American Indian Law Journal

Volume 6 | Issue 1 Article 3

12-15-2017

Indian Sovereignty, General Federal Laws, and the Canons of Construction: An Overview and Update

Bryan H. Wildenthal
Thomas Jefferson School of Law

INDIAN SOVEREIGNTY, GENERAL FEDERAL LAWS, AND THE CANONS OF CONSTRUCTION: AN OVERVIEW AND UPDATE

Bryan H. Wildenthal

CONTENTS

INDIAN SOVEREIGNTY, GENERAL FEDERAL LAWS, AND THE CANONS OF CONSTRUCTION: AN OVERVIEW AND UPDATE

Bryan H. Wildenthal [*]

I. INTRODUCTION

This article focuses on the application within Indian country of federal regulatory laws—typically dealing with labor relations, employment, health, the environment, or other social and economic issues—and their impact on Indian Nation governments and tribal enterprises. Such laws are often described as "federal law[s] of general applicability,"[1] or as I would put it more simply, "general federal laws" (GFLs). Such laws are "general" in the sense that they are not specialized Indian legislation aimed primarily at tribal issues or concerns. Rather, they appear on their face to be relevant to all Americans, Indian or non-Indian, whether living within Indian country or not. This article takes the position that GFLs, just like specialized Indian legislation and all laws potentially affecting the ancient rights and sovereignty of Indian Nations, should be subjected to the rules of interpretation commonly known as the Indian law "canons of construction."[2]

---

[*] Professor of Law, Thomas Jefferson School of Law (San Diego); J.D., Stanford Law School (see http://www.tjsl.edu/directory/bryan-h-wildenthal and http://ssrn.com/author=181791). I have regularly taught the course in American Indian Law at Thomas Jefferson since joining the faculty there in 1996. For much of that time, this has been the only such course taught by a full-time faculty member at any California law school south of Los Angeles. I also teach in the fields of constitutional law, civil procedure, and federal courts, among others, and have written a college textbook, NATIVE AMERICAN SOVEREIGNTY ON TRIAL: A HANDBOOK WITH CASES, LAWS, AND DOCUMENTS (ABC-CLIO, 2003), along with numerous articles in leading law reviews on subjects including constitutional law and history, American Indian law, and the rights of gay, lesbian, bisexual, and transgender people. I dedicate this article to my beloved husband, Ashish Agrawal. He encouraged me to accept the invitation to speak at the 2015 ILC (see note 3) and has always unstintingly supported my scholarly endeavors.

[1] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton *et al.* eds., LexisNexis, 2012), § 2.03, at 123.

[2] *See generally* Part II; COHEN'S HANDBOOK (2012), *supra* note 1, § 2.02, at 113−23, and § 2.03, at 123−28. On the definition of a GFL, see Bryan H. Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of*

In April 2015, I completed a much shorter version of this article in connection with my presentation at the Federal Bar Association's 40th Annual Indian Law Conference.[3] I previously published two major articles on this subject in the *Oregon Law Review* (2007) and *Michigan State Law Review* (2008).[4] Many other scholars have undertaken valuable studies of this area. In particular, no discussion of the subject should proceed without acknowledging the crucial articles by Professor Alex Tallchief Skibine (1991) and Professor Vicki Limas (1994), and the treatise by Kaighn Smith, Jr. (2011), a leading practitioner in the field.[5] See also the prescient early article by Joseph J. Brecher (1977).[6] Even eight years before the notorious decision by the U.S. Court of Appeals for the Ninth Circuit in *Donovan v. Coeur d'Alene Tribal Farm* (1985) ("*Coeur d'Alene*"),[7] Brecher accurately perceived and anticipated the emerging trends.

This article updates my 2007 and 2008 articles. It reviews some key points about the Ninth Circuit's remarkable three-judge

---

Construction, 86 OR. L. REV. 413, 493, 499−502 (2007) (hereinafter Wildenthal 2007).

[3] Federal Bar Association, *40th Annual Indian Law Conference: Conference Materials* 342 (April 9−10, 2015). The theme of the 2015 ILC, held at Talking Stick Resort, Salt River Pima-Maricopa Indian Community (near Scottsdale, Arizona), was "Forty Years Strong: The Indian Self-Determination Era Strengthening Tribal Sovereignty." The article grew out of my participation on Plenary Panel 6, "Standing Strong: Inherent Tribal Governmental Status" (April 10, 2015).

[4] Wildenthal 2007, *supra* note 2; Bryan H. Wildenthal, *How the Ninth Circuit Overruled a Century of Supreme Court Indian Jurisprudence—And Has So Far Gotten Away With It*, 2008 MICH. ST. L. REV. 547 (2008) (hereinafter Wildenthal 2008); *see also* Bryan H. Wildenthal, *Fighting the* Lone Wolf *Mentality: Twenty-First Century Reflections on the Paradoxical State of American Indian Law*, 38 TULSA L. REV. 113 (2002) (hereinafter Wildenthal 2002) (offering several wide-ranging observations on Indian law).

[5] Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L. REV. 85 (1991); Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L.J. 681 (1994); *see also* SMITH, LABOR AND EMPLOYMENT LAW IN INDIAN COUNTRY (2011). Professor Skibine made another important contribution to this field with his recent article, *Practical Reasoning and the Application of General Federal Regulatory Laws to Indian Nations*, 21 WASH. & LEE. J. CIV. RTS. & SOCIAL JUSTICE 123 (2016).

[6] Brecher, *Federal Regulatory Statutes and Indian Self-Determination: Some Problems and Proposed Legislative Solutions*, 19 ARIZ. L. REV. 285 (1977).

[7] 751 F.2d 1113 (9th Cir. 1985) (holding that general federal laws should presumptively apply to on-reservation Indian Nation employment and other activities).

panel opinion in *Coeur d'Alene*, which—*for more than thirty years now*—has frustrated lawyers in Indian country and out-muscled the Supreme Court itself in influencing other lower-court rulings on how to interpret GFLs in relation to Indian country. *Coeur d'Alene* effectively overruled—in many federal circuits and for many GFLs—the weight of more than a century of Supreme Court jurisprudence on the Indian law canons of construction.

This article also reviews some aspects of the notorious *San Manuel* cases. In that litigation, the National Labor Relations Board (NLRB or Board) in 2004, and the U.S. Court of Appeals for the District of Columbia Circuit in 2007, incoherently deployed the *Coeur d'Alene* doctrine to extend the National Labor Relations Act (NLRA) to on-reservation employment by tribal government-owned gaming enterprises—even though Congress never authorized or intended such an extension.[8] That specific issue of federal labor law, and the broader dispute over *Coeur d'Alene*, emerged again in 2015 with appeals to the Sixth and Tenth Circuits over application of the NLRA to tribal casinos.[9] The appeals were resolved by three important decisions discussed in Part V of this article: one by the NLRB (effectively mooting the Tenth Circuit appeal) and two by the Sixth Circuit.

Part II discusses the classical canons of construction governing Indian law and contrasts them with the perverse and ill-conceived *Coeur d'Alene* doctrine which has flourished in the lower federal courts. Part III highlights the stunning degree of irony—not to mention outright defiance of the Supreme Court—in the lower courts' treatment of the Supreme Court's 1960 decision

---

[8] San Manuel Indian Bingo & Casino, 341 N.L.R.B. 1055 (2004), *enforced by* San Manuel Band of Serrano Mission Indians v. NLRB, 475 F.3d 1306 (D.C. Cir. 2007); *see generally* Wildenthal 2007, *supra* note 2.

[9] The Sixth Circuit appeals, brought by two Indian Nations in Michigan, challenged the NLRB's assertions of jurisdiction in Little River Band of Ottawa Indians, 361 N.L.R.B. No. 45 (2014) (concerning the Little River Casino Resort), and Soaring Eagle Casino and Resort, 361 N.L.R.B. No. 73 (2014) (operated by the Saginaw Chippewa Indian Tribe). District courts in the Sixth Circuit had rejected preliminary challenges to NLRB jurisdiction in Little River Band of Ottawa Indians v. NLRB, 747 F. Supp. 2d 872 (WD MI 2010), and Saginaw Chippewa Indian Tribe v. NLRB, 838 F. Supp. 2d 598 (ED MI 2011). The Tenth Circuit appeal challenged Chickasaw Nation, 359 N.L.R.B. No. 163 (2013) (asserting jurisdiction over Chickasaw's WinStar World Casino). A district court in the Tenth Circuit had initially enjoined the NLRB from asserting jurisdiction, in Chickasaw Nation v. NLRB, No. CIV-11-506-W (WD OK, July 11, 2011), but a partial settlement allowed the NLRB to proceed with a limited assertion of jurisdiction, subject to the appeal.

in *Federal Power Commission v. Tuscarora Indian Nation*.[10] Part IV discusses continuing struggles over the *Coeur d'Alene* doctrine in the lower federal courts. Finally, Part V discusses the 2015 decisions and where things have gone from there.

II. COMPETING CANONS OF CONSTRUCTION

The Ninth Circuit in *Coeur d'Alene* held that a GFL, even if silent on the issue, presumptively applies to Indian tribes unless the tribe shows that (1) it intrudes on "purely intramural" tribal self-government, (2) it conflicts with an "explicit" or "specific" tribal-treaty right, or (3) Congress affirmatively intended it *not* to apply.[11]

By contrast, the classical Indian law canons of construction, developed and reiterated in a multitude of *Supreme* Court decisions from 1832 to 2014, require that courts (1) construe treaties and agreements with tribes as the Indians themselves would have understood them, including broadly implied tribal rights even in the absence of explicit or specific treaty language (the "treaty canon"), (2) construe treaties, statutes, and other sources of law liberally in favor of Indians, so as to resolve any ambiguities or uncertainties in their favor (the "ambiguity canon"), and (3) construe federal statutes *not* to abrogate or limit tribal sovereign rights (including but not limited to treaty rights), rather to *preserve* them, unless *Congress clearly intended* such laws to *limit* such rights (the "congressional intent canon"). Among the most important landmark cases supporting those canons are *Worcester v. Georgia* (1832) (in an opinion by Chief Justice John Marshall),[12] *United States v. Winans* (1905),[13] *Yakima County v. Yakima Indian Nation* (1992),[14] *Minnesota v. Mille Lacs Band of Chippewa Indians* (1999),[15] and, most recently, *Michigan v. Bay Mills Indian Community* (2014).[16]

---

[10] 362 U.S. 99 (1960).
[11] *Coeur d'Alene*, 751 F.2d at 1115−16 (setting forth basic "rule" and three "exceptions"); *see also id.* at 1117 (discussing whether any treaty "explicitly" or "specifically" protects a relevant tribal right).
[12] 31 U.S. 515, 551−56 (1832); *see also id.* at 563, 582 (McLean, J., concurring).
[13] 198 U.S. 371, 380−84 (1905).
[14] 502 U.S. 251, 258, 269 (1992).
[15] 526 U.S. 172, 193−208 (1999).
[16] 134 S. Ct. 2024, 2030−32 (2014).

The Court's 1999 *Mille Lacs* decision systematically applied the classical canons to an 1837 treaty, an 1850 presidential executive order,[17] an 1855 treaty,[18] and the 1858 act of Congress admitting Minnesota to statehood.[19] This case has not received nearly the attention it deserves. In 2002, I published one of the first discussions in the law review literature of *Mille Lacs* and its application of the canons—also discussing Chief Justice William Rehnquist's shocking dissent from the 5-4 decision—and noting the similar analysis (effectively equivalent to the canons) in *Idaho v. United States* (2001).[20]

The 1992 *Yakima* case illustrates the degree of consensus on the modern Supreme Court supporting the overall force and applicability of the canons. Justice Antonin Scalia—generally known as hostile to Indian claims—wrote for an 8-1 majority applying both the congressional intent and ambiguity canons. While the case did not involve a GFL, Justice Scalia declared broadly that "[w]hen we are faced with … two possible constructions [of federal law], our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: [the ambiguity canon]."[21] Justice Harry Blackmun,

---

[17] *Mille Lacs*, 526 U.S. at 16, at 193–95 & n. 5 (discussing 1837 treaty and 1850 order).
[18] *Id.* at 195−202.
[19] *Id.* at 202−08.
[20] 533 U.S. 262 (2001). Chief Justice Rehnquist's dissent in *Mille Lacs*, 526 U.S. at 208−20 (joined by Scalia, Kennedy, and Thomas, JJ.) was truly outrageous and merits more extended treatment than I have yet been able to provide. The same four justices, again led by Rehnquist, also dissented in *Idaho*, 533 U.S. at 281−88. *See* Wildenthal 2002, *supra* note 4, at 131−35 (discussing *Mille Lacs* and *Idaho*); Wildenthal 2007, *supra* note 2, at 495 & n. 258, 499 & n. 270 (discussing *Idaho*); Wildenthal 2008, *supra* note 5, at 587−88 & nn. 215-18 (discussing *Mille Lacs* and *Idaho*). On *Mille Lacs*, see also COHEN'S HANDBOOK (2012), *supra* note 1, § 2.02[1], at 115-16; *id.* § 2.03, at 123, and on *Idaho*, *id.* § 2.02[3], at 119−20.
[21] *Yakima*, 502 U.S. at 269; *see also id.* at 258 (quoting and applying the congressional intent canon). It is understood that "ambiguity" (while often used loosely in common parlance) is not exactly synonymous with "vagueness" or "uncertainty." Strictly speaking—as suggested by Justice Scalia's reference quoted in the text to "two possible constructions"—"ambiguous" connotes a duality of possible meaning. The canon at issue (sometimes expressed as two closely related canons) supports sympathetic construction of any indeterminate text. *See* COHEN'S HANDBOOK (2012), *supra* note 1, § 2.02[1], at 113 & nn. 2−3 (referring not only to "ambiguities" but also to "doubtful expressions" construed "generously" or "liberally" in favor of Indians). It is nevertheless most often described in terms of "ambiguity," and for reasons of convenient economy this article follows that style.

the only (partial) dissenter, emphatically endorsed the Court's restatement of the canons and complained only that it failed to apply them vigorously enough in favor of the tribe.[22] Thus, *Yakima* stands as a resounding and *unanimous* modern reaffirmation of the classical canons—at least by the Supreme Court.

Four notable Supreme Court decisions during the 1980s forthrightly applied the canons to a series of garden-variety GFLs: *Merrion v. Jicarilla Apache Tribe* (1982) (applying the ambiguity and congressional intent canons to, *inter alia*, the Natural Gas Policy Act of 1978),[23] *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians* (1984) (applying the congressional intent canon to the Federal Power Act),[24] *United States v. Dion* (1986) (applying the congressional intent canon to the Eagle Protection Act),[25] and *Iowa Mutual Insurance Co. v. LaPlante* (1987) (applying the congressional intent canon to the federal diversity jurisdiction statute).[26] *Merrion* predated *Coeur d'Alene* by almost three years and was actually discussed by the Ninth Circuit in *Coeur d'Alene*, though in an astonishingly misleading way that ignored and evaded *Merrion*'s reaffirmation and use of the canons.[27] The Supreme Court itself has not forgotten those cases. It cited *Dion* and *Iowa Mutual* with approval in its 2014 *Bay Mills* decision.[28]

I have argued that the *Mille Lacs* and *Idaho* cases, along with the decisions almost a century earlier in *Winans* (1905) and *Winters v. United States* (1908),[29] may also be viewed as examples of the Supreme Court applying the canons to GFLs, on the ground that the statehood enabling and admission acts at issue are properly viewed as such. Statehood acts are not specialized Indian legislation. They have general and national impact, not just on the state admitted.[30] Concededly, however, the interaction between

---

[22] *Yakima*, 502 U.S. at 270−78 (Blackmun, J., concurring in part and dissenting in part).
[23] 455 U.S. 130, 149−52 (1982).
[24] 466 U.S. 765, 767−69, 781–87 (1984).
[25] 476 U.S. 734, 738−46 (1986).
[26] 480 U.S. 9, 17−18 (1987).
[27] *See* Wildenthal 2008, *supra* note 4, at 573−79.
[28] *Bay Mills*, 134 S. Ct. at 2032.
[29] 207 U.S. 564 (1908); *see also Winans*, 198 U.S. 371; *Mille Lacs*, 526 U.S. 172; *Idaho*, 533 U.S. 262.
[30] *See* Wildenthal 2007, *supra* note 2, at 493−502; *see also supra* note 20 (citing *Idaho* and discussing *Mille Lacs*).

statehood acts and Indian rights may be viewed by some as a distinctive issue unlikely to control judicial interpretation of GFLs dealing with labor, employment, the environment, and the like.[31]

---

[31] My 2007 article appears to have had an impact on the leading treatise in the field of American Indian law. It is prominently cited at the outset of a key section of COHEN'S HANDBOOK (2012), *supra* note 1, § 2.03, at 123 n. 2, one of only three law review articles cited in that section, *see id.* at 124 n. 13 (citing Skibine 1991, *supra* note 5, 126 n. 23 (citing Limas, *supra* note 5), Indeed, that section—which focuses on the interaction of the canons with GFLs—appears to have been carefully rewritten for the 2012 edition in direct response to my 2007 article, which offered some criticisms (reluctant and sympathetic) of the 2005 edition's treatment of the case law analyzing GFLs. Compare COHEN'S HANDBOOK (2012), *supra* note 1, § 2.03, at 123−28, with COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton *et al.* eds., LexisNexis, 2005), § 2.03, at 128−32; *see also* Wildenthal 2007, *supra* note 2, at 480−86; Wildenthal 2008, *supra* note 4, at 569−71.

I had expressed puzzlement, for example, that § 2.03 in the 2005 edition cited *Tuscarora*, 362 U.S. 99, prominently in the text (albeit with criticisms and caveats), as providing the main rule, while *Dion*, 476 U.S. 734, was relegated to a later pair of footnotes as merely illustrating an *exception* to the *Tuscarora* "presumption." COHEN'S HANDBOOK (2005), § 2.03, at 129−30 nn. 102−03; *see also Tuscarora*, 362 U.S. 99; Part III (discussing *Tuscarora*). *Mille Lacs*, 526 U.S. 172, was not mentioned at all in § 2.03 (though amply discussed in § 2.02), and neither *Merrion*, 455 U.S. 130, nor *Iowa Mutual*, 480 U.S. 9, was discussed or even cited in §§ 2.02 or 2.03. The 2005 edition did, however, cite *Escondido* (though like *Dion*, only in a footnote) as an example of the canons being applied to a GFL. COHEN'S HANDBOOK (2005), § 2.03, at 129 n. 95; *see also Escondido*, 466 U.S. 765. The 2012 edition now states clearly that "[t]he Supreme Court has long applied the Indian law canons to statutes of general applicability" (citing my 2007 article, *supra* note 2), and starts with *Dion* in the main text as "[t]he leading modern case taking this approach," followed by prominent discussion in the text of *Mille Lacs* and *Iowa Mutual*. COHEN'S HANDBOOK (2012), *supra* note 1, § 2.03, at 123 & ns. 2−7. And the 2012 edition again properly cites *Escondido* as a GFL canons case. *Id.* at 124 n. 11. Oddly, however, *Merrion*—widely acknowledged as an extremely important Indian law precedent and otherwise cited dozens of times throughout the Cohen treatise—is still mysteriously absent from §§ 2.02 and 2.03. *Merrion*'s important reaffirmation of the canons, particularly as to GFLs, continues to be strangely invisible to many judges and commentators (as discussed further in the text).

Also, as I noted with regard to the 2005 edition, *see* Wildenthal 2007, *supra* note 2, at 485−86; Wildenthal 2008, *supra* note 4, at 570, chapter 10 of the 2012 edition continues to assert flatly that "federal environmental laws apply in Indian country unless they interfere with tribal self-government or conflict with treaty or statutory rights, or unless Congress intended to exclude Indian lands from the reach of the statute." COHEN'S HANDBOOK (2012), *supra* note 1, § 10.01[2][a], at 785. The 2012 edition, just like the 2005 edition, merely cites *Coeur d'Alene* (with a general cross-reference to § 2.03) to support that sweeping endorsement of the *Coeur d'Alene* doctrine. *Id.* at 785 n. 6.; *see also Coeur d'Alene*, 751 F.2d 1113. This remains inconsistent with the reasoning of *Dion* (still not discussed or even cited in chapter 10), not to mention many other Supreme Court cases. *Dion*, of course, was a 1986 Supreme Court decision that actually dealt with the application to Indian country of a federal environmental

All four of the key Supreme Court decisions of the 1980s applying the canons to GFLs—*Merrion*, *Escondido*, *Dion*, and *Iowa Mutual*—were cited on point in briefs provided to the D.C. Circuit in the 2007 *San Manuel* case. *Merrion*, *Escondido*, and *Iowa Mutual* were also cited on point in the NLRB's published opinions reviewed in *San Manuel*.[32] That did not prevent Judge Janice Rogers Brown, the author of the D.C. Circuit *San Manuel* opinion, from denying that any such cases were brought to her court's attention. She made the surprising claim that "[w]e have found no case in which the Supreme Court applied this [ambiguity] principle of pro-Indian construction . . . [to] a statute of general application."[33]

Despite the publication of my article later in 2007 pointing out the D.C. Circuit's error in this regard, D.C. Circuit Judge David Tatel repeated this odd confession of inability to perform basic legal research in his 2011 opinion in *El Paso Natural Gas Co. v. United States*.[34] The first time might be excusable as a mistake. For the court to reiterate this factually false claim about the Supreme Court's case law, after being called on it in a published and readily available law review article, is deeply disappointing. Perhaps the D.C. Circuit judges should hire as law clerks some graduates of Thomas Jefferson School of Law who

---

law. *Dion* would thus *seem* both to outrank and to be more on-point than *Coeur d'Alene*—an *earlier* decision by a *lower* court that did *not* address an environmental law! Chapters 17 and 18 on "natural resources" and "hunting, fishing, and gathering rights," in both the 2005 and 2012 editions, do extensively cite *Dion*. But that merely underscores the oddity of its absence from chapter 10, the leading section on environmental law in Indian country. Chapter 10 goes on to note that, "[w]ith limited exceptions, federal environmental statutes now specifically address the role of Indian tribes as regulators, providing clear congressional intent that those laws apply to Indian country." COHEN'S HANDBOOK (2012), *supra* note 1, § 10.01[2][a], at 785. That, of course, reflects proper respect for the classical Indian law canons. All the more reason, then, to avoid needlessly suggesting the sweeping validity of a lower-court doctrine contrary to the canons and never yet endorsed by the Supreme Court.

[32] *See* Wildenthal 2007, *supra* note 2, at 467−68 & nn. 167-68, 476 nn. 193−95, 479 n. 205.

[33] *San Manuel*, 475 F.3d at 1312; *but see* Wildenthal 2007, *supra* note 2, at 475−80.

[34] 632 F.3d 1272, 1278 (D.C. Cir. 2011), quoting *San Manuel*, 475 F.3d at 1312; *but see* Wildenthal 2007, *supra* note 2, at 475−80. Distressingly, this factually false claim was repeated by the Sixth Circuit in its 2015 opinion deciding the *Little River* appeal. *See supra* note 9; *infra* Part V.C.3.

have taken my American Indian Law course. They can find the cases!

Compounding *San Manuel*'s mistake by suggesting that the ambiguity canon applies only to laws with a specialized focus on Indian affairs (not to GFLs),[35] *El Paso Natural Gas* took that error a troubling step further by claiming the canon "applies *only* to statutes" enacted to *benefit* tribes.[36] Actually adopting such a rule would require overruling numerous Supreme Court precedents. It would be a deeply disruptive curtailment of the canons and expansion of the *Coeur d'Alene* doctrine. It is certainly important under the canons to construe laws intended to benefit Indians in a liberal manner, to make sure their beneficial goals are fully achieved. But it is even more important to apply the canons to laws that concededly (to some extent) limit tribal rights—or that may appear silent or mostly indifferent to Indian concerns, like GFLs. Such laws might otherwise be read to erode tribal rights more than Congress intended. Such laws are in particular need of interpretation through the protective lens of the canons.[37]

El Paso Natural Gas based its suggested narrowing of the Indian law canons on a stunningly erroneous misreading of a 1918 Supreme Court case, *Alaska Pacific Fisheries v. United States*.[38]

---

[35] *See supra* note 33.

