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The Tribal Right to Exclude Non-Tribal Members from Indian-Owned Lands

Alexander Tallchief Skibine

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Last May, two Indian tribes in South Dakota, the Cheyenne River Sioux and Oglala Sioux Tribes, invoking the dangers caused by Covid-19, established health safety checkpoints on state and federal roads accessing the entrance to their reservations. The South Dakota governor immediately threatened legal action, arguing that such roadblocks could only happen pursuant to an agreement with the State.[1] Later that summer, the Blackfeet Nation in northern Montana refused to open its access road to tourists wanting to visit Glacier National Park.[2] Unlike in South Dakota, the Montana Governor supported the Tribe's decision. In South Dakota, the Cheyenne River Sioux Tribe argued that the Tribal checkpoints were legal because the tribe had a "treaty right to exclude" non-members from its reservation.[3] Besides the treaty right to exclude, the tribes can also claim that as sovereign nations they have the inherent power to control their borders. This article does not focus on the Covid-19 issues facing the tribes. Others have already done this.[4] Instead, it casts a wider net and examines from a general perspective the Tribes' power to exclude non-members from their reservations.

When it comes to inherent tribal powers to control people who are not members of the tribe, hereinafter referred to as non-members, the Supreme Court in a 1981 case, *Montana v. United States*,[5] announced a somewhat new principle that unless one of two exceptions applied, as a general rule Indian tribes have been implicitly divested of the inherent sovereign power to control the activities of non-members on lands owned by non-members within the reservation. This doctrine would become known as the implicit divestiture doctrine.[6] Besides its inherent sovereign power, the Crow Tribe in *Montana* had also invoked its treaty right to exclude non-

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[1] That lawsuit was never filed. Instead, the Governor asked for the help of the Federal government which eventually threatened to cancel a number of contracts it had with the two tribes unless they complied with the request to dismantle their roadblocks. One of these tribe eventually filed a lawsuit asking for injunctive and declaratory relief to prevent the federal government to make good on its threat. The facts as stated here are taken from the tribal complaint which was filed on June 23, 2020, case 1:20-cv-01709. The complaint is available on the June 24th Turtle Blog.

[2] See Washington Post article "A closed border, pandemic-weary tourists and a big bottleneck at Glacier National Park, available in the Turtle Blog and June 13, 2020.

[3] The letter was issued on May 8th 2020. It is available on the May 11th Turtle Blog.

[4] See Matthew L.M. Fletcher, *Indian Lives Matter: Pandemic and Inherent Tribal Powers,* 73 Stanford Law Review On Line, June 2020.

[5] 450 U.S. 544 (1981).

[6] See discussion at notes 17-25.

members from the reservation, arguing that this right includes the lesser right to regulate those who are allowed to stay on the land. The Court held, however, that when Congress opened a reservation for land to be acquired by non-members, it implies a congressional intent to abrogate the treaty right to exclude on such acquired lands.[7] In addition, because neither of the two exceptions to *Montana's* general rule were available, the Crow tribe could not control fishing activities by non-members on the Big Horn River within its reservation since the bed of the river was now owned by the State.

For twenty years, the *Montana* general rule was not applied to limit tribal jurisdiction over non-member activities taking place on tribal or Indian owned land.[8] However, in 2001, the Supreme Court unanimously extended the *Montana* principle to Indian owned land in *Nevada v. Hicks*.[9] It has now been almost twenty years since *Hicks* was decided and an analysis of the cases show that lower courts have disagreed on when to apply *Montana* to assertion of tribal jurisdiction over non-members on Indian owned lands. One of the main reason for this lack of consistency is that although unanimous in its holding that the tribal court did not have jurisdiction over a lawsuit involving state law enforcement officials as defendants, the *Hicks* Court was badly divided on the reasoning for the holding. In effect, even though Justice Scalia wrote the majority opinion for the Court, there were two other opinions, consisting of three Justices each,[10] each adopting a different view of what role the status of the land played in determining whether the tribe had jurisdiction.[11]

Many noted scholars have addressed the issue of tribal jurisdiction over non-members comprehensively.[12] Notably, Professor Judith Royster in a perceptive 2015 article covered some

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[7] Id., at 558-559, stating "If the 1868 treaty created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to lands held in fee by non-Indians… this tribal "authority could only extend to land on which the Tribe exercises "absolute and undisturbed use and occupation."

[8] See South Dakota v. Bourland, 508 U.S. 679 (1993); Strate v. A-1 Contractors, 520 U.S. 438 (1997); Atkinson Trading v. Shirley, 532 U.S. 645 (2001), Brendale v. Confederated Tribes, 492 U.S. 408 (1980);

[9] 533 U.S. 353 (2001),

[10] In addition to the Scalia opinion, Justice Souter filed a concurring opinion joined by Justices Kennedy and Thomas. Justice O'Connor filed an opinion concurring in part joined by Justices Breyer and Stevens.

[11] There was also a concurring opinion by Justice Ginsburg, writing for herself, and a concurring opinion by Justice Stevens joined by Justice Breyer that did not add much of anything new to Justice O'Connor's opinion which these two Justices also had joined.

[12] See e.g. Matthew L. M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779 (2014) Katherine Florey, *Beyond Uniqueness, Reimagining Tribal Courts' Jurisdiction*, 101 CALIF. L. REV. 1499 (2013), Sarah Krakoff, *Tribal Civil Jurisdiction Over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187 (2010).

of the same grounds this article will be addressing.[13] Like her, I also take the position that *Montana* should not apply to lands in which tribes have retained the right to exclude.[14] However, in concluding that "the Supreme Court's decision in *Hicks* is neither intelligible nor doctrinally helpful,"[15] Professor Royster did not try to make sense of Justice Scalia's heavy reliance on the State's interests in law enforcement. In this Article, I make two arguments. The first one is that Justice Scalia's opinion in *Hicks* can be conceptualized as using the state interest in law enforcement to support the finding that the tribe had lost the right to exclude state law enforcement officials in the case. In effect, *Hicks* could be read as requiring a two-step analysis to determine if an Indian tribe has retained jurisdiction over non-members on *Indian owned lands*. First, courts should determine whether a tribe has retained its right to exclude. If the answer is yes, this is the end of the inquiry and the tribe has jurisdiction. If the answer is no, step two requires courts to apply the *Montana* framework in determining whether one or both of the exceptions to *Montana's* general rule apply to preserve tribal jurisdiction. The second argument is that *Hicks* should have really been decided as a state jurisdiction case. The results would have been the same as a finding of state jurisdiction in this case should have preempted tribal court jurisdiction. However, in the long run, relying on state jurisdiction as preempting tribal jurisdiction would have been potentially less harmful to tribal sovereignty and would not have generated the same degree of confusion and difference of opinions among the circuits.

In addition, this article analyzes whether there should be a difference between a tribal treaty right to exclude non-members from the reservations and the "inherent sovereign" right to exclude when it comes to decide whether such a "right to exclude" has been abrogated. Professor Royster took the position that there should not be any difference, stating "Not all Indian tribes have treaties with the federal government. When it comes to tribal jurisdiction over nonmembers on Indian lands based on treaty rights, where does that leave tribes without formal treaties? The answer, I submit, is in exactly the same place as tribes with treaties."[16] In this Article, I take the position that this may not necessarily be the case.

To explore these issues, Part I will explain the Court's jurisprudence when it comes to tribal control over non-members. Part II will analyze the on-going debate among the Federal Circuit

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[13] See Judith V. Royster, *Revisiting Montana: Indian Treaty Rights and Tribal Authority over Nonmembers on Trust Lands*, 57 ARIZ. L. REV. 889 (2015).

[14] Id., stating "Over the years, discussions of the *Montana-Hicks* line of cases seem to start and end with the question of *inherent* tribal authority over nonmembers… The treaty rights approach has been lost in the discussion and needs to be revived. This Article intends to bring the treaty rights argument--that Indian tribes have rights to govern on trust lands recognized by treaty and treaty-equivalents--back to the forefront. Id., at 892.

[15] If., at 904.

[16] Royster, 57 Ariz. L. Rev. 889, 919.

Court of Appeals concerning the interpretation of *Hicks* and concludes by arguing that *Hicks* should be re-imagined as a state jurisdiction case. Finally, after exploring the differences, if any, between the tribes' sovereign right to exclude and their treaty right to exclude, PART III looks at the right to exclude beyond tribal jurisdiction over non-members, namely the role the right to exclude plays when it comes to determining whether federal laws of general applicability should apply to Indian tribes.

Part I: The implicit divestiture doctrine and the right to exclude from *Montana* to *Hicks* and beyond.

