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ESSAY

What We Talk About When We Talk About (Indian) Sovereignty: *Montana* and the Application of General Statutes to Tribes

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Montana v. US is a case about tribal civil jurisdiction. Yet it has had a second life in a surprising context: federal statutes of general applicability that do not mention tribes. This Comment explores the circuit split on these silent statutes and shows that *Montana* is the doctrinal lynchpin for every court that has considered the question. *Montana* has brought sovereignty into what should be an inquiry into Congressional intent. And *Montana*'s vision of sovereignty is limited, intramural, and membership-based. I argue that *Montana* is theoretically incompatible with the silent statute inquiry and produces practically unintuitive results. I close by sketching potential paths forward for tribes grappling with the applicability of silent statutes.

Introduction

Do federal statutes of general applicability that do not mention Indian tribes apply to tribes? This question has generated a circuit split—indeed, a four-way circuit intersection. Courts have come up with a smorgasbord of

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methods for divining Congress's intent in these statutes, which I call "silent statutes." The Tenth Circuit applies a strong presumption that silent statutes do not apply to tribes; the Ninth Circuit applies a strong presumption that they do.[1] The D.C. Circuit approach falls somewhere in between.[2]

All three approaches agree that if a statute infringes on the core of tribal sovereignty, it does not apply to tribes.[3] They disagree on what that core is. How did the circuits reach agreement that sovereignty matters to the silent statute inquiry? And how did they come to differ so strikingly on what that sovereignty is?

This Comment shows that these silent statute decisions represent a second life of *Montana v. United States*'s implicit divestiture theory. Both *Montana*[4] and *Federal Power Commission v. Tuscarora Indian Nation*[5] deal with the scope of tribal jurisdiction, not the reach of federal statutes. But the circuit courts have unquestioningly applied their logic to answer the silent statute question.[6]

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1. NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1191-92 (10th Cir. 2002) (en banc); Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985).

2. San Manuel Indian Bingo & Casino v. NLRB, 475 F.3d 1306, 1312 (D.C. Cir. 2007). These approaches—especially the less tribe-friendly approach of the Ninth Circuit—have come in for significant scholarly criticism. For articles analyzing whether individual statutes should apply to tribes, see Rachel Sibila, Comment, *"Play or Pay": Interpreting the Employer Mandate of the Patient Protection and Affordable Care Act as It Relates to Tribal Employers*, 39 AM. INDIAN L. REV. 235, 236 (2014); David Spohr & Lara B. Fowler, *Application of the Endangered Species Act to Tribal Actions: Can Ambiguity be a Good Thing?*, 1 BELLWETHER: SEATTLE J. ENVTL. L. & POL'Y 64, 119-120 (2009); Kristen E. Burge, Comment, *ERISA and Indian Tribes: Alternative Approaches for Respecting Tribal Sovereignty*, 2000 WIS. L. REV. 1291 (2000); Bryan R. Lynch, Comment, *Silence is Anything but Golden: Laws of General Applicability in Indian Country*, 42 AM. INDIAN L. REV. 207, 208 (2017) (arguing that the FMLA should apply to tribes); Mitchell Peterson, *The Applicability of Federal Employment Law to Indian Tribes*, 47 S. D. L. REV. 631, 632 (2002).

3. Pueblo of San Juan, 276 F.3d at 1191; Couer d'Alene Tribal Farm, 751 F.2d at 1116 (explaining that the protected core of sovereignty encompasses only purely intramural matters such as membership); San Manuel, 475 F.3d at 1311.

4. 450 U.S. 544 (1981).

5. 362 U.S. 99 (1960).

6. Numerous scholars have critiqued lower courts' application of *Tuscarora* in this context. *See infra* note 35. Another line of scholarship critiques the *Montana* cases in their original tribal jurisdiction context. *See, e.g.*, Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, 101 CAL. L. REV. 1499, 1559 (2013) (arguing that the test for tribal jurisdiction should be not the *Montana* line of cases but ordinary personal jurisdiction minimum contacts analysis, because it is sufficiently nuanced and flexible to take into account the complex facts of Indian country cases); Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973, 989-990 (2010) (criticizing *Montana* for limiting tribal sovereignty and moving away from the principle of tribal consent to divestitures of sovereignty).

I argue that courts have relied on an implicit dichotomy between affirmative tribal jurisdiction and federal statutory applicability. This is a false dichotomy. Civil jurisdiction is logically distinct from federal statutes of general applicability, and viewing them as a strict, mutually exclusive binary ignores areas of concurrent (or no) jurisdiction. Moreover, importing *Montana* into the silent statute inquiry forces courts to develop brightline rules defining whether statutes infringe on tribal sovereignty, often without considering issues unique to tribal governments.

