Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction

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If there is one point about tribal status that the Supreme Court has stressed for decades if not centuries, it is the notion that tribes as political entities are utterly one of a kind. This is to some extent reasonable; tribes, unlike other governments, have suffered the painful history of colonial conquest, making some distinctive treatment eminently justifiable. But recent developments have demonstrated to many tribes that uniqueness has its disadvantages. In the past few decades, the Supreme Court has undertaken a near-complete dismantling of tribal civil jurisdiction over nonmembers. Under current law, tribes have virtually no authority to permit nonmembers to be haled into tribal courts—even when nonmembers have significant ties to the tribe and have come onto the reservation for personal gain. In this project of limiting tribal power, as with so much of the Court’s Indian law jurisprudence, the Supreme Court has emphasized tribes’ distinctive status, notably failing to consider the relevance of more generally applicable doctrines such as personal jurisdiction. Tribal uniqueness has thus come to include tribes’ singular inability to exercise jurisdiction over nonmembers, despite the reality that people and commerce move freely across tribal and non-tribal land.

This is a mistake. Tribal court jurisdiction has much in common with broader notions of personal jurisdiction, and treating it in any other way limits and distorts courts’ analysis. Indeed, the field of jurisdiction presents a striking disparity between the absence of factors actually unique to the tribal context and the extreme idiosyncrasy of the Court’s doctrine. No good reason exists why existing personal jurisdiction doctrines could not be adapted to encompass the issues that tribal court jurisdiction presents; that is true even if one concedes various premises of the Court’s opinions, such as the idea that it is inherently burdensome in most cases for nonmembers to defend in tribal court. Further, because minimum contacts analysis allows courts to take a nuanced, flexible view of the degree of
connection between the defendant and the forum, personal jurisdiction doctrine is perfectly suited to addressing the often-complex fact patterns that characterize modern disputes involving Indian country. For these reasons, the Article argues, limitations on tribal court jurisdiction over nonmembers should be recharacterized as limits on personal jurisdiction. This would both harmonize tribal courts’ jurisdiction with that of state courts, and do a better job than current doctrine in balancing the legitimate interests of both tribes and nonmember defendants.

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INTRODUCTION

For decades, if not centuries, the Supreme Court has emphasized above all else one point about the status of Native American tribes: As political entities, tribes are utterly one of a kind. A hallmark of the Court’s recent Indian law cases is the word “unique.” Thus, tribes are “unique aggregations” occupying a “unique status under our law.” Their sovereignty is “of a unique and limited character,” informed by tribal sovereignty’s “unique historical origins.” More broadly, the “lives and activities” of tribal members are “governed by the BIA [Bureau of Indian

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1 The vogue for referring to tribes as “unique” is a relatively recent one. I can find no Supreme Court case prior to 1974 that uses the term to characterize general attributes of tribal status. (The earliest use appears to be in Morton v. Mancari, 417 U.S. 535, 555 (1974), in which the Court refers to the federal government’s “unique obligation” toward the tribes and also to the “unique legal status of tribal and reservation-based activities.” Id. at 546.) Although early cases did not use the word “unique,” however, they did frequently emphasize the distinctiveness of tribes’ legal position. Thus, in Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1830) (the case in which Justice Marshall famously coined the phrase “domestic dependent nations” to describe the tribes), the Court noted that “the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.”

2 Among the numerous areas of federal Indian law the Court has described as “unique” are the “tax immunity jurisprudence” the Court has applied to Indian country, Wagon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 97 (2005), and the federal government’s “unique powers to manage and control tribal property.” U.S. v. Sioux Nation of Indians, 448 U.S. 371, 409 n.26 (1980). Likewise, the Court has noted that tribes and the United States participate in a “unique trust relationship,” County of Oneida v. Oneida Indian Nation of N.Y., 470 U.S. 226, 247 (1985), that imposes a “unique obligation” on the federal government. Morton v. Mancari, 417 U.S. 535, 555 (1974).


6 White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980). Further, a primary reason that tribes are permitted to retain this sovereignty is to promote their “unique customs and social order.” Duro v. Reina, 495 U.S. 676, 686 (1990).
Affairs] in a unique fashion.” And this should perhaps come as little surprise, given that the BIA is itself an agency “described as ‘sui generis.’”

Of course, no fair or reasonable consideration of Indian law issues could ignore the many powerful ways in which tribes are genuinely distinct. Most important, tribes are different from other entities because they have suffered the painful history of colonial conquest and the fallout from innumerable hostile or misguided federal policies over the years. Many federal Indian law doctrines attempt to compensate at least modestly for the devastating injuries tribes have suffered at the hands of the United States; courts, for example, apply canons that construe statutes and treaties in tribes’ favor where possible. History aside, it would be difficult to argue that tribes do not possess political and structural characteristics that are, at the very least, unusual. Tribes are unconstrained by the Constitution, yet

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8 Rice v. Cayetano, 528 U.S. 495, 520 (2000). Note that, lest anyone think I am unfairly nitpicking the Supreme Court, I readily concede that this particular linguistic habit is a “uniquely” difficult one to avoid when talking about tribes and Indian country. See Katherine Florey, Indian Country’s Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty, 51 B.C. L. Rev. 595, 603 (2010) [hereinafter Territoriality] (discussing the “unique status of tribal lands”).
9 These historical injustices have been chronicled in various ways. See, e.g., FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIAанс, INDIAN TRIBES, AND THE CONSTITUTION (2009); ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005).
10 See Philip P. Frickey, (Native) American Exceptionalism in Federal Public Law, 119 Harv. L. Rev. 431, 445-48 (2005) [hereinafter Exceptionalism] (discussing the canons of interpretation and how they have afforded some degree of protection to tribal interests). Other ways in which tribes benefit from their distinctive status include the semi-exemption from equal protection jurisprudence the federal government has with respect to tribes, enabling it to give tribal members preference in federal hiring, see id. at 446-47, and the several ways in which the sovereign immunity of tribes is more robust than that of states. See Florey, Territoriality, supra note 8, at 627-28.
they are severely constrained in the degree to which they can regulate their own territory. They are “domestic dependent nations,” an uneasy hybrid that makes them in some ways more autonomous than states and in other respects more dependent. An understanding of these differences is necessary to treating tribes fairly and respecting tribal rights.

But if some sui generis treatment of tribes is both justified and woven into the American fabric, recent developments have demonstrated to many tribes that uniqueness has its disadvantages. In the past few decades, the Supreme Court has undertaken a near-complete dismantling of tribal civil jurisdiction over nonmembers. Following cases like Montana, Strate, and Hicks, tribes have virtually no authority either to regulate nonmember conduct or permit nonmembers to be haled into tribal courts – even when nonmembers have significant ties to the tribe and have come onto the reservation deliberately and for personal gain. Consider, for example, EXC, Inc. v. Jensen, a recent case in which non-Indian tourists on a chartered tour bus spent two days on the Navajo reservation, stopping at a tribal visitors center and staying overnight at a Navajo-owned hotel. The bus then collided with a sedan containing three Navajo occupants, killing

11 See Florey, Territoriality, supra note 8, at 597.
12 See Frickey, Exceptionalism, supra note 13, at 437-38 (explaining the nature of “domestic dependent” status).
the driver and causing significant injuries to the passengers. Applying *Montana* and *Strate*, a federal district court nonetheless found that – because the defendants were not members of the tribe – a Navajo court lacked jurisdiction over negligence claims by the Navajo sedan occupants against the tour bus operators.\(^\text{18}\)

Cases like *EXC* show how devastating the doctrines developed in cases like *Strate* have been to tribes. A lack of jurisdiction over nonmembers severely complicates tribal efforts to apply uniform law throughout the reservation and undermines the authority of tribal courts.\(^\text{19}\) Further, it contributes significantly to the more general problem of lawlessness that prevails on many reservations. Rape and murder rates in Indian country are more than 20 times the national average,\(^\text{20}\) and crimes by nonmembers against members account for a substantial part of these figures.\(^\text{21}\) Similar patterns hold true for civil wrongdoing; Matthew L.M. Fletcher, for example, notes that “[n]on-tribal member activity in Indian country is some of the least governed activity in the United States”\(^\text{22}\) and argues that the absence of civil checks on nonmembers contributes to their

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\(^\text{17}\) See id.

\(^\text{18}\) See id.


\(^\text{21}\) See Fletcher, *Resisting*, supra note 19, at 1002.

\(^\text{22}\) See id.
disproportionate involvement in “destructive and exploitative behavior in Indian country.”

Certainly, lack of civil jurisdiction is not the only cause of these devastating problems; funding shortages and the absence of tribal criminal jurisdiction over nonmembers also contribute substantially. Nonetheless, constraints on tribal courts’ civil jurisdiction deprive tribal governments of what might otherwise be a potent tool in achieving both law and order and substantive justice.

But the negative effect of the Court’s jurisprudence goes beyond the substantive limits it imposes on tribal power. The problem stems not merely from what recent cases say about tribal court jurisdiction but from how they say it. In the project of limiting tribal courts’ power, as with so much of the Court’s Indian law jurisprudence, the Supreme Court has emphasized tribes’ distinctive status. And in keeping with this supposed tribal uniqueness, the Supreme Court has developed the jurisdictional doctrines that govern tribes on an entirely clean slate. The Court, that is, has never seriously examined the field of personal jurisdiction, or related

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23 See id. at 1002-03.
24 See Williams, supra note 20.
25 Expanded civil jurisdiction even has potential as one way of addressing reservation crime. Outside Indian country, for example, victims of rape and sexual assault have made productive use of civil suits against offenders. See Ellen M. Bublick, Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms, and Constituencies, 59 SMU L. Rev. 55, 71-73 (2006) (noting that civil suits have some advantages for sexual assault victims, including standards of proof that are easier to satisfy, and that courts have reached “progressive results” in many such cases).
26 See, e.g., Strate, 520 U.S. at 459 (describing tribal court as “unfamiliar” and contrasting it to the “commonplace” claim at issue).
doctrines like conflict of laws, when discussing Indian country, despite the fact that these doctrines are by their nature designed to accommodate different legal values and contexts in multijurisdictional disputes. Instead, the Court has developed new doctrines and categories, presumably rooted in federal common law, that bear little relation to jurisdictional concepts as applied in any other context 27 - speaking, for example, of “legislative,” “adjudicative,” 28 and in some cases “subject matter” jurisdiction 29 in scenarios that would ordinarily be conceptualized as ones involving personal jurisdiction.

In fashioning a body of doctrine that is untethered to the broader doctrines that govern judicial jurisdiction in other contexts, the Supreme Court has changed the conversation about tribal jurisdiction in a way that has worked decisively to tribes’ detriment. To begin with, the absence of doctrinal mooring has given the Supreme Court unparalleled freedom to decide cases not according to settled doctrinal principles but according to its own, sometimes inaccurate, ideas and prejudices about Indian country. 30 Second, the recent case law promotes the idea that tribes are exotic entities

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27 As the Ninth Circuit put it recently (and with a certain amount of tact), “The Court… has never defined Indian tribal ‘subject matter jurisdiction’ with the same precision as we use that term [in the Article III context].” See Smith v. Salish Kootenai College, 434 F.3d 1127, 1131 (9th Cir. 2006) (en banc).
28 See, e.g., Strate, 520 U.S. at 453.
29 See Hicks, 533 U.S. at 367 n. 8.
30 For a devastating account of the degree to which the Supreme Court’s Indian law jurisprudence has been shaped (if perhaps unintentionally) by racist ideology, see WILLIAMS, supra note 9.
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harboring different ideas of jurisdiction and justice than do other governments\textsuperscript{31} – a notion that is at odds with the realities of modern tribal judiciaries.\textsuperscript{32} Third, it isolates tribes, reducing the ways in which they can effectively communicate and collaborate with other governments.\textsuperscript{33} The fact that tribal and state jurisdiction are grounded in such different conceptual frameworks makes reciprocity troublesome; one can hardly expect states and tribes to work out efficient mechanisms for enforcing each other’s orders or applying each other’s laws when their courts are bounded by mutually alien jurisdictional doctrines.\textsuperscript{34}

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\textsuperscript{33} For a (slightly dated in light of recent cases but still valuable) account of the jurisdictional difficulties created by the Court’s confusing pronouncements, see Laurie Reynolds, \textit{Adjudication in Indian Country: The Confusing Parameters of State, Federal, and Tribal Jurisdiction}, 38 WM. & MARY L. REV. 539 (1997).

\textsuperscript{34} This attitude in turn threatens to foster a notion that the proper status of tribes is separateness, that tribes should retreat into themselves and exercise authority over only their own members, not interfering with the nontribal world around them. Reinforcing this fear are decisions in cases like \textit{Brendale v. Confederated Tribes of the Yakima Nation}, in which a fractured Court held that the Yakima Nation had greater powers to regulate nonmember land in an area of the reservation mostly closed to the public than in one that was more open. \textit{See} 492 U.S. 408, 419-21, 432-33 (1989). Of course, even assuming such separatism were a desirable outcome for tribes, it is increasingly difficult in the modern world. Travel, commerce, and communications make multijurisdictional conflicts and disputes increasingly common everywhere, and that tendency is, if anything, exacerbated on most reservations, which have a long history of “checkerboard” land status in which much property is owned by nonmembers who may have varying degrees of connection to the tribe. \textit{See} Katherine Florey, \textit{Choosing Tribal Law: Why State Choice-of-Law Principles Should Apply to Disputes with Tribal Contacts}, 55 AM. U. L. REV. 1627, 1637 (2006) [hereinafter \textit{Tribal Law}]. Thus, tribes are frequently stuck in an unwinnable
Perhaps the most profound effect of the Court’s “uniqueness” jurisprudence, however, is the way in which it obscures the harsh effects of the Court’s recent Indian law policies. To say that tribes are “unique” suggests that we should expect to find disparities between the legal treatment of tribes and that of other sovereigns – that the extent of tribal power should be measured on a separate scale. It is certainly less transparent, and perhaps less controversial, to say that tribes have a different sort of sovereignty from states or foreign nations – a “unique” one – than to say that they have a lesser one. Highlighting tribes’ uniqueness, then, can be a way of lowering expectations about the sort of entities tribes actually are – and also, significantly, of masking the true nature and implications of the Court’s decisions.

This Article argues that this lack of dialogue between federal Indian law principles and other areas of law has been a particular problem in tribal civil jurisdiction. The jurisdiction of tribal courts is an area in which the disparity between the absence of factors actually unique to the tribal context and the extreme idiosyncrasy of the Court’s doctrine is both striking and consequential. In other words, there is no good reason why existing personal jurisdiction doctrines could not be adapted to encompass the issues that tribal court jurisdiction presents; that is true even if one concedes
various premises of the Court’s opinions, such as the idea that it is inherently burdensome in most cases for nonmembers to defend in tribal court. Indeed, because conventional personal jurisdiction doctrine allows for a flexible, case-by-case analysis that focuses on both fairness issues and the number and quality of the defendant’s contacts, it is in many ways perfectly suited to the complicated fact patterns that disputes arising in Indian country often present.

The Court, however, has notably failed to consider the possible relevance of the personal jurisdiction doctrines applied outside Indian country to the tribal context. Nor have many Indian law commentators addressed the issue in depth. While scholars have lamented the Court’s failure to view tribal court cases in minimum contacts terms or noted potential similarities between personal jurisdiction and cases involving tribes, the existing scholarship, for the most part, has not sought to make

35 See, e.g., Strate, 520 U.S. at 459 (alluding to such difficulties).
36 See Quill Corp. v. North Dakota, 504 U.S. 298, 307 (1992) (noting that the Court has “abandoned more formalistic tests … in favor of a more flexible inquiry into whether a defendant’s contacts with the forum made it reasonable … to require it to defend the suit in that State”).
37 See infra Part III.B.1 (explaining why minimum contacts analysis is well suited to the facts of Indian country).
38 See Hicks, 533 U.S. at 367 n. 8 (rejecting comparisons between the jurisdiction of tribal courts and personal jurisdiction).
40 See Joshua Jay Kanassatega, The Case for “Expanding” the Abstention Doctrine to
the case in any comprehensive fashion that tribal jurisdiction can and should be governed by the same jurisdictional doctrines applicable to state, federal, and foreign courts. This Article seeks to fill that gap in part.

In making the case for integration of the doctrine applicable to tribal courts with broader notions of jurisdiction, I do not wish to suggest that there is anything wrong, in general, with Indian law doctrines that focus on tribal distinctiveness. Consideration of tribes as unique is, in many respects, justified and inevitable; in many circumstances it has worked, reasonably and justly, to tribes’ advantage. But just as it would be a mistake to treat tribes as interchangeable in all contexts with states, cities, foreign nations, NGOs, or any other imaginable sort of entity, so it is undesirable to treat tribes as possessing a status so distinctive that it can never be assessed in light of principles developed for any other context. The field of personal jurisdiction, far from being inapplicable to Indian country, provides a helpful lens through which to view the question of tribal civil jurisdiction. There is much to be said for situating Indian law principles against the backdrop of such norms. Indeed, some courts are


41 See Frickey, Exceptionalism, supra note 10, at 435-36 (arguing that the seeming incoherence of much federal Indian law doctrine stems from its inherently self-contradictory roots and is to a large extent inescapable). While this is an immensely important perspective and one with which I largely agree, I argue in Part III that it is possible and desirable to permit mutual influence between tribal and nontribal jurisdictional doctrine without forcing a false coherence onto the standards applied to tribal courts.
beginning to do so in ways that may prove fruitful both for legal doctrine and for tribal rights.\textsuperscript{42}

This Article proceeds in three parts. The first Part briefly discusses the doctrinal principles that govern legislative and judicial jurisdiction in cases involving contacts with multiple states or nations. The Article then goes on to consider the parallel doctrines that apply to tribes, aiming both to survey the modern landscape of tribal jurisdiction and consider the historical reasons why the Court has never tried to fit tribes into the jurisdictional framework it applies to similar problems in the interstate or international context. Finally, the Article closes by arguing that the two bodies of doctrine can and should be harmonized – and that doing so would promote both increased fairness to nonmembers and a more meaningful conception of tribal sovereignty.

\textbf{I. Civil Jurisdiction Outside the Tribal Context}

Before turning to the question of civil jurisdiction in Indian country, this Article will survey the law as it exists in the state context. Outside Indian country, “civil jurisdiction” is rarely discussed as an undifferentiated whole. International norms governing the assertion of sovereign authority distinguish between a nation’s jurisdiction to prescribe (sometimes called

\textsuperscript{42} See, e.g., Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 805-06 (9th Cir. 2011) (discussed infra at Part II.3).
“legislative” jurisdiction) and to adjudicate (often called “judicial” jurisdiction).\textsuperscript{43} According to the Restatement (Third) of Foreign Relations Law, jurisdiction to prescribe is the power of a state “to make its law applicable to the activities, relations, or status of persons,” by various means. \textsuperscript{44} Notably, aspects of this power can include applying law both through direct legislation and through court determinations.\textsuperscript{45} Jurisdiction to adjudicate, by contrast, is a state’s power “to subject persons or things to the process of its courts or administrative tribunals.”\textsuperscript{46} As Catherine Struve has noted, the latter power is normally broader: “A government’s judicial power is generally presumed to reach well beyond that government’s regulatory power.”\textsuperscript{47}

Courts within the United States (both state and federal) have long been guided by such international norms in assessing the proper reach of their jurisdiction; the Supreme Court’s first efforts to construct limits on state court powers “can be traced to 19th century perceptions about public

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\textsuperscript{44} Restatement (Third) of Foreign Relations Law of the United States §401 (1987).