1. Montana v. United States: The "path-marking" case.[17]

The main issue in *Montana* was whether the tribe had the authority to regulate hunting and fishing by non-members on land determined by the Court to be non-Indian fee land located within the Crow Indian reservation. The tribe first argued that its 1868 treaty with the United States granted such tribal authority because Article II of the treaty not only established a reservation for the Crow Tribe, but also provided that it be "set apart for the *absolute and undisturbed use and occupation* of the Indians herein named."[18] The Court disagreed with this argument. While recognizing that "the treaty obligated the United States to prohibit most non-Indians from residing on or passing through reservation lands used and occupied by the Tribe, and, thereby, arguably conferred upon the Tribe the authority to control fishing and hunting on those lands,"[19] the Court held that this authority "could only extend to land on which the Tribe exercises "absolute and undisturbed use and occupation."[20] Since the land in question was now owned by the State, the Tribe could no longer exercise undisturbed use and occupation.

Having disposed of the treaty argument, the Court addressed whether the Tribe could nevertheless control non-members under its inherent sovereign power. Writing for the Court, Justice Stewart announced what, at the time, seemed to have been a new principle that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes."[21] After stating this principle, Justice Stewart held that as a "general proposition," the inherent powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[22]

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[17] 450 U.S. 544 (1981). Montana was first referred as "path-marking" in Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997).
[18] 15 Stat. 649
[19] Id., at 558
[20] Id., at 559
[21] Id., at 564
[22] Id., at 565.

The Court, however, identified two exceptions to its general rule. The first exception, now known as the consensual relations exception, allows tribes "to regulate through taxation, licensing, or other means, the activities of non-members who enter into consensual relationships with the tribe or its members through commercial dealings, contracts, leases, or other arrangements."[23] The second exception, known as the tribal self-government exception, allows tribal civil authority over the conduct of non-members (even on fee lands within the reservation) "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."[24] Unfortunately for the Crow Tribe, however, neither of the exceptions applied to this case.[25]

2. **Strate v. A-1- Contractors: Equating tribal adjudicatory jurisdiction with tribal regulatory power.**

In *Strate v. A-1 Contractors*,[26] the issue was whether the tribal court had jurisdiction over a lawsuit filed by one non-member against another non-member over a routine fender bender accident that happened within the reservation but on a road over which the state had obtained a right of way. In holding that the tribal court had no jurisdiction, the opinion brought three important clarifications, or perhaps modifications, to the *Montana* analysis. First it clarified that in order to be considered "Indian owned" land for the purposes of the *Montana* analysis, the Tribe had to have retained a "gatekeeper" role in excluding non-members from the area.[27] Secondly, and more importantly, it held that the *Montana* analysis was applicable to both tribal regulatory and adjudicatory jurisdiction because "as to nonmembers, a tribe's adjudicative jurisdiction cannot exceed its legislative jurisdiction."[28] This meant that in order to determine whether a tribal court had jurisdiction over a non-member defendant, courts only have to ask whether the tribal council could have regulated the non-member activity on the land in question. Third, the Court considerably narrowed the scope of the tribal self-government exception to

[23] Id.
[24] Id.
[25] Id., at 566, stating, "No such circumstances, however, are involved in this case. Non-Indian hunters and fishermen on non-Indian fee land do not enter any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction. And nothing in this case suggests that such non-Indian hunting and fishing so threaten the Tribe's political or economic security as to justify tribal regulation."
[26] 520 U.S. 438 (1997).
[27] Id., at 456. Since the tribe had not maintained that role here, the Court ruled that the state right of way was the equivalent of non-member fee land for the purposes of the *Montana* analysis.
[28] 520 U.S. at 453.

Montana's general rule by holding that having jurisdiction over non-members driving on state roads within reservations was not necessary to the health and welfare of the tribes.[29]

Unlike in *Strate,* where the location of the accident was clear and undisputed, determining where, for the purposes of the *Montana* analysis, the crucial facts took place can be a complicated question.[30] For instance, in *Wilson v. Horton's Towing*,[31] a tribal police officer suspected that Wilson, a non-Indian, was driving while inebriated. The officer stopped Wilson on a state road within the reservation. After finding drugs in the vehicle, the tribal officer called a state trooper, who arrested the non-Indian driver for a DWI and had his truck impounded off the reservation. The next day, the Lummi Tribal Court issued a "Notice of Seizure and Intent to Institute Forfeiture," because under the Lummi Nation tribal code, possession of marijuana over one ounce is a ground for civil forfeiture. Eventually, Horton's Towing released the truck to the tribe and Wilson brought suit in federal court against Horton's Towing and the arresting tribal officer.

Finding that there was a colorable claim of tribal jurisdiction, the Ninth Circuit held that the non-Indian had to exhaust his tribal remedies before bringing his suit in federal court.[32] After stating that in this case, "the threshold question is whether Plaintiff's claim "bears some direct connection to tribal lands," the Court noted that the driver was found with several containers of marijuana in his truck immediately after leaving the tribal casino. Therefore, although the driver was stopped on a state road, "one could logically conclude that the forfeiture was a response to his unlawful possession of marijuana while on tribal land. So interpreted, the events giving rise to the conversion claim reveal a "direct connection to tribal lands."[33]

3. Nevada v. Hicks:[34] The origin of the confusion.

Nevada v. Hicks involved a lawsuit filed in tribal court by a member of the Fallon Paiute-Shoshone Tribes of western Nevada against the State of Nevada and its state officials. Hicks

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[29] If., at 459, stating "Neither regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve "the right of reservation Indians to make their own laws and be ruled by them."

[30] See for instance discussion of *MacArthur v. San Juan County,* infra at notes 67-73 and *Belcourt Public School District v. Herman,* infra at notes 59-60.

[31] 906 F.3d 773 (9th Cir. 2018).

[32] The requirement that a party should first exhaust the available tribal remedies before filing in federal court arguing that the tribal court did not have jurisdiction was first promulgated in National Farmers Union v. Crow Tribe, 471 U.S. 845, 856–57, (1985) and Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15–16, (1987)

[33] 906 F.3d at 780. See also Employer's Mutual Casualty Co. v. Branch, 381 F.Supp.3d 1144 (2019) where the court found that none of the contracts made by a non-reservation Insurance Co. with a non-Indian contractor, whose employees negligently caused a massive fuel leak on the reservation, were made on the reservation. Therefore, the Insurance Co. was not subject to the jurisdiction of the tribal court.

[34] 533 U.S. 353 (2001).

alleged that state game wardens had violated his civil rights and damaged his property when they came on the reservation to search his house for evidence related to an off-reservation crime, hunting out of season, he was alleged to have committed. The State's game wardens were acting pursuant to warrants issued by both the state and the tribal court. The main issue before the Supreme Court was whether the tribal court had jurisdiction over the non-member defendants. The Tribe's main argument was that that the *Montana* analysis was not applicable since the non-member state law enforcement officials' activities relevant to the lawsuit took place on Indian owned land.

Justice Scalia delivered the opinion for the Court and held that the tribal court lacked jurisdiction. Although he was joined by five other Justices, Justice Souter wrote a concurring opinion joined by Justices Kennedy and Thomas, where he stated "While I agree with the Court's analysis as well as its conclusion, I would reach that point by a different route... [w]hile the Court gives emphasis to measuring tribal authority here in light of the State's interest in executing its own legal process to enforce state law governing off-reservation conduct, I would go right to *Montana's* rule."[35] Justice O'Connor wrote an opinion, joined by Justices Breyer and Stevens, concurring in part and arguing that while she was concurring in the result because she believed the state officials had sovereign immunity, she would have remanded to the lower courts on the issue of whether the tribe had jurisdiction under the *Montana* exceptions.

The question here is why did Justice Scalia not go directly to the *Montana* rule as Justice Souter did? There are, I think, three possible interpretations of Justice Scalia's opinion.

The first one, followed in the Seventh and Eighth Circuits,[36] is that Scalia was in fact just performing a *Montana* analysis. Under that interpretation, *Hicks* stands for the proposition that the *Montana* general rule of no-tribal jurisdiction over non-members extends to all lands within Indian reservations. For sure, language used by Justice Scalia towards the end the end of the Opinion suggested as much when he stated

> "tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations—to "the right to make laws and be ruled by them." The State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government.[37]

[35] Id., at 375.
[36] See discussion *infra* at notes 50-66.
[37] 533 U.S. at 364.

A second interpretation of the Scalia Opinion, followed in the latest Tenth Circuit opinion,[38] is that the Court considered the state law enforcement interests at issue because its holding is limited to denying tribal jurisdiction over state law enforcement officials conducting criminal investigations on the reservation. This was the position taken by Justice Ginsburg in her short concurring opinion [39] Also supporting that interpretation is the majority's statement in a footnote that "our holding in this case is limited to the question of tribal court jurisdiction over state officers enforcing state law. We leave open the question of tribal court jurisdiction over nonmember defendants in general."[40] Under that interpretation, the Court does consider the state's interests in law enforcement but it does so in a *Montana type* analysis to determine whether it outweighs the Tribal interest in self-government as described in the second *Montana* exception.