The Supreme Court's recent dramatic expansion of *Montana* into the world of criminal jurisdiction may presage a revival of *Montana*'s implicit divestiture theory in hitherto unrelated spheres.[7] At the same time, it represents an opportunity for tribes to present arguments that widen the scope of their sovereignty and limit the application of statutes of general applicability. At this moment, as lower courts consider the ramifications of *United States v. Cooley*, critiques of *Montana*–both its flawed premises and the expansive reach of its second life–are increasingly relevant.

I. The Circuit Split on Federal Statutes of General Applicability

A. Supreme Court Caselaw

The Supreme Court has never addressed ambiguous statutes of general applicability head-on, but two cases have become doctrinal lynchpins for lower courts.[8]

1. Tuscarora

Federal Power Commission v. Tuscarora Indian Nation is a case about whether the Federal Power Commission (FPC) could authorize the flooding of Tuscarora Indian Nation fee land.[9] The statute at issue, the Federal Power Act

7. *See generally* United States v. Cooley, 593 U.S. 345, 347-348 (2021) (applying *Montana*'s second exception–allowing tribes to exercise jurisdiction over conduct by non-Indians which has a direct effect on the political integrity, the economic security, or the health or welfare of the tribe–to the context of tribal criminal jurisdiction for the first time).

8. Of course, the question of deriving intent from Congressional silence is just as relevant and just as thorny outside the Indian law context. *See, e.g.*, Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515 (1982). This Comment, however, leaves aside that broader question and deals only with the unique interaction of the Indian canons of construction and principles of tribal sovereignty with silent statutes.

9. 362 U.S. 99, 100 (1960).

(FPA), included specific provisions related to reservations. The Court held in favor of the FPC on the grounds that the fee land was not a reservation.[10]

The Tuscarora Indian Nation contended in the alternative that the FPA should not apply to tribes, citing the language in *Elk v. Wilkins* that "General acts of congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."[11] In response, the Court remarked that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests" and cited cases holding that the income of individual Indians was subject to federal taxation.[12]

All in all, *Tuscarora* is an implausible lynchpin for the proposition that silent statutes ought to presumptively apply to tribes, as Alex Skibine has cogently argued.[13] First, the finding that the FPA's reference to reservations did not apply to fee land was dispositive; the court's musings on general statutes are likely dicta.[14] Second, the FPA explicitly mentions (Indian) reservations, and *Tuscarora* thus does not involve "a general law that was silent with respect to its application to Indians."[15] Finally, *Tuscarora* and *Elk* alike speak of individual Indians, not of tribes.[16] Despite these formidable logical obstacles, the *Tuscarora* dictum has become central to the circuit courts' decisions on silent statutes.[17]

The careful reader will notice that the analysis of both the FPA in *Tuscarora* and the Internal Revenue Act in its precursor case, *Choteau v.*

10. *Id.* at 115 ("Inasmuch as the lands involved are owned in fee simple by the Tuscarora Indian Nation and no 'interest' in them is 'owned by the United States,' we hold that they are not within a 'reservation' as that term is defined and used in the Federal Power Act.")

11. Brief for Respondent at 32, *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960) (Nos. 63, 66), 1959 WL 101537, at *32 (quoting *Elk v. Wilkins*, 112 U.S. 94, 100 (1884)).

12. 362 U.S. at 116.

13. Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L. REV. 85, 104 (1991).

14. *Id.* at 89. *See also* Coeur d'Alene Tribal Farm, 751 F.2d at 1115 ("The Secretary relies on *FPC v. Tuscarora Indian Nation,* 362 U.S. 99 (1960), for the principle, "now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." *Id.* at 116. The Farm may be correct when it argues that this language from *Tuscarora* is dictum, but it is dictum that has guided many of our decisions."); San Manuel Indian Bingo & Casino v. NLRB, 475 F.3d 1306, 1311 (D.C. Cir. 2007) ("Moreover, *Tuscarora*'s statement is of uncertain significance, and possibly dictum, given the particulars of that case.")

15. Skibine, *supra* note 13, at 104.

16. *Id.* at 105.

17. *See, e.g.*, San Manuel, 475 F.3d at 1309; Couer d'Alene Tribal Farm, 751 F.2d at 1116.

Burnet,[18] focused on the intent of Congress in writing these generally applicable statutes, not on the possibility that statutes might infringe on tribal sovereignty. Where, then, does the sovereignty piece of the puzzle come in? To answer this question, I look to *Montana*.

2. Montana v. US

Montana is a case about tribal jurisdiction over non-Indians. In particular, it is about "the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians."[19] First, the Court considers and dismisses the argument that the Crow treaties granted these rights—reasoning, in part, that "control over the property underlying navigable waters is so strongly identified with the sovereign power of government" that the United States would not have given it away lightly.[20]

Then the Court turns to the argument that these rights come from the tribe's inherent sovereignty. It cites *United States v. Wheeler*, a case upholding the "power of a tribe to punish tribal members who violate tribal criminal laws."[21] But *Wheeler* also noted that "Indian tribes have lost many of the attributes of sovereignty," including "those involving the relations between an Indian tribe and nonmembers of the tribe."[22] When they became dependent nations, tribes lost the power "to determine their external relations." [23] But they retained "the powers of self-government." Self-government is narrowly defined: It refers to power over "the relations among members of a tribe."[24]

The *Montana* court squared *Wheeler* with its precedents giving tribes the "power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members" by clarifying that these three powers are inherent powers of self-government.[25] But anything beyond "what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."[26] *Montana*

18. 283 U.S. 691, 693-694 (1931) (holding that individual Indians are subject to income tax under the Revenue Act of 1918).

