AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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

Supplementary Material

Chapter 12: The Contemporary Era – Federalism/States and Native American Sovereignty

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

*Jimcy McGirt was convicted of several sexual assault offences by an Oklahoma state court. He subsequently filed a postconviction appeal, claiming that Oklahoma had no right to try him because federal law provided that Native Americans who committed certain offenses in “Indian country” could be tried only in federal court. Oklahoma responded by claiming that Congress had extinguished all Native American reservations in that state, so no Indian country existed within the state borders. A local state court denied McGirt’s petition and that decision was affirmed by the Oklahoma Court of Criminal Appeals. McGirt appealed to the Supreme Court of the United States.*

*The Supreme Court of the United States by a 5-4 vote reversed McGirt’s conviction. Justice Neil Gorsuch claimed that reservations could be extinguished only by explicit federal law and that Congress had never explicitly extinguished reservations in Oklahoma. Compare the ways in which Gorsuch and Chief Justice John Roberts interpret federal law. Gorsuch is clearly a textualist. Is Roberts a different kind of textualist or does he practice another form of statutory interpretation. Whose method of statutory interpretation is correct.* McGirt *might be compared to* Bostock v. Clayton County, Georgia *(2020). Does Gorsuch rely on the same principles of statutory interpretation in both cases? What are those principles, how does he apply them and are they correct? Note also none of the liberal justices in* McGirt *or* Bostock *issued a concurring opinion. Do they stand with Gorsuch on statutory interpretation or were they willing to go along just to get a favorable result?*

Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I4f78222ac1b711eaa4a6da07b08de5cd&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I4f78222ac1b711eaa4a6da07b08de5cd) delivered the opinion of the Court.

On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever. In exchange for ceding “all their land, East of the Mississippi river,” the U. S. government agreed by treaty that “[t]he Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians.” Both parties settled on boundary lines for a new and “permanent home to the whole Creek nation,” located in what is now Oklahoma. The government further promised that “[no] State or Territory [shall] ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves.”

Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.

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Under our Constitution, States have no authority to reduce federal reservations lying within their borders. . . . That would be at odds with the Constitution, which entrusts Congress with the authority to regulate commerce with Native Americans, and directs that federal treaties and statutes are the “supreme Law of the Land.”  It would also leave tribal rights in the hands of the very neighbors who might be least inclined to respect them.

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

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In an effort to show Congress has done just that with the Creek Reservation, Oklahoma points to events during the so-called “allotment era.” Starting in the 1880s, Congress sought to pressure many tribes to abandon their communal lifestyles and parcel their lands into smaller lots owned by individual tribe members. . . .Missing in all this, however, is a statute evincing anything like the “present and total surrender of all tribal interests” in the affected lands. Without doubt, in 1832 the Creek “cede[d]” their original homelands east of the Mississippi for a reservation promised in what is now Oklahoma. And in 1866, they “cede[d] and convey[ed]” a portion of that reservation to the United States. But because there exists no equivalent law terminating what remained, the Creek Reservation survived allotment. . . . Congress may have passed allotment laws to create the conditions for disestablishment. But to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination.

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If allotment by itself won't work, Oklahoma seeks to prove disestablishment by pointing to other ways Congress intruded on the Creek's promised right to self-governance during the allotment era. . . . For example, just a few years before the 1901 Creek Allotment Agreement, and perhaps in an effort to pressure the Tribe to the negotiating table, Congress abolished the Creeks’ tribal courts and transferred all pending civil and criminal cases to the U. S. Courts of the Indian Territory. . . . . Plainly, these laws represented serious blows to the Creek. But, just as plainly, they left the Tribe with significant sovereign functions over the lands in question. For example, the Creek Nation retained the power to collect taxes, operate schools, legislate through tribal ordinances, and, soon, oversee the federally mandated allotment process. And, in its own way, the congressional incursion on tribal legislative processes only served to prove the power: Congress would have had no need to subject tribal legislation to Presidential review if the Tribe lacked any authority to legislate. Grave though they were, these congressional intrusions on pre-existing treaty rights fell short of eliminating all tribal interests in the land.

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There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help “clear up ... not create” ambiguity about a statute's original meaning.  And, as we have said time and again, once a reservation is established, it retains that status “until Congress explicitly indicates otherwise.”