A third possible understanding of the opinion, followed by the Ninth Circuit,[41] is that Justice Scalia first determined that the tribe had in fact lost the right to exclude state agents from the reservation in cases involving circumstances such as were present here. Thus, instead of first evaluating whether any of the *Montana* exceptions apply, courts should proceed on debating the importance of the state's interests inside the reservation to determine whether the Tribe has lost the right to exclude these state law-enforcement officials from Indian-owned lands. In other words, the balancing of the tribal and state interests at stake is done to determine if the tribe has lost the right to exclude. It is only after the Tribe is found to have lost the right to exclude that the *Montana* analysis becomes applicable.

4. Post *Hicks* Supreme Court cases.

Although the Supreme Court had a possibility to comment on *Hicks* twice since 2001, neither cases added much to the debate. In *Plains Commerce Bank v. Long Family Ranch,*[42] the issue was whether a tribal court had jurisdiction over a lawsuit brought by tribal members claiming that a non-Indian bank had discriminated against them in the sale of a parcel of non-Indian fee land within the reservation. The Supreme Court held that the tribal court had no jurisdiction over the non-member defendant because the tribe had lost the right to regulate the sale of non-Indian fee land on the reservation. Allowing the tribe to invoke its tort law in this case would allow the tribal court to control the sale of such non-Indian fee land. The Court hardly mentioned *Hicks.*[43]

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[38] See Norton v. Ute Indian Tribe, 862 F.3d 1236 (10th Cir. 2017) and discussion *infra* at notes 67-74.
[39] 533 U.S. 353, at 386 (Justice Ginsburg concurring.)
[40] Id., at footnote 2.
[41] See discussion, *infra,* at notes 75-100.
[42] 554 U.S. v. 316 (2008)
[43] Although it did quote from the opinion for the purposes of stating "Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them." Id., at 335.

However, it did state that *Montana's* "general rule restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians,"[44] thus at least implying that *Montana* was applicable to activities on both Indian and non-Indian land within the reservations.

Of course, it is essential to understand that the debate here is not whether the *Montana* analysis is applicable to all reservation lands. It clearly potentially is. The debate is when should the analysis take place: directly as Justice Souter did in *Hicks,* or after the Court weighs the state interest as Justice Scalia arguably did.

The other case, *Dolgencorp v. Mississippi Band of Choctaw Indians,* ended in a 4-4 draw without a decision,[45] thereby affirming the decision below which had upheld tribal court jurisdiction over a non-Indian Corporation.[46] The 5th Circuit in *Dolgencorp* had upheld tribal jurisdiction over a lawsuit by the Tribe against a non-Indian corporation whose employee was alleged to have sexually abused a minor tribal member who was working for the corporation at a store located on tribal land. The Circuit court upheld tribal jurisdiction under *Montana's* commercial relationship exception,[47] and never mentioned, let alone discuss *Nevada v. Hicks* even though the alleged wrongdoing occurred on land the tribe had leased to the corporation.[48]

Needless to say, the three *Hicks* plurality opinions and the perplexing structure of Scalia's main opinion have created a divergence of opinions among the lower courts for the last twenty years. The Supreme Court has never revisited the issue since the only opinion issues since *Hicks* in the area of tribal jurisdiction over non-members involved non-Indian fee land.[49] The next Part discusses the various positions adopted by the Circuits and proposes to re-imagine *Hicks* as a state jurisdiction case.

PART II: The Federal Circuits debate on when to extend *Montana* to Indian owned lands within reservations.

1. The 7th and 8th Circuits approach: interpreting *Hicks* as always extending *Montana* to all reservation lands owned by the Tribes or their members.

The first category of cases are those that have followed Justice Souter's *Hicks* concurrence and have extended *Montana* directly to all lands within the reservations, Indian and non-Indian owned. In *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa*

[44] Id., at 328.
[45] 136 S. Ct. 2159 (2016)
[46] 746 F.3d 167 (5th Cir. 2014).
[47] Id., at 173-174.
[48] It seems that the District Court in the case had adopted a broad interpretation of *Hicks* and the Tribe decided to focus its appeal on the applicability of the *Montana* exceptions. 846 F.Supp.2d 646, 651.
[49] See Plains Commerce Bank v. Long Family Land and Cattle, 554 U.S. 316 (2008).

Indians,[50] the Seventh Circuit specifically disagreed with the proposition that *Hicks* was of limited applicability when it came to tribal jurisdiction over Indian owned lands. The case involved a lawsuit filed by a tribal entity in tribal court wanting to invalidate a sale of tribal bonds made with a non-Indian bank. The sale of the bonds occurred on Indian owned land.

Answering the tribal argument that *Montana* only applies to situations in which tribes attempt to regulate nonmember conduct on non-Indian fee land, as opposed to tribal trust land, the court stated "We do not believe that these conclusions can be reconciled with the language that the Court employed in *Hicks*."[51] The court first focused on language in *Hicks* stating that "The ownership status of land, *is only one factor to consider* in determining whether regulation of the activities of nonmembers is necessary to protect tribal self-government or to control internal relations."[52] The court then analyzed *Plains Commerce Bank*, and concluded that the statement that *Montana* 's "general rule restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians"[53] left no doubt that "*Montana* applies regardless of whether the actions take place on fee or non-fee land."[54]

The Eight Circuit has also adopted a broad definition of *Hicks*. In *Attorney's Process and Investigation v. Sac and Fox Tribe*,[55] the non-Indian defendant (API) had sent a group of armed men to take over the tribal casino on behalf of a competing tribal political faction. Although the Court relied on the second *Montana* exception (threat to tribal health and welfare, political integrity and economic security) to uphold the jurisdiction of the tribal court,[56] it stated

> Although the issue in the *Montana* case was about tribal regulatory authority over nonmember fee land within the reservation, *Montana's* analytic framework now sets the outer limits of tribal civil jurisdiction—both regulatory and adjudicatory—over nonmember activities on tribal and nonmember land... The Court has also indicated that "*Montana* applies to both Indian and non-Indian land."[57]

[50] 807 F.3d 184 (7th Cir. 2015)
[51] Id., at 207.
[52] Id.
[53] Id., at 206-207
[54] Id., at 208.
[55] 609 F.3d 927 (8th Cir. 2010).
[56] Stating "because API's forceful intervention on October 1, 2003 threatened the "political integrity, the economic security, [and] the health [and] welfare" of the Tribe, as well as its rights as a landowner, the tribal courts may exercise jurisdiction over the claims that arise out of that conduct," Id., at 940.
[57] Id., at 936.

Towards the end of its opinion the Court did mention that the tribe had a right to exclude non-members from tribally owned land but it only invoked that right as part of the *Montana* framework.[58]

In a more recent case, *Belcourt Public School District v. Herman*,[59] the 8th Circuit applied *Montana* to deny tribal jurisdiction over the school district on what may have been Indian-owned land. The case involved multiple employment related claims by tribal employees against the school district. Although the status of the land as Indian or non-Indian owned was not clear, the Court disposed of this issue by stating in a footnote "there is scant evidence in the record what, if any, land and facilities relevant to this case were owned by the Tribe. Nevertheless, even if the Tribe owned all of the land and facilities relevant to this case—which is not supported by the record—*Montana* would still apply, and our analysis would not change."[60] The Court never mentioned the tribal right to exclude.

The first part of the Supreme Court's analysis in *Hicks* tends to support the 7th and 8th Circuits position. Thus, after stating that "Both *Montana* and *Strate* rejected tribal authority to regulate nonmembers' activities on land over which the tribe could not "assert a landowner's right to occupy and exclude,"[61] and remarking that the land status was central to the analysis of the Court in previous cases, he concluded that "the reason that was so was *not* that Indian ownership suspends the "general proposition"… that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe"[62] He followed that by noting that the *Montana* Court clearly implied that its general rule was applicable throughout the reservation when it stated that Indian tribes retain some forms of civil jurisdiction over non-Indians "even on non-Indian fee lands."[63] Finally after remarking that who owns the land is only one factor to

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[58] Stating "Finally, there remains "the critical importance of land status" to questions of tribal jurisdiction… Here the Tribe does not seek to assert jurisdiction over non Indian fee land. The facilities API raided are on tribal trust land. The Tribe's trespass and trade secret claims thus seek to regulate API's entry and conduct upon tribal land, and they accordingly "stem from the tribe's 'landowner's right to occupy and exclude... Tribal civil authority is at its zenith when the tribe seeks to enforce regulations stemming from its traditional powers as a landowner. 609 F.3d at 940.

[59] 786 F.3d 653 (8th Cir. 2015).

