AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURE OF GOVERNMENT

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 12: The Contemporary Era – Federalism/Preemption

**Rogers County Board of Tax Roll Corrections v. Video Gaming Technologies, \_\_\_ U.S. \_\_\_ (2020)**

*Video Gaming Technologies (VGT) leased electronic gaming equipment to the Cherokee Nation for use in gambling on Cherokee lands in Oklahoma. When the Rogers County Board of Tax Roll Corrections attempted to tax that equipment, VGT filed a lawsuit claiming that state taxes on that property were preempted by the Indian Gaming Regulation Act. Several local courts found no preemption, but that decision was reversed by the Oklahoma Supreme Court. VGT appealed to the Supreme Court.*

*The Supreme Court denied certiorari. Justice Clarence Thomas dissented. He insisted that federal courts needed to clarify state tax power, particularly in Oklahoma where* McGirt v. Oklahoma *(2020) had found a substantial part of the state to be tribal lands. Why does Thomas think this case particularly important for judicial resolution? Is he correct? The Roberts Court decides far fewer cases than any other tribunal in American history. Justice Thomas issues more dissents from denials of certiorari than any other justice in American history (unless one counts Justice Thurgood Marshall and William Brennan, who routinely issues dissents in death cases on the ground that the death penalty was unconstitutional). Does Thomas want the Supreme Court to decide more cases or different cases? Which option do you think is best?*

The petition for a writ of certiorari is denied.

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I9a98d733095511ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I9a98d733095511ebbea4f0dc9fb69570), dissenting from the denial of certiorari.

Earlier this year, the Court “disregard[ed] the ‘well settled’ approach required by our precedents” and transformed half of Oklahoma into tribal land. *McGirt* v. *Oklahoma* (2020). That decision “profoundly destabilized the governance of eastern Oklahoma” and “create[d] significant uncertainty” about basic government functions like “taxation.” The least we could do now is mitigate some of that uncertainty.

This case presents a square conflict on an important question: Does federal law silently pre-empt state laws assessing taxes on ownership of electronic gambling equipment when that equipment is located on tribal land but owned by non-Indians? Here, the Oklahoma Supreme Court said yes. But a few years earlier, the Second Circuit said no.  This disagreement alone merits review.

“[T]axes are the life-blood of government, and their prompt and certain availability an imperious need.”  By enjoining a tax on ownership of property, the Oklahoma Supreme Court has disrupted funding for schools, health departments, and law enforcement. And although this case concerns only electronic gambling equipment, it injects uncertainty about whether state and local governments can tax the ownership of many other kinds of property located on millions of acres of now-tribal land. The sooner localities in Oklahoma receive a clear answer, the sooner they can plan accordingly and avoid serious funding shortfalls.

This case also presents an opportunity to clear up tension among courts about how to apply pre-emption principles at the intersection of federal law, state law, and tribal land. This Court has created a “flexible” test for evaluating whether federal law implicitly pre-empts state taxation of non-Indians on tribal land.  But our “flexible” test has provided little guidance other than that courts should balance federal, tribal, and state interests.  This vague test is no prescription for the “certain availability” of tax revenue.

Because the Court declines to take up this case, geographical happenstance will continue to play an outsized role in a State's ability to raise revenues, and pre-emption law will remain amorphous. “The State of Oklahoma deserves more respect under our Constitution's federal system” than we give it today. . . .