

HOW THE NINTH CIRCUIT OVERRULED
A CENTURY OF SUPREME COURT INDIAN
JURISPRUDENCE—AND HAS SO FAR GOTTEN
AWAY WITH IT

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TABLE OF CONTENTS

INTRODUCTION	548
I. THE UNBEARABLE ODDNESS OF <i>COEUR D'ALENE</i>	550
II. THE REMARKABLE INFLUENCE OF <i>COEUR D'ALENE</i>	552
A. The Circuits Following <i>Coeur d'Alene</i>	552
B. The Tenth Circuit and the Puzzle of <i>San Juan</i>	555
C. The Cohen and Canby Treatises	569
III. THE DEMONSTRABLE ERROR OF <i>COEUR D'ALENE</i>	571
A. Misusing <i>Tuscarora</i>	571
B. Defying <i>Merrion</i> (and Much of the Rest of Indian Law)	573
1. <i>Defying Merrion on Tribal Power Over Non-Indians</i>	573
2. <i>Defying Merrion on Applying the Canons to General Federal Laws</i>	575
3. <i>Defying Merrion on the Significance of Treaty Rights</i>	577
C. The Supreme Court's Jurisprudence Since <i>Coeur d'Alene</i> Confirms the Ninth Circuit's Error.....	581
1. <i>The Supreme Court's Last Word on Tuscarora</i>	581
2. <i>Confirming the Irrelevance of the "Commercial" Nature of a Government Activity</i>	582
3. <i>Confirming the Application of the Canons to General Federal Laws</i>	583
CONCLUSION	586

* Professor of Law, Thomas Jefferson School of Law, San Diego; J.D., Stanford Law School. © Bryan H. Wildenthal. Social Science Research Network (SSRN) Author Page: <http://ssrn.com/author=181791>. Homepage: <http://members.cox.net/bryanw64/prof.html>. This Article was originally posted on SSRN in March 2008 and remains available at <http://ssrn.com/abstract=1099683> (for my other published scholarship, see the Author Page cited above). As always, I thank my life partner (and soon-to-be husband) Ashish, for all his love and support.

INTRODUCTION

I am honored to participate in this Symposium and to have been a member of the Association of American Law Schools (AALS) panel on Labor and Employment Laws in Indian Country from which it derives. My involvement in the AALS conference grew out of a lengthy 2007 article I wrote about on the extension of the National Labor Relations Act (NLRA) to cover the on-reservation employees of American Indian tribes—thus overriding and reducing to that extent the inherent sovereignty retained by America's Indian Nations over their own lands and governmental operations.¹ This extension was accomplished by the administrative and judicial fiat of the National Labor Relations Board (NLRB) and the U.S. Court of Appeals for the District of Columbia Circuit, in the *San Manuel* cases.² It has never been approved by Congress or the Supreme Court. Indeed, it is contrary to Supreme Court precedents and statutory policy choices by Congress that have molded the field of American Indian law for the past century.³

My 2007 article devoted many pages to analyzing and criticizing the *San Manuel* cases and providing the background of Supreme Court case law against which they were wrongly decided. But it referred only glancingly to the U.S. Court of Appeals for the Ninth Circuit's opinion in *Donovan v. Coeur d'Alene Tribal Farm*, which applied the Occupational Safety and Health Act (OSHA) to a tribal government workplace and has provided the doctrinal basis for the *San Manuel* cases and many other lower court decisions in this area.⁴ The Ninth Circuit in *Coeur d'Alene* claimed to find sup-

1. See Bryan H. Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction*, 86 OR. L. REV. 413 (2007). The conference panel, sponsored by the AALS Section on Indian Nations and Indigenous Peoples, took place on January 5, 2008, at the AALS Annual Meeting in New York City. On terminology issues relating to American Indians or Native Americans, see *id.* at 415 n.3.

2. *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055 (2004), *relief granted*, 345 N.L.R.B. No. 79, 2005 WL 2452002 (Sept. 30, 2005), *petition denied and cross-application for enforcement granted*, 475 F.3d 1306 (D.C. Cir. 2007) (construing the NLRA, 29 U.S.C. § 151 (2006)).

3. See generally Wildenthal, *supra* note 1; see also *infra* note 128; Section III.B.

4. 751 F.2d 1113 (9th Cir. 1985) (construing Occupational Safety and Health Act (OSHA), 29 U.S.C. § 651). For my discussion of the many relevant Supreme Court cases, see primarily Wildenthal, *supra* note 1, at 434-44, 452-73, 475-502, 512-24. The 2007 article's discussion focusing specifically on *Coeur d'Alene* was mostly limited to a single paragraph, which merely quoted *Coeur d'Alene*'s key rule statement and noted that it had been followed by other lower courts. See *id.* at 455-56. For discussion of the D.C. Circuit *San Manuel* decision, see *id.* at 474-80, 502-11. I am indebted in this Article, as in the 2007 article, to the pathbreaking scholarship of Professor Skibine and his insightful analysis and criticism of *Coeur d'Alene*. See Alex Tallchief Skibine, *Applicability of Federal Laws of*

port for its approach in a passing statement in a 1960 Supreme Court opinion, *Federal Power Commission v. Tuscarora Indian Nation*, to the effect that there is a presumption that “a general [federal] statute in terms applying to all persons includes Indians and their property interests.”⁵ Yet most scholars—and so far, it appears, the Supreme Court—have long viewed *Tuscarora*, and especially the disputed statement just quoted, as a discarded relic of a now-discredited era of American Indian law.⁶

Coeur d’Alene, after declaring the “[g]eneral [r]ule” that it claimed the *Tuscarora* statement established,⁷ set forth a narrow set of “[e]xceptions” under which a general federal law “silent on the issue of applicability to Indian tribes will *not* apply to [tribes]:”

(1) [if] the law touches “exclusive rights of self-governance in purely intramural matters”; (2) [if] the application of the law to the tribe would “abrogate rights guaranteed by Indian treaties”; or (3) [if] there is proof “by legislative history or some other means that Congress intended [the law] *not* to apply to Indians on their reservations”⁸

By contrast, “longstanding principles”⁹ of American Indian law known as the “canons of construction”¹⁰ require, in relevant part, that “(1) ambiguities in a federal statute must be resolved in favor of Indians, and (2) a clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty.”¹¹ These Indian law canons thus embody a presumption that federal laws should not be construed to limit tribal sovereignty or tribal rights unless Congress clearly, intentionally, and unambiguously chooses to do so—a presumption diametrically opposed to the *Coeur d’Alene* approach. (Compare, for example, the third stated element of *Coeur d’Alene* with the second quoted Indian law canon.) The D.C. Circuit in *San Manuel* cited no fewer than eight Supreme Court decisions postdating *Tuscarora* that have supported the classical Indian law canons, and in which the Supreme Court ignored the purported *Tuscarora*-

General Application to Indian Tribes and Reservation Indians, 25 U.C. DAVIS L. REV. 85, 88-93, 111-14, 117-22 (1991).

5. 362 U.S. 99, 116 (1960), *quoted in Coeur d’Alene*, 751 F.2d at 1115.

6. *See generally* Wildenthal, *supra* note 1, at 452-73.

7. *See Coeur d’Alene*, 751 F.2d at 1115-16.

8. *Id.* at 1116 (quoting *United States v. Farris*, 624 F.2d 890, 893-94 (9th Cir. 1980) (opinion of Choy, J.)) (emphases and bracketed “ifs” added here; brackets around “the law” added by *Coeur d’Alene*).

9. *San Manuel Indian Bingo & Casino v. N.L.R.B.*, 475 F.3d 1306, 1311 (D.C. Cir. 2007).

10. *See* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 2.02, at 119-28 (Nell Jessup Newton et al. eds., rev. ed. 2005) [hereinafter COHEN].

11. *San Manuel*, 475 F.3d at 1311 (internal citations omitted); *see also* COHEN, *supra* note 10, § 2.02[1], at 119-20.

Coeur d'Alene approach.¹² My 2007 article identified *at least twenty-seven* such Supreme Court cases.¹³

While that article repeatedly referred to the “*Tuscarora-Coeur d'Alene* doctrine,” the focus was on the true meaning and significance of *Tuscarora* and the many relevant Supreme Court cases.¹⁴ This Article, by contrast, focuses on the fascinating paradox that is *Coeur d'Alene*. Part I summarizes why *Coeur d'Alene* is so strange. Part II discusses its remarkable influence. Part III lambastes its demonstrable wrongness. In conclusion, the Article considers what might explain this phenomenon and where we may be headed.

I. THE UNBEARABLE ODDNESS OF *COEUR D'ALENE*¹⁵

There are four striking aspects of the Ninth Circuit *Coeur d'Alene* decision. They are not so odd when taken individually, but in combination they approach the bizarre. The first thing one notices is how short the opinion is—a mere four pages from beginning to end.¹⁶ Maybe there is power in brevity. The Supreme Court’s opinion in *Merrion v. Jicarilla Apache Tribe* lumbers along for 27 pages (plus a 32-page dissent).¹⁷ The Supreme Court’s *Tuscarora* opinion, which *Coeur d'Alene* selectively quoted, rambles on for 25 pages (plus a 19-page dissent).¹⁸ As we will see in Part III, the Ninth Circuit made short work of *Merrion*, while ignoring most of *Tuscarora*.

Second, as we will see in Part II, *Coeur d'Alene* has enjoyed remarkable influence and prestige for a lower court decision. For twenty-three years now, it has been binding precedent within the vast Ninth Circuit.¹⁹

12. See *San Manuel*, 475 F.3d at 1311-13; Wildenthal, *supra* note 1, at 419 & n.14.

13. See Wildenthal, *supra* note 1, 464-66.

14. See *supra* note 4.

15. Apologies to MILAN KUNDERA, *THE UNBEARABLE LIGHTNESS OF BEING* (1984).

16. See *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1114-18 (9th Cir. 1985).

17. 455 U.S. 130, 133-59 (1982) (majority opinion); *id.* at 159-90 (Stevens, J., joined by Burger, C.J., and Rehnquist, J., dissenting).

18. *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 100-24 (1960) (majority opinion); *id.* at 124-42 (Black, J., joined by Warren, C.J., and Douglas, J., dissenting).

19. The Ninth Circuit covers a huge swathe of the Western United States, including California, Oregon, Washington, Idaho, Montana, Nevada, Arizona, Alaska, and Hawaii. These states encompass a large proportion of America’s Native Nations and Indian reservations. Although *Coeur d'Alene* was only a three-judge panel decision, under Ninth Circuit precedent it is binding on all later Ninth Circuit panels, unless and until modified by an *en banc* decision. See, e.g., *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (*en banc*) (discussing Ninth Circuit precedent rules). A Westlaw® citation check indicates that *Coeur d'Alene* has been cited by twelve published Ninth Circuit decisions—including nine since 2000, a sign that it may be gaining prestige and influence as time goes on. Interestingly, the Ninth Circuit has conceded, in theory, “that circuit precedent, authoritative at the time it

The *Tuscarora-Coeur d'Alene* doctrine has been strongly endorsed by the Second, Seventh, and Eleventh Circuits, among the six other circuits that have considered similar issues regarding the application of general federal laws to Indian tribes. The Eighth and D.C. Circuits have embraced it a bit less clearly. Only one circuit, the Tenth, has offered some wavering resistance to it. Finally, *Coeur d'Alene* has received surprisingly prominent and respectful treatment in leading scholarly treatises on American Indian law, including the latest edition of the venerable *Cohen Handbook*.²⁰

Third, as we will see in Part III, *Coeur d'Alene* was just wrong—way wrong. It was not simply mistaken in reasoning and result. It flagrantly misconstrued the governing precedents of the Supreme Court. It fairly thumbed its nose in defiance of the leading relevant Supreme Court case already on the books when it was decided in 1985. Its approach fundamentally contradicted other Supreme Court cases going back to at least 1905. And Supreme Court cases handed down since 1985 have only further underscored its egregious error.

Finally, and in jarring dissonance with its stature and influence, *Coeur d'Alene* is striking because it was decided by the Ninth Circuit—the Rodney Dangerfield of federal courts. This Circuit has generally not gotten much respect, especially from the Supreme Court, in recent years. (I suppose this Article may add to the problem. Sorry.) Headquartered in San Francisco, on the popularly dubbed “Left Coast” of the United States, it is regarded by much of the legal community as being fundamentally out of step and out of favor with the increasing conservatism of the nation’s highest court. And *Coeur d'Alene* is a mere three-judge panel opinion. It has never even been confirmed by an en banc decision of the Ninth Circuit.²¹ The leading scholarly treatment of the Ninth Circuit, by my Thomas Jefferson School of Law colleague Marybeth Herald, is aptly titled *Reversed, Vacated, and Split*.²² The first two words refer to the frequent fate of Ninth Circuit decisions in the Supreme Court, especially where the Circuit has indulged a doctrinal or philosophical stance contrary to prevailing attitudes on the Court.²³ The

issued, can be effectively overruled by subsequent Supreme Court decisions that ‘are closely on point,’ even though those decisions do not expressly overrule the prior circuit precedent.” *Id.* at 899 (internal citation omitted). It does not seem to have occurred to the Ninth Circuit that post-*Coeur d'Alene* Supreme Court decisions, such as those discussed in Section III.C, *infra*, might have undermined *Coeur d'Alene* in such fashion.

20. COHEN, *supra* note 10; see also *infra* Section II.C (discussing the *Cohen Handbook*'s treatment of *Coeur d'Alene*); Wildenthal, *supra* note 1, at 418 n.13 (noting the value and stature of the *Cohen Handbook*); *id.* at 483 (same).

21. It has, however, been cited and followed many times by other Ninth Circuit panels. See *supra* note 19.

22. Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 OR. L. REV. 405 (1998).

23. See *id.* at 412-17, 450-56, 467-76.

final word refers to proposals by some to divide up the Ninth Circuit, on grounds that it is too large, unwieldy, and dysfunctional in its current form.²⁴

In any other area of law, the idea that the Ninth Circuit could succeed in spearheading a major shift in legal doctrine, in flagrant defiance of the Supreme Court—and get away with it for almost a quarter-century now—would be a joke, a fantasy. But Indian law practitioners and scholars know better. If the Supreme Court is Superman, the Ninth Circuit judges seem to have some kryptonite hidden under their robes—or at least so it appears in the case of *Coeur d'Alene*.

II. THE REMARKABLE INFLUENCE OF *COEUR D'ALENE*

A. The Circuits Following *Coeur d'Alene*

As noted above, six of the seven federal circuits to address the issue—the Second, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits—have generally embraced the *Tuscarora-Coeur d'Alene* doctrine. It is fascinating to compare the reliance on *Coeur d'Alene* by other circuits to their treatment of the three leading Supreme Court cases of the 1980s dealing with the application of general federal laws to Indian tribes: the 1982 decision in *Merrion*,²⁵ the 1986 decision in *United States v. Dion*,²⁶ and the 1987 decision in *Iowa Mutual Insurance Co. v. LaPlante*.²⁷ As we will see, *Merrion*, *Dion*, and *Iowa Mutual* applied the classical Indian law canons of construction to general federal laws potentially affecting tribal sovereignty.

In 1989, in *Smart v. State Farm Insurance Co.*,²⁸ the Seventh Circuit became the first to follow the Ninth Circuit's lead in *Coeur d'Alene*. It uncritically accepted the disputed *Tuscarora* statement as the “general rule,” and embraced the *Coeur d'Alene* approach based on it, without even bothering to cite *Merrion*, *Dion*, or *Iowa Mutual*.²⁹ The Eleventh Circuit, in 1999,

24. See *id.* at 481-82.

25. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

26. 476 U.S. 734 (1986).

27. 480 U.S. 9 (1987).

28. 868 F.2d 929 (7th Cir. 1989).

29. See *id.* at 932-33 (quoting *Tuscarora* and *Coeur d'Alene*); see also *id.* at 932-36 (applying the *Tuscarora-Coeur d'Alene* approach to find that the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, applies to a tribal government health center). A later Seventh Circuit opinion written by the famous Judge Richard Posner—who was not on the *Smart* panel (if one may call it that!)—showed a better grasp of Indian law principles. In *Reich v. Great Lakes Indian Fish & Wildlife Commission*, 4 F.3d 490, 493 (7th Cir. 1993), Judge Posner, for a divided panel, cited *Dion* (though not *Merrion* or *Iowa Mutual*) in support of a generally sound restatement of the Indian law canons as applied to federal laws. The *Great Lakes* majority found that the Fair Labor Standards Act, 29 U.S.C. § 201, does not apply to tribal law enforcement personnel. See *Great Lakes*, 4 F.3d at 491-95. But Judge Posner, while criticizing and distinguishing *Smart*, did not challenge its status as circuit

the most recent to embrace *Coeur d'Alene*, likewise did so while completely ignoring *Merrion*, *Dion*, and *Iowa Mutual*.³⁰ In this area, it seems, it is the Supreme Court rather than the Ninth Circuit which has become the Rodney Dangerfield of the federal judiciary!

