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## Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction

Katherine Florey

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## Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction

Katherine Florey\*

*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 that, for many tribes, 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. Tribal uniqueness has thus come to include tribes'*

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c. Confusion in the Opinion: Conflation of Choice of Law and Procedural Burdens .....	1530
C. <i>Hicks</i> and the Subject Matter Jurisdiction Problem .....	1532
D. Tribal Jurisdiction Doctrine on the Ground: <i>Smith</i> and <i>Water     Wheel</i> .....	1536
1. <i>Smith v. Kootenai College</i> : The Ninth Circuit’s Expansion of the Consensual Relationships Exception .....	1536
2. <i>Water Wheel v. LaRance</i> : The First Steps Toward a Personal Jurisdiction Framework .....	1540
III. Reintegrating Tribal Courts into the U.S. and International Fold: The Possibilities of Personal Jurisdiction Doctrine .....	1542
A. Tribal Court Jurisdiction as Personal Jurisdiction .....	1543
1. Treating Tribal Courts as Courts: Why the Equation of Tribal Regulatory and Adjudicative Authority Fails .....	1543
2. Recharacterizing Existing Doctrine: The Practicalities .....	1549
3. The Case for Recharacterization .....	1553
B. The Broader Possibilities of Reframing: Enhancing Tribal Court Power While Respecting Nonmember Rights .....	1555
1. The Particular Suitability of Personal Jurisdiction Doctrine to the Facts of Indian Country .....	1557
2. Drawing from Experience: How Personal Jurisdiction Doctrine Can Promote Better Results .....	1560
Conclusion .....	1564

## INTRODUCTION

For decades, if not centuries,<sup>1</sup> 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.”<sup>2</sup> Thus, tribes are “unique aggregations”<sup>3</sup>

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1. The vogue for referring to tribes as “unique” is a relatively recent one. I have found 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 (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, 555. Although early cases did not use the word “unique,” they did frequently emphasize the distinctiveness of tribes’ legal position. Thus, in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)—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 no where else.” *Id.* at 2.

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, *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 112 (2005), and the federal government’s “unique powers to manage and control tribal property,” *United States 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,” *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985), that imposes a “unique obligation” on the federal government, *Morton*, 417 U.S. at 555.

3. *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

occupying a “unique status under our law.”<sup>4</sup> Their sovereignty is “of a unique and limited character,”<sup>5</sup> informed by tribal sovereignty’s “unique historical origins.”<sup>6</sup> More broadly, the “lives and activities” of tribal members are “governed by the BIA [Bureau of Indian Affairs] in a unique fashion.”<sup>7</sup> This should perhaps come as little surprise, given that the BIA is itself an agency “described as ‘*sui generis*.’”<sup>8</sup>

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.<sup>9</sup> 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; for example, courts apply canons that construe statutes and treaties in tribes’ favor where possible.<sup>10</sup> History aside, it would be difficult to argue that tribes do not possess political and structural characteristics that are, at the very least, unfamiliar. Tribes are unconstrained by the Constitution, yet they are severely constrained in the degree to which they can regulate their own territory.<sup>11</sup> They are “domestic dependent nations,” an uneasy hybrid that makes them in some ways more autonomous than states and in other respects less so.<sup>12</sup> An understanding of these differences is necessary to treating tribes fairly and respecting tribal rights.

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4. Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 851 (1985).

5. United States v. Wheeler, 435 U.S. 313, 323 (1978).

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).

7. Morton, 417 U.S. at 554.

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 J. Florey, *Indian Country’s Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595, 603 (2010) (discussing the “unique status of tribal lands”).

9. These historical injustices have been chronicled in various ways. See, e.g., FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, 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) (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, *supra* note 8, at 627–28.

11. See Florey, *supra* note 8, at 597.

12. See Frickey, *supra* note 10, at 437–38. As Frickey explains, “domestic dependent nations” is a slippery and confusing category, but it has come to mean a few things. As he notes, “the Constitution supports viewing tribes as both domestic and sovereign, even if it does not clearly support the idea of dependence.” *Id.* at 438. The Constitution authorizes congressional regulation of commerce

But even 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*,<sup>13</sup> *Strate*,<sup>14</sup> and *Hicks*,<sup>15</sup> tribes have virtually no authority to regulate nonmember conduct or hale nonmembers into tribal court—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.<sup>16</sup> The bus then collided with a sedan containing three Navajo occupants, killing the driver and causing significant injuries to the passengers.<sup>17</sup> Applying *Montana* and *Strate*, the U.S. District Court for the District of Arizona nonetheless found that a Navajo court lacked jurisdiction over negligence claims by the Navajo sedan occupants against the tour bus operators because the defendants were not members of the tribe.<sup>18</sup>

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.<sup>19</sup> 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 twenty times the national average,<sup>20</sup> and crimes by nonmembers against members account for a

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“with foreign nations, and among the several States, and with the Indian Tribes,” thus “recogniz[ing] that tribes are sovereigns distinct from the United States but nonetheless suggest[ing] that they are not foreign nations.” *Id.* (quoting U.S. CONST. art I, § 8). Historically, the federal government also acknowledged the sovereign status of tribes by entering into treaties with them. *See id.* This differentiates tribal sovereignty from state sovereignty, which is more explicitly subordinated to that of the federal government through the Supremacy Clause and the constitutional structure. At the same time, tribes are in some respects far more subject to federal control than states. The Supreme Court has “assum[ed] that Congress had plenary power over Indian affairs, despite no evident basis for it in constitutional text” and more recently has also “injected itself into Indian affairs.” *See id.* at 436. Thus tribes’ sovereignty is real but fragile, immensely important to tribes’ identity but at the same time meaningful in practice only to the extent that Congress and the federal courts choose to recognize it.

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

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

15. *See Nevada v. Hicks*, 533 U.S. 353 (2001).

16. *See EXC, Inc. v. Jensen*, No. CV 10-08197-PCT-JAT, 2012 WL 3264526, at \*1-2 (D. Ariz. Aug. 9, 2012).

17. *Id.* at \*2.

18. *Id.* at \*7-8.

19. *See Matthew L.M. Fletcher, Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973, 1002 (2010).

20. *See Timothy Williams, Washington Steps Back from Policing Indian Lands, Even as Crime Rises*, N.Y. TIMES, Nov. 13, 2012, at A13.

substantial part of these figures.<sup>21</sup> 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”<sup>22</sup> and argues that the absence of civil checks on nonmembers contributes to their disproportionate involvement in “destructive and exploitative behavior in Indian country.”<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup> In keeping with this supposed tribal uniqueness, the Supreme Court has developed the jurisdictional doctrines that govern tribes on an entirely clean slate. In other words, the Court has never seriously examined the field of personal jurisdiction, or related 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 multi-jurisdictional 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.<sup>27</sup> For example, the Court speaks of “legislative,” “adjudicative,”<sup>28</sup> and, in some cases, “subject matter”

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21. See Fletcher, *supra* note 19, at 1002.

22. *Id.*

23. *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 v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (describing tribal court as “unfamiliar” and contrasting it to the “commonplace” claim at issue).

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].” *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1137 (9th Cir. 2006) (en banc).

28. See, e.g., *Strate*, 520 U.S. at 453 (describing tribes’ adjudicative and legislative jurisdictions).

jurisdiction<sup>29</sup> 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 ideas and prejudices about Indian country.<sup>30</sup> Second, the recent case law promotes the idea that tribes are exotic entities harboring different ideas of jurisdiction and justice than do other governments<sup>31</sup>—a notion that is at odds with the realities of modern tribal judiciaries.<sup>32</sup> Third, it isolates tribes, reducing the ways in which they can effectively communicate and collaborate with other governments.<sup>33</sup> 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.<sup>34</sup>

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29. See *Nevada v. Hicks*, 533 U.S. 353, 367 n.8 (2001) (describing tribes' jurisdiction as pertaining to "subject matter").

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.

31. Justice Scalia notoriously articulated this fear during oral argument in *Strate*, suggesting that nonmembers passing through reservations should avoid the possibility of tribal jurisdiction by staying on the "good roads": "Just stay on the good roads; you've got nothing to worry about. Stay on the state highways." Transcript of Oral Argument at \*43, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (No. 95-1872), 1997 WL 10398. Editor's Note: The published transcript of the oral argument does not identify the names of the justices asking the questions. Professor Florey used the audio recording of the oral argument to identify which Justice asked each question.

32. See, e.g., Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1052 (2005) (describing the "good track record" of Navajo courts in adjudicating the claims of nonmembers fairly).

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

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 *Brendale v. Confederated Tribes & Bands of the Yakima Nation*, 492 U.S. 408 (1989), 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. See *id.* at 419–21, 432–33. 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. See Katherine J. Florey, *Choosing Tribal Law: Why State Choice-of-Law Principles Should*



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 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 form of sovereignty. Highlighting tribes' uniqueness 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; this 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.<sup>35</sup> 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,<sup>36</sup> it is in many ways perfectly suited to the complicated fact patterns that disputes arising in Indian country often present.<sup>37</sup>

The Court, however, has notably failed to consider the possible relevance of the personal jurisdiction doctrines applied outside Indian country to the tribal context.<sup>38</sup> Similarly, few Indian law commentators have addressed the issue in depth. While scholars have lamented the Court's failure to view tribal court cases in minimum contacts terms<sup>39</sup> and noted potential similarities between

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*Apply to Disputes with Tribal Contacts*, 55 AM. U. L. REV. 1627, 1635–36 (2006). Thus, tribes are frequently stuck in an unwinnable situation, thrust into multijurisdictional conflicts but lacking the power to resolve them.

35. See, e.g., *Strate*, 520 U.S. 438, 459 (1997) (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, e.g., *Nevada v. Hicks*, 533 U.S. 353, 367 n.8 (2001) (rejecting comparisons between the jurisdiction of tribal courts and personal jurisdiction).

39. See, e.g., Sarah Krakoff, *The Renaissance of Tribal Sovereignty, the Negative Doctrinal Feedback Loop, and the Rise of a New Exceptionalism*, 119 HARV. L. REV. F. 47, 52–53 (2005) [hereinafter *New Exceptionalism*] (lamenting the Supreme Court's failure to apply personal jurisdiction concepts to cases involving tribal jurisdiction over nonmembers); Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV.

personal jurisdiction and cases involving tribes,<sup>40</sup> the existing scholarship, for the most part, has not sought to make 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 integrating 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.<sup>41</sup> 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 the jurisdiction of their courts 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 beginning to do so in ways that may prove fruitful both for legal doctrine and for tribal rights.<sup>42</sup>

This Article proceeds in three parts. The first Part briefly discusses the ordinary 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. It aims both to survey the modern landscape of tribal jurisdiction and to consider the historical development of the doctrine in an effort to understand 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. Modern personal jurisdiction doctrine is well suited to address current issues of tribal courts' jurisdiction. Concepts of purposeful availment and reasonableness, for example, which are key to modern personal jurisdiction cases, could easily be

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1177, 1260 (2001) (arguing that the Supreme Court should have applied personal jurisdiction concepts in *Strate*).

40. See, e.g., Joshua Jay Kanassatega, *The Case for "Expanding" the Abstention Doctrine to Account for the Laws and Policies of the American Indian Tribes*, 47 GONZ. L. REV. 589, 640 (2012) (using *Montana* as an example through which to compare personal jurisdiction and tribal jurisdiction doctrines).

41. See Frickey, *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.

42. See, e.g., *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 805–06 (9th Cir. 2011) (discussed *infra* Part II.D.2).

tailored to suit the complex jurisdictional facts that often characterize current disputes in Indian country. To do so has the potential to promote both increased fairness to nonmembers and a more meaningful conception of tribal sovereignty.

## I.

### ESTABLISHED PRINCIPLES OF CIVIL JURISDICTION

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 “legislative” jurisdiction) and to adjudicate (often called “judicial” jurisdiction).<sup>43</sup> 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,” through various means.<sup>44</sup> Notably, aspects of this power can include applying law both through direct legislation and through court determinations.<sup>45</sup> Jurisdiction to adjudicate, by contrast, is a state’s power “to subject persons or things to the process of its courts or administrative tribunals.”<sup>46</sup> 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.”<sup>47</sup>

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 international law.”<sup>48</sup> 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.<sup>49</sup> The following Sections explore the law governing state

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43. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813–14 (1993) (Scalia, J., dissenting) (noting the existence of this distinction).

44. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 401 (1987).

45. See *id.*

46. *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.” *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.

47. Catherine T. Struve, *How Bad Law Made a Hard Case Easy: Nevada v. Hicks and the Subject Matter Jurisdiction of Tribal Courts*, 5 U. PA. J. CONST. L. 288, 298 (2003).

48. Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT’L & COMP. L. 1, 2 (1987).

