A Lack of Trust: *South Dakota v. Yankton Sioux Tribe* and the Abandonment of the Trust Doctrine in Reservation Diminishment Cases

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Abstract: Over the past three decades, the U.S. Supreme Court has repeatedly confronted the issue of whether Indian reservation lands sold to non-Indian settlers at the turn-of-the-century under Congress's allotment policy remain tribal territory for jurisdictional purposes. As the means of adjudicating these reservation diminishment cases, the Court has adopted a troubled three-pronged analytical approach. The Court's approach circumvents well-established rules of construction and diverges significantly from historic principles embodied in the trust doctrine that forms the ideological foundation of Indian law. The Court's recent decision in South Dakota v. Yankton Sioux Tribe exposes important shortcomings in the Court's multi-factor analysis and reveals the Court's effort to reach outcomes in these cases that favor non-Indian interests. This Note argues that the Court's current approach to the diminishment issue erodes tribal sovereignty and arrogates to the Court the role of balancing Indian and non-Indian interests, which traditionally has been a prerogative left to Congress. This Note advocates that the Court return to settled tenets of Indian law and reestablish an analytical framework that focuses exclusively on statutory language as the sole means for adjudicating diminishment cases.

A well-defined body of principles is essential in order to end the need for case-by-case litigation which has plagued [Indian] law for a number of years.¹

Jurisdictional questions between tribal and state governments constitute some of the most vexing problems in federal Indian law. Many of the current problems derive directly from the vestiges of turn-of-the-century congressional Indian policy. The allotment program Congress instituted in the late nineteenth century opened numerous Indian reservations to white settlement. As a result, Indian and non-Indian lands became intermingled, creating checkerboard patterns of land settlement within the original boundaries of many reservations. Because jurisdiction in Indian law often depends on the territorial boundaries of a reservation, the effect of allotment on the status of land opened for settlement a century earlier proves vitally important in ascertaining the scope of modern tribal jurisdiction.

Frequently, states argue that an allotment-era act of Congress reduced in size, or "diminished,"² tribal territory, thus decreasing tribal


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jurisdiction. For over three decades, the U.S. Supreme Court has struggled to develop an analytical framework to adjudicate these disputes; yet, conceptual clarity and predictability remain elusive. Each new decision in this area of law has turned on increasingly attenuated points of law, resulting in the alarmingly malleable three-pronged analytical approach enunciated by the Court in Solem v. Bartlett.\(^3\)

The Supreme Court’s recent decision in *South Dakota v. Yankton Sioux* demonstrates the inherent weaknesses of the *Solem* test. Utilizing *Solem*’s three-part test, the Court reasoned that contradictory and ambiguous statutory language, meager legislative history, subsequent state jurisdictional control, and contemporary racial demographics indicated congressional intent to diminish the size of the Yankton Sioux Reservation in 1894.\(^4\) In so doing, the *Yankton* Court abandoned settled principles of Indian law in favor of an approach that allowed the Court to use its own subjective perceptions of non-Indian interests to reach political issues.

This Note argues that as applied in *Yankton*, *Solem*’s test for determining reservation diminishment is fundamentally flawed and disregards the avowed canons of construction essential to Indian jurisprudence. Part I briefly summarizes core concepts and policies in Indian law and traces the development of the Supreme Court’s analytical approach in diminishment cases. Part II describes the Court’s analysis and its treatment of the diminishment doctrine in *Yankton*. Part III contends that the *Yankton* Court reached the outcome it did because the *Solem* test allows the Court to manipulate its analysis to grant state government jurisdiction over disputed areas of Indian country. This Note concludes that the Court should abandon the *Solem* test and return to an approach that examines express statutory language in light of the rules of construction that traditionally govern Indian law.

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2. "Diminished" and "disestablished" are used interchangeably. "Disestablished" describes a reservation’s elimination, whereas "diminished" refers to a reservation’s reduction in size. Additionally, the word "terminated" is often interchanged with "disestablished." This Note uses the terms in their appropriate contexts, but in instances where general reference is made, "diminished" is the default term. See Yankton Sioux Tribe v. Southern Mo. Waste Management Dist., 99 F.3d 1439, 1443 n.4 (8th Cir. 1996), rev’d sub nom. South Dakota v. Yankton Sioux Tribe, 118 S. Ct. 789 (1998).


I. HISTORICAL, JURISDICTIONAL, AND JURISPRUDENTIAL FRAMEWORK OF THE DIMINISHMENT CASES

The enduring struggle over the application of state and tribal jurisdiction in Indian country lies at the heart of the diminishment cases.\(^5\) Aggressive attempts by states to assert jurisdictional control in Indian country, an increased sense of tribal goals, and friction among the three sovereigns that compete for Indian lands form the bases of conflict in these cases. To realize fully the ramifications of the diminishment cases in the larger body of federal Indian law, one must understand the jurisdictional framework that operates in Indian country, the persisting legacy of the allotment policy, the competing interests at stake, and the evolution of the Court’s mode of analysis in the diminishment cases.

A. Contours of Jurisdiction in Indian Country

Indian tribal jurisdiction and the exclusion of state jurisdictional control in Indian country stem from the doctrine of tribal sovereignty,\(^6\) first expressed by the U.S. Supreme Court in *Worcester v. Georgia*.\(^7\) In *Worcester*, the Court recognized Indian tribes as separate political communities with geographical boundaries within which state laws held no power.\(^8\) The tribes thus possess exclusive sovereign control over Indian territory, subordinate only to the federal plenary power.\(^9\)

Indian sovereignty and the right to tribal self-government, with its concomitant jurisdictional limit on the reach of state law, form the backdrop against which jurisdictional control in Indian law is defined.\(^10\) Because tribal jurisdiction hinges on the definition of tribal territory, subject matter jurisdiction in Indian law is largely geographically based.\(^11\) Although the reservation is usually the major component of tribal territory, the geographical boundaries of tribal territories are best

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8. Id. at 560–61.

9. Id.


defined by the term "Indian country." Thus, Indian country is defined by the territorial boundaries of a given tribe, not property ownership. Over time, the Supreme Court has weakened the original *Worcester* bar to state intrusion. Generally, states possess no jurisdictional control over Indian affairs unless expressly sanctioned by Congress. Where non-Indians' rights are at stake, however, the Court has increasingly allowed state intrusion. As a result, states can assert jurisdiction over non-Indians in Indian country as long as the state does not interfere with Indian property or rights, federal Indian programs, or tribal self-government. Nonetheless, *Worcester* has never been overruled and the Court continues to recognize the strong territorial component of Indian tribal sovereignty.

**B. The Legacy of Allotment in the Diminishment Cases**

Support for dismantling reservations fueled late nineteenth-century federal Indian policy. The Dawes General Allotment Act, the cornerstone of federal policy of the era, stipulated the division of

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12. The statute defines Indian country as all lands, however owned, within the exterior boundaries of an Indian reservation. 18 U.S.C. § 1151 (1994). The statute also defines dependent Indian communities and Indian allotments as "Indian country." 18 U.S.C. § 1151. Although § 1151 is a criminal statute, the Supreme Court has held that "it generally applies as well to questions of civil jurisdiction." Decoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975).

13. Royster, supra note 11, at 3.


reservations into family-sized farms.\textsuperscript{19} The remaining land was declared surplus, or "opened," and sold to non-Indians.\textsuperscript{20} Because the Dawes Act supplied little more than a statement of intent,\textsuperscript{21} Congress often felt prompted to enact special "surplus land acts" to ensure the opening of particular reservations.\textsuperscript{22} The methods used to open reservation lands to settlement varied. Some acts carried out terms of agreements negotiated with tribes for the cession of surplus lands, whereas others, without tribal consent, unilaterally opened surplus lands to non-Indian settlement. Whatever the method, the purpose of the surplus lands acts was to return Indian lands to the public domain and thereby allow white settlement.\textsuperscript{23} Although all the acts accomplished this, not all removed the lands from the reservation.\textsuperscript{24} As a result, the boundaries of Indian country became hard to define because Dawes Act era legislation intermixed non-Indian and Indian lands on "old" reservations.

The diverse legislative scheme created by the Dawes Act and subsequent surplus land acts have forced the courts to determine arbitrarily Indian reservation boundaries based on different fact patterns in each instance. The surplus land acts seldom detailed whether Congress intended to open reservation lands for settlement or diminish a particular reservation's boundaries.\textsuperscript{25} Faced with these difficulties, the courts created the "diminishment" doctrine.\textsuperscript{26} If past congressional actions returned the disputed lands to the public domain, the court deems the reservation diminished and the tribe loses jurisdiction. If the reservation holds its status, the tribe retains jurisdictional authority. Consequently, diminishment doctrine forces courts to examine the language and intent of antiquated legislation,\textsuperscript{27} leading to case-by-case analysis.

\begin{itemize}
  \item \textsuperscript{19} Act of Feb. 8, 1887, ch. 119, 24 Stat. 388.
  \item \textsuperscript{20} § 5, 24 Stat. at 389-90.
  \item \textsuperscript{21} The Dawes Act contained no timetables and few instructions for implementation. It authorized, but did not require, the President to open reservation land for allotment. § 1, 24 Stat. at 388.
  \item \textsuperscript{22} Congress enacted 108 separate "surplus land acts" directing the allotment of specific reservations across the nation. Conference of W. Attorneys Gen., \textit{American Indian Law Deskbook} 47-50 (1993).
  \item \textsuperscript{23} See Royster, \textit{supra} note 11, at 9.
  \item \textsuperscript{24} \textit{American Indian Law Deskbook, supra} note 22, at 47-50.
  \item \textsuperscript{26} See \textit{infra} Part I.D.
  \item \textsuperscript{27} \textit{American Indian Law Deskbook, supra} note 22, at 49.
\end{itemize}
C. Competing Indian and Non-Indian Interests

States are frequently disgruntled by their lack of power within Indian country, especially when reservations are heavily populated with non-Indians. Consequently, states continually attempt to assert jurisdictional control over reservations. As a result, tribes often initiate lawsuits to limit state encroachments into Indian country.

