



ESSAY

Indian Lives Matter: Pandemics and Inherent Tribal Powers

Matthew L.M. Fletcher*

American Indian people know all too well the impact of pandemics on human populations, having barely survived smallpox outbreaks and other diseases transmitted during the generations of early contact between themselves and Europeans. Indian people also suffered disproportionately from the last pandemic to hit the United States about a century ago. Some things have changed for the better for Indian people, namely tribal self-governance, but many things are not much better, including the public health situation that many Indian people face.¹

Modern tribal governments navigate a tricky legal and political environment. While tribal governments have power to govern their own citizens, nonmembers are everywhere in Indian country, and the courts are skeptical of tribal authority over nonmembers. For example, after the Navajo Nation announced a 57-hour curfew for the weekend of April 10-13, 2020 (Easter weekend for many), the sheriff's offices of Cibola and McKinley Counties sent letters to the tribe insisting that the tribe refrain from citing nonmembers during the curfew, further insisting that nonmembers are governed more "full[y]" by the Governor of the State of New Mexico.² A few weeks later, the Governor of South Dakota threatened litigation against tribes

* Professor of Law and Director of the Indigenous Law and Policy Center, Michigan State University College of Law; Visiting Professor, University of Michigan Law School (2020-2021). Miigwetch to Kate Fort, Doreen McPaul, Paul Spruhan, and most especially Wenona Singel, who predicted all of this.

1. See generally Aila Hoss, *A Framework for Tribal Public Health Law*, 20 NEV. L.J. 113, 115 (2019).
2. Letter from Tony Mace, Sheriff, Cibola Cty. to Officer in Charge, Ramah Navajo Police Dep't (Apr. 10, 2020); Letter from James Maiorano III, Undersheriff, McKinley Cty., and Douglas Decker, County Attorney, Cty. of McKinley, to Ramah Navajo Police Dep't (Apr. 9, 2020). Both letters cite to *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), which bars tribes from prosecuting crimes by non-Indians absent Congressional authorization. Civil offenses are not criminal offenses, so the citation to *Oliphant* seems to be misplaced.

who planned to enforce a quarantine roadblock on reservation roads,³ then later asked the President to intervene.⁴ Further, the fact that state and local officials are the ones sending these letters is a deeply consequential signal to nonmembers, one that encourages opposition to tribal regulation. Of course, allowing nonmembers to flout the tribe's curfew defeats the purpose of the curfew. During a pandemic, limiting tribal power could lead to tragedy.

This short essay argues for tribal regulatory powers over nonmembers in Indian country during a pandemic. This should be an easy argument, but federal Indian law makes it more complicated than it should be.

I. Historical and Legal Background

In the first century of the existence of the United States, hundreds of Indian tribes negotiated treaties and other agreements with the federal government designed to guarantee what Charles Wilkinson calls “measured separatism.”⁵ Tribes negotiated for homelands,⁶ and for guarantees of protection by the federal government.⁷ The government did not often fulfill those guarantees. The Executive branch failed to stop non-Indians from entering reservations.⁸ Congress enacted laws breaking down reservation boundaries and encouraging non-Indians to settle on reservation lands.⁹ And the Supreme Court enabled both other branches of federal government to erode Indian separatism.¹⁰

As a consequence, non-Indians overran some reservations. They rarely respected tribal authority to govern. Even on reservations left relatively intact by the federal government, many non-Indian settlers refused to be governed by

3. Letter from Kristi Noem, Governor, State of S.D. to Julian Bear Runner, President, Oglala Sioux Tribe (May 8, 2020); Letter from Kristi Noem, Governor, State of S.D. to Harold Frazier, Chairman, Cheyenne River Sioux Tribe (May 8, 2020).

4. Letter from Kristi Noem, Governor, State of S.D. to Donald Trump, President of the U.S. (May 20, 2020).

5. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 14 (1987).

6. *E.g.*, United States v. Idaho, 448 P.3d 322, 349 (Idaho 2019) (describing the various purposes of an Indian reservation).

7. Indian Trust Asset Reform Act, 25 U.S.C. §§ 5601(4)-(5) (“[T]he fiduciary responsibilities of the United States to Indians also are founded in part on specific commitments made through written treaties and agreements securing peace, in exchange for which Indians have surrendered claims to vast tracts of land, which provided legal consideration for permanent, ongoing performance of Federal trust duties . . . and have established enduring and enforceable Federal obligations . . .”).