[36] *El Paso Natural Gas*, 632 F.3d at 1278 (emphasis added). What made this all the more regrettable was that the canons did not properly apply to this case in the first place. The court declined to apply the ambiguity canon to the Uranium Mill Tailings Remediation and Control Act of 1978 (UMTRCA) (as requested by the Navajo Nation, an intervenor in the litigation), noting that it was a GFL designed "to protect public health in general rather than tribal health in particular." *Id.*; *see also id.* at 1273−76. More to the point was that the UMTRCA did not limit tribal sovereignty in any way, and the provisions at issue did not relate to any distinct rights of Indians or tribes. See *id.* at 1278−79. The mere fact that an Indian Nation was seeking a generally available potential benefit under such a GFL (here, cleanup of a uranium mining site) did not provide any basis to invoke the canons. As explained by COHEN'S HANDBOOK (2012), *supra* note 1: "The canons will not apply when the interpretive question is one that might be posed by an ordinary litigant and has nothing to do with the distinct rights of Indians and tribes." *Id.*, § 2.03, at 123−24; *see also id.* at 124 & ns. 8−9 (briefly noting *El Paso Natural Gas*'s mistakenly restricted view of the canons).

[37] *See* Wildenthal 2007, *supra* note 2, at 493 (noting well established doctrine that Indian law canons apply "to laws designed both to benefit Indians and to undermine Indian rights," lack of "any logical basis for exempting laws that appear, at first blush, indifferent to Indian concerns" [*i.e.*, GFLs], and that any such exemption "would be a peculiar 'donut hole' in the analysis").

[38] 248 U.S. 78 (1918); *see also El Paso Natural Gas*, 632 F.3d at 1278, citing *Alaska Pacific*, 248 U.S. at 89.

The brief and unanimous opinion in *Alaska Pacific* was devoted to a straightforward application of the ambiguity canon to a law setting aside several islands as a reservation for an Alaska Indian tribe. The Court held that the reservation included the adjacent waters and fishing grounds and stated that "statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians."[39] The case obviously involved a law intended to benefit Indians and did not concern or mention any laws limiting tribal rights. While the case reaffirmed that the canons do apply to beneficial legislation, there is nothing in *Alaska Pacific* restricting any of the canons *only* to that category of laws.

El Paso Natural Gas's contrary assertion rips *Alaska Pacific* out of context and flies in the face of numerous far more recent Supreme Court precedents that have clearly and emphatically applied the canons (including the ambiguity canon) to laws partly or largely designed to *limit* tribal rights. Such laws include both GFLs and specialized Indian legislation. Of the leading Supreme Court cases cited above, four applied the canons to such laws—and this is merely a small sampling: *Escondido* (1984),[40] *Dion* (1986),[41] *Yakima* (1992),[42] and *Bay Mills* (2014).[43]

As my 2007 article noted, "the [Supreme] Court has often vigorously applied the canons even to specialized Indian legislation designed to undermine tribal sovereignty."[44] I cited in support of that point what is probably the most famous and important modern example of such a case, one that *Judge Brown herself cited* (among others) in *San Manuel* to support the point that "ambiguities in a federal statute must be resolved in favor of Indians"[45]—*Bryan v. Itasca County* (1976).[46]

---

[39] *Alaska Pacific*, 248 U.S. at 89; *see generally id.* at 86−90.
[40] 466 U.S. 765.
[41] 476 U.S. 734.
[42] 502 U.S. 251.
[43] 134 S. Ct. 2024; *see also* Wildenthal 2007, *supra* note 2, at 419 n. 14, 464 n. 162 (citing more than two dozen Supreme Court cases applying the canons to various federal laws, many of them laws limiting tribal rights).
[44] Wildenthal 2007, *supra* note 2, at 493.
[45] *San Manuel*, 475 F.3d at 1311, citing Bryan v. Itasca County, 426 U.S. 373 (1976).
[46] *Bryan*, 426 U.S. 373, cited in Wildenthal 2007, *supra* note 2, at 419 n. 14, 493 n. 250.

What *El Paso Natural Gas* missed is that the Supreme Court's *unanimous* opinion in *Bryan* quoted the very same passage in *Alaska Pacific*, proving that its rule can hardly be limited to the context of "beneficial" Indian legislation.[47] *Bryan* interpreted the federal law commonly known as "P.L. 280," one of the most sweeping intrusions on tribal sovereignty enacted during the discredited Termination Era of 1943–61. P.L. 280 extended state criminal and civil jurisdiction over tribal lands in several selected states.[48] It has been bitterly resented by most Indian Nations and widely viewed as a disastrous experiment.[49] *Bryan* strained mightily, perhaps even implausibly, to construe P.L. 280 favorably to tribal sovereignty, to carefully limit the law's scope and effect. To do so, the Court deployed both the congressional intent canon and (quoting *Alaska Pacific*) the ambiguity canon.[50]

The *Bryan* Court could not have been more clear that it viewed itself as having long extended the rule quoted in *Alaska Pacific* to laws decidedly *unfavorable* to tribal interests. Immediately after quoting *Alaska Pacific*, it stated: "This principle of statutory construction has particular force in the face of claims that ambiguous statutes abolish by implication Indian tax

---

[47] *Bryan*, 426 U.S. at 392, quoting *Alaska Pacific*, 248 U.S. at 89.

[48] Pub. L. 280, 67 Stat. 589 (1953), codified principally at 18 U.S.C. § 1162 and 28 U.S.C. § 1360; *see also Bryan*, 426 U.S. at 377−80; COHEN'S HANDBOOK (2012), *supra* note 1, § 1.06, at 91−92.

[49] *See, e.g.*, Duane Champagne & Carole Goldberg, *Captured Justice: Native Nations and Public Law 280* (Carolina Academic Press, 2012); Carole Goldberg, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405 (1997); Wildenthal 2002, *supra* note 4, at 129 (noting that P.L. 280 "has been intensely unpopular with both states and tribes . . . ever since it was passed at the height of the Termination Era," and that "[s]tates have resented the costs of criminal jurisdiction over territories and peoples not otherwise subject to state taxation, and tribes have resented the consequent loss of sovereignty and intrusion by non-Indian state authorities into their affairs").

[50] *Bryan* concluded that the civil-jurisdiction part of P.L. 280 (codified at 28 U.S.C. § 1360) did not authorize a state to tax on-reservation personal property owned by a tribal member. *Bryan*, 426 U.S. at 375, 393; *see also id.* at 387−90 (applying the congressional intent canon); *id.* at 390−93 (applying the ambiguity canon); *id.* at 392, quoting *Alaska Pacific*, 248 U.S. at 89. In California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), the Court held that the criminal-jurisdiction part of P.L. 280 (codified at 18 U.S.C. § 1162) did not authorize a state which allowed many forms of legal gambling to comprehensively apply its gambling prohibitions and regulations to tribally operated on-reservation gaming enterprises. While not explicitly reciting the canons itself, *Cabazon* relied heavily on *Bryan*'s interpretation of P.L. 280, which was explicitly governed by the canons. *See Cabazon*, 480 U.S. at 207−12.

immunities."[51] The Court noted on the same page: "What we recently said of a claim that Congress had terminated an Indian reservation by means of an ambiguous statute is equally applicable here . . . ."[52]

Despite all this, it must be conceded that the Supreme Court, in an otherwise narrow and obscure 1993 decision, *Negonsott v. Samuels*,[53] included dicta calling into question this broad reading of *Bryan* and the ambiguity canon. *El Paso Natural Gas* understandably overlooked *Negonsott*—it is very obscure even for Indian law specialists. *Negonsott* held that a 1940 federal law, the Kansas Act, which applied only to criminal jurisdiction over Indian country in Kansas,[54] allowed the state to exercise concurrent state jurisdiction over certain crimes also within federal jurisdiction. The Court found the statutory text unambiguous,[55] and Congress's intent clear from the legislative history,[56] and therefore found "no occasion to resort to [the ambiguity] canon of statutory construction."[57] Rather, the Court held, "for the reasons previously discussed, we think that the Kansas Act quite unambiguously confers jurisdiction on the State . . . ."[58]

---

[51] *Bryan*, 426 U.S. at 392, citing three more of its precedents: McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973), Squire v. Capoeman, 351 U.S. 1, 6−7 (1956), and Carpenter v. Shaw, 280 U.S. 363, 366−67 (1930).

[52] *Bryan*, 426 U.S. at 392−93. What the Court had "recently said" was that it would *not* infer that Congress had terminated a reservation, absent clear language or other evidence of congressional intent. *I.e.*, the full traditional force of the canons would apply. *See id.* at 393, quoting Mattz v. Arnett, 412 U.S. 481, 504−05 (1973).

[53] 507 U.S. 99 (1993); *see also* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 127 (West, 6th ed. 2015) (discussing *Alaska Pacific*, *Bryan*, and *Negonsott*'s dicta on the ambiguity canon).

[54] *Negonsott*, 507 U.S. at 103.

[55] *Id.* at 104−06.

[56] *Id.* at 106−09.

[57] *Id.* at 110.

[58] *Id.*; see also COHEN'S HANDBOOK (2012), *supra* note 1, § 6.04[4][b], at 581 (discussing *Negonsott*'s holding but not exploring its troubling dicta on the ambiguity canon). Another reason why *Negonsott* should not be viewed as having any importance on the broader issue of the Indian law canons is that cases on Indian country criminal jurisdiction fall within one of a few specialized categories where the canons have long been held not to apply with their usual force or regularity. Another example is federal tax legislation, where the Indian law canons may be overcome by a competing canon against unexpressed exemptions from taxation. There are some additional Supreme Court cases affecting Indian rights that have not applied the Indian law canons for various specialized reasons. But none of these cases has ever endorsed or even suggested anything like the *Coeur d'Alene* doctrine, nor have they suggested any

In response to Negonsott's (the tribal member criminal defendant's) citation of *Bryan* and the ambiguity canon, however, the *Negonsott* Court offered some curiously unnecessary, tendentious, and misleading statements. Whether the author of the opinion, Chief Justice Rehnquist, was being mischievous or merely careless is not entirely clear. He was well known as an almost relentless enemy of Indian sovereignty.[59] It seems he may have taken the opportunity of a unanimous, highly technical, and apparently uncontroversial decision to kick up some dust about the scope of the Indian law canons. This was the same Chief Justice Rehnquist who made several arguments profoundly contrary to the canons and deeply hostile to Indian rights, in his outrageous dissent in *Mille Lacs*.[60]

Responding to counsel for Negonsott's accurate and widely used paraphrase of the ambiguity canon—"that 'laws must be liberally construed to favor Indians'"[61]—Rehnquist scolded: "What we actually said in *Bryan*, was that 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'"[62] Rehnquist went on: "It is not entirely clear to us that the Kansas Act is a statute 'passed for the benefit of dependent Indian tribes.'"[63]

One cannot argue with Rehnquist's last statement quoted above. As an extension of state jurisdiction into Indian country, the Kansas Act is exactly the kind of law (like P.L. 280) long viewed by most Indian Nations as deeply hostile to tribal sovereignty. But note how Rehnquist neatly skipped over the similarity of the Kansas Act to P.L. 280, the very law subjected to the ambiguity canon in *Bryan*, the very case which Rehnquist falsely—and very ironically—scolded Negonsott's counsel for misciting. As noted above, what the Court "actually said in *Bryan*" (an opinion Rehnquist himself joined) included some very important and

---

undermining of the ambiguity canon along the lines suggested by *El Paso Natural Gas*, 632 F.3d 1272, or the *Negonsott* dicta. *See* Wildenthal 2007, *supra* note 2, at 434 n. 59, 468−69 n. 170, 487−89 & nn. 233−37.

[59] *See, e.g.*, Wildenthal 2002, *supra* note 4, at 124−35 (discussing "The Rehnquist Era of American Indian Law").

[60] *See supra* notes 17−20 and accompanying text.

[61] *Negonsott*, 507 U.S. at 110 (quoting petitioner's, *i.e.*, defendant's, brief).

[62] *Id.*, quoting *Bryan*, 426 U.S. at 392, quoting *Alaska Pacific*, 248 U.S. at 89 (omitting here the second set of internal quotation marks).

[63] *Negonsott*, 507 U.S. at 110.

relevant additional statements that Rehnquist misleadingly ignored and omitted in *Negonsott*. It was Chief Justice Rehnquist, not counsel for Negonsott, who needed correction about what *Bryan* said and held.

Rehnquist was still not quite finished. Apparently seeking to drive a wedge between Negonsott, the tribal member criminal defendant, and the broader concerns of Negonsott's tribe (the Kickapoo) and other Indian Nations, he stated: "We see no reason to equate 'benefit of dependent Indian tribes,' as that language is used in *Bryan*, with 'benefit of accused Indian criminals,' without regard to the interests of the victims of these crimes or of the tribe itself."[64]

This was an outrageous cheap shot for Rehnquist to take. It ignored the reality that intrusions on Indian sovereignty very often affect *both* the purely personal interests of individual Indians *and* the broader sovereign interests of their tribes and of all Indian Nations—much as *Bryan* and the state tax it struck down affected not just the purely personal financial interest of Russell Bryan, but the sovereign interests of the Minnesota Chippewa Tribe and by extension all Indian Nations.[65]

It was also stunningly hypocritical and suggested a disturbing racial double standard. As my 2002 article noted, "Rehnquist, never known as a staunch defender of the rights of criminal defendants,"[66] nevertheless solicitously invoked the rights and liberties of *non*-Indian defendants in writing the Court's infamous opinion granting non-Indians special protection from prosecution by Indian Nations for crimes committed within tribal territory.[67] Rehnquist implicitly equated United States citizens only with *non*-Indians, ignored the fact that tribal member Indians are also United States citizens, and indifferently consigned Indians to the very same tribal justice he deemed inadequate for *non*-Indians choosing to commit on-reservation crimes. He "suggested no concern whatsoever for *their* [tribal members'] rights and liberties."[68]

---

[64] *Id.*
[65] *See supra* note 50 (discussing holding and reasoning of *Bryan*).
[66] Wildenthal 2002, *supra* note 4, at 127.
[67] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), discussed in Wildenthal 2002, *supra* note 4, at 126−28.
[68] Wildenthal 2002, *supra* note 4, at 127 (emphasis in original); *see also id.* at 126−28.

Shameful—but fortunately, as noted, these mischievous and disturbing comments in Rehnquist's *Negonsott* opinion were clearly dicta, not affecting the Court's holding and thus devoid of any precedential force. For the reasons stated, they should also be viewed as lacking any persuasive value whatsoever. We may hope the *Bay Mills* Court's unqualified reaffirmation of the canons in 2014 has laid them to rest.[69]

III. THE IRONY OF *TUSCARORA*

The sole *Supreme* Court authority cited by *Coeur d'Alene* to support its anti-canonical rule was a brief, passing statement in one of the most reviled Indian law decisions of the 20th century, the 1960 *Tuscarora* decision. The majority in *Tuscarora* held that the Federal Power Act (FPA) authorized the seizure and flooding of a large portion of the Tuscarora Indian Nation's land.[70] The disputed *Tuscarora* statement—that GFLs presumptively apply to "Indians and their property interests"—was an unnecessary, alternative, and seemingly secondary ground for the *Tuscarora* decision.[71] The *Supreme* Court itself has *never even cited* that statement, let alone relied upon it, in the 57 years since. *Supreme* Court justices have been fonder of quoting Justice Hugo Black's powerful *dissent* in *Tuscarora*.[72]

The primary ground for the decision, set forth at much greater length by the *Tuscarora* Court itself, was that Congress

---

[69] *See Bay Mills*, 134 S. Ct. at 2030−32.

[70] *Coeur d'Alene*, 751 F.2d at 1115, citing *Tuscarora*, 362 U.S. at 116; *see also* Wildenthal 2007, *supra* note 2, at 452−54 (discussing *Tuscarora*); Wildenthal 2008, *supra* note 4, at 572−73 (criticizing *Coeur d'Alene*'s misuse of *Tuscarora*).

[71] The disputed statement, that "a general statute in terms applying to all persons includes Indians and their property interests," appeared in *Tuscarora*, 362 U.S. at 116 (the page almost always cited on this point), and was repeated in substance four pages later, *id.* at 120 ("general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary").

[72] *See* Wildenthal 2007, *supra* note 2, at 466 & n. 164. Justice Black's dissent is famously eloquent and concluded with the memorable statement: "Great nations, like great men, should keep their word." *Tuscarora*, 362 U.S. at 142 (Black, J., joined by Warren, C.J., and Douglas, J., dissenting); *see also* Wildenthal 2007, *supra* note 2, at 454 & n. 124 (quoting more extensively from the moving final page of Justice Black's dissent, and commenting on a poignant memory that passage always brings to my mind, from when I was first interviewed by Judge Frank M. Johnson, Jr., for whom I clerked after law school).

allegedly did in fact *intend* for the FPA to authorize the seizure of tribal land—a debatable conclusion (producing a horribly unjust result), but a classic application of the Indian law canons.[73] In the 1984 *Escondido* decision (another FPA case), the *Supreme* Court cited *Tuscarora* specifically with regard to the 1960 decision's canonical analysis of Congress's *intent*. The *Escondido* Court conspicuously *never* quoted or mentioned (nor has any other *Supreme* Court case) the anti-canonical *Tuscarora* statement on which *Coeur d'Alene* leaned so heavily, even though it would have provided useful support for *Escondido*'s anti-tribal conclusion. *Escondido* did not even cite the two pages on which the disputed *Tuscarora* statement appeared.[74]

There have been exactly *two* relevant occasions on which the *Supreme* Court (in *any* majority opinion) has *ever* cited *any aspect at all* of its own majority opinion in *Tuscarora*. Both citations strongly suggest the *Supreme* Court long ago *repudiated* the disputed *Tuscarora* statement. The first citation was in *Escondido*, exactly eight months to the day before *Coeur d'Alene* was decided—but ignored by the Ninth Circuit. The second citation was in 1985, less than two months after *Coeur d'Alene*.[75] Beyond that, more than two dozen other *Supreme* Court decisions

---

[73] *See Tuscarora*, 362 U.S. at 111−14, and especially 118 (relying extensively on purported evidence of Congress's intent in the relevant FPA provisions, including specific references to Indians).

[74] *See Escondido*, 466 U.S. at 786, citing *Tuscarora*, 362 U.S. at 118 (*not* 116 or 120), to reaffirm that Congress *intended* to apply the FPA to tribal lands; see also note 71; Wildenthal 2007, *supra* note 2, at 467−70.

[75] *See* Oneida County v. Oneida Indian Nation, 470 U.S. 226, 248 n. 21 (1985), citing *Tuscarora*, 362 U.S. 99 generally (without any specific page citation) as one of three cases that were "relied upon by [Oneida County]" to oppose the tribal claim at issue there. The *Oneida* Court rejected that use of all three. One case, it noted, "expressly reaffirmed" the canons. *Tuscarora* and the other case, it stated, "do so implicitly." *Id.* The *Oneida* Court thus rejected the idea that *Tuscarora* may properly be viewed as standing for any anti-canonical principle of Indian law. *See* Wildenthal 2007, *supra* note 2, at 470−71; Wildenthal 2008, *supra* note 4, at 581−82. *Escondido*, 466 U.S. 765 was decided on May 15, 1984, *Coeur d'Alene*, 751 F.2d 1113 on January 15, 1985, and *Oneida* on March 4, 1985. The third (and only other) citation by the Supreme Court of any aspect of the *Tuscarora* majority opinion, in United States v. Sioux Nation, 448 U.S. 371, 415 (1980), is irrelevant for present purposes. It had nothing to do with how to interpret federal laws, but merely reaffirmed the point that Congress has the constitutional power to take even treaty-guaranteed Indian land for public use as long as just compensation is paid. *See* Wildenthal 2007, *supra* note 2, at 466 & n. 165.

since 1960 have reaffirmed the canons while ignoring the *Coeur d'Alene* rule purportedly based on *Tuscarora*.[76]

Let's be very clear about this: The *Supreme* Court has *twice* cited and discussed *Tuscarora* as simply one more in the long line of its own decisions applying the classical Indian law canons—specifically, in *Tuscarora*, the congressional intent canon. *Tuscarora* and *Escondido* are part of that very line of cases. Moreover, in both cases the *Supreme* Court applied the canons to a quintessential GFL—the FPA! They thus join the other cases we saw in Part II, dating back 112 years, in which the *Supreme* Court has applied the canons or their effective equivalent to various GFLs. Here is the full list of all nine cases: *Winans* (1905), *Winters* (1908), *Tuscarora* (1960), *Merrion* (1982), *Escondido* (1984), *Dion* (1986), *Iowa Mutual* (1987), *Mille Lacs* (1999), and *Idaho* (2001).[77]

The contrary reading of *Tuscarora*, as repudiating the canons in the case of GFLs—celebrated coast-to-coast in the lower federal courts ever since *Coeur d'Alene*—has sunk without a trace in the *Supreme* Court's case reports. *Tuscarora*, in fact, stands for the exact opposite of what *Coeur d'Alene* and its misbegotten progeny have claimed it does. And that has been clear since, at the very latest, the same year (1985) that *Coeur d'Alene* was decided!

Are the *Supreme* Court and the lower federal courts, on this issue, operating in two parallel universes? Perhaps "Supreme" should be put in quotation marks instead of the italics I have intentionally used (with a touch of sardonic humor) in the previous five paragraphs and at other key points in this article.

It remains worrisome, however, that the Supreme Court, never shy about reversing the Ninth Circuit when it wants to (that circuit has been something of a punching bag for the Court),[78] has allowed this bizarre state of affairs to persist for almost a third of a century now—including what is surely the longest-running unresolved federal circuit split on an important legal issue in American history.[79] Of course, one factor has been the reluctance

---

[76] *See* Wildenthal 2007, *supra* note 2, at 464−73.
[77] *See supra* notes 13, 29, 10, 23−26, 15, 20.
[78] *See* Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 OR. L. REV. 405 (1998); Wildenthal 2008, *supra* note 4, at 551−52.
[79] Compare *Coeur d'Alene*, 751 F.2d 1113 (holding that Occupational Safety and Health Act applies to tribal government employers) with Donovan v. Navajo

of tribes losing in the U.S. Court of Appeals to take cases to the Supreme Court.[80] But one must be queasy about what will actually happen when the Supreme Court finally confronts the issue.

IV. CONTINUING STRUGGLES OVER *COEUR D'ALENE*

We must be skeptical of *Coeur d'Alene*'s self-description as embracing "three exceptions" to the purported "rule" derived from *Tuscarora*. That is misleading puffery designed to portray *Coeur d'Alene* as somehow moderate or balanced when it really is not.[81] Consider the third *Coeur d'Alene* "exception" in particular, demanding proof that Congress affirmatively intended *not* to regulate tribes.[82] It is the mirror-image opposite of the classical congressional intent canon. A tribe that can show *that* kind of evidence with regard to a federal law—that Congress clearly intended it *not* to regulate tribes—has no need of the protective shield of the canons in any event, at least not in that particular case.

The third so-called "exception" to the *Coeur d'Alene* rule is not really an "exception" at all, in any logical sense. Rather, it helps define the essential nature and scope of the rule itself. It would be as if a law imposing a general income tax contained two exceptions for specific types of exempted income, then added a

---

Forest Products Industries, 692 F.2d 709 (10th Cir. 1982) (contra). Reich v. Mashantucket Sand & Gravel, 95 F.3d 174 (2d. Cir. 1996), and Menominee Tribal Enterprises v. Solis, 601 F.3d 669 (7th Cir. 2010) (discussed in Part IV), have sided with *Coeur d'Alene* on this point. *See* Wildenthal 2008, *supra* note 4, at 553−54 (discussing *Mashantucket*) and 555−57 (discussing *Navajo Forest*).

[80] *See* Wildenthal 2007, *supra* note 2, at 529−30 (discussing the San Manuel Band's decision not to appeal the 2007 D.C. Circuit *San Manuel* ruling, 475 F.3d 1306); Wildenthal 2008, *supra* note 4, at 586 & n. 212 (discussing the remarkable fact that not a single one of six leading cases applying GFLs to tribes between 1985 and 2007, including *Coeur d'Alene* and *San Manuel*, was appealed to the Supreme Court). This trend continued from 2007 to 2015. At least two appellate decisions (prior to the 2015 Sixth Circuit rulings discussed in Part V) applied a GFL to a tribal or on-reservation business during that period, on the basis of the *Coeur d'Alene* doctrine—Solis v. Matheson, 563 F.3d 425 (9th Cir. 2009) (applying Fair Labor Standards Act to Indian-owned reservation business), and *Menominee*, 601 F.3d 669 (applying Occupational Safety and Health Act to tribal government-owned business). Neither was appealed to the Supreme Court. Both are discussed further in Part IV. As discussed in Part V.D, however, this trend was finally broken with the petitions for certiorari filed in February 2016 with regard to the 2015 Sixth Circuit decisions.

