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THE LEGACY OF *SOLEM v. BARTLETT*: HOW COURTS HAVE USED DEMOGRAPHICS TO BYPASS CONGRESS AND ERODE THE BASIC PRINCIPLES OF INDIAN LAW

Charlene Koski

Abstract: Only Congress has authority to change a reservation's boundaries, so when disputes arise over whether land is part of a reservation, courts turn to congressional intent. The challenge is that in many cases, Congress expressed its intent to diminish or disestablish a reservation as long as one hundred years ago through a series of "surplus land acts."[1] To help courts with their task, the Supreme Court in *Solem v. Bartlett*[2] laid out a three-tiered analysis. This Comment examines how courts have applied modern demographics—part of *Solem*'s third and least probative tier—and demonstrates that they have consistently and primarily used the factor to support finding reservation diminishment. Furthermore, in 2005, the Supreme Court in *City of Sherrill v. Oneida Indian Nation*[3] applied *Solem*'s justifications for considering demographics to questions of tribal tax immunity and the legal doctrines of laches, acquiescence, and impossibility,[4] laying the groundwork for expansive use of demographics in other areas of Indian law. This Comment argues that courts should stop applying modern demographics to questions of reservation diminishment because doing so has led to outcomes that conflict with congressional Indian policy and undermine core canons of construction that have long governed the relationship between Indian tribes and federal courts.

INTRODUCTION

The reservation status of a specific piece of land has significant meaning for the people who live there. If a court determines Congress diminished (shrunk) or disestablished (terminated) a reservation, tribal members may suddenly find themselves answering to a different set of laws or having to move to maintain their tribal benefits.[5] At stake in diminishment and disestablishment cases is the existence of the reservation itself. Jurisdiction issues, taxation authority, mineral rights, and cultural identities hinge on the outcomes. Whether a piece of land

1. Surplus land acts are the individual pieces of legislation Congress used around the turn of the twentieth century to allot individual parcels of reservation land to Indians and open the remaining land to white settlers. *See infra* Part I.B.

2. 465 U.S. 463 (1984).

3. 544 U.S. 197 (2005).

4. *Id*. at 221.

5. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.04[2][a] (Nell Jessup Newton et al. eds., 2005) [hereinafter COHEN] (discussing the distinct status of tribal Indians in their own territory).

has reservation status significantly impacts how tribal, state, and federal governments operate, and how people on that land—Indian and non-Indian alike—live.

Diminishment cases generally involve the interpretation of surplus land acts, some of which diminished reservations and some of which did not.[6] The starting point for analysis is straightforward: only Congress can diminish a reservation. Because of this, courts must determine—using traditional Indian law canons of construction—whether Congress intended the surplus land act in question to shrink or terminate a reservation's boundaries, or whether Congress intended to leave the reservation intact.[7] The problem is that surplus land acts are things of the past—the far distant past. Most took effect about one hundred years ago.

With *Solem v. Bartlett*,[8] the Supreme Court sought to give courts some guidance.[9] The case created a weighted three-tiered analysis to apply in questions of diminishment.[10] In addition to an act's text and the historical circumstances surrounding an act's passage, *Solem* gave courts permission to examine what happened after an act took effect, including changes in populations as reflected by modern demographics—specifically the ratio of Indians to non-Indians living in a given area—for one additional clue as to whether Congress intended that area to remain a reservation.[11] While the *Solem* Court urged caution when considering demographics, courts have unhesitatingly embraced the factor and used it to support finding after finding against Indian interests. In fact, commentators have noted that demographics predict a diminishment case's outcome more accurately than any other factor.[12]

This Comment argues that courts should abandon the use of

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6. Solem v. Bartlett, 465 U.S. 463, 469 (1984) ("[I]t is settled law that some surplus land Acts diminished reservations and other surplus land Acts did not." (internal citations omitted)).

7. *Id*. at 470 ("The first and governing principle [in distinguishing those surplus land Acts that diminished reservations from those Acts that did not] is that only Congress can divest a reservation of its land and diminish its boundaries. . . . Diminishment, moreover, will not be lightly inferred. Our analysis of surplus land Acts requires that Congress clearly evince an 'intent . . . to change . . . boundaries' before diminishment will be found.").

8. 465 U.S. 463 (1984).

9. *Id*.

10. *Id*. at 470–72.

11. COHEN, *supra* note 5, § 3.04[3], at 197–98.

12. James M. Grijalva et al., *Diminishment of Indian Reservations: Legislative or Judicial Fiat?*, 71 N.D. L. REV. 415, 422 (1995) ("In a diminishment case you can have absolute certainty of result by checking out the demographics. If the demographics are unfavorable to Indians, they will lose.").

demographics because it has led to results that contradict the Indian law canons of construction and Congress's clear modern preference for tribal self-government. Part I offers an overview of the history of tribal sovereignty and the relationship between Indian nations and Congress, while Part II introduces a product of that history: the Indian law canons of construction, which require federal courts to wait for clear direction from Congress before abrogating Indian tribal powers. Part III explains the relationship between tribal sovereignty, reservation status, and Indian Country. Part IV introduces *Solem*, showing that the Supreme Court's effort to synthesize a three-tiered analysis from earlier cases created the odd result of courts examining modern demographics to discern century-old congressional intent. Part V shows that since *Solem*, courts have generally not used demographics to clarify ambiguities in favor of the Indians. Part VI introduces *City of Sherrill v. Oneida Indian Nation*.[13] In that case, the Supreme Court relied in part on *Solem* when it used demographics to justify using laches to bar tribal sovereignty and effectively diminish a reservation. The decision has the potential of introducing the use of demographics to other areas of Indian law. Part VII argues that demographics should be abandoned as a measure of congressional intent in diminishment cases.

I. INDIAN TRIBES ARE SOVEREIGN NATIONS IN A DEPENDENT RELATIONSHIP WITH CONGRESS

Modern tribal powers and rights flow from historic principles, and from relationships that predate European contact with tribes.[14] To decide questions related to tribal status and jurisdiction, courts must examine hundreds of years of treaties, agreements, and relationships. Thus, more than in many other areas of law, history is relevant in Indian law.[15] This Part summarizes some of that history. First, it introduces the historical relationship between the United States and the Indians who lived on the land early settlers colonized. Second, it looks at the development of the reservation system and its significance for tribes and Indians. Finally, it summarizes Congress's modern-era shift away from assimilation policies toward tribal self-government and cultural autonomy.

13. 544 U.S. 197 (2005).

14. COHEN, *supra* note 5, § 1.01, at 8.

15. *See id.* § 1.01, at 6.

A. The American Relationship with Indians Developed Through Shifts in Strength and Loyalty, Fueled by Americans' Unrelenting Thirst for Land

Indian tribes have long been treated as sovereign nations. When Europeans first arrived in North America, approximately five hundred Indian nations lived in what is now the United States—mostly along coastal areas, major river systems, and near the Great Lakes[16]—and had established a commercial network spanning the continent that allowed them to trade food, clothing, and crafts.[17] British and Spanish colonies negotiated treaties with them in the seventeenth century,[18] and in 1763 King George III issued a royal proclamation[19] promising to protect the Indians' land in gratitude for their help during the French and Indian War.[20]

Early Americans also acknowledged the sovereign status of Indian tribes. To establish successful colonies, settlers needed to minimize conflict with neighboring Indians, who for several decades vastly outnumbered them.[21] One of the best ways to do that was through promises to respect tribal land,[22] so colonies passed laws protecting Indians from hostile non-Indians,[23] and generally allowed only government agents to purchase Indian-claimed land.[24]

Even as they worked to maintain relations, however, many colonists did not trust the Indians. Some Indians had helped the British win the French and Indian War, and colonists feared they would again side with the British during the Revolutionary War.[25] Colonists tried to deter Indians by destroying their villages and crops, inadvertently motivating

16. STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 1 (3d ed. 2002).

17. *Id.*

18. INDIAN TRIBES AS SOVEREIGN GOVERNMENTS 4 (Am. Indian Lawyer Training Program, Inc. ed., 1988).

19. The Royal Proclamation, 1763, 3 Geo. 3 (Eng.), *available at* http://avalon.law.yale.edu/18th_century/proc1763.asp, *discussed in* ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW 28 (2008).

20. *See* PEVAR, *supra* note 16, at 5.

21. *See* COHEN, *supra* note 5, § 1.02[1], at 16.

22. PEVAR, *supra* note 16, at 5.

23. DAVID H. GETCHES & CHARLES F. WILKINSON, FEDERAL INDIAN LAW 37 (2d ed. 1986).

24. COHEN, *supra* note 5, § 1.02[1], at 16–17.

25. PEVAR, *supra* note 16, at 5.

most tribes to side openly with the British.[26] After the Revolutionary War, the battered and war-weary states wanted to avoid further hostilities, so Congress passed laws promising that the new country would respect the land and sovereign powers of Indian tribes.[27] Congress also negotiated treaties and agreements with tribes, further acknowledging their status as distinct sovereign bodies.[28]

Agreements between Congress and Indian tribes often included exchanges of land rights. The first was the Treaty of Fort Pitt, or the Delaware Treaty of 1778,[29] in which the United States agreed to build a fort inside the Delaware Nation to protect the tribe in return for a cooperative and friendly relationship.[30] The Treaty also guaranteed members of the Delaware Nation "all their territorial rights in the fullest and most ample manner."[31] As treaty making progressed, the immense scope of the practice came to encompass land transactions of more than two billion acres, and individual concessions involving tens of millions of acres.[32]

Americans' thirst for land was insatiable. As their new nation became more powerful, the dynamics of the relationship between the former colonists and the Indians shifted.[33] After the War of 1812, the British Empire began to withdraw, taking with it much of the tribes' bargaining power.[34] The United States used its military power, especially the cavalry, to protect prospectors and settlers moving westward onto tribal lands.[35] Treaties were used primarily to force Indians from their land

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26. *Id*. The New York Oneidas of *City of Sherrill v. Oneida Indian Nation*, discussed *infra* Part VI, sided with the colonists. *Id*.

27. *Id*. (explaining that examples of such laws include the Northwest Ordinance of 1787, which declared that Indian land and property would never be taken without Indian consent, and laws passed in 1793 that forbade federal employees from trading with Indians, prohibited non-Indians from settling on Indian lands, and exempted Indians from complying with state trade regulations).

28. 1 TREATIES WITH AMERICAN INDIANS 5 (Donald L. Fixico ed., 2008).

29. Treaty with the Delawares, U.S.-Del. Nation, Sept. 17, 1778, 7 Stat. 13.

30. TREATIES WITH AMERICAN INDIANS, *supra* note 28, at 6–7.

31. Treaty with the Delawares, *supra* note 29, art. VI.

32. COHEN, *supra* note 5, § 1.01, at 8–9 (discussing the scope of treaty making between Congress and Indian tribes).

33. PEVAR, *supra* note 16, at 2.

34. 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, 608–09 (1975) ("Prior to 1815, Indians negotiated treaties from a position of some power, for the tribes had the option of allying with either the United States or the British.").

