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“The Rule of the Strong, Not the Rule of Law”: Reexamining Implicit Divestiture After *McGirt v. Oklahoma*

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“THE RULE OF THE STRONG, NOT THE RULE OF LAW”: REEXAMINING IMPLICIT DIVESTITURE AFTER *MCGIRT V. OKLAHOMA*

Joseph Palandrani*

In McGirt v. Oklahoma, the U.S. Supreme Court found that the boundaries of the Muscogee (Creek) Nation, which were set in 1866 and which encompass a large swath of present-day Oklahoma, remain intact. Although non-Indigenous people had settled on the land in droves by the early twentieth century, the Court held that the land remains “Indian Country” until Congress explicitly indicates otherwise. Because Congress never so indicated, the reservation is undiminished.

McGirt marked a massive shift in the Court’s approach to the question of whether reservation boundaries remain in force; demographic history had previously figured prominently in the Court’s rulings in this arena. The Court has relied on similar historical evidence to inform its analysis of a closely related set of questions: those pertaining to whether Indigenous nations’ sovereign powers over their reservations extend to non-Indigenous people. This Note argues that McGirt’s repudiation of a context-driven inquiry in the former line of cases has ramifications for the latter. In particular, this Note argues that the types of evidence and the modes of reasoning that McGirt rejects have been central to the Court’s doctrine of “implicit divestiture,” which holds that Indigenous nations have limited authority over non-Indigenous people on reservations. This Note argues that McGirt and implicit divestiture are incompatible.

This Note concludes that the Court, having undermined its theory of implicit divestiture, should apply McGirt’s mode of analysis to questions involving Indigenous nations’ territorial authority over reservations.

INTRODUCTION.....	2376
I. PARALLEL TRACKS: IMPLICIT DIVESTITURE AND RESERVATION DIMINISHMENT THROUGH <i>MCGIRT</i>	2380
A. <i>Implicit Divestiture of Tribal Territorial Authority</i>	2380

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1. The Sovereign Baseline: Early Jurisprudence on Tribal Power	2381
2. Changes in the Status of “Domestic Dependent Nations”	2384
3. Tribal Territorial Authority over Non-Indigenous Property Within Allotted Reservations	2386
4. Evaluating Implicit Divestiture: Scholarly Assessments of the Doctrine.....	2391
B. <i>Reservation Disestablishment Before McGirt</i>	2394
C. McGirt	2398
1. Justice Gorsuch’s Opinion	2398
2. The Dissent	2400
II. DIVERGING DOCTRINES: TENSIONS BETWEEN <i>MCGIRT</i> ’S REASONING AND IMPLICIT DIVESTITURE.....	2401
III. AFTER <i>MCGIRT</i> : A CLEAR STATEMENT RULE FOR INDIGENOUS NATIONS’ TERRITORIAL AUTHORITY	2406
A. <i>Realigning the Court’s Approaches to Tribal Territorial Authority and Reservation Boundaries</i>	2406
B. <i>Clarifying the 1948 Indian Country Statute</i>	2408
C. <i>Facilitating Authority-Expanding Policies</i>	2409
CONCLUSION	2412

INTRODUCTION

“Supreme Court Rules That About Half Of Oklahoma Is Native American Land,” blared a representative headline on July 9, 2020, the final day that opinions from the U.S. Supreme Court’s October 2019 term were announced.¹ That day, in *McGirt v. Oklahoma*,² the Court ruled that the Muscogee (Creek) Nation’s reservation retained the boundaries reflected in an 1866 treaty;³ all of the land within those boundaries remains “Indian Country,”⁴ no matter who owns the land within it.⁵ The Muscogee (Creek) reservation spans a broad swath of Oklahoma, including “most of Tulsa.”⁶ It does not, as the headline above suggests, stretch across half the state, but if the similarly situated Cherokee, Chickasaw, Choctaw, and Seminole reservations also retain their post-Civil War boundaries—and they almost

1. Laurel Wamsley, *Supreme Court Rules That About Half of Oklahoma Is Native American Land*, NPR (July 9, 2020, 7:17 PM), <https://www.npr.org/2020/07/09/889562040/supreme-court-rules-that-about-half-of-oklahoma-is-indian-land> [https://perma.cc/KPL2-G8GU].

2. 140 S. Ct. 2452 (2020).

3. *See id.* at 2461.

4. *See* 18 U.S.C. § 1151.

5. *Id.* (stating that all reservation land is Indian Country “notwithstanding the issuance of any patent”).

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

certainly do⁷—then nearly all of eastern Oklahoma is indeed Indian Country.⁸

McGirt provided rhetorical fodder for those with an interest in overstating its effects. Senator Ted Cruz, for example, notoriously claimed that the Court “gave away half of Oklahoma” and warned that “Manhattan is next.”⁹ Attorneys representing Oklahoma conjured the specter of a mass exodus from state prisons once convictions for crimes committed on the reservation—and therefore beyond state jurisdiction—became vulnerable to vacation.¹⁰ Indian law experts, however, called it “absurd” to suggest that the Muscogee (Creek) Nation’s victory in *McGirt* would drastically change the laws by which most non-Indigenous people¹¹ order their lives,¹² let alone

7. 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/SBX7-CQQK>]; see also *McGirt*, 140 S. Ct. at 2482 (Roberts, C.J., dissenting) (“Not only does the Court discover a Creek reservation . . . but the Court’s reasoning portends that there are four more such reservations in Oklahoma.”). A county judge in Oklahoma recently found, consistent with *McGirt*, that the Choctaw Nation’s reservation was never disestablished. See Derrick James, *Latimer County Judge Rules County Located in ‘Indian Country,’* MCALESTER NEWS-CAP. (Dec. 16, 2020), https://www.mcalesternews.com/news/latimer-county-judge-rules-county-located-in-indian-country/article_4884c9e2-4004-11eb-bc3a-cff1e5201ae9.html [<https://perma.cc/W8UJ-94WC>].

8. For a visual representation of the boundaries of the reservations in question, see *Map of the Indian and Oklahoma Territories* (illustration) (1892), in *Library of Congress Geography and Map Division*, LIBR. OF CONG., <https://www.loc.gov/resource/g4021e.ct000224/> [<https://perma.cc/Y96F-27GX>] (last visited Mar. 16, 2021).

9. Ted Cruz (@tedcruz), TWITTER (July 9, 2020, 12:52 PM), <https://twitter.com/tedcruz/status/1281269895519514625?s=20> [<https://perma.cc/4J2S-W6M6>].

10. See Rebecca Nagle, *Oklahoma’s Suspect Argument in Front of the Supreme Court*, ATLANTIC (May 8, 2020), <https://theatlantic.com/ideas/archive/2020/05/oklahomas-suspect-argument-front-supreme-court/611284/> [<https://perma.cc/A55C-WUYR>] (explaining and refuting these concerns).

11. The U.S. Code uses the terms “Indian” and “non-Indian,” but this Note will refer to sovereigns and individuals as either “Indigenous” or “non-Indigenous” unless quoting directly from another source. Although “Indigenous” refers broadly to people who trace their ancestry to “pre-colonial and/or pre-settler societies” around the world, *Reporting and Indigenous Terminology*, NATIVE AM. JOURNALISTS ASS’N, https://najanewsroom.com/wp-content/uploads/2018/11/NAJA_Reporting_and_Indigenous_Terminology_Guide.pdf [<https://perma.cc/SH7G-STVV>] (last visited Mar. 16, 2021), this Note uses the term to refer only to federally recognized American Indian nations and their citizens or members. This is the least common denominator of the varying meanings borne by the term “Indian” in the U.S. Code. See, e.g., 25 U.S.C. § 3103(9), (11) (stating that “‘Indian’ means a member of an Indian tribe,” where “Indian tribe” refers to “any Indian tribe, band, nation, Pueblo or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians”); *id.* § 1603(13), (14) (stating the same but expressly including Alaska Native entities within “Indian tribe”). This Note will use “Indigenous nations” to refer generally to Indigenous polities, but the adjective “tribal” will denote particular aspects of those polities, as in “tribal courts” or “tribal citizenship.” See *Reporting and Indigenous Terminology*, *supra* (referring to “tribal membership or citizenship,” “tribal government,” and “tribal affiliation”). This Note will use the terms of art “Indian Country” and “Indian law” where appropriate.

12. Reese, *supra* note 7.

sweep their land titles out from under them.¹³ The Court decided only “whether the land . . . promised” to the Muscogee (Creek) Nation by the United States in a series of nineteenth-century treaties “remains an Indian reservation for purposes of federal criminal law.”¹⁴ Specifically, the Court’s affirmation of the reservation’s boundaries matters a great deal to Indigenous people accused of, or victimized by, crimes involving other Indigenous people,¹⁵ as the state “has no right to prosecute” defendants in such cases in Indian Country.¹⁶

To be precise about the limited scope of *McGirt*’s holding is not to discount its potentially profound ramifications.¹⁷ The Seventh Circuit recently held that *McGirt* “turned what was a losing position for” a Wisconsin village challenging the reservation status of Oneida Nation lands “into a nearly frivolous one.”¹⁸ Additionally, because states’ powers to tax enrolled citizens of Indigenous nations are more limited within Indian Country than without,¹⁹ the Oklahoma Tax Commission estimates that \$21.5 million in state taxes previously collected annually from within the treaty-defined boundaries of the Muscogee (Creek) reservation are now unlawful after *McGirt*.²⁰ And *McGirt* may also invite reconsideration of ostensibly unrelated principles of the Court’s Indian law jurisprudence—particularly as that jurisprudence concerns Indigenous nations’ power to regulate

13. See Wamsley, *supra* note 1 (“It’s important to note that the case concerned jurisdiction, not land ownership.”).

14. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020).

15. Some non-Indigenous criminal defendants will also be affected; the Violence Against Women Reauthorization Act of 2013 granted Indigenous nations the ability to opt in to criminal jurisdiction over non-Indigenous defendants accused of dating or domestic violence against Indigenous victims. See Pub. L. No. 113-4, § 904, 127 Stat. 54, 120 (2013); see also Mary Kathryn Nagle & Sarah Deer, Response, *McGirt v. Oklahoma: A Victory for Native Women*, GEO. WASH. L. REV. ON DOCKET (July 20, 2020), <https://www.gwlr.org/mcgirt-v-oklahoma-a-victory-for-native-women> [<https://perma.cc/2RAK-ZPTM>] (discussing the impediments to tribal prosecution of gender-based violence that the Court could have caused had it decided *McGirt* differently).

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

17. See, e.g., Reese, *supra* note 7 (detailing *McGirt*’s specific jurisdictional consequences while also arguing that *McGirt* could portend further judicial or legislative adjustments to the laws governing Indian Country).

18. *Oneida Nation v. Village of Hobart*, 968 F.3d 664, 685 (7th Cir. 2020).

19. Compare *Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 462–67 (1995) (permitting state income taxes on enrolled citizens of the Chickasaw Nation employed by the Nation within Indian Country but living outside Indian Country), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157–58 (1973) (permitting state sales taxation of an off-reservation business operated by the Mescalero Apache Tribe), with *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 268–270 (1992) (striking down state excise taxes on sales of reservation land parceled out under the General Allotment Act), and *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 179–81 (1973) (invalidating state income tax on an enrolled citizen of the Navajo Nation living on the Navajo reservation and deriving income from reservation sources).

20. OKLA. TAX COMM’N, REPORT OF POTENTIAL IMPACT OF *MCGIRT V. OKLAHOMA* 2 (2020), <https://www.ok.gov/tax/documents/McGirt%20vs%20OK%20-%20Potential%20Impact%20Report.pdf> [<https://perma.cc/9DZY-WAFY>]. This figure increases to \$72.7 million if the analysis is extended to the treaty-defined territory of the Choctaw, Chickasaw, Cherokee, and Seminole reservations. *Id.*

reservation land owned by non-Indigenous people.²¹ Such is the position of this Note.

McGirt at first seems only tenuously related to the topic this Note addresses. The *McGirt* Court ruled on the scope of federal criminal jurisdiction over enrolled citizens of federally recognized Indigenous nations.²² This Note, by contrast, is concerned with tribal authority over lands owned by non-Indigenous people within reservations. The *McGirt* Court ruled on *where* the boundaries of the Muscogee (Creek) Nation’s reservation lie;²³ this Note analyzes *what* powers an Indigenous nation like the Muscogee (Creek) may exercise over nonmembers who own land within its territory.²⁴

While accounting for the salience of these important differences, this Note argues that the method by which Justice Gorsuch’s majority opinion affirmed the boundaries of the Muscogee (Creek) reservation is incompatible with the method by which the Court has previously deduced substantive limitations on Indigenous nations’ sovereign powers.²⁵ In particular, this Note suggests that *McGirt*’s text-bound readings of statutes that transformed reservations into constellations of private parcels are irreconcilable with precedents that relied on those same statutes and their real-world consequences to deprive Indigenous nations of certain elements of territorial authority.²⁶ *McGirt* could—and should—therefore affect how courts evaluate tribal authority over non-Indigenous fee landowners in the future.²⁷

Part I outlines the paths the Court has taken in evaluating two related questions. First, what sovereign powers can Indigenous nations exercise over their entire reservations, especially when those reservations are populated by non-Indigenous people? This part introduces one doctrine, often termed “implicit divestiture,”²⁸ that the Court has used to answer this question.²⁹ Using this doctrine, the Court has diminished Indigenous nations’ territorial authority,³⁰ even when no express legislative pronouncements required such a result.³¹ Second, does a particular reservation still exist and, if so, have its boundaries changed? Part I proceeds to explore the methods the Court has developed to answer this question and puts the relevant pre-*McGirt* precedents in dialogue with implicit divestiture.³² Finally, Part I then

21. *See infra* Part II.

22. *See generally* *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

23. *See generally id.*

24. *See infra* Part I.A.

25. *See infra* Part II.

26. *See infra* Part II.

27. *See infra* Part III.

28. *United States v. Wheeler*, 435 U.S. 313, 326 (1978).

29. *See infra* Parts I.A.2–4.

30. Throughout this Note, “territorial authority” will refer to the substantive powers that sovereigns enjoy within their borders—for example, the power to enforce criminal laws or regulate land use.

31. *See infra* Parts I.A.2–4.

32. *See infra* Part I.B.

examines *McGirt*, the Court's most recent pronouncement on reservation boundaries.³³

Part II describes the tension between implicit divestiture and the reasoning that prevailed in *McGirt*. This part identifies those elements of *McGirt* that appear to contradict core precepts of implicit divestiture. Conversely, this part shows the close resemblance between implicit divestiture's bedrock principles and the reasoning that sustains Chief Justice Roberts's *McGirt* opinion, which failed to command a majority.