[81] *See* Wildenthal 2008, *supra* note 4, at 577−78.

[82] *Coeur d'Alene*, 751 F.2d at 1116.

third "exception" stating (rather obviously and redundantly) that no tax would be owed if Congress repealed the entire law. The third *Coeur d'Alene* "exception" was always a necessary and logically implied corollary of the alleged *Tuscarora* rule about GFLs in the first place. Indeed, the second (mostly overlooked) statement of that disputed rule in *Tuscarora* explicitly articulated this very point, asserting that "general Acts of Congress apply to Indians as well as to all others *in the absence of a clear expression to the contrary*."[83] It is impossible to imagine the rule without this corollary. It would obviously be nonsensical for a court to apply a federal law to an Indian tribe if it was clear from that very law (and any related evidence) that Congress specifically intended it not to apply.

That leaves only the first and second *Coeur d'Alene* "exceptions" as having any real significance. While they may in some sense moderate the impact of the alleged *Tuscarora* "rule," in realistic and practical terms the purported "rule" and its purported "exceptions" operate together as a single unified doctrine deeply inimical to tribal rights and profoundly subversive of the classical Indian law canons.

That is especially clear with regard to *Coeur d'Alene*'s "treaty exception," which has had an insidiously corrosive effect on Indian sovereignty in two different ways.[84] First, *Coeur d'Alene*'s focus on treaty rights has provided an all-too-convenient excuse to improperly denigrate and limit the sovereign rights of tribes that happen to lack extant treaties.[85] Second, the insistence of *Coeur d'Alene* and its progeny that tribes demonstrate "explicit," "specific," or "express" treaty rights to escape the grip of any GFL is "wildly out of line with" the treaty canon itself, "the original historical bedrock of American Indian law," given that canon's

---

[83] *Tuscarora*, 362 U.S. at 120 (emphasis added); *see also supra* note 71. I myself missed this interesting point in my 2007 and 2008 articles, as have *Coeur d'Alene* and its progeny, the Cohen treatise, and (to the best of my knowledge) all other academic commentators. *See, e.g.*, COHEN'S HANDBOOK (2012), *supra* note 1, § 2.03, at 124, 127.

[84] *See* Wildenthal 2008, *supra* note 4, at 577−81.

[85] *But see* Wildenthal 2007, *supra* note 2, at 425−27, 438−40, 495−98 (documenting the point that treaty rights are not required for a tribe to assert fully equal sovereign rights). Of course, the extant treaties, and the overall legacy of the Treaty Era of 1778−1868, do in important ways provide a collective historical and moral shield for all Indian Nations. *See, e.g.*, COHEN'S HANDBOOK (2012), *supra* note 1, § 1.03[1], at 23−24.

requirement that treaties "be construed generously 'as the Indians would have understood them.'"[86]

In the final analysis, exactly how damaging the *Coeur d'Alene* doctrine may be to Indian sovereignty depends on how broadly or narrowly courts construe each of the first two "exceptions." There have been significant variations among the federal circuits in how the doctrine has played out. My 2008 discussion of the lower-court case law,[87] not comprehensive to begin with, is now somewhat out-of-date. A full treatment is beyond the scope of this article. Good surveys are provided in *Cohen's Handbook* and Smith's 2011 treatise on labor and employment law in Indian country.[88]

The Tenth Circuit remains the leader in defending the classical canons of construction. The 2-1 panel opinion by Judge Carlos Lucero in *Dobbs v. Anthem Blue Cross and Blue Shield* (2010),[89] seemed to resolve some of the confusion left over by the Tenth Circuit's decision in *NLRB v. Pueblo of San Juan* (2002).[90] *Dobbs* appeared to lean strongly against any expansion of the

---

[86] Wildenthal 2008, *supra* note 4, at 580, quoting COHENS HANDBOOK (2005), *supra* note 1, § 2.02[1], at 119−20.

[87] As of 2008, six of the seven federal circuits to address the issue—the Second, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits—had generally embraced the *Coeur d'Alene* doctrine. *See* Wildenthal 2008, *supra* note 4, at 552−55. The D.C. Circuit in *San Manuel*, 475 F.3d 1306 had coyly denied doing so, while succumbing for all practical purposes. *See* Wildenthal 2007, *supra* note 2, at 474−75, 502−11; Wildenthal 2008, *supra* note 4, at 554−55. The 2011 *El Paso Natural Gas* decision (cited *supra* note 34 and discussed in Part II) certainly seems to confirm the D.C. Circuit's de facto adherence to *Coeur d'Alene*.

[88] *See* COHEN'S HANDBOOK (2012), *supra* note 1, § 2.03, at 124−27, and § 21.02[5][c][i], at 1334−44; SMITH, *supra* note 5, at 114−72. Embracing the *Coeur d'Alene* doctrine does not invariably lead to rulings against tribal sovereignty, at least where the core protection of tribal sovereign immunity from private civil lawsuits is concerned. *See, e.g.*, Williams v. Poarch Band of Creek Indians, 839 F.3d 1312, 1322−24 (11th Cir. 2016) (reaffirming Eleventh Circuit's embrace of *Coeur d'Alene* doctrine generally); *id.* at 1317−18, 1321−22, 1324−25 (also reaffirming, however, citing Supreme Court precedents, special protections for tribal sovereign immunity from private civil lawsuits, and concluding that federal laws such as the Americans With Disabilites Act and Age Discrimination in Employment Act did not abrogate such immunity, even construed in light of the *Coeur d'Alene* doctrine); United States *ex rel.* Cain v. Salish Kootenai College, 862 F.3d 939 (9th Cir. 2017) (holding that an Indian tribe is not a "person" subject to suit under the False Claims Act, and remanding for consideration of whether an on-reservation college is an arm of the tribe).

[89] 600 F.3d 1275 (10th Cir. 2010).

[90] 276 F.3d 1186 (10th Cir. 2002) (*en banc*).

Coeur d'Alene doctrine and in favor of the traditional Indian law canons.

This was especially notable and heartening since Judge Lucero, in 2002, had declined to join the key section of the muddled but mostly pro-canons *San Juan* majority opinion. Instead, he joined a separate concurrence in *San Juan* by Judge Mary Beck Briscoe. They went along with the 9-1 *en banc* judgment, which upheld a tribal so-called "right to work" law against a claim that it was preempted by the NLRA. But they embraced the analytical framework set forth by the lone *San Juan* dissenter, Judge Michael Murphy, who flagrantly misconstrued key Supreme Court Indian law precedents and advocated a startlingly aggressive application of the *Coeur d'Alene* doctrine.[91]

Dobbs involved the Employee Retirement Income Security Act (ERISA), as amended by Congress in the Pension Protection Act of 2006, which specified that ERISA applies to certain tribal insurance plans (for tribal employees engaged in "commercial activities") but not others (for tribal employees engaged in "essential governmental functions"). Before the 2006 amendment, ERISA expressly exempted federal, state, and local governments, but was silent on tribal governments.[92]

Judge Lucero's opinion in *Dobbs* adopted a broadly pro-tribal reading of *San Juan* and refused to apply the *Coeur d'Alene* doctrine to ERISA—albeit, rather oddly, without ever mentioning *Coeur d'Alene* itself. *Dobbs* held that even before the 2006 amendment, "ERISA would not apply to insurance plans purchased by tribes for employees primarily engaged in governmental functions unless Congress expressly or necessarily preempted Indian tribal sovereignty."[93] By contrast, Judge

---

[91] *See id.* at 1200−01 (Briscoe, J., concurring, and Lucero, J., concurring); *id.* at 1201−10 (Murphy, J., dissenting); *see also* Wildenthal 2008, *supra* note 4, at 559−69. While critical of many aspects of *San Juan*, my 2008 article praised some other Tenth Circuit decisions, *see id.* at 555−58, and noted that among the federal circuits, the Tenth stands alone in "mount[ing] significant resistance to the allure of *Coeur d'Alene*." *Id.* at 555. Judge Lucero reaffirmed his 2002 embrace of *Coeur d'Alene* in 2005, making his apparent (at least partial) 2010 change of heart in *Dobbs*, 600 F.3d 1275 all the more interesting and significant. *See supra* note 94.

[92] *See Dobbs*, 600 F.3d at 1278−79.

[93] *Id.* at 1284; *see generally id.* at 1283−84. Judge Lucero implicitly criticized the *Coeur d'Alene* doctrine, and suggested the Tenth Circuit had squarely rejected it, stating that "[i]n this circuit, respect for Indian sovereignty means that federal regulatory schemes do not apply to tribal governments exercising

Briscoe's dissent—the same Judge Briscoe whom Judge Lucero had joined in *San Juan* in 2002—construed *San Juan* narrowly and applied the *Coeur d'Alene* doctrine (again without citing *Coeur d'Alene* itself) to find that ERISA had fully applied to tribal employers before the 2006 amendment.[94]

The Ninth Circuit in *Solis v. Matheson* (2009) and the Seventh Circuit in *Menominee Tribal Enterprises v. Solis* (2010),

---

their sovereign authority absent express congressional authorization." *Id.* at 1283. But he never cited *Coeur d'Alene* by name. In a footnote, he conceded that *San Juan* had drawn a distinction between a tribe's authority as a "sovereign" as compared to its exercise of "property rights." *Id.* at 1283 n. 8, quoting *San Juan*, 276 F.3d at 1199. This distinction in *San Juan* was merely stated in dicta, but in fact it distinguished a tribe's "sovereign" authority not just from its role as "property" owner but more generally from its roles as either "employer or landowner." *San Juan*, 276 F.3d at 1199; *see generally id.* at 1198−99; *see also Dobbs*, 600 F.3d at 1293 (Briscoe, J., dissenting) (correctly noting the broader reach of *San Juan*'s discussion in this regard, though failing to acknowledge it as dicta); Wildenthal 2008, *supra* note 4, at 560−61 (criticizing *San Juan*'s dicta in this regard); Wildenthal 2007, *supra* note 2, at 518 n. 331 (same). My 2007 article discussed and criticized at some length the artificial distinctions drawn in the *San Manuel* cases (cited *supra* note 8) between so-called "traditional" and "commercial" governmental functions, or between "governmental" and "proprietary" functions of governments, noting the Supreme Court's rejection of such distinctions in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), among other cases. *See* Wildenthal 2007, *supra* note 2, at 518−21 (discussing *Garcia*); *see generally id.* at 511−26.

[94] *Dobbs*, 600 F.3d at 1293−96 (Briscoe, J., dissenting). Judge Briscoe noted that Judge Lucero had reaffirmed his embrace of the *Coeur d'Alene* doctrine in *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 984 (10th Cir. 2005) (Lucero, J., concurring), cited in *Dobbs*, 600 F.3d at 1293 (Briscoe, J., dissenting). Judge Lucero's restatement of the *Coeur d'Alene* doctrine in *Shivwits* quoted *Nero v. Cherokee Nation*, 892 F.2d 1457, 1462−63 (10th Cir. 1989), noting that *Nero* in turn quoted and relied upon *Coeur d'Alene*, 475 F.3d at 1116. *See Shivwits* at 984 (Lucero, J., concurring) (quoting *Nero*'s restatement of *Coeur d'Alene*'s so-called "three exceptions to *Tuscarora*'s rule"). When Judge Briscoe quoted Judge Lucero's *Shivwits* concurrence, she retained his citation of *Nero* but dropped his citation of *Coeur d'Alene* and avoided any mention of *Coeur d'Alene* in her ensuing three pages of discussion and application of the *Coeur d'Alene* doctrine. She instead referred to "the *Tuscarora* rule," *Dobbs*, 600 F.3d at 1294 (Briscoe, J., dissenting), and cited other cases following *Tuscarora* and *Coeur d'Alene*, *see id.* at 1293−96 (Briscoe, J., dissenting). As noted in the text and note 93, Judge Lucero himself in *Dobbs* likewise chose to discuss and criticize the *Coeur d'Alene* doctrine without citing its foundational case (he did not cite *Tuscarora* either), thus creating the confusing paradox that *Coeur d'Alene*, though central to the issue in *Dobbs*, and in fact the key bone of contention between Judges Lucero and Briscoe, was never cited in *Dobbs*.

on the other hand, appeared to double down on their longstanding embrace of the *Coeur d'Alene* doctrine.[95]

Menominee followed *Coeur d'Alene*'s specific holding in applying the Occupational Safety and Health Act (OSHA) to an on-reservation business owned by the Menominee tribal government. Judge Richard Posner's application of *Coeur d'Alene*'s so-called "treaty exception" confirmed its especially troubling potential. My 2008 article praised Judge Posner for successfully "fight[ing] the undertow of the *Coeur d'Alene* treaty analysis" in an earlier Seventh Circuit case.[96] In *Menominee*, unfortunately, it pulled him under.[97]

Matheson applied the Fair Labor Standards Act (FLSA) to a tribal-member-owned business on the Puyallup reservation. That was hardly surprising, since *Coeur d'Alene* remains governing precedent in the Ninth Circuit. But *Matheson* provided yet a further illustration of *Coeur d'Alene*'s corrosive impact on treaty rights.[98]

---

[95] *Matheson*, 563 F.3d 425; *Menominee*, 601 F.3d 669

[96] Wildenthal 2008, *supra* note 4, at 580, discussing Reich v. Great Lakes Indian Fish & Wildlife Commission, 4 F.3d 490 (7th Cir. 1993).

[97] Distinguishing *Navajo Forest*, 692 F.2d 709, Judge Posner's *Menominee* opinion noted specific treaty language limiting access of nonmembers of the tribe to the Navajo reservation, while claiming in contrast that "there is nothing like that here" with regard to the Menominee reservation. *Menominee*, 601 F.3d at 674. *Coeur d'Alene* itself distinguished *Navajo Forest* on the same erroneous basis, creating the now-32-year-old circuit split on OSHA's application to Indian country. *See supra* note 79 and accompanying text. Both cases ignored the elementary hornbook principle of Indian law that all tribes, regardless of "specific" or "explicit" treaty language—*or whether they have any treaty at all*—enjoy the inherent sovereign right to exclude nonmembers from tribal lands. *See, e.g.*, *Merrion*, 455 U.S. at 133−34 & n. 1, 144; COHEN'S HANDBOOK (2012), *supra* note 1, § 4.01[2][e], at 220−22; Wildenthal 2008, *supra* note 4, at 578−79 (citing authorities and criticizing *Coeur d'Alene* on this point).

[98] The court rejected any exemption from the FLSA based on the Puyallup Tribe's rights under the Medicine Creek Treaty because there was no language in the treaty "directly on point discussing employment or wages and hours." *Matheson*, 563 F.3d at 435. The court cited with approval United States v. Smiskin, 487 F.3d 1260, 1267 (9th Cir. 2007), which improperly asked whether the very same treaty protected a claimed right "expressly." *Matheson*, 563 F.3d at 435; *see also* Wildenthal 2008, *supra* note 4, at 580 n. 181 (discussing *Smiskin*).

V. THE NEAR-MISS OF 2015–16

In the spring of 2015, three separate appeals were pending in the Sixth and Tenth Circuits from NLRB decisions that followed *San Manuel* in asserting federal labor relations jurisdiction over tribal government on-reservation gaming enterprises.[99] All three cases were decided within the space of four weeks in the early summer of 2015. The two Sixth Circuit cases were especially interesting because that circuit had never previously taken a stand on the *Coeur d'Alene* doctrine. The Tenth Circuit case was especially interesting because, as discussed in Part IV, that circuit has been notable for its resistance to that doctrine. All three cases, perhaps especially the latter, seemed to offer the best (and perhaps last) chance for a federal appellate ruling that might reject the NLRB's 2004 power grab in *San Manuel*,[100] and force the Supreme Court to take up the issue. But the result was a dramatic and frustrating near-miss for opponents of the *Coeur d'Alene* doctrine.

A. *The NLRB's (Strategic?) Reversal in the Tenth Circuit* Chickasaw *Case*

First up, on June 4, 2015, was the Tenth Circuit appeal—which was not, however, decided by the Tenth Circuit. Rather, the NLRB in *Chickasaw Nation*[101] preemptively reversed its 2013 assertion of jurisdiction in the same case,[102] concluding that the 1830 Treaty of Dancing Rabbit Creek protected Chickasaw's WinStar World Casino from federal labor jurisdiction.[103] That

---

[99] *See supra* note 9.
[100] *See supra* note 8.
[101] Chickasaw Nation, 362 N.L.R.B. No. 109 (2015).
[102] Chickasaw Nation, 359 N.L.R.B. No. 163 (2013). The Board was given the opportunity to reconsider after the Supreme Court vacated the 2013 decision, along with many other NLRB rulings, when it held that President Obama had exceeded his power under the Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3, in filling vacancies on the Board. *See* NLRB v. Noel Canning, 134 S. Ct. 2550 (2014); *see also* Bryan H. Wildenthal & Steven Semeraro, *The Truth About the Supreme Court's Recess-Appointments Ruling: A Debate*, THE ORIGINALISM BLOG (Aug. 2014), http://ssrn.com/abstract=2538257 [https://perma.cc/6VK4-U7BD].
[103] *Chickasaw*, 362 N.L.R.B. No. 109, at 1–3.

decision effectively mooted the Nation's appeal to the Tenth Circuit.

The 1830 treaty does contain unusually strong and specific language protecting the Indian Nation signatories from any outside laws "except such as may . . . [be] enacted by Congress, to the extent that Congress under the Constitution [is] required to exercise a legislation over Indian Affairs."[104] It was thus not surprising that the Board, which embraced the *Coeur d'Alene* doctrine in its 2004 *San Manuel* decision,[105] found that *Coeur d'Alene*'s so-called "treaty exception" applied in *Chickasaw*.[106]

In a sense, relying so heavily on such treaty language yet again repeats the mistake that *Coeur d'Alene* and so many of its progeny have made, since it wrongly implies that tribes lacking such explicit treaty protections are less entitled to judicial protection of their inherent sovereignty. No tribe, not even one lacking any extant treaty protection at all, should be subjected to the intrusive application of a federal law without a showing that Congress intended to so intrude upon its sovereignty, and any ambiguities in the law should be resolved in favor of tribal immunity.[107]

That being said, the NLRB *Chickasaw* decision deserves praise for its analysis of treaty rights. First, the Board accurately set forth the general nature and scope of the classical treaty canon, with better care and attention to its historical origins than any court

---

[104] *Id.* at 2, quoting Treaty of Dancing Rabbit Creek Between the United States and the Choctaw Nation, Sept. 27, 1830, art. IV, 7 Stat. 333, 334 (hereinafter 1830 Treaty). As the Board noted, the Chickasaw Nation became in effect a party to this treaty in 1837. *Chickasaw*, 362 N.L.R.B. No. 109, at 1 n. 3, citing Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 465 n. 15 (1995); *see also* Convention Between the Choctaws and Chickasaws, Jan. 17, 1837 (approved by the United States, March 24, 1837), 11 Stat. 573, 575. The NLRB also noted the possible relevance of the Treaty of Washington Between the United States and the Choctaw and Chickasaw Nations, April 28, 1866, 14 Stat. 769 (hereinafter 1866 Treaty). *See Chickasaw*, 362 N.L.R.B. No. 109, at 1, 3–4.

[105] *See supra* note 8. The D.C. Circuit in *San Manuel*, while upholding the NLRB decision, claimed not to "choose between" the *Coeur d'Alene* doctrine and the classical Indian law canons. *San Manuel*, 475 F.3d at 1315. In reality, it took essentially the same approach as *Coeur d'Alene* and the NLRB. *See supra* note 87.

[106] *Chickasaw*, 362 N.L.R.B. No. 109, at 2, quoting *San Manuel*, 341 N.L.R.B. 1055, and citing *Coeur d'Alene*, 751 F.2d 1113.

[107] *See supra* Part IV(especially sources *supra* note notes 84–86, and text accompanying those notes); *see also infra* Part V.C.2.

decision following *Coeur d'Alene* of which I am aware.[108] This renders rather ironic the Board's modest statement, opening its analysis, that it "has no special expertise in construing Indian treaties" and "therefore look[s] to the decisions of the federal courts to assist [it] in determining the extent of the [Chickasaw] Nation's treaty rights."[109] The crucial question is to *which* federal courts the Board should defer, the circuit courts or the *Supreme* Court? In just two concise but richly informative paragraphs, the Board excelled (and ignored, at least there) the entire 30-year body of lower-court *Coeur d'Alene* case law.[110] Thankfully, instead, the Board primarily relied, for its general rule statement on treaty interpretation, on two of the greatest *Supreme* Court reaffirmations of the classical canons.[111]

The second reason the Board's *Chickasaw* decision deserves praise is that it remained faithful to the true meaning of the treaty canon in construing the language of the two treaties on whose meaning the decision turned. It did *not* require the Chickasaw Nation to demonstrate "explicit," "specific," or "express" treaty language supporting tribal rights.[112] It construed the language of the 1830 treaty in a broadly pro-tribal sense, rejecting any implication that "Congress['s] . . . required . . . legislation over Indian Affairs"[113] might include a broad GFL like the NLRA not enacted with tribal concerns in mind.[114]

More significantly, the Board discussed the very real possibility that an 1866 treaty with the Chickasaw might be read to limit the 1830 treaty's protections. Article VII of the 1866 treaty stated that the Chickasaw "agree to such legislation as Congress and the President . . . may deem necessary for the better administration of justice and the protection of the rights of person and property."[115]

---

[108] *See Chickasa*w, 362 N.L.R.B. No. 109, at 2–4.
[109] *Id.* at 2; *see also id.* at 2–3 (pt. III.1, The Rules of Construction Favoring Indian Tribes).
[110] *Id.* at 2–3 (second and third paragraphs of pt. III.1).
[111] *Id.* at 3, quoting *Winans*, 198 U.S. 371, and *Oneida*, 470 U.S. 226.
[112] *See supra* Part IV (text accompanying notes 84–86); *see also supra* Part V.C.2.
[113] 1830 Treaty, *supra* note 104, art. IV, at 334.
[114] *See Chickasa*w, 362 N.L.R.B. No. 109, at 3, quoting and discussing 1830 Treaty, *supra* note 104.
[115] 1866 Treaty, *supra* note 104, art. VII, at 771, quoted and discussed in *Chickasa*w*,* 362 N.L.R.B. No. 109, at 3.

It is not difficult to imagine how most courts following *Coeur d'Alene* would probably find that kind of treaty language to affirmatively *support* applying a GFL within an Indian Nation. They might easily conclude that it does not "explicitly" support any tribal *exemption* from a GFL. But the NLRB in *Chickasaw* took exactly the opposite approach. In proper compliance with the classical canons, the Board noted that the 1866 treaty language did not "explicitly" support *subjecting* the Chickasaw Nation to GFLs.[116]

Furthermore, the Board noted that the potentially harmful 1866 Article VII did *not* state that the Chickasaw (or the Choctaw, who were also signatories) "agree" to "all" federal legislation fitting the general description of Article VII.[117] An additional point, which the Board did not mention but might have, is that Article VII "*[p]rovided* . . . [that] [s]uch legislation *shall not in any wise interfere with or annul* their present tribal organization, or their respective legislatures or judiciaries, or the rights, laws, privileges, or customs of the Choctaws and Chickasaw nations respectively."[118] Imposing the NLRA on the Chickasaw Nation certainly would have disrupted—as it actually has in all other Indian Nations wrongly subjected to the NLRA since 2004 under *San Manuel* and its progeny—the Nation's own laws and regulations governing employment and labor relations within its own territory, including as to nonmembers of the tribe voluntarily choosing to work there.[119]

Finally, it should be noted, the NLRB *Chickasaw* decision is not merely an example of the Board's claimed "discretion"—in cases affecting tribal sovereignty—not to exercise the sweeping

---

[116] *Chickasa*w*,* 362 N.L.R.B. No. 109, at 3 ("The language in . . . the 1866 Treaty does not explicitly state that the Nation agrees to be subject to all federal laws of general applicability."). On the contrary, the Board noted, the 1866 language may be read as "compatible" with the protective 1830 language. *Id.* The Board, *id.* at 3–4, also relied on another provision of the 1866 Treaty, *supra* note 104, art. XLV, at 779–80, stating: "All the rights, privileges, and immunities heretofore possessed by [the Chickasaw Nation] . . . or to which [it was] entitled under the treaties and legislation heretofore made . . . shall be, and are hereby declared to be, in full force, so far as they are consistent with the provisions of this treaty."

[117] *Chickasa*w*,* 362 N.L.R.B. No. 109, at 3; *see also supra* note 115.

[118] 1866 Treaty, *supra* note 104, art. VII, at 771–72 (first emphasis in original; second emphasis added).