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 determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.”). Restrictions on

judicial and prescriptive jurisdiction in more detail and offer some observations as to how these laws relate to tribal jurisdiction.

### *A. State Judicial Jurisdiction*

State and federal courts, especially when considering domestic matters, rarely use the terms “judicial” and “legislative” jurisdiction; 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<sup>50</sup> 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 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.<sup>51</sup> 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.<sup>52</sup> Finally, state legislation may be found unconstitutional under the Dormant Commerce Clause if it seeks to regulate wholly out-of-state events.<sup>53</sup> 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 that also surface in discussions about tribal regulation in Indian country—such as defendant expectations and mediating among competing claims to regulate—it is worth considering them in a bit more depth.

The most powerful and most familiar of these limitations is personal jurisdiction. Everyone is familiar with the basic story of modern personal jurisdiction doctrine’s development: In *Pennoyer v. Neff*, the Supreme Court

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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, 1068 (2009).

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*.

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.”).

52. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (plurality opinion).

53. See *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989).

(applying the Due Process Clause as a limit on in personam jurisdiction for the first time since the Fourteenth Amendment's passage) articulated a highly territorial view of the doctrine.<sup>54</sup> Under this view, 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.<sup>55</sup> 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*.<sup>56</sup> In *International Shoe*, the Court instead articulated a standard that allowed for a forum to hale a defendant into court<sup>57</sup> 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."<sup>58</sup> This standard is generally considered to add to, rather than to supplant, the traditional territorial bases for asserting state power over defendants.<sup>59</sup> In a series of cases,<sup>60</sup> 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.<sup>61</sup> Notably, this principle echoes many of the approved bases for asserting judicial jurisdiction under the international norms described in the Restatement (Third).<sup>62</sup>

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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. 326 U.S. 310, 316 (1945).

57. 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).

58. 326 U.S. at 316.

59. See *Burnham v. Super. Ct.*, 495 U.S. 604, 623 (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.

60. See, e.g., *Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846 (2011); *J. McIntyre Mach. v. Nicastro*, 131 S. Ct. 2780 (2011); *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Calder v. Jones*, 465 U.S. 783 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

61. See, e.g., *Burger King*, 471 U.S. at 473 (noting that the Court's personal jurisdiction cases have "emphasized that parties who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to regulation and sanctions in the other State for the consequences of their activities") (citation and internal quotation marks omitted).

62. 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

While this Article will not discuss the complexities of personal jurisdiction doctrine in detail, 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;<sup>63</sup> defendants with a sustained and continuous presence may be subject to personal jurisdiction even for unrelated causes of action.<sup>64</sup> The former type of jurisdiction is frequently called “specific”; the latter is called “general.”<sup>65</sup> 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 “purposefully avails itself of the privilege of conducting activities within the forum State, thereby invoking the benefits and protections of its laws.”<sup>66</sup> 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.<sup>67</sup> The Court thus looks to intentional and targeted activities in the forum state,<sup>68</sup> not necessarily physical presence there. Indeed, defendants in some cases may be subject to jurisdiction in a state in which they have never set foot.<sup>69</sup> 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 particular state, “it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.”<sup>70</sup>

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

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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.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 421(2)(h)–(j) (1987).

63. 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”).

64. 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”).

65. See *Goodyear*, 131 S. Ct. at 2851 (“Opinions in the wake of the pathmarking *International Shoe* decision have differentiated between general or all-purpose jurisdiction, and specific or case-linked jurisdiction.”).

66. *Burger King*, 471 U.S. at 474–75 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

67. See, e.g., *Calder v. Jones*, 465 U.S. 783, 789 (1984).

68. See *Burger King*, 471 U.S. 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 significant activities” or “create[] continuing obligations” in the forum, which do) (citations and internal quotation marks omitted).

69. 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”).

70. See *id.* at 476.

manufacturer of valve assemblies.<sup>71</sup> 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.<sup>72</sup> The Court, however, rejected personal jurisdiction 8–1<sup>73</sup> on a different ground, formulating clearly for the first time<sup>74</sup> a new test under which, even if minimum contacts were present, a lack of “reasonableness” could defeat personal jurisdiction.<sup>75</sup> In finding 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.<sup>76</sup>

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.<sup>77</sup>

Although *Asahi Metal*’s reasonableness test has sometimes been applied to domestic defendants, it is predominantly used in the international context.<sup>78</sup> Likewise, the most recent personal jurisdiction cases, particularly *J. McIntyre*

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71. 480 U.S. 102 (1987).

72. See *id.* at 116 (Brennan, J., concurring) (discussing split of the Court on the stream-of-commerce issue despite agreement on the reasonableness issue).

73. The relevant part of the opinion was joined by all Justices but Justice Scalia. See *id.* at 105.

74. The Court had first articulated the “reasonableness” factors in passing in *World-Wide Volkswagen Corp. 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.

75. *Asahi Metal*, 480 U.S. at 113–14. 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.” *Id.* at 113 (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.

76. *Id.* at 114.

77. *Id.* at 115–16.

78. See Linda J. Silberman, *Goodyear and Nicastro: Observations from a Transnational and Comparative Perspective*, 63 S.C. L. REV. 591, 594 (2012) (noting that “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”).

*Machinery Ltd. v. Nicastro*,<sup>79</sup> reaffirm the Court's special concern for the rights of foreign actors. In *McIntyre*, Justice Breyer's 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."<sup>80</sup> 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."<sup>81</sup>

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 American legal system, such as the variations in American courts and the tendency of state courts to apply forum law. Part III, *infra*, which discusses how personal jurisdiction doctrine can be adapted to the tribal context, will return to this point.<sup>82</sup>

### B. State Legislative Jurisdiction

The doctrinal framework relating to limits on states' legislative jurisdiction is less 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 state court (or a federal court applying state law) determines that a defendant is subject to its personal jurisdiction, there still 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.<sup>83</sup> In

79. 131 S. Ct. 2780 (2011). 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. Silberman, *supra* note 78, at 595.

80. *McIntyre*, 131 S. Ct. at 2794.

81. *Id.* For example, the percentage of plaintiffs winning tort trials, Justice Breyer noted, varied from 17.9 percent in one Massachusetts county to 69.1 percent in a Wisconsin county. *Id.*

82. See *infra* Part III.

83. 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, *Choice of Law in the American Courts in 2011: Twenty-Fifth Annual Survey*, 60 AM. J. COMP. L. 291, 309 (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, *The 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



broad terms, some states apply a traditional approach 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).<sup>84</sup> 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.<sup>85</sup> 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).<sup>86</sup> 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 use forum law as a tiebreaker in close cases.<sup>87</sup> Depending on which of these methods is 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 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.<sup>88</sup> 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 *Allstate Insurance Co. v. Hague*, 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 decision making.<sup>89</sup> 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.<sup>90</sup> The Court upheld application of Minnesota law under both the Due Process and Full Faith and

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widespread popularity of the Second Restatement of Conflict of Laws, perhaps the most malleable of choice of law approaches, tends to confirm [this suspicion]).

84. See Katherine Florey, *State Law, U.S. Power, Foreign Disputes: Understanding the Extraterritorial Effects of State Law in the Wake of Morrison v. National Australia Bank*, 92 B.U. L. REV. 535, 554–55 (2012).

85. *Id.* at 555.

86. *See id.* at 572.

87. See Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 495 (2011) (noting the existence of forum law bias).

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

89. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (plurality opinion).

90. The insured had worked in Minnesota and the plaintiff, the decedent’s widow, had moved to Minnesota before the litigation. In addition, the defendant also did business in Minnesota (among many other states). See *id.* at 316–19 (summarizing contacts). 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. *Id.*

Credit Clauses,<sup>91</sup> with a plurality holding that application of a 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."<sup>92</sup>

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<sup>93</sup> rather than solely the defendant's (as in the personal jurisdiction analysis); and second, because the contacts the Court accepted as adequate in *Hague* were (despite the "significant" language) quite modest.<sup>94</sup> 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.<sup>95</sup>

A notable feature of the *Hague/Shutts* standard is that—though it seemingly polices states' legislative jurisdiction—it relates entirely to the activities of courts. In other words, it has no bearing on the acts of state legislatures, and does not restrict in any way what regulations a state can pass.

In contrast to the *Hague/Shutts* standard, a second principle governing state legislative jurisdiction is rooted in the Dormant Commerce Clause and applies primarily to legislative acts (although in a few cases courts have treated themselves as bound by it as well).<sup>96</sup> 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

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91. The Court announced that the standard is "similar" under both clauses, *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).

92. 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).

93. *See, e.g., Hague*, 449 U.S. at 319 (discussing plaintiff's contacts with Minnesota as a basis for the court's personal jurisdiction).

94. *See* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 257–58 (1992) (describing *Hague* as dispensing with any "meaningful" limits on a court's choice of forum law).

95. In class actions, however, the limitations of *Hague* have proved more important. In *Shutts*, 472 U.S. at 797, 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. *Id.* at 799–801. 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. *See* Chad DeVeaux, *Lost in the Dismal Swamp: Interstate Class Actions, False Federalism, and the Dormant Commerce Clause*, 79 GEO. WASH. L. REV. 995, 998 (2011).

96. *See* Florey, *supra* note 49, at 1101–08 (citing several examples).

Dormant Commerce Clause (and possibly other constitutional sources) imposed an outer limit on the territorial reach of state legislative acts. The Court has articulated this test in several ways, perhaps most sweepingly in *Healy v. Beer Institute*,<sup>97</sup> 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.”<sup>98</sup>

Much subsequent commentary has suggested that the Court may not remain wholly committed to these principles.<sup>99</sup> Other scholarship has suggested sources other than the Dormant Commerce Clause for constitutional limits on state extraterritorial regulation,<sup>100</sup> 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).<sup>101</sup>

In any case, commentators are in general agreement that some set of restrictions—whether grounded in the Dormant Commerce 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 these principles do not impose parallel restrictions on state *judicial* jurisdiction or choice of law.<sup>102</sup>

### 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

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97. 491 U.S. 324 (1989).

98. *Id.* at 336–37 (citations and internal quotation marks omitted).

99. See Florey, *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.”).

100. See Mark D. Rosen, “Hard” or “Soft” Pluralism?: Positive, Normative, and Institutional Considerations of States’ Extraterritorial Powers, 51 ST. LOUIS U. L.J. 713, 731–38 (2007) (considering, though ultimately rejecting, arguments that various constitutional provisions limit states’ extraterritorial powers).

101. See Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 863–64 (2002) (arguing that states have the power to regulate their citizens’ extraterritorial activities).

102. States are, of course, subject to all sorts of other regulatory limitations; for example, they cannot regulate in ways that are prohibited by the Constitution, or that are preempted by federal law. These principles, however, do not address the problem of the territorial scope of state power—the issue that seems most directly comparable when considering the scope of tribal jurisdiction.

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 multifaceted, flexible, and nuanced, allowing the states varying degrees of involvement depending on the extent of their 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<sup>103</sup> and—particularly where foreign defendants are concerned—where the exercise of jurisdiction is reasonable.<sup>104</sup> In rare cases, states may be required to apply another jurisdiction's law.<sup>105</sup> 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.<sup>106</sup>

In short, the rules relating to state power reflect the great variety of issues present when a state attempts to assert its authority over noncitizen or out-of-state conduct (such as practical burdens on the defendant, efficiency, party expectations, orderly allocation of state power), and offer a suitably nuanced regime that recognizes that the solution may differ depending on the circumstances under which the assertion of state authority occurs.<sup>107</sup>

As the following Part will discuss, judicial and prescriptive jurisdiction are treated quite differently in the tribal context. As discussed above, limits on state judicial jurisdiction are governed by a different regime from restrictions on state prescriptive jurisdiction. By contrast, for tribes, these two quite distinctive powers are governed by a single standard.<sup>108</sup> Further, many problems of tribal jurisdiction turn narrowly on the question of whether a given

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103. See *Burger King v. Rudzewicz*, 471 U.S. 462, 475–76 (1985).

104. See *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 115 (1987).

105. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 799–801 (1985).

106. 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, *supra* note 49, at 1062.

107. 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 *id.* at 1059–60. 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.

108. See *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (“[A] tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction.”).

litigant is or is not a member of the tribe, ignoring other forms of tribal and territorial affiliation.<sup>109</sup> The next Part will discuss the evolution of these rules.

## II.

### THE DEVELOPMENT OF TRIBAL CIVIL JURISDICTION: FROM *WILLIAMS* THROUGH *HICKS* AND BEYOND

In setting forth a history of tribal jurisdiction doctrine's development, there are two important stories to be told. The first story concerns the Court's development of a jurisprudence of tribal distinctiveness. The Court could have treated tribal courts as simply another player in the American system, and adapted existing jurisdictional doctrines as necessary to suit the tribal context. However—for historical reasons this Article will explore—the Court did not start down that path, a decision that has profoundly affected its subsequent jurisprudence.