[60] Id., at 660 n.5. For an almost identical 8th Circuit case, see Fort Yates Pub. Sch. Dist. No. 4 v. Murphy, 786 F.3d 670 (8th Cir. 2015), stating at footnote 6, "]T]his court is aware that "[t]he ownership status of land" is "one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations.' " As noted above, however, there is scant evidence in the record what land and facilities relevant to this case were owned by the Tribe. Nevertheless, even if the Tribe owned all of the land and facilities relevant to this case—which is not supported by the record—*Montana* would still apply, and our analysis would not change for the reasons stated herein."

[61] Id., at 359.

[62] Id.

[63] Id., at 360.

consider in determining whether tribal regulation of nonmembers is necessary to protect tribal self-government, he stated "the existence of tribal ownership is not alone enough to support regulatory jurisdiction over non-members."[64]

In a later part of the opinion, after remarking that the major criticism of Justice O'Connor's concurrence was that "our reasoning "gives only passing consideration to the fact that the state officials' activities in this case occurred on land owned and controlled by the Tribes,"[65] Justice Scalia asserted

> To the contrary, we acknowledge that tribal ownership is a factor in the *Montana* analysis, and a factor significant enough that it "may sometimes be ... dispositive." We simply do not find it dispositive in the present case, when weighed against the State's interest in pursuing off-reservation violations of its laws.[66]

This statement implies that it was a "*Montana* analysis" that the Court was performing. But what of Justice Scalia invocation of the State's interests in law enforcement before concluding that the Tribal court did not have jurisdiction in the case? The State's interests had never been part of any *Montana* analysis under which the courts are supposed to evaluate whether jurisdiction of non-members is necessary to tribal self-government. There are two other interpretations of the Court's *Hicks* opinion that make more sense of Scalia's invocation of the state interests.

2. The Tenth Circuit approach: From a broad interpretation of *Hicks* to one limiting it to cases involving strong state law enforcement interests.

An early Tenth Circuit decision was *MacArthur v. San Juan County.*[67] The case involved tribal members employed by a health clinic who were challenging certain administrative actions taken by the clinic. Whether the alleged wrongful conduct of the non-members occurred on what can be classified as Indian or non-Indian fee land was debatable. Although the clinic started out as part of a County Health Services district, the County relinquished operation of the Clinic on January 1, 2000, at which time the Utah Navajo Health Systems, an entity affiliated with the Navajo tribe, took over operation. Although the Tenth Circuit took the position that "The record indicates that the land on which the Clinic is located is fee land owned by the State of Utah as part of the Navajo Trust Fund,"[68] it did address *Hicks's* extension to Indian owned land, stating

> The notion that *Montana*'s applicability turns, in part, on whether the regulated activity took place on non-Indian land was finally put to rest in *Hicks.* … Because the activities

[64] Id.
[65] Id., at 370.
[66] Id.
[67] 497 F.3d 1057 (10th Cir. 2007).
[68] Id., at 1061.

> occurred on Indian land, Hicks argued that *Montana* had no relevance. In rejecting that argument, the Court explained that… language from *Montana* itself clearly implied that the general rule announced in that case applies to Indian and non-Indian land alike.[69]

In a more recent decision, however, *Norton v. Ute Indian Tribe*,[70] the Tenth Circuit seemed to take a much narrower view of *Hicks*. In *Norton*, the Ute Tribe was suing state police officers who had trespassed unto tribal land while chasing a car occupied by a pair of tribal members. In the ensuing pursuit, Murray who was the passenger in the fleeing car ended up dead from a gunshot wound to the head. The parties disagreed as to whether Murray committed suicide as the state police claimed or whether he was shot by the police.

The Court first addressed the right to exclude and stated "In light of these repeated confirmations of tribes' right to exclude nonmembers from tribal lands, we think it plausible that the Tribal Court possesses jurisdiction over the trespass claim."[71] The Court then addressed the argument that *Hicks* had changed the lay of the land. After noting that the *Hicks* Court "expressly limited its holding to "the question of tribal-court jurisdiction over state officers enforcing state law,"[72] the Tenth Circuit stated "Thus, the question before us is whether this case sufficiently mirrors *Hicks* so as to compel its narrow holding to apply."[73]

The Court went on to observe that the facts in this case were much different from those in *Hicks* since the tribal member who died from the gun shot was not suspected of having committed any off-reservation crime. Although the driver of the car was speeding outside of the Reservation, Murray (the tribal member who died) was merely a passenger. Thus, the Court concluded by stating "To the extent that Murray's running away from State Trooper Swenson could be considered an offense, see Utah Code § 41-6a-209 (disobeying a lawful order of a law enforcement officer), this crime does not fit within Hicks' confines."[74] In effect, the Tenth Circuit in *Norton* took the position that in order for *Hicks* to be controlling, the State has to put forth a substantial law enforcement interest.

3. The Ninth Circuit approach: From a narrow interpretation of *Hicks* to rejecting the application of *Montana* when tribes have preserved the right to exclude.

The third category of cases are out of the Ninth Circuit. The first Ninth Circuit case to discuss the meaning of *Hicks*, was *McDonald v. Means*.[75] The issue involved an assertion of tribal court jurisdiction over a tort resulting from a collision on a federal Bureau of Indian

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[69] Id., at 1069-70.
[70] 862 F.3d 1236 (10th Cir. 2017).
[71] Id., at 1245.
[72] Id., at 1248.
[73] Id.
[74] d., at 1248.
[75] 309 F.3d 530 (9th Cir. 2002).

Affairs' road. The non-member defendant argued that *Hicks* extended *Montana* to all lands within the reservation. After noting that the *Hicks* Court had limited its holding to the question of tribal-court jurisdiction over state officers enforcing state law, the Ninth Circuit concluded that the limited nature of *Hicks's* holding was not applicable to this case. Among the distinguishing factors was the fact that the Tribe here had continued to exercise control over the road where the incident took place.[76]

Perhaps the first 9th Circuit decision to discuss the role of the right to exclude in a *Montana* analysis was *Elliott v. White Mountain Apache Tribal Court.*[77] The issue was whether the tribal court had jurisdiction to hear a case brought by the tribe against a non-member who set a signal fire after she got lost on the reservation and that fire ended up burning 400,000 acres of tribal timber. After acknowledging that determining the scope of tribal court jurisdiction was not an easy task, the court noted that here, it only needed to determine whether tribal jurisdiction was plausible since the issue was whether the non-member had to first exhaust her tribal remedies before filing her case in federal court.[78] In deciding that tribal jurisdiction was in fact plausible, the 9th Circuit Court examined the Supreme Court precedents and noted

> The Supreme Court has strongly suggested that a tribe may regulate nonmembers' conduct on tribal lands to the extent that the tribe can "assert a landowner's right to occupy and exclude. The tribal regulations at issue stem from the tribe's "landowner's right to occupy and exclude."… Accordingly, the tribe's ownership of the land may be dispositive here.[79]

The Court further rejected the argument that *Hicks* precluded tribal jurisdiction. Although the Ninth Circuit acknowledged that the *Hicks* Court held that the tribal court lacked jurisdiction notwithstanding tribal ownership of the land, it stated that "the crux of the Court's reasoning was that the state's strong interest in executing its criminal warrants concerning an off-reservation crime outweighed the tribe's interest in regulating the activities of "state wardens."[80]

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[76] Id., at 540.

[77] 566 F.3d 842 (9th Cir. 2009). An earlier case, Smith v. Salish Kootenai College, 434 F.3d 1127 (2006) discussed *Hicks* but instead of discussing whether the tribe had kept its right to exclude, it focused on how the claims were related to tribal land, stating "The interaction of these factors—the status of the parties and the connection between the cause of action and Indian lands—is complex…Our own cases, however, suggest that whether tribal courts may exercise jurisdiction over a nonmember defendant may turn on how the claims are related to tribal lands." Id., at 1132. A later 9th circuit opinion, Window Rock v. Reeves, 861 F.3d 894 (2017), acknowledged that "Although *Smith v. Salish Kootenai College* could arguably be read to extend the *Montana* framework [to Indian owned land], the jurisdictional question in *Smith* arose in a different context from the one presented here. In *Smith*, a nonmember challenged a tribal court's authority to adjudicate a claim that he had filed as a plaintiff in tribal court. We held that by filing the claim, the nonmember had consented to tribal jurisdiction." Id., at Footnote 9.

[78] Id., at 849. See discussion supra at note 42 on exhaustion tribal court remedies.

[79] 566 F.3d at 849-850.

[80] Id., at 850.

