Conquering a Legislative Court: *Murphy* and an Opportunity for Clarity in Indian Country

Michael R. Faz[*±]

[*]Michael R. Faz, J.D., 2020, University of Nebraska College of Law; B.A., 2017, Texas A&M University-Commerce. The author thanks Mallory Rechtenbach and Jordan Pitcher for their assistance and insight.

[±] The author wrote this Note before the Supreme Court granted certiorari in *McGirt v. Oklahoma*. *McGirt* presents substantially similar facts as *Murphy*; however, this Note will not address that case. Due to his participation in *Murphy* as a judge on the Tenth Circuit, Justice Gorsuch is recused. He is not recused, though, in *McGirt.* Accordingly, *Murphy*'s fate likely relies on the full Court's opinion in *McGirt*.

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I. Part I: Introduction

In 2017, the Tenth Circuit declared that the Muscogee (Creek) Nation continues to govern a large swarth of land in Eastern Oklahoma because Congress never stripped the Creek of jurisdiction.[1] The issue before the court was whether the twentieth century policy of allotment[2] removed tribal jurisdiction from the land in dispute.[3] Following Supreme Court precedent established by *Solem v. Bartlett*,[4] the court ruled that the Creek Nation persists.[5] By implication, many legal scholars argue that since Congress's treatment of the Creek resembled all Five Civilized Tribes,[6] the State of Oklahoma lacks jurisdiction in nearly half of its current territory, including the city of Tulsa.[7] The State of Oklahoma appealed.[8] In November 2018, the Supreme Court heard oral arguments; however, in an unusual move, they ordered the parties to reargue the case in the 2019–20 term.[9] The fate of Oklahoma remains in purgatory.

Federal Indian[10] law is chaotic.[11] Legal scholars note that these "laws are not only numerous; they are also conflicting, [and] born out of the explicit regimen and implicit tone of the

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[1] *See infra* section IV.a (discussing the Tenth Circuit's holding). The terms Muscogee and Creek are synonymous.
[2] Allotment refers to a policy whereby the federal government looked to assimilate the Indian tribes into American society. Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 13 (1995). Under allotment, "individual Indians received a certain number of acres of reservation land." *Id.* at 11. Thereafter, the remaining "lands could, at the discretion of the President, be opened to non-Indian settlement." *Id.* at 13; *see also* Jessica A. Shoemaker, Comment, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 WIS. L. REV. 729, 730 (2003) (stating that under the policy of allotment, "indigenous communities were first divided and [then] separated into small squares of fenced-in private property parcels").
[3] *See infra* section IV.a.
[4] 465 U.S. 463 (1984).
[5] *See infra* section IV.a.
[6] The Five Civilized Tribes is a historical term collectively referring to the Muskogee (Creek), Chickasaw, Cherokee, Choctaw, and the Seminole.
[7] *See infra* Part VI.
[8] *See infra* section IV.b.
[9] *Id.*
[10] The author uses the terms Indian, Native American, and Indigenous synonymously.
[11] *See* Blake A. Watson, *The Thrust and Parry of Federal Indian Law*, 23 DAYTON L. REV. 437 (1998) (discussing the confusion among legal scholars in interpreting federal Indian jurisprudence and the Supreme Court's role in causing such confusion); *see also* Laurie Reynolds, *Adjudication in Indian Country: The Confusing Parameters of State, Federal, and Tribal Jurisdiction*, 38 WM. & MARY L. REV. 539, 578 (1997) (viewing the distribution of adjudicatory powers among, federal, tribal, and state courts as "creat[ing] an almost daunting set of inconsistencies").

eras in which they were enacted."[12] The interpretation of such laws are a result of a "mere exercise in judicial subjectivism."[13] Courts will often ignore or subvert the textual language of a statute to reach their desired policy goals of either separatism or assimilation.[14] The proper administration of our justice system demands otherwise.

This Note intends to address the Tenth Circuit's decision in *Murphy v. Royal*[15] and the *Solem* framework.[16] Since its inception, Indian jurisprudence has always been the easiest area of law. A judge simply uses his or her own personal predilections, decides a side to win, and creates an imaginary reasoning by distorting and creating law.[17] Fortunately, the Tenth Circuit correctly applied "established" jurisprudence; however, on appeal, this case gives the Supreme Court an opportunity to begin correcting this incoherent mess called Indian jurisprudence by returning to traditional canons of construction and applying the law as Congress writes it, not as the judiciary writes it.

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[12] Watson, *supra* note 11, at 490. *Compare* Elk v. Wilkins, 112 U.S. 94, 100 (1884) ("General acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."), *with* Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960) (stating that a "general statute in terms applying to all persons includes Indians and their property interests"); Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985) (holding that the Occupational Safety and Health Act, 29 U.S.C. §§ 651–678 (1982), applies to tribal government employers), *with* Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709 (10th Cir. 1982) (contra).

[13] David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1576 (1996).

[14] *See* Watson, *supra* note 11, at 490 (stating that "federal Indian policy has always been the product of the tension between two conflicting forces-separatism and assimilation"). Further, Watson states that "[t]he Supreme Court has not only manipulated interpretive maxims in the field of Indian law, it has espoused contradictory rules of construction." *Id.* at 458, n.120; *see, e.g.*, Robert S. Pelcyger, *Justices and Indians: Back to Basics*, 62 OR. L. REV. 29, 30 (1983) ("The Court's lack of consistency and predictability has been noted, even by the Justices themselves.").

[15] 875 F.3d 896 (10th Cir. 2017), *cert. granted*, 138 S. Ct. 2026 (2018), *argued sub nom.* Carpenter v. Murphy, No. 17-1107 (U.S. Nov. 27, 2018), *restored to calendar*, No. 17-1107 (U.S. June 27, 2019). In July 2019, Tommy Sharp replaced Mike Carpenter as Interim Warden of the Oklahoma State Penitentiary. Accordingly, hereon the case is known as *Sharp v. Murphy* until such time as the Court renders a decision or the State replaces Tommy Sharp with a different warden.

[16] This Note will not address other claims raised by Murphy including his AEDPA claim. Further, this Note assumes *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), does not apply. The author limits this Note to *Solem v. Bartlett*, 465 U.S. 463 (1984), and its progeny cases.

[17] *See* Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433, 436 (2005) ("In attempting to fix the internal incoherence by imposing external principles, the Court has engaged in aggressive institutional and doctrinal revisionism, essentially displacing Congress as the federal agent with front-line responsibility for federal Indian policy."); Getches, *supra* note 13, at 1654 (stating that Indian law "decisions have been based essentially on the Justices' subjective judgments").

This Note argues that the Tenth Circuit correctly applied established jurisprudence; however, such jurisprudence is a result of judicial activism to comport with a judge's personal beliefs. *Murphy* gives the Court an opportunity to correct this tragedy by returning to traditional canons of construction that look only at the statutory text of a congressional enactment. This Note will proceed in several parts. Part II will lay out the relevant law. Part III will provide a background of *Murphy* as well as a brief history of the Creek Nation. Part IV will detail the proceedings at the Tenth Circuit and the Supreme Court, so far. Part V will argue that while the Tenth Circuit correctly applied the law, the Supreme Court should overrule that law in favor of traditional canons of construction. Finally, Part VI will discuss the potential implications of *Murphy* espoused by the proponents of both sides.[18]

II. Part II: Relevant Law

a. Authority Generally

i. Tribal Authority and the States

Tribal authority is unique. Tribes only have authority—legislative, regulatory, adjudicative, or otherwise—within "Indian country" unless a federal statute or treaty authorizes otherwise,[19] the parties' consent to jurisdiction in tribal courts,[20] or the matter involves the internal

[18] This Note will not address the issue of whether tribal sovereignty is constitutionally compatible with congressional control nor will it discuss whether tribes should retain their status as sovereign entities. To the extent of this Note, the author expresses no opinion on either issue, but proceeds based upon the current prevailing view that Indian nations retain a sense of sovereignty. This issue arises from Justice Thomas' concurrence in *United States v. Lara*, 541 U.S. 193, 214–26 (Thomas, J., concurring in the judgment).

[19] *See* United States v. Brown, 777 F.3d 1025 (8th Cir. 2015) (holding that the United States lacked jurisdiction to prosecute tribal members for violations of the Lacey Act, 16 U.S.C. § 3372(a)(1), because an 1837 treaty between the United States and the tribe guaranteed tribal members the right to fish for commercial purposes); Settler v. Lameer, 507 F.2d 231, 239 (9th Cir. 1974) (holding that tribal regulation of fishing waters off the reservation was valid because an 1855 treaty with the tribe allowed them to retain "regulatory and enforcement powers with respect to tribal fishing at all 'usual and accustomed places' off the reservation" (quoting Treaty with the Yakima, Yakima Nation of Indians-U.S., June 9, 1855, 12 Stat. 951))

[20] *See* Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 337 (2008) (stating that "laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions").

concerns of tribal members.[21] Tribal "jurisdiction over non-Indians or nonmembers within Indian country is complex" and limited.[22] Tribal authority is at its height when exercised over members living in Indian country.[23] States, generally, lack any authority over "the property or conduct of tribes or tribal-member Indians in Indian country."[24] The U.S. Constitution even bars states from exercising jurisdiction over Indians in Indian country unless Congress authorizes such action.[25] Thus, a court must determine whether a purported crime, regulation, or action occurs in Indian country to rule jurisdiction as proper.

Indian country is a statutorily defined term.[26] In relevant part, Indian country incorporates "*all Indian allotments*, the Indian titles to which have not been extinguished, including rights-of-way running through the same."[27] If land is Indian country and the conduct involves *solely* tribal

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[21] *See* Sac & Fox Tribe of the Miss. in Iowa, Election Bd. v. Bureau of Indian Affairs, 439 F.3d 832, 835 (8th Cir. 2006) (stating that "[j]urisdiction to resolve internal tribal disputes . . . lies with Indian tribes and not in the district courts;" therefore, internal matters such as "election disputes between competing tribal councils [are] nonjusticiable, intratribal matters" (quoting *In re* Sac & Fox Tribe of the Miss. in Iowa/Meskwaki Casino Litig., 340 F.3d 749, 763 (8th Cir. 2003))).

[22] FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.02 (Nell Jessup Newton ed., 2017); *see infra* Part VI. A non-Indian is an individual who does not affiliate with an indigenous tribe. A nonmember is an individual who affiliates with an Indian tribe, but not the specific tribe with jurisdiction in the area.

[23] COHEN, *supra* note 22, at §6.02[1] ("Tribal governing power is at its zenith with respect to authority over tribal members within Indian country."); *see also* Flandreau Santee Sioux Tribe v. Gerlach, 269 F. Supp. 3d 910, 917 (D.S.D. 2017) ("A state's regulatory power is at its lowest and generally inapplicable when applied to on-reservation conduct of tribal members.").

[24] COHEN, *supra* note 22, at § 6.03[1][a].

[25] *See* Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 764 (1985) (holding that the federal government has "exclusive authority over relations with Indian tribes"); Worcester v. Georgia, 31 U.S. 515, 559 (1832) (stating that "our existing constitution . . . confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with Indians"), *abrogated by* Nevada v. Hicks, 533 U.S. 343 (2001). *But see* United States v. Lara, 541 U.S. 193, 225–26 (Thomas, J., concurring in the judgment) (questioning whether Congress has the power to regulate tribal sovereignty or whether such power lies with the executive). Further, states do possess some authority over non-Indians living in Indian country. *See infra* Part VI.

[26] 18 U.S.C. § 1151 (1949). Although this statutory definition only relates to criminal jurisdiction, courts have consistently applied it to civil disputes as well. *See* Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 527 (1998) (stating that "[a]lthough [the] definition of [Indian country] by its terms relates only to federal criminal jurisdiction, we [the Supreme Court] have recognized that it also generally applies to question of civil jurisdiction").

[27] 18 U.S.C. § 1151(c) (emphasis added). While two other sections exist, this section is the portion that concerns Indian allotments.

members, tribal and federal authority is near-absolute while the state retains little, if any, jurisdictional authority.[28]

ii. Tribal Authority and Federal Supremacy

The federal government's authority trumps tribal authority even in Indian country. Courts recognize that the federal government has "plenary and exclusive" authority to legislate and regulate tribes.[29] Given this, the federal government may compel a tribe, with or without tribal consent, to cede or share jurisdiction.[30]

The Major Crimes Act is one example of the federal government stripping tribes of jurisdiction without tribal consent.[31] In *Crow Dog*,[32] a Native American murdered another Native American "of the same band and nation" in Indian country.[33] A federal court convicted the defendant and sentenced him to death.[34] The Supreme Court reversed holding that the district court lacked jurisdiction because no statute or treaty provided a federal court with jurisdiction to prosecute crimes in Indian country between two Native Americans.[35] As a result, tribal law governed the prosecution and the tribal court ordered the defendant to "pay restitution and to

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[28] *See* Tunica-Biloxi Indians of La. v. Pecot, 351 F. Supp. 2d 519, 524 (W.D. La. 2004) (stating "primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States" (quoting Native Vill. of Venetie Tribal Gov't, 522 U.S. at 527 n.1)). *But see* Public Law 280, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2010)) (granting concurrent state jurisdiction).