8. *See, e.g.*, Wilson v. Omaha Indian Tribe, 442 U.S. 653, 664 (1979) (referring to “recurring trespass upon and illegal occupancy of Indian territory”).

9. *See generally* INST. FOR GOV'T RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION 6-8 (1928).

10. *E.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 565-67 (1903) (holding the federal government may unilaterally impose allotment on Indian reservations); United States v. Kagama, 118 U.S. 375, 384 (1886) (holding the federal government may assert criminal jurisdiction in Indian country).

the tribes. Pockets of land owned by non-Indians sometimes became areas of lawlessness, with the non-Indians refusing to accept tribal authority, and state and federal governments doing little to pick up the slack.

Indian country¹¹ became a dumping ground for settlers. FMC Corporation dumped 22 million tons of “radioactive, carcinogenic, and poisonous . . . hazardous waste” on the Shoshone-Bannock Fort Hall Reservation.¹² Nonmember residents on the Flathead Indian Reservation operated virtually unregulated “feedlots, dairies, mine tailings, auto wrecking yards and dumps, construction activities and landfills.”¹³ The Burlington Northern Santa Fe Railroad Company ran more than 1,600 train cars a day carrying hazardous materials through the Fort Peck Indian Reservation.¹⁴ Each of these actors rejected tribal regulatory authority.

Worse, nonmembers learned that they could flout other tribal laws with impunity. Roberta Bugenig clear-cut within a no-cut buffer zone designed to protect tribal cultural resources.¹⁵ Robert Johnson’s lease of Indian lands expired, but he refused to comply with the tribe’s eviction orders.¹⁶ Marvin Donius claimed he could use his reservation land for anything short of a “nuclear waste dump” if he wanted.¹⁷

A half-century ago, the United States began to acknowledge and enable tribal inherent powers to self-govern, beginning a period known as the self-determination era. Assisted by federal self-determination funds, tribes began developing tribal justice systems and enacting basic codes needed to govern. Almost as soon as tribes began to assert their inherent powers, nonmembers

-
11. “Indian country” is a term of art defined by Congress. 18 U.S.C. § 1151 (2018). It includes lands within reservation boundaries, whether the lands are owned by Indians, tribes, or not, and “dependent Indian communities” that are not within reservation boundaries.
 12. FMC Corp. v. Shoshone-Bannock Tribes, 942 F.3d 916, 919 (9th Cir. 2019), *petition for cert. filed*, No. 19-1143 (Mar. 18, 2020).
 13. Montana v. EPA, 137 F.3d 1135, 1139-40 (9th Cir. 1998).
 14. Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation, 323 F.3d 767, 774 (9th Cir. 2003) (“We note, in particular, that in the year 2000, more than 1,695 freight cars crossed the Reservation each day. The Tribes are aware that hazardous materials are carried on [Burlington Northern’s (BN)] cars because BN has asked the Tribes to work with the Company on emergency contingency plans. The Tribes know of derailment incidents and, in their own words, ‘have gathered evidence of numerous fires and accidents with attendant property damage and sometimes fatalities . . . but discovery of Burlington’s own files [is] necessary for a complete record on application of *Montana’s* second exception.”)
 15. Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201, 1208-09 (9th Cir. 2001) (en banc); *see also* Hoopa Valley Tribe v. Bugenig, 25 Indian L. Rep. 6137, 6138 (Hoopa Valley Tribal Ct., July 11, 1996) (noting Bugenig’s “blatant disregard of tribal law”).
 16. Colo. River Indian Tribes v. Water Wheel Camp Recreation Area, Inc., No. 08-0003, at 6-7 (Colo. River Indian Tribes Ct. App., Mar. 10, 2009) (per curiam), <https://perma.cc/8M3W-HXN9> (describing nonmember conduct as “the ultimate in *chutzpah*”).
 17. Donius v. Rincon Band of Luiseño Indians, No. AP-0205-19, slip op. at 31 (Rincon Ct. App. Apr. 2, 2020), <https://perma.cc/V4Y4-B9RD>. Disclosure: I served a judge on the panel.