\textsuperscript{45} See id.

\textsuperscript{46} See id. The Restatement also refers to a third category, “jurisdiction to enforce,” which is the power to “induce or compel compliance or to punish noncompliance with its laws or regulations.” See id. While this power is not precisely coextensive with the power to prosecute criminally, there are obvious similarities. Because the focus of this Article is civil jurisdiction, I will not treat this power extensively here.

Following the passage of the Fourteenth Amendment, however, the Court began to view the Due Process Clause as the primary vehicle for imposing such limits. The following section explores the law governing state judicial and prescriptive jurisdiction in more detail.

A. State Judicial Jurisdiction

State and federal courts, especially when considering domestic matters, use the terms “judicial” and “legislative” jurisdiction rather rarely. At the same time, however, these two categories describe to some extent the inquiries that U.S. courts, both state and federal, must undertake when they are presented with a suit. That is, courts first must establish that they have personal and (in the case of federal courts) subject matter jurisdiction over the case—a step that appears to correspond neatly to the “judicial jurisdiction” category. Then they determine what law is to be applied to the

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49 See Pennoyer v. Neff, 95 U.S. 714, 733 (1877) (“Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of .. judgments may be directly questioned … on the ground that proceedings in a court of justice to deter mine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.”) Restrictions on state legislative jurisdiction are somewhat murkier in origin, but also have apparent constitutional sources in (at a minimum) the Due Process Clause, Full Faith and Credit Clause, and the Dormant Commerce Clause. See Katherine Florey, State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation, 84 NOTRE DAME L. REV. 1057, 1068ff (2009) [hereinafter State Courts].
50 Because most state courts are courts of general jurisdiction—i.e., subject to no subject matter limits—state courts generally need not undertake a subject matter jurisdiction inquiry. See Erwin Chemerinsky, FEDERAL JURISDICTION 265 (5th ed. 2007). The issue of subject matter jurisdiction is discussed in more detail in Part III.A infra.
case – a process that, in essence, helps to define the scope of various states’ legislative jurisdiction.

In actual practice, however, things are not quite so simple. Indeed, three separate doctrines constrain, to varying degrees, the extent to which states can exert their power over people who are not citizens of the state. First, state courts are subject to the familiar due process constraints that limit the degree to which they may assert personal jurisdiction over out-of-state defendants.\(^{51}\) Second, state courts are limited by the Due Process and Full Faith and Credit clauses (albeit in a rather modest fashion), in the degree to which they can apply forum law to disputes that lack a meaningful connection to the state.\(^{52}\) Finally, state legislation may be found unconstitutional under the Dormant Commerce Clause if it seeks to regulate wholly out-of-state events.\(^{53}\) The first two of these prohibitions thus apply only to courts, while the third applies predominantly to state legislatures.

Because all three of these doctrines deal with issues – such as defendant expectations and mediating among competing claims to regulate – that also surface in discussions about tribal regulation in Indian country, it is worth considering them in a bit more depth.

I begin with the most powerful and most familiar of these

\(^{51}\) See, e.g., World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) (“The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant.”)


limitations: personal jurisdiction. Everyone is familiar with the basic story of modern personal jurisdiction doctrine’s development: In *Pennoyer v. Neff*, the Supreme Court (applying the Due Process Clause as a limit on in personam jurisdiction for the first time since the Fourteenth Amendment’s passage\(^{54}\)) articulated a highly territorial view of the doctrine, under which a court could adjudicate cases against unconsenting out-of-state defendants only if they were served with process within the state – in other words, were physically subjected to the state’s sovereign power.\(^{55}\) This view caused severe practical problems in a mobile society, however, and after a few decades of piecemeal whittling away, the Court notably broke from it in *International Shoe v. Washington*, articulating instead a standard that allowed for a forum to hale a defendant into court\(^{56}\) provided the defendant had “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.”\(^{57}\) This standard is generally considered to add to, rather than to supplant, the traditional territorial bases for asserting state power over

\(^{54}\) See 95 U.S. 714, 733 (1877).

\(^{55}\) See id. at 733 (noting that for a judgment over an out-of-state defendant to be valid, the defendant must be “brought within [the court’s] jurisdiction by service of process within the State, or his voluntary appearance”). This account glosses over some minor complexities of *Pennoyer v. Neff*, such as its suggestion that broader personal jurisdiction might exist over corporations doing business in a state. See id. at 734-35.

\(^{56}\) I do not differentiate here between state and federal courts, because federal courts generally have personal jurisdiction over defendants only to the same extent as do the states in which they are located. See Fed. R. Civ. P. 4(k)(1)(A).

\(^{57}\) 326 U.S. 310, 315 (1945) (internal citations and quotation marks omitted).
In a series of cases, the Court has refined this standard, but its underlying principle – that defendants may subject themselves to suit in a particular forum by engaging in activities there, particularly activities that are related to the dispute – has remained constant. Notably, this principle echoes many of the approved bases for asserting judicial jurisdiction under the international norms described in the Restatement (Third).

While this Article will not discuss in detail the complexities of personal jurisdiction doctrine, a few basic points are worth noting. Under the International Shoe standard, defendants may be subject to personal jurisdiction based on a small number of contacts, provided those contacts are closely related to the dispute; defendants with a sustained and continuous presence may be subject to personal jurisdiction even for unrelated causes of action. The former type of jurisdiction is frequently

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58 See Burnham v. Superior Court of California, 495 U.S. 604, 622-23 (1990) (“By its very language, that test [for determining the existence of jurisdiction under the Due Process Clause] is satisfied if a state court adheres to jurisdictional rules that are generally applied and have always been applied in the United States.”). *Burnham* found the exercise of “tag” jurisdiction to comport with the Due Process Clause; note that, although only a plurality of the Court signed on to the language quoted above, this result was unanimous.

59 The Restatement (Third), for example, permits jurisdiction to be exercised over a defendant who “regularly carries on business in the state”; who “had carried on activity in the state, but only in respect of such activity” and who “had carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state, but only in respect of such activity.” *See* Restatement (Third) of Foreign Relations Law of the United States § 421(1987).

60 326 U.S. at 318 (noting that some “single or occasional acts … because of their nature and quality .... may be deemed sufficient to render the [defendant] liable to suit”).

61 *See* id. (explaining that in some cases “the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities”).
called “specific”; the latter is called “general.”\(^6^2\) Contacts are particularly significant to the extent that they reflect the defendant’s deliberate attempt to target a forum in hopes of some reward – when a defendant, that is, “purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”\(^6^3\) In tort cases, courts follow a similar analysis, generally looking to whether the defendant intentionally engaged in activities that had the forum state as their “focal point” and caused “the brunt” of their effects there.\(^6^4\) In all the factors the Court considers, a common thread is the idea that the defendant took deliberate action to cause some effect in the forum state or reap some benefit from it – not necessarily physical presence there (indeed, defendants may in some cases be subject to jurisdiction in a state in which they have never set foot\(^6^5\)), but intentional and targeted activities.\(^6^6\) Further, the Court has justified this focus by invoking a sort of grand bargain – the idea that if the defendant engages in the “privilege” of associating himself with a

\(^{6^2}\) See Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S.Ct. 2846, 2851 (2011) (“Opinions in the wake of the pathmarking International Shoe decision have differentiated between general or all-purpose jurisdiction, and specific or case-linked jurisdiction.”).

\(^{6^3}\) See Burger King v. Rudzewicz, 471 U.S. 462, 474 (1985) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

\(^{6^4}\) See id. at 479 (finding that Florida had validly exercised personal jurisdiction over defendant despite the fact that he “did not maintain offices in Florida and, for all that appears from the record, has never even visited there”).

\(^{6^5}\) See id. at 475-76 (contrasting “random, fortuitous, or attenuated contacts,” which do not give rise to personal jurisdiction, to a defendant’s “deliberate[]” decisions to “engage[] in substantial activities” or “create continuing obligations” in the forum, which do) (citations and quotation marks omitted).
particular state, “it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.”

Although the basic personal jurisdiction framework applied to U.S. and foreign defendants is the same, U.S. courts have often shown particular solicitude for foreigners. In *Asahi Metal Industry Co. v. Superior Court*, the Court found that a California court lacked jurisdiction over a Taiwanese manufacturer of valve assemblies. The Court was divided on the question of whether the manufacturer had established minimum contacts with California by virtue of placing products into the stream of commerce that were likely to end up there. The Court, however, rejected personal jurisdiction on a different ground, formulating clearly for the first time a new test under which, even if minimum contacts were present, a lack of “reasonableness” could defeat personal jurisdiction. In finding

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67 See *Burger King*, 471 U.S. at 476.
69 See id. at 116 (Brennan, J., concurring) (discussing split on Court on the stream of commerce issue despite agreement on the reasonableness issue).
70 The relevant part of the opinion was joined by all justices but Justice Scalia. See id. at 105.
71 The Court had first articulated the “reasonableness” factors in passing in World-Wide Volkswagen v. Woodson, 444 U.S. 286, 292 (1980), and had alluded to them in *Burger King*, 471 U.S. at 477, but had never before applied them to defeat the existence of personal jurisdiction.
72 *Asahi Metal*, 480 U.S. at 113. Specifically, the reasonableness factors include “the burden on the defendant, the interests of the forum State, and the plaintiff’s interest in obtaining relief,” as well as the “interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.” See id. (citation and quotation marks omitted). The Court noted that, in a case involving a foreign defendant, “this advice calls for a court to consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by the California court.” Id. at 115
that the California court’s assertion of personal jurisdiction was unreasonable, the Court focused on the plight of a foreign defendant caught within an unfamiliar legal system. As the Court noted:

Certainly the burden on the defendant in this case is severe. Asahi has been commanded by the Supreme Court of California not only to traverse the distance between Asahi’s headquarters in Japan and the Superior Court of California in and for the County of Solano, but also to submit its dispute … to a foreign nation’s judicial system. The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.73

In addition to these burdens on the defendant, the Court found that the “international context” and the possible interests of other nations in regulating the conduct at issue also supported dismissal of the case.74

Although Asahi’s reasonableness test has sometimes been applied to domestic defendants, it is predominantly used in the international context.75

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73 480 U.S. at 114.
74 Id. at 115-16.
Likewise, the most recent personal jurisdiction cases, particularly *McIntyre Machinery v. Nicastro*, reaffirm the Court’s special concern for the rights of foreign actors. In *McIntyre*, for example, which produced no majority opinion, Justice Breyer in concurrence worried about the consequences of permitting U.S.-wide jurisdiction based on a few sales by a foreign entity, noting that it would often “be fundamentally unfair to require a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, … to respond to products-liability tort suits in virtually every State in the United States.” This was particularly so, Justice Breyer argued, because of a distinctive feature of the U.S. legal system: “the wide variance in the way courts within different States apply [the] law.”

Thus, current personal jurisdiction doctrine takes seriously the burden that adjudication in the United States may pose on foreign defendants. Further, in doing so, it takes into account features peculiar to the post-Asahi cases in the state and federal courts did not limit the reasonableness prong to foreign-country defendants, although my own read of many of the cases suggests that most of the cases that ultimately invoke unreasonableness as the basis for rejecting specific jurisdiction actually involve foreign defendants”).

*McIntyre*, 131 S.Ct. at 2794. The Court found there was no personal jurisdiction over the British defendant in that case, but did not invoke the reasonableness test. Professor Silberman suggests that one explanation for this may be that “the Court determined that the requirement of minimum contacts was not met, and thus had no reason to proceed further,” although she also notes that another possibility is that the Court is retreating from the reasonableness test to some extent. See Silberman, supra note 75, at 595.

*Id.* For example, the percentage of plaintiffs winning tort trials, Justice Breyer noted, varied from 17.9% in one Massachusetts county to 69.1% in a Wisconsin one. See *id.*
the American legal system, such as the variations in American courts and the tendency of state courts to apply forum law. The section of this Article discussing how personal jurisdiction doctrine can be adapted to the tribal context will return to this point.\textsuperscript{79}

B. State Legislative Jurisdiction

The doctrinal framework relating to limits on states’ legislative jurisdiction is less well-developed than principles governing judicial jurisdiction, but is worth discussing briefly here, again for comparison with the tribal context.

The first piece of the state legislative jurisdiction framework has to do with the activities of courts. Once a defendant is subjected to valid personal jurisdiction in a state court (or a federal court applying state law) there remains the question of which law should apply to the dispute. Currently, state choice-of-law principles are quite diverse, with states pursuing a variety of approaches, some long-established and some of more recent vintage.\textsuperscript{80} In broad terms, some states apply a traditional approach

\textsuperscript{79} See infra Part III.

\textsuperscript{80} The Restatement (Second) of Conflict of Laws is currently relied upon by nearly half of courts in the United States in both tort and contract cases, but states follow one of at least seven distinct approaches. See Symeon C. Symeonides, \textit{Choice of Law in the American Courts in 2011: Twenty-Fifth Annual Survey}, 60 AM. J. COMP. L. 291, 308 (2012). Further, at least one commentator has suggested that the popularity of the Second Restatement does not lead to any greater uniformity or predictability, since the hallmark of the Second Restatement is its flexibility, allowing judges to apply it differently according to personal preference or their sense of the justice of the case. See Stewart E. Sterk, \textit{The
that focuses on a single “localizing” element that determines what law will apply to a case (e.g., in tort claims, the law of the place of the injury).\footnote{See Katherine Florey, \textit{State Law, U.S. Power, Foreign Disputes: Understanding the Extraterritorial Effects of State Law in the Wake of Morrison v. Australia National Bank}, 92 B.U. L. REV. 535, 554 (2012).} Most other states, however, apply one of a few different methods that attempt to weigh, in number and quality, the contacts between the dispute and relevant jurisdictions.\footnote{Id. at 555.} Finally, a handful of states use idiosyncratic methods such as applying, in close cases, the “better law” (among other things, generally the law that represents the evolving trend in more states).\footnote{Id. at 572.} Throughout this process, many states have a preference, implicit or explicit, for forum law; state courts generally apply forum law presumptively unless a party argues otherwise, and nearly all states likely use forum law as a tiebreaker in close cases.\footnote{See Christopher A. Whytock, \textit{The Evolving Forum Shopping System}, 96 CORNELL L. REV. 481, 495 (2011) (noting the existence of forum law bias).} Depending on the method used, there may be a greater or lesser risk that a law with very little connection to the case will be applied.

Despite this diversity of choice-of-law methods and results, state choice-of-law decisions rarely run afoul of the Constitution. The Court has

\textit{Marginal Relevance of Choice-of-Law Theory}, 142 U. PA. L. REV. 949, 951 (1994) (observing that in many choice-of-law-decisions, “the result in the case often appears to have dictated the judge’s choice of law approach at least as much as the approach itself generated the result” and suggesting that “[t]he widespread popularity of the Second Restatement of Conflict of Laws, perhaps the most malleable of choice of law approaches,” tends to confirm this suspicion).
generally suggested that a variety of choice-of-law methods (and hence outcomes) are acceptable, and thus that in any given multijurisdictional conflict, the law of several different jurisdictions may be constitutionally applied to the case. At the margins, however, both the Due Process Clause and the Full Faith and Credit Clause impose modest restrictions on the choice-of-law decisions state courts can make. In *Hague v. Allstate*, a plurality of the Court articulated what has now become the modern standard for determining whether a state court has transgressed constitutional boundaries in its choice-of-law decisionmaking. In that case, the Court considered the constitutionality of a decision of a Minnesota court applying Minnesota law to an issue of insurance coverage despite the fact that the underlying dispute arose in Wisconsin and the contacts between the dispute and Minnesota were minimal (the insured had worked there; the plaintiff, the decedent’s widow, had moved there before filing the litigation). The Court upheld application of Minnesota law under both the Due Process and Full Faith and Credit clauses, with a plurality holding that application of a

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85 *See* *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (noting that “frequently . . . a court can lawfully apply either the law of one State or the contrary law of another”).


87 *See id.* at 316-19 (summarizing contacts). In addition to those mentioned, the defendant also did business in Minnesota (among many other states). The Court counted the fact that the decedent commuted to Minnesota and that he worked there as separate contacts, though this logic is dubious, particularly given the fact that the accident at issue did not occur while he was either commuting or working.

88 The Court announced that the standard is “similar” under both clauses, see *id.* at 308 n.10, though its reasoning was questioned by Justice Stevens’s concurrence, which would have imposed a separate test under each clause. *See id.* at 320 (Stevens, J., concurring).
particular state’s law is proper so long as the state possesses a “significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.”

89 The Hague standard for valid application of a particular state’s law is notably similar to the minimum contacts standard for personal jurisdiction. Indeed, despite the fact that Hague at least nominally requires a “significant aggregation” of contacts rather than simply “certain minimum contacts,” it is arguably more lenient for two reasons – first, because it permits consideration of the plaintiff’s contacts rather than solely (as in the personal jurisdiction analysis) the defendant’s; and second, because the contacts the Court accepted as adequate in Hague were (despite the “significant” language) quite modest.

90 In individual litigation, then, it is exceedingly unlikely that Hague would interfere with the choice-of-law decisions made by a court exercising valid personal jurisdiction over a dispute. In class actions, however, the limitations of Hague have proved more important. In Philips Petroleum v.

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89 Although the opinion in Hague was endorsed only by a plurality, a majority of the Court subsequently signed on to the “aggregation of contacts” language in Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818, 821 (1985).

90 See, e.g., Hague, 449 U.S. at 319 (discussing plaintiff’s contacts with Minnesota as a basis for

the Court held that Kansas could not constitutionally apply its law to a class action involving royalties on oil leases where the large majority of both leases and leaseholders were located outside Kansas, notwithstanding the fact that the defendant did substantial business in Kansas. Although Shutts indicates that state choice-of-law decisions will be subject to more scrutiny in class actions, at least one commentator has noted that the limitations it imposes are still not particularly onerous.