The Second Circuit's 1996 decision in *Reich v. Mashantucket Sand & Gravel*³¹ at least acknowledged *Dion* and *Iowa Mutual*. But the court failed to grapple convincingly with either, and essentially ignored the relevance of *Merrion*.³² Instead, the *Mashantucket* panel embraced the *Tuscarora* rule and followed *Coeur d'Alene* in applying the OSHA to a tribal government employer.³³ Astonishingly, the Second Circuit asserted that the Tribe's argument premised on *Dion* and *Iowa Mutual*—that federal laws should not be construed to limit tribal sovereignty absent evidence that Congress so intended—implied “too grandiose a concept of tribal sovereignty.”³⁴ *Mashantucket* claimed this was incompatible with the principle that tribal sovereignty is subordinate to the supremacy of federal law—a rationale not offered by the comparatively cursory *Coeur d'Alene* opinion.³⁵

But *Mashantucket's ipse dixit* was specious nonsense. It amounted to a naked assault on the core meaning and rationale of the Indian law canons of construction restated and applied by *Merrion*, *Dion*, and *Iowa Mutual*—or, perhaps, a complete failure to comprehend them. It hardly denies the supremacy of federal power to merely require evidence that Congress in-

precedent. Perhaps only because he felt bound by *Smart*, he accepted the application of the *Coeur d'Alene* doctrine to tribal government employees “engaged in routine activities of a commercial or service character.” *Id.* at 495. *But see infra* Subsection III.C.2 (discussing the invalid nature of any such “commercial” vs. “traditional” distinction). *Cf. Great Lakes*, 4 F.3d at 496, 499-504 (Coffey, J., dissenting) (favoring extension of the *Tuscarora-Coeur d'Alene* doctrine to the tribal employees in *Great Lakes*).

30. See *Fla. Paralegic Ass'n v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1127, 1129-30 (11th Cir. 1999) (applying Title III, the public accommodations title, of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12181, to a tribally owned restaurant). The Eleventh Circuit also, however, found that the ADA does not override the tribe's sovereign immunity from private lawsuits. *See id.* at 1130-34. In *Sanderlin v. Seminole Tribe*, 243 F.3d 1282 (11th Cir. 2001), the Eleventh Circuit similarly held—without referring to *Coeur d'Alene*, *Merrion*, *Dion*, or *Iowa Mutual*—that the Rehabilitation Act, 29 U.S.C. § 701, does not override tribal sovereign immunity. *Sanderlin* properly distinguished the disputed *Tuscarora* statement about general federal laws as being inapplicable to the distinct issue of sovereign immunity from lawsuits. *See Sanderlin*, 243 F.3d at 1291-92.

31. 95 F.3d 174 (2d Cir. 1996).

32. *See id.* at 177-78 (discussing *Dion* and *Iowa Mutual*). *Mashantucket* noted that the Occupational Safety and Health Review Commission's decision in the same litigation, which the Second Circuit reversed, quoted some relevant language in *Merrion*. *See id.* at 176. But, the Second Circuit itself never discussed *Merrion*, nor even mentioned it again. This seems all the more inexcusable given this smoking-gun evidence that the Second Circuit was fully aware of *Merrion* and its relevance.

33. *See id.* at 177-81.

34. *Id.* at 178.

35. *See id.* at 178-79.

tended to exercise such power. To cite the supremacy of federal law as a reason not to apply the canons is utterly perverse. The canons first arose and were developed precisely to ameliorate and counterbalance the threatening potential of federal supremacy. The *Mashantucket* approach, inspired by *Coeur d'Alene*, would keep the bitter and throw away the sweet. It would aggressively assert the full, raw, colonialist potential of historical assaults on Native American sovereignty, while cheerfully ripping away the protective rules of judicial interpretation specifically designed over the past two centuries to modestly cushion and constrain that very potential.³⁶

The Eighth Circuit, in its 1993 decision in *Equal Employment Opportunity Commission v. Fond du Lac Heavy Equipment and Construction Co.*, followed *Coeur d'Alene* in accepting the disputed *Tuscarora* statement as the "general rule."³⁷ But the Eighth Circuit also declined to follow *Coeur d'Alene* in certain respects.³⁸ The *Fond du Lac* panel held that the Age Discrimination in Employment Act (ADEA) did not apply to a tribal government's employment of a tribal member.³⁹ *Fond du Lac* cited, and to a certain extent properly applied, both *Merrion* and *Dion*. But it failed to recognize their basic incompatibility with the purported "rule" of *Tuscarora*.⁴⁰

Finally, the D.C. Circuit appears to have embraced the *Tuscarora-Coeur d'Alene* approach. Its first suggestion to that effect came forty-seven years ago, just a year after *Tuscarora* was decided, in *Navajo Tribe v. NLRB*.⁴¹ The D.C. Circuit, quoting the *Tuscarora* statement about general federal laws, held that the NLRA applied to a private company operating a uranium mill inside the Navajo Reservation.⁴² This decision was later cited

36. See *infra* Subsection III.B.2 (discussing *Coeur d'Alene*). A full-dress discussion of the Indian law canons, and their historical origins and rationale, would be well beyond the scope of this Article. For discussion and citations supporting the points in the text, see, for example, COHEN, *supra* note 10, § 2.02, at 119-28; Wildenthal, *supra* note 1, 531 & n.381.

37. 986 F.2d 246, 248 (8th Cir. 1993).

38. See *id.* at 249 & n.3.

39. See *id.* at 247-51 (construing the Age Discrimination in Employment Act, 29 U.S.C. § 621); accord *E.E.O.C. v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989) (cited and quoted in *Fond du Lac*, 986 F.2d at 248-49, 251, and discussed in Section II.B). The Eighth Circuit's emphasis on "the narrow facts of this case which involve a [tribal] member [employed by] the tribe," *Fond du Lac*, 986 F.2d at 251, suggests, however, that it may not reach a similar result in a case involving tribal employment of nonmembers. The Eighth Circuit panel, and the *en banc* circuit, were divided. See *id.* (Wollman, J., dissenting) (favoring extension of the ADEA even to tribal member employees); see also *id.* at 247 (noting that Judge Wollman, and four judges not on the panel, voted unsuccessfully to rehear the case *en banc*).

40. See *Fond du Lac*, 986 F.2d at 248-50; see also *infra* Part III (discussing the incompatibility of such cases with *Tuscarora*). *Fond du Lac* did not cite *Iowa Mutual*.

41. 288 F.2d 162 (D.C. Cir. 1961).

42. See *id.* at 164-65 & n.4 (quoting *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960)); see also *id.* at 163 (noting that the tribe objected to the assertion of jurisdiction under the NLRA).

with approval by *Coeur d'Alene* itself, although it is distinguishable from *Coeur d'Alene* and most cases in that line because it did not involve direct regulation of tribal government operations.⁴³

In 2007, the D.C. Circuit held in *San Manuel* that the NLRA applies to at least some tribal government employment within Indian country.⁴⁴ *San Manuel* failed to discuss or even cite *Merrion*, *Dion*, or *Iowa Mutual*.⁴⁵ In fact, the D.C. Circuit falsely claimed that no Supreme Court case applying the ambiguity canon to any federal law of general application had been cited in that litigation, and falsely suggested that no Supreme Court cases applying any of the Indian law canons to such laws even existed.⁴⁶ The D.C. Circuit did, however, cite and discuss *Tuscarora* and *Coeur d'Alene* extensively.⁴⁷ *San Manuel* conceded the existence of the canons, but suggested—in line with *Tuscarora-Coeur d'Alene*—that they only apply to federal laws focusing mainly on Indian affairs.⁴⁸ Conceding the “conflict” and “tension” between the canons and the disputed *Tuscarora* statement,⁴⁹ the D.C. Circuit purported to resolve the issue in *San Manuel* without choosing between the two. In reality, for most practical purposes, its analysis seems very similar to the *Tuscarora-Coeur d'Alene* approach, and poses an equivalent threat to tribal sovereignty.⁵⁰

B. The Tenth Circuit and the Puzzle of *San Juan*

Only the Tenth Circuit has mounted significant resistance to the allure of *Coeur d'Alene*. But its response has been mixed, to put it kindly. In

43. See *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985). Cf. Wildenthal, *supra* note 1, at 432 n.52 (discussing the *Navajo* decision).

44. *San Manuel Indian Bingo and Casino v. N.L.R.B.*, 475 F.3d 1306, 1318-19 (D.C. Cir. 2007).

45. Curiously, it also failed to mention its own decision in *Navajo*.

46. See *id.* at 1312; see also Wildenthal, *supra* note 1, at 475-79 (criticizing this aspect of *San Manuel*, and noting that *Merrion* and *Iowa Mutual* were in fact repeatedly cited, including several citations precisely on point, by briefs filed in the case and in the NLRB opinions below, and that *Dion* was also cited on point by the Tribe's brief); *id.* at 474-80, 502-11 (generally discussing the D.C. Circuit opinion in *San Manuel*).

47. See *San Manuel*, 475 F.3d at 1309-12, 1315.

48. See *id.* at 1311 (citing several Supreme Court cases reaffirming the canons, which happened to apply them to specialized Indian legislation); *id.* at 1312 (asserting the suggestion mentioned in the text). The D.C. Circuit even acknowledged one of its own recent decisions reaffirming the canons. See *id.* at 1311 (citing *Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003)). As *Roseville* stated: “The Supreme Court has on numerous occasions noted that ambiguities in federal statutes are to be read liberally in favor of the Indians.” 348 F.3d at 1032. For criticism of the notion that the canons should only apply to specialized Indian legislation, see Wildenthal, *supra* note 1, at 493, and, generally, *id.* at 475-502.

49. *San Manuel*, 475 F.3d at 1311.

50. See *id.* at 1315; Wildenthal, *supra* note 1, at 474-75, 502-11.

1982, before *Coeur d'Alene* was decided, the Tenth Circuit correctly held in *Donovan v. Navajo Forest Products Industries* that the disputed *Tuscarora* statement had been “limit[ed] or, by implication, overrule[d]” by *Merrion*.⁵¹ The *Navajo Forest* panel, contrary to the later decisions by the Ninth Circuit in *Coeur d'Alene* and the Second Circuit in *Mashantucket*, found that the OSHA does not apply to a tribal government employer.⁵² Amazingly, neither the Supreme Court nor Congress has yet resolved this quarter-century-old circuit split regarding the scope of an extremely important federal law.

Navajo Forest easily can be, and has been, miscited and misunderstood, because before flatly rejecting the *Tuscarora* rule, the opinion first seemed to concede its general validity, “unless Congress expressly excepts [Indians]” from the general law at issue or “the application of the general statute would be in derogation of the Indians’ treaty rights.”⁵³ And while the Tenth Circuit understandably emphasized that the Navajo Nation was protected by relevant treaty rights, that aspect of *Navajo Forest* is also easily misconstrued. The Tenth Circuit emphatically did *not* presage *Coeur d'Alene* by *requiring* tribes to carry the burden of affirmatively establishing some clear or specific treaty right to support an exception to a general presumption that federal law applies. Instead, consistently with the canons, *Navajo Forest* held that treaty provisions and their implications must be broadly construed in favor of tribal sovereignty.⁵⁴ Furthermore, *Navajo Forest* expressly recognized that *Merrion* reaffirmed the presumptive scope of tribal sovereignty and self-government even where no treaty rights exist.⁵⁵ *Navajo Forest* concluded each section of its opinion with powerful restatements of the congressional intent canon: that “[l]imitations on tribal self-government . . . must be expressly stated or otherwise made clear from surrounding circumstances and legislative history,”⁵⁶ and that “[a]bsent

51. 692 F.2d 709, 713 (10th Cir. 1982); *see also id.* at 714 (conceding that “[t]he United States retains legislative plenary power to divest Indian tribes of any attributes of sovereignty,” but concluding that “[a]bsent some expression of . . . legislative intent” the court would “not permit divestiture of the tribal power to manage reservation lands so as to exclude non-Indians from entering thereon merely on the predicate that federal statutes of general application apply to Indians just as they do to all other persons . . . unless Indians are expressly excepted therefrom,” and stating that “[w]e believe that *Merrion* . . . settled that issue in favor of the tribes”) (internal citations omitted); *see generally id.* at 712-14.

52. *See id.* at 710.

53. *Id.* at 711 (emphasis added).

54. *See id.* at 711-12.

55. *See id.* at 712-13 (noting that *Merrion* itself involved a tribe without treaty rights, with a reservation established only by presidential executive order); *see also infra* Subsection III.B.3; Wildenthal, *supra* note 1, at 438-40, 495-98.

56. 692 F.2d at 712 (concluding Part I).

some expression of such legislative intent, . . . we shall not permit divestiture of the tribal power to manage reservation lands”⁵⁷

All that seemed to go for naught in 1986, in *Phillips Petroleum Co. v. United States Environmental Protection Agency*, which found that the Environmental Protection Agency (EPA) was authorized to impose within Indian country certain regulations enforcing the Safe Drinking Water Act (SDWA).⁵⁸ *Phillips* was a poor test for tribal sovereignty, since the affected tribe was not even a party to the case and actually *supported* the federal regulation. It was only the oil company that challenged it.⁵⁹ The Tenth Circuit panel in *Phillips* did not cite *Coeur d’Alene*, but—in defiance of *Navajo Forest*—it accepted the disputed *Tuscarora* statement as the guiding “presumption.”⁶⁰ The *Phillips* panel’s only mention of *Navajo Forest* was to include it in a string cite—no quotation, nor even a pincite—as alleged support for the assertion that the purported *Tuscarora* “rule of construction” may only be avoided “where a tribe raises a *specific* right under a treaty or statute which is in conflict with the general law to be applied”⁶¹ That basically amounted to the *Coeur d’Alene* approach. The Supreme Court’s decision in *Merrion* did not merit even the deceptive and backhanded treatment given to *Navajo Forest*. *Phillips* did not even bother to cite *Merrion*.⁶² This handling of the matter was especially needless and regrettable, given that the evidence *Phillips* cited might have supported its conclusion under a straightforward application of the intent canon.⁶³

The Tenth Circuit flip-flopped again in 1989, in *EEOC v. Cherokee Nation*, which foreshadowed the Eighth Circuit’s *Fond du Lac* decision in finding that the ADEA did not apply to Indian tribes.⁶⁴ The *Cherokee* panel,

57. *Id.* at 714 (concluding Part II and the opinion as a whole); *see also supra* note 51 (providing a more complete version of this quotation).

58. 803 F.2d 545, 547 (10th Cir. 1986) (citing the Safe Drinking Water Act, 42 U.S.C. § 300f).

59. *See id.* at 547, 556.

60. *Id.* at 556.

61. *Id.* (emphasis added).

62. *Phillips* also failed to cite *Dion*. *See infra* note 185. *Phillips* predated *Iowa Mutual*. A partial explanation, though not justification, for the discordance between *Navajo Forest* and *Phillips*, might be that none of the judges on the *Navajo Forest* panel served on the *Phillips* panel. Compare *Phillips*, 803 F.2d at 547, with *Navajo Forest*, 692 F.2d at 710. One gathers that the Tenth Circuit does not follow the panel precedent rule of the Ninth Circuit. *Cf. supra* note 19. That hardly excuses, however, the *Phillips* panel’s dismissive treatment of *Navajo Forest* and *Merrion*. *See also infra* note 69.

63. *See Phillips*, 803 F.2d at 554-55. It was only *after* this discussion of congressional intent that *Phillips* gratuitously added that its conclusion was “also consistent with” the purported *Tuscarora* rule. *Id.* at 556; *see also* Skibine, *supra* note 4, at 102-03.

64. 871 F.2d 937 (10th Cir. 1989); *see also* E.E.O.C. v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246, 248-49, 251 (8th Cir. 1993) (discussed *supra* Section II.A, citing and quoting *Cherokee*). *Cherokee* did not indicate whether the employees at issue were tribal members or not and never hinted that such a distinction should make any differ-

while not mentioning *Iowa Mutual*, quoted and applied relevant language from *Merrion* and *Dion*.⁶⁵ *Cherokee* referred dismissively in a footnote to the EEOC's "inapposite" argument based on "the so-called *Tuscarora* rule," and observed in the same footnote that *Coeur d'Alene* and *Phillips* conceded an exception to that purported rule when treaty rights are affected, as they were in *Cherokee*.⁶⁶ But *Cherokee* did not otherwise discuss or cite *Tuscarora*, *Coeur d'Alene*, or *Phillips*, nor did it suggest that it would follow the *Tuscarora-Coeur d'Alene* approach in a case *not* involving treaty rights. On the contrary, it suggested the opposite by correctly noting that the canons embodied in *Merrion* and *Dion* apply even in "nontreaty matters involving Indians."⁶⁷ The battle of the Tenth Circuit panels thus continued in *Cherokee*, which cited *Navajo Forest* prominently in the text,⁶⁸ but, as noted, buried its only mention of *Phillips* in a footnote.⁶⁹

ence, so the decision may fairly be taken as holding that the ADEA does not apply to any tribal government employees. *Cherokee* was a divided panel opinion, but Judge Tacha's dissent did not mention *Tuscarora*, *Coeur d'Alene*, or *Phillips*. Instead, she purported to apply the congressional intent canon. She cited *Navajo Forest* extensively. See *Cherokee*, 871 F.2d at 939-42 (Tacha, J., dissenting); see also *infra* note 69. A student scholar has maintained that Judge Tacha "argued persuasively" that the ADEA must apply to tribes, on the ground that it was originally "passed only three years after Title VII" of the Civil Rights Act of 1964, which contains an express tribal exemption of the sort lacking in the ADEA. Mitchell Peterson, Student Article, *The Applicability of Federal Employment Law to Indian Tribes*, 47 S.D. L. REV. 631, 650 (2002); see also *Cherokee*, 871 F.2d at 941 (Tacha, J., dissenting) (citing 42 U.S.C. § 2000e(b) (2000)). It is a superficially appealing argument, but falls apart upon careful consideration. The fact that Congress may on *some* occasions take *explicit* care to preserve and protect tribal sovereignty is hardly a persuasive reason not to consistently apply the canons—especially where two separate laws are involved. The Supreme Court has applied the canons to federal legislation even where the same related set of laws contains language explicitly protecting tribal sovereignty. See Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L.J. 681, 724-26 (1994) (offering similar and additional reasons not to accept the *Cherokee* dissent's argument).