challenged them. The Supreme Court immediately enabled these challenges, holding in *Oliphant v. Suquamish Indian Tribe* that tribes could not prosecute non-Indian criminals, on the ground that the federal government long ago had stripped tribes of that power.¹⁸ On the civil side, in *Montana v. United States*, the Court did not go so far as to bar tribal regulatory jurisdiction in all cases, but did announce the general rule that tribes do not possess authority over nonmembers, grounding that decision in land ownership.¹⁹

In *Montana*, the Court held that tribes possessed inherent power to regulate a nonmember on non-Indian lands who did not consent to tribal jurisdiction only when the nonmember’s “conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”²⁰ That case involved nonmember fishing on a river running through the Crow Reservation and owned by the State of Montana, an activity the Court held did not imperil tribal governance.²¹ In subsequent cases involving the second *Montana* exception (or *Montana 2*), the Court reviewed claims involving zoning and land use,²² hunting and fishing regulations (again),²³ motor vehicle crashes,²⁴ hotel taxes,²⁵ race discrimination against Indian ranchers,²⁶ and the previously mentioned child sexual molestation case.²⁷

Compared to the hundreds of thousands of nonmembers that live in tribal public housing, work for Indian tribes and their enterprises, and do business with Indian tribes,²⁸ the universe of cases involving *Montana 2* is tiny—and likely indicative of the types of issues that seem to attract the attention of the Supreme Court. The Court affirmed tribal power only in the zoning and molestation cases, and neither of those cases resulted in a majority opinion supporting tribal powers under *Montana 2*.²⁹

18. 435 U.S. 191, 195, 201-02 (1978).

19. 450 U.S. 544, 566 (1981).

20. *Id.*

21. *Id.*

22. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 414 (1989) (plurality opinion).

23. *South Dakota v. Bourland*, 508 U.S. 679, 681-82 (1993).

24. *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997).

25. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 647-48 (2001).

26. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 320 (2008).

27. *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (per curiam), *aff’d by an equally divided court*, *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 169 (5th Cir. 2014).

28. For a non-exhaustive survey of the types of cases heard in federal courts involving tribal civil jurisdiction over nonmembers, see my paper, Matthew L.M. Fletcher, *Tribal Civil, Criminal, and Regulatory Jurisdiction over Nonmembers*, in *INDIAN LAW AND NATURAL RESOURCES: THE BASICS AND BEYOND 2-1*, at 12-17 (Rocky Mt. Min. L. Fdn. 2017).

29. In *Brendale*, the zoning case, there was no majority opinion, and none of the opinions affirming tribal powers over nonmembers relied on the *Montana* test. 492 U.S. at 433, 443-
footnote continued on next page

In recent decades, the Supreme Court has recharacterized the *Montana 2* exception as requiring more than mere threats or direct impacts, as originally stated in the *Montana* case itself. The recharacterized exception requires something more akin to nonmember conduct that has a “catastrophic” impact on tribal government.³⁰ In a few cases, lower courts have held that tribal inherent power over nonmembers was plausibly “necessary to ‘avert catastrophic consequences.’”³¹ The Eighth Circuit so held in a case where nonmembers organized “a physical attack by thirty or more outsiders armed with batons and at least one firearm against the Tribe’s facilities and the tribal members inside, including the duly elected council.”³² And the Ninth Circuit so held in the previously mentioned hazardous and radioactive waste case on the Shoshone-Bannock reservation.³³ A cert petition is pending in the latter case.³⁴

In short, a nonmember who has not consented to tribal civil jurisdiction and chooses to flout tribal law has enormous advantages in avoiding consequences for their violations.

II. Pandemics and Indian Country

The 1918 and 1919 influenza pandemic devastated American Indian communities. In several states in the west and southwest—Arizona, Colorado, Mississippi, New Mexico, and Utah—4% to 6% of American Indian people died.³⁵ “Among Alaskan Natives, entire communities were stricken, and some towns were abandoned.”³⁶ Nearly 3,400 Diné (Navajo) people walked on during this time.³⁷ Overall, 2% of American Indian people walked on because of the pandemic.³⁸

A century ago, the federal government treated Indian people as wards of the United States under a repressive guardianship concocted by Congress and

44 (Stevens, J.); *id.* at 448-50, 454-55 (Blackmun, J.). In *Dollar General*, the molestation case, Justice Scalia died during the Court’s deliberation, leaving the Court with eight Justices—and a tie. 136 S. Ct. 2159, 2159-60.

30. *Plains Commerce Bank*, 554 U.S. at 341 (quoting FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 232 n. 220 (2005 ed.)).