[29] *Lara*, 541 U.S. at 200 (majority opinion); *see also* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) (stating that "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs"); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (stating that "tribal sovereignty . . . is subject to the superior and plenary control of Congress"). In rebuke of this power, Justice Thomas has "seized upon the fundamental incompatibility between the plenary power doctrine and the concept of Indian sovereignty." William Bradford, *Another Such Victory and We Are Undone: A Call to an American Indian Declaration of Independence*, 40 TULSA L. REV. 71, 92 (2013). Essentially, Justice Thomas rebukes Court precedent by declaring that "either Congress lacks the constitutional authority to alter the inherent sovereignty of tribes . . . or, if the power to expand or contract Indian sovereignty is of extraconstitutional origin and properly wielded by Congress, then Indian nations are, quite simply, not sovereigns . . . ." *Id.* at 93.

[30] *See, e.g.*, Major Crimes Act, 18 U.S.C. § 1153 (2013).

[31] *Id.*

[32] *Ex parte* Kan-gi-Shun-ca (Crow Dog), 109 U.S. 556, 557 (1883), *superseded by statute*, 18 U.S.C. § 1153.

[33] *Id.* at 557.

[34] *Id.* at 557–58.

[35] *Id.* at 570–75; *see also* COHEN, *supra* note 22, at § 9.04 (stating that *Crow Dog* held that "there was no federal court jurisdiction to prosecute an Indian for the murder of another Indian").

support the family of the victim."[36] The defendant avoided his death sentence and jail time.[37] Outraged, Congress acted swiftly.[38] In 1885, Congress passed the Major Crimes Act[39] granting the federal government jurisdiction to prosecute tribal members for committing one or more of the Act's enumerated crimes, including murder, in Indian country.[40] Still in force today, the Major Crimes Act provides exclusive jurisdiction to the federal government to prosecute murders by "[a]ny Indian . . . against the person or property of another Indian . . . within the Indian country."[41] This act "is the jurisdictional statute at the heart" of *Murphy*.[42]

b. Altering Jurisdiction – Diminishment/Disestablishment

i. In General

The primary issue in *Murphy* is whether a murder committed by an Indian is subject to federal jurisdiction, through the Major Crimes Act, or state jurisdiction.[43] The issue turns on whether the disputed land continues as Indian country.[44] If the land is not Indian country, then the state possesses primary authority in regard to regulatory, criminal, and civil proceedings concerning non-tribal and tribal citizens, unless a federal statute declares otherwise.[45]

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[36] COHEN, *supra* note 22, at § 9.04.
[37] *Id.*; *see also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 197 (1978) (stating that under tribal law "[o]ffenses by one Indian against another . . . emphasis was on restitution rather than on punishment"), *superseded by statute*, Act of Oct. 28, 1991, 105 Stat. 646, *as recognized in* United States v. Lara, 541 U.S. 193 (2004).
[38] *Cf.* United States v. Other Med., 596 F.3d 677, 680 (9th Cir. 2010) ("The Major Crimes Act permits the federal government to prosecute Native Americans in federal courts for a limited number of enumerated offenses committed in Indian country that might otherwise go unpunished under tribal criminal justice systems.").
[39] Act of Mar. 3, 1885, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153 (2013)). *Crow Dog* to the enactment of the Major Crimes Act took approximately one year and three months (Dec. 17, 1883, to Mar. 3, 1885).
[40] Whether this jurisdiction is exclusive or concurrent with the tribe remains unanswered. *See* Calandra McCool, *Welcome to the Mvskoke Reservation:* Murphy v. Royal*, Criminal Jurisdiction, and Reservation Diminishment in Indian Country*, 42 AM. INDIAN L. REV. 355, 378 (2018) ("One unanswered question is whether the Major Crimes Act extinguishes tribal jurisdiction over these enumerated felonies.").
[41] 18 U.S.C. § 1153.
[42] Murphy v. Royal, 875 F.3d 896, 915 (10th Cir. 2017), *cert. granted*, 138 S. Ct. 2026 (2018), *argued sub nom.* Carpenter v. Murphy, No. 17-1107 (U.S. Nov. 27, 2018), *restored to calendar*, No. 17-1107 (U.S. June 27, 2019).
[43] *Id.* at 911.
[44] *Id.*
[45] *Id.*; *see supra* notes 20–22; *see also* Fife v. Moore, 808 F. Supp. 2d 1310 (E.D. Okla. 2011) (declining to extend tribal jurisdiction to tribal members for offenses conducted off-reservation). *Contra* Kelsey v. Pope, 809 F.3d 849, 860 (6th Cir. 2016) (holding that "Indian tribes have the inherent sovereign authority to try and prosecute members

Under a body of law called diminishment and disestablishment, courts analyze whether the early-twentieth century policy of allotment reduced or eliminated tribal jurisdiction.[46] Under the policy of allotment, the federal government "divid[ed], or 'allott[ed],' communal Indian lands into individualized parcels for private ownership by tribal members."[47] Afterwards, the government sold the surplus lands, or the land not allotted, to willing buyers—primarily non-Indian, white settlers.[48] From this policy, diminishment and disestablishment cases emerged. Diminishment and disestablishment have separate meanings; however, they both alter tribal jurisdiction over Indian country and only "Congress can divest a reservation of its land and diminish its boundaries."[49] The Eighth Circuit declared that "disestablishment generally refers to the relatively rare elimination of a reservation while diminishment commonly refers to the reduction in size of a reservation."[50] Through their plenary power over Indian affairs,[51] Congress may "eliminate or reduce a reservation against a tribe's wishes and without its consent."[52] Congressional intent, though, must be clear.[53] Courts construe any ambiguity in favor of the tribe.[54]

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on the basis of tribal membership even if criminal conduct occurs beyond a tribe's Indian country"); John v. Baker, 982 P.2d 738, 752 (Alaska 1999) ("[I]n determining whether tribes retain their sovereign powers, the United States Supreme Court looks to the character of the power that the tribe seeks to exercise, not merely the location of events."). It is possible, though, that *Kelsey*'s holding is a narrow exception. COHEN, *supra* note 22, at § 9.04 (limiting the holding in *Kelsey* by stating that tribes may only have jurisdiction to prosecute members for offenses occurring outside of Indian country so long as the member's conduct implicates tribal self-governance interests).

[46] *See* McCool, *supra* note 40, at 359 ("The body of case law addressing the reduction of tribal land base and jurisdiction is referred to as either the diminishment or disestablishment cases.").

[47] *Murphy*, 875 F.3d at 919.

[48] *Id.*

[49] Nebraska v. Parker, 136 S. Ct. 1072, 1078 (2016) (quoting Solem v. Bartlett, 465 U.S. 463, 470 (1984)).

[50] Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010, 1017 (8th Cir. 1999).

[51] *See supra* note 29 (discussing Congress's plenary power).

[52] *Murphy*, 875 F.3d at 918.

[53] South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 333 (1998).

[54] *See, e.g.*, Herrera v. Wyoming, 139 S. Ct. 1686, 1699 (2019) (stating that "Indian treaties 'must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indian'" (quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 206 (1999))); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) (stating that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit").

ii. The Diminishment Test: *Solem v. Bartlett*

In *Solem v. Bartlett*, the Supreme Court established a framework for determining whether Congress diminished or disestablished an Indian reservation.[55] In *Solem*, South Dakota convicted Bartlett, a member of the Cheyenne River Sioux Tribe, of rape and sentenced him to a ten-year term in the state penitentiary.[56] After exhausting his state remedies, Bartlett argued that his crime occurred within the boundaries of the Cheyenne River Sioux reservation.[57] Even though in the Act of May 29, 1908,[58] "Congress opened for settlement by non-Indians the portion of the reservation on which [he] committed his crime, the opened portion nonetheless remained Indian country; and that the State therefore lacked criminal jurisdiction."[59] The Supreme Court agreed.[60] Building upon precedent, the Court established a three-part framework for delineating surplus land acts[61] that eliminated tribal authority over land purchased by settlers "from those Acts that simply offered non-Indians the opportunity to purchase land within established reservation boundaries" but retained tribal authority to govern the land.[62]

In beginning the three-part *Solem* analysis, the Supreme Court first declared that "[d]iminshment . . . will not be lightly inferred. [An] analysis of surplus land Acts requires that Congress clearly evince an 'intent . . . to change . . . boundaries' before diminishment will be

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[55] 465 U.S. 463 (1984).
[56] *Id.* at 465.
[57] Congress established the Cheyenne River Sioux reservation by an Act of Congress in 1889. *See* Act of Mar. 2, 1889, ch. 405, § 4, 25 Stat. 888, 889 (1889).
[58] Act of May 29, 1908, ch. 218, 35 Stat. 460.
[59] *Solem*, 465 U.S. at 465.
[60] *Id.* at 466.
[61] *See* Susan D. Campbell, *Reservations, The Surplus Land Acts and the Question of Reservation Disestablishment*, 12 AM. INDIAN L. REV. 57, 57 (1984) (stating that surplus lands acts "provided for the allotment in severalty of tracts of land on specific reservations to individual tribal members, and then for the opening of the surplus lands to settlement").
[62] *Solem*, 465 U.S. at 470.

found."[63] Thus, courts will use three factors, none of which are dispositive standing alone, to determine whether Congress intended to diminish a reservation.[64]

First, under *Solem*, "[t]he most probative evidence of congressional intent is the statutory language."[65] When "language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished."[66] Language of cession is fact dependent and includes a variety of phrases.[67] Accordingly, the text of a statute or treaty is the first, and most probative, evidence courts consider to determine whether Congress diminished a reservation.[68]

Statutory language, while extremely convincing, is not dispositive. In *Solem*, the Court reasoned that explicit language of cession is "not [a] prerequisite[] for a finding of diminishment" and that "a widely held, contemporaneous understanding that the affected reservation would shrink as a result of proposed legislation" may lead to an inference that Congress diminished a reservation.[69] Accordingly, under *Solem*'s second factor, courts consider "events surrounding the passage of a surplus land Act."[70] In particular, a court looks to the "manner in which the transaction

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[63] *Id.* (quoting Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 614 (1977)).
[64] *See, e.g.*, South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) (finding diminishment based on the first and third factors); Wisconsin v. Stockbridge-Munsee Cmty., 554 F.3d 657 (7th Cir. 2009) (finding diminishment based on the second and third factors).
[65] *Solem*, 465 U.S. at 470.
[66] *Id.* at 470–71.
[67] *See, e.g.*, *Yankton Sioux Tribe*, 522 U.S. at 344 (stating that diminishment language includes words such as the tribe shall "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted land"); Hagen v. Utah, 510 U.S. 399, 412–14 (1994) (finding diminishment language such as "shall be *restored to the public domain*"); Mattz v. Arnett, 412 U.S. 481, 505 n.22 (1973) (pre-*Solem* case stating that diminishment languages includes "the reservation is hereby discontinued" and the "Reservation . . . be, and is hereby, vacated and restored to the public domain").
[68] *Solem*, 465 U.S. at 470–71.
[69] *Id.*
[70] *Id.*

was negotiated with the tribes involved and the tenor of legislative reports presented to Congress."[71]

Finally, *Solem*'s third factor considers the "events that occurred after the passage of a surplus land Act."[72] In *Solem*, the Court reasoned that "Congress' own treatment of the affected areas . . . has some evidentiary value [in determining whether diminishment occurred], as does the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with unallotted open lands."[73] If an "area has long since lost its Indian character," then the court must "acknowledge[] that *de facto*, if not *de jure*, diminishment may have occurred."[74] Subsequent demographics of the opened lands may show the loss of the Indian character of the land and aid the court in finding a congressional intent to diminish.[75]

iii. Applying the Framework: *Hagen* and *Yankton Sioux Tribe*

After *Solem*, courts continually used this third factor coupled with ambiguous showings of the first two to find diminishment.[76] The third factor consistently favored diminishment.[77] In the 1990s, the Supreme Court granted certiorari to two cases applying the *Solem* framework.

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[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.* at 471–72.
[76] *See* 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) (stating that "[o]ddly 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 [in *Solem*] found 'clear' . . . [a]nd, the conclusion in *Hagen* that the Uintah Reservation had been diminished was, at least, 'not controverted' by present demography" (quoting *Solem*, 465 U.S. at 479–80; Hagen v. Utah, 510 U.S. 399, 420 (1994))); A.J. Taylor, *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, 1175 (1998).
[77] *See supra* note 76; *see also* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 356 (1998) (stating that "[e]very surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation").

