

Sanctuaries No More: The United States Supreme Court Deals Another Blow to Indian Tribal Court Jurisdiction

[*Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304 (2001)]

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I. INTRODUCTION

Fiat iustitia ruat caelum
(Let justice be done though the heavens fall)¹

The Romans believed that the law reigned supreme and justice depended on strict adherence to the law, regardless of the circumstances.² In *Nevada v. Hicks*,³ the United States Supreme Court put justice and adherence to law first in spite of the storm of criticism the Court undoubtedly knew this decision would draw.⁴ In *Hicks*, the justices dealt with Indian tribal court jurisdiction over non-members, an issue often before the Court in the last twenty-five years.⁵ Since 1978, the Court has increasingly limited the jurisdiction of tribal courts over non-members;⁶ the holding in *Hicks* defines those limitations even further.⁷

The Court held in *Hicks* that tribal courts have no jurisdiction over state officials acting to enforce state law on Indian lands when the underlying state violation occurred off the reservation.⁸ To arrive at its holding, the majority found that tribal courts are not courts of general jurisdiction and therefore may not hear claims under 42 U.S.C. § 1983.⁹ Since tribal courts cannot hear § 1983 claims, there is

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1. EUGENE EHRLICH, *AMO, AMAS, AMAT AND MORE* 132 (1985).

2. *Id.*

3. *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304 (2001) (*United States Reports* pagination not available at time of publication).

4. Indeed, the outcry from Indian tribes was immediate. Tony Mauro, *O'Connor, Breyer Get Earful About Decisions Limiting Tribal Jurisdiction*, 165 N.J.L.J. 1, 1-2 (2001).

5. See *Atkinson Trading Co. v. Shirley*, 121 S. Ct. 1825 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985); *Montana v. United States*, 450 U.S. 544 (1981); *United States v. Wheeler*, 435 U.S. 313 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

6. See *Atkinson Trading Co.*, 121 S. Ct. at 1825; *Strate*, 520 U.S. at 438; *Nat'l Farmers Union*, 471 U.S. at 845; *Montana*, 450 U.S. at 544; *Wheeler*, 435 U.S. at 313; *Oliphant*, 435 U.S. at 191.

7. See *Hicks*, 121 S. Ct. at 2318.

8. *Id.*

9. *Id.* at 2314.

no requirement for the state officials to exhaust their remedies in tribal court before seeking remedy in federal court.¹⁰

While this holding was quite broad, the Court could have gone further. The Court missed an opportunity to decide the broader issue of exactly how far tribal court jurisdiction extends over non-Indians. The majority opinion took care to point out that *Hicks* only applies to state officials when acting in their official capacity.¹¹ In light of the narrowness of this part of the decision, it is time for clear guidelines on the jurisdiction of tribal courts when dealing with non-Indians. *Hicks* appears to be a stepping stone to those guidelines.

II. CASE DESCRIPTION

Floyd Hicks was a tribal member who lived on the Fallon Paiute-Shoshone Reservation in Nevada.¹² In 1990, Nevada game wardens suspected Hicks of poaching game outside the reservation.¹³ The wardens first sought authority for a search in state court.¹⁴

A state judge issued a warrant to search Hicks' home and yard; subsequently a tribal court judge, at the request of the wardens, issued a second warrant to be used in tandem with the state warrant.¹⁵ No contraband was discovered during the search.¹⁶ A year later, the warden again procured both state and tribal warrants and searched Hicks' home,¹⁷ aided by other state wardens and tribal officials.¹⁸ This second search also uncovered no wrongdoing.¹⁹

Hicks brought suit in Fallon Paiute-Shoshone Tribal Court, alleging that his property was damaged and that the most recent search went beyond the permissible scope of the warrant.²⁰ Hicks claimed

10. *Id.* at 2315.

11. *Id.* at 2309 n.2. Justice Ginsburg issued a concurring opinion only to point out the limitations of the decision. *Id.* at 2324 (Ginsburg, J., concurring). Justice Souter, also writing separately, noted the need for guidance in this area because of his concern with protecting the rights of non-Indians. *See id.* at 2323 (Souter, J., concurring).

12. *Id.* at 2308.

13. *Id.* The wardens suspected that Hicks had killed a California bighorn sheep, a species protected under Nevada law. *Id.*

14. *Id.*

15. *Id.* The tribal court warrant was issued because the state warrant contained the language "SUBJECT TO OBTAINING APPROVAL FROM THE FALLON TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES." *Id.* The state judge who issued the original warrant believed his court had no jurisdiction on the reservation. *Id.*

16. *Id.* The search of Hicks' yard by the state game warden and reservation police uncovered a buried Rocky Mountain bighorn head, a species not protected by Nevada law. *Id.*

17. *Id.* These warrants were issued based upon a tip from a member of the tribal police force to a Nevada game warden that Hicks had two bighorn sheep heads in his home. *Id.* This time the state warrant did not require permission from the tribal court, but the warden obtained one from the tribal court anyway. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* The suit was brought against the tribal judge who issued the tribal warrant, tribal officers who participated in the search, the Nevada game wardens in "both their individual and official capacities," and the State of Nevada. *Id.* Eventually, a directed verdict dismissed Hicks'

“trespass to land and chattels, abuse of process, and violation of civil rights – specifically, denial of equal protection, denial of due process, and unreasonable search and seizure, each remediable under 42 U.S.C. § 1983.”²¹ Jurisdiction immediately became the primary issue.²²

The tribal court and the tribal appeals court held that the tribe had jurisdiction.²³ The wardens and the State of Nevada sought a declaratory judgment in federal district court denying tribal court jurisdiction.²⁴ The United States District Court for the District of Nevada ruled that the tribal court had jurisdiction.²⁵ The District Court also held that the defendants must exhaust their immunity claims in tribal court before bringing such claims in federal court.²⁶ The Ninth Circuit Court of Appeals agreed, noting that Hicks resided on Indian-owned land within the reservation.²⁷ According to the Ninth Circuit, Hicks’ residence, and the fact that it was a civil claim, was enough to create tribal court jurisdiction over the wardens.²⁸ The State of Nevada appealed the Ninth Circuit decision, and the United States Supreme Court granted certiorari on October 10, 2000.²⁹

III. BACKGROUND

The question of state-tribal jurisdiction is not a new problem. The Supreme Court dealt with the issue as early as 1832 when Chief Justice John Marshall wrote in *Worcester v. Georgia*:

[T]he Cherokee nation . . . is a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.³⁰

If this view of tribal supremacy had remained the rule, there would be no need for a new rule today.