The Ninth Circuit adopted a somewhat different approach in 2011 in what would become its leading case, *Water Wheel v. LaRance*.[81] The case arose out of a dispute involving a lease between the Colorado Indian Tribes and its lessee, Water Wheel, which operated a recreational resort on leased tribal lands. After the lease expired and Water Wheel refused to vacate the premises, the Tribe sued Water Wheel and its owner in tribal Court. Water Wheel challenged the jurisdiction of the tribal court in Federal court. Although the Ninth Circuit first stated that *Hicks* was limited to cases involving strong state law enforcement interests,[82] it ended upholding tribal court jurisdiction over the non-Indian lessee on a slightly different rationale, stating

> In this instance, where the non-Indian activity in question occurred on tribal land, the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests at play, the tribe's status as landowner is enough to support regulatory jurisdiction without considering *Montana.*[83]

The Ninth Circuit revisited the issue two years later in *Grand Canyon Skywalk Development v. 'Sa' Nyu Wa Inc*.[84] In that case, a non-Indian corporation, Grand Canyon Skywalk, had brought a lawsuit against a tribally chartered corporation of the Hualapai Indian Tribe, seeking a declaratory judgment that the Hualapai Tribe lacked the authority to condemn Grand Canyon Skywalk's property rights in a revenue-sharing contract with a tribally chartered corporation. The Ninth Circuit held that the non-Indian Corporation had to exhaust its tribal remedies before bringing an action in federal court because the tribal court did not plainly lack jurisdiction over that corporation so as to avoid the tribal exhaustion mandate.[85]

In extending *Water Wheel* to the present case, the court stated "Although this case involves an intangible property right within a contract, rather than a leasehold as in *Water Wheel*, the contract in this case equally interfered with the Hualapai's ability to exclude GCSD from the reservation."[86] Summarizing its interpretation of *Hicks*, the Court stated " When deciding whether a tribal court has jurisdiction, land ownership may sometimes prove dispositive, but when a competing state interest exists, courts balance that interest against the tribe's."[87]

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[81] 642 F.3d 802 9th Cir. 2011).
[82] Id., at 813. stating "To summarize, Supreme Court and Ninth Circuit precedent, as well as the principle that only Congress may limit a tribe's sovereign authority, suggest that *Hicks* is best understood as the narrow decision it explicitly claims to be. Its application of *Montana* to a jurisdictional question arising on tribal land should apply only when the specific concerns at issue in that case exist."
[83] 642 F.3d 802, 814.
[84] 715 F.3d 1196 (2013)
[85] The *Grand Canyon Skywalk* court further stated "We have interpreted *National Farmers* as determining that tribal court exhaustion is not a jurisdictional bar, but rather a prerequisite to a federal court's exercise of its jurisdiction. Therefore, under *National Farmers*, the federal courts should not even make a ruling on tribal court jurisdiction ... until tribal remedies are exhausted." Id., at 1200.
[86] Id., at 1204–05.
[87] Id., at 1205.

Extending *Hicks* to the activities of non-members on tribal land was also at play in *Window Rock Unified District v. Reeves*.[88] There, employees of two school districts filed complaints with the Navajo Tribal Labor Commission, arguing that the Districts owed them merit pay and also alleging violation of the Navajo Preference in Employment Act . Before the Commission could hold evidentiary hearings, the School Districts filed a lawsuit in federal court, arguing that the Commission and the Navajo tribal courts had no jurisdiction over the School Districts' employment decisions. As in the *Grand Canyon Skywalk* case, the issue in front of the Ninth Circuit was whether the School District should exhaust its tribal remedies before filing in federal court.

The Ninth Circuit first remarked that caselaw has recognized two distinct frameworks for deciding tribal jurisdiction over non-members on Indian owned lands: "(1) The right to exclude which generally applies to nonmember conducts on tribal land and (2) the exceptions articulated in *Montana v. United States* which generally apply to nonmember conduct on non-tribal land."[89] Answering arguments that *Hicks* had eliminated the right to exclude framework the court stated

> [t]oday we reaffirm that the right-to-exclude framework continues to exist. Our court has read *Hicks* as creating only a narrow exception to the general rule that, absent contrary provisions in treaties or federal statutes, tribes retain adjudicative authority over nonmember conduct on tribal land—land over which the tribe has the right to exclude. We have held that *Hicks* applies "only when the specific concerns at issue in that case exist."[90]

One of the issues in the case was whether Arizona's interests in regulating education were sufficiently important to meet the *Hicks* threshold. Although the Court rejected the position adopted by the District Court that "any state interest in this case plainly defeats [tribal] jurisdiction under *Hicks,*" it took the position that even though *Hicks* involved state interests dealing with law enforcement, state interests beyond those affecting criminal law enforcement could at times trigger application of *Hicks*.[91] However, the Ninth Circuit concluded by holding that "because our caselaw leaves open the question of what state interests might be sufficient to preclude tribal jurisdiction over disputes arising on tribal land, tribal jurisdiction is plausible enough here that exhaustion is required."[92]

There was a strong dissent from Judge Christen. Although the dissent argued against a narrow interpretation of *Hicks*,[93] the more salient part of the dissenting opinion was its argument

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[88] 861 F.3d 894 (2017).
[89] 861 F.3d 894, 898.
[90] Id.
[91] Id., at 899
[92] Id.
[93] Id., at 911-912.

that even if the majority was correct in adopting a narrow interpretation of *Hicks*, the Tribe still did not have jurisdiction.[94] First, the tribe had ceded its right to exclude the school district from the reservation.[95] Secondly, even if *Hicks* is interpreted as requiring a strong state interest before the *Montana* framework can be invoked, Arizona here did have a substantial interest relating to education.[96]

The *Reeves* dissent considered the State interest but not as part of its right to exclude analysis or the *Montana* analysis. Instead, it analyzed the state interest in distinguishing previous cases such as *Water Wheel.* Either the state interest can be discussed as opening the door for a *Montana* analysis or it can be conceived as having eliminated the right to exclude. Although either analysis end up at the same place, this Article takes the position that it is normatively more consistent to discuss the state interests in order to determine whether a tribe has lost the right to exclude.

The most recent Ninth Circuit decision in this area of the law as of this writing is *Knighton v. Cedarville Rancheria*.[97] The case involved a lawsuit filed in tribal court by the tribe against a former non-member employee who was being accused of having defrauded the Tribe. The employee sought declaratory and injunctive relief in federal court claiming that the tribal court did not have jurisdiction. In upholding tribal jurisdiction the Ninth Circuit first rejected the employee's claim that *Hicks* had eliminated "the right to exclude framework as an independent source or regulatory power over non-member conduct on tribal land."[98] The Court also rejected the argument that tribal jurisdiction is "limited to conduct that directly interferes with a tribe's inherent power to exclude and manage its own land.[99] Finally the Court clarified the meaning of *Water Wheel,* stating

> *Water Wheel* and our subsequent cases… do not exclude *Montana* as a source of tribal regulatory authority over nonmember conduct on tribal land. Rather, our caselaw states that an Indian tribe has power to regulate nonmember conduct on tribal land incident to

[94] Unlike the majority the dissent concluded that exhaustion of tribal remedies was not required. Id., at 921-922.
[95] Id., at 914-916.
[96] Id., at 916-918, stating "The Navajo Nation Supreme Court's amicus brief asserts interests in protecting Navajo employees and students, and the tribal court's opening brief asserts interests in hearing complaints arising from employment decisions of all-Navajo school boards. But the school boards are political subdivisions of the State of Arizona, and Arizona has vitally important competing interests in the finality of its state-court judgments and its ability to enforce them. Further, Arizona's constitution mandates "the establishment and maintenance of a general and uniform public school system," a requirement of the Arizona Enabling Act. It cannot be questioned that Arizona has a compelling interest in complying with its statutory and state constitutional mandate." Id., at 917.
[97] 922 F.3d 892 (9th Cir. 2019).
[98] Id., at 900.
[99] Id., at 901.

> its sovereign power to exclude nonmembers from tribal land, regardless of whether either of the *Montana* exceptions is satisfied… a tribe's power to regulate nonmember conduct on tribal land flows from its inherent power to exclude and is circumscribed only to the limited extent that the circumstances in *Hicks*—significant state interests—are present.[100]

4. Conclusion to Part II and re-imagining *Hicks* as a state Jurisdiction case.

Ultimately, the Ninth Circuit position as clarified in *Knighton v. Cedarville Rancheria* is the more doctrinally sound approach among the Circuits.[101] Justice Scalia's opinion in *Hicks* should be interpreted as creating a two-step analysis before tribal jurisdiction over non-members *on Indian-owned land* could be said to have been divested. First, a court should determine if the Tribe has lost the right to exclude. If the answer is yes, the court should determine if the tribe can exercise jurisdiction under one of the two *Montana* exceptions.

Conceptualizing *Hicks* in that manner makes the most sense out of Justice Scalia's invocation of the State interest. Although considering the state interests either as divesting the tribes' of the right to exclude or as part of the *Montana* analysis may lead to the same result, construing Scalia's opinion as integrating a state interest into the *Montana* analysis lacks any doctrinal basis. The implicit divestiture doctrine was never about tribes losing inherent sovereignty because of a state interest. The State interest should only be taken into consideration in determining whether a tribe has lost its inherent right to exclude.