65. *Cherokee*, 871 F.2d at 938-39.

66. *Id.* at 938 n.3.

67. *Id.* at 939; see also *infra* Subsection III.B.3.

68. See *Cherokee*, 871 F.2d at 938.

69. See *id.* at 938 n.3. The reader will not be amazed to learn that the author of *Cherokee*, Judge McKay, was a member of the *Navajo Forest* panel. There was otherwise no overlap between the *Navajo Forest*, *Phillips*, and *Cherokee* panels. See also *supra* notes 62, 64. Later the same year as *Cherokee*, in *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457 (10th Cir. 1989), another Tenth Circuit panel took a stab. Judge Seymour, the author of *Nero*, had also served on the *Navajo Forest* panel. Judge McKay also participated in *Nero*—and, as noted, in *Navajo Forest* and *Cherokee*. The third member of the *Nero* panel was a visiting judge from the Fifth Circuit who may have felt some hesitation sorting out the Tenth Circuit's conflicting precedents. *Nero* simply acknowledged the existence of the *Tuscarora* statement, which it termed "dictum," and noted that *Cherokee* had "question[ed]" its "continuing vitality . . . in light of . . . *Merrion*." *Id.* at 1462 (internal citation and quotation marks omitted). That was *Nero*'s only significant citation of *Merrion*, and it offered no further discussion. Without resolving the stated conflict, *Nero* then referred to "the *Tus-*

In 2002, the full Tenth Circuit, sitting *en banc*, rendered a judgment in this area in *NLRB v. Pueblo of San Juan*.⁷⁰ One would think this would have provided an opportunity to resolve the foregoing panel conflicts.⁷¹ But the Tenth Circuit somehow managed to leave things even more muddled. The issue in *San Juan* was whether, under the NLRA, an Indian tribe enjoys the same sovereign authority as a state or territory to enact a so-called “right to work” law forbidding “union shop” agreements between employers and labor unions. The NLRA expressly authorizes states and territories to enact such laws, but neither authorizes nor forbids Indian tribes to do so.⁷² Indeed, nothing in the text or legislative history of the NLRA indicates that it has, or was ever intended to have, any application whatsoever to Indian tribes.⁷³

carora rule” and noted that “[l]ower courts have recognized three exceptions to [it].” *Id. Nero* quoted the operative language of *Coeur d’Alene* and cited the 1989 Seventh Circuit decision in *Smart* as added support. *Id.* at 1462-63. *Nero* then proceeded to apply the first element of *Coeur d’Alene* and concluded that the lawsuits at issue, under 42 U.S.C. sections 1981 and 2000d (in relevant part), intruded on the Tribe’s self-government with regard to membership. Thus, since the cited federal laws were silent with regard to tribal rights, they did not support the claims against the Tribe, which were brought by descendants of the “Freedmen Cherokee” seeking tribal membership, voting, and other rights. *Id.* at 1458, 1463. *Nero* never mentioned *Dion*, *Iowa Mutual*, *Navajo Forest*, or *Phillips*. Given *Nero*’s ultimate holding in favor of tribal immunity—a distinctly atypical outcome under the *Tuscarora-Coeur d’Alene* framework—one might argue that its use of that framework was intended, or should be viewed, merely as *arguendo* dictum. The same holding would have resulted even more clearly under a straightforward application of *Merrion* and the canons. Or maybe *Nero* constituted the *third* Tenth Circuit flip-flop in a row on the issue. Who knows?

70. 276 F.3d 1186 (10th Cir. 2002) (en banc).

71. There was certainly an opportunity for a fresh look at the issue. Of the ten participating judges, seven had not participated in any of the four leading Tenth Circuit decisions in the area—*Navajo Forest*, *Phillips*, *Cherokee*, and *Nero*. Those seven were Judges Brorby and Ebel (appointed by President Reagan in 1988), Judge Kelly (appointed by President George H.W. Bush in 1992), Judge Henry (appointed by President Clinton in 1994), and Judges Briscoe, Lucero, and Murphy (appointed by President Clinton in 1995). Chief Judge Tacha (appointed by President Reagan in 1985) had dissented in *Cherokee*, though she had seemed to agree with *Cherokee*’s rejection of the *Tuscarora-Coeur d’Alene* approach. Judge Seymour (appointed by President Carter in 1979) had joined in *Navajo Forest* (rejecting *Tuscarora*), but wrote *Nero*, which seemed to endorse *Tuscarora-Coeur d’Alene* (though perhaps only *arguendo*). Finally, Judge Holloway (appointed by President Johnson in 1968), the author of the *San Juan* majority opinion, had joined in *Phillips* (which endorsed *Tuscarora*). See U.S. Tenth Circuit Court of Appeals, <http://www.ck10.uscourts.gov/chambers/index.php> (last visited May 21, 2008); see also *supra* note 69. One has to speculate that the muddled outcome in *San Juan* may, in part, reflect the divergent philosophies of Judges Holloway, Tacha, and Seymour, reflected in *Navajo Forest*, *Phillips*, *Cherokee*, and *Nero*. The only consistent voting pattern was that the Clinton appointees, all relatively new to the circuit, leaned 3-to-1 in favor of the *Tuscarora-Coeur d’Alene* doctrine. See *infra* note 78.

72. See *San Juan*, 276 F.3d at 1188-91 (construing the NLRA, 29 U.S.C. §§ 158(a)(3), 164(b)).

73. See Wildenthal, *supra* note 1, at 431-34, 445-52.

The 9-to-1 judgment in *San Juan*, upholding the Tribe's authority to enact such a labor ordinance,⁷⁴ was thus certainly correct. The majority's lengthy discussion of the applicable Indian law canons was generally sound, drawing some appropriate support from *Merrion* and *Iowa Mutual*.⁷⁵ The majority did not mention *Coeur d'Alene*, and devoted nearly three pages to an effort to refute the argument that *Tuscarora* undercuts the tribal authority at issue.⁷⁶ But while the *San Juan* majority's discussion of *Tuscarora* was sound in one respect,⁷⁷ it was otherwise weak and failed to respond effectively to the *Tuscarora-Coeur d'Alene* approach, which was embraced by the dissenting judge and even two of the concurring judges.⁷⁸

San Juan distinguished *Tuscarora* as dealing "solely with issues of ownership, not . . . the tribe's sovereign authority to govern the land."⁷⁹ But the Supreme Court has specifically cited and applied *Tuscarora* with regard to tribal sovereign authority over tribal trust lands.⁸⁰ The broader implications of *San Juan*'s invalid distinction between tribal "sovereign" and "proprietary" forms of authority are very troubling.⁸¹ Even while upholding the

74. See *San Juan*, 276 F.3d at 1188, 1191, 1200. But see *id.* at 1201-10 (Murphy, J., dissenting).

75. See *id.* at 1191-98 (discussing and applying the canons); *id.* at 1193, 1194, 1196, 1198, 1200 (citing *Merrion*); *id.* at 1192, 1195 (citing *Iowa Mutual*). The *San Juan* majority did not cite *Dion*, though the dissent did, only for the point that tribal rights "may be abrogated by Congress." *Id.* at 1205 (Murphy, J., dissenting).

76. See *id.* at 1198-1200.

77. The majority recognized that the *Tuscarora* Court did not rely primarily on its disputed statement about general federal laws to support its holding. Rather, *Tuscarora* relied mainly on a straightforward application of the congressional intent canon. See *San Juan*, 276 F.3d at 1198 (citing and quoting *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 118 (1960)); see also *infra* Section III.A.

78. See *San Juan*, 276 F.3d at 1200-01 (Briscoe, J., concurring); *id.* at 1201 (Lucero, J., concurring); *id.* at 1201, 1202-06, 1209-10 (Murphy, J., dissenting). Thus, if *San Juan* was a rejection of the *Tuscarora-Coeur d'Alene* approach, it was, at most, a 7-to-3 decision in that regard. Interestingly, the judges embracing *Tuscarora-Coeur d'Alene* constituted three of the four Clinton appointees on the Tenth Circuit, see *supra* note 71, perhaps because of sympathy for labor interests, possibly similar to a pattern observed in the *San Manuel* cases. See Wildenthal, *supra* note 1, at 527 n.370.

79. *San Juan*, 276 F.3d at 1198.

80. See *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 786 (1984) (quoting *Tuscarora*, 362 U.S. at 118); Wildenthal, *supra* note 1, at 453 n.118. But see *infra* Section III.A (discussing the important respect in which *Escondido* curtailed the precedential validity of *Tuscarora*); Wildenthal, *supra* note 1, at 467-70 (same). *Tuscarora* itself plainly affected tribal sovereign authority over the land at issue, which, although owned in fee simple and not technically a "reservation" according to the *Tuscarora* majority, was the property of the tribe, not of individual members. See *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 124-42 (1960) (Black, J., joined by Warren, C.J., and Douglas, J., dissenting); *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055, 1060 n.17 (2004); Wildenthal, *supra* note 1, at 452-53 nn.117-18; *id.* at 457-58 n.135 (second paragraph of footnote).

81. See *San Juan*, 276 F.3d at 1198-99.

tribe's "sovereign" authority to enact the labor law at issue, *San Juan* suggested in dicta that the NLRA might apply to and limit the tribe's "proprietary capacity" as an "employer or landowner."⁸² This distinction is closely akin to the invalid distinction between "traditional" and "commercial" tribal government functions suggested by *Coeur d'Alene* and recently applied in the *San Manuel* cases.⁸³ Such distinctions regarding governmental activities have been emphatically rejected by the Supreme Court as incoherent and unprincipled, most notably in a landmark 1985 decision handed down just a month after *Coeur d'Alene*.⁸⁴

San Juan also made very inept use of *Merrion*, especially with regard to the central and crucial issue raised by the case—whether and how to apply the Indian law canons to a general federal law. Indeed, *San Juan* misused *Merrion* in a way that boomeranged, perhaps unintentionally, against tribal sovereign interests. In the section of the majority opinion seeking to rebut the NLRB's use of *Tuscarora*, the Tenth Circuit quoted *Merrion*, but only to support the invalid distinction between tribal "sovereign" and "proprietary" interests.⁸⁵

To be sure, *Merrion* did support, in certain respects, the point the Tenth Circuit was making. *Merrion* did emphasize, as *San Juan* phrased it, the importance of a tribe's "interest as a sovereign in regulating economic activity."⁸⁶ Thus, *Merrion*'s strong reaffirmation of the tribal power to tax nonmembers doing business on the reservation certainly supports a tribe's presumptive power to regulate labor relations on the reservation, even when nonmembers are involved.⁸⁷ And there are, of course, *some* valid distinctions between a tribe's, or any government's, "commercial," "proprietary," and other roles—just not the distinction endorsed by *Coeur d'Alene*, *San Juan*, and the *San Manuel* cases. The latter distinction, as we will see, proposes that a tribe loses the presumptive protection of the Indian law canons when it engages in "commercial" or "proprietary" activities. But *Merrion* never suggested anything of the kind. Its strong reaffirmation of the canons suggested precisely the opposite.⁸⁸

Merrion did note that a tribe, like any government, may engage in dealings as a "commercial partner."⁸⁹ For example, it may "sell the right to

82. *Id.* at 1199; *see also* Wildenthal, *supra* note 1, at 518 n.331 (criticizing *San Juan* on this point).

83. *See supra* note 2; *see also* Wildenthal, *supra* note 1, at 511-26.

84. *See infra* Subsection III.C.2 (discussing *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)).

85. *See San Juan*, 276 F.3d at 1200.

86. *Id.*

87. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 136-38 (1982).

88. *See id.* at 149-52.

89. *Id.* at 145.

use . . . land and take from it valuable minerals”⁹⁰ And *Merrion* did admonish against “confus[ing] the Tribe’s role as commercial partner with its role as sovereign.”⁹¹ But the thrust of *Merrion*’s admonition was precisely opposed to the *Coeur d’Alene-San Juan-San Manuel* distinction. The precise point the *Merrion* Court made was that a tribe does *not* lose its sovereign character or authority when it happens to act in a “commercial” capacity. The Court castigated the dissent in *Merrion* for wrongly arguing “that the Tribe has abandoned its sovereign powers simply because it has not expressly reserved them through a contract,” a “[c]onfusi[on]” that “denigrates Indian sovereignty.”⁹² *Merrion* chided the dissent for wrongly “view[ing] tribal authority as little more than a landowner’s contractual right.”⁹³

The whole point was that just because a tribe may sometimes act in a “commercial” or “proprietary” capacity, it *cannot* properly be treated the same as a private commercial actor. It does not lose its sovereign attributes—among which, for an Indian tribe, are the benefits of the Indian law canons of construction. The erroneous thrust of the *Coeur d’Alene-San Juan-San Manuel* distinction, by contrast, is precisely to treat tribes, in certain ways, the same as private actors—to treat tribal government operations labeled “commercial” as presumptively subject to federal law on the same terms as *private* commercial operations.

Quite astonishingly, the *San Juan* majority never even quoted or cited the most obviously relevant passage in *Merrion*, in which the *Merrion* Court applied both the ambiguity and congressional intent canons to general federal legislation.⁹⁴ It is difficult to understand this oversight because the Tenth Circuit in *Cherokee*—a case repeatedly cited by both the majority and the dissent in *San Juan*—had prominently quoted that very passage.⁹⁵ Even more striking, the *San Juan* dissent itself extensively cited and discussed that very passage in *Merrion*—though the dissent’s discussion, as we will see, was remarkably distorted.⁹⁶

90. *Id.* at 146.

91. *Id.* at 145-46.

92. *Id.* at 146.

93. *Id.* at 147.

94. *See id.* at 149-52.

95. *See* E.E.O.C. v. Cherokee Nation, 871 F.2d 937, 939 (10th Cir. 1989) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982), with regard to the ambiguity canon); N.L.R.B. v. Pueblo of San Juan, 276 F.3d 1186, 1192, 1194 (10th Cir. 2002) (en banc) (citing and quoting the very same page of *Cherokee* four separate times); *id.* at 1202, 1203 (Murphy, J., dissenting) (five separate citations to the very same page of *Cherokee*).

96. *See San Juan*, 276 F.3d at 1202 (Murphy, J., dissenting) (citing *Merrion*, 455 U.S. at 152); *id.* at 1204 (Murphy, J., dissenting) (quoting and discussing *Merrion*, 455 U.S. at 149-52); *id.* at 1206 (Murphy, J., dissenting) (citing and discussing *Merrion* generally).

Finally, the *San Juan* majority failed to resolve the deep conflicts over *Tuscarora-Coeur d'Alene* between the Tenth Circuit and other circuits, and among the Tenth Circuit's own prior panel decisions. Its discussion was bafflingly contradictory. *San Juan* first cited with approval the language in *Cherokee* that emphatically reaffirmed the classical Indian law canons.⁹⁷ But then, in its crucial section discussing *Tuscarora*, *San Juan* ignored *Cherokee* and cited the diametrically opposed *Phillips* decision as, in its view, a proper application of *Tuscarora* to a tribe's "property rights."⁹⁸ *San Juan* then cited with approval, as applications of "the *Tuscarora* principle," the decisions by the Eleventh Circuit in *Florida Paraplegic*, the Second Circuit in *Mashantucket*, and the Seventh Circuit in *Smart*.⁹⁹ Perhaps misled by the deceptive citation of *Navajo Forest* in *Phillips*, noted earlier, *San Juan* inexplicably added *Navajo Forest* to this string cite of cases said to embrace the *Tuscarora-Coeur d'Alene* doctrine.¹⁰⁰ Yet, as we have seen, *Navajo Forest* emphatically rejected the alleged *Tuscarora* rule even before *Coeur d'Alene* was decided, declared that *Merrion* had overruled that aspect of *Tuscarora*, and refused to find the federal law at issue applicable to the Tribe—notwithstanding that *Navajo Forest* involved a tribal government activity that *San Juan* classified as "proprietary."¹⁰¹

If Judge Holloway, the author of the *San Juan* majority opinion, hoped to keep everyone happy with this "cite 'em all'" approach, he failed. Even two of the concurring judges criticized the majority's lack of "logical, precedential, or authoritative support" for its approach.¹⁰² They instead endorsed "the *Tuscarora/Coeur d'Alene* analytical framework outlined in Judge [Michael R.] Murphy's dissent."¹⁰³ Indeed, what makes *San Juan*

97. *See id.* at 1192, 1194 (majority opinion) (citing and quoting *Cherokee*, 871 F.2d at 939).