However, in the nearly 170 years since Justice Marshall’s strong statement, the Supreme Court has systematically reformulated these

claims against all defendants except the wardens and the State of Nevada; the Supreme Court did not consider those claims. *Id.*

21. *Id.* Hicks later dismissed his suit against Nevada and the wardens in their official capacities, leaving the court with only the suit against the wardens in their individual capacities. *Id.*

22. *Id.* at 2308-09.

23. *Id.*

24. *Id.*

25. *Id.* at 2309.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Williams v. Lee*, 358 U.S. 217, 219 (1959) (*quoting Worcester v. Georgia*, 6 Peters 515, 561 (1832)). Even this case is distinguishable, as Justice Scalia noted in footnote 4 of *Hicks*; *Worcester* involved the Cherokee reservation and the 1828 treaty with the Cherokee, which had guaranteed the tribe autonomy from states and territories. *Hicks*, 121 S. Ct. at 2311 n.4.

principles giving the states increasingly more jurisdiction and creating more distinct lines.³¹ In addition, Congress has acted to define the relationship between Indians and both state and federal governments by enacting various laws delineating state and federal responsibilities.³² In spite of this legislative action, in the area of jurisdiction, it is the Supreme Court that has paved the way for *Hicks*.³³

Since 1978, the Court has narrowed tribal court jurisdiction in a number of ways. In March of 1978, the Court handed down two cases that greatly curtailed the power of tribal courts over non-members.³⁴

In the first case, *Oliphant v. Suquamish Indian Tribe*,³⁵ tribal police arrested two non-Indians for assault, resisting arrest, damage to tribal property, and reckless endangerment.³⁶ The defendants argued that the tribe had no criminal jurisdiction over non-members and the Court agreed.³⁷ Later that same month, the Court decided *United States v. Wheeler*.³⁸ Wheeler, a Navajo Indian, was convicted in tribal court for contributing to the delinquency of a minor and subsequently indicted for statutory rape by a federal grand jury for the same incident.³⁹ The Court ruled that the Double Jeopardy clause of the Constitution did not apply.⁴⁰ In discussing the sovereignty issue, the Court held "areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe."⁴¹ The stage was thus set for a watershed case in this area of the law.

The Court found such a case in *Montana v. United States*.⁴² This decision built on the holdings in *Wheeler* and *Oliphant*. *Montana* involved an attempt by the Crow Tribe to regulate all hunting and fish-

31. See *Williams*, 358 U.S. at 219-20. *Williams* contains a brief description of this evolution in thinking from Justice Holmes' statement in *Worcester* to 1959. *Id.*

32. Examples include: 18 U.S.C. § 1152 (2000), allowing federal prosecution of crimes committed on Indian land provided the crimes are not the exclusive jurisdiction of the tribe and prohibiting double jeopardy for crimes already punished by tribal courts, and 18 U.S.C. § 1153, establishing punishments for certain crimes occurring in Indian Country to be the same as those occurring elsewhere under federal law and providing for substituting laws of the state when federal laws do not define the crime.

33. See *Atkinson Trading Co. v. Shirley*, 121 S. Ct. 1825 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985); *Montana v. United States*, 450 U.S. 544 (1981); *United States v. Wheeler*, 435 U.S. 313 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

34. See *Wheeler*, 435 U.S. at 313; *Oliphant*, 435 U.S. at 191.

35. *Oliphant*, 435 U.S. at 194.

36. *Id.*

37. *Id.* at 195.

38. *Wheeler*, 435 U.S. at 313.

39. *Id.* at 315-16.

40. *Id.* at 329-30. The Court said that when Indian tribes punish offenders, they are acting in their status as independent sovereigns; therefore, since the U.S. and the tribe are separate sovereigns, it is not double jeopardy to prosecute an offender under federal law after acquittal for the same offense by the tribal court. *Id.* Such double jeopardy was later prohibited by Congress. 18 U.S.C. § 1152 (2000).

41. *Wheeler*, 435 U.S. at 326.

42. *Montana v. United States*, 450 U.S. 544 (1981).

ing on non-Indian owned land within the borders of the reservation.⁴³ Greatly limiting tribal court jurisdiction, the Court held “that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”⁴⁴

The *Montana* Court conceded that there were limited times when a tribal court might have jurisdiction over a non-member, but in order for such jurisdiction to be triggered, the controversy must fall into at least one of two categories.⁴⁵ First, tribes are allowed to regulate “the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”⁴⁶ Second, tribes are also allowed to exercise civil jurisdiction over non-members on Indian property inside the reservation borders when their conduct “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”⁴⁷

One of the key elements of the second prong of the *Montana* test was “on fee lands within its reservation . . .”⁴⁸ This phrase made land ownership an important factor in the analysis, which was central to the Court’s next major decision, *Strate v. A-1 Contractors*.⁴⁹ In this 1997 case, the Court held that tribal courts have no jurisdiction to hear tort claims arising out of traffic accidents involving a non-member on a state highway running through the reservation.⁵⁰ The Court ruled that since the highway was physically on a state-owned right-of-way, it was alienated, non-Indian owned land; therefore, the tribal court had no jurisdiction.⁵¹

Reading *Strate* along with its predecessors, it is clear that Supreme Court jurisprudence already favored limiting Indian tribal court jurisdiction at the time the Court heard *Hicks*. Additionally, in *Hicks*, the Court also had to face another, even more difficult issue, the question of whether tribal courts are courts of general jurisdiction.⁵²

In *Strate*, the Court held that the jurisdiction of tribal courts could not be greater than the tribe’s regulatory authority.⁵³ Such a restriction would be inconsistent with a claim of general jurisdiction. For example, state courts, which are courts of general jurisdiction,

43. *Id.* at 547.