[119] *See, e.g.*, Wildenthal 2007, *supra* note 2, at 429–31, 434–37, 441–42; *see also San Manuel*, 341 N.L.R.B. 1055.

jurisdictional *power* it generally claims to have. That discretionary restraint is an option left open by the Board's 2004 *San Manuel* decision and exercised in another ruling that same day.[120] Rather, *Chickasaw* "decline[d] to assert jurisdiction" because it conceded that under the applicable treaties the NLRB simply *lacked power*—even under *San Manuel* and the *Coeur d'Alene* framework—to regulate labor relations in the Chickasaw Nation.[121]

For all these reasons, *Chickasaw* may be viewed as a significant step back by the NLRB from its aggressive project launched in 2004 of subjecting all Indian Nation gaming enterprises (and perhaps most other on-reservation businesses) to Board jurisdiction. Its analysis of tribal treaty rights seems sincere and thoughtful. If the decision was merely a cynical strategic move to block the case from reaching the Tenth Circuit, the Board might easily have ruled in the Chickasaw Nation's favor on narrower grounds—perhaps by depicting the 1830 treaty rights as sufficiently "explicit" to overcome presumptive application of the NLRA.

At the same time, we cannot ignore the practical result, which was indeed to postpone to some future case any ruling on the *San Manuel* issue by the one federal circuit known to be skeptical of the *Coeur d'Alene* doctrine and generally the most sympathetic to tribal rights. Did the Board, perhaps, decide to sacrifice jurisdiction over this one Oklahoma tribal casino, in order to shield *San Manuel* from a broader challenge that might have generated a clear circuit split? After all, we should not forget, *Chickasaw* unapologetically reaffirmed *San Manuel* itself.[122]

---

[120] *See San Manuel*, 341 N.L.R.B. at 1062; Yukon Kuskokwim Health Corp., 341 N.L.R.B. 1075, 1076–77 (2004) (exercising "discretion" not to apply the NLRA to a hospital controlled by several Alaska Native Nations, even though the Board specifically found that the hospital was "*not* exempt" from its jurisdictional power) (emphasis in original); Wildenthal 2007, *supra* note 2, at 522–23 (discussing *Yukon Kuskokwim* and the discretion issue).

[121] *Chickasaw*, 362 N.L.R.B. No. 109, at 1; *see also id.* at 4 (concluding that "because . . . asserting jurisdiction would abrogate treaty rights specific to the [Chickasaw] Nation, we shall dismiss the complaint").

[122] *Id.* at 1, 2, citing *San Manuel*, 341 N.L.R.B. 1055, twice with approval. Briana Green, *San Manuel's Second Exception: Identifying Treaty Provisions That Support Tribal Labor Sovereignty*, 6 MICH. J. ENVTL. & ADMIN. L. 463 (2017), provided a thoughtful and carefully researched analysis of the *Chickasaw* decision (to which she referred using the name of the tribal government enterprise, WinStar World Casino). Green surveyed all ratified tribal treaties for language that might prove helpful in protecting Indian Nations

B. *The Sixth Circuit: The Conflicting* Little River *and* Soaring Eagle *Panels and the Petitions for* En Banc *Rehearing*

The Sixth Circuit stepped into the fray just five days after the NLRB *Chickasaw* decision. On June 9, 2015, a three-judge panel of the Sixth Circuit decided *NLRB v. Little River Band of Ottawa Indians*, concerning application of the NLRA to the Little River Casino Resort, an on-reservation tribal government gaming enterprise south of Traverse City, Michigan.[123] Only three weeks after that, on July 1, 2015, a different Sixth Circuit panel decided *Soaring Eagle Casino and Resort v. NLRB*, concerning application of the NLRA to an on-reservation gaming enterprise operated by the Saginaw Chippewa Indian Tribe of Michigan.[124]

The decisions proved the old adage that timing is everything, because the *Soaring Eagle* panel unanimously favored rejecting both the NLRA's application to such tribal enterprises and, more generally, the entire *Coeur d'Alene* doctrine.[125] Unfortunately, a 2-1 majority of the *Soaring Eagle* panel felt bound, under Sixth Circuit precedent rules, to follow the *Little River* panel decision released just three weeks earlier, which upheld application of the NLRA and heartily embraced *Coeur d'Alene*.[126]

Sharpening the drama in this unusual instance of near-simultaneous competing panels on the same circuit, *Little River* was not unanimous, but rather split 2-1 on the basic issue. The dissenting judge in *Little River* wrote a powerful opinion refuting the NLRA's application and demolishing the premises of

---

from GFLs under *Chickasaw*'s approach. She found only four such treaties, suggesting the limits of *Chickasaw*'s beneficial impact. *See id.* at 470–81.

[123] 788 F.3d 537 (6th Cir. 2015); *see also supra* note 9.

[124] 791 F.3d 648 (6th Cir. 2015); *see also supra* note 9.

[125] *Soaring Eagle,* 791 F.3d at 675; *see also id.* at 675–77 (White, J., concurring in part and dissenting in part).

[126] *See id.* at 661–62, 675 (discussing *Little River*); *Little River,* 788 F.3d at 551, 555–56. *But see Soaring Eagle,* 791 F.3d at 675–77 (White, J., concurring in part and dissenting in part) (arguing that *Little River* was distinguishable based on the Saginaw Chippewa Tribe's treaty rights); Part V.C.2 (discussing Judge White's opinion).

the *Coeur d'Alene* doctrine.[127] Thus, of all six judges presiding on the two panels, a 4-2 majority rejected *Coeur d'Alene*. Yet because the unanimous second panel felt compelled to defer to the contrary view of the 2-1 majority of the first panel, it allowed the *Little River* tail to wag the *Soaring Eagle*.

The ultimate outcome in the Sixth Circuit may not have been different if the *Soaring Eagle* panel had released its opinion before *Little River*, but that at least would have forced the full *en banc* court to hear and decide both cases *de novo*—unless it were inclined to let stand the *Soaring Eagle* panel's preferred approach. We cannot be sure whether such reconsideration would have made a difference.

As it happened, there were at the time fifteen judges in regular active service on the Sixth Circuit,[128] and eleven of those judges did not participate on either the *Little River* or *Soaring Eagle* panels. The *Little River* majority opinion was written by Sixth Circuit Judge Julia Smith Gibbons, joined by senior Sixth Circuit Judge Gilbert Merritt.[129] The dissenter was Sixth Circuit Judge David McKeague.[130] The *Soaring Eagle* majority opinion was written by Judge Kathleen O'Malley, a visiting judge from the U.S. Court of Appeals for the Federal Circuit, sitting by designation, joined in full by Sixth Circuit Judge Bernice Donald.[131] Sixth Circuit Judge Helene White agreed with the *Soaring Eagle* majority's rejection of *Coeur d'Alene* but dissented in part because, as she persuasively showed, *Little River* was distinguishable based on the Saginaw Chippewa Tribe's treaty rights.[132]

Thus, only four of the fifteen active Sixth Circuit judges participated on the two panels: Judges Gibbons and McKeague in

---

[127] *Little River,* 788 F.3d at 556–65 (McKeague, J., dissenting); *see also* Part V.C.4.

[128] *See* UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, http://en.wikipedia.org/wiki/United_States_Court_of_Appeals_for_the_Sixth_Circuit [https://perma.cc/6WLT-WJ4B].

[129] *Little River,* 788 F.3d at 539. The case report does not identify Judge Merritt as a "senior" judge, but he did take senior status in 2001. *See* SIXTH CIRCUIT, *supra* note 128.

[130] *Little River,* 788 F.3d at 556–65 (McKeague, J., dissenting); *see also infra* Part V.C.4.

[131] *Soaring Eagle,* 791 F.3d at 651 & n. *.

[132] *Id.* at 675–77 (White, J., concurring in part and dissenting in part); *see also infra* Part V.C.2. *Compare Little River*, 788 F.3d at 551 ("there [was] no treaty right at issue in th[at] case").

Little River and Judges Donald and White in *Soaring Eagle*. And only three of those judges—McKeague, Donald, and White—opposed *Coeur d'Alene* and application of the NLRA.

Both tribes petitioned for *en banc* rehearing by the full Sixth Circuit, but the petitions were denied in September 2015, with only Judge McKeague publicly dissenting.[133] We may never know how close the actual *en banc* vote was among all active Sixth Circuit judges. Judges often choose not to publicly record dissents on rehearing votes. One might tend to assume Judges Donald and White also favored rehearing, but even if so, evidently there were not enough additional votes. Judge O'Malley of the Federal Circuit (who opposed *Coeur d'Alene*) was not eligible to vote on the *en banc* rehearing petition in *Soaring Eagle*, nor could she have participated on the *en banc* Sixth Circuit that would have decided the cases if rehearing had been granted. By contrast, senior Sixth Circuit Judge Merritt (who supported *Coeur d'Alene*), though likewise ineligible to vote on the petition for *en banc* rehearing in *Little River*, would have been eligible to participate with his active Sixth Circuit colleagues in an *en banc* decision.[134]

The fact that there were not enough votes to rehear the cases does not, of course, necessarily indicate how they would have been decided *de novo* if all the judges, presiding *en banc*, had read and heard full-dress briefs and oral arguments on the merits. Some judges might be disinclined to vote to rehear a panel decision but might well, if compelled to address the merits *de novo* on full *en banc* review, reach a different conclusion in the end. If *Soaring Eagle* had beaten *Little River* to the punch, the Sixth

---

[133] *Little River,* 788 F.3d at 537 & n. * (*en banc* rehearing denied Sept. 18, 2015; noting merely that "Judge McKeague would grant rehearing for the reasons stated in his [panel] dissent"); *Soaring Eagle,* 791 F.3d at 648 (*en banc* rehearing denied Sept. 29, 2015; no recorded dissent).

[134] *En banc* rehearing may only be "ordered by a majority of the circuit judges . . . in regular active service." 28 U.S.C. § 46(c); *see also* Fed. R. App. P. 35(a) (echoing this rule and limiting the vote, obviously, to active judges "who are not disqualified"). Rule 35(a) also notes that *en banc* rehearings are "not favored and ordinarily will not be ordered unless . . . necessary to secure or maintain uniformity of the court's decisions" or when the case "involves a question of exceptional importance." An *en banc* court in the Sixth Circuit consists of all active circuit judges plus any senior circuit judges who participated in a panel decision being reviewed. *See* 28 U.S.C. § 46(c); Sixth Circuit Internal Operating Procedure 35(c), http://www.ca6.uscourts.gov/rules-and-procedures (under "Rules," click on "Local Rules: F.R.A.P., Local Rules, I.O.P.'s") [https://perma.cc/9WM8-SFNE].

Circuit would either have had to accept *Soaring Eagle*'s rejection of *Coeur d'Alene* or grant full *en banc* review.

C. *A Closer Look at* Little River *and* Soaring Eagle

The 2015 Sixth Circuit opinions did not dramatically alter the existing analytical battle lines over the *Coeur d'Alene* doctrine, which have been clearly drawn for decades now. But there are at least four points worth elaborating. First, Judge Gibbons's *Little River* opinion and Judge O'Malley's *Soaring Eagle* opinion, though arriving at diametrically opposed views on *Coeur d'Alene*, shared a curious common feature. Both went to awkward lengths, with mixed and troublesome results, to fuse their analysis of whether and how GFLs should apply to Indian Nations with a distinct branch of Indian law—the *Montana* doctrine—dealing with the scope of inherent tribal authority over non-Indians.[135] Second, Judge White's partial dissent in *Soaring Eagle* showed a welcome sensitivity to Indian treaty rights. Third, it is deeply troubling that Judge Gibbons's *Little River* opinion—which now speaks for the Sixth Circuit—repeated two of the worst (and long-refuted) mistakes of *San Manuel* and other opinions influenced by the *Coeur d'Alene* doctrine. Fourth, but not least, Judge McKeague's *Little River* dissent deserves special praise for his devastatingly vivid and concise restatement of the argument against what he aptly dubbed the *Coeur d'Alene* "house of cards."[136]

---

[135] *See* Montana v. United States, 450 U.S. 544, 563–66 (1981).

[136] *Little River,* 788 F.3d at 565 (McKeague, J., dissenting). A small body of law review commentary has already emerged on the *Little River* and *Soaring Eagle* decisions. *See* Skibine 2016, *supra* note 5, at 138–42 (primarily focusing on the *Soaring Eagle* panel majority's analysis), and two student case comments also focusing mainly on *Soaring Eagle*. Cristen R. Hintze, *Going "All-In" Against the NLRB: How Tribal Self-Government Lost on the River in the Sixth Circuit*, 55 WASHBURN L.J. 529 (2016); Riley Plumer, *Overriding Tribal Sovereignty by Applying the National Labor Relations Act to Indian Tribes in Soaring Eagle Casino and Resort v. National Labor Relations Board*, 35 L. INEQUALITY 131 (2017). Skibine's and Hintze's analyses are especially thoughtful and perceptive.

1. Attempting to Fuse *Montana* and the Interpretation of Federal Laws

Judge Gibbons in *Little River* embraced the *Coeur d'Alene* doctrine, repeating many of its familiar fallacies.[137] Her two most egregious mistakes are discussed in Part V.C.3. Judge Gibbons took a somewhat innovative and interesting approach, however—though also troubling and misguided—in extensively discussing the doctrine pioneered by the Supreme Court in *Montana v. United States* (1981).[138] Judge O'Malley relied on the *Montana* doctrine even more extensively in her *Soaring Eagle* opinion, despite favoring a different outcome.

Under *Montana*, as expanded by several later cases, courts apply a rebuttable presumption that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[139] This presumption may be overcome, however, pursuant to either of two important exceptions. The most relevant *Montana* exception, for present purposes, is that "Indian tribes *retain* inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations," notably to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[140] Generations of students and practitioners of Indian law, along with judges grappling with a wide array of Indian law cases, have come to know this doctrine (the presumption along with its two exceptions) as the "*Montana* rule."

---

[137] *See*, *e.g.*, Wildenthal 2008, *supra* note 4, at 552–69, 572–85.

[138] *See Montana,* 450 U.S. at 563–66.

[139] *Id.* at 565. In the particular context of criminal jurisdiction, a related rule categorically rejects any surviving *inherent* power of Indian Nations to prosecute non-Indians. *See id.*, citing *Oliphant,* 435 U.S. 191. Thus, *Montana* applies only to tribal civil and regulatory jurisdiction. *Montana* originally limited tribal civil jurisdiction over nonmembers only as to their activities on property within Indian country that the nonmembers owned in fee simple, but later cases expanded the "*Montana* rule" (with its two exceptions noted in the text and *infra* note 140) to tribal power over nonmembers throughout tribal lands. *See* Wildenthal 2002, *supra* note 4, at 135–43 (discussing and criticizing *Montana* and its progeny); *id.* at 126–31 (same as to *Oliphant*).

[140] *Montana,* 450 U.S. at 565 (emphasis added). The other exception is that tribes retain inherent power to regulate nonmember on-reservation conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

The *Montana* rule had not previously played a substantial role in cases grappling with how to interpret GFLs in relation to tribal sovereignty. *Montana* was not discussed or even cited in *Coeur d'Alene* itself in 1985, nor in the D.C. Circuit's 2007 *San Manuel* decision, nor in the 1989, 1993, and 1999 cases in which the Seventh, Eighth, and Eleventh Circuits adopted the *Coeur d'Alene* doctrine.[141] Nor was it mentioned in 2002 in the leading (dissenting) opinion advocating the doctrine in the Tenth Circuit.[142]

There is a very good reason for *Montana*'s typical absence (or low profile) in most cases analyzing the application of GFLs or other federal laws to Indian Nations, whether under the classical canons of construction or the competing *Coeur d'Alene* doctrine.[143] The whole point of the *Montana* rule is that it governs the "inherent" powers of Indian Nations in the absence of any federal law or treaty relevant to the specific power at issue.[144] It is a settled point under Supreme Court case law that Congress has the power to limit or abrogate inherent tribal authority over nonmembers or in any other respect,[145] even though *Montana* might otherwise support such tribal authority. The whole point of the canons is to

---

[141] See *Coeur d'Alene,* 751 F.2d 1113; *San Manuel,* 341 N.L.R.B. 1055; Smart v. State Farm Ins. Co., 868 F.2d 929, 932–36 (7th Cir. 1989); Equal Employment Opportunity Comm'n v. Fond du Lac Heavy Equipment and Construction Co., 986 F.2d 246, 248 (8th Cir. 1993); Florida Paraplegic Ass'n v. Miccosukee Tribe, 166 F.3d 1126, 1127–30 (11th Cir. 1999); *see also supra* Part IV (especially notes 87–88) (discussing circuits which have followed the *Coeur d'Alene* doctrine). As discussed below in text, *Montana* has been discussed to a limited extent in some pre-2015 cases applying the *Coeur d'Alene* doctrine. *See, e.g.*, *Mashantucket,* 95 F.3d 174 (1996 case in which the Second Circuit first adopted *Coeur d'Alene*) and *Matheson,* 563 F.3d 425 (2009 Ninth Circuit case); s*ee also* Wildenthal 2008, *supra* note 4, at 552–54 (discussing foregoing cases from Second, Seventh, Eighth, and Eleventh Circuits), 575 & n. 152 (briefly discussing *Montana* and noting that *Coeur d'Alene* did not cite it).

[142] *See* NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1201–10 (10th Cir. 2002) (*en banc*) (Murphy, J., dissenting); *see also supra* Part IV (notes 90–91 and accompanying text) (discussing *San Juan*); Wildenthal 2008, *supra* note 4, at 563–69 (same, in great depth). *Montana* was, however, quoted and briefly discussed by the Tenth Circuit majority in *San Juan* (which did *not* embrace *Coeur d'Alene*). *San Juan,* 276 F.3d at 1193.

[143] *See supra* Part II.

[144] For example, a section of *Montana* itself, separate from the enunciation and application of the *Montana* rule, discussed whether the Crow Tribe might have power over nonmember hunting and fishing based on two treaties and a federal statute. *Montana*, 450 U.S. at 557–63.

[145] *See, e.g.*, United States v. Lara, 541 U.S. 193, 196, 200–03 (2004).

guide courts in analyzing whether Congress has exercised that power intentionally or with sufficiently unambiguous clarity.[146]

Congress may also restore or expand tribal powers, including the understood scope of "inherent" tribal sovereignty—including over nonmembers, even outside Indian country—even though *Montana* might *not* otherwise support such tribal powers.[147] The canons should also guide courts in construing the latter kind of federal legislation, to fulfill Congress's pro-tribal intentions and to resolve any ambiguities in favor of achieving Congress's pro-tribal goals.[148]

Thus, strictly speaking, the *Montana* rule (on the one hand) and the application of the canons to federal laws (on the other) are entirely separate and mutually exclusive approaches—apples and oranges. The *Montana* rule only comes up to bat if there is *not* a relevant federal law, and the canons can only apply to a federal law if there *is* one.

But *Montana* does have some indirect relevance to the problem of GFLs. Keep in mind that state laws generally do not apply within Indian Nations—absent some federal law properly construed under the canons to authorize state regulation or jurisdiction within Indian country.[149] Thus, when it comes to civil

---

[146] *Coeur d'Alene,* 751 F.2d 1113, of course, offers a competing guide.

[147] *See Lara,* 541 U.S. at 196, 200–05, 210; *see generally* COHEN'S HANDBOOK, *supra* note 1, § 5.02, at 391–96. Congress has expanded tribal powers over some nonmembers in several important ways. *See, e.g.*, *Lara,* 541 U.S. 193 (upholding federal law restoring inherent tribal power to criminally prosecute Indians committing on-reservation crimes who are not members of the prosecuting tribe); Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) (applying federal Indian Child Welfare Act (ICWA)—which generally expands tribal powers, even off-reservation, over adoption, foster care placement, and termination of parental rights with regard to Indian children—to limit ability of non-Indians to finalize off-reservation adoption of Indian child born off-reservation); COHEN'S HANDBOOK, *supra* note 1, § 9.04, at 765–69 (discussing *Lara* and tribal criminal jurisdiction over nonmember Indians); *id.*, § 11.03, at 840–45 (discussing ICWA and *Holyfield*). As discussed, *supra* notes 139–140 and accompanying text, *Montana* does not support tribal *criminal* jurisdiction over nonmembers nor any tribal powers outside tribal lands.

[148] The Supreme Court in *Holyfield*, 490 U.S. 30, while not explicitly invoking the canons, was careful to resolve a key disputed ambiguity in ICWA—whether an Indian child's "domicile" should be defined by reference to state or federal law—in favor of a uniform federal definition designed to achieve Congress's clear intent to protect "the rights of Indian families and Indian communities." *Id.* at 45; *see also id.* at 32–37, 43–45, and 49–53.

[149] *See, e.g.*, *Bryan,* 426 U.S. 373; *supra* Part II (text accompanying notes 45–50). There are some exceptions. For more details (not relevant for present

regulatory authority over things like employment, labor relations, health, and environmental protection within Indian country, the two alternatives, as a practical matter, are tribal or federal regulation.

To the extent tribes regulate their own members, it is fairly uncontroversial that they should continue to have power to do so, unless and until Congress clearly and intentionally intervenes to say otherwise. But what about tribal regulation of nonmembers and their activities within Indian lands? If by some chance, under *Montana*, tribes lack authority to regulate nonmembers in a particular situation, that would *not* prove that *Congress* has clearly and intentionally imposed federal regulation. But it would fairly suggest it might be a wise and desirable policy choice for Congress to do so. On the other hand, to the extent *Montana* indicates that tribes retain inherent power to regulate nonmembers in a given situation, that would suggest far less reason to assume Congress should intervene (or has actually done so) in that situation.

It is thus not surprising that when some pre-2015 cases following *Coeur d'Alene* have occasionally discussed *Montana*, it has typically been to suggest that tribes lack authority to regulate nonmembers, either as a general matter or with regard to the specific subject matter of whatever GFL was at issue. Consistently with *Coeur d'Alene*'s own erroneous and extremely misleading treatment of other Supreme Court precedents,[150] the use of *Montana* by some cases following *Coeur d'Alene* has been deeply flawed, even deceptive. Two cases provide useful illustrations.

In *Reich v. Mashantucket Sand & Gravel* (1996),[151] the Second Circuit applied the federal Occupational Safety and Health Act (OSHA) to a tribal government employer. *Mashantucket* first quoted *Montana*'s second (less relevant) exception, introducing it in a misleading way.[152] Two pages later, in a section headed

---

purposes), *see, e.g.*, COHEN'S HANDBOOK, *supra* note 1, § 6.03, at 511–30, § 7.03, at 607–11, and § 8.03[1], at 696–717.

[150] *See* Wildenthal 2008, *supra* note 4, at 572–81.

[151] *Supra* note 79.

[152] *See supra* note 140 for an accurate paraphrase and quotation of this second *Montana* exception. *Mashantucket* stated that tribes "may regulate any *internal conduct* which threatens the 'political integrity, the economic security, or the health or welfare of the tribe.'" *Mashantucket,* 95 F.3d at 178 (my emphasis), paraphrasing and quoting *Montana,* 450 U.S. at 566. The vague phrase "internal conduct" (*whose* conduct?)—substituted by *Mashantucket* for the language actually used by *Montana*—might easily be read to suggest that tribal regulation

"Employment of Non-Indians," the court quoted *Montana*'s general presumption without acknowledging it was rebuttable or mentioning either of the two crucial exceptions.[153] This quotation was offered as alleged support for the court's assertion that the tribe's "employment of non-Indians weighs heavily against its claim" that applying OSHA would infringe on tribal sovereignty.[154]

Right after that second quotation (of *Montana*'s rebuttable presumption), the *Mashantucket* court quoted a vague general statement earlier in the *Montana* opinion (on page 564), that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes . . . ."[155] *Montana*, of course, went on to clarify that vague general premise on page 564 by concluding (on pages 565–66, where it set forth its actual rule) that certain tribal regulatory powers over nonmember activities within tribal lands are indeed "necessary to protect tribal self-government"[156]—but you would never know that from reading *Mashantucket*.

Thus, rather than quote *Montana*'s language in its actual proper order, working up to its final, most relevant, and specific guidance with respect to tribal power over nonmembers, *Mashantucket* misleadingly quoted snippets of *Montana* in *reverse* order, literally going *backward* to end up with the broadest and least useful language (on page 564) with respect to the issue at hand. And *Mashantucket*—apparently because it was inconvenient to the Second Circuit's preferred conclusion—simply avoided any mention of the most specifically on-point language of *Montana*, language virtually compelling the conclusion that *nonmembers choosing to enter on-reservation employment relationships with tribes become properly subject to tribal regulation*. That would be *Montana*'s first exception, stating that "tribes *retain inherent*

---

extends only to "internal relations" or conduct of tribal members, *see Montana*, 450 U.S. at 564, whereas the whole point of both *Montana* exceptions is to reaffirm tribal power over certain kinds of on-reservation "activities of nonmembers," *id.* at 565, or "conduct of non-Indians," *id.* at 566.