A notable feature of the Hague/Shutts standard is that – though it seemingly polices state’s legislative jurisdiction – it relates entirely to the activities of courts; that is, it has no bearing on the acts of state legislatures, and does not restrict in any way what regulations a state can pass. A second principle governing state legislative jurisdiction applies, by contrast, primarily to legislative acts, although in a few cases courts have treated themselves as bound by it as well. States’ regulatory authority, that is, appears to be limited by a principle that restricts how broadly their legislatures can regulate extraterritorial conduct. This principle is described most clearly in a handful of cases from the 1980s in which the Court suggested that the Dormant Commerce Clause (and possibly other constitutional sources) imposed an outer limit on the territorial reach of

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93 See id. at 799-801.
95 See Florey, State Courts, supra note 49, at 1101-08 (citing several examples).
state legislative acts. The Court has articulated this test in several ways, perhaps most sweepingly in *Healy v. Beer Institute*, in which it suggested that a state could not purport to regulate “commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State,” if the practical effect of such legislation would be “to control conduct beyond the boundaries of the State,” or if it would lead to “inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.” Much subsequent commentary has suggested that the Court may not remain wholly committed to these principles. Other scholarship has suggested sources other than the Dormant Commerce Clause for constitutional limits on state extraterritorial regulation, or considered whether, in narrow circumstances, states might have additional powers to reach beyond their borders (by, for example, regulating the conduct of citizens who travel out-of-state). In any case, however, commentators are in general agreement that some set of restrictions – whether grounded in the Dormant Commerce Clause or elsewhere – is necessary to prevent states from exceeding their constitutional authority

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97  See Florey, *State Courts, supra* note 49, at 1090 (“The extraterritoriality prohibition articulated in *Edgar* and *Healy* is so sweeping that most commentators have assumed that these cases cannot mean what they appear to say.”).
Clause, other aspects of the constitution, or inherent limits on state sovereignty in a federalist system – limits state legislative jurisdiction in meaningful ways, while at the same time it does not impose parallel restrictions on state judicial jurisdiction or choice of law.\textsuperscript{100}

\textbf{C. Overall Observations}

What are the takeaway points about this sometimes-confusing landscape of multiple restrictions on state power? A few key features of the state system are worth noting for comparison with the tribal context. The first is the perhaps obvious but nonetheless important point that both citizenship and territory matter to states’ power to regulate. States have more opportunity to regulate their citizens than they do noncitizens and more opportunity to regulate noncitizens’ in-state conduct than their out-of-state conduct – and that is true whether the vehicle for state regulation is the assertion of personal jurisdiction by state courts, the application of forum law to a legal dispute, or a direct regulation by a state legislature. But an important flip side of this principle is that, when it comes to noncitizens and out-of-state conduct, the rules governing states’ authority are not rigid but

\textsuperscript{100} States are, of course, subject to all sorts of other regulatory limitations; they cannot regulate in ways that are prohibited by the Constitution, or that are preempted by federal law. The proscription against extraterritorial regulation, however, seems to parallel most obviously the restrictions on tribal civil jurisdiction, since (despite the Court’s nominal grounding of its decisions in the Dormant Commerce Clause) it appears to be rooted more in a notion of inherent limitations on the scope of state power than in a specific constitutional prohibition.
multifaceted, flexible, and nuanced, allowing the state varying degrees of involvement depending on the extent of its connection with the case. In some circumstances, that is, state courts may be able to adjudicate disputes that involve out-of-state residents and conduct. But generally they may do so only upon a showing that the defendant has targeted the forum or availed herself of its benefits\(^\text{101}\) and – particularly where foreign defendants are concerned – where the exercise of jurisdiction is reasonable.\(^\text{102}\) In rare cases, they may be required to apply another jurisdiction’s law.\(^\text{103}\) Further, the fact that a state court may possess jurisdiction over a given dispute does not by any means imply that the state legislature would have authority to regulate that conduct directly.\(^\text{104}\)

In short, the rules relating to state power reflect the great variety of issues present (practical burdens on the defendant, efficiency, party expectations, orderly allocation of state power) when a state attempts to assert its authority over noncitizen or out-of-state conduct, and offer a suitably nuanced regime that recognizes that the solution may differ depending on the circumstances under which the assertion of state authority

\(^{101}\) See Burger King, 471 U.S. at 475-76

\(^{102}\) See Asahi Metal, 480 U.S. at 115.

\(^{103}\) See, e.g., Shutts, 472 U.S. at 799-801.

\(^{104}\) This is true because the standards for direct regulation are so much more stringent than those for choice-of-law, and hence also for the (very similar) standards for personal jurisdiction. See Florey, State Courts, supra note 49, at 1062.
II. TRIBAL CIVIL JURISDICTION FROM WILLIAMS THROUGH HICKS AND BEYOND

In the tribal context, matters are – to say the least – different. In setting forth a history of tribal jurisdiction doctrine’s development, there are two important stories to be told. The first has to do with the Court’s development of a jurisprudence of tribal distinctiveness. The Court could, that is, have treated tribal courts as simply another player in the American system along with state and federal courts, and adapted existing jurisdictional doctrines as necessary to suit the tribal context. The Court, however, did not start down that path – for historical reasons this Article will explore – and has never gotten back on it.

The second story has to do with the Court’s overall divestiture of tribal jurisdiction over nonmembers, a process that began with its decision

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105 Indeed, in some cases this nuance may go too far. In a previous article, I offered a critique of the notion that the Hague line of cases and the Healy line of cases should be viewed as entirely separate principles, given that there is some similarity between, on the one hand, the application of forum law by a state court and, on the other, a regulation by the state legislature that attempts to reach the same behavior. See Florey, State Courts, supra note 49, at 1059. My criticisms, however, should not obscure the fact that the current system generally runs smoothly in a functional sense as a means of apportioning state power and protecting noncitizens, and also that any system of policing extraterritorial assertion of state authority should (as I have previously argued) be flexible and attentive to the real differences that exist between regulation by legislature and by court decision. See id. at 1128-33.
in _Oliphant v. Suquamish Indian Tribe_\(^{106}\) and continues to the present. While this divestiture has gone hand in hand with the _sui generis_ treatment of tribal jurisdiction and been in some respects enabled by it, it is important to emphasize that this was not necessarily an inevitable process. It would be possible, that is, to have tribal jurisdictional doctrines that were distinct from state ones but that still protected tribal powers robustly. Indeed, the important 1959 case _Williams v. Lee_\(^{107}\) takes this path. At the same time, as it turned out, the separate treatment of tribal jurisdiction has in practice facilitated the divestiture of tribal power in numerous ways.

**A. Williams v. Lee and the Origins of Uniqueness in Tribal Jurisdiction Doctrine**

The history of tribal authority over nonmembers is a complicated one. A separate regime of jurisdiction for tribes, to some extent, predated the Court’s more recent divestiture of tribal sovereignty. Why was this the case, and why has the Court continued to refer to tribal jurisdiction in something other than the standard framework?

Tribes began their history as “domestic dependent nations” within the United States as self-governing entities with a degree of autonomy that, while fragile and constantly under attack, was perhaps greater in some ways

that the powers tribes enjoy today. In 1832, the Supreme Court famously in *Worcester v. Georgia* pronounced definitively that tribal territory was a place in which “the laws of Georgia can have no force.”  

Most accounts agree that in the nineteenth century tribes were generally assumed to have territorial authority over all persons living on or passing through reservations, but since tribal contacts with nonmembers were fairly limited, this authority was presumably exercised somewhat rarely. Meanwhile, in the 1881 case *United States v. McBratney*, the Court held that states could assert criminal jurisdiction over crimes by and against non-Indians that occurred in Indian country – thus suggesting, in contrast to *Worcester v. Georgia*, that states enjoyed at least some concurrent authority on tribal lands, at least with respect to nonmember conduct.

The debate about state power in Indian country intensified with Congress’s two major attempts to phase out tribes as institutions – first, the allotment program of the 1880s, which opened much tribal land to nonmember settlement; and second, the termination movement of the 1950s, which attempted to eliminate tribes’ special status under federal law and dissolve tribes as political entities. These two programs physically

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108 31 U.S. 515, 520 (1832).
110 4 U.S. 621 (1881).
111 See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW (2005), § 1.04, at 80-81.
fractured reservation territory by taking land out of tribal hands and creating the “checkerboard” pattern (under which reservations are a mix of tribal trust land, nonmember fee land, and tribal fee land) that characterizes most reservations today.113 They had the closely linked effects of, on the one hand, increasing the opportunities for legal friction between tribes and nonmembers and, on the other, creating a group of nonmembers who, notwithstanding their ownership of reservation property, did not necessarily have any particular sympathies for the tribe or tribal governance.114

Against this backdrop, the first Supreme Court case to comment meaningfully on the role of tribal courts as an instrument of tribal sovereignty was Williams v. Lee,115 the 1959 case that is generally hailed as not merely a dramatic victory for tribes but as one of the foundational cases on which a strong view of tribal sovereignty and institutions rests.116 Williams involved a Navajo couple, Paul and Lorena Williams, who had been sued in by a non-Indian trading post operator in Arizona court following the Williams’s nonpayment of a debt incurred at the trading post, within the boundaries of the reservation.117 The Arizona courts had found that, because no federal authority prohibited it from doing so, Arizona could

113 See id.
114 See Florey, Territoriality, supra note 8, at 608 n.73.
117 See 358 U.S. at 218.
exercise civil jurisdiction over such non-Indian-against-Indian suits arising on the reservation.\textsuperscript{118} The Supreme Court, in something of a surprise,\textsuperscript{119} unanimously reversed, in doing so forcefully reaffirming the holding of\textit{ Worcester v. Georgia} that state “laws … can have no force” in Indian country,\textsuperscript{120} and suggesting that any intrusion of state authority onto a reservation was invalid if it “infringed on the right of reservation Indians to make their own laws and be ruled by them.”\textsuperscript{121} Noting that “[t]he Tribe itself has in recent years greatly improved its legal system through increased expenditures and better-trained personnel,”\textsuperscript{122} the Court held that “[t]here can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.”\textsuperscript{123}

\textit{Williams} has been understood to create a general and fairly strict jurisdictional rule that tribal courts have exclusive jurisdiction over suits by non-Indians against Indians for causes of action arising on the reservation.\textsuperscript{124} Yet the precise source of this rule remains unclear. Even

\textsuperscript{118} Id. at 218.
\textsuperscript{119} See Berger, \textit{Equality}, supra note 116, at 1511 (“It is … surprising that the Court issued the strong statement of inherent tribal sovereignty that it did.”)
\textsuperscript{120} See id. at 219 (quoting \textit{Worcester}, 6 Pet. at page 561).
\textsuperscript{121} 358 U.S. at 219.
\textsuperscript{122} Id. at 222.
\textsuperscript{123} Id. at 223.
\textsuperscript{124} See Reynolds, supra note 33, at 546-47 (1997) (discussing interpretation of \textit{Williams}). Note that exclusive jurisdiction does not exist if any one of these factors is different. Indians may bring suit against other Indians in state court; Indians may – indeed, in most cases, must – sue non-Indians in state court; and a non-Indian vs. Indian suit may
Norman Littell, the attorney who argued before the Supreme Court that Arizona lacked jurisdiction over the case, was uncertain about whether this lack was one of subject matter jurisdiction, personal jurisdiction, or something else, and ultimately left it to the Court to determine. The Court declined this invitation, ruling for the tribe without ever resolving the issue.

Further, throughout the briefing and argument of Williams, both sides appeared to regard as coextensive the question of whether the Arizona court could hear the case and the question of whether state law could apply. That is, all parties assumed that the tribal court would apply Navajo law and the Arizona court would apply state law. The result in Williams, then, protected tribes both from having important cases funneled out of their growing but still fragile court systems and from having state law substituted for tribal law as a source of decisional rules. Both of these aims were important, particularly given that in the years before Williams was decided, be brought in state court if it arises off the reservation. See Florey, State Courts, supra note 34, at 1644.

125 See Berger, Equality, supra note 116, at 1513 (2011) (citing Transcript of Oral Argument, Williams, 358 U.S. 217 (No. 39), available at National Archives, RG 267) (“Much of the November 20th argument in the case was consumed with procedural questions. … This led to a[n] … important question: Did the petitioners argue that the state court lacked subject-matter jurisdiction over the dispute or personal jurisdiction over the defendants? Littell could not quite answer this question: sometimes he said they lacked personal jurisdiction, sometimes subject-matter jurisdiction, and when challenged he ultimately asked to throw himself on the mercy of the Supreme Court and have this question resolved in chambers.”).

126 See Williams, 358 U.S. at 223 (referring to “the exercise of state jurisdiction” without indicating what sort of jurisdiction the Court meant).

127 See, e.g., id. at 220 (describing issue as whether “States have … power to regulate the affairs of Indians on a reservation”).
the Navajo Nation had actively worked to cultivate the tribal justice system, increasing funding for tribal courts and resisting legislation that would have extended New Mexico’s jurisdiction over the reservation.\textsuperscript{128}

In light of these surrounding circumstances, it is easy to understand why a Court sympathetic to the development of the Navajo judicial system would have seen the case through the framework it did. Permitting the Arizona court to hear the Williamses’ case would have been acutely damaging to Navajo interests in a variety of ways – because it would have substituted state law for tribal law, because it would have undermined the authority of the evolving tribal courts, and because it would have imposed the real and significant hardship on the Williamses of defending themselves in an unfamiliar and perhaps hostile system.\textsuperscript{129} Seeing Williams as a rather insignificant sideshow to the important debates about civil rights that were happening at the time,\textsuperscript{130} the Court managed to avoid these harmful consequences while – unsurprisingly – punting on the jurisdiction question, holding for the Williamses without explaining exactly why it was doing so.

In thinking about Williams’s silence on the jurisdictional question, it is also notable that, at the time Williams was decided, the Court was

\textsuperscript{128} See id. at 364-66.

\textsuperscript{129} The Williamses found their encounter with Arizona’s justice system to be deeply upsetting, even traumatic. See Berger, Story, supra note 133, at 307 (noting that Lorena Williams, at 98 years old, recalled the Arizona sheriff’s seizure of her sheep as “the thing that had hurt her most deeply in her life, a thing from which she had never fully recovered”).

\textsuperscript{130} See Berger, Equality, supra note 116, at 1464-65 (noting that the Court considered Williams “likely a ‘nothing case.’”).
entering a relative period of quiescence on the personal jurisdiction front; minimum contacts doctrine was well-ensconced, but many important cases clarifying the doctrine’s application had yet to be decided.\footnote{131} Indeed, 1959 was simply a time of less jurisdictional overlap overall, both as among states and as between states and tribes, and perplexing jurisdictional and choice-of-law problems such as multistate mass tort cases were virtually nonexistent.\footnote{132} Further, no special jurisdictional problems were seen to exist with respect to tribes and reservations; most authorities at the time assumed that state courts had civil jurisdiction over Indians as a matter of course.\footnote{133} Given this background, it is unsurprising that the Court considered the precise nature of the jurisdictional rule it announced to be an unimportant question.

The Supreme Court’s silence, however, had an unforeseen consequence. In finding (undoubtedly correctly) that state adjudication of the Williamses’ case would interfere with the exercise of tribal sovereignty, \textit{Williams} had the (undoubtedly unintended) effect of muddling the role of personal jurisdiction in Indian country, setting forth a murky category of problems.
“civil jurisdiction”\textsuperscript{134} that was apparently similar to personal jurisdiction but apparently not identical to it. This lumping together of various forms of jurisdiction was to have implications when, decades later, the Supreme Court began to look with suspicion at the actions tribes and tribal courts took toward nonmembers. The next section explores these developments.

B. Doctrinal Uniqueness and Divestiture of Tribal Power: The Road to Hicks

Over the past forty years, the Supreme Court has systematically divested tribes of jurisdiction over nonmembers,\textsuperscript{135} a process that has had devastating consequences for the rule of law in Indian country.\textsuperscript{136} This section considers how the Court first limited tribal authority in the regulatory arena. It then examines how the Court applied those limits, in their entirety and without alteration, to the very different context of tribal judicial power. In doing so, this section argues, the Court not only severely and unnecessarily limited the power of tribal courts, but did so in a way that engendered needless uncertainty and confusion. This section closes by examining two recent Ninth Circuit cases that have struggled with the

\textsuperscript{134} See Williams, 358 U.S. at 218 (describing issue as whether Arizona courts may “exercise jurisdiction over civil suits by non-Indians against Indians”); id. at 222 (“Today the Navajo Courts of Indian Offenses exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants.”).

\textsuperscript{135} For a comprehensive account, see Philip P. Frickey, \textit{A Common Law for Our Age of Colonialism: The Judicial Divestiture of Tribal Authority Over Nonmembers}, 109 \textit{Yale L.J.} 1, 8-12 (1999) [hereinafter \textit{Common Law}].

\textsuperscript{136} See Fletcher, \textit{Resisting, supra} note 19, at 1002.
practical difficulties and the confusing jurisdictional categories the Court has created.

1. Limiting Tribal Power Over Nonmembers

In *Oliphant v. Suquamish Indian Tribe*, the Supreme Court started what was to become a multi-decade process of limiting tribal authority by holding that tribes lacked criminal jurisdiction over non-Indians. The case was striking for upending what had been more or less settled law – the notion that tribes possessed all powers inherent to sovereignty unless such powers had been divested by the doctrine of discovery, by treaty, or by direct federal action. None of those sources explicitly limited tribal criminal powers over nonmembers, but the Court nonetheless found in *Oliphant* that tribal sovereignty did not include such powers. The Court rested this holding on a number of murkyly defined factors, including a vaguely characterized “presumption” of the federal governments and lower federal courts that tribes lacked such a power and the idea that tribes’ “exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty of the United States.”

While it was by no means obvious that *Oliphant*’s logic would

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139 435 U.S. at 209.
extend to civil powers, the Court nonetheless concluded in *Montana v. United States*\(^\text{140}\) that tribes could not exert regulatory powers over nonmembers living on the reservation, subject to two exceptions that will be discussed in detail later.\(^\text{141}\) At stake in *Montana* was the validity of a tribal regulation prohibiting hunting and fishing by nonmembers within the reservation (including on privately owned fee lands).\(^\text{142}\) The Court initially defined the issue before it as “a narrow one,”\(^\text{143}\) a question “concern[ing] the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians.”\(^\text{144}\) In determining that the regulation was invalid, however, the Court ultimately built directly on *Oliphant*’s holding and reasoning; it concluded by announcing a sweeping limitation on tribes, finding that “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.”\(^\text{145}\)

It is important to keep in mind that the Court in *Montana* was

\(^{140}\) 450 U.S. 544 (1981).

\(^{141}\) These two exceptions permitted tribes to regulate “the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements” and “the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” (Somewhat oddly, the Court cited *Williams v. Lee* as authority for both these propositions.) See id. at 565-66.

\(^{142}\) *Id.* at 544.

\(^{143}\) *Id.* at 556.

\(^{144}\) *Id.* at 547.