First, in *Hagen v. Utah*,[78] the Court addressed whether Congress diminished the Uintah Indian Reservation[79] by opening the land for settlement by non-Indian settlers.[80] Under the first *Solem* factor, the Court found a congressional intent to diminish through a 1902 Act[81] that required tribal consent before unallotted lands were "*restored to the public domain*."[82] The tribe did not consent.[83] In 1905, Congress passed an Act forcing the Uintah into allotment.[84] Congress, however, eliminated the diminishing language in the new Act.[85] The dissent urged that such action created an ambiguity and under traditional canons of construction, the Court should resolve that ambiguity in favor of the tribe.[86] The majority disagreed and treated the earlier, eliminated language as dispositive of Congress's intent to diminish,[87] thereby, ignoring traditional canons of construction.

Thereafter, the Court continued its analysis stating that diminishment cases "require us [the Court] to examine all the circumstances surrounding the opening of a reservation."[88] Under the second factor, the Court found diminishment through a *failed* House amendment to the 1905 Act and a Senate amendment replicating the same failed House amendment.[89] The Senate amendment eliminated all diminishment language.[90] This conduct, coupled with clear evidence of

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[78] 510 U.S. 399 (1994).
[79] Congress established the Uintah Indian Reservation through the Act of May 5, 1864. *See* Act of May 5, 1864, ch. 77, 13 Stat. 63; *Hagen*, 510 U.S. at 402.
[80] *Hagen*, 510 U.S. at 401.
[81] Act of May 27, 1902, ch. 888, 32 Stat. 263.
[82] *Hagen*, 510 U.S. at 412–14 (quoting ch. 888, 32 Stat. at 263).
[83] *Id.* at 404–05.
[84] *Id.*; *see* Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1069.
[85] *See Hagen*, 510 U.S. at 436 (Blackmun, J., dissenting) ("When Congress finally opened the Uintah Reservation to non-Indian settlement in 1905, it removed the public domain language from the opening statute and severely restricted non-Indian access to the opened lands."); Getches, *supra* note 13, at 1622 ("This later Act also eliminated the language restoring unallotted lands to the public domain.").
[86] *Hagen,* 510 U.S. at 436–37.
[87] *See* Taylor, *supra* note 76, at 1175 (stating that "[t]he Court disregarded ambiguities that existed in the language and legislative history of the acts").
[88] *Hagen*, 510 U.S. at 412 (majority opinion).
[89] *Id.* at 419.
[90] *Id.*

the Chief Executive's intent to diminish thus showed a contemporaneous understanding of diminishment.[91]

Finally, the Court reasoned that the third factor favored diminishment because the modern demographics of the area coupled with the state assuming jurisdiction over the opened land in the years following allotment evidenced clear congressional intent to diminish.[92] Conclusively, the Court's finding of the first two factors was ambiguous. The Court used a clear third factor to bolster the first two factors to extinguish the Uintah Tribe Reservation, thereby, ignoring established jurisprudence that the Court is to resolve ambiguities in favor of the tribe.[93]

Second, in *South Dakota v. Yankton Sioux Tribe*, the Yankton Sioux Tribe challenged state environmental regulations by asserting that the State lacked jurisdiction to regulate the area because an 1858 Act of Congress did not diminish their reservation.[94] Applying *Solem*, the Court found that an 1894 Act providing that the tribe will "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted land" coupled with a pledge for a payment of $600,000 created an insurmountable presumption of a congressional intent to diminish.[95] The Court continued its analysis and found the second factor inconclusive. In ruling such, the Court found some evidence of diminishment through congressional reports and the manner in which the executive and the tribe entered into negotiations, however, such "context of the Act [was] not so compelling that, standing alone, it would indicate diminishment."[96] The third factor coupled with the first, though, proved decisive. The Court reasoned that the state's assumption of jurisdiction after the 1894 Act and it "continuing[,] virtually unchallenged, to the

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[91] *Id.* at 419–20. The Court declared that President Roosevelt issued a proclamation making clear that the 1905 Act supplemented the 1902 Act. *Id*. Accordingly, the Court stated that Congress did not repeal the 1902 Act. *Id.*
[92] *Id.* at 420–21.
[93] *Supra* note 54 and accompanying text.
[94] South Dakota v. Yankton Sioux Tribe, 522 US. 329, 340–42 (1998).
[95] *Id.* at 344 (quoting Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, 314–15).
[96] *Id.* at 351–54.

present day," reinforced diminishment.[97] Thus, the first *Solem* factor, bolstered by the third factor, evinced a clear intent from Congress to diminish the reservation.[98]

iv. Clarifying the Framework: *Nebraska v. Parker*

Two decades later, the Supreme Court addressed *Solem*'s third factor because courts continued to use it to support ambiguous findings of diminishment. In *Nebraska v. Parker*,[99] the Omaha tribe attempted to assert jurisdiction over the village of Pender, Nebraska, by subjecting retailers to a liquor control ordinance.[100] The issue before the Court was whether Congress diminished the Omaha Indian Reservation.[101]

In *Parker*, the State argued that the third *Solem* factor, standing alone, may reflect clear congressional intent to diminish a reservation.[102] The State reasoned that *Solem* allowed a showing of de facto diminishment through the third factor, and in *Parker*, "[t]he demographic and jurisdictional history of the disputed area . . . necessitate[d] a finding of *de facto* diminishment."[103] Accordingly, the State argued that diminishment occurred from a practical standpoint through a "de facto diminishment" analysis.[104] The Supreme Court disagreed.[105]

Under the first factor of *Solem*, the Supreme Court reasoned that an 1882 Act, which Nebraska argued diminished the reservation, did not bear any "hallmarks of diminishment" evident

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[97] *Id*. at 357.
[98] *See id*. at 342 (holding "that the unallotted lands ceded as a result of the 1894 Act did not retain reservation status").
[99] 136 S. Ct. 1072 (2016).
[100] *Id.* at 1078.
[101] *Id.* Further, a treaty between the Omaha tribe and the United States established the Omaha Indian Reservation in 1854—before the admittance of Nebraska as a state on Mar. 1, 1867. *See* Treaty with the Omaha, Omaha Tribe of Indians-U.S., Mar. 16, 1854, 10 Stat. 1043.
[102] Transcript of Oral Argument at 5, *Parker*, 136 S. Ct. 1072 (No. 14-1406) (stating that "the focus should be - - if you're looking at intent of Congress, you should be looking at what Congress is doing after the Act that is reflective of not understanding essentially that they've diminished the reservation").
[103] Brief for Petitioner at 20–24, *Parker*, 136 S. Ct. 1072 (No. 14-1406); *see also* Solem v. Bartlett, 465 U.S. 463, 471 (1984) ("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.").
[104] Brief for Petitioner at 20–24, *Parker*, 136 S. Ct. 1072 (No. 14-1406).
[105] *Parker*, 136 S. Ct. at 1076.

in the statutory texts of *Hagen* and *Yankton Sioux Tribe*.[106] Without clear textual evidence, the Court reasoned, "it is clear that the 1882 Act . . . 'merely opened reservation land to settlement'" and diminishment did not occur.[107]

The Court continued its analysis finding that, under the second factor, the State's "cherry-picked statements by individual legislators" failed to "*unequivocally* support[] a finding that the existing boundaries of the reservation would be diminished."[108] Accordingly, *Parker* clarified that if a court failed to find diminishment under the first factor, then the court may still find diminishment under the second factor only if the evidence "unequivocally" supports diminishment.[109] The State, however, failed to show diminishment through either.

Parker's significance lies in the Court's interpretation of the third factor. In *Parker*, "the demographic and federal treatment" of the disputed land evidenced "a clear absence of a strong Omaha presence in the area for decades."[110] Nevertheless, the Court refused to find de facto diminishment[111] because the third factor is "the least compelling"[112] evidence of diminishment and it is "not [the Court's] role to 'rewrite the 1882 Act in light of [] subsequent history.'"[113] Accordingly, *Parker* denies the existence of a de facto diminishment test espoused in *Solem*. Thus, in the absence of compelling evidence of diminishment through the first two factors, federal courts may not rely solely on the third factor.[114]

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[106] *Id.* at 1079–80.
[107] *Id.* (quoting DeCoteau v. Dist. Cty. Court for the Tenth Judicial Dist., 420 U.S. 425, 448 (1975)).
[108] *Id.* at 1080–81 (emphasis added).
[109] *Id.*
[110] McCool, *supra* note 40, at 364; *see* Bethany R. Berger, *Hope for Indian Tribes in the U.S. Supreme Court?:* Menominee*,* Nebraska v. Parker*,* Bryant*,* Dollar General . . . *and Beyond*, 2017 U. ILL. L. REV. 1901, 1922 (2017) (stating that unlike "earlier [diminishment] cases, the demographics were on Nebraska's side").
[111] *Parker*, 136 S. Ct. at 1076.
[112] *Id.* (quoting South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 356 (1998)); *see* Berger, *supra* note 110, at 1925–26.
[113] *Parker*, 136 S. Ct. at 1082 (quoting DeCoteau v. Dist. Cty. Court for the Tenth Judicial Dist., 420 U.S. 425, 447 (1975)).
[114] *Parker* was a unanimous opinion for the tribe. A change in the Court's composition may account for the shift in opinion from *Yankton Sioux Tribe* to *Parker*. Only Justices Thomas, Ginsburg, and Breyer were on the court in

III. Part III: Background

a. A Brutal Murder

In 2018, a jurisdictional battle ensued before the Supreme Court between Oklahoma and the Creek Nation.[115] In August 1999, Patrick Murphy (Murphy), a member of the Creek Nation, "was living with Patsy Jacobs, his alleged 'common-law' wife."[116] Prior to this relationship, Patsy lived with George Jacobs (Jacobs), also a tribal member, and had a child with him.[117] An argument occurred and Murphy "told Patsy that he was going to get [George] Jacobs and his family one by one."[118]

On August 28, 1999, Jacobs and his cousin, Mark Sumka (Sumka), spent the day drinking and driving around McIntosh county in Eastern Oklahoma.[119] As Jacobs laid "passed out in the back seat," Sumka drove past Murphy whom "was driving in the opposite direction."[120] Murphy eventually forced Sumka to stop his car[121] and a conflict ensued.[122]

Murphy's friends approached Jacobs, dragged him into a ditch, and began beating him.[123] Sumka proceeded to tell Murphy "that was enough, you know, he's passed out."[124] Murphy traded

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Yankton Sioux Tribe and *Parker*. Notably, *Parker* was the last oral argument heard by Justice Scalia before his passing. During oral arguments, Scalia expressed contempt for the State's argument. *See* Transcript of Oral Argument at 5, *Parker*, 136 S. Ct. 1072 (No. 14-1406) ("It's a different Congress. I mean, to say, you know, a later Congress did thus and so, and therefore the earlier Congress, when it enacted a particular statute, must have diminished. That doesn't make any sense."). At least one legal scholar expressed the view that "respect for [Justice Scalia's] memory may even have convinced some Justices to join in the unanimous opinion for the tribe." Berger, *supra* note 110, at 1904.

[115] *See* Murphy v. State, 47 P.3d 876 (Okla. Crim. App. 2002), *post-conviction relief granted in part, denied in part*, 124 P.3d 1198 (Okla. Crim. App. 2005).

[116] *Id.* at 879.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] The record does not reflect how Murphy forced Sumka to stop his car. *See generally id.*

[122] *Id.*

[123] *Id.* at 879–80. The author is not sure if Jacobs was awake during the attack. At trial, "[t]he medical examiner testified that, although the victim had a blood alcohol content of .23, a normal person would be impaired, but still able to function, at this level." *Id.* at 883. The author deduces that Jacobs was awake, but unable to defend himself. The author also does not know whether an individual can experience pain with a .23 blood alcohol content level.