Part III argues that although *McGirt* does not directly change the law on tribal territorial authority, it will nevertheless be difficult for the Court to persuasively maintain its theory of implicit divestiture after *McGirt*'s tacit repudiation of the doctrine's foundations. For that reason, this part argues that implicit divestiture should be abandoned in favor of a rule for tribal territorial authority that tracks *McGirt*'s rule for reservation boundaries: namely, that anything promised by treaty or inherent to Indigenous nations is retained unless expressly removed by Congress. Such a rule would promote uniformity and predictability across related doctrines,³⁴ clear the interpretive hurdles that implicit divestiture has erected on facially straightforward statutes,³⁵ and advance important federal policies.³⁶

I. PARALLEL TRACKS: IMPLICIT DIVESTITURE AND RESERVATION DIMINISHMENT THROUGH *MCGIRT*

This part places *McGirt* in the context of the Court's jurisprudence on tribal territorial authority and reservation boundaries. Part I.A discusses the development of the Court's method for evaluating Indigenous nations' territorial authority over non-Indigenous people on reservations. Part I.B sketches the manner in which the Court has answered the related question of whether land that once comprised a reservation retains its reservation status. Part I.C presents aspects of *McGirt*'s majority opinion and dissent that bear on the lines of precedent outlined in Parts I.A and I.B.

A. *Implicit Divestiture of Tribal Territorial Authority*

In a series of cases decided in the late twentieth century, the Court found that the federal government had curtailed or withdrawn from Indigenous nations certain aspects of territorial authority that were historically considered inherent to sovereign status.³⁷ These cases introduced a theory of "implicit divestiture"³⁸ according to which the United States, in addition to abrogating tribal territorial authority through statutes and treaties, had also

33. See *infra* Part I.C.

34. See *infra* Part III.A.

35. See *infra* Part III.B.

36. See *infra* Part III.C.

37. See, e.g., *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); *Montana v. United States*, 450 U.S. 544 (1981); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); see also *infra* Parts I.A.2–3 (discussing the cited cases).

38. *United States v. Wheeler*, 435 U.S. 313, 326 (1978).

nullified some attributes of territorial authority implicitly.³⁹ Part I.A.1 examines the Court's conceptions of Indigenous nations' territorial authority from the beginning of the nineteenth century through the late twentieth century. Part I.A.2 describes the shift, beginning in the 1970s, in the Court's understanding of the scope of tribal territorial authority. Part I.A.3 demonstrates how the Court, drawing inferences from the federal government's repudiated allotment policy,⁴⁰ arrived at the conclusion that non-Indigenous settlement on reservation land implicitly limits Indigenous nations' territorial authority within those reservation boundaries. Part I.A.4 collects insights from scholars' attempts to explain the developments detailed in Parts I.A.1–3.

1. The Sovereign Baseline: Early Jurisprudence on Tribal Power

The Court once held a broad view of Indigenous nations' territorial authority over unceded land.⁴¹ Chief Justice John Marshall referred to Indigenous nations as “domestic dependent nations” within the United States.⁴² Domestic dependent nations had nearly full territorial authority over their respective lands, and non-Indigenous people on Indigenous lands were subject to the powers of the nation to which those lands were reserved.⁴³ Addressing the treaty relationship between the United States and the Cherokee Nation, Chief Justice Marshall wrote that the relevant treaties showed the latter “claiming and receiving the protection” of the former; its members had not “abandon[ed] their national character” nor “submit[ed] as subjects to the laws of a master.”⁴⁴

There were important caveats to Indigenous nations' sovereign power under this theory.⁴⁵ In *Johnson v. M'Intosh*,⁴⁶ for example, the Marshall Court imposed limits on Indigenous nations' authority to unilaterally cede or convey land to parties other than the federal government.⁴⁷ Even this holding, however—which inscribed the morally (if not legally) repudiated

39. See, e.g., *Brendale*, 492 U.S. 408; *Montana*, 450 U.S. 544; *Oliphant*, 435 U.S. 191.

40. See *infra* notes 94–103 and accompanying text.

41. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) (“[T]he several Indian nations [are] distinct political communities, having territorial boundaries, within which their authority is exclusive . . .”).

42. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

43. See *Worcester*, 31 U.S. (6 Pet.) at 561 (“The Cherokee nation . . . is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.”).

44. *Id.* at 555.

45. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823) (holding that Indigenous nations' “complete sovereignty, as independent nations, were necessarily diminished” upon “discovery” by whichever European empire happened to claim the particular lands in question).

46. 21 U.S. (8 Wheat.) 543 (1823).

47. See generally *id.*

doctrine of discovery⁴⁸ at the foundation of federal Indian law—does not foreclose the retention of Indigenous nations’ territorial authority over land reserved to them by treaty or statute.⁴⁹ The *M’Intosh* Court did not necessarily find that Indigenous nations were categorically impotent to grant their own land titles.⁵⁰ European “discovery” did not *automatically* abrogate Indigenous nations’ power to convey title to non-Indigenous individuals; it simply attached a preemption right of annexation that was good against other European powers.⁵¹ In guaranteeing lands to Indigenous nations by treaty, the United States expressly forbore the “consummat[ion]”⁵² of that right as to the reserved territories.⁵³ While titles granted by Indigenous sovereigns were unprotected by American law and were susceptible to displacement by conflicting grants from the federal government, such titles could still govern land tenure within Indigenous territory.⁵⁴

This jurisprudential conception of Indigenous nations’ power amounted to a “historic presumption against the loss of tribal sovereignty.”⁵⁵ Canons of construction admonished courts to give effect to this presumption by interpreting ambiguous treaties—and later statutes⁵⁶—in favor of the Indigenous nations impacted thereby.⁵⁷ The federal judiciary upheld laws

48. *See id.* at 573 (holding that a European nation’s “discovery” of land “gave title to the government . . . by whose authority, it was made, against all other European governments, which title might be consummated by possession”).

49. *See* Richard A. Monette, *Governing Private Property in Indian Country: The Double-Edged Sword of the Trust Relationship and Trust Responsibility Arising out of Early Supreme Court Opinions and the General Allotment Act*, 25 N.M. L. REV. 35, 51–54 (1995).

50. *See id.*

51. *See M’Intosh*, 21 U.S. (8 Wheat.) at 587; *see also* *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 544 (1832) (observing that “discovery” title alone “could not affect the rights of those already in possession”); *id.* (“The United States succeeded to all the claims of Great Britain, both territorial and political So far as [such claims] existed merely in theory, or were in their nature only exclusive of the claims of other European nations, they . . . remain dormant.”).

52. *M’Intosh*, 21 U.S. (8 Wheat.) at 573; *see supra* note 48 and accompanying text.

53. *See Worcester*, 31 U.S. (6 Pet.) at 576, 557 (suggesting that “treaties” that effected “cessions of territory” and set “boundaries” delineated the area “within which [the Cherokee Nation’s] authority is exclusive”).

54. *M’Intosh*, 21 U.S. (8 Wheat.) at 593 (“The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws.”). Philip Frickey argued that *M’Intosh*’s invalidation of Indigenous title was compelled only because there was a direct conflict between a land grant from the United States, on the one hand, and from an Indigenous sovereign, on the other. In his view, *M’Intosh* is not a sweeping condemnation of the power of Indigenous nations to govern the rights of those within their territories. *See* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 37–38 (1999).

55. John Fredericks III, *America’s First Nations: The Origins, History and Future of American Indian Sovereignty*, 7 J.L. & POL’Y 347, 396 (1999).

56. *E.g.*, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (“[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.”).

57. *See Worcester*, 31 U.S. (6 Pet.) at 552–54 (declining to find, on the basis of ambiguous statutory provisions, that the Cherokee Nation forfeited core sovereign rights). The Court continues to invoke these interpretive principles today. *See* *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2470 (2020).

and conditions of entry onto land that Indigenous nations applied to non-Indigenous people within their territories, such as permit taxes for conducting business.⁵⁸ Non-Indigenous people who purchased land and formed their own communities on reservations remained subject to tribal rules,⁵⁹ even when Congress had expressly divested a governing Indigenous nation of many critical elements of territorial authority.⁶⁰ The forms of territorial authority that were enforceable against non-Indigenous people ranged widely,⁶¹ up to and including the power to seize property.⁶² Felix S. Cohen described further elements of this rich conception of tribal territorial authority in the first edition of his treatise on federal Indian law⁶³: there, he wrote that Indigenous nations possessed the power to remove,⁶⁴ levy

58. See, e.g., *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906) (mem.). Nearly a century after dismissing an appeal from *Buster*'s ruling, the Court noted that it had "never endorsed *Buster*'s statement that an Indian tribe's 'jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it.'" *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 n.4 (2001) (quoting *Buster*, 135 F. at 951). While the Court had cited *Buster* in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 143–44 (1982), the *Atkinson* Court rejected the suggestion that *Merrion*'s reference to *Buster* amounted to an embrace of *Buster*'s broad conception of Indigenous territorial authority. See *Atkinson*, 532 U.S. at 653 n.4. However, the language from *Buster* on which the *Merrion* Court relied to confirm that an Indigenous nation's authority to tax, inter alia, non-Indigenous people on reservations, "derives not from its power to exclude, but from its power to govern and to raise revenues," *Merrion*, 455 U.S. at 144, sits immediately adjacent to the language rejected by the *Atkinson* Court. Compare *Merrion*, 455 U.S. at 144 (quoting *Buster*, 135 F. at 952), with *Atkinson*, 532 U.S. at 653 n.4 (quoting *Buster*, 135 F. at 951). Notwithstanding the Court's characterization in *Atkinson* of its use of *Buster* in prior precedents, *Buster* remains probative of the contemporaneous understanding of the scope of tribal territorial authority.

59. See *Buster*, 135 F. at 953 ("[N]either the establishment of town sites nor the purchase nor the occupancy by noncitizens of lots therein withdraws those lots or the town sites or their occupants from the jurisdiction of the government of the Creek Nation . . ."); see also Maxey v. Wright, 54 S.W. 807, 809 (Indian Terr. 1900) (upholding a Muscogee (Creek) Nation permit fee collected from non-Indigenous attorneys); James Matthew V. Martin, *The Cherokee Supreme Court: 1823–1835*, at 99–100 (Dec. 2018) (Ph.D. dissertation, University of Nevada) (on file with author) (suggesting that non-Indigenous litigants in the early nineteenth century submitted themselves to the Cherokee Nation's courts for suits concerning reservation property).

60. *Buster*, 135 F. at 951 ("[T]he United States by various acts of Congress deprived this tribe of all its judicial power, and curtailed its remaining authority until its powers of government have become the mere shadows of their former selves. Nevertheless its authority to fix the terms upon which noncitizens might conduct business within its territorial boundaries . . . remained undisturbed.").

61. See Brief for Amici Curiae Historians & Legal Scholars Gregory Ablavsky et al. in Support of Respondents at 16–17, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496) (listing tribal regulations to demonstrate "tribes' power, even at its nineteenth-century nadir, to enforce their laws against non-Indians on tribal land").

62. See *Hamilton v. United States*, 42 Ct. Cl. 282, 285 (1907) (upholding the Choctaw Nation's seizure of storehouses owned by non-Indigenous business partners because the United States had promised the Choctaw Nation it could "maintain a domestic government for the regulation of their own internal affairs").

63. See FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 142–45 (1942).

64. *Id.* at 143.

property taxes on,⁶⁵ and prescribe property laws affecting anyone, including non-Indigenous people, residing on reservation land.⁶⁶

2. Changes in the Status of “Domestic Dependent Nations”

For much of the twentieth century, the Court presumed that Indigenous nations retained attributes of territorial authority that Congress had not expressly abrogated.⁶⁷ Although the Marshall Court’s understanding of Indigenous nations’ autonomy within reservations had changed slightly over time,⁶⁸ the Court had never held that reservationwide territorial authority had been implicitly revoked. At most, the Court found that previously exclusive tribal territorial authority had become concurrent with a modicum of state authority.⁶⁹ Indigenous nations retained their territorial authority,⁷⁰ even when that authority operated on non-Indigenous people.⁷¹

This changed significantly in 1978, when the Court issued its opinion in *Oliphant v. Suquamish Indian Tribe*.⁷² There, the Court held that Indigenous nations’ “dependent” status, as defined in *Cherokee Nation v. Georgia*,⁷³ necessitated restrictions on tribal territorial authority beyond those stipulated in “specific restrictions in treaties or congressional enactments.”⁷⁴ Specifically, the *Oliphant* Court ruled that Indigenous nations’ domestic

65. *Id.* at 142.

66. *Id.* at 144–45.

67. See *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 173–75 (1973) (recognizing a “tradition of sovereignty” prohibiting state encroachment on Indigenous nations’ independence on reservation lands absent clear congressional permission); *Williams v. Lee*, 358 U.S. 217, 219 (1959) (upholding exclusive tribal jurisdiction over a lawsuit brought by a non-Indigenous person against an Indigenous person regarding reservation-based transactions and observing that the “basic policy” of maintaining Indigenous nations’ sovereign autonomy “remained”); see also *United States v. Winans*, 198 U.S. 371, 381 (1905) (describing a treaty establishing a reservation not as “a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted”).

68. See *McClanahan*, 411 U.S. at 171 (“[N]otions of Indian sovereignty have been adjusted to take account of the State’s legitimate interests in regulating the affairs of non-Indians.”); *Williams*, 358 U.S. at 219 (noting that categorical prohibitions on state regulatory power on reservations no longer held “in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized”). For an introduction to the Court’s early understanding of Indigenous territorial authority, see *supra* notes 41–54 and accompanying text.

69. See *McClanahan*, 411 U.S. at 171 (citing cases upholding state taxation and prosecutorial powers over non-Indigenous people on reservations); *Williams*, 358 U.S. at 219–20 (citing cases upholding state criminal jurisdiction over non-Indigenous people on reservations and state court civil jurisdiction over Indigenous litigants).

70. See *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (“Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory” (emphasis added) (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832))).

71. See *Williams*, 358 U.S. at 223 (upholding exclusive tribal court jurisdiction over a non-Indigenous person involved in a reservation-based suit and finding it “immaterial that respondent” was not Indigenous, because he “was on the Reservation and the transaction with an Indian took place there”).