19. Montana v. United States, 450 U.S. 544, 547 (1981).

20. *Id.* at 552.

21. *Id.* at 563 (citing U.S. v. Wheeler, 435 U.S. 313, 323 (1978)).

22. *Id.* at 563-64 (citing Wheeler, 435 U.S. at 326).

23. *Id.* at 564 (quoting Wheeler, 435 U.S. at 326).

24. *Id.* (quoting Wheeler, 435 U.S. at 326).

25. *Id.*

26. *Id.*

concludes by authorizing tribes to exercise civil jurisdiction over non-Indians when their conduct threatens the "political integrity, the economic security, or the health or welfare of the tribe."[27]

Montana deals with tribal sovereignty in sweeping strokes. Its implicit divestiture theory neatly splits sovereignty into two categories: the vanished external sovereignty and the retained internal sovereignty. Of course, all this can be considered expansive dicta. All that *Montana* held is that tribes lack jurisdiction over hunting and fishing regulation on reservation lands owned by non-Indians. But later decisions recognized that "[t]he logic of *Montana*" equated "the internal relations of the tribe" and "tribal self-rule" with the sovereign authority of tribes.[28]

B. *Montana* in the Majority Approach

Montana's limited view of sovereignty pervades the lower courts' decisions. Take, for example, the majority approach set forward by the Ninth Circuit in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) and subsequently adopted by Second, Seventh, and Eleventh Circuits (as well as, in modified form, the Sixth and Eighth Circuits).[29]

The Ninth Circuit held that "silent statutes" presumptively apply to Indian tribes, with three exceptions: "(1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations."[30] This Comment deals exclusively with the first exception.[31]

What falls under this first exception? *Coeur d'Alene Tribal Farm* does not elaborate much on this crucial question. It explicitly mentions only "tribal membership, inheritance rules, and domestic relations" as "purely intramural matters" exempted from the general rule that otherwise applicable federal statutes apply to Indian tribes.[32] If these seem strangely cherry-picked (why

27. *Id.* at 566.

28. Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 334-35 (2008).

29. *See infra*, notes 47-58 and accompanying text.

30. Coeur d'Alene Tribal Farm, 751 F.2d at 1116 (internal citations and quotations omitted); *see also* Solis v. Matheson, 563 F.3d 425, 429 (9th Cir. 2009) (applying the rule set out in *Couer d'Alene*).

31. The second exception refers to the uncontroversial presumption that Congress would not abrogate treaty rights without some explicit statement of intent. United States v. Dion, 476 U.S. 734, 739 (1986). The third exception is for statutes which are not *really* silent, as Congressional intent can be derived from legislative history or other sources.

32. Coeur d'Alene Tribal Farm, 751 F.2d at 1116 (citation omitted). These three examples are identical to the three exceptions noted in *Montana*: "the Indian tribes retain their

footnote continued on next page

internal inheritance rules, but not internal taxes?), it is for good reason. These three areas are carved out not because of their status as foundational to tribal sovereignty, but because they were mandated by longstanding Supreme Court precedents.[33]

The subsequent line of cases–both within and outside of the Ninth Circuit– on the scope of this first *Coeur d'Alene* exception reveals that the exception is shaped by *Montana*'s concept of "the political integrity, the economic security, or the health or welfare of the tribe."[34] These two exceptions—one from circuit courts' silent statute caselaw, one from the Supreme Court's tribal jurisdiction caselaw—have blended into one. Both have come to stand for a limited and narrow vision of sovereignty.[35]

This blending is most noticeable in two contexts: the treatment of nonmembers and of economic activity.

First, *Montana* emphasizes that tribes have lost "the attributes of sovereignty" relating to "nonmembers of the tribe."[36] Strictly speaking, this is dicta—*Montana* only applies to the regulation of nonmembers "on lands no longer owned by the tribe."[37] That is, its holding should not dispose of questions about a tribe's control of nonmembers who live on the tribe's reservation or territory–nevermind questions about Congress's intent in passing generally applicable statutes.

But *Montana*'s emphasis on sovereignty as defined by *membership* (as opposed to, for example, territory) has been taken up enthusiastically in the silent statute context. The Ninth Circuit held that, "[b]ecause the [Tribe's] Farm employs non-Indians as well as Indians," its operation was neither "profoundly intramural . . . nor essential to self-government."[38] The movement from a geographic to a membership-based definition of sovereignty "depart[s] from

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inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." Montana v. United States, 450 U.S. 544, 563-64 (1981).

33. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978) (tribal membership); Roff v. Burney, 168 U.S. 218, 222 (1897) (same); Jones v. Meehan, 175 U.S. 1, 29 (1899) (inheritance rules); United States v. Quiver, 241 U.S. 602, 606 (1916) (domestic relations).

34. Montana, 450 U.S. at 566.

35. The Ninth Circuit's application of *Tuscarora* has already been handily criticized by scholars and judges alike; I won't reiterate those critiques here. *See* Skibine, supra note 13, at 101-110; NLRB v. Little River Band of Ottawa Indians Tribal Gov't, 788 F.3d 537, 565 (6th Cir. 2015) (McKeague, C.J., dissenting) ("The proper inference to be drawn from Congress's silence, I submit, is that tribal sovereignty is preserved and the Board's incursion is unauthorized by law.").

36. Montana, 450 U.S. at 563-564 (citing US v. Wheeler, 435 U.S. 313, 323, 326).

37. *Id.* at 564.

38. Coeur d'Alene Tribal Farm, 751 F.2d at 1116 (citation omitted).

basic legal principles" and would be "inconceivable where another sovereign is concerned."[39]

Second, *Montana* suggests that tribal regulation is justified when that conduct affects the "economic security" of the tribe. But the bar to qualify is high: The conduct must "imperil the subsistence or welfare of the Tribe."[40] This strictly limits the ability of the Tribe to engage in the regulation of ordinary commercial conduct when nonmembers have not explicitly consented to regulation. Likewise, in the silent statute context, the Ninth Circuit approach has rejected any suggestion that "all tribal business and commercial activity" be brought "within the embrace of 'tribal self-government.'"[41]

These two limits are derived from *Montana*'s conception of sovereignty, not from any inquiry into Congress's intent in enacting silent statutes. And they have serious consequences for tribes, which are subjected to environmental and labor statutes which Congress may not have intended to apply to them, and which may preempt them from developing their own environmental and labor regulatory regimes. [42] I will return to this point at the close of this Comment. First, however, I will examine how other cases in the majority and minority circuit approaches treat the logic of *Montana*.

1. The Ninth Circuit Test in Action

The Ninth Circuit has said that little falls under the self-governance exception. The few cases that have come out in favor of tribes do not, as a rule, contravene the generally limited view of sovereignty adopted from *Montana*. Instead, they rely on interpreting the intent of Congress.

Take *Snyder v. Navajo Nation*, which held that the Fair Labor Standard Act's overtime pay provision did not apply to tribal law enforcement officers because tribal law enforcement (as distinct from primarily commercial activity) was a purely intramural affair. The court reached this conclusion

39. Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 90, 87 (1993). For example, Dussias explains, the Court would never hold that "a citizen of, for example, Michigan, who committed a crime while in Indiana could not be prosecuted in Indiana for committing the crime because the defendant was not a citizen of Indiana." *Id.* at 87.

40. Montana, 450 U.S. at 566.

41. Coeur d'Alene, 751 F.2d at 1116.

42. Vicki Limas, *The Tuscarorganization of the Tribal Workforce*, 2008 MICH. ST. L. REV. 467, 470 (2008) ("If they become subject to federal regulation, Indian nations' regulatory and adjudicatory authority over employment relationships will be significantly curtailed. Not only will they be subject to federal laws in addition to their own laws governing employment, some federal laws may preempt tribal laws or preclude traditional remedies.")

through statutory interpretation. Tribal police were exempt by analogy with the FLSA's "express exemption for state and local law-enforcement officers."[43]

Or take *EEOC v. Karuk Tribe Housing Authority*,[44] a seemingly more expansive case in which the Ninth Circuit held that when the tribe acted as the employer of a housing authority, it was acting in its sovereign capacity. As evidence for the proposition, however, the court cited the statute which created the Karuk Tribe Housing Authority, which explicitly mentioned tribes.[45] The court also emphasized that the case did not involve non-members.[46]

2. Other Circuits' Application of *Coeur d'Alene*

A plurality of circuits have adopted the Ninth Circuit's test. The logic of *Montana* pervades these cases: All of them connect the *Coeur d'Alene Tribal Farm*'s presumption of applicability to tribes to implicit divestiture of sovereignty.

The Second Circuit explicitly connected the exception to tribes' limited "retained sovereignty."[47] It defined intramural matters as "conduct the immediate ramifications of which are felt primarily within the reservation by members of the tribe" and specified that this likely excludes all tribal operations that affect commerce outside of the tribe and reservation.[48] Thus, it viewed "employment of non-Indians" and "commerce" as "distinctly inconsistent with the portrait of an Indian tribe exercising exclusive rights of self-governance in purely intramural matters."[49]

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43. 382 F.3d 892, 895 (9th Cir. 2004). Arguably, this case also reflects a brand of police exceptionalism which carves out special rules favoring tribal police officers. *See also* Cooley, 593 U.S. at 348, *supra* note 7 (applying the second *Montana* exception in the tribal policing context).