\(^{145}\) *Id.* at 564.
narrowly focused on a specific issue: the validity of a single regulation.\footnote{Moreover, the Court likely viewed the regulation at stake in Montana – inaccurately, as it happens – as motivated by discriminatory intent toward nonmembers. See John P. LaVelle, Beating a Path of Retreat From Treaty Rights and Tribal Sovereignty, in Indian Law Stories (2011), at 539-41 (describing the Court’s indifference to the abundant evidence that the Crow Tribe’s regulation was passed in response to a significant problem of tourists traveling to the reservation to hunt and fish, thus severely depleting the tribe’s resources).} Because Montana involved the exercise of a quintessentially regulatory power – the power of the Tribal Council to pass ordinances – the Court did not have before it the constellation of concerns that arise when thinking about the activities of courts as opposed to regulatory bodies – issues such as the burden on the defendant and the fairness and efficiency of the procedures employed. As a result, there was no particular reason whatsoever to assume that Montana should have consequences for the tribal judicial realm (although some courts nonetheless believed that it did).\footnote{See, e.g., Red Fox v. Hettich, 494 N.W.2d 638, 646-47 (S.D.1993) (applying Montana to determine the extent of a tribe’s adjudicatory jurisdiction).}

In fact, nearly two decades were to pass before the Court considered Montana’s implications into the judicial realm in Strate v. A-I Contractors.\footnote{520 U.S. 438 (1997).} In the interim, the Court had decided two cases that appeared, if anything, to bode well for an expansive notion of tribal jurisdiction. In National Farmers Ins. Cos. v. Crow Tribe\footnote{471 U.S. 845 (1985).} and Iowa Mutual v. LaPlante,\footnote{480 U.S. 9 (1987).} the Court formulated a requirement that in cases originating in tribal court, defendants must exhaust tribal remedies in both
federal-question cases (National Farmers) and diversity cases (Iowa Mutual) before invoking federal jurisdiction. In the process, the Court forcefully reaffirmed the importance of tribal courts to tribal governance. It stressed that “[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. …. Civil jurisdiction over such activities presumptively lies in the tribal courts[.]”

Neither National Farmers nor Iowa Mutual, however, made any clear pronouncement about the nature of the limits that might exist on tribal-court jurisdiction, and in their wake, lower courts adopted a variety of approaches to the problem. Many courts continued to assume that the Montana framework applied to exercises of tribal court jurisdiction or blended traditional personal jurisdiction principles with Montana, suggesting that the latter constituted a limit on tribal subject matter jurisdiction. At least one court cited conflict of laws principles as relevant.

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151 Id. at 18.
152 National Farmers, of course, requires exhaustion of tribal remedies before a federal court can consider the question of whether a tribal court exceeded its jurisdiction; it nonetheless clarifies, however, that some external limits on tribal court jurisdiction do exist, and that federal courts may eventually be called upon to police them. See National Farmers, 471 U.S. at 853 (finding that “a federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction”).
154 See Hinshaw v. Mahler, 42 F.3d 1178, 1180-81 (9th Cir. 1994) (applying Montana standard to determine propriety of tribal subject matter jurisdiction and minimum contacts standard to assess personal jurisdiction); Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1228-29 (9th Cir. 1989) (distinguishing between personal and subject matter jurisdiction and finding that “even if the consent of [the defendant] was adequate to confer personal jurisdiction onto the tribal court, the question of whether the tribal court has subject matter jurisdiction over the case would still not be resolved”).
to the question of whether a state or tribal court was best suited to hear a particular action.\textsuperscript{155} Thus, significant confusion existed on the relationship between conventional territorial jurisdiction and the limits on tribal civil authority that the Court had announced in \textit{Montana}.

2. \textit{Strate v. A-I Contractors} and the Tribal Judicial Power

Into this confusion the Court finally sounded a note of unmistakable (if perhaps unwelcome) clarity, ruling in the 1997 case \textit{Strate v. A-I Contractors} that “\textit{Montana} delineated – in a main rule and exceptions – the bounds of the power tribes retain to exercise forms of civil jurisdiction over non-Indians. …. As to nonmembers, we hold, a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction.”\textsuperscript{156} How did the Court come, first, to equate tribal legislative and judicial jurisdiction and, second, to hold that the latter was governed not by familiar standards of personal jurisdiction but the \textit{Montana} principle? The following section attempts to puzzle out the answer to these questions.

\textit{Strate} involved a suit by Gisela Fredericks and her five children (who were enrolled tribe members, although Fredericks herself was not) for

\textsuperscript{155} Stock West Corp. v. Taylor, 964 F.2d 912, 920 (9th Cir. 1992) (citing the Restatement (Second) of Conflict of Laws in holding that it was “a colorable question” to be resolved by the Colville tribal courts “[w]hether Colville Tribal law applies to a tort that involved certain acts committed on reservation land and other acts committed outside its territorial jurisdiction to induce another to perform a contract on tribal lands”).

\textsuperscript{156} 520 U.S. at 453 (citation and quotation marks omitted).
damages arising out of a collision between Fredericks’ car and a gravel truck owned by A-1 Contractors and driven by Lyle Stockert, nonmembers of the tribe who were under contract with the tribe to construct a community building. The accident took place on a state highway within the borders of the Fort Berthold reservation. Notably, the substantive issues before the tribal court were to be decided under state law.

Both the district court and the Eighth Circuit initially found tribal jurisdiction, but the Eighth Circuit reheard the case en banc and reversed, finding that Montana governed the issue of “civil tribal jurisdiction over non-Indians” and precluded jurisdiction in this case. The Supreme Court affirmed the Eighth Circuit’s decision, setting forth several important principles in doing so. First, the Court held, the Montana framework governed the issue of whether tribal courts could assert jurisdiction over nonmembers. Second, the Court suggested, the standards for tribal regulation of nonmembers and tribal court jurisdiction

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158 See Strate, 76 F.3d 930, 932 (8th Cir. 1996) (en banc). The record was apparently not clear about whether A-1 was performing work on the contract at the time of the accident. See id. at 932 n.1.
160 See Transcript of Oral Argument at *18, Strate, 520 U.S. 438 (counsel for petitioners explaining that the tribal court “follow[s] state law” on the issues before it).
161 See id. at *5.
162 Strate, 76 F.3d 930 (8th Cir. 1996) (en banc).
163 Strate, 520 U.S. at 453.
over nonmembers were likely identical (and tribal judicial jurisdiction was at any rate no broader than the legislative powers at issue in *Montana*).\(^{164}\)

Third, the Court indicated that the two exceptions it had announced in *Montana*—permitting tribes to exercise authority over “activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements”\(^{165}\) and “conduct that threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe”\(^{166}\)—were to be interpreted narrowly and did not apply in this case.\(^{167}\)

The Court’s rejection of a broad reading of the “consensual relationships” exception was particularly notable, because on its face this exception might seem to support comparisons to the notion of minimum contacts in personal jurisdiction.\(^{168}\) Nonetheless, the Court found that—even though A-1 had deliberately associated itself with the tribe by entering into a contract with it—Gisela Fredericks could not rely upon the exception because she was not a party to the contract between A-1 and the tribe and her suit concerned “tortious conduct” rather than a contractual issue.\(^{169}\) The Court did not reach the issue of whether the tribal court might have jurisdiction over a

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\(^{164}\) See *id*.

\(^{165}\) See *id.* at 456-57 (citing *Montana*, 450 U.S. at 565).

\(^{166}\) *Strate*, 520 U.S. at 457 (citing *Montana*, 450 U.S. at 566).

\(^{167}\) See *id.* at 456-58.

\(^{168}\) See Smith v. Salish Kootenai College, 434 F.3d 1127, 1138 (9th Cir. 2006) (en banc) (noting parallels).

\(^{169}\) See *id.* at 457.
case arising on tribal trust land; instead, it found that the right-of-way North Dakota held over the highway rendered it “equivalent, for nonmember governance purposes, to alienated, non-Indian land.”

In reaching its holding in Strate, the Court observed that its previous precedents, including both Oliphant and Montana, had sounded a unified theme: “tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances.” The Court thus indicated that “jurisdiction” in Indian country was a generalized, all-encompassing category that included any governmental act on the part of tribes aimed at nonmember conduct. In other words, the Court’s framework did not distinguish between regulatory and judicial acts.

What led the Court to this equation of legislative and judicial jurisdiction, an equation that was dictated neither by existing case law nor by the standard understanding of these powers in other contexts? One

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170 See id. at 454.
171 See id. at 455. While relying in part on Oliphant as support for its holding, however, the Court nonetheless recognized that “tribal courts have more extensive jurisdiction in civil cases than in criminal proceedings.” Id. at 449. Suggestions in Iowa Mutual and National Farmers should not, the Court stressed, be taken to the contrary: while recognizing that those precedents had been “variously interpreted,” the Court “reiterate[d] that National Farmers and Iowa Mutual enunciate only an exhaustion requirement, a prudential rule.” Id. at 453 (citation and quotation marks omitted).
172 Notably, the Court ignored suggestions in the briefing that concepts of personal jurisdiction might be a useful analogy. The amicus brief submitted by the United States drew analogies between the tribe’s assertion of jurisdiction and, respectively, purposeful availment and minimum contacts. See Strate, 1996 WL 666742 (U.S.), 15 (U.S. Amicus Brief 1996) (“This case involves not just the Tribe's general authority to adjudicate claims of hazardous driving on reservation roads, but, more specifically, the Tribe's ability to adjudicate claims of hazardous driving by commercial enterprises that, like A-1, ‘avail themselves of the substantial privilege of carrying on business on the reservation.’”); id. at
possible explanation is the role of choice of law – an issue that the Court did not allude to explicitly in its opinion, but that was the subject of extensive discussion during oral argument. Counsel for the petitioners urged that the question of whether the tribal court could hear the case was separate from the issue of whether tribal or state law should apply; Justice Rehnquist sharply challenged that assertion, arguing that “the two are tied together.”

Justice Rehnquist suggested that, because any tribal judicial jurisdiction would be based on the on-reservation location of the event, tribal law would also have to provide the rule of decision: “[T]he most basic choice of law rule is the place of injury. The law comes from the place of injury, and

20 (“Like a State, an Indian Tribe has ‘an especial interest’ in exercising civil jurisdiction to deter and remedy wrongful conduct within its territory. That interest is particularly strong where, as here, both the perpetrators and the victims of the conduct at issue have close ties to the reservation and the tribal community. Cf. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).”).

173 Melody McCoy, counsel for the petitioners, and Justice Rehnquist had the following exchange on this issue:

Justice Rehnquist: Now, is your assertion that the tribe... you keep referring to adjudicatory jurisdiction. As I recall, you say it is possible for the tribal court to adjudicate the case but not to apply tribal law.

Ms. McCoy: That's correct, Your Honor.

Justice Rehnquist: And you don't ask us to decide right here whether they should apply tribal law or not, or do you think they shouldn't?

Ms. McCoy: That's two questions. I think that the Court need not reach that issue in this case if it chooses not to, because we're not at that point yet. We're at the threshold point. However, we would also argue that if the Court wants to set the rule that it could be on a case-by-case... it should be on a case-by-case basis because it might involve fee land, it might involve quasi fee land, it might involve trust--

Justice Rehnquist: I don't understand your answer to that question, because it seems to me the two are tied together. If you're basing the jurisdiction on, it happened on our land, whether the underlying... it happened on our land, then the most basic choice of law rule is the place of injury. The law comes from the place of injury, and when you have a coincidence between the forum and the place of injury, what other law would apply?

when you have a coincidence between the forum and the place of injury, what other law would apply?” Notably, this was not only an oversimplification of the choice-of-law landscape of the time but an incorrect description of the tribal court’s intent (it planned to apply state law to the dispute). Yet the justices may have feared that similarly situated tribal courts might apply forum law in future, or simply believed that it would be “the sensible thing” to assign the case to the state court if state law were ultimately to apply anyway.

174 See id.
175 By the mid-1990s, a majority of states used a choice-of-law rule other than “place of the injury” for torts, though it is true that if accident and conduct occur in the same state, most courts will follow that state’s law as to conduct-regulation issues. See Symeon C. Symeonides, Choice of Law in the American Courts in 1996: Tenth Annual Survey, 45 Am. J. Comp. L. 447, 459 (1997) (noting that 12 states in 1996 retained the traditional approach, which includes a strict place of injury rule). Tribal courts, of course, are presumably free to adopt whatever choice-of-law principles they wish.
176 See supra note 160.
177 See Transcript of Oral Argument at 20, Strate, 520 U.S. 438 (“And yet if the tribal court has jurisdiction, that is a real question, isn't it, as to which body of law would be applied. ... They might say, well, we're going to apply tribal law. At the present time, tribal law follows State law, but we could develop tribal law, and our general rule will be that we're going to apply tribal law.”).
178 The following colloquy occurred on the subject between Justice Breyer and Jonathan Nuechterlein (appearing on behalf of the United States as amicus curiae supporting the petitioners):

Justice Breyer: ... I mean, what good does this mixing up of [choice of forum and choice of law] do except to leave – the lawyers will get very mixed up and the judge will get mixed up, and it will mean a lot of extra cost and very hard to sort out who goes where. I mean, what's to be said against simplifying this? If it's South Dakota law on the fee thing, go to the South Dakota court. If it's the tribal law, go to the tribal court, if there's room to do it.

Mr. Nuechterlein: As an initial matter, Justice Breyer, we believe that both the State and the tribe have concurrent jurisdiction over this sort of suit in the same way that adjoining States often have jurisdiction over accidents--

Justice Breyer: I'm not talking about jurisdiction. I'm saying if we had room to do it, why wouldn't the sensible thing be to simplify? If it's
The notion that the choice of state or tribal court would determine choice of law echoes the assumptions of *Williams* (though at the time *Williams* was decided, such assumptions were more likely to be true\(^\text{179}\)) and provides an intriguing glimpse into *Strate’s* underlying reasoning. If tribal courts serve primarily as an instrument of tribal regulation, the Court’s decision to unite the standards for tribal legislative and judicial jurisdiction perhaps makes sense.\(^\text{180}\) At the same time, because there was no indication that the tribal court planned to apply any distinctively tribal regulatory standards to this case, *Strate* seems like an odd occasion for such unification. *Strate*, that is, was a case about characteristically judicial issues (which court is more convenient? where will the defendants get a fair


\(^{180}\) See supra notes 131-133 and accompanying text.

The Eighth Circuit en banc opinion reasoned along these lines, concluding that if the tribal court tried this suit, it essentially would be acting in both an adjudicatory capacity and a regulatory capacity. At oral argument, all of the parties agreed that if the tribal court tried this case, it would have the power to decide what substantive law applies. Essentially, the tribal court would define the legal relationship and the respective duties of the parties on reservation roads and highways. Thus, while adjudicating the dispute, the tribal court also would be regulating the legal conduct of drivers on the roads and highways that traverse the reservation. Accordingly, we see no basis in this case for applying the regulatory-adjudicatory distinction the appellees have proposed.

See *Strate*, 76 F.3d at 938. This reasoning, however, is at odds with actual practice in the state (and to some extent the international) context. States are permitted to regulate the conduct of outsiders more broadly when they do so through their courts (i.e., when their courts apply forum law to a dispute involving out-of-staters) than when their legislatures directly regulate such conduct. See *supra* Part I.C. Had the court applied a similar framework to the tribal context, it might have found support for allowing tribal courts to apply tribal law to a nonmember defendant even where a direct regulation of a nonmember in such circumstances would violate *Montana*.
BEYOND UNIQUENESS

Further complicating matters, the Court’s unanimous opinion, authored by Justice Ginsburg, focused not on the choice-of-law issue the justices had emphasized at oral argument but on the potential procedural burdens on nonmember defendants forced to appear in tribal court. The Court observed that the state court “is physically much closer by road to the accident scene ... than [is] the tribal courthouse.” Likewise, in finding that the tribal court lacked jurisdiction over the case, the Court was careful to note that Fredericks’ claim could be pursued in an alternative forum, “the state forum open to all who sustain injuries on North Dakota’s highway,” and that such an outcome would avoid the necessity of requiring A-1 and Stockert “to defend against this commonplace state highway accident claim in an unfamiliar court.” Finally, the Court suggested that the defendants – as nonmembers in tribal court – were in a situation analogous to that of out-of-state defendants in state court, who are permitted to remove cases to federal court in order to avoid prejudice, a device unavailable in the tribal

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181 At oral argument, the justices also discussed the possibility of procedural irregularities in tribal court, such as the possibility of the jury being composed of friends and relatives of the plaintiff. See Transcript of Oral Argument at 28, Strate, 520 U.S. 438 (“Well, how about if it goes to trial in the tribal court and the tribe chooses to use as the jury all the friends and relatives of the victim, and they say, yeah, she’s really been injured, and we’re going to give a heck of a verdict here ....”).
182 520 U.S. at 445 n.4.
183 Id. at 459.
Thus, despite the suggestions in oral argument that the problem with keeping the case in tribal court was that tribal law might be applied to nonmembers, the opinion the Court ultimately produced suggested that it was motivated by purely procedural concerns – that is, keeping the dispute in a forum that was convenient to the accident site, familiar to the parties, expert in the underlying area of law (a “commonplace state highway accident claim”), and unmotivated by prejudice against outsiders (as the Court suggested with the analogy to removal). These concerns, to be sure, lacked apparent grounding in fact – there was nothing in the record to indicate that the tribal court suffered from prejudice against nonmembers or incompetence in adjudicating ordinary tort claims. Further, as Sarah Krakoff has pointed out, in focusing on certain procedural norms (such as fairness to the defendant), the Court slighted others (such as honoring the plaintiff’s forum choice). Nonetheless, it is notable that the focus on oral argument on the sort of law (state or tribal?) that should be applied was

\[184\] Id. at 459 n.13 (“Within the federal system, when nonresidents are the sole defendants in a suit filed in state court, the defendants ordinarily may remove the case to federal court.”). See also Frickey, Exceptionalism, supra note 10, at 458 (regarding the Court as influenced by more broadly applicable norms that a defendant “should not be relegated to an unfair, foreign forum”).

\[185\] Indeed, as Sarah Krakoff notes, the record in Strate was particularly undeveloped because “the defendants challenged the tribe’s jurisdiction in federal court before a full evidentiary hearing was held in the tribal court.” See Krakoff, supra note 39, at 47 (2005).

\[186\] See id. (“Had the facts been properly developed, the prominence of other norms might have emerged, and the strength of the “fairness to the defendant” norm would have receded.”)
ignored in the Court’s ultimate opinion in favor of presumptions about the suitability of the tribal court.

The reasoning in Strate thus exacerbated the already-existing confusion about jurisdictional categories in Indian country. It left unanswered a central question: When tribal courts assert “adjudicative jurisdiction” to hear claims against a nonmember, what exactly is the problem, from the Court’s point of view? Is it 1) a due process-like objection to subjecting nonmembers to the jurisdiction of an unfamiliar and perhaps distant court (as the Court suggested in Strate)? 2) a Hague-like problem with the tribal court’s application of tribal law to a dispute insufficiently connected to the reservation? 3) a concern that the tribal

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187 It is notable that the very term “adjudicative jurisdiction” is more or less unique to the tribal context. The standard term is “judicial jurisdiction.” The Supreme Court has used the term “judicial jurisdiction” in 53 cases in a variety of contexts, including several times in run-of-the-mill personal jurisdiction cases. See, e.g., Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984) (noting, in discussing whether personal jurisdiction existed over defendant, that “[a] state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory.”) (quoting Leeper v. Leeper, 114 N.H. 294, 298 (1974)). The Court has used the term “adjudicative jurisdiction” in only six cases, five of them cases discussing Indian country. The only time the Court has used that term outside the Indian law context is in Justice Scalia’s dissent in Hartford Fire Ins. Co. v. California, in which he uses the terms “judicial jurisdiction” and “adjudicative jurisdiction” interchangeably. See 509 U.S. 764, 820 (1993) (Scalia, J., dissenting). It is hard to know what to make of the Court’s decision to eschew the more prevalent term “judicial jurisdiction” in talking about what is undeniably the same concept; whatever the Court’s intent, however, its use of the more unconventional “adjudicative jurisdiction” draws attention to the distinctiveness of the tribal context and the inapplicability of more conventional jurisdictional norms.