The second story concerns the Court's overall divestiture of tribal jurisdiction over nonmembers, a process that began with its decision in *Oliphant v. Suquamish Indian Tribe*<sup>110</sup> and continues to the present. While this divestiture has gone hand in hand with the *sui generis* treatment of tribal jurisdiction and has been in some respects enabled by it, it is important to emphasize that this was not necessarily an inevitable process. In theory, it would be possible to have tribal jurisdictional doctrines that are distinct from state ones but that still protect tribal powers robustly. Indeed, the important 1959 case *Williams v. Lee*<sup>111</sup> took this approach. As it turned out, however, the separate treatment of tribal jurisdiction has in practice facilitated the divestiture of tribal power in numerous ways.

#### *A. 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?

##### *1. The Early Moments of Tribal Jurisdiction*

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

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109. See *Nevada v. Hicks*, 533 U.S. 353, 382 (2001) ("It is the [tribal] membership status of the unconsenting party . . . that counts as the primary jurisdictional fact.").

110. 435 U.S. 191 (1978).

111. 358 U.S. 217 (1959).

ways than the powers tribes enjoy today. For example,<sup>112</sup> tribes and tribal territory originally were not subject to state law. In the 1832 case *Worcester v. Georgia*, the Supreme Court famously proclaimed that tribal territory was a place in which “the laws of Georgia can have no force.”<sup>113</sup> Most commentators 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.<sup>114</sup> But by 1881, the Court held in *United States v. McBratney* that states could assert criminal jurisdiction over crimes by and against non-Indians that occurred in Indian country.<sup>115</sup> Thus, the Court suggested—in contrast to *Worcester v. Georgia*—that states enjoyed at least some concurrent authority on tribal lands, at least with respect to nonmember criminal conduct.

In the late nineteenth and early twentieth centuries, the debate over state power in Indian country intensified with Congress’s two major attempts to phase out tribes as institutions. First came the allotment program of the 1880s, which opened much tribal land to nonmember settlement.<sup>116</sup> Second was the termination movement of the 1950s, which attempted to eliminate tribes’ special status under federal law and dissolve tribes as political entities.<sup>117</sup> These two programs physically and politically 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.<sup>118</sup> These programs 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.<sup>119</sup> These events would provide the backdrop for the first Supreme Court case to comment meaningfully on the role of tribal courts as an instrument of tribal sovereignty—*Williams v. Lee*.<sup>120</sup>

## 2. *Williams v. Lee* as a Victory for Tribal Sovereignty

The 1959 case *Williams v. Lee* is generally hailed as a dramatic victory for tribes and one of the foundational cases on which a strong view of tribal

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112. See *supra* note 12 for a brief discussion of other consequences of “domestic dependent nation” status.

113. 31 U.S. 515, 520 (1832).

114. See, e.g., Florey, *supra* note 34, at 1634.

115. 104 U.S. 621, 624 (1881).

116. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 80–81 (2005).

117. See Florey, *supra* note 34, at 1636–37 (describing policies of termination).

118. See *id.* at 1636–38.

119. See Florey, *supra* note 8, at 608 n.73.

120. 358 U.S. 217 (1959).

institutions and sovereignty rests.<sup>121</sup> *Williams* involved a Navajo couple, Paul and Lorena Williams, who were sued in Arizona court by a non-Indian trading post operator. The controversy arose following the Williams's nonpayment of a debt incurred at the trading post, which was within the boundaries of the reservation.<sup>122</sup> The Arizona courts found that, because no federal authority prohibited it from doing so, Arizona could exercise civil jurisdiction over such non-Indian-versus-Indian suits arising on the reservation.<sup>123</sup> In something of a surprise,<sup>124</sup> the Supreme Court unanimously reversed. In doing so, it forcefully reaffirmed the holding of *Worcester v. Georgia* that state "laws . . . can have no force" in Indian country,<sup>125</sup> and suggested 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."<sup>126</sup> Noting that "[t]he Tribe itself has in recent years greatly improved its legal system through increased expenditures and better-trained personnel,"<sup>127</sup> 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."<sup>128</sup>

### 3. Understanding *Williams's Silence: The Aftermath and Implications*

Commentators have understood *Williams* 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.<sup>129</sup> Yet the precise source of this rule remains unclear. Even 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; Littell ultimately left this issue for the Court to determine.<sup>130</sup> However, the Court declined this invitation,

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121. See Bethany R. Berger, *Williams v. Lee and the Debate over Indian Equality*, 109 MICH. L. REV. 1463, 1465 (2011) (describing *Williams's* importance in federal Indian law and policy).

122. See *Williams*, 358 U.S. at 218.

123. *Id.*

124. See Berger, *supra* note 121, at 1511 ("It is . . . surprising that the Court issued the strong statement of inherent tribal sovereignty that it did.").

125. See *Williams*, 358 U.S. at 219 (quoting *Worcester v. Georgia*, 31 U.S. 515, 561 (1832)).

126. *Id.* at 220.

127. *Id.* at 222.

128. *Id.* at 223.

129. See Reynolds, *supra* note 33, at 546–47 (discussing interpretation of *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 be brought in state court if it arises off the reservation. See Florey, *supra* note 34, at 1644.

130. See Berger, *supra* note 121, at 1513 ("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

ruling for the tribe without ever explaining the source of this newly minted jurisdictional rule.<sup>131</sup>

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. In other words, all parties assumed that the tribal court would apply Navajo law and the Arizona court would apply state law.<sup>132</sup> Thus, the result in *Williams* 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 safeguards were important—particularly given that in the years before *Williams* was decided 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.<sup>133</sup>

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. First, it would have substituted state law for tribal law; second, it would have undermined the authority of the evolving tribal courts; and third, it would have imposed the real and significant hardship on the Williamses of defending themselves in an unfamiliar and perhaps hostile system.<sup>134</sup> Seeing *Williams* as a rather insignificant sideshow to the important debates about civil rights that were happening at the time,<sup>135</sup> 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 entering a relative period of quiescence on the personal jurisdiction front; minimum

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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.” (citing Oral Argument, *Williams*, 358 U.S. 217 (No. 39))).

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

132. See, e.g., *id.* at 220 (describing the issue as whether “States have . . . power to regulate the affairs of Indians on a reservation”).

133. See Bethany R. Berger, *Sheep, Sovereignty, and the Supreme Court: The Story of Williams v. Lee*, in *INDIAN LAW STORIES* 359, 364–66 (2011).

134. The Williamses found their encounter with Arizona’s justice system to be deeply upsetting, even traumatic. See *id.* at 367 (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”).

135. See Berger, *supra* note 121, at 1514 (noting that the Court considered *Williams* “likely a ‘nothing case’”).



contacts doctrine was well-ensconced, but many important cases clarifying the doctrine's application had yet to be decided.<sup>136</sup> Indeed, 1959 was a simpler jurisdictional time: There was less jurisdictional overlap, 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.<sup>137</sup> 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.<sup>138</sup> Given the relatively tranquil state of civil procedure issues at this time, 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, *Williams* had the (undoubtedly unintended) effect of muddling the role of personal jurisdiction in Indian country, setting forth a murky category of "civil jurisdiction"<sup>139</sup> that was apparently similar to personal jurisdiction but not identical to it. This lumping together of various forms of jurisdiction was to have grave 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,<sup>140</sup> a process that has had devastating consequences for the rule of law in Indian country.<sup>141</sup> This Section first considers how the Court initially 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. This

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136. See Martin B. Louis, *Jurisdiction over Those Who Breach Their Contracts: The Lessons of Burger King*, 72 N.C. L. REV. 55, 58 (1993) ("From 1959 to 1976, the Supreme Court did not decide a single personal jurisdiction case . . . . The Court finally broke its silence in 1977 and since then has handed down one or more jurisdictional decisions in almost every term.").

137. See, e.g., Richard L. Marcus, *Reassessing the Magnetic Pull of Megacases on Procedure*, 51 DEPAUL L. REV. 457, 463 (2001) (noting that the first mass tort cases arose in the 1960s, and that this type of litigation did not become prevalent until the 1980s).

138. See Berger, *supra* note 133 at 372.

139. See *Williams v. Lee*, 358 U.S. 217, 218 (1959) (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.").

140. For a comprehensive account, see Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 8–13 (1999).

141. See Fletcher, *supra* note 19, at 1002.

Section argues that in doing so, 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 cases in the U.S. Court of Appeals for the Ninth Circuit that have struggled with the practical difficulties and confusing jurisdictional categories the Court has created.

### *1. Limiting Tribal Power over Nonmembers: From Oliphant to Montana*

In *Oliphant v. Suquamish Indian Tribe*,<sup>142</sup> the Supreme Court started what would become a multi-decade process of limiting tribal authority by holding that tribes lacked criminal jurisdiction over non-Indians. The Court found that the Suquamish Tribe could not assert criminal jurisdiction over two non-Indian residents of its reservation, one who was alleged to have assaulted a tribal police officer and another who was arrested after a high-speed race on a reservation highway.<sup>143</sup> The case was striking because it upended 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.<sup>144</sup> None of those sources explicitly limited tribal criminal powers over nonmembers, but the *Oliphant* Court nonetheless found that tribal sovereignty did not include such powers. The Court rested this holding on a number of murkily defined factors, including a vaguely characterized “presumption” of the federal government 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].”<sup>145</sup>

While it was by no means obvious that *Oliphant*’s logic would extend to civil powers, the Court nonetheless concluded in *Montana v. United States*<sup>146</sup> that tribes could not exert regulatory powers over nonmembers living on the reservation, subject to two exceptions (listed in full immediately below).<sup>147</sup> 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).<sup>148</sup> The Court initially defined the issue before it as “a narrow

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142. 435 U.S. 191 (1978).

143. *See id.* at 194–95.

144. *See Frickey, supra* note 140, at 8–12.

145. *Oliphant*, 435 U.S. at 209.

146. 450 U.S. 544 (1981).

147. 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.” *Id.* at 565–66. Somewhat oddly, the Court cited *Williams v. Lee* as authority for both these propositions. *See id.*

148. *Id.* at 547.

one,”<sup>149</sup> 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.”<sup>150</sup> In determining that the regulation was invalid, however, the Court built directly on both *Oliphant*’s holding and its cursory reasoning, citing “the principles on which [*Oliphant* relied]” for the “general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”<sup>151</sup> The Court 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.”<sup>152</sup>

It is important to keep in mind that the Court in *Montana* was narrowly focused on a specific issue: Was a single hunting and fishing regulation a valid exercise of tribal regulatory power?<sup>153</sup> *Montana* involved the exercise of a quintessentially regulatory power—the power of the Tribal Council to pass ordinances. Because of this, 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, which are typical concerns in personal jurisdiction. As a result, there was no particular reason to assume that *Montana*’s holding was relevant to issues concerning the tribal judicial realm.<sup>154</sup> Nearly two decades passed before the Court considered *Montana*’s implications for tribal judicial power in *Strate v. A-1 Contractors*.<sup>155</sup>

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 Union Insurance Companies v. Crow Tribe of Indians*<sup>156</sup> and *Iowa Mutual Insurance Company v. LaPlante*,<sup>157</sup> the Court formulated a requirement that in cases originating in tribal court, defendants must exhaust tribal remedies in both federal-question cases (*National Farmers*)<sup>158</sup> and diversity cases (*Iowa*

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149. *Id.* at 557.

150. *Id.* at 547.

151. *Id.* at 565.

152. *Id.* at 564.

153. 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: The Story of Montana v. United States*, 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).

154. See, e.g., *Red Fox v. Hettich*, 494 N.W.2d 638, 646–48 (S.D. 1993) (applying *Montana* to determine the extent of a tribe’s adjudicatory jurisdiction).

155. 520 U.S. 438 (1997).

156. 471 U.S. 845 (1985).

157. 480 U.S. 9 (1987).

158. See *Nat’l Farmers*, 471 U.S. at 856 (“We believe that examination [of a tribal court’s jurisdiction] should be conducted in the first instance in the Tribal Court itself.”).

*Mutual*)<sup>159</sup> 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.”<sup>160</sup>

Neither *National Farmers* nor *Iowa Mutual*, however, made any clear pronouncement about the nature of the limits that might exist on tribal court jurisdiction.<sup>161</sup> 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<sup>162</sup> or blended traditional personal jurisdiction principles with *Montana*, suggesting that the latter constituted a limit on tribal subject matter jurisdiction.<sup>163</sup> At least one court cited conflict of laws principles as relevant to the question of whether a state or tribal court was best suited to hear a particular action.<sup>164</sup> Thus, the relationship between conventional territorial jurisdiction and the limits on tribal civil authority that the Court had announced in *Montana* caused significant confusion.