It is primarily in this context of competing jurisdictional interests that diminishment cases take on extreme significance. To defeat the strong judicial ethos of protecting tribal sovereignty in Indian country, states routinely contend that Congress diminished the reservation, thereby eradicating tribal governmental power and allowing state jurisdiction. If the geographic boundaries of a tribe’s reservation are judicially diminished, the tribe loses its sovereign jurisdictional power over the removed area. Given this result, virtually no other issue poses a greater threat to Indian tribal sovereignty than diminishment.

1. Reasonable Expectations and Non-Indian Concerns

Non-Indians living on lands purchased under the authority of the surplus land acts have settled expectations that deserve consideration in diminishment analysis. Non-Indians originally settled on open reservation lands in good faith and secured legal title to their lands. Many reservations contain multitudes of non-Indian businesses and landowners, often outnumbering Indians and their enterprises. Commonly, non-Indians have established local governments within the original reservation boundaries that have operated in concert with state government and exerted unchallenged jurisdiction for decades. If Indian tribes assert political authority over non-Indians who live inside reservations, non-Indians are excluded from the governing process because they cannot vote in tribal elections and have no voice in tribal government. These facts, non-Indians argue, guarantee them a right to government under non-Indian

29. *Id.*
31. *Id.* at 88.
32. *Id.* at 32.
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authority and often impel the states to claim reservation diminishment to protect non-Indian interests in Indian country.

2. Indian Sovereignty and the Court's Protection of Tribal Rights

In spite of these justifiable non-Indian considerations, countervailing facts and legal doctrine support maintaining the original jurisdictional boundaries of reservations. The tribes maintain that Congress established the reservations for their exclusive use and non-Indians who wish to live on Indian reservations impliedly consent to tribal authority. The Court has generally agreed with the tribe's position based on the dominant notion of protecting tribal sovereignty. Traditionally, the Court has adhered to established principles of tribal self-government and articulated rules that prevent state powers from encroaching upon tribal privileges except by express congressional permission.

a. The Federal Trust Doctrine

The sovereign status of Indian tribes stands as the foremost principle of Indian law. Tribes do not, however, possess absolute sovereignty because they are subject to the overriding plenary power of Congress. Pursuant to this plenary authority, Congress may limit tribal rights, even though such acts restrict tribal sovereign powers.

In the face of this awesome congressional power, the Supreme Court formulated the federal trust doctrine to provide Indian rights maximum protection. The trust doctrine recognizes a federal governmental duty to protect tribal sovereignty under a good faith standard. Essentially, the

34. Id.
37. Felix Cohen, Handbook of Federal Indian Law 122–23 (1942); Royster, supra note 11, at 1.
38. Congress's plenary power derives from the U.S. Constitution's "Indian Commerce Clause." This clause grants Congress far-reaching plenary authority over such areas as Indian lands, trade, culture, religion, and government. U.S. Const. art. I, § 8, cl. 3.
39. See Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989); see also Soll, supra note 5, at 544.
40. Soll, supra note 5, at 544.
federal government owes common law fiduciary duties to the tribes, which the Court characterized as "moral obligations of the highest responsibility and trust." 42 Under the trust doctrine, courts have acted as the moral conscience in federal Indian law, protecting tribal powers from state encroachment unless Congress has spoken clearly to the contrary. 43

b. The Rules of Construction

To enforce the trust doctrine, the Court developed special rules of statutory construction designed to impose appropriate limits on Congress’s plenary authority. When Congress has purported to abrogate Indian rights, the courts have implemented these rules to determine the intent and effect of the legislative action with staunch regard for the federal trust relationship. 44

Three primary rules exist. First, the Court resolves doubtful expressions of congressional intent in favor of the tribes. 45 The Court must find clear intent to overcome this presumption either in a specific statement on the face of a statute or its legislative history. 46 Second, the Court interprets ambiguous expressions as the Indians would have understood them. 47 Third, the Court liberally construes statutes and treaties in favor of the Indians. 48 The Court has also adopted in its Indian jurisprudence the general statutory rule of construction that all statutory clauses should be read together in a way that will make them consistent and give all parts equal force. 49 In applying these rules in diminishment cases, the Court has emphasized that it "does not lightly conclude that an Indian reservation has been terminated." 50 Because the diminishment

44. Soll, supra note 5, at 546.
cases depend heavily on statutory interpretations concerning the status of Indian lands, the rules of construction prove particularly significant.\textsuperscript{51}

\subsection{Development of the Diminishment Doctrine in the Court's Jurisprudence}

\subsubsection{Early Diminishment Cases}

The U.S. Supreme Court did not address most of the problems concerning reservation diminishment until the modern era.\textsuperscript{52} In the initial diminishment cases, the Supreme Court focused on express statutory language as the basis for its determinations. In \textit{Seymour v. Superintendent}, decided in 1962, the Court determined that the controlling legislation did not contain "any language... expressly vacating" the land in question.\textsuperscript{53} In the 1973 case of \textit{Mattz v. Arnett}, the Court expanded its approach to include legislative history as an indicator of congressional intent.\textsuperscript{54} Nonetheless, in deference to \textit{Seymour}, the Court based its decision on the absence of express statutory language.\textsuperscript{55}

Following \textit{Mattz}, the Court began to look behind the written words of statutes and treaties to determine their meaning. In \textit{Decoteau v. District County Court},\textsuperscript{56} the Court found the relevant act of Congress ambiguous,\textsuperscript{57} and thus introduced a series of new factors to find the

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\item \textsuperscript{51} Although originally created by the Court to interpret treaties, the same standards of construction have been applied to statutes. \textit{See County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985).}
\item \textsuperscript{52} The Supreme Court first confronted the diminishment issue in 1909 in \textit{United States v. Celestine}, holding that once Congress established a reservation, "all tracts included within it remain a part of the reservation until separated therefrom by Congress." 215 U.S. 278, 285 (1909). \textit{Celestine} proposed that diminishment depended on the presence or absence of express statutory language indicating Congress's clear intent. \textit{Id}. With the exception of \textit{Celestine}, the dearth of diminishment cases during the first half of the twentieth century probably occurred because during that period the tribes and federal government instituted few suits to define or expand tribal powers. This trend changed in 1959 with the landmark Supreme Court case \textit{Williams v. Lee}, 358 U.S. 217 (1959), which marked the beginning of Indian law's modern era. \textit{See generally Wilkinson, supra note 16, at 7-23, 32-37.}
\item \textsuperscript{53} 368 U.S. 351, 355 (1962).
\item \textsuperscript{54} 412 U.S. 481, 505 (1973).
\item \textsuperscript{55} "Congress was fully aware of the means by which termination could be effected. But clear termination language was not employed...." \textit{Id} at 504. The Court refused "to infer an intent to terminate the reservation" from legislative history. \textit{Id}.
\item \textsuperscript{56} 420 U.S. 425 (1975).
\item \textsuperscript{57} The 1891 Act that opened the reservation provided that the tribe agree to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the
\end{itemize}
requisite intent. First, the Court held that when Congress coupled cession language with an unconditional commitment to compensate the tribe for its land, a strong supposition existed that Congress meant to diminish the tribe’s reservation. \(^5\) Although the Decoteau Court stated that its ruling derived from the face of the act, in reality the Court relied entirely on surrounding circumstances to support its finding—a significant departure from prior disestablishment analysis. \(^6\)

Second, if a previously negotiated agreement between the tribe and the federal government that served as the basis for a congressional act existed, it strongly indicated disestablishment. \(^6\) Third, state exercise of criminal or civil jurisdiction over the reservation was a pertinent “surrounding circumstance” that suggested termination. \(^6\)

Two years later, in Rosebud Sioux Tribe v. Kneip, the Court relied on a new aspect in the disestablishment analysis: the “unquestioned actual assumption of state jurisdiction over the unallotted lands” after the legislation took effect. \(^6\) Thus, the Court tacitly approved the incursion of state jurisdiction over time as a factor in striking down tribal authority. \(^6\) The Court ignored the absence of other relevant factors emphasized in preceding cases, \(^6\) and instead focused on debatable language of termination and fragments of legislative history. \(^6\)

unallotted lands.” Id. at 436-39. The Court in Decoteau never stated unequivocally that this language standing alone would result in disestablishment. See id. at 446, 448.