[124] *Id.* at 880.

places with one friend and began beating Jacobs while his friend approached Sumka and punched him in the nose.[125] Sumka momentarily fled.[126]

Soon thereafter, as Murphy continued to beat Jacobs, a passerby drove up and asked "what was wrong with the guy in the ditch?"[127] Murphy and his friends approached the man's vehicle, but the man immediately drove away and called the police.[128] Immediately, Sumka unwillingly left the scene with Murphy and his friends while Jacobs laid in a "ditch and was barely breathing."[129] Within four to twelve minutes of the attack, Jacobs bled to death.[130] Subsequently, the State of Oklahoma arrested and charged Murphy with Jacobs' murder.[131]

In 2000, a jury in McIntosh County, Oklahoma, convicted Murphy of first-degree murder and an Oklahoma state court imposed the death penalty.[132] A slew of complex appeals on various grounds followed.[133] Finally, Murphy's challenge to Oklahoma's exercise of jurisdiction came

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[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.* The record reflects that during the beating Murphy pulled out a knife, severed Jacobs' genitals, and placed them in Jacobs' mouth. *Id.* Further, Murphy slashed Jacobs in several areas and "stomp[ed] on the victim's head like a pancake." *Id.* Upon returning to the scene, the passerby saw Jacobs' stomach and chest slashed and his throat cut. *Id.* The medical examiner stated that Jacobs died due to severe lacerations on his genitals, face, neck, chest, and abdomen. *Id.* "Death was not immediate." *Id.*
[131] Murphy v. Royal, 875 F.3d 896, 905 (10th Cir. 2017), *cert. granted*, 138 S. Ct. 2026 (2018), *argued sub nom.* Carpenter v. Murphy, No. 17-1107 (U.S. Nov. 27, 2018), *restored to calendar*, No. 17-1107 (U.S. June 27, 2019).
[132] *Id.* Concerning Murphy's accomplices, an Oklahoma court found Billy Long guilty of first-degree murder and sentenced him to life with the possibility of parole. While incarcerated, Long died on April 24, 2017. *See* Mark Sherman, *Justices to Review Oklahoma's Indian Territory Murder Appeal*, MUSKOGEE PHOENIX (May 22, 2018), https://www.muskogeephoenix.com/news/justices-to-review-oklahoma-s-indian-territory-murder-appeal/article_96dd01be-3a93-5e46-ba49-21a56aa9b079.html; Okla. Dep't of Corr. OK Offender Search, OKLA. DEP'T OF CORR., https://okoffender.doc.ok.gov (type 381084 in the box labeled "OK DOC#"; then click search) (last visited Sept. 17, 2019). Likewise, Kevin King, the other accomplice, pleaded guilty to second-degree murder. In return for his plea, the State sentenced him to forty-five years in prison. This lighter sentence is a result of King's status as a minor at the time of the offense and his willingness to accept a plea agreement. While incarcerated, King died in May 2016. *See* Sherman, *supra* note 132; Okla. Dep't of Corr. OK Offender Search, OKLA. DEP'T OF CORR., https://okoffender.doc.ok.gov (type 415050 in the box labeled "OK DOC#"; then click search) (last visited Sept. 17, 2019).
[133] *Murphy*, 875 F.3d at 905–11 (describing the voluminous appeals and remands occurring before the Tenth Circuit heard the jurisdiction action). For the purposes of this Note, the author will not address the appeals concerning trial inaccuracies and Murphy's *Atkins* defense. This Note concerns the jurisdiction question alone.

before the Tenth Circuit in 2017—seventeen years after his initial conviction—as Murphy argued that the State lacked jurisdiction over him because he is a member of the Creek Nation and the crime occurred in Indian country.[134] If so, Murphy's trial would begin anew in federal court.

b. A Brief History of the Creek Nation

Ironically, Murphy's situation is peripheral to the larger implications of his case because if he successfully argues that the Creek reservation did not diminish, then Creek authority will dramatically increase in Oklahoma—to the detriment of the State.[135] Accordingly, an overview of Creek-United States history is pertinent. Creek-United States relations begin at the founding of the United States. In 1789, open hostilities raged between citizens of Georgia and the Creek.[136] The Senate sought peace and allowed President Washington, with its consent, to enter into a treaty with the Creek recognizing the boundaries of Creek territory among other rights.[137]

Over the next several decades, the South saw continued hostilities between several tribes and the United States.[138] With the passage of the Indian Removal Act in 1830, the federal government forced many of these tribes to relocate to lands west of the Mississippi River.[139] By treaty, the Creek ceded its land to the United States[140] in exchange for lands in fee simple, as opposed to a right of occupancy, in modern-day Oklahoma.[141]

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[134] *Id.* at 911. Under the Major Crimes Act, 18 U.S.C. § 1153 (2013), if Oklahoma lacks jurisdiction, the United States District Court for the Eastern District of Oklahoma would then obtain jurisdiction over Murphy's crime.
[135] *See infra* Part VI**.**
[136] COHEN, *supra* note 22, at § 1.03.
[137] *See* Treaty with the Creeks, Creek Nation-U.S., Aug. 7, 1790, 7 Stat. 35.
[138] *See* COHEN, *supra* note 22, at § 1.03.
[139] *Id.*
[140] *See* Treaty with the Creeks, Creek Nation-U.S., Jan. 24, 1826, 7 Stat. 286; Treaty with the Creeks, Creek Nation-U.S., Mar. 24, 1832, 7 Stat. 366.
[141] *See* Treaty with the Creeks, Creek Nation-U.S., Feb. 14, 1833, 7 Stat. 417; *see also* United States v. Creek Nation, 295 U.S. 103, 109 (1935) (stating that the "Creek Tribe had a fee-simple title, not the usual Indian right of occupancy with the fee in the United States"). Historians call this area of U.S.-Indian relations the "Treaty Era" since the U.S. controlled the native populace through treaties.

Over the next several decades the Creek ceded portions of their land, thereby diminishing their boundaries.[142] Following the Civil War, the Creek established a new form of government at the direction of Congress by treaty.[143] This treaty also established a court system in Indian Territory "with such jurisdiction . . . as Congress may by law provide" while preventing Congress from "interfere[ing] with or annul[ing] . . . present tribal organization, rights, laws, privileges, [or] customs."[144]

In the 1880s, Congress ended its policy of treaty-making with natives[145] and began the era of allotment by passing small, piecemeal acts and the 1887 General Allotment Act.[146] By passing these acts, "Congress 'anticipated the imminent demise' of reservations," thereby, opening surplus tribal lands—lands not allotted to tribal members—to white settlers.[147] These several acts opening unallotted land to settlers became known as surplus lands acts.[148] In 1901, Congress forced the Creek to accept allotments.[149] The tribal government, though, continued to operate.[150]

In 1906, Congress passed the Oklahoma Enabling Act,[151] which allowed the territory of Oklahoma to apply for statehood.[152] The Act, however, "preserved the authority of the federal government over Indians and their lands, and required the State to disclaim all right and title to

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[142] *See* Indian Country, U.S.A., Inc. v. Oklahoma *ex rel.* Okla. Tax Comm'n, 829 F.2d 967, 971–72 (10th Cir. 1987) (stating that the United States and the Creek agreed, by mutual consent, to cede a portion of Creek land to the Seminole and, later, the United States forced the Creek to relinquish claims to a portion of their land due to the Creek alliance with the Confederacy during the Civil War).

[143] Murphy v. Royal, 875 F.3d 896, 933 (10th Cir. 2017), *cert. granted*, 138 S. Ct. 2026 (2018), *argued sub nom.* Carpenter v. Murphy, No. 17-1107 (U.S. Nov. 27, 2018), *restored to calendar*, No. 17-1107 (U.S. June 27, 2019); *see* Treaty with the Creeks, Creek Nation-U.S., June 14, 1866, 14 Stat. 785.

[144] Treaty with the Creeks, *supra* note 143.

[145] *See* COHEN, *supra* note 22, at § 1.04.

[146] *Id.*; *see* General Allotment Act, ch. 119, 24 Stat. 388 (1887).

[147] *Murphy*, 875 F.3d at 919 (quoting Solem v. Bartlett, 465 U.S. 463, 468 (1984)).

[148] Campbell, *supra* note 61, at 57.

[149] *Murphy*, 875 F.3d at 934–35.

[150] *Id.* at 935 (stating that "Congress never dissolved the Creek government . . . [even though] Congress contemplated the future dissolution of the tribal government"). Collectively, historians call this era the Allotment Era.

[151] Okla. Enabling Act, ch. 3335, 34 Stat. 267 (1906).

[152] *Murphy*, 875 F.3d at 935–36.

such lands."[153] Despite this provision, Oklahoma continued to assert jurisdiction over Indians and non-Indians within its border without regard to whether Congress allotted the land to a tribal member.[154] Accordingly, throughout the twentieth century, tribal authority diminished significantly due to Oklahoma's exercise of jurisdiction. By the end of the twentieth century, the State of Oklahoma exercised near-complete jurisdiction over the lands granted to the Creek, and non-tribal members accounted for approximately eighty percent of the area's population.[155]

IV. Part IV: *Murphy* Proceedings

a. The Tenth Circuit

In *Murphy*, the Tenth Circuit addressed whether Congress disestablished the Creek reservation by granting surplus lands to settlers.[156] After discussing the relevant law concerning Indian country jurisdiction, the Tenth Circuit turned to *Solem*.[157] The court stated that "[if] the Reservation's boundaries are still intact, the crime [by Murphy] occurred within them."[158] Accordingly, the State of Oklahoma would lack jurisdiction to prosecute.[159]

i. First *Solem* Factor

Turning to the first *Solem* factor—the statutory language—the State reasoned that even though no act of Congress contained language expressly disestablishing the Creek reservation, Congress disestablished the Creek reservation based upon the collective weight of a "series of

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[153] *Id.* at 936 (quoting Indian Country, U.S.A., Inc. v. Oklahoma *ex rel.* Okla. Tax Comm'n, 829 F.2d 967, 978 (10th Cir. 1987)).
[154] *See, e.g.*, State v. Littlechief, 573 P.2d 263, 265 (Okla. Crim. App. 1978) (stating that although the crime occurred within Indian country, the state court had jurisdiction over an Indian defendant).
[155] *See Murphy*, 875 F.3d at 964–66.
[156] This Note will not address the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996), discussed by the Tenth Circuit. *See Murphy*, 875 F.3d at 911–14 (discussing the AEDPA).
[157] *Murphy*, 875 F.3d at 914–21, 930–32 (discussing relevant law).
[158] *Id.* at 937.
[159] *Id.* at 938.

statutes that allotted Creek lands and created the State of Oklahoma."[160] In reviewing the eight statutes the State relied on,[161] the Tenth Circuit disagreed for three reasons.

First, the statutes lacked the textual "hallmarks" demonstrating an intent to diminish the reservation's boundaries.[162] Second, the 1901 Original Allotment Agreement with the Creek and subsequent statutes,[163] actually recognized the existence of the Creek Nation's border by reserving lands for tribal purposes.[164] Under *Solem*, the court explained that the "retention of lands for tribal purposes 'strongly suggests' continued reservation status."[165] Finally, the court found unavailing the State's argument that Congress intended to disestablish the reservation because Congress sought to terminate tribal title to the land and create one or more state governments within the same territory.[166] Although "Congress largely achieved both goals,"[167] the court reasoned that the State's argument fails under this theory because: (1) allotment does not equate to disestablishment,[168] (2) a tribal government's powers and its boundaries "are not the same thing,"[169] (3) Congress never dissolved the Creek government itself,[170] and (4) the admission of a

[160] *Id.* The author believes that the State's argument concerning the cumulative effect of the statutes abrogating tribal sovereignty does not belong under the first factor. This argument sounds more appropriate under the second factor, which analyzes the surrounding circumstances of a statute.
[161] The eight statutes cited by the State, and analyzed by the court in order, are: (1) Act of Mar. 3, 1893, ch. 209, 27 Stat. 612; (2) Act of June 10, 1896, ch. 398, 29 Stat. 321; (3) Act of June 7, 1897, ch. 3, 30 Stat. 62; (4) Curtis Act, ch. 517, 30 Stat. 495 (1898); (5) "Original Allotment Agreement," ch. 676, 31 Stat. 861 (1901); (6) "Supplemental Allotment Agreement," ch. 1323, 32 Stat. 500 (1902); (7) Five Tribes Act, ch. 1876, 34 Stat. 137 (1906); and (8) Okla. Enabling Act, ch. 3335, 34 Stat. 267 (1906).
[162] *Murphy*, 875 F.3d at 948 (quoting Nebraska v. Parker, 136 S. Ct. 1072, 1079 (2016)).
[163] *See supra* note 161 (listing the several statutes asserted by the State).
[164] *Murphy*, 875 F.3d at 951.
[165] *Id.* (quoting Solem v. Bartlett, 465 U.S. 463, 475 (1984)).
[166] *Id.* at 952.
[167] *Id.*
[168] *Id.* ("The allotment of Creek lands—the transfer of title from the Tribe to its members—does not mean Congress disestablished the Creek Reservation.").
[169] *Id.* at 953.
[170] *Id.* ("Even when Congress contemplated the *future* dissolution of the Creek government, it continued to recognize the Tribe's governmental authority within the Reservation's boundaries.").

state into the "Union is compatible with . . . [the] continuation" a tribe's government.[171] Accordingly, the State "fail[ed] at the first and most important step."[172]

ii. Second *Solem* Factor

Turning to the second factor—contemporary historical evidence—both parties presented legislative and executive materials to persuade the court.[173] The court declared that they "need not settle which side has the stronger argument about the contemporary historical evidence. . . . Because no clear textual evidence shows Congress disestablished the Creek reservation at step one," therefore, the evidence presented by either party "in no way '*unequivocally* reveal[s] a widely held, contemporaneous understanding.'"[174] Thus, the first factor was dispositive.