44. *Id.* at 565.

45. *Id.*

46. *Id.* at 565.

47. *Id.* at 566.

48. *Id.*

49. *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

50. *Id.* at 459.

51. *Id.* at 454.

52. *Nevada v. Hicks*, 121 S. Ct. 2304, 2313-14 (2001).

53. *Strate*, 520 U.S. at 453.

may hear federal issues that are clearly outside the state's regulatory authority. However, Congress has enacted statutes permitting tribal courts to assume jurisdiction over certain federal issues.⁵⁴ One of the implied questions left for a future court to resolve was whether, absent specific Congressional delegation, tribal courts could assume jurisdiction over federal issues. An additional implied issue left open was how much litigation in the tribal court is necessary before the attempt at remedy is exhausted and the issue can be removed to federal court, once the tribal court assumes jurisdiction.

In *National Farmers Union Insurance Cos. v. Crow Tribe*, a 1985 decision, the Court held that a defendant must exhaust his remedies in tribal court before seeking remedy in federal court.⁵⁵ *National Farmers Union* involved a default judgment in tribal court against a school district whose insurer attempted to remove the case from tribal court.⁵⁶ Still, in *National Farmers Union* the Court offered exceptions to the exhaustion rule,⁵⁷ ruling that exhaustion in tribal courts was not required when seeking such jurisdiction was "motivated by a desire to harass or [was] conducted in bad faith."⁵⁸ Exhaustion is also not required when "[an] action [was] patently violative of express jurisdictional prohibitions or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."⁵⁹

The *Strate* Court further whittled away the exhaustion requirement. In *Strate*, the Court held that when it was obvious that no grant of federal power allowed tribal court jurisdiction over a non-member's actions under the *Montana* rule, exhaustion would not be required before removal to federal court.⁶⁰ Thus, when the Supreme Court granted certiorari in *Hicks*, the pattern of its decisions reflected an across-the-board weakening of tribal court jurisdiction over non-members.⁶¹

54. *Hicks*, 121 S. Ct. at 2314. For example, 25 U.S.C. § 1911 (1994) grants tribal courts right to hear, under the Indian Child Welfare Act of 1978, child custody cases involving Indian children. *Id.*

55. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985).

56. *Id.* at 847.

57. *Id.* at 856 n.21.

58. *Id.* (quoting *Juidice v. Vail*, 430 U.S. 327, 338 (1977)).

59. *Nat'l Farmer's Union*, 471 U.S. at 856 n.21.

60. *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997).

61. See *Atkinson Trading Co. v. Shirley*, 121 S. Ct. 1825 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985); *Montana v. United States*, 450 U.S. 544 (1981); *United States v. Wheeler*, 435 U.S. 313 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

IV. ANALYSIS

The issue before the United States Supreme Court in *Nevada v. Hicks* was whether state officials, who searched a private, Indian-owned residence on an Indian reservation pursuant to a valid search warrant issued by a state court for off-reservation infractions, were subject to tribal court jurisdiction for civil rights violations allegedly committed while executing the warrant.⁶²

A. Parties' Arguments

Floyd Hicks alleged state officials violated his civil rights under 42 U.S.C. § 1983.⁶³ Hicks first argued that the tribal court had jurisdiction despite the fact that the state officials were not tribe members, since the incident occurred on tribal land.⁶⁴ He also maintained that his suit was not barred by the wardens' claim of sovereign immunity because of their official duties on behalf of the state, nor did that claim prevent the tribal court from hearing the suit.⁶⁵ Finally, he charged that the state officials must exhaust their immunity claims in tribal court before moving to federal court.⁶⁶

The State of Nevada and its officials made five arguments: (1) that the tribal court had no jurisdiction over state officials because of the State's immunity to suit; (2) that Hicks could not bring a claim under § 1983 in tribal court because of limited tribal court jurisdiction; (3) that Hicks' recharacterization of the suit to an action against the officials in their individual capacities did not alter their immunity or his inability to bring a § 1983 claim in tribal court; (4) the Supreme Court's holding in *Montana v. United States* prevented tribal jurisdiction even if state immunity did not do so; and (5) tribal sovereignty was not undermined by lack of jurisdiction over state officials.⁶⁷

B. Majority Opinion

Justice Scalia, writing for the Court, concluded that the tribal court had no jurisdiction over state officials who entered the reservation in their official capacities to investigate violations of Nevada law that occurred off the reservation.⁶⁸ Furthermore, Justice Scalia wrote that the State's interest in enforcing its own laws was substantial, and this exercise of power did not undermine the right of the tribe to gov-

62. *Nevada v. Hicks*, 121 S. Ct. 2304, 2308-09 (2001).

63. *Id.* at 2308.

64. Brief of Respondent at 8-9, *Nevada v. Hicks*, 121 S. Ct. 2304 (2001)(No. 99-1994).

65. *Id.* at 14-15.

66. *Id.* at 46-47.

67. Brief of Petitioner at 1, 6-7, 16, 19, *Nevada v. Hicks*, 121 S. Ct. 2304 (2001)(No. 99-1994).

68. *Hicks*, 121 S. Ct. at 2313.

ern itself.⁶⁹ The Court also held that the tribal court lacked authority to hear the § 1983 claim since it was not a court of general jurisdiction because Congress had not granted that right through legislation.⁷⁰ It logically followed that since there was no authority to hear the § 1983 claim, exhaustion in tribal court of the disputed jurisdiction was not required.⁷¹

C. Concurring Opinions

Although all nine justices agreed in the result, there was disagreement with how the majority arrived at its holding. Four justices filed concurring opinions.