98. *Id.* at 1199 (citing *Phillips Petroleum Co. v. E.P.A.*, 803 F.2d 545, 556 (10th Cir. 1986)). Leaving aside its invalid distinction between "property rights" and "sovereign authority," *San Juan*, to its credit, did point out that *Phillips* was a poor test of tribal sovereignty, given that the affected tribe actually supported the federal regulation at issue. *See id.*

99. *Id.*

100. *Id.*

101. *Id.* *San Juan* threw in an approving footnote citation to *Nero*, which applied the *Tuscarora-Coeur d'Alene* framework (possibly *arguendo*) but concluded that the federal laws at issue did not apply to the Tribe. *See id.* at 1199 n.11; *see also supra* note 69.

102. *San Juan*, 276 F.3d at 1200 n.1 (Briscoe, J., concurring) (citation and internal quotation marks omitted); *see also id.* at 1201 (Lucero, J., concurring) ("I join Judge Briscoe's concurrence."). *Cf. supra* note 71.

103. *San Juan*, 276 F.3d at 1200 (Briscoe, J., concurring); *see also id.* at 1201 (Lucero, J., concurring) ("I join Judge Briscoe's concurrence."); *supra* note 78. Given this Article's strong criticism of Judge Murphy's analysis, it is perhaps well to note that he should not be confused with Judge Diana E. Murphy of the neighboring Eighth Circuit Court of Appeals, also appointed by President Clinton (a year earlier, in 1994). *See supra* note 71; U.S. Court of Appeals for the Eighth Circuit, <http://www.ca8.uscourts.gov/newcoa/judge.htm> (last visited May 21, 2008). As far as I know, they are unrelated.

such a maddeningly bungled opportunity is that the majority opinion, while reaching the correct result, failed to coherently refute Judge Murphy's alarmingly aggressive revival of the *Tuscarora-Coeur d'Alene* doctrine.

Despite *San Juan*'s specific outcome, given the majority's own nods in favor of *Tuscarora-Coeur d'Alene*—notwithstanding its coy refusal to mention *Coeur d'Alene* itself—*San Juan* may turn out to be an important advance for that doctrine. It bears a remarkable similarity to the D.C. Circuit's *San Manuel* opinion, which was similarly muddled and also coyly denied embracing *Coeur d'Alene*.¹⁰⁴ It may be almost irresistible for future courts to clean up the mess left by such opinions by turning to the seductive simplicity, brevity, and clarity of *Coeur d'Alene*. My 2007 article, and this one, however, point out that the *Supreme* Court has all along provided a clear and simple alternative.

One hesitates to devote further discussion to the lone dissent in a 9-to-1 circuit court decision. But as noted above, in terms of broader substance, *San Juan* was really a 7-to-3 decision. Judge Murphy's dissent is potentially influential, and some aspects of it simply cannot go unexamined.¹⁰⁵

104. See Wildenthal, *supra* note 1, at 474-75, 502-11.

105. Several aspects of Judge Murphy's dissent do not seem worthy of extended treatment in the text of this Article, yet should not be overlooked. First, he echoed the Second Circuit's scare tactic in *Mashantucket*, suggesting that a rigorous application of the Indian law canons would somehow threaten the supremacy of federal law. He claimed, preposterously, that under the *San Juan* majority's approach, "tribes will now have *unfettered* power to enact ordinances that directly conflict with any federal statute of general application." *San Juan*, 276 F.3d at 1205 (Murphy, J., dissenting) (emphasis added). But as noted earlier in response to *Mashantucket*, federal supremacy is hardly even dented by merely requiring evidence that Congress act *intentionally* in imposing whatever "fetters" it may choose upon tribal powers.

Equally false was Judge Murphy's contention that the majority's approach "effectively bestows upon Indian tribes sovereign powers far greater than those possessed even by the states." *Id.* States and tribes enjoy distinct and limited forms of sovereignty, and each form has some attributes the other lacks. But the states, unlike the tribes, are *not* generally at the mercy of Congress's good intentions. The states enjoy far more secure *constitutional* protections for their sovereign rights and their very existence. Compare, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (enforcing constitutional limits on Congress's ability to override state sovereign immunity, even regarding a lawsuit brought by a sovereign Indian tribe), with *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 757-60 (1998) (discussing Congress's plenary power to limit or abrogate tribal sovereign immunity whenever and however it wishes); see also *Printz v. United States*, 521 U.S. 898 (1997) (enforcing constitutional rule protecting states against commandeering of their officials by the federal government); *New York v. United States*, 505 U.S. 144 (1992) (same). Furthermore, even where constitutional constraints do *not* protect state sovereignty, the *Supreme* Court has enforced a "plain statement" rule—exceeding the rigor of the comparable 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. *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (internal citations and quotation marks omitted); see also, e.g., *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 495 (7th Cir. 1993) (Posner, J.). Nothing in the *San Juan* majority's decision or opinion can even re-

He wasted no time advertising his refusal to respect the most elementary principles of American Indian law. The very first paragraph of his *San Juan* dissent falsely asserted that the majority “conclude[d] . . . that Congress, by its silence, implicitly granted Indian tribes the right to enact [right-to-work] laws when it passed § 14(b) [of the NLRA].”¹⁰⁶ First of all, that statement brazenly misrepresented what the majority, rightly or wrongly, actually said and held.¹⁰⁷ But more importantly, it misleadingly sought to frame the en-

motely be construed to question these advantageous protections for state as opposed to tribal sovereignty—far less to elevate tribes *above* the states. Quite the contrary. As noted earlier in the text, *San Juan* merely construed a federal law to allow tribes the *same* legislative choice as the states, in one narrow area. Judge Murphy was simply making it up as he went along.

Still more ludicrous was Judge Murphy’s claim that the majority implied that tribes could pass “legislation declaring [their] members to be exempt from all federal tax laws,” and that such tribal legislation “would effectively preempt the application of all federal tax laws until Congress remedied the situation by expressly including Indian tribes within the reach of the federal tax laws.” *San Juan*, 276 F.3d at 1205 (Murphy, J., dissenting). He huffed and puffed that “[t]his certainly cannot be the rule.” *Id.* No, indeed, it is not. Rightly or wrongly, it had not been the rule for more than 130 years. See *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1871); see also Wildenthal, *supra* note 1, at 434 n.59 (citing authorities supporting the longstanding principle that the Indian law canons may be trumped by the “presumption against unexpressed exemptions from federal taxation”) (internal quotation marks omitted); *id.* at 468 n.170 (same). Judge Murphy must have been fully aware of this principle, because he (mis)cited *Chickasaw Nation v. United States*, 534 U.S. 84 (2001), as allegedly supporting the *Tuscarora-Coeur d’Alene* doctrine. See *San Juan*, 276 F.3d at 1209-10 (Murphy, J., dissenting). In fact, the Supreme Court in *Chickasaw* never even cited *Tuscarora* or *Coeur d’Alene*, instead expressly reaffirming that “the canon that assumes Congress intends its statutes to benefit the tribes is offset by the canon that warns us against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed.” *Chickasaw*, 534 U.S. at 95. The *San Juan* majority, far from suggesting that tribes could evade federal taxes, expressly acknowledged *Chickasaw*’s reaffirmation of the specialized tax law canon. *San Juan*, 276 F.3d at 1196. Judge Murphy’s misrepresentation of what the majority held was outrageously false. He went on to describe the majority as distinguishing *Chickasaw* only “on the basis that it did not involve a tribe’s power to enact and enforce laws,” *id.* at 1209 (Murphy, J., dissenting); see also *id.* at 1196-97, selectively ignoring the fact that the majority *also*, as noted, distinguished *Chickasaw* on the basis of the tax canon. One can only marvel at Judge Holloway’s restraint. He did not comment on the dissent.

106. *San Juan*, 276 F.3d at 1201 (Murphy, J., dissenting) (first emphasis in original) (second emphasis added). Judge Murphy repeated the point for emphasis. See *id.* (“Because I disagree with the majority’s . . . conclusion that § 14(b) implicitly granted Indian tribes the same power to enact right-to-work laws . . . I respectfully dissent.”) (emphasis added).

107. See, e.g., *id.* at 1191 (the majority, at the outset of its analysis, framing “the central question here,” in relevant part, as “whether Congress in enacting §§ 8(a)(3) and 14(b) of the NLRA . . . intended to strip Indian tribal governments of this authority as a sovereign”) (emphasis added; internal citations omitted); *id.* at 1197 (“What Congress has not taken away by § 8(a)(3) it need not give back (by § 14(b)) in order for the tribe to continue to have authority to pass a right-to-work law.”) (emphases added); *id.* at 1198 (the majority concluding its relevant analysis by stating, “When Congress enacted § 14(b), it did not grant new authority to states and territories, but merely recognized and affirmed their

tire case with a profoundly false premise. Indian tribes have never needed Congress to “grant” them any authority whatsoever regarding labor relations on their own lands. They had and still have such authority—as part of their residual, inherent sovereignty—*unless and until* it may have been, or may yet be, *taken away* by Congress. There is no more basic hornbook principle of Indian law. Judge Murphy is free to advocate rejection of such principles if he disagrees with them, but if so, he should be honest enough to say so directly. And as a federal appellate court judge he is, in any event, bound to follow binding Supreme Court precedents enunciating such principles.¹⁰⁸

Judge Murphy’s failure to grasp—or refusal to accept—the core meaning of the Indian law canons becomes clear upon dissecting his astonishingly misleading discussion of *Merrion*.¹⁰⁹ He claimed that *Merrion* “clearly engaged in the very analysis repudiated by the majority in this case.”¹¹⁰ He was referring to the *San Juan* majority’s argument that the tribe’s “sovereign power to govern . . . can never be divested by implication.”¹¹¹ Judge Murphy insisted that “*Merrion* clearly stands for the proposition that Congress *can* divest an Indian tribe of a ‘power of self-government’ by implication.”¹¹² He proceeded to the bizarre conclusion that “*Merrion* . . . stand[s] for the proposition that the *Tuscarora/Coeur d’Alene*

existing authority. Congress’ silence as to the tribes can therefore hardly be taken as an affirmative *divestment* of their *existing* general authority”) (emphases added; internal citation and quotation marks omitted).

108. See, e.g., *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978); see also, e.g., COHEN, *supra* note 10, at 206 (§ 4.01[1][a]) (“Perhaps the most basic principle of all Indian law, supported by a host of decisions, is that those powers lawfully vested in an Indian nation are not, in general, delegated powers granted by express acts of Congress, but rather ‘*inherent powers of a limited sovereignty which has never been extinguished*.’”) (quoting *Wheeler*, 435 U.S. at 322-23) (*Wheeler* in turn quoted an earlier edition of the *Cohen Handbook*; the indicated emphasis does not appear in the cited 2005 edition of *Cohen* but reflects the actual emphasis in the earlier edition of *Cohen* and in *Wheeler* itself). Judge Murphy might protest that he did in fact proceed to pay lip service to this principle. See *San Juan*, 276 F.3d at 1202 (Murphy, J., dissenting) (restating the NLRB’s argument as being “that the Pueblo’s power has been divested by the exercise of congressional plenary authority over Indian tribes”). But why, then, begin his opinion with such a misleading attempt to falsely frame the issue? Why repeat the false point for emphasis at the very outset? See *supra* note 106. Judge Murphy’s later, grudging concession of the correct principle is not exculpatory. It merely removes any defense of mistake or ignorance.

109. See *San Juan*, 276 F.3d at 1202 (Murphy, J., dissenting) (citing *Merrion*, 455 U.S. at 152); *id.* at 1204 (Murphy, J., dissenting) (quoting and discussing *Merrion*, 455 U.S. at 149-52); *id.* at 1206 (Murphy, J., dissenting) (citing and discussing *Merrion* generally).

110. *Id.* at 1204.

111. *Id.* Judge Murphy did not, of course, refer to the majority’s contradictory endorsement (at other points and in other respects) of the *Tuscarora-Coeur d’Alene* approach that he himself favored. With regard to *those* aspects of the majority opinion, of course, I myself contend that the majority “repudiated” *Merrion*’s analysis.

112. *Id.* (quoting *Merrion*, 455 U.S. at 152) (emphasis added).

analysis should be applied to determine whether Congress has, by implication, divested an Indian tribe of any powers it retains.”¹¹³ Yet how could this be, given that *Merrion* never even cited *Tuscarora*—it predated *Coeur d’Alene*—and that *Merrion* reaffirmed canons diametrically opposed to the *Tuscarora-Coeur d’Alene* approach?

The majority’s argument dismissed by Judge Murphy was a perfectly accurate and commonsensical summary of the canons reaffirmed by *Merrion*. The majority’s point was that mere implications or ambiguities in statutory text and related evidence cannot, *standing alone*, limit tribal sovereignty. The canons require either explicit statutory text or comparably strong and specific evidence of congressional intent. They also require that any ambiguities and doubts be resolved in favor of the tribe. The relevant passage in *Merrion* states the following key points: (1) “Before reviewing th[e] argument” in *Merrion*, which was “that Congress *implicitly* took away th[e] [tribal] power [at issue],” the Court stated that “we reiterate here our admonition . . . [that] ‘a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of *legislative intent*.’”¹¹⁴ (2) The parties opposing tribal power “cite no *specific* federal statute restricting Indian sovereignty.”¹¹⁵ (3) “[I]f there were *ambiguity* on th[e] [relevant] point, *the doubt would benefit the Tribe*, for ‘[a]mbiguities in federal law have been construed generously’ [to favor tribal sovereignty]”¹¹⁶

Ironically, Judge Murphy seized on *Merrion*’s ultimate conclusion in favor of tribal power—“find[ing] *no* ‘clear indications’ that Congress ha[d] implicitly deprived the Tribe of its power”¹¹⁷—to argue that *Merrion* “did not conclude that Congress could *never* divest a tribe of such powers by implication.”¹¹⁸ The latter point is literally correct, but only in a narrow, irrelevant sense that did not support Judge Murphy’s tendentious argument. An *implicit* divestiture of tribal power would, of course, include any divestiture not accomplished by *explicit* statutory language. The Court has obviously not required that divestitures *only* occur explicitly as opposed to implicitly. If it had adopted any such rule, there would be no need for the can-

113. *Id.* at 1206. My ellipsis in the text removes, for brevity and clarity, Judge Murphy’s assertion that the Tenth Circuit decision in *Nero* also “stand[s] for the proposition that the *Tuscarora/Coeur d’Alene* analysis should be applied.” *Id.* He was arguably correct as to *Nero*. See *supra* note 69. My concern is with his treatment of the Supreme Court decision in *Merrion*.

114. *Merrion*, 455 U.S. at 149 (first emphasis in original) (second emphasis added; internal citation omitted).

115. *Id.* at 151 (emphasis added).

116. *Id.* at 152 (emphases added; internal citation omitted).

117. *Id.* (emphasis added here), *quoted in San Juan*, 276 F.3d at 1204 (Murphy, J., dissenting).

118. *San Juan*, 276 F.3d at 1204 (Murphy, J., dissenting) (emphases in original).

ons in their current form—certainly no need for the congressional intent canon. The Court could simply use an explicit “plain statement” rule, obviating any need to inquire into other evidence of intent.¹¹⁹

The crucial point is that, while implicit divestitures can occur, implications *alone* are never enough. If all one has are implications—such as those derived from broad language in a general federal law not specifically clarifying its possible impact on tribal powers—there would always be ambiguity and doubt, and the issue would then be properly resolved in favor of the tribe. 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. The *Tuscarora-Coeur d’Alene* approach is utterly different. With regard to general laws lacking any explicit statement regarding tribal rights, their broad language and implications alone—*without* any further evidence of intent—will *often* suffice to override such rights, unless the tribe bears the burden of showing some specific legislative intention or legal protection to the contrary.