188 Interestingly, Justices Kennedy and Ginsburg in oral argument raised the point that the Due Process Clause imposed only very minimal limits on state courts’ choice of law. See Transcript of Oral Argument at 24, Strate, 520 U.S. 438 (“[In] Allstate, some might have regarded the homing instinct of that State court as exorbitant, and yet this Court held that it didn’t violate due process for the State to prefer itself, so it seems to me that Allstate proves that at the very least this Court has been extraordinarily indulgent to choice of law
council, under Montana, cannot make law in the first instance that would be applicable to nonmembers, and so the tribal court has, in some sense, no law to apply? Or is it some combination of the three? In allowing this confusion to persist, the Court glossed over the larger problem of the source of restrictions—whatever they may be—on tribal power. Montana, that is, suggests that tribes lack regulatory power over the activities of nonmembers on nonmember land. But the Court failed to explain why Montana should imply that a tribal court cannot hear a dispute voluntarily filed by a nonmember (as the Strate plaintiff happened to be) in tribal court, particularly if that court plans to apply state law on substantive issues. Strate failed to provide a coherent—or, indeed, any—answer to these questions, and the Court’s next tribal jurisdiction case served only to exacerbate the confusion.

3. Hicks and the Subject Matter Jurisdiction Problem

Just four years after Strate, the Court decided a second case about tribal court jurisdiction, Nevada v. Hicks.189 While the holding of Hicks was narrow, its expansive language continued to reflect and perpetuate confusion over jurisdictional categories. In the case, the Court (with Justice Scalia writing) held that the tribal court lacked jurisdiction over a suit by

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Hicks, a Fallon Paiute-Shoshone Tribes member, against state officers alleged to have improperly searched his property.  

(Hicks had asserted claims against the officers in tribal court for trespass and abuse of process, and various civil rights claims under the federal statute 42 U.S.C. 1983.)

Because the allegedly improper search had taken place on the tribe member’s property, Hicks potentially touched on the question the Court had avoided in Strate: whether tribes may regulate nonmembers more expansively when their conduct takes place on member-owned or tribal trust land. As many commentators pointed out, however, the actual holding of Hicks could arguably be limited to suits in tribal court against state officers, thus putting aside once more the issue of land ownership and tribal power. Thus Hicks may have decided relatively little.

Despite the limited question before the Court, Hicks was nonetheless the occasion for additional pronouncements about the nature of tribal court

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190 The plaintiff argued that the search had exceeded the scope of the warrant (which had been issued under both state and tribal law) and caused damage to sheep heads in his possession. Id. at 356.

191 Id. at 356-57.

192 See, e.g., Daan Braveman, Tribal Sovereignty: Them and Us, 82 Or. L. REV. 75, 95 (2003) (noting that Hicks can be read as limiting tribal authority only when defendants are state officials). The Court itself described the question before it as “whether a tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation.” See 533 U.S. at 355.

193 See, e.g., Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 813 (9th Cir. 2011) (holding that “Hicks is best understood as the narrow decision it explicitly claims to be” and that Montana does not apply to tribal land). But see Dolgen Corp., Inc. v. Miss. Band of Choctaw Indians, No. 4:08CV22TSL-JCS, 2008 WL 5381906, at *2 n.1 (S.D. Miss. Dec. 19, 2008) (suggesting that subsequent case law mandates that Hicks be understood as holding that “Montana applies to Indian and non-Indian land alike”).
jurisdiction. To begin with, the Court—as it had done in *Strate*—approached the jurisdiction question by treating the exercise of judicial jurisdiction by a tribal court as equivalent to an assertion of tribal legislative authority, asking whether “the Fallon Paiute-Shoshone Tribes—either as an exercise of their inherent sovereignty, or under grant of federal authority—can regulate state wardens executing a search warrant for evidence of an off-reservation crime.” The Court’s use of the term “regulate” is particularly striking because the claims (for trespass to land and chattels, abuse of process, and violation of civil rights) were unremarkable common-law causes of action, not distinctively “tribal” in any way; indeed, the last of these claims was a federal one. The Court decided that the tribe lacked such power to “regulate” by means of judicial jurisdiction—in part, it suggested, because the state maintained some territorial control over reservation land. Although the principal opinion focused less on specifically procedural issues than the Court had in *Strate*, Justice Souter (joined by two other justices), in a concurrence notably hostile to the notion of tribal jurisdiction, discussed them at length, noting (among other observations) that “tribal courts are often subordinate to the political

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194 *Id.* at 358. (Emphasis added.)
195 *Id.* at 356-57.
196 *Id.* at 361-62 (“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 … Ordinarily, it is now clear, an Indian reservation is considered part of the territory of the State.”) (citation and quotation marks omitted).
branches of tribal governments.”

Having dealt with the basic question of whether tribal courts could hear cases against state officers in this situation, the Court then turned in a different direction, but one that also had implications for the nature of tribal jurisdiction. Separate from the question of the tribe’s regulatory authority to hear the trespass and related claims, the Court found, was the issue of whether “the tribal court, as a court of general jurisdiction, has authority to entertain federal claims under § 1983.”

In approaching this question, the Court first pronounced that the tribal court was not, as it held itself out to be, a court of general jurisdiction: “Tribal courts … cannot be courts of general jurisdiction in [the sense that state courts are], for a tribe’s inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction.”

The Court further explained that “Strate’s limitation on jurisdiction over nonmembers pertains to subject-matter, rather than merely personal, jurisdiction, since it turns upon whether the

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197 See id. at 384 (Souter, J., concurring) (citations and quotation marks omitted). Justice Souter’s observation again displays the Court’s tendency to see tribal courts as having an essentially regulatory rather than adjudicatory function; a court doing the bidding of a political branch, that is, is presumably more of an instrument of regulation than a court that is detached from the legislative function.

198 Id. at 366.

199 Id. at 367. The Court was responding to Justice Stevens’s concurrence, which argued, “Absent federal law to the contrary, the question whether tribal courts are courts of general jurisdiction is fundamentally one of tribal law, … This principle is not based upon any mystical attribute of sovereignty, … but rather upon the simple, commonsense notion that it is the body creating a court that determines what sorts of claims that court will hear. The questions whether that court has the power to compel anyone to listen to it and whether its assertion of subject-matter jurisdiction conflicts with some higher law are separate issues.” See id. at 402 & 403 n.2 (Stevens, J., concurring).
actions at issue in the litigation are regulable by the tribe.” Because of these limits on tribes’ regulatory powers, tribal courts did not have the same “inherent authority” and “presumptive competen[ce]” to adjudicate federal statutes and, unlike state courts, did not benefit from the “historical and constitutional assumption of concurrent state-court jurisdiction” over federal law. Finally, the Court noted, permitting tribal-court jurisdiction over federal claims would create an anomaly – those claims if filed in state court could be removed to federal court, but no explicit provision existed for removal from tribal to federal court.

Although this last point is a reasonable (though not insurmountable) one, the Court’s reasoning here is otherwise somewhat inexplicable. Tribal courts, the Court suggests, cannot hear § 1983 claims because they are not courts of general jurisdiction – but the very question the Court was ostensibly considering was whether tribal courts might enjoy expanded jurisdiction in claims involving federal law, making the Court’s reasoning unsatisfyingly circular. The Court, moreover, notably left unclear whether tribal courts lack jurisdiction over all § 1983 claims, or simply over those that do not otherwise fall within the scope of the tribal adjudicatory

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200 Id. at 367 n.8.
201 Id. at 366 (citation and quotation marks omitted).
202 Id. at 367.
203 Id. at 368-69.
204 For example, Catherine Struve has noted that if Congress were displeased with the lack of uniformity of tribal court interpretation of federal law, it could easily create a mechanism for federal review of such issues. See Struve, supra note 47, at 314.
Further, as Catherine Struve has observed, the Court was able to reach the result it did only by adopting an unorthodox interpretation of subject matter jurisdiction to begin with; inherent sovereignty normally “includes the power to authorize the [sovereign’s] courts to hear claims that arise under the law of another sovereign,” and no treaty or statute strips this power from tribes. But most problematically, Hicks rests its characterization of tribal court jurisdiction as involving “subject matter” on the equation of tribal judicial and regulatory authority, leaving unexplained the same issues that the Court failed to grapple with in Strate: What is the justification for treating adjudication as necessarily an act of regulation by the tribe, particularly when there is no indication that the tribal court plans to apply a distinctively tribal decisional rule? Further, even if one is to concede some overlap between tribal adjudication and tribal regulation, why are they so alike that they must be governed by precisely the same rule, particularly when they are treated so distinctly in the state context?  

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205 For example, if one tribe member asserts a § 1983 claim against another, the tribal court would normally have jurisdiction. Does the federal nature of the § 1983 claim still mandate that the tribal court refrain from hearing it? See Struve, supra note 47, at 296 (“The reach of the Court's section 1983 holding is somewhat uncertain, for it might be the case that under Hicks, tribal courts can still hear federal claims against defendants who are subject to tribal regulatory authority.”)  
206 See Struve, supra note 47, at 297-98.  
207 See Part IB and IC (discussing the three different standards that govern, respectively, state assertions of jurisdiction over out-of-state defendants, state-court applications of forum law, and state legislation). Notably, many scholars have rejected on efficiency and fairness grounds the equation of adjudicatory and regulatory authority in other contexts. See, e.g., Peter Hay, Judicial Jurisdiction and Choice of Law: Constitutional Limitations, 59 U. COLO. L. REV. 9, 9 (1988) (arguing against “congruent” constitutional limitations on “long-arm adjudicatory jurisdiction and for legislative
After *Hicks*, courts have frequently referred to tribal court jurisdictional limits as questions of “subject matter jurisdiction,” and certainly Justice Scalia’s comments in *Hicks* lend support to that view. But it is important to note that Justice Scalia was addressing the issue in the narrow context of whether tribal courts should be considered to have presumptive jurisdiction over federal claims, not as part of a comprehensive understanding of tribal jurisdiction in general. Even more fundamentally, the category of “subject matter jurisdiction” remains (as the next section will discuss) a framework that simply fails to make sense in the tribal context, and one which the Court has never properly explained. Thus, Justice Scalia’s offhand “subject matter” characterization, while influential, cannot be said to be definitive.

4. Tribal Jurisdiction Doctrine on the Ground: *Smith* and *Water Wheel*

Two recent Ninth Circuit cases illustrate both the confusion that *Strate* and *Hicks* have wrought and lower courts’ attempt to rework these cases’ jurisdictional categories. In both cases, the Ninth Circuit nominally applied the *Montana* framework, but ultimately ended up falling back on jurisdiction”); Arthur T. von Mehren, *Theory and Practice of Adjudicatory Authority in Private International Law* 36-37 (2003) (arguing that equating choice of law with jurisdiction would entail “potentially great costs to both” as well as “severe administrative problems” because of the different nature of the two inquiries).

208 *Hicks* is the Court’s last major pronouncement on the subject of tribal court jurisdiction. A subsequent case, Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008), reiterates and expands the limits on tribal regulation of nonmembers, though it does not concern the activities of tribal courts per se.
notions of personal jurisdiction to address the complexities of the issues at hand.

Smith v. Salish Kootenai College\(^{209}\) involved a dizzying array of tribal and federal court opinions, spanning a period of over five years, in an attempt to work out the contours of tribal jurisdiction. As the Ninth Circuit noted, the case’s procedural history was “complex” – if anything, an understatement.\(^{210}\) Smith, the plaintiff, was attending Salish Kootenai College (“SKC”), but was a member of the Umatilla Tribe, not the Confederated Salish and Kootenai Tribes.\(^{211}\) In connection with his work at the SKC, he drove a truck on the reservation with two other students, both enrolled members of the Confederated Tribes, as passengers. Following a rollover accident, passenger Burland was killed, while Smith and passenger Finley were injured.\(^{212}\)

Burland’s estate then sued SKC and Smith in tribal court. SKC cross-claimed against Smith, and Smith then cross-claimed against SKC; Finley filed his own suit against SKC and Smith.\(^{213}\) All claims were consolidated in tribal court where they settled, leaving only Smith’s cross-claim against SKC.\(^{214}\) The claim was fully litigated in tribal court, and

\(^{209}\) 434 F.3d 1127, 1129 (9th Cir. 2006) (en banc).
\(^{210}\) Id.
\(^{211}\) Id.
\(^{212}\) Id.
\(^{213}\) Id.
\(^{214}\) Id.
Smith lost.215 Only at that point did Smith raise an argument that – because he was a nonmember who had initially been brought into the case as a defendant – the tribal court lacked subject matter jurisdiction over the dispute.216 While appeals on this issue were pending in tribal court, Smith filed for an injunction in federal court, alleging that the tribal court lacked jurisdiction, and also sought to re-file his claim against SKC.217 The district court denied the injunction; the Ninth Circuit reversed, then granted rehearing en banc and reversed the Ninth Circuit panel, finding that the tribal court had jurisdiction.218 Meanwhile, the tribal appeals court had reaffirmed tribal court jurisdiction as well.219

The complex configuration of this case, and the lengthy period necessary to resolve the jurisdictional issues, illustrate the difficulty of simultaneously applying Williams (mandating that nonmember vs. member claims be heard in tribal court), Montana (limiting tribal court jurisdiction over nonmembers), and National Farmers (requiring exhaustion of tribal remedies but allowing ultimate federal determination of the tribal jurisdiction question).220 Even more notable, however, was the difficulty the

215 Id.
216 Id.
217 Id. at 1130.
218 Id.
219 Id.
220 See Florey, State Courts, supra note 34. The case further illustrates the possibility of jurisdictional friction between tribal and federal court, since here the federal case was filed while tribal appellate proceedings were ongoing; although both courts in this case ultimately reached the same resolution, this is obviously not a foregone conclusion.
Ninth Circuit had in reconciling the complex facts of an actual case to the Court’s complicated tribal jurisdiction framework. *Smith* recalled some features of *Williams* (in which the Court had held that tribal courts have exclusive jurisdiction over suits by nonmember plaintiffs over tribal defendants), but it did not fit the mold exactly: Smith had originally been brought into the case as a defendant, although he ended up asserting his own claim and being renamed a plaintiff by the tribal court. SKC, as a tribal entity, was not technically a “member” of the tribe, although the Ninth Circuit ended up concluding that “for purposes of civil tribal court jurisdiction, [it] may be treated as though it were a tribal “member.”

But if *Williams* did not fit precisely, neither did *Montana*. That is, while it is generally true that someone who has voluntarily submitted to a court’s jurisdiction waives jurisdictional objections, the situation in *Smith*, as the Ninth Circuit noted, did not “fit obviously” into either of the *Montana* exceptions, which the Supreme Court has suggested apply only to disputes arising directly out of contractual relationships or to serious threats to tribal welfare. Ultimately, the Ninth Circuit chose to handle this issue by expanding the “consensual relationships” exception to *Montana*, even

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221 For this reason, the court suggested, concurrent jurisdiction would exist in tribal and state courts. See 434 F.3d at 1140 n.6.
222 Id. at 1133.
223 Id. at 1135.
224 This is generally the case, for example, in the context of personal jurisdiction and sovereign immunity. See, e.g., Lapides v. Bd. of Regents of Univ. Syst. of Ga., 535 U.S. 613 (2002).
225 Id. at 1136.
while acknowledging that “Smith’s claims do not fit easily with the literal examples cited in the first *Montana* exception.”226 As the court reasoned, “Smith comes to this proceeding as the plaintiff, in full control of the forum in which he prosecutes his claims against SKC.”227 Because of Smith’s control of the suit and the forum, the Court suggested, the claim grew out of a consensual relationship even though no actual contract was involved.228

It seems quite possible that the Supreme Court, even applying *Montana* strictly, would agree with the Ninth Circuit’s result.229 That is, permitting a tribal court to litigate a claim voluntarily filed by a plaintiff who, though not enrolled in the Confederated Tribes, was a member of another tribe who was driving in connection with his studies at a tribal college, seems compatible even with *Montana*’s constricted view of tribal sovereignty. Further, it is highly consistent with the emphasis on consent that has pervaded the Court’s approach to Indian country in recent years.230

It is notable, however, how the jurisdictional framework imposed by *Montana* complicated the Ninth Circuit’s ability to reach what seems both a

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226 *Id.* at 1136.
227 *Id.* at 1139.
228 *Id.*
229 Three dissenting members of the en banc panel, however, did reject the majority opinion as “part[ing] company with compulsory Supreme Court guidance.” *See id.* at 1141 (Gould, J., dissenting). Among other differences with the majority, the dissenters suggested that the rule of *Williams* might no longer be good law. *See id.* at 1141-42. Taking the “subject matter jurisdiction” limitation seriously, the dissent further suggested that limits on tribal jurisdiction are nonwaivable. *Id.* at 1144. For a critique of the dissent’s view, see *infra* note 287
230 *See* Florey, *Territoriality, supra* note 8, at 603 (arguing that “the Court increasingly looks at tribal sovereignty through the lens of consent”).
sensible and just result. The Ninth Circuit had to grapple not only with the
narrowness of Montana’s exceptions – making it difficult to find a basis for
upholding jurisdiction over a case that seemed to belong in tribal court but
did not exactly fit the mold the Supreme Court had articulated – but with
the Court’s characterization of limits on tribal adjudication as ones of
subject matter jurisdiction. That is, if Strate and Hicks truly articulated an
outer bound on tribal subject matter jurisdiction, Smith’s voluntary election
of the tribal forum presumably could not have been a basis for tribal
adjudication, since subject matter jurisdiction cannot be conferred by the
parties’ consent.231

The Ninth Circuit, however, was ultimately able to move beyond the
odd result that would have ensued from taking the Supreme Court’s
categorizations at face value. As the court observed (citing several personal
jurisdiction cases), “the ‘consensual relationship’ analysis under Montana
resembles the Court’s Due Process Clause analysis for purposes of personal
jurisdiction” with its emphasis on voluntary contacts with the forum.232
This emphasis was “inconsistent with federal subject matter jurisdiction,
though perfectly consistent with principles of personal jurisdiction.”233 The
court thus appeared to conclude that the Supreme Court had not meant its

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231 See Smith, 434 F.3d at 1137 (noting that parties “may not confer [subject matter]
jurisdiction ... by stipulation”) (citation and quotation marks omitted.
232 Id. at 1138.
233 Id.
Hicks statements literally. While insisting that it did not intend “to question whether the exercise of tribal civil jurisdiction is in fact subject matter jurisdiction,” the court nonetheless found that the doctrine must, in practice, have some “play in the margins” and “employ[] a test more flexible than those defining the strict notions of subject matter jurisdiction under Article III.” As a result, the Ninth Circuit was comfortable announcing a rule that “a nonmember who knowingly enters tribal courts for the purpose of filing suit against a tribal member has, by the act of filing his claims, entered into a “consensual relationship” with the tribe within the meaning of Montana.” To reach this eminently reasonable result, however, required going beyond the misleading jurisdictional categories the Court has used.