35. PEVAR, *supra* note 16, at 48.

against their will.[36] One journal article describes this period and its treaty negotiations:

> From the Indians' point of view, it was a Hobson's choice. Theoretically, they could keep their land and be overrun by white settlers. Or, they could sell their land, their ancestral heritage, and remove to a new site. Certainly no happy solution to such a dilemma could be found under the best of circumstances.
>
> The results of treaty negotiations were almost always unsatisfactory to the Indians.[37]

Historians have documented examples of threats, coercion, bribery, trickery, and outright fraud on the part of American treaty negotiators,[38] and breaches of treaty promises by the United States were common.[39]

By the 1850s, Americans were excited by the prospect of a cross-continental railroad to fuel westward expansion. Worried that railroad lines would need to cut through tribal territories, they began looking for ways to control the Indians.[40] In 1851, Congress passed the first Indian Appropriation Act,[41] expanding the federal Indian Department so that "Indians could be collected on reservations and looked after by the federal government."[42] Congress hoped that the reservation system would encourage Indians to adopt agriculture and other aspects of western lifestyle.[43] Indians often expressed dislike of the reservation policy, claiming it favored white settlers and left tribes with small and otherwise inadequate land parcels.[44] Even so, many tribes reluctantly accepted it as the only way to preserve their communities, ways of life, and sovereignty.[45] It was during this time that "the modern meaning of

36. Wilkinson & Volkman, *supra* note 34, at 609–10.

37. *Id*. (citations omitted).

38. *Id*. at 610.

39. *Id*. at 611.

40. *See* ROBERT A. TRENNERT, JR., ALTERNATIVE TO EXTINCTION 49–50 (1975).

41. Indian Appropriation Act, ch. 14, 9 Stat. 574, 586–87 (1851).

42. TRENNERT, *supra* note 40, at 58.

43. *Id*. at 60.

44. ANDERSON, *supra* note 19, at 83.

45. Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 165 (2002). Other tribes resisted, at least for a while. Eventually, however, even some of those tribes "actively embraced the concept when they saw their ancestral domains voraciously, and often illegally, taken over by squatting white settlers." *Id*.

Indian reservation emerged, referring to land set aside under federal protection for the residence or use of tribal Indians, regardless of origin."[46] As more settlers moved west, however, Indian reservations increasingly served as barriers to expansion.[47] Thus the federal government began considering the idea of land "allotments" for individual Indians as opposed to large concessions of land for entire tribes.[48]

B. By Passing the Dawes Act of 1887, Congress Aimed to Gradually Assimilate Indians into American Society and Use Their Land for Homesteading

Tribes generally owned reservation land communally[49] until Congress passed the General Allotment Act of 1887.[50] Also called the Dawes Act, it was passed to assimilate Indians into the general population of the United States, in part by allocating to each Indian family 160 acres, 80 acres to each individual over the age of 18, and 40 acres to each other single person under 18.[51] After twenty-five years, the allotted land would belong to the Indian who received it, free of encumbrance.[52] By 1885, the government had issued more than eleven thousand patents to individual lands and more than one thousand certificates of allotment[53] under laws and treaties.[54]

Using land ownership to promote assimilation had been tried before and failed, resulting in major land scandals.[55] Nonetheless, policymakers

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46. COHEN, *supra* note 5, § 3.04[2][c][ii], at 189.

47. GETCHES & WILKINSON, *supra* note 23, at 111.

48. *Id*.

49. INDIAN TRIBES AS SOVEREIGN GOVERNMENTS, *supra* note 18, at 8.

50. General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388.

51. DELOS S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 6–7 (Francis Paul Prucha ed., Univ. Okla. Press 1973) (1934).

52. § 5, 24 Stat. at 389. In 1891 the Act was amended to provide for allotments of 160 acres of grazing land, or 80 acres of farming land to each Indian. *See* Act of Feb. 28, 1891, ch. 383, §§1–2, 26 Stat. 794, 794–95.

53. "Certificates of allotment, like receiver's receipts under the general land laws, entitle the holder to exclusive possession of the premises." Duncan Townsite Co. v. Lane, 245 U.S. 308, 310 (1917).

54. OTIS, *supra* note 51, at 3.

55. COHEN, *supra* note 5, § 1.04, at 77 ("Indian lands had been allotted as early as 1633. Many treaties reserved certain tracts of lands not for the tribe but for designated individual Indians or families under various forms of tenure. Allotment might also be tied to termination of tribal status or

tried again with the Dawes Act. Senator Dawes, the bill's primary sponsor, argued allotment would make restitution to the Indians.[56] Others believed assimilation was necessary for "the moral improvement of native people and the progress of civilization."[57] Indians would need less land if they assimilated, others realized, leaving more for white homesteaders.[58]

The Dawes Act, which Congress implemented through a series of individual acts called surplus land acts,[59] did make significantly more land available to homesteaders.[60] It gave the President authority to make unallotted "surplus" reservation land available to non-Indians for purchase and settlement.[61] The end result was that between 1887 and 1934, Indians lost two-thirds of their land; Indian land was reduced from 138 million to 48 million acres.[62]

The Dawes Act failed to meet its goals and assimilation was a dismal failure.[63] In some cases, the allotted land was ill-adapted for farming and not vast enough for cattle.[64] In others, Indians who lacked any skill or interest in farming leased their land to settlers, defeating the assimilative purpose of allotment altogether, as demonstrated by an 1895 report of a government agent who worked with the Cheyennes and Arapahoes, describing one of the reasons allotment was failing in parts of the Oklahoma Territory: "Their nomadic habits militate against the permanent occupation of any locality as a home . . . . To live in one locality is repugnant to the Indian idea of home . . . . Their lavish hospitality militates against the accumulation of wealth by individuals."[65]

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elimination of tribal autonomy. These early experiments in allotment prior to the Dawes Act were generally recognized as failures, even by Congress. Allotted Indian lands were often lost, producing major national land scandals.").

56. OTIS, *supra* note 51, at 8.

57. COHEN, *supra* note 5, § 1.04, at 77.

58. *Id*.

59. ANDERSON, *supra* note 19, at 106.

60. OTIS, *supra* note 51 at 6–7. At first, Congress needed tribal consent to allot lands, but in 1903 the United States Supreme Court held in *Lone Wolf v. Hitchcock* that Congress could force surplus land acts on Indian tribes without their consent. 187 U.S. 553, 564–68 (1903).

61. ANDERSON, *supra* note 19, at 108.

62. *Id*. at 107.

63. *Id*. at 107–09.

64. *Id*. at 109.

65. COMM'R OF INDIAN AFFAIRS ANN. REP. 243 (1895).

By 1934, about two-thirds of the land allotted to tribal members had passed by sale or involuntary transfer to non-Indians,[66] and starvation and disease were spreading through tribal communities.[67] Indians and their allies blamed assimilation and allotment.[68] A 1928 Brookings Institute report exposed the deplorable living conditions of the Indians.[69] The report recommended an end to the allotment policy and encouraged the government to change course and promote tribal autonomy and self-government.[70] Congress responded with the Indian Reorganization Act of 1934,[71] adopting many of the report's recommendations and moving the country away from assimilation and allotment.[72]

C. Modern Indian Policy Rejects Assimilation and Embraces Tribal Self-Government

Congress has repudiated assimilation in favor of tribal sovereignty and self-government. President Lyndon Johnson expressed the modern approach to Indian policy when he told Congress in 1968 that the United States should strive to erase "old attitudes of paternalism" and promote "partnership self-help."[73] This shift from removal and assimilation is reflected in many of the laws Congress passed over the next decade including the Indian Civil Rights Act of 1968,[74] and the Indian Self-Determination and Education Assistance Act of 1975.[75] In recent times,

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66. COHEN, *supra* note 5, § 16.03[2][b].

67. THE PROBLEM OF INDIAN ADMINISTRATION (L. Meriam ed., 1928) [hereinafter Meriam Report], *available at* http://www.alaskool.org/native_ed/research_reports/IndianAdmin/Indian_Admin_Problms.html. The Meriam Report is discussed in COHEN, *supra* note 5, § 1.05, at 84.

68. COHEN, *supra* note 5, § 1.04, at 83.

69. *See* Meriam Report, *supra* note 67.

70. *Id*.; *see also* INDIAN TRIBES AS SOVEREIGN GOVERNMENTS, *supra* note 18, at 10.

71. Wheeler-Howard (Indian Reorganization) Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. § 461 (2006)).

72. COHEN, *supra* note 5, § 1.05, at 84.

73. Special Message to Congress on the Problems of the American Indian: "The Forgotten American," 1 PUB. PAPERS 336 (Mar. 6, 1968).

74. Pub. L. No. 90-284, 82 Stat. 73 (codified at 25 U.S.C. §§ 1301–1341 (1968) (defining "Indian tribe" as "any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government" and creating an Indian Bill of Rights)).

75. Pub. L. No. 93-638, 82 Stat. 2203 (codified at 25 U.S.C. § 450 (1975) (recognizing that the "prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government")).

Congress has consistently demonstrated respect for tribal autonomy.[76] For example, Congress allows tribes to administer programs related to child welfare and family services, which means tribes can tailor programs to their communities' cultural needs.[77] Tribes administering federal welfare programs "are far more likely than states to count education, training, and cultural activities toward mandatory work requirements."[78] Other examples of Congress's support for tribal self-government include legislation that allows the Secretary of the Interior to perform certain administrative acts only with the consent of a tribe,[79] and the fact that tribal courts are the initial forums to hear tribal jurisdiction challenges.[80] Additionally, in 1966, Congress gave federally recognized tribes the right to sue in federal court without first gaining permission from the United States.[81] Finally, to ensure that the passage of time did not prevent tribes from enforcing their property rights, Congress refused to enact time bars to such claims when it enacted the Indian Claims Limitations Act of 1982.[82]

Today, Indian tribes are quasi-sovereign nations. Their sovereign powers are limited only by treaty or statute, or by necessary implication because of their dependent status.[83] "Under Chief Justice John Marshall, the Supreme Court conceptualized an Indian treaty as a grant of rights from the tribe to the United States, with the tribe *reserving* for itself all

76. COHEN, *supra* note 5, § 4.01[1][c], at 210.

77. *See id*. § 22.06[2][a], at 1403–06 (citing Temporary Assistance for Needy Families, 42 U.S.C. § 608(a)(7)(A) (1996) and Supplemental Security Income, 42 U.S.C. §§ 1381–1381a (1972)) ("Tribal control . . . allows tribes to tailor . . . programs to the unique conditions in their communities.").

78. *Id*. § 22.06[3], at 1406.

79. *Id*. § 4.01[1][c], at 211.

80. *Id*. § 4.05[1], at 275–76.

81. Act of Oct. 10, 1966, Pub. L. No. 89-635, 80 Stat. 880 (codified at 28 U.S.C. § 1362 (2006)) ("The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."). Part of the statute's intent was to allow tribes to protect their federally derived property rights. Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605, 620 (2006).

82. Pub. L. No. 97-394, 96 Stat. 1966, 1976–1978 (codified as amended at 28 U.S.C. § 2415 (1966)); S. REP. NO. 96-569, at 4 (1980) ("The statute of limitations does not bar an Indian tribe, band, or group, an individual Indian, or the United States acting on their behalf from bringing a claim for title to lands.").

83. United States v. Wheeler, 435 U.S. 313, 323 (1978).

interests not clearly ceded."[84] The principle led to the "reserved rights doctrine," within which lies the notion that Indian tribes hold some sovereign powers and are capable of negotiating with the United States on a sovereign-to-sovereign basis.[85]

Tribes exercise their inherent powers in many ways. For example, they establish their own forms of government,[86] determine tribal membership,[87] make criminal and civil laws,[88] operate court systems with distinct procedures and structures,[89] and have authority to exclude people from tribal territory.[90] Indian governments are free to use these powers in ways that preserve tribal customs and traditions.[91] The United States has encouraged this approach and the Supreme Court has recognized as much, observing that the United States has a duty to protect tribes' rights to "self-government . . . [and] the maintenance of order and peace among their own members by the administration of their own laws and customs."[92]

II. THE INDIAN LAW CANONS PROMOTE DEMOCRATIC PRINCIPLES AND POLITICAL ACCOUNTABILITY

Because Indian law cases often deal with delicate issues involving the rights and powers of colonized native people, courts apply special

84. COHEN, *supra* note 5, § 2.02[2], at 123 (emphasis added).

85. *See id*. § 2.02[2], at 123 ("Far from being based on the helplessness of tribal people, the reserved rights doctrine is based on the status of tribes as preexisting sovereigns entering into a government-to-government relationship with the United States.").