58. Id. at 446–47.
59. Id. at 444–49.
60. Id. at 445. In Decoteau, three-fourths of the Sisseton-Wahpeton Indians signed the agreement that provided for a lump sum payment of $2.50 per acre for lands ceded from the Lake Traverse Reservation. Id. at 448. The presence of Indian consent makes Decoteau an anomaly. Most other disestablishment cases involve a unilateral act of Congress. See, e.g., Hagen v. Utah, 510 U.S. 399 (1994); Solem v. Bartlett, 465 U.S. 463 (1984).

61. The Court, however, did not appear to rely on the jurisdictional evidence as a basis for its ruling. See Decoteau, 420 U.S. at 442, 449.
62. 430 U.S. 584, 603 (1977). The Rosebud Court based its decision on subsequent state jurisdiction, which Decoteau mentioned only in passing. Id. at 598 n.20; see supra note 61 and accompanying text.
63. The long-standing assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, not only demonstrates the parties’ understanding of the meaning of the Acts of Congress, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress . . . .

Rosebud, 430 U.S. at 604–05. The Court referred to the large non-Indian population in the region and for the first time implied that demographic data served an evidentiary purpose. See infra notes 80–82, 94–97 and accompanying text.

64. In two cases, the Court relied on the lack of any sum-certain payment and the absence of any express cession language to hold that Congress did not intend to diminish the reservations. Mattz v.
2. The Modern Diminishment Test

In 1984, the Court attempted to sort its various approaches into a functional test. In *Solem v. Bartlett*, the Court found that the prior cases "established a fairly clean analytical structure," despite their assorted emphases. The Court first reemphasized its trust responsibility, declaring that the underlying principle governing the entire analysis requires that "Congress clearly evince an 'intent... to change... the boundaries' before diminishment will be found." The Court then outlined a three-part analysis adopting portions of the earlier cases' analyses.

The first prong of *Solem* states that the statutory language used to open a reservation supplies the most probative evidence of intent: explicit reference of cession or language in the statute that evinces a surrender of all tribal interests strongly suggests that Congress diminished the reservation. When such language included a commitment from Congress to compensate a tribe for the divestiture of the open land by providing a "lump-sum" payment, "an almost insurmountable presumption" exists that Congress intended to terminate the surplus lands from the reservation. If, however, the act provided that the tribe receive money placed in trust as the lands eventually sold, Congress intended only that the Secretary of Interior act as the tribe's "sales agent" and did not propose diminishment. Because the analysis under prong one sets out express indicators of intent, it comports with the rules of construction that require clarity of intent to find diminishment.

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66. *Id.*
67. *Id.* at 470–72.
69. *Id.*
70. *Id.*
71. *Id.* at 473.
Under the second prong, the Court looks to legislative history as evidence of intent.\textsuperscript{73} When the circumstances surrounding passage of the act "unequivocally reveal a widely held, contemporaneous understanding" that the reservation would shrink, the Court infers diminishment.\textsuperscript{74} Legislative history can reveal an intent to diminish despite explicit statutory language to the contrary.\textsuperscript{75}

As the third prong of intent analysis, the Court embraced the "pragmatic" factors it relied on in \textit{Decoteau} and \textit{Rosebud}: evidence of subsequent state jurisdictional control over the surplus lands and the demographic history of the area.\textsuperscript{76} The Court concluded that this type of evidence may support de facto diminishment.\textsuperscript{77} Recognizing that relying on demographic and jurisdictional history proved unconventional, the Court attempted to justify its reliance on de facto diminishment by qualifying it as "a necessary expedient" given the difficult task of determining congressional intent from the allotment statutes.\textsuperscript{78} The Court indicated, however, that reliance on de facto diminishment should be limited, stating that such evidence would not prove dispositive if both the statutory language and legislative history failed to provide compelling evidence of diminishment.\textsuperscript{79}

Applying this three-part analysis, the Court held that Congress did not diminish the Cheyenne River Sioux Reservation.\textsuperscript{80} The Court adhered to the rules of construction in congruence with its analysis, discovering

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\item \textsuperscript{73} \textit{Solem}, 465 U.S. at 471.
\item \textsuperscript{74} \textit{Id.} Reports presented to Congress and government negotiations with the tribe are particularly important. \textit{Id.} Negotiations that result in an agreement between the tribe and federal government for cession of tribal lands provides evidence of intent to diminish. \textit{Id.} at 471, 476–77. The Court also stated that it would look to events that occurred after the passage of a surplus land act to decipher Congress's intentions, including Congress's own treatment of the affected areas in the years immediately following the opening. \textit{Id.} at 471.
\item \textsuperscript{75} \textit{Id.} In this respect, it seems that the second prong reasoning violates the rules of construction in that an intrinsic ambiguity would exist between the express statutory terms and the legislative history. \textit{See supra} Part I.C.2.b.
\item \textsuperscript{76} \textit{Solem}, 465 U.S. at 471. Previously, the Court examined evidence of whether non-Indians flooded onto the surplus lands of a reservation immediately after opening as possible evidence of disestablishment. \textit{See Rosebud Sioux Tribe v. Kneip}, 430 U.S. 584, 604–05 (1977). However, the \textit{Solem} Court extended the consideration of demographics to include contemporary data of the debated area. \textit{Solem}, 465 U.S. at 480. This expansion proved pivotal in both the \textit{Solem} and \textit{Hagen} holdings. \textit{See infra} notes 80–82, 94–97 and accompanying text.
\item \textsuperscript{77} \textit{Solem}, 465 U.S. at 471–72.
\item \textsuperscript{78} \textit{Id.} at 472 n.13.
\item \textsuperscript{79} \textit{Id.} at 472.
\item \textsuperscript{80} \textit{Id.} at 481.
\end{itemize}
ambiguities in the facts concerning all three prongs, and found no diminishment. The extent of tribal versus non-Indian land ownership and population proved crucial to the Court’s determination.

3. Hagen v. Utah and the Court’s Increasing Reliance on De Facto Diminishment

A decade later, the Supreme Court first applied the Solem test to reach its highly controversial determination in Hagen v. Utah. In Hagen, the Supreme Court concluded that a series of surplus land acts, culminating in the Act of 1905, opened the Uintah Valley Reservation to white settlement and diminished its boundaries. The Court disregarded ambiguities that existed in the language and legislative history of the acts. Instead, the Court emphasized the history of state jurisdictional control over the open lands and the modern demographic composition of the region to find support for de facto diminishment. The Court scrutinized the statutory language used to open the reservation, relying extensively on the initial 1902 Act that addressed allotment of the reservation, even though that statute never became operative. The Court embraced language in it that stated that unallotted lands “shall be restored to the public domain” as evidence of congressional intent to terminate reservation status. The Court ignored the fact that Congress deleted the “public domain” language from the 1905 Act that actually opened the reservation and replaced it with more tempered wording.

81. Id.
82. The Indian population constituted nearly 50% of the total population in the opened portion; thus, the Court concluded that the area had not lost its “Indian character” and de facto diminishment was defeated. Id. at 480.
83. 510 U.S. 399 (1994). For a general discussion of Hagen, see Soll, supra note 5.
85. Hagen, 510 U.S. at 421.
86. See id. at 415–19.
87. Id. at 421.
88. Id. at 404.
89. Id. In his dissenting opinion in Hagen, Justice Blackmun emphasized that the term “restored to the public domain” contained a highly ambiguous meaning and if the majority chose to focus on that term, application of the rules of construction would still require a finding in favor of the Indians due to the questionable interpretation of the term. See id. at 428 (Blackmun, J., dissenting).
90. Id. at 415.
91. The 1905 Act provided that the reservation open under the “homestead and townsite laws of the United States.” Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, 1069. This language closely
More striking, however, was the Court’s assertion that the 1902 and 1905 Acts be read together because Congress clearly viewed the 1902 legislation as the basic building block for the 1905 Act, resulting in diminishment of the reservation.92 Because the Court based its decision in large part on the 1902 Act that never took effect, the ruling garnered staunch criticism.93

The Supreme Court did not rest its decision on this analysis alone, however, but relied heavily on Solem's third prong for its main authority.94 Writing for the majority, Justice O'Connor stated that the fact that nearly eighty-five percent of the present-day area residents were non-Indians exhibited congressional intent to diminish the reservation.95 Also, tribal headquarters stood on trust land, not in the open area.96 Modern demographics, the Court asserted, reinforced its finding of diminishment.97

The Hagen Court’s application of the three-part disestablishment test reflected the problems inherent in the analytical framework created by Solem. The Court found diminishment despite the absence of the type of unequivocal evidence customarily required to find an intent to diminish.98 While supposedly applying traditional principles of statutory

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92. Hagen, 510 U.S. at 415–16. Employing Solem’s second prong, the Court asserted that legislative history supported its reading of the 1902 and 1905 Acts. The Court referred to the House version of the 1905 Act that would have restored the surplus lands to the “public domain” as probative, even though the Senate version struck that wording and it never became operative. Id. at 418–20. Admitting that “we have no way of knowing for sure” why Congress chose to offer entry under the homestead laws rather than restore the lands to the public domain, the Court nonetheless felt that “it seems likely” Congress merely intended to limit land speculation, an objective “not inconsistent with the restoration of the unallotted lands to the public domain.” Id. at 419.