72. 435 U.S. 191 (1978).

73. 30 U.S. (5 Pet.) 1 (1831); see also *supra* notes 42–43 and accompanying text.

74. *Oliphant*, 435 U.S. at 208.

dependent status immunized nonmember U.S. citizens from tribal criminal sanctions.⁷⁵ The Court rested on the novel theory⁷⁶ that the United States’s “solicitude that its citizens be protected . . . from unwarranted intrusions on their personal liberty” renders Indigenous nations’ power to prosecute non-Indigenous people “inconsistent with [Indigenous nations’] status” of “dependence on the Federal Government.”⁷⁷

Before *Oliphant*, statutes and treaties determined which sovereigns maintained criminal jurisdiction over reservations.⁷⁸ Several treaties contemplated tribal power to punish non-Indigenous people.⁷⁹ When such powers were named, they were counted as preexisting, inherent elements of tribal territorial authority that positive law simply affirmed.⁸⁰ *Oliphant* reversed this understanding of retained territorial authority: the Court construed textual invocations of tribal criminal jurisdiction over non-Indigenous people as conferrals from the federal government, not acknowledgments of extant powers.⁸¹

Oliphant’s concern for individual liberties recalls the protections of the Bill of Rights; for this reason, the holding appears “quasi-constitutional.”⁸²

75. See *id.* at 210. This holding is no longer universally applicable. See *supra* note 15.

76. See Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1056 (2005) (describing “the principle that simply by incorporation within the United States tribes had lost inherent criminal jurisdiction over non-Indians” as “something wholly new in Indian law” at the time *Oliphant* was decided).

77. *Oliphant*, 435 U.S. at 208, 210 (emphasis omitted).

78. See COHEN, *supra* note 63, at 363–65 (detailing an entirely statutory and treaty-based body of law governing criminal jurisdiction over non-Indigenous people in Indian Country).

79. *Id.* at 364 (observing that “[e]arly treaties frequently provided that non-Indians committing offenses in the Indian country against Indians should be subject to punishment by tribal authorities”); see also *id.* at 45 (describing some early treaties guaranteeing tribal prosecutorial power over non-Indigenous people on reservations).

80. See *id.* at 145–46, 146 n.212 (observing that the United States, in several treaties, including the Treaty of Peace and Friendship, Cherokee Nation-U.S., art. 8, July 2, 1791, 7 Stat. 39, 40, “expressly recognized” Indigenous nations’ “original sovereign power[]” to “punish aliens within [their] jurisdiction according to [their] own laws and customs,” which power endures “save as it has been expressly limited by the acts of a superior government”). The 1942 edition of Cohen’s treatise is not entirely consistent on this point, but where it contradicts the language quoted above, it rests on scant authority. In one passage, Cohen suggests, without direct support, that tribal courts have no inherent criminal jurisdiction over non-Indigenous people because Indigenous sovereigns lack the “common law principle of the territoriality of criminal law.” *Id.* at 360. Elsewhere, Cohen states that “attempts of tribes to exercise [criminal] jurisdiction over non-Indians . . . have been generally condemned by the federal courts since the end of the treaty-making period.” *Id.* at 148. The only case cited, *Ex parte Kenyon*, found that tribal criminal jurisdiction was limited to tribal citizens, but the case supported this proposition with a statute; it did not suggest that the lack of criminal jurisdiction over non-Indigenous people was a necessary, implicit consequence of domestic dependent nation status. See *Ex parte Kenyon*, 14 F. Cas. 353, 355 (C.C.W.D. Ark. 1878) (No. 7,720) (citing 28 Rev. Stat. § 2146 (1873)).

81. See *Oliphant*, 435 U.S. at 198 n.8 (noting that “[f]ar from representing a recognition of any inherent Indian criminal jurisdiction over non-Indians settling on tribal lands, these [treaty] provisions,” acknowledging tribal criminal jurisdiction over non-Indigenous trespassers, “were instead intended as a means of discouraging non-Indian settlements on Indian territory, in contravention of treaty provisions to the contrary”).

82. Frickey, *supra* note 54, at 65–66, 73–75. Before *Oliphant* was decided, Congress enacted a quasi-Bill of Rights that limited tribal governments’ power, including in the realm

This inchoate sense that the United States is constitutionally compelled to protect its citizens from the coercive power of Indigenous nations of which they are not constituents rose to the surface in *Duro v. Reina*.⁸³ There, the Court suggested that congressional efforts to expand tribal criminal jurisdiction beyond the citizens of the prosecuting Indigenous nation would be unconstitutional.⁸⁴ The consequences of this suggestion, however, never came to fruition: the Court upheld subsequent legislation that allowed Indigenous nations to prosecute some people outside their own citizenry.⁸⁵ *Oliphant* and its progeny are therefore squarely within the domain of federal common law—not constitutional jurisprudence.⁸⁶

Part I.A.3 describes how this common-law doctrine of implicit divestiture spilled over from the criminal context into the civil context and further complicated Indigenous nations' territorial authority.

3. Tribal Territorial Authority over Non-Indigenous Property Within Allotted Reservations

Paeans to the territorial reach of tribal authority did not disappear abruptly from the Court's decisions after *Oliphant*.⁸⁷ Nevertheless, soon after *Oliphant* was decided, the Court found further implied limitations on tribal territorial authority in the civil context.⁸⁸ In *Montana v. United States*,⁸⁹ the Court held that Indigenous nations have limited power to regulate the land uses of non-Indigenous owners of fee lands within reservations.⁹⁰ This holding imported *Oliphant*'s restrictions on the inherent powers of domestic dependent nations⁹¹ and expanded them to include an additional legal theory: when Congress breaks a treaty promise to "set apart" reservations "for the

of criminal procedure. See Indian Civil Rights Act of 1968, Pub. L. No. 90-284, § 202, 82 Stat. 73, 77 (codified as amended at 25 U.S.C. § 1302).

83. 495 U.S. 676 (1990).

84. *Id.* at 693–94 (finding "constitutional limitations . . . on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right" and suggesting that such concerns may apply to tribal courts); see also Frickey, *supra* note 54, at 40 (noting the significance of the *Duro* Court's suggestion that Congress may be constitutionally barred from acknowledging tribal jurisdiction over nonmembers).

85. See *United States v. Lara*, 541 U.S. 193, 196 (2004); see also *supra* note 15 (discussing Congress's 2013 recognition of Indigenous nations' authority to prosecute some non-Indigenous defendants).

86. See Frickey, *supra* note 54, at 58.

87. See, e.g., *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty."); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (noting that "[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management" and upholding tribal taxes on non-Indigenous people and corporations within the Jicarilla Apache Nation reservation (emphasis added)).

88. See *Montana v. United States*, 450 U.S. 544, 563–67 (1981).

89. 450 U.S. 544 (1981).

90. See generally *id.*

91. See *id.* at 565 (citing *Oliphant* for "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe").

absolute and undisturbed use and occupation”⁹² of Indigenous nations, tribal territorial authority over the land is implicitly revoked as to non-Indigenous fee lands.⁹³

Montana concerned lands that had originally been parceled out of the Crow Tribe’s reservation in the early twentieth century,⁹⁴ pursuant to the allotment program that the United States adopted in 1887.⁹⁵ In enacting its allotment policy, the United States unilaterally divided reservations into parcels of private land titles vested in individual tribal citizens.⁹⁶ Once certain restrictions on alienation were lifted,⁹⁷ individuals with allotted lands became fully “subject to the laws, both civil and criminal, of the State or Territory in which they . . . reside[d].”⁹⁸ Because unrestricted private fee titles could be purchased by anyone, non-Indigenous people acquired a tremendous amount of reservation land.⁹⁹ Congress acknowledged that its allotment policy had resulted in devastating land loss among Indigenous nations and individuals and abandoned the program in 1934.¹⁰⁰ Though this repudiation did not amount to a wholesale reversal of the policy,¹⁰¹ Congress did walk back states’ broad license to preside over allotted fee lands in 1948. That year, it defined Indian Country—that is, “country within which Indian laws and customs and federal laws relating to Indians are generally applicable”¹⁰²—to include all reservation land irrespective of ownership.¹⁰³

The *Montana* Court denied the Crow Tribe’s power to restrict non-Indigenous hunting and fishing within reservation boundaries, including on

92. *Id.* at 548 (quoting Treaty With the Crow Indians, Crow Nation-U.S., May 7, 1868, 15 Stat. 649).

93. *See id.* at 558–63.

94. *Id.*

95. *See* General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C.).

96. *See* 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 16.03(2)(a) (Nell Jessup Newton ed., 2019).

97. *See id.* § 16.03(2)(b).

98. *See* § 6, 24 Stat. at 390 (codified as amended at 25 U.S.C. § 349).

99. *See* David A. Chang, *Enclosures of Land and Sovereignty: The Allotment of American Indian Lands*, RADICAL HIST. REV., Winter 2011, at 108, 108–10 (explaining that roughly eighty-six million acres were taken from Indigenous people nationwide during the allotment period, leading to mass Indigenous landlessness); *see also* Kristen A. Carpenter & Angela R. Riley, *Privatizing the Reservation?*, 71 STAN. L. REV. 791, 816–17 (2019) (describing Indigenous resistance to the allotment policy and to the fraudulent methods by which non-Indigenous settlers often acquired reservation parcels).

100. *See* Indian Reorganization Act, Pub. L. No. 73-383, § 1, 48 Stat. 984, 984 (1934) (codified at 25 U.S.C. § 5101); *see also* 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 96, § 16.03(2)(c) (describing the Indian Reorganization Act’s departures from the allotment policy).

101. *See* *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 270 (1992) (construing an allotment statute to allow state taxation of Indigenous-owned reservation parcels). *But see* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 25–26 (1995) (critiquing *County of Yakima* for giving continuing effect to allotment statutes in spite of the post-1934 abandonment of the allotment program).

102. 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 96, § 3.04(1).

103. Act of June 25, 1948, Pub. L. No. 80-772, § 1, 62 Stat. 683, 757 (codified at 18 U.S.C. § 1151(a)).

post-allotment fee lands owned by non-Indigenous people.¹⁰⁴ The Court held that “treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands,”¹⁰⁵ and in particular, in light of the fact that the “avowed purpose of the allotment policy was the ultimate destruction of tribal government.”¹⁰⁶ The Court found the Crow Tribe’s full territorial authority to be conditioned on its “absolute and undisturbed use and occupation”¹⁰⁷ of its reservation.¹⁰⁸ Indigenous nations’ “dependent” status, after *Oliphant*, cabined their territorial authority to matters directly affecting tribal citizens.¹⁰⁹ Only when a reservation was exclusively inhabited by an Indigenous nation’s citizens, the Court reasoned, was the power to govern tribal territory coextensive with the power to govern “internal [tribal] relations.”¹¹⁰ When Congress, aiming to abolish Indigenous nations as polities, forced the Crow Tribe to allow non-Indigenous people to settle on Crow land, the Tribe’s territorial authority was correspondingly diminished.¹¹¹ The Court subjected this prohibition on tribal regulatory power over non-Indigenous land to two exceptions: where non-Indigenous people have expressed some form of consent to tribal regulation¹¹² and where the core internal concerns of the Indigenous nation were implicated.¹¹³

104. *Montana v. United States*, 450 U.S. 544, 559 (1981). When *Montana* was decided, non-Indigenous people owned “approximately 28 percent” of the land within the Crow Tribe reservation. *Id.* at 548.

105. *Id.* at 561 (citing *Puyallup Tribe, Inc. v. Dep’t of Game*, 433 U.S. 165, 174 (1977)).

106. *Id.* at 561 n.9.

107. *Id.* at 548 (quoting Treaty With the Crow Indians, Crow Nation-U.S., May 7, 1868, 15 Stat. 649).

108. *Id.* at 558–59.

109. *See id.* at 563–65.

110. *Id.* at 564 (“[R]egulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations . . .”).

111. *Id.* at 561 (citing *Puyallup Tribe, Inc. v. Dep’t of Game*, 433 U.S. 165, 174 (1977)). *But see* *South Dakota v. Bourland*, 508 U.S. 679, 691 (1993) (“To focus on [congressional] purpose is to misread *Montana*.”). The Court’s reliance on congressional intent has ebbed and flowed throughout the *Montana* line of cases. *Cf.* *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 n.1 (2001) (citing *Montana*’s language on the intent of the General Allotment Act and the Act’s resulting effects on tribal power); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 422–23, 437, 441, 447 (1989) (plurality opinion) (relying on the intent of an allotment-era Congress to find the Yakima Nation without power to zone parts of its reservation).

112. *See Montana*, 450 U.S. at 565 (holding that “the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements” may be subject to tribal territorial authority).

113. *See id.* at 566 (allowing that an Indigenous nation’s “inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation” may be lawful “when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe”). The Court has narrowly construed this exception. *See, e.g., Brendale*, 492 U.S. at 428–29 (finding tribal authority to zone reservation land inessential to guarding “the political integrity, the economic security, or the health or welfare” of Indigenous nations); *see also Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 340–41 (2008) (reaching the same conclusion as to tribal authority to regulate sales of reservation land).

The consensus among the Justices in *Montana*¹¹⁴ fractured in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*.¹¹⁵ At issue in *Brendale* were conflicting sets of zoning regulations: one imposed by the Yakima Nation over its reservation and one imposed by the County of Yakima.¹¹⁶ Both regimes purported to reach fee lands situated in an area where the reservation and the county overlapped.¹¹⁷ A divided Court, ruling on the validity of the regulations, produced three opinions, none of which commanded a majority.¹¹⁸ Two diametrically opposed bright-line rules sat at the extremes of the Court's disposition—one prescribing a strong presumption against tribal authority over non-Indigenous reservation land,¹¹⁹ the other favoring a strong presumption for it¹²⁰—between which Justice John Paul Stevens proposed a functional, context-specific analysis.¹²¹ Six Justices agreed, however, that allotment had deprived the Yakima Nation of considerable power to regulate non-Indigenous land use within its reservation.¹²²

The plurality's theory of divestiture closely tracked that of the *Montana* Court's.¹²³ Justice Byron White declined to recognize Indigenous territorial authority “to the extent it involve[d] a tribe's ‘external relations.’”¹²⁴ Proscribed powers pertaining to “external relations” included, for Justice White, the ability to “regulate the use of [reservation] fee land”¹²⁵ when an Indigenous nation “no longer retains the ‘exclusive use and benefit’” of its reservation.¹²⁶ Once Congress revoked the power to exclude, Indigenous nations were without authority to set land use policy binding on *any* non-Indigenous owner of reservation land, unless one of the *Montana* exceptions applied.¹²⁷

114. The *Montana* Court was divided on a separate question but unanimous in finding the Crow Tribe without power to categorically limit hunting and fishing on the reservation to members of the Crow Tribe. See *Montana*, 450 U.S. at 567–69 (Stevens, J., concurring) (remaining silent on the aspects of the majority opinion relevant to this Note); *id.* at 581 n.18 (Blackmun, J., dissenting in part) (“I agree with the Court's resolution of the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe.”).