## 2. *Strate v. A-1 Contractors: Extending Montana to Tribal Judicial Power*

In 1997, the Court finally sounded a note of unmistakable (if perhaps unwelcome) clarity into this doctrinal muddle in *Strate v. A-1 Contractors*, which held that “*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

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159. See *Iowa Mutual*, 480 U.S. at 16 (“Although . . . federal jurisdiction in this case is based on diversity of citizenship, . . . the exhaustion rule announced in *National Farmers Union* applies here as well.”).

160. *Id.* at 18 (citations omitted).

161. *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 *Nat’l 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”).

162. See, e.g., *Red Fox v. Hettich*, 494 N.W.2d 638, 646–48 (S.D. 1993).

163. See *Hinshaw v. Mahler*, 42 F.3d 1178, 1180–81 (9th Cir. 1994) (applying the *Montana* standard to determine propriety of tribal subject matter jurisdiction and minimum contacts standard to assess personal jurisdiction); *Stock W., 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 on the tribal court . . . [the] question of whether the tribal court had subject matter jurisdiction over the case would still not be resolved”).

164. *Stock W. Corp. v. Taylor*, 964 F.2d 912, 919–20 (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”).

does not exceed its legislative jurisdiction.”<sup>165</sup> 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 by the *Montana* principle? The following Section attempts to answer these questions. This Section argues that despite the purported clarity of the Court’s holding, the source of the rule remained unaccounted for. The result was an exacerbation of the already-existing confusion in issues of tribal civil jurisdiction.

*a. Background of Strate: Facts, Procedure, and Holdings*

*Strate* involved a suit by Gisela Fredericks and her five children for damages arising out of a collision between Fredericks’s car and a gravel truck owned by A-1 Contractors and driven by Lyle Stockert.<sup>166</sup> Fredericks’s children were enrolled tribe members, though she was not.<sup>167</sup> A-1 Contractors and Stockert were nonmembers under contract with the tribe to construct a community building.<sup>168</sup> The accident took place on a state highway within the borders of the Fort Berthold reservation.<sup>169</sup> Interestingly, the substantive issues before the tribal court were to be decided under state law, suggesting that the case had more to do with the tribal forum than with tribal law.<sup>170</sup> Both lower courts initially found tribal jurisdiction,<sup>171</sup> but the U.S. Court of Appeals for the Eighth Circuit reheard the case en banc and reversed. The en banc court held that *Montana* governed the issue of “civil tribal jurisdiction over non-Indians” and precluded jurisdiction in the case.<sup>172</sup>

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.<sup>173</sup> Second, the Court suggested that the standards for tribal regulation of nonmembers and tribal court jurisdiction over nonmembers were likely identical—tribal judicial jurisdiction was at any rate no broader than the legislative powers at issue in *Montana*.<sup>174</sup> 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

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165. 520 U.S. 438, 453 (1997) (citation and internal quotation marks omitted).

166. A-1 Contractors v. Strate, Civ. No. A1–92–24, 1992 WL 696330, at \*1 (D.N.D. Sept. 16, 1992).

167. *Strate*, 520 U.S. at 443.

168. See A-1 Contractors v. 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 932–33 n.1.

169. See *Strate*, 1992 WL 696330, at \*1.

170. See Transcript of Oral Argument, *supra* note 31, at \*18 (counsel for petitioners explaining that the tribal court “follow[s] state law” on the issues before it).

171. See *id.* at \*5.

172. *Strate*, 76 F.3d at 935.

173. *Strate*, 520 U.S. 438, 453 (1997).

174. See *id.*

with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements”<sup>175</sup> and “conduct that threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe”<sup>176</sup>—were to be interpreted narrowly and did not apply in this case.<sup>177</sup> 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.<sup>178</sup> 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.<sup>179</sup> The Court did not reach the issue of whether the tribal court might have jurisdiction over a 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.”<sup>180</sup>

In reaching its holding in *Strate*, the Court observed that its previous precedents, including both *Oliphant* and *Montana*, sounded a unified theme: “[T]ribal jurisdiction over the conduct of nonmembers exists only in limited circumstances.”<sup>181</sup> 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.

#### *b. Strate Oral Argument: The Hidden Role of Choice of Law*

What led the Court to this conflation of legislative and judicial jurisdiction? The Court’s decision was dictated neither by existing case law nor by the standard understanding of these powers in other contexts.<sup>182</sup> One

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175. See *id.* at 456–57 (quoting *Montana v. United States*, 450 U.S. 544, 565 (1981)).

176. *Id.* at 457 (citing *Montana*, 450 U.S. at 566).

177. See *id.* at 456–59.

178. See *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1138 (9th Cir. 2006) (en banc).

179. See *Strate*, 520 U.S. at 457.

180. See *id.* at 454.

181. See *id.* at 445. While relying in part on *Oliphant* as support for its holding, 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 internal quotation marks omitted).

182. 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 Brief for the United States as Amicus Curiae Supporting Petitioners at \*15, *Strate*, 520 U.S. 428 (1997) (No. 95-1872) (“This case involves not just the Tribe’s general authority to adjudicate

possible explanation is the role of choice of law. While the Court did not allude to choice of law explicitly in its opinion, it 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 Ginsburg sharply challenged that assertion, arguing, “[T]he two are tied together.”<sup>183</sup> Justice Ginsburg went on to suggest 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 when you have a coincidence between the forum and the place of injury, what other law would apply?”<sup>184</sup> This was not only a simplification of the choice-of-law landscape of the time<sup>185</sup> but an incorrect description of the tribal court’s intent (it planned to apply state law to the dispute<sup>186</sup>). Yet the Justices may have feared that

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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 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.* *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).”).

183. 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 Ginsburg: 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?

Transcript of Oral Argument, *supra* note 31, at \*16–18.

184. *See id.* at \*18.

185. 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 twelve 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.

186. *See* Transcript of Oral Argument, *supra* note 31, at \*18.

similarly situated tribal courts might apply forum law in the future,<sup>187</sup> 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.<sup>188</sup>

The notion articulated in oral argument that the choice of state or tribal court would determine choice of law echoes the assumptions of *Williams* that Arizona law would be applied in Arizona court and Navajo law in Navajo court (though at the time *Williams* was decided, such assumptions were more likely to be true).<sup>189</sup> The issue 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.<sup>190</sup> 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

187. See *id.*, at \*20 (“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.”).

188. 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 State law that governs it, have them go to a State court. If it’s the tribal law that governs it, have them go to a tribal court. That way we’d save legal fees, time, and effort.

*Id.* at 26–27.

189. See *supra* notes 136–38 and accompanying text.

190. 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 *A-1 Contractors v. Strate*, 76 F.3d 930, 938 (8th Cir. 1996) (en banc). 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*.



(which court is more convenient? where will the defendants get a fair trial?), not regulatory ones (what substantive standards should govern the conduct at issue?).

*c. Confusion in the Opinion: Conflation of Choice of Law and Procedural Burdens*

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.<sup>191</sup> The Court observed that the state court "is physically much closer by road to the accident scene . . . than [is] the tribal courthouse."<sup>192</sup> Likewise, in finding that the tribal court lacked jurisdiction over the case, the Court was careful to note that Fredericks's 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."<sup>193</sup> 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 system.<sup>194</sup>

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 procedural concerns—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

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191. 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. Transcript of Oral Argument, *supra* note 31, at \*28 ("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 . . .").

192. A-1 Contractors v. Strate, 520 U.S. at 445 n.4 (1997).

193. *Id.* at 459.

194. *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, *supra* note 10, at 459 (regarding the Court as influenced by more broadly applicable norms that a defendant should not be "relegated to an unfair, foreign forum").

claims.<sup>195</sup> 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).<sup>196</sup> Nonetheless, it is notable that the focus in oral argument on the sort of *law* (state or tribal?) that should be applied was ignored in the Court's ultimate opinion in favor of presumptions about the suitability of the tribal court.

In sum, the reasoning in *Strate* exacerbated the already-existing confusion about jurisdictional categories in Indian country. The Court left unanswered a central question: When tribal courts assert "adjudicative jurisdiction"<sup>197</sup> to hear claims against a nonmember, what exactly is the problem, from the Court's point of view? Is it a due process-like objection to subjecting nonmembers to the jurisdiction of an unfamiliar and perhaps distant court (as the Court suggested in *Strate*)? Is it a *Hague*-like problem with the tribal court's application of tribal law to a dispute insufficiently connected to the reservation?<sup>198</sup> Is it a concern that the tribal 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? The shift in focus from choice-of-law issues that preoccupied the justices at oral argument to the choice-of-forum issues that *Strate* ultimately emphasized suggests that the Court itself may have been unsure about the answer.

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195. 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, *New Exceptionalism*, *supra* note 39, at 52.

196. 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.").

197. 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 fifty-three 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 Insurance Co. v. California*, in which he used 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.

198. 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. Transcript of Oral Argument, *supra* note 31, at \*24 ("[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 decisions made by a forum.").

Moreover, 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. The Court’s next tribal jurisdiction case only increased the confusion.

### C. Hicks and the Subject Matter Jurisdiction Problem

Just four years after *Strate*, the Court decided *Nevada v. Hicks*<sup>199</sup>—another tribal jurisdiction case that would perpetuate doctrinal confusion. After Nevada state officers conducted an allegedly improper search that took place on Fallon Paiute-Shoshone Tribes member Hicks’s property, Hicks asserted claims against the state officers in tribal court for trespass, abuse of process, and various 42 U.S.C. § 1983 civil rights violations.<sup>200</sup> The Court, in an opinion authored by Justice Scalia, held that the tribal court lacked jurisdiction over Hicks’s suit against the officers who had allegedly conducted the improper search.<sup>201</sup>

While the *Hicks* Court’s technical holding was narrow, its expansive language continued to reflect and perpetuate confusion over tribal jurisdictional categories. *Hicks* implicated 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.<sup>202</sup> As many commentators pointed out, however, the technical holding of *Hicks* could be limited to suits in tribal court against state officers for violations that occur on tribal lands—thus putting aside once more the issue of land ownership and tribal power.<sup>203</sup> Arguably, then, *Hicks* may have decided relatively little.<sup>204</sup>

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199. 533 U.S. 353 (2001).

200. *Id.* at 356–57.

201. *Id.* at 374. 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.

202. *See Strate*, 520 U.S. 438, 454 (1997) (suggesting that “tribes retain considerable control over nonmember conduct on tribal land” but treating the land at issue “equivalent . . . to alienated, non-Indian land”).

203. *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.” *Hicks*, 533 U.S. at 355.

204. *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. v. Miss. Band of Choctaw Indians*,

Despite the limited question before the Court, *Hicks* nonetheless provided an occasion for more expansive pronouncements about the nature of tribal court jurisdiction. To begin with, the Court—as it had done in *Strate*—approached the jurisdictional question by treating the tribal court’s exercise of judicial power as constrained by tribal legislative authority. The Court asked 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.”<sup>205</sup> 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<sup>206</sup>) were unremarkable state common law and federal causes of action, not distinctively “tribal” in any way. The Court decided that the tribe lacked such power to “regulate” through judicial jurisdiction, in part because the state maintained some territorial control over reservation land.<sup>207</sup> Although the majority opinion focused less on specifically procedural issues than the Court had in *Strate*, Justice Souter discussed them at length in a concurrence notably hostile to the notion of tribal jurisdiction. Justice Souter’s concurrence emphasized, for example, that “tribal courts are often subordinate to the political branches of tribal governments,”<sup>208</sup> suggesting that tribal courts are more inclined to carry out a political agenda than to serve as unbiased arbiters.

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.”<sup>209</sup> 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:

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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”).

205. *Hicks*, 533 U.S. at 358 (emphasis added).

206. *See id.* at 356–57.

207. *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 internal quotation marks omitted).

208. *Id.* at 385 (Souter, J., concurring) (citations and internal 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—that is, a court doing the bidding of a political branch is presumably more of an instrument of regulation than a court that is detached from the legislative function.

209. *Id.* at 366 (majority opinion).

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.<sup>210</sup>

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 actions at issue in the litigation are regulable by the tribe.”<sup>211</sup> 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<sup>212</sup> and, unlike state courts, did not benefit from the “historical and constitutional assumption of concurrent state-court jurisdiction” over federal law.<sup>213</sup> Finally, the Court noted, permitting tribal court jurisdiction over federal claims would create an anomaly—such claims filed in state court could be removed to federal court, but no explicit provision existed for removal from tribal to federal court.<sup>214</sup>

Although this last point in particular is a reasonable (though not necessarily insurmountable) one,<sup>215</sup> the Court’s overall reasoning here is faulty. Tribal courts, the Court suggests, cannot hear § 1983 claims at least in part because their adjudicative powers do not exceed their legislative ones and they are hence not courts of general jurisdiction. But the very question the Court was ostensibly considering was whether tribal courts might enjoy expanded adjudicative powers in federal, as opposed to state law, claims. This makes the Court’s reasoning somewhat 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 power. For example, the Court leaves unanswered the question of whether, if one tribe member asserts a § 1983 claim against

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210. *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.” *Id.* at 402 (Stevens, J., concurring). Justice Stevens further noted,

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.