93. See, e.g., James M. Girjalva et al., Diminishment of Indian Reservations: Legislative or Judicial Fiat?, 71 N.D. L. Rev. 415, 416–32 (1995); Royster, supra note 11; Skibine, supra note 33; Soll, supra note 5. But see Wendy L. Slater, “Pulling Up the Nails” from the Uintah Indian Reservation Boundary: Hagen v. Utah, 28 Creighton L. Rev. 529, 541 (1995).


95. [W]hen an area is predominantly populated by non-Indians with only a few surviving 'pockets of Indian allotments, finding that the land remains in 'Indian Country' seriously burdens the administration of state and local government .... A contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area.

Id. at 420–21 (citing Solem v. Bartlett, 465 U.S. 463, 472 n.12 (1984)).

96. Id. at 421.

97. Id. at 420.

98. See Soll, supra note 5, at 544.
construction, the Court in actuality relied on vague language that fell well below the applicable standard. More troubling, the Court relied on evidence of contemporary racial demographics to a more alarming degree than ever before, apparently compensating for deficiencies in the direct evidence. After Hagen, it seemed the Court would only keep a reservation intact when the surplus land act contained no terminology that could be construed as language of cession or termination. The test allowed the Court to embrace questionable evidence of intent under prongs two and three, which nearly always reflect disestablishment.

II. SOUTH DAKOTA v. YANKTON SIOUX TRIBE

A. Factual Background

In early 1998, the Supreme Court faced yet another diminishment case, South Dakota v. Yankton Sioux Tribe. The central issue in that case was whether the Yankton Sioux Reservation was diminished when Congress ratified an 1892 Agreement with the Yankton Sioux for the sale of surplus reservation lands.

The diminishment issue in Yankton arose out of an insipid event: the proposed construction of a waste management facility. In 1992, the Southern Missouri Recycling and Waste Management District selected land owned by a non-Indian within the original boundaries of the Yankton Sioux Reservation (Reservation) as a site to develop a regional landfill. The Yankton Sioux Tribe (Tribe) filed an action in the Federal District for the Southern District of South Dakota requesting an injunction to halt construction and declaratory relief that the Tribe had jurisdiction to regulate the facility. The State raised the diminishment issue first, asserting that Congress diminished the Reservation in 1894 when it enacted legislation embodying a negotiated land sale agreement

99. Id. at 548.
102. Id. at 888-89.
103. Id. at 889.
104. Id. at 890.
between the Tribe and the federal government, arguably defeating tribal jurisdiction.\textsuperscript{105}

In \textit{Yankton}, the Court faced a complicated and ambiguous historical record typical of most diminishment cases. Under the 1858 Treaty between the United States and the Tribe, the Tribe relinquished control of over eleven million acres in return for the “quiet and peaceable possession” of 400,000 acres for the Reservation, along with direct payment and scheduled annuities.\textsuperscript{106} Pressure for land from settlers expanding westward motivated Congress in 1891 to enact legislation allotting the Reservation under the Dawes Act.\textsuperscript{107} After allotment, the Reservation contained 168,000 acres of surplus lands.\textsuperscript{108} Soon thereafter, a federal commission negotiated with the Tribe for the sale of the surplus lands, culminating in a formal agreement on December 31, 1892,\textsuperscript{109} which Congress ratified on August 15, 1894.\textsuperscript{110}

The language of the 1892 Agreement, adopted verbatim in the 1894 Act, differed in an important respect from the statutes the Court interpreted in its other diminishment cases: the 1894 Act, essentially a “sum-certain” sale and cession statute, contained a “savings clause.” Articles I and II of the Act provided that the Yankton Sioux agreed to “cede, sell, relinquish, and convey... all their claim, right, title, and interest... to the unallotted lands” of the reservation for “six hundred thousand dollars.”\textsuperscript{111} Article XVIII, the savings clause, stated:

Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States.... [A]ll provisions of said treaty... shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty.\textsuperscript{112}

\textsuperscript{105} Brief for Petitioner at 2, \textit{Yankton} (No. 96-1581).
\textsuperscript{106} Treaty with Yankton Tribe of Sioux, Apr. 19, 1858, art. IV, 11 Stat. 743, 744.
\textsuperscript{107} \textit{Yankton}, 890 F. Supp. at 881.
\textsuperscript{108} \textit{Id}.
\textsuperscript{109} After considerable haggling, the government and tribe agreed to a direct sale of the land for a sum of $600,000. S. Exec. Doc. No. 53-27, at 68 (1894).
\textsuperscript{110} Act of Aug. 15, 1894, ch. 290, 28 Stat. 286.
\textsuperscript{111} § 12, 28 Stat. at 314–15. Articles I and II of the 1894 \textit{Yankton} statute mirrored nearly word-for-word the statute in question in \textit{Decoteau}. See supra note 57 and accompanying text.
\textsuperscript{112} § 12, 28 Stat. at 318.
Savings clauses are far from uniform, and no other treaty or agreement in existence used language identical to that used here. The problem in Yankton was that the cession language used in articles I and II appeared to contradict directly the language of article XVIII.

Following the opening of the reservation, the state government assumed virtually exclusive jurisdiction over the area. South Dakota state courts exercised both civil and criminal jurisdiction over cases arising on nontrust lands. Non-Indians constituted over two-thirds of the population and owned ninety-one percent of the nontrust land in the region.

B. Procedural History

The district court granted declaratory judgment, finding that Congress did not diminish the Reservation. The district court relied heavily on the existence of the savings clause in the 1894 statute and held that its phraseology, when read together with the clear cession language and sale clauses of the other articles, created internal inconsistency that destroyed any clear intent to diminish. The Eighth Circuit affirmed the district court's ruling based on similar reasoning. This decision conflicted with earlier South Dakota Supreme Court decisions that found diminishment. Presumably for this reason, the U.S. Supreme Court granted certiorari.

114. Id. at 887.
117. Id. at 885.
118. Yankton, 99 F.3d at 1451–57.
119. Subsequent to the Eighth Circuit opinion, the Supreme Court of South Dakota in an unrelated case determined that Congress had intended to diminish the reservation notwithstanding the decisions of the federal district court and circuit court. See State v. Greger, 559 N.W.2d 854 (S.D. 1997). The state supreme court held that the specific cession and sum certain provisions of the 1894 Act controlled despite the savings clause. Id. The court also held that de facto diminishment had occurred, based on the jurisdictional history and population patterns of the area. Id.
C. The Supreme Court’s Holding

On January 26, 1998, the U.S. Supreme Court unanimously held that Congress clearly intended to diminish the Reservation in 1894. The Court declared that the express language of the 1894 Act, the legislative history, and evidence of subsequent state jurisdictional control and demographic data all indicated an intent to diminish.

In applying Solem’s first prong, the Court focused on articles I and II of the 1894 Act, concluding that the statutory language evinced a congressional intent to diminish. In the Court’s view, article I’s “cession” language, in tandem with article II’s provision for “sum certain” consideration, was “precisely suited” to terminating the reservation status. Under Solem’s second prong, the Court reasoned that the manner in which the government negotiated the transaction with the Tribe and the tenor of legislative reports presented to Congress revealed a contemporaneous understanding that the 1894 Act modified the Reservation. Lastly, the Court applied Solem’s third prong, holding that because the area remained predominantly populated by non-Indians, de facto diminishment had occurred.

III. THE FUNDAMENTALLY FLAWED NATURE OF THE SOLEM TEST AND A BETTER APPROACH

The Yankton decision did more to convolute, rather than clarify, the already addled doctrine governing reservation diminishment. Instead of discarding the capricious Solem test in favor of a more direct method, the Yankton Court twisted the rules of construction even further. The result was more inequitable than that reached in prior cases. Although the Court continues to cite the rules of construction, it is difficult to ascertain how the Court reached its holding in Yankton in light of these canons. Moreover, Solem’s “fairly clean analytical structure” allows the Court to circumvent the traditional principles governing the interpretation of

122. Id. at 793.
123. Id. at 798.
124. Id.
125. Id.
126. Id. at 802.
127. Id. at 804.
Reservation Diminishment and the Trust Doctrine

Indian statutes in favor of a piecemeal approach in which the Court picks and chooses which factors will prove decisive in each case. The Court’s approach permits the Justices’ subjective beliefs to serve as grounds for limiting tribal authority in favor of non-Indian interests.\textsuperscript{129}

Returning to a standard that focuses exclusively on statutory language as the sole determinative factor in the diminishment cases would avoid inequitable results. More importantly, such an analytical framework would give proper effect to the trust doctrine, which requires the Court to honor its solemn duty to protect the tribes when confronted with anything less than clear congressional intent to interfere with Indian sovereign rights.