115. 492 U.S. 408 (1989).

116. *Id.* at 416.

117. *Id.*

118. *Id.* at 425–27; *id.* at 433 (Stevens, J., concurring in part); *id.* at 448 (Blackmun, J., concurring in the judgment in part and dissenting in part).

119. *Id.* at 414 (plurality opinion).

120. *Id.* at 448 (Blackmun, J., concurring in the judgment in part and dissenting in part).

121. *Id.* at 433 (Stevens, J., concurring in part).

122. *Id.* at 414–32 (plurality opinion); *id.* at 444–47 (Stevens, J., concurring in part).

123. See *id.* at 422–28 (plurality opinion).

124. *Id.* at 425–26 (quoting *United States v. Wheeler*, 435 U.S. 313, 326 (1978)).

125. *Id.* at 430.

126. *Id.* at 422 (quoting Treaty With the Yakamas, U.S.-Yakima Nation, art. 2, June 9, 1855, 12 Stat. 951).

127. See *supra* notes 112–13 and accompanying text (describing the exceptions to *Montana*'s limitations on tribal territorial authority). In the plurality's view, neither exception was available to the Yakima Nation. See *Brendale*, 492 U.S. at 428–32 (plurality opinion).

Justice Stevens was less interested in the abstract right to exclude than he was in the extent of actual exclusion.¹²⁸ In his view, allotment did not automatically remove the Yakima Nation's power to zone its reservation; instead, allotment-enabled, non-Indigenous settlement on the reservation limited the Nation's territorial authority.¹²⁹ Part of the disputed region of the reservation was off-limits to anyone who neither owned land therein nor had any associations with the Nation; the remainder of the region was open to the general public¹³⁰ and was inhabited primarily by noncitizens of the Nation.¹³¹ Justice Stevens wrote, and a bare majority of the Court agreed, that the Yakima Nation retained the power to regulate land use in the former portion.¹³² The Nation's power to zone non-Indigenous reservation land extended as far as, but no further than,¹³³ that afforded by an equitable servitude.¹³⁴ As long as a particular area in a reservation retained its "pristine character"¹³⁵ as an "undeveloped refuge,"¹³⁶ non-Indigenous owners of parcels within that area accepted their titles subject to tribal rules designed to protect the area's "traditional character."¹³⁷ Conversely, such restrictions became "outmoded,"¹³⁸ and therefore invalid, once the pre-allotment character of a swath of reservation territory gave way to an "integrated community" consisting of both Indigenous and non-Indigenous people.¹³⁹ Justice Stevens reasoned that Congress, in allotting the Yakima Nation's reservation, must have intended to dissolve tribal territorial authority over lands where non-Indigenous people, "who lack any voice in setting tribal policy," had densely settled.¹⁴⁰ In Justice Stevens's framing, as in Justice

128. Joseph William Singer, *Sovereignty and Property*, 86 *Nw. U. L. REV.* 1, 23 (1991); see *Brendale*, 492 U.S. at 441–43 (Stevens, J., concurring in part).

129. See *Brendale*, 492 U.S. at 441–45 (Stevens, J., concurring in part) (arguing that Indigenous nations retain territorial authority when a small number of non-Indigenous people acquire reservation land but lose that authority as non-Indigenous people settle more densely on the reservation).

130. *Id.* at 415–16 (plurality opinion).

131. *Id.* at 445 (Stevens, J., concurring in part) (noting that the Yakima Nation's members constituted "less than 20 percent" of the population in this part of the reservation).

132. See *id.* at 433–44.

133. On this point, Justice Stevens did not have a majority. Justices Blackmun, Marshall, and Brennan would have upheld the Yakima Nation's power to zone the entire reservation. See *id.* at 448–68 (Blackmun, J., concurring in the judgment in part and dissenting in part).

134. *Id.* at 442 (Stevens, J., concurring in part) ("[T]he Tribe's power to zone is like an equitable servitude; the burden of complying with the Tribe's zoning rules runs with the land without regard to how a particular estate is transferred.").

135. *Id.* at 440.

136. *Id.* at 441.

137. *Id.* at 435.

138. *Id.* at 447 (locating the Yakima Nation's loss of zoning authority in the "'change of neighborhood' doctrine," by which "an equitable servitude lapses when the restriction, as applied to 'the general vicinity and not merely a few parcels,'" is no longer consistent with a property's surroundings (quoting R. CUNNINGHAM ET AL., *LAW OF PROPERTY* § 8.20 (1984))).

139. See *id.* at 444–45 ("Because the Tribe no longer has the power to exclude nonmembers from a large portion of this area, it also lacks the power to define the essential character of the territory.").

140. *Id.* at 437; see also *id.* at 447 (articulating this point again).

White's, allotment "to some extent reworked fundamental notions of Indian sovereignty."¹⁴¹

Brendale and *Montana* demonstrate how, by subtle elision, Indigenous nations' territorial authority was vacated of much of its binding power over non-Indigenous people.¹⁴² The *Montana* Court and the *Brendale* plurality relied on language from *United States v. Wheeler*,¹⁴³ a case that recognized no Indigenous sovereignty "involving the relations between an Indian tribe and nonmembers of the tribe."¹⁴⁴ The *Wheeler* Court derived this membership-limited conception of tribal territorial authority primarily from *Oliphant*¹⁴⁵ and nineteenth-century decisions that had in fact contemplated a territorial authority that went beyond tribal citizenship.¹⁴⁶ Justice Stevens's *Brendale* opinion, by contrast, cited neither *Oliphant* nor *Wheeler* but bristled with the same concerns about subjecting non-Indigenous individuals to tribal authority that animated the Court's ruling in *Oliphant*.¹⁴⁷ If the text of the General Allotment Act¹⁴⁸ expressly eclipsed erstwhile promises that Indigenous nations would have their reservations to themselves, the Court found that the Act also cast penumbras that blotted out the authority to govern the new settlements.¹⁴⁹

4. Evaluating Implicit Divestiture: Scholarly Assessments of the Doctrine

By the time the Court began to find new, implied limitations on tribal territorial authority in the late 1970s, Congress had given up both the allotment program and a subsequent policy, which it called "termination," that similarly attempted to disband Indigenous nations and "subject Indians to state and federal laws on exactly the same terms as other citizens."¹⁵⁰ Congress, spurred by Indigenous organizing,¹⁵¹ instead staked out an enduring position in favor of Indigenous nations' autonomy.¹⁵² The Court

141. *Id.* at 436.

142. *See supra* notes 89–141 and accompanying text (discussing the progression of implicit divestiture in *Montana v. United States*, 450 U.S. 544 (1981), and *Brendale*).

143. 435 U.S. 313 (1978).

144. *Id.* at 326; *see Brendale*, 492 U.S. at 425–26, 427 (plurality opinion) (examining the quoted language from *Wheeler*); *Montana*, 450 U.S. at 563–64 (same).

145. *See Wheeler*, 435 U.S. at 323, 325 n.22 (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 191, 203–04 (1978)); *see also supra* notes 72–81 and accompanying text (discussing *Oliphant*).

146. *See Wheeler*, 435 U.S. at 326 (first citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); then citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); then citing *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); and then citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810)); *see also supra* Part I.A.1 (discussing the Court's nineteenth-century conception of tribal territorial authority).

147. *See supra* notes 75–77, 82 and accompanying text.

148. Ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C.).

149. *See Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 422–28 (1989) (plurality opinion); *id.* at 444–48 (Stevens, J., concurring in part); *Montana v. United States*, 450 U.S. 544, 557–61, 563–65 (1981).

150. 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 96, § 1.06.

151. *See Carpenter & Riley*, *supra* note 99, at 823.

152. *See* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 96, § 1.07 (indicating that the federal government has officially prioritized Indigenous nations' self-determination

therefore winnowed down the scope of tribal territorial authority as Congress was intent on expanding it and, conversely, expanded non-Indigenous immunities from tribal authority when federal policy was least compatible with those immunities.¹⁵³

Justice Harry Blackmun registered this dissonance in his *Brendale* dissent,¹⁵⁴ and scholars have since amplified and developed his critiques.¹⁵⁵ Pointing to the “Federal Government’s active and ‘longstanding policy of encouraging tribal self-government,’”¹⁵⁶ Justice Blackmun argued that any hopes for the dissolution of tribal polities that Congress may have harbored when it began allotting reservations¹⁵⁷ should be displaced by more recent congressional efforts to restore tribal authority.¹⁵⁸ This comported, he argued, with the Court’s long-standing hesitation to deprive Indigenous nations of powers Congress had not expressly withdrawn¹⁵⁹—a reluctance that survived *Oliphant* and *Montana*.¹⁶⁰ While Justice Blackmun did not cast aspersions on *Oliphant*,¹⁶¹ he denied that its reasoning could be extended to exempt non-Indigenous people from Indigenous territorial authority beyond the criminal context.¹⁶² For Justice Blackmun, Justice White’s *Brendale* opinion too readily found domestic dependent nation status incompatible with territorial authority over non-Indigenous land,¹⁶³ while Justice

continuously since 1961); see also Royster, *supra* note 101, at 18–20 (summarizing the transition from the termination era to the self-determination era and noting that a “cornerstone[.]” of the latter is “tribal control over the Indian Country”).

153. This conflict has at times led Congress to reverse Court-imposed restrictions on tribal territorial authority. See Royster, *supra* note 101, at 73–74; see also *supra* note 85 and accompanying text (discussing the legislative rejection of the Court’s holding in *Duro v. Reina*, 495 U.S. 676 (1990)).

154. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 467 (1989) (Blackmun, J., concurring in the judgment in part and dissenting in part). Justice Blackmun also noted that *Montana* “contains language flatly inconsistent with [the Court’s] prior decisions defining the scope of inherent tribal jurisdiction.” *Id.* at 455. Justice Blackmun had, however, joined the relevant portions of the *Montana* majority opinion. See *supra* note 114 and accompanying text.

155. See *infra* notes 165–74 and accompanying text.

156. *Brendale*, 492 U.S. at 467 (Blackmun, J., concurring in the judgment in part and dissenting in part) (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987)).

157. See *supra* notes 106, 140 and accompanying text (discussing the Court’s inferences about congressional intent during the allotment era).

158. *Brendale*, 492 U.S. at 464 (Blackmun, J., concurring in the judgment in part and dissenting in part); see also *supra* notes 100–03 and accompanying text (discussing Congress’s abandonment of the allotment policy).

159. See *Brendale*, 492 U.S. at 451–54 (Blackmun, J., concurring in the judgment in part and dissenting in part).

160. See *id.* at 454–55 (discussing cases decided after *Montana* in which reservationwide tribal territorial authority was upheld in the absence of specific acts of Congress).

161. *Id.* at 453. Justice Blackmun joined the Court’s opinion in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

162. *Brendale*, 492 U.S. at 453–54 (Blackmun, J., concurring in the judgment in part and dissenting in part).

163. *Id.* at 451–55.

Stevens's theory of a territorial authority that varied according to reservation demographics baselessly froze Indigenous life in amber.¹⁶⁴

Scholars who largely share in Justice Blackmun's critiques have attributed the Court's adoption of implicit divestiture to its special attentiveness to non-Indigenous interests when they seem to conflict with the interests of Indigenous nations.¹⁶⁵ Echoing Justice Blackmun's quarrel with Justice Stevens in *Brendale*, Bethany Berger has identified a sort of tribal originalism in the Court's jurisprudence, where only "traditional" tribal interests merit the protection of tribal territorial authority.¹⁶⁶ Conversely, Indigenous nations' right to "make their own laws and be ruled by them"¹⁶⁷ has no bearing on most matters involving non-Indigenous people on reservations.¹⁶⁸ Professor Berger argues that the Court's apparent suspicion that tribal institutions will discriminate against non-Indigenous people bolsters the Court's conception of a territorial power that applies only to tribal citizens.¹⁶⁹ Meanwhile, Ann Tweedy has noted that the Court treats non-Indigenous landowners' repose in their property's freedom from tribal territorial authority as an "equitable defense" to Indian Country's¹⁷⁰ statutorily clear reservationwide sweep.¹⁷¹ This sense that the Court has exercised its equitable discretion sub silentio also appears in Judith Royster's work, which suggests that implicit divestiture has transformed non-Indigenous settlers' "psychological reliance" on the allotment-era promise of land titles unburdened by tribal regulation into a "sort of vested right."¹⁷² Philip Frickey similarly remarked that the *Montana* Court felt compelled to safeguard "basic Anglo-American assumptions about the autonomy of property owners."¹⁷³ Finally, for Joseph William Singer, *Brendale* suggests

164. *See id.* at 464–65 (arguing that Justice Stevens's test relied on a "stereotyped and almost patronizing view of Indians and reservation life" according to which Indigenous nations retain their territorial authority only to the extent that "they forgo economic development and maintain [their] reservations according to a single, perhaps quaint, view of what is characteristically 'Indian' today").

165. *But see generally* Michael Doran, *Redefining Tribal Sovereignty for the Era of Fundamental Rights*, 95 IND. L.J. 87 (2020) (defending implicit divestiture as a justifiable attempt to balance the fundamental constitutional rights of non-Indigenous people against the unique position of Indigenous nations in the constitutional scheme).

166. *See* Berger, *supra* note 76, at 1058–59.

167. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

168. Berger, *supra* note 76, at 1050 (arguing that the Court's jurisprudence rests on the assumption that "jurisdiction over nonmembers and legal issues shaped by outside influence, such as those involving commerce with nonmembers, have little to do with tribal self-government").

169. *Id.*; *see also id.* at 1067–94 (examining Navajo Nation court proceedings involving non-Navajo litigants to refute this suspicion).

170. *See* 18 U.S.C. § 1151(a); *see also supra* notes 102–03 and accompanying text (discussing the 1948 redefinition of "Indian Country").

