JUDGING "INDIAN CHARACTER"? THE SUPREME COURT'S OPPORTUNITY IN *NEBRASKA V. PARKER*

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When the English arrived in the "New World" in the seventeenth century, they viewed the land as empty, unused, and unclaimed—a "vacuum domicilium" that legally justified their usurpation of the land. Nearly four hundred years later, we have come to appreciate that Native Americans stood in various agricultural, economic, spiritual, and geopolitical relationships with the land. The English simply failed to perceive these connections and uses. The Supreme Court's recent decision to hear *Nebraska v. Parker*[1] offers an opportunity for the American justice system to demonstrate that it has since developed a more enlightened and nuanced jurisprudence, one that understands more about Native Americans than the early colonists did.

At issue in *Nebraska v. Parker* are the boundaries of the Omaha Indian Reservation. Specifically, the court will determine whether an 1882 Act of Congress "diminished" the size of the reservation.[2] The Omaha Tribe of Nebraska argues that businesses in the Village of Pender are located on the reservation and are thus subject to the tribe's jurisdiction and tax scheme. The retailers claim they are not located on the federally recognized Indian reservation due to the 1882 diminishment.[3]

The courts developed the "diminishment doctrine" to determine whether reservations lost portions of their territory through various

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1. *Smith v. Parker*, 774 F.3d 1166 (8th Cir. 2014), *cert. granted sub nom. Nebraska v. Parker*, 136 S. Ct. 27 (2015) (mem.).

2. The Act of August 7, 1882, 22 Stat. 341, ratified an agreement for the sale of Omaha tribal lands to non-Indian settlers. For more on the Act and its implementation, see the district court opinion. *Smith v. Parker*, 996 F. Supp. 2d 815, 823–28 (D. Neb. 2014).

3. The dispute involves the Beverage Control Ordinance, established under Title 8 of the Omaha Tribal Code and approved by the Secretary of the Interior on February 28, 2006. In addition to creating a licensing scheme, the ordinance imposes a ten percent sales tax on the purchase of alcoholic beverages within the reservation. *See id.* at 819–20.

congressional acts.[4] "[D]iminishment commonly refers to the reduction in size of a reservation. A finding of diminishment generally suggests that a discrete, easily identifiable parcel of land has been removed from reservation status."[5] The doctrine requires courts to conduct a three-part analysis to determine whether a surplus land act resulted in the diminishment of a federal Indian reservation.[6] First, the court considers whether a congressional statement explicitly indicates an intent to change a reservation's boundaries. Second, the court considers events surrounding the passage of the congressional act. And, finally, the court evaluates events that occurred following passage of the act.[7] The third factor further compels courts to consider whether *de facto* diminishment has occurred. As the Supreme Court stated in *Solem v. Bartlett*[8] (1984):

> On a more pragmatic level, we have recognized that who actually moved onto an opened reservation is also relevant to deciding whether a surplus land Act diminished a reservation. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred.[9]

In *Nebraska v. Parker*, the District Court and Eight Circuit concluded that diminishment had not occurred.[10] But the courts only analyzed the first and second factors, failing to consider whether *de facto* diminishment has occurred.[11] And the Supreme Court granted

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4. For a helpful analysis of diminishment cases, see Rebecca Tsosie, *Tribalism, Constitutionalism, and Cultural Pluralism: Where Do Indigenous Peoples Fit Within Civil Society?*, 5 U. PA. J. CONST. L. 357 (2003).

5. *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1017 (8th Cir. 1999) (citations omitted).

6. An alternative test, articulated in *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), stands apart from the congressional-intent analysis required under *Solem v. Bartlett*, 465 U.S. 463 (1984). *City of Sherrill* compels consideration of equitable diminishment, which suggests that a tribe loses its sovereignty over its reservation when the territory has been governed and populated by non-Indians for a substantial period of time.

7. The doctrine was developed in *Solem*, 465 U.S. at 470–72. In 1994, the Supreme Court clarified that courts must "examine all the circumstances surrounding the opening of a reservation." *Hagen v. Utah*, 510 U.S. 399, 412 (1994).

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

9. *Id.* at 471.

10. *Smith v. Parker*, 996 F. Supp. 2d 815 (D. Neb. 2014); *Smith v. Parker*, 774 F.3d 1166 (8th Cir. 2014).

11. As the State of Nebraska and Village of Pender argue in their petition for a writ of certiorari: "The Eighth Circuit's finding that ambiguity concerning the first

Nebraska's petition for certification on this basis.[12] Accordingly, in *Nebraska v. Parker*, to determine whether the Omaha Tribe lost parts of its reservation, the Supreme Court will judge the "Indian character" of the land. Sound familiar?