*Id.* at 403 n.2.

211. *Id.* at 367 n.8 (majority opinion).

212. *Id.* at 366 (citation and quotation marks omitted).

213. *Id.* at 367.

214. *Id.* at 368–69.

215. 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.

another, the tribal court would have jurisdiction. Does the federal nature of the § 1983 claim still mandate that the tribal court refrain from hearing it?<sup>216</sup>

In addition, *Hicks* marked a further departure from the Court's traditional framework for analyzing tribal sovereignty. Under traditional notions of tribal sovereignty that were widely accepted prior to *Oliphant*, tribes possess all generally acknowledged sovereign powers unless they have given them up through the treaty process or been divested of them by Congress.<sup>217</sup> 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."<sup>218</sup> Yet the Court, with little explanation, dismissed the possibility that tribes might have the power to authorize their courts to hear federal-law claims.<sup>219</sup>

Most problematically, though, *Hicks* rested its characterization of tribal court jurisdiction as involving "subject matter" on the equation of tribal judicial and regulatory authority, leaving unexplained the same issue 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 and international contexts?<sup>220</sup> Notably, many scholars have rejected on efficiency and fairness grounds the equation of adjudicatory and regulatory authority in other situations.<sup>221</sup> Arthur von Mehren, for example, has argued that equating choice of law with judicial jurisdiction would entail "potentially great costs to both."<sup>222</sup> In particular, von Mehren notes, resting judicial jurisdiction on "the applicability to the underlying controversy of domestic rules and principles would . . . present severe administrative problems," forcing courts to conduct a cumbersome choice-of-law analysis

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216. See *id.* 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.").

217. See Frickey, *supra* note 140, at 8–12.

218. Struve, *supra* note 47, at 298. Struve suggests that the Court might have reached a similar result under the traditional approach, but that the question would have been a more difficult one. See *id.* at 297. Ultimately, Struve suggests that the issue would turn on whether tribal jurisdiction over federal claims would "thwart the supremacy of federal law." See *id.* at 302.

219. See *Hicks*, 533 U.S. at 368 n.8 (2001).

220. See *supra* Parts I.B and I.C (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).

221. 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 jurisdiction"); ARTHUR TAYLOR VON MEHREN, *THEORY AND PRACTICE OF ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW* 36–37 (2003).

222. See VON MEHREN, *supra* note 221, at 37.

before they could determine their jurisdiction.<sup>223</sup> In consequence, “no modern legal order seriously considers having its adjudicators entertain only fully domestic litigation [i.e., disputes involving solely within-forum contacts].”<sup>224</sup> The Court failed, however, to weigh or even consider such compelling practical arguments against equating tribes’ regulatory and judicial powers.

After *Hicks*,<sup>225</sup> courts have frequently referred to tribal court jurisdictional limits as questions of “subject matter jurisdiction.”<sup>226</sup> But it is important to note that Justice Scalia’s opinion in *Hicks* only addressed 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.<sup>227</sup> Even more fundamentally, the category of “subject matter jurisdiction” remains (as the next Section will discuss) a framework that fails to make sense in the tribal context, and is one that the Court has never properly explained. Thus, Justice Scalia’s “subject matter” characterization, while influential, does not deserve the sweeping application it received.

#### *D. 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’ attempts to rework these cases’ jurisdictional categories. In both cases, the Ninth Circuit nominally applied the *Montana* framework, but ultimately fell back on notions of personal jurisdiction to address the complexities of the issues.

##### *1. Smith v. Kootenai College: The Ninth Circuit’s Expansion of the Consensual Relationships Exception*

*Smith v. Salish Kootenai College*<sup>228</sup> involved a dizzying array of tribal and federal court opinions, spanning more than five years, in an attempt to work out the contours of tribal jurisdiction. As the Ninth Circuit noted, the case’s

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223. *Id.*

224. *Id.*

225. *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.

226. *See, e.g., Attorney’s Process & Investigation Servs. v. Sac & Fox Tribe*, 609 F.3d 927, 937 (8th Cir. 2010) (“Each claim must be analyzed individually in terms of the *Montana* principles to determine whether the tribal court has subject matter jurisdiction over it.”); *Houle v. Cent. Power Elec. Coop.*, No. 4:09–cv–021, 2011 WL 1464918, at \*31 (D.N.D. March 24, 2011) (noting that “a tribal court’s subject matter jurisdiction cannot exceed the legislative jurisdiction of the tribe”); *Ford Motor Co. v. Todecheene*, 221 F. Supp. 2d 1070, 1075 (D. Ariz. 2002) (considering “whether a tribal court has the power to exercise civil-subject matter jurisdiction over non-Indians”).

227. *See Water Wheel Camp Recreational Area v. LaRance*, 642 F.3d 802, 810 (9th Cir. 2011) (discussing the “explicitly narrow nature of the question considered in *Hicks*”).

228. 434 F.3d 1127, 1129 (9th Cir. 2006) (en banc).

procedural history was “complex”—which is, if anything, an understatement.<sup>229</sup> Smith, the plaintiff, attended Salish Kootenai College (“SKC”), but was a member of the Umatilla Tribe, not the Confederated Salish and Kootenai Tribes.<sup>230</sup> 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.<sup>231</sup> Following a rollover accident, passenger Burland was killed, while Smith and passenger Finley were injured.<sup>232</sup>

Burland’s estate then sued SKC and Smith in tribal court. SKC cross-claimed against Smith, and Smith cross-claimed against SKC.<sup>233</sup> Finley filed his own suit against SKC and Smith.<sup>234</sup> All claims were consolidated in tribal court where the passenger claims settled, leaving only Smith’s cross-claim against SKC.<sup>235</sup> The claim was fully litigated in tribal court, and Smith lost.<sup>236</sup> Only at that point did Smith argue that the tribal court lacked subject matter jurisdiction over the dispute because he was a nonmember who had initially been brought into the case as a defendant.<sup>237</sup> 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.<sup>238</sup> 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.<sup>239</sup> Meanwhile, the tribal appeals court had reaffirmed tribal court jurisdiction as well.<sup>240</sup>

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).<sup>241</sup> Even more notable, however, was the difficulty the Ninth Circuit had in reconciling the complex facts of an actual case to the Court’s complicated tribal jurisdiction framework. *Smith* shared some features with *Williams* (in which the Court had

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229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 1129–30.

239. *Id.* at 1130.

240. *Id.*

241. See Florey, *supra* note 49. 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.



held that tribal courts have exclusive jurisdiction over suits by nonmember plaintiffs against tribal defendants), but it did not fit the mold exactly.<sup>242</sup> 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.<sup>243</sup> SKC, as a tribal entity, was not technically a “member” of the tribe, although the Ninth Circuit concluded, “[F]or purposes of civil tribal court jurisdiction, [it] may be treated as though it were a tribal ‘member.’”<sup>244</sup>

But if *Williams* did not fit precisely, neither did *Montana*. While it is generally true that someone who voluntarily submits to a court’s jurisdiction waives jurisdictional objections,<sup>245</sup> the situation in *Smith*, as the Ninth Circuit noted, did not “fit obviously”<sup>246</sup> into either of the exceptions to the limits on tribal jurisdiction as set out in *Montana*: (1) consensual relationships such as “commercial dealings, contracts, [or] leases” or (2) serious threats to tribal welfare.<sup>247</sup> Ultimately, the Ninth Circuit chose to handle this issue by expanding the “consensual relationships” exception to *Montana* (which had generally been understood to apply only to disputes arising directly out of contracts<sup>248</sup>), despite acknowledging that “Smith’s claims do not fit easily with the literal examples cited in the first *Montana* exception.”<sup>249</sup> 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.”<sup>250</sup> The Court suggested that the claim grew out of a consensual relationship because of Smith’s control of the suit and the forum, even though no actual contract was involved.<sup>251</sup>

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242. For this reason, the court suggested, concurrent jurisdiction would exist in tribal and state courts. See *Smith*, 434 F.3d at 1140 n.6.

243. *Id.* at 1133.

244. *Id.* at 1135.

245. This is generally the case, for example, in the context of personal jurisdiction and sovereign immunity. Many states hold that a defendant waives objections to personal jurisdiction by making a general appearance, which entails “participat[ing] in the action in a manner which recognizes the court’s jurisdiction.” See, e.g., *State Farm Gen. Ins. Co. v. JT’s Frames, Inc.*, 181 Cal. App. 4th 439, 441 (2010) (citing this principle as an “essential rule”). In federal court, the issue of waiver is governed by Federal Rule of Civil Procedure 12, under which a defendant who files a responsive pleading without objecting to personal jurisdiction waives any personal jurisdiction argument. See FED. R. CIV. P. 12(h)(1)–(2). Similarly, in the sovereign immunity context, a state may waive sovereign immunity through its own litigation conduct, such as removing a case from state to federal court. See *Lapides v. Bd. of Regents of Univ. Syst. of Ga.*, 535 U.S. 613, 616 (2002).

246. *Smith*, 434 F.3d. at 1136.

247. See *Montana v. United States*, 450 U.S. 544, 565 (1981).

248. See, e.g., *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997) (holding that consensual relationship exception did not apply where defendant was a party to a subcontract to be performed on the reservation, but dispute did not arise directly out of that subcontract).

249. *Smith*, 434 F.3d at 1136.

250. *Id.* at 1137.

251. *Id.*

It seems quite possible that the Supreme Court, even applying *Montana* strictly, would agree with the Ninth Circuit's result.<sup>252</sup> That is, permitting a tribal court to litigate a claim by a plaintiff who was a member of another tribe and was engaged in activity connected to his studies at a tribal college seems compatible even with *Montana*'s constricted view of tribal sovereignty. Because the Court has not fully delineated the contours of *Montana*'s exceptions, for example, it is conceivable that one of the exceptions could be stretched to fit this situation.<sup>253</sup> Further, the Ninth Circuit's overall approach is highly consistent with the emphasis on consent that has pervaded the Court's approach to Indian country in recent years.<sup>254</sup>

Nonetheless, the jurisdictional framework imposed by *Montana* complicated the Ninth Circuit's ability to reach what seems both a 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.<sup>255</sup>

The Ninth Circuit 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.<sup>256</sup> This emphasis was "inconsistent with federal subject matter jurisdiction, though perfectly consistent with principles of personal jurisdiction."<sup>257</sup> The court thus appeared to conclude that the Supreme Court had not meant its *Hicks* statements literally. While insisting that

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252. Three dissenting members of the en banc panel, however, did reject the majority opinion as "part[ing] company with compulsory Supreme Court guidance." *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 not waivable. *Id.* at 1144. For a critique of the dissent's view, see *infra* note 321.

253. *See Smith*, 434 F.3d at 1136 (majority opinion) (noting some similarities between the case at hand and the *Montana* exceptions, even while acknowledging that neither exactly fit the circumstances).

254. *See Florey*, *supra* note 8, at 603 (arguing that "the Court increasingly looks at tribal sovereignty through the lens of consent").

255. *See Smith*, 434 F.3d at 1137 (noting that parties "may not confer [subject matter] jurisdiction . . . by stipulation") (citation and quotation marks omitted).

256. *Id.* at 1138.

257. *Id.*

it did not intend “to question whether the exercise of tribal civil jurisdiction is in fact subject matter jurisdiction,”<sup>258</sup> the court nonetheless found that the doctrine must, in practice, have some “play in the margins”<sup>259</sup> and “employ[] a test more flexible than those defining the strict notions of subject matter jurisdiction under Article III.”<sup>260</sup> 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*.”<sup>261</sup> To reach this reasonable result, however, required going beyond the misleading jurisdictional categories the Court has used.

## 2. *Water Wheel v. LaRance: The First Steps Toward a Personal Jurisdiction Framework*

A second case, *Water Wheel Camp Recreational Area, Inc. v. LaRance*,<sup>262</sup> 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.<sup>263</sup> 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.<sup>264</sup> The tribal court denied the defendants’ motion to dismiss on jurisdictional grounds, and found for the Colorado River Indian Tribes (“CRIT”) on the merits. The tribal appellate court affirmed in a lengthy opinion.<sup>265</sup> The defendants sought a declaratory judgment in federal district court that the tribal court lacked jurisdiction over them; the district court agreed, citing *Montana*.<sup>266</sup> 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 *Montana* test. The court limited *Hicks* strictly to its facts and found that the *Montana* standard only governed exercises of tribal authority on non-Indian land.<sup>267</sup> 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

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258. *Id.*

259. *Id.* at 1139.

260. *Id.* at 1138.

261. *Id.* at 1140.