86. *Id*. § 4.01[2][a] (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62–63 (1978)).

87. *Id*. § 4.01[2][b], at 212.

88. *Id*. § 4.01[2][c], at 214.

89. *Id*. § 4.01[2][d], at 217.

90. *Id*. § 4.01[2][e], at 219.

91. For example, a Rosebud Sioux court invalidated an injunction that denied a defendant access to her mother's housing project because it prevented the defendant and her children from visiting their grandmother in violation of the concept of *tiyospaye*, i.e., importance of family. Moran v. Rosebud Hous. Auth., 19 Indian L. Rep. 6106, 6108 (Rsb. Sx. Ct. App. 1991).

92. *Ex parte* Crow Dog, 109 U.S. 556, 568 (1883); *see also* Fisher v. Dist. Court, 424 U.S. 382, 383, 386–87 (1976) (denying state court jurisdiction over adoption proceedings involving tribal members because such jurisdiction interfered with the "right of the Northern Cheyenne Tribe to govern itself independently of state law"); Williams v. Lee, 358 U.S. 217, 223 (1959) (denying state court jurisdiction over a contract dispute between Indians and non-Indians on a reservation and noting the Court has "consistently guarded the authority of Indian governments over their reservations"); COHEN, *supra* note 5, § 4.01[2][d], at 216.

canons of statutory construction that require Congress to make its intent clear, especially before abrogating tribal powers. The canons trace back to three epochal Indian law decisions by Chief Justice John Marshall.[93] This Part introduces those decisions along with the canons that resulted from them, and demonstrates that they complement basic democratic principles and allow for greater public accountability.

It is black-letter Indian law that Congress has plenary and exclusive authority over Indian affairs.[94] That authority comes in part from the Commerce Clause, which empowers Congress to regulate commerce "with foreign nations, and among the several states, and with the Indian tribes."[95] Judicial deference to Congress's paramount authority in matters concerning Indian policy remains a central principle of the field of Indian law,[96] and the Supreme Court has interpreted congressional power over Indian affairs as virtually limitless.[97]

Under Chief Justice Marshall's leadership, the Supreme Court decided cases involving Indian tribes in a way that recognized absolute congressional power, but also acknowledged the existence of tribal autonomy and the duty to protect tribal interests that Congress's absolute power brings. *Johnson v. McIntosh*[98] is the first of three defining opinions referred to collectively as the Marshall Trilogy. In it, the Court declined to consider moral questions raised by colonization, saying courts have no choice but to apply the law of their sovereign:[99]

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93. The three cases are *Johnson v. McIntosh*, 21 U.S. 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), and *Worcester v. Georgia*, 31 U.S. 515 (1832).

94. *See* United States v. Lara, 541 U.S. 193, 200 (2004); Washington v. Confederated Bands and Tribes of the Yakima Nation, 439 U.S. 463, 470 (1979); COHEN, *supra* note 5, § 5.02, at 398.

95. U.S. CONST. art. I, § 8, cl. 3.

96. COHEN, *supra* note 5, § 2.01[1], at 116–17.

97. *See id.* ("Congress's primacy over the other branches of the federal government with respect to Indian law and policy is rooted in the text and structure of the Constitution, and has been recognized in numerous Supreme Court decisions. . . . Judicial deference to the paramount authority of Congress in matters concerning Indian policy remains a central and indispensible principle of the field of Indian law." (citing *Lara*, 541 U.S. 193)).

98. 21 U.S. 543 (1823).

99. For a discussion of some of the political considerations driving Marshall's approach, see Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1194–95 (2001), noting that "Marshall had to employ the harsh Anglo version of the discovery doctrine, thereby implicitly sanctioning the thesis that Indian tribes were 'conquered' merely by the arrival of Christians on their continent," and Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 416–17 (1993), stating that "'Courts of the conqueror' cannot realistically be expected to invalidate even harsh colonial measures in the name of the very

> We will not enter into the controversy, whether agriculturalists, merchants and manufacturers, have a right, on abstract principles, to expel hunters from the territory they posses, or to contract their limits. Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.[100]

Any limitations on conquest came from the people, not the law, the Chief Justice wrote: "The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed . . . ."[101] Still, the Chief Justice implicitly suggested that some parts of Indian sovereignty had survived discovery: "In the establishment of these relations, ... [the Indians] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, . . . but their rights to complete sovereignty, as independent nations, were necessarily *diminished*."[102]

In the other opinions forming the Marshall Trilogy, *Cherokee Nation v. Georgia*[103] and *Worcester v. Georgia*,[104] the Court confronted a long-running dispute between the Cherokee Nation and the State of Georgia,[105] and articulated principles that have protected tribes from the interference of states ever since. In *Cherokee Nation*, after the federal government failed to enforce its treaty obligations with the Cherokees, the tribe sued in the Supreme Court to prevent Georgia from enforcing laws that took Cherokee lands and suspended tribal government.[106] In deciding to dismiss the case for lack of jurisdiction, the Court declared

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constitution established by the colonizers. How can such courts determine when Congress or the executive 'goes too far' to promote colonization? How could a decree that made such a judgment be enforced, in any event?"

100. *Johnson*, 21 U.S. at 588.

101. *Id*. at 589.

102. *Id*. at 574 (emphasis added).

103. 30 U.S. 1 (1831).

104. 31 U.S. 515 (1832).

105. The state of Georgia wanted the Cherokees removed from historical lands to which the United States had moved them, but the United States had repeatedly refused. In response, the state of Georgia "resorted to legislation, intending to force . . . the Indians from their territory." *Cherokee Nation*, 30 U.S. at 9.

106. *Id*. at 12.

the tribe could not be a "foreign nation" under the Constitution "because it is not foreign to the United States."[107] But the Chief Justice took the opportunity to frame the case as involving Georgia laws that "go directly to annihilate the Cherokee as a political society."[108] Indian tribes, Chief Justice Marshall declared, were more like "domestic dependent nations . . . in a state of pupilage; their relation to the United States resembles that of a ward to his guardian."[109] In describing the relationship as such, Marshall acknowledged the special obligations of protection federal authority owed the Cherokee.[110]

Worcester, heard one year later, is the final case in the Marshall Trilogy. This time, a non-Indian sued the state of Georgia, claiming the state's laws did not apply on the Cherokee reservation.[111] The dispute allowed the Chief Justice to address many of the issues that had been presented in *Cherokee Nation* and in the process announce the core principles firmly rooted in Indian law even today. First, Marshall emphasized what he had alluded to in *Johnson*: that discovery gave the conqueror rights to acquire and settle the land it discovered, but "could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man."[112] When the United States succeeded Britain, it assumed the sovereign-to-sovereign relationship that existed between Britain and the Indians, and that relationship "was that of a nation claiming and receiving the protection of one more powerful; not that of

107. *Id*. at 19.

108. *Id*. at 15; *see also* Frickey, *supra* note 99, at 391–92 (arguing that Chief Justice Marshall used *Cherokee Nation* strategically to articulate principles tending to protect tribes from encroachments by states).

109. *Cherokee Nation*, 30 U.S. at 17 ("[Indians] look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.").

110. *See* Clinton, *supra* note 45, at 141 ("In *Cherokee Nation*, Chief Justice Marshall employed the term dependent, not as a statement of political inferiority or a statement of federal supremacy, but, rather, as an implied criticism of the political branches of the United States government which had failed to enforce the treaty obligations of protection when requested to do so by the Cherokee Nation. Thus, dependence for Chief Justice Marshall was not a source of federal authority over the Cherokee Nation. Rather, it constituted a description of a relationship created by treaty in which the federal government owed the Cherokee certain obligations of protection.").

111. The plaintiff, Samuel A. Worcester, was indicted for residing on the reservation without a license or permit from the state and without having sworn an oath "to support and defend the constitution and laws of the state of Georgia." Worcester v. Georgia, 31 U.S. 515, 515 (1832).

112. *Id*. at 543.

individuals abandoning their national character, and submitting, as subjects, to the laws of a master."[113]

In light of this sovereign relationship, the United States negotiated with tribes through treaties.[114] *Worcester* involved the Treaty of Hopewell of 1785,[115] in which the federal government gave the Cherokee tribe a promise of protection in exchange for the tribe's promise of peace. However, the treaty also referred to land "allotted" to the tribe as hunting grounds, implying that the United States was giving to the Cherokees, not the other way around.[116] If that was true, the Cherokees had arguably surrendered their sovereign autonomy.[117] But Marshall rejected that argument: "Is it reasonable to suppose, that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish the word 'allotted' from the words 'marked out?'"[118]

Marshall refused to endorse a broad interpretation of the Treaty of Hopewell that would place the Court in the role of colonizer:

> Is it credible, that they should have considered themselves as surrendering to the United States the right to dictate their future cessions, and the terms on which they should be made? or to compel their submission to the violence of disorderly and licentious intruders? . . . Such a measure could not be "for their benefit and comfort," or for "the prevention of injuries and oppression." Such a construction would be inconsistent with the spirit of this and of all subsequent treaties. . . . It would convert a treaty of peace, covertly, into an act annihilating the political existence of one of the parties. Had such a result been intended, it would have been openly avowed.[119]

Furthermore, the *Worcester* Court's statement of congressional supremacy was absolute. The Chief Justice declared that the "whole intercourse between the United States and [the Cherokee] nation, is, by

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113. *Id*. at 555.

114. *Id*. at 556 ("From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians, which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate.").

115. Treaty of Hopewell, U.S.-Cherokee, Nov. 28, 1785, 7 Stat. 18.

116. *Worcester*, 31 U.S. at 552–53.

117. *See* Frickey, *supra* note 99, at 399.

118. *Worcester*, 31 U.S. at 552–53.

119. *Id*. at 554.

our constitution and laws, vested in the government of the United States,"[120] and invalidated the Georgia laws as "interfer[ing] forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the Union."[121]

Scholars have traced basic Indian law canons of construction back to *Worcester*.[122] Today, courts applying the canons construe treaties, agreements, statutes, and executive orders affecting Indians liberally in their favor, interpret them as Indians would have understood them, and leave tribal property rights and sovereign powers intact unless Congress has clearly and unambiguously expressed an intent to abrogate or eliminate them.[123] A court's goal is to achieve the reasonable expectations of the disadvantaged party.[124] The canons underscore the notion that Indian tribes are sovereign bodies—"domestic dependent nations"[125] in a "unique trust relationship"[126]—that possess a government-to-government association with the United States. As a consequence, Congress, not the judiciary, has authority to alter an Indian treaty by diminishing or disestablishing a reservation.[127]

III. MUCH OF A TRIBE'S AUTHORITY IS LINKED TO INDIAN COUNTRY STATUS AND RESERVATION BOUNDARIES

Two basic concepts animate the law of tribal powers over land: Indian Country status[128] and reservation status.[129] Prior to 1948, the practice of fee patenting[130] along with sales of surplus and allotted lands resulted in

120. *Id*. at 520.

121. *Id*. at 561.

122. Frickey, *supra* note 99, at 398.

123. COHEN, *supra* note 5, § 2.02, at 119 n.24.

124. Wilkinson & Volkman, *supra* note 34, at 617–18.

125. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

126. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985).

127. United States v. Celestine, 215 U.S. 278, 285 (1909).

128. *See* GETCHES & WILKINSON, *supra* note 23, at 338 ("The term 'Indian country' is the starting point for analysis of jurisdictional questions in Indian law, because it defines the geographic area in which tribal and federal laws normally apply and state laws normally do not apply.").

