

***Carpenter v. Murphy,***  
No. 17-1107 (2018)

Muscogee (Creek) Nation Reservation Boundaries Litigation  
United States Supreme Court

**Presentation to the Muscogee (Creek) Nation District Court's 17<sup>th</sup> Annual  
Indian Law Continuing Legal Education Conference, May 2-3, 2019**

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# Timeline of the Creek Reservation

- **1828-36:** Removal from Alabama to Oklahoma on **Trail of Tears**.
- **1833:** Creek Reservation Boundaries established by Treaty.
- **1836:** Creek arrival in Indian Territory and founding of **Tulsa**.
- **1866:** Reduced Creek boundaries established by Treaty.
- **1901:** **Allotment** of Creek Reservation (**termination set for 1906**).
- **1906:** **Termination revoked**. Tribes *preserved* by Congress.



➤ “There is nothing more dangerous to an Indian reservation than a rich mine.”

Secretary of the Interior, Carl Schurz (1881).

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- “An orgy of plunder and exploitation probably unparalleled in American history.”
  - “Within a generation these Indians ... were stripped of their holdings and were rescued from starvation only through public charity.”

*Angie Debo, And Still the Waters Run: The Betrayal of the Five Civilized Tribes*



# Oklahoma Statehood

- **1907**: Oklahoma becomes a U.S. state.
- Oklahoma courts immediately begin to exercise **jurisdiction** over Five Tribes members and their lands.
- Continues throughout 20<sup>th</sup> Century.

## *Solem v. Bartlett*, 465 U.S. 463 (1984)

- ▶ "The first and governing principle is that only Congress can divest a reservation of its boundaries."
- ▶ A reservation "retains its status **until Congress** explicitly indicates otherwise."
- ▶ "**Congress [must] clearly evince** an "intent . . . to change . . . Boundaries."

# The Three-Step *Solem* Test

- ▶ Step 1: the **statutory text**
  - “the most probative evidence” of Congress’s intent
- ▶ Step 2: the **circumstances surrounding** the statute
  - “unequivocal” and “contemporaneous”
- ▶ Step 3: what happened ***after*** the statute
  - jurisdictional and demographic changes

# The Three-Step *Solem* Test (cont'd)

- ▶ **Step 3** is “an **unorthodox** and potentially **unreliable** method of statutory interpretation.”
- ▶ It is thus merely “**one additional clue** as to what Congress expected”
- ▶ If disestablishment is not found at steps 1-2, “**we are bound** to rule that the old **reservation boundaries survived.**”

## The Court's Post-Solem Application of Step 3

Hagen v. Utah, 510 U.S. 399 (1994)

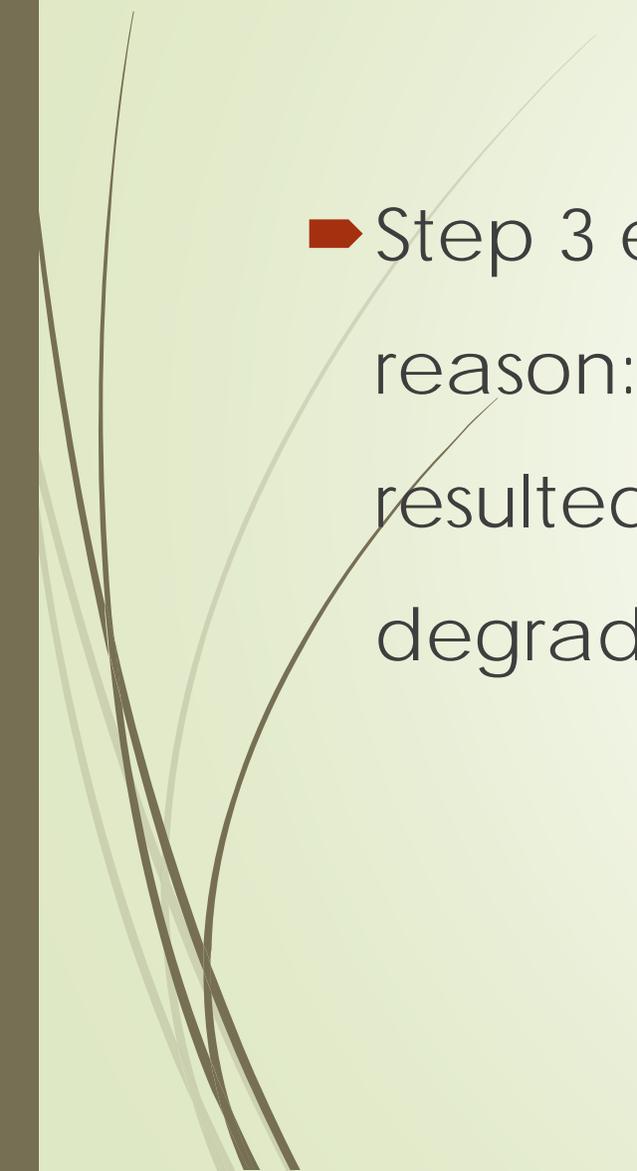
- ▶ State jurisdiction + non-Indian population = a “**practical acknowledgment** that the Reservation **was diminished.**”
- ▶ “A contrary conclusion would seriously **disrupt the justifiable expectations** of the people living in the area.”