There is hardly any law on what kind of state interest is sufficient or important enough to overcome a tribe's right to exclude. Whether the important state interest has to be related to law enforcement is debatable. For instance, in answering Justice O'Connor's accusation that the Court's opinion would "give nonmembers freedom to act with impunity on tribal land based solely on their status as state law enforcement officials,"[102] Justice Scalia stated "We do not say state officers cannot be regulated; we say they cannot be regulated in the performance of their law enforcement duties. Action unrelated to that is potentially subject to tribal control depending on the outcome of the *Montana* analysis."[103] Although I do not take the position that a state interest has to be tied to law enforcement as it was in *Hicks*, it seems to me that the state interest should somehow be connected to state officials needing to be on Indian owned land or having the legal right to be on such lands.

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[100] Id., at 903. The Ninth Circuit also added that a "tribe also has sovereign authority to regulate nonmember conduct on tribal lands independent of its authority to exclude if that conduct intrudes on a tribe's inherent sovereign power to preserve self-government or control internal relations." Id., at 904.
[101] For an even better approach, see discussion supra at notes…. About re-imagining *Hick*s as a state jurisdiction case.
[102] Id., at 373.
[103] Id., at 373-374.

In order to avoid all the confusion surrounding the proper understanding of *Hicks*, perhaps that case should not be viewed as tinkering with the *Montana* analysis by introducing a balancing of tribal and state interest but should be re-imagined as a State Jurisdiction case. In other words, rather than decide the case using *Montana* to hold that the tribal court had been implicitly divested of jurisdiction, the Court should have used the Indian Preemption doctrine to hold that because the State had jurisdiction to send its game wardens on the reservation, tribal jurisdiction to regulate such state officials had been preempted.

Under the Indian preemption doctrine, as stated by the Court *in White Mountain Apache Tribe v. Bracker*,[104] the inquiry determining whether a state has jurisdiction "is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law."[105] In a case decided shortly thereafter, the Court further refined the Indian Preemption doctrine as a balancing inquiry, stating "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority."[106]

At one point in the Court's *Hicks* opinion, it seemed that Justice Scalia was going to do such a balancing inquiry. Thus, after stating that "Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border,"[107] Justice Scalia focused on the right of states to run "process" inside the reservations which he claimed had been recognized since the 1880's."[108] Black's Law Dictionary defines "Process" as "any means used by a court to acquire or exercise its jurisdiction over a person or over specific property."[109] Justice Scalia added that "While it is not entirely clear from our precedent whether the last mentioned authority entails the corollary right to enter a reservation (including Indian-fee lands) for enforcement purposes, several of our opinions point in that direction."[110]

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[104] 448 U.S. 136 (1980).
[105] Id., at 145.
[106] New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1980).
[107] Id., at 361.
[108] Stating "The Court's references to "process" in *Utah & Northern R. Co.* and *Kagama*, and the Court's concern in *Kagama* over possible federal encroachment on state prerogatives, suggest state authority to issue search warrants in cases such as the one before us." Id., at 361.

[109] Black's Law Dictionary 1084 (5th ed.1979).
[110] Id., at 363.

Justice Scalia also invoked *Washington v. Confederated Tribes of the Colville Reservation,*[111] for the proposition that states can even have jurisdiction over Indian tribes and their members on Indian reservations.[112] True enough, the Court has in the past stated that "[U]nder certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and ... in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members."[113] Following this reasoning, I was expecting Justice Scalia to next argue that the State had the power to enter the reservation and assume jurisdiction over Hicks because of exceptional circumstances, thereby abrogating the tribe's right to exclude. Justice Scalia could have then argued that the state law enforcement interests in this case pre-empted tribal jurisdiction because dual tribal/state regulations over the activities of state officials would have not been possible nor practical.

In that manner, the case could have been similar to *New Mexico v. Mescalero Tribe* but in reverse.[114] In *Mescalero*, the state was attempting to regulate non-members hunting and fishing on the reservation but the Court held that such state regulations were preempted because, among other things, both tribal and state regulations could not co-exist.[115] For whatever reason, Justice Scalia did not continue along this path and abruptly shifted to an implicit divestiture mode of analysis, balancing the tribal and state interests not to determine whether the state should have jurisdiction but to conclude that tribal jurisdiction in this case was not necessary to tribal self-government.[116]

From a tribal perspective, however, I believe that it would have been better if the Court had invoked exceptional circumstances and used the Indian preemption doctrine to affirm state

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[111] 447 U.S. 134 (1980).

[112] 533 U.S. 353, 362, stating "When, however, state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land, as exemplified by our decision in *Confederated Tribes.* In that case, Indians were selling cigarettes on their reservation to nonmembers from off reservation, without collecting the state cigarette tax. We held that the State could require the Tribes to collect the tax from nonmembers, and could "impose at least 'minimal' burdens on the Indian retailer to aid in enforcing and collecting the tax."

[113] California v. Cabazon Band of Mission Indians, 480 U.S. 202, 214–16 (U.S.Cal.,1987).

[114] 462 U.S. 324 (1980).

[115] Id., at 338, stating "It is important to emphasize that concurrent jurisdiction would effectively nullify the Tribe's authority to control hunting and fishing on the reservation. Concurrent jurisdiction would empower New Mexico wholly to supplant tribal regulations. The State would be able to dictate the terms on which nonmembers are permitted to utilize the reservation's resources. The Tribe would thus exercise its authority over the reservation only at the sufferance of the State."

[116] 533 U.S. 353, at 364. Perhaps Justice Scalia abandoned this line of reasoning because even though the Court had used the Indian preemption inquiry to allow state power over Indians under "exceptional circumstances," it had never used the Indian preemption doctrine to prohibit *tribal jurisdiction* over non-members. But that is probably dues to the fact that most of the state jurisdiction cases are tax cases and in the tax area, concurrent tribal and state jurisdiction is possible. See Cotton Petroleum v. New Mexico, 490 U.S. 163 (1988).

jurisdiction in order to preempt tribal jurisdiction. There would have been then no need to further denigrate tribal sovereignty and there would have been no questions that the implicit divestiture doctrine was being extended to Indian owned land.

PART III: THE TREATY RIGHT TO EXCLUDE BEYOND *MONTANA* AND *HICKS*.

1. Is the treaty right to exclude different than the sovereign right to exclude?

Although tribes have been surprisingly successful in getting the Supreme Court to uphold their treaty rights, the same cannot be said for cases relying on tribal inherent sovereignty to control the conduct of non-tribal members.[117] The question, therefore, is whether tribes with a treaty right to exclude may be better off focusing on their treaty rights rather than on their "inherent" sovereign power to exclude. Some scholars do not think it makes much difference. One of the more forceful statement for treating both treaty and non-treaty reservations alike was made by Professor Royster,

> If tribes with reservations established by statute or executive order have the same rights to water and the same rights to hunt and fish as tribes with reservations established by treaty, then by what argument would they not have the same right to the use and occupation of their lands? …Particular treaties, statutes, or executive orders may speak of a tribal right to use and occupy the reservation, but that language merely clarifies or affirms the federal guarantee implicit in the establishment of the reservation. Whether that use and occupation right arises from an actual treaty or the treaty-equivalent of a statute or executive order should make no difference.[118]

While I do not disagree with Professor Royster's statement, I think the difference between an inherent sovereign right and a treaty right to exclude comes in when a court has to determine whether the right to exclude has been lost. Under my interpretation of *Hicks*, without a treaty, a court would have to decide whether there are state interests that are important enough so that the tribe has lost the right to exclude. If the right to exclude is based on a treaty, however, the question should be whether there are clear indications of congressional intent to abrogate the treaty right to exclude.[119]

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[117] See Alex Tallchief Skibine, The Supreme Court's last 30 Years of Federal Indian Law: Looking for Equilibrium or Supremacy, 8 Colum. J. Race & L. 277, at 287-289 (2018).

[118] See Royster, supra at n. 13, 57 Ariz. L. Rev. 889, 921.

[119] See United States v. Dion, 476 U.S. 734 (1986). Stating "where the evidence of congressional intent to abrogate is sufficiently compelling, "the weight of authority indicates that such an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute." What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." Id., at 739–40.

Some may argue that all Indian tribes, whether they have treaty rights or not, should be treated equally and have the same rights on their own reservations. Such argument, however, denigrates the historical and legal importance of treaties made with Indian nations. While it is true that Federal Indian law has been homogenized, at first mostly through the Supreme Court's use of Federal Common Law, and then by federal statutes treating all Indian tribes generically, this was not always so. For about the first one hundred years, except for the Indian Trade and Intercourse Acts,[120] the relations between the federal government and each Indian tribe was mostly governed through particular treaties.[121] Some noted scholars, such as Vine Deloria and Saikrishna Prakash, have criticized the move towards homogenization,[122] arguing that such move was made for the purpose of assuming federal power over Indians.[123] Certainly, the so-called federal plenary power doctrine over Indian tribes and the implicit divestiture doctrine are fine examples of this strategy.