31. *E.g.*, *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 920 (2017) (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008)).

32. *Attorney’s Process & Investigation Servs. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927, 939 (8th Cir. 2010).

33. *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 919, 940 (9th Cir. 2019).

34. Petition for Writ of Certiorari, *FMC Corp.*, 942 F.3d 916 (No. 19-1143) (“FMC Petition”).

35. Benjamin R. Brady & Howard M. Bahr, *The Influenza Epidemic of 1918–1920 Among the Navajos: Marginality, Mortality, and the Implications of Some Neglected Eyewitness Accounts*, 38 AM. INDIAN Q. 459, 461 (2014).

36. *Id.*

37. *Id.* at 484.

38. David H. Dejong, “*Unless They Are Kept Alive*”: *Federal Indian Schools and Student Health, 1878–1918*, 31 AM. INDIAN Q. 256, 273 (2007).

the Executive branch. Many Indians couldn't vote.³⁹ It was a crime to sell liquor to an Indian.⁴⁰ Allotment of Indian reservations, and its aftermath, was in full force.⁴¹ Tribal property rights were still considered inferior to those of federal, state, and local property rights.⁴²

When the 1918 pandemic hit Indian country, the federal government's response was abysmally inadequate, bordering on non-existent. Locals in Anderson, California forced Indian people into isolation in order to protect themselves.⁴³ More than 100 students were sick at Stewart Indian School in Nevada, and the matron of the school died (no word in local news about how many Indian children walked on).⁴⁴ More than 300 students were sick at Greenville Indian School in California, with at least one death reported.⁴⁵ This is just a snapshot of the horror show that was Indian country public health a century ago.

Perhaps the worst part of the story was how the federal government congratulated itself on a job well done, gaslighting writ large. In early 1919, the spokesman for the United States Public Health Service, Dr. Grady Shytle, claimed the mortality rate of Indian people was less than 2%.⁴⁶ But by December of 1919, the government admitted that at least 6,000 Indian people died during the pandemic of 1918 and 1919, meaning that a horrific rate of 9% of all Indian cases resulted in death⁴⁷ (while worldwide only 2.8% of cases resulted in death⁴⁸).

It appears the COVID-19 pandemic sadly may have a similar impact on Indian people once again. Indian people are disproportionately poor and unhealthy, the awful consequence of centuries of colonialism.⁴⁹ Many Indian people live in rural areas, where American health care services are weakest.⁵⁰

39. *E.g.*, *Elk v. Wilkins*, 112 U.S. 94 (1884) (holding the Fourteenth Amendment did not extend voting rights to Indians).

40. *E.g.*, *United States v. Nice*, 241 U.S. 591, 595, 601 (1916) (confirming conviction of non-Indian for selling liquor to an Indian).

41. *E.g.*, *Ward v. Ward*, 182 P. 675, 675-77 (Okla. 1919) (adjudicating Indian allotment interests).

42. *E.g.*, *Williams v. City of Chicago*, 242 U.S. 434, 437-38 (1917) (dismissing tribal land claims on the grounds that Indians merely possessed a right of occupancy).

43. *Indians Isolated*, SACRAMENTO BEE, Oct. 28, 1918, at 1 ("Aroused about the deaths of the Indians—the three yesterday and five others during the week—the people of Anderson rounded up all the Indians and forced them to go into quarantine on C.W. Bolles' ranch.").

44. *Matron of Stewart Indian School Dies*, S.F. CHRON., Mar. 30, 1919, at 1.

45. *One Death in Plumas*, SACRAMENTO BEE, Nov. 2, 1918, at 17.

46. *Influenza Fails Against Navajos*, FORT WORTH STAR TELEGRAM, Jan. 7, 1919, at 11.

47. *Lauds Work Done in Indian Plague*, DETROIT FREE PRESS, Dec. 9, 1919, at 10.

48. Brady & Bahr, *supra* note 34, at 459.

49. See Kirsten Carlson, *Tribal Leaders Face Great Need and Don't Have Enough Resources To Respond to the Coronavirus Pandemic*, CONVERSATION (Mar. 25, 2020 8:30 AM EDT), <https://perma.cc/5EUS-783K>.