Justice Souter was in general agreement with the majority opinion.⁷² He parted company with the majority because of its emphasis on the superiority of the state interest as the primary factor.⁷³ Justice Souter implied that the Court did not go far enough and that the general issue of tribal court civil jurisdiction over non-members should be addressed.⁷⁴ He based this argument on what he saw as significant differences between Indian tribal courts and state and federal courts.⁷⁵

In a short concurrence, Justice Ginsburg simply pointed out the limitations of the decision. She emphasized that in her view the holding was confined to state officials acting to enforce state laws allegedly violated off-reservation.⁷⁶

Justice O'Connor found almost no common ground with the majority.⁷⁷ Although she agreed that the rule in *Montana* was determinative, she believed the majority misapplied *Montana* and its progeny.⁷⁸ The key to understanding the ruling in *Montana* and the

69. *Id.*

70. *Id.* at 2314.

71. *Id.* at 2315.

72. *Id.* at 2318 (Souter, J., concurring). Justice Souter's concurrence was joined by Justices Kennedy and Thomas. *Id.* (Souter, J., concurring). Justice Souter agreed with the majority that the tribal court had no jurisdiction to adjudicate Hicks' suit against the state officials and also agreed that the analysis in *Montana* was determinative as to tribal court jurisdiction. *Id.* (Souter, J., concurring).

73. *Id.* (Souter, J., concurring). Instead, Justice Souter argued that one arrived at the same conclusion simply by applying the *Montana* test to the facts of the case. *Id.* (Souter, J., concurring).

74. *See id.* at 2323 (Souter, J., concurring).

75. *Id.* (Souter, J., concurring). Further, Justice Souter pointed out that many constitutional rights may not necessarily be respected by tribal courts, which could place the non-member in the position of having his rights violated by the tribal court. *Id.* (Souter, J., concurring). Also, Justice Souter discussed the fact that there is "no effective review mechanism in place to police tribal courts' decisions on matters of non-tribal law." *Id.* (Souter, J., concurring). He based this logic on the fact tribal court decisions cannot be appealed to state or federal courts and there is no removal provision making such a review impossible. *Id.* (Souter, J., concurring).

76. *Id.* at 2324 (Ginsburg, J., concurring).

77. *See id.* at 2324 (O'Connor, J., concurring). Justices Stevens and Breyer joined this concurrence. *Id.* (O'Connor, J., concurring).

78. *Id.* at 2325 (O'Connor, J., concurring).

later cases was the ownership status of the land.⁷⁹ Justice O'Connor saw the decision in *Hicks* as threatening tribal self-government by undermining both prongs of the *Montana* test.⁸⁰ She believed the majority went too far with its analysis of tribal court jurisdiction and that the case could have been resolved by an examination of state immunity.⁸¹

Justice Stevens wrote separately to disagree with the portion of the majority opinion that held the tribal court was not a court of general jurisdiction and could not hear § 1983 claims.⁸² In addition, Justice Stevens did not discern any justification for preventing tribal courts from adjudicating § 1983 claims, reasoning that the statute did not bestow any rights that did not exist elsewhere.⁸³ His opinion, like that of Justice O'Connor, demonstrated that for them, *Hicks* was not a stepping stone, but a step too far in restricting tribal court authority.

D. Commentary

1. Precedent

The *Hicks* Court took the next step in limiting tribal court authority over non-members in three ways. The Court further limited the tribal court's jurisdiction, tribal court ability to hear cases involving federal laws absent a specific grant of power, and the requirement that parties to such suits exhaust their remedy in tribal court.⁸⁴ Although the Court stopped short of a more complete rule for tribal courts dealing with non-members, *Hicks* was an important step in the continuing evolution toward developing such a rule.

79. *Id.* at 2326 (O'Connor, J., concurring).

80. *Id.* at 2324, 2328-29 (O'Connor, J., concurring). Justice O'Connor believed the majority's dismissal of consensual relationships as those involving private individuals was too narrow. *Id.* at 2328 (O'Connor, J., concurring). For Justice O'Connor, the majority opinion may preclude such relationships in the future, undermining the consensual relationship prong of *Montana* for making jurisdictional determinations. *Id.* (O'Connor, J., concurring). She also wrote that the majority undermined the second prong of *Montana* by asserting that state officials acting on Indian lands in pursuit of violations off-reservation does not undermine tribal self-government. *Id.* at 2328-29 (O'Connor, J., concurring).

81. *Id.* at 2330 (O'Connor, J., concurring). Justice O'Connor asserted that the immunity claims should have been heard concurrently with the other claims. *Id.* at 2332 (O'Connor, J., concurring). Justice O'Connor would have held "*Montana* governs a tribe's civil jurisdiction over non-members, and that in order to protect government officials, immunity claims should be considered in reviewing tribal court jurisdiction." *Id.* (O'Connor, J., concurring). Also, she would have preferred to reverse the Ninth Circuit and remand the case, based on her ideas regarding the immunity claims of the state officials. *Id.* (O'Connor, J., concurring).

82. *Id.* at 2332-33 (Stevens, J., concurring). Concurrence joined by Justice Breyer. *Id.* (Stevens, J., concurring). Using state courts as an example, Justice Stevens wrote that unless the tribal court was specifically prohibited by federal law from being considered a court of general jurisdiction, whether it was such a court is a matter of tribal law. *Id.* at 2333 (Stevens, J., concurring). He acknowledged the majority's view that *Strate* is "federal law to the contrary." *Id.* at 2333 n.3 (Stevens, J., concurring). However, he read *Strate* as limited to defining when tribal courts have adjudicatory authority over non-members, not whether that authority extends to hearing claims under specific federal acts. *Id.* (Stevens, J., concurring).

83. *Id.* at 2333 (Stevens, J., concurring).

84. *Id.* at 2315, 2318.