129. *See* DeCoteau v. Dist. County Court, 420 U.S. 425, 427 n.2 (1975) ("If the lands in question are within a continuing 'reservation,' jurisdiction is in the tribe and the Federal Government.").

130. In 1906, Congress amended the Dawes Act so that instead of the federal government having

reservations being carved up into "checkerboards" of non-Indian and Indian-owned parcels, making it difficult to determine who had jurisdiction over any given piece of a reservation.[131] To deal with that confusion, Congress declared in 1948 that all land within reservation boundaries, regardless of ownership, is "Indian Country" and under Indian jurisdiction.[132] Indian Country includes all land inside a reservation's borders, land the federal government holds in trust for tribes, and land allotted to individual Indians.[133] Unless and until Congress declares otherwise, tribes and the federal government, rather than state governments, have jurisdiction over Indian Country.[134]

Because reservation boundaries determine the Indian Country status of any given piece of land, an Indian tribe loses a great deal if a court finds Congress diminished its reservation. A tribe's ability to exercise many of its sovereign powers hinges in large part on whether it is trying to do so in Indian Country. For example, with Indian Country status comes authority over zoning, building codes, health services, environmental controls, and other police powers.[135] Tribes also have the

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to hold allotted land in trust for twenty-five years, the Secretary of the Interior could issue premature fee patents to individuals who received allotted land as long as those individuals were deemed competent and capable of managing their own affairs. Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 10–11 (1995) (citing Burke Act of 1906, ch. 2348, 34 Stat. 182 (amending § 6 of the Dawes Act) (codified at 25 U.S.C. § 349 (2006)). Once such a patent was issued, the land was subject to alienation, encumbrance, and taxation. *Id*. at 11. Under pressure to "liberate the Indians from federal guardianship," the government issued patents to unqualified allottees and allottees who neither applied for nor wanted them. *Id*. Even though reports at the time showed at least ninety percent of premature patentees lost their land, the policy was expanded in 1917. *Id*. at 12.

131. ANDERSON, *supra* note 19, at 109–10.

132. Indian Country Act of 1948, ch. 645, 62 Stat. 757 (codified at 18 U.S.C. § 1151 (2006)) ("[A]ll land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, . . . all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and . . . all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."); ANDERSON, *supra* note 19, at 110.

133. COHEN, *supra* note 5, § 3.04[2][c], at 188.

134. *Id*. § 3.04[1], at 182–83; *see also id*. § 13.01, at 890 (noting that Congress can adjust the definition of Indian Country for a specific purpose).

135. Also at stake in reservation boundary disputes are services and benefits Congress has created for Indian tribes, including aid for education, health, welfare, business development, and natural-resource protection. These special programs continue to be directed primarily to Indians on or near reservations. *See* INDIAN TRIBES AS SOVEREIGN GOVERNMENTS, *supra* note 18, at 8.

legal authority to regulate the use of *all* reservation land, including land owned by non-Indians. This authority includes the power to tax,[136] and the Supreme Court has never struck down a tribal tax of reservation land owned by non-Indians.[137]

The location of reservation boundaries also impacts a tribe's ability to claim or reclaim tribal land. Tribes that own parcels of land can petition the federal government to place that land in trust, which creates "tribal trust land," the jurisdictional equivalent of a reservation.[138] This process provides a way for tribes to convert real property they have acquired—or in some situations, reacquired after being removed—into Indian Country, shielding the land from further encroachment.[139] The further a parcel of land lies from a recognized reservation, the greater scrutiny a trust application receives, which means that tribes with diminished reservations will have a more difficult time reclaiming or establishing reservation lands.[140]

Diminishment cases often involve a plaintiff claiming either that a state or local government has exceeded its jurisdiction by regulating Indian Country, or the opposite—that the federal government exceeded its jurisdiction by regulating what is *not* Indian Country.[141] These cases

136. COHEN, *supra* note 5, § 8.04[2][b], at 715.

137. *Id*. § 6.02[2][a], at 515–16.

138. *Id*. § 15.07[1][b], at 1010 ("Taking land into trust shields the land from involuntary loss, and, if the land is located outside an existing Indian reservation, establishes it as Indian country with all the jurisdictional consequences attaching to that status." (internal citations omitted)).

139. *Id*.

140. *Id*. § 15.07[1][b], at 1011–12.

141. For example, *Seymour v. Superintendent* concerned a member of the Colville Indian Tribe in Washington who pled guilty to attempted burglary under state law then filed a petition for a writ of habeas corpus claiming his alleged crime had been committed on the Colville Indian Reservation. 368 U.S. 351, 352 (1962). He argued that a 1906 surplus land act had not diminished the reservation, so the state lacked jurisdiction over his crime. *Id*. at 354–55. Also, *Mattz v. Arnett* arose from a disagreement between a Klamath River Indian who used gill nets to catch fish on the Klamath River and a California game warden who confiscated the nets, claiming a state statute prohibited their use. 412 U.S. 481, 484–85 (1973). The Indian sued, claiming the statute did not apply because he had been using the nets on the Klamath Reservation. *Id*. The state argued an 1892 land surplus act had diminished the reservation. *Id*. In *DeCoteau v. District County Court*, a mother argued the state lacked jurisdiction to order the removal of children from her home because an 1891 surplus land act had not terminated the reservation status of the parcels of land on which the removal had taken place. 420 U.S. 425, 429–31 (1975). Finally, in *Wisconsin v. Stockbridge-Munsee Community*, Wisconsin claimed a casino on the Stockbridge-Munsee Reservation was illegal because the land it was built on was no longer a reservation. 554 F.3d 657, 659 (7th Cir. 2009).

most often arise from disagreements over whether Congress intended to change a reservation's borders through an individual surplus land act.[142] Because the acts allowed both Indians and non-Indians to own tribal land, one logistical concern courts face specific to diminishment questions is the risk of creating the very patchwork quilt of state and federal authority—called "checkerboard jurisdiction"—Congress was trying to avoid when it defined Indian Country in 1948. Courts considering jurisdictional questions try to avoid creating such a result.[143]

IV. IN *SOLEM V. BARTLETT*, THE COURT ADOPTED DEMOGRAPHICS AS AN INTERPRETIVE TOOL

Diminishment cases are difficult because they require courts to interpret congressional intent dating all the way back to the time of surplus land acts. For a while, courts experimented with different approaches to figuring out how Congress intended any one surplus land act to affect a particular reservation's boundaries. Then, in the 1984 landmark case *Solem v. Bartlett*, a unanimous Supreme Court synthesized four of its earlier decisions into a three-tiered analysis incorporating aspects of each case, including the use of modern demographics, to determine congressional intent.[144]

A. The Court's Contradictory Approach to Interpreting Congressional Intent in Surplus Land Acts Led to the Need for a Uniform Test

Between 1962 and 1977, the Supreme Court worked to establish a consistent approach to interpreting surplus land acts. In *Seymour v.*

142. COHEN, *supra* note 5, § 3.04[3], at 197.

143. Courts bemoan checkerboard jurisdiction, but it is an inevitable and necessary consequence of the requirement that courts review congressional intent. *See, e.g.*, Yankton Sioux v. Podhradsky, 529 F. Supp. 2d 1040, 1048 (D.S.D. 2007) ("The inescapable result of the prior court decisions interpreting Congressional acts affecting the Yankton Sioux Reservation is that it is a checkerboard reservation."); *see also* Singer, *supra* note 81, at 609 ("[I]t takes *chutzpah* for the Supreme Court to complain about the untenability of checkerboard jurisdiction when it was the Supreme Court that created checkerboard jurisdiction in a series of cases based on its ruling in *Montana v. United States* [450 U.S. 544 (1981)]. Those cases granted Indian nations substantial sovereign powers over their own lands and over non-Indians who enter tribal lands, but nearly eliminated tribal sovereign powers over non-Indian lands inside Indian country.").

144. 465 U.S. 463, 470–72 (1984).

Superintendent,[145] the Court relied primarily on the text of a 1906 surplus land act to find that the Colville Reservation remained intact.[146] In *Mattz v. Arnett*,[147] decided eleven years later, the Court found that Congress had left the Klamath Reservation intact as well, but this time considered not only the text of the relevant surplus land act, but also its legislative history.[148] In the next two cases, *DeCoteau v. District County Court*[149] and *Rosebud Sioux Tribe v. Kneip*,[150] the Court relied on other factors in addition to text and legislative history. In both *DeCoteau* and *Rosebud Sioux*, the Court found Congress had diminished a reservation.[151] In *DeCoteau*, the Court pointed to newspaper coverage, Bureau of Indian Affairs documents, and the state of the tribe at the time of the 1889 negotiations—they were suffering from disease and failed harvests—to support its conclusion of consent.[152] The *DeCoteau* Court also noted the area's contemporary demographics, which were mostly non-Indian.[153]

In *Rosebud*, the Court examined developments that occurred *after* Congress acted. The Court began its analysis by looking at a 1901 agreement between the tribe and the government that would have diminished the reservation because it contained consent and clear language indicating diminishment.[154] However, Congress never ratified that agreement and three subsequent surplus land acts that did pass lacked such clearly expressed intent.[155] In finding congressional intent to

145. 368 U.S. 351 (1962).

146. *See id*. at 355–59.

147. 412 U.S. 481 (1973).

148. *See id*. at 495–506. The *Mattz* Court touched briefly on historical demographics when it reviewed a letter transmitted to the Committee on Indian Affairs in 1881. An infantry lieutenant, acting as Indian agent, suggested that the Committee's population estimates were "gleaned principally from civilians, who are, I believe, somewhat inclined to lessen the number, thinking doubtlessly that the smaller the number the greater the likelihood of its being thrown open to settlers." *Id*. at 499 n.21.

149. 420 U.S. 425 (1975).

150. 430 U.S. 584 (1977).

151. *DeCoteau*, 420 U.S. at 449; *Rosebud*, 430 U.S. at 588.

152. *DeCoteau*, 420 U.S. at 431–34.

153. The Court began its statement of the facts with the contemporary demographics of the 918,000 acres of land: "Within the 1867 boundaries, there reside about 3,000 tribal members and 30,000 non-Indians." *Id*. at 428.

154. *Rosebud Sioux*, 430 U.S. at 592 ("[T]he effect and intent of the 1901 Agreement, if ratified, would have been to change the Reservation boundaries.").

155. *Id*. at 618–20 (Marshall, J., dissenting). Justice Marshall noted, "What is perhaps most

diminish, the Court considered language in a 1904 Presidential proclamation along with circumstances surrounding the acts, including demographic changes that followed.[156] Specifically, the Court emphasized that "[t]he longstanding assumption of jurisdiction by the State over an area that is over [ninety percent] non-Indian, both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations."[157] The Court then decided it was "simply unable to conclude" that Congress's intent "was other than to disestablish."[158]

Justice Thurgood Marshall wrote a strong dissent, joined by Justice Brennan and Justice Stewart, criticizing the Court's decision in *Rosebud* as "wholly unjustifiable,"[159] and warning that its ramifications "may extend to a large number of other reservations throughout the Nation."[160] For Justice Marshall, the case was a departure from long-standing Indian law canons of construction: "[B]y holding against the Tribe when the evidence concerning congressional intent is palpably ambiguous, [the Court] erodes the general principles for interpreting Indian statutes."[161]

B. In Solem v. Bartlett, *the Court Established a Three-Tiered Analysis Incorporating the Early Diminishment Cases and Establishing Demographics as an Interpretive Tool*

In *Solem v. Bartlett*, the Court wrangled the four earlier diminishment cases into a single comprehensible framework.[162] *Solem* incorporates

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striking about the Rosebud Acts . . . is the absence of any express provision disestablishing the Reservation." *Id.* at 618. Specifically, the acts that passed lacked language indicating the government would pay the tribe a fixed-sum amount for its land. *Id*. at 587 (majority opinion). The Court reasoned, however, that the language used was "substantially equivalent" to that used in the acts at issue in *DeCoteau*. *Id*. at 588.

