McGirt v. Oklahoma:

Colonial Doctrine Veiled in a Native Nation Supreme Court Victory

By Peter d'Errico and Steven T. Newcomb

Justice Gorsuch's majority opinion in *McGirt v. Oklahoma* offered a tone of solicitude for Native nations from his opening sentence – "On the far end of the Trail of Tears was a promise."— through his acknowledgement that land allotment and other federal actions "represented serious blows to the Creek," to his condemnation of "brazen and longstanding injustices." He concluded that the Creek Nation exists despite these blows.

The *McGirt* dissent, on the other hand, insisted that "Congress…[has] eliminated the foundation of tribal sovereignty … [and] extinguish[ed] the Five Tribes' territory." The dissenters showed no hesitation using language that echoes the formal definition of genocide: "actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves."

Commentators on *McGirt* split between those who praised it as a victory for "tribal sovereignty" and those who bemoaned the "jurisdictional complexity" left in its wake. Both these perspectives fail to probe the fundamental reasoning in the case, which is an affirmation of US "plenary power" over Native nations, premised on a colonial era doctrine of "Christian discovery."

So much hoopla surrounded the *McGirt v. Oklahoma* decision that few people could see what the case really decided.

The decision said the Creek Nation was "Indian country" as defined in federal law and that Oklahoma had no jurisdiction over crimes committed by

Native persons in Creek territory. Lots of people were thrilled to read Justice Gorsuch's opening line, "On the far end of the Trail of Tears was a promise."

The temptation was great to think *McGirt* closed the door on the genocidal era of "Indian Removal." But *McGirt* didn't close that door. In the language of federal Indian law, when it said Creek lands are part of "Indian country" it meant they are subject to the US *Major Crimes Act*. That was the legal question in the case.

Despite the hoopla about a "landmark decision," ***McGirt* did not transform federal Indian law**. In fact, *McGirt* upheld the key federal Indian law doctrine of US domination over Native nations and peoples — the doctrine called "congressional plenary power." It said the Creek Nation existed because Congress had not (yet) "disestablished" it.

As the majority opinion itself pointed out, it was reaffirming the "plenary power" claim of US domination asserted by the Supreme Court "long ago":

This Court long ago held that the Legislature [Congress] wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties.

The majority and dissent in *McGirt* agreed about this fundamental point of law. They both said the US Congress can do as it wishes with Native nations, peoples, and lands. The only difference between the majority and dissent was whether Congress had or had not "disestablished" the Creek nation. The dissent said yes. The majority said no.

To make the fundamental point clear, the majority said Congress could do the dirty deed whenever it wished, citing the 1903 Supreme Court decision, *Lone Wolf v. Hitchcock*, as precedent:

…of course, …Congress remains free to [take action]… about the lands in question at any time. It has no shortage of tools at its disposal.

Anyone who reads the McGirt decision can see the underlying and unchanged claim of US domination over Native peoples, even with rose-colored glasses.

The doctrine of "plenary power" is rooted in an 1823 US Supreme Court decision, *Johnson v. McIntosh*, where the court adopted the 15th century doctrine that a "discovery" of "heathens" by "Christian people" resulted in a US title of "ultimate dominion" over all Native lands. *Johnson* said that "natives, who were heathens" were "merely occupants" in their lands, subject to US power as the "owner" of the lands.

The *Johnson* decision has never been overruled. In fact, the Supreme Court reaffirmed "Christian discovery" in 1955, in *Tee-Hit-Ton v. US*, only a year after it overturned the equally noxious doctrine of "separate but equal" in *Brown v. Board of Education*. The US legal brief in *Tee-Hit-Ton* explicitly argued that the US held title to Native lands based on "discovery" of lands of "heathens and infidels" by "Christian nations." The court agreed, saying, "The tribes …[hold] lands after the coming of the white man…[by] permission from the whites to occupy."

Gorsuch's opinion in *McGirt* pointed to Creek Nation Treaties that "solemnly guarantied" a "permanent home to the whole Creek nation… [where no] State or Territory [shall] ever have a right to pass laws for the government of such Indians, …they shall be allowed to govern themselves." But, following from the foundational premise of "Christian discovery," the opinion said the Creek Nation is under the jurisdiction of the federal Major Crimes Act enacted by Congress using its so-called "plenary power" over "Indians" to impose US criminal jurisdiction

over certain offenses committed by a Native person against another Native person in "Indian country."

The only difference between majority and dissent in *McGirt* is that the majority said Congress has not *yet* "extinguished" the Creek Nation and it is therefore "Indian country," while the dissent said Creek extinguishment had been accomplished in a series of federal actions. The majority and dissent each affirmed the "overriding power" of Congress over Native nations and peoples. As Gorsuch said in conclusion, "If Congress wishes to withdraw its promises, it must say so."

Neither Gorsuch nor the dissent said clearly on what basis they claimed Congress has such overriding power. Gorsuch cited the 1903 decision, *Lone Wolf v. Hitchcock,* to say, "This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties." Gorsuch elided the fact that the *Lone Wolf* decision was premised not on constitutional law but on *Johnson v. McIntosh*. A dozen other citations in the opinion also trace back to the *Johnson* decision.

Gorsuch invoked Christian discovery in a more cryptic citation purporting to explain why the US can "allow non-Indian settlers to own land on [a] reservation." He wrote, "It isn't so hard to see why" and explained that federal homesteader patents "transferred legal title" to Creek land. He then cited "3 E. Washburn, American Law of Real Property *521–*524."

This reference is to a chapter in Emory Washburn's 1868 *A Treatise on the American Law of Real Property* discussing "title by public grant." The chapter begins with a discussion of "the discovery and settlement of this country by Europeans" and says, "Nor has any title, beyond the right of occupation, been recognized in the native tribes by any of the European governments or their

successors, the Colonies, the States, or the United States. The law in this respect seems to have been uniform with all the Christian nations that planted colonies here. They recognized no seisin [ownership] of lands on the part of Indian dwellers upon it." Washburn then says, "The sovereignty and general property of the soil …were claimed …by right of discovery." This sentence carries a footnote to *Johnson v. McIntosh*.

Gorsuch's use of a nineteenth century law treatise to reference "discovery" by "Christian nations" is subtle, more subtle by far than Justice Ginsburg, whose opinion in *City of Sherrill v. Oneida Indian Nation (2005)* rejected Oneida land title by saying, "Under the 'doctrine of discovery,' fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States." (Ginsburg avoided saying "*Christian* discovery.")

Simply put, the presumption throughout *McGirt* is that Congress has the right to breach Native Treaty obligations and "extinguish" Native nations, if only it does so "clearly." The fact that *McGirt* ruled in favor of continuing Creek Nation existence provides an excuse for not looking into the doctrinal basis of the decision. But make no mistake; *McGirt* rests on the doctrine of a US claim of "dominion" over the existence of "heathens and infidels."

We examined the *McGirt* decision in detail from the perspective of the original free and independent existence of Native Nations in a three-part presentation on Redthought.org, moderated by former Yakama Chairman JoDe Goudy: "The Domination System Veiled within a Native Supreme Court Victory." A preview is available here.

Peter d'Errico is Professor of Legal Studies Emeritus, University of Massachusetts / Amherst. He graduated from Yale Law School in 1968 and was

staff attorney in Dinébe'iiná Náhiilna be Agha'diit'ahii Navajo Legal Services, 1968-1970, in Shiprock. Steven T. Newcomb is co-founder and director of the Indigenous Law Institute and author of Pagans in the Promised Land: Decoding the Doctrine of Christian Discovery *(Fulcrum, 2008).*

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