[153] *Mashantucket*, 95 F.3d at 180, quoting *Montana,* 450 U.S. at 565.

[154] *Mashantucket,* 95 F.3d at 181.

[155] *Id.* at 180, quoting *Montana,* 450 U.S. at 564 (internal quotation marks omitted).

[156] *See supra* notes 139–40 and accompanying text.

sovereign power to . . . regulate . . . nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[157]

The Ninth Circuit's 2009 *Matheson* decision[158] also mishandled *Montana*. As discussed in Part IV, *Matheson* applied the federal FLSA to an on-reservation business owned by tribal members (the Mathesons), which employed nonmembers. The Ninth Circuit did at least acknowledge the Mathesons' argument, citing *Montana* (along with treaty language supporting a right to exclude nonmembers), that the tribe had "a right to regulate employment relationships with those nontribal members who consent to employment by tribal members."[159] *Matheson* quoted the same vague *Montana* statement (on page 564) emphasized by *Mashantucket*—that tribes generally lack power "beyond what is necessary to protect tribal self-government or to control internal relations."[160] But *Matheson* did at least proceed in proper order to quote in full the *Montana* rule (with both exceptions).[161]

Matheson offered two reasons for applying the GFL at issue to on-reservation employees, despite the implications of *Montana*. First, the court noted that the tribe in question had not sought to exercise any "regulatory authority over employment and wages."[162] That's a fair point and might suggest the *desirability* of some federal regulation *as a policy matter*. On the other hand, a sovereign's decision *not* to regulate a particular matter at a particular time may itself be a legitimate exercise of regulatory authority. And all this would still leave unresolved the question of how *courts* should interpret federal law to determine if *Congress* has decided to exercise its regulatory power to the point of intruding on tribal sovereignty. The classical Indian law canons properly govern that question—that's their whole *raison d'être*!—but *Matheson* was bound by *Coeur d'Alene* as Ninth Circuit precedent.

Matheson's second reason for finding the *Montana* rule irrelevant was a puzzling *nonsequitur*. The court asserted there was "no evidence that the non-Indians employed [by the Mathesons]

---

[157] *Montana,* 450 U.S. at 565 (emphasis added).
[158] *Supra* note 80.
[159] *Matheson,* 563 F.3d at 435.
[160] *Montana,* 450 U.S. at 564, quoted in *Matheson,* 563 F.3d at 435.
[161] *Matheson,* 563 F.3d at 435–36, quoting *Montana*, 450 U.S. at 565–66.
[162] *Matheson* 563 F.3d at 436.

entered into any agreements or dealings *with the . . . Tribe* that would subject [them] to tribal civil jurisdiction."[163] That ignored the language of *Montana* that *Matheson* itself had just quoted, which upheld tribal civil jurisdiction over "nonmembers who enter consensual relationships with the tribe *or its members*."[164]

In any event, it is absurd to suggest that nonmembers who choose to accept employment on an Indian reservation and regularly commute there for that purpose, are not also consensually entering into a very significant "relationship" with the tribe in general, not just with the specific tribal employer. Tribes are largely *defined* by their membership, more so (in some respects) than by geographical boundaries.[165] If one enters into "commercial dealings" with tribal members, one is by definition dealing with the tribe.

Judge Gibbons in *Little River* discussed *Montana* far more extensively than did *Mashantucket* or *Matheson*, or any other case (to my knowledge) in the *Coeur d'Alene* line. Judge Gibbons cited *Montana* on at least 10 distinct occasions spread over eight of the 17 pages of her *Little River* opinion.[166] Three of those occasions involved quite substantial discussions of *Montana*.[167]

On only one of those 10 occasions (the second) did Judge Gibbons quote the full actual rule (with both exceptions) set forth on pages 565–66 of *Montana*.[168] Even there, she concluded by insisting that the *Montana* rule was somehow limited by the vague antecedent statement on page 564 of *Montana* (the same one emphasized by *Mashantucket* and *Matheson*): that tribal powers generally extend only to matters "necessary to protect tribal self-government or to control internal relations."[169] Just to be clear (though at risk of repetition), let us note again that *Montana* itself clarified its statement on page 564 by concluding (with the more detailed *Montana* rule) that certain tribal regulatory powers over

---

[163] *Id.* (emphasis added).
[164] *Montana,* 450 U.S. at 565 (my emphasis), quoted in *Matheson,* 563 F.3d at 436.
[165] *See generally* Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. Pitt. L. Rev. 1 (1993).
[166] *See Little River,* 788 F.3d at 544, 545, 546, 550 (three citations), 551, 552, 553, 554.
[167] *See id.* at 545, 546, 551.
[168] *Id.* at 545, quoting *Montana,* 450 U.S. at 565–66.
[169] *Montana*, 450 U.S. at 564, quoted in *Little River,* 788 F.3d at 545.

nonmember activities within tribal lands are indeed "necessary" in that regard. The *Montana* rule specifically reaffirmed and provided more guidance about those vital tribal powers over nonmembers.[170]

On all the other occasions (including the first) where Judge Gibbons cited *Montana*, she emphasized its general presumption *against* tribal regulation of nonmembers.[171] She repeatedly cited and emphasized—no fewer than seven separate times throughout the opinion—that vague premise on page 564 of *Montana*.[172] Judge Gibbons, at one point, cited a post-*Montana* Supreme Court case cautioning that the *Montana* exceptions should not "be construed in a manner that would swallow the rule or severely shrink it."[173] That is a fair point, but Judge Gibbons seemed to go to the other extreme of construing *Montana*'s general rule (and the earlier statement on page 564) to the point of swallowing the exceptions which form a crucial *part* of that rule.

Let's be very clear. It is not just the author of this article who contends that tribal powers over nonmember activities on tribal lands are an "important" surviving part of the inherent sovereignty of Indian Nations. The Supreme Court in *Iowa Mutual* (1987), decided six years after *Montana*, held: "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty."[174] You have one guess as to

---

[170] *See supra* notes 139–40, 155–56, and accompanying text.

[171] *See Little River,* 788 F.3d at 544, 546, 550 (three citations), 551, 552, 553, 554.

[172] *See id.* at 544, 545, 546, 550 (three citations), 552.

[173] *Id.* at 546, quoting Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 330 (2008) (internal quotation marks and citations omitted). Judge Gibbons wrongly suggested that *Plains Commerce* "narrowed the ambit of *Montana*'s exceptions." *Little River,* 788 F.3d at 546. But however debatable *Plains Commerce*'s specific 5–4 holding might be (I happen to agree with Justice Ginsburg's dissent, *Plains Commerce* at 342–52), it did not claim to alter the *Montana* rule. It merely (not too surprisingly) *applied* that rule so as not to support tribal jurisdiction in a context (as Judge Gibbons noted) involving a non-tribal bank's sale of a parcel of reservation land that was allotted long ago and had passed into fee simple non-Indian ownership. *See Little River,* 788 F.3d at 546; *see also Plains Commerce*, 554 U.S. at 328–29, 331, 335–37. That is a far cry from the scenario presented in *Little River* (and the many other cases which are the primary focus of this article), as discussed in the text below, involving nonmembers voluntarily entering into employment and other commercial relationships with tribes and their members *on tribal reservation trust land*.

[174] *Iowa Mutual,* 480 U.S. at 18; *see also supra* Part II (discussing *Iowa Mutual* as one of four leading Supreme Court decisions of the 1980s that applied the classical Indian law canons of constructions to GFLs); Wildenthal 2008, *supra* note 4, at 575 (quoting this same part of *Iowa Mutual*'s holding in the context of

the first case the *Iowa Mutual* Court cited to support this hornbook principle of American Indian law—*Montana* (specifically, pages 565–66).[175]

The exact scope of Indian Nation regulatory authority over nonmembers under the *Montana* rule is, of course, a debatable issue that will vary with the facts of each case. But it is quite obvious, as noted in my 2007 article, that "one of the scenarios most strongly favoring [tribal power] is when nonmembers engage in voluntary commercial or other dealings with a tribe on its reservation—such as, say, employment or patronage at a tribal casino."[176]

Judge Gibbons in *Little River*, despite her extensive discussion of *Montana* and despite acknowledging *Iowa Mutual*,[177]

---

pointing out how *Coeur d'Alene*, 751 F.2d 1113, ignored and misapplied Supreme Court precedents in this regard); Wildenthal 2007, *supra* note 2, at 460 (quoting this same part of *Iowa Mutual*'s holding in the context of pointing out how the NLRB's 2004 *San Manuel* decision, 341 N.L.R.B. 1055, misapplied *Iowa Mutual* and other Supreme Court precedents in this regard); *id.* at 476 (noting that the D.C. Circuit's 2007 *San Manuel* decision, 341 N.L.R.B. 1055, failed to discuss or even cite *Iowa Mutual*, despite the fact that it was cited and discussed extensively in the briefs and in the NLRB opinions below); *id.* at 506 (reiterating the point that *Iowa Mutual* and other Supreme Court precedents support tribal power to regulate nonmember activities on tribal lands).

[175] *Iowa Mutual,* 480 U.S. at 18, citing *Montana,* 450 U.S. at 565–66. *Iowa Mutual* also cited in support, *e.g.*, Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980), and *Merrion* (1982), 455 U.S. 130. Part V.C.3 of this article, *infra*, discusses Judge Gibbons's blatant mischaracterization and misapplication of *Merrion*.

[176] Wildenthal 2007, *supra* note 2, at 506; *see generally id.* at 459–61, 506–07 & n. 288; Wildenthal 2008, *supra* note 4, at 574–75; *see also Little River,* 788 F.3d at 562 (McKeague, J., dissenting) (noting that the nonmembers the Little River Band sought to regulate "entered into contractual (employment) relationships with the Band and are therefore properly subject to" tribal law), citing *Montana,* 450 U.S. at 565.

[177] *See Little River,* 788 F.3d at 548 (citing and discussing *Iowa Mutual*). Judge Gibbons mistakenly argued that the classical Indian law canons could not possibly apply to all GFLs potentially affecting tribal sovereignty (as she seemed to concede *Iowa Mutual* suggested), because "the sovereign powers of the several states—which, unlike the sovereign powers of Indian tribes, are constitutionally protected," do not receive "such solicitude." *Id.* at 549. That is simply wrong on multiple levels. The courts, first of all, obviously do enforce (with great "solicitude") the constitutional guarantees of state sovereignty. *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997) (enforcing constitutional rule protecting states against federal commandeering of state or local executive or legislative officials); Seminole Tribe v. Florida, 517 U.S. 44 (1996) (enforcing constitutional limits on Congress's ability to override state sovereign immunity, even as to a lawsuit brought by a sovereign Indian Nation); Texas v. White, 74 U.S. 700, 725 (1869) ("The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."); *see also*, *e.g.*, U.S.

Const. art. IV, § 3, cl. 1 (providing that "no new States shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned"); *id.*, art. V (providing that "no State, without its Consent," not even by constitutional amendment, "shall be deprived of its equal Suffrage in the Senate"); amdt. XI (constitutionalizing certain aspects of state sovereign immunity).

The very fact that *tribal* sovereignty has *not* been held constitutionally protected, but instead vulnerable to Congress's purported "plenary" power over Indian Nations, *see Lara,* 541 U.S. at 200; *Bay Mills,* 134 S. Ct. at 2030–32, is *precisely the strongest argument in favor of judicial application of the canons*, to make sure Congress exercises its powers intentionally or at least unambiguously. *See* Wildenthal 2008, *supra* note 4, at 554 (noting that the canons "were developed precisely to ameliorate and counterbalance the threatening potential of federal supremacy"); *id.* at 564–65 n. 105 (refuting an argument, similar to Judge Gibbons's, in Judge Murphy's dissent from the Tenth Circuit's 2002 *San Juan* decision, 276 F.3d at 1205). The Supreme Court in *Bay Mills*, reaffirming the canons, confirmed that "[a]lthough Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Bay Mills,* 134 S. Ct. at 2032; *see also Little River,* 788 F.3d at 563–64 (McKeague, J., dissenting) (discussing *Bay Mills* and the *Little River* majority's misunderstanding of it).

"Furthermore, even where constitutional constraints do *not* protect state sovereignty," my 2008 article noted that "the Supreme Court has enforced a 'plain statement' rule—exceeding the rigor of the comparable [congressional intent] Indian law canon—requiring that Congress make its intent 'unmistakably clear in the language of [a] statute' before it will be read to alter the traditional federal-state balance." Wildenthal 2008, *supra* note 4, at 565 n. 105, quoting Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991) (internal citations and quotation marks omitted).

Judge Gibbons did not acknowledge *Printz*, *Seminole*, *White*, *Gregory*, or any of the constitutional provisions cited above. Instead, she merely cited two cases dealing with preemption of state laws by federal laws based on Congress's constitutionally delegated powers. *See Little River,* 788 F.3d at 549. Congress's exercise of its delegated powers does not threaten state sovereignty in even remotely the same way that its "plenary" power over Indian Nations threatens tribal sovereignty. Such preemption of state laws (as long as it does not threaten to "alter the traditional federal-state balance" so as to trigger the *Gregory* rule noted above) cannot *improperly* threaten state sovereignty at all (if that doctrine is properly understood), since it merely fulfills the constitutional design, which explicitly grants valid federal laws supremacy over any conflicting state laws. *See* U.S. Const. art. VI, cl. 2.

It may be noted that the doctrine of "plenary" power over Indian Nations has a far weaker and more dubious constitutional and historical basis than federal supremacy over state laws. *See, e.g.*, Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002); Wildenthal 2002, *supra* note 4, at 142. In any event, the Supreme Court's state preemption doctrine (which Judge Gibbons did not discuss in any detail) considers Congress's "purpose" and "express" statutory text, and indulges a "presumption against preemption," in a manner comparable to (though admittedly somewhat different from) the Indian law canons. *See, e.g.*, Wyeth v. Levine, 555 U.S. 555, 565–66 & n. 3 (2009); *id.* at 597–98 & n. 5 (Thomas, J., concurring in judgment).

fundamentally failed to grasp the true import of those decisions. Concluding Part III—the heart of her opinion, focusing on the issue of tribal authority—Judge Gibbons asserted that *Coeur d'Alene* "reflects the teachings of *Montana* [and] *Iowa Mutual*" that "there is a stark divide between tribal power to govern the identity and conduct of its membership, on the one hand, and to regulate the activities of nonmembers, on the other."[178]

That was an utterly bizarre assertion to make on the basis of two Supreme Court precedents that *reaffirmed tribal power over nonmembers*. The *Montana* rule, as we have seen, supports tribal power over nonmembers in precisely the context presented by *Little River*—where nonmembers voluntarily enter into tribal employment on tribal lands. *Iowa Mutual* applied the classical Indian law canons—most emphatically *not* anything resembling the *Coeur d'Alene* doctrine—to uphold tribal court jurisdiction over a civil lawsuit against a non-tribal company. *Iowa Mutual* did so against a claim that such tribal jurisdiction was divested or limited by the federal statute conferring diversity jurisdiction on the federal courts—a quintessential GFL.[179]

Judge Gibbons argued that *Coeur d'Alene*'s "first exception incorporates the teachings of *Iowa Mutual*."[180] But recall that *Coeur d'Alene*'s first so-called "exception" protects only "purely intramural" tribal self-government from *Coeur d'Alene*'s erroneous presumption that a GFL will override tribal sovereignty—even a GFL silent on tribal concerns, in the absence of any evidence of congressional intent.[181] *Coeur d'Alene* and most of its progeny—including *Little River*—have found that first exception *not* to protect tribal sovereignty precisely *because* (in part) nonmembers were involved.[182] Yet *Iowa Mutual* upheld tribal sovereignty in precisely such a scenario. Judge Gibbons simply ignored, or failed to understand, this basic contradiction between *Coeur d'Alene* and *Iowa Mutual*.

---

[178] *Little River,* 788 F.3d at 551; *see generally id.* at 544–51 (Part III of *Little River* majority opinion).
[179] *See Iowa Mutual,* 480 U.S. at 11–13, 17–19; Wildenthal 2007, *supra* note 2, at 459–61, 490–92 (discussing *Iowa Mutual*); Wildenthal 2008, *supra* note 4, at 575, 585 (same).
[180] *Little River,* 788 F.3d at 551.
[181] *See Coeur d'Alene,* 751 F.2d at 1116; *supra* Part II (text accompanying note 11).
[182] *See, e.g.*, *Coeur d'Alene,* 751 F.2d at 1116–17; *Little River,* 788 F.3d at 552–53, 555.

Judge O'Malley's opinion in *Soaring Eagle* discussed and relied upon *Montana* even more extensively than Judge Gibbons did in *Little River*.[183] But Judge O'Malley drew the opposite conclusion from *Montana*. She correctly noted that the *Coeur d'Alene* doctrine is fundamentally inconsistent with the *Montana* rule. She pointed out, as we have already seen, that *Montana*'s first exception strongly supports tribal authority over nonmembers in the scenario presented by *Soaring Eagle*[184]—and, I would add, by virtually all similar cases involving on-reservation Indian gaming enterprises, or for that matter any on-reservation tribal employment.[185]

As noted in Part V.B of this article, Judge O'Malley concluded that her panel was bound by *Little River* as Sixth Circuit precedent (and thus by *Coeur d'Alene*)—if only by three weeks.[186] That makes *Soaring Eagle*'s extensive discussion of *Coeur d'Alene* and *Montana* merely dicta. But it merits close scrutiny since it drew support from three of the four judges on the two panels who rejected the *Coeur d'Alene* doctrine.[187]

---

[183] Part IV of Judge O'Malley's *Soaring Eagle* opinion, taking up 15 of the opinion's 25 pages, was devoted to discussing whether applying the NLRA to the Saginaw Chippewa Indian Tribe's casino would improperly intrude on the tribe's inherent sovereignty. *See Soaring Eagle,* 791 F.3d at 661–75. The introductory section of Part IV summarized the *Little River* panel's analysis (including its reliance on *Montana* and adoption of *Coeur d'Alene*). *See id.* at 661–62. Parts IV.A and IV.B then set forth what the *Soaring Eagle* panel felt was the correct analysis, disagreeing with the reasoning of both *Little River* and *Coeur d'Alene*. *See id.* at 662–75. Based on extensive discussion and dozens of citations of *Montana* (more than 40, by my count, spread across 14 of the 15 pages of Part IV), Judge O'Malley explained at length why the *Soaring Eagle* panel concluded that *Montana* was inconsistent with, and supported rejection of, *Coeur d'Alene*. *See id.* at 661–62, 664–75.

[184] *See id.* at 667–69 & n. 12; *see also id.* at 674 (summing up that "in *Montana*" as in other cases, "the Supreme Court made clear that a tribe's right to self-governance and its power to regulate the conduct of nonmembers extends to consensual commercial relationships with nonmembers").

[185] *See supra* note 176 and accompanying text.

[186] *See Soaring Eagle,* 791 F.3d at 661–62; *see also id.* at 675 (Part V of Judge O'Malley's *Soaring Eagle* opinion).

[187] Judge Donald joined fully in Judge O'Malley's *Soaring Eagle* opinion. *Id.* at 651. Judge White dissented in part (and, in effect, from the judgment), but only based on her analysis of the Saginaw Chippewa Tribe's treaty rights, as discussed in Part V.C.2 of this article. *See Soaring Eagle,* 791 F.3d at 656–61 (Parts III.A and III.B of Judge O'Malley's opinion, discussing the treaty-rights issue); *id.* at 675–77 (White, J., concurring in part and dissenting in part) (same, disagreeing with Part III.B of Judge O'Malley's opinion). Judge White expressly joined all of Judge O'Malley's opinion other than Part III.B. *Id.* at 675; *see also id.* at 677 (agreeing with "the majority's conclusion that *Little River* is wrongly

Does Judge O'Malley's analysis offer a way forward that might attract support in other federal circuits, or even in the Supreme Court? Perhaps so. Her approach is certainly preferable to the *Coeur d'Alene* doctrine. It may appear to be an appealingly moderate "compromise" approach in some ways. Even Supreme Court justices relatively sympathetic to tribal claims, on the current Court, have viewed *Montana* as a "path-marking case."[188] A doctrine incorporating *Montana* analysis, however awkwardly, might thus have some broad appeal on the Court.

But while I regret having to criticize the first and so far only prevailing federal court opinion to indicate a preference to squarely reject *Coeur d'Alene*,[189] Judge O'Malley's attempted fusion of *Montana* with the proper analysis of federal laws—while surely well-intended—was troubling and deeply problematical. One must hope the Supreme Court will continue, instead, to adhere to the classical Indian law canons it has so painstakingly developed and applied over the past 185 years.[190]

---

decided but [as precedent] dictates that the Tribe's inherent sovereignty cannot itself carry the day"). Judge McKeague's *Little River* dissent, by contrast, did not reject *Coeur d'Alene* on the basis of *Montana* nor did he attempt to fuse *Montana* analysis with his application of the classical Indian law canons. He correctly noted that the first *Montana* exception supported tribal regulation of nonmember casino employees. *See Little River,* 788 F.3d at 562 (McKeague, J., dissenting). But he discussed *Montana* only briefly during the course of his 10–page dissent and generally seemed to view it as simply irrelevant. *See id.* at 562–63. That is basically correct, as I would argue. See the discussion in the text and *infra* Part V.C.4.

[188] *See, e.g.*, *Plains Commerce,* 554 U.S. at 343 (Ginsburg, J., joined by Stevens, Souter, and Breyer, JJ., dissenting).

[189] *See infra* Part V.C.4 (discussing the very few opinions of any kind that have explicitly rejected *Coeur d'Alene*).

[190] *See supra* Part II (tracing the canons back to the 1832 opinion by Chief Justice Marshall in *Worcester*, 31 U.S. 515. Professor Skibine, somewhat similarly, noted that *Soaring Eagle*'s *Montana*-based approach was preferable to the approaches in *Coeur d'Alene,* 751 F.2d 1113 or *San Manuel* (D.C. Cir. 2007), 475 F.3d 1306; *see* Skibine 2016, *supra* note 5, at 130–35 (discussing *Coeur d'Alene*); *id.* at 135–38 (discussing *San Manuel*); *id.* at 141–42 (favorably comparing *Soaring Eagle*'s approach), yet noted (as this article does) that *Soaring Eagle*'s use of *Montana* was still "flaw[ed]," *id.* at 142. *Compare* Hintze, *supra* note 136, at 552–56 (also discussing, and somewhat equivocally criticizing and then praising, *Soaring Eagle*'s *Montana*-based approach).

Skibine, instead of advocating a straightforward return to the classical canons, as this article does, proposed that GFLs affecting Indian Nations should be analyzed under a "practical reasoning" approach derived from the work of Professors William N. Eskridge, Jr., and Philip P. Frickey. *See* Skibine 2016, *supra* note 5, at 127 & n. 25, citing Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Skibine 2016, *supra* note

Judge O'Malley acknowledged the classical canons and recognized that they generally give tribes the benefit of the doubt, citing *Iowa Mutual*, *Merrion*, and two other Supreme Court cases, all of which applied the canons to uphold tribal sovereignty. As reflected in the language quoted by Judge O'Malley from all four cases, the proper presumption is that tribes *retain* sovereign regulatory authority *unless* clearly and affirmatively *divested* by federal law.[191]

The essential problem with Judge O'Malley's hybrid approach was that, by awkwardly and prematurely trying to shoehorn *Montana* into the analysis of federal legislation, she undermined that basic pro-tribal presumption. Even the way she introduced her hybrid analytical framework was confusing. She contended that under "Supreme Court precedent," "to determine whether a tribe has the inherent sovereign authority necessary to prevent application of a federal statute to tribal activity, we apply the analysis set forth in *Montana*."[192] Immediately after that puzzling statement, instead of actually citing, quoting, or "apply[ing]" anything in *Montana*, she cited and quoted *Iowa Mutual*, *Merrion*, and two more classical-canons Supreme Court cases, as just noted above. They in fact "set forth" the proper "analysis" to be followed.

Judge O'Malley's introductory statement was puzzling because tribal sovereignty can never withstand or "prevent" the "application" of federal legislation—*if Congress has clearly indicated its intent to override tribal power*. If Congress has *not* indicated such intent, then by definition (under the canons) federal law does *not* limit tribal authority. It is literally impossible to analyze or resolve that issue by "apply[ing] . . . *Montana*." The analytical focus must be on *Congress's* legislation and intentions, not on the background scope of "inherent [tribal] sovereign authority."