There is something very troubling about Judge Murphy’s extended analysis, citations, and quotations of this crucial passage in *Merrion*. During this discussion of *Merrion*, he somehow avoided any mention of the fact that it reaffirmed and applied to general federal legislation—in the very passage under discussion—the congressional intent canon and the ambiguity canon.¹²⁰ An unsuspecting reader would leave Judge Murphy’s discus-

119. As discussed in note 105, *supra*, the Court has adopted precisely such a simplified “plain statement” rule with regard to constitutionally permissible congressional impositions on *state* sovereignty. By contrast, *United States v. Dion*, 476 U.S. 734 (1986), is a good example of a case in which the Supreme Court held that a federal law was properly construed to limit a *tribal* right, despite the lack of any explicit statutory language to that effect. If this was the point Judge Murphy was trying to make, why not just cite *Dion*? He had earlier, in fact, cited the Tenth Circuit *Cherokee* decision for this basic point, that a congressional limitation of tribal sovereignty may be accomplished *either* by explicit statutory language *or* by a showing of congressional intent. See *San Juan*, 276 F.3d at 1202 (Murphy, J., dissenting) (citing *E.E.O.C. v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989)). Perhaps he declined to cite *Dion* on this point because then it would have been difficult to avoid discussing what kind of evidence the *Supreme* Court has required as a *substitute* for explicit text. *Dion* found a divestiture only on the basis of clear, strong, and specific evidence of congressional intent (including legislative history and some elements of the statutory text). See Wildenthal, *supra* note 1, at 437–44 (discussing *Dion*). Judge Murphy did, in fact, later cite *Dion*. But he avoided any mention of *Dion*’s powerful restatement and application of the congressional intent canon. He cited it only for the point that tribal rights “‘may be abrogated by Congress.’” *San Juan*, 276 F.3d at 1205 (Murphy, J., dissenting). He avoided any mention of *how* and under *what legal standard* that was found to occur in *Dion*. The whole point of Judge Murphy’s discussion seemed to be to obscure the actual governing canons.

120. See *San Juan*, 276 F.3d at 1204 (Murphy, J., dissenting) (quoting and discussing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149–52 (1982)). His only mention on this page of the words “intent” or “ambiguity” or their variations, was to paraphrase *Merrion* as

sion with the impression that *Merrion* endorsed the *Tuscarora-Coeur d'Alene* approach and countenanced the erosion of tribal sovereignty based merely on implications. In short, most of his readers—including most lawyers lacking a thorough background in Indian law—will be gravely misled.

C. The Cohen and Canby Treatises

The leading scholarly treatise on American Indian law, the venerable *Handbook* based on the pioneering work of Felix Cohen,¹²¹ gives prominent and respectful treatment to the *Tuscarora-Coeur d'Alene* doctrine in three crucial sections of the latest revised edition published in 2005. The editors may have felt they had little choice in the matter, given, as we have seen, the remarkable ascension of the *Coeur d'Alene* doctrine in the lower courts in the years since the previous edition appeared in 1982, before *Coeur d'Alene* was decided.¹²²

Cohen discusses the canons in Chapter 2, Section 2.02, and in Section 2.03 the treatise discusses their interaction with “federal laws of general applicability.”¹²³ While neither section cites *Coeur d'Alene* itself, Section 2.03 discusses *Tuscarora* prominently in the text,¹²⁴ and the footnotes repeatedly cite lower court decisions embracing the *Coeur d'Alene* approach.¹²⁵ Indeed, Section 2.03, together with other sections of Cohen, is

“conclud[ing] that [one federal] statute [it discussed] contained express language indicating congressional intent that it *not* apply to Indian tribes.” *Id.* (emphasis added) (citing, but not quoting, *Merrion*, 455 U.S. at 150). It is true that *Merrion*, on the cited page, quoted certain statutory language that did expressly preserve certain tribal rights. But *Merrion* never suggested that such express language was necessary for the tribe to make any showing of *pro-tribal* congressional intent. Yet that seems to be exactly what Judge Murphy’s selective citation and paraphrasing were misleadingly designed to suggest. Note that his paraphrasing of *Merrion* on this point closely tracks the third element of *Coeur d'Alene*, which, as noted earlier, is the exact mirror opposite of the classical congressional intent canon. *See supra* p. 549. *Merrion* did not phrase its analysis or conclusion in any such manner.

121. COHEN, *supra* note 10; *see also* Wildenthal, *supra* note 1, at 418 n.13 (noting the value and stature of the *Cohen Handbook*); *id.* at 483 (same).

122. *Cf.* COHEN, *supra* note 10, at ix–xxiii (foreword to 2005 edition and introduction to 1982 edition).

123. *See id.* § 2.02, at 119–28, § 2.03, at 128–32.

124. *See id.* § 2.03, at 128–32. While Cohen’s discussion of *Tuscarora* is, appropriately, somewhat critical, and notes that *Tuscarora* should have limited precedential force, *see id.* at 128–29, it misses the Supreme Court’s later specific curtailment of *Tuscarora*, as discussed in Section III.A and Subsection III.C.1. *See id.* at 128–29; *see also* Wildenthal, *supra* note 1, at 482 & n.216.

125. *See* COHEN, *supra* note 10, at 129–32 nn.96, 98, 101, 105–10, 112 & 118–23. Cohen thrice cites the decision in *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980), which *Coeur d'Alene* quoted and relied upon. *See supra* note 8; COHEN, *supra* note 10, at 129 nn.96 & 101, 130 n.105. Cohen also takes care to cite the (relatively few) lower court decisions tending to go against the *Tuscarora-Coeur d'Alene* approach, such as the Tenth Circuit’s decisions in *Cherokee*, *id.* at 129 n.100, and *Navajo Forest*, *id.* at 131 n.110, and its

easily read to suggest that the canons do not generally apply to general federal laws.¹²⁶ To be sure, Section 2.03 does cite *Dion*, a Supreme Court decision applying the canons to general federal legislation. But it does so only in footnotes as supporting an *exception* to the purported general *rule* of the *Tuscarora-Coeur d'Alene* doctrine.¹²⁷ Neither Section 2.02 nor Section 2.03 makes any mention of *Merrion* or *Iowa Mutual*, the two other Supreme Court cases of the 1980s that applied the canons to general federal legislation.¹²⁸

Cohen, in Chapter 10, asserts that the *Tuscarora-Coeur d'Alene* doctrine is the governing rule with regard to the application of federal environmental laws in Indian country. Cohen simply cites *Coeur d'Alene* and Section 2.03 to support that sweeping conclusion.¹²⁹ Surprisingly, nowhere in Chapter 10 does Cohen cite *Dion*, even though *Dion* is a Supreme Court decision postdating *Coeur d'Alene* and more closely on point. *Dion*, unlike *Coeur d'Alene*, actually involved the application of a federal environmental law in Indian country.¹³⁰ But Cohen's treatment appears to reflect an assessment—probably sound and realistic—that most lower courts are, in fact, more likely to follow and rely upon *Coeur d'Alene* in this area. Likewise, in Chapter 21, Cohen treats *Coeur d'Alene* as the guiding authority on federal labor and employment laws in Indian country.¹³¹

Judge William Canby's respected deskbook on American Indian law similarly acknowledges the leading role of *Coeur d'Alene*. Canby, as a senior Ninth Circuit judge, is no doubt familiar with *Coeur d'Alene*'s rising

muddled decision in *San Juan*, *id.* at 129 n.98, 131 nn.108-09 & 112. The point is not to suggest that there is anything inappropriate in Cohen's citations, but rather to illustrate the remarkable influence that the *Tuscarora-Coeur d'Alene* doctrine has achieved in the lower courts.

126. See Wildenthal, *supra* note 1, at 480-86.

127. Compare COHEN, *supra* note 10, at 131 (referring to "the *Tuscarora* rule"), with *id.* at 129-30 nn.102-03 (citing *United States v. Dion*, 476 U.S. 734 (1986)); see also Wildenthal, *supra* note 1, at 484.

128. Section 2.02 also cites *Dion*, and four other cases during the past century that have applied the canons or similar analysis to general federal laws: *United States v. Winans*, 198 U.S. 371 (1905), *Winters v. United States*, 207 U.S. 564 (1908), *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), and *Idaho v. United States*, 533 U.S. 262 (2001). But Section 2.02 does not focus on the issue of interpreting general federal laws and does not mention how any of these cases bear on that point. None of them, except *Dion*, is mentioned in Section 2.03. See Wildenthal, *supra* note 1, at 479 & n.207, 483 n.217, 484, 489-502.

129. See COHEN, *supra* note 10, § 10.01[2][a], at 775 & n.6.

130. See Wildenthal, *supra* note 1, at 437-44, 485-86. *Dion* is cited several times in chapters 17 and 18 dealing with natural resources and hunting, fishing, and gathering rights. See COHEN, *supra* note 10, at TC-17 (entry for *Dion* in the Table of Cases).

131. See COHEN, *supra* note 10, at 1295-1300 (§ 21.02[5][c][i]); see also Wildenthal, *supra* note 1, at 485.

influence over the years.¹³² His treatise's section on "federal regulation in Indian country" describes it as setting forth "[t]he most widely accepted rule" in that area.¹³³ This section also cites numerous other lower court cases following the *Tuscarora-Coeur d'Alene* approach, but only two Supreme Court decisions apart from *Tuscarora* itself—which makes its sole appearance in Canby's treatise here.¹³⁴ One of the cited Supreme Court cases is *Dion*, which Canby—similarly to Cohen—treats as illustrating merely an *exception* to the *Tuscarora-Coeur d'Alene* rule.¹³⁵

III. THE DEMONSTRABLE ERROR OF *COEUR D'ALENE*

A. Misusing *Tuscarora*

The Ninth Circuit in *Coeur d'Alene* conceded that the *Tuscarora* statement on which it relied has been viewed by some as "dictum."¹³⁶ This statement was, in fact, an alternative—and unnecessary—ground for the

132. Judge Canby's own jurisprudence has tended to show more sympathy for tribal sovereignty. See, e.g., *Rumsey Indian Rancheria v. Wilson*, 64 F.3d 1250, 1252-55 (9th Cir. 1995) (Canby, J., dissenting from denial of rehearing en banc) (protesting an interpretation of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21, that had the effect of subjecting tribal gaming enterprises to more intrusive state control), *amended on denial of reh'g*, 99 F.3d 321 (9th Cir. 1996); 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, 116-17 (2002) (discussing *Rumsey*). I am not aware of any judicial opinion by Judge Canby discussing the *Tuscarora-Coeur d'Alene* doctrine, which would be binding upon him as Ninth Circuit precedent in any event.

133. WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 282 (4th ed. 2004); see also *id.* at 282-86.

134. See *id.* at 283 (citing *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960)).

135. See *id.* at 285 (citing *Dion* to support the statement that "[e]ven when a treaty expressly conflicts with a federal statute of general application, the statute will apply if Congress appears to have intended to override treaty rights"). Canby fails to clarify that *Dion* made no mention of *Tuscarora* or *Coeur d'Alene* and did not apply anything resembling that approach. The *Dion* Court did not view treaty rights as the basis for an affirmative defense against a general rule of applicability of general federal laws. Rather, *Dion* applied a strong version of the congressional intent canon as the main rule. *Dion* also cannot properly be viewed as restricted to the treaty rights context. See Wildenthal, *supra* note 1, at 438-40, 495-98. Furthermore, the treaty involved in *Dion* did not, in fact, "expressly conflict[t] with" the general federal law applied in *Dion*. See *infra* Subsections III.B.3, III.C.3. The other Supreme Court case that Canby mentions in this section is, ironically, a case in which the Court effectively curtailed the precedential force of the disputed *Tuscarora* statement about general federal laws, and instead—again—applied the congressional intent canon. See *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984), cited in Canby, *supra* note 133, at 283; see also *infra* Section III.A. Canby's brief citation of *Escondido* does not mention these points.

136. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985).

Supreme Court's holding in *Tuscarora*.¹³⁷ More to the point was that *Coeur d'Alene* simply ignored the *Tuscarora* Court's *other* stated grounds for the holding, which take up considerably more space in the opinion and on which the Court arguably placed more weight. Those other grounds in *Tuscarora* set forth a fully sufficient basis for the Court's holding—a straightforward application of the classical Indian law canon of congressional intent.¹³⁸

Coeur d'Alene justified its selective reliance on the disputed *Tuscarora* statement on the ground that, even if it was dictum, "it is dictum that has guided many of our decisions."¹³⁹ But the Ninth Circuit should have asked whether the Supreme Court has ever drawn any "guidance" from that statement. The answer is no, quite the contrary. Neither up to the time the Ninth Circuit decided *Coeur d'Alene*, nor up to the present day, has the Supreme Court *ever even cited* its own disputed statement in *Tuscarora*.¹⁴⁰

Even more startling, exactly eight months before *Coeur d'Alene* was decided, in the *only* relevant Supreme Court citation of *any* aspect of the majority opinion in *Tuscarora* up to that time, the Court essentially *repudi-*

137. See Wildenthal, *supra* note 1, at 457 & n.135 (discussing the concepts of dictum and holding).

138. See *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 111 (1960) (stating that the plain words of the statute at issue, the Federal Power Act (FPA), 16 U.S.C. §§ 791a, 796(2), "show [how] Congress *intended* the term 'reservations[]' to be understood, and that the "legislative history . . . too, strongly indicates . . . the congressional *intention*" (emphases added); *id.* at 112 ("It is difficult to perceive how congressional *intention* could be more clearly and definitely expressed.") (emphasis added); *id.* (discussing "[f]urther evidence" of what "Congress *intended*") (emphasis added); *id.* at 113 (yet again discussing what "Congress *evidently intended*") (emphasis added); *id.* at 114 (stating that its foregoing discussion "leaves us with no doubt that Congress . . . *intended* to and did confine 'reservations'" to the meaning found by the Court) (emphasis added); *id.* at 118 (noting that the explicit text of the FPA "neither overlooks nor excludes Indians" and indeed "specifically defines and treats with lands occupied by Indians," and that the FPA "gives every indication that, within its comprehensive plan, Congress *intended* to include lands owned or occupied by any person or persons, including Indians") (emphasis added). It should be noted that the *Tuscarora* Court discussed the proper meaning of § 4(e) of the FPA in one part of its opinion, *see id.* at 110-15, and then proceeded to discuss the proper meaning of § 21 of the FPA (in tandem with other statutory provisions) in the following part, *see id.* at 115-24. The famous *Tuscarora* statement about general federal laws appears on page 116 and is paraphrased again in substance on page 120, in the latter part. *See id.* at 116, 120. The Court's analysis of both statutory sections, however, as indicated by the citations above, was fully and sufficiently supported by its discussion of Congress's overall *intent*. The central and crucial summary of the Court's analysis appears on page 118, where it analyzed §§ 4(e) and 21 together (along with §§ 3(2) and 10(e) of the FPA, which specifically referred to Indians), describing the FPA as "a complete and comprehensive plan" and stating: "The Act gives every indication that, within its comprehensive plan, Congress *intended* to include lands owned or occupied by any person or persons, including Indians." *Id.* at 118 (emphasis added).

139. *Coeur d'Alene*, 751 F.2d at 1115.

140. See Wildenthal, *supra* note 1, at 466-71.

ated the disputed *Tuscarora* statement. In *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, a case involving the same federal law as *Tuscarora*, the Supreme Court ignored that statement, never even citing the page on which it appears, and instead cited *only* an aspect of *Tuscarora*'s opinion and reasoning based on the congressional intent canon.¹⁴¹ *Coeur d'Alene* simply ignored or overlooked *Escondido*.

B. Defying *Merrion* (and Much of the Rest of Indian Law)

Escondido is one of at least *twenty-seven* Supreme Court cases, since *Tuscarora* was decided almost fifty years ago, that have reaffirmed the classical Indian law canons while ignoring—and implicitly repudiating—any purported “rule” based on the disputed *Tuscarora* statement. Fifteen of those Supreme Court decisions were already on the books when the Ninth Circuit decided *Coeur d'Alene* at the beginning of 1985. And there are still more Supreme Court precedents, going back to at least 1905, whose relevant guidance *Coeur d'Alene* disregarded.¹⁴² The only one of these cases that *Coeur d'Alene* bothered to respond to—or even cite—was the Supreme Court's decision less than three years earlier in *Merrion v. Jicarilla Apache Tribe*.¹⁴³ And within the space of less than two pages, the Ninth Circuit managed to flagrantly misconstrue, in three different and important ways, *Merrion*'s relevant guidance. *Coeur d'Alene*'s treatment of *Merrion*, like that in Judge Murphy's *San Juan* dissent, was—at best—astonishingly misleading.

1. Defying *Merrion* on Tribal Power Over Non-Indians

The Ninth Circuit in *Coeur d'Alene* argued that the Tribe claimed “far too much” by seeking to “bring within the embrace of ‘tribal self-government’ all tribal business and commercial activity.”¹⁴⁴ In a telling turn of phrase, it added that “[o]ur decisions do not support an interpretation of such breadth.”¹⁴⁵ Rather, “[w]e believe that . . . tribal self-government . . .

141. 466 U.S. 765, 786 (1984) (concluding, with regard to the Federal Power Act, 16 U.S.C. § 796(2), that “‘Congress intended to include lands owned or occupied by any person or persons, including Indians’”) (quoting *Tuscarora*, 362 U.S. at 118) (emphasis added here); see also Wildenthal *supra* note 1 (manuscript at 43-45). *Escondido* was decided May 15, 1984. 466 U.S. at 765. *Coeur d'Alene* was decided January 15, 1985. 751 F.2d at 1113.