. . . . Oklahoma proceeds on the implicit premise that its historical practices are unlikely to have defied the mandates of the federal [law]. That premise, though, appears more than a little shaky. . . . . Oklahoma state courts erroneously entertained prosecutions for major crimes by Indians on Indian allotments for *decades*, until state courts finally disavowed the practice in 1989. And if the State's prosecution practices disregarded [federal law] for so long, it's unclear why we should take those same practices as a reliable guide to the meaning and application of [federal law].

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We are also asked to consider commentary from those outside the Tribe. In particular, the dissent reports that the federal government “operated” on the “understanding” that the reservation was disestablished. In support of its claim, the dissent highlights a 1941 statement from Felix Cohen. Then serving as an official at the Interior Department, Cohen opined that “ ‘all offenses by or against Indians’ in the former Indian Territory ‘are subject to State laws.’ ”  But that statement is incorrect. As we have just seen, Oklahoma's courts acknowledge that the State lacks jurisdiction over Indian crimes on Indian allotments. . . .

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In the end, only one message rings true. Even the carefully selected history Oklahoma and the dissent recite is not nearly as tidy as they suggest. It supplies us with little help in discerning the law's meaning and much potential for mischief. If anything, the persistent if unspoken message here seems to be that we should be taken by the “practical advantages” of ignoring the written law. How much easier it would be, after all, to let the State proceed as it has always assumed it might. But just imagine what it would mean to indulge that path. A State exercises jurisdiction over Native Americans with such persistence that the practice seems normal. Indian landowners lose their titles by fraud or otherwise in sufficient volume that no one remembers whose land it once was. All this continues for long enough that a reservation that was once beyond doubt becomes questionable, and then even farfetched. Sprinkle in a few predictions here, some contestable commentary there, and the job is done, a reservation is disestablished. None of these moves would be permitted in any other area of statutory interpretation, and there is no reason why they should be permitted here. That would be the rule of the strong, not the rule of law.

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. . . . Holding that the Creek never had a reservation would require us to stand willfully blind before a host of federal statutes. . . . . What are we to make of the federal government's repeated treaty promises that the land would be “solemnly guarantied to the Creek Indians,” that it would be a “permanent home,” “forever set apart,” in which the Creek would be “secured in the unrestricted right of self-government”? What about Congress's repeated references to a “Creek reservation” in its statutes? No one doubts that this kind of language normally suffices to establish a federal reservation. . . .

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. . . “The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history.”  Chief Justice Marshall, for example, held that Indian Tribes were “distinct political communities, having territorial boundaries, within which their authority is exclusive ... which is not only acknowledged, but guarantied by the United States,” a power dependent on and subject to no state authority. And in many treaties, like those now before us, the federal government promised Indian Tribes the right to continue to govern themselves. For all these reasons, this Court has long “require[d] a clear expression of the intention of Congress” before the state or federal government may try Indians for conduct on their lands.

Oklahoma cannot come close to satisfying this standard. . . .

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What are the consequences the State and dissent worry might follow from an adverse ruling anyway? Primarily, they argue that recognizing the continued existence of the Creek Reservation could unsettle an untold number of convictions and frustrate the State's ability to prosecute crimes in the future. But the MCA applies only to certain crimes committed in Indian country by Indian defendants. A neighboring statute provides that federal law applies to a broader range of crimes by or against Indians in Indian country. States are otherwise free to apply their criminal laws in cases of non-Indian victims and defendants, including within Indian country. And Oklahoma tells us that somewhere between 10% and 15% of its citizens identify as Native American. Given all this, even Oklahoma admits that the vast majority of its prosecutions will be unaffected whatever we decide today.

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. . . . [D]ire warnings are just that, and not a license for us to disregard the law. By suggesting that our interpretation of Acts of Congress adopted a century ago should be inflected based on the costs of enforcing them today, the dissent tips its hand. Yet again, the point of looking at subsequent developments seems not to be determining the meaning of the laws Congress wrote in 1901 or 1906, but emphasizing the costs of taking them at their word.

Still, we do not disregard the dissent's concern for reliance interests. It only seems to us that the concern is misplaced. Many other legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few—are designed to protect those who have reasonably labored under a mistaken understanding of the law. And it is precisely because those doctrines exist that we are “fre[e] to say what we know to be true ... today, while leaving questions about ... reliance interest[s] for later proceedings crafted to account for them.”