5, at 155–76. Skibine's approach has much to commend it and at times he reaffirmed aspects of the classical canons, *e.g.*, *id.* at 162–64. My fear, however, would be that a "practical reasoning" approach, like *Soaring Eagle*'s attempted fusion with *Montana*, would make it all too easy for many judges to yield (and all too difficult for others to avoid yielding) to the temptations of judicial policy-making discussed below in the text.

[191] *See Soaring Eagle,* 791 F.3d at 666, citing and quoting *Iowa Mutual,* 480 U.S. 9, *Merrion,* 455 U.S. 130, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), and United States v. Wheeler, 435 U.S. 313 (1978).

[192] *Soaring Eagle,* 791 F.3d at 666.

It is important to note that even if federal law does not apply in a given situation, it does not automatically follow that a tribe may assert its own authority. The latter is a second and separate analytical question, which may require further inquiry into the often-uncertain scope of inherent tribal sovereignty. That second question would certainly be subject to *Montana* analysis where nonmembers are concerned. The problem with Judge O'Malley's approach was that she merged the two questions in a confusing way. She obscured the proper canons analysis by improperly putting *Montana* first, front, and center. She put *Montana*'s cart before the canons' horse.[193]

This became clear as Judge O'Malley proceeded to apply her well-intended hybrid analysis to the NLRA. She correctly stated that it was necessary to "first determine whether Congress has demonstrated a clear intent that a [GFL] will apply to the activities of Indian tribes." But she then promptly derailed herself by stating, confusingly, that "[i]f Congress has not so spoken, we would then determine if the [GFL] impinges on" certain aspects of tribal authority.[194] If Congress has not "spoken" clearly or intentionally enough, however, a federal law (whether a GFL or specialized Indian legislation) would not and should not "impinge" on tribal authority *at all, in the first place*. The analysis of the federal law would be at an end, and it would simply not apply to the tribe. That is not to suggest the tribe would necessarily have authority to act as it wished in that situation. Any party with proper standing could certainly challenge the extent of the tribe's own inherent authority, by invoking *Montana*.

Judge O'Malley, by contrast, seemed to believe that even if a GFL merely *appears* to *potentially* affect a tribe's interaction with nonmembers, it should be presumed to apply to the tribe unless the tribe "demonstrate[s] that one of the two *Montana* exceptions . . . applies."[195] But that simply does not follow under

---

[193] A somewhat analogous analytical confusion hobbled Judge Janice Rogers Brown's analysis in *San Manuel* (D.C. Cir. 2007), 475 F.3d 1306, as discussed in Wildenthal 2007, *supra* note 2, at 504; *see generally id.* at 502–11.

[194] *Soaring Eagle,* 791 F.3d at 667.

[195] *Id.* Professor Skibine hit the nail on the head with his apt observation that the *Soaring Eagle* "approach in effect creates a rebuttable presumption that Congress always intends a federal law to apply to Indian nations inside their reservations if such law has the potential to impact a significant number of non-tribal members." Skibine 2016, *supra* note 5, at 142.

either the classical canons or *Montana*, taken properly as separate questions considered in proper sequence. The fact that a tribe might possibly (hypothetically) lack authority under *Montana* to regulate certain nonmember activities does not mean a court should reflexively conclude—without evidence of congressional intent—that a given federal law (even a GFL) does apply to such activities. To be sure, such a hypothetical lack of tribal authority might arguably suggest policy reasons supporting Congress's consideration of new legislation to address the problem in a careful, thoughtful, and intentional manner.

Judge O'Malley, despite quoting relevant language from *Merrion*, did not seem to understand the significance of that landmark precedent in the Supreme Court's Indian jurisprudence. She stated that because *Soaring Eagle* involved an employee who was "a nonmember of the Tribe," "the aspects of inherent [tribal] sovereignty recognized in . . . *Merrion* are not applicable. Accordingly, unless one of the *Montana* exceptions [applies] . . . the NLRA should apply to the [Tribe] . . . ."[196] That makes no sense. The central issue in *Merrion* was tribal power—which the Supreme Court upheld—to tax *nonmembers* engaged in on-reservation business.[197] *Merrion*, like *Soaring Eagle*, but unlike *Montana*, involved the proper interpretation under the canons of federal legislation claimed as limiting tribal authority,[198] and thus had far more direct and obvious "application" to *Soaring Eagle* than did *Montana*.

There is, one must concede, a certain commonsense appeal to the notion that in the absence of clear congressional guidance, courts should resort to the *Montana* framework. But embracing such an approach would be fundamentally inconsistent with the canons—and even more importantly, inconsistent with any proper judicial role. It would tempt and encourage courts to undermine tribal sovereignty by improperly engaging in their own policy analysis—in judicial legislation, to put it bluntly—untethered by the democratic political constraints that properly apply to Congress. While Judge O'Malley and her *Soaring Eagle* colleagues commendably resisted that temptation, this is exactly the kind of free-form administrative and judicial policy-making

---

[196] *Soaring Eagle,* 791 F.3d at 667.
[197] *See generally Merrion*, 455 U.S. 130.
[198] *See id.* at 149–52; *see generally supra* Part II.

approach that led to the improper expansion of the NLRA in the first place, in the *San Manuel* cases[199]—and eventually in *Little River*.

As we have seen, the hypothetical stated above, about possible lack of tribal power under *Montana*, is very unlikely with regard to the typical scenario discussed in this article—a tribe's regulation of nonmembers choosing to engage in on-reservation employment. *Montana*'s first exception plainly and amply supports tribal authority in that scenario. As we have also seen, Judge O'Malley herself correctly reached that ultimate conclusion. She would have held accordingly in *Soaring Eagle* were it not for the Sixth Circuit precedent rule that she felt commanded obedience to *Little River*'s erroneous contrary holding.

2. Judge White in *Soaring Eagle*: A Welcome Attempt to Revive and Contextualize Treaty Rights Within the Broader Framework of Indian Sovereignty

The two Sixth Circuit judges who appeared in 2015 to have the soundest understanding of the Supreme Court's case law on tribal sovereignty were Judge Helene White in *Soaring Eagle* and Judge David McKeague in *Little River*. (Judge McKeague's *Little River* dissent is discussed in Part V.C.4.)

Judge White agreed with the *Soaring Eagle* panel majority "that *Little River* was wrongly decided, that *Coeur d'Alene* . . . is inconsistent with Supreme Court precedent," and that the NLRA did not properly apply to the Saginaw Chippewa Tribe on that basis alone.[200] She also agreed with "the majority's conclusion that

---

[199] *See supra* note 8; *see also, e.g.*, Wildenthal 2007, *supra* note 2, at 504.

[200] *Soaring Eagle,* 791 F.3d at 675 (White, J., concurring in part and dissenting in part). Judge White, while joining the relevant parts of Judge O'Malley's opinion, did not comment specifically on Judge O'Malley's troubling and needlessly laborious attempt to fuse *Montana* analysis with the classical canons of construction, as discussed in Part V.C.1. One has to wonder, given Judge White's strong understanding of tribal sovereignty reflected in her dissent, whether she actually embraced Judge O'Malley's approach wholeheartedly. Perhaps she went along merely because Judges O'Malley and Donald were not willing to go any further in repudiating *Coeur d'Alene*, or because (as explained in her dissent) the outcome in *Soaring Eagle* did not ultimately turn on inherent tribal sovereignty in any event, or both.

Judge White's dissent of barely more than two pages seemed to cover more ground, more lucidly and effectively, than Judge O'Malley's lumbering

Little River [as circuit precedent by three weeks] . . . dictates that the Tribe's inherent sovereignty cannot itself carry the day."[201] But she ultimately dissented because she found that the Saginaw Chippewa Tribe's rights under the U.S.-Chippewa Treaty of 1864[202] protected its authority to regulate the employment of nonmembers on its reservation and have never been abrogated by the NLRA or any other federal law.[203]

Judge O'Malley's majority opinion in *Soaring Eagle* agreed that the tribe's treaty rights have not been abrogated[204] and offered a decent recital of the treaty canon of construction.[205] Sadly, however, even though Judge O'Malley generally rejected the *Coeur d'Alene* doctrine (as discussed in Part V.C.1), she yielded to that doctrine's perversion of the treaty canon to require a showing of "specific" treaty rights (as discussed in Part IV). Her

---

25-page panel opinion. Judge White's dissent focused mainly on the treaty-rights issue, as discussed in this subpart. But her most significant general comment on *Coeur d'Alene* seems more succinctly in line with Judge McKeague's *Little River* dissent than with the *Soaring Eagle* panel majority:

> That *Little River* and *Coeur d'Alene* relegate tribal sovereign rights of exclusion to history does not justify the abrogation of treaty-based exclusionary rights as well. . . . Indeed, the very purpose of the Treaty was to operate as a bulwark against any erosion of the Tribe's sovereign rights that might otherwise occur. In *Little River* and *Coeur d'Alene*, the tribes' inherent sovereignty was curtailed notwithstanding the absence of express congressional intent to do so. *Where those courts derived the right or authority to make such a finding is not apparent in the reasoning of the opinions themselves, nor is it apparent from Supreme Court precedent*.

Soaring Eagle, 791 F.3d at 677 (White, J., concurring in part and dissenting in part).

[201] *Id.*

[202] 14 Stat. 657; *see also Soaring Eagle,* 791 F.3d at 651.

[203] *See Soaring Eagle,* 791 F.3d at 675–76 & n. 1 (White, J., concurring in part and dissenting in part). The exact scope of Judge White's dissent is a bit of a puzzle. She specifically stated that she joined "all but section III(B) of [Judge O'Malley's] majority opinion." *Id.* at 675; *see also id.* at 657–61 (Part III.B of the majority opinion, containing the treaty analysis with which Judge White disagreed). Logically, given the reasoning of her dissent, Judge White should also have dissented, *a fortiori*, from the panel *judgment* set forth in Part V of the majority opinion. *See id.* at 675. Yet her statement just quoted seemed to indicate, oddly, that she joined Part V and thus the judgment. She reiterated in conclusion only that she "respectfully dissent[ed] from section III(B) of the majority opinion." *Id.* at 677 (White, J., concurring in part and dissenting in part).

[204] *Id.* at 657–59.

[205] *See id.* at 656–57.

panel majority opinion held that the Saginaw Chippewa Tribe's "*general* [treaty] right of exclusion [of tribal nonmembers]" was insufficiently "specific" to preclude the enforcement within Indian country of a GFL like the NLRA.[206]

The panel majority acknowledged, but failed to really grasp, the elementary hornbook principle of Indian law that every tribe enjoys the sovereign authority to exclude nonmembers from the reservation, and that—as the Supreme Court held in *Merrion*—this "necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct."[207] Furthermore, this basic element of inherent tribal sovereignty not only most emphatically does *not* depend on any "specific" or "explicit" treaty right, *it does not depend on support in any treaty whatsoever*.[208]

The panel majority twice cited the Supreme Court's treaty-rights decision in *Dion* (1986),[209] but only for the point that Congress has the power to abrogate such rights—a power concededly not exercised in *Soaring Eagle*, making the citations somewhat off-point. The majority ignored the fact that *Dion*—consistently with the generous interpretation of treaty rights required by the treaty canon—flatly repudiated the notion that such rights must be "specific" or "explicit." *Dion* declared that treaty hunting and fishing rights within tribal lands "*need not be expressly mentioned in the treaty*."[210]

---

[206] *Id.* at 661 (emphasis added); *see also id.* at 659–61 (repeatedly contrasting "broad," "non-specific," or "general" treaty rights with "specific" or "explicit" treaty rights, and indicating that only the latter would suffice). *But see* Wildenthal 2008, *supra* note 4, at 577–81.

[207] *Merrion,* 455 U.S. at 144. Ironically, the panel majority quoted this very passage in *Merrion*, *Soaring Eagle,* 791 F.3d at 659, but failed to grasp that *Merrion* illustrates the very point noted in the text following this note, that this basic tribal right *does not depend on treaty rights at all* (whether "general" or "specific"). *Merrion* itself involved a tribe *lacking any treaty protection at all*. As the *Merrion* Court itself explicitly held: "The fact that the Jicarilla Apache reservation was established by Executive Order rather than by treaty or statute *does not affect our analysis*; the Tribe's sovereign power *is not affected* by the manner in which its reservation was created." *Merrion,* 455 U.S. at 134 n. 1 (emphases added); *see also supra* note 97; Wildenthal 2008, *supra* note 4, at 578–79.

[208] *See supra* notes 97 and 207; *Merrion,* 455 U.S. at 133–34 & n. 1, 144; Wildenthal 2008, *supra* note 4, at 578–79.

[209] *Supra* note 25; *see also Soaring Eagle,* 791 F.3d at 657, 659.

[210] *Dion,* 476 U.S. at 738 (emphasis added); *see also* Wildenthal 2008, *supra* note 4, at 581; Hintze, *supra* note 136, at 556 (aptly noting that the *Soaring Eagle* majority's "fatal flaw was the misapplication of [the] Indian law canons

Judge White, by contrast, clearly understood and applied all these principles. Conceding sardonically that the 1864 treaty did not "expressly state" that "federally recognized labor unions cannot solicit on tribal land," she bluntly stated the relevant point: "[I]t does not need to."[211] Quite the contrary. As Judge White noted, the treaty must be interpreted as the Indian signatories reasonably and originally would have understood it. "To parse the specificity of the over 150-year-old Treaty to the Tribe's detriment violates recognized canons of interpretation."[212] She correctly articulated the tribal right to exclude, and that it did not depend on specific treaty support or indeed any treaty support at all.[213]

As the latter point illustrates, Judge White was admirably careful to keep treaty rights in proper context within the broader framework of tribal sovereignty. As explained in Part IV, overemphasizing treaty rights (important though they are) may promote a tendency (even if unconscious) to undermine the sovereign rights of the many tribes that lack treaties. That is a pitfall that has frequently been overlooked (or exploited) by cases following the *Coeur d'Alene* doctrine and its so-called "treaty exception." Indeed, *Coeur d'Alene* has operated as a viciously effective two-pronged pincer attack in this regard: on the one hand, isolating and undermining the sovereignty of tribes without treaties, and on the other hand, undermining the generous interpretation of treaties themselves.

Judge White concluded her dissent with an elegantly balanced summation. "[T]he Treaty matters, and to find otherwise suggests that the federal government's agreement with the Tribe is not worth the paper on which it was written."[214] On the other hand, she noted: "It may well be that when a tribe's inherent sovereignty rights are broadly interpreted, its treaty-based . . . right[s] . . . ha[ve] little work to do. But out of necessity, the treaty-based right

---

on the treaty language at issue"); *id.* at 556–58, 561–62 (criticizing the majority's treaty analysis).

[211] *Soaring Eagle,* 791 F.3d at 676 (White, J., concurring in part and dissenting in part).

[212] *Id.*

[213] *See id.* at 676–77 (White, J., concurring in part and dissenting in part). She noted, for example, that "*Merrion* did not involve a treaty." *Id.* at 677; *see also supra* note 207.

[214] *Soaring Eagle,* 791 F.3d at 677 (White, J., concurring in part and dissenting in part).

assumes a paramount role when a tribe's inherent sovereignty has been judicially narrowed . . . ."[215]

As noted in Part V.C.1, Judge O'Malley's *Soaring Eagle* opinion was the first, and so far remains the only majority opinion by any federal court to take a clear stand against *Coeur d'Alene*'s erosion of tribal sovereignty—albeit fruitlessly since it bowed to *Little River* as circuit precedent.[216] It is thus all the more disappointing that the panel majority effectively threw in the towel when it came to the fallback tribal treaty defense. Judge White valiantly attempted a last stand behind the treaty barricade.

3. Do They Never Learn? The Outrageous Repetition of Errors by Judge Gibbons in *Little River*

In my 2007 article, I undertook the unpleasant task of noting the embarrassing claim by Judge Janice Rogers Brown, author of the D.C. Circuit's 2007 *San Manuel* opinion, that she and two D.C. Circuit colleagues could not find any of the Supreme Court cases applying the classical Indian law canons to GFLs—even though four were cited on point in the briefs filed in that very case, three of which were also cited on point in the published NLRB opinions under review.[217] In Part III of this article, I had the even more distressing task of noting that Judge Brown's D.C. Circuit colleague, Judge David Tatel, outrageously repeated this claim in the 2011 *El Paso Natural Gas* opinion.[218]

This is not a matter of opinion or interpretation. It is a factual reality that the Supreme Court has applied the ambiguity and congressional intent canons to multiple GFLs, in multiple cases. One might disapprove of these decisions, or disagree with them, or seek to distinguish them, but they did happen. Furthermore, for the D.C. Circuit judges to deny they were put on notice of this reality was doubly false, leaving only two possible

---

[215] *Id.*

[216] *See supra* Part V.B (*Little River* as circuit precedent); *see also supra* Part V.C.1 (text accompanying note 189), and *infra* Part V.C.4 (discussing the very few opinions of any kind that have explicitly rejected *Coeur d'Alene*).

[217] *See San Manuel* (D.C. Cir. 2007), 475 F.3d at 1312; *supra* Part III (notes 32–33 and accompanying text); Wildenthal 2007, *supra* note 2, at 475–80.

[218] *See El Paso Natural Gas* (D.C. Cir. 2011), 632 F.3d at 1278, quoting *San Manuel* (D.C. Cir. 2007), 475 F.3d at 1312; *supra* Part III (notes 34–52 and accompanying text).

and equally unpalatable explanations—intentional dishonesty or embarrassing incompetence.

This is also not a partisan problem. Judge Brown, viewed as a conservative, was appointed by President George W. Bush over strong Democratic opposition.[219] Judge Tatel, viewed as a liberal, was appointed by President Bill Clinton to fill the seat vacated by Justice Ruth Bader Ginsburg upon her promotion to the Supreme Court. A total of five D.C. Circuit judges have now subscribed to this head-in-the-sand double-denial of reality. Judge Brown in 2007 was joined by Judge Merrick Garland, appointed by President Clinton and famously (unsuccessfully) nominated for promotion to the Supreme Court by President Barack Obama in 2016. Judge Tatel in 2011 was joined by Judge Judith Rogers, also appointed by President Clinton. Judge Stephen Williams, appointed by President Ronald Reagan, joined both *San Manuel* in 2007 and *El Paso Natural Gas* in 2011.[220]

I now have the still more distressing task of reporting that Judge Julia Smith Gibbons in *Little River*, joined by Judge Gilbert Merritt (bringing us to a total of *seven* life-tenured federal judges), repeated this factually false claim yet again in 2015.[221] This is deeply discouraging for a legal scholar whose life work has consisted mainly of studying the work-product of judges. Has our present maddening and nihilistic era of "fake news" and "alternative facts" also become one of "fake law" or "alternative" Supreme Court jurisprudence? Leaving aside legitimately divergent *opinions about* the various legal doctrines enunciated and applied by the Supreme Court, are we unable even to agree about *what* doctrines the Court *has in fact* enunciated and applied and in what *factual* context?

Even worse, it is impossible to ignore clear indications of conscious deception and self-contradiction in the crafting of Judge

---

[219] *See* Wildenthal 2007, *supra* note 2, at 429 & n. 42.

[220] *See San Manuel*, 475 F.3d at 1307; *El Paso Natural Gas*, 632 F.3d at 1273; UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, http://en.wikipedia.org/wiki/United_States_Court_of_Appeals_for_the_District_of_Columbia_
Circuit [https://perma.cc/6UVX-6GC2].

[221] *See Little River,* 788 F.3d at 539 (identifying judges on panel); *id.* at 551, citing *San Manuel*, 475 F.3d at 1312. The bipartisan nature of the problem continues. Judge Gibbons was appointed by President George W. Bush. Senior Judge Merritt was appointed by President Jimmy Carter. *See* SIXTH CIRCUIT, *supra* note 128.

Gibbons's opinion. Judge Gibbons herself discussed two of the four Supreme Court cases applying the canons to GFLs—*Merrion* and *Iowa Mutual*—that were (we may charitably assume) overlooked by Judges Brown and Tatel in 2007 and 2011.[222]

Judge Gibbons acknowledged the ambiguity canon and that (like all the canons) it "is rooted in the unique trust relationship between the United States and the Indians."[223] But, she insisted, "it does not undermine that trust relationship to presumptively apply a [GFL] to a tribe's regulation of . . . non-members where the tribal regulation is not necessary to the preservation of tribal self-government."[224] That comment was part of Judge Gibbons's selective misuse of the statement on page 564 of *Montana*—mostly ignoring, as in this very instance, the actual *Montana* rule stated on pages 565–66 of that case—and defying the teachings of *Merrion*, *Iowa Mutual*, and *Montana* (among many other cases) that tribal regulation of nonmembers is often "necessary to the preservation of tribal self-government" and amply supported by the *Montana* rule.[225]

Judge Gibbons's false statement in 2015 tracked very closely the doubly false nature of Judge Brown's 2007 statement. Judge Gibbons, like Judge Brown, first falsely claimed that the cases cited by the Indian Nation at bar, to support the application of the ambiguity canon, involved only specialized Indian legislation.[226] There is something especially insufferable about

---

[222] For citations and discussions of *Merrion,* 455 U.S. 130, *see Little River,* 788 F.3d at 544 (two citations, though only of Justice Stevens's dissent in *Merrion*); *id.* at 547 n. 1 (a lengthy footnote devoted entirely to discussing how *Merrion* bears on the issue of interpreting GFLs, quoting the very pages in which *Merrion* applied both the congressional intent and ambiguity canons to a GFL—see below in this subpart for an explanation of the utterly misleading and intellectually dishonest nature of that discussion by Judge Gibbons).

For citations and discussions of *Iowa Mutual,* 480 U.S. 9, *see Little River,* 788 F.3d at 548 (half a paragraph devoted to discussing the very fact that *Iowa Mutual* applied the congressional intent canon to a GFL); *id.* at 550 (again citing *Iowa Mutual*'s application of the canons to a GFL); *id.* at 551 (twice citing *Iowa Mutual*, in service of what was, at best, a confused and deeply mistaken argument that *Coeur d'Alene* somehow "reflects the teachings of . . . *Iowa Mutual*"); *see also supra* Part V.C.1 (notes 174–82 and accompanying text) (discussing these citations and discussions of *Iowa Mutual* by Judge Gibbons).

[223] *Little River,* 788 F.3d at 550 (internal quotation marks omitted).

[224] *Id.*, citing *Montana,* 450 U.S. at 564.

[225] *See supra* Part V.C.1 (discussing Judge Gibbons's misuse of *Montana*, *Merrion*, and *Iowa Mutual*).

[226] *Little River,* 788 F.3d at 550–51.

such efforts to blame the briefing, by the very tribe whose sovereignty was erroneously and unjustly curtailed, for the court's own incompetent (or deceptive) mishandling of governing Supreme Court precedents. That is especially true when (as we will shortly see) the briefing in each case actually goes far to expose each court's incompetence (or dishonesty).

Judge Gibbons then cited and closely paraphrased Judge Brown's 2007 statement, stating: "Like the D.C. Circuit, we have found no case in which the Supreme Court applied this canon to resolve an ambiguity in a statute of general application silent as to Indians, like the NLRA."[227] The only material change in Judge Gibbons's paraphrase, from Judge Brown's 2007 statement, was that Judge Gibbons added the last seven words: "silent as to Indians, like the NLRA."

Unfortunately, that weak and ham-handed attempt to qualify Judge Brown's statement is the most important red flag that this part of Judge Gibbons's opinion was consciously and deceptively crafted to evade the binding precedential force of the Supreme Court's case law on this point—in particular, *Merrion*. Another red flag, mentioned above, is that *Little River* elsewhere cited and discussed *Merrion* (and *Iowa Mutual*), proving that the opinion's author was perfectly well aware of those Supreme Court precedents. Unlike with Judge Brown's and Judge Tatel's 2007 and 2011 versions of this false statement, Judge Gibbons herself removed any possible defense of mere mistake, ignorance, or incompetence.

In fact, the Little River Band's principal brief in *Little River* repeatedly cited *Merrion* and *Iowa Mutual* and argued that both those Supreme Court GFL cases supported the application of the canons.[228] So did all four briefs filed by *amici*.[229] One brief

---

[227] *Id.* at 551, citing *San Manuel* (D.C. Cir. 2007), 475 F.3d at 1312.