142. See Wildenthal, *supra* note 1, at 519 & n.14, 464-66 & n.162 (citing and discussing these twenty-seven post-*Tuscarora* cases); see also *supra* note 128 (discussing *United States v. Winans*, 198 U.S. 371 (1905), and *Winters v. United States*, 207 U.S. 564 (1908)); Wildenthal, *supra* note 1, at 493-94 (also discussing *Winans* and *Winters*).

143. 455 U.S. 130 (1982). *Merrion* was decided January 25, 1982. *Id.*; see also *supra* note 141.

144. *Coeur d'Alene*, 751 F.2d at 1116.

145. *Id.* (emphasis added).

[covers] purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations”¹⁴⁶ The court concluded: “Because the [Coeur d’Alene Tribal] Farm employs *non-Indians* as well as Indians, and . . . is in virtually every respect a normal *commercial* farming enterprise, we believe that its operation . . . is ‘neither profoundly intramural . . . nor essential to self-government.’”¹⁴⁷ Subsection III.C.2 will address the fallacy of *Coeur d’Alene*’s focus on the allegedly “commercial” nature of a tribal government operation. This Subsection considers the fallacy of *Coeur d’Alene*’s cramped conception of tribal sovereignty with regard to non-Indians choosing to do business on tribal lands.

Perhaps, again, the Ninth Circuit should have considered the guidance of the *Supreme Court*’s relevant decisions. *Merrion*, discussed on the very next page of the *Coeur d’Alene* opinion, upheld—as *Coeur d’Alene* itself put it—“the tribal power to tax non-Indians who enter reservations for commercial purposes.”¹⁴⁸ Yet *Coeur d’Alene* introduced that concession with the utterly perplexing claim that “*Merrion* arose in a context very different from the one presented here.”¹⁴⁹ Well, yes, like almost any two cases, *Merrion* and *Coeur d’Alene* can be factually distinguished. *Merrion* involved tribal power to tax those choosing to do business on tribal lands, while *Coeur d’Alene* involved tribal power to regulate the working conditions of those choosing to seek employment with the tribal government on tribal lands. But *Coeur d’Alene* did not even attempt to explain why that distinction should matter.¹⁵⁰ (It does not and should not.) What the Ninth Circuit had insisted, on the previous page, was that *Coeur d’Alene* was *markedly distinguishable* from cases upholding tribal sovereignty *precisely because* it involved “commercial” dealings with “non-Indians.” Yet *Merrion* also, as *Coeur d’Alene* conceded on the very next page, involved “commercial” dealings with “non-Indians.”¹⁵¹

In fact, *Merrion* is merely one in a long line of *Supreme Court* decisions that have made perfectly clear that tribal sovereignty extends far beyond the narrow category of tribal membership rules, inheritance, and “domestic relations”—though few would dispute that the latter matters, among others, are at the core of tribal self-government. A full survey of the cases

146. *Id.* (emphasis added).

147. *Id.* (quoting *United States v. Farris*, 624 F.2d 890, 893 (9th Cir. 1980)) (emphases added here).

148. *Id.* at 1117.

149. *Id.*

150. *Coeur d’Alene*, following its recitation of the fact that *Merrion* involved tribal tax powers, did not say anything about why tax powers should be treated differently. The Ninth Circuit simply offered a brazenly false argument denying that *Merrion* even analyzed the possible impact on tribal sovereignty of general federal legislation. See *id.* But see *infra* Subsection III.B.2.

151. Compare *Coeur d’Alene*, 751 F.2d at 1116, with *id.* at 1117.

would go well beyond the scope of this Article. But one landmark precedent in addition to *Merrion* may usefully be cited—and both cited many more Supreme Court cases. The Court held in 1981—four years before *Coeur d'Alene*—that tribes may regulate, even on reservation lands owned in fee simple by non-Indians, “the activities of nonmembers who enter consensual relationships with the tribe or its members, through *commercial* dealing, contracts, leases, or other arrangements,” as well as any “conduct of non-Indians . . . that . . . threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”¹⁵² The Supreme Court restated in 1987, in *Iowa Mutual*, what any attentive lower court should already have understood in 1985: “Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.”¹⁵³

2. *Defying Merrion on Applying the Canons to General Federal Laws*

It gets worse. *Coeur d'Alene* asserted that *Merrion* “in no way addressed Congress’ ability to modify [tribal] rights through the exercise of its plenary powers.”¹⁵⁴ Instead of venturing to characterize the honesty or dishonesty of that statement, it is better to just quote a bit of *Merrion*: “Because Congress may limit tribal sovereignty, we now review petitioners’ argument that Congress, when it enacted two federal Acts governing Indians and various pieces of federal energy legislation, deprived the Tribe of its authority to impose the severance tax.”¹⁵⁵ The next four pages of *Merrion*—the very pages cited by *Coeur d'Alene*—proceeded to analyze whether, indeed, Congress had exercised its powers in that manner.¹⁵⁶

Now, to be sure, one might nitpick that *Merrion* did not question, and thus in some sense did not “address,” Congress’s ultimate *power* to limit tribal sovereignty. (An acerbic rejoinder to that might be that *Coeur d'Alene*, as noted above, claimed that *Merrion* “in no way addressed” that issue.) But leaving such Talmudic distinctions aside, Congress’s practical “ability” to exercise its undoubted power is surely affected by the analysis applied by the Supreme Court to determine whether and how Congress, in any given case, has in fact exercised such power. And that is exactly what *Merrion* “addressed” in the very pages cited by *Coeur d'Alene*, though you would never know it from the discussion in *Coeur d'Alene*.

152. *Montana v. United States*, 450 U.S. 544, 565-66 (1981) (emphasis added). *Coeur d'Alene* did not cite *Montana*.

153. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (citing *Montana* and two other Supreme Court cases predating *Coeur d'Alene*).

154. *Coeur d'Alene*, 751 F.2d at 1117 (emphasis added).

155. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 (1982).

156. *See id.* at 149-52, cited in *Coeur d'Alene*, 751 F.2d at 1117.

The Ninth Circuit was previewing here the Second Circuit's 1996 diversionary tactic in *Mashantucket*. By keeping the reader's attention focused on Congress's ultimate *power*—a red herring that no one disputed in either case—both courts avoided serious discussion or application of the canons governing how to properly *construe* the relevant Acts of Congress. As noted earlier—the point is absolutely crucial—to use the undoubted supremacy of federal law to obscure the proper role of the canons is utterly perverse and outrageous. That turns American Indian law upside down. The very purpose of the canons, all along, has been to ameliorate and counterbalance Congress's power over Indians.¹⁵⁷

In any event, the very next sentence in *Coeur d'Alene*, following the one quoted at the outset of this Subsection, was only slightly less misleading. The Ninth Circuit claimed that “[u]nlike . . . in this case, the non-Indian petitioners in *Merrion* could point to no statute of general applicability that even appeared to modify the tribe's sovereign power”¹⁵⁸ That statement may, perhaps, be literally true. It very cleverly paraphrased only *Merrion*'s ultimate conclusion on the facts, which was that the petitioners indeed failed, *in the end*, to persuade the Court that the federal laws they cited limited tribal power as they claimed. But the *Merrion* petitioners certainly “could”—and in fact *did*—“point to” federal laws that “appeared,” *or so they argued*, to limit tribal power. The laws they pointed to included one law of “general applicability” not primarily dealing with Indian affairs. And *Merrion*, as discussed in Section II.B with regard to *San Juan*, applied to these laws nothing even remotely resembling the *Tuscarora-Coeur d'Alene* analysis. Rather, *Merrion* applied the classical Indian law canons concerning congressional intent and ambiguity.¹⁵⁹

Coeur d'Alene told us, in effect, that *Merrion* rejected an anti-tribal argument, but it offered nary a hint as to *why* or *how* the Court rejected it, or *under what governing canons of construction*. And *Coeur d'Alene* very misleadingly implied that no general federal laws were even raised in *Merrion* and thus that *Merrion* had no occasion even to consider how such laws might interact with tribal rights and powers. The sentences quoted above marked the end of *Coeur d'Alene*'s discussion of *Merrion* and were followed immediately by a citation of the very pages in *Merrion* refuting what *Coeur d'Alene* said and implied.

Perhaps the Ninth Circuit felt that it satisfied its duty of candor to the public by simply citing the very pages which—upon careful study—expose the profoundly misleading nature of its discussion. One might question whether the Ninth Circuit judges confused their role as neutral oracles of the

157. See *supra* Section II.A (discussing *Mashantucket*).

158. *Coeur d'Alene*, 751 F.2d at 1117.

159. See *Merrion*, 455 U.S. at 152 (discussing the Natural Gas Policy Act, 15 U.S.C. § 3320(a), (c)(1)); see also *id.* at 149-52; Wildenthal, *supra* note 1, at 476-77.

law with the zealous and slanted advocacy of a lawyer pushing the edge of the envelope in arguing a point for his or her client. Perhaps, as a cynic might suspect, the Ninth Circuit counted on the fact that few readers were or are likely to look up and read the cited pages in *Merrion*, and that even experienced lawyers who do so might have some difficulty piecing together exactly how misleading *Coeur d'Alene's* discussion really is, unless they happen to be well-versed in the arcane field of American Indian law.

In any event, one can only admire the nerve it took for the Ninth Circuit in *Coeur d'Alene* to assert, with laughable irony: “We believe that [the Tribe’s] argument misconstrues the Supreme Court’s decision [in *Merrion*].”¹⁶⁰

3. *Defying Merrion on the Significance of Treaty Rights*

There’s more. The second element of *Coeur d'Alene*—the so-called “treaty exception”—focuses on whether the application of a general federal law would abrogate an Indian treaty right.¹⁶¹ Indian treaty rights are certainly very important and often provide the most secure form of protection for tribal sovereignty. But *Coeur d'Alene* improperly suggested that the many federally recognized Indian tribes lacking treaties with the United States therefore also lack the full basic measure of tribal sovereignty. That is simply wrong as a matter of hornbook Indian law.¹⁶² More to the point for present purposes, *Coeur d'Alene's* application of its treaty exception again reveals the Ninth Circuit’s contemptuous disregard for *Merrion*—and for much of the rest of the Supreme Court’s Indian law jurisprudence, going back 176 years to the time of Chief Justice John Marshall.

One must be skeptical of *Coeur d'Alene's* self-description as embodying “three exceptions” to the purported “rule” of *Tuscarora*.¹⁶³ That wrongly implies that *Coeur d'Alene* is somehow protective of tribal sovereignty. While its “exceptions” may in a sense moderate the impact of the *Tuscarora* “rule,” *Coeur d'Alene* and its three elements, in realistic and practical terms, operate together with the disputed *Tuscarora* statement to form a single unified doctrine profoundly subversive of tribal sovereignty and the Indian law canons of construction. The “treaty exception” illustrates this point with particular force.

Coeur d'Alene completely ignored *Merrion* during the course of its treaty discussion. Yet the Ninth Circuit could not have been unaware of *Merrion's* bearing on the issue. The Ninth Circuit cited the fact that the Coeur d'Alene Tribe lacks a treaty with the United States as a key support

160. *Coeur d'Alene*, 751 F.2d at 1117 (emphasis added).

161. *See id.* at 1116.

162. *See Wildenthal, supra* note 1, at 425-27, 438-40, 495-98.

163. *See Coeur d'Alene*, 751 F.2d at 1116.

for its conclusion that the Tribe was subject to the federal law at issue.¹⁶⁴ It distinguished the Tenth Circuit's *Navajo Forest* decision on this ground.¹⁶⁵ *Coeur d'Alene* even went so far as to state: "To whatever extent [*Navajo Forest*] [was] not tied to the existence of an *express* treaty right, we disagree with it."¹⁶⁶ That is quite fascinating, because it is perfectly clear that to whatever extent *Navajo Forest* went beyond treaty rights, and relied on generic "principles of tribal sovereignty,"¹⁶⁷ that was because the Tenth Circuit recognized the binding force of *Merrion*.¹⁶⁸ By simply ignoring *Merrion* on this point, the Ninth Circuit neatly bypassed the inconvenient fact that it could not properly decline to follow a *Supreme* Court precedent in the way that it could a decision from a sister circuit.

What *Navajo Forest* recognized—on a page cited by *Coeur d'Alene*—was that "*Merrion* dealt with an Indian Reservation created by executive order"¹⁶⁹ *Navajo Forest* went on to note that no treaty with the Jicarilla Apache, the tribe involved in *Merrion*, had ever come into force.¹⁷⁰ As the *Supreme* Court in *Merrion* put it, in language that *Coeur d'Alene* studiously ignored: "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."¹⁷¹

The problem goes even deeper. *Coeur d'Alene*'s treaty exception does not just threaten the tribal sovereignty of Indian Nations lacking treaty protections—though it certainly does that. It also threatens the scope, interpretation, and viability of treaty protections themselves. *Coeur d'Alene* distinguished *Navajo Forest* by pointing to the fact that the Navajo Nation happens to have a treaty "*explicitly* protect[ing]" the Nation's "right to exclude non-Indians" from its lands.¹⁷² By contrast, the *Coeur d'Alene* Tribe could not "point to any document . . . that *specifically* guarantees the Tribe's right to exclude non-Indians."¹⁷³ And as noted above, *Coeur d'Alene* declined to follow *Navajo Forest* to the extent that the Tenth Circuit's reasoning was not based on "an *express* treaty right."¹⁷⁴

164. See *id.* at 1117.

165. See *id.* (discussing *Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709 (10th Cir. 1982)); see also *supra* Section II.B.

166. *Coeur d'Alene*, 751 F.2d at 1117 n.3 (emphasis added).

167. *Navajo Forest*, 692 F.2d at 712, quoted in *Coeur d'Alene*, 751 F.2d at 1117 n.3.

168. See *Navajo Forest*, 692 F.2d at 712-13 (discussing *Merrion*).

169. *Navajo Forest*, 692 F.2d at 712; see also *supra* note 167.

170. See *Navajo Forest*, 692 F.2d at 713.

171. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 134 n.1 (1982) (emphases added).

172. *Coeur d'Alene*, 751 F.2d at 1117 (emphasis added).

173. *Id.* (emphasis added).

174. *Id.* at 1117 n.3 (emphasis added).

Coeur d'Alene's casual rejection of the Tribe's right to exclude nonmembers shows, again, the staggering degree to which the Ninth Circuit simply thumbed its nose at binding Supreme Court precedent. *Merrion*, which involved a tribe with no treaty, *nor any explicit protection whatsoever of the right to exclude*,¹⁷⁵ nevertheless emphatically reaffirmed the ancient hornbook principle that *all* tribes presumptively retain that right as an element of inherent sovereignty. "Nonmembers who lawfully enter tribal lands remain subject to the tribe's *power* to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct" ¹⁷⁶

Coeur d'Alene's insistence that tribes present "explicit," "specific," or "express" treaty language to support tribal treaty rights has been echoed in some later cases applying the *Tuscarora-Coeur d'Alene* doctrine. For example, the Tenth Circuit in the 1986 *Phillips* decision held that the *Tuscarora* "rule" can only be overcome, pursuant to the treaty exception, "where a tribe raises a *specific* right . . . which is in conflict with the general law to be applied," and that "no such right" was "demonstrated" in that case.¹⁷⁷ In the 1989 *Smart* decision, the Seventh Circuit—like *Coeur d'Alene* itself—ruled against a tribal sovereignty claim because the relevant treaties did "not *delineate specific* rights in a manner comparable to the treaty in *Navajo Forest*" ¹⁷⁸

The Seventh Circuit, while ultimately ruling in favor of a tribal claim in *Reich v. Great Lakes Indian Fish & Wildlife Commission*, similarly found no "treaty right to employ law enforcement officers on any terms."¹⁷⁹ Judge Posner's opinion in *Great Lakes* stated that "one searches the treaties in vain for such a right," and noted that while the treaties at issue conferred

175. The original 1887 executive order establishing the Jicarilla reservation not only did not specify any right to exclude nonmembers, it expressly protected the rights of nonmember "bona fide settler[s]." *Merrion*, 455 U.S. at 161 n.3 (Stevens, J., dissenting) (quoting the 1887 order); see also *id.* at 133-34 n.1 (majority opinion) (outlining the series of executive orders defining the reservation boundaries). Of course, the 1887 order does contain language that, properly construed under the Indian law canons, supports the right to exclude nonmembers who were *not* "bona fide settlers"—namely, the provision that the designated land be "set apart as a reservation for the use and occupation of the Jicarilla Apache Indians." *Id.* at 161 n.3 (Stevens, J., dissenting) (quoting the 1887 order).

176. *Id.* at 144 (emphasis in original); see also COHEN, *supra* note 10, § 4.01[2][e], at 219-20; Wildenthal, *supra* note 1, at 506-07 & n.289.