In reaching our conclusion about what the law demands of us today, we do not pretend to foretell the future and we proceed well aware of the potential for cost and conflict around jurisdictional boundaries, especially ones that have gone unappreciated for so long. But it is unclear why pessimism should rule the day. With the passage of time, Oklahoma and its Tribes have proven they can work successfully together as partners. Already, the State has negotiated hundreds of intergovernmental agreements with tribes, including many with the Creek. . . .

[31](https://1.next.westlaw.com/Document/I4f78222ac1b711eaa4a6da07b08de5cd/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad7403700000176145dc5dbff0441e2%3FNav%3DCASE%26fragmentIdentifier%3DId819771d6cd611ea96bae63bc27a1895%26startIndex%3D21%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&list=CASE&rank=27&grading=na&sessionScopeId=2777de45a367353ef8b27c891249989c9c2ffcab1126bd08d3ed670315695b54&originationContext=previousnextdocument&transitionType=SearchItem&contextData=%28sc.Search%29&listPageSource=d1852cff17d865b07f2904492b383694#co_anchor_F312051429023)The federal government promised the Creek a reservation in perpetuity. Over time, Congress has diminished that reservation. It has sometimes restricted and other times expanded the Tribe's authority. But Congress has never withdrawn the promised reservation. As a result, many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.

Chief Justice [ROBERTS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=I4f78222ac1b711eaa4a6da07b08de5cd&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I4f78222ac1b711eaa4a6da07b08de5cd), with whom Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I4f78222ac1b711eaa4a6da07b08de5cd&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I4f78222ac1b711eaa4a6da07b08de5cd) and Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I4f78222ac1b711eaa4a6da07b08de5cd&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I4f78222ac1b711eaa4a6da07b08de5cd) join, and with whom Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I4f78222ac1b711eaa4a6da07b08de5cd&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I4f78222ac1b711eaa4a6da07b08de5cd) joins [with exception of a footnote not excerpted]

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. . . . What has gone unquestioned for a century remains true today: A huge portion of Oklahoma is not a Creek Indian reservation. Congress disestablished any reservation in a series of statutes leading up to Oklahoma statehood at the turn of the 19th century. The Court reaches the opposite conclusion only by disregarding the “well settled” approach required by our precedents. Under those precedents, we determine whether Congress intended to disestablish a reservation by examining the relevant Acts of Congress and “all the [surrounding] circumstances,” including the “contemporaneous and subsequent understanding of the status of the reservation.”

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[During the late nineteenth century,] Congress began by establishing a uniform body of law applicable to all occupants of the territory, regardless of race. To apply these laws, Congress established the U. S. Courts for the Indian Territory. Next Congress systematically dismantled the tribal governments. It abolished tribal courts, hollowed out tribal lawmaking power, and stripped tribal taxing authority. Congress also eliminated the foundation of tribal sovereignty, extinguishing the Creek Nation's title to the lands. Finally, Congress made the tribe members citizens of the United States and incorporated them in the drafting and ratification of the constitution for their new State, Oklahoma.

In taking these transformative steps, Congress made no secret of its intentions. It created a commission tasked with extinguishing the Five Tribes’ territory and, in one report after another, explained that it was creating a homogenous population led by a common government. That contemporaneous understanding was shared by the tribal leadership and the State of Oklahoma. The tribal leadership acknowledged that its only remaining power was to parcel out the last of its land, and the State assumed jurisdiction over criminal cases that, if a reservation had continued to exist, would have belonged in federal court.

A century of practice confirms that the Five Tribes’ prior domains were extinguished. The State has maintained unquestioned jurisdiction for more than 100 years. Tribe members make up less than 10%–15% of the population of their former domain, and until a few years ago the Creek Nation itself acknowledged that it no longer possessed the reservation the Court discovers today. This on-the-ground reality is enshrined throughout the U. S. Code, which repeatedly terms the Five Tribes’ prior holdings the “former” Indian reservations in Oklahoma. As the Tribes, the State, and Congress have recognized from the outset, those “reservations were destroyed” when “Oklahoma entered the Union.”

. . . .Our “touchstone” is congressional “purpose” or “intent.”  To “decipher Congress’ intention” in this specialized area, we are instructed to consider three categories of evidence: the relevant Acts passed by Congress; the contemporaneous understanding of those Acts and the historical context surrounding their passage; and the subsequent understanding of the status of the reservation and the pattern of settlement there. . . .