A. Solem’s First Prong: The Court’s Disregard of the Rules of Construction When Examining Express Statutory Language

Consistent with Solem, the Court first examined the 1894 Act’s language, recognizing that it provided “[t]he most probative evidence” of intent.\textsuperscript{130} In so doing, the Court dismissed the manifest ambiguity created in the 1894 Act by the “sum-certain” cession language and the juxtapositioned savings clause.\textsuperscript{131} Instead, the Court examined each individual article of the Act,\textsuperscript{132} thus denigrating the fundamental canon of statutory construction that commands courts to read all sections of a statute together and give all parts equal force.\textsuperscript{133}

I. Misplaced Reliance on Decoteau v. District County Court

The Court relied on the fact that the 1894 Act’s language corresponded to the language that terminated the Lake Traverse Reservation in Decoteau.\textsuperscript{134} The Yankton Court’s reliance on Decoteau is questionable, given the debatable nature of Decoteau’s holding. Arguably, the similar cession language in Decoteau and Yankton only

\textsuperscript{130} Yankton, 118 S. Ct. at 798.
\textsuperscript{131} See supra notes 111–17 and accompanying text.
\textsuperscript{132} Yankton, 118 S. Ct. at 799 (refusing to give agreement “holistic” construction).
\textsuperscript{133} See supra note 49 and accompanying text.
\textsuperscript{134} Yankton, 118 S. Ct. at 798; see also supra note 57.
completed a sale of land for an agreed price. Because every surplus land act had one distinct motivating purpose—to lure white settlers onto the reservation by offering inexpensive parcels—most of the statutes contained some form of cession terminology necessary to effectuate the land transfer. A sale of land, however, does not necessarily concede loss of jurisdictional authority over it.

As the dissent in Decoteau pointed out, not one word exists in the cession language used in Decoteau and Yankton to suggest alteration of the reservation boundaries. The Decoteau majority could only determine intent to disestablish by looking to other factors, thus implying that the cession and sum-certain language, standing alone, proved indeterminate on its face. In Decoteau, the Court relied almost exclusively on surrounding circumstances to reach its conclusion.

Yankton appears to adopt the premise that Congress's use of cession language combined with a sum-certain payment always indicates diminishment, despite the absence of any statutory language regarding the intended effect on jurisdictional authority. Without referring to additional evidence from the legislative history of the 1894 Act showing a "clear and plain" intent to diminish, the Yankton Court's reliance on the cession language as the primary determining factor moves beyond Decoteau's holding. If the Court had engaged in its chosen practice of looking to a number of factors other than cession language to consider diminishment, including surrounding circumstances, it would have understood the ambiguous nature of the inclusion of the lump-sum provision in this instance. The commission's negotiations with the Tribe,

137. Decoteau, 420 U.S. at 461 (Douglas, J., dissenting).
138. Id. at 445.
139. Id. at 444–49; Royster, supra note 11, at 33.
140. The Yankton Court also found it probative that the 1894 Act simply ratified a negotiated agreement between the tribe and federal government. South Dakota v. Yankton Sioux Tribe, 118 S. Ct. 789, 799 (1998). Such evidence of a negotiated agreement played prominent roles in Decoteau and Rosebud and now forms an important factor in the intent equation. Although the Court believes that a statute ratifying a negotiated agreement provides more secure footing for finding diminishment, at no point in Yankton does the Court ask the threshold question required by the rules of construction: Would the tribe have understood the 1894 Act to have dissolved its jurisdictional authority over the surplus lands? If the Court had engaged in such analysis, undoubtedly the savings clause would have militated against a finding of disestablishment. See generally Charles F. Wilkinson & John M. Volkman, Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows upon the Earth"—How Long a Time Is That?, 63 Cal. L. Rev. 601 (1975) (discussing role of rules of construction in federal Indian law).
the stated desires of the Yankton Sioux, and the House of Representatives debate all plainly divulge that a lump-sum price was included for reasons other than jurisdiction and sovereignty.  

Although it might appear that Decoteau provides strong precedent for finding diminishment in Yankton, the Court overlooked a basic defect in its analogy: the 1891 Act opening the Lake Traverse Reservation in Decoteau did not include a savings clause, and therefore contained no internal ambiguity on the face of the statute as in Yankton. Indeed, the existence of the savings clause precludes any presumption that might otherwise arise from the cession and sum-certain provisions.

2. Inherent Ambiguity Created by the Article XVIII Savings Clause

Even if articles I and II indicate a congressional intent to terminate, the article XVIII savings clause confounds such an assessment and makes the 1894 Act undeniably ambiguous. The savings clause constitutes the strongest such clause of any unallotted land sale agreement between a tribe and the United States in history. Although the Court previously considered a number of savings clauses in other agreements, none proved as extensive because they were limited by language explaining that the prior treaties remained in effect as long as they were not inconsistent with the later agreement. Article XVIII

141. The government's original instructions to the Commission designated "appraisal and sale to the highest bidder" as the intended sale option. See S. Exec. Doc. No. 53-27, at 68 (1894). The Tribe believed it would receive more money for the land if it were sold piece-by-piece to individual settlers. Id. at 67-68. The Commissioner, however, feared that the less desired lands would not sell under such an arrangement and opted for the direct sale method. Id. The House of Representatives amended the agreement to provide for payment only as individual parcels of the unallotted lands sold, apparently due to concern regarding whether all the land would sell. Id. However, the House withdrew its amendment to avoid any charge of bad faith for changing the terms of the agreement. 53 Cong. Rec. 8268, 8268-71 (1894). Thus, the intent behind the provision of a lump-sum payment is arguably ambiguous and does not evidence a "clear and plain" intent to disestablish the reservation. See Solem v. Bartlett, 465 U.S. 463, 472 (1984).


143. See, e.g., Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 761 (1985) ("[N]othing in this agreement shall be construed to deprive [the tribe] of any benefits to which they are entitled under existing treaties not inconsistent with the provisions of this agreement."); United States v. Southern Ute Tribe or Band of Indians, 402 U.S. 159, 162 (1971) (discussing Act of Apr. 29, 1874, ch. 136, art. IV, 18 Stat. (pt. 3) 36, 37, which stated that "[a]l]l treaty provisions] not altered by this agreement shall continue in force."); Dick v. United States, 208 U.S. 340, 352 (1908) (treaty provisions "not inconsistent with the provisions of this agreement are hereby continued in force"). Although the statutes at issue in Rosebud contained savings clauses with the "not inconsistent with" language, the majority did not discuss them. Rosebud Sioux Tribe v. Kneip,
contains no such limitation. The clause only states that earlier provisions of the original treaty remain in force, yet, the Court read such a restriction into the clause.

To avoid the apparent conflict the 1894 Act provisions present, the Court strained to limit its interpretation of the savings clause. Despite the clause’s explicit declaration that all provisions of the 1858 treaty “shall be in full force and effect, the same as though this agreement had not been made,” the Court refused to construe the language literally. Instead, the Court held that it could not reconcile the savings clause with another provision in the 1858 treaty in which the United States agreed that “[n]o white person [would] be permitted to reside or make any settlement upon any part of the [reservation].” According to the Court’s curbed assessment, this latter 1858 stipulation “clearly runs counter to [the] tribe’s . . . claims” and to read the savings clause in such a manner “eviscerates the agreement in which it appears.”

The Court’s conclusion concerning the wording in the 1858 treaty prohibiting white settlement is easily challenged because the language relied on by the Court expresses nothing more than pre-Civil War separatist notions. The treaty provision simply voices the commonly held view of the early nineteenth century that the purpose of the reservation system was to segregate the races. Congress abandoned that idea and sought to promote a policy that intermingled white settlers with Indians on reservations when it implemented the allotment policy three decades later. Understood in this context, the phrasing barring white settlement

430 U.S. 584, 623 (1977) (Marshall, J., dissenting). The dissent concluded that the savings clauses constituted “clear congressional commands to interpret the Rosebud Acts so as to minimize conflicts with the Treaty of 1889,” demonstrating Congress’s wish to preserve the reservation boundaries. Id.

145. See Yankton, 118 S. Ct. at 799.
146. Id.
148. The Court referred to Oregon Department of Fish & Wildlife v. Klamath Indian Tribe, which eluded that when a savings clause creates a “glaring inconsistency” between the original treaty and a subsequent agreement, it is afforded little weight. Yankton, 118 S. Ct. at 799; see Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985). The Court neglected to note, however, that the effect of the savings clause was not at issue in Klamath and not explicitly considered by the Court. See Yankton, 118 S. Ct. at 799; Oregon Dept. of Fish & Wildlife, 473 U.S. 753.
149. See Hoxie, supra note 18, at 2.
150. Id. at 70.
in the 1858 treaty is irrelevant in light of subsequent policy changes, and
has no bearing on the intent of the savings clause to guarantee that the
Reservation remain intact under the broad terms of the treaty creating it.

The Court overlooked the reservation system's original purpose and
instead speculated that article XVIII merely "pertains to the continuance
of annuities, not the 1858 borders."151 For support, the Court turned to
the 1892 negotiations, noting that the topic of annuities played a
significant role in the bargaining.152 Based on this fact, the Court
disregarded the broad phrasing of the savings clause and found that it
only protected annuities.153 The Court went as far as to conclude that "it
is hard to identify any provision in the 1858 Treaty that the Tribe might
have sought to preserve, other than those plainly inconsistent with . . . the
1894 Act."154

The Court's construction of the savings clause, grievously flawed in
several respects, flies directly in the face of the rules of construction. The
savings clause of the 1894 Act is arguably the most direct statement
imaginable indicating a desire to preserve the core principles embodied
in the 1858 treaty creating the Yankton Sioux Reservation.155 In pursing
the treaty-making policy of the nineteenth century, the federal
government created distinct geographical enclaves for the Indians that
gave tribal governments sovereign power within their borders.156
Accordingly, the 1858 treaty with the Yankton Sioux recognized the

151. Yankton, 118 S. Ct. at 800. Congress previously prescribed the reach of an annuities pro-
vision, but it chose not to enact that type of limited provision in the 1894 Yankton Act. See, e.g.,
was to be construed to deprive [the Indians] of their annuities or benefits under any existing
agreements or treaty stipulations.").
152. Yankton, 118 S. Ct. at 799.
153. Id.
154. Id. at 800.
156. See generally Wilkinson & Volkman, supra note 140, at 602–23 (discussing history of
treaty-making between tribes and United States).
specific borders of the Reservation, and granted the Tribe full governmental authority within its boundaries. Thus, because the savings clause preserved the "full force and effect" of the 1858 treaty, it concurrently kept the borders of the Reservation intact, "the same as though [the] agreement had not been made." The Court escaped this conclusion by limiting its interpretation and abrogating the rules of construction.