44. 260 F.3d 1071 (9th Cir. 2001).

45. *Id.* at 1080 (citing 25 U.S.C. § 4101).

46. *Id.* at 1081.

47. "The tribes' retained sovereignty reaches only that power 'needed to control . . . internal relations[,] . . . preserve their own unique customs and social order[, and] . . . prescribe and enforce rules of conduct for [their] own members.' Toward this end, the Supreme Court has recognized that a tribe may regulate any internal conduct which threatens the 'political integrity, the economic security, or the health or welfare of the tribe.'" Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 178-79 (2d Cir. 1996) (internal citations omitted) (first quoting Duro v. Reina, 495 U.S. 676, 685-86 (1990); and then quoting Montana v. United States, 450 U.S. 544, 566 (1981)).

48. *Id.* at 181 ("When a tribal operation affects open markets, it is unlikely that the operation is purely intramural.").

49. *Id.*

The Sixth Circuit also linked the *Coeur d'Alene Tribal Farm* approach to *Montana*.[50] It took the definition of tribes' "residual power over intramural affairs" from *Montana*.[51] The court reasoned that "the application of the *Montana* framework is guided by an overarching principle: inherent tribal sovereignty has a core and a periphery."[52] In the silent statute context, it held that "federal statutes of general applicability may implicitly divest Indian tribes of their sovereign power to regulate the activities of non-members" if they are comprehensive and do not fall into any of the *Coeur d'Alene Tribal Farm* exceptions.[53] The Sixth Circuit only made explicit what the Ninth Circuit had left unsaid.

The Seventh Circuit came to a similar result in *Smart v. State Farm Insurance Co.*[54] The Court wrote that "[a]ny federal statute applied to an Indian on a reservation or to a Tribe has the arguable effect of eviscerating self-governance since it amounts to a subordination of the Indian government. But Indian Tribes are not possessed of absolute sovereignty."[55] The Court held that ERISA did not "impermissibly upset the Tribe's self-governance in intramural matters" because it did not "broadly and completely define the employment relationship," but merely provided reporting and accounting requirements for employers that chose to offer benefit plans.[56]

The Eighth Circuit largely follows the majority approach, although with its own particular twist: that the presumption of applicability "does not apply

50. Soaring Eagle Casino & Resort v. NLRB, 791 F.3d 648, 671 (6th Cir. 2015); NLRB v. Little River Band of Ottawa Indians Tribal Gov't, 788 F.3d 537, 551 (6th Cir. 2015); *see also* Alex Tallchief Skibine, *Practical Reasoning and the Application of General Federal Regulatory Laws to Indian Nations*, 22 WASH & LEE J. CIV. RTS. & SOC. JUST. 123, 126-127, 139-141 (2016) (noting that the Sixth Circuit acknowledges a connection between its approach and *Montana*).

51. *Little River Band*, 788 F.3d at 544 (citing *Montana*, 450 U.S. at 564).

52. *Id.* at 546.

53. *Id.* at 548 ("Our sister circuits have employed the framework set forth in Coeur d'Alene to conclude that aspects of inherent tribal sovereignty can be implicitly divested by comprehensive federal regulatory schemes that are silent as to Indian tribes.").

54. 868 F.2d 929 (7th Cir. 1989), *superseded by statute*, Pension Protection Act of 2006 § 906(a)(2)(A), Pub. L. No. 109-280, 120 Stat. 780, 1051 (codified as amended at 26 U.S.C. § 414), *as recognized in* Meyers v. Oneida Tribe of Indians of Wis., 868 F.3d 818, 827 (7th Cir. 2016); *see also* Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490, 496 (7th Cir. 1993); Menominee Tribal Enter. v. Solis, 601 F.3d 669, 671 (7th Cir. 2010) (stating that the decision in *Great Lakes* was based on *Coeur d'Alene*'s intramural tribal governance exception).

55. *Smart*, 868 F.2d at 935.

56. Both the Second and Seventh Circuits cite only one federal law that abridges tribal sovereignty without mentioning Tribes specifically: federal employment withholding taxes. Their support for this is Felix Cohen's statement that "there can be little doubt" that tribes are subject to federal employment withholding taxes. *Id.*; Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 179 (2d Cir. 1996).

when the interest sought to be affected is a specific right reserved to Indians."[57] The contours of these specific rights may come from treaties, statutes, or federal common law. However, the effect in practice of the Eighth Circuit approach is similar to that of the Ninth Circuit: if the right is reserved by treaties, it falls under the *Coeur d'Alene Tribal Farm* treaty abrogation exception, and if it is reserved by statute, then it either falls under the third *Coeur d'Alene Tribal Farm* exception (when the intent of Congress can be divined) or the issue becomes a standard question of interpreting two conflicting statutes.