[228] *See* Brief of Petitioner/Cross-Respondent Little River Band of Ottawa Indians (filed July 8, 2013, in *Little River*, 788 F.3d 537) at iv (citing *Merrion*, 455 U.S. 130, "*passim*" throughout, and *Iowa Mutual*, 480 U.S. 9, on six different pages); *see also supra* note 32 (citing references documenting the briefing in *San Manuel*, 341 N.L.R.B. 1055, belying the D.C. Circuit's false claim in 2007).

[229] *See* Brief of *Amici Curiae* Chickasaw Nation *et al.* at iv, 3, 7, 22–23, 28–29; Brief of *Amici Curiae* Navajo Nation *et al.* at ii, 9, 16, 18; Brief of *Amici Curiae* National Congress of American Indians and White Mountain Apache Tribe at iii–iv, 4, 6, 14–15, 24 n. 8; Brief of *Amicus Curiae* American Indian Law Scholars at 3–4, 11–13, 16, 22–24, 28 (all filed July 15, 2013, in *Little River*,

specifically cited and debunked the D.C. Circuit's 2007 statement and *expressly cautioned the Sixth Circuit against following it*, noting that the D.C. Circuit "overlooked" two key Supreme Court cases applying the canons to GFLs.[230] The Little River Band's reply brief carefully discussed the congressional intent and ambiguity canons.[231] The tribe noted that the NLRB misunderstood those canons and that the NLRB erroneously contended "that the principle applies only to Indian-specific statutes," which, the tribe noted, "finds no basis in the law."[232] In short, it was simply outrageous for Judge Gibbons to suggest inadequate briefing somehow supported or contributed to her decision to blow past such warnings and repeat the D.C. Circuit's error.

Let us look more closely now at Judge Gibbons's attempt to qualify and somehow salvage the D.C. Circuit's 2007 false statement. First, it must be conceded that—read literally—Judges Brown, Tatel, and Gibbons all qualified the scope of their statements by limiting them to the *ambiguity* canon. They did not

---

788 F.3d 537). (I was not involved in any of the briefs in these cases.) The latter brief, on the pages cited, repeatedly cited *Dion,* 476 U.S. 734, as well as *Merrion,* 455 U.S. 130, and *Iowa Mutual,* 480 U.S. 9, all with regard to their application of the canons to GFLs.

[230] Brief of American Indian Law Scholars, *supra* note 229, at 28, quoting *San Manuel* (D.C. Cir. 2007), 475 F.3d at 1312 (noting D.C. Circuit's failure to acknowledge *Dion* and *Iowa Mutual*); *see also supra* note 229; Brief of American Indian Law Scholars, *supra* note 229, at 11–12 (also citing *Merrion*'s application of the canons to a GFL). All three Supreme Court cases were in fact cited in briefs filed in *San Manuel*, just as they were again cited in the briefs filed in *Little River*. *See supra* Part II (note 32 and accompanying text). All to no avail, apparently.

[231] *See* Reply Brief of Petitioner/Cross-Respondent Little River Band of Ottawa Indians (filed Aug. 29, 2013, in *Little River*, 788 F.3d at 6–7) (the tribe referred to the congressional intent canon as "the clear-expression principle").

[232] *Id.* at 7, citing *Dion,* 476 U.S. 734, and *Iowa Mutual,* 480 U.S. 9 (specifically noting that *Dion* and *Iowa Mutual* both involved GFLs). The tribe did not cite *Merrion,* 455 U.S. 130, in this particular passage, but did so elsewhere in this brief (and, *see supra* note 228, in its principal brief). Minutely parsing the reply brief, it may be noted that the tribe did not state with perfect clarity that *both* canons apply to GFLs. In referring to "the principle," the tribe appeared to refer to "the clear-expression principle" (its term for the congressional intent canon). In this passage, it appeared to refer to the ambiguity canon as "the Indian canon." However, it argued that the NLRB improperly conflated the two canons and described *the NLRB* as erroneously limiting "the principle" (perhaps both canons combined?) to specialized Indian legislation. But that is all beside the point, which is that the Sixth Circuit was *more than sufficiently briefed* about *Merrion*, about the other relevant Supreme Court GFL canons cases, and what they all stood for. It is obviously the duty of a lower federal court to familiarize itself with governing Supreme Court precedents *and to follow them.*

specifically deny that the *congressional intent* canon might apply to a GFL.[233] There is no logical reason, however, why the two canons would apply differently—why one would apply to GFLs while the other would be categorically inapplicable.[234] None of these judges suggested any reason for such a bizarre and counterintuitive notion. Nor has the Supreme Court. Quite the contrary. The Supreme Court in *Merrion* made perfectly clear that both canons apply to GFLs.[235]

The logical implication of the statements by Judges Brown, Tatel, and Gibbons, in all three cases, was that *none* of the classical canons should apply to GFLs. Judge Gibbons argued that "it does not undermine [the federal-tribal] trust relationship to

---

[233] *See San Manuel* (D.C. Cir. 2007), 475 F.3d at 1312; *El Paso Natural Gas,* 632 F.3d at 1278; *Little River,* 788 F.3d at 551.

[234] *See* Wildenthal 2007, *supra* note 2, at 479. There have, of course, been legitimate debates about whether both canons, or the canons generally, do or should apply to GFLs affecting tribal rights to the same general extent they do to specialized Indian legislation, though I have argued that they do and should. *See, e.g., supra* Part II (especially note 37); Wildenthal 2007, *supra* note 2, at 493; *see generally id.* at 484–502. Some federal laws do not implicate the canons at all. *See supra* note 36. And a court in any given case might easily happen to apply one canon but not the other. The Supreme Court, for example, has applied the congressional intent canon to GFLs in several cases without bothering to also discuss or apply the ambiguity canon, either because there was no relevant ambiguity, or because the congressional intent canon sufficed to decide the case, or both. *See*, *e.g.*, *Escondido,* 466 U.S. 765, *Dion,* 476 U.S. 734, and *Iowa Mutual,* 480 U.S. 9. None of those cases even hinted that the ambiguity canon was somehow *categorically inapplicable*.

But that is all beside the point. The issues under discussion are whether the Supreme Court *has in fact* (rightly or wrongly) applied *both* canons to GFLs (it has; *see supra* note 235), whether it has ever suggested that one but not the other canon might be categorically inapplicable to GFLs (it has not), and whether there would be any imaginable reason whatsoever to treat a GFL (or any federal law) as categorically subject to one but not the other canon. There is not, as noted and explained in the text above, *infra* note 235, *supra* Part II, and in the cited pages of my 2007 article.

[235] *See Merrion,* 455 U.S. at 149–52. Indeed, *Merrion* applied both canons to several GFLs (naming one in particular) as well as to at least two specialized laws dealing with Indians. *See id.* at 149 (referring to "two federal Acts governing Indians *and various pieces of federal energy legislation*") (emphasis added); *id.* at 150–51 (discussing 1927 and 1938 acts of Congress dealing specifically with mineral resources on Indian lands); *id.* at 151 (referring generally to "national energy policies" and related "federal law"); *id.* at 151–52 (specifically discussing the Natural Gas Policy Act of 1978, an obvious GFL). *Merrion* carefully applied the congressional intent canon to all of this federal legislation, *id.* at 149–52, and explicitly applied the ambiguity canon to all of it as well, *id.* at 152, all in service of its holding that none of it limited tribal power to tax nonmembers exploiting mineral resources on tribal lands, *see id.* at 133–37, 152, 159. *See also* Wildenthal 2007, *supra* note 2, at 477–78 & n. 204.

presumptively apply a [GFL]" to a tribe in situations like that presented in *Little River*.[236] "Presumptive application" would necessarily, of course, dispense with any need to identify evidence of congressional intent, as well as not being deterred by any ambiguity or silence in the relevant federal law.

One is forced to speculate that the statements by Judges Brown, Tatel, and Gibbons may have been limited to the ambiguity canon, in order to avoid contradicting too obviously the larger number of Supreme Court precedents (beyond *Merrion*) that have emphatically applied the congressional intent canon to various GFLs. Those cases include, just from the 1980s, *Escondido*, *Dion*, and *Iowa Mutual*.[237] This particular qualification did not, of course, salvage the accuracy of these statements, given the inconvenient existence of *Merrion*, which applied the ambiguity canon as well as the congressional intent canon to GFLs.[238]

Judge Gibbons added the further qualification that she was unaware of any Supreme Court case applying the ambiguity canon to a GFL "silent as to Indians."[239] She did not offer any reason why a GFL's complete silence about Indian or tribal concerns, as opposed to making some mention of such concerns, should make any difference with regard to the applicability of the ambiguity canon—or the congressional intent canon for that matter. It appears that her qualification was purely and intentionally designed to sidestep *Merrion* as a precedent on point—and as an obvious obstacle to the conclusion she was determined to reach. The GFL most prominently analyzed in *Merrion* under the ambiguity canon was admittedly *not* completely silent about tribal concerns.[240]

---

[236] *Little River,* 788 F.3d at 550.

[237] *See supra* Part II, discussing, *e.g.*, *Escondido* (1984), 466 U.S. 765, *Dion* (1986), 476 U.S. 734, and *Iowa Mutual* (1987), 480 U.S. 9; *see also supra* note 234.

[238] *See Merrion,* 455 U.S. 130, discussed in note 235.

[239] *Little River,* 788 F.3d at 551.

[240] *See* Wildenthal 2007, *supra* note 2, at 477. The fact that a GFL may happen to include some minor or incidental mention of Indians or tribal concerns does not mean it ceases to be a GFL. That does not somehow convert such a GFL into specialized Indian legislation. The GFL most prominently analyzed in *Merrion* was the Natural Gas Policy Act (NGPA). *See supra* note 235. I daresay no one would call that specialized Indian legislation, though it did happen to include a provision defining recoverable costs to include tribal taxes. Some GFLs, like the NLRA central to this article, or the diversity jurisdiction statute at issue in *Iowa Mutual* (*see* text accompanying note 241), may be completely silent on tribal concerns. Others, like the NGPA at issue in *Merrion*, or the Eagle Protection Act

By contrast, Judge Gibbons conceded that the congressional intent canon did apply even to GFLs "silent as to Indians." She recognized that *Iowa Mutual* "refused to read the statute granting federal diversity jurisdiction, which is silent as to Indian tribes," to limit certain tribal court remedies, because of "the absence of clear congressional intent" supporting any such limitation.[241] *Iowa Mutual* involved tribal power over nonmembers, which Judge Gibbons ignored. Her studious disregard of that point apparently explains how she could reconcile her concession just quoted with her contradictory suggestion two pages later that the canons should not apply at all to a GFL affecting a tribe's regulation of nonmembers—because, in her mistaken view (quoted twice above), that "does not undermine [the federal-tribal] trust relationship."[242]

Leaving aside its apparent improper purpose—to sidestep *Merrion*—Judge Gibbons's qualification about a GFL's "silence" as to Indians did not succeed in salvaging, in any meaningful way, the accuracy of her version of the D.C. Circuit's 2007 statement. On the contrary, as noted earlier, it constitutes a red flag highlighting the dishonest nature of Judge Gibbons's version of that statement.

While the key GFL analyzed in *Merrion* did contain an incidental tribal-related provision, it was not that part of the law that was alleged to limit tribal authority. Rather, it was the overwhelming *remainder* of that law, *silent on tribal concerns*,

---

(EPA) at issue in *Dion*, may include one or more incidental tribal-related provisions.

A tribal-related provision in a GFL (as in any federal law), depending on its content and context, might be favorable, neutral, or unfavorable to any given tribal-sovereignty claim. *Merrion* (applying both the congressional intent and ambiguity canons) happened to view the tribal-tax provision in the NGPA as one factor supporting its holding that the NGPA did not curtail tribal rights. *See Merrion,* 455 U.S. at 151–52; Wildenthal 2007, *supra* note 2, at 477. *Dion* (applying the congressional intent canon while not discussing the ambiguity canon; *see supra* note 234) happened to view the Indian religious permit exemption in the EPA as a crucial factor supporting its holding that Congress did in fact otherwise intend to curtail tribal rights in that case. *See Dion,* 476 U.S. at 738–45; Wildenthal 2007, *supra* note 2, at 440–41.

[241] *Little River,* 788 F.3d at 548, citing *Iowa Mutual,* 480 U.S. at 18 (statutory citation omitted).

[242] *Little River,* 788 F.3d at 550; *see also supra* notes 224 and 236 and accompanying text. Judge Gibbons's confused and mistaken treatment of *Iowa Mutual* has already been discussed, *supra* Part V.C.1 (notes 174–82 and accompanying text).

which allegedly curtailed tribal sovereignty. And that was precisely the most important part of the law—*the tribally silent part*—that the Supreme Court subjected to both relevant Indian law canons. So the Supreme Court *has*, in fact, "applied th[e] [ambiguity] canon to . . . a [GFL] silent [*in relevant part*] as to Indians, like the NLRA."[243]

The *Merrion* Court noted the highly generalized nature of the attack on tribal authority in that case, commenting that while the litigants "argu[ed] that Congress," in the various GFLs and specialized Indian legislation discussed, implicitly "deprived the Tribe of its authority to impose [a] severance tax,"[244] they "cite[d] no *specific* federal statute restricting Indian sovereignty."[245] The *Merrion* Court carefully noted three separate reasons for finding the key GFL *not* to curtail tribal authority. The Court, (1) applying the congressional intent canon, found no evidence of the required intent by Congress to implicitly divest tribal power,[246] (2) found the law's tribal-related provision to provide *further* support for the conclusion that no implicit divestiture was intended,[247] and (3) applying the ambiguity canon, held that "if there were ambiguity . . . the doubt would benefit the Tribe."[248]

Further destroying any possible excuse that might be offered for Judge Gibbons, her colleague Judge McKeague politely pointed out in dissent exactly how *Merrion* refuted her entire approach. Judge McKeague repeatedly cited *Merrion* on point.[249] He noted that *Merrion* showed "congressional silence [was] deemed insufficient to justify"[250] curtailment of a tribe's authority, and that *Merrion* supported tribal regulation of nonmembers engaged in on-reservation business.[251] He called out the only occasion where Judge Gibbons actually discussed *Merrion*'s

---

[243] *Little River,* 788 F.3d at 551; *see also supra* note 240. I am borrowing and altering Judge Gibbons's language here, as indicated by brackets, to make my own point.
[244] *Merrion,* 455 U.S. at 149.
[245] *Id.* at 152 (emphasis added).
[246] *Id.* at 149–52.
[247] *Id.* at 151–52; *see also supra* note 240.
[248] *Merrion,* 455 U.S. at 152; *see also* Wildenthal 2007, *supra* note 2, at 476–77; Wildenthal 2008, *supra* note 4, at 562–63, 566–69.
[249] *See Little River,* 788 F.3d at 558, 559, 561 (multiple citations), 562 (McKeague, J., dissenting).
[250] *Id.* at 558.
[251] *See id.* at 562.

holding, pointing out what Judge Gibbons left unclear—namely, that *Merrion* rejected a claim that a GFL limited tribal authority "precisely because the text and legislative history did not evidence . . . congressional *intent*"[252] to do so.

Judge Gibbons's strange effort to evade the applicability of the ambiguity canon, and sweep *Merrion* under the rug in that regard, was pointless anyway. Even if that canon did not apply, her evasion did not advance her argument much if at all. While the ambiguity canon certainly does apply, in principle, to the NLRA, it has little practical work to do in that context because of the phrasing and structure of the law. The ambiguity canon is often less useful in defending tribal sovereignty than the congressional intent canon, which explains why (as noted above) there are more Supreme Court precedents applying the latter canon to GFLs. The congressional intent canon, which Judge Gibbons was unable to evade, is far more significant as applied to the NLRA.[253]

Sadly, there is still more to the tale of Judge Gibbons and *Merrion*. As noted earlier, Judge Gibbons actually did cite *Merrion* on three occasions in her *Little River* opinion. Her first two citations avoided the force of *Merrion*'s majority holding by simply citing Justice Stevens's *dissent* in that case. Her third discussion of *Merrion* was in her lengthy footnote one, four pages before her repetition of the false statement about the scope of the ambiguity canon (refuted by *Merrion*, which she ignored there).[254] Footnote one was appended to an important paragraph at the beginning of Part III.B of her *Little River* opinion, devoted to a discussion of "implicit divestiture of tribal sovereignty."[255]

Judge Gibbons leaned heavily on the disputed *Tuscarora* statement discussed in Part III, suggesting that some GFLs might be found (without applying the canons) to presumptively and implicitly divest tribes of important sovereign rights and

---

[252] *Id.* at 561 (emphasis added).
[253] *See* Wildenthal 2007, *supra* note 2, at 431–33, 435–36, 441, 443–45.
[254] *See supra* note 222.
[255] *See Little River,* 788 F.3d at 546–47 & n. 1. Judge Gibbons actually began "reviewing the law governing the implicit divestiture of tribal sovereignty" in Part III.A, *see id.* at 544 (the same page where she first twice cited the *dissent* in *Merrion*). Part III.A, *id.* at 544–46, focused almost entirely on *Montana* and cases applying the *Montana* rule (where "implicit divestiture" is indeed a major theme), which derailed and hopelessly confused her analysis of the NLRA *as federal legislation* (governed by the canons), for reasons discussed in Part V.C.1 of this article.

interests.[256] Judge Gibbons, relying on *Coeur d'Alene* and its progeny,[257] ignored—just as *Coeur d'Alene* itself ignored—the fact that the Supreme Court in *Tuscarora* relied primarily and far more extensively on the congressional intent canon.[258]

Judge Gibbons then segued directly from *Tuscarora* to *Merrion*. She claimed that "*Merrion* also suggests that [GFLs] may implicitly divest Indian tribes of their sovereign power[s] . . . ."[259] To give Judge Gibbons credit, she did recognize in footnote one that *Merrion* ultimately upheld tribal authority over nonmembers in that case because the *Merrion* Court found "no clear indications"[260] that Congress "implicitly divested the tribe of its authority."[261] But she insisted that the ultimate and most important point was that, while tribal power was not "implicitly divested" in *Merrion*, "the [*Merrion*] Court's analysis presumes that Congress could do so."[262] Yes, Congress *could* do so—*but on what required showing and under what governing canons of construction?* The reference to "no clear indications" was a step in the right direction, but nowhere in footnote one did Judge Gibbons mention the crucial and central requirement to show congressional "*intent*."[263] Nor did she mention in footnote one, or anywhere in relation to *Merrion*, the requirement to resolve statutory ambiguities in favor of the tribe.

---

[256] *See Little River,* 788 F.3d at 546–47, quoting, *e.g.*, *Tuscarora,* 362 U.S. at 116.

[257] *See Little River,* 788 F.3d at 547, citing *Coeur d'Alene,* 751 F.2d 1113, and many other lower-federal-court cases following *Coeur d'Alene*.

[258] *See supra* Part III; Wildenthal 2008, *supra* note 4, at 572–73. Judge Gibbons got very close to the truth. She cited the very page of *Tuscarora* on which the *Tuscarora* Court itself summarized its reliance on evidence said to show Congress's intent to divest the tribal rights at issue. *See Little River,* 788 F.3d at 547, citing *Tuscarora,* 362 U.S. at 118. But in her text supported by that citation, instead of acknowledging *Tuscarora*'s application of the congressional intent canon on that very page, Judge Gibbons merely stated that *Tuscarora* applied the Federal Power Act to divest lands owned by the Tuscarora Nation.

[259] *Little River,* 788 F.3d at 547 n. 1.

[260] *Id.*, quoting *Merrion,* 455 U.S. at 152 (internal quotation marks omitted).

[261] *Little River,* 788 F.3d at 547 n. 1.

[262] *Id.*

[263] She did refer elsewhere in *Little River* to the congressional intent canon (not in relation to *Merrion*)—for example, as enunciated in *Iowa Mutual*. *See* text accompanying *supra* note 241; *Little River,* 788 F.3d at 548, citing *Iowa Mutual,* 480 U.S. at 18. Her treatment of *Iowa Mutual* was derailed by the problems discussed in Part V.C.1 (*supra* notes 174–82 and accompanying text), just as her treatment of *Merrion* was derailed by the problems discussed in this subpart.

By transitioning directly from *Tuscarora*'s alleged support for "implicit divestiture" without applying the canons at all, by repeatedly suggesting *Merrion* "also" supported "implicit divestiture," and by conspicuously omitting any adequate description of the canons actually and emphatically applied by *Merrion* (in the very pages she cited from that case),[264] Judge Gibbons left her footnote one discussion misleadingly incomplete (at best). Judge McKeague called out her erroneous suggestion that *Merrion* somehow indicated "the Supreme Court's willingness to find implicit divestiture."[265] On the contrary, Judge McKeague noted: "[T]he *Merrion* Court *held* that [a GFL] did *not* effect a divestiture *precisely because* [of a lack of] . . . congressional *intent*. *Merrion* . . . thus confirms traditional Indian law principles: . . . a federal law will *not* be deemed to implicitly impair tribal sovereignty simply because it is generally applicable."[266]

Even worse, Judge Gibbons cited with approval Judge Michael Murphy's dissent from the Tenth Circuit's 2002 *San Juan* decision.[267] Judge Murphy's *San Juan* dissent aggressively pursued an argument remarkably similar to the one implied by Judge Gibbons's footnote one in *Little River*. As Judge Gibbons's repeated citations suggest, Judge Murphy's dissent seems to have directly inspired her view of *Merrion*, fulfilling the fear expressed in my 2008 article that Judge Murphy's dissent might prove "influential."[268] As my 2008 article explained in depth, Judge Murphy crafted an "astonishingly misleading" argument that *Merrion* was somehow consistent with the *Coeur d'Alene*

---

[264] *See Little River,* 788 F.3d at 547 n. 1, citing *Merrion,* 455 U.S. at 149, 152. *Merrion* emphatically stated and applied the congressional "intent" and "ambiguity" canons precisely at pages 149–52, but the only clue Judge Gibbons provided was her elliptical quotation of the reference to "no clear indications" of "implicit divestiture" by Congress.

[265] *Little River,* 788 F.3d at 561 (McKeague, J., dissenting), citing *id.* at 547 n. 1 (majority opinion).

[266] *Id.* at 561 (McKeague, J., dissenting) (first emphasis in original; other emphases added).

[267] *Id.* at 547 n. 1 (majority opinion), citing *San Juan,* 276 F.3d at 1205 (Murphy, J., dissenting); *see generally San Juan,* 276 F.3d at 1201–10 (Murphy, J., dissenting). Judge Gibbons cited Judge Murphy's dissent three more times later in her opinion. *See Little River,* 788 F.3d at 550, 551, 554.

[268] Wildenthal 2008, *supra* note 4, at 564; *see generally id.* at 563–69 & nn. 105, 108 & 119–20 (discussing Judge Murphy's *San Juan* dissent); *see also supra* note 267 (noting Judge Gibbons's multiple citations of Judge Murphy's dissent).

doctrine.[269] His argument was reminiscent of *Coeur d'Alene*'s own blatantly deceptive treatment of *Merrion*.[270]

Both *Coeur d'Alene* itself, and Judge Murphy's elaboration of it in *San Juan*, dishonestly evaded and obscured the basic reality that *Merrion* strongly reaffirmed the classical Indian law canons and applied them to GFLs. Judge Murphy's argument that tribal sovereignty may be "implicitly" divested by federal law, like Judge Gibbons's similar argument in footnote one, was a classic red herring. It has been clear for more than 30 years that the Supreme Court will not require an *explicit* statement in statutory text for Congress to limit tribal rights.[271] (If it did, that would greatly simplify the canons.) As my 2008 article noted, if that was the point Judge Murphy wished to make—and by the same token, if that was all Judge Gibbons wanted to establish in footnote one—then *Merrion* was hardly the best case to cite.

Why not cite *Dion* (1986), where the Supreme Court actually held that Congress *did* implicitly curtail a tribal treaty right?[272] Perhaps because that would have made it even more awkwardly difficult to avoid calling attention to exactly what the Supreme Court has required in *Dion* and many other cases: "Any alleged implicit divestiture carries the heavy burden of showing—by clear and strong evidence, such as in the legislative history—that it was also *intended*. And any ambiguities or doubts are resolved *against* the alleged implication."[273]

---

[269] Wildenthal 2008, *supra* note 4, at 566; *see generally id.* at 566–69 & nn. 119–20.

[270] *See id.* at 573–79; *see also supra* Part II (text accompanying note 27).

[271] The Supreme Court appeared to come close to such an explicit "plain statement" rule, at least for treaty abrogation, in Justice William O. Douglas's majority opinion in Menominee Tribe v. United States, 391 U.S. 404, 412–13 (1968); *see also* Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long As Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 CAL. L. REV. 601 (1975).