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No one here contends that any individual congressional action or piece of evidence, standing alone, disestablished the Creek reservation. Rather, Oklahoma contends that all of the relevant Acts of Congress together, viewed in light of contemporaneous and subsequent contextual evidence, demonstrate Congress's intent to disestablish the reservation. “[O]ur traditional approach ...*requires* us” to determine Congress's intent by “examin[ing] *all* the circumstances surrounding the opening of a reservation.” . . .

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Our precedents . . . explain that disestablishment can occur “[e]ven in the absence of a clear expression of congressional purpose in the text of [the] Act.”  The “notion” that “express language in an Act is the *only* method by which congressional action may result in disestablishment” is “quite inconsistent” with our precedents. . . . At the turn of the century, the possibility that a reservation might persist in the absence of “tribal ownership” of the underlying lands was “unfamiliar,” and the prevailing “assumption” was that “Indian reservations were a thing of the past.”  Congress believed “to a man” that “within a short time” the “Indian tribes would enter traditional American society and the reservation system would cease to exist.”  As a result, Congress—while intending disestablishment—did not always “detail” precise changes to reservation boundaries.  Recognizing this distinctive backdrop, our precedents determine Congress's intent by considering a broader variety of evidence than we might for more run-of-the-mill questions of statutory interpretation. . . .

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The statutory texts are the “most probative evidence” of congressional intent.  The Court appropriately examines the Original Creek Agreement of 1901 and a subsequent statute for language of disestablishment, such as “cession,” “abolish[ing]” the reservation, “restor[ing]” land to the “public domain,” or an “unconditional commitment” to “compensate” the Tribe. *Ante*, at 2462 – 2465 (internal quotation marks omitted). But that is only the beginning of the analysis; there is no “magic words” requirement for disestablishment, and each individual statute may not be considered in isolation. . . . In this area, “we are not free to say to Congress: ‘We see what you are driving at, but you have not said it, and therefore we shall go on as before.’ . . .

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What Congress actually did here was enact a series of statutes beginning in 1890 and culminating with Oklahoma statehood that (1) established a uniform legal system for Indians and non-Indians alike; (2) dismantled the Creek government; (3) extinguished the Creek Nation's title to the lands at issue; and (4) incorporated the Creek members into a new political community—the State of Oklahoma. These statutes evince Congress's intent to terminate the reservation and create a new State in its place.

Congress systematically dismantled the governmental authority of the Creek Nation, targeting all three branches. . . . Thus, by the time Oklahoma became the 46th State in 1907, there was little left of the Creek Nation's authority: No tribal courts. No tribal law. No tribal fisc. . . .

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These statutes evince a clear intent to leave the Creek Nation with no communally held land and no meaningful governing authority to exercise over the newly distributed parcels. Contrary to the Court's portrayal, this is not a scenario in which Congress allowed a tribe to “continue to exercise governmental functions over land” that it “no longer own[ed] communally.”  From top to bottom, these statutes, which divested the Tribes and the United States of their interests while displacing tribal governance, “strongly suggest[ ] that Congress meant to divest” the lands of reservation status.

Finally, having stripped the Creek Nation of its laws, its powers of self-governance, and its land, Congress incorporated the Nation's members into a new political community. Congress made “every Indian” in the Oklahoma territory a citizen of the United States in 1901—decades before conferring citizenship on all native born Indians elsewhere in the country. . . .

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In sum, in statute after statute, Congress made abundantly clear its intent to disestablish the Creek territory. The Court, for purposes of the disestablishment question before us, defines the Creek territory as “lands that would lie outside both the legal jurisdiction and geographic boundaries of any State” and on which a tribe was “assured a right to self-government.”  That territory was eliminated. By establishing uniform laws for Indians and non-Indians alike in the new State of Oklahoma, Congress brought Creek members and the land on which they resided under state jurisdiction. By stripping the Creek Nation of its courts, lawmaking authority, and taxing power, Congress dismantled the tribal government. By extinguishing the Nation's title, Congress erased the geographic boundaries that once defined Creek territory. And, by conferring citizenship on tribe members and giving them a vote in the formation of the State, Congress incorporated them into a new political community. “Under any definition,” that was disestablishment.