Finally, the Eleventh Circuit agreed that "tribe-run business enterprises acting in interstate commerce do not fall under the 'self-governance' exception" and held that the ADA applied to tribal employers even in the context of a tribal gaming facility—this despite the centrality of casino operations to many tribal governments as a source of revenue and employment.[58]

C. Minority Approaches

The minority approaches taken by the D.C. and Tenth Circuits are less likely to find that a silent statute applies to tribes. But both approaches link the silent statute inquiry with tribal sovereignty, just as the majority approach does. The courts simply draw the line of sovereignty in different locations.

1. D.C. Circuit Approach

The D.C. Circuit grappled with the tension between the two canons of statutory interpretation: generally applicable statutes apply to tribes, but ambiguous statutes must be resolved in favor of Indians.[59] The court decided that statutes should not apply to areas of core tribal sovereignty (including the intramural exceptions recognized by the Ninth Circuit as well as other traditional governmental functions), while regulation of economic activities off-reservation or involving non-Indians was a peripheral area of sovereignty in which federal statutes presumptively apply.[60] While *San Manuel* does not cite *Montana*, this core/periphery distinction seems to be drawn from its theory of implicit divestiture.

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57. EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246, 248 (8th Cir. 1983).

58. Fla. Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla., 166 F.3d 1126, 1129-30 (11th Cir. 1999).

59. San Manuel Indian Bingo & Casino v. NLRB, 475 F.3d 1306, 1312 (D.C. Cir. 2007). The second of these canons applies when a statute regulates or benefits Indians. Alex Tallchief Skibine, *Textualism and the Indian Canons of Statutory Construction*, 55 U. Mich. J. L. Reform 267, 269-270 (describing the Indian ambiguity canon).

60. *Id.* at 1312-13.

The D.C. Circuit achieves more conceptual clarity than the Ninth Circuit in its acknowledgement that "in some cases at least, a statute of general application can constrain the actions of a tribal government without at the same time impairing tribal sovereignty."[61] And the *San Manuel* court goes far beyond the Ninth Circuit approach in calling for "a particularized inquiry into the nature of the state, federal, and tribal interests at stake" before a statute is found to apply to tribes.[62] Nevertheless, the court is clear that "an off-reservation commercial enterprise" is plainly not part of a tribe's sovereign power, and therefore is always subject to regulation even by silent statutes.[63]

2. Tenth Circuit Approach

Unlike the other circuits in the split, the Tenth Circuit decided that the canon of construction that ambiguous statutes must be resolved in favor of Indians should apply to silent statutes.[64] It held that tribes generally "retain sovereign authority to regulate economic activity within their territory," meaning most labor and employment statutes would not apply to tribes.[65] And it placed the burden on the government to show that a silent statute ought to apply to tribes.

At least in the realm of economic activity, "[t]he correct presumption is that silence does not work as a divestiture of tribal power."[66] Like the D.C. Circuit's approach, the Tenth Circuit may draw the line at off-reservation commercial activity. Nevertheless, its much more expansive approach has been met with approbation from Indian law scholars.[67]

II. What *Montana*'s Application in the Silent Statute Context Tells Us About Sovereignty

A. *Montana* is Theoretically Out of Place

How does *Montana* relate to the silent statute inquiry? In the context of congressional statutes, the nature of the sovereign interest infringed on is logically irrelevant. So long as it makes its intent clear, it is undisputed under

61. *Id.* at 1312.

62. *Id.* at 1313 (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980)).

63. *Id.*

64. NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1191-92 (10th Cir. 2002) (en banc).

65. *Id.* at 1192-93.

66. *Id.* at 1196.

67. *See, e.g.*, Alex Tallchief Skibine, *Practical Reasoning and the Application of General Federal Regulatory Laws to Indian Nations*, 22 WASH & LEE J. CIV. RTS. & SOC. JUST. 123, 154 (2016).

the plenary power doctrine that Congress can do whatever it likes to tribes, including infringing on its "internal relations" and "tribal self-rule."[68]

Nevertheless, *Montana* has come to shape courts' thinking in determining whether an ambiguous statute should apply to tribes. The courts reason that Congress should not be presumed to have intended to infringe on tribal self-government. Thus, if the statute infringes on powers tribes don't possess, then the presumption doesn't apply, and it can safely be assumed that Congress intended these general, comprehensive statutes to apply to tribes.[69]

Scholars have critiqued the lower court decisions holding silent statutes applicable to tribes on pragmatic grounds.[70] I join the chorus with the doctrinal argument that *Montana* has no business in the silent statute inquiry.