S.D. v. Yankton Sioux Tribe, 522 U.S. 329 (1998)

- ▶ “**Today**, fewer than ten percent of the reservation lands are in Indian hands, non-Indians constitute over two-thirds of the population within the 1858 boundaries ... and **those demographics signify a diminished reservation.**”



## ***Yankton Sioux:***

- ▶ Step 3 evidence is the “**least compelling** for a simple reason: Every [statute that opened a reservation] resulted in a surge of non-Indian settlement and degraded the ‘Indian character’ of the reservation.”
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## *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005)

- ▶ “Reestablishment of Indian sovereignty would have **disruptive practical consequences.**”
- ▶ “The longstanding assumption of jurisdiction by the State over a 90% non-Indian area may create **justifiable expectations** which **merit heavy weight** here.” (citing *Hagen*).
- ▶ “Long acquiescence to state authority may have **controlling effect.**”

## ***Murphy v. Sirmons*, 497 F. Supp. 2d 1257 (E.D. Okla. 2007)**

- ▶ “There is no question, based on the history of the Creek Nation, that **Indian reservations do not exist in Oklahoma.**”
- ▶ “**State laws** have applied over the lands within the historical boundaries of the Creek nation for **over a hundred years.**”
- ▶ “The **justifiable expectations** of the people living in the area are proper considerations in determining Indian issues.”
- ▶ Citing . . . *Sherrill*.

# Osage Nation v. Irby, 597 F.3d 1117 (10<sup>th</sup> Cir. 2010)

Step 1: no text supporting disestablishment

Step 2: no mention of “unequivocal” “contemporary” evidence.

- “Historian Lawrence Kelly concludes that “[t]reatises and articles in professional journals” consider the Osage reservation disestablished.
- “Historian Francis Prucha has thoroughly discussed...”
- “Another historian, Berlin Chapman, states...”

# *Osage Nation v. Irby* (cont'd)

## Step 3:

- "Population demographics dramatically shift[ed]" after allotment.
- "Land ownership also dramatically shifted."
- These factors "create **justifiable expectations**" that "**merit heavy weight.**" *Sherrill*
- Our decision must reflect "the **modern-day balance of the area demographics.**"

# Nebraska v. Parker, 136 S.Ct. 1072 (2016)

Step 1: No text supporting disestablishment.

Step 2: Surrounding circumstances were “**mixed**,” so not “**unequivocal**”

Step 3:

- “The Tribe was almost **entirely absent** from the [area] for more than **120 years**.”
- “For **more than a century** ... [federal] Government officials treated the disputed land as Nebraska’s.”
- Nebraska assumed jurisdiction and Tribe **acquiesced**.
- Land ownership and demographics > **98 percent non-Indian**.

# Nebraska v. Parker (cont'd)

- ▶ “Subsequent demographic history [Step 3] **cannot overcome our conclusion** [at Steps 1-2] that Congress did not intend to diminish the reservation. It is **not our role to ‘rewrite’** the statute in light of this subsequent demographic history.”
- ▶ “Concerns about upsetting the **‘justifiable expectations’** of the almost exclusively non-Indian settlers who live on the land ... **cannot diminish** reservation boundaries. *Only Congress has the power to diminish a reservation.*”

# *Murphy v. Royal*, 866 F.3d 1164 (10<sup>th</sup> Cir. 2017)

Step 1: No text supporting disestablishment.

Step 2: Evidence was not “unequivocal.”

➤ “The step-two evidence is at most **debatable**, and we need not parse it further.”

Step 3:

➤ “When 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. ***Solem***. Such is the case here.”

# *Murphy v. Royal*, 875 F.3d 896 (10<sup>th</sup> Cir. 2017) (Tymkovich, C.J., concurring)

- “This case might benefit from **further attention by the Supreme Court.**”
- “The Creek Reservation encompass[es] a **substantial non-Indian population**, including much of the **City of Tulsa**; this [could] have **dramatic consequences** for taxation, regulation, and law enforcement.”
- “The panel faithfully applied Supreme Court precedent holding that such demographic evidence cannot overcome the absence of statutory text.”
- But “this may be the case where the Supreme Court wishes to **[revisit] *Solem*** if it can be persuaded that **the square peg of *Solem* is ill suited for the round hole of Oklahoma[.]**”

# Oklahoma's Opening Brief

➤ “The decision below would create the largest Indian reservation in America today, which would include **Tulsa**, Oklahoma’s second-largest city:



➤ “That revolutionary result would **shock** the 1.8 million **residents** of eastern Oklahoma who have **universally understood** that they reside on land regulated by state government, not by tribes. Affirmance would plunge Oklahoma into civil, criminal, and regulatory **turmoil** and **overturn 111 years of Oklahoma history.**”

# Oral Argument

- ▶ Justice Sotomayor: “Exactly when did **Congress** do this? What's the exact date? It wasn't in **the statute**.”
- ▶ Justice Kagan: In 1901 **Congress said** we are going to terminate all sovereignty by 1906. ... But **Congress** actually **changed its mind**.
- ▶ Justice Breyer: “In the **1901 allotment act** ... **Congress** did not eliminate the Creek [government].... And in the 1906 **statute**, **Congress said** the tribal government still continues.”
- ▶ Justice Kagan: “The question is ... *did Congress, in fact, terminate the reservation?*”

# Oral Argument (cont'd)

- ▶ Justice Alito: Could you say something about the **practical effects** of the Tenth Circuit's decision on ... eastern Oklahoma?
- ▶ Chief Justice Roberts: Would this expand the reach of **gaming** in the area?
- ▶ Justice Kavanaugh: We would be creating great **turmoil**. With the **historical practice** [of] 100 years, all the **practical implications**, shouldn't we just leave well enough alone here?
- ▶ Justice Alito: **None of this was asserted by the Creek Nation** for 100 years?