171. Ann E. Tweedy, *Unjustifiable Expectations: Laying to Rest the Ghosts of Allotment-Era Settlers*, 36 SEATTLE U. L. REV. 129, 181 (2012); *see also id.* at 137–38, 144 (arguing that when the Court has divested Indigenous nations of territorial authority, it has been guided by the assumptions of non-Indigenous people who settled on reservations pursuant to the allotment policy).

172. Royster, *supra* note 101, at 71.

173. Frickey, *supra* note 54, at 48.

that “non-Indians cannot trust tribal governments to treat them right, but . . . American Indians can and should expect fair treatment from the states and the federal courts.”¹⁷⁴

Non-Indigenous presence and land ownership within reservations, then, has strongly influenced the Court’s understanding of tribal territorial authority.¹⁷⁵ In this important sense, the Court’s implicit divestiture jurisprudence dovetailed with its pre-*McGirt* precedents on reservation diminishment and disestablishment—the subject of the next section of this Note.

B. Reservation Disestablishment Before *McGirt*

Part I.A described the course the Court has taken in defining the elements of territorial authority that Indigenous nations are able to exercise throughout their reservations. In particular, Part I.A.2 and Part I.A.3 demonstrated that the Court has, in recent decades, found Indigenous nations implicitly divested of certain powers over non-Indigenous people. This section introduces the Court’s approach to a separate but related question: whether a particular stretch of land qualifies as a reservation at all. In such cases—which this Note will refer to as “diminishment,” “disestablishment,” or “reservation boundary” cases—the Court determines whether Congress has changed or erased the boundaries of reservations previously set aside for Indigenous nations.¹⁷⁶ When a reservation is “diminished,” it continues to exist, but it encompasses a smaller territory than its originating document delineated.¹⁷⁷ When a reservation (or a part of a reservation) is “disestablished,”¹⁷⁸ it ceases to be a reservation; all the land within its former boundaries is absorbed into the jurisdiction of the surrounding state.¹⁷⁹

The Court has written that non-Indigenous settlement on allotted reservations cannot, of its own force, cause diminishment or disestablishment.¹⁸⁰ Similarly, the Court has held that “only Congress

174. Singer, *supra* note 128, at 40.

175. See *supra* Part I.A.3 (discussing the implicit divestiture of tribal territorial authority due to allotment and non-Indigenous settlement on reservations).

176. See *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588–89, 605 (1977) (finding that Congress intended to “disestablish” parts of a reservation promised to the Rosebud Sioux Tribe in 1868 and thereby “diminished” the reservation’s boundaries).

177. See, e.g., *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 358 (1998) (finding that Congress had annexed a part of a reservation that had previously been promised to the Yankton Sioux Tribe and that Congress had therefore “diminished” the reservation).

178. Some cases use the term “terminated” rather than “disestablished.” See *infra* notes 179–80.

179. See, e.g., *DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425, 428 (1975) (finding that an act of Congress “terminated the Lake Traverse Reservation, and that consequently the state courts have jurisdiction over conduct on non-Indian lands within the [former] reservation borders”).

180. See *Mattz v. Arnett*, 412 U.S. 481, 504 (1973) (finding that the “presence of allotment provisions in” reservation legislation “cannot be interpreted to mean that the reservation was to be terminated”); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 355–56 (1962) (finding that Congress, by an allotment enactment targeted at the Colville reservation, “did no more than open the way for non-Indian settlers to own land on the

can . . . diminish[] a reservation, and its intent to do so must be ‘clear and plain.’”¹⁸¹ These rules mark important differences between reservation boundary cases and the implicit divestiture cases: the latter have found non-Indigenous reservation settlement to directly impinge on the reach of tribal territorial authority¹⁸² and have relied on inferences about congressional intent without requiring that intent be clear or plain.¹⁸³ In practice, however, the Court’s method for determining diminishment and disestablishment had largely converged with its method for parsing the substance of retained territorial authority during the late twentieth century.¹⁸⁴ The Court’s inquiries into reservation boundaries, like its inquiries into tribal territorial authority, were often inflected by reservation demography.¹⁸⁵

In *Solem v. Bartlett*,¹⁸⁶ the Court formalized the role of demographic considerations in reservation boundary cases.¹⁸⁷ The *Solem* Court listed three kinds of evidence that it found probative of congressional intent to diminish or disestablish a reservation: (1) the text of applicable allotment-era legislation, (2) legislative history and similar indicia of contemporaneous understandings of the effects that the relevant statutes would have on the status of the land, and (3) the manner in which nontribal government entities and non-Indigenous settlers regarded the contested land following the relevant congressional enactments.¹⁸⁸ In explaining the third prong of this analysis, the Court reasoned that “[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian

reservation” because the legislation did not “expressly vacat[e] [part of a] reservation and restor[e] that land to the public domain”).

181. *Yankton Sioux Tribe*, 522 U.S. at 343 (citation omitted) (quoting *United States v. Dion*, 476 U.S. 734, 738–39 (1986)).

182. See *supra* notes 92–93, 107–11, 124–29, 138–39 and accompanying text (describing how the Court determined that Indigenous nations necessarily lost aspects of their territorial authority when Congress allowed non-Indigenous people to settle on reservations).

183. See *supra* notes 105–06, 111, 140 and accompanying text (describing how the Court’s inferences about unexpressed congressional intent partially sustained the conclusion that Indigenous nations had been implicitly divested of aspects of their territorial authority).

184. See Frickey, *supra* note 54, at 59–60 (describing convergences in the Court’s approaches to the two classes of cases); see also *supra* Parts I.A.2–4 (discussing the Court’s precedents on tribal territorial authority).

185. See, e.g., *Yankton Sioux Tribe*, 522 U.S. at 356 (declaring the Yankton Sioux reservation diminished where “fewer than 10 percent of the 1858 reservation lands [were] in Indian hands” and “non-Indians constitute[d] over two-thirds of the population within the 1858 boundaries”); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604–05 (1977) (finding that “[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian . . . not only demonstrates” a shared contemporaneous understanding that the applicable legislation disestablished the Rosebud reservation “but has created justifiable expectations” among non-Indigenous residents). For a recent analysis of the Court’s use of non-Indigenous reservation settlement as evidence of congressional intent to change reservation boundaries, see Bethany R. Berger, *McGirt v. Oklahoma and the Past, Present, and Future of Reservation Boundaries*, 170 PENN. L. REV. ONLINE (forthcoming 2021), <https://ssrn.com/abstract=3694051> [<https://perma.cc/F7CA-5CVS>].

186. 465 U.S. 463 (1984).

187. See *id.* at 470–71.

188. See *id.*

character, . . . *de facto*, if not *de jure*, diminishment may have occurred.”¹⁸⁹ The search for *de facto* changes to reservation boundaries was, the Court cautioned, “unorthodox and potentially unreliable”;¹⁹⁰ elsewhere, the Court called demographic change the “least compelling” form of evidence.¹⁹¹ In spite of these admonitions, however, scholars have noted that non-Indigenous settlement—the “least legally probative” factor in the *Solem* framework—has historically been the “most outcome-determinative” in the Court’s reservation boundary cases.¹⁹² Upon canvassing several decades of precedent, Philip Frickey, writing in 1999, concluded that the Court’s willingness to affirm reservation boundaries varied inversely with the magnitude of non-Indigenous interests that would be unsettled thereby.¹⁹³ This pattern held notwithstanding salient differences in the statutes under examination in each case.¹⁹⁴

The defining attributes of the Court’s theory of allotment-induced implicit divestiture have therefore had considerable purchase in the reservation boundary cases.¹⁹⁵ In both lines of cases, congressional desires to eliminate tribal territorial authority over certain lands, “formed at one time and never implemented, . . . control the effect” of other relevant enactments.¹⁹⁶ Similarly, both bodies of precedent suggest that Indigenous nations’ power to exclude non-Indigenous people from reservations contained implied powers that collapsed when non-Indigenous people were allowed to settle on reservations.¹⁹⁷ While the Court has articulated this theory more directly in the implicit divestiture cases, the Court’s use of demographic evidence in the reservation boundary cases has rendered Indian Country status—with all of its attendant jurisdictional import—judicially revocable on lands from which non-Indigenous people are no longer excluded.¹⁹⁸ Just as the implicit divestiture cases have largely limited Indigenous nations’ territorial authority to tribal citizens,¹⁹⁹ the reservation boundary cases suggest that “nonmembers are ‘really’ in a region meriting the term ‘Indian country’ only when the area has retained its ‘Indian character.’”²⁰⁰

189. *Id.* at 471.

190. *Id.* at 472 n.13.

191. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 356 (1998).

192. Frickey, *supra* note 54, at 20; *see also* Tweedy, *supra* note 171, at 143 (observing that non-Indigenous settlers’ “justifiable expectations tend to be an explicit and central concern” in reservation boundary cases).

193. *See* Frickey, *supra* note 54, at 17–24.

194. *See id.*

195. *See* Tweedy, *supra* note 171, at 137 (calling reservation diminishment and divestiture of territorial authority “related issue[s]”). *Compare supra* Parts I.A.3–4 (describing the effects of post-allotment non-Indigenous reservation settlement on tribal territorial authority), *with supra* notes 184–94 and accompanying text (describing the effects of the same factors on reservation boundaries).

196. Berger, *supra* note 185, at 14; *see also supra* Parts I.A.3–4.

197. *See supra* Part I.A.3 (describing how the Court found tribal territorial authority to be contingent on the power to exclude settlers from reservations).

198. *See supra* notes 184–94 and accompanying text.

199. *See supra* Part I.A.3.

200. Frickey, *supra* note 54, at 27.

The relationship between the two lines of cases surfaced in *Brendale*.²⁰¹ The five Justices who ruled that the Yakima Nation retained its power to zone the restricted portion of its reservation could not agree on a rationale,²⁰² but they appeared to be in agreement on the relevance of the Court's disestablishment jurisprudence.²⁰³ The two opinions that, together, partially upheld the Yakima Nation's zoning regulation cited *Mattz v. Arnett*²⁰⁴ for the proposition that allotment did not change reservation boundaries and thus could not abrogate tribal territorial authority on its own.²⁰⁵ Justice Blackmun found the strands of precedent so tightly interwoven as to be mutually controlling: "I fail to see how th[e] distinction" between the "open" and "closed" portions of the reservation²⁰⁶

can be squared with this Court's decisions specifically rejecting arguments that those reservation areas where the [General Allotment] Act has resulted in substantial non-Indian land ownership should be treated differently for jurisdictional purposes from those areas where tribal holdings predominate. And I do not see how [this distinction] can be squared with the unequivocal holdings of our cases that the [General Allotment] Act did not diminish the reservation status of reservation lands alienated to non-Indian owners even where that part of the reservation had "lost its [Indian] identity."²⁰⁷

The weight of non-Indigenous settlement in the Court's reservation boundary analyses appeared to wane in 2016, when the Court decided *Nebraska v. Parker*.²⁰⁸ *Parker* held that Pender, Nebraska, a village with 1300 mostly non-Indigenous residents,²⁰⁹ fell within the still extant Omaha reservation.²¹⁰ The settled expectations of "non-Indian settlers who live on the land," though "compelling,"²¹¹ were overwhelmed by countervailing textual evidence that Congress never sought to disestablish the reservation.²¹²

201. See *supra* notes 114–41 and accompanying text (discussing the Justices' opinions in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (plurality opinion)).

202. See *supra* notes 130–33 and accompanying text.

203. See *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 436, 442 (1989) (Stevens, J., concurring in part); *id.* at 457 (Blackmun, J., concurring in the judgment in part and dissenting in part).

204. 412 U.S. 481 (1973).

205. See *Brendale*, 492 U.S. at 436, 442 (Stevens, J., concurring in part); *id.* at 457 (Blackmun, J., concurring in the judgment in part and dissenting in part).

206. See *supra* notes 130–31 and accompanying text (introducing the "opened" and "closed" areas of the Yakima Nation reservation that were under consideration in *Brendale*).

207. *Brendale*, 492 U.S. at 463 (Blackmun, J., concurring in the judgment in part and dissenting in part) (fourth alteration in original) (citations omitted) (quoting *Mattz*, 412 U.S. 481 at 484–85); see also Frickey, *supra* note 54, at 45 (discerning "the echo of the realistic reading of the diminishment cases" in Justice Stevens's focus on the "character" of an area in his *Brendale* opinion).

208. 136 S. Ct. 1072 (2016).

209. See *id.* at 1078.

210. See *id.* at 1076.

211. *Id.* at 1082.

212. See *id.* at 1079–82.

Because the *Parker* Court did not measure the limits of Indian Country by the size of the non-Indigenous population on reservation land, *Parker* set the Court's reservation boundary jurisprudence on a divergent path from its implicit divestiture precedents.²¹³ However, since the magnitude of non-Indigenous interests had often been outcome determinative in reservation boundary cases, scholars were skeptical that the Court would apply the rule of *Parker* to a case that involved far more land and far more non-Indigenous people—such as eastern Oklahoma.²¹⁴ Defying expectations, the Court did precisely this in *McGirt*.²¹⁵

C. McGirt

Part I.B introduced the Court's reservation boundary precedents, a line of cases running parallel to the implicit divestiture cases discussed in Part I.A. This section discusses the Court's most recent reservation boundary case: *McGirt*. *McGirt* broke with prior reservation boundary cases,²¹⁶ and its reasoning challenges the implicit divestiture cases as well.²¹⁷

1. Justice Gorsuch's Opinion

In *McGirt*, the state of Oklahoma argued that it had criminal jurisdiction over Indigenous people in territory that had been reserved to the Muscogee (Creek) Nation in an 1866 treaty.²¹⁸ The state argued that even if the contested lands had once been a reservation,²¹⁹ Congress disestablished it around the turn of the twentieth century by allotting it and expressly nullifying essential features of the Muscogee (Creek) Nation's territorial authority.²²⁰

213. Cf. *supra* notes 184–200 and accompanying text (describing how non-Indigenous reservation settlement factored into reservation boundary cases before *Parker*).

214. E.g., Gregory Ablavsky, McGirt: Gorsuch Affirms “Rule of Law,” Not “Rule of the Strong,” in *Key Federal Indian Law Decision*, SLS 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/RH8K-YMKH>] (remarking that “Tulsa is not Pender”); Berger, *supra* note 185, at 17–18 (noting the vast demographic and geographic differences between Pender, Nebraska, and eastern Oklahoma);

215. See *infra* Part I.C.

216. See *Oneida Nation v. Vill. of Hobart*, 968 F.3d 664, 685 (7th Cir. 2020) (finding that *McGirt* ended the practice of consulting “congressional intent to diminish . . . inferred from unequivocal contextual sources even in the absence of textual support” in reservation boundary analyses, favoring “a more textual approach consistent with statutory interpretation more generally”).