iii. Third *Solem* Factor

Finally, the court proceeded to the third factor—subsequent history and current demography. The court began by noting that "step-three evidence is considered '[t]o a lesser extent.'"[175] The court found the State's argument unpersuasive following the Supreme Court's trend of "never rel[ying] solely on this third consideration to find diminishment."[176] Thus, the court held that "[w]hen steps one and two 'fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands,' courts must . . . conclude 'the old reservation boundaries' remain intact."[177]

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171 *Id.*
172 *Id.* at 954 (quoting Nebraska v. Parker, 136 S. Ct. 1072, 1080 (2016)).
173 *Id.* at 954–59.
174 *Id.* at 959 (alteration in original) (quoting *Parker*, 136 S. Ct. at 1081).
175 *Id.* at 960 (alteration in original) (quoting Solem v. Bartlett, 465 U.S. 463, 471 (1984)).
176 *Id.* (quoting *Parker*, 136 S. Ct. at 1081).
177 *Id.* at 966 (quoting *Solem*, 465 U.S. at 472).

iv. Conclusion

Conclusively, the Tenth Circuit ruled in favor of Murphy and declared that Congress did not disestablish the Creek reservation.[178] In sum, since Murphy "is an Indian and because the crime occurred in Indian country, the federal court has jurisdiction. Oklahoma lacked jurisdiction."[179] Accordingly, "Murphy's state conviction and death sentence are [] invalid."[180] The Creek Nation had won.

b. The Supreme Court

After the Tenth Circuit's ruling, the State moved for a rehearing by the panel and, alternatively, a rehearing en banc.[181] The Tenth Circuit denied the motion.[182] Thereafter, the State appealed, and the Supreme Court granted certiorari.[183]

On November 27, 2018, the Supreme Court heard oral arguments.[184] During oral arguments, "several justices appeared extremely uncomfortable with" ruling for the tribe because of the "possible practical implications for non-Indian Oklahomans."[185] On December 4, 2018, the Supreme Court directed the parties to file supplemental briefing.[186] Finally, on June 27, 2019, the

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[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id*. at 901 (denying respondent's "Petition for Panel rehearing or Rehearing En Banc").
[182] *Murphy*, 875 F.3d at 966. Interestingly, in his concurrence, Chief Judge Tymkovich even exclaimed that "[i]n sum, this challenging and interesting case makes a good candidate for Supreme Court review." *Id.* at 966–68 (Tymkovich, C.J., concurring in the denial of rehearing en banc).
[183] Writ of Certiorari, Royal v. Murphy, 138 S. Ct. 2026 (mem.) (May 21, 2018) (No. 17-1107).
[184] Transcript of Oral Argument, Carpenter v. Murphy, No. 14-1406 (U.S. argued Nov. 27, 2018) [hereinafter *Murphy* Transcript].
[185] Chuck Sturtevant, *Is Oklahoma Indian Country?: Law, Reckoning, and Recognition*, ANTHROPOLOGY NEWS (Jan. 18, 2019), http://www.anthropology-news.org/index.php/2019/01/18/is-oklahoma-indian-country/.
[186] Order Directing the Parties to File Supplemental Briefs, Carpenter v. Murphy, 139 S. Ct. 626 (2018). The supplemental briefing asked two questions: "(1) Whether any statute grants the state of Oklahoma jurisdiction over the prosecution of crimes committed by Indians in the area within the 1866 territorial boundaries of the Creek Nation, irrespective of the area's reservation status. (2) Whether there are circumstances in which land qualifies as an Indian reservation but nonetheless does not meet the definition of Indian country as set forth in 18 U.S.C. § 1151(a)." *Id.*

last day of the 2018 term, the Supreme Court restored the case to its calendar for reargument.[187] Thus, *Murphy* remains unresolved causing rumors to circulate over the Supreme Court's decision to rehear arguments.[188]

V. Part V: *Solem*'s Application and End

a. The Tenth Circuit's Decision was Correct (even though they Misapplied *Parker*).

The judiciary's role is to apply the law as written by Congress and interpreted by higher courts. Accordingly, the Tenth Circuit's decision was correct under the common law principle of stare decisis. Under this principle, courts must follow earlier judicial decisions of higher courts covering their jurisdiction when the same point arises in later litigation—even if they disagree with that decision.[189] The Tenth Circuit's decision adhered to *Solem* and *Parker*.

Solem compelled the Tenth Circuit to follow its framework. The court, therefore, must analyze the statutory text, surrounding circumstances, and, to a lesser extent, the subsequent developments of the disputed land.[190] The Tenth Circuit did just that.

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[187] *See* Carpenter v. Murphy, No. 17-1107 (U.S. Nov. 27, 2018), *restored to calendar*, No. 17-1107 (U.S. June 27, 2019).

[188] Reargruments at the Supreme Court are extremely rare, but not unheard of. *See* Stephen Wermiel, *SCOTUS for Law Students: Reargruments*, SCOTUS BLOG (Oct. 31, 2014, 8:00 AM), https://www.scotusblog.com/2014/10/scotus-for-law-students-reargruments/. The Supreme Court, though, never gives a reason for ordering a case reargued. *Id.* "Political scientists have attempted to explain why the Court reargues cases, but . . . there is no published rule governing when reargument occurs." *Id.* For example, the Court ordered reargruments in several famous cases including *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), *Roe v. Wade*, 410 U.S. 113 (1973), and *Citizens United v. FEC*, 558 U.S. 310 (2010). Here, rumors are circulating. Some commentators believe the Court is deadlocked (4–4) since Justice Gorsuch is recused due to his participation in the Tenth Circuit's denial of a rehearing en banc. *See* Jordan S. Rubin, *Oklahoma Tribal Border Battle Set for More Argument Next Term*, BLOOMBERG LAW (June 27, 2019, 11:08 AM), https://www.bloomberglaw.com/document/XAFBV7N4000000?bna_news_filter=white-collar-and-criminal-law&jcsearch=BNA%252000000167326bdf82a9f7ffef8b820000#jcite. Others think that the Court wants to address the supplemental briefing issued in December 2018. *See* Rebecca Nagle, *This Land: Episode 6. The Postponement*, CROOKED MEDIA (July 8, 2019), https://crooked.com/podcast/this-land-episode-6-the-postponement/. Finally, others are under the impression that the Court simply ran out of time and did not finish writing its opinion because other cases were more important. *Id.* Reargument, these individuals assert, is a procedural tactic by the Court to give them additional time to write their opinion. *Id.*

[189] *Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[190] *See supra* subsection II.b.ii (discussing the *Solem* factors).

In conducting their analysis, the panel properly and extensively applied *Solem* to the facts. During oral arguments, the panel asked if the State could provide specific language showing congressional intent to diminish the Creek reservation.[191] The State replied that "[o]ther than the entire context of what happened," they could not.[192] The State, however, continued to argue that based upon the context of the several statutes, Congress disestablished the Creek reservation.[193] Such "context" based argument is unavailing. *Parker* shows that, under the first factor, a court analyzes the text of a statute, not its context, but the words itself.[194] An intent to diminish must be clear.[195] Here, the State did not provide any diminishment language and, therefore, failed the first, and most probative, factor.

Under step two, the court committed error. Such error, though, was harmless.[196] In stating that "[b]ecause no clear textual evidence shows Congress disestablished the Creek Reservation at step one," the court incorrectly applied *Parker* and treated the State's failure to present compelling, step-one evidence as dispositive.[197] *Parker*, however, did not declare the first *Solem* factor as dispositive, but stated that the second factor may show diminishment so long as the evidence

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[191] Murphy v. Royal, 875 F.3d 896, 938 (10th Cir. 2017), *cert. granted*, 138 S. Ct. 2026 (2018), *argued sub nom.* Carpenter v. Murphy, No. 17-1107 (U.S. Nov. 27, 2018), *restored to calendar sub nom.*, No. 17-1107 (U.S. June 27, 2019).

[192] *Id.*

[193] *Id.* at 938–39.

[194] *See* Nebraska v. Parker, 136 S. Ct. 1072, 1079–80 (2016) (analyzing the text of the statute, not its context).

[195] *Id.* at 1079.

[196] In criminal law, harmless error means "[a]ny error, defect, irregularity, or variance that does not affect substantial rights [that] must be disregarded." FED. R. CRIM. P. 52(a).

[197] *Murphy*, 875 F.3d at 959. The author recognizes that individuals may read this paragraph as the court stating that the circumstances surrounding the passage of the acts was ambiguous, therefore, it cannot "unequivocally reveal[s] a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Parker*, 136 S. Ct. at 1080 (alteration in original) (quoting Solem v. Bartlett, 465 U.S. 463, 471 (1984)). The author, however, reads this paragraph as the Tenth Circuit treating the failure of the State to produce a minutia of evidence as dispositive of the result. Under the author's understanding of this paragraph, the author disagrees with the Tenth Circuit.

"unequivocally supports a finding that the existing boundaries of the reservation would be diminished."[198]

This misapplication of *Parker* bore little effect on the outcome because the court continued its analysis and found that "[n]one of the step-two evidence . . . show[ed] unmistakable congressional intent to disestablish the Creek Reservation."[199] *Solem*'s second factor requires historical evidence that "*unequivocally* reveal[s]" congressional intent.[200] An ambiguous record "of subsequent treatment of the disputed land cannot overcome" statutory text that is "devoid of any language indicative of Congress' intent to diminish."[201] Thus, the State failed to carry its burden of providing an unambiguous record showing Congress's intent to diminish the reservation.

Finally, since the State failed to satisfy either the first or second *Solem* factor, the Tenth Circuit properly applied *Parker. Parker* is clear in stating that courts cannot "rel[y] solely on this third consideration to find diminishment."[202] Oklahoma failed to provide evidence showing disestablishment under the first or second *Solem* factor; therefore, Oklahoma cannot use the third *Solem* factor to win. Conclusively, the "panel opinion faithfully applie[d] Supreme Court precedent" and such "precedent precludes any other outcome."[203] Oklahoma lacks jurisdiction and the Eastern District of Oklahoma has jurisdiction. The Creek reservation persists.

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[198] *Parker*, 136 S. Ct. at 1081; *see also Solem*, 465 U.S. at 471 (stating that "explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment").
[199] *Murphy*, 875 F.3d at 959.
[200] *Id.* (quoting *Parker*, 136 S. Ct. at 1080).
[201] *Parker*, 136 S. Ct. at 1082 (citing South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 356 (1998)).
[202] *Id.* at 1075.
[203] *Murphy*, 875 F.3d at 966 (Tymkovich, C.J., concurring in the denial of rehearing en banc).

b. Overruling *Solem* in Support of Traditional Means of Statutory Construction.

Federal Indian law is in shambles. Commentators declare that "[m]ore than any other field of public law, federal Indian law is characterized by doctrinal incoherence and doleful incident."[204] It is a "rudderless exercise in judicial subjectivism."[205] Justice Scalia even described the current state of Indian affairs as not bound by the rule of law, but as a judicial search "to discern what the current state of affairs ought to be."[206] *Solem* is no exception. *Murphy* provides a starting point for the Court to begin the process of creating coherent Indian jurisprudence that strictly follows the law passed by the political branches and allows the Court to remove itself from judicial law-making. The Court must extinguish *Solem* and revert to traditional canons of statutory construction to determine diminishment and disestablishment for several reasons.[207]

To begin, *Solem*'s third factor—subsequent history—is highly controversial and completely ignores all standards of judicial interpretation and canons of construction. In *Parker*, the Court was correct in stating that subsequent history is "the least compelling" evidence of diminishment for "[e]very surplus land Act . . . degraded the 'Indian character' of the reservation."[208] *Solem*'s third factor, though, is a mere ruse to oust tribes from jurisdiction.[209]

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[204] Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1754 (1997) (footnotes omitted); *see also* United States v. Lara, 541 U.S. 193, 225 (2004) (Thomas, J., concurring in the judgment) (stating that "federal Indian law is at odds with itself").

[205] Getches, *supra* note 13, at 1576.

[206] Memorandum from Antonin Scalia to William Brennan (Apr. 4, 1990) (on file with author).

[207] Surplus lands Acts apply only to allotment. Under allotment, Congress passes *statutes* to grant tribal members individualized parcels of land. *Solem* is inapplicable to treaties. This Note will not delve into the proper methods of treaty interpretation. Treaty interpretation differs from statutory interpretation due to the presence of a massive barrier between the parties: language. Accordingly, reverting to traditional *statutory* canons of construction may not work for treaties. For a discussion of treaty interpretation methods, see generally RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW §§ 301–313 (AM. LAW INST. 2018); Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431 (2004); Ian Johnstone, *Treaty Interpretation: The Authority of Interpretive Communities*, 12 MICH. J. INT'L L. 371 (1991); Harold H. Koh, *The President Versus the Senate in Treaty Interpretation: What's All the Fuss About?*, 15 YALE J. INT'L L. 331 (1990).