156. *Id*. at 588, 602–03, 605–06 ("Having determined that the 1904 Act carried forth the intent to disestablish which was unquestionably manifested in the 1901 Agreement, our examination of the 1907 and 1910 Acts is made easier. None of the parties really disputes that the intent of the three Acts was the same.").

157. *Id*. at 604–05.

158. *Id*. at 605.

159. *Id*. at 617 (Marshall, J., dissenting).

160. *Id*.

161. *Id*. at 618.

162. *See* 465 U.S. 463, 470–72 (1984). For a more detailed discussion on the conflicts between these cases, see Susan D. Campbell, *Reservations: The Surplus Land Acts and The Question of Reservation Disestablishment*, 12 AM. INDIAN L. REV. 57, 69 (1984).

factors from each of the four cases to create a three-tiered analysis for determining whether Congress intended a surplus land act to diminish a reservation. The analysis first considers an act's plain language, then the circumstances surrounding the act's passage, and finally what happened after the act took effect, including modern demographics.

The Court began with a statement of absolute congressional power over Indian lands, and the corollary principle of absolute judicial deference: "[O]nly Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."[163] For the Court, these principles meant a reaffirmation of the traditional Indian law canons of construction: "Diminishment . . . will not be lightly inferred. Our analysis of surplus land Acts requires that Congress clearly evince an intent to change boundaries before diminishment will be found."[164]

The first tier of the Court's framework was the plain language of the congressional act, which the Court considered "[t]he most probative evidence of congressional intent."[165] The second tier was the act's legislative history and events surrounding its passage, which might reveal evidence that "Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged."[166] The Court said that if courts fail to find "substantial and compelling evidence" of congressional intent to diminish after considering those first two factors, they should stop their inquiry and leave the reservation intact.[167] If a lower court found such evidence, however, it could look for "one additional clue" of congressional intent by examining what happened after Congress acted,

163. *Solem*, 465 U.S. at 470.

164. *Id*.

165. *Id*. The Court described certain phrases in surplus land acts as important. Explicit reference to "cession" or other language "evidencing the present and total surrender of all tribal interests," combined with language indicating that Congress had agreed to unconditionally pay tribes for the opened land, create an "almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Id*. at 470–71.

166. *Id*. at 471.

167. *Id*. at 472.

including changes in demographics.[168]

The Court acknowledged that relying on demographic history was an "unorthodox and potentially unreliable" method of statutory construction, but defended the factor as a "necessary expedient,"[169] because during the time of surplus land acts, "various factors kept Congress from focusing on the diminishment issue."[170] The Court also argued that the factor created "practical advantages,"[171] defending the assertion that:

> When an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of state and local governments. Conversely, problems of an imbalanced checkerboard jurisdiction arise if a largely Indian opened area is found to be outside Indian country.[172]

The Court concluded by emphasizing that federal courts would not use unorthodox interpretive tools to diminish a reservation without first having found strong evidence from more traditional sources:

> There are, of course, limits to how far we will go to decipher Congress' intention in any particular surplus land Act. When both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place

168. *Id*. at 471–72.

169. *Id*. at 472 n.13.

170. *Id*.; *see also id.* at 468 ("The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century."). For a criticism of this historical analysis, see Campbell, *supra* note 162, at 96. Campbell argues that Congress omitted explicit language of cession from surplus land acts because leaving reservations intact aided the implementation of allotment, provided a backup system in case allotment failed or the Indians rebelled, and perhaps also protected Indians from settlers and state authorities. *Id*.

171. *Solem*, 465 U.S. at 471.

172. *Id*. at 471–72 n.12 (internal citations omitted) (citing DeCoteau v. Dist. County Court, 420 U.S. 425 (1975); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977)); *see also id*. at 471 ("On a more pragmatic level, we have recognized that who actually moved onto open reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." (citing *DeCoteau*, 420 U.S. at 428; *Rosebud Sioux*, 430 U.S. at 588 n.3, 604–05)).

and that the old reservation boundaries survived the opening.[173]

Applying the new analysis to the Cheyenne River Act,[174] the *Solem* Court found that Congress had left the Cheyenne River Sioux Reservation intact.[175] After finding some evidence of congressional intent to diminish in the text and surrounding circumstances, the Court analyzed the reservation's modern demographics: "The strong tribal presence in the opened area has continued until the present day. Now roughly two-thirds of the Tribe's enrolled members live in the opened area. The seat of tribal government is now located in a town in the opened area, where most important tribal activities take place."[176] The Court also observed that the population of the disputed area was evenly divided between Indian and non-Indian residents, making it "impossible to say that the opened areas of the Cheyenne River Sioux Reservation ha[d] lost their Indian character."[177]

Some commentators have noted that even though the *Solem* Court cautioned against relying exclusively on demographics, it seemed to do just that in an effort to maintain the reservation's borders:

> The logical relationship between the question of what Congress meant when it legislated many years ago and the ethnicity of the people who now live on or near the reservation has always been attenuated, at best. [*Solem*] is brimming with self-consciousness over the very suggestion of a link between the two. . . . Oddly enough, in the face of all this apprehension about using present demography as a tool in statutory construction, in the end it is about the only thing that the Court found "clear" . . . .[178]

At the time, one commentator noted that the Court's use of subsequent events and demographic changes to measure congressional intent "might have produced the right result in *Solem*," but "ha[d] the potential of producing wrong results in many surplus land cases."[179]

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173. *Id*. at 472.

174. Act of May 29, 1908, ch. 218, 35 Stat. 460.

175. *Solem*, 465 U.S. at 481.

176. *Id*. at 480.

177. *Id*.

178. Robert Laurence, *The Dominant Society's Judicial Reluctance to Allow Tribal Civil Law to Apply to Non-Indians: Reservation Diminishment, Modern Demography and the Indian Civil Rights Act*, 30 U. RICH. L. REV. 781, 789–90 (1996).

179. Campbell, *supra* note 162, at 71.

V. SINCE *SOLEM*, COURTS HAVE CONSISTENTLY USED DEMOGRAPHICS TO FIND DIMINISHMENT

Since *Solem*, the Supreme Court has decided two diminishment cases: *Hagen v. Utah*[180] and *South Dakota v. Yankton Sioux Tribe*.[181] In both cases, the Court ruled against the tribe; and in both cases, it relied in part on modern demographics to do so. Other federal courts that have considered modern demographics in diminishment cases have also consistently ruled against tribes. The few courts since *Solem* that have left reservations intact have not relied on demographics to do so.[182]

A. The Supreme Court Has Considered Diminishment Twice Since Solem *and Both Times it Used Demographics to Find Against Indian Tribes*

Hagen v. Utah involved the Uintah Indian Reservation and two surplus land acts.[183] One, from 1902, said the reservation would be allotted if the tribe consented (which it did not);[184] the other, from 1905, actually opened the reservation to non-Indians without tribal consent after the Supreme Court in 1903 held it was constitutional to do so.[185] The state argued that read together, the 1902 and 1905 acts showed congressional intent to diminish the reservation.[186] The Supreme Court

180. 510 U.S. 399 (1994).

181. 522 U.S. 329 (1998).

182. This Comment's analysis is representative, not exhaustive. For example, Part V discusses a Ninth Circuit case, *United States v. Webb*, 219 F.3d 1127, 1138 (9th Cir. 2000), which held a reservation had not been diminished without considering demographics, but not an Eighth Circuit case, *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1296–98 (8th Cir. 1994), in which the court applied *Solem*'s test to reconsider its prior decision to leave the Fort Berthold Reservation intact and upheld its earlier ruling. The Eighth Circuit decision reversed a district court's consideration of "population and fee ownership patterns" to determine a certain part of the Reservation was "de facto" excluded from most aspects of tribal jurisdiction. *Duncan Energy*, 27 F.3d at 1298. The court called "this exclusive reliance on the third *Solem* factor to create a quasi-diminishment totally inappropriate." *Id*.

183. 510 U.S. at 403–07. The case arose after the State of Utah charged Hagen with distribution of a controlled substance in 1989. *Id.* at 408. Hagen entered a conditional plea of guilty, arguing that the crime had occurred on the Uintah Indian Reservation. *Id*. The State argued it had jurisdiction because Congress diminished the reservation in 1905. *Id*.

184. The 1902 act never took effect. *Id*. at 404–08, 422 (Blackmun, J., dissenting).

185. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 567–68 (1903).

186. Brief for the Respondent at 23–25, Hagen v. Utah, 510 U.S. 399 (1994) (No. 92-6281), 1993 WL 384805, at *23–25.

first considered text in the 1902 act that said unallotted lands "shall be restored to the public domain."[187] Turning to historical circumstances, the Court determined that a contemporaneous understanding existed that once the 1905 Act opened the land to non-Indians there would be no "outside boundary line to this reservation."[188] The Court held that both factors—text and historical circumstances—pointed toward intent to diminish.[189]

The Court next considered modern demographics, noting that about eighty-five percent of the land's population was non-Indian, and that the largest city in the area was about ninety-three percent non-Indian.[190] For the Court, those numbers "demonstrate[d] a practical acknowledgement that the Reservation was diminished; a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area."[191]

Dissenting, Justice Blackmun argued that the majority had abandoned the Indian law canon of construction requiring courts to interpret ambiguities in favor of the Indians,[192] and that its decision was

187. *Hagen*, 510 U.S. at 404. In his dissent, Justice Blackmun argued that the majority's reliance on the "public domain" language ignored *Solem*'s conclusion that "the public domain is an ambiguous concept that is not incompatible with reservation status." *Id*. at 429 (Blackmun, J., dissenting).

188. *Id*. at 417 (quoting the federal inspector who negotiated the act as saying that after the surplus land act takes effect, "there will be no outside boundary line to this reservation").

189. *Id*. at 420. Legal scholars have disagreed with *Hagen*'s conclusion. *See, e.g.*, Rebecca Tsosie, *Tribalism, Constitutionalism and Cultural Pluralism: Where Do Indigenous Peoples Fit Within Civil Society?* 5 PA. J. CONST. L. 357, 381 (2003) ("In *Hagen v. Utah*, the Supreme Court examined possibly the most ambiguous record of Congressional intent to date . . . . While [Justice] O'Connor purported to apply the same three-part test articulated in *Solem v. Bartlett*, which examined the statutory language, the historical context of a Surplus Land Act, and who actually moved onto the opened land, it became apparent that the Court's primary concern was over the governance of many non-Indians in the area.").

190. *Hagen*, 510 U.S. at 420–21.

191. *Id*. at 421 (citing Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 604–05 (1977)).