50. Cf. Shanelle Afcan and Christina McDonogh, Opinion, *Two Women Fighting To Prevent COVID-19 from Destroying Rural Alaska*, KSRM RADIO GROUP, (Apr. 10, 2020), <https://perma.cc/UT3D-8PMN>.

Professor Kirsten Carlson reported that there is a drastic shortage of intensive care beds in Indian Health Service hospitals.⁵¹ Many Indian tribes depend heavily on gaming and other enterprises to supplement federal self-determination appropriations. The pandemic forced the closure of virtually all Indian gaming facilities, strangling the major revenue stream for tribes.⁵² Add in the closure of tribal government operations, and the vast majority of Indian country workers are currently furloughed.

It should be no surprise that many Indian tribes have been aggressively issuing drastic quarantine orders. We have collected many of these orders and placed them on Turtle Talk.⁵³

III. Tribal Powers to Respond to the COVID-19 Pandemic

The federal government's early response to the COVID-19 pandemic was halting, slow, and confused.⁵⁴ Federal and state officials delivered mixed messages about the pandemic's potential severity throughout. The *New York Times* reported on what it called a "liberty rebellion" of conservative rural Americans who did not believe in the seriousness of the pandemic and refused to comply with quarantine orders.⁵⁵ Some American leftists reached the same conclusion.⁵⁶ As a result, much of America is rushing to reopen.⁵⁷ Persons who refuse to comply with stay-at-home orders issued by state or local governments are also unlikely to comply with tribal orders. There might not be many such people, but in a pandemic it does not take many people to cause an outsized impact.⁵⁸

The playbook for attacking tribal inherent powers is thumb-worn. Nonmembers begin by alleging they "have no say in the laws and regulations that govern tribal territory."⁵⁹ Nonmembers then argue that "tribal sovereignty

51. Carlson, *supra* note 48.

52. Anna V. Smith, *Casino Closures in Indian Country Hit Core Tribal Services*, HIGH COUNTRY NEWS (Colo.), (Apr. 10, 2020), <https://perma.cc/38FE-WZYY>.

53. See *COVID-19 Tribal Documents*, TURTLE TALK, <https://perma.cc/A9DA-FXKP>.

54. See generally Eric Lipton et al., *Despite Timely Alerts, Trump Was Slow to Act*, N.Y. TIMES, Apr. 12, 2020, at A1.

55. Mike Baker, *A 'Liberty' Rebellion in Idaho Threatens to Undermine Coronavirus Orders*, N.Y. TIMES, (Apr. 7, 2020), <https://perma.cc/2TVS-6FK6>.

56. Louis Proyect, *The SWP and Social Distancing: A Study in Abnormal Political Psychology*, COUNTERPUNCH (Apr. 10, 2020), <https://perma.cc/A9DG-TTCG> (referring to members of the Socialist Workers Party who refuse to comply with quarantine orders).

57. Lindsay Huth, *States Don't Agree on How to Determine When It Is Safe to Reopen*, WALL ST. J. (May 21, 2020), <https://perma.cc/WX93-3EUR>.

58. See generally Joel Achenbach et al., *Coronavirus Hot Spots Erupt Across the Country; Experts Warn of Second Wave in South*, WASH. POST (May 20, 2020), <https://perma.cc/EN6H-YCVS>.

59. FMC Petition, *supra* note 33, at 2 (quoting *Plains Commerce Bank*, 554 U.S. at 337); see also Petition for Writ of Certiorari at 17, *Dollar General Corp. v. Miss. Band of Choctaw*
footnote continued on next page

itself ‘is a sovereignty outside the basic structure of the Constitution.’⁶⁰ Nonmembers assert that they might “unknowingly be subjected to tribal claims in tribal court.”⁶¹ Nonmembers often argue that tribal judges are biased or incompetent,⁶² and that tribal laws are “unknown and obscure.”⁶³ A final line of argument is that it is in the economic interests of tribes to *not* possess jurisdiction over nonmembers.⁶⁴

This Essay is not the place to respond to each of these contentions. Suffice it to say that, despite the parade of horrors alleged by nonmembers that challenge tribal jurisdiction all the way to the Supreme Court, litigious nonmembers are outliers. As noted by some of nonmembers themselves, thousands of nonmembers choose to work for Indian tribes, to do business with Indian tribes, to lease lands from Indian tribes, and so on.⁶⁵ No one is ever *forced* to enter Indian country.