217. See *infra* Part II (discussing tensions between *McGirt*'s reasoning and implicit divestiture).

218. See *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2460 (2020); see also Treaty With the Creek Indians, Creek Nation-U.S., art. 3, June 14, 1866, 14 Stat. 785 (fixing the current boundaries of the Muscogee (Creek) reservation).

219. Oklahoma did not concede this; it pressed the argument that the treaty in question did not create a reservation in the first place. See Brief for Respondent at 8–13, *McGirt*, 140 S. Ct. 2452 (No. 18-9526), 2020 WL 1478582. The Court rejected this argument. See *McGirt*, 140 S. Ct. at 2474–76.

220. Brief for Respondent, *supra* note 219, at 29–42.

The Court rejected these arguments—it insisted that a reservation persists even if the lands within were parceled out during allotment.²²¹ The majority opinion rested on a sharp distinction between property interests and sovereign powers and declined to read forfeitures of the former as forfeitures of the latter.²²² The Court also rejected the notion that an intent to disestablish a reservation could be inferred from the United States’s other incursions on tribal territorial authority²²³ in violation of treaty promises: “it’s no matter how many other promises to a tribe the federal government has already broken,” the Court wrote, if Congress has not expressly broken its promise to set aside a reservation for an Indigenous nation.²²⁴ While Congress had long since deprived the Muscogee (Creek) Nation of the “quiet possession” of a reservation that was to be “forever set apart as a home,”²²⁵ the Court found no reason to hold that the reservation status of the land had changed as a consequence of this encroachment.²²⁶

The *McGirt* Court was unwilling to submerge text in context.²²⁷ The Court read *Solem*’s three-part test²²⁸ as a list of hierarchically ordered interpretive strategies, not a list of necessary analytical steps.²²⁹ “[T]o ascertain and follow the original meaning of the law before us is the only ‘step’ proper for a court of law,” the majority wrote.²³⁰ By this reasoning, it was immaterial that the allotment of the Muscogee (Creek) reservation was the “first step in a plan” by which the Congresses of the allotment era hoped to erase the reservation.²³¹ As the majority emphasized twice in its opinion, “wishes don’t make for laws.”²³² Nor was the reservation’s subsequent history probative of anything when the text was clear: the Court rejected Oklahoma’s argument that the settled expectations of a large non-Indigenous population should defeat the reservation boundaries delineated in the relevant treaty.²³³ The majority wrote that it “imagine[d] some members of the 1832 Creek Tribe would be just as surprised to find” non-Indigenous people on

221. *McGirt*, 140 S. Ct. at 2464 (“Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others.”).

222. *Id.* at 2463–64 (holding that a conveyance of “all right, title, and interest of the Creek Nation” to allottees did not amount to “total surrender of all tribal interests”—including the Nation’s sovereign interests—“in the affected lands” (first quoting Creek Original Agreement, ch. 676, § 23, 31 Stat. 861, 868 (1901); and then quoting *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016))).

223. Such incursions included, inter alia, the abolition of Muscogee (Creek) courts and the subjection of Muscogee (Creek) legislative power to federal supervision. *See McGirt*, 140 S. Ct. at 2465–66.

224. *Id.* at 2462.

225. *Id.* at 2461 & n.1 (quoting Treaty With the Creek Indians, *supra* note 218, 14 Stat. at 786).

226. *See id.* at 2473–74.

227. *See id.*

228. *See supra* notes 186–90 and accompanying text (discussing the three categories of evidence that *Solem* found relevant in diminishment and disestablishment cases).

229. *McGirt*, 140 S. Ct. at 2468.

230. *See id.*

231. *Id.* at 2464.

232. *Id.* at 2462; *see id.* at 2465 (“[J]ust as wishes are not laws, future plans aren’t either.”).

233. *Id.* at 2479.

their reservation as those non-Indigenous people would be to find that “they have been living in Indian country this whole time.”²³⁴

2. The Dissent

Chief Justice Roberts wrote the principal dissent.²³⁵ For the Chief Justice, Congress’s designs for the reservation after allotment²³⁶ and the process of non-Indigenous settlement that followed loomed large over the text of the 1866 treaty.²³⁷ The Congress that had severely curtailed tribal territorial authority had “made no secret of its intentions” to ultimately dissolve the Muscogee (Creek) Nation as a political unit; the Chief Justice believed those intentions were sufficient to disestablish the reservation even if no single statute did so expressly.²³⁸ Moreover, the dissent stressed that the history of the reservation following its allotment—including its “subsequent treatment by Congress, the State’s unquestioned exercise of jurisdiction, and demographic” change²³⁹—remained an important source of evidence of congressional intent, even in the absence of statutory ambiguity.²⁴⁰ *Solem*, in this view, compelled the Court to consider whether the contested territory had “long since lost its Indian character” to determine whether “*de facto*, if not *de jure*, diminishment” had been effected.²⁴¹

Against Justice Gorsuch’s distinction between the Muscogee (Creek) Nation’s loss of its title to land and the Nation’s loss of its sovereign territory, the Chief Justice counterposed the argument that allotment could be functionally equivalent to outright cession of reservation land.²⁴² The dissent found that clear statutory language indicating full cession was unnecessary to disestablish a reservation where “Congress provided for allotment to tribe members who could then ‘sell their land to Indians and non-Indians alike.’”²⁴³ Chief Justice Roberts did not expressly distinguish *McGirt* from the precedents that had found allotment insufficient to change reservation boundaries,²⁴⁴ but he insisted allotment was inconsistent with reservation status because Congress had extinguished the Muscogee (Creek) Nation’s

234. *Id.*

235. *Id.* at 2482 (Roberts, C.J., dissenting). Justice Thomas dissented separately to explain that he would have dismissed the petition as improvidently granted for reasons irrelevant to this Note. *See id.* at 2502–04 (Thomas, J., dissenting).

236. *Id.* at 2488 (Roberts, C.J., dissenting) (arguing that Congress’s “prevailing ‘assumption’ . . . that ‘Indian reservations were a thing of the past’” could sustain a finding of reservation disestablishment, even if Congress had failed to “‘detail’ precise changes to reservation boundaries” (quoting *Solem v. Bartlett*, 465 U.S. 463, 468 (1984))).

237. *Id.* at 2498.

238. *See id.* at 2484.

239. *Id.* at 2498.

240. *See id.* at 2485 (arguing that the reservation boundary precedents compelled the Court to consult extratextual evidence to ascertain congressional intent).

241. *Id.* at 2486 (quoting *Solem*, 465 U.S. at 471).

242. *Id.* at 2489.

243. *Id.* (quoting *id.* at 2463 (majority opinion)).

244. *See supra* note 180 and accompanying text (citing cases that found allotment compatible with continued reservation status).

“communally held land” title and abrogated the Nation’s “governing authority . . . over the newly distributed parcels.”²⁴⁵

The dissent supported its conclusion with a number of other extratextual forms of evidence.²⁴⁶ The Chief Justice pointed to contemporaneous understandings of the cumulative effect of allotment-era legislation concerning the Muscogee (Creek) reservation,²⁴⁷ Oklahoma’s assumption of jurisdiction over the contested lands,²⁴⁸ and the settlement of a large non-Indigenous population within reservation boundaries.²⁴⁹ The residual territorial authority that Indigenous nations continue to possess over non-Indigenous people, even after implicit divestiture, was a special cause for concern for Chief Justice Roberts: he argued that the ambiguous exceptions to *Montana* would inject a “complicated layer of governance over the” newly reaffirmed Muscogee (Creek) reservation²⁵⁰ and cited *Brendale*²⁵¹ to support the position that case-by-case tests of the sort introduced there could “mire[] state efforts to regulate on reservation lands in significant uncertainty.”²⁵² One factor counseling against affirming the Muscogee (Creek) reservation, then, was the confusion that the Court’s own implicit divestiture precedents could engender.²⁵³

II. DIVERGING DOCTRINES: TENSIONS BETWEEN *MCGIRT*’S REASONING AND IMPLICIT DIVESTITURE

Part I.B described the convergence of two lines of precedent: one regarding tribal territorial authority over non-Indigenous people on reservations and one regarding reservation boundaries. Part I.C described *McGirt*’s new method for discerning reservation boundaries, as well as the *McGirt* dissent’s protests to the majority’s method. This part compares the reasoning of *McGirt*’s majority and dissenting opinions to the reasoning that sustains implicit divestiture. Although the substance of tribal territorial authority is neither abridged nor enlarged by *McGirt*’s holding,²⁵⁴ this part attempts to show that the majority’s reasoning conflicts in important ways with implicit divestiture.

Because Chief Justice Roberts’s rejoinders to the majority recapitulated common themes of the implicit divestiture cases, they throw the arguments

245. *McGirt*, 140 S. Ct. at 2492 (Roberts, C.J., dissenting).

246. *See id.* at 2494–501.

247. *See id.* at 2494–96.

248. *See id.* at 2496–500.

249. *See id.* at 2500–01.

250. *Id.* at 2502.

251. *Id.* at 2501 n.10 (citing *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989)).

252. *Id.* at 2501.

253. *See id.* at 2501–02.

254. *See Berger, supra* note 185, at 36–37 (arguing that “because of [the implicit divestiture] cases, state and tribal jurisdiction largely remains the same regardless of reservation boundaries” after *McGirt* “with respect to non-Indians,” even though such “cases are unmoored from prior jurisprudence, and stem instead from desires to protect perceived non-Indian interests over tribal interests”).

spurned by Justice Gorsuch into particularly sharp relief. The majority's rejection of the dissent's logic would seem to be a rejection of implicit divestiture's underpinnings as well.²⁵⁵

First, the import the Chief Justice ascribed to what Philip Frickey called "general congressional assimilative purposes unadorned by explicit congressional intent,"²⁵⁶ and in particular to the reservation's history of allotment,²⁵⁷ are in step with the reasoning by which the Court extended *Oliphant* to deprive Indigenous nations of territorial authority in *Montana* and *Brendale*. Allotment's ultimate goals figured prominently in the *Montana* and *Brendale* Courts' inferences about Congress's intent to shield non-Indigenous settlers from tribal territorial authority.²⁵⁸ This is precisely the mode of analysis that the *McGirt* Court dismissed as elevating "wishes" and "future plans" over laws.²⁵⁹ The *McGirt* majority drew a bright line: the only things allotment statutes take from Indigenous nations are those which the text necessitates.²⁶⁰

Second, Chief Justice Roberts would have held that the nullification of the Muscogee (Creek) Nation's exclusive right to use and possess its reservation necessarily amounted to a full abrogation of tribal sovereignty.²⁶¹ Cession of the reservation to the United States and allotment of the land to individuals were, according to this logic, functionally identical. The dissent's framing comports with *Brendale*, where allotment's elimination of the tribal power to exclude also implicitly—but necessarily—limited the tribal territorial authority to zone, leaving at most an "equitable servitude,"²⁶² if not a wholesale dissolution of territorial authority over lands owned by non-

255. See *The Supreme Court, 2019 Term—Leading Cases*, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), 134 HARV. L. REV. 600, 600–09 (2020) (discussing the incongruity between the presumption against tribal territorial authority over nonmembers announced in *Montana v. United States*, 450 U.S. 544 (1981), and *McGirt*'s insistence on express congressional abrogation of treaty rights).

256. Frickey, *supra* note 54, at 22; see also *McGirt*, 140 S. Ct. at 2484 (Roberts, C.J., dissenting) (pointing to extratextual evidence to support the conclusion that Congress intended to disestablish the Muscogee (Creek) reservation).

257. See *supra* notes 242–45 and accompanying text.

258. See *Montana v. United States*, 450 U.S. 544, 560 n.9 (1981) ("It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government."); see also *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 437 (1989) (Stevens, J., concurring in part) ("[I]t is . . . improbable that Congress envisioned that the Tribe would retain its interest in regulating the use of vast ranges of land sold in fee to nonmembers who lack any voice in setting tribal policy.").

259. *McGirt*, 140 S. Ct. at 2462, 2465.

260. See *id.* at 2464–65.

261. See *supra* notes 242–45 and accompanying text (discussing the *McGirt* dissent's conclusion that the Muscogee (Creek) Nation effectively ceded its reservation when the reservation was allotted).

262. *Brendale*, 492 U.S. at 442 (Stevens, J., concurring in part); see also *supra* notes 134–39 and accompanying text (explaining Justice Stevens's theory that Indigenous nations may only zone reservation land if that land's uses and inhabitants have not changed drastically since the reservation was established).

Indigenous people.²⁶³ By contrast, the *McGirt* majority used an analogy to distinguish erosions of sovereignty from erosions of property: “[t]he federal government issued its own land patents to many homesteaders” that “transferred legal title,” but “no one thinks” such patents “diminished the United States’s claim to sovereignty over any land.”²⁶⁴ Likewise, there is no reason to think that Indigenous nations could not “continue to exercise governmental functions over land even if they no longer own it communally.”²⁶⁵ Drawing on the “plain terms” of the statute defining Indian Country to include all reservation land irrespective of ownership,²⁶⁶ the majority suggested that the force of its analogy to federal homestead patents was just as strong when applied to fee lands owned by non-Indigenous people.²⁶⁷

McGirt’s equating of federal homestead patents with patents issued within the territory of “domestic dependent nations” also undermines *Montana*’s incorporation of *Oliphant*.²⁶⁸ Central to *Montana* is the view that non-Indigenous land ownership within reservations lies presumptively beyond the “internal” concerns of tribal governance.²⁶⁹ This membership-based conception of Indigenous nations’ territorial authority sits uncomfortably alongside *McGirt*’s resistance to the conflation of sovereign powers and ownership rights; if Indigenous nations are like the United States in the manner suggested by Justice Gorsuch’s homestead patent analogy, reservation land owned by non-Indigenous people is hardly “external” to Indigenous nations’ sphere of regulatory concern.²⁷⁰ Additionally, the rights of the Crow Tribe, the Yakima Nation, and the Muscogee (Creek) Nation to exclude settlers from their domains were codified in similar terms in the treaties establishing the reservations at issue in *Montana*, *Brendale*, and

263. See *Brendale*, 492 U.S. at 414–32 (plurality opinion); see also *supra* notes 123–27 and accompanying text.

264. *McGirt*, 140 S. Ct. at 2464; see also *supra* note 222 and accompanying text (discussing *McGirt*’s distinction between conveyance of property and cession of territory); Ann E. Tweedy, *Has Federal Indian Law Finally Arrived at “The Far End of the Trail of Tears”?*, 37 GA. ST. U. L. REV. (forthcoming 2021) (manuscript at 26), <https://ssrn.com/abstract=3684971> [<https://perma.cc/3QS7-PF8T>] (noting that *McGirt*’s observation of this distinction marks a departure from prior precedent).