192. *Id*. at 422 (Blackmun, J., dissenting). Justice Blackmun argued that both the statutory text and surrounding circumstances were ambiguous and that those ambiguities should be interpreted in favor of the Indians. *Id*. at 422–24. He emphasized that the Court focused its textual analysis on the 1902 act, which never went into effect, and that the term "public domain," which the majority pointed to as language suggesting diminishment, was removed from the 1905 act, which actually did take effect. *Id*. at 422, 427–30, 433–38. Even if one assumed the majority's position that such language suggested intent to diminish, the removal of that language indicated Congress's intent to *not* diminish the reservation, he argued. *Id*. at 436–38. He also offered examples of sentences the federal inspector spoke over six days of negotiations that indicated the tribe members would be "deprived of no privileges you have at the present time," and that they would maintain jurisdiction

unsupported by precedent: "Although the majority purports to apply these canons in principle . . . it ignores them in practice."[193] For the dissent, checkerboard jurisdiction was the consequence of a deliberate congressional policy decision:

> Nothing in the "face of the Act," its "surrounding circumstances," or its "legislative history" establishes a clear congressional purpose to diminish the Uintah Reservation. I appreciate that jurisdiction often may not be neatly parsed among the States and Indian tribes, but this is the inevitable burden of the path this Nation has chosen. Under our precedents, the lands where petitioner's offense occurred are Indian country, and the State of Utah lacked jurisdiction to try him for that crime.[194]

The Supreme Court's next diminishment decision was *South Dakota v. Yankton Sioux Tribe*.[195] Tribal, state, and federal officials disagreed over whether environmental regulations applied to a solid waste disposal facility located within the Yankton Sioux Reservation's original 1858 boundaries. The State of South Dakota argued that Congress had diminished the reservation in a surplus land act from 1894.[196] The Court found that the plain language of the 1894 act clearly indicated congressional intent to diminish the reservation,[197] and that the historical

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over their land. *Id*. at 432.

193. *Id*. at 424. Justice Blackmun stated that the majority had resolved "every ambiguity in the statutory language, legislative history, and surrounding circumstances in favor of the State and imputing to Congress, where no clear evidence of congressional intent exists, an intent to diminish the Uintah Valley Reservation." *Id.*

194. *Id*. at 442 (internal citations omitted).

195. 522 U.S. 329 (1998).

196. *Id*. at 333.

197. *Id*. The Court first looked to the statutory language of the act, which provided that the tribe would "cede, sell, relinquish and convey" to the United States all unallotted land on the reservation and the federal government would compensate the tribe by paying a lump sum of $600,000, about $3.60 per acre. *Id*. at 338. However, the act also contained a savings clause that said the 1894 act left "all provisions of" the 1858 act in "full force and effect." *Id*. at 338–39. The savings clause made the 1894 Act "undeniably ambiguous." *See* A.J. Taylor, Note, *A Lack of Trust:* South Dakota v. Yankton Sioux Tribe *and the Abandonment of the Trust Doctrine in Reservation Diminishment Cases*, 73 WASH. L. REV. 1163, 1183 (1998) ("Even if articles I and II [of the 1894 Act] 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."). The Court, however, decided that "[t]he unconditional relinquishment of the Tribe's territory for settlement by non-Indian homesteaders [in the 1894 act] can by no means be reconciled with the

circumstances also indicated a "contemporaneous understanding that the proposed legislation modified the reservation."[198]

The Court next turned to demographics, and noted that less than one-third of the population was Indian.[199] The tribe argued that data indicated a rising Indian population, and pointed out that the tribe was the area's largest employer.[200] The Court reviewed evidence presented by the tribe, but was not persuaded, concluding that "the area remains predominately populated by non-Indians with only a few surviving pockets of Indian allotments, and those demographics signify a diminished reservation."[201]

B. Federal Courts Considering Diminishment Since Solem *Have Consistently Failed to Use Demographics to Favor Indian Tribes*

Since *Solem*, federal courts presented with demographic evidence suggesting even larger Indian populations than the *Solem* Court considered have consistently failed to use that evidence to support maintaining a reservation's borders.

Pittsburg & Midway Coal Mining Co. v. Yazzie,[202] one of the first diminishment cases decided by a federal circuit court after *Solem*, involved a coal-mining company's challenge to a tribe's tax authority.[203] The area's demographic makeup was undeniably Navajo: Indians made up ninety percent of the population.[204] About fifty-five percent of the land surface was either owned by the tribe and tribal members, or held in

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central provisions of the 1858 Treaty, which recognized the reservation as the Tribe's 'permanent' home and prohibited white settlement there," and that such an "absurd conclusion" supported a finding of diminishment. *Yankton Sioux*, 522 U.S. at 345–46.

198. *Yankton Sioux*, 522 U.S. at 352.

199. *Id*. at 356.

200. Brief for the Respondents Yankton Sioux Tribe and Darrell E. Drapeau at 18, South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) (No. 96-1581), 1997 WL 593862, at *18.

201. *Id*. at 356–57 (internal quotation marks omitted) (quoting Solem v. Bartlett, 465 U.S. 463 (1984)). The Court remanded *Yankton Sioux* to the district court, with instructions to decide whether the reservation had been entirely disestablished. *Id*. at 358. After further proceedings, including an appeal to the Eighth Circuit and another remand, it was decided in 2007 that the reservation continues to exist, but is significantly diminished from the original 1858 reservation boundaries. *See* Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010, 1030 (8th Cir. 1999); Yankton Sioux Tribe v. Pohradsky, 529 F. Supp. 2d 1040 (D.S.D. 2007).

202. 909 F.2d 1387 (10th Cir. 1990).

203. *Id*. at 1388–89.

204. *Id*. at 1419.

trust for them.[205] The tribe also leased twenty percent of the area's land from the federal government.[206]

The Tenth Circuit Court of Appeals diminished the reservation after studying the text of the surplus land act and the surrounding circumstances of its passage. It did not consider the strong Navajo presence, explaining that it "need not linger over the subsequent demographics of the area" because it had already found compelling evidence of diminishment.[207] The court concluded that it would not "'remake history' and declare a *de facto* reservation in the face of clear congressional intent to the contrary."[208]

More recently, in January 2009, the Seventh Circuit, in considering acts from 1871 and 1906, relied primarily on circumstances surrounding the acts' passage and subsequent events to diminish and then disestablish the reservation of the Stockbridge-Munsee Community,[209] even though the statutory language lacked a clear expression of congressional intent[210] and the tribe had submitted evidence that the land's population was sixty-three percent Indian.[211] In their briefs, the parties had disagreed over what "demographics" meant, but the court did not address the issue.[212] In a short concurring opinion, Judge Kenneth Ripple emphasized that the court was not abandoning the Indian law canon that only Congress can change or disestablish a reservation's boundaries, or *Solem*'s finding that explicit language holds the most probative value because, "the unique historical context [of the case at hand] makes it

205. *Id*.

206. *Id*. at 1419–20.

207. *Id*. at 1419.

208. *Id*. at 1420 (citing DeCoteau v. Dist. County Court, 420 U.S. 425, 449 (1975)).

209. Wisconsin v. Stockbridge-Munsee Cmty., 554 F.3d 657, 664 (7th Cir. 2009).

210. *Id*. at 663.

211. Opening Brief of Defendants-Appellants the Stockbridge-Munsee Community and Robert Chicks at 14, *Stockbridge-Munsee Cmty.*, 554 F.3d 657 (No. 04-3834), 2008 WL 1756378, at *14.

212. *See* Reply Brief of Defendants-Appellants the Stockbridge-Munsee Community and Robert Chicks at 23, *Stockbridge-Munsee Cmty.*, 554 F.3d 657 (No. 04-3834), 2008 WL 2066506, at *23 ("[T]he State does not dispute that the demographics of the two-township Reservation compare very favorably to cases in which the Supreme Court and Circuit Courts have found no diminishment or disestablishment. The State nevertheless attempts to gerrymander a more limited 'disputed area' (by excluding lands reacquired by the Tribe) to skew the population statistics. The 'disputed area,' however, is the entire two-township Reservation. *See, e.g.*, *Solem*, 465 U.S. at 480 (treating the disputed area as *the entire area alleged to have been diminished*). Thus, the demographics, and the problems of checkerboard jurisdiction, weigh heavily in the Tribe's favor." (some internal citations omitted)).

unreasonable for us to demand a clearer statement in the statutory language."[213]

United States v. Webb[214] is one case decided since *Solem* that rejected diminishment.[215] However, the court did so without considering demographics. At issue was whether the Nez Perce Reservation in Idaho, established by an 1863 treaty, was diminished or disestablished by an 1893 surplus land act.[216] Applying *Solem*'s test, the court concluded that when "both an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place . . . ."[217]

The Ninth Circuit held that the plain text of the 1893 Act failed to suggest Congress intended to diminish the reservation because it lacked any mention of a change in reservation boundaries and contained a savings clause to preserve the land rights created by an earlier treaty.[218] The court cited language in *Mattz* acknowledging that Congress knew how to require termination or disestablishment of reservations by express language in surplus land acts when it wanted to, and concluded it had not done so in the case at hand.[219]

Next, the court turned to surrounding circumstances. After finding that the circumstances surrounding the 1894 Act disclosed "nothing to impeach the district court's findings" rejecting diminishment,[220] the court considered subsequent events, including documented post hoc references to the "former" reservation.[221] It found that the bulk of that

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213. *Stockbridge-Munsee Cmty*., 554 F.3d at 665. The "unique historical context" was essentially that, unlike the surplus land acts which were designed to open land to white settlers and to encourage the assimilation and integration of the tribes into white society, the purpose of the 1871 Act was to provide economic benefit to the tribe and to open lands to lumbering interests for the legal harvesting of timber. Wisconsin v. Stockbridge-Munsee Cmty., 366 F. Supp. 2d 698, 765 (E.D. Wis. 2004). The Act also addressed the long-standing conflict between two tribal factions, the Indian party and the Citizen party, and treated them in different ways. *Stockbridge-Munsee Cmty*., 554 F.3d at 659–60.

214. 219 F.3d 1127 (9th Cir. 2000).

215. *Id*. at 1138.

216. *Id*. at 1131.

217. *Id*. at 1132 (citing Solem v. Bartlett, 465 U.S. 463, 472 (1984)).

218. *Id*. at 1135.

219. *Id*. at 1135 (citing Mattz v. Arett, 412 U.S. 481, 504 (1973)).

220. *Id*.

221. *Id*. at 1137 n.15.

evidence consisted of events that occurred after ratification, "the category deemed least probative by the Supreme Court" in *Solem*, and that the references created an ambiguity that Indian Law canons demand be resolved in favor of the tribe.[222]

VI. IN *SHERRILL V. ONEIDA* THE SUPREME COURT USED DEMOGRAPHICS TO SUPPORT A FINDING OF LACHES

In *City of Sherrill v. Oneida Indian Nation*[223] the Supreme Court expanded *Solem*'s use of demographics beyond the realm of diminishment. It did so by pointing to the diminishment cases[224] to support its use of laches to prevent a tribe from asserting its sovereign right to reservation land.[225]

The case's controversy was rooted in a conflict more than two hundred years old. In the years after the Revolutionary War, New York began purchasing sections of three hundred thousand acres of Oneida reservation, ignoring the 1794 Treaty of Canandaigua in which the United States acknowledged the Oneida's reservation and guaranteed the tribe "free use and enjoyment" of that land.[226] Early Washington administrations objected to the state's actions, but later administrations pursued a policy to open reservation lands to white settlers.[227] In short, the Oneidas were forced to abandon their land. Many ended up on a reservation in Wisconsin and their New York reservation eventually dwindled to just thirty-two acres.[228] In the mid-twentieth century, the Oneidas began seeking some form of remedy.[229]

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222. *Id*. The category of subsequent events also includes demographics, which the Ninth Circuit noted but did not specifically consider. *Id*. at 1132 (acknowledging that *Solem*'s "far less probative" category of subsequent events includes Congress's treatment of the affected area as well as "who settled in the area and subsequent demographic history"). In *Yankton Sioux*, the Supreme Court had considered similar evidence and found diminishment. *Id.* at 1133. However, the Ninth Circuit distinguished *Webb* in part because the land in question was allotted as opposed to unallotted. *Id*.

223. 544 U.S. 197 (2005).

224. *Id*. at 215 (citing *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604–05 (1977) and *Hagen v. Utah*, 510 U.S 399, 421 (1994) to support consideration of "jurisdictional history" and "the current population situation" in using the doctrine of laches).

225. *Id*. at 211.

226. *Id*. at 204–05.

227. *Id*. at 206.