On its face, the jurisdiction rule in *Hicks* appears only to apply to state officials under restricted circumstances.⁸⁵ However, it is the logical extension of earlier cases. In 1978, *Oliphant* eliminated tribal court jurisdiction over non-members in criminal matters.⁸⁶ At about the same time, the *Wheeler* Court held that the tribes had essentially divested their sovereignty over non-members and, though *Wheeler* involved a criminal case, the sovereignty language was not confined to criminal cases.⁸⁷ Finally, the *Montana* rule severely curtailed tribal court jurisdiction over non-members except for very limited circumstances under the two-prong test.⁸⁸ It is not a great leap to recognize, as the *Hicks* majority did,⁸⁹ that state officials, in pursuit of off-reservation crime, did not threaten the sovereignty or rights of the tribe. Even more significantly, the implications of the *Hicks* holding are extremely far-reaching: if state officials are protected from tribal court jurisdiction, then why not all non-members?

On the issue of jurisdiction over non-members, *Hicks* extended *Montana* only in that *Hicks* severed the direct relationship between ownership of the land and jurisdiction.⁹⁰ Justice O'Connor believed jurisdiction and land ownership should remain coupled,⁹¹ but as Justice Souter pointed out, such a rule would result in a jurisdictional checkerboard because Indian and non-Indian owned lands are often mixed together.⁹² *Hicks* thus built on *Oliphant*, which had already severed the tie between the situs of the crime and the jurisdiction when a non-member was involved.⁹³

Having eliminated the situs tie in criminal matters, it would seem illogical to retain such a tie in civil matters; indeed, *Wheeler* laid the foundation for severing this tie by establishing that the tribes had surrendered their sovereignty over non-members.⁹⁴ The *Hicks* majority was willing to concede land ownership could be a consideration in civil cases.⁹⁵ However, it was not a consideration in *Oliphant*, which broke the tie between situs and criminal jurisdiction⁹⁶ or *Wheeler*, which clearly said tribes had surrendered sovereignty over non-members.⁹⁷ As a result it seems that *Hicks* is likely to be the bridge between *Oliphant*, *Wheeler*, *Montana*, and a future case that will definitively es-

85. *See id.* at 2318.

86. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

87. *United States v. Wheeler*, 435 U.S. 313, 326 (1978).

88. *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

89. *Hicks*, 121 S. Ct. at 2313.

90. *See id.* at 2316.

91. *See id.* at 2324-25 (O'Connor, J., concurring).

92. *Id.* at 2322 (Souter, J., concurring).

93. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

94. *United States v. Wheeler*, 435 U.S. 313, 326 (1978).

95. *Hicks*, 121 S. Ct. at 2316.

96. *Oliphant*, 435 U.S. at 195.

97. *Wheeler*, 435 U.S. at 326.

establish the bounds of jurisdiction over non-members in civil cases. There certainly seems to be sentiment on the Court to do so, both in the majority opinion and Justice Souter's concurring opinion.

Addressing the more general question of tribal court jurisdiction over non-members, Justice Scalia noted in *Hicks* that the issue "deserves more considered analysis,"⁹⁸ but offered no explanation as to why the Court made no attempt to do so. Justice Souter, in his concurring opinion, wrote that it was necessary to clearly define the limits of tribal court jurisdiction.⁹⁹ Justice Souter's willingness to go further gave the clearest evidence that *Hicks* may be an interim step to a more complete ruling in the future. Possibly, the majority elected to save that issue for another day because it was not necessary to reach the scope of jurisdiction over non-members in order to resolve *Hicks*.¹⁰⁰

In doing so, the Court followed the longstanding doctrine of strict necessity, going no further than what is necessary to settle the case at bar.¹⁰¹ However, the plethora of cases involving tribal court jurisdiction over non-members in the last few years would seem to indicate a need for the Court to settle the issue.¹⁰² Although the part of the ruling involving how far jurisdiction extends may be viewed as narrow, the ruling involving a tribal court's ability to hear federal cases is very far-reaching.

The *Hicks* majority's holding with regard to the § 1983 issue was quite broad, yet consistent with previous jurisprudence.¹⁰³ Central to the majority's decision was whether a tribal court is a court of general jurisdiction.¹⁰⁴ Justice Scalia quoted Federalist Number 82 to define a court of general jurisdiction: "[the court] lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe."¹⁰⁵ Using this definition, the tribal court would need to have broad jurisdiction to qualify as a court of general jurisdiction. However, Supreme Court jurisprudence involving tribal courts, as indi-

98. *Hicks*, 121 S. Ct. at 2318.

99. *See id.* at 2323 (Souter, J., concurring).

100. *Id.* at 2318.

101. JOHN E. NOWAK, CONSTITUTIONAL LAW, § 2.12(G)(6th ed. 2000). This self-imposed restriction dates back to Chief Justice Marshall. *Id.*

102. *See Atkinson Trading Co. v. Shirley*, 121 S. Ct. 1825 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985); *Montana v. United States*, 450 U.S. 544 (1981); *United States v. Wheeler*, 435 U.S. 313 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

103. *See Strate*, 520 U.S. at 453.

104. *See Hicks*, 121 S. Ct. at 2313-14.

105. *Id.* at 2314 (quoting THE FEDERALIST NO. 82 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

cated by cases such as *Wheeler* and *Montana*, demonstrates that tribal court jurisdiction is very narrow.¹⁰⁶

Moreover, the *Strate* Court had denied jurisdiction to the tribal court based on the fact the tribe did not own the property on which the tort occurred.¹⁰⁷ Prior to *Hicks*, *Strate* was distinguishable because of the property issue, but certainly if the tribal court had been a court of general jurisdiction, its jurisdiction would have extended to include the tort regardless of who owned the property.¹⁰⁸ In spite of joining this restrictive view of jurisdiction in the *Strate* holding, Justice Stevens, concurring in *Hicks*, wrote that tribal courts could decide for themselves whether they were courts of general jurisdiction.¹⁰⁹

Justice Stevens' argument that tribal courts should be allowed to hear § 1983 claims was built around an analogy between tribal courts and state courts.¹¹⁰ Although tribes were recognized early in United States history as sovereign entities, courts and Congress have greatly curtailed that sovereignty due to the tribes' dependent status.¹¹¹ Justice Stevens failed to recognize that whatever an Indian reservation is under current jurisprudence, it certainly is not the equivalent of a state, as illustrated in *Wheeler*, *Oliphant*, *Strate*, and now *Hicks*.