[208] Nebraska v. Parker, 136 S. Ct. 1072, 1082 (2016) (quoting South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 356 (1998)).

[209] *See supra* subsection II.b.iii.

Commentators continually criticize the Court's continued use of subsequent history to find diminishment.[210] The Court itself has repeatedly denounced the use of subsequent history, yet retains it. In *Solem*, Justice Thurgood Marshall, writing for a unanimous Court, exclaimed that "[r]esort to subsequent demographic history is, of course, an unorthodox and potentially unreliable method of statutory interpretation."[211] Accordingly, even the author of *Solem* denoted the peculiarity of using subsequent history. The use of subsequent history inevitably deals a fatal blow to tribal rights.

By using subsequent history to infer earlier congressional intent, the Court creates a harmful precedent whereby individuals with greater power may oppress more vulnerable individuals. Subsequent history will nearly always favor diminishment.[212] Chief Justice John Marshal indubitably proclaimed that federal courts are "courts of the conqueror."[213] Using subsequent history as a basis of statutory interpretation will lead to incorrect rulings and discrimination against the weaker party—the Indian tribes. Accordingly, *Brown v. Board of Education*[214] is a good example of the dangers of using current demographics and society's current state as a means of statutory construction. In the 1950s, the American public largely favored

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[210] *See* Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990) (Scalia, J., concurring in part) ("Arguments based on subsequent legislative history, like arguments based on antecedent futility, should not be taken seriously, not even in a footnote."); Wyoming v. U.S. Envtl. Prot. Agency, 875 F.3d 505, 532 n.6 (10th Cir. 2017) (Lucero, J., dissenting) ("The third step of the *Solem* analysis cannot be meaningfully described as a tool to decipher congressional intent. Rather, it is a means of ignoring that intent."); Symposium, *Diminishment of Indian Reservations: Legislative or Judicial Fiat?*, 71 N.D. L. REV. 415, 421–22 (1995) (stating that using demographics to interpret congressional intent is "totally irrational" and that it is "hard put to see how that could ever be a principled decision"); *id.* at 417 (asserting that "[a]ny test that starts by saying that it is looking for 'clear' indications of congressional intent and then lists as a factor in determining the clear intent the present day demographics of the reservation cannot legitimately talk in terms of clear indications of congressional intent").

[211] Solem v. Bartlett, 465 U.S. 463, 472 n.13 (1984).

[212] *See Yankton Sioux Tribe*, 522 U.S. at 356 (stating that "[e]very surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation" (quoting *Solem*, 465 U.S. at 471)).

[213] Johnson v. M'Intosh, 21 U.S. 543, 588 (1823).

[214] 347 U.S. 483 (1954).

retaining the subservient status of African-Americans.[215] It is undisputed that American society treated African-Americans as lower-class citizens due to the color of their skin. After *Brown*, views among white-Americans towards blacks altered significantly.[216] If *Brown* used a standard like *Solem*'s third factor, the Court would inevitably find that the subsequent history—the continued discrimination after the passage of the multitude of civil rights acts and constitutional amendments calling for equality—showed that persons of color remained subservient. A *Solem*-like standard would support retention of *Plessy v. Ferguson*'s "separate but equal" notion.[217] The oppression of minorities would continue. By allowing the third factor to persist, the Court allows a majority to continually oppress minority rights—a notion antithetical to our democracy.[218] *Solem*'s third factor is harmful to the proper functioning of our judicial system—to ensure equal justice for all.

Further, courts continually misapply *Solem*'s second factor by substituting executive intent for congressional intent. *Solem*'s purpose is to discover a *congressional* intent to diminish a reservation, not *executive* intent.[219] In *Solem*, the court used executive materials—a report—not to support a finding of diminishment, but as a mere statement that Congress did not consider it in its floor debates or legislative reports.[220] The Court did not use executive materials to evince a

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[215] *See generally* Mildred A. Schwartz, *Trends in White Attitudes Toward Negroes*, NAT'L OPINION RES. CTR. 113–26 (1967), http://www.norc.org/PDFs/publications/NORCRpt_119.pdf.

[216] *Id.* at 114 ("Of all the events which have occurred in the last twenty years in the civil rights arena, surely the 1954 Supreme Court decision had the most dramatic impact, initiating, as it did, a revolution in American society. It is hence the single event that could conceivably mark a turning point in white viewpoints.").

[217] *See* Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by Brown*, 347 U.S. 483.

[218] *See* THE FEDERALIST NO. 10 (James Madison); *cf. Plessy*, 163 U.S. 537; *Brown*, 347 U.S. 483.

[219] *See* Solem v. Bartlett, 465 U.S. 463, 470 (1984) (stating that "*Congress* [must] clearly evince an 'intent to change boundaries' before diminishment will be found" (emphasis added) (quoting Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 615 (1977))); *id*. at 478 (stating that "in the absence of some clear statement of *congressional* intent . . . it is impossible to infer" diminishment (emphasis added)). Justice Thomas has also expressed an interest in the Court addressing whether Congress even has the power to regulate the indigenous populations or whether the executive branch has such power through treatymaking if tribes are sovereign. *See* United States v. Lara, 541 U.S. 193, 214–26 (Thomas, J., concurring in the judgment).

[220] *See Solem*, 465 U.S. at 477 ("In neither floor debates or legislative reports is there a clear statement that Congress interpreted Inspector McLaughlin's report to establish an agreement on the part of the Cheyenne River Indians to cede the opened areas.").

congressional intent. The intent of the executive branch does not necessarily reflect the intent of Congress.

The Supreme Court's decisions in *Hagen* and *Yankton Sioux Tribe* exacerbated this issue of confusing congressional and executive intent. In *Hagen*, the Court used a presidential proclamation coupled with a prior Act of Congress to support a finding of diminishment—even though Congress intentionally deleted the diminishment language in the new Act.[221] Similarly, in *Yankton Sioux Tribe*, the Court considered negotiations between the Commissioner of Indian Affairs, an executive branch official, and the Tribe to rule in favor of diminishment.[222] Even in *Murphy*, the Tenth Circuit considered a 1900 attorney general opinion, an opinion by the executive branch.[223] Emphatically, executive intent is not always consistent with congressional intent—in some instances, their interests may even conflict. The Court's usage of executive materials likely flows from treaty interpretation methods by which the Court attempts to discover congressional *and* executive intent.[224] Surplus lands Acts are not treaties but Acts of Congress. The era of Indian-U.S. relations governed through treaties (the Treaty Era) is over.[225] Now, Congress governs tribes by legislative enactments.[226] Accordingly, using executive material to show congressional intent leads the Court to place the will of the chief executive over the will of the legislature. Such usage

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[221] *See* Hagen v. Utah, 510 U.S. 399, 419–20 (1994) (discussing the use of a presidential proclamation).
[222] *See* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 351–54 (1998).
[223] Murphy v. Royal, 875 F.3d 896, 958–59 (10th Cir. 2017), *cert. granted*, 138 S. Ct. 2026 (2018), *argued sub nom.* Carpenter v. Murphy, No. 17-1107 (U.S. Nov. 27, 2018), *restored to calendar*, No. 17-1107 (U.S. June 27, 2019). The author notes that it is unlikely that the exclusion of this evidence alone would create *unequivocal* evidence of diminishment. The author's issue is with the court even *considering* executive evidence to find congressional intent.
[224] *See* Alex Glashausser, *Difference and Deference in Treaty Interpretation*, 50 VILL. L. REV. 25, 36 (2005) (stating that the Supreme Court "has historically deferred mightily to the [treaty] interpretations [by] the executive branch, perhaps because that branch handles the actual enforcement"); David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 1015 (1994) (asserting that the executive branch's opinion is "the single best predictor of interpretive outcomes in American treaty cases").
[225] *See supra* subsection III.b (discussing the history of the Creek).
[226] The author expresses no opinion on whether treaties or statutes should govern United States-Indian relations.

gives the executive branch a role in domestic law-making through judicial subjectivism.[227] This conduct is contrary to the Separation of Power principles inherent in the Constitution.[228]

Additionally, the use of legislative history to discover intent complicates diminishment analyses by assuming "that the legislature even *had* a view on the matter at issue."[229] For example, in *Parker*, the State "cherry-picked statements by legislators" to evince a congressional intent to diminish the reservation.[230] In this manner, the Court's quest to discover a unified congressional intent through legislative history opens their decisions to "manipulation and distortion."[231] Further, "because there are no rules about which categories of statements are entitled to how much weight, the [legislative] history can be either hewed to as determinative or disregarded as inconsequential—as the court desires."[232] Legislative history "increases the scope of manipulated interpretation, making possible some interpretations that the traditional rules of construction could never plausibly support."[233]

In *Murphy*, the State relied on the legislative history, or the "context" of the various statutes.[234] The Tenth Circuit, though, found that the State failed to provide a specific statute containing diminishment language—even ambiguous language.[235] Courts should not "inquire what the legislature meant . . . only what the statute means."[236] The idea that legislative reports may

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[227] *See generally* Getches, *supra* note 13.

[228] *See* U.S. CONST. art. I, § I ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."). The author asserts that if the United States returned to an era of treatymaking with Indian tribes, then the executive's intent would become relevant. Currently, however, Congress governs through a congressional plenary power, therefore, the Court should not inquire into the executive's intent. *See supra* subsection II.a.ii (discussing congressional plenary power of the Indian tribes).

[229] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXT 376 (2012).

[230] Nebraska v. Parker, 136 S. Ct. 1072, 1082 (2016).

[231] SCALIA & GARNER, *supra* note 229, at 376.

[232] *Id.* at 377–78.

[233] *Id.* at 378.

[234] Murphy v. Royal, 875 F.3d 896, 938 (10th Cir. 2017), *cert. granted*, 138 S. Ct. 2026 (2018), *argued sub nom.* Carpenter v. Murphy, No. 17-1107 (U.S. Nov. 27, 2018), *restored to calendar*, No. 17-1107 (U.S. June 27, 2019).

[235] *Id.*

[236] OLIVER WENDELL HOMES, *The Theory of Legal Interpretation*, *in* COLLECTED LEGAL PAPERS 203, 207 (1920).

present a unified congressional intent is "fantasy."[237] Each legislator votes on laws for varying reasons—some of which may be directly contrary to other legislators voting in the same direction. The words of the statute govern, not the words of the legislature in debate.

Here, Oklahoma failed to provide a statute, therefore, the Creek reservation did not diminish. Allowing a context-based, legislative history argument to prevail would upset separation of power principles by allowing the Court to make the law through judicial subjectivism[238] while giving the legislature a role in interpreting that law.[239] If the Court allows legislative history to influence its decisions, the Court opens the door to interpreting outlandish remarks made to empty congressional chambers by congressmen attempting to structure future court decisions. This is impermissible. In the absence of a statute, courts should not rely on legislative materials or the surrounding circumstances of acts to find diminishment. Congress must be explicit by the words they enact.

c. Statutory Text Must Control and the Court Must Restore the Creek Reservation.

The Court does not make the law; it interprets the law.[240] In *Murphy* and subsequent diminishment cases, the Court should take a straight-forward approach and analyze cases using traditional canons of construction with consideration to special Indian canons. This method ensures that judges do not legislate from the bench and the rights and privileges of the Indian population remain bound by legislative enactment, not judicial subjectivism. Courts cannot declare laws

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[237] SCALIA & GARNER, *supra* note 229, at 376.

[238] *See* William D. Popkin, *Law-Making Responsibility and Statutory Interpretation*, 68 IND. L.J. 865, 878 (1993) (stating that "the judicial re-creation of legislative purpose impinges on legislative law-making responsibility").

[239] SCALIA & GARNER, *supra* note 229, at 386 ("The use of legislative history also spawns a separation-of-powers problem: It entrusts the legislature (or more precisely some legislators) with the interpretation of provisions that it has enacted—a function that is the preeminent and exclusive responsibility of the courts.").

[240] *See* U.S. CONST. art. III, § 1; U.S. CONST. art. II, § 1 (showing that the Constitution vests judicial power in one Supreme Court and legislative power in Congress).

created on their own volition but are bound to interpret the laws enacted by the sovereign of the United States: the People. Chief Justice John Marshall recognized that federal courts are "courts of the conqueror."[241] Public opinion, acting through Congress, provides some protection for oppressed parties to assert their rights. Following basic statutory interpretation principles ensures that the law follows the will of the populace and not the will of a single judge or a panel of judges appointed by the conquering body.