262. 642 F.3d 802, 805–06 (9th Cir. 2011).

263. *Id.*

264. *Id.* at 805.

265. *Id.* at 806.

266. *Id.* at 807–08.

267. *See id.* at 809 (“The narrow question the Court considered in [*Montana*] concerned the tribe’s exercise of regulatory jurisdiction over non-Indians on non-Indian land within the reservation.”).

them unless Congress has said otherwise, or unless the Supreme Court has recognized that such power conflicts with federal interests promoting tribal self-government.”<sup>268</sup> Thus, the tribal court had what the Ninth Circuit termed “subject matter jurisdiction—consisting of regulatory and adjudicative jurisdiction” over the case.<sup>269</sup>

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 *Burnham v. Superior Court* and other personal jurisdiction precedents from the state context.<sup>270</sup> Applying a conventional personal jurisdiction analysis, the Ninth Circuit noted that the defendant 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.”<sup>271</sup>

*Water Wheel* has attracted some praise from commentators for limiting *Montana* and returning to established principles governing tribal jurisdiction.<sup>272</sup> Another interesting feature of *Water Wheel*, however, is the way in which it succeeds in replacing the *Montana* test with a personal jurisdiction analysis. *Water Wheel* suggests, perhaps, some wiggle room in the *Montana/Strate/Hicks* framework. That is, the analysis in *Water Wheel* suggests that cases in which the Supreme Court has not strictly forbidden tribal jurisdiction may be understood—as an alternative—in ordinary personal jurisdiction terms. Further, it illustrates the ready adaptability of personal jurisdiction principles to Indian country. Of course, the contours of this approach are not entirely clear,<sup>273</sup> and *Water Wheel* leaves standing many of the problems with current law. For example, it does nothing to enhance tribal authority over non-Indian land, and it continues *Strate*’s linkage of adjudicative and regulatory jurisdiction.<sup>274</sup> 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* 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

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268. *Id.* at 812.

269. *Id.* at 809, 816.

270. *See id.* at 819–20 (discussing landmark personal jurisdiction cases).

271. *Id.* at 819.

272. *See* Winter King et al., *Bridging the Divide: Water Wheel’s New Tribal Jurisdiction Paradigm*, 47 GONZ. L. REV. 723, 757–60 (2012).

273. *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”).

274. *See Water Wheel*, 642 F.3d at 804–05 (describing the issue as one of tribes’ “civil authority over non-Indians acting on tribal land”).

coherent analysis. The following Section takes this state of affairs as a starting point. It argues that the 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.

### 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.” If the Supreme Court fails to act, the lower courts should resolve ambiguities of tribal court jurisdiction cases 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 court context. Scholars,<sup>275</sup> practitioners,<sup>276</sup> and lower courts<sup>277</sup> have continued to remark upon them despite the Supreme Court’s discouragements. With this in mind, the argument for using the doctrine of personal jurisdiction in this context is twofold.

First, 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 courts’ personal jurisdiction over nonmembers (despite the Supreme Court’s protestations to the contrary<sup>278</sup>). In other words, even if limits on tribal jurisdiction remain static, it would be preferable to characterize those limits as ones of personal jurisdiction, rather than of subject matter or “adjudicative” jurisdiction.

Second, 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.

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275. See, e.g., Krakoff, *New Exceptionalism*, *supra* note 39, at 52 (describing ways in which personal jurisdiction and due process norms could and should play a role in cases like *Strate*).

276. 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.” Kanassatega, *supra* note 40, at 640.

277. See e.g., *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1138 (9th Cir. 2006) (en banc).

278. See *supra* Part II.C.

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.<sup>279</sup> In *Hicks*, the Court specifically (albeit in passing) rejected the idea that tribal jurisdiction should be conceptualized as personal jurisdiction.<sup>280</sup> Nonetheless, recharacterizing the law governing tribal courts' power in personal jurisdiction terms presents numerous advantages—not only to tribes but also to nonmembers who may have dealings with them. Such a change would help in clarifying the existing doctrine, honoring party expectations, and ensuring fair and consistent treatment across the jurisdictional 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 detailed in the preceding Section, the Supreme Court does not treat tribal jurisdiction like other forms of jurisdiction, and does not treat tribal courts like other courts. Unlike most sovereigns, whose legislative and judicial powers are considered separately,<sup>281</sup> the Court considers tribal legislative and judicial jurisdiction to be essentially coextensive.<sup>282</sup> 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 external power.<sup>283</sup> This Section argues that the Court's exceptionalist treatment of tribal courts is without justification.<sup>284</sup> It contends, instead, that whatever the substantive limits on tribal courts' powers are, 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 *Montana* (in language cited in many subsequent opinions):

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279. See Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45, 94–95 (2012) (discussing Court's extensive reliance on “implicit divestiture” doctrine to limit tribal sovereignty).

280. See *Nevada v. Hicks*, 533 U.S. 353, 367 n.8 (2001) (stating that the “limitation on jurisdiction over nonmembers pertains to subject-matter, rather than merely personal, jurisdiction”).

281. See, e.g., Hay, *supra* note 221 (describing important differences in the nature of adjudicatory and regulatory jurisdiction).

282. See *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (“[A] tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.”).

283. See Struve, *supra* note 47, at 297–98.

284. I use the term “exceptionalist” to refer not only to differences between the Court's treatment of tribal courts and state courts, but also to the divergence between the *Strate/Hicks* framework and generally accepted norms for the exercise of judicial jurisdiction. See *supra* notes 43–49.

[T]ribes 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 . . . .<sup>285</sup>

Under these principles (or at least the Court's interpretation of them in *Strate* and *Hicks*), all "exercises of tribal 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.<sup>286</sup> Any attempt to conflate the two simply ignores the "different interests" involved.<sup>287</sup>

Although Hay had in mind limits on the power of state courts, his analysis is equally pertinent in the tribal context. A comparison of the nature of the tribe's action in passing an ordinance like that at issue in *Montana*, on the one hand, and adjudicating a dispute in tribal court in a case like *Strate*, on the other, illustrates the different interests involved in regulation and adjudication. 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 primary task is the same—to resolve individuals' private legal claims—and they do so using many of the same methods.<sup>288</sup> *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.<sup>289</sup> By contrast, the tribal court in *Strate* had been asked to adjudicate private rights in a dispute brought to it by a nonmember,<sup>290</sup> to which it planned to apply principles of state negligence law.<sup>291</sup> Unlike tribal legislative bodies, which can choose whether or not to affirmatively regulate, tribal courts take disputes as

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285. See *Montana v. United States*, 450 U.S. 544, 564 (1981) (citation omitted).

286. See Hay, *supra* note 221, at 9–12.

287. *Id.* at 10.

288. 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").

289. See *supra* note 153.

290. See *Strate v. A-1 Contractors*, 520 U.S. 438, 443 (1997).

291. See Transcript of Oral Argument, *supra* note 31, at \*18, (counsel for petitioners explaining that the tribal court "follow[s] state law" on the issues before it).

they come.<sup>292</sup> While court decisions may certainly shape primary behavior in the long run, the unpredictability and frequently limited scope of litigation make it hard to imagine that tribal courts would be particularly useful as a way of systematically regulating nonmembers.<sup>293</sup>

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.<sup>294</sup> Presumably such borrowing is most likely precisely when the tribal court considers the actions of nonmembers.<sup>295</sup> Consider, for example, the tribal court in *Strate*—presented with the dispute at hand not through any action of the tribe but because Fredericks, a nonmember, had chosen to file there—which planned to resolve the case through the application of state law.<sup>296</sup> As *Strate* illustrates, tribal court cases involving nonmembers do not always entail the exercise of any distinctively tribal regulatory authority.

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

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292. Of course, like all courts, tribal courts serve some public function. 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, *supra* note 279, at 67 (discussing “forward-thinking” criminal diversion and dispute resolution methods employed by many tribes).

293. In this context, it is important to note that decoupling tribal adjudicative and prescriptive jurisdiction does not in itself undo the holding of *Montana* or permit greater regulation of nonmembers by a tribal council than the Supreme Court has allowed. Thus, absent exceptional circumstances or a change in the governing doctrine, a tribal court would rarely be called upon to, for example, apply a tribal ordinance to nonmembers; most cases could be expected to be in the common law mode of *Strate*.

294. See Katherine C. Pearson, *Departing from the Routine: Application of Indian Tribal Law Under the Federal Tort Claims Act*, 32 ARIZ. ST. L.J. 695, 718 (2000) (noting that “frequently tribal law mirrors state law”); Newton, *supra* note 288 at 300–01 (noting that tribal courts often rely on state law to fill gaps in tribal codes). A study by Robert D. Cooter and Wolfgang Fikentscher found both differences and similarities between the law of tort and contract applied by several tribes and Anglo-American legal principles. See Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part II of II)*, 46 AM. J. COMP. L. 509 (1998). For example, Cooter and Fikentscher found that some tribes do not adhere to the bargain theory of contract and emphasize remedies for breach of contract that are aimed at repairing relationships (such as specific performance as opposed to money damages). See *id.* at 547–49. On the other hand, the authors found, “[t]ribal traffic codes . . . look about the same on the reservation as off it” (though the authors speculated that enforcement of such codes by tribal juries might be influenced by distinctively tribal perspectives). See *id.* at 552; see also Robert D. Cooter & Wolfgang Fikentscher, *American Indian Law Codes: Pragmatic Law and Tribal Identity*, 56 AM. J. COMP. L. 29 (2008) (examining the content of tribal codes and the ways in which tribal courts interpret such codes in practice).

295. Under *Montana*, that is, tribes have limited ability to pass regulations governing nonmember activities, with the presumed consequence that tribal courts will have less law on point to refer to where nonmembers are concerned.

296. See Transcript of Oral Argument, *supra* note 31, at \*18, (counsel for petitioners explaining that the tribal court “follow[s] state law” on the issues before it).



tribal policies only indirectly, since they are limited to making policy in the context of whatever disputes happen to come before them.<sup>297</sup> 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. For example, most tribal courts presented with negligence or trespass claims will resolve the issues under common law principles that more or less resemble state ones.<sup>298</sup>

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 nontribal *courts*, particularly state courts. This is not to generalize about the nature of tribal courts, which in some respects display great variety, as the Supreme Court has recognized,<sup>299</sup> across many dimensions.<sup>300</sup> Some are located on impoverished reservations, while others belong to tribes that have ample means to fund them.<sup>301</sup> Some are modeled on state judicial systems, while others seek to implement distinctive tribal values.<sup>302</sup> Some are widely respected models of the administration of justice,<sup>303</sup> while others have a less established track record.<sup>304</sup> These differences, while real, nonetheless should not obscure the more fundamental similarities 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

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297. Moreover, where nonmembers are concerned, these will mostly involve common law rather than tribal ordinances, since the latter have only limited applicability to nonmembers under *Montana*.

298. See *supra* note 294 (referencing scholarship discussing the heavy reliance of tribal courts on state-law principles).

299. See *Nevada v. Hicks*, 533 U.S. 353, 384 (2001) (Souter, J., concurring) (noting that “[t]ribal courts . . . differ from . . . one another”).

300. See Max Minzner, *Treating Tribes Differently: Civil Jurisdiction Inside and Outside Indian Country*, 6 NEV. L.J. 89, 89 (2005) (noting differences among tribes and tribal courts); see also Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069 (2004).

301. See Minzner, *supra* note 300, at 89.

302. *Id.* Indeed, in many tribes, courts modeled on the Anglo-American example and traditional tribal dispute resolution processes exist side by side. See Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 129 (1995) (noting that many tribes employ “combinations of family and community forums, traditional courts, quasi-modern courts, and modern tribal courts”).

303. See Fletcher, *supra* note 279, at 67 (noting that “Indian tribal courts have developed some of the most forward-thinking criminal diversion courts”).

304. Notably, however, this does not imply such courts’ inferiority. While the perception of bias is rampant, the evidence for pervasive bias by tribal courts is sparse. Aaron F. Arnold et al., *State and Tribal Courts: 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 Newton, *supra* note 288, at 287–88).

enforced and have res judicata effect in state courts.<sup>305</sup> 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.<sup>306</sup> While state courts have not always applied these principles fairly to tribal judgments,<sup>307</sup> 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.<sup>308</sup>

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;<sup>309</sup> such explanations likely account, for example, for the decision of Gisela Fredericks to file the *Strate* suit in tribal court.<sup>310</sup> 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.<sup>311</sup> 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 involving nonmembers, since tribes are often willing to waive their immunity only in a tribal forum.<sup>312</sup> Thus, tribal courts, like state courts, enjoy broad prerogatives to definitively adjudicate the rights of nonmembers. To the extent doing so is an act of “regulating” nonmembers (in the Court’s terms), tribal courts regulate all the time, frequently in cases involving nonmembers who have no choice (at least if they want to receive redress for their injuries) to have their disputes heard in any other forum.