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. . . [T]he contemporaneous actions of Oklahoma, the Creek, and the United States in criminal matters confirm their shared understanding that Congress did not intend a reservation to persist. Had the land been a reservation, the federal government—not the new State—would have had jurisdiction over serious crimes committed by Indians under the Major Crimes Act of 1885. Yet, at statehood, Oklahoma immediately began prosecuting serious crimes committed by Indians in the new state courts, and the federal government immediately ceased prosecuting such crimes in federal court. At argument, McGirt's counsel acknowledged that he could not cite a single example of federal prosecutions for such crimes. . . .

. . . . Lacking any other arguments, the Court suspects uniform lawlessness . . . . But we normally presume that government officials exercise their duties in accordance with the law. Certainly the presumption may be strained from time to time in this area, but not so much as to justify the Court's speculations, which posit that government officials at every level either conspired to violate the law or uniformly misunderstood the fundamental structure of their society and government.

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“Congress’ own treatment of the affected areas” strongly supports disestablishment. [*Id.*, at 471, 104 S.Ct. 1161](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984109093&pubNum=0000708&originatingDoc=I4f78222ac1b711eaa4a6da07b08de5cd&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). After statehood, Congress enacted several statutes progressively eliminating restrictions on the alienation and taxation of Creek allotments, and Congress subjected even restricted lands to state jurisdiction. Since Congress had already destroyed nearly all tribal authority, these statutes rendered Creek parcels little different from other plots of land in the State. . . .

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Second, consider the State's “exercis[e] [of] unquestioned jurisdiction over the disputed area since the passage of ” the Enabling Act, which deserves “weight” as “an indication of the intended purpose of the Act.”  As discussed above, for 113 years, Oklahoma has asserted jurisdiction over the former Indian Territory on the understanding that it is not a reservation, without any objection by the Five Tribes until recently (or by McGirt for the first 20 years after his convictions). . . . All the while, the federal government has operated on the same understanding. No less than Felix Cohen, whose authoritative treatise the Court repeatedly cites, agreed while serving as Acting Solicitor of the Interior in 1941 that “all offenses by or against Indians” in the former Indian Territory “are subject to State laws.” . . .

Indeed, far from disputing Oklahoma's jurisdiction, the Five Tribes themselves have repeatedly and emphatically agreed that no reservation exists. After statehood, tribal leaders and members frequently informed Congress that “there are no reservations in Oklahoma. . . . Like the Creek, this Court has repeatedly described the area in question as the “former” lands of the Creek Nation. . . .

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Third, consider the “subsequent demographic history” of the lands at issue, which provides an “ ‘additional clue’ ” as to the meaning of Congress's actions.  Continuing from statehood to the present, the population of the lands has remained approximately 85%–90% non-Indian. . . . Not to worry, the Court says, only about 10%–15% of Oklahoma citizens are Indian, so the “majority” of prosecutions will be unaffected. . . . But the share of serious crimes committed by 10%–15% of the 1.8 million people in eastern Oklahoma, or of the 400,000 people in Tulsa, is no small number.

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State and tribal authority are also transformed. As to the State, its authority is clouded in significant respects when land is designated a reservation. Under our precedents, for example, state regulation of even non-Indians is preempted if it runs afoul of federal Indian policy and tribal sovereignty based on a nebulous balancing test. . . . . In addition to undermining state authority, reservation status adds an additional, complicated layer of governance over the massive territory here, conferring on tribal government power over numerous areas of life—including powers over non-Indian citizens and businesses. Under our precedents, tribes may regulate non-Indian conduct on reservation land, so long as the conduct stems from a “consensual relationship[ ] with the tribe or its members” or directly affects “the political integrity, the economic security, or the health or welfare of the tribe.”  Tribes may also impose certain taxes on non-Indians on reservation land, and in this litigation, the Creek Nation contends that it retains the power to tax nonmembers doing business within its borders. No small power, given that those borders now embrace three million acres, the city of Tulsa, and hundreds of thousands of Oklahoma citizens. Recognizing the significant “potential for cost and conflict” caused by its decision, the Court insists any problems can be ameliorated if the citizens of Oklahoma just keep up the “spirit” of cooperation behind existing intergovernmental agreements between Oklahoma and the Five Tribes. . . .

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Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I4f78222ac1b711eaa4a6da07b08de5cd&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I4f78222ac1b711eaa4a6da07b08de5cd), dissenting.

[omitted]