In the next section I discuss then differences between the inherent and treaty right to exclude has fared in two Supreme Court cases. One was based on the inherent sovereign right to exclude, the other on a treaty right to exclude.

2. The treaty and sovereign right to exclude at the Supreme Court.

A. Merrion v. Jicarilla Tribe:[124] The right to exclude as a sovereign right.

A year after *Montana*, the Court had the opportunity to debate the right to exclude as an inherent sovereign right. The issue in *Merrion* involved the Jicarilla Apache's power to impose an additional tax on a non-Indian corporation, Merrion, that had leased lands from the tribe for the purpose of energy development. Merrion argued that because its lease with the tribe did not provide for the imposition of new taxes, the tribal tax was precluded. The Court upheld the new tribal tax. The difference between the majority opinion penned by Justice Marshall and the

[120] The first Indian Trade and Intercourse Act was enacted in 1790, Act of July 22, 1 Stat 137. The last one was enacted in 1834, 4 Stat. 729.

[121] In 1871, Congress enacted a statute prohibiting the United States from entering into treaties with Indian Nations but reaffirming the validity of existing treaties, 16 Stat. 566 (March 3, 1871).

[122] See Vine Deloria Jr, *Reserving to Themselves: Treaties and the Powers of Indian Tribes,* 38 Ariz. L. Rev. 963 (1996) (criticizing Felix Cohen's Handbook of Federal Indian Law because "it was designed to present a homogenous body of law in which few questions remained" and concluding that "Newer versions of the handbook have simply built upon old and weak foundations, failing to articulate either Indian rights or federal responsibility clearly. Id., at 979)

[123] See Saikrishna Prakash, *Against Tribal Fungibility*, 89 Cornell L. Rev. 1069 (2004). See also Ezra Rosser. Ambiguity and the Academic: *The dangerous Attraction of Pan-Indian Legal Analysis,* 119 Harv. L. Rev. F. 141 (2005).

[124] 455 U.S. 130, 145–47 (1982).

dissent by Justice Stevens centered on the nature of the power to exclude and whether the tribal power to tax derived solely from the power to exclude.

Justice Marshall took the position that the tribal power to tax could be derived from either inherent tribal sovereignty or the right to exclude which includes other lesser rights such as regulating the terms under which anyone not excluded can remain on tribal lands. Justice Stevens argued that the power to tax non-members derived solely from the power to exclude and since the lease did not provide for additional taxes, Merrion could not be excluded for refusing to pay such taxes. Justice Marshall had this to say about the dissent's argument:

> [t]he dissent confuse the Tribe's role as commercial partner with its role as sovereign… Confusing these two results denigrates Indian sovereignty. Indeed, the dissent apparently views the tribal power to exclude, as well as the derivative authority to tax, as merely the power possessed by any individual landowner or any social group to attach conditions, including a "tax" or fee, to the entry by a stranger onto private land or into the social group, and not as a sovereign power."[125]

The tribal right in *Merrion* was, however, a non-treaty right to exclude. As noted by Justice Marshall, the difference between the majority and the dissent centered on whether the tribal right to exclude was an inherent "sovereign" right or a property owner's right.

B. South Dakota v. Bourland:[126] The right to exclude as a treaty right.

The issue in *Bourland* was whether the Cheyenne River Sioux Tribe had kept its treaty right to exclude non-members from hunting on land that was within the reservation but had been taken from the tribe for a federal dam and reservoir project. Relying on *Montana*, the Court in an opinion authored by Justice Thomas held that the Tribe's treaty right to exclude non-members from the reservation, implicit in its rights of "absolute and undisturbed use and occupation," of such lands, as well as its derivative right to regulate non-members while on these lands, was implicitly abrogated when the United States took the lands and opened them for the use of the general public.[127]

The Court also argued that its decision was not in contravention of *United States v. Dion*,[128] where the Court had held that a treaty right can only be abrogated if there is "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[129] The Court concluded that it could not explain Section 10 of the Cheyenne River Act and section 4 of

[125] Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 145–47 (1982).
[126] 508 U.S. 679 (1993).
[127] Id., at 690.
[128] 476 U.S. 734 (1986).
[129] Id., at 740

the Flood Control Act except as "indications that Congress sought to divest the Tribe of its right to "absolute use and occupation."[130] That conclusion was strongly objected to by the dissent which stated that the majority:

> points not even to a scrap of evidence that Congress actually considered the possibility that by taking the land in question it would deprive the Tribe of its authority to regulate non-Indian hunting and fishing on that land. Instead, it finds Congress' intent *implicit* in the fact that Congress deprived the Tribe of its right to exclusive use of the land.[131]

The Dissent also remarked that although the Court acknowledged the application of cases like *Dion* to this case, "the majority adopts precisely the sort of reasoning-by-implication that those cases reject."[132]

The Dissent also accused the majority of having a "myopic focus on the Treaty" and ignoring the fact that Treaties just confirmed Tribes' pre-existing sovereign rights over their reservations.[133] Therefore, according to the dissent "Even on the assumption that the Tribe's treaty-based right to regulate hunting and fishing by non-Indians was lost with the Tribe's power to exclude non-Indians, its *inherent* authority to regulate such hunting and fishing continued."[134] In effect, although Justice Thomas did state that "General principles of "inherent sovereignty" also do not enable the Tribe to regulate non-Indian hunting and fishing in the taken area,"[135] his majority opinion in fact remanded the question of whether either of the two *Montana* exceptions applied to the lower court.[136]

3. **The treaty right to exclude beyond jurisdiction over non-members: Applying federal laws of general applicability to Indian tribes.**

Besides being relevant in determining tribal jurisdiction over non-members, the distinction between inherent sovereign rights and treaty rights has also played a role in the on-going debate among the Circuits about extending federal laws of general applicability to Indian tribes. These are general federal law that do not mention Indian tribes in either the text or the legislative history.[137] There are currently three official approaches among the Circuits in deciding whether to apply a general federal law to Indian tribes. Under the prevailing approach, first formulated

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[130] Id., at 693.
[131] Id., at 700 (Blackmun and Souter dissenting.)
[132] Id.
[133] Id., at 701.
[134] Id.
[135] Id., at 694.
[136] Id., at 695-696.
[137] See Alex T. Skibine, *Practical Reasoning and the Application of General Federal Regulatory Laws to Indian Nations,* 22 Washington and Lee J, of Civ. Rights and Soc J. 123, 126 (2016).

by the 9th Circuit in *Donovan v. Coeur D'Alene,*[138] there is a presumption that federal laws that are generally applicable to everyone are also applicable to Indian tribes.[139] The tribes can, however, rebut this presumption by showing that the general federal law would interfere with "purely intramural aspects of tribal Sovereignty."[140] Under the D.C. Circuit approach as formulated in *San Manuel Bingo v. NLRB,*[141] the focus is on whether the general federal law would interfere with traditional powers of tribal self-government.[142] The Tenth Circuit, on the other hand, assumes that any federal law applied to tribes would interfere with tribal self-government and therefore requires clear indications of congressional intent to apply the law to the tribes.[143]

While all three approaches acknowledge that the general federal law should not be applied to Indian tribes if it interferes with some aspects of tribal self-government, they also agree that a general federal law should not be applied if it interferes with a specific treaty right unless there is clear evidence that Congress considered the matter and decided to abrogate the treaty right.[144] This indicates that in this area of the law, Tribes having a treaty right to exclude may be better off than those with just a sovereign right to exclude. Finding clear evidence of congressional intent to abrogate a treaty can, however, be a subjective inquiry. The Supreme Court in both *Montana* and *Bourland*, for instance, found clear indications of congressional intent to eliminate the treaty right to exclude as to non-Indian owned land when Congress had either transferred the land to non-Indian ownership, or provided a mechanism for non-Indians to acquire land within Indian reservations.[145]

When it comes to invoking a treaty right to prevent application of a federal law of general applicability, the debate has centered on what kind of treaty right qualifies. Is a treaty that reserves the Indian reservation "for the exclusive use" of the tribe and its members, specific

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[138] 751 F.2d 1113 (9th Cir. 1985).
[139] Id., at 1115-1117, relying on FPC v. Tuscarora, 362 U.S. 99 (1960).
[140] Id., at 1116-1117
[141] 475 F.3d 1306 (D.C. Cir. 2007)
[142] Id., at 1312-1313.
[143] See NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1196 (10th Cir. 2002) (stating "The correct presumption is that silence does not work a divestiture of tribal power.) More recently, a fourth approach was suggested by the 6th Circuit in *Soaring Eagle Casino v. NLRB, 791 F.3d 648 (6th Cir. 2015)* Although the panel acknowledged that it was bound by a previous panel's decision to follow the *Coeur d'Alene* framework, Id., at 662, it severely criticized that approach and argued that a much better approach would be to adopt what could be termed a "*Montana* framework" in determining whether application of federal regulatory laws to a reservation-based tribally owned enterprise would infringe on tribal sovereignty. The *Soaring Eagle* court took the position that the question to be answered in such cases was "whether a tribe has the inherent sovereign authority necessary to prevent application of a federal statute to tribal activity." Id., at 666.
[144] See, Skibine, *Practical Reasoning*, supra at note 137, at p. 130.
[145] See discussion supra at notes 17-20 and 126-136.