If tribal courts are not courts of general jurisdiction, can Congress grant them the authority to hear § 1983 claims? All members of the *Hicks* Court seem to have agreed that Congress may grant such authority;¹¹² however, as Justice Scalia pointed out, there was no such Congressional grant regarding § 1983 claims.¹¹³ In *Strate*, the Court held that the tribal court's jurisdiction did not extend beyond the tribe's regulatory jurisdiction unless expanded by federal law.¹¹⁴

Without such an expansion in § 1983,¹¹⁵ there is no evidence that Congress intended for tribal courts to hear such claims. This failure to delegate authority is consistent with congressional action to limit tribal authority through legislation.¹¹⁶ It would seem that Congress has

106. See *Montana*, 450 U.S. at 565-66; *Wheeler*, 435 U.S. at 329-30.

107. *Strate*, 520 U.S. at 453.

108. If the tribal court had measured up to Justice Scalia's definition, found in Federalist No. 82, it would have clearly had jurisdiction in *Strate* regardless of who owned the property. See *Hicks*, 121 S. Ct. at 2314 (quoting THE FEDERALIST NO. 82 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

109. *Id.* at 2333 (Stevens, J., concurring).

110. *Id.*

111. See generally *United States v. Wheeler*, 435 U.S. 313 (1978) (listing areas of sovereignty Indian tribes have relinquished due to their dependent status; included is jurisdiction over non-members); *Utah & N. R.R. Co. v. Fisher*, 116 U.S. 28 (1885) (trying to avoid taxes on portion of a railroad line running through an Indian reservation, a rail company argued the reservation was not a part of the Territory of Idaho; court held the reservation was a part of Idaho).

112. *Hicks*, 121 S. Ct. at 2314.

113. *Id.*

114. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997).

115. *Hicks*, 121 S. Ct. at 2314 n.7.

116. See *supra* note 32. Another example is Public Law 280, which granted to California, Wisconsin, Minnesota, Nebraska, and Oregon jurisdiction over both criminal and civil actions

participated with the Court in building a constricted theory of tribal court jurisdiction.

Finally, since Congress did not authorize the tribal court to hear the § 1983 claim, the State of Nevada did not believe it should be forced to litigate the jurisdictional issue in the tribal court before seeking remedy in federal court.¹¹⁷ Moreover, since the Court had already determined that the tribal court had no jurisdiction to hear a § 1983 claim against a non-member, to force Nevada to continue to seek resolution of its jurisdictional issues in tribal court would only delay the inevitable removal to federal court.¹¹⁸ This determination was completely consistent with the removal exception in *Strate*.¹¹⁹

2. Implications

Hicks provides guidance for state officials who enter Indian reservations to pursue off-reservation violations of state law.¹²⁰ State officials, acting within the bounds of their official duties, may enter an Indian reservation or Indian fee lands to pursue off-reservation violations of state law without tribal approval.¹²¹ What is less clear is how far the *Hicks* rationale extends beyond state officials. The *Oliphant* decision ended tribal court jurisdiction over non-members in criminal cases, and the *Hicks* Court, by limiting jurisdiction in a civil case, paved the way to preclude jurisdiction over non-members generally.

The second part of the *Hicks* ruling has far broader implications. Since the Court held that tribal courts were not courts of general jurisdiction,¹²² tribal court jurisdiction is now essentially confined to the tribe's legislative reach, at least as applied to non-members.¹²³ However, the implication in *Hicks* is that the tribal court's jurisdiction over non-members may not equal the tribe's legislative reach.¹²⁴ The ruling implies that Indian tribes may never have jurisdiction over non-members outside very restricted categories. This is the logical extension of *Wheeler*, *Oliphant*, *Montana*, and *Strate*. Moreover, *Hicks* will

committed on the reservations in those states. DOCUMENTS OF UNITED STATES INDIAN POLICY, 234-35 (Francis Paul Prucha ed., Univ. of Neb. Press 3d ed. 2000)(1975).

117. *Hicks*, 121 S. Ct. at 2315.

118. *Id.* Justice O'Connor again saw the issue differently. *Id.* at 2331 (O'Connor, J., concurring). She argued that the exhaustion rule was based on principles of comity and that the district and circuit courts were wrong not to consider the state officials' immunity claims in determining tribal jurisdiction. *Id.* (O'Connor, J., concurring). She went on to say that if the issues of immunity had been addressed early, it was possible the case would have been resolved at a much lower level. *Id.* at 2332 (O'Connor, J., concurring).

119. *See Strate*, 520 U.S. at 459.

120. *Hicks*, 121 S. Ct. at 2313.

121. *Id.* Such an official remains accountable under both federal and state laws for his behavior, but as Justice Scalia pointed out, the remedy for any improper conduct lies in the state or federal courts, not tribal courts. *Id.* at 2318.

122. *Id.* at 2314.

123. *See id.*

124. *See id.* at 2309.

likely result in further litigation as some non-member defendants, who might have quietly accepted tribal court jurisdiction before *Hicks*, will now attempt to avoid it.

In the post-*Hicks* era, tribal courts are not courts of general jurisdiction unless Congress clearly delegates such authority.¹²⁵ By extension, a tribal court can never hear a federal cause of action absent a specific federal delegation of authority. This is a significant limitation on tribal authority and, in the view of the tribes, undermines the stature of tribal courts.¹²⁶ Such a limitation is a key indicator that the Court may be using *Hicks* to move toward a more definitive ruling on tribal court jurisdiction in the future.

