worry about the consequences of their decisions on non-Indian interests. There seems to be an enormous fear that tribal governance will profoundly “destabilize . . . vast swathes” of America.⁴³¹ Justice Gorsuch characterized Canary Textualism perfectly: “Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye.”⁴³²

⁴²⁷ *Id.* at 337 (quoting *Nevada v. Hicks*, 533 U.S. 353, 383 (2001) (Souter, J., concurring)).

⁴²⁸ *Id.* at 346 (Ginsburg, J., dissenting).

⁴²⁹ FRANK POMMERSHEIM, *TRIBAL JUSTICE: TWENTY-FIVE YEARS AS A TRIBAL APPELLATE JUSTICE* 78 (2016).

⁴³⁰ See *Indigenous Treaties Are Helping to Secure Environmental Wins*, WNYC STUDIOS: THE TAKEAWAY (Dec. 29, 2020), <https://www.wnycstudios.org/podcasts/takeaway/segments/indigenous-treaties-are-helping-secure-environmental-wins> [<https://perma.cc/DJE7-ARJW>]; *Give the Land Back?*, FLASH FORWARD (Nov. 10, 2020), <https://www.flashforwardpod.com/2020/11/10/land-back/> [<https://perma.cc/D9QJ-3XEH>].

⁴³¹ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2501 (2020) (Roberts, C.J., dissenting).

⁴³² *Id.* at 2482 (majority opinion).

Muskral textualists seemingly are more circumspect. Muskral textualists have faith that “[Congress] has no shortage of tools at its disposal” to correct the policy problems arising from the enforcement of the law.⁴³³ This is just basic judging. In Justice Gorsuch’s concluding words: “Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.”⁴³⁴

Muskral Textualism respects Congress’s role in driving national policy on Indian affairs. Muskral Textualism respects the wisdom of tribal governance of Indian Country when Congress has chosen not to legislate. Muskral Textualism respects settled law. Importantly, Muskral Textualism cuts through the background chatter that obscures the settled rules of Indian law interpretation. Confusion would no longer be invoked as an excuse to employ policy preferences.

Justice Gorsuch’s opinion in *McGirt* is a clarion call for righting the ship in federal Indian law. Professor Frickey’s call from fifteen years ago for more practical scholarship that might influence the Court seems to have come to partial fruition. This Article is an attempt to offer a broader theoretical framework for Justice Gorsuch’s call.

⁴³³ *Id.* at 2481–82.

⁴³⁴ *Id.* at 2482.