If the Court had remained true to the canons of construction, it would have reached a different conclusion because rules demand that all provisions of an agreement be read together in a manner that will make them consistent and give all parts force. The savings clause's broad phraseology indicates that the other sections, not the clause itself, should be read narrowly to minimize any conflict with the 1858 treaty. Despite the Court's claim that the subject of annuities "dominated" the negotiations, the record shows that the Tribe expressed concern over numerous other issues. More importantly, only the second independent clause of the second sentence mentions annuities, and it follows the broad language professing to preserve the 1858 treaty. The interpretation offered by the Court gives effect to only one independent clause in one sentence. Not only did the Court refuse to analyze the saving clause in conjunction with articles I and II, as required by the rules of construction, it refused to examine the savings clause in its

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157. The 1858 treaty specifically delineated the boundaries of the Reservation, stating that the Yankton Sioux ceded and relinquished to the United States:

[A]ll the lands now owned...except four hundred thousand acres thereof, situated and described as follows, to wit—Beginning at the mouth of the...Chouteau River and extending up the Missouri River thirty miles; thence due north to a point; thence easterly to a point on the said Chouteau River; thence down said river to the place beginning, so as to include the said quantity of four hundred thousand acres.


158. Id.

159. Ch. 290, § 12, 28 Stat. at 318.

160. The Court concluded that "the Treaty's reference to tribal authority is indirect, at best" and did not maintain exclusive tribal governance within the original reservation boundaries. South Dakota v. Yankton Sioux Tribe, 118 S. Ct. 789, 800 (1998). Apparently, despite knowledge of the general intent behind the treaty policy, the Court would require the savings clause to stipulate each and every tribal governmental power intended for preservation as a prerequisite for recognizing retention of tribal sovereignty.

161. See supra note 49 and accompanying text.

162. Yankton, 118 S. Ct. at 799.


164. See supra notes 106–10 and accompanying text.
entirety, choosing instead to emphasize the portion of the provision that supported its holding.165 This approach is nonsensical given that the 1858 treaty constitutes the only instrument that speaks directly to the Reservation boundaries.166 Giving effect to the plain language and all parts of article XVIII leads to the conclusion that it covers more than annuities. If read broadly, article XVIII's "full force and effect" language requires the agreement to be construed to preserve the Tribe's governmental authority within the boundaries under the 1858 treaty, defeating any claim of diminishment.

The Court's interpretation violated the rules of construction in another more discernible manner. Articles I and II are intrinsically irreconcilable with the savings clause, and therefore create inherent ambiguity. In view of this contradiction, the rules instruct that the ambiguity be resolved in favor of the tribe.167 Nonetheless, the Court abdicated its responsibility to adhere to this rule, referring to Decoteau and stating that a rule of construction "is not . . . a license to disregard clear expressions of tribal and congressional intent."168

The approach adopted under Solem's first prong of looking to express statutory language as the best indicator of intent is correct, but only as long as the Court adheres to the rules of construction. The rules mandate that to find diminishment, congressional intent must prove "clear and plain."169 Logically, because the text of a statute is the only thing actually enacted into law, it best expresses what Congress intended.170 As the Court itself observed, "Congress has used clear language of express termination when that result is desired."171 Therefore, Solem's first prong would provide equitable results if the Supreme Court returned to this type of straightforward analysis, focusing on the express language of an

165. Yankton, 118 S. Ct. at 799.
166. See supra note 157.
167. See supra note 45 and accompanying text.
168. Yankton, 118 S. Ct. at 801 (quoting Decoteau v. District County Court, 420 U.S. 425, 447 (1975)).
170. United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.").
171. Mattz v. Ameet, 412 U.S. 481, 504 n.22 (1973); see, e.g., Act of July 27, 1868, ch. 248, 15 Stat. 198, 221 ("[T]he Smith River reservation is hereby discontinued."); Fulfilling Treaty Stipulations with and Support of Indian Tribes, ch. 1402, 33 Stat. 193, 218 (1904) ("[T]he reservation lines of the Ponc and Otoe and Missouria Indian reservation be, and the same are hereby, abolished . . . .").
act while giving equal effect to all portions of the statute and conforming to the rule that ambiguities favor the tribe.\textsuperscript{172} Such an approach gives meaning to the trust doctrine and tribal sovereignty.\textsuperscript{173}

Instead, as evidenced by \textit{Yankton}, the analysis under \textit{Solem}'s first prong founders because the Court shunned those principles and perverted the analysis. By disposing of obvious ambiguities in the statutory language and fractionating its analysis, the Court appears willing to preserve reservation status only in instances where the acts contain absolutely no language the Court can arguably construe as language of termination. Such a mode of analysis is fundamentally flawed and stands in stark opposition to the tenets of Indian law.

\textbf{B. Solem's Second Prong: Inadequacy of Legislative History and Surrounding Circumstances to Show Intent}

Given the many difficulties plaguing inquiry into legislative history in the diminishment cases, the \textit{Yankton} Court should have recognized these short-comings and abandoned \textit{Solem}'s second prong. Requiring the Court to delve into examinations of legislative history only obfuscates the diminishment issue. First, the Court must struggle to determine in which context to view the evidence: one that focuses on the intent from the perspective of the forlorn allotment policy, or one cognizant of the modern realization that allotment was an abysmal failure. Next, if it chooses to explore intent from the perspective of the allotment era, it faces the unfeasibility of trying to understand the motivations fueling a bygone era. Finally, the task of discovering intent through legislative history proves utterly impossible because Congress at the time did not have any intent to address the jurisdiction question. Most importantly, the inquiry into intent proves unnecessary because the architects of the allotment policy never foresaw the jurisdiction problem; therefore, the surplus land acts are ambiguous by their very nature. As long as the Court adheres to the rules of construction and resolves all ambiguities in favor of the tribes, inquiry into legislative history is not needed. The only purpose legislative history serves is to allow justices to manipulate the facts in favor of their own subjective beliefs.


\textsuperscript{173} See \textit{Royster}, \textit{supra} note 11, at 47–49.
1. The Quandary of Selecting the Proper Perspective for Determining Intent

The first major difficulty that impairs the Court's legislative history analysis is determining how to view the effect of social change when reviewing legislative history. Every statute carries with it certain assumptions about the nature of law and society that may be incorrect, shallow, or extinct in light of social change. When change indeed occurs, judges are placed in the impossible predicament of trying to determine how to best address the interpretive question.\textsuperscript{174}

This dilemma proves especially problematic in the diminishment cases. Throughout American history, federal Indian policy has fluctuated wildly. The most significant redirection occurred as a result of the allotment policy. In 1934, Congress repudiated the allotment scheme with passage of the Indian Reorganization Act (IRA),\textsuperscript{175} which condemned the Dawes General Allotment Act as failed policy.\textsuperscript{176} The core concepts the IRA endorsed form the cornerstone of modern U.S. Indian policy: the preservation and encouragement of tribal control over Indian country.\textsuperscript{177} Thus, when examining the legislative history surrounding a surplus land act the question becomes: Should the Court ask how Congress in the late nineteenth century would have answered the jurisdiction question, even though Congress did not envision the continuation of the reservation system? Or, should the Court inquire how that legislature would answer the question after realizing that the allotment policy was a complete and utter failure? This quandary reveals the futility of looking to legislative history as an indicator of intent in these cases.

The \textit{Yankton} decision sheds light on the Court's preferred approach under these circumstances. In \textit{Yankton}, the Court looked to "the contemporary historical context" to discover the intent of Congress in

\begin{itemize}
\item \textsuperscript{176} Primarily, the IRA promoted Indian self-government and protected and increased the amount of land preserved for Indian control by repealing the Dawes Act, restoring surplus lands to tribal ownership, and ending allotment. See generally Hoxie, supra note 18; \textit{Indian Self-Rule: First-hand Accounts of Indian-White Relations from Roosevelt to Reagan} (Kenneth R. Philp ed., 1986); Francis Paul Prucha, \textit{The Great Father: The United States Government and American Indians} (1984); Singer, supra note 129, at 31.
\item \textsuperscript{177} Royster, supra note 11, at 19–20.
\end{itemize}
Instead of giving credence to the modern policy recognizing tribal sovereignty, the Yankton Court chose to perpetuate the allotment policy expressly rejected by Congress.\textsuperscript{179} As a matter of pure statutory interpretation, it proves curious that the Yankton Court focused on the intent of the Congress that implemented the Dawes Act, rather than the intent of the Congress responsible for enactment of the IRA, given that the latter nullified the former. Normally when two statutes conflict, the more recent applies.\textsuperscript{180} The best explanation for the Court's analysis is that, once again, it is simply trying to reach a conclusion that corresponds to the Justices' own subjective notion that tribes should not have jurisdictional control over lands predominated by whites.\textsuperscript{181} By rendering decisions consistent with the allotment era's policies, the Court accomplishes this goal. It does so, however, at the cost of frustrating the obvious modern policy supporting tribal sovereignty.