enough to qualify under the approaches described above. In *United States v. Farris*[146] for instance, the Ninth Circuit stated the treaty exception applied "only to subjects specifically covered in treaties, such as hunting rights . . . To bring the special rule into play here, general treaty language such as that devoting land to a tribe's 'exclusive use' is not sufficient, although such language does suffice to oust state jurisdiction."[147]

The Ninth Circuit has continued to follow this position. For instance, in *Department of Labor v. Occupational Safety and Health Review Commission,*[148] the issue was the application of OSHA to a tribally owned enterprise. Because the treaty created the reservation for the exclusive use of the tribe and stated that "nor shall any white person be permitted to reside upon the same without the concurrent permission of the agent and superintendent," the Occupational Safety and Health Commission concluded that the treaty "evidence an intent of the parties to exclude the white man from the reservation lands for any and all purposes except as therein enumerated."[149] Therefore, according to the Commission, the application of OSHA to the tribe would infringe on the tribe's right to exclusive use. On Appeal, the Ninth Circuit disagreed, stating, "on the facts before us, we do not find the conflict between the Tribe's right of general exclusion and the limited entry necessary to enforce the Occupational Safety and Health Act to be sufficient to bar application of the Act to the Warm Springs mill. The conflict must be more direct to bar the enforcement of statutes of general applicability."[150]

The Seventh Circuit has followed the lead of the Ninth Circuit. In *Smart v. State Farm*,[151] where the issue was application of ERISA to a tribal healthcare center, the Seventh Circuit stated, "Simply because a treaty exists does not by necessity compel a conclusion that a federal statute of general applicability is not binding on an Indian Tribe…The critical issue is whether application of the statute would jeopardize a right that is secured by the treaty."[152] The Court concluded that the treaty in question here did not delineate specific rights. The treaty simply conveyed land to be within the exclusive sovereignty of the Tribe.

The Tenth Circuit, on the other hand, has adopted a different position on the treaty exception. In *Donovan v. Navajo Forest Products,*[153] the Tenth Circuit held that OSHA was not applicable to the tribe because the treaty of 1868 with the Navajo Nation provided that only designated federal officials could enter the Navajo reservation.[154] Since applying OSHA would

[146] 624 F.2d 890 (9th Cir. 1980.)
[147] Id., at 893
[148] 935 F.2d 182 (9th Cir 1991).
[149] Id., at 184-85.
[150] Id., at 186-87.
[151] 868 F.2d 929 (7th Cir. 1989).
[152] Id., at 935
[153] 692 F.2d 709 (10th Cir. 1982),
[154] Article II of the treaty, states as follows: [T]he United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents and employees of the government, or of the

allow federal employees to enter the reservation at any times in order to enforce the statute, the court stated

> The Navajo Treaty recognizes the Indian sovereignty of the Navajos and their right of self-government . . . Application of OSHA to NFPI [Navajo Forest Products Inc.] would constitute abrogation of Article II of the Navajo Treaty relating to the exclusion of non-Indians not authorized to enter upon the Navajo Reservation. Furthermore, it would dilute the principles of tribal sovereignty and self-government recognized in the treaty.[155]

The Tenth Circuit applied *Navajo Forest Products* in *EEOC v. Cherokee Nation*,[156] where the issue was application of the Age Discrimination in Employment Act (ADEA) to the Cherokee Nation. Remarking that in *Navajo Forest Products*, the court had found that application of OSHA would dilute the principles of tribal sovereignty and self-government recognized in the treaty, the *Cherokee Nation* court concluded, "The treaty's language clearly and unequivocally recognizes tribal self-government with only two express exceptions, neither of which is at issue in this case . . . Consequently, we hold that ADEA is not applicable because its enforcement would directly interfere with the Cherokee Nation's treaty-protected right of self-government."[157]

The difference of opinion between the 9th and 10th Circuit concerning how specific a treaty right has to be before it can prevent the application of a general federal law came to the fore more recently in *Soaring Eagle Casino v. NLRB,*[158] a case involving application of the National Labor Relations Act to a tribal casino. After acknowledging a split between the Ninth and Seventh Circuits on one side and the Tenth on the other, the Sixth Circuit recognized that "the question was a close one" but concluded that a treaty right to exclude was insufficient to bar application of federal regulatory statutes of general applicability, at least in the absence of a "direct conflict between a specific right or exclusion and the entry necessary for effectuating the statutory scheme."[159]

Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article. Treaty with the Navaho, 15 Stat. 667 (1868).

[155] 692 F.2d at 712.
[156] 871 F.2d 937 (10th Cir. 1989).
[157] Id., at 938.
[158] Soaring Eagle Casino and Resort v. N.L.R.B., 791 F.3d 648 (6th Cir. 2015)
[159] Id. at 661, stating "Although, given the protective language employed by the Supreme Court when assessing tribal treaty rights, the question is a close one, ultimately we conclude that a general right of exclusion, with no additional specificity, is insufficient to bar application of federal regulatory statutes of general applicability. Unless there is a direct conflict between a specific right of exclusion and the entry necessary for effectuating the statutory scheme, we decline to prohibit application of generally applicable federal regulatory authority to tribes on the existence of such a treaty right alone."

Judge White, concurring in part and dissenting in part, took a different view. Judge White began by acknowledging that under Circuit precedent, the tribe's inherent sovereignty could not prevent the application of general federal law. However, the tribe's treaty right was another matter."[160] Disagreeing with the majority that the treaty right to exclude was not specific enough, Judge White stated

> As memorialized in the Treaty, in exchange for "relinquishing ... several townships" to the federal government, the Tribe secured the "exclusive use, ownership, and occupancy" of the remnant it retained. ..Surely, these signatories who just gave up a significant portion of their homeland, would not have understood their right to the "exclusive use, ownership, and occupancy" of their remaining land to be limited, non-specific, or subject to regulation regarding the conditions the Tribe might impose on those it permitted to enter. On the contrary, the Tribe would reasonably have understood this provision to mean that the federal government could not dictate, in any way, what the Tribe did on the land it retained.[161]

Judge White concluded that "Absent Congress's express direction to the contrary, the Tribe's treaty-based exclusionary right is sufficient to preclude application of the NLRA to the Tribe's on- reservation Casino."[162]

CONCLUSION:

A treaty right to exclude is more valuable to the tribes because in order for this right to be abrogated a party has to show clear evidence of congressional intent to that effect. The Supreme Court has, however, found such clear evidence when Congress has allowed Indian land to be transferred to non-members. In addition, most courts have generally required treaty rights to have a certain level of specificity before acknowledging that they may give more rights than what tribes already have under their inherent sovereign powers. Finally, it is important to note that while tribes have been successful at the Supreme Court when it comes to defending their treaty rights, just about all of the Indian treaty cases have involved off reservation hunting, fishing, or gathering rights.[163] Although one of the later cases involved a treaty right to avoid state fuel taxes on trucks using state highways to reach the reservation,[164] that case also involved

[160] As she put it, "It well may be that when a tribe's inherent sovereignty rights are broadly interpreted, its treaty-based exclusionary right (general or specific) has little work to do. But out of necessity, the treaty-based right assumes a paramount role when a tribe's inherent sovereignty has been judicially narrowed, and the treaty should not be narrowly interpreted." Id., at 677.
[161] Id., at 676.
[162] Id., at 676-677.
[163] See Washington v. Washington State Passenger Fishing Vessel Ass'n, 433 U.S. 658 (1979), Minnesota v. Mille Lacs Band of Chippewas, 526 U.S. 172 (1999), Herrera v. Wyoming, 139 S. Ct. 1686 (2019).
[164] Cougar Den v. Washington State Dept. of Licensing, 193 S. Ct. 1000 (2019).

off reservation activities. Moreover, none of the cases involved using a treaty right to control the activities or non-tribal members as would be the case when invoking the treaty right to exclude.

Finally, Justice Scalia's opinion in *Hicks* is not a model of clarity and lends itself to different interpretations. This Article has argued that while each of the three interpretations can find support in the language used in *Hicks*, the more doctrinally sounder interpretation among the circuits, is the one adopted by the Ninth Circuit. Under that version, before the *Montana* analysis can be applied to potentially divest Indian tribes of jurisdiction over Indian owned reservation lands, the parties arguing against tribal jurisdiction have to show a state interest important enough to neutralize the tribal right to exclude. This article has also argued, however, that an even better way to proceed would be to re-imagine or re-conceptualize *Hicks* as a state jurisdiction case.