A second case, Water Wheel Camp Recreational Area, Inc. v. LaRance, also relied in part on personal jurisdiction principles in determining that a tribal court could hear an action against a nonmember defendant. Water Wheel concerned a non-Indian resort operator that had failed to vacate tribal property following expiration of its lease with the tribe. The tribe sued Water Wheel and its president in tribal court for eviction, unpaid rent, damages from the tribe’s loss of use of their property,
and attorney’s fees.\textsuperscript{239} The tribal court denied the defendants’ motion to dismiss on jurisdictional grounds, and found for CRIT on the merits. The tribal appellate court affirmed in a lengthy opinion.\textsuperscript{240} The defendants sought a declaratory judgment in federal district court that the tribal court lacked jurisdiction over them; the district court agreed, citing \textit{Montana}.\textsuperscript{241} In reversing, the Ninth Circuit considered the jurisdictional issues at length in a thought-provoking opinion.

To begin with, the Ninth Circuit found a way of removing the issue from the constraints of the \textit{Montana} test. The court limited \textit{Hicks} strictly to its facts and found that the \textit{Montana} standard only governed exercises of tribal authority on non-Indian land.\textsuperscript{242} Therefore, it did not affect the tribe’s more robust power to exclude outsiders from tribal land, and the court thus found that “the CRIT’s right to exclude non-Indians from tribal land includes the power to regulate them unless Congress has said otherwise, or unless the Supreme Court has recognized that such power conflicts with federal interests promoting tribal self-government.”\textsuperscript{243} Thus, the tribal court had what the Ninth Circuit termed “subject matter jurisdiction – consisting

\begin{itemize}
\item \textsuperscript{239} \textit{Id.} at 805.
\item \textsuperscript{240} \textit{Id.} at 806.
\item \textsuperscript{241} \textit{Id.} at 807-08.
\item \textsuperscript{242} See \textit{id.} at 809 (“The narrow question the Court considered in [\textit{Montana}] concerned the tribe’s exercise of regulatory jurisdiction over non-Indians on non-Indian land within the reservation.”)
\item \textsuperscript{243} \textit{Id.} at 813.
\end{itemize}
of regulatory and adjudicative jurisdiction” over the case.\textsuperscript{244}

But this did not end the matter; the Ninth Circuit also determined that personal jurisdiction was an independent requirement that the court must inquire into. Moreover, in concluding that the tribal court did in fact possess personal jurisdiction, the court looked to the standard due process framework, citing \textit{Burnham v. Superior Court} and other personal jurisdiction precedents from the state context.\textsuperscript{245} Applying a conventional personal jurisdiction framework, the Ninth Circuit noted that Johnson had been served with tribal process on tribal land and lived on tribal land, which “on its own serves as a basis for personal jurisdiction.”\textsuperscript{246}

\textit{Water Wheel} has attracted some praise from commentators for limiting \textit{Montana} and returning to more established principles governing tribal jurisdiction.\textsuperscript{247} Another interesting feature of \textit{Water Wheel}, however, is the way in which it succeeds in replacing the \textit{Montana} test with a personal jurisdiction analysis. \textit{Water Wheel} suggests, perhaps, some wiggle room in the \textit{Montana/Strate/Hicks} framework, under which cases in which the Supreme Court has not strictly forbidden tribal jurisdiction may be understood – as an alternative – in personal jurisdiction terms. Further, it

\textsuperscript{244} Id. at 806.
\textsuperscript{245} See id. at 819-20 (citing Burnham, \textit{International Shoe}, and other personal jurisdiction cases).
\textsuperscript{246} Id. at 819.
\textsuperscript{247} See Winter King et al., \textit{Bridging the Divide: Water Wheel’s New Tribal Jurisdiction Paradigm}, 47 GONZ. L. REV. 723, 757-60 (2012).
illustrates the ready adaptability of personal jurisdiction principles to Indian country. Of course, the contours of this approach are not entirely clear,\(^{248}\) and *Water Wheel* leaves standing many of the problems with current law – it does nothing to enhance tribal authority over non-Indian land, and it continues *Strate’s* linkage of adjudicative and regulatory jurisdiction.\(^{249}\) Nonetheless, *Water Wheel* is a promising step in the right direction, illustrating the possibilities of a more nuanced and expansive framework for assessing tribal jurisdiction.

*Smith* and *Water Wheel*, then, reveal both the difficulties courts have had fitting the actual situations with which they are presented into the *Montana* framework and the possibilities personal jurisdiction doctrine may offer for a more coherent analysis. The following Section takes this state of affairs as a starting point. It argues that this terms “adjudicative” and “subject matter” jurisdiction should – along with the Court’s other distinctive terminology and categorizations – be abandoned where tribal courts are concerned, and that more conventional notions of personal jurisdiction should replace them.

\(^{248}\) *See id.* at 763 (describing *Water Wheel* as the rare case that “actually answered more questions than it raised,” but nonetheless noting that it leaves some issues open, such as how it might be applied “in situations that are not so closely linked to the tribe’s use and control over its land”).

\(^{249}\) *See Water Wheel*, 642 F.3d at 804-05 (describing the issue as one of tribes’ “inherent civil authority over non-Indians acting on tribal land”).
III. REINTEGRATING TRIBAL COURTS INTO THE U.S. AND INTERNATIONAL FOLD: THE POSSIBILITIES OF PERSONAL JURISDICTION DOCTRINE

The final section of this Article proposes a simple change in the way we regard tribal court jurisdiction: The Supreme Court should untether the jurisdiction of tribal courts from the legislative jurisdiction of tribes, and refer to the doctrine governing tribal courts as one of “personal jurisdiction.” Failing action by the Supreme Court itself, lower courts should resolve ambiguities of tribal court jurisdiction cases to the extent possible in light of personal jurisdiction principles, on the model of Smith and Water Wheel.

Strong parallels exist between the inquiries into tribal court jurisdiction and personal jurisdiction in the state context. Scholars, practitioners, and lower courts have continued to remark upon them despite the Supreme Court’s discouragements. With this in mind, my argument is twofold. First, I argue that the restrictions on tribal courts’ assertions of power over nonmembers, as the Court has articulated them in Strate and Hicks, are best understood as restrictions on the scope of such

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250 See Krakoff, supra note 39, at 47 (describing ways in which personal jurisdiction and due process norms could and should play a role in cases like Strate).
251 For example, a recent article by the former Solicitor General for the Non-Removable Mille Lacs Band of Ojibwe notes that “each [Montana] exception seems to be grounded in the law of personal jurisdiction.” See Kanassatega, supra note 40, at 640.
252 See Smith, 434 F.3d at 1138.
courts’ personal jurisdiction over nonmembers (despite the Supreme Court’s protestations to the contrary). In other words, even if limits on tribal jurisdiction are to remain static, it would be preferable to characterize those limits as ones of personal jurisdiction, rather than of subject matter or “adjudicative” jurisdiction.

Second, I make a broader argument that personal jurisdiction concepts – including minimum contacts, purposeful availment, and reasonableness – should be better integrated into the doctrine governing tribal courts and ultimately play a role in establishing the standards for fair tribal jurisdiction over nonmembers. Such a move would allow tribal courts to exercise both broader and more clearly delineated powers while at the same time providing protections that are better calibrated than current doctrine to safeguard the legitimate interests and expectations of nonmembers.

To be sure, the Court has shown little inclination in recent years to move toward a more expansive view of tribal sovereignty; indeed, all indications have been to the contrary.253 And in Hicks, the Court specifically rejected the idea that tribal jurisdiction should be conceptualized as personal jurisdiction.254 Nonetheless, recharacterizing the

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253 See Matthew L.M. Fletcher, Tribal Consent, 8 STAN. J. CIV. RTS. & CIV. LIBERTIES 45, 94-95 (2012) (discussing Court’s extensive reliance on “implicit divestiture” doctrine to limit tribal sovereignty) [hereinafter Consent].

254 See Hicks, 533 at 368 n.8 (stating that the “limitation on jurisdiction over
law governing tribal courts’ power in personal jurisdiction terms presents numerous advantages – not only to tribes but to nonmembers who may have dealing with them – in clarifying the existing doctrine, honoring party expectations, and ensuring fair and consistent treatment across the jurisdictional crazy quilt of Indian country. These advantages may be apparent even to courts that are otherwise skeptical of robust tribal sovereignty.

A. Tribal Court Jurisdiction as Personal Jurisdiction

As the preceding section has detailed, the Supreme Court does not treat tribal jurisdiction like any other sort of jurisdiction, and does not treat tribal courts like any other sort of courts. Unlike most sovereigns, whose legislative and judicial powers are considered separately,\(^{255}\) the Court considers tribal legislative and judicial jurisdiction to be essentially coextensive.\(^{256}\) Further, the Court regards limits on the latter to be limits on what it calls the “subject matter jurisdiction” of the tribal courts – even though subject matter jurisdiction in other contexts means a limit that is imposed by the sovereign that creates the courts, not one imposed by an nonmembers pertains to subject-matter, rather than merely personal, jurisdiction”).

\(^{255}\) See, e.g., Hay, supra note 207 (describing important differences in the nature of adjudicatory and regulatory jurisdiction).

\(^{256}\) See Strate, 520 U.S. at 453 (“[A] tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.”)
external power.\textsuperscript{257} This section argues that this exceptionalist treatment of tribal courts is without justification. It contends, instead, that wherever the substantive limits on tribal courts’ powers may best be set, those limits are best characterized as ones of personal jurisdiction.

1. Treating Tribal Courts as Courts: Why the Equation of Tribal Regulatory and Adjudicative Authority Fails

In general, the Court has justified the current exceptionalist framework for treatment of tribal courts by situating it within a larger understanding of limits on tribal power and tribal sovereignty. As the Court explained in \textit{Montana} (in language cited in many subsequent opinions), tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But 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[].\textsuperscript{258}

Under these principles (or at least the interpretation of them the Court adopted in \textit{Strate} and \textit{Hicks}), all “exercises of tribal

\textsuperscript{257} See Struve, supra note 47, at 297-98.
\textsuperscript{258} See \textit{Montana}, 450 U.S. at 564
sovereignty” are subject to the same test, assertions of judicial jurisdiction no less than direct regulation.

The extension of *Montana* principles into the judicial realm, however, ignores the ways in which tribal adjudication and tribal regulation (like adjudication and regulation more generally) are distinct from each other. As Peter Hay has argued, boundaries on courts’ adjudicative powers are primarily concerned with fairness to the defendant and the defendant’s relationship to the forum; by contrast, concerns about substantively limiting sovereign power are best addressed through restrictions on legislative jurisdiction.259 Any attempt to conflate the two simply ignores the “different interests” involved.260

Although Hay had in mind limits on the power of state courts, his analysis is equally pertinent in the tribal context. In most respects, that is, tribal courts are courts like any other. Despite the many differences that may exist between tribal courts and state courts, their primarily task is the same – to resolve individuals’ private legal claims – and they do so using many of the same methods.261 It is instructive to compare the nature of the tribe’s action in passing an ordinance like that at issue in *Montana*, on the

259 See Hay, supra note 207, at 10-12.
260 Id. at 10.
261 See Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 Am. Indian L. Rev. 285, 351 (1998) (concluding from examination of tribal court decisions that “most tribal courts are largely indistinguishable in structure and process from state and federal courts”).
one hand, and adjudicating a dispute in tribal court, in the other. *Montana* involved a tribal regulation that was specifically directed at nonmember conduct, designed intentionally by the tribal council to deal with the perceived problem of nonmember overuse of the reservation’s fish and game resources. Unlike tribal legislative bodies, however, which can choose whether or not to affirmatively regulate, tribal courts take disputes as they come, and for this reason it is hard to imagine that they would be particularly useful as a way of systematically regulating nonmembers.

Moreover, even where tribal courts have the opportunity to apply substantive tribal standards, they do not necessarily seize it. Instead, tribal courts frequently apply state law, or something like it, to the claims before them, explicitly borrowing from state law as a way to fill in gaps in still-evolving tribal codes. Presumably such borrowing is most likely precisely when the tribal court is dealing with the actions of nonmembers. Consider, for example, the tribal court in *Strate* – presented with the case not through any action of the tribe but because Fredericks, a nonmember, had chosen to file there – which planned to resolve the case at hand through

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262 See supra note 146.

263 Of course, like all courts, tribal courts serve some public function – and, indeed, many tribal courts place a particular premium on dispute-resolution methods that aim to repair relationships between the litigants and thus promote community harmony. See Fletcher, *Consent*, supra note 253, at 67 (discussing “forward-thinking” criminal diversion and dispute resolution methods employed by many tribes).

the application of state law.  

The tribal judicial power thus differs in significant ways from tribal regulatory authority. Whereas tribal councils or other regulatory bodies actively carry out the policies of the tribal government, tribal courts can implement tribal policies only indirectly if at all, since they are limited to making policy in the context of whatever disputes happen to come before them. Further, the actual practice of tribal courts suggests that, particularly in cases involving nonmembers, there may be relatively little distinctively tribal about the law that is applied – that is, most tribal courts presented with a negligence or trespass claim will resolve the issue under common-law principles than more or less resemble state ones.  

Tribal courts, then, bear little resemblance to tribal regulatory authorities, and serve only incidentally as tools of tribal regulatory policies. By contrast, they are, in many ways, surprisingly similar to non-tribal courts, particularly state courts. This is not to generalize about the nature of tribal courts, which display tremendous variety, as the Supreme Court itself has recognized, across nearly every conceivable dimension. Some are

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265 See supra note 160.
266 See id.
267 See Hicks, 533 U.S. at 384 (Souter, J., concurring) (noting that “[t]ribal courts … differ from … one another”).
poor, others well-funded. Some are modeled on state judicial systems, while others seek to implement distinctive tribal values. Some are universally respected models of the administration of justice, while others are of more questionable quality. These real differences, however, should not obscure the important attributes tribal courts of any stripe share with state courts.

First, tribal courts are treated as peers by many other judicial bodies. State and federal courts generally give comity to tribal judgments comparable to that given to international judgments, meaning that tribal court orders can be enforced and have res judicata effect in state courts. In at least a few cases, this means automatic or near-automatic full faith and credit, akin to the effect states give sister-state judgments. While state

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269 See Minzner, supra note 268, at 89.
271 See Fletcher, Consent, supra note 268.
272 Notably, however, even though the perception of bias is rampant, the evidence for pervasive bias by tribal courts is sparse. Aaron F. Arnold et al., State and Tribal Court: Strategies for Bridging the Divide, 47 GONZ. L. REV. 801, 817-18 (2012) (noting that, while there is a “a widespread misperception among state court practitioners that tribal courts are biased against non-Indians,” this is not borne out by objective evidence; even “investigations which began with apparent hostile intent have ended by stressing the strengths of tribal courts and noting their weaknesses stem from lack of funding and not pervasive bias”) (quoting Nell Jessup Newton, supra note 261, at 287-88).
273 See Fletcher, Consent, supra note 253, at 67-68 (noting that state courts are required to give full faith and credit to tribal orders under the Indian Child Welfare Act, and that “[e]ven in areas where Congress hasn’t spoken, state and federal courts and governments grant enormous deference to tribal law and court judgments”).
courts have not always applied these principles fairly to tribal judgments, the comity state courts extend to them is nonetheless significant. To begin with, it demonstrates a collegial relationship between state and tribal courts and some degree of mutual respect. Moreover, it means that the full powers of states are available, in many cases, to enforce the orders of tribal courts.

Second, tribal courts – even after Strate and Hicks – necessarily hear many disputes involving nonmember plaintiffs, who file in tribal court for reasons of practicality or jurisdictional necessity. Plaintiffs may file in tribal court simply because the court is most convenient or familiar; such explanations likely account, for example, for the decision of Gisela Fredericks to file the suit at issue in Strate in tribal court. Other plaintiffs may have little choice in seeking a tribal forum. Williams v. Lee makes tribal courts the exclusive forum for many nonmember grievances against tribe members. In addition, tribal sovereign immunity – which protects many tribal business enterprises as well as the tribal government itself – effectively makes tribal court the sole forum for many other claims.

New Mexico, Idaho, Maine, New York, and South Carolina give full faith and credit at least in some circumstances to tribal judgments).

275 See Leeds, supra note 274, at 360-62.
276 See supra note 273.
277 One study of Navajo appellate cases found, for example, that most cases with nonmember parties arose from a business relationship between an individual Navajo and a non-Indian employer or institution. See Berger, Justice, supra note 32, at 1085.
278 See Strate, 520 U.S. at 438. Strate, notably, was a dispute between nonmembers, although Fredericks, as the widow and mother of tribe members who resided on the reservation, obviously had deeper connections to the tribe than did the defendants.
involving nonmembers, since tribes are often willing to waive their immunity only in a tribal forum. Thus, tribal courts – like state courts – enjoy broad prerogatives to adjudicate definitively the rights of nonmembers. To the extent doing so is an act of “regulating” nonmembers, tribal courts do it all the time, and over nonmembers who have no choice (at least if they want to receive redress for their injuries) to have their disputes heard in any other way.

Given these circumstances, the Court’s underlying concern in Strate and Hicks logically cannot be with tribal regulation of nonmembers (despite the Court’s suggestions to the contrary280), because to the extent that adjudication equals regulation, tribal courts already adjudicate nonmember rights. Likewise, the Court’s focus on the general problem of nonmembers who involuntarily wind up in unfriendly tribal courts also rings hollow, because jurisdictional rules dictate that nonmember plaintiffs must frequently litigate there. Rather, the Court’s concern is specifically directed at nonmember defendants.

This worry about defendants – and defendants alone – is anomalous in the context of a doctrine that is nominally about limits on tribal regulation and subject matter jurisdiction, both of which would appear to

279 See Berger, Justice, supra note 32, at 1067.
280 See, e.g., Hicks, 533 U.S. at 358 (describing the question of tribal jurisdiction as resting on the issue of whether tribal courts may “regulate state wardens executing a search warrant for evidence of an off-reservation crime”) (emphasis added).
apply to litigants in any posture. Yet defendants are a natural focus if we recall personal jurisdiction doctrine, which deals entirely with the issue of whether a court can assert authority over a particular defendant – an analysis from which the plaintiff’s wishes or the strength of her connection to the forum are generally excluded.\textsuperscript{281} Furthermore, much of the Court’s reasoning in both \textit{Strate} and \textit{Hicks} suggests that its primary concern is not so much the burden of subjecting a nonmember to tribal law but the burden of having to appear in tribal \textit{court}.\textsuperscript{282} Thus, the Court in \textit{Strate} called the tribal court “unfamiliar”\textsuperscript{283} and noted it was physically distant from the accident scene.\textsuperscript{284} Justice Souter’s concurrence in \textit{Hicks} likewise focused on the possibility of bias or procedural irregularities in tribal court.\textsuperscript{285} These are all concerns about the tribal court’s procedural suitability, not the substance of tribal regulation.