2. \textit{The Problem of Discovering Intent from Antiquated Legislation}

The second problem associated with relying on legislative history as an accurate indicator of congressional intent rests on the dubious proposition that judges can accurately recreate the historical understanding of a previous legislature.\textsuperscript{182} The task of interpretation proves especially complex in the diminishment cases because most surplus land acts are nearly a century old. This time gap requires the Court to attempt to decipher the "surrounding circumstances" of the surplus land acts within their antiquated context—a nearly impossible task. The result has been majority and dissenting opinions that examine the same evidence but tell vastly different stories.\textsuperscript{183}


\textsuperscript{179} Id. at 805 ("[D]espite the present-day understanding of a 'government-to-government relationship between the United States and each Indian tribe' . . . 'we cannot remake history.'").

\textsuperscript{180} Singer, supra note 129, at 31–32.

\textsuperscript{181} Cf. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 423 (1989) (quoting Montana v. United States, 450 U.S. 544, 560 n.9 (1980)) ("'It defies common sense to suppose 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.'").


\textsuperscript{183} Decoteau, Rosebud, and Hagen each produced lively dissents that disagreed vehemently with the majority's reading concerning most of the key facts. See Hagen v. Utah, 510 U.S. 399, 421
3. Difficulties of Determining Intent from Meager Historical Evidence

A final complication with determining intent through legislative history centers on the fact that a court must ascertain the intent of different bodies of people, the U.S. House of Representatives and Senate, whose views are only known from the historical record. The historical record almost never reveals why each legislator voted as he or she did. These difficulties manifest themselves because at the time Congress passed the surplus land acts, it did not foresee the continuation of the reservation system. As a policy matter, Congress had no reason to address the issue of continued jurisdiction over reservation lands. The legislative history demonstrates Congress’s “almost complete lack of... concern with the boundary issue.” The end result is that although in each diminishment case a voluminous historical record confronts the trier of fact, the evidence inevitably contains sparse references to the jurisdiction question, thus obfuscating attempts to attribute an intent to Congress.

Given this paucity of evidence concerning the jurisdictional issue, the approach to legislative history endorsed by Solem’s second prong threatens the sanctity of the rules of construction. Solem instructs that when an act contains express language indicating a congressional intent to diminish, the Court should only examine extrinsic evidence to confirm the language on the face of the act. Only in the complete absence of express language of termination must the legislative history and surrounding circumstances “unequivocally” reveal a congressional intent to diminish. Faced with a dearth of historical proof, the Court has frequently trumped-up or skewed the meager evidence available to support a finding of diminishment. Thus, because the Court’s most...
recent trend is to bend the analysis under Solem's first prong to find an intent to diminish on the face of a given allotment act, the Court rarely needs to find that the legislative history "unequivocally" reveals an intent to diminish.

This approach to legislative history contravenes the canons of construction. The canons mandate that the Court find "clear and unequivocal intent" in order to determine diminishment and resolve ambiguities in favor of the tribe. Remaining true to the canons, the Court should consistently find in favor of the tribe because the ambiguity in the historical record destroys any clear intent. Yet, because the historical evidence need not prove "unequivocally" an intent to terminate under Solem, application of the second-prong standard allows the Court to sidestep the canons and resolve ambiguities against the Indians. As a result, the Court need only find supplemental support, which does not satisfy the "clarity" of intent required under the rules of construction.

The Yankton decision illustrates the problem. The Court stated that the legislative history and surrounding circumstances are "not so compelling that, standing alone, [they] would indicate diminishment." Nonetheless, the Court held that the record did not controvert its diminishment finding and should therefore not be discounted. Instead of redirecting the analysis under Solem and stating that ambiguities in the historical record should always favor the tribe, the Court embraced scattered references in the legislative record and negotiations between the Tribe and the government that supported a finding of diminishment to buttress its conclusion.

the House version of the 1905 Act that opened the Uintah Ouray Reservation, which would have restored lands to the public domain, as support for its holding. Hagen v. Utah, 510 U.S. 399, 436–37 (1994) (Blackmun, J., dissenting). Yet, the Court ignored legislative history showing that the Senate version, which Congress ultimately enacted, struck this language in favor of more moderate wording. Id.

192. Id. at 803.
193. Although the Court stated that "[t]he legislative history itself adds little" and the "mixed record" concerning contemporaneous understanding of the 1894 Act "reveals no consistent, or even dominant, approach to the territory in question," it still held that the historical information supported diminishment. Id. at 802–04. As evidence of intent, the Court cited the instructions provided by the Commissioner of Indian Affairs to the Yankton Commission, charging its members to "negotiate... for the cession of [the tribe's] surplus lands." Id. The Court also referred to comments made by Yankton Commissioner Cole, in which he admonished the Tribe that "you must break down the barriers and invite the white man," as further proof of an intent to terminate. Id. at 802. Lastly, following Solem, the Court looked to subsequent treatment of the Reservation by both Congress and the Executive Branch. Id. at 803. Despite the fact that both Congress and the
C. Solem's Third Prong: Inappropriate Reliance on De Facto Diminishment

As the final means for discovering intent, the Court has employed the peculiar technique of looking to evidence of subsequent state jurisdictional control over the contested area and its modern racial composition as proof of "de facto diminishment." More than any other part of Solem's analytical structure, the third prong allows the Court to circumvent the tenets of Indian law to construct an intent that accords with its own subjective notions as to the proper resolution of the jurisdiction question. The logical connection between Congress's intent at the turn of the century and consequent state influence and modern demography is attenuated at best, as the Court itself recognizes. Yet, the Court continues to rely on such evidence because in nearly all cases it harmonizes the Court's own assumptions as to the expectations of non-Indians living in the area. In the end, the Court's weighing and balancing of non-Indian interests ultimately impinges on the core concepts of tribal sovereignty.

I. Recognizing Subsequent State Jurisdictional Control Unjustly Disadvantages Tribes

By giving credence to subsequent state jurisdictional control over territory opened by a surplus land act, the Court essentially penalizes the tribes for the failures of allotment. The allotment policy wrought destruction on the tribes and, as a result, the tribes suffered extreme impoverishment and lost much of their ability to assert their sovereign powers. But the Dawes Act did not abolish tribal governments, and thus tribal governmental powers merely went dormant during the era. Most tribes simply were not in a position to assert their sovereign powers until 1934, with passage of the IRA, or later, when the tribes tried to resuscitate themselves economically and politically from the devastating
effects of allotment.\textsuperscript{197} Thus, during the interim period, the tribes were vulnerable to state encroachment.

Generally, the Court has refused to prejudice the tribes for their failure to exercise tribal power during these periods.\textsuperscript{198} In the diminishment cases, however, the Court has departed from this well-established standard.\textsuperscript{199} Instead, the Court’s countenance of state encroachment as valid evidence of intent flies in the face of the established proposition that sovereign tribal governments do not lose legislative power when they do not implement it.\textsuperscript{200} In this respect, the Court deprives the tribes of sovereign powers when it recognizes state encroachment as a means of displacing tribal authority.

On a more rudimentary level, the Court’s reliance on jurisdictional history should be censured in light of the trust doctrine. The courts have generally served as the conscience of federal Indian law, protecting tribal powers and rights against undue intrusion when the tribes are weakest. Allotment debilitated tribal governmental authority; therefore, according to the trust doctrine, the Court should protect tribal autonomy in the diminishment cases. Yet, \textit{Solem}’s third prong forwards the perverse notion that traditional Indian rights are not to be defended precisely when they need the most protection—when a dominant state government frustrates the exercise of tribal power by extending its own authority over tribal domain.