First, there is a theoretical mismatch. The affirmative jurisdiction of tribes can't be made to match neatly with the effects of statutes on tribes. These are often two *different types of power* (that is, there's a category error). For one example of this sort of category error, see Justice Blackmun's dissent in *South Dakota v. Bourland*: "To say that non-Indians may hunt and fish in the taken area is not to say that they may do so free of tribal regulation any more than it is to say that they may do so free of state or federal regulation. Even if the Tribe lacks the power to exclude, it may sanction with fines and other civil penalties those who violate its regulations."[71]

Moreover, as Justice Blackmun points out, regulatory authority may be concurrent:

> [T]he majority also believes that tribal authority to regulate hunting and fishing is inconsistent with the fact that Congress has given the Army Corps of Engineers authority to promulgate regulations for use of the area by the general public. . . . I see no inconsistency. . . . This regulation clearly envisions a system of *concurrent* jurisdiction over hunting and fishing in the taken area. The majority offers no explanation why concurrent jurisdiction suddenly becomes untenable when the local authority is an Indian tribe.[72]

This critique is especially powerful in the context of a tribal/federal power divide that is rotten at its core. Federal power is all-encompassing. Any tribal

68. Montana, 450 U.S. at 564.

69. This raises an potential question for further research: how, if at all, has Congress historically understood and considered the Indian canons of construction when passing statutes outside of the realm of Indian law? Has this understanding changed over time, such that the presumed intent of Congress should be different for older statutes than for newer?

70. *See, e.g.*, Vicki Limas, *The Tuscarorganization of the Tribal Workforce*, 2008 MICH. ST. L. REV. 467, 470 (2008); Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. Davis L. Rev. 85, 88 (1991).

71. 508 U.S. 679, 702 (1993) (Blackman, J., dissenting).

72. *Id.*

exercise of authority is an exercise of concurrent jurisdiction because it exists at the sufferance of Congress. The federal government always retains the right to terminate that tribal authority and assume full jurisdiction.[73]

Finally, note that there is also a practical mismatch in the *Montana* division of power scheme, one which results from the distinction between membership and territory. Presumptively applying federal statutes to tribes often infringes on their affirmative powers. For example, environmental statutes, when applied to tribes, infringe on tribal authority to regulate environmental issues in their territories. Nothing in the *Montana* scheme justifies the special distinction tribal authority over its *members* from tribal authority over its *land*. Internal affairs of the tribe often involve the tribe's lands, not just its citizens. The *Montana* Court never puts forward a convincing justification for holding otherwise.[74]

B. *Montana* Produces Practically Troubling Results

Tribal governments are *sui generis*. They are not perfect analogues to state or local governments. Courts aren't well-equipped to assess what is important to the sovereignty of tribes by applying the brightline rules derived from *Montana*. *Montana*'s approach flattens the differences between different tribes, applying a one-size-fits-all definition of sovereignty to wildly distinctive governmental entities.

Montana also results in an arbitrary line: statutes which perhaps should apply to tribes do not, while statutes that tribes believe put their core sovereignty at risk unquestionably do apply. On all sides of the circuit split, the sovereignty-focused approach has produced puzzling results. Courts have "arbitrarily and progressively adopt[ed] continuously narrower judicial

73. Another, more abstract, critique applies. One might argue that sovereign powers don't exist as background realities waiting to be called upon. Instead, the power to do X is created only when someone decides to do X. Thus, just as there are spaces of concurrent jurisdiction, there are also voids of no jurisdiction. When governments decide to fill these voids, they articulate a new kind of power. Because such statutes displace nothing, they will not obviously fall into either the "tribal" or "federal" categories of power. Put differently, sovereign power is not a menu of options, divided neatly between tribes, states, and the federal government. Rather, it is an ever-changing and often re-constituted configuration of government-citizen-territory relationships.

74. The skeletal framework of this tribal jurisdiction/federal statute dichotomy may also be imported from the world of dormant Commerce Clause and other state jurisdiction/federal jurisdiction sorting exercises. This notion is outside of the scope of this paper but worth exploring.

definitions of tribal self-government using unprincipled federal common law."[75]

For example, the "intramural" sovereignty framework adopted by the plurality of circuits firmly excludes off-reservation economic activity. Tribal sovereignty over commercial affairs is limited to "conduct the immediate ramifications of which are felt primarily within the reservation by members of the tribe."[76] In these courts' telling, the federal government has exclusive sovereign power to regulate interstate commerce. But tribal governments often act not just as a government but also as "a participant" in the reservation economy, because they are at once government and "landowner and entrepreneur."[77] This casts *Solis*, *Snyder*, and other court-made distinctions between governmental and commercial functions into doubt.

III. Ways Forward for Tribes

This paper has offered two arguments that *Montana* is inappropriate in the silent statute context. Theoretically, a lack of affirmative jurisdiction over a given subject does not necessarily mean that ambiguous federal statutes must apply. Practically, sovereignty as the courts have defined it is too narrowly confined to the internal self-governance and intramural affairs of a tribe. Courts which wish to reject the notion of implicit divestiture may be best off embracing the *Santa Clara Pueblo v. Martinez* line of cases,[78] which call for Congress to make clear their intent to intrude on tribal sovereignty. The Tenth Circuit's presumption that silent statutes do not apply to tribes most faithfully implements this principle.