177. *Phillips Petroleum Co. v. E.P.A.*, 803 F.2d 545, 556 (10th Cir. 1986) (emphasis added); see also *supra* Section II.B (discussing *Phillips*).

178. *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 935 (7th Cir. 1989) (emphasis added); see also *supra* Section II.A (discussing *Smart*); *Smart*, 868 F.2d at 935 ("fail[ing] to uncover a single *specific* treaty . . . right that would be affected by application of ERISA") (emphasis added).

179. 4 F.3d 490, 493 (7th Cir. 1993); see also *id.* at 495-96; *supra* note 29 (discussing *Great Lakes*).

“rights to hunt, fish, and gather,” they made “no mention of the system for enforcing these rights, let alone any reference to the terms of employment of those hired to enforce it.”¹⁸⁰ Clearly, Judge Posner felt obligated to find *explicit* treaty support for such tribal powers. He apparently did not feel free to generously construe ambiguities in the treaties to infer such powers. *Great Lakes* is an especially revealing example of the corrosive impact of *Coeur d’Alene*, because Judge Posner, while apparently viewing himself as bound by *Smart* and the *Tuscarora-Coeur d’Alene* doctrine, otherwise showed a sound awareness of the canons of construction as a general matter—and, as noted, managed to rule in favor of the Tribe.¹⁸¹ Yet he still had to fight the undertow of the *Coeur d’Alene* treaty analysis.

Coeur d’Alene’s insistence that tribes demonstrate “explicit,” “specific,” or “express” treaty rights is wildly out of line with the most fundamental Indian law canon of them all—that treaties and agreements with Indian Nations must be construed generously “as the Indians would have understood them.”¹⁸² That canon forms the original historical bedrock of American Indian law. It has been repeatedly and emphatically affirmed by the Supreme Court, as early as 1832 and as recently as 1999.¹⁸³ In one such reaffirmation, the Court in *Dion*—the year after *Coeur d’Alene*—flatly repudiated the Ninth Circuit’s approach, declaring that treaty hunting and

180. *Great Lakes*, 4 F.3d at 493.

181. Compare *id.* (discussing the canons), *with id.* at 495 (citing *Coeur d’Alene* and *Smart*). A recent Ninth Circuit case similarly confirms how even a judge sincerely struggling to adhere to the canons must battle the undertow of *Coeur d’Alene*’s treaty analysis. Judge Paez’s opinion in *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), acknowledged the binding circuit precedent in favor of the *Tuscarora-Coeur d’Alene* doctrine. See *id.* at 1263-64 (citing *United States v. Baker*, 63 F.3d 1478 (9th Cir. 1995), and *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980)); *Baker*, 63 F.3d at 1484-85 (citing *Tuscarora* and *Coeur d’Alene*). He also showed a sensitive awareness of the governing canons of treaty construction. See *Smiskin*, 487 F.3d at 1264 (noting that “a treaty must be construed as the Indians would naturally have understood it at the time of the treaty, with doubtful or ambiguous expressions resolved in the Indians’ favor”). Yet, in construing the treaty at issue, he apparently felt forced to pejoratively distinguish the “ambiguous treaty language” involved in *Baker*, which “did not expressly grant” the relevant rights, from the treaty language at issue in *Smiskin*, which did “expressly” grant such rights. *Id.* at 1267 (emphases added); see also *id.* n.12 (holding that the treaty language at issue was “sufficiently specific”) (emphasis added).

182. COHEN, *supra* note 10, § 2.02[1], at 119-20; see also Wildenthal, *supra* note 1, at 479 n.208 (noting that if “the burden is improperly shifted to the tribe to plead and prove a treaty right, in order to overcome the general rule,” as the *Tuscarora-Coeur d’Alene* doctrine demands, then “[i]n the practical course of litigation, that will inevitably tend to erode the presumptively pro-tribal interpretation of such treaty rights”).

183. See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 189-90, 195-202 (1999); *United States v. Winans*, 198 U.S. 371, 380-81 (1905); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551-56 (1832) (Marshall, C.J.); *id.* at 563, 582 (McLean, J., concurring).

fishing rights within tribal lands “need not be expressly mentioned in the treaty.”¹⁸⁴

But the treaty canon nevertheless appears to have met its match in the Ninth Circuit’s 1985 panel opinion. *Phillips, Smart, and Great Lakes* all postdated *Dion*, but relied instead on *Coeur d’Alene* for guidance in this regard.¹⁸⁵

C. The Supreme Court’s Jurisprudence Since *Coeur d’Alene* Confirms the Ninth Circuit’s Error

No fewer than four major Supreme Court decisions, within two years after *Coeur d’Alene*, confirmed on several different fronts the profound error of the Ninth Circuit’s approach. Two more Court decisions within the last ten years continue to confirm why *Coeur d’Alene* was wrong. Yet *Coeur d’Alene* just keeps going and going. Who is in charge here?

1. *The Supreme Court’s Last Word on Tuscarora*

Less than two months after *Coeur d’Alene* was decided, the Supreme Court, in *County of Oneida, New York v. Oneida Indian Nation of New York State*,¹⁸⁶ issued what remains, to date, its final word on *Tuscarora*. *Oneida* confirmed the Court’s 1984 repudiation, in *Escondido*, of any reading of *Tuscarora* that would lend precedential weight to its disputed statement about general federal laws.¹⁸⁷ *Oneida*, like *Escondido*, made clear that *Tuscarora* only has precedential value to the extent its reasoning was consistent with the Indian law canons. Oneida County had cited *Tuscarora* in an attempt to bolster its opposition to the tribal claim at issue in *Oneida*. The *Oneida* Court curtly repudiated that attempted use of *Tuscarora*, declaring that *Tuscarora* had “reaffirmed”—albeit “implicitly”—the Indian law canons also reaffirmed in *Oneida* itself.¹⁸⁸ *Oneida* further confirmed that the

184. *United States v. Dion*, 476 U.S. 734, 738 (1986) (emphasis added); *see also infra* Subsection III.C.3.

185. Judge Posner in *Great Lakes* actually cited *Dion* and seemed to grasp the proper application of the congressional intent canon in determining whether the general federal legislation at issue had abrogated the treaty right involved. *See supra* note 29. But, blinded by *Coeur d’Alene*, he evidently missed *Dion*’s guidance on interpreting the treaty itself. *Phillips* and *Smart* did not even bother to cite *Dion*. *See supra* Section II.A (discussing *Smart*); *supra* note 62 (discussing *Phillips*). *Dion* was decided June 11, 1986. 476 U.S. at 734. *Phillips* was decided October 10, 1986. *Phillips Petroleum Co. v. E.P.A.*, 803 F.2d 545 (10th Cir. 1986).

186. 470 U.S. 226 (1985). *Oneida* was decided March 4, 1985. *Id.*; *see also supra* note 141.

187. *See supra* Section III.A (discussing *Escondido*).

188. *Oneida*, 470 U.S. at 248 n.21; *see also Wildenthal, supra* note 1, at 470.

canons apply to “nontreaty matters,” thus underscoring the profound error of *Coeur d’Alene*’s treaty analysis.¹⁸⁹

It has now been twenty-three years since both *Coeur d’Alene* and *Oneida* were decided. As we have seen, *Coeur d’Alene*—based on the very aspect of *Tuscarora* repeatedly repudiated by the Supreme Court—has emerged during this time as an influential and oft-cited authority on the application of general federal laws to Indian tribes. The lower courts following *Coeur d’Alene* have given short shrift to—sometimes not even bothering to cite—the relevant Supreme Court precedents. Yet during these same twenty-three years, the Supreme Court has not once cited *Tuscarora* or *Coeur d’Alene*, nor has it ever expressed so much as a hint of support for the doctrine they embody. On the contrary, the Court has implicitly and repeatedly repudiated that doctrine.¹⁹⁰ It is enough to make you wonder which court, the Ninth Circuit or the “Supreme” Court,¹⁹¹ actually sits atop the federal judiciary—or whether the Supreme Court and the federal circuit courts are even part of the same judicial system.

2. *Confirming the Irrelevance of the “Commercial” Nature of a Government Activity*

As noted earlier, *Coeur d’Alene* emphasized the allegedly “commercial” nature of the tribal government operation in that case as a justification for finding it presumptively subject to the federal law at issue.¹⁹² But just one month later the Supreme Court, in *Garcia v. San Antonio Metropolitan Transit Authority*, issued a salutary reminder that trying to define “traditional,” “sovereign,” or uniquely “governmental” functions—as opposed to “commercial” or “proprietary” government functions—was hopelessly “unsound in principle and unworkable in practice.”¹⁹³ The *Garcia* decision

189. *Oneida*, 470 U.S. at 247; see also *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *supra* Subsection III.B.3; Wildenthal, *supra* note 1, at 425-27, 438-40, 495-98.

190. As discussed *infra* in Subsection III.C.3—and at greater length in my 2007 article—the Supreme Court has dealt in several cases during these years with whether, and to what extent, general federal laws apply to Indian tribes. Some of its decisions may be criticized for not properly applying the Indian law canons of construction, or for carving out certain exceptions to them. But even so, in none of these decisions has the Court ever endorsed or even mentioned anything resembling the *Tuscarora-Coeur d’Alene* approach. See Wildenthal, *supra* note 1, at 434 n.59, 468-70 & n.170, 487-502.

191. See U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in *one supreme Court*, and in such *inferior Courts* as the Congress may from time to time ordain and establish.”) (emphases added).

192. See *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985); *supra* Subsection III.B.1.

193. 469 U.S. 528, 546 (1985); see also *id.* at 538-47; Wildenthal, *supra* note 1, at 517-21; Bryan H. Wildenthal, *Judicial Philosophies in Collision: Justice Blackmun, Garcia,*

dealt with state sovereignty. As Carole Goldberg has wisely admonished, one cannot automatically equate state and tribal sovereignty. But in the context of applying the Indian law canons of construction, *Garcia*'s reasoning has equal if not greater salience.¹⁹⁴ And *Garcia* did not come out of nowhere. It reflected the reasoning of several earlier Supreme Court cases, reasoning that was available to the Ninth Circuit in *Coeur d'Alene*.¹⁹⁵

3. *Confirming the Application of the Canons to General Federal Laws*

As previously noted, the Supreme Court confirmed in its 1986 *Dion* decision, and again in its 1987 *Iowa Mutual* decision, that the classical Indian law canons—not the *Tuscarora-Coeur d'Alene* doctrine—apply to general federal laws potentially infringing on tribal sovereignty.¹⁹⁶ The Court yet again reaffirmed that principle in 1999 and 2001. Several points are worth emphasizing.

First, *Dion* held that a treaty hunting right had been abrogated by general federal legislation, but *only* based on powerful evidence of congressional intent.¹⁹⁷ And the Court never suggested that the canons would not apply where treaty rights were *not* involved. In fact, *Dion* suggested exactly the opposite.¹⁹⁸ If any reassurance were needed that the canons should apply

and the Tenth Amendment, 32 ARIZ. L. REV. 749, 767-68 (1990). *Garcia* was decided February 19, 1985, one month and four days after *Coeur d'Alene*. See *Garcia*, 469 U.S. at 528; *supra* note 141.

194. See Wildenthal, *supra* note 1, at 521 & nn.340-41 (citing Carole Goldberg, *Critique by Comparison in Federal Indian Law*, 82 N.D. L. REV. 719, 732-35, 739 (2006)). As one commentator has perceptively put it, a “commercial-governmental distinction misses entirely the purpose of . . . protect[ing] tribal sovereignty [over] internal affairs,” because, if it leads to enforcement of federal regulations over such a “commercial” tribal government operation, it inevitably also “precludes the Tribe from enacting different . . . regulations that are inconsistent with [the federal law].” Peterson, *supra* note 64, at 655; see also Limas, *supra* note 64, at 740-41 (making several related arguments).

195. See, e.g., *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 680, 686, 690 (1982); *Reeves, Inc. v. Stake*, 447 U.S. 429, 443 n.16 (1980); *New York v. United States*, 326 U.S. 572 (1946); *id.* at 591 (Douglas, J., joined by Black, J., dissenting); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); Wildenthal, *supra* note 1, at 517-20 & nn.326, 330, 332-33 & 337 (citing and discussing these cases).

196. See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17-18 (1987); *United States v. Dion*, 476 U.S. 734, 738-40 (1986); *supra* Part II (discussing *Dion* and *Iowa Mutual* and their treatment in lower court cases and scholarly treatises); *supra* Subsection III.B.3 (discussing *Dion* more specifically); *supra* notes 119, 135 (same); Wildenthal, *supra* note 1, at 437-44, 460-61, 479, 483 n.217, 484-86, 489-502 (same); *id.* at 459-61, 476, 479, 483 n.217, 489-502 (discussing *Iowa Mutual*).

197. See *Dion*, 476 U.S. at 738-46.

198. See *id.* at 745 n.8 (noting that “Indian reservations created by statute, agreement, or executive order normally carry with them the same implicit hunting rights as those created by treaty”); see also Wildenthal, *supra* note 1, at 439 (discussing this language in *Dion*); *id.*

in full force, even outside the treaty context, the Supreme Court unanimously provided it in 1992, in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, where Justice Scalia wrote the opinion of the Court.¹⁹⁹ While *Yakima* happened to involve a law focusing on Indian affairs, the Court held broadly that “[w]hen we are faced with . . . two possible constructions [of a federal law], our choice between them *must be dictated by a principle deeply rooted in this Court’s Indian jurisprudence*: ‘[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.’”²⁰⁰

Second, *Dion* demolished—or would have, in a properly functioning judicial system—*Coeur d’Alene*’s requirement that tribes demonstrate “explicit,” “specific,” or “express” treaty language in order to benefit from *Coeur d’Alene*’s so-called “treaty exception.”²⁰¹ A naive or casual reader of the *Tuscarora-Coeur d’Alene* line of cases might assume that the specific application of the canons in *Dion* was consistent with those cases. After all, *Dion* involved a treaty right. So surely the Tribe there would have benefited—at least in terms of the analysis, if not the result—from *Coeur d’Alene*’s much-touted “treaty exception,” had it applied. But a careful reading of *Dion*, and the treaty with the Yankton Sioux Tribe at issue, shows that it would not have. The treaty, very typical of many Indian treaties, does not contain any explicit protection for hunting rights or most other specific powers and prerogatives traditionally viewed as elements of inherent tribal sovereignty.²⁰² As noted earlier, however, that did not concern the

at 425-27, 438-40, 495-98 (demonstrating that tribes without treaty rights enjoy the same basic protections of the Indian law canons); *supra* Subsection III.B.3 (same).

199. 502 U.S. 251 (1992). *Yakima* was an 8-to-1 decision, but the only (partial) dissenter was Justice Blackmun, who specifically endorsed the Court’s reaffirmation of the canons, and whose only complaint was that the majority did not apply them vigorously enough. *See id.* at 270-78 (Blackmun, J., concurring in part and dissenting in part). Justice Scalia is not generally known as a defender of Indian sovereignty. *See, e.g.*, BRYAN H. WILDENTHAL, NATIVE AMERICAN SOVEREIGNTY ON TRIAL: A HANDBOOK WITH CASES, LAWS, AND DOCUMENTS 93-101 (2003) (strongly criticizing Justice Scalia’s majority opinion in *Nevada v. Hicks*, 533 U.S. 353 (2001)); Wildenthal, *supra* note 132, at 137-43 (same).

200. *Yakima*, 502 U.S. at 269 (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)) (emphasis added here); *see also id.* at 258 (reaffirming the canon of “‘unmistakably clear’” congressional intent) (quoting *Blackfeet*, 471 U.S. at 765).

201. *See supra* Subsection III.B.3 (discussing *Coeur d’Alene*’s treaty analysis).

202. *See Dion*, 476 U.S. at 736-38; Treaty between the United States of America, and the Yancton [sic] Tribe of Sioux, or Dacotah [sic] Indians, Apr. 19, 1858, 11 Stat. 743. About the closest the treaty comes to explicitly protecting hunting rights, or any tribal governance rights or powers, is that it “protect[s] the said Yanctons [sic] in the quiet and peaceable possession of the said tract of . . . land so reserved for their future home, and also their persons and property thereon during good behavior on their part.” *Id.* at 744.