Thus, seen as anything other than a discussion of personal jurisdiction – that is, either as a more general restraint on tribal sovereignty

\textsuperscript{281} See Hay, supra note 207, at 10 (noting that the “underlying concern” of personal jurisdiction doctrine is “fairness to the defendant”). A modest and partial exception to this general principle is in the reasonableness test, which the Court suggested in \textit{Asahi} can defeat personal jurisdiction even if minimum contacts are present. The reasonableness factors permit consideration of “the interests of the forum State,” and “the plaintiff’s interest in obtaining relief” in determining whether an exercise of jurisdiction is reasonable. See \textit{Asahi}, 480 U.S. at 113.

\textsuperscript{282} In some ways, too, this is a more appropriate area of focus for the Supreme Court if its concern is protecting nonmember rights. Particularly in the sort of garden-variety tort and contract disputes that nonmembers may be involved in, many tribal courts apply common-law principles borrowed from or closely resembling state law. See \textit{supra} note 264.

\textsuperscript{283} \textit{Strate}, 520 U.S. at 459.

\textsuperscript{284} \textit{Id.} at 445 n.4.

\textsuperscript{285} \textit{See Hicks}, 533 U.S. at 384 (Souter, J., concurring).
or as a more general protection for nonmember litigants – the Court’s reasoning is puzzling. If the limits on tribal courts are rooted in concerns about their fairness and suitability as forums for resolving nonmember disputes, it makes little sense for these limitations to be dictated by the Montana framework, which ignores the vastly different nature of the tribal regulatory and judicial powers and does not speak at all to the procedural suitability of tribal courts for any given dispute. Further, if the Court’s aim is to limit tribal courts’ role to “control[ling] internal relations” among tribe members, the extensive role tribal courts continue to have in determining nonmembers’ rights appears anomalous.

Both the Court’s own reasoning in Strate and Hicks and the bald reality that tribal courts frequently address nonmember disputes in practice suggest that the Court’s true concern has nothing to do with tribal regulation, but with subjecting nonmembers involuntarily to tribal jurisdiction, particularly where they may not expect it or where the tribal

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286 For a discussion of why Montana involved a very different context from judicial jurisdiction, see supra notes 146-148 and accompanying text.

287 The dissent in Smith ominously suggests that, for this reason, Williams may no longer be good law and that the characterization of tribal jurisdiction as “subject matter jurisdiction” should be understood to preclude tribal courts from exercising jurisdiction over nonmembers even when they voluntarily file as plaintiffs. See 434 F.3d at 1141-42, 1144 (Gould, J., dissenting). This view seems clearly wrong, however, for two reasons. First, the Supreme Court has let the rule of Williams stand for more than 50 years, despite its frequent revisiting and narrowing of other aspects of tribal court jurisdiction. Second, in delineating the restrictions on tribal jurisdiction, the Court has focused heavily on the idea of consent. See supra note 227. It would be odd, to say the least, to allow tribal courts to assert jurisdiction based on the at best highly indirect consent of being a tribe member or entering into a contract with the tribe (as Montana permits), but to deny tribal jurisdiction where a plaintiff has deliberately opted for the tribal forum by filing suit there.
court may employ unfamiliar procedures. These are characteristically the
concerns of personal jurisdiction doctrine. The Court’s focus on them thus
suggests that tribal-court jurisdiction rules would fit far more naturally in
the personal jurisdiction category.

2. Recharacterizing Existing Doctrine: The Practicalities

Suppose, then, that lower courts were to disregard or limit the reach
of the Court’s suggestion in *Hicks* that tribal court jurisdiction is a question
of subject matter.288 Instead, courts could simply say that when the
propriety of tribal court jurisdiction over a nonmember is at issue, the
question is whether the tribal court has “personal jurisdiction” over the
nonmember.

As an initial observation, it is worth noting that such a
recharacterization does not necessarily require a major change in current
document regarding tribal courts.289 Personal jurisdiction doctrine is a fluid
set of principles that can encompass both categorical rules (such as the rule
permitting state courts to exercise personal jurisdiction over defendants
domiciled there, even when the dispute at issue is unconnected to the

288 See *Hicks*, 533 U.S. at 367 n.8.
289 This is not to say that major change is not desirable. See infra Part IIIB. It is
simply to make the point that there is room to recharacterize the doctrine even within the
Court’s current framework.
state and flexible tests, such as whether the defendant has purposefully availed herself of the forum. In other contexts, commentators have noted the flexibility of the notion of personal jurisdiction for describing otherwise hard-to-categorize limits on judicial powers; for example, both a prominent scholar and a Supreme Court justice have suggested that state sovereign immunity might be seen as a limit on personal jurisdiction. There is no necessary incompatibility, therefore, between seeing tribal courts’ power over nonmembers as a matter of personal jurisdiction while nonetheless recognizing that some particularized rules of jurisdiction apply in Indian country and that tribal courts may, in general, have less power over nonmembers than they do over members.

With this qualification in mind, the “personal jurisdiction” framing appears far more compatible with current doctrine than the notion of “subject matter jurisdiction.” Personal jurisdiction is normally conceived of as jurisdiction over a specific individual, and generally focuses on an inquiry that encompasses both the ways in which the defendant’s activities make jurisdiction fair and (to a lesser extent) the forum’s interest in

290 See Goodyear, 131 S.Ct. at 2853-54.
291 See Burger King, 471 U.S. at 474.
294 The minimum contacts standard is sometimes seen as an implicit bargain under which the defendant subjects himself to jurisdiction in return for reaping some benefits from his contacts with the forum. See, e.g., Burger King, 471 U.S. at 474. Although
adjudicating the dispute. The same can be said to be true of tribal-court jurisdiction. That is, the tribal jurisdiction inquiry focuses on whether the court has jurisdiction over a specific person, not a particular subject. To be sure, the nature of the dispute — including the land on which it occurs — may have some relevance to the inquiry, but the question of the defendant’s identity is far more fundamental.

Further, the Montana exceptions — consensual relationships and threats to tribal welfare — mirror the focus on the minimum contacts “bargain” and on forum interests in personal jurisdiction. Although the Court has strongly resisted what seem to be the particularly natural comparisons between the “consensual relationships” exception and personal jurisdiction doctrine, the Court has not articulated a clear justification for this view. To be sure, the Court has generally suggested that a suit must

This concern surfaces explicitly only in the reasonableness test applied in Asahi, which permits consideration of “the interests of the forum State.” See Asahi, 480 U.S. at 113. More broadly, however, the minimum contacts test can be seen as permitting states a role in regulating the conduct of people who have reaped some benefits from their association with the state. See Burger King, 471 U.S. at 474.

Notably, one commentator has also suggested that another field — jurisdiction over divorces — that has historically been conceived in idiosyncratic jurisdictional terms should be recharacterized in terms of mainstream minimum contacts principles. See Courtney G. Joslin, Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts, 91 B.U. L. Rev. 1669 (2012).

See, e.g., Hicks, 533 U.S. at 371 (suggesting that tribal jurisdiction is central to tribal self-governance only when it is exercised over members rather than “outsiders”).

See Smith, 434 F.3d at 1138 (noting similarities).

See Strate, 520 U.S. at 457 (finding defendants’ contract with tribe to be irrelevant to consensual relationships exception in a non-contractual case).
arise directly out of a contract or sale for the “consensual relationships” exception to apply,\textsuperscript{300} while personal jurisdiction in the state context can be conferred by the implicit bargain inherent in purposeful availment of a state’s resources.\textsuperscript{301} The fact that the tribal test is a more stringent one, however – requiring an explicit rather than implicit bargain – does not mean that it is inherently different in nature from the theory underlying personal jurisdiction. On the contrary, both tests rest on the intuition that it is fairer to exercise jurisdiction over a defendant who has deliberately associated herself with the forum and reaped benefits from doing so.

Finally, statutory authority arguably exists for viewing tribal court jurisdiction as personal jurisdiction – in sharp contrast to the Court’s current doctrine governing tribal adjudicative powers. The Oliphant/Montana restrictions are notoriously made up of nearly thin air, grounded in little more than the Supreme Court’s sense of a “commonly shared presumption of Congress, the Executive Branch, and lower federal courts” that tribes lacked jurisdiction over nonmembers in most circumstances.\textsuperscript{302} The Court has been abundantly criticized for ignoring the settled understanding of tribal sovereignty\textsuperscript{303} in formulating a set of principles that are at once ad hoc (that, is lacking grounding in positive law) while at the same time sweeping

\begin{footnotesize}
\begin{enumerate}
\item See Strate, 520 U.S. at 457 (listing types of activities that fit the exception).
\item See Goodyear, 131 S.Ct. at 2854 (explaining the concept of purposeful availment and describing it as the “centerpiece” of modern personal jurisdiction doctrine).
\item See Oliphant, 435 U.S. at 206.
\item See Frickey, Common Law, supra note 135, at 8-12.
\end{enumerate}
\end{footnotesize}
in their implications. By contrast, tribes are – through the Indian Civil Rights Act (ICRA), which applies most of the protections of the Bill of Rights and Fourteenth Amendment to Tribes – explicitly prohibited from “depriv[ing] any person of liberty or property without due process of law.”\(^\text{304}\) Conceiving of limits on tribal jurisdiction in terms of minimum contacts and due process is, then, consistent with ICRA’s mandate.

ICRA is normally seen as being of limited relevance in civil cases because the Supreme Court has held that it does not create a private right of action.\(^\text{305}\) Thus, tribes cannot be sued for violating its provisions, and the only mechanism of enforcement in federal court is through habeas proceedings in a criminal case.\(^\text{306}\) But *Iowa Mutual* and *National Farmers* already provide that federal courts may exercise jurisdiction, following exhaustion of tribal remedies, to determine the propriety of tribal court jurisdiction over nonmembers.\(^\text{307}\) Given that such a review mechanism exists, there seems little reason why the due process provisions in ICRA should not be relevant to the jurisdictional question, and provide some authority for seeing that question in the familiar terms of *International*
Indeed, many tribal courts, recognizing the obligations that ICRA imposes on them, have historically analyzed the existence of personal jurisdiction through the lens of minimum contacts and due process. Of course, few would want to undermine the result of *Santa Clara Pueblo*, which held that ICRA did not create a private cause of action in federal court. Nonetheless, some reliance on ICRA as a source of law (in cases that, in any event, are already in federal court for another reason) could provide needed grounding and legitimacy to the often-rudderless doctrine of tribal jurisdiction.

3. The Consequences of Recharacterization

One might object that simply renaming the Court’s doctrines does nothing for the underlying substance of the law. Yet the issue of how tribal jurisdiction is framed is not merely a matter of semantics. Courts take jurisdictional categories seriously, particularly when the issue is one of

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308 Commentators have suggested that the due process provisions of ICRA require tribal courts to conduct a personal jurisdiction analysis using a minimum contacts framework. See David A. Castleman, *Personal Jurisdiction in Tribal Courts*, 154 U. PA. L. REV. 1253, 1255 (2006). Further, tribal courts show “a willingness to apply federal due process precedent in interpreting their own jurisdictional statutes.” See *id.* While Castleman argues that tribal courts must satisfy personal jurisdiction requirements in addition to the *Montana* rules, see *id.* at 1261, I argue that personal jurisdiction concepts should replace the *Montana* standards where the scope of tribal court jurisdiction is concerned.

309 See *id.; Newton, supra* note 261, at 322-25.

310 See *Santa Clara Pueblo*, 436 U.S. at 61.

311 The Court, that is, held in *National Farmers* that federal courts may review the propriety of tribal courts’ exercise of jurisdiction following exhaustion of tribal remedies. See 471 U.S. at 852.
subject matter jurisdiction. A large literature has described and critiqued the Court’s use of jurisdictional categories in other situations.\textsuperscript{312} In other contexts, commenters have argued that excessive focus on jurisdictional rhetoric can inhibit our understanding of doctrine and obscure what courts actually do. Scott Dodson, for example, has aimed to “shake up” the rigid treatment of subject matter jurisdiction generally by questioning whether it makes sense to think of federal subject-matter jurisdiction as “something separate, special, and unique.”\textsuperscript{313} Rigid use of jurisdictional categories in inappropriate situations inhibits judicial flexibility and sound analysis even outside the tribal context.

Further, it is difficult to put a doctrine in a jurisdictional category – particularly one as loaded as “subject matter jurisdiction” – without acquiring all the baggage attached to that category. Thus, courts may have started by thinking of tribal court jurisdiction as subject matter jurisdiction as a sort of default after Williams, which suggested that the issue of jurisdiction in Indian country might challenge traditional categories.\textsuperscript{314} Yet once the label is attached, a danger exists that courts will attach to tribal court jurisdiction all the incidents of limitations on federal subject matter jurisdiction.


\textsuperscript{313}See Dodson, supra note 312, at 1440.

\textsuperscript{314}See supra note 124.
jurisdiction. Consider, for example, the dissenters in *Smith*, who argued that, because limits on subject matter jurisdiction are generally nonwaivable, a nonmember plaintiff could not subject himself to tribal court jurisdiction even as to a claim he had voluntarily filed there.\textsuperscript{315}

Moreover, if calling tribal court jurisdiction “subject matter jurisdiction” is misleading, so is calling it simply by the name “judicial jurisdiction” or “adjudicative jurisdiction.” First of all, judicial jurisdiction in other contexts essentially means personal jurisdiction.\textsuperscript{316} Yet the Court has repeatedly characterized limits on tribal court jurisdiction as something other than personal jurisdiction – as having to do with the fundamental nature of tribal sovereignty and authority over nonmembers\textsuperscript{317} – while at the same time it has resisted comparisons between personal jurisdiction and tribal court jurisdiction. Thus, tribal court jurisdiction has remained freestanding, a doctrine that is both misleadingly termed and impossible to integrate into the more general body of law that governs the power of courts.

This is problematic, among other reasons, because it fails to give guidance to courts in cases like *Smith* who must grapple with the complex

\textsuperscript{315} See *supra* note 287.

\textsuperscript{316} See *supra* note 46. Though subject matter jurisdiction may also fall under the heading of judicial jurisdiction, subject matter jurisdiction is normally a limit imposed by the sovereign, not an externally imposed limit as the *Montana* restrictions are.

\textsuperscript{317} See, e.g., *Hicks*, 533 U.S. at 367 n.8 (“But *Strate’s* limitation on jurisdiction over nonmembers pertains to subject-matter, rather than merely personal, jurisdiction, since it turns upon whether the actions at issue in the litigation are regulable by the tribe.”)
realities of modern tribal litigation – cases that may, as Smith illustrates, involve several litigants with varying degrees of connection to the tribe and multiple claims in which parties may appear in different postures.\(^{318}\) Moreover, the Court’s approach creates substantial uncertainty because – even as it displays a sweeping hostility to tribal sovereignty in general\(^{319}\) – it mandates an examination that is stubbornly case-by-case,\(^ {320}\) depending on a multiplicity of relevant factors (land status, membership status, degree of association with the tribe, posture as defendant or plaintiff, and so forth) that might potentially appear in innumerable combinations.

Finally, the Court’s approach in cases like *Hicks* ignores the practical connectedness of tribal members and nonmembers, and of tribal courts with other courts. For all the Court’s suggestions that tribal courts should retreat to matters of “internal relations,”\(^ {321}\) the checkerboard nature of tribal land\(^ {322}\) and the importance the Court has placed on land and formal

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\(^{318}\) See *supra* note 220 and accompanying text.

\(^{319}\) See *Hicks*, 533 U.S. at 358-59 (suggesting the existence of a “general proposition” that “the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe”) (citation and quotation marks omitted).

\(^{320}\) See, e.g., *id.* at 355 (describing the case in narrow terms as “present[ing] the question whether a tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation”). See also *supra* note 192 (noting that *Hicks* can be easily limited to its particular facts).

\(^{321}\) See *Hicks*, 533 U.S. at 359 (“[T]he 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.”) (Citation and quotation marks omitted.)

\(^{322}\) See Florey, *Territoriality, supra* note 8, at 608 (discussing checkerboard status of reservations).
membership status\textsuperscript{323} practically guarantee the existence of multijurisdictional disputes. In a world where tribal jurisdiction was treated like state jurisdiction, a hypothetical dispute between, say, two neighbors over a trespass claim could be easily handled by the local tribal court. But applying the \textit{Montana} standard to the case adds a layer of jurisdictional complexity more typical of a complicated multistate mass tort case, forcing the parties and court to examine the membership status of the parties, the ownership status of the land on which the claim arose, and the issue of who sued whom first before it is clear where the court may be filed\textsuperscript{324} (and even then, there may not be a single court that has power to hear all claims).\textsuperscript{325} Thus, even as \textit{Strate} and \textit{Hicks} suggest that nontribal matters can be carved out with clinical precision from the issues that tribal courts are given permission to address, the \textit{Montana} standard – by narrowing the scope of permissible tribal concern – makes that division impossible. Further, as previously noted, conceptualizing tribal courts as separate ignores the ways in which state and tribal courts are related in practice – by, for example, tribal court reliance on state common law, and through state courts’ enforcement of tribal court orders.

\textsuperscript{323} See \textit{id.} at 603-13 (discussing historical role of land ownership and membership in delineating the bounds of tribal sovereignty).

\textsuperscript{324} See \textit{supra} note 220 and accompanying text.

\textsuperscript{325} \textit{Williams}, that is, precludes suits by nonmembers against members from being heard in state court, while \textit{Strate} precludes most suits by members against nonmembers from being heard in tribal court; a case involving both may have to be split. See Florey, \textit{Tribal Law, supra} note 34, at 1631.
In short, federal Indian law doctrine treats tribal courts as separate, when they are in fact inevitably and inextricably connected to nontribal courts and disputes. Calling tribal court jurisdiction “personal jurisdiction” could help to change that. Indeed, by making the doctrine applicable to tribal courts clearer and comprehensible, this reframing could facilitate greater cooperation between tribal and nontribal courts.

B. The Broader Possibilities of Reframing: Enhancing Tribal Court Power While Respecting Nonmember Rights

In the preceding section, I have endeavored to make the case that, even if the Court’s attitudes toward tribal jurisdiction continue to be as grudging as they have been in recent years, it is more logical, sensible, and transparent for such jurisdiction to be denominated “personal jurisdiction.” In other words, the holdings of Strate and Hicks could be more sensibly recast in different terms, explaining that, if tribal courts cannot assert authority over nonmember defendants, it is because they lack personal jurisdiction over them. Such a change would promote greater clarity in a notoriously muddled area of law, and remove the distortions in logic that thinking of tribal court jurisdiction as “subject matter jurisdiction” has introduced. It would also promote transparency, allowing a readier
understanding of the relative powers of tribal courts as compared to the courts of other sovereigns.

More fundamentally, however, I wish to make a more sweeping argument: that the restrictions on tribal court jurisdiction the Supreme Court has imposed are overbroad and irrational, and that the Court should do away with the Montana categories and consider instead whether the usual elements of personal jurisdiction – targeted contacts, foreseeability of suit, purposeful availment, reasonableness, and so forth – are present.