Alternatively, merely recognizing *Montana* as the heart of the doctrine might give tribes a way forward in court. The language in *Montana* refers not to the inherent sovereign powers of tribes but to the effects of non-Indian conduct on the political and economic integrity of the tribe and its health and welfare. If courts insist on applying *Montana*, they should apply it correctly.

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75. Alex Tallchief Skibine, *Constitutionalism, Federal Common Law, and the Inherent Powers of Indian Tribes*, 39 AM. INDIAN L. REV. 77, 82 (2014).

76. Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 181 (2d Cir. 1996); *see* Rachel Sibila, *"Play or Pay": Interpreting the Employer Mandate of the Patient Protection and Affordable Care Act as it Relates to Tribal Employers*, 39 AM. INDIAN L. REV. 235, 244-54 (summarizing caselaw on whether a variety of labor and employment statutes apply to tribes); *see also* Mitchell v. Pequette, No. CV-07-38, 2008 WL 8567012, at *5-7 (Leech Lake Trial Div. May 9, 2008) (holding that FLSA did not apply to the Tribe).

77. DAVID E. WILKINS, INDIGENOUS GOVERNANCE: CLANS, CONSTITUTIONS, AND CONSENT 27 (2023) (citing COMMISSION ON STATE-TRIBLE RELATIONS, HANDBOOK: STATE-TRIBAL RELATIONS 30 (1984)).

78. 436 U.S. 49 (1978).

This means inquiring into the statute's effect in practice.[79] And it may mean refusing to unilaterally decide whether a given statute applies to all tribes, depending on the case. This approach has the practical advantage of moving away from a monolithic and abstract concept of tribal sovereignty towards an understanding of each tribe as unique *in its sovereignty*.

Moreover, if *Montana* is a lynchpin for silent statute analysis, *United States v. Cooley*[80] may present an important opportunity. In *Cooley*, the Supreme Court extended *Montana* into the field of criminal jurisdiction. It held that a single intoxicated and armed driver on a reservation was a sufficient threat to tribal health or welfare to fit the *Montana* exception "like a glove" and convey jurisdiction to tribal police.[81] This expansion presents an opportunity for tribes to argue that statutes with even relatively particularized effects on tribal political integrity, economic security, or health or welfare should not necessarily apply to tribes.[82]

Conclusion

Vine Deloria famously described the "immense difficulties in bringing" tribal sovereignty "directly into the field of law as a viable doctrine."[83] Sovereignty—once a "strict, territorial" concept—has become increasingly about the "obligation on the sovereign state to care for and regulate the behavior of its citizens both inside and outside state borders."[84]

Most courts have not followed this broad conception of sovereignty. Instead, they have torturously defined the exact boundaries of tribal self-governance in interpreting the intramural exception to federal statutes of general applicability. The application of these statutes to tribes may be burdensome in the cases before the court. But it could also have the more alarming effect of hampering tribal sovereignty by discouraging tribes from forming their own regulatory regimes in, *inter alia*, the labor and environment

79. This argument was made by Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L. REV. 85, 122-26 (1991). Skibine describes the silent statute caselaw in great detail and makes a persuasive case for this practical effects approach.

80. 593 U.S. 345 (2021).

81. *Id.* at 348, 350.

82. *See, e.g.*, Mandan, Hidatsa & Arikara Nation v. U.S. Dep't of the Interior, 95 F.4th 573, 581 (8th Cir. 2024) (quoting Montana, 450 U.S. at 566) ("MHA claims it has the power to enforce its law against Slawson, by way of the BLM permitting process, under Montana's second exception for regulating the "health or welfare of the tribe.").

83. Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203, 217 (1989).

84. Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1058 (quoting Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029, 2050-51 (2003)).

contexts. Rather than relying on a narrow construction of tribal sovereignty derived from the affirmative jurisdiction context of *Montana*, courts should hear evidence on how practically disruptive a statute is when applied to individual tribes.

Congressional silence is often the product of a simple failure to remember tribes. But it could produce an unexpected benefit. Courts, unlike Congress, are equipped and mandated to make narrow determinations, situation-by-situation and tribe-by-tribe. Likewise, federal agencies may have different practical approaches on different reservations—flexibility that, when appropriately constrained, may be desirable.[85] Courts and agencies have the institutional competence to inquire into the effects of statutes on tribes case-by-case, rather than resorting to hardline rules—nonmembers versus members, commercial versus governmental. And a final advantage of looking to the tribe, rather than Congress, is that courts must learn about individual tribes to adjudicate.[86] What do tribes think are important effects on their governance, land, and people? By recognizing the uniqueness of each tribal government and situation, courts can bring the silent statute doctrine closer to the ideal of tribal sovereignty.

85. For a similar argument in the context of a specific statute, see Spohr & Fowler, *supra* note 2, at 64. Professor Dan Lewerenz pointed out to me that the Department of Interior's approach to the Indian Gaming Regulating Act's "governmental authority" requirement may be another example of such tribe-by-tribe agency discretion.

86. *See also* Matthew Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973 (2010).