[272] *See* Wildenthal 2008, *supra* note 4, at 568 n. 119, discussing *Dion,* 476 U.S. 734.

[273] Wildenthal 2008, *supra* note 4, at 568 (emphasis in original); *see also id.* n. 119; *Dion,* 476 U.S. at 738–45; Wildenthal 2007, *supra* note 2, at 440–41.

4. Judge McKeague's Dissent: At Last! A Clear Judicial Rejection of *Coeur d'Alene*!

One turns with relief to Judge McKeague's dissent in *Little River*, which was and remains an important judicial landmark.[274] As we have seen, Judge O'Malley's *Soaring Eagle* opinion was the first and remains so far the only federal court majority opinion to take a clear stand against *Coeur d'Alene*.[275] But it followed *Little River* by three weeks, was in effect just another dissent from *Little River*'s controlling force as circuit precedent,[276] and was afflicted by serious problems.[277] Some might claim the Tenth Circuit as having rejected *Coeur d'Alene*, but unfortunately, it has been less than clear.[278] While the Supreme Court itself has never yet endorsed *Coeur d'Alene*,[279] and I have strongly argued that numerous Supreme Court opinions both before and after *Coeur d'Alene* have implicitly contradicted that case's reasoning and fundamental premises, the Supreme Court too has yet to explicitly reject *Coeur d'Alene*.[280]

Indeed, before June 2015 only a single solitary opinion, either majority or dissenting, issued by *any* adjudicative body or member thereof, had *ever* specifically and unequivocally rejected the *Coeur d'Alene* doctrine. That would be the powerful dissent by National Labor Relations Board Member Peter Schaumber in the NLRB's 2004 *San Manuel* decision.[281] The total number of

---

[274] *Little River, 788* F.3d at 556–65 (McKeague, J., dissenting).
[275] *See supra* Part V.C.1 (text accompanying note 189); *see also supra* Part V.C.2 (text accompanying note 216).
[276] *See supra* Part V.B.
[277] *See supra* Part V.C.1.
[278] *See San Juan* (10th Cir. 2002), 276 F.3d 1186, discussed in Part IV; *see also* Wildenthal 2008, *supra* note 4, at 555–69 (discussing the Tenth Circuit's very mixed record overall on *Coeur d'Alene*, in *San Juan* and other cases); *Dobbs* (10th Cir. 2010), 600 F.3d 1275, discussed in Part IV (seeming on the whole to implicitly reject the *Coeur d'Alene* approach, but without ever citing it by name).
[279] In fact, *Coeur d'Alene* has never even been cited in any Supreme Court opinion.
[280] *See generally* Wildenthal 2007, *supra* note 2, Wildenthal 2008, *supra* note 4, and of course the present article.
[281] *San Manuel* (NLRB 2004), 341 N.L.R.B. at 1065–74 (Schaumber, Member, dissenting), discussed and praised extensively in Wildenthal 2007, *supra* note 2, *e.g.*, at 415–16 & n. 4, 506–07, 517. Schaumber served on the NLRB from 2002 to 2010, and as NLRB Chair in 2008−09. *See Board Members Since 1935,* NATIONAL LABOR RELATIONS BOARD, https://www.nlrb.gov/who-we-are/board/board-members-1935; *List of Chairs of the National Labor Relations*

published opinions rejecting *Coeur d'Alene* suddenly quadrupled to four—though with frustratingly little ultimate effect—within just the three-week period between June 9 and July 1, 2015. Added to Schaumber's dissent, we now have Judge McKeague's *Little River* dissent, Judge O'Malley's *Soaring Eagle* opinion, and Judge White's *Soaring Eagle* dissent. Judge White's opinion, like Judge McKeague's, was powerful and praiseworthy, but also quite brief and devoted mainly to the treaty-rights issue rather than to *Coeur d'Alene*.[282]

Judge Gibbons spent 17 pages of the Federal Reporter adding to the mountainous pile of misguided confusion and derogation of the Supreme Court's Indian jurisprudence perpetrated over the past 32 years by lower courts (and administrative agencies like the NLRB) following *Coeur d'Alene*. Judge O'Malley spent 25 pages entangling both the classical canons and *Coeur d'Alene* with the *Montana* doctrine (which Judge Gibbons also did).[283]

Judge McKeague's nine-page dissent, less than one fourth as long as that combined total of 42 pages, concisely refuted 32 years of error by dozens of his lower-federal-court colleagues. It is frustrating, to put it mildly, that a majority of his Sixth Circuit colleagues spurned his effort to follow, instead, 183 years of *Supreme* Court Indian jurisprudence.[284] As he stated:

> The sheer length of the majority's opinion, to resolve the single jurisdictional issue before us, betrays its error. Under governing law, the question presented is really quite simple. Not content with the simple answer, the majority strives mightily to justify a different approach. In the process, [it] contribute[s] to a judicial remaking of the law that

---

Board, http://en.wikipedia.org/wiki/List_of_Chairs_of_the_National_Labor_Relations_Board [https://perma.cc/GKV8-YQDU]; *see also* http://www.fed-soc.org/experts/detail/peter-schaumber [https://perma.cc/JZ98-9YL6].

[282] *See supra* Part V.C.2.

[283] *See supra* Parts V.C.1 and 3.

[284] *See supra* Part II (tracing the classical Indian law canons back to the 1832 opinion by Chief Justice John Marshall in *Worcester*, 31 U.S. 515).

> is authorized neither by Congress nor the Supreme Court.[285]

The peroration of Judge McKeague's dissent aptly charted the insidious cancer-like growth of the *Coeur d'Alene* doctrine. I refuse henceforth to continue calling it the "*Tuscarora*" or "*Tuscarora-Coeur d'Alene*" doctrine. That is simply a misnomer. It is purely a *lower-court* "doctrine," invented mostly out of thin air, with remarkable intellectual dishonesty, by a single three-judge panel of the Ninth Circuit in 1985.[286] While the *Supreme* Court was certainly guilty of a major injustice in its specific decision in *Tuscarora*—and of a mistaken and inadvisable passing comment out of line with the primary thrust of its own, then-128-year-old, now-185-year-old Indian jurisprudence—*Tuscarora* itself relied primarily and extensively on one of the classical Indian law canons. And the Supreme Court itself never developed or endorsed any "doctrine" based on that passing comment, and indeed, has implicitly (repeatedly) repudiated it, during the 57 years since *Tuscarora*.[287]

As Judge McKeague concluded in *Little River*:

> How does one statement . . . in a 1960 Supreme Court opinion [*Tuscarora*], grow into a "doctrine," contrary to traditional principles of Indian law . . . ? It starts with litigants urging lower courts to . . . exten[d] the reach of federal law. Once one court agrees and . . . invents its own exceptions, other courts find it convenient to follow suit. Why not? It's a handy standard, and other courts are using it without disastrous consequences. And so it begins. Then the alert federal agency, sensing a shift in momentum and judicial receptivity to expansion of regulatory power, seizes the opportunity and completely inverts its preexisting approach . . . .
>
> But it's also a house of cards. It should—and does—collapse when we notice [that] . . . the "doctrine" is exactly 180-degrees backward. . . .

---

[285] *Little River*, 788 F.3d at 556 (McKeague, J., dissenting).
[286] *See, e.g., supra* Parts II–III; Wildenthal 2008, *supra* note 4, at 572–81.
[287] *See, e.g., supra* Part III; Wildenthal 2007, *supra* note 2, at 457–73.

> Our adding to, rather than blowing down, the house of cards at once usurps Congress's power, ignores Supreme Court precedent . . . and, not least of all, impermissibly intrudes on tribal sovereignty.[288]

D. *The Unsuccessful Petitions for Supreme Court Review*

The main practical significance of *Little River* and *Soaring Eagle* is that we now have two federal circuits—the Sixth Circuit and the D.C. Circuit in *San Manuel*—that have squarely upheld the application of the NLRA to on-reservation employment by Indian Nation governments.

The Ninth Circuit has never squarely ruled on this issue, but as the circuit that gave us *Coeur d'Alene* itself, there seems little doubt that it should be counted as a third circuit almost certainly aligned with this view. While the San Manuel Band understandably sought review of the 2004 NLRB decision in the D.C. Circuit rather than the Ninth Circuit, San Manuel is located within the Ninth Circuit.[289] Like many other Indian Nations in the Ninth Circuit operating gaming enterprises (mostly in California), San Manuel has been subjected to NLRB jurisdiction for well over a decade now. Even before 2004, the Ninth Circuit had strongly hinted that it thought the NLRA applied to tribal government enterprises.[290]

Opposing the Sixth, Ninth, and D.C. Circuits with regard to the NLRA, the Tenth Circuit has resisted the NLRA's on-reservation application, as well as (to some extent) the *Coeur d'Alene* doctrine generally. As discussed in Part IV, the Tenth Circuit in *San Juan* (2002) held that the NLRA did not preempt a tribe's sovereign power (analogous to that of a state) to enact a so-called "right to work" law. *San Juan*, however, specifically distinguished and seemed to reserve for future decision the issue of

---

[288] *Little River*, 788 F.3d at 565 (McKeague, J., dissenting).
[289] *See San Manuel* (NLRB 2004), 341 N.L.R.B. 1055; *San Manuel* (D.C. Cir. 2007), 475 F.3d 1306; *see generally* Wildenthal 2007, *supra* note 2.
[290] *See* NLRB v. Chapa De Indian Health Program, Inc., 316 F.3d 995 (9th Cir. 2003) (upholding enforcement of NLRB subpoenas against off-reservation Indian health center, and strongly suggesting NLRA applied to tribes, though expressly not deciding jurisdictional issue); Wildenthal 2007, *supra* note 2, at 420 n. 20, 446 n. 101 (discussing *Chapa De*).

the NLRA's application to a tribal government acting in its capacity *as an employer*.[291]

It is difficult to disentangle the two issues, since Indian Nations (just like federal, state, and local governments) not only *employ* workers directly, they also *regulate* employment and labor relations in their sovereign legislative and regulatory capacities—including in their government-owned enterprises. For this very reason, Smith's 2011 treatise urged Indian Nations to do more to flex their own sovereign legislative and regulatory powers, rather than just arguing that their practices as government employers are exempt from federal regulation.[292]

Given this background, one might have thought that when the Little River Band and the Saginaw Chippewa Tribe petitioned the Supreme Court to review the *Little River* and *Soaring Eagle* decisions, the Court would have jumped at the chance to resolve this circuit split. A related circuit split—between the Tenth Circuit and the Ninth Circuit's decision in *Coeur d'Alene* itself—has persisted for more than 32 years now over the application of the Occupational Safety and Health Act to tribal government employers.[293] The tribal decisions to appeal in *Little River* and *Soaring Eagle* broke with a long pattern of Indian Nations choosing *not* to appeal adverse *Coeur d'Alene*-era decisions upholding the application of GFLs within Indian Country.[294] A Supreme Court decision in the Sixth Circuit NLRA cases could and should have resolved both circuit splits mentioned above. Resolving such divisions among the lower federal courts is, after all, supposed to be one of the Supreme Court's main jobs.

---

[291] *See San Juan,* 276 F.3d at 1198–99 (drawing, though only in dicta, an invalid "proprietary" vs. "sovereign" distinction with regard to tribe's authority as an "employer or landowner"); *see also supra* note 93 (discussing my earlier criticisms of this distinction and the related dicta in *San Juan*); *Dobbs,* 600 F.3d at 1283 n. 8 (2010 Tenth Circuit decision acknowledging this distinction); *id.* at 1293 (Briscoe, J., dissenting) (same); *supra* Part V.C.4 (and note 278) (discussing the Tenth Circuit's mixed record on *Coeur d'Alene*).

[292] *See* SMITH, *supra* note 5, at 173–296.

[293] The Second and Seventh Circuits have sided with the Ninth Circuit in that circuit split. *See supra* Part III (note 79 and accompanying text).

[294] *See supra* Part III (note 80 and accompanying text, citing Wildenthal 2008, *supra* note 4, at 586 & n. 212) (noting at least eight major federal appellate decisions from 1985 to 2015 applying GFLs to tribes, including *Coeur d'Alene* itself and *San Manuel*, in which the losing tribe chose *not* to appeal to the Supreme Court).

Timing, however, once again may have played a crucial role in the *Little River* and *Soaring Eagle* litigation—perhaps again affecting, as in June 2015, this entire area of American Indian law. The *Little River* and *Soaring Eagle* petitions for certiorari were filed on February 12, 2016.[295] The very next day, Justice Antonin Scalia died, reducing the Supreme Court to an eight-justice bench.[296] The Court appeared, as a result, to deliberately avoid taking on controversial and hotly contested cases in which it might have ended up deadlocked four-to-four. Many of the Court's decisions in 2016 and 2017 seemed to reflect this cautious approach.[297] Perhaps partly as a result, the Court denied certiorari in both *Little River* and *Soaring Eagle*—without further comment or recorded dissent—on June 27, 2016.[298] A denial of certiorari

---

[295] Petition for Writ of Certiorari in *Little River,* 788 F.3d 537, 2016 WL 626713 (filed Feb. 12, 2016); Petition for Writ of Certiorari in *Soaring Eagle,* 791 F.3d 648, 2016 WL 676000 (filed Feb. 12, 2016).

[296] Adam Liptak, *Justice Scalia, Who Led Court's Conservative Renaissance, Dies at 79*, NEW YORK TIMES, Feb. 14, 2016, at A1, http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html.

[297] *See*, *e.g.*, Adam Liptak, *Missing Voice Is Likely to Alter Major Decisions of This Term*, NEW YORK TIMES, Feb. 15, 2016, at A,1 http://www.nytimes.com/2016/02/15/us/politics/antonin-scalias-absence-likely-to-alter-courts-major-decisions-this-term.html; Adam Liptak, *A Cautious Supreme Court Sets a Modern Record for Consensus*, NEW YORK TIMES, June 28, 2017, at A16, http://www.nytimes.com/2017/06/27/us/politics/supreme-court-term-consensus.html. Justice Scalia was not replaced until the confirmation of Justice Neil Gorsuch in April 2017. *See* Adam Liptak & Matt Flegenheimer, *Court Nominee Is Confirmed After Bruising Yearlong Fight*, NEW YORK TIMES, April 8, 2017, at A1, http://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html.

[298] Little River Band of Ottawa Indians v. NLRB, 136 S. Ct. 2508 (2016); Soaring Eagle Casino and Resort v. NLRB, 136 S. Ct. 2509 (2016). There have been efforts in Congress to legislatively reverse the Sixth Circuit's decisions, just as there were efforts in 2004-06 to persuade Congress to reverse the NLRB's 2004 *San Manuel* decision, 341 N.L.R.B. 1055. The 2004-06 efforts failed to win approval even in the House of Representatives and probably never had any chance of surmounting a filibuster in the Senate in any event. *See*, *e.g.*, Wildenthal 2007, *supra* note 2, at 451 n. 115. In November 2015, the House actually passed a bill to effectively reverse *San Manuel*, *Little River*, and *Soaring Eagle*, by explicitly exempting Indian tribes (and enterprises owned and operated by Indian Nations on their own lands) from the NLRA. *See*, *e.g.*, Plumer, *supra* note 136, at 134–35 & n. 25, 157; *see also* Green, *supra* note 122, at 481–82. But such efforts, just like a decade earlier, have gone nowhere in the Senate, and contrary to Plumer's optimistic assessment, it seems very unlikely that such a bill will ever pass Congress. As noted in Wildenthal 2007, *supra* note 2, at 451–52; *see generally id.* at 431–33, 445–52, it should not be necessary for Congress to go to the trouble to amend the NLRA to exclude Indian Nations when there is absolutely no evidence whatsoever that Congress ever intended to

does not necessarily indicate any view of the merits of the decision below and does not in itself have any precedential effect. Only time and future litigation will tell if the Supreme Court's decision to abstain did perhaps reflect its approval of, or acquiescence in, the 32-year-long *Coeur d'Alene* saga.

VI. CONCLUSION

The Supreme Court, despite frequently disappointing Indian sovereignty advocates, still has the capacity to deliver surprising victories for Indian Nations. That said, things were looking bleak going into 2014. The last major Supreme Court decision clearly reaffirming the classical Indian law canons had been *Mille Lacs* in 1999. *Mille Lacs* was a 5-4 decision, almost a generation old by 2014 and receding into the past millennium.[299] And it was written by Justice Sandra Day O'Connor, who retired in 2006. She was effectively replaced as the Court's "swing vote" by Justice Anthony Kennedy, who served on the Ninth Circuit panel that provided the foundation for *Coeur d'Alene*, joined Chief Justice Rehnquist's outrageous dissent in *Mille Lacs*,[300] and wrote majority opinions like *Duro v. Reina*.[301] In cases like *Carcieri v.*

---

include them in the scope of that law in the first place. The NLRB's effort to argue that an episode in Congress in 1999-2000 indicated an understanding that tribes were already subject to the NLRA was deceptive and ill-founded. *See* Wildenthal 2007, *supra* note 2, at 445–52. As Green aptly noted: "While a legislative remedy could provide heightened clarity for tribes in the present day, it could also be quickly eroded by subsequent turns in Congressional perspective. This could lead to uncertainty similar to that now created by conflicting judicial . . . opinions." Green, *supra* note 122, at 482.

[299] *See Mille Lacs,* 526 U.S. 172, discussed *supra* Part II (text accompanying notes 16–19).

[300] *See* United States v. Farris, 624 F.2d 890, 899–900 (9th Cir. 1980) (Kennedy, J., concurring); *Coeur d'Alene,* 751 F.2d at 1115 & n. 2 (citing and discussing *Farris*); *see also supra* Part II (note 19 and accompanying text) (discussing Chief Justice Rehnquist's dissent in *Mille Lacs*, 526 U.S. 172; *supra* Part II (text accompanying notes 53–69, and note 58) (discussing Chief Justice Rehnquist's opinion in *Negonsott*, 507 U.S. 99, which was also joined by Justice Kennedy); Wildenthal 2002, *supra* note 4, at 131–35 (discussing *Mille Lacs*); Wildenthal 2008, *supra* note 4, at 587–90 (discussing *Mille Lacs* and the broader role of Justice Kennedy in Indian law).

[301] 495 U.S. 676 (1990); *see also* Wildenthal 2002, *supra* note 4, at 128–31 (discussing *Duro*, which held that tribes lacked authority to prosecute nonmembers for on-reservation crimes, even when the alleged offenders were members of other tribes who chose or were allowed to reside within the territory of the prosecuting tribe). Congress promptly overruled *Duro* by statutory amendment. *See* Wildenthal 2008, *supra* note 4, at 588–89 & nn. 219–20.

Salazar (2009),[302] and *Adoptive Couple v. Baby Girl* (2013),[303] it seemed like most of the justices had simply forgotten the canons.

But then Justice Kennedy joined the majority opinion in the 2014 *Bay Mills* decision, reaffirming the sweeping scope of tribal sovereign immunity against most civil lawsuits. Unlike the 1998 *Kiowa* case, in which Kennedy had reaffirmed the tribal sovereign immunity doctrine while seeming to disparage it as much as possible (with no justice really defending it),[304] Justice Elena Kagan's opinion of the Court in *Bay Mills*, and especially Justice Sonia Sotomayor's concurrence, defended its value in more than merely precedential terms.[305] Best of all, as discussed in Part II, the *Bay Mills* Court's emphatic restatement of the "enduring" Indian law canons cited *Dion* and *Iowa Mutual*, two cases that applied the classical canons to GFLs.[306] And yet—*Bay Mills*, like *Mille Lacs*, was decided 5-4.[307]

Meanwhile, the Ninth Circuit's fierce embrace of *Coeur d'Alene* has not mellowed. In January 2017, in *Consumer Financial Protection Bureau v. Great Plains Lending*, the Ninth Circuit held that the Consumer Financial Protection Act of 2010 (CFPA) was a GFL that applied to tribal businesses.[308] Several tribal government-owned enterprises, citing the Supreme Court's unanimous view in the 1992 *Yakima* case,[309] argued that the ambiguity canon should be applied to the CFPA, as to all federal

---

[302] 555 U.S. 379 (2009) (construing the Indian Reorganization Act in a hypertechnical manner not compelled by the statutory text, without reference to the canons, so as to preclude the Secretary of the Interior from taking land into trust for the benefit of certain federally recognized Indian tribes, solely because such tribes had not been formally recognized at the time the Act was originally adopted in 1934). *But see id.* at 401–14 (Stevens, J., dissenting).

[303] 133 S. Ct. 2552 (2013) (construing the Indian Child Welfare Act of 1978 in a peculiarly cramped and implausible manner, without reference to the canons, so as to block its application to an Indian child whose biological Indian father sought to retain parental rights). *But see id.* at 2571–72 (Scalia, J., dissenting); *id.* at 2572–86 (Sotomayor, J., joined by Ginsburg and Kagan, JJ., and joined in part by Scalia, J., dissenting).

[304] *See* Kiowa Tribe v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998).

[305] *See Bay Mills,*134 S. Ct. at 2028–39 (opinion of the Court by Kagan, J.); *id.* at 2040–45 (Sotomayor, J., concurring).

[306] *Id.* at 2031–32, citing *Dion,* 476 U.S. 734, and *Iowa Mutual,* 480 U.S. 9; *see also* note 28 and accompanying text.

[307] *See Bay Mills,* 134 S. Ct. at 2045–55 (Thomas, J., joined by Scalia, Ginsburg, and Alito, JJ., dissenting).

[308] 846 F.3d 1049 (CA9 2017).

[309] *See Yakima County v. Yakima Indian Nation,* 502 U.S. 251, discussed *supra* Part II (notes 21–22 and accompanying text).

laws, to find it presumptively inapplicable. The Ninth Circuit disagreed. The *Great Plains* panel politely acknowledged *Yakima*, and a 1985 Supreme Court decision also cited by the tribes,[310] but with jaw-dropping chutzpah simply declined to follow them.

"Nevertheless," the Ninth Circuit stated, "we have repudiated this presumption"—the *Supreme Court's* presumption, mind you, which the Ninth Circuit had just quoted from *Yakima*—"in the face of *our* governing precedent."[311] As the panel promptly made clear, what it meant by "our" precedent was *Coeur d'Alene*. Apparently, United States Supreme Court precedents, in this area, do not always enjoy primacy in the Ninth Circuit. To follow the cited Supreme Court precedents, the Ninth Circuit explained, "would be effectively to overrule" *Coeur d'Alene*, "which of course this panel cannot do."[312] The Ninth Circuit panel did not favor us with an explanation of why it felt it could defy two Supreme Court precedents.

The January 1985 *Coeur d'Alene* panel decision predated the June 1985 Supreme Court decision cited in *Great Plains* by five months, and the *Yakima* decision by seven years almost to the day.[313] Thus, the Ninth Circuit in 2017 (along with several sister circuits[314]) continues to follow its own 1985 three-judge panel decision in defiance of the contrary teachings of *later* decisions by a *higher* court—the United States Supreme Court—a court which most American judges and lawyers have always believed to have supervisory authority over the lower federal courts.

Beyond the realm of federal case law, Smith's 2011 treatise has urged Indian Nations to proactively *exercise* their sovereignty, not simply engage in negative defenses of it against federal encroachment. He thus devoted the bulk of his treatise to discussing and modeling affirmative tribal legislation to protect

---

[310] Montana v. Blackfeet Tribe, 471 U.S. 759 (1985), cited in *Great Plains,* 846 F.3d at 1057. This "*Montana*" decision is not to be confused with *Montana v. United States*, 450 U.S. 544 (1981).

[311] *Great Plains,* 846 F.3d at 1057 (emphasis added).

[312] *Great Plains,* 846 F.3d at 1057 (citation to another Ninth Circuit decision, and internal quotation marks, omitted).

[313] *Coeur d'Alene* was decided on January 15, 1985. *Coeur d'Alene,* 751 F.2d at 1113. *Montana v. Blackfeet Tribe* was decided on June 3, 1985. *Montana v. Blackfeet Tribe,* 471 U.S. at 759. *Yakima* was decided on January 14, 1992. *Yakima,* 502 U.S. at 251.

[314] *See supra* Part IV (notes 87–88) and Part V.C.1 (note 141 and accompanying text) (discussing the circuits which have embraced the *Coeur d'Alene* doctrine).

workers within Indian country.[315] That is not only the right thing to do, but will bolster the long-term cause of preserving tribal sovereignty.

It is difficult to predict the ultimate outcome of the battles over the *Coeur d'Alene* doctrine chronicled in this article. American Indian law remains on a knife edge. But I feel confident that Indian Nations and their sovereignty will prevail.

[315] *See* SMITH, *supra* note 5, at 173–296.