To prove that the disputed land is no longer part of the reservation, the retailers of the Village of Pender argue that the Omaha Tribe does not have a government office in the disputed territory.[13] They further contend that the tribe does not operate industry or business on the land, provide social services in the area, or even claim mineral rights to the land.[14] In contrast, the Village of Pender explains that for 132 years the non-Indians in the disputed territory have "chosen to reside in the Pender, Nebraska area and build homes, schools, and churches, open businesses and raise families."[15] In other words: they are making use of the land; the Omaha Tribe is not. Moreover, non-Indians now comprise ninety-eight percent of the population.[16] The demographic data and lack of a perceived Omaha presence, the argument goes, indicate that the land does not have an "Indian character." In its brief to the Supreme Court, the Village of Pender even goes so far as to claim that "this land has never had any Indian character."[17]

Meanwhile, the Omaha Tribal Court concurred that few Omaha Indians made the disputed portion of the Omaha Indian Reservation a home.[18] Instead, the court noted, they used the land as a hunting ground, and—notably—as a buffer and security zone between them and the encroaching non-Indians.[19] Much like the English settlers of the seventeenth century, the retailers of the Village of Pender simply cannot see this alternative use of the land. Although they describe it in

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two *Solem* factors – statutory language and legislative history – creates a *conclusive presumption of non-diminishment* not subject to rebuttal by evidence concerning the third *Solem* factor is in apparent conflict with the Court's precedent regarding the potential for *de facto* diminishment." Petition for a Writ of Certiorari at 16–17, *Nebraska v. Parker*, No. 14-1406 (U.S. May 27, 2015).

12. After the Eighth Circuit denied rehearing en banc, the Supreme Court granted Nebraska's petition for certiorari on October 1, 2015. *Nebraska v. Parker*, 136 S. Ct. 27 (2015) (mem.).

13. Brief for Petitioners at 33, *Nebraska v. Parker*, No. 14-1406 (U.S. Nov. 16, 2015).

14. *Id.*

15. Petition for a Writ of Certiorari, *supra* note 11, at 25.

16. This figure is listed among the undisputed facts in the Brief for Petitioners, *supra* note 13, at 24.

17. *Id.* at 29.

18. *Village of Pender v. Morris*, CV. No. 08-2, at 35 (Omaha Nation Tribal Ct. 2013).

19. *Id.*

different words, they rely on an argument that echoes the "vacuum domicilium" justification made centuries ago.

The Supreme Court has the chance to demonstrate that American justice has evolved beyond its culturally myopic seventeenth-century roots. No court has yet determined the "Indian character" of the land at issue in *Nebraska v. Parker*. But by agreeing with the lower courts, the Supreme Court will not only decide that the reservation has not been diminished, it will recognize land uses beyond those practices perceived as worthwhile by non-Indians.

Yet, even if the Supreme Court delivers a win to the Omaha Tribe, it has emphasized the importance of the "Indian character" test. It has reaffirmed that a tribe can lose its authority and its territory if lands are perceived—by non-Indians—to have lost their "Indian character." In the past, courts have determined diminishment on precisely this basis. In *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*,[20] the Court found that the tribe lost sovereignty over its reservation because the territory was used for industrial and commercial purposes rather than for expected tribal uses, like hunting and gathering.[21] Under this jurisprudence, tribes may lose their authority due to an influx of non-Indians moving into the territory, or because their lands are used in a manner that appears to conflict with "traditional" uses. Judging diminishment according to "Indian character" risks freezing Native Americans and indigenous culture in time, forcing Indians to correspond to the nineteenth-century imagination.[22] In this regard, there is some virtue in the argument put forward by the retailers in Pender: they characterize the land as lacking an "Indian character" because there is no Native-run industry in the area. Nevertheless, their argument overlooks Indian uses beyond their narrow perspective.

These cases highlight the unsettling indeterminacy of the concept of "Indian character."[23] And they challenge who should determine "Indian character" and how. Fortunately, when the Supreme Court hears *Nebraska v. Parker*, it will have the opportunity to acknowledge the perspective of the Omaha Tribe, even if it has been overlooked by the non-Indian settlers in the Village of Pender. The Court has the

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20. 492 U.S. 408 (1989).

21. *Id.* at 425–28.

22. For a compelling analysis of such freezing, see John Borrows, *Frozen Rights in Canada: Constitutional Interpretation and the Trickster*, 22 AM. INDIAN L. REV. 37 (1997).

23. Frickey similarly describes "Indian character" as "a culturally loaded concept of dubious determinacy in the hands of non-Indian judges." Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 27 (1999).

chance to demonstrate the importance of embracing a wider perspective that includes long-marginalized indigenous voices. But as the Court determines what constitutes "Indian character," we should continue to question the validity of such culturally fraught tests.[24] Indeed, to prove that it has developed a more enlightened jurisprudence, the Supreme Court should acknowledge its own misplaced reliance on the importance of "Indian character." When it decides *Nebraska v. Parker* this spring, it should do so without judging "Indian character" at all.

24. Even if the Court does not rely on *Solem*, the only available alternative test, articulated in *City of Sherrill*, discussed *supra* note 6, similarly relies on a determination of "Indian character." In that case, the Oneida Nation of New York was determined to have lost sovereign control over its reservation on the basis of "the longstanding, distinctly non-Indian character of [central New York] and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneidas' long delay in seeking judicial relief against parties other than the United States." *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 202 (2005).