Under traditional canons of construction, the Court looks to the plain meaning of a statute's words to determine its applicability.[242] Under Indian canons, laws are "interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians."[243] Further, "Congress [must] clearly evince an 'intent . . . to change . . . boundaries' before diminishment will be found."[244] The Court may only find such intent through explicit statutory language.[245] Accordingly, "'[a]scertaining the "intention of the legislature" . . . boils down to finding the meaning of the words used.' If courts do otherwise, they engage in policy-based lawmaking."[246] Allowing courts to engage in lawmaking "run[s] the risk of perpetuating a history of colonialism that by its nature contradicts democratic principles."[247] Thus, under the appropriate canons of construction, the Court must apply the words of a statute with deference to the indigenous tribes.

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[241] Johnson v. M'Intosh, 21 U.S. 543, 588 (1823).
[242] SCALIA & GARNER, *supra* note 229, at 56–58, 69–77.
[243] Herrera v. Wyoming, 139 S. Ct. 1686, 1699 (2019) (quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 206 (1999)).
[244] Solem v. Bartlett, 465 U.S. 463, 470 (1984) (quoting Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 614 (1977)); *see also* Nebraska v. Parker, 136 S. Ct. 1072, 1079 (2016) (stating that congressional intent to diminish the boundaries of an Indian reservation must be clear); *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 202 ("Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so."); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143–44 (1980) ("Ambiguities in federal law have been construed generously in order to comport with these traditional notions of [tribal] sovereignty and with the federal policy of encouraging tribal independence.").
[245] *See supra* section V.b (arguing for *Solem*'s end).
[246] SCALIA & GARNER, *supra* note 229, at 395 (quoting JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 165 (1909)).
[247] Charlene Koski, *The Legacy of* Solem v. Bartlett*: How Courts Have Used Demographics to Bypass Congress and Erode the Basic Principles of Indian Law*, 84 WASH. L. REV. 723, 761 (2009).

Under this approach, *Murphy* is simple. The State failed to provide explicit—or even ambiguous—statutory language showing Congress diminished the Creek reservation.[248] Accordingly, the Supreme Court must apply the law—in this case, the absence of law—and rule in favor of Murphy and the Creek Nation. The State cannot prevail. Even under this analysis, Oklahoma lacks jurisdiction and the federal courts have jurisdiction to hear Murphy's case because Congress did not disestablish the Creek reservation.

VI. Part VI: The Implications of the Tenth Circuit's Decision

Murphy will have extensive implications that may extend well beyond Murphy and the Creek and effect a sizable portion of Oklahoma. Numerous commentators suggest that a ruling for Murphy would affect the historical reservations of all Five Civilized Tribes because all five tribes lost their reservation by similar means.[249] Such repercussions, many argue, would affect approximately forty-two percent of Oklahoma, including the city of Tulsa.[250] An inquiry into these

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[248] Murphy v. Royal, 875 F.3d 896, 938–39 (10th Cir. 2017), *cert. granted*, 138 S. Ct. 2026 (2018), *argued sub nom.* Carpenter v. Murphy, No. 17-1107 (U.S. Nov. 27, 2018), *restored to calendar*, No. 17-1107 (U.S. June 27, 2019).

[249] *See, e.g.*, Joe Bubar, *Who Owns Oklahoma? A Supreme Court Ruling Could Return Nearly Half of the State to Native Americans*, N.Y. TIMES: UPFRONT (Jan. 28, 2019), https://upfront.scholastic.com/issues/2018-19/012819/who-owns-oklahoma.html#1280L ("If the Supreme Court upholds the Tenth Circuit's ruling, it would not only revive the Muscogee reservation, it could open the door for the other four major tribes in eastern Oklahoma to reclaim the land that had been granted to them before statehood."); Chris Casteel, *Supreme Court to Rehear Creek Reservation Case in the Next Term*, OKLAHOMAN (June 28, 2019, 1:04 AM) https://oklahoman.com/article/5634922/supreme-court-punts-creek-reservation-case-to-next-term ("Congress apparently never passed legislation explicitly disestablishing the Creek reservation or those of the other Five Civilized Tribes."); Garrett Epps, *Who Owns Oklahoma? The Supreme Court Must Decide the Fate of a Murderer—and Whether Roughly Half of Oklahoma is Rightfully Reservation Land*, THE ATLANTIC (Nov. 20, 2018) https://www.theatlantic.com/ideas/archive/2018/11/murphy-case-supreme-court-rules-muscogee-land/576238/ ("If the Tenth Circuit's decision stands—and if courts restore the reservation boundaries for all five civilized tribes—roughly half of Oklahoma will become, at a stroke, Indian country.").

[250] *See* Megan Dollenmeyer, Carpenter v. Murphy*: A Matter of Life and Death for Tribal Sovereignty*, U. CIN.: L. REV. BLOG (Oct. 14, 2018), https://uclawreview.org/2018/10/14/carpenter-v-murphy-a-matter-of-life-and-death-for-tribal-sovereignty/. As another note, Public Law 280 may mandate or allow states to assume jurisdiction over Indians committing crimes in Indian country. Oklahoma, however, is not subject to Public Law 280. *See* Public Law 280, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2010)). Public Law 280 requires the following states to assume criminal jurisdiction: Alaska, California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin. Further, Public Law 280 authorizes other states to voluntarily assume jurisdiction. The following states have enacted legislation pursuant to Public Law 280 in whole or part: Florida, FLA. STAT. § 285.16 (1961); Idaho, IDAHO CODE § 67-5101 (1963) (limiting criminal jurisdiction to certain circumstances); and Washington, WASH. REV. CODE § 37.12.010 (1963) (limiting criminal jurisdiction to certain circumstances). Finally, there are other states that possess similar authorizing statutes—criminal or civil. For a more detailed discussion of states under Public Law 280 or similar authorizing statues, see Carole Goldberg, *Tribal*

practical effects is necessary to understand the importance of the potential rights and privileges *Murphy* may alter.

In *Murphy*, the parties dispute the severity of a ruling affirming the Tenth Circuit's decision for Murphy. Generally, the Supreme Court tends to resist recognition of land as Indian country when such "conclusion would seriously disrupt the justifiable expectations of the people living in the area."[251] This, however, leads to speculation and causes judicial lawmaking—which is not the Court's role.[252] During the first Supreme Court argument, the State contended that the effects of ruling against diminishment "would be dramatic" and "several thousand convictions . . . might be called into . . . question."[253] In contrast, Murphy's counsel downplayed the effect of any implications.[254] This section will lay out a few implications of declaring the dispute land as Indian country in general.[255] This Note intends to cover criminal and civil ramifications generally and will not cover every aspect of these areas nor will it cover every effect.

a. Criminal Implications

Murphy's dispute centers on criminal jurisdiction. Specifically, whether the State or the Creek, through the federal government, has jurisdiction to prosecute and sentence Murphy for his crime.[256] An opinion in favor of the defendant-respondent would expand tribal and federal criminal jurisdiction while reducing state prosecutorial and law enforcement powers.

Jurisdictional Status Analysis, TRIBAL CT. CLEARINGHOUSE, http://www.tribal-institute.org/lists/tjsa.htm (last updated Feb. 16, 2010).

[251] Hagen v. Utah, 510 U.S. 399, 421 (1994).

[252] *See supra* section V.b (discussing the reasons to return to traditional canons of construction).

[253] *Murphy* Transcript, *supra* note 184, at 28–31.

[254] *Id.* at 56–60.

[255] This Note will not discuss the mess in Indian jurisprudence created by City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005). Commentators, academics, and legal professions remain puzzled by *City of Sherrill*'s application to the overall diminishment framework and its implications.

[256] *See supra* section III.a (discussing the procedural history the case).

In general, Indian country criminal jurisdiction analyses implicate two major statutes: the Indian Country Crimes Act (ICCA)[257] and the Major Crimes Act (MCA).[258] Under these statutes, four situations generally arise dictating proper jurisdiction in criminal cases. First, if an Indian defendant commits a major crime, defined by the MCA, federal courts have jurisdiction.[259] If the crime is not a major crime and the matter involves an Indian defendant *and* Indian victim, tribal courts have jurisdiction.[260] Next, under the ICCA, if the victim *or* the defendant is an Indian and the other is not, federal courts have jurisdiction.[261] Finally, if neither the victim nor defendant is Indian, state courts will have jurisdiction.[262] These final two scenarios involving non-Indian defendants contain a critical exception. Under the Violence Against Women Reauthorization Act

[257] 18 U.S.C. § 1152 (1948).
[258] 18 U.S.C. § 1153 (2013).
[259] *See* Negonsott v. Samuels, 507 U.S. 99, 102 (1993) (stating that an offense by one Indian against the person or property of another Indian fall under the jurisdiction of the concerned Indian tribe); United States v. Antelope, 430 U.S. 641, 643 n.2 (1977) ("Except for the offenses enumerated in the Major Crimes Act, all crimes committed by enrolled Indians against other Indians within Indian country are subject to the jurisdiction of tribal courts.").
[260] *See* cases cited *supra* note 259.
[261] *See infra* notes 262–64 and accompanying text (discussing the ICCA and non-Indian crimes in Indian country). *Contra* Violence Against Women Reauthorization Act of 2013, 25 U.S.C. § 1304 (2013) (allowing tribes to assume jurisdiction over non-Indians when they commit acts of domestic violence against tribal members).
[262] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) (holding that "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians"), *superseded by statute*, Act of Oct. 28, 1991, 105 Stat. 646, *as recognized in* United States v. Lara, 541 U.S. 193 (2004). The author notes that the statute overruling *Oliphant* declared that tribes do possess authority to prosecute *nonmember* Indians. The statute did not overrule the longstanding notion that tribes lack jurisdiction to prosecute non-Indians; tribes continue to lack authority to prosecute non-Indians. *See* Act of Oct. 28, 1991, 105 Stat. 646; *see also* United States v. Langford, 641 F.3d 1195, 1197 (10th Cir. 2011) ("The states possess exclusive criminal jurisdiction over crimes occurring in Indian country if there is neither an Indian victim, nor an Indian perpetrator."); *Antelope*, 430 U.S. at 643 n.2 (stating that "a non-Indian charged with committing crimes against other non-Indians in Indian country is subject to prosecution under state law"). By its express terms, though, federal jurisdiction should exist under the ICCA when non-Indians commit crimes in Indian country. *See* 18 U.S.C. § 1152. Longstanding Supreme Court precedent, however, holds that when a non-Indian commits a crime against a non-Indian, the federal government and tribe have no interest in prosecuting the crime; therefore, the state has jurisdiction. United States v. McBratney, 104 U.S. 621 (1881); *accord Langford*, 641 F.3d 1195 (applying *McBratney* and holding that the federal government and tribe lack jurisdiction unless the crime involved an Indian); United States v. Graham, 572 F.3d 954, 956 n.3 (8th Cir. 2009) (stating that the ICCA only applies when a crime involves an Indian and non-Indian). A different issue arises where a non-Indian commits a crime against both a non-Indian and an Indian in Indian country. Since "each sovereign [the state and the federal government] derives its power from a different constitutional source, [] both may prosecute and punish the same individual for the same act." United States v. Basile, 109 F.3d 1304, 1307 (8th Cir. 1997)). Accordingly, in these circumstances, the state may seek justice for the non-Indian victim while the federal government seeks justice for the Indian victim.

of 2013,[263] a tribe may elect to prosecute non-Indians for domestic violence, dating violence, or violating a protective order if the perpetrator has "ties to the Indian tribe" as defined by the statute.[264]

Given this background, one commentator argues that a ruling for Murphy means that "every state conviction of an 'Indian' who committed a 'major crime' within the 1866 boundaries of the Creek Nation is void" and federal officials would need to "reopen, reinvestigate, and re-prosecute those cases—numbering in the thousands—many of which are decades old."[265] Further, the State even declared that a ruling for Murphy would cause the federal government to reopen the cases of "155 murderers, 113 rapists, and over 200 felons who committed crimes against children" as well as over "2,000 prisoners in state court . . . who self-identify as Native American" and "it [is not] clear that the federal government could retry any of these."[266]

Other commentators, though, are skeptical of the criminal implications espoused by Oklahoma and argue that the implications of any ruling are unclear.[267] Murphy even argues that "Oklahoma's claims are mostly rhetoric"[268] and the "decision below [at the Tenth Circuit] only modestly realigns criminal jurisdiction."[269] Further, "the federal government has ample resources

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[263] 25 U.S.C. § 1304. For a more detailed analysis of the Act, see LISA N. SACCO, CONG. RESEARCH SERV., R45410, THE VIOLENCE AGAINST WOMEN ACT (VAWA): HISTORICAL OVERVIEW, FUNDING, AND REAUTHORIZATION (2019).
[264] 25 U.S.C. § 1304(b)(4)(B), (c). The statute states that to have sufficient ties, the defendant must: "(i) reside[] in the Indian Country . . . (ii) [be] employed in the Indian country . . . or (iii) be a spouse, intimate partner, or dating partner of (I) a member of the participating tribe; or (II) an Indian who resides in the Indian country." *Id.*
[265] T.J. McCarrick, *Jurisdiction, "Indian Country," and a Critique of* Murphy v. Royal*, -F.3d-, (10th Cir. Aug. 8, 2017)*, LEAST DANGEROUS BLOG (Aug. 16, 2017), https://leastdangerousblog.com/2017/08/16/jurisdiction-indian-country-a-critique-of-murphy-v-royal-f-3d-10th-cir-aug-8-2017/.
[266] *Murphy* Transcript, *supra* note 184, at 75–76.
[267] *See* Garrett Epps, *Could a Supreme Court Decision Entitle 2,000 Oklahoma Inmates to New Trials?*, THE ATLANTIC (Dec. 18, 2018), https://www.theatlantic.com/ideas/archive/2018/12/carpenter-v-murphy-could-reopen-2000-oklahoma-trials/578308/ ("But would the decision affect prisoners currently in jail? It's not clear.").
[268] Brief of Respondent at 55, Carpenter v. Murphy, No. 17-1107 (U.S. filed Sept. 19, 2018).
[269] *Id.*

to handle additional prosecutions."[270] Murphy's contention, therefore, is that the State's argument concerning criminal implications are mere hyperbole to force the Court to maintain the status quo.