Despite this limitation, Justice Scalia pointed out that tribal members could seek relief under § 1983 or any other federal statute in either state or federal court.¹²⁷ These options will bring little comfort to Indian tribes who perceive their sovereignty has been infringed and who believe state and federal courts are unfair to Indians.¹²⁸ Additionally, the question of exactly how far the jurisdiction of tribal courts extends when dealing with non-members remains.¹²⁹ There seems to be sentiment on the Court for resolving this issue.¹³⁰

In his concurring opinion, Justice Souter outlined important reasons, including the protection of the constitutional rights of non-members, why the extent of tribal court jurisdiction should be settled.¹³¹ Justices Thomas and Kennedy joined in his concurring opinion.¹³² Furthermore, Justice Scalia made favorable reference to Justice Souter's concurrence in the majority opinion,¹³³ perhaps implying that Justice Scalia is willing to go further. All in all, the Court seems to have paved the way for such a decision in the future.

As noted previously, one might explain the *Hicks* Court's reluctance to resolve the issue with the doctrine of strict necessity. However, there is likely a better explanation. Justice O'Connor's concurring opinion reads more like a dissent and leaves one with the impression that almost the only thing she agreed with in *Hicks* was the outcome.¹³⁴ Justices Breyer and Stevens joined her concurrence,¹³⁵ and Justice Stevens' concurring opinion also found serious problems

125. *See id.* at 2314.

126. Mauro, *supra* note 4, at 1, 2.

127. *Hicks*, 121 S. Ct. at 2318.

128. *See* Mauro, *supra* note 4, at 1, 2.

129. *Hicks*, 121 S. Ct. at 2309.

130. *Id.* at 2323 (Souter, J., concurring).

131. *Id.* (Souter, J., concurring). These reasons include predictability, uniformity in application of the law, protection of defendants' civil rights, and the lack of a review process for tribal courts when ruling on non-tribal law. *Id.* (Souter, J., concurring).

132. *Id.* at 2318.

133. *Id.*

134. *See id.* at 2324-32 (O'Connor, J., concurring).

135. *Id.* at 2324 (O'Connor, J., concurring).

with the majority opinion.¹³⁶ A close read of the O'Connor and Stevens concurrences leaves little doubt that had the majority attempted to resolve the jurisdiction question in a restrictive way, their votes would have been lost and the attempt to build a transition to the future may have failed.

For a variety of reasons, Justices O'Connor, Stevens, and Breyer are more sensitive to tribal rights. Justice O'Connor hails from Arizona and grew up on a ranch.¹³⁷ Indian matters and tribal autonomy remain hot issues in the West, as *Hicks* indicated, arguably making Justice O'Connor more sensitive to Indian concerns. Similarly, Justices Stevens and Breyer, who are considered to be sensitive to minority rights and issues generally,¹³⁸ likely share Justice O'Connor's concern with Indian rights. Recently Justices O'Connor and Breyer were the only two Justices to accept an invitation to tour tribal courts.¹³⁹ Justice Breyer has taken an interest in Indian law and in 2000 gave a lecture to the Supreme Court Historical Society discussing a series of cases involving the Cherokee.¹⁴⁰

It may be possible to explain the positions of Justice Scalia and the Justices that joined him through the lens of states' rights; certainly some believe a move toward states' rights has driven the Court's recent decisions narrowing tribal jurisdiction.¹⁴¹ From that perspective, allowing tribal court jurisdiction in *Hicks* could be viewed as an infringement on the right of a state to control an entity within its borders. This logic fails to explain the positions of Justices Souter and Ginsburg. Justice Souter, in his separate concurrence, made clear he fears that broad tribal court authority over non-members could result in the denial of civil rights to defendants.¹⁴²

Still, the observer is left to wonder why Justice Scalia did not attempt to further define tribal court authority. It would appear that Justices Souter, Thomas, Kennedy, and possibly Ginsburg, were fully prepared to go down that path, and one would assume, given the states' rights analysis above, that Chief Justice Rehnquist would have likely followed.¹⁴³

136. *See id.* at 2332-33 (Stevens, J., concurring).

137. Mauro, *supra* note 4, at 1.

138. *See* THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 1710-11, 1878-80 (Leon Friedman & Fred L. Israel eds., 1995).

139. Mauro, *supra* note 4, at 1.

140. *Id.*

141. *Id.* at 2.

142. *Nevada v. Hicks*, 121 S. Ct. 2304, 2323 (2001) (Souter, J., concurring).

143. Certainly such an approach would likely have driven Justices O'Connor, Stevens, and Breyer into dissent; however, Justice Scalia still appeared to have had the votes to win the day.

The most likely explanation is that *Hicks* is a logical extension of Supreme Court jurisprudence on this issue to date,¹⁴⁴ and the Court is putting in place another stepping stone on the path to a more definitive test. Since, as Justice Scalia pointed out, Congress can remove the states' jurisdiction on reservations,¹⁴⁵ it is certainly possible, and perhaps probable, that the Court was attempting to determine if Congress would act. There will certainly be pressure on Congress to do so, given the outcry in Indian Country caused by *Hicks*.¹⁴⁶ If Congress continues to turn a deaf ear, then perhaps, contrary to Justice Stevens' argument,¹⁴⁷ the congressional inaction is intentional. Should Congress fail to act, the next case involving tribal court jurisdiction over non-members may well resolve the larger issue once and for all.

If *Hicks* is a stepping stone, it is a stepping stone to a new test. This area of Indian law, specifically tribal court jurisdiction, is in desperate need of such a test. It is essential for both tribes and non-Indians to know exactly what the limits of tribal court jurisdiction are. The *Montana* test, operative prior to *Hicks*, was tied to land ownership, generally giving the tribe jurisdiction on Indian-owned lands.¹⁴⁸ Even in the post-*Hicks* era, it seems land ownership is an important part of the analysis, and Justice Scalia wrote in *Hicks* that it was an important factor.¹⁴⁹ Whether or not the analysis is disconnected from land ownership, the *Montana* test still needs to be revisited. The first prong of *Montana*, extending jurisdiction when a non-member enters into a consensual relationship with the tribe, would likely still be effective. However, *Hicks* has called into question the validity of the second prong, extending jurisdiction when a non-member's conduct on Indian land threatens the sovereignty of the tribe.

144. See generally *Atkinson Trading Co. v. Shirley*, 121 S. Ct. 1825 (2001) (holding said tribe could only tax on tribal lands and such transactions must be done by the tribe or members of the tribe); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (tort arising from traffic accident on state-owned highway running through reservation; Court held tribal court had no jurisdiction to hear the tort because it occurred on state-owned land); *Montana v. United States*, 450 U.S. 544 (1981) (holding tribe could not regulate hunting and fishing of non-members on river running through reservation; river belonged to State of Montana, not the tribe); *United States v. Wheeler*, 435 U.S. 313, 326 (1978) (listing areas of sovereignty Indian tribes have relinquished due to their dependent status; included is jurisdiction over non-members); *Utah & N. R.R. Co. v. Fisher*, 116 U.S. 28 (1885) (rail company tried to avoid taxes on portion of railroad line running through Indian reservation, arguing it was not a part of the Territory of Idaho; court held the reservation was a part of Idaho).

145. *Hicks*, 121 S. Ct. at 2313.

146. Mauro, *supra* note 4, at 1.

147. *Hicks*, 121 S. Ct. at 2334 (Stevens, J., concurring) (citing *El Paso Natural Gas Co.*, Justice Stevens maintained that congressional silence on the issue of tribal court jurisdiction was not intentional, but most likely inadvertent).

148. *Id.* at 2324-26 (O'Connor, J. concurring).

149. *Id.* at 2316.

In such a new test, the first prong of the *Montana* test would remain valid.¹⁵⁰ A non-member who willingly enters into a consensual relationship with the tribe, as long as the provision for tribal court jurisdiction is expressly made, is in no different position than a party who agrees to a choice of law in contract negotiations. On the other hand, the second prong of *Montana* is now flawed because *Hicks* has undermined the role that land ownership plays in the analysis.¹⁵¹ More importantly, what may threaten or directly affect the tribe's sovereignty in one of the ways listed in *Montana* is simply in the eye of the beholder. Without a more definitive test, there will always be litigation over what qualifies as threatening or affecting tribal sovereignty.

Not only is the *Montana* test too broad and thus difficult to apply, it is unnecessary. The tribe may seek relief in state or federal court when the conduct of a non-member impacts a tribe in such a way that the tribe believes the conduct is an affront to its sovereignty. This approach would afford the tribe complete remedy under the law, while protecting the civil rights of the non-member and avoiding the pitfalls described by Justice Souter.¹⁵²

The new test should consist of *Montana*'s first prong only. In other words, a court should ask: Did the non-member enter into a consensual agreement with the tribe or tribe member, and was an express part of the agreement that tribal court jurisdiction would apply to the agreement? If the answer to both is yes, the tribal court would have jurisdiction. If the answer to either or both is no, then the tribal court would not have jurisdiction and the tribe or tribe member would be free to seek remedy in state or federal court.

Such an arrangement, common under choice of law/choice of forum provisions in contract law, would put both parties on notice. Thus the non-member party could make an informed decision concerning whether to enter into such an agreement with the tribe or tribe member.

It could be argued that limiting tribal court jurisdiction over non-members in such a way would interfere with "the right of reservation Indians to make their own laws and be ruled by them."¹⁵³ Since this new test would only apply to controversies with non-members, the argument that it would in some way undermine the rights of Indians is

150. This prong allows a tribe to regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana v. United States*, 450 U.S. 544, 565 (1981).

151. The second prong allowed tribes to exercise civil jurisdiction over non-members on Indian property inside reservation borders when their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

152. *Hicks*, 121 S. Ct. at 2323 (Souter, J., concurring).

153. *Williams v. Lee*, 79 S. Ct. 269, 271 (1959).

without merit. *Wheeler* long ago declared that tribes had divested their sovereignty over non-members. Under the new test, Indian tribes would retain the right to make laws for themselves within the boundaries of the reservation. Conversely, when interacting with non-members, those non-members would be protected by the rights that protect all Americans, unless they choose to waive those rights through some consensual arrangement with the tribe. This test is simple, fair to Indians and non-Indians, and can be easily applied by courts and law enforcement officials.

V. CONCLUSION

The ruling in *Hicks* allowing state officials to enter Indian land in their official capacity to pursue off-reservation violations of state law without fear of submitting to tribal court jurisdiction reflects a major step in limiting tribal court power. The holding was consistent with the direction the Supreme Court has taken since 1978. *Hicks* also may well provide the link to a more definitive test for courts, both tribal and non-Indian, to use when deciding whether the tribal court has valid jurisdiction.

The new test must be consistent with the direction the Supreme Court has taken and, after *Hicks*, should not be based on land ownership alone. Establishing a test based on the first prong of the old *Montana* test is simple and easy to apply. More fundamentally, it preserves the tribes' right to be ruled by their own laws and the right of non-Indians to full protection under the Constitution.

If *Hicks* leads to a distinct severing of tribal court jurisdiction over non-members in civil matters as *Oliphant* did in criminal matters, then one must ask what is left for tribal courts? The answer is clearly jurisdiction over tribal members alone. If tribal courts are to have jurisdiction over only tribal members, then the next logical question is why tribal courts at all? Certainly the tribes would argue their members would not be dealt with fairly in state and federal courts, but other racial minorities have faced similar problems without recourse to a separate court system. The Indian tribal court system is a vestige of the past and Justice Souter's concurrence correctly recognizes the problems inherent in this system. Justice Souter's concern for the civil rights of non-members in tribal courts is commendable, but do tribal members not have the same civil rights? This is truly the question for Congress and the Supreme Court; *Hicks* may provide the impetus for a reassessment of the necessity and validity of tribal courts in America in the twenty-first century. *Fiat iustitia ruat caelum*.¹⁵⁴

154. EHRlich, *supra* note 1, at 132.