2. The Irrelevance of Modern Demography to the Intent Analysis

The Court’s utilization of demographics opposes traditional Indian law concepts. The Court’s reliance on demographics is perhaps understandable, given the ambiguity surrounding the diminishment analysis. Demographic data will often be the only consistent evidence easily discernible by the Court. However, the threshold question centers

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{197} Id.
\item \textsuperscript{198} See Fisher v. District Court, 424 U.S. 382, 385–89 (1976); Kennerly v. District Court, 400 U.S. 423, 429–30 (1971); see also Wilkinson, supra note 16, at 38–39.
\item \textsuperscript{199} See Hagen v. Utah, 510 U.S. 399, 421 (1994) (“This ‘jurisdictional history’... demonstrates acknowledgment that the Reservation was diminished....”); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 603 (1977) (“[T]he single most salient fact is the unquestioned actual assumption of state jurisdiction over the unallotted lands...since the passage of the 1904 Act....”).
\item \textsuperscript{200} See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982) (“[S]overeign power, even when unexercised, is an enduring presence that...will remain intact unless surrendered in unmistakable terms.”).
\end{enumerate}
\end{footnotesize}
on whether proof of demographic advantage of one ethnic group over another as a deciding factor constitutes principled analysis. At best, demographics form a “tangential relation” to historical intent.\footnote{\textit{Hagen}, 510 U.S. at 441 (Blackmun, J., dissenting).}

Nowhere in its diminishment jurisprudence does the Court explain why demography provides an accurate reflection of Congress’s intent at the turn of the century. The \textit{Solem} Court referred to demographic evidence as only “one additional clue” both “unorthodox and potentially unreliable,” but also termed it a “necessary expedient.”\footnote{\textit{Solem v. Bartlett}, 465 U.S. 463, 472 n.13 (1984).}

In reality, the Court is attempting to find a practical, rather than doctrinal, relationship between present demographics and the construction of aged statutes. In \textit{Hagen}, the Court stated: “[T]he current population situation in the Uintah Valley demonstrates a practical acknowledgment that the Reservation was diminished; a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area.”\footnote{\textit{Hagen}, 510 U.S. at 421 (emphasis added).}

This reasoning begs the question: a practical acknowledgment by whom?\footnote{Robert Laurence, \textit{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, 792 (1996).}

It is difficult to attribute a “practical acknowledgment” by state officials or white settlers on the land is irrelevant to the central inquiry because their conclusions mirror only their own beliefs, not Congress’s intent. Therefore, the most reasonable conclusion is that the Court made its own “practical acknowledgment” that the reservation had been diminished because “a contrary conclusion would seriously disrupt the expectations” of the non-Indians residing in the area.\footnote{\textit{Id.}}

The demographic standard emulates the trend in the Court’s modern Indian law decisions: the Court is reluctant to acknowledge tribal authority over non-Indians living on the reservation.\footnote{See supra note 15 and accompanying text.}

The Court’s use of demographic data suffers from two primary weaknesses. First, although the Court in \textit{Solem} labeled modern demography as only “one additional clue,” it takes on far greater
meaning in application. Given that demography often constitutes the
only indisputable evidence in these cases and that the demographic
analysis allows the Court to interject current "practical" considerations
into the analysis, the "clue" confounds diminishment analysis, which
supposedly centers on a historical examination of intent. As long as the
Court views demography as a viable component of the diminishment
test, rarely will an indeterminate statutory text stand in the way of the
Court's consideration of the "justifiable expectations" of the people of
the region. Instead of looking to intent as mandated by the rules of
construction, the Court weighs and balances non-Indian interests against
the sovereignty of the tribes. In the end, under the application of Solem's
third prong, the Indians' minority status costs them their rights.

This balancing process suggests the second problem with the use of
demography: by asserting that demography reflects intent, the Court can
hide behind the façade of statutory construction to reach political
resolutions. By weighing the merits of retaining a reservation in light of
the "justifiable expectations" of non-Indians who settled on the surplus
lands, the Court becomes the final arbiter of how much governing
authority tribes may exercise, assuming a prerogative that formally lies
with Congress. However, as the Court has acknowledged, the power to
discontinue reservation status rests with Congress, which can clearly
express itself if it so wishes. According to its own reasoning, the Court
should not address such political questions. The Court should leave
determinations of the proper extent of tribal jurisdiction in Indian country
to Congress, under its plenary authority, where they belong.

3. Yankton's Application of Solem's Third Prong: An Illustration of
the Approach's Shortcomings

Despite wide-spread academic criticism of the analytical deficiencies
inherent in Solem's third prong, the Yankton decision reveals that the
Court will continue to utilize evidence of subsequent state jurisdictional

207. See Hagen, 510 U.S. at 420–22.
that Congress clearly evince an 'intent . . . to change . . . boundaries' before diminishment will
be found.").
211. See, e.g., Girjalva et al., supra note 93; Laurence, supra note 204; Royster, supra note 11;
Skibine, supra note 33; Soll, supra note 5.
control and demography in its diminishment analysis. Perhaps the most frustrating aspect of the *Yankton* decision centers on the fact that the Court recognized the analytical flaws under the third prong, calling such evidence "the least compelling" indicator of intent. Yet, after citing the weakness, the Court turned immediately to demographic data and evidence of state jurisdictional control as factors bolstering its decision. Referring to the fact that non-Indians constituted over two-thirds of the population and owned a vast majority of the nontrust land in the region, the Court concluded that "[these] demographics signify a diminished reservation." In addition, the Court relied on evidence that the state government assumed virtually exclusive jurisdiction over the territory after the reservation opened.

Choosing the evidence that best supported its desired result, the *Yankton* Court disregarded evidence showing that the Tribe resisted initial state incursions. Also, although the Court noted that the Tribe did not attempt to assert jurisdictional control until recently, it did not contemplate whether the Tribe ever stood in a position to govern effectively during the period of state control. More troubling, the Court recognized the predominance of non-Indians in the area, but dismissed the demographic evidence showing a strong increase in the Indian presence in the area. The Tribe constituted the largest employer, not only within the boundaries of the Reservation, but within all of Charles Mix County. Further, data illustrated a marked increase in the Indian population, while the non-Indian population had steadily decreased. Nonetheless, the Court found this information unconvincing.

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212. Consideration of subsequent jurisdictional control and demographic data was the "least compelling for a simple reason: Every surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation." South Dakota v. Yankton Sioux Tribe, 118 S. Ct. 789, 804 (1998).

213. *Id.*

214. *Id.*

215. *Id.*

216. Brief for Respondent at 45, *Yankton* (No. 96-1581).


218. *Id.*


220. *Yankton*, 118 S. Ct. at 804.

221. *Id.*
Demographics and jurisdictional history have undoubtedly become entrenched in the Court's diminishment analysis. The ramifications prove significant. Until the Court's decisions in Solem, Hagen, and Yankton, congressional intent formed the sole basis for legal judgment. With the advent of Solem's third prong, the legal argument moved away from congressional intent and emphasized weighing non-Indian interests. Because the Court maintains the myth that evidence under the third prong provides suitable indications of intent, the Court concludes it is reaching results in line with the trust doctrine. In actuality, the Solem approach enables the Court to readjust tribal jurisdiction based on current conditions irrespective of whether Congress ever intended such a change. In so doing, the Court relegates congressional intent to a secondary position and violates the core precepts of the trust doctrine.

D. Returning to the Appropriate Standard: Express Statutory Language and Respect for the Trust Doctrine

The Yankton decision illustrates the need for the Court to return to its original approach where explicit statutory language stood as the sole determining factor in the diminishment or disestablishment question. The Court's analysis in Yankton demonstrates Solem's elemental weaknesses—the vagaries in the second prong's "surrounding circumstances" standard and the inherent racism embodied in prong three. Only by returning to an analytical approach that applies the rules of construction while focusing exclusively on express statutory language can the Court avoid Solem's problems and effectively safeguard the principles of tribal sovereignty embodied in the trust doctrine.

Although the Court has occasionally fluctuated, it has articulated a recurrent position congruent with the trust doctrine requiring Congress to speak clearly when impinging on established Indian rights. Because text is the only thing actually enacted into law, it most clearly expresses Congress's intent. Moreover, by concentrating on the express statutory

222. See supra Part I.C.2.b.
224. Eskridge & Frickey, supra note 174, at 337. Interpretative approaches that emphasize strict adherence to statutory language are criticized because statutes are rarely completely unambiguous; thus, textual analysis is difficult. Id. In the context of Indian law, however, this point is moot because the rules of construction require the courts to decide all ambiguities in favor of the tribes; hence,
words chosen by Congress, as the Court originally did in *Seymour* and *Mattz*, the task of determining intent becomes far easier and allows for proper application of the canons of construction. In the face of indeterminate statutory language, a straightforward application of the canons should guide the outcome, requiring all statutory provisions to be read as a whole and resolving ambiguity in favor of the tribe. If the Court had relied exclusively on statutory language in *Yankton*, it would have ruled in favor of the Tribe without meandering into the judicially malleable and subjective factors included in *Solem*'s second and third prongs. To comply with its obligation under the trust doctrine in the future, the Court should return to an approach that relies exclusively on statutory language to determine diminishment.

IV. CONCLUSION

The Supreme Court's holding of diminishment in *South Dakota v. Yankton Sioux Tribe* came as a result of its continued adherence to the three-pronged approach set out in *Solem v. Bartlett*, which made the rules of construction alarmingly flexible and furnished a framework by which the Court can reach its own desired result of preserving non-Indian interests. The Court's ruling underscores the salient fact that significant inconsistencies exist in the Court's analytical approach to the diminishment/disestablishment cases, both as to governing principles and the application of those principles. The trust doctrine and traditional rules of construction no longer apply. The Court claimed to adhere to the canons, but in reality it merely paid them lip service. Faced with conflicting statutory language and vague legislative history, the *Yankton* Court chose to isolate statutory terminology and parse out selective events in the historical record to circumvent palpable ambiguity. Although it derogates the fundamental precepts of the trust doctrine, the *Yankton* Court sustained *Solem*'s approach of relying on evidence of subsequent state jurisdictional control and contemporary demographic

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225. *See supra* notes 53–55 and accompanying text.

226. *See supra* notes 45, 49 and accompanying text.
data as indicators of intent, which further buoyed the Court's finding of diminishment.

The Court's decision in *Yankton* most likely defeats any expectancy that the federal courts will depart from *Solem*’s three-pronged test to assert an approach truer to the rules of construction and the trust doctrine. Instead the Court has chosen to remain married to an approach that belies those core principles. As such, Indian jurisdictional law remains impotent.