Both sides are (obviously) exaggerating. The impacts of this case are substantial, but overstated. If the Supreme Court rules for the Creek, Creek courts and the Eastern District of Oklahoma will need to vastly increase their staff, prosecutors, public defenders, and other critical individuals to maintain proper judicial efficiency and due process. Many, if not all, crimes involving an Indian as victim or defendant would transfer from Oklahoma state courts to federal or Creek courts.[271] It is highly unlikely, however, that the Creek or federal government will allow violent criminals to simply avoid the criminal justice system as the State implies. Neither the Creek nor the federal government possess an interest in releasing murderers, rapists, or child abusers. Here, it would be difficult to find an individual sympathetic to Murphy. Those supporting Murphy's side are not supporting him, but the indigenous tribes of Oklahoma. In terms of criminal implications, though, a ruling for Murphy will transfer his case to the federal court system.

b. Civil and Tax Implications

Murphy will also have important civil and tax implications. During oral arguments, the State declared that a decision for Murphy would have "earth-shattering consequence[s] on the civil side."[272] "Affirmance," the State contends, would "raise[] a specter of tearing families all across eastern Oklahoma."[273] Further, the State asserts that businesses are wary of the effects of the decision below in topics ranging from taxation to construction permits.[274] Murphy's counsel even contended that affirmance would cause a "significant," but not "existential," shift over the

[270] *Id.* at 5.
[271] It is unclear whether a ruling for Murphy would be retroactive.
[272] *Murphy* Transcript, *supra* note 184, at 76.
[273] *Id.* at 77.
[274] *See* Brief of Petitioner at 56, *Murphy*, No. 17-1107 (U.S. filed July 23, 2018).

authority of the state to lay income and sales taxes on tribal members.[275] Murphy's counsel contends that Oklahoma overstates the civil implications because current precedent already limits tribal authority over nonmembers.[276]

Outside of Indian country, a tribe's authority extends to matters involving treaty rights, the internal concerns of tribal members, and to consenting nonmembers.[277] Nondiscriminatory state laws apply to both non-Indians and Indians outside of Indian country unless preempted by federal statute or treaty.[278]

Within Indian country, the authority of the State and tribe become puzzling. State jurisdiction is (relatively) straight-forward. The State's civil jurisdiction over non-Indians continues in Indian country; however, the State generally lacks civil jurisdiction over Indians in Indian country.[279]

Tribal jurisdiction relating to nonmembers, though, is unclear. *Montana v. United States*[280] limits a tribe's power to regulate nonmembers in Indian country. Under *Montana*, the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[281] Two exceptions to this rule exists. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its

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[275] *Murphy* Transcript, *supra* note 184, at 48.
[276] *Id.* at 48 ("Stepping back, this Court's cases in -- in cases like Plains Commerce Bank and the whole Montana line of cases have drastically limited tribal authority over nonmember, non-fee land, even within a reservation.").
[277] *See supra* notes 20–22 and accompanying text.
[278] *See, e.g.*, Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 453 (1995) (holding that Oklahoma may not apply a motor fuel tax to Indians in Indian country but may apply the tax to non-Indians and Indians outside of Indian country).
[279] *Id*. (asserting that Oklahoma lacks taxing authority over Indians in Indian country); *see also* Williams v. Lee, 358 U.S. 217, 223 (1959) (holding that "the exercise of state jurisdiction undermines the authority of tribal courts" in civil proceedings involving on-reservation conduct involving an Indian). *But see* Nevada v. Hicks, 533 U.S. 353 (2001) (holding that a tribe may not assert jurisdiction over nonmember law enforcement officers executing a search warrant against an Indian in Indian country).
[280] 450 U.S. 544 (1981). *Montana* has numerous issues and contradictory opinions that leave legal scholars puzzled on its meaning and application. This Note will not address those.
[281] *Id.* at 565.

members, through commercial dealing, contracts, leases, or other arrangements."[282] Second, a tribe may "exercise civil authority over the conduct of non-Indians on fee land within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[283] Unless one of these two exceptions—or a congressional statute or treaty— apply, the Creek will not have civil jurisdiction over non-Indians in Indian country.[284] Courts remain confused, though, as to the scope of these exceptions and are generally prone to limit tribal exercise of regulatory and adjudicatory civil jurisdiction.[285]

Further, an issue arises over the taxing authority in Indian country. The Creek's taxing authority would be absolute when applied to Indians in Indian country. Nonmembers, though, present a puzzling issue. The Court recognizes the power of tribal governments to tax nontribal members in Indian country as a core aspect of tribal sovereignty.[286] The State may also tax non-Indians in Indian country. Taxation by the State, though, is subject to a "flexible preemption analysis sensitive to the particular facts and legislation involved" and the Court will void any tax that would interfere with the tribe's ability to exercise their sovereign powers.[287] Accordingly, the Creek and the State may have concurrent taxing authority over non-Indians in Indian country depending upon the particularized facts of the situation.

Like its criminal counterpart, *Murphy*'s implications involving civil jurisdiction and taxation are dubious. Unquestionably, a decision for the Creek will expand their ability to regulate

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[282] *Id.* at 565–66.
[283] *Id.* at 566.
[284] *See* Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997) (holding that "[a]s to nonmembers, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction").
[285] *See* COHEN, *supra* note 22, at § 7.02[1][a]. For an interesting rebuke of *Montana* by a tribal court, see *In re* A.P. v. Tuba City Family Court, 8 Navajo Rptr. 671 (2005).
[286] *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982) ("The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management.").
[287] Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 176 (1989).

and tax Indians.[288] By restoring the original Creek reservation, the Creek would strip the State of its power to regulate and tax its members in the area prior to the Tenth Circuit's decision. The justifiable expectations of individuals and businesses to due process and enforcing their judgment will continue. Federal law requires the Creek and Oklahoma judicial systems to comport with the essential principles of due process.[289] The Creek and Oklahoma even agree to enforce the judgments of one another.[290]

Regarding taxation, Oklahoma's persistence in this fight is understandable. Oklahoma will lose taxing authority over every Indian in the "new" Creek reservation. Further, Oklahoma would need to second-guess its revenue statutes because Oklahoma would need to comport with the federal and common law requirement that their taxes not infringe upon the sovereignty of the Creek Nation or its member. Given this, the Creek will have an expansive ability to generate revenue at the expense of Oklahoma, thereby, requiring the state to reassess its budgetary needs—scaling back some essential services provided to citizens.[291]

Further, the justifiable expectations of individuals and business regarding taxation, while noteworthy, are not as severe as promulgated by the State. The State and the Creek would exercise concurrent taxing authority over non-Indians in Indian country. A second taxing authority is burdensome.[292] In many instances, though, the Creek code provides tax credits to individuals and

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[288] *See supra* note 28 and accompanying text (discussing tribal powers to regulate its members).
[289] *See* Indian Civil Rights Act, 25 U.S.C. § 1302(a) (2010).
[290] *See* OKLA. STAT. tit. 12, § 728 (1992) (extending full faith and credit to any tribe that agrees to grant reciprocity of judgments); M(C)NCA, Title 27, § 7-101 (granting reciprocity to all Indian nations, states, and territories recognizing the judgments of the Creek courts). Interestingly, the Creek were the first tribe to enter a reciprocity agreement with Oklahoma in June 1994. Shelly Grunsted & Joseph H. Webster, *Full Faith and Credit: Are Oklahoma Tribal Courts Finally Getting the Respect They Deserve*, 36 TULSA L.J. 381, 391 (2013). For a more detailed discussion of reciprocity agreements between Oklahoma and the tribes within its boundaries, see *id.*
[291] The author is not implying that the Creek are inadequate at providing these services. The author does not possess the knowledge to delve into the vast amount of social services, emergency services, and other areas of public assistance to make a fair and accurate representation of the Creek's governmental services provided to members, nonmember Indians, and non-Indians.
[292] Technically third because the federal government may also tax this area.

businesses whom pay a tax to the State of Oklahoma.[293] In sum, the State's "end-of-the-world" argument is unavailing; however, Murphy's argument that the Court's decision will have little, if any, effect is also incorrect. Courts will decide the implications on a case-by-case basis and by applying a straight-forward statutory analysis, the Court will reach the right result. Any change in that result lay solely at the feet of Congress. Hopefully, a strict application of the law will spur Congress to act to mitigate any harmful effects to the citizens of Oklahoma as to protect their justifiable expectations.

c. Recourse

A decision for the Creek and Murphy does not foreclose the possibility of congressional action. Upon issuing its ruling, the Court may issue a stay on its decision to allow Congress, the Creek, and the State time to mitigate any potential implications that may result due to this decision.[294] Congress has "plenary and exclusive" authority to regulate and legislate tribes and Indian affairs.[295] Theoretically, Congress may abrogate any, or all, jurisdictional boundaries of a tribe's reservation. Congress may also allow the state of Oklahoma to share concurrent jurisdiction with a tribe in a variety of matters including criminal, civil, and regulatory jurisdiction.[296] In any case, Oklahoma's recourse is not judicial, it is political.[297]

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[293] *See, e.g.*, M(C)NCA, Title 36, § 4-105 (granting a tax credit to vendors that pay state sales tax). It is unclear whether the Creek would expand their tax credits to other areas if the Supreme Court affirms the Tenth Circuit. This expansion would reduce the tax burden on non-Indian individuals and businesses in the reservation thereby mitigating such ruling.

[294] While this action is beyond extremely rare, in 1982 the Court issued a stay on its opinion when they declared the structure of the bankruptcy courts unconstitutional. In its order, the Court gave Congress a few months to fix the constitutional defect. Of course, Congress failed to meet this deadline. This spurred the judiciary to take immediate steps to mitigate the damage until Congress finally acted. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, *as recognized in* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015).

[295] United States v. Lara, 541 U.S. 193, 200 (2004).

[296] *See* Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779, 816–19 (2014).

[297] The possibilities of Oklahoma's response if it loses before the Supreme Court are endless. For example, one possibility is that the Creek and State mutually enter into cross-deputization agreements whereby state and tribal police work together in the area. *See generally* Kevin Morrow, *Bridging the Jurisdictional Void: Cross-Deputization*

VII. Part VII: Conclusion

Whether any of the Five Civilized Tribes of Oklahoma have jurisdiction is fact intensive and the courts will decide those issues as they arise.[298] One thing is clear: "A well-defined body of principles is essential in order to end the need for case-by-case litigation which has plagued [Indian] law for a number of years."[299] The law governing tribal affairs must begin to comport with traditional notions of fairness and justice that our court system strives to achieve. Since the founding of the United States, courts have taken the initiative to make law concerning tribal affairs, thereby, creating incoherent and inconsistent rulings. This must stop.

Murphy gives the Court an opportunity to correct a mistake. The *Solem* framework must end. In the absence of statutory language, a court cannot unilaterally declare Indian country as disestablished due to mere comments from individual legislators, legislative history, or current demographics. A statute's words must govern, and such words must be clear. In the absence of specific statutory language showing diminishment or disestablishment, the State faces an up-hill challenge. Unfortunately for them, *Solem* and this Note's suggestion of a reversion to the traditional canons of statutory construction dictate that the Creek reservation, and possibly the reservations of all Five Civilized Tribes, persist. The Court, though, is an expert at avoiding the obvious outcome. In any event, it will be interesting to see how the Court sidesteps this issue to surprise us all.

Agreements in Indian Country, 94 N.D. L. REV. 65 (2019). This Note, however, will not address those modes of recourse.

[298] *See supra* Part VI (discussing implications).

[299] Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 176 (1980) (Rehnquist, J., concurring in part, concurring in the result in part, & dissenting in part).