228. *Id*. at 207.

229. *Id*. at 207–08.

In 1951, the Oneidas of Wisconsin and those remaining in New York sought redress for lands New York had acquired between 1795 and 1846. The Indian Claims Commission found that the federal government had breached its fiduciary duty to ensure the Oneidas received conscionable consideration from New York for the land in question.[230] Before the case could go any further, however, the Oneidas asked for its dismissal. They had decided to pursue legal action against local governments instead.[231]

The tribe filed a test case in 1970 against the New York counties of Oneida and Madison.[232] It asked for damages in the form of fair rental value for the years 1968 and 1969 of 872 acres of land occupied by the two counties.[233] The case went to the Supreme Court on a jurisdictional issue and, in *Oneida I*, the Court held the Oneidas could sue in federal court.[234] The case was then heard in the lower federal courts and eventually made its way back to the Supreme Court, which in *Oneida II* held the Oneidas could maintain their claim to be compensated "for violation of their possessory rights based on federal common law."[235] The Supreme Court left open the question of whether equitable considerations should limit the relief available.[236]

In 2000, the Oneidas filed a second case.[237] This time, the tribe sought to recover land it had not occupied for about two hundred years and to eject twenty thousand private landowners.[238] The district court refused, saying the situation "cr[ied] out for a pragmatic approach."[239] The court agreed that the Oneidas might recover some type of compensation, but held that ejection went too far.[240]

Rebuffed in their attempt to eject private landowners, the Oneidas used money they collected through their casino to purchase some of the

230. *Id*.

231. *Id*. at 208.

232. *See* Oneida Indian Nation v. County of Oneida, 464 F.2d 916 (2d Cir. 1972).

233. *Id*. at 920.

234. Oneida Indian Nation v. County of Oneida (*Oneida I*), 414 U.S. 661, 682 (1974).

235. County of Oneida v. Oneida Indian Nation (*Oneida II*), 470 U.S. 226, 236 (1985).

236. *See* City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 209 (2005). On remand, Oneida was awarded $15,994 from Oneida County and $18,970 from Madison County. *Id*.

237. Oneida Indian Nation v. County of Oneida, 199 F.R.D. 61 (N.D.N.Y. 2000).

238. *Id*. at 61–62.

239. *Sherrill*, 544 U.S. at 211 (quoting *Oneida Indian Nation*, 199 F.R.D. at 92).

240. *Id*. at 210–11.

land that had been illegally taken in 1805.[241] Some of that land was located within the City of Sherrill's limits—specifically two parcels containing a gas station and convenience store—so the city wanted the tribe to pay taxes.[242] But when the city sent the tribe a property-tax bill for about $3,000, the tribe refused to pay, claiming it had sovereign immunity against such taxes because the land it had purchased was within its reservation borders.[243] Only Congress, not the courts, could strip the tribe of that immunity, it argued.[244] The city sued for eviction, setting the stage for *Sherrill*.[245]

Supporters on both sides emphasized matters of fairness. Sherrill's city manager, for example, argued it was unfair for one local business to pick and choose what taxes it would pay.[246] Other counties said that Indians, who made up less than one percent of the population, had bought more than 16,000 acres of land in the area costing the counties about $1.5 million in lost property taxes and $8 to $10 million in lost sales taxes that other taxpayers had to make up.[247]

Daan Braveman, a law professor at Syracuse University told the *New York Times* that the situation signified the "Catch-22" that Indians face: "Their sovereignty is not a divisive issue only as long as they remain too poor and powerless to do anything with it."[248] As for the argument that too much time had passed, Harry R. Sachse, a lawyer in Washington who represents various tribes, opined in the same article that the argument itself was unfair because the Oneidas had been wronged during a time when they faced serious barriers to remedies.[249] He argued that they should not be penalized just because "enough time goes by."[250]

The tribe and U.S. government maintained their claim that because the Court in *Oneida II* had recognized the Oneidas' title to their reservation and because the tribe had purchased the land in question

241. *See* Brief for Petitioner at 9, City of Sherrill v. Oneida Indian Nation, 544 U.S. 1057 (2005) (No. 03-855), 2004 WL 1835364, at *9.

242. *Id*. at 9–10.

243. Peter Applebome, *A Land Deal, A Tax Bill And a Dispute*, N.Y. TIMES, Jan. 9, 2005, at 23.

244. Brief for Respondents at 9, *Sherrill*, 544 U.S. 1057 (No. 03-855), 2004 WL 2246333, at *9.

245. City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 198 (2005).

246. Applebome, *supra* note 243, at 23.

247. *Id*.

248. *Id*.

249. *Id*.

250. *Id*.

(which was within the reservation boundaries) on the open market, the tribe had sovereign immunity from taxation.[251] Since Congress had not revoked that immunity, the tribe should not have to pay taxes to the City of Sherrill.[252]

In the district court, city attorneys had asked to brief the equitable doctrine of laches, hoping to argue that too much time had passed without tribal presence on the land. The court denied the motion, holding that laches "is not an available defense in actions brought by Indians, or by the United States on behalf of Indians, to protect their rights to their lands."[253] The Second Circuit affirmed that decision, so no record on laches was ever developed.[254] On the merits, both lower courts sided with the tribe, finding that the parcels in question were within the reservation boundaries and that the relevant surplus land act had left the reservation intact.[255]

The Supreme Court reversed, basing its decision on laches.[256] The Court declined to address the issue of diminishment, deciding the case instead under the doctrines of laches, acquiescence, and impossibility,[257] holding that it had been too long since the tribe had first relinquished its governmental interest in the land for it to claim sovereignty.[258]

The Court began its analysis with a discussion of the area's modern demography: "According to the 2000 census, over 99% of the population in the area is non-Indian: American Indians represent less than 1% of the city of Sherrill's population and less than 0.5% of Oneida County's population."[259] The justices reasoned that an Oneida victory

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251. Brief for Respondents at 12, City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005) (No. 03-855), 2004 WL 2246333, at *12.

252. *Id*.

253. Oneida Indian Nation v. City of Sherrill, 145 F. Supp. 2d 226, 259 (N.D.N.Y. 2001).

254. Respondent's Petition for Rehearing at 1–2, *Sherrill*, 544 U.S. 197 (No. 03-855), 2005 WL 959687, at *1–2.

255. *Sherrill*, 544 U.S. at 212.

256. *Id*. at 214 n.8 (citing SUP. CT. R. 14.1(a)). For the Court, the lack of briefing on the issue was not a concern: "the question of equitable considerations . . . is inextricably linked to, and is thus 'fairly included' within, the questions presented." *Id*.

257. *Id*. at 215. The Court explained that the appropriateness of relief awarded to the Oneidas must be evaluated in light of the long history of state sovereign control over the territory. *Id*. The properties involved "have greatly increased in value since the Oneidas sold them 200 years ago. Notably, it was not until lately that the Oneidas sought to regain ancient sovereignty over land converted from wilderness to become part of cities like Sherrill." *Id*.

258. *Id*. at 218.

259. *Id*. at 211.

would create the "disruptive practical consequences" that the impossibility doctrine is designed to avoid.[260] The Court set the stage for its discussion of the equitable doctrines by explicitly comparing the "different, but related, context of the diminishment of an Indian reservation":[261]

> This Court has observed . . . that "[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use," may create "justifiable expectations." . . . Similar justifiable expectations, grounded in two centuries of New York's exercise of regulatory jurisdiction, until recently uncontested by [the Oneida Indian Nation], merit *heavy weight* here.[262]

The Court further reasoned that 25 U.S.C. § 465, which authorizes the Secretary of the Interior to acquire land in trust for Indians and specifies that such land will be exempt from state and local taxation, provided the proper avenue for the Oneidas.[263] While the Court agreed with the tribe that the property fell within the boundaries of its reservation, it nonetheless upheld the city's taxing authority.[264] The claim to a sovereign's exclusive legal rights does not survive eternally, it decided.[265] Allowing the tribe to exercise its taxation immunity would be a remedy that stretched into the future, a result the Court rejected.[266]

In dissent, Justice Stevens lamented that the Court had crossed into Congress's territory.[267] He asserted:

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260. *Id*. at 219 (citing Yankton Sioux Tribe v. United States, 272 U.S. 351, 357 (1926) and concluding that "the unilateral reestablishment of present and future Indian sovereign control, even over land purchased at the market price, would have disruptive practical consequences similar to those that led this Court in *Yankton Sioux* to initiate the impossibility doctrine.").

261. *Id*. at 215 (citing Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 604–05 (1977); Hagen v. Utah, 510 U.S 399, 421 (1994) ("'[J]urisdictional history' and 'the current population situation . . . demonstrat[e] a practical acknowledgement' of reservation diminishment"; "a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area . . . .")); *see also id*. at 219–20 (referring to Solem v. Bartlett, 465 U.S. 463, 471–72 n.12 (1984)).

262. *Id*. at 215–16 (internal citations omitted and emphasis added).

263. *Id*. at 221.

264. *Id*.

265. *Id*. at 221 n.14.

266. *Id*.

267. *Id*. at 222 (Stevens, J., dissenting). Justice Stevens argued that both sides had agreed throughout the case that if the tribe's properties were within the reservation's boundaries, "the City has no jurisdiction to tax them without express congressional consent," *id*. at 223, and that Congress had in fact already spoken on the issue of sovereign tax immunity and reconfirmed it with respect to

> [T]he Court has ventured into legal territory that belongs to Congress. Its decision today is at war with at least two bedrock principles of Indian law. First, only Congress has the power to diminish or disestablish a tribe's reservation. Second, as a core incident of tribal sovereignty, a tribe enjoys immunity from state and local taxation of its reservation lands, until that immunity is explicitly revoked by Congress.[268]

By ignoring those principles, he argued:

> [T]he Court has done what only Congress may do—it has effectively proclaimed a diminishment of the Tribe's reservation and an abrogation of its elemental right to tax immunity. Under our precedents, whether it is wise policy to honor the Tribe's tax immunity is a question for Congress, not this Court, to decide.[269]

In a motion for a rehearing, the tribe's attorneys asked for a chance to brief the issue of laches.[270] They argued that the Court erred in finding acquiescence: "[T]he Court's opinion must be read to fault the Oneidas for failing to sue the State or local governments before repurchasing land. But the Court did not consider whether such suits were possible."[271] The tribe could not have sued in federal court for immunity before possessing the land in question,[272] and Congress had forbidden state courts from hearing such suits.[273] "In short, this Court's crucial

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the reservation lands of the New York Indians, *id*. at 224–25. He pointed to the fact that in providing New York state courts with jurisdiction over civil actions between Indians, Congress had emphasized that the statute was not to be "construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes." *Id*. at 224 n.4 (citing 25 U.S.C. § 233 (2000)).

268. *Id*. at 223–24.

269. *Id*. at 224–25.

270. Petition for Rehearing, *supra* note 254, at 4.

271. *Id*. at 4; *see also* Sarah Krakoff, City of Sherrill v. Oneida Indian Nation of New York*: A Regretful Postscript to the Taxation Chapter in Cohen's Handbook of Federal Indian Law*, 41 TULSA L. REV. 5, 14–15 (2006) ("[T]he Oneidas' ability to sue the federal government was dependent on the United States' consent pursuant to the establishment of the Indian Claims Commission in 1946. In short, the Oneidas, in joining in the 1893 litigation and suing the United States as early as 1951, were doing all that could reasonably be expected of an Indian tribe to address allegations of illegal dispossession of property."). For a discussion of this and other barriers the Oneidas faced in bringing suit, see generally Singer, *supra* note 81.

272. Petition for Rehearing, *supra* note 254, at 4 (arguing that the tribe would have been prevented from pursuing a claim in federal court for several reasons, including the Eleventh Amendment bar against suing a state in federal court).