In some ways this may require a minimal amount of adaptation of these principles to the tribal context. Because, for example, the relationship between tribal power and territory is uncertain, passing through a reservation or even living on-reservation on private land might not have precisely the same significance that entering a state does. At the same time, much of personal jurisdiction doctrine is easily transferrable to the tribal context. For example, nonmember activities that target the tribe or seek to benefit from a tribal connection – whether travel to a tribal resort, entering into a contract with the tribe, or engaging in a fraudulent scheme directed at tribe members – easily qualify as relevant actions that could be considered in a classic minimum contacts analysis. As Sarah Krakoff has noted, there would have been little difficulty in finding, under a minimum contacts

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326 See Florey, Territoriality, supra note 8, at 602 (noting that “crossing a tribal border, particularly for a nonmember, is only rarely a legally significant act”).
framework, that the tribal court in *Strate* had personal jurisdiction over the defendants, given their extensive and deliberate dealings with the tribe and their familiarity with the tribal forum.327

Such an approach might help to resolve the tension between, on the one hand, the severe deficiencies of the Court’s current approach and, on the other, the Court’s concern about ensuring that nonmembers have appropriate procedural protections. On the one hand, no shortage of scholarship exists criticizing the *Oliphant/Montana/Strate* line of cases. Commentators have argued, among other trenchant criticisms, that this case law upends time-honored Indian law principles,328 ignores the federal government’s wishes,329 relies on outdated or ill-informed misconceptions about tribal governments,330 and ignores tribes’ legitimate needs to assert authority over their territory and the people who live there.331 At the same time – and specifically in the area of tribal judicial powers – reasonable concerns about fairness, bias, and unfair surprise exist when nonmembers, particularly those only marginally connected with the tribe, are haled into tribal courts as defendants.332

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327 See Krakoff, supra note 185.
328 See supra note 138.
329 See Frickey, *Exceptionalism*, supra note 10, at 463-64 (describing disconnect between the Court and Congress).
330 See Williams, supra note 30.
331 See Florey, *Territoriality*, supra note 8, at 597.
332 These concerns can easily be exaggerated; empirical studies suggest that tribal courts have generally dealt fairly with nonmember defendants. See generally Berger, *Justice*, supra note 32; Newton, supra note 261. Nonetheless, it is reasonable to conclude
Ultimately, harmonizing principles of tribal-court jurisdiction with more general principles of personal jurisdiction can and should go hand in hand with substantive expansion of tribal jurisdiction in a way that addresses the concerns of both the Court and its critics. Reframing the issues in personal jurisdiction terms, that is, has potential to serve the goals of permitting tribal courts to exercise reasonable authority over nonmembers, while at the same time offering nonmembers reasonable and predictable protections from being unexpectedly haled into tribal court. This is especially true because particular characteristics of personal jurisdiction doctrine make it particularly suited to helping courts navigate the disputes that tend to arise involving Indian country. It is also true because the Court’s muddled jurisprudence in this area could benefit from the guidance that more generally applicable doctrinal principles could provide. The following sections explore these points more fully.

1. The Particular Suitability of Personal Jurisdiction Doctrine to the Facts of Indian Country

The Montana/Strate approach, with its rigid focus on member or nonmember status, is severely out of touch with the realities of Indian country. The Court’s attempt to draw a bright-line distinction between

that at least the potential for unfairness exists in any situation when a defendant is haled into a distant or unfamiliar court. See Asahi, 480 U.S. at 115-16 (discussing similar concerns as applied to international defendants who must appear in state court).
members and nonmembers of tribes in civil adjudication ignores the reality that connection with a tribe is better conceived as falling along a spectrum. At one end might be, for example, a person who is a member of the tribe, lives on allotted land that has been passed down through her family for decades, participates actively in tribal government, and works on the reservation. At the other end might be a non-Indian driver who, while on a cross-country trip, takes a state highway that happens to pass through a reservation and accidentally strikes another car. In between are many other possibilities: the non-Indian contractor of Strate who is on the reservation to fulfill contractual obligations to the tribe; the litigant of Smith who, while not a member of the tribe in question, belongs to another tribe, attends a tribal college, and files a claim in tribal court; the tour bus operator who makes a profit by taking nonmembers to a tribal hotel and visitors center; the nonmember who lives on the reservation and has children who have joined the tribe; and so forth. Drawing a binary distinction between member and nonmember – and, further, making the entire possibility of tribal jurisdiction turn on it – slights the complexities of tribal affiliation. The multiple degrees of voluntary affiliation with tribes that are so characteristic of modern Indian country call out for a more nuanced

333 See Strate, 520 U.S. at 443.
334 See Smith, 434 F.3d at 1129.
335 See EXC, Inc., 2012 WL 3264526.
336 See Strate, 520 U.S. at 443.
understanding of tribal connection.

Moreover, the extreme diversity that characterizes the quality and quantity of the contacts that nonmembers have with tribes pervades other aspects of tribal existence. Tribal courts, for example, differ in the procedures they employ, the identity of their decisionmakers, the degree of appellate review they provide, and how geographically convenient their location is for nonmembers. Any of these factors might well affect the reasonableness of requiring nonmembers to defend lawsuits there.

The sort of member-nonmember interactions that result in tribal litigation typically involve, then, a great deal of nuance and variation in their underlying facts. And personal jurisdiction doctrine is far better adapted than the rigid *Montana* framework for dealing with such differences. Indeed, modern minimum contacts doctrine evolved largely as a response to the inadequacies of the formalistic personal jurisdiction regime that preceded it, the deficiencies of which arguably bear some resemblance to the limitations of *Montana*. In contrast to *Montana*, modern personal jurisdiction doctrine is flexible and adaptable, permitting courts to balance a variety of facts rather than to focus on such ultimately

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337 See Minzner, *supra* note 268, at 104-09 (describing vast differences in procedures employed by tribal courts).

338 See, e.g., Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 54 (1990) (noting that “*International Shoe* has been widely heralded as the great ‘liberator’ of personal jurisdiction from the formalisms of *Pennoyer*”).
meaningless questions as whether a highway on a state right-of-way through a reservation qualifies as state or tribal land for jurisdictional purposes. 339

Further, to the extent the Court’s primary concern is fairness to nonmembers, personal jurisdiction doctrine would be better able than current doctrine to weigh that issue explicitly, ensuring that protections for nonmembers are neither underinclusive nor overbroad. The Asahi reasonableness factors in particular appear readily adaptable to the diversity that prevails in the tribal context. 340 It may be perfectly reasonable, for example, to require a non-Navajo to defend a suit in the Navajo judicial system, which offers appellate review, published opinions, and an excellent track record of fairness to nonmembers, 341 but perhaps unreasonable to subject a non-member to suit where judicial procedures are informal and derive from tribal custom. 342

Finally, a personal jurisdiction framework could lead to more precise targeting of the Court’s concerns about tribal power. The Court’s apparent rationale for the more extensive jurisdiction tribal courts enjoy over members as opposed to nonmembers appears to rest on the idea that

339 See Strate, 520 U.S. at 454.
340 See supra note 72 and accompanying text.
341 See Minzner, supra note 268, at 106 (describing praise for Navajo courts); Berger, Justice, supra note 32, at 1074 (noting that nonmembers won slightly more than half the time in suits in Navajo courts).
342 See Minzner, supra note 268, at 108 (noting that “[a] non-adversarial, village-based approach to proving custom would be a difficult system for a non-tribal member to litigate in”).
members have in some way consented to tribal authority. Yet this is an odd way to look at litigation. That is, membership in a polity – the sort of “consent” the Court has focused on in the tribal context through the premium the case law places on tribal membership – is wholly different from the more implicit sorts of acquiescence that are relevant in determining whether it is fair to make someone a defendant. Reflecting this, personal jurisdiction focuses not on the sort of political participation the Court found key in Montana but on concepts specifically relevant to lawsuits, such as predictability, reasonable expectations, and having obtained benefits from the forum in exchange for which some accountability to suit is reasonable. Personal jurisdiction’s focus on affiliation, availment, and causing effects are, indeed, particularly suited to the tribal context, where the relevance of territory may be uncertain but where certain conduct may clearly manifest the defendant’s efforts to derive benefits from association with the tribe or to exert influence on the tribe’s activities. Quite simply, personal jurisdiction doctrine manifests a serious consideration of what sort of behavior makes it reasonable to subject

343 See supra note 230.
344 See, e.g., Burger King, 471 U.S. at 474 (suggesting that a defendant who has “avail[ed] itself of the privilege of conducting activities within the forum State” may fairly be held to account for its activities there in the forum’s courts).
345 See supra Part I.B.
346 The significance of tribal territorial boundaries, that is, is not clearly defined. See Florey, Territoriality, supra note 8, at 602. Because personal jurisdiction doctrine is not strictly territorial, however – for example, allowing personal jurisdiction to be asserted over someone who has benefited from a connection with a state without traveling there – it would appear to be readily adaptable to the tribal context.
someone to suit in a particular court – in stark contrast to the *Montana* framework, which does not address the issue at all.

2. Drawing From Experience: How Personal Jurisdiction Doctrine Can Promote Better Results

   A second benefit of reliance on personal jurisdiction doctrine could simply be the availability of a source of more fleshed-out, time-tested law than the *Montana* line of cases – with their recent provenance and lack of grounding in positive law – can provide. On the one hand, the varied fact patterns that arise in Indian country suggest that any tribal jurisdiction doctrine should be a dynamic and flexible one. Sarah Krakoff has argued that tribal jurisdiction doctrine “is still unfolding, and because it is common law, in addition to adhering to precedent and some set of coherent meta-principles, it should make sense on the ground.” In other words, situations like *Smith* are bound to arise that do not clearly fit the *Montana* mold, and judges should have some flexibility to fashion the law at its margins. Personal jurisdiction doctrine permits this flexibility.

   At the same time, greater integration of tribal civil jurisdiction doctrine with personal jurisdiction doctrine holds out the hope of offering experience and guidance from another area of law that is designed to deal

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with interjurisdictional conflicts. The concerns of Strate, Hicks, and the lower court cases they have engendered—unfair surprise to defendants,\textsuperscript{348} “hometown” biases,\textsuperscript{349} the relative competencies of different courts to address particular legal issues,\textsuperscript{350} procedural differences among forums,\textsuperscript{351} and so forth—are universal issues when people from different jurisdictions meet in litigation, whether in Indian country or elsewhere. Notably, while some tribal courts may be different from state courts, some are quite similar\textsuperscript{352}—perhaps even, in some cases, more similar to the typical state court than courts of different states are to each other. The enormous variety within the state court system should not be understated. As Justice Breyer noted in his McIntyre concurrence, for example, plaintiffs’ win rates in various U.S. jurisdictions range from 17.9\% to 69.1\%.\textsuperscript{353} Likewise, states vary greatly in both the procedural and substantive rules they apply.\textsuperscript{354}

Some of the same concerns that the Court has had about tribal court bias also pervade the state context; commentators have, for example, voiced concerns that elected state judges may “succumb to the pressure to decide

\begin{itemize}
\item \textsuperscript{348} See Asahi, 480 U.S. at 114 (noting similar concerns in the international context).
\item \textsuperscript{349} See Frickey, \textit{Common Law}, supra note 135, at 74 (noting similarities between scenario in \textit{Strate} and fears that out-of-state defendants will be “hometowned” in state court).
\item \textsuperscript{350} See Asahi, 480 U.S. at 114.
\item \textsuperscript{351} See id.
\item \textsuperscript{352} See Minzner, supra note 268, at 106 (describing features of Navajo courts).
\item \textsuperscript{353} See McIntyre, 131 S.Ct. at 2794 (Breyer, J., concurring).
\end{itemize}
close cases as the majority of the electorate would prefer, rather than as the law requires.” Nonetheless, personal jurisdiction doctrine has for decades done at least a serviceable job of helping defendants and potential defendants navigate these differences. There is no reason why personal jurisdiction principles – including the Asahi reasonableness factors, which display understanding for the plight of a foreign actor caught in an unfamiliar and far-off legal system – cannot encompass similar diversity in the tribal context.

The Supreme Court’s treatment of Indian country continues to attract severe criticism and continues to be in tension with the practical needs of tribes for greater authority over their territory, with the policies of the other branches, and with the real-life situations that federal courts confront in the tribal context. In a recent paper, Matthew L.M. Fletcher highlights the no-win situation tribes face vis-à-vis nonmembers, such that nonmember conduct “is some of the least governed activity in the United States,” and calls for unconventional solutions, including resistance on the part of tribal courts to “the federal judiciary’s [efforts] to determine

356 See Florey, Territoriality, supra note 8, at 596.
357 Congress has expanded tribal criminal jurisdiction significantly twice in recent years, through the so-called Duro fix (25 U.S.C. § 1301), clarifying Congress’s understanding that tribal criminal jurisdiction extended to nonmember Indians, and the 2010 Tribal Law and Order Act, which both extended tribal criminal powers and provided additional federal support for tribal justice systems.
358 See supra Part II.B.4.
359 See Fletcher, Resisting, supra note 19, at 1002.
tribal court jurisdiction, a step which might include tribal court efforts to assert civil jurisdiction over nonmembers, perhaps even in the face of a federal order to halt.”  

Fletcher’s prescription reflects a genuine sense of crisis on the part of tribal authorities, who have seemingly an ever-diminishing toolbox for addressing misconduct on the part of nonmembers. A reliance on personal jurisdiction principles both by tribal courts and by federal courts as an alternative to (or reimagination of) *Montana* and *Strate* bears the potential both to permit tribal courts more authority over disputes that genuinely affect the tribe and to facilitate communication between tribal and nontribal courts, perhaps avoiding the need for the sort of crisis of legitimacy Fletcher suggests otherwise may be destined to occur.

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360 Id. at 1004.
361 See supra notes 20-24 (describing problems of lawless nonmember conduct on reservations).
362 As Fletcher notes, tribal codes assert jurisdiction over nonmembers on a variety of bases, and while tribal codes frequently reject or ignore *Montana*, many include clauses “noting that the tribe will not go further than ‘federal law’ proscribes.” See Fletcher, *Resisting*, supra note 19, at 1004. This suggests some possibility that tribes might see personal jurisdiction doctrine as having greater legitimacy than *Montana*.
363 It is important to note that the issue of what substantive standard tribal courts should apply to determine their own jurisdiction is separate from the question of whether and to what extent federal courts should have a role in reviewing the exercise of tribal jurisdiction. Professor Fletcher argues compellingly that the Supreme Court should “reconsider its own precedents and defer to tribal court judgments and processes” on the jurisdiction issue to a greater extent. See Fletcher, *Resisting*, supra note 19, at 1004. Reconceptualizing tribal court jurisdiction as personal jurisdiction by no means incompatible with such a move toward greater deference to tribal courts; in fact, it might help facilitate it. Fletcher calls for the development of a “truly tribal jurisdictional test.” See id. at 1003. While tribes could of course incorporate their own preferences and values in formulating jurisdictional standards – just as states do in passing long-arm statutes – accepted U.S. and international principles of personal jurisdiction could also play a role in the development of such standards.
Finally, if there is to be progress in federal courts’ recognition of tribal sovereignty as a whole, the powers of tribal courts are a logical and important starting point. *Williams v. Lee* rested in part on the central role of tribal courts to tribal autonomy, and that connection has, if anything, only grown over time. Tribal courts represent both an expression of tribal values and the site of tribes’ interface with the nontribal community.\(^{364}\) Tribal courts are also a practical necessity for resolving disputes,\(^{365}\) and their unavailability has many undesirable consequences. The absence of a tribal forum may force tribe members (and nonmembers residing on the reservation) to litigate their disputes in an inconvenient forum; it may make cases like *Smith* that involve complex configurations of parties impossible to resolve efficiently; and (most important) it may mean that much negligence, contract-breaching, fraud, and other legal harms caused by nonmembers simply go unaddressed.\(^{366}\) The expansion of tribal court authority within the bounds of personal jurisdiction doctrine has the potential to further tribe members’ legitimate desires to have disputes adjudicated in a familiar and convenient forum.\(^{367}\) At the same time,

\(^{364}\) See Berger, *Justice, supra* note 32, at 1107 (discussing importance of tribal courts to tribes’ business dealings with the nontribal community) and 1109 (discussing ways in which tribal courts are “integral to the internal legitimacy of tribal legal systems”).

\(^{365}\) See id. at 1105 (noting that tribal courts are needed to “address the everyday legal and social problems of concern to Indian people”).

\(^{366}\) See Fletcher, *Resisting, supra* note 19, at 1002-03 (arguing that, as a result of a lack of tribal authority, “nonmembers are more likely to engage in destructive and exploitative behavior in Indian country”).

\(^{367}\) See Berger, *Justice, supra* note 32, at 1107-09 (discussing important internal and
personal jurisdiction doctrine provides protections for defendants that are both time-tested and familiar, and that further allow for the degree of nuance that is appropriate to the highly fact-specific situations that arise in Indian country. Thus, the expansion of tribal authority under the rubric of personal jurisdiction doctrine has immense potential to allow for the reasonable assertion of tribal courts’ authority in ways that are fair and predictable to nonmembers.

Finally, there is some degree of sleight of hand in the Court’s current jurisprudence. Borrowing concepts such as legislative and judicial jurisdiction from the international context creates the false impression that the Supreme Court is treating tribes legitimately as sovereigns and drawing from some established source of law in delineating the limits on their powers. In fact, however, the Supreme Court has more or less invented its tribal jurisdiction doctrine from scratch. It would further a productive conversation about what kinds of sovereigns tribes are, and what sort of role they should have on the American judicial landscape, to cast their jurisdiction in terms that are both familiar and transparent. While making such a change would certainly not in itself undo the years of hostility the

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368 There are other ways in which jurisdictional clarity could facilitate congressional action – by, for example, allowing devices that arose in nontribal contexts to be more easily adapted to fit tribes. Congress could, for example, authorize tribal courts to hear federal claims, while creating a removal procedure akin analogous to the one that permits removal from state to federal court in certain circumstances.
Court has displayed toward tribal sovereignty, it would be an important starting point for a reimagining of tribal courts’ nature and role.

CONCLUSION

In explaining the nature of tribal court jurisdiction, the Supreme Court has for the most part ignored more broadly applicable jurisdictional principles. Yet if one strips away the misleading terminology the Court has imposed on tribal adjudication, the jurisdiction that tribal courts exercise over defendants is best understood as a form of personal jurisdiction. Making use of concepts such as purposeful availment and reasonableness in the substantive analysis of tribal courts’ jurisdictional reach would provide a more coherent framework for thinking about the powers exercised by tribal courts. Further, such a framework could serve the simultaneous interests of protecting the rights of nonmember defendants, while at the same time permitting tribes reasonable authority to adjudicate cases that affect them. It is time for the Court to stop regarding tribal courts’ jurisdiction as unique, and instead use terms and concepts that place tribal courts in a wider domestic and international judicial context. Doing so would be a first step in allowing tribes a reasonable say over the conduct of nonmembers in their territory.