Given these circumstances, the Court’s underlying concern in *Strate* and *Hicks* logically cannot be with tribal regulation of nonmembers (despite the

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305. See Fletcher, *supra* note 279, 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”).

306. See *id.*; Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311, 345–46 (2000) (noting that New Mexico, Idaho, Maine, New York, and South Carolina give full faith and credit, at least in some circumstances, to tribal judgments).

307. See Leeds, *supra* note 306, at 360–62.

308. See *supra* note 305 and accompanying text.

309. 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. Berger, *supra* note 32, at 1085.

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

311. See *Williams v. Lee*, 358 U.S. 217, 223 (1959).

312. See Berger, *supra* note 32, at 1067.

Court's suggestions to the contrary<sup>313</sup>), because to the extent that adjudication equals regulation, tribal courts already "regulate" nonmembers.<sup>314</sup> 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—however, 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 apply to litigants in any posture. By contrast, the focus on defendants strongly recalls personal jurisdiction doctrine, which deals entirely with the issue of whether a court can assert authority over a particular defendant, generally excluding consideration of the plaintiff's wishes or the strength of her connection to the forum.<sup>315</sup>

Furthermore, much of the Court's reasoning in both *Strate* and *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 court.<sup>316</sup> Thus, the Court in *Strate* called the tribal court "unfamiliar"<sup>317</sup> and noted that it was physically distant from the accident scene.<sup>318</sup> Justice Souter's concurrence in *Hicks* likewise focused on the possibility of bias or procedural irregularities in tribal court.<sup>319</sup> 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—either as a more general restraint on tribal sovereignty or as a more general protection for nonmember litigants—the Court's reasoning is puzzling. If the

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313. See, e.g., *Nevada v. Hicks*, 533 U.S. 353, 358 (2001) (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).

314. Philip Frickey has also commented on this point. See Frickey, *supra* note 140, at 38 (observing that "[f]rom the standpoint of fairness, subjecting a non-Indian with a retail store in Indian country to the *exclusive* jurisdiction of tribal court for collection actions [as the Court required in *Williams v. Lee*] may be at least as troubling as subjecting a non-Indian reservation resident to tribal jurisdiction over minor crimes").

315. See Hay, *supra* note 221, 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 *Asahi Metal* 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 *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 113 (1987).

316. 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 *supra* note 294.

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

318. *Id.* at 445 n.4.

319. See *Nevada v. Hicks*, 533 U.S. 353, 384 (2001) (Souter, J., concurring).

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 restrictions to be dictated by the *Montana* framework. Applying *Montana*'s scheme to the judicial context 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.<sup>320</sup> 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 *plaintiffs'* rights (as discussed above) appears anomalous.<sup>321</sup>

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 actual concern has nothing to do with tribal regulation. Rather, the Court's worries are predicated upon its perception of the burdens of subjecting nonmembers involuntarily to tribal jurisdiction, particularly where they may not expect it or where the tribal 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.<sup>322</sup> 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 practical change in the way current doctrine regards tribal courts.<sup>323</sup> Personal jurisdiction doctrine is a fluid set of

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320. For a discussion of why *Montana* involved a very different context from judicial jurisdiction, see *supra* notes 153–155 and accompanying text.

321. 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 *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1141–42, 1144 (9th Cir. 2006) (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 fifty 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 *id.* at 1137 (majority opinion). 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.

322. See *Hicks*, 533 U.S. at 367 n.8.

323. This is not to say that major change is not desirable. See *infra* Part III.B. It is simply to make the point that there is room to recharacterize the doctrine even within the Court's current framework.

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 state<sup>324</sup>) and flexible tests, such as whether the defendant has purposefully availed herself of the forum.<sup>325</sup>

In other contexts, commentators have noted the flexibility of personal jurisdiction for describing otherwise hard-to-categorize limits on judicial powers; for example, both a prominent scholar<sup>326</sup> and a Supreme Court Justice<sup>327</sup> 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<sup>328</sup> and (to a lesser extent) the forum's interest in adjudicating the dispute.<sup>329</sup> The same can be said to be true of tribal court jurisdiction as the Court has currently framed it.<sup>330</sup> 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

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324. See *Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846, 2853–54 (2011).

325. See *Burger King v. Rudzewicz*, 471 U.S. 462, 474 (1985).

326. See Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002).

327. See *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 395 (1998) (Kennedy, J., concurring).

328. 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 distinct from explicit or implicit consent, it nonetheless reflects an emphasis on the defendant's voluntary conduct and reasonable expectations, ideas that mirror the Court's emphasis on consent in tribal jurisdiction.

329. This concern surfaces explicitly only in the reasonableness test applied in *Asahi Metal*, which permits consideration of "the interests of the forum State." See *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 113 (1987). 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.

330. 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).

occurs—may have relevance to the inquiry, but the question of the defendant’s identity is far more fundamental.<sup>331</sup>

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.<sup>332</sup> Although the Court has strongly resisted the particularly natural comparisons between the “consensual relationships” exception and personal jurisdiction doctrine,<sup>333</sup> the Court has not articulated a clear justification for this view. To be sure, the Court has generally suggested that a suit must arise directly out of a contract or sale for the “consensual relationships” exception to apply,<sup>334</sup> while personal jurisdiction in the state context can be conferred by the implicit bargain inherent in purposeful availment of a state’s resources.<sup>335</sup> The fact that the tribal test is more stringent, 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 specious, grounded in little more than the Supreme Court’s (not necessarily accurate or well-supported) sense of a “commonly shared presumption of Congress, the Executive Branch, and lower federal courts” that tribes lacked jurisdiction over nonmembers in most circumstances.<sup>336</sup> The Court has been abundantly criticized for ignoring the settled understanding of tribal sovereignty<sup>337</sup> in formulating a set of principles that are at once ad hoc (that is, lacking grounding in positive law) and at the same time sweeping 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

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331. See, e.g., *Nevada v. Hicks*, 533 U.S. 353, 371 (2001) (suggesting that tribal jurisdiction is central to tribal self-governance only when it is exercised over members rather than “outsiders”).

332. See *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1138 (9th Cir. 2006) (en banc) (noting similarities).

333. See *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997) (finding defendants’ contract with tribe to be irrelevant to consensual relationships exception in a noncontractual case).

334. See *id.* (listing types of activities that fit the exception).

335. See *Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846, 2854 (2011) (explaining the concept of purposeful availment and describing it as the “centerpiece” of modern personal jurisdiction doctrine).

336. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978). As a historical and factual matter, the Court’s description of this “presumption” has been widely criticized. See, e.g., Frickey, *supra* note 140, at 37–39 (noting that tribal criminal jurisdiction over nonmembers would not have interfered with congressional priorities, and that “[o]ne is left wondering whether there is anything more substantial than a judicial gut instinct” at work in *Oliphant* and other cases).

337. See Frickey, *supra* note 140, at 8–12.

“depriv[ing] any person of liberty or property without due process of law.”<sup>338</sup> Conceiving of limits on tribal jurisdiction in terms of minimum contacts and due process is, then, consistent with ICRA’s mandate, since such analysis in the state context is rooted in the Fourteenth Amendment Due Process Clause on which ICRA’s provisions are based.<sup>339</sup>

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 Shoe*.<sup>340</sup> 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.<sup>341</sup> 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.<sup>342</sup> 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.<sup>343</sup> 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.<sup>344</sup> Of course, ICRA’s effect is limited by the Supreme Court’s holding in *Santa Clara Pueblo v. Martinez* that ICRA does not in itself create a private cause of action in federal court.<sup>345</sup> Few would want to undermine the *Santa Clara Pueblo* status quo, which could significantly undermine tribal sovereignty by subjecting tribes to more federal oversight. Nonetheless, some reliance on ICRA as a source of law (in cases that, in any event, are already in federal court for another reason<sup>346</sup>) could

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338. 25 U.S.C. § 1302(a)(8) (2010).

339. See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (“Whether due process is satisfied must depend . . . upon the quality and nature of the activity [alleged to subject the defendant to jurisdiction].”).

340. 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.

341. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978).

342. See *id.* Tribes, of course, can and do provide their own enforcement mechanisms. See Greg Rubio, *Reclaiming Indian Civil Rights: The Application of International Human Rights Law to Tribal Disenrollment Actions*, 11 OR. REV. INT’L L. 1, 38 (2009) (“Some tribes already ensure that plaintiffs bringing ICRA suits in tribal court enjoy a structure of available remedies consistent with that provided in federal or state courts.”).

343. See *supra* notes 158 and 159 and accompanying text.

344. See *id.*; Newton, *supra* note 288, at 322–25.

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

346. The Court held in *National Farmers* that federal courts may review the propriety of tribal courts’ exercise of jurisdiction following exhaustion of tribal remedies. See *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). In practice (as in *Strate* and *Hicks*) federal

provide needed grounding and legitimacy to the often-rudderless doctrine of tribal jurisdiction.

### 3. *The Case for 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 subject matter jurisdiction. A large body of literature has described and critiqued the Court's overreliance on jurisdictional categories in other situations.<sup>347</sup> 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."<sup>348</sup> 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.<sup>349</sup> 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.<sup>350</sup> Yet once the label is attached, a danger exists that courts will attach to tribal court jurisdiction all the incidents of federal subject matter 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.<sup>351</sup>

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courts review the jurisdiction of tribal courts all the time. As a result, it is unlikely that simply substituting ICRA's due process framework for *Montana*'s would result in a greater burden for the federal courts or pose a greater threat to tribal autonomy.

347. See, e.g., Karen Petroski, *Statutory Genres: Substance, Procedure, Jurisdiction*, 44 LOY. U. CHI. L.J. 189 (2012); Scott Dodson, *Hybridizing Jurisdiction*, 99 CALIF. L. REV. 1439 (2011); Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1 (2011); Katherine Florey, *Insufficiently Jurisdictional: The Case Against Treating State Sovereign Immunity as an Article III Doctrine*, 92 CALIF. L. REV. 1375 (2004).

348. See Dodson, *Hybridizing Jurisdiction*, *supra* note 347, at 1440.

349. While the personal jurisdiction characterization of course potentially comes with its own baggage, subject matter jurisdiction is a particularly inflexible category; it must be raised by courts *sua sponte*, cannot be waived, and so forth. See, e.g., *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004) ("Characteristically, a court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct.").

350. See *supra* note 129.

351. See *supra* note 321.



Moreover, if calling tribal court jurisdiction “subject matter jurisdiction” is misleading, so is calling it simply by the name “judicial jurisdiction” or “adjudicative jurisdiction.” Judicial jurisdiction in other contexts essentially means personal jurisdiction.<sup>352</sup> 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.<sup>353</sup> At the same time, the Court 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 freestanding tribal doctrine is problematic, among other reasons, because it fails to give guidance to courts that must grapple with the complex realities of modern tribal litigation in cases like *Smith*—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.<sup>354</sup> Moreover, the Court’s approach creates substantial uncertainty because—even as it displays a sweeping hostility to tribal sovereignty in general<sup>355</sup>—it mandates an examination that is stubbornly unpredictable.<sup>356</sup> The Court’s analysis, that is, depends 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 and that the Court weights to different degrees in different cases.

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,”<sup>357</sup> the checkerboard nature of tribal land<sup>358</sup> and

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352. 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.

353. See, e.g., *Nevada v. Hicks*, 533 U.S. 353, 367 n.8 (2001) (“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.”).

354. See *supra* note 241 and accompanying text.

355. 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 internal quotation marks omitted)).

356. 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 203 (noting that *Hicks* can be easily limited to its particular facts).

357. See *Hicks*, 533 U.S. at 379 (Souter, J., concurring) (“[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 internal quotation marks omitted)).

the importance the Court has placed on land and formal membership status<sup>359</sup> 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 *Montana* standard to the case adds a layer of jurisdictional complexity more typical of a complicated multistate mass tort case. The parties and court are forced 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 suit may be filed.<sup>360</sup> Even then, there may not be a single court that has power to hear all claims.<sup>361</sup> Thus, even as *Strate* and *Hicks* suggest that nontribal matters can be carved out with clinical precision from the issues that tribal courts are given permission to address, the *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. For example, tribal courts rely on state common law and state courts enforce tribal court orders.

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 more 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 logic distortions introduced by thinking of tribal court jurisdiction

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358. See Florey, *supra* note 8, at 608 (discussing the checkerboard status of reservations).

359. See *id.* at 603–13 (discussing the historical role of land ownership and membership in delineating the bounds of tribal sovereignty).

360. See *supra* note 241 and accompanying text.

361. *Williams* precludes suits by nonmembers against members from being heard in state court, while *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, *supra* note 34, at 1631.

as “subject matter jurisdiction.” It would also promote transparency, allowing a more candid presentation of the relative powers of tribal courts as compared to the courts of other sovereigns.