Dion Court, which stated: “These rights *need not be expressly mentioned in the treaty.*”²⁰³

Third, *Iowa Mutual*, as noted earlier, confirmed *Coeur d’Alene*’s error in asserting that tribal self-government does not encompass a tribe’s on-reservation dealings with nonmembers of the tribe. The *Iowa Mutual* Court could not have put it more bluntly: “Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.”²⁰⁴ *Iowa Mutual* also contradicted *Coeur d’Alene* by applying the congressional intent canon—not anything resembling the *Tuscarora-Coeur d’Alene* approach—to one of the most basic and general federal laws on the books: the diversity jurisdiction statute.²⁰⁵ No treaty right was involved in *Iowa Mutual*,²⁰⁶ and the diversity statute is completely silent regarding tribal rights and tribal sovereignty, just like the federal laws construed in *Coeur d’Alene* and numerous other cases following the Ninth Circuit’s lead. But the Supreme Court in *Iowa Mutual* treated that very silence as a reason to construe it *not* to limit tribal sovereignty—the exact opposite of the *Tuscarora-Coeur d’Alene* approach.²⁰⁷

Finally, in 1999 and 2001, the Supreme Court again reaffirmed that when a federal law—even one *not* dealing primarily with Indian affairs—comes into potential conflict with tribal sovereignty, it should be construed in accordance with the classical Indian law canons. The Court’s two decisions so holding, *Minnesota v. Mille Lacs Band of Chippewa Indians*²⁰⁸ and *Idaho v. United States*,²⁰⁹ each involved statehood admission acts said to override or limit certain tribal rights. The acts were completely silent with regard to the relevant issues. The Court in each case construed them to protect and preserve tribal sovereignty.²¹⁰

203. *Dion*, 476 U.S. at 738 (emphasis added); *see also supra* Subsection III.B.3 (discussing *Dion*).

204. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987); *see also supra* Subsection III.B.1 (quoting this sentence in *Iowa Mutual*); Wildenthal, *supra* note 1, at 460 (discussing this aspect of *Iowa Mutual*).

205. *See Iowa Mutual*, 480 U.S. at 17-18.

206. *See Wildenthal, supra* note 1, at 496.

207. *See Iowa Mutual*, 480 U.S. at 17-18; *see also* Wildenthal, *supra* note 1, at 490-91.

208. 526 U.S. 172, 176-77, 185, 202-08 (1999); *see also* Wildenthal, *supra* note 1, at 495 & n.256.

209. 533 U.S. 262, 270, 272-73, 278-81 (2001). The *Idaho* Court did not expressly invoke the canons, but applied very similar reasoning. *See Wildenthal, supra* note 1, at 495 & n.258, 499 & n.270.

210. *See Wildenthal, supra* note 1, at 495 & nn.256 & 258, 499-501 & n.270; *see also id.* at 499-502 (explaining why statehood enabling and admission acts are properly viewed as “general” federal laws for relevant purposes).

CONCLUSION

How are we to account for the long strange trip²¹¹ of the *Coeur d'Alene* doctrine? Most importantly, does the Ninth Circuit know something that this author and other aficionados of American Indian law do not? It is all very well to show how formally out of line the Ninth Circuit has gotten with regard to the Supreme Court's Indian jurisprudence of the past century. But the fact remains that the Supreme Court—for more than a generation now—has not chosen, or perhaps has not been given an opportunity, to directly rein in the Ninth Circuit or those that have followed it down the trail of *Tuscarora-Coeur d'Alene*. This may, to a certain extent, be due to reluctance on the part of Indian Nations to appeal to the Supreme Court. There has been a prevailing view in Indian country for some time that the Court—despite its numerous pro-tribal decisions cited in this Article—is no longer well disposed toward tribal sovereignty.²¹² Maybe the tribes, on the front line of struggles to preserve their ancestral sovereignty, are on to something.

As it turns out, there is one former Ninth Circuit judge involved in the origins of the *Coeur d'Alene* doctrine who remains today in a position of great influence: Anthony M. Kennedy, an Associate Justice on the Supreme Court since 1988. Justice Kennedy was not on the *Coeur d'Alene* panel,²¹³

211. Apologies to the Grateful Dead.

212. See, e.g., Wildenthal, *supra* note 1, at 529-30 (discussing the decision of the San Manuel Band of Serrano Mission Indians not to appeal the D.C. Circuit's *San Manuel* decision, discussed *supra* Section II.A, to the Supreme Court). Indian Nations have shown impressive discipline in this regard. Of the five leading circuit court decisions discussed in this Article, in which the *Coeur d'Alene* analysis or something similar was applied and the court ruled against the tribes involved—*Coeur d'Alene* itself, *Smart* (see *supra* Section II.A), *Florida Paraplegic* (see *supra* Section II.A, and note 30), *Mashantucket* (see *supra* Section II.A), and *San Manuel* (see above)—not a single one was appealed to the Supreme Court, judging by the lack of any indication of denial of *certiorari*. *Phillips*, a case to which no tribe was a party, but which also applied *Coeur d'Alene* to uphold application of a federal law to a tribe, also was not appealed. See *supra* Section II.B. (This Article follows the modern citation practice of not indicating denials of *certiorari* in any event, but this is just to confirm that there were in fact no such denials in these cases—and thus, apparently, no writs of *certiorari* were sought.)

213. Of the Ninth Circuit judges on the original *Coeur d'Alene* panel, two—including the author, Judge Joseph T. Sneed III—are now deceased. Judge Sneed, appointed to the court by President Nixon in 1973, died on February 9, 2008. See Press Release, U.S. Court of Appeals for the Ninth Circuit, Court of Appeals Mourns Loss of Senior Circuit Judge Joseph T. Sneed (Feb. 13, 2008), available at <http://www.ca9.uscourts.gov> (and on file with the author and the *Michigan State Law Review*). I truly regret the unfortunate coincidence that this Article's publication follows so soon after his death. He was a highly respected federal judge for thirty-five years. Despite my strong criticisms of *Coeur d'Alene*, I would be the first to say it is only one opinion out of thousands that Judge Sneed wrote and that his career should not be assessed on the basis of any one opinion. Partly for this reason, I have chosen not to highlight the judges participating in *Coeur d'Alene* as individuals, instead

but he did concur in the divided 1980 panel decision in *United States v. Farris* that provided part of *Coeur d'Alene's* foundation.²¹⁴

There is a troubling pattern with regard to Justice Kennedy and the Supreme Court cases cited in this Article that stand opposed to the *Coeur d'Alene* doctrine. He did not participate in *Merrion*, *Dion*, or *Iowa Mutual*, because he was not yet on the Supreme Court. And in the two most recent Supreme Court decisions of great importance to the Indian law canons—*Mille Lacs* in 1999 and *Idaho* in 2001—Justice Kennedy dissented.²¹⁵

Furthermore, *Mille Lacs* and *Idaho* were both 5-to-4 decisions. Still further, the author of *Mille Lacs* was Justice Sandra Day O'Connor, who was also a member of the *Idaho* majority and who retired from the Court in 2006.²¹⁶ Justice Kennedy is today widely perceived as having replaced Justice O'Connor as the key swing vote on the Court with regard to many issues. The future of the Indian law canons, and of American Indian law generally, may be one of these issues.

The portents are not good. In *Mille Lacs*, the dissent, joined by Justice Kennedy, took a number of outlandish positions regarding the Indian law canons. The dissent refused to apply them to a presidential executive order

treating it impersonally as simply a troubling decision. I have chosen a somewhat different tack in discussing and criticizing Tenth Circuit Judge Michael R. Murphy by name. But that is because he was the lone and prominent dissenter in the Tenth Circuit's important and recent *en banc* decision in *San Juan*. And given that Judge Murphy presumably will be active on the federal bench for many more years, in a position to influence the further development of the law in this area, I think he deserves to be called to account, at least in the court of academia and public opinion, for his very troubling contribution to the *Tuscarora-Coeur d'Alene* saga. See *supra* Section II.B (discussing *San Juan*). Returning to the two Ninth Circuit judges who joined Judge Sneed's *Coeur d'Alene* opinion, Judge Eugene A. Wright, appointed by President Nixon in 1969, died in 2002. Judge Arthur L. Alarcon, appointed by President Carter in 1979, took senior status in 1992. See Wikipedia, United States Court of Appeals for the Ninth Circuit, http://en.wikipedia.org/wiki/United_States_Court_of_Appeals_for_the_Ninth_Circuit (last visited May 21, 2008) (regrettably, the official Ninth Circuit website does not provide adequate biographical information on current or former judges). The same comments made above regarding Judge Sneed also, of course, apply to Judges Wright and Alarcon.

214. See *United States v. Farris*, 624 F.2d 890, 899-900 (9th Cir. 1980) (Kennedy, J., concurring) (agreeing with Judge Choy's lead opinion, over the partial dissent of Judge Browning, in affirming the convictions of Indian tribal members prosecuted under the Organized Crime Control Act, 18 U.S.C. § 1955, with regard to an on-reservation casino operation); see also *id.* at 892-98 (lead opinion of Choy, J.); *id.* at 898-99 (Browning, J., concurring in part and dissenting in part); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115-16 (9th Cir. 1985) (quoting and discussing Judge Choy's opinion in *Farris*).

215. See *Idaho v. United States*, 533 U.S. 262, 281-88 (2001) (Rehnquist, C.J., joined by Scalia, Kennedy, and Thomas, JJ., dissenting); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 208-20 (1999) (Rehnquist, C.J., joined by Scalia, Kennedy, and Thomas, JJ., dissenting).

216. See *Mille Lacs*, 526 U.S. at 175; see also *Idaho*, 533 U.S. at 264; *supra* note 215.

affecting tribal rights, suggesting that the canons should not apply *at all* outside the context of interpreting the language of treaties themselves.²¹⁷ This jaw-dropping theory would do far more than adopt the *Tuscarora-Coeur d'Alene* doctrine. It would eliminate the canons altogether for *any* federal statutes, “general” or otherwise. Even as applied to treaties, the canons might then have little value if federal statutes, freed of the ameliorating influence of the canons, were easily found to override treaty rights. It becomes academic how treaty language is interpreted if the treaty is found to be abrogated by federal statute. And indeed, the *Mille Lacs* dissent showed little interest in seriously applying the canons even to treaties, where it conceded in theory that they should apply. The dissent actually *strained* to read the ambiguous language of an 1837 Indian treaty to provide legal support for an 1850 presidential Indian removal order that was soon abandoned and was recognized *even at that time* as a disaster inflicting misery and death on many affected Indians.²¹⁸

Three key opinions authored by Justice Kennedy provide added cause for concern. In 1990, he wrote the Court’s opinion in *Duro v. Reina*, holding that Indian tribes lacked inherent authority to prosecute nonmembers for crimes committed on their reservations—even if the offenders were members of other Indian tribes who had chosen to reside and commit crimes within the territory of the prosecuting tribe.²¹⁹ Congress almost immediately

217. See *Mille Lacs*, 526 U.S. at 214 n.1 (Rehnquist, C.J., joined by Scalia, Kennedy, and Thomas, JJ., dissenting); see also *id.* at 210-17; Wildenthal, *supra* note 132, at 134 (strongly criticizing this aspect of the *Mille Lacs* dissent). In *Idaho*, the dissent joined by Justice Kennedy reversed the classical congressional intent canon, instead placing the burden on the *Tribe* to prove congressional intent in its favor. See *Idaho*, 533 U.S. at 281-88 (Rehnquist, C.J., joined by Scalia, Kennedy, and Thomas, JJ., dissenting).

218. Compare *Mille Lacs*, 526 U.S. at 213-14 (Rehnquist, C.J., joined by Scalia, Kennedy, and Thomas, JJ., dissenting), with *id.* at 179-82 (majority opinion by O’Connor, J.) (generally discussing the historical context of the 1850 removal effort), *id.* at 180 (noting that it resulted in the deaths of hundreds of Indians, which “intensified opposition to [it],” even “among non-Indian residents of the area”), and *id.* at 188-95 (properly applying the canons to the removal order and the 1837 treaty); see also Wildenthal, *supra* note 132, at 134-35 (strongly criticizing and expressing near-incredulity at this aspect of the *Mille Lacs* dissent, noting that “Indian removal was . . . one of the most horrific and genocidal policies in United States history, apart from racial slavery”). The *Mille Lacs* dissent also misapplied the canons to an 1855 treaty. Compare *Mille Lacs*, 526 U.S. at 195-202 (properly applying the canons to the 1855 treaty, with remarkable sensitivity and respect for the historical context), with *id.* at 217-18 (Rehnquist, C.J., joined by Scalia, Kennedy, and Thomas, JJ., dissenting) (improperly applying a “plain meaning” approach to the 1855 treaty, in a manner completely tone-deaf to historical context, and based on a theory, utterly antithetical to the canons, that the Indians at the time would have understood the implications of certain Anglo-American legal terminology); see also WILDENTHAL, *supra* note 199, at 66-69 (generally discussing these and other aspects of *Mille Lacs*).

219. 495 U.S. 676 (1990); see also WILDENTHAL, *supra* note 199, at 73-85 (discussing *Duro* and related issues, and criticizing Justice Kennedy’s analysis). *Duro* was a 7-to-2 decision. See *Duro*, 495 U.S. at 698 (Brennan, J., joined by Marshall, J., dissenting).

reversed that ruling by statute, restoring a measure of inherent tribal sovereignty. But when the Court upheld Congress's action in 2004, Justice Kennedy—while concurring in the judgment on narrow alternative grounds—expressed grave doubt whether Congress had the power to do so.²²⁰ In 2000, Justice Kennedy wrote the Court's opinion striking down an effort by the State of Hawaii to restore certain quasi-sovereign, quasi-tribal rights to Native Hawaiians, on the ground that the state had denied equal voting rights based on race in violation of the Fifteenth Amendment.²²¹

The common thread linking these opinions by Justice Kennedy is his concern that treating Native Americans differently from non-Natives under the law may violate constitutional principles of equal protection.²²² That is a legitimate concern, though the longstanding theory of American Indian law is that the special legal status of Indians based on tribal membership is a historically grounded *political* status, like national and state citizenship, and not a form of racial discrimination.²²³ That broader issue is beyond the scope of this Article. What is relevant here is the deep appeal of egalitarian ideals in American political and legal culture—even though such ideals are often not reflected in reality.

The *Tuscarora-Coeur d'Alene* doctrine may resonate with these ideals in a dangerously powerful way, given its deceptively appealing notion that

220. See *United States v. Lara*, 541 U.S. 193, 197-98 (2004) (citing, e.g., Act of Oct. 28, 1991, 105 Stat. 646, codified at 25 U.S.C. § 1301(2)); *id.* at 211-14 (Kennedy, J., concurring in the judgment); see also *id.* at 214-26 (Thomas, J., concurring in the judgment) (advocating an alarmingly wide-ranging reconsideration of the very foundations of Indian law).

221. See *Rice v. Cayetano*, 528 U.S. 495 (2000). While *Rice* was a 7-to-2 decision in result, Justice Kennedy's opinion only attracted five votes. See *id.* at 524 (Breyer, J., joined by Souter, J., concurring in the result); *id.* at 527 (Stevens, J., joined by Ginsburg, J., dissenting); *id.* at 547 (Ginsburg, J., dissenting). Justice Kennedy has also joined key opinions that have extended to all tribal lands the rule of *Montana v. United States*, 450 U.S. 544, 565 (1981), which held that tribal civil jurisdiction presumptively does not extend to nonmembers on nonmember-owned land within reservations, subject to certain exceptions. See *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 660 (2001) (Souter, J., joined by Kennedy and Thomas, JJ., concurring); *Nevada v. Hicks*, 533 U.S. 353, 357-65 (2001) (majority opinion by Scalia, J., joined by Kennedy, J.); *id.* at 375-86 (Souter, J., joined by Kennedy and Thomas, JJ., concurring); Wildenthal, *supra* note 132, at 135-43 (criticizing these decisions).

222. To be sure, it is “the most ludicrous of ironies” that Justice Kennedy defended his ruling in *Duro* “in the name of avoiding racial discrimination.” Wildenthal, *supra* note 132, at 129. *Duro* denied tribal criminal jurisdiction over nonmember Indians in part because the Court had previously (and wrongly) denied tribal criminal jurisdiction over nonmember non-Indians. That earlier ruling was itself deeply infected by anti-Indian racism. See *id.* at 124-30. This was an “equal protection problem . . . of the Court's own creation.” *Id.* at 130. “Indian nations have never sought to ‘single out’ anyone, either non-Indians or nonmember Indians or anyone else, for criminal jurisdiction. They have simply sought to do what all sovereign governments traditionally do: apply their laws to everyone entering their jurisdictions.” *Id.* at 129-30.

223. See, e.g., COHEN, *supra* note 10, § 3.03[1], at 171-73 & nn.257-58 (citing Carole Goldberg, *American Indians and “Preferential” Treatment*, 49 UCLA L. REV. 943 (2002)).

“general” federal laws, which appear at face value to treat all Indians and non-Indians equally, should presumptively apply to tribal lands and peoples without distinction. Justice Kennedy’s attachment to egalitarian ideals is honorable and deeply sincere.²²⁴ But will he and the other justices on today’s Supreme Court study the history of American Indian law sufficiently to understand why the canons of construction actually advance, rather than conflict with, basic American ideals of fairness?

Will they agree with Justice Black, the great dissenter in *Tuscarora*, that “[g]reat nations, like great men, should keep their word”?²²⁵

The jury is out. *Coeur d’Alene* may yet prevail.

224. For one example—one of his finest opinions—see *Powers v. Ohio*, 499 U.S. 400 (1991) (majority opinion by Kennedy, J.) (striking down race-based peremptory juror challenges even when the objecting defendant and the challenged jurors are not of the same race).

225. *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting).