Distilling the Essence of Nevada v. Hicks: The State's Perspective

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In *Nevada v. Hicks*,[1] the State of Nevada established that a tribal court lacks civil adjudicatory jurisdiction over state officials who enter an Indian reservation to investigate a crime over which the State has jurisdiction. This result was contrary to expectations and aspirations of emerging tribal courts, but confirmed fundamental principles underpinning state sovereignty. This paper addresses the disparity between these two perspectives, and offers a state counterpoint to recent commentaries criticizing the Rehnquist Court's Indian law jurisprudence.

I. BACKGROUND

Nevada v. Hicks arose from a routine wildlife law enforcement investigation. Though the subject of the investigation, Floyd Hicks, was a member of the Fallon Paiute-Shoshone Tribe (the Tribe) who lived on the Tribe's reservation, the investigation concerned a possible crime committed off the reservation.[2] Armed with multiple sources of information, including that of a confidential informant, state game wardens obtained a state search warrant; obtained the tribal judge's consent to serve it on the reservation; and secured tribal police to accompany them to the member's residence. This procedure was twice used. On both occasions—separated by approximately a year's time—state officials seized different bighorn sheep heads, and then returned them to the owner several days afterward.

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[1] 533 U.S. 353, 121 S. Ct. 2304 (2001).

[2] States long have possessed criminal jurisdiction over off-reservation crime committed by tribal members. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962). They also have jurisdiction over crimes committed on a reservation by nonmembers which do not involve tribal members. *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1945); *Draper v. United States*, 164 U.S. 240 (1896).

In separate tribal court actions filed in 1991 and 1992, Floyd Hicks sued the State and state officials in the same tribal court that had approved the search warrants. He named the state officials in both their official and individual capacities, and asserted a variety of torts, as well as tribal and federal civil rights claims.

Over a ten-year period, the cases progressed through tribal court, the inter-tribal appellate court, federal district court,[3] and the Ninth Circuit Court of Appeals.[4] Each of these courts uniformly ruled in favor of the tribe's jurisdiction. Each meticulously scrutinized and analyzed tribal sovereignty, and resolved the State's challenge to tribal jurisdiction by reference to the absence of express limitation on tribal jurisdiction, inferring therefrom tribal power to assert jurisdiction over the State.

The U.S. Supreme Court, without dissent, reversed the Ninth Circuit and ruled the tribal court lacked jurisdiction.

II. REACTION TO THE DECISION

Tribal and academic commentators profess surprise, puzzlement and dismay about *Hicks*.[5] These reactions are unjustified. *Hicks* was a necessary and foreseeable correction to a drift in lower courts away from a correct understanding of both state and tribal sovereignty, a drift paralleled in much of the scholarly writing on the subject.[6] This deviation has arisen from unwarranted extrapolations of Indian law principles to unsupportable extremes, in defiance of limits on tribal sovereignty which arise from the Constitution, as well as from a proper understanding of the Supreme Court's precedents.

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[3] The State filed an original action in federal court, 944 F. Supp. 1455 (D. Nev. 1996), to enjoin tribal court proceedings after the Inter-tribal Appellate Court ordered the actions to trial.

[4] 196 F. 3d 1020 (9th Cir. 1999).

[5] *See, e.g.,* N. Bruce Duthu and Dean B. Suagee, *Supreme Court Strikes Two More Blows Against Tribal Self-Determination,* 16 Nat. Resources & Env't 118 (2001), David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values,* 86 MINN. L. REV. 267 (2001).

[6] *See* Ray Torgerson, *Sword Wielding and Shield Bearing: An Idealistic Assessment of the Federal Trust Doctrine in American Indian Law,* 2 Tex. Forum Civ. Lib & Civ. R. 165, 192 (1996) (describing "creative resistance on the part of a sympathetic [to tribes] judicial minority and a burgeoning academic presence").

This paper invites critics of the *Hicks* decision to undertake a serious reappraisal of the creed of undiluted tribal sovereignty. Pundits should at least entertain the possibility that recent Supreme Court Indian law decisions signal a serious misunderstanding on their own part, rather than the highest Court's lack of understanding about Indian law.

The origin of tribal proponents' error may be found in the fact that their reasoning is isolated from the rest of the nation's jurisprudence. They propound a "canonical approach" to Indian law.[7] This approach depends, always, on the so-called Marshall trilogy,[8] whose principles are first misconstrued to stand for tribal sovereignty akin to that of foreign nations,[9] and then misportrayed as the final, immutable word. Such devotion to the trilogy resembles religious reverence. Subsequent decisions which do not hew to the dogmatic interpretation of the trilogy are dismissed as heretical. *Hicks* is but the most recent decision to receive this denunciation.

Tribal sovereignty proponents' embrace of isolationism is unabashed. One commentator states, "even a pragmatist might concede . . . the importance of maintaining a distinct body of Indian law."[10] Another states that "federal Indian law must retain its collectivist, separatist, and unique legal elements."[11] "Judges who are not steeped in the culture and values of Indian tribalism are ill-equipped to rework these complex and anomalous traditions case by case."[12]

Insularity is often accompanied by euphemistic descriptions of Indian law which seem transparent to the unconverted: "complex and anomalous traditions,"[13] "alien concepts that may defy the vernacular of Anglo-American law"[14] are seen as ways of urging that favored principles be given priority over all others, and be protected from development and change. To a real

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[7] Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers,* 109 YALE L.J. 1, *passim* (1999).

[8] *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

[9] The rudimentary principles established by these decisions are: (1) Indian tribes possess certain incidents of preexisting sovereignty; (2) tribal sovereignty is subject to diminution by the United States but not the individual states; and (3) the United States bears a trust responsibility for the tribes. *American Indian Law Deskbook* 4 (2d ed. 1998).

[10] *See, e.g.,* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 304 (2001).

[11] Philip P. Frickey, *Domesticating Federal Indian Law,* 81 MINN. L. REV. 31, 49 (1996).

[12] Getches, *Beyond Indian Law*, 86 MINN. L. REV. at 276.

[13] *Id.*

[14] *Id.*, 86 MINN. L. REV. at 304.

extent, this insistence on the immutability of perceived "foundational principles" of tribal sovereignty is tantamount to elevating these principles to a constitutional stature.

In *Hicks,* this egocentric perspective ran headlong into constitutional first principles. By arguing that state officials should stand trial in tribal courts, tribal proponents preferred the policy of broad tribal sovereignty to the constitutional principles of state sovereignty. Of course, the founders would not have foreseen such a result, much less intended it. It is little wonder that the Supreme Court interceded in *Hicks*. It will no doubt do so again when development of Indian law in the lower courts again so profoundly betrays founders' understanding.

In the case of *Nevada v. Hicks,* the tribal parties and amici were blind to two critical factors: (1) states are constitutionally established sovereigns, and (2) tribal sovereignty is developed in federal courts to shield tribes and tribal members from nonmembers, not to invest them with power over others. Recognition of the existence of these two factors supplies rationality and predictability to the Court's jurisprudence.

III. FIRST FACTOR: STATES ARE SOVEREIGN

First, the pundits overlook the fact that, in *Hicks*, the Tribe attempted to assert civil jurisdiction over state officials, not ordinary nonmembers. The Supreme Court has never confirmed tribal civil adjudicatory jurisdiction over nonmember defendants, much less ones imbued with state sovereignty and immunity. As a consequence, the case became one about much more than nonmember jurisdiction. It in fact became a constitutional case, although not expressly so.

Critics of the Court's recent decisions argue that tribal sovereignty is not a function of the Constitution,[15] and consequently, legal limitations on tribal sovereignty exist only as a matter of

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[15] *See, e.g.,* Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1230 (2001) (positing that Chief Justice Marshall's view was that tribal sovereignty "is both pre-and extra-constitutional"), Frickey, *Domesticating Federal Indian Law,* 81 MINN. L. REV. at 31 (" tribal sovereignty is not 'created by and springing from the Constitution,' but rather is an inherent sovereignty that 'existed prior to the Constitution' and is, therefore, not subject to it") (citations omitted), Torgerson, *Sword Wielding and Shield Bearing*, 2 Tex. Forum Civ. Lib & Civ. R. at 167 ("scholars have described tribes as

federal common law and federal legislation, although this supposed fact is oftentimes lamented.[16] This is a plausible position, the merits of which need not be explored here. In *Hicks*, however, the argument was subject at least to this one exception: tribal sovereignty must square with state (and federal) sovereignty. To the extent that tribal jurisdiction is limited by state sovereignty, tribal jurisdiction necessarily assumes a constitutional dimension.[17]

There is some acknowledgement by Court critics, albeit disapproving,[18] that the State's presence was a determinant in *Hicks*, as though state sovereignty ought not influence definitions of tribal sovereignty and tribal jurisdiction. However, the question of tribal adjudicatory jurisdiction is indisputably a question of federal law for federal courts to determine.[19] This determination, as with all rulings on federal law by federal courts, was constrained by the Constitution, which includes state sovereignty as an essential component. Therefore, state sovereignty could not be ignored, even if it was not directly addressed.

It was thus a momentous undertaking to use *Hicks* as the vehicle to establish tribal adjudicatory jurisdiction over nonmember defendants. It has taken all these years, since the formation of the union, to define the federal civil adjudicatory power over states and their officials. That delimited authority has been distilled through the alembic of hundreds of decisions. The Tribe plainly overreached by conflating this attempt to establish corollary authority for tribal courts, together with its effort to establish general nonmember jurisdiction, all in a single case.

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metaphorical 'islands' within a larger ocean of American society, in which Indians exist in an insulated manner . . . . This status is commonly regarded as extra-Constitutional in nature") (citations omitted). *But see* Getches, *Beyond Indian Law*, 86 MINN. L. REV. at 301 (invoking the "original understandings of the Framers concerning the place of Indians in the constitutional order").

[16] *See generally* Frickey, *A Common Law for Our Age of Colonialism,* 109 YALE L.J. 1. *See also* Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 ARIZ. ST. L.J 439, 465 (1999) (lamenting the "bottomless pit of federal common law").

[17] *Cf.* Alex Tallchief Skibine, *Making Sense out of Nevada v. Hicks: A Reinterpretation*, 14 ST. THOMAS L. REV. 347, 366-67 (2001) ("the Court's decisions are, at least in part, based on the position of tribes relative to the structure of the Constitution").

[18] Getches, *Beyond Indian Law*, 86 MINN. L. REV. at 320-21 and *passim*; Krakoff, *Undoing Indian Law One Case at a Time*, 50 AM. U. L. REV. at 1235 (*citing* "overwhelming concern for the status of the state defendants").

[19] *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

The first constitutional problem for the Tribe's argument in *Hicks* was that it failed to properly account for the states' immunity. State immunity is a fundamental aspect of state sovereignty.[20] Not even Congress can abrogate that immunity unless the states have consented in the plan of the convention.[21] Congress cannot unjustifiably abrogate state immunity in federal court or in state court.[22] It therefore should follow that tribes, whose sovereignty is subject to complete defeasance by Congress,[23] could not pierce state immunity.[24] The fine points of law debated in *Hicks* could not obscure the basic question looming: would state officials be put on trial in the Tribe's court? Contemplation of such a trial offended the ordered understanding of the place of states in the union.

In addition to the hurdle of Nevada's immunity arising from its sovereignty, the Tribe's argument in *Hicks* also conflicted with the structure of federalism within which states and the federal government interact. "It is incontestable that the Constitution established a system of 'dual sovereignty,'" comprised of state and federal sovereigns.[25] The Constitution's dual sovereignty also presupposes a dual system of state and federal courts, together forming "one system of jurisprudence."[26] By hypothecating a third category of sovereigns whose courts would operate within this system, the Tribe in *Hicks* opened questions[27] too numerous, too imponderable, and inviting too large a campaign of judicial lawmaking to contemplate. It is not an exaggeration to

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[20] *Alden v. Maine*, 527 U.S. 706, 713 (1999) ("[t]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional amendments").

[21] *Seminole Tribe v. Florida*, 517 U.S. 44, 72 (1996) ("[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States").

[22] *Alden v. Maine*, 527 U.S. at 754.

[23] *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians,* 466 U.S. 765, 787 n.30 (1984).

[24] The Court had already held that states did not consent to suits by tribes in federal court, *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), and that Congress lacked authority under the Indian Commerce Clause to subject non-consenting States to suit by Indian Tribes in federal court. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

[25] *Printz v. U.S.*, 521 U.S. 898, 918 (1997) (*quoting from Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)).

[26] *Claflin v. Houseman,* 93 U.S. 130, 137 (1876).

[27] Questions would include authority for off-reservation service of process and other documents, scope and effect of state immunity, limits on tribal authority to exceed state damages caps, tribal authority in official capacity suits against the State, rules of evidence, tribal authority to compel discovery and attendance of witnesses, enforcement of judgments, and rights of appeal or other review in federal courts.

say that recognition of an organic role for tribes within the nation's dual sovereignty would have effectively amended the Constitution.[28]

By naming state officials as defendants, Hicks thus conjured up high principles with constitutional significance. This salient point was flatly ignored in the lower courts. The momentousness of the Tribe's attempt to assert jurisdiction over state officials was simply unmentioned. Commentators have criticized the Supreme Court for making new federal common law in *Nevada v. Hicks*, but the truly inventive minds were the ones that would have thus peeled away state sovereignty and immunity in a tribal forum with essentially no comment about the effect on states. The effect of that outcome would have been manipulation of constitutional principles grounding state sovereignty as though they were merely tenets of federal common law.

Ultimately, then, the *Hicks* case presented a true dilemma: either state or tribal sovereignty had to yield. Because state sovereignty is constitutionally-based and tribal sovereignty is not, the result was predictable.

Critics of the Court who remain wedded to tribal jurisdiction over state officials have a duty to address the constitutional problems created by their position.[29] Is there a plausible argument that the Constitution authorizes suit against state officials in tribal court? If one posits such argument, what account is made for the founders' intent? Are the founders' views to be discounted; if so, upon what principled basis?

If, on the other hand, one argues that tribal courts are not constrained by the Constitution, how is this position reconciled with the fact that tribal adjudicatory jurisdiction is a federal question determined by federal courts that are so constrained? Is the judicial branch at liberty to declare an abrogation of state immunity without a constitutional foundation? Is the abrogation of

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[28] For a contrary point of view, *see* Frank Pommersheim, *"Our Federalism" In the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community*, 71 U. COLO. L. REV. 123 (2000).

[29] One such critic even abstractly "proposes that inherent in the Constitution, not outside the Constitution, are all those notions of inherent sovereignty under international law *that are not inconsistent with constitutional text, structures, or institutional relationships*." Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. at 68.

state immunity in tribal court a matter of federal common law, pronounced by the federal courts on the basis of a federal judge's personal perception of history and right?

One can only wonder what limits, if any, would have been found for the Tribe's jurisdiction over the State had the Ninth Circuit's decision in *Hicks* been affirmed. That decision would appear to leave entirely to the Tribe's own discretion definition of any limiting effect resulting from the State's sovereign immunity. Perhaps the Circuit meant only to put off questions such as the effect in tribal court of state-defined tort limits on awards against the State, or the prohibition of punitive awards against the State, or even the off-reservation reach of the Tribe's adjudicatory jurisdiction over the State. However, it is difficult to find any basis in the decision for deferral of these issues. The State's real concern was that the limits were left to the twenty-nine tribes, bands, and colonies in Nevada to decide. Under such a rule, the State—much less local governments—could ill-afford to interact with tribes.

These questions are neither moot nor academic. Because the Court in *Hicks* did not fully base its decision on state sovereignty or immunity, there will certainly be major tribal court challenges to states in the future. Furthermore, tribal attempts to address *Hicks* through legislation will encounter these same questions. The force of state sovereignty will remain, however, an enduring and influential presence in all cases, just as in *Hicks*.

IV. SECOND PRINCIPLE: TRIBAL SOVEREIGNTY AS SHIELD, NOT SWORD

The second factor overlooked by the pundits is that the Tribe in *Hicks* attempted to wield its sovereignty offensively instead of using it as a defensive device. This, like the presence of state sovereignty, was fundamental to the result. Because it departed from the developed concept of tribal sovereignty as a shield, the asserted tribal power was rejected.

The federal government's duty towards tribes is almost universally described as protective, sometimes is criticized as patronizing. In all of these references, though, is the notion

that the federal government shields the tribes from harm and interference by outsiders.[30] This is the context in which tribal sovereignty has been developed, and which therefore limits the concept. Properly viewed, even the Marshall trilogy partake of this character.

This context, though, can and has been ignored. The widespread misuse of the decision in *Williams v. Lee*, 358 U.S. 217 (1959), is the most conspicuous example. *Williams v. Lee* was a decision shielding a tribe, and foremost a tribal member, from outside forces. A nonmember plaintiff attempted to collect a debt from the tribal member in state court. The Supreme Court ruled that the nonmember plaintiff must pursue his claim in tribal court. The Court justified this narrow result with broad language: "[t]he cases in this Court have consistently guarded the authority of Indian governments over their reservations."[31]

The Court's broad language had come to assume talismanic significance for proponents of expansive tribal sovereignty. It was taken as authority that tribal courts have jurisdiction over *all* cases arising on a reservation between a member and nonmember, not just those involving a private, nonmember plaintiff. In Hicks' litigation with Nevada, for example, *Williams v. Lee* was wielded offensively without regard to its context. The lower federal court endorsed such use.[32]

However, such offensive use of tribal sovereignty breaks tradition with the culture of federal protectionism in which tribal sovereignty was cultivated.[33] Until contemporary times,

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[30] *See, e.g.*, Torgerson, *Sword Wielding and Shield Bearing*, 2 Tex. Forum Civ. Lib & Civ. R. at 171 (1996) (acknowledging it was originally intended for federal government to "insulate and protect the tribes from non-Indian aggression"); Krakoff, *Undoing Indian Law One Case at a Time*, 50 AM. U. L. REV. at 1265-66 (2001) (referring to tribal sovereignty as "protective shell").

[31] 358 U.S. at 223.

[32] *See* 944 F. Supp. at 1467 and *passim.* The Supreme Court acknowledged that *Williams v. Lee* is distinguishable on this basis, but did not conclude on the issue. 121 S. Ct. at 2309, n.2.

[33] The theme of sovereignty as shield is notable for its persistence through all the differing periods of federal policy. *See, e.g., Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832);*United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876); *Choctaw Nation v. United States,* 119 U.S. 1 (1886); *United States v. Quiver*, 241 U.S. 602 (1916) (in a prosecution for adultery committed on reservation by tribal member, Court declined to apply federal law, on basis that such matters were left to the tribes), *Williams v. Lee*, 358 U.S. 217 (1959) *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (tribes are accorded a "historic immunity from state and local control"); *Fisher v. District Court*, 424 U.S. 382 (1976) (the Court shielded an Indian mother from a state court adoption proceeding); *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971) (the Court shielded a tribal member sued in state court on a food debt); *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 153-54 (1982) ("This

tribes had not converted their sovereignty to offensive use, as *jura majestatis* employed against nonmembers. As tribes today, though, more frequently "exert their sovereignty in ways that are typical for non-tribal governments, they face increasing impediments from the Supreme Court."[34] Possessing new federal and self-generated financial resources, tribes furthermore are in better position to test—and find limits to—their notions of tribal sovereignty.

This change in tribes' assertion of sovereignty, rather than any reversal of policy, confusion, or animus in the Court, explains the noted increase in number of adverse outcomes for tribes. The recent decisions in *Hicks*, *Atkinson Trading Co. v. Shirley,*[35] *Strate v. A-1 Contractors*,[36] and *El Paso Natural Gas v. Neztsosie,*[37] all have dealt with a tribe's attempt to affirmatively assert its sovereignty over nonmembers. Again, acknowledgement of this factor makes the result in *Hicks* and the other decisions understandable if not predictable, while denial of its existence leaves the prognosticator with a perception of incoherence.[38] The critics' criticism against the Court's faithlessness to history,[39] and even accusing it of racism,[40] is therefore disingenuous; the results are in fact true to precedent, history, and reason.

Viewed in this context, there is nothing radical in the *Hicks* result. As the Court noted, it has "never held that a tribal court had jurisdiction over a nonmember defendant,"[41] much less a state official named as defendant. Thus the Court did not alter the limited holding in *Williams v. Lee,* and did not take away any established tribal jurisdiction. Instead, it rejected the Tribe's

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Court has relied on the Indian Commerce Clause as a shield to protect Indian tribes from state and local interference").

[34] Krakoff, *Undoing Indian Law One Case at a Time*, 50 AM. U. L. REV. at 1190-91.

[35] 532 U.S. 645 (2001).

[36] 520 U.S. 438 (1997).

[37] 526 U.S. 473 (1999)

[38] *See, e.g.,* Pommersheim, *Coyote Paradox,* 31 ARIZ. ST. L.J. at 439-40 (1999) (accusing the current Court of "doctrinal incoherence that spawns unpredictable ad hoc decision making").

[39] *Id.,* 31 ARIZ. ST. L.J. at 443 (declaiming against "judicial power shorn of historical understanding or conscience").

[40] *Id.,* 31 ARIZ. ST. L.J. at 470 ("structural ignorance [about tribal sovereignty] . . . reflects a legacy of racism and marginalization"); John Fredericks III, *America's First Nations: The Origins, History and Future of American Indian Sovereignty*, 7 J.L. & POL'Y 347, 384 (1999) (decrying "racist-inspired backlash against Indian peoples' vision of what tribal sovereignty ought to be in the United States"). *But see* Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. at 327, n.258 (although stating that "Critical race theory may offer a further explanation for the Court's recent decisions," concluding that "I do not believe that a case can be made that the present Justices harbor racist motives more extreme than were manifested by any predecessor Courts").

[41] 121 S. Ct. at 2309, n.2

assertion of a novel jurisdiction. The result is faithful to the historical concept of limited tribal sovereignty.

It is difficult to understand the logic of argument to the contrary. Were the tribes to employ both the traditional federal shield and a newly-forged sword of full sovereign powers, tribes would assume a character of impervious super-sovereign. Such a result cannot have been within the contemplation of any of the progenitors of tribal sovereignty. Any argument for this result in future cases is bound to encounter resistance, just as it did in *Hicks*, or as it did in *Oliphant v. Suquamish Tribe,*[42] or *Duro v. Reina.*[43]

Furthermore, such an argument would also encounter strong resistance in Congress.[44] To accommodate departure from the established and understood concept of limited tribal sovereignty, a legislated expansion of tribal nonmember jurisdiction would, at a bare minimum, contain (1) a guarantee of full constitutional rights for those subject to tribal jurisdiction; (2) private civil remedies against abuse of guaranteed rights; and (3) right of recourse or appeal to federal courts. Without these, it is doubtful that public policy would even contemplate expansion of tribal jurisdiction over nonmembers.

Tribes' aspiration for increased jurisdiction and responsibility is entirely understandable, even commendable. The urge to enlarge their sphere of influence must be combined, however, with a realization that such expansion is not a natural development of tribal sovereignty, that instead it is a departure from the conventional understanding that exists outside the arcane world of the tribal advocate. In *Hicks*, the Tribe lacked this critical insight.

V. CONCLUSION

Nevada v. Hicks represents the beginning of a new era in tribal-state relations. *Worcester v. Georgia*, in 1832, was the first significant rejection of a state's attempt to exert control over a

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[42] 435 U.S. 191 (1978).

[43] 495 U.S. 676 (1990).

[44] At the time of this paper, tribes are exploring a legislative response to *Hicks* and other recent decisions. Mitchell C. Wright, *Lessons from the Supreme Court,* 1 Case in Point (Alumni Magazine of the National Judicial College) at 25, n.5 (Winter/Spring 2002).

tribe. *Nevada v. Hicks,* in 2001, is the first significant rejection of a tribe's attempted assertion of direct jurisdiction over a state. Thus the decision represents the tribes' embarkation on a journey which the states began long ago, a journey of self-discovery and maturation, based upon finding limits and accepting others' concurrent jurisdiction.

The tribes' disappointment with the result in *Hicks* is understandable; their alarm about it is not. The State was not seeking or asserting new jurisdiction over tribes. To the contrary, it was foremost a defense case for the State: Nevada's argument defensively raised established limits against new assertions of tribal sovereignty. While the Court's decision was cast in terms that describe states' jurisdiction, it was argued in terms that sought recognition of state officials' immunity in a separate sovereign's court. There is thus no plan in the State Attorney's Office to change advice to state agencies regarding service of process on a reservation. The legal counsel given to the game wardens in *Hicks* will continue to be the advice given in the future: state officials should obtain a tribal court's approval for service on a reservation. If that approval is not forthcoming, then the proper next step is to seek a federal court order, with the decision in *Hicks* as legal authority for that order.

Tribes' desire to have exclusive jurisdiction within their reservations is also understandable, but it is not realistic. Exclusive tribal jurisdiction is inconsistent with established law. It is furthermore contrary to the reality of requirements for intergovernmental cooperation. Tribes and reservation residents, both member and nonmember, require and often demand services from state and local governments. Unfettered tribal adjudicatory jurisdiction over cooperating nonmember governments and government officials would severely discourage such cooperation.

This reality, as much as the law, justifies the result in *Hicks*. The decision now opens the door for the state and local governments to better cooperate with tribal officials. There still remain serious concerns on all sides, but the full chill that fell on cooperation while the Hicks matter was pending no longer exists. Nevada looks forward to, and welcomes discussions about, realizing the potential for better cooperation created by *Nevada v. Hicks*.