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

Some personal jurisdiction principles may need some flexible adaptation to be most useful in the tribal context. Because the relationship between tribal power and territory is uncertain,<sup>362</sup> passing through a reservation or even living on-reservation on private land might not have precisely the same significance that entering a state does. For example, the practice of “tag” jurisdiction—that is, haling someone into a jurisdiction’s courts based solely on service of process while present there—has been justified by historical factors that probably do not apply in the tribal context.<sup>363</sup>

At the same time, much of personal jurisdiction doctrine is particularly well suited to the tribal context. In particular, traditional minimum contacts analysis and the “reasonableness” factors of *Asahi Metal* appear not just adaptable to Indian country, but to make particular sense there. For example, nonmember activities that target the tribe or seek to benefit from a tribal connection—whether traveling 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 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.<sup>364</sup> Likewise, *Asahi Metal*’s concern for “[t]he unique burdens placed upon one who must defend oneself in a foreign legal system” might be relevant in helping courts assess what practical burdens might or might not exist for nonmembers named as defendants.<sup>365</sup>

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,

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362. See Florey, *supra* note 8, at 602 (noting that “crossing a tribal border, particularly for a nonmember, is only rarely a legally significant act”).

363. See *Burnham v. Super. Ct.*, 495 U.S. 604, 610 (1990) (noting that “[a]mong the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State”). A similar history does not exist in Indian country, in part because a tribe’s physical power over its territory has almost always been regarded as less absolute.

364. See Krakoff, *New Exceptionalism*, *supra* note 39.

365. See *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 114 (1987).

the Court's concern that nonmembers have appropriate procedural protections. 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,<sup>366</sup> ignores the federal government's wishes,<sup>367</sup> relies on outdated or ill-informed misconceptions about tribal governments,<sup>368</sup> and ignores tribes' legitimate needs to assert authority over their territory and the people who live there.<sup>369</sup> 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.<sup>370</sup> These, however, are the traditional concerns of personal jurisdiction.

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 may permit tribal courts to exercise reasonable authority over nonmembers, while at the same time offering nonmembers reasonable and predictable protections from being unexpectedly or unfairly subject to a tribal court's jurisdiction. This is especially true because certain 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 has attempted to draw a bright-line distinction between members and nonmembers of tribes in civil adjudication, but membership is a highly inexact metric for assessing a given person's ties to a tribe. It is common for spouses,

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366. See Frickey, *supra* note 140, at 8–12.

367. See Frickey, *supra* note 10, at 463–64 (describing disconnect between the Court and Congress).

368. See WILLIAMS, *supra* note 9.

369. See Florey, *supra* note 8, at 597.

370. These concerns can easily be exaggerated; empirical studies suggest that tribal courts have generally dealt fairly with nonmember defendants. See generally Berger, *supra* note 32; Newton, *supra* note 288. Nonetheless, it is reasonable to conclude that at least the potential for unfairness exists in any situation when a defendant is haled into a distant or unfamiliar court. See *Asahi Metal*, 480 U.S. at 115–16 (discussing similar concerns as applied to international defendants who must appear in state court).

parents, or children of tribe members to be unable to join the tribe for technical reasons such as blood quantum, even though they may live on the reservation and be active participants in tribal life.<sup>371</sup> Similarly, nonmembers who choose to buy property on a reservation or do extensive business there have elected to have some affiliation with the tribe, even though they may not qualify for (or be interested in) tribal membership. The frequently high standards for tribal membership, combined with the checkerboard pattern of land ownership in most reservations, make a binary member/nonmember distinction a generally crude means of understanding tribal connection.<sup>372</sup>

For these reasons, 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;<sup>373</sup> 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;<sup>374</sup> the tour bus operator who makes a profit by taking nonmembers to a tribal hotel and visitors center;<sup>375</sup> the nonmember who lives on the reservation and has children who have joined the tribe;<sup>376</sup> 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 understanding of tribal connection.

Even though ample scholarship has found that tribal courts in general have a strong track record and few obvious problems with bias,<sup>377</sup> tribal judicial systems are likewise diverse. They differ in the procedures they employ, the

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371. See Matthew L.M. Fletcher, *Tribal Membership and Indian Nationhood*, 37 AM. INDIAN L. REV. 1, 5 (2012) (noting that criteria for membership may be “comically arbitrary,” permitting membership to someone who has never set foot on the reservation while denying it to an active and respected tribal leader). While tribal membership standards themselves may be criticized, in many cases they are strongly rooted historically and were developed with the assistance of the federal government. See *id.* at 2.

372. See *id.* at 1 (arguing that “[n]o one can rationally devise a boundary line between who is an American Indian and who is not”).

373. See *Strate v. A-1 Contractors*, 520 U.S. 438, 443 (1997).

374. See *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1129 (9th Cir. 2006) (en banc).

375. See *EXC, Inc. v. Jensen*, No. CV 10-08197-PCT-JAT, 2012 WL 3264526, at \*1 (D. Ariz. Aug. 9, 2012).

376. See *Strate*, 520 U.S. at 443.

377. See, e.g., Arnold et al., *supra* note 304, at 817–18; Berger, *supra* note 32, at 1052; Newton, *supra* note 288, at 287–88.

identity of their decision makers, the degree of appellate review they provide, and how geographically convenient their location is for nonmembers.<sup>378</sup> Any of these factors might well affect the reasonableness of requiring a particular nonmember to defend a lawsuit in tribal court.

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. 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,<sup>379</sup> 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 formalistic and ultimately inconsequential issues such as whether a highway on a state right-of-way through a reservation qualifies as state or tribal land for jurisdictional purposes.<sup>380</sup>

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 too narrow nor overbroad. The *Asahi Metal* reasonableness factors in particular appear readily adaptable to the diversity that prevails in the tribal context.<sup>381</sup> 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,<sup>382</sup> but perhaps unreasonable to subject a nonmember to suit where judicial procedures are informal and derive from tribal custom.<sup>383</sup> Commentators have criticized the Supreme Court for treating

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378. See Minzner, *supra* note 300, at 104–09 (describing vast differences in procedures employed by tribal courts).

379. 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*”).

380. See *Strate*, 520 U.S. at 454.

381. See *supra* note 75 and accompanying text.

382. See Berger, *supra* note 32, at 1075 (noting that nonmembers won slightly more than half the time in suits in Navajo courts); Minzner, *supra* note 300, at 106 (describing praise for Navajo courts).

383. See Minzner, *supra* note 300, 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”). In practice, however, it is worth noting that many of the largest and most economically active tribes, such as the Navajo Nation, have procedures similar to the Anglo-American model. See *id.* at 107. It is presumably these large and active tribes that are most likely to have meaningful contacts with nonmembers. Further, it is of course important to emphasize that the fact that tribal procedures are different from Anglo ones does not necessarily make them inferior or impossible for a nonmember to navigate.

all tribes as identical and all tribal courts as alien and different, arguing that a more nuanced approach would better reflect the variety among tribal judicial systems.<sup>384</sup> Considering reasonableness factors in a personal jurisdiction analysis would allow courts to draw such distinctions, but to do so in a flexible and evolving way.

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 members have in some way consented to tribal authority.<sup>385</sup> Yet this is an odd way to look at litigation. 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.<sup>386</sup> 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.<sup>387</sup>

Indeed, personal jurisdiction's focus on affiliation, availment, and causing effects is particularly suited to the tribal context, where the relevance of territory may be uncertain<sup>388</sup> but where certain conduct may clearly demonstrate 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 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 personal jurisdiction doctrine is 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. The varied

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384. See *id.* at 114–15.

385. See Florey, *supra* note 8, at 603 (arguing that “the Court increasingly looks at tribal sovereignty through the lens of consent”).

386. See, e.g., *Burger King v. Rudzewicz*, 471 U.S. 462, 475 (1985) (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).

387. See *supra* Part I.B.

388. The significance of tribal territorial boundaries is not clearly defined. See Florey, *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.

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.”<sup>389</sup> 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 with interjurisdictional conflicts. The concerns of *Strate*, *Hicks*, and the lower court cases they have engendered—unfair surprise to defendants,<sup>390</sup> “hometown” biases,<sup>391</sup> the relative competencies of different courts to address particular legal issues,<sup>392</sup> procedural differences among forums,<sup>393</sup> 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.<sup>394</sup> In some cases, a tribal court may be 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 percent to 69.1 percent.<sup>395</sup> Likewise, states vary greatly in both the procedural and substantive rules they apply.<sup>396</sup> Some of the same concerns that the Court harbors regarding 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 close cases as the majority of the electorate would prefer, rather than as the law requires.”<sup>397</sup> Nonetheless, personal jurisdiction doctrine has for decades done at least a serviceable job of helping defendants and potential defendants

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389. See Sarah Krakoff, *Tribal Civil Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1230 (2010).

390. See *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 114 (1987) (noting similar concerns in the international context).

391. See Frickey, *supra* note 140, at 74 (noting similarities between the scenario in *Strate* and fears that out-of-state defendants will be “hometowned” in state court).

392. See *Asahi Metal*, 480 U.S. at 114–15.

393. See *id.*

394. See Minzner, *supra* note 300, at 106 (describing features of Navajo courts).

395. See *J. McIntyre Mach. v. Nicastro*, 131 S. Ct. 2780, 2794 (2011) (Breyer, J., concurring).

396. See *supra* note 83 (noting variety in state choice-of-law rules); Symposium, *The Restyled Federal Rules of Evidence*, 53 WM. & MARY L. REV. 1435, 1513 (2012) (noting differences across states in rules of evidence).

397. See Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 723 (2010).



navigate these differences. There is no reason why personal jurisdiction principles—including the *Asahi Metal* 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,<sup>398</sup> with the policies of the other branches,<sup>399</sup> and with the real-life situations that federal courts confront in the tribal context.<sup>400</sup> 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."<sup>401</sup> Fletcher calls for unconventional solutions, including resistance on the part of tribal courts to "the federal judiciary's [efforts] to determine 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."<sup>402</sup> 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 by nonmembers.<sup>403</sup> A reliance on personal jurisdiction principles both by tribal courts<sup>404</sup> 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. This may avoid the crisis of legitimacy Fletcher suggests otherwise may be destined to occur.<sup>405</sup>

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398. Tribes, of course, like all governments, have interests in redressing harms to their citizens and maintaining law and order within their borders. See Florey, *supra* note 8, at 596 (discussing the problem of disruptive nonmember behavior on reservations); Fletcher, *supra* note 19, at 1002 (noting that nonmember "activity in Indian country is some of the least governed activity in the United States").

399. Congress has expanded tribal criminal jurisdiction significantly three times in recent years: through the so-called *Duro* fix of 1990–91, 25 U.S.C. § 1301(2), clarifying Congress's understanding that tribal criminal jurisdiction extended to nonmember Indians; the 2010 Tribal Law and Order Act, which both extended tribal criminal powers and provided additional federal support for tribal justice systems; and the 2013 amendments to the Violence Against Women Act, which permits tribal courts to prosecute non-Indians for domestic and sexual abuse. See Tribal Law and Order Act, Pub. L. No. 111–211 § 201 (2010); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4.

400. See *supra* Part II.D.

401. Fletcher, *supra* note 19, at 1002.

402. *Id.* at 1004.

403. See *supra* notes 20–24 and accompanying text (describing problems of lawless nonmember conduct on reservations).

404. 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, *supra* note 19, at 1004. This suggests some possibility that tribes might see personal jurisdiction doctrine as having greater legitimacy than *Montana*.

405. 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

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.<sup>406</sup> Tribal courts are also a practical necessity for resolving disputes,<sup>407</sup> 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.<sup>408</sup>

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.<sup>409</sup> At the same time, personal jurisdiction doctrine provides protections for defendants that are both time-tested and familiar, and that further allow for the degree of nuance 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

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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 id.* at 1023–24. Reconceptualizing tribal court jurisdiction as personal jurisdiction is 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 1004. 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.

406. *See* Berger, *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").

407. *See id.* at 1105 (noting that tribal courts are needed to "address the everyday legal and social problems of concern to Indian people").

408. *See* Fletcher, *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").

409. *See* Berger, *supra* note 32, at 1107–09 (discussing important internal and external functions of tribal courts).

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. Casting tribal jurisdiction in terms that are both familiar and transparent would further a productive conversation about what kinds of sovereigns tribes are and what their role should be on the American judicial landscape.<sup>410</sup> While making such a change would certainly not in itself undo the years of hostility the 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.

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410. An understanding of the commonalities between tribal jurisdiction and broader notions of jurisdiction could also point the way for Congress to adapt devices from nontribal contexts to fit tribes. Congress could, for example, authorize tribal courts to hear federal claims, while creating a removal procedure analogous to the one that permits removal from state to federal court in certain circumstances.