265. *McGirt*, 140 S. Ct. at 2464.

266. See 18 U.S.C. § 1151(a).

267. *McGirt*, 140 S. Ct. at 2464 (holding that by the terms of 18 U.S.C. § 1151(a), it does not “matter whether . . . individual parcels have passed hands to non-Indians”).

268. See *supra* notes 109–13 and accompanying text (discussing *Montana*’s reliance on *Oliphant* to conclude that tribal power to regulate non-Indigenous land use falls beyond Indigenous nations’ territorial authority); see also Matthew L. M. Fletcher, *Muskrat Textualism*, 115 NW. U. L. REV. (forthcoming 2022) (manuscript at 66–71), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3767096 [<https://perma.cc/7FUT-HJW5>] (arguing that courts may depart from *Oliphant* due to *McGirt*’s conflicting mode of analysis).

269. See *supra* note 110 and accompanying text (describing *Montana*’s holding that internal tribal affairs do not include matters affecting non-Indigenous reservation lands).

270. Compare *McGirt*, 140 S. Ct. at 2464 (suggesting that reservation allotments remain subject to tribal territorial authority irrespective of who owns such allotments), with *Montana v. United States*, 450 U.S. 544, 563–65 (1981) (holding that allotted lands fall outside Indigenous nations’ territorial authority when non-Indigenous people acquire them).

McGirt, respectively.²⁷¹ It is difficult, in light of these parallels, to attribute discrepancies among these cases' varying theories of allotment's legal effects to differences among the cases' underlying histories; if the Crow Tribe's and Yakima Nation's sovereign powers changed when allotment abrogated the power to exclude nontribal citizens, then the effect should have been the same for the Muscogee (Creek) Nation.²⁷² The narrow inferences Justice Gorsuch drew from allotment's destruction of the power to exclude may therefore be irreconcilable with core tenets of implicit divestiture.

Third, the *McGirt* dissent, like Justice Stevens's *Brendale* opinion, emphasized the "Indian character" of the unceded land.²⁷³ The majority dismissed such evidence as singularly unhelpful in the absence of textual ambiguity.²⁷⁴ *Montana*'s admonition that "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands"²⁷⁵ is inverted in *McGirt*, where the Court reads treaty rights as they were when they were written.²⁷⁶ That members of the Muscogee (Creek) Nation had "los[t] their titles by fraud or otherwise in sufficient volume that no one remembers whose land it once was,"²⁷⁷ such that the reservation is now populated predominantly by non-Indigenous people,²⁷⁸ was irrelevant in determining whether the reservation still existed.²⁷⁹ *McGirt*'s dismissiveness regarding demographics—a factor that has figured prominently in disestablishment and implicit divestiture cases—undermines the context-driven analyses that appear in both lines of precedent.

271. See Treaty With the Crow Indians, Crow Nation-U.S., May 7, 1868, 15 Stat. 649 (promising that a reservation will be "set apart for the absolute and undisturbed use and occupation" of the Crow Tribe); Treaty With the Yakamas, U.S.-Yakima Nation, art. 2, June 9, 1855, 12 Stat. 951 (granting the Yakima Nation the "exclusive use and benefit" of its reservation); Treaty With the Creek Indians, *supra* note 218, 14 Stat. at 785 (declaring a reservation to be "forever set apart as a home" and guaranteeing the Muscogee (Creek) Nation "quiet possession of [its] country").

272. Compare *McGirt*, 140 S. Ct. at 2464 (resisting extratextual inferences from the fact of non-Indigenous settlement on the Muscogee (Creek) reservation), with *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 414–32 (1989) (plurality opinion) (finding allotment's abrogation of the Yakima Nation's power to exclude non-Indigenous people deprived the Nation of the power to zone reservation land), and *Montana*, 450 U.S. at 558–59, 564 (finding that non-Indigenous settlement deprived the Crow Tribe of the power to prohibit hunting on non-Indigenous fee land).

273. *McGirt*, 140 S. Ct. at 2486 (Roberts, C.J., dissenting) (quoting *Solem v. Bartlett*, 465 U.S. 463, 471 (1984)); *Brendale*, 492 U.S. at 447 (Stevens, J., concurring in part) (finding it significant that part of the Yakima Nation reservation had "lost its character as an exclusive tribal resource"); see also *supra* notes 197–200 and accompanying text (discussing the role of "Indian character" in the Court's reservation boundary jurisprudence prior to *McGirt*).

274. See *McGirt*, 140 S. Ct. at 2468–69.

275. *Montana*, 450 U.S. at 561 (citing *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 174 (1977)); see also *supra* notes 104–13 and accompanying text (discussing the inferences the *Montana* Court drew from the history of allotment on the Crow Tribe's reservation).

276. See *McGirt*, 140 S. Ct. at 2468–69.

277. *Id.* at 2474.

278. *Id.* at 2482 (Roberts, C.J., dissenting) (noting that Indigenous people constitute 10–15 percent of the population living within the 1866 boundaries of the Muscogee (Creek), Chickasaw, Seminole, Cherokee, and Choctaw reservations).

279. See *id.* at 2474 (majority opinion).

Precedents that endorsed expansive views of tribal territorial authority, but which the Court had previously questioned or partially abandoned, find new life in *McGirt*.²⁸⁰ The majority subtly challenged the membership-based understanding of territorial authority that has reigned since *Oliphant* by gesturing toward some of the most sovereignty-affirming language in *Worcester v. Georgia*²⁸¹: “Indian Tribes [are] ‘distinct political communities, having territorial boundaries, within which their authority is exclusive’”²⁸² While the Court has written that it “[l]ong ago . . . departed” from *Worcester*’s robust conception of territorial authority,²⁸³ *McGirt* quotes that early precedent without qualification.²⁸⁴ And in its pattern of sharply limiting allotment-era statutes to their literal, necessary effects, the *McGirt* majority emphasized that “congressional incursion on tribal legislative processes” left the Muscogee (Creek) Nation with “significant sovereign functions over the lands in question.”²⁸⁵ *Buster v. Wright*,²⁸⁶ an Eighth Circuit case that had not only contemplated the Muscogee (Creek) Nation’s retention of territorial authority after allotment but had directly upheld the Nation’s ability to regulate the activity of non-Indigenous people within the reservation, appears in support of this portion of *McGirt*.²⁸⁷

The pillars of *McGirt*’s holding conspire to put implicit divestiture on the defensive.²⁸⁸ If “congressional incursion on tribal legislative processes” in the midst of a massive land transfer campaign “only serve[s] to prove the [Indigenous nation’s legislative] power”²⁸⁹ over Indian Country, then it is hard to see how that authority is implicitly eroded by the land transfers themselves.²⁹⁰ The next part of this Note argues that the Court should not attempt to square *McGirt* with its implicit divestiture precedents and should instead align its jurisprudence on territorial authority with the principles that sustain *McGirt*.

280. *E.g.*, *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906) (mem.); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

281. 31 U.S. (6 Pet.) 515 (1832).

282. *See McGirt*, 140 S. Ct. at 2477 (quoting *Worcester*, 31 U.S. (6 Pet.) at 557).

283. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980); *see also supra* Parts I.A.2–4 (discussing the Court’s divergence from its nineteenth-century conception of tribal territorial authority).

284. *See McGirt*, 140 S. Ct. at 2477.

285. *Id.* at 2466.

286. 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906) (mem.).

287. *See id.* at 950–52; *see also* Tweedy, *supra* note 264, at 24 (noting the significance of *McGirt*’s citation to *Buster*); *supra* notes 58–60 (discussing *Buster*’s contested history in the Court’s precedents).

288. *See supra* notes 255–87 and accompanying text.

289. *McGirt*, 140 S. Ct. at 2466.

290. *See supra* notes 255–87 and accompanying text (discussing the tension between *McGirt*’s reasoning and the idea that allotment necessarily abrogates tribal territorial authority).

III. AFTER *McGirt*: A CLEAR STATEMENT RULE FOR INDIGENOUS NATIONS' TERRITORIAL AUTHORITY

McGirt changes the role of non-Indigenous settlement in the Court's analysis of reservation boundaries,²⁹¹ but Indigenous nations' territorial authority over non-Indigenous property on reservations remains constrained by *Oliphant*, *Montana*, and *Brendale*.²⁹² However, because *McGirt* undermines the premises on which these cases depend,²⁹³ *McGirt* provides a blueprint for the Court to change its prevailing theory of Indigenous nations' territorial authority. This part argues that extending *McGirt*'s logic to questions of territorial authority would retire unpredictable rules of federal common law that produce tortured readings of clear statutes and hobble important federal aims.²⁹⁴

This part identifies three independent reasons for extending *McGirt*'s reasoning to questions of tribal territorial authority. Part III.A suggests that answering questions about territorial authority and questions about reservation boundaries the same way would best serve doctrinal coherence. This section further argues that *McGirt*'s method for answering these questions generates consistency and predictability. Part III.B contends that the statute defining Indian Country has been distorted by implicit divestiture and would be clarified if *McGirt*'s reading controlled in all instances. Part III.C argues that a *McGirt*-style rule according to which Indigenous nations retain their territorial authority unless Congress says otherwise would advance some of the goals of the federal government's practice of consolidating land in trust for Indigenous nations.

A. *Realigning the Court's Approaches to Tribal Territorial Authority and Reservation Boundaries*

McGirt resolved a contradiction in the Court's reservation boundary decisions: while acknowledging that conveying land was not tantamount to ceding territory, the Court had nevertheless found such conveyances highly probative—if not dispositive—of congressional intent to disestablish reservations.²⁹⁵ The majority in *McGirt* sharpened the distinction between conveyance and cession and denied that the former was evidence of the

291. Compare *supra* Part I.B (discussing the prominent role played by non-Indigenous settlement in prior reservation boundary cases), with *supra* Part I.C (discussing *McGirt*'s rejection of demographic evidence in determining the boundaries of the Muscogee (Creek) reservation).

292. See *supra* Parts I.A.2–4 (discussing the Court's elaboration of implicit divestiture in the cited cases).

293. See *supra* Part II (discussing the tensions between *McGirt*'s reasoning and implicit divestiture).

294. See *infra* Parts III.A–C.

295. See *supra* notes 180–85, 190–94 and accompanying text (explaining that allotment and non-Indigenous settlement have played important roles in the Court's disestablishment cases, despite black-letter rules that such factors are of only secondary significance in the Court's reservation boundary analysis); see also Berger, *supra* note 185, at 12–19 (contextualizing *McGirt* in light of the incorporation of post-allotment demographic history in prior reservation boundary cases).

latter.²⁹⁶ In smoothing this jurisprudential wrinkle, however, the Court created new complications in the relationship between reservation boundary cases and territorial authority cases.²⁹⁷ Until *McGirt*, the two lines of precedent, though addressed to distinct questions, converged in their sensitivity to non-Indigenous reservation settlement as a critical factor in evaluating tribal interests.²⁹⁸ Even if the cases were not entirely coherent, the principles for which they stood coalesced around a somewhat predictable (if unstated) presumption against the retention of tribal sovereignty if significant non-Indigenous interests would be affected.²⁹⁹

McGirt upends this practical consistency. Leaving implicit divestiture undisturbed after *McGirt* would create a confusing contradiction in the Court's Indian law jurisprudence: on one hand, allotment and non-Indigenous settlement cannot independently affect reservation boundaries, and the Court will not find a reservation diminished or disestablished unless Congress has explicitly required it; on the other hand, non-Indigenous settlement after allotment automatically constrains tribal territorial authority even if Congress has not said so.³⁰⁰ This dissonance is especially jarring when set against the Court's recent insistence that clear statutory text is also necessary to revoke tribal sovereign immunity³⁰¹ and treaty-promised hunting rights.³⁰²

The close kinship of the reservation boundary cases and the territorial authority cases counsels in favor of consistent rules among them.³⁰³ It could be argued that the interests at stake in the reservation boundary cases are sufficiently distinct from those at stake in the territorial authority cases to warrant independent rules that accommodate different factors and concerns. For example, when land loses its Indian Country designation because it no

296. See *supra* notes 264–67 and accompanying text.

297. See *supra* Part II (describing how the *McGirt* approach to determining reservation boundaries undermines implicit divestiture).

298. See *supra* Part I.B. But see *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (finding no change to reservation boundaries where the population of the contested territory was predominantly non-Indigenous); see also *supra* notes 208–14 and accompanying text (discussing *Parker*'s position in the Court's reservation boundary jurisprudence).

299. See *supra* Parts I.A.4, I.B (describing the Court's apparent solicitude for non-Indigenous reliance interests in both reservation boundary and territorial authority cases).

300. Compare *supra* Parts I.A.3–4 (describing the effect of allotment and subsequent non-Indigenous reservation settlement on tribal territorial authority), with *supra* Part I.C.1 (describing *McGirt*'s rejection of the notion that allotment and subsequent non-Indigenous reservation settlement indicate reservation disestablishment).

301. See *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790–91 (2014).

302. See *Herrera v. Wyoming*, 139 S. Ct. 1686, 1691–92 (2019); see also *The Supreme Court, 2019 Term—Leading Cases*, *supra* note 255, at 605–06, 608–09 (discussing the textualist thread tying *McGirt* to *Bay Mills Indian Community* and *Herrera*).

303. See *supra* Part I.B (discussing the relationship between territorial authority cases and reservation boundary cases); see also Robert Laurence, *The Dominant Society's Judicial Reluctance to Allow Tribal Civil Law to Apply to Non-Indians: Reservation Diminishment, Modern Demography and the Indian Civil Rights Act*, 30 U. RICH. L. REV. 781, 800–01 (1996) (arguing that the Court's stated, if not practiced, reliance on clear congressional intent in reservation boundary cases but on a common-law evaluation of retained powers in territorial authority cases is inconsistent).

longer comprises a reservation, tribal citizens there lose immunities from state taxation and prosecution.³⁰⁴ Even *Montana*'s limited allowances for tribal regulation of non-Indigenous land use are inapplicable.³⁰⁵ Judicial or legislative withdrawals of tribal territorial authority over non-Indigenous people may be considered less egregious intrusions on the sovereignty of Indigenous nations. On this view, there may be a principled basis on which to require more of Congress to disestablish a reservation than to withdraw an element of territorial authority.