273. *Id*.

premise of available but foregone remedies does not stand up when examined concretely," the tribe argued.[274] Finally, the tribe argued that the Court would benefit from briefing about congressional intent:

> When Congress, in the 1960s through 1980, statutorily authorized tribal possessory actions, it pointedly refused to enact time bars, and it did so fully aware that the lands subject to tribal possessory and treaty claims had been in non-Indian hands and under non-Indian jurisdiction for many years. This Court, in its current opinion, did not consider how its policy judgment that it is too late for the Oneidas to assert tax immunity (on land purchased from willing sellers) can be squared with Congress' evident judgment *not* to bar "ancient" claims to possessory and treaty rights.[275]

Indian law scholars have railed against *Sherrill* as a dangerous precedent that will allow courts to dismiss tribal claims for reasons related to equity without applying substantive law.[276] One scholar took special issue with the Court for saying the tribe could seek federal trust status:

> The Court is prolonging the "dependent" state of Indian nations by forcing them to seek shelter from the federal government—by necessitating taking land back into trust status—during a time when at least some Indian nations finally have the resources to begin to act as *independent*, albeit unique, sovereigns. . . . Today, the Court forces the dependent status to continue, despite the repudiation of colonialism and its moral underpinnings that we allegedly embrace.[277] [278]

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274. *Id*. at 5.

275. *Id*. at 5–6 (internal citation omitted).

276. *See* Singer, *supra* note 81, at 611–12. Singer argues that in relying on laches, "the Court ignores certain facts—facts that are well-known to those versed in federal Indian law, as the Supreme Court certainly should be. A number of principles of both jurisdiction and substantive law barred the Oneidas from suing either the state of New York or the United States until the 1960s, and New York's sovereign immunity may bar suit even today. These facts make it ludicrous to blame the Oneida Indian Nation for waiting too long to file a lawsuit to recover the lands illegally transferred to the state of New York in the early 19th Century." *Id. See also* Krakoff, *supra* note 271, at 10 ("*City of Sherrill* . . . flings open the doors of equitable discretion. . . . [L]itigants will ask courts to dismiss tribal claims grounded in historical wrongs more frequently, and courts will grant those requests for dismissal more frequently. The substantive law is relatively untouched, but it will rarely be applied.").

277. Krakoff, *supra* note 271, at 18.

278. In April 2005, one month after the Court issued *Sherrill*, the tribe filed an application with

VII. COURTS SHOULD ABANDON DEMOGRAPHICS AS A MEASURE OF CONGRESSIONAL INTENT

Courts should stop using demographics to measure congressional intent in diminishment cases. Since *Solem* offered its reluctant endorsement of demographics as a tool for deciphering congressional intent, the factor has been applied consistently against Indian interests and the canons of construction meant to protect them. This Part explains the political and legal consequences of the Supreme Court assuming a legislative role and argues that with *Sherill*, the Court laid the groundwork for expanding the negative effects of demographics beyond diminishment into other areas of Indian law.

A. Consideration of Demographics in Diminishment Cases Has Led to the Erosion of Canons That Protect Tribal Sovereignty, Further Democratic Principles, and Ensure Public Accountability

While courts considering questions of diminishment often begin by reciting the Marshall Court's special canons of construction, they tend to apply them halfheartedly. This is unfortunate because despite their controversial roots,[279] the canons of construction serve a vital purpose beyond statutory construction. They promote core national values about American relations with Indians by emphasizing the special trust relationship between the federal government and Indian tribes and placing decision-making authority regarding that relationship with the representative branch. Keeping authority for Indian affairs squarely with Congress, as opposed to the judiciary, provides for greater accountability.

Chief Justice Marshall understood that federal courts would be powerless to prevent many of the grave injustices that would occur as a result of colonialism and conquest, and that it would ultimately be up to the electorate to hold the "Conqueror" to standards of "humanity."[280] Yet

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the Department of the Interior requesting the United States take into trust 17,370 acres located in Madison and Oneida counties, including the land at issue in the Supreme Court case. The Department announced it would take 13,004 acres of the land into trust. U.S. DEP'T OF THE INTERIOR, FACT SHEET CONCERNING THE RECORD OF DECISION FOR THE ONEIDA INDIAN NATION OF NEW YORK'S LAND-INTO-TRUST APPLICATION, *available at* http://www.oneidanationtrust.com/index.cfm?fuseaction=ROD.

279. *See supra* note 99 and accompanying text.

280. *See* Johnson v. McIntosh, 21 U.S. 543, 588 (1823) ("The title by conquest is acquired and

the Chief Justice also knew that federal courts would necessarily be "the courts of the conqueror"[281] in any dispute between the U.S. Government and Indian nations. The canons were designed in part to ensure that federal courts, despite being courts of the conqueror, would never have to serve as colonizers on behalf of land-hungry Americans pushing ever more forcefully onto the frontier.[282] Instead, under the canons, courts must wait for Congress to act. Congress alone can restrict tribal sovereignty through express legislation.[283] Courts decide the constitutionality of that legislation. This approach, rooted in federalism and separation of powers, has the positive effect of forcing debate about American Indian policy into Congress, the most representative branch of the federal government, where the nation's most difficult ethical controversies are debated and decided.

When courts act without a clear expression of congressional intent, they run the risk of perpetuating a history of colonialism that by its nature contradicts democratic principles and which the American people have decidedly abandoned. When courts take it upon themselves to decide American Indian policy in lieu of the people's elected representatives, they effectively remove an important regulator on colonialism: public opinion. Public opinion regarding American Indian policy has changed significantly since Chief Justice Marshall penned his Indian law trilogy. Congress has over the last fifty years abandoned assimilation and embraced tribal self-government and cultural autonomy. It has decided that certain powers, including tax immunity, promote those goals.[284] The Court, by using demographics as an interpretive tool, has undermined that clearly expressed intent to move Indian policy in a different direction.

Since *Solem*'s endorsement of modern demography, courts have primarily used the tool to reach results more in line with the goals of

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maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed.").

281. *See supra* notes 100–02 and accompanying text.

282. *See Johnson*, 21 U.S. at 588 ("The British Government . . . whose rights have passed to the United States, asserted a title to all the lands occupied by Indians . . . . These claims have been maintained and established . . . by the sword . . . . It is not for the courts of this country to question the validity of this title, or to sustain one which is incompatible with it."); *see also supra* Part II.

283. Worcester v. Georgia, 31 U.S. 515, 520 (1832) ("[T]he whole intercourse between the United States and [the Cherokee] nation, is, by our constitution and laws, vested in the government of the United States.").

284. *See supra* Part I.C.

assimilation than self-government. When an area is occupied mostly by non-Indians, courts point toward *Solem*'s demographic considerations to support diminishment.[285] Yet when an area is occupied primarily by Indians, courts decline to consider demographics at all or dismiss them as bearing little weight.[286] Even more troubling, this often occurs after a court has interpreted arguably ambiguous statutory text and surrounding circumstances in favor of non-Indians, despite Indian law canons demanding the opposite approach.[287]

In fact, demographic considerations have been used to support a string of decisions diminishing the very tribal sovereignty the Indian law canons of construction aim to protect. The canons exist in recognition of the special sovereign status tribes hold and to ensure Congress—not courts—plays the colonial role of "Conqueror" described by Justice Marshall.[288] They reflect the notion that the relationship between tribes and the federal government is sovereign-to-sovereign and exist to prevent erosion of that relationship.[289] It is difficult to think of a more attenuated measure of congressional intent than the changing racial composition of a particular piece of land over the last century.[290] When courts apply such an elusive tool to help decide whether an Indian tribe retains its reservation—despite canons assigning Congress sole authority over a reservation's borders and demanding that courts interpret ambiguities in favor of the Indians—they undermine democratic values and goals, and the canons designed to guard them.

B. With Sherrill, *the Supreme Court Expanded the Problematic Use of Demographics Beyond* Solem *and Diminishment*

The *Sherrill* Court barred the Oneidas from exercising their sovereign tax immunity because too much time had passed.[291] It pointed to changes

285. *See, e.g.*, South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 355 (1998) (concluding that sixty-six percent non-Indian population supported diminishment); Hagen v. Utah, 510 U.S. 399, 419 (1994) (concluding that eighty-five percent non-Indian population supported diminishment).

286. *See, e.g.*, Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387, 1419 (10th Cir. 1990) (explaining the court "need not linger over the subsequent demographics of the area" showing the area's population was ninety percent Indian).

287. *See, e.g.*, *supra* notes 187, 189, 192–93 and accompanying text, and *supra* note 197.

288. *See supra* Part II.

289. *See* Frickey, *supra* note 99, at 417.

290. *See, e.g.*, *supra* notes 178–79 and accompanying text.

291. City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 221 (2005).

in the area's demographics to frame and support that decision.[292] In doing so, the Court catapulted the demographic justifications expressed in *Solem* from their already uneasy place in diminishment cases to entirely new areas of Indian law including taxation immunity, laches, acquiescence, and impossibility. Such a shift seems contrary to what the *Solem* Court had in mind when it offered reluctant approval of the "unorthodox and potentially unreliable" tool.[293]

In *Sherrill*, the Court looked only to *Solem*'s justifications for using demographics—to avoid the administrative burdens of checkerboard jurisdiction—without considering the opinion's caveats.[294] In doing so, the Court essentially disregarded *Solem*'s entire demographic context. For example, the Court failed to consider that in *Solem*, it only turned to demographics in the first place because of inherent ambiguities surrounding surplus land acts.[295] Such ambiguities did not exist in *Sherrill*.

In direct conflict with *Solem*, the *Sherrill* Court placed "heavy weight" on the land's demographic composition,[296] emphasizing the area's primarily non-Indian population to justify a decision to block the tribe's tax immunity, effectively diminishing their reservation.[297] The *Sherrill* Court used the diminishment cases and their reasoning to support this move, but not once does its opinion mention the Indian law canons, or the caution and reluctance the *Solem* Court stressed. Instead, the *Sherrill* Court cited *Rosebud* and *Hagen* to support a conclusion that "the current population situation" is something courts may consider when determining questions of tribal jurisdiction. [298] Thus, the Court laid the groundwork for expansive use of an analytical tool that leads to unjust results, places courts in the role of Marshall's "Conqueror," and undermines societal and congressional values.

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292. *See supra* notes 259–62 and accompanying text.

293. *See* Solem v. Bartlett, 465 U.S. 463, 472 n.13 (1984); *see also supra* Part IV.B.

294. *See supra* Part VI.

295. *See supra* note 170 and accompanying text.

296. *See supra* notes 261–62 and accompanying text.

297. *See* Singer, *supra* note 81, at 611 ("The result [of *Sherrill*] is a rather extraordinary situation. The Indian nations situated in New York may have title to hundreds of thousands of acres in that state but no rights over the land they own. The non-Indian trespassers have all the property rights associated with ownership, even though they lack the formal title . . . it is very unusual—actually, it is bizarre—to have legal title to property but no rights in the property whatsoever.").

298. City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 215 (2005).

Courts should abandon the use of modern demographics in the diminishment context before *Solem*'s "unorthodox and potentially unreliable" tool shifts even further from its original context, undermining the Indian law canons of construction and leading to the gradual destruction of tribes' sovereignty and their ability to self-govern.

CONCLUSION

Only Congress has the authority to diminish a reservation's boundaries. In using modern demographics to interpret ambiguities in century-old congressional intent, courts are bending legal principles and rules to find diminishment where congressional intent is unclear. In continuing to use demographics to combat policy concerns that might arise from declaring a non-Indian community a reservation, courts are acting as legislative bodies, not judicial ones. In doing so, they jeopardize the basic principles that govern Indian law, both within the realm of diminishment and without.