There is a clear trend surfacing in the small universe of Supreme Court cases involving tribal civil jurisdiction over nonmembers—the conduct of the nonmembers determined to challenge tribal jurisdiction is worsening. Considerably so. The original civil jurisdiction cases involved hunting and fishing licenses. The most recent case involved 22 million tons of hazardous waste. Defending these nonmembers from tribal government regulation is becoming an increasingly onerous job.

Indians, 136 S. Ct. 2159 (2016) (No. 13-1496), 2014 WL 2704006 (“Dollar General Petition”) (“[N]onmembers have no say, directly or through legislative representation, in the laws, regulations, or court system of the Tribe.”).

60. FMC Petition, *supra* note 33, at 2 (quoting *Plains Commerce Bank* 554 U.S. at 337); *see also Dollar General Petition*, *supra* note 58, at 12 (alleging that tribal court jurisdiction “subject[s] nonmembers to tribal court jurisdiction risk[ing] serious intrusions on individual liberty, given the incomplete guarantee of Due Process protections in that forum”); Petition for Writ of Certiorari at 12, *Knighton v. Cedarville Rancheria of N. Paiute Indians*, No. 19-131, 2019 WL 3425107 (emphasis added) (“Knighton Petition”) (“This issue is of great importance to citizens of the United States whom are being haled into a *foreign* tribal court . . .”).
61. Petition for Writ of Certiorari at 9, *Plains Commerce Bank*, 554 U.S. 316 (2008) (No. 04-411), 2007 WL 2809189 (“Plains Commerce Petition”); *see also* Petition for Writ of Certiorari at 24, *Attorney’s Process and Investigation Servs. v. Sac and Fox Tribe of the Mississippi in Iowa* (No. 10-613), 2010 WL 4478420 (“A categorical approach to the *Montana* exceptions provides clear notice to both a tribe and nonmembers about which tribal laws, if any, govern nonmember conduct.”).
62. FMC Petition, *supra* note 33, at 9 (alleging that two tribal judges, later removed from the case, made “public remarks at a law school conference evidencing a clear bias in favor of tribal jurisdiction”); *Knighton Petition*, *supra* note 59, at 15 (“In this case, the tribal court judge was selected and paid by the twelve adult members of the Cedarville Rancheria whom have brought this action.”).
63. *Knighton Petition*, *supra* note 59, at 12-13.
64. *Dollar General Petition*, *supra* note 58, at 17 (“[S]ome businesses may simply withdraw from communities in which unemployment is already high and access to commercial services . . . is low.”).
65. *E.g.*, *Dollar General Petition*, *supra* note 58, at 13 (referencing “thousands of nonmember individuals and companies doing business on reservations”).

Imagine a case where a tribe issues a civil offense ticket to nonmembers violating a tribal stay-at-home order or tribal curfew order during the pandemic. Ticketed nonmembers are likely to challenge tribal powers to cite them,⁶⁶ or in extreme situations simply flout the tribe's laws with impunity.⁶⁷ We know from a large universe of cases involving the power of tribal police to stop and detain nonmembers that some nonmembers will later challenge their detention.⁶⁸ We also know that the tribal power to impose civil offense charges on nonmembers is subject to the *Montana* test.⁶⁹

Public health scholars have long warned that a pandemic reaching Indian country could be more disastrous for Indian people than for the American population overall.⁷⁰ American Indian people have vulnerable elderly populations and higher incidences of serious chronic illness.⁷¹ Urban Indian health services are terribly underfunded, as are tribal and federal services on reservations.⁷² Much of Indian country is rural and geographically isolated.⁷³ The ongoing public health crisis of the Navajo Nation, the largest Indian tribe in the country, is indicative of the threat.⁷⁴

It likely will be up to federal courts to decide whether an Indian tribe can validly enforce a tribal curfew or quarantine order on a nonmember on nonmember-owned lands within a tribe's reservation boundaries. For

66. See generally *Developments in the Law—Indian Law: Fresh Pursuit from Indian Country; Tribal Authority to Pursue Suspects onto State Land*, 129 Harv. L. Rev. 1685, 1685-86 (2016) (describing cases where nonmembers challenged tribal law enforcement authority).

67. E.g., Deborah Sullivan Brennan, *Tribes Seek More Power for Their Police Forces*, L.A. TIMES, (Dec. 27, 2000, 12:00 AM), <https://perma.cc/66ZV-ZYSJ> (“Cabazon tribal police officers have chased drunk drivers only to see them careen off the reservation in defiance. The officers have ticketed midnight dumpers who ditched illegal loads of trash here—20 miles east of Palm Springs—then skipped their court dates with impunity.”).

68. E.g., *United States v. Cooley*, 919 F.3d 1135, 1139-40 (9th Cir. 2019) (describing interaction between tribal police and nonmember drunk driver that formed the factual basis for the nonmember's successful motion to suppress evidence). In some cases, nonmembers physically resist tribal police. E.g., *Scharp v. United States*, No. 1:06-CV-438, 2006 WL 1752396, at *1-2 (W.D. Mich., June 23, 2006) (“Rather than comply with the officers’ instruction to submit to arrest and exit the casino, Petitioner forcibly resisted the officers. Petitioner continued to resist the officers’ instructions, forcing them to employ pepper spray to gain his compliance.”).

69. E.g., *Miner Elec. Inc. v. Muscogee (Creek) Nation*, 464 F. Supp. 2d 1130, 1132-33, 1135-37 (N.D. Okla. 2006) (applying *Montana* to a tribal civil forfeiture ordinance, and concluding that the tribe's confiscation of a nonmember's drugs, cash, gun, and truck was not valid), *rev'd on other grounds*, 505 F.3d 1007 (10th Cir. 2007); *Skokomish v. Mosbarger*, 7 NICS App. 90, 91 (Skokomish Tribal Ct. App. 2006) (confirming tribal power to issue civil traffic offense tickets to nonmembers near a tribal school).

70. See generally Amy V. Groom et al., *Pandemic Influenza Preparedness and Vulnerable Populations in Tribal Communities*, 99 (supp. 2) AM. J. PUBLIC HEALTH S271 (Oct. 2009), <https://perma.cc/NPS8-9FVC>.

71. *Id.* at S273.

72. *Id.* at S271, S272.

73. *Id.* at S271.

74. Kalen Goodluck, *Every Corner of the Navajo Nation Has Been Hit By COVID-19*, MOTHER JONES, (May 21, 2020), <https://perma.cc/X3RM-B6GM>.

whatever political reason, Congress has not chosen to establish standards or guidelines for the exercise of tribal regulatory powers on nonmembers.

Leaving these questions to the federal judiciary is a serious problem. The Supreme Court has never reviewed a case where nonmember conduct could have such far-reaching implications on a tribe's health and safety—recall that the 1918-1919 pandemic killed around 3,400 Diné people alone, and many thousands of other Native people throughout the country.⁷⁵ The Court's ultimate analysis, if it follows its own guidance under the *Montana* line of cases, will be to determine whether nonmembers that flout a tribal quarantine order actually imperil “the political integrity of Indian tribes.”⁷⁶ In the morbid analysis of the Supreme Court, would dozens of dead Indians be sufficient to imperil tribal government? Hundreds? Thousands?

The answer should be an easy one. Yes, even a single nonmember who is a COVID-19 carrier violating a tribal quarantine order is a terrible danger to a tribal community. The high transmission rate,⁷⁷ the unique vulnerabilities of Indian people,⁷⁸ and the jurisdictional complexities of Indian country governance are more than sufficient to establish a considerable threat to tribal governance. Valarie Blue Bird Jernigan, a tribal public health expert, concluded “[t]his is a really scary perfect storm for Indigenous populations because of a lot of factors that are already risks for disease.”⁷⁹

Nonmembers following the playbook for those opposing tribal jurisdiction will press courts to prioritize the individual rights of nonmembers over the health and safety of Indian country residents. In the end, it might be up to a court, perhaps the Supreme Court, to decide whether Indian lives matter.

75. Brady & Bahr, *supra* note 35, at 484.

76. *Atkinson Trading*, 532 U.S. at 657-58 n.12.

77. Steven Sanche et al., *High Contagiousness and Rapid Spread of Severe Acute Respiratory Syndrome Coronavirus 2*, 26:7 EMERGING INFECTIOUS DISEASES J. (July 2020), <https://perma.cc/8G8M-F5FR>.

78. Groom, *supra* note 69, at S275.

79. Kat Eschner, *Native American Nations Are Even More Vulnerable to COVID-19*, POPULAR SCI., (Apr. 9, 2020), <https://perma.cc/NTX7-94AW>.