Even if the questions presented in the two types of cases touched such disparate interests that divergent rules were appropriate as a matter of policy, this would be insufficient to overcome the fact that *McGirt* undermines the specific legal theory developed in the implicit divestiture cases.³⁰⁶ If Indigenous nations can “continue to exercise governmental functions over land even if they no longer own it communally”³⁰⁷—even when that land has passed primarily to non-Indigenous people as part of a program intended to disband tribal sovereigns—then little space remains for a strictly membership-based conception of tribal territorial authority. To adhere to different standards in the two types of cases would require proceeding in open contradiction with *McGirt* or developing a new theory for why Indigenous nations do not retain authority over non-Indigenous people within their reservations. The risk that either of these approaches would generate undue confusion and inconsistency outweighs whatever abstract merit there may be in treating reservation boundary cases and territorial authority cases differently. The Court could sidestep these complications by following *McGirt*'s straightforward method and declining to withdraw territorial authority unless statutory text compels it.

B. Clarifying the 1948 Indian Country Statute

The *McGirt* majority argued that the “plain terms” of the statutory definition of Indian Country³⁰⁸ left no room for the suggestion that allotment had had any effect on the boundaries of the Muscogee (Creek) reservation.³⁰⁹ “Indian Country” denotes land over which tribal governments presumptively exercise territorial authority,³¹⁰ and *McGirt*'s literal reading of the term's reservationwide scope militates against ad hoc carveouts for non-Indigenous land. Implicit divestiture, however, has muddled this fairly straightforward

304. See *supra* note 19 and accompanying text; cf. *supra* notes 15–16 and accompanying text.

305. See *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (stating that Indigenous nations retain power over “their members and their territory,” which does not include non-Indigenous people beyond Indigenous territory (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832))).

306. See *supra* Part II.

307. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2464 (2020).

308. See 18 U.S.C. § 1151 (stating that “Indian Country” includes all land within reservations “notwithstanding the issuance of any patent”).

309. See *supra* notes 266–67 and accompanying text.

310. See *supra* notes 101–03 and accompanying text.

definition.³¹¹ The Court has inferred caveats to the clear statutory language, creating what Ann Tweedy has called an “equitable defense” to shield non-Indigenous interests from tribal territorial authority.³¹² By allowing Yakima County’s zoning ordinance to prevail over the Yakima Nation’s in *Brendale*, for example, the Court effectively removed certain reservation parcels from Indian Country for as long as those parcels remain in non-Indigenous hands.

Because the operative definition of Indian Country was enacted after Congress abandoned the allotment program in 1934,³¹³ it is not surprising that its “plain terms” suggest a restoration of Indigenous territorial authority over reservation land. Nor is it surprising that Congress’s whipsawing changes in policy toward Indigenous nations throughout the nineteenth and twentieth centuries³¹⁴ left contradictory marks on the U.S. Code, such that parts of the General Allotment Act remain intact alongside the expansive Indian Country definition. These contradictions are the result of express and implicit promises Congress made to both Indigenous nations and non-Indigenous settlers regarding reservation land. Congress has, by turns, reneged on promises to both parties.³¹⁵ The implicit divestiture cases saw the Court selectively revive the promise that allotment would afford non-Indigenous people access to reservation land free from tribal territorial authority, even though that promise had become incompatible with post-allotment policy.³¹⁶ *McGirt*’s text-bound interpretive approach prevents the Court from attempting to reconcile conflicting provisions in a way that allows earlier enactments to frustrate and distort subsequent ones.

C. Facilitating Authority-Expanding Policies

If the Court were to apply *McGirt*’s reasoning to questions of tribal territorial authority, important federal initiatives could be facilitated. For example, pursuant to a practice that is calibrated to expand tribal sovereignty by expanding tribal land holdings, the federal government buys land to hold in trust for Indigenous nations.³¹⁷ Insofar as the Court’s crabbed view of tribal territorial authority has made it necessary for tribal governments (or

311. See *supra* Parts I.A.2–4 (describing how the Court has divested Indigenous nations of territorial authority over reservations); see also 18 U.S.C. § 1151 (indicating that all land within reservations is Indian Country).

312. Tweedy, *supra* note 171, at 181.

313. See *supra* note 100 and accompanying text (describing Congress’s repudiation of allotment).

314. See *supra* notes 94–103, 150–53 and accompanying text (describing congressional policies regarding Indigenous nations from the allotment era to the present).

315. See Royster, *supra* note 101, at 71–72 (arguing that any hopes allotment-era settlers harbored about the abrogation of tribal territorial authority were dashed when Congress repudiated the allotment program and should not influence constructions of post-allotment statutes).

316. See *id.*

317. See Carpenter & Riley, *supra* note 99, at 804–05; see also Jessica A. Shoemaker, *An Introduction to American Indian Land Tenure: Mapping the Legal Landscape*, 5 J.L. PROP. & SOC’Y 1, 54 (2020) (“One trust-status benefit, of many, is that the trust status cements Indian country status, too.”).

their citizens) to hold property interests in land in order to govern that land,³¹⁸ the Court could advance the aims of this federal policy by retreating from the doctrine of implicit divestiture. A rule that recognizes Indigenous nations' authority to regulate all reservation land unless Congress says otherwise would save the federal policy favoring territorial self-determination from reliance on incremental acquisitions of trust lands.³¹⁹ Attributes of territorial authority, such as the power to zone, could then be exercised across reservations more expeditiously than is possible under current law.

As a majority in *Brendale* noted, the power to regulate land use is a critical attribute of a sovereign's capacity to protect the health and welfare of those within its borders.³²⁰ The importance of land use regulations may be even more pronounced for Indigenous nations, because particularized "norms and values regarding land are reflected in the law of many (but not all) tribes."³²¹ Such laws are necessarily weakened when their operation varies according to the identities of reservation landowners, as is mandated by implicit divestiture.³²² A clear statement rule of tribal territorial authority could extend the geographic reach of these laws directly.

This approach would have the added benefit of assuaging some of the dissenting Justices' concerns in *McGirt*.³²³ As the *McGirt* dissent argued,³²⁴ and as the majority conceded, non-Indigenous people on reservations are not categorically exempt from tribal territorial authority in all instances, and the extent and nature of the obligations created by such authority may be uncertain.³²⁵ While the dissent believed this was a reason to declare the Muscogee (Creek) reservation disestablished, certainty about which sovereign's law applies in a particular area could be more equitably assured

318. See *supra* Part I.A.3 (discussing Indigenous nations' loss of territorial authority over land owned by anyone other than tribal citizens).

319. See Jessica A. Shoemaker, *Complexity's Shadow: American Indian Property, Sovereignty, and the Future*, 115 MICH. L. REV. 487, 538–40 (2017) (arguing that the bureaucratized system by which the federal government holds tribal land in trust is undesirable but remains popular among Indigenous nations because it is among the few methods to ensure tribal territorial authority).

320. See *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 433 (1989) (Stevens, J., concurring in part) ("[Z]oning provides the mechanism by which the polity ensures that neighboring uses of land are not mutually—or more often unilaterally—destructive."); *id.* at 458 (Blackmun, J., concurring in the judgment in part and dissenting in part) ("It would be difficult to conceive of a power more central to 'the economic security, or the health or welfare of the tribe' than the power to zone." (quoting *Montana v. United States*, 450 U.S. 544, 566 (1981))).

321. Carpenter & Riley, *supra* note 99, at 851.

322. Shoemaker, *supra* note 319, at 537 ("Tribes do not truly communicate their land ethics or organize social relations through the mess of jurisdictional checkerboards, emulsions, and property-versus-sovereignty stratifications.").

323. See *supra* notes 250–52 and accompanying text (describing the *McGirt* dissent's concerns about jurisdictional confusion on the Muscogee (Creek) reservation); see also Reese, *supra* note 7 (suggesting that confusion among non-Indigenous people regarding Indian Country's jurisdictional complexity could motivate policymakers to prescribe clearer jurisdictional rules).

324. See *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2501–02 (2020) (Roberts, C.J., dissenting).

325. See *id.* at 2480–81; see also Reese, *supra* note 7 ("The civil . . . jurisdictional rules governing Indian Country are so complicated that they're commonly described as a 'maze.'").

by extending *McGirt*'s clear statement rule to the domain of tribal territorial authority. This would enhance the effectiveness of tribal regulatory programs that require territorywide buy-in³²⁶ and would set clear terms of negotiation and collaboration for Indigenous nations and their neighboring states.³²⁷ It would also relieve the federal courts of the task of parsing which elements of territorial authority are sufficiently important to Indigenous nations that their "political integrity, . . . economic security, or . . . health or welfare" is implicated³²⁸—an inquiry that should turn on the specific aims and values of particular Indigenous nations and which federal courts are, for that reason, ill-equipped to undertake.³²⁹ Finally, an adoption of *McGirt*'s principles would harken back to the pre-*Oliphant* conception of territorial authority, which provided all parties with the sort of cheap information regarding jurisdiction that the dissent extols: non-Indigenous settlers were on notice that they were subject to tribal territorial authority on reservations.³³⁰

Replacing implicit divestiture with *McGirt*'s reasoning would not remove all obstacles to tribal territorial authority over reservations. For example, Indigenous nations' power over reservation property is significantly constrained by byzantine federal regulatory schemes as well.³³¹ However, extending *McGirt* to questions of tribal territorial authority would at least remove one impediment to the current federal policy favoring territorial self-determination.

To be sure, implicit divestiture does not prevent Congress from returning the elements of tribal territorial authority that the Court has withdrawn.³³² By *McGirt*'s own terms, it is not the Court's job to give force to Congress's desired but unenacted policies.³³³ It may therefore seem antithetical to

326. See, e.g., Katherine Florey, *Making It Work: Tribal Innovation, State Reaction, and the Future of Tribes as Regulatory Laboratories*, 92 WASH. L. REV. 713, 742–43, 753–54 (2017) (describing tribal governments' attempts to implement gun control legislation and observing that such regulatory schemes "require[] fairly uniform compliance to be effective," such that they "may simply be of little value" to the extent that they "apply to only a fraction of the [reservation] population"); *id.* at 745–46 (making a similar point about environmental regulations that protect the specific significance of shared elements of the landscape like bodies of water).

327. See *id.* at 759–62.

328. *Montana v. United States*, 450 U.S. 544, 566 (1981) (discussing when an Indigenous nation's "inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation" may be lawful); see also *supra* note 113 and accompanying text (describing this aspect of *Montana*'s holding).

329. See Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 631–33 (2021).

330. See *supra* notes 59–66 and accompanying text (describing the clarity of tribal territorial authority prior to the Court's introduction of implicit divestiture).

331. See generally Shoemaker, *supra* note 319 (arguing that federal policy regarding Indigenous property interests on reservations is restrictive, confusing, and difficult to administer).

332. See *supra* notes 82–86 and accompanying text (indicating that implicit divestiture is a creature of federal common law).

333. See *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020) ("[W]ishes don't make for laws.").

McGirt to entertain general concerns about advancing federal policy aims. This argument would ignore the fact that Congress codified its policy in favor of broadening Indigenous nations' territorial authority when it specified, in 1948, that Indian Country spans all reservations.³³⁴ According to *McGirt*, Congress cannot acquiesce in the de facto invalidation of its previous reservation-related enactments by failing to remedy violations of those enactments.³³⁵ Congress has therefore not given force to implicit divestiture simply by declining to expressly repudiate it.³³⁶

McGirt is entirely consistent with the contention that Congress must speak clearly if it is willing to endorse implicit divestiture. If Congress is not so willing, then it has been enjoying the protection of the doctrine's political shield while evading accountability for the erosion of Indigenous nations' territorial authority. It has neither had to interfere with non-Indigenous settlers' expectations of immunity from tribal territorial authority nor has it had to leave its fingerprints on the ugly work of breaking treaties expressly.³³⁷ If that is the case, the doctrine has functioned to "sav[e] the political branches [from] embarrassment," which "is not one of [the Court's] constitutionally assigned prerogatives."³³⁸

CONCLUSION

Over the past several decades, the Supreme Court has deprived Indigenous nations of aspects of their sovereignty even when Congress has not expressly compelled that result. The Court modified its historical understanding of "domestic dependent nation" status to exclude most forms of tribal territorial authority over non-Indigenous people who acquired land on reservations. Similarly, when faced with questions about reservation boundaries, the Court was likely to find that a reservation had shrunk or disappeared if a large non-Indigenous population had settled there. Both lines of cases rested on inferences about the intentions of the Congresses that implemented the allotment policy, conceptions of tribal territorial authority that could operate only on lands in which Indigenous nations or their citizens held property interests, and a conviction that historical developments could eclipse tribal rights and powers guaranteed by treaties.

In *McGirt*, the Court forswore these principles in finding that the Muscogee (Creek) Nation's reservation retained the boundaries that the

334. See *supra* Part III.B.

335. See *McGirt*, 140 S. Ct. at 2468 (calling it "mistaken" to believe that anything but express congressional statements can affect reservation boundaries, regardless of intervening historical developments that Congress enabled or left unchallenged).

336. Congress has repudiated the doctrine to a limited extent at times. See *supra* notes 75, 84–85 and accompanying text.

337. See Michael C. Dorf, *What Good Is a Treaty That Congress Can Simply Discard?: Quite a Bit, as the Creek Nation's Victory in the Supreme Court Shows*, JUSTIA: VERDICT (July 22, 2020), <https://verdict.justia.com/2020/07/22/what-good-is-a-treaty-that-congress-can-simply-discard> [<https://perma.cc/3D6X-HATT>] (arguing that political constraints make it difficult for legislators to abrogate treaties if they are forced to do so openly).

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

Nation and the United States had agreed on in 1866. Because the same principles that *McGirt* rejected form the bedrock of implicit divestiture, the adoption of *McGirt*'s methodology in cases regarding the substance of tribal territorial authority would produce a more consistent jurisprudence. Abandoning implicit divestiture would clarify important statutory provisions whose meanings have been clouded by the doctrine and would advance the federal policy of expanding the land base subject to tribal territorial authority. The application of *McGirt* in the domain of tribal territorial authority would also prevent the Court from shielding non-Indigenous owners of reservation land from the jurisdictional consequences of